REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON SOCIAL ISSUES

INQUIRY INTO THE IMPACT OF COMMONWEALTH WORKCHOICE LEGISLATION

At Sydney on Friday 28 July 2006

The Committee met at 9.30 a.m.

PRESENT

The Hon. J. C. Burnswoods (Chair)

The Hon. Dr A. Chesterfield-Evans
The Hon. K. F. Griffin
The Hon. R. M. Parker
The Hon. I. W. West

CHAIR: I declare the meeting open. You have been given a copy of the Chair's opening statement, so I shall not go through that. This is an inquiry where people feel quite strongly. Feel free to say what you want but we ask you not to go too far in the direction of naming individuals because they have rights as well. If we get a certain type of evidence we feel that we should make a copy available to people who have been criticised and give them the right to comment as well, so please bear that in mind. It is usually possible to get across your story without naming or criticising individuals. I note that no members of the media are present, so we will go straight into swearing the witnesses.

ANDREW FERGUSON, State Secretary, Construction, Forestry, Mining and Energy Union, 12 Railway Street, Lidcombe,

RITA MALLIA, Senior Legal Officer, Construction, Forestry, Mining and Energy Union, 12 Railway Street, Lidcombe,

ELIZABETH RIVERA,

OMIR MAJSTROVIC,

DAVID JAMES HALLS, affirmed and examined:

Mr FERGUSON: Firstly, I would like to congratulate the State Government on organising the inquiry. From our point of view there has not been sufficient opportunity for public debate and parliamentary debate about these radical new workplace laws. The CFMEU submitted a 22-page submission to the parliamentary inquiry and I assume that has been circulated to the participants of this Committee.

CHAIR: It has.

Mr FERGUSON: Also, the union received some very specific questions, which we were asked to address and I have drafted responses to those questions. Do I table that here or do I have it circulated?

CHAIR: You will probably use it to give answers but it would be useful to table it afterwards.

Mr FERGUSON: Thank you. I would like to make a few comments in relation to a number of issues that the parliamentary inquiry is looking at. The first thing I would like to address is the wages and employment conditions of building workers. The CFMEU represents workers in the building trade in New South Wales and Australia. The first impact of the legislation is that there has been introduction of a prohibition on all project agreements. In the past on all major projects there were project agreements that make provision for project productivity payments. As workers met milestones in terms of completions of jobs there was payment of productivity payments. They have been applied in New South Wales construction for decades, most notably on the Sydney Olympic projects, all of which were completed on time and within budget.

Under the new workplace laws all project agreements are now prohibited and that has meant an immediate reduction in the wages of building workers on big projects of between $100 and $150 per week. Also under those project agreements there were provisions for minimum standards that also now have been undermined. We have also seen in the recent period the introduction of individual contracts more extensively into the building trade. I have not seen one AWA with wages or employment conditions better than those that have been prevailing for many decades.

Employers are imposing those AWAs as a condition of employment. There is no choice. When a worker fronts up to the gate of a new project they are told that the wages and conditions are an individual choice and if you do not like it you do not have a job. That has a very significant impact in building and construction because the workers go from job to job, site to site, frequently seeking

new employment and the opportunity to impose AWAs means that employers can lower the wages and employment conditions of building workers.

WorkChoices and related Federal legislation has a disastrous impact on workplace safety. This is an industry where one worker is killed every week and under the new radical workplace relations laws we have restrictions on union right of entry to sites. We have a prohibition on including in enterprise bargaining agreements, provision for delegates, including safety delegates, to go to any forums and any training sessions that are conducted by the union but even more outrageous there is actually a prohibition on paid leave for safety representatives or union delegates to go to any forums or training courses where there will be union members present. Even if it is not conducted by the union, if union members are present that is prohibited content and cannot be included in enterprise bargaining agreements.

That is having a very significant impact on safety training in the industry. The union has been in the forefront of conducting forums and training sessions in the past about issues of workplace safety. We frequently have WorkCover New South Wales attend those safety forums doing presentations about particular hazards or new safety alerts or issues confronting workplace safety and the attendance has significantly collapsed in recent months. This week we had a safety representatives meeting and only five delegates managed to attend whereas in the past we would have had 100 delegates going to safety forums.

The transfer of knowledge in the industry and presentations from WorkCover are being significantly impacted. The removal of the unfair dismissal laws makes it very difficult for workers to raise issues of safety on sites. The workers do not have any rights in relation to safety. It inevitably means that employers are going to cut corners and that means further fatalities and serious injuries in future years. The new laws have a disastrous impact for young workers that come into the industry. We have thousands of apprentices that come into the building trade every year. We have now got employers forcing 16 and 17-year-old young people—it is generally young teenage boys—on to individual contracts. There are no rights, no choice, no opportunities. The first employer organisation to take advantage of WorkChoices in terms of apprentices was the Housing Industry Association of New South Wales that overnight forced every apprentice on an individual contract that eroded their employment conditions—no choice, no rights and no opportunities: You either work under an individual contract or you do not have a job.

It has a disastrous impact on standards for building workers outside the metropolitan area. Historically the union has been stronger in the Sydney metropolitan area. It is far more difficult in terms of resources and capacity to organise workers in rural areas. We are now receiving on a regular basis reports from building workers across rural New South Wales being forced onto unfair individual contracts.

The other area where groups of workers suffer greatly is in the area of workers from a non-English speaking background. The industry is very much dominated by workers from a non-English speaking background not understanding labour laws, not understanding their rights, having no bargaining power being forced onto individual contracts, but also in particular workers on visas, 457 visas, backpackers, being used as cheap labour, undermining labour standards and workplace safety. I might leave it there. Rita Mallia, the senior legal officer of the union, will make some comments and will introduce two workers who have their own stories of being subject to unfair treatment and also the partner of another worker, who cannot be here today for fear of retaliation from an employer.

Ms MALLIA: Just before I introduce our three witnesses today, I want to make a couple of other comments. The legislation itself—and you have probably seen it—is incredibly complicated. What was once one volume is now, as I understand, CCH has reprinted into two volumes. That does not even include the regulations. It has become very difficult to find out what people's rights are and are not under this legislation and you really do need a team of lawyers to figure it all out. It is quite horrendous that people's rights are now so complicated, and you really have to work through pages and pages of provisions before you can come to some sort of decision whether someone has or has not got rights in any particular circumstance. For instance, if it is termination of employment, victimisation under the legislation, figuring what is or is not in an award, how redundancy provisions are going to operate and everyone is still very much trying to get on top of the detail.

Also in terms of enterprise bargaining agreement processes, and the processes around collective agreements, we have to engage in quite a lengthy discussion with the Office of Employment Advocate who have officers there employed by the Department of Employment and Workplace Relations and the Office of Employment Advocate with whom you have to negotiate about terms and conditions in our enterprise bargaining agreements. And they will not tick it off unless the words in those agreements meet what they think is consistent with the Workplace Relations Act. We do not have recourse to challenge the arbitrary decisions that they make about the various interpretations that they give, particularly the regulations. I have referred to it in the submission, but under the regulations there is a whole series of things that are prohibited from being in collective agreements. An agreement cannot be lodged that contains prohibited content, and there are penalties if agreements are lodged where there is prohibitive content in them. If agreements do have prohibitive content they may be invalidated and unenforceable.

We have had to undergo and use quite a lot of resources in lengthy discussions in meetings with the Office of Employment Advocate about individual wording in agreements to satisfy them that these agreements contain provisions in there that are not prohibited by the regulations. These are individuals in the Howard Government's department with whom we have to negotiate, before we even get to negotiate with an employer, to ensure that we are not putting up an agreement that has got prohibitive content. If something has prohibitive content in it, and we were to take protected action, for example, that protected action could be invalidated and we could be facing penalties and damages under the Act. It is such a powerful tool that even the State now has which imposes upon parties who could otherwise freely negotiate.

So you have all this rhetoric about flexibility in this legislation, about employers and employees coming together and negotiating a whole bunch of conditions that suit their enterprise but that is far from the truth. In fact, there are a whole bunch of conditions in this legislation badly drafted where we now have to negotiate with the Government before we can take something to an employer because if we take something that is prohibited we can pay for it later on down the track. So this idea that this legislation provides and frees up the economy, and employers and employees and organisations to collectively or individually bargain is nonsense. It really is a very Draconian complicated set of provisions, and nobody really knows how it all will turn out at the end. It really does make operating the system very difficult.

The provisions of the Act obviously undermine conditions in awards, and in our submission we have taken you to where the provisions of our award will be stripped away. For example, you cannot have clauses which limit people's period of being a casual. In our building construction awards we do have a very valuable right where a person cannot be a casual for more than six weeks. That was a recognition by the industry. It is a condition that was reflected in both Federal and State awards for many years that, given the itinerant nature building and constructions, you should not have unfettered use of the casual status of employment. WorkChoices renders that a non-allowable matter.

The benefits that New South Wales gained by bringing forward their claim for conversion of casuals to full-time employment in the recent test case which the New South Wales Industrial Relations Commission looked very favourable on that application, and did include in State awards provisions whereby casuals could be offered full-time employment, have been rendered nul and void by this legislation. I notice some questions asked of us in the draft questions was how this would impact on low paid casual workers. Essentially, under this legislation someone could be a casual forever. That impacts on their capacity to get mortgages, on their ability to plan their day-to-day life and on their security and certainty of employment. It does leave a lot of people, particularly those in lower paid jobs, in a precarious position. This legislation is quite insidious in the way that it impacts on the most vulnerable. Combined that with what we have seen with the welfare-to-work changes, and you have got a system whereby it is a race to the bottom, and employers will have all of the power in that relationship.

The other important features are the loss of independent tribunal's access to the New South Wales Industrial Relations Commission where parties—employers, unions and employees—could go and have issues resolved very quickly, often by consent; where there were arbitration proceedings that that were done quickly and simply. You could get something on very quickly. You did not have to get caught up in jurisdictional and legal arguments. Both the Federal and the State commissions have been denuded of their capacity to resolve disputes. The Federal commission has very limited power now

under WorkChoices. Even where parties to an agreement choose to take their disputes to the Australian Industrial Relations Commission, it only has very limited powers with respect to resolving those disputes. There is not an open process. It is all a private, alternative dispute model that this legislation puts forward.

I brought an application in relation to transmission of business only last week. I turn up there with a delegate and people from our organisation and the other side turns up with a barrister. We have already started seeing this incursion of the legal fraternity into this area. It is going to be a far more legally complex process, even in dispute resolution whereas in the past you could go to either the State or Federal commission, have your say and get the assistance of good people on those tribunals to resolve disputes. That is not the way of the future: the way of the future is going to be a legalistic, lawyer-driven process which, in the end, will not help the economy of workers certainly, and probably not employers at the end of the day either.

CHAIR: Do Committee members want to ask any questions? The Hon. Dr Arthur Chesterfield-Evans, do you want to ask any questions before you leave?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: No.

The Hon. KAYEE GRIFFIN: If you take a dispute to the Australian Industrial Relations Commission what do you mean by limited powers to actually resolve disputes?

Ms MALLIA: As I understand the process, and there are quite complicated provisions, parties have to choose to go to the Australian Industrial Relations Commission so they have to have an enterprise agreement or something that says that the parties will take their disputes to the Australian Industrial Relations Commission [AIRC]. They can agree that the decisions are binding but it is very much an informal process. There is not a formal arbitration process that I can find in there, and it is all done behind closed doors so you do not have a transcript, decisions or the benefit of precedents which means that basically the parties are in a room and the commission will try to resolve the dispute as best it can. In the past, we have had the benefit of an open forum, the capacity to bring witnesses and the capacity to have a binding determination which is then enforceable, which I do not understand exists in this process.

If you have not chosen the AIRC there is a model dispute resolve process which basically leaves it to the parties to choose a process by which they resolve their disputes. You do not get access to the commission directly, you have got to use your own private mediation process. I gather there will be a whole string of consultants now who will start setting themselves up to provide this alternative dispute resolution, as we have seen in other areas of alternative dispute resolution. It is only if the parties cannot agree on who is going to do that mediation that you get the opportunity to approach the commission for a member of the commission to then try to resolve that dispute. So it is not a very open, transparent or binding process. Then if you have not even agreed that that is the process you are only to take, and you get stuck with this alternate process in the Act it is really up to the parties.

Obviously individual workers are not going to be able to pay for a mediator to help them with their disputes. Obviously people who are represented by unions will have some capacity to have representation in that process but it is very much taking and moving it away from having an independent party like the Australian Industrial Relations Commission or the New South Wales Industrial Relations Commission which has been a feature of industrial relations in this country for more than 100 years. Two or three years ago I was in America when I did a course about employment and IR in the United States. They do not have a system like that and they were very interested in a system where you have the State providing an independent arbiter. Over there you have a system that this WorkChoices is now trying to create where people pay for mediators. People get paid very highly to be mediators in disputes, and it really is not an open, transparent and independent process at the end of the day and you get the mediator that you pay for. So it is not very conducive to fair dispute resolution, particularly where you have individual workers who will not have the capacity to really participate in the dispute resolution process and basically whatever the employer says is what they are going to have to live with. That is the concern with that.

CHAIR: Would you introduce our other witnesses?

Ms MALLIA: Our first witness is Ms Elizabeth Rivera. I am going to make a little statement about each one before they speak. Elizabeth is the partner of a building worker, a member of the CFMEU. Her partner is employed as a carpenter. As Andrew mentioned, her husband could not come today as he was very concerned that if his employer found out he would be sacked. Ms Rivera's partner had been unemployed for a period of three months, and he did not want to put himself in a position where he might lose his job. But we have asked Elizabeth here to explain to you about a procedural process in this new system.

When her partner got a start, about two months after he commenced employment they received a letter in the mail from the Office of Employment Advocate advising that the employer had lodged an employee collective agreement with the Office of Employment Advocate. With the new process now you do not have to go to the Federal commission and lodge an agreement and have that agreement assessed by the commission to ensure it meets certain minimum standards and conditions. Now employers go off to the Office of Employment Advocate. They lodge a document. The Office of Employment Advocate under the legislation does not have to consider that document, consider whether all the processes have been undertaken that had to be undertaken before it was lodged. Basically it is lodged. Once an agreement is lodged with the Office of Employment Advocate it is binding so there is not a vetting process at all.

So two months after Ms Rivera's partner started his job there was a letter received from the Office of Employment Advocate that a collective agreement, a non-union agreement, had been lodged. The employer had not provided a copy of the agreement. To this day Ms Rivera's partner does not know what it contains and what the conditions of employment are. Obviously he knows how much he is being paid because he gets that on his pay slip. Despite efforts on Ms Rivera's part, she has been unable to obtain a copy from the Office of Employment Advocate, and she advises me that she is very scared to ask the employer because he does not want to get into a position where the employer can just say "If you do not like what I am paying you, you can go."

I understand that the agreement does not contain certain industry standards such as contributions to the Australian Construction Industry Redundancy Trust and we know that those contributions are not being made. So we asked Elizabeth here just to tell the Committee of this administrative aspect and how it is impacting on her life and the uncertainty that it represents in her and her husband's family life. So I will just introduce you to Elizabeth Rivera.

Ms RIVERA: My husband has been a carpenter formworker for many years and he has always worked under an agreement with the union, so he always knew what his working conditions were, what the rights were and what the union would be able to do for him with this particular agreement that he had. So he was always quite happy to be a member of the union knowing that he has the union to back him up and also to know that the union would fight for his rights and for his conditions in case he ever needed to know that. So having a collective agreement as such with the union was something that he felt secure about. But since he lost his job because the project has finished and, as normally happens in the industry, they move from job to job, he was off work for a period of three to four months lately and then eventually he found a job.

He had the job, there was not enough work and he was put off again so he found another one. When he finally gets this one—and that is the reason, like Rita was saying, he does not want to be here because he does not want to be put off again and be off work for three or four months or maybe more as the industry is very slow at the moment, as you all know—he come home and I asked if the agreement was given to him, if they have a union agreement. He did not know, nobody has told him anything. He tried to find out with some of his co-workers whether they knew about an agreement or has anybody mentioned one. Nobody seemed to know anything about it. I asked him if he could go to the employer and ask the employer if they have an agreement. He refused to do so because he said that if he did then he may be able to be put off work within a few days if he asked for that. So he refused to do that.

My next thing was to try to find out what was happening. Obviously I could not. Then we received a letter from the Office of the Employment Advocate saying that a collective agreement has been lodged by the employer and that the employer is supposed to give this particular letter within 21 days to all the employees to let them know that an agreement was lodged. I called the office to find

out if I could get a copy of the agreement so I would be able to tell my husband what his rights were and his concerns about whether he was going to be paid for the redundancy package like he used to be paid before. They were the main concerns for him—and, obviously, the hourly rate that he get in his pay.

I did that and I spoke to an officer from the Office of the Employment Advocate and the person I spoke to told me that was private and confidential, that I could not get a copy unless my partner would go to the employer himself and ask for one. I asked him if there was a way that I could find out any more about it or can I get it anywhere else and he gave me the number of the Office of Work Services, a 1300 number, and he said that the only way was that if I had an official complaint I could just call in there and they will be able to have a look. He did not know when or how long it would take for that. So I asked him again if there was any way in the web page, through WorkCover, that I may be able to get an agreement or they could tell me where I could go in because I had already been looking and he said in the near future I may be able to go into the web page and maybe the agreements will be there, that they are working on it.

I asked him what the "near future" was and he just responded that unfortunately he could not tell me that. So once again I tried to put my word across and ask him if I was able to get this agreement any other way and he just replied again the only way was to tell my partner to go in and ask the employer. I said shouldn't the employer be giving this agreement to my partner and he answered that the employer should have put the agreement up on the shed for at least seven days for the workers to read and agree and approve this agreement. Also, if that was not the case then he should have given each individual a copy of it if that was not what was happening. But a copy should have been put in the shed.

I came back home and I told my partner what I found out and I asked him if he ever saw any agreement and he said no, that he asked the other workers and nobody had seen an agreement either on the table at the shed or on the board like this officer from the Office of the Employment Advocate told me that it should be. They never got consulted about the agreement. So he just does not know anything. He has no idea what is in the agreement and I have not been able to get an agreement from elsewhere to try to read it and let him know. He is limited in his English skills so that makes it even more difficult to find out, to ask properly, to probably go to the employer and make sure that he does not come across too strong to ask for the agreement and get put off. The main concern at the moment is that he does not want to be put off and he does not want to lose his job. That is why I am here, just to tell the story and say that unfortunately no matter where I went or who I asked or what phone numbers I called, nobody was able to let me know anything about this agreement until yesterday when I tried once again, there was no answer for me.

The "near future" is probably a long time away for the Office of the Employment Advocate to actually create this web page where all the agreements eventually will be there, if they will ever be. So I do not know how to get one.

CHAIR: Would there have been a ballot before this agreement?

Ms RIVERA: No. I asked my partner if he could find out with the other workers whether they have been asked to go into the shed and maybe have a talk about the agreement. Nobody there who have been there before he started have ever been to the shed for a talk or been informed that an agreement was going to be prepared and lodged, or read about it. Absolutely nothing.

Ms MALLIA: One of the issues that this example raises is that there are provisions in the Workplace Relations Act that are supposed to be gone through, some of which I have detailed in our submission, such as giving access. It does not actually require an employer to give you a copy and take it away in the seven days; they only need to give you access. So it would be sufficient under this legislation for an employer to leave on the table in the site shed a draft copy of that agreement and say, "This is it. See you in seven days". There are provisions in there where employers are supposed to approve the agreement. However, once an agreement is lodged you cannot challenge any of that unless you are prepared to go to the Federal Court and get a judge to say that the process was flawed, whereas in the past we would be able to complain to the Australian Industrial Relations Commission who had the overriding role in terms of the certification of enterprise agreements and would be able to go and complain about it and take evidence to the commission that in fact the steps prior to the

making of either a union or a non-union agreement were flawed and that that agreement should not be certified.

But this legislation does not operate in that fashion. Once it is lodged with the Office of the Employment Advocate it is an enforceable document and we would have to fund a case in the Federal Court to overturn that agreement, which is very resource intensive and not necessarily something that is going to lead to a positive outcome, not to mention the difficulties that these workers are placed in because they are not going to put their hands up and, like you have heard from Elizabeth about her partner, complain about these things because combine that with the fact that those people will not have any unfair dismissal rights puts employees in a very precarious position in terms of challenging how it came about that these agreements were ever made in the first place.

Mr FERGUSON: In terms of a building site, unlike a factory or an office perhaps, on day one there might be two workers of a particular company that might endorse an agreement, for want of a better word, and then the workforce might build up to 100 or 150 workers that never participated in this initial process where a non-union agreement was imposed. In the case of Elizabeth's partner he speaks virtually no English; having access at a workplace to a document that is in English does not represent any right whatsoever, let alone understanding a document if it was in your own language.

Ms RIVERA: Can I just add something else? I would just like to also say that whenever he worked on any other sites before where there was a union collective agreement when the worker came into the site for the first time the first thing that the employer would do is to give them the actual EBA, the actual agreement that the union had with that employer. So you did not have to ask, you just got to the site and they would be handing this to you. So obviously my first question when he came home on the first day was, "Did you get your tax forms so we can get that organised and did you get your agreement?" And he goes, "No". So I said, "That's all right, it's your first day. The next day they may give it". Another week and another week and nothing happened so that is when I started to get worried about it.

I asked him if he wants me to call the union to find out, which I did, and I asked the union if this company did have an agreement with the union. They did before previously but not anymore. So this is another problem that all the companies that used to have previous agreements now they do not and they are lodging these new agreements that deal with the Office of the Employment Advocate, which we have no rights to see or sight or read as the officer told me it was private and I should go and ask the employer, which makes it very difficult for the workers.

Mr FERGUSON: There is actually no right of entry to this workplace for the union: there is a non-union agreement. Elizabeth's partner has been a union member for many years but we have no right of entry to this workplace to actually deal with this issue and make representations in terms of even providing the agreement.

CHAIR: Just returning for a minute to what Rita said, the point of them being lodged at all is to make them enforceable but the upshot is that either side can be forced to do something by an agreement that they have never seen.

Ms MALLIA: Yes, it would seem that is the way the system allows it to operate.

CHAIR: And what Elizabeth was saying about a possible near future placement on a web site, that would not be making these private agreements public, would it?

Ms MALLIA: I do not think that would happen.

CHAIR: It might be some guidelines or rules?

Ms MALLIA: Given the whole thrust of this legislation talking about individual enterprises, individuals and their employers, I cannot imagine, from any dealings I have had with any of the Office of Workplace Services or the Office of Employment Advocate, that these private agreements would find their way onto the web site. When the Australian Industrial Relations Commission had the powers to certify these agreements they were publicly accessible documents.

The Hon. IAN WEST: Elizabeth, when you spoke to the Office of the Employment Advocate did they indicate at all as to how you may enforce this agreement that you had no knowledge of what was in it?

Ms RIVERA: No. All he keep insisting that I do was to continue trying to get it from the employer. So there was no other indication of how I would be able to get this unless I put out an official complaint to the Office of Work Services, and he told me that if I do that it makes it official and making it official means that they will be able to go and talk to the employer, find out if he did put it on the shed for them to read, and if the employer said it wasn't there at that time, did they receive a copy of it.

The Hon. IAN WEST: Were you able to get any advice as to whether or not, should you or your husband attempt to seek to enforce this agreement that you knew nothing about with the Office of Work Services, and your husband was sacked, you still have the right to proceed?

Ms RIVERA: I asked that. I said to this person, "It is very easy for you to tell me to go and ask the employer when my husband could be put off the next day or on the same day". I said how could I prevent that if I have no idea what is in the agreement or what this agreement contained to protect my partner's rights? I do not know whether he had no knowledge, but he was very short in his answers and he kept insisting that if I had a complaint I should call this office, and he gave me the number to do so.

The Hon. IAN WEST: Did the Office of Employment advocate give you any indication as to whether or not they had some template document that they could show you?

Ms RIVERA: I asked for that. I said, "Can you actually send me anything?" and he said, "No." He said that it was private and that the employer should have it, and if I want it I should just insist that the employer give it to us.

The Hon. IAN WEST: They did not indicate whether or not there was some sort of blank document that they were handing out to employees as a template?

Ms RIVERA: No. I asked, but no.

CHAIR: Is that happening in the industry? We heard some evidence in Wollongong yesterday that documents prepared by lawyers for employer bodies are starting to float around, blank documents or templates. Is that happening in the construction industry, do you know?

Ms MALLIA: I have seen drafts of enterprise agreements that have been handed out by employer organisations, or employers who have gone off to lawyers to draft things. There are documents that are prepared to fit the new legislation.

Mr FERGUSON: Under the legislation there is a prohibition on the union being involved in pattern bargaining, that is to have the same document and pass it around to a host of different employers to maintain a level playing field, but there is no prohibition on employers doing that. There are standard documents prepared by lawyers and employer organisations that we have seen. Also, in terms of individual contracts I have never seen any one that is not identical in the same company. As workers front the gate, "Here's your individual contract." Everything is the same. There is no variation about rates of pay or conditions. When the Housing Industry Association unilaterally imposed their unfair contracts they were all identical. It was a pattern individual contract simply being imposed by brute force.

CHAIR: We can always come back to people later on, but perhaps we should move on to our next witness.

Ms MALLIA: Our next speaker is Mr Majstrovic. I will go into a little detail about his story, because his English is not as good as Ms Rivera's. He is a formwork labourer. He was employed as a labourer by a company known as Formbrace, and he has been employed with that company since 1 June 1998. He has three children aged 14, 9 and 7, and his wife has been working two days a week. Mr Majstrovic's employment was terminated this week. As a result of that his wife has now been

forced—she was the primary child caretaker—to take up extra hours, and he has been placed in quite a difficult situation by his employer. I asked Mr Majstrovic because I noticed that in some of the questions the Committee asked you had some interest in the plight of injured workers. Whilst Mr Majstrovic does not have a physical incapacity that prevents him from working, it is about a workers compensation matter that the termination of his employment came about this week.

In May 2006 he was in the lunchroom when he saw an ad and some information about industrial deafness and getting hearing tested. Building and construction workers, by and large, suffer industrial deafness in the industry because it is a noisy industry and a noisy workplace. He decided to check his hearing, and he was told by the audiologist, in fact, his hearing was very bad. This diagnosis was confirmed by a doctor at Westmead Hospital. He sought legal advice and made a claim, as he is entitled to do under the Workers Compensation Act 1987 in New South Wales. On approximately 1 July 2006 a company foreman came up to him and asked him not to continue with his industrial deafness claim, questioned why he was making the claim and told him that if he did not stop making a claim his employment would be terminated. Mr Majstrovic, obviously, refused to stop bringing what is his lawful entitlement.

About 6 July another foreman and a company safety officer this time came to him. They had copies of his paperwork, which would have gone to the employer, in relation to his hearing claim. Again, he was told that they wanted him to stop the claim and they also gave the name of another solicitor, not his own solicitor, and that that would be his solicitor from now on. About 15 July, another week, the foreman approached him again as he was working on site and, again, he was asked to stop making this industrial deafness claim. In fact, he has advised me that since 15 July it was like harassment on a constant basis in terms of this claim. On or about 22 July the foreman approached him again, with a mobile phone. The company owner was on the end of the mobile phone and told him that if he did not stop bringing this industrial deafness claim there would be no point coming to work the following Monday. Mr Majstrovic went home and his employment had been terminated.

The tragedy is that some 11 other workers have also been terminated by this company because they did undertake a hearing test and have put in industrial deafness claims. Obviously, the union has taken up these issues. The other thing is that some of the workers have, actually, pulled out their claim and have been reinstated by this company. We have not finalised our inquiries, but there is a possibility that there are fewer than 100 employees here, so it is a corporation. We have not made a final determination about that, but, given that companies in the building and construction industry and all manner of related entities and the like, it is possible here that there are fewer than 100 employees, which means that we cannot bring an unfair dismissal claim.

I had a look at the Freedom of Association provisions in the Workplace Relations Act where employers are prohibited from terminating workers on certain grounds. Whilst you cannot be terminated for asking for a benefit under an industrial instrument that does not seem broad enough to cover making a claim that is of benefit to you under a law, such as the Workers Compensation Act. There does not seem to be anything in the Workers Compensation Act that will assist Mr Majstrovic and the other workers who have been put in this position. There is a potential provision under the New South Wales Industrial Relations Act, which has some broad victimisation provisions, but it is unclear jurisdictionally whether or not there is an argument because, as you know, WorkChoices seeks to render null and void, by and large, the Industrial Relations Act of New South Wales to the extent that employees employed by constitutional corporations, which, presumably, this company being an incorporated body is.

It puts us in a bit of a difficult position. In the meantime Mr Majstrovic has lost his job, all because he made a claim for a lawful entitlement, being some compensation, modest as compensation is under the Workers Compensation Act in any event, for compensation for loss of hearing as a result of the conditions of his work. That is his story. It is a tragic injustice that has been perpetrated here. It would seem that, of course, we have not finalised our investigations in terms of his legal rights, he is standing on thin ice in terms of what kind of claim he may or may not be able to bring to try to bring about either the reinstatement of his employment or some sort of compensation. I will hand over to Mr Majstrovic, just to say how this has impacted on his family life. He is a young man with three young children.

Mr MAJSTROVIC: I am very nervous after Saturday with my three children and my wife. My wife is working only two days. I have no job at the moment and I am not sleeping enough. That is all.

The Hon. IAN WEST: I understand that under the Occupational Health and Safety Act that criminal provisions apply to people who interfere with a person's rights or safe work environment. I assume that you will investigate those aspects. However, I understand that with industrial deafness, the issue of measuring such industrial deafness is understood medically and that it is not in dispute. If a person has industrial deafness I assume that there is not an issue here as to whether the person has a claim or whether the claim is valid. That is not in issue?

Ms MALLIA: As far as I can tell, no, there is no issue. He has been tested. He has made a claim. If there were an issue about liability, that would be for the workers compensation insurer to determine and then he would have right through the Workers Compensation Commission if he did not agree with it. What we have here, though, is an employer essentially monstering this individual to pull out of that process and to withdraw his claim: "Don't claim your lawful entitlements, and if you do you lose your job." As I understand it there is no issue here with liability, but even if there were this is not the way it should be resolved. It should be resolved in the workers compensation system. In terms of the Occupation Health and Safety Act, there are provisions that prevent a person being victimised in raising an occupational health and safety issue, or in relation to breaches of the Occupational Health and Safety Act. But here we do not really have a breach of the Occupational Health and Safety Act, we have someone making a claim under the Workers Compensation Act. Even in that regard our rights might be quite limited.

And you are right, you have to bring a prosecution. It is beyond reasonable doubt. It is a legal case. I do not know that there is necessarily a real remedy there for Mr Majstrovic in terms of his termination of employment. It is also not clear under that Act whether the commission would be entitled to do anything, such as a reinstating, in any event. There is certainly nothing in the Workers Compensation Act that would be helpful. If there were, for example, workers compensation being specifically excluded from the reach of WorkChoices, whereby you could bring a claim, say, in the Industrial Relations Commission of New South Wales about this very conduct, which does not exist today. Maybe that is something that this inquiry, at the end of the day, could recommend, that there be an amendment to the Workers Compensation Act so that where people are put upon in these circumstances they are not left to cop the result of standing up for their rights or have to compromise their rights to ensure that they continue being employed.

CHAIR: We will move on to our third witness.

Ms MALLIA: Our third witness is Mr David Halls. We have brought him along and I have referred to him in our submission because he actually did have the benefit of a pre WorkChoices regime and he is now facing the prospect of having quite different rights post WorkChoices. Mr Halls was employed as a scaffolding yard employee for a company called Boral Formwork and Scaffolding. He was employed as a scaffolder, but he also served as the CFMEU delegate at that workplace. He was made redundant before Christmas last year, 7 December 2005, on the basis of the company claiming a downturn in work. He had been employed with the employer for about three years. The union's view was that there was still a high enough workload to sustain his employment, that there was a significant amount of overtime being done, and that his termination should not have occurred. A claim for unfair dismissal pre WorkChoices was lodged, and we won his reinstatement. Commissioner Larkin of the Australian Industrial Relations Commission, though she was satisfied that there had been some downturn in work, was not satisfied that it was Mr Halls who should have gone. He was reinstated and back pay was ordered.

About two weeks after that decision, WorkChoices had already commenced and he has now been sacked again. The company had reissued the redundancy matrix, as they call it, and he has been advised that he, and he alone, has been chosen to be made redundant. We have again brought another claim, and now there is a big jurisdictional argument about whether or not the company has genuine operational requirements to put him off. Under WorkChoices, as you know, if an employer has fewer than 100 employees people do not have any right to go to the Federal commission for relief from unfair dismissal, but even when a company, such as this one, does have more than 100 employers, if they can show that one of the reasons for the termination is an operational reason, that is some

reduction in work or something like that, then a person does not have the right to challenge their termination of employment.

It is very difficult for individual employees to be able to show that a company does not have a reason for operational purposes to bring about the termination of employment. Employers hold all of that evidence. They have the evidence of their finances and their projects. Particularly in the building and construction industry, where there is some sort of general acceptance that it is a cyclical industry where things go up and things go down, it is very difficult, even where there are 100 employees or more for someone to be able to show that, in fact, the company did not have a genuine operational reason to bring about the termination of their employment.

So Mr Halls finds himself in a bit of a catch-22. He won his case and was reinstated. We ran the evidence and won it but two weeks after the order was made WorkChoices had come into force. We are now back before the commission trying to argue whether he has any additional rights. That argument is yet to be had. It highlights quite starkly the pre-WorkChoices and the post-WorkChoices regimes and one aspect in relation to unfair termination and the position that people have been put in and the fact that, by and large, they are at the whim of their employer when it comes to the hiring and firing of employees. That will impact on their capacity to bargain, negotiate or whatever it is that they must accept to ensure that they can secure longstanding employment. I will now hand over to David, who will give his feelings about how he has been treated.

Mr HALLS: To give you a little bit of history, I was also on the consultative committee for Boral previous to the first retrenchment. They kept on threatening this retrenchment. This occurred over a period of probably four or five months. There were four yardmen—I was one of them—and they repeatedly put to us that one of us would have to go and it would be at the end of the week. That was basically like saying, "We're still going to execute you; it will be this week but not today." This happened four or five times. Everybody was very uptight about it. So at the consultative committee meeting I gave seven reasons why we should not have a retrenchment at the yard. Some of them were that we had doubled the tonnage in the yard so we were doing twice as much work as when there were only three men there. We had only increased by one man but we were doing twice the work. We were working every Saturday and the overtime was probably a bit too much. This carried on. I still have not had an answer to those seven reasons, and this is 12 months ago.

It seemed to me that, from that meeting on, their attitude to me changed. I think I had them a little bit upset that somebody would actually query their making a decision that possibly they should not have made. After I won my case I was kicked out of the consultative committee. I copped that on the chin. I thought, "Well, fair enough, they obviously do not want me on it." But from then on it spiralled down for two weeks until in the end it was just unbelievable that they could do it again but they did. That is why I am here. The redundancy matrix was an absolute joke. He gave me zeros for everything. You get different points for different things, such as attitude to work and attendance. For attendance he gave me zero out of 10 but I have never been late, never left early and never had a day off. He thinks he can do whatever he likes—and the way it looks maybe he can. I do not know.

CHAIR: Were you the only person made redundant?

Mr HALLS: Yes, the second time. The first time there were three from another yard made redundant but only me from Brookvale.

CHAIR: And the second time you were the only one.

Mr HALLS: Yes.

CHAIR: Did you end up with a copy of documentation like the redundancy matrix and so on?

Mr HALLS: Yes.

CHAIR: Bringing it together, the construction industry is obviously an industry where workers are much more at risk in a variety of ways—the lack of stability of long-term employment,

the cyclical nature of the industry and so on. Therefore, do you think the legislation has impacted on people in the construction industry more than on those in many other industries?

Ms MALLIA: In terms of the way that casuals will be treated and losing the limited rights that workers did have to challenge the unfair nature of their employment I think it will have a massive impact. As you say, it is a cyclical industry, where workers move from employment to employment. There were some rights contained in awards and in legislation and we were able, when the right case came about, to challenge termination of employment and the like. This whole legislation—the attack on the capacity of people to collectively bargain and the difficulty in terms of taking protected action with the use of secret ballots—compounds the difficulties that construction workers have.

You may or may not be aware that we also have special legislation in the building and construction industry, which is the Orwellian named Australian Building and Construction Industry Improvement Act. What WorkChoices did not take away that Act takes away in terms of workers' capacity to take strike action where necessary and to stand up for their rights. It is a direct undermining of their civil liberties. They are treated differently from the rest of the work force. There is special legislation and special police and if you step out of line there will be massive fines and penalties imposed upon you. So building workers and their representatives and unions are attacked on two fronts: by WorkChoices and by the Building and Construction Industry Improvement Act. I do not know whether Andrew wants to say a bit more in relation to that.

Mr FERGUSON: We had a worker in Sydney this week from a building site in Western Australia. He was here with his partner. It was Mal Peters and his wife, Bernadette. They were on a site where a worker was unfairly sacked. They had a meeting on the site to protest the sacking of their union delegate. That issue was eventually resolved. The worker got some compensation for unfair sacking, which he donated to a local charity in Perth. But we now have 107 workers on that site who are being prosecuted under this special legislation. They are facing fines of $28,600 for stopping work about the unfair sacking of their delegate. Another 300 workers on the job now are being investigated for the same meeting that took place. That puts extreme pressure on their rights to express themselves and to put their point of view about grievances.

This legislation will have a disastrous impact on building workers and their families, in particular in Sydney where there is a significant recession. In addition to that, we now have the immigration policies of the country being used to allow tens of thousands of workers on temporary visas and backpackers into the industry. Those workers are invariably working for wages that are substantially less than prevailing market rates. I will give you a few examples. In the ceramic tiling trade there would now be 300 backpackers from South Korea, all builders labourers. Without any doubt they are overwhelmingly on cash money. They are simply taking away the jobs of the work force that has traditionally worked in that industry. They are on much lower rates of pay and conditions and the union has no right to go to those sites to raise those sorts of issues about pay and conditions with those workers. It is having a disastrous impact on all workers, but particularly workers from non-English speaking backgrounds, young workers and workers in rural areas, who have even fewer rights in terms of union representation.

The Hon. IAN WEST: And workers who may be injured.

Mr FERGUSON: We have seen the case of a particular worker who was sacked, along with 11 other workers, for simply putting in a hearing claim. As I said in my introductory remarks, it will also be a disaster in terms of workplace safety. When there is a recession people are desperate to keep their jobs. If you raise issues about workplace safety that will cost the employer money—such as providing a scaffold or a harness—you can be victimised and sacked. If you do not raise these concerns it means that more corners will be cut and the end result will be more fatalities and injuries in the industry.

CHAIR: It is a pretty bleak picture. Thank you very much for appearing before the Committee. Thank you to the three witnesses who told their personal stories. We wish you luck in getting your jobs back or getting things sorted out.

Ms MALLIA: We have the written response. I will also hand up a summary of the individual stories because they did not form of our original submission.

CHAIR: Thank you.

Motion by the Hon. Ian West agreed to:

That the Committee accept the documents.

CHAIR: Remember that you are covered by parliamentary privilege. If you feel that any threats have been made or anything has been discussed as a result of what you have said today please let us know because the Parliament can take steps to make sure that there is no retaliatory action because of something said before the Committee.

(The witnesses withdrew)

(Short adjournment)

HELENA BRIGID O'CONNELL, Executive Officer, NSW Council for Intellectual Disability, Level 1, 418A Elizabeth Street, Surry Hill, affirmed and examined:

CHAIR: You have previously given evidence before this Committee when we did our inquiry into disability services?

Ms O'CONNELL: Yes.

CHAIR: Do you want to start off with a statement?

Ms O'CONNELL: I do not have anything prepared but just a general preamble about the council. The Council for Intellectual Disability is a consumer organisation representing people with intellectual disability. We have a lot of involvement and membership of family members, service providers, advocates and other interested people in the community. We have been around 50 years this year. Our focus more and more over recent years has been to ensure the participation of people with intellectual disability and supporting that to happen. Clearly, there are capacity issues for many people so we have to take a lot of steps to make sure that people can participate within our organisation and also within their community. Of course, employment and the opportunity for employment is a clear indicator of participation and a means to independence, socialisation and greater potential for improved lifestyle for people. Without employment or with segregated employment, which is common for people with intellectual disability, this cannot be achieved. So, employment is crucial. What I am going to talk about is in that context.

CHAIR: When we were talking before you made the comment about the need to avoid an unduly paternalistic approach?

Ms O'CONNELL: Yes. The situation we are in with the current Federal legislation, Welfare to Work particularly, and other reforms, while we welcome them and some of the additional funding, there is a focus that some people are capable and some people are not. What happens with assessments that are a bit inconsistent and often just not accurate, people can get sidelined into the group of people who cannot work, will not work, will never work, and they are the people the system feels we have to look after, obviously. A whole lot of those people could work and then there are people who have medium support needs who need a lot of support to work and a lot of support to understand employment processes. The key issue, I suppose, if we get down to the WorkChoices legislation, for people with intellectual disability, will be the capacity to participate and understand the process of developing a workplace agreement. That is where we are really concerned.

I just touched on the issue of paternalism. A lot of people say they do not have to worry, they do not have to be involved, but a lot of people want to be involved and have the choice to work part-time and have part-time income support or options like that. There needs to be a level of flexibility in the system for that. I think we are moving towards that with some of the work on disability employment reform but this legislation we are really concerned, and there have been cases already around joint bargaining situations in sheltered workshops or business services where people have been, if you like, coerced or perhaps not even coerced but encouraged to sign agreements when they had no understanding of what they were signing and getting locked into really low wages and poor conditions and, more importantly, particularly in business services, the contractual arrangements have not allowed them to move on to open employment, to move out of that congregate setting.

The Hon. IAN WEST: I am interested in your comments regarding the upcoming hearings with the Fair Pay Commission.

Ms O'CONNELL: Yes.

The Hon. IAN WEST: I understand the interestingly named Fair Pay Commission has a role to play in deciding rates of pay?

Ms O'CONNELL: The minimum wage, yes.

The Hon. IAN WEST: Can you give us some thoughts on that?

Ms O'CONNELL: Yes. How this is usually determined for people with intellectual disability is using a supported wage system, and it is based usually on the minimum wage, depending on the award. We do have concerns that this is not going to be a fair process or, particularly, that the issues relating to people with intellectual disability will not be taken into account. I think the submissions close Monday or today to the Fair Pay Commission and our national body, the National Council on Intellectual Disability, has made a submission in relation to that and we have had some input into that where we pointed out the concerns we have around how that will impact on people. Overall, the supported wage system is probably a good system. I think it has been a really good process to get people into open employment and to encourage employers to employ people.

The Hon. IAN WEST: But can you explain the fundamental differences between that and the Fair Pay Commission?

Ms O'CONNELL: We are not sure at this stage, because it is not really determined. The supported wage system will still be implemented but we do not know at what level the minimum wage will be determined.

The Hon. IAN WEST: In general terms my question goes to the issue of your participation and your involvement and your rights of involvement. In the first process you are an active participant and a partner in the process. With the Fair Pay Commission you are, are you not, an invitee?

Ms O'CONNELL: We were invited to submit a response and that would be, I suppose, the limit of our involvement.

The Hon. IAN WEST: So you do not have an involvement?

Ms O'CONNELL: No, as such we do not. Our national council has had some input and we have had consultation with people with intellectual disability around New South Wales about the issue. That has occurred around the rest of the country.

CHAIR: The commission will be in New South Wales for four or five days, I think, the week after next.

Ms O'CONNELL: If that is your question, no, we have not been invited to give evidence, but we submitted—because of the nature of advocacy organisations, we divide up the work that we have and we decided we would submit to this State inquiry and we have had input into the Fair Pay Commission inquiry through our National Council on Intellectual Disability. I am not sure, but I assume they will be invited to give evidence.

CHAIR: No, if I may. I think this is what Mr West is driving at, the difference. The visit of the Fair Pay Commission to New South Wales, I think the week after next, does not take the form of any public hearings or discussion amongst groups like yours. I think what he is driving at is there is a difference from the previous system, where you could lobby and advocate, where that was an open process?

Ms O'CONNELL: The only opportunities we have had would be to put in written submissions and also through discussions we have had with HREOC, because they have made submissions as well. But in that context, no, this sort of situation is not available.

The Hon. IAN WEST: There was a Federal award, disability employment award, negotiated by organisations of employers and employees in the Federal Industrial Commission. Are you aware of the standing of that document?

Ms O'CONNELL: No, I am not.

The Hon. KAYEE GRIFFIN: I take it the Challenge Foundation would be a member of the your council?

Ms O'CONNELL: Some of the Challenge foundations are. They are a foundation but they are different entities. There is Challenge Tamworth, Challenge Coffs Harbour.

The Hon. KAYEE GRIFFIN: I think you said in a previous answer to Mr West that you have had some discussions with people with intellectual disability across New South Wales in relation to some of these changes?

Ms O'CONNELL: Yes.

The Hon. KAYEE GRIFFIN: I suppose through some of your members, like Challenge, have issues been raised in relation to employment? I suppose I would use someone with Down syndrome as an example, who is going into a workplace. Under WorkChoices and the changes in WorkChoices, has concern been expressed about how some of these young people or older people would have to negotiate with an employer themselves all, if they belong to, say, to Challenge and it was one of your members, would Challenge do the negotiations, because they have already done negotiations to place people up to now?

Ms O'CONNELL: A lot of the Challenge Foundation employment services are supported employment services, which are business services. They pose other difficulties of a congregate service, there are some open employment services. Probably the employment support staff within an open employment service would support them in that process, but there would be some limitations around that. A lot of people do not have access. A lot of people with disabilities try to get jobs for themselves, because they do not have access to support.

The Hon. KAYEE GRIFFIN: You think there would be some limitations in the support networks, whatever they might be?

Ms O'CONNELL: Absolutely.

The Hon. KAYEE GRIFFIN: Limitations in their ability to support people looking for jobs and what sort of agreement there would be with a job, such as an AWA?

Ms O'CONNELL: The job support network is an organisation. Open employment support networks also have targets to meet if they want to get people into jobs. They have a busy process already. The opportunity for negotiation and the skill level and understanding of the legislation would make it quite difficult. I know a lot of the people are workers who support them, job placement officers support people. I am not sure they would have that capacity or see it as part of their job description.

CHAIR: Also there would be some doubt as to whether under WorkChoices the workers or potential employees would have any right to use that kind of assistance for job placement.

Ms O'CONNELL: There are opportunities for people to have support people, that is in there somewhere, but there could be a conflictive role for a support placement officer as well.

CHAIR: When you think of someone with an intellectual disability who is in the work force, perhaps in a particular job for some years, when there has been a decision, perhaps by the employer to move to AWAs, you need to go through some of the processes that previous witnesses spoke about. Is there a concern about the right of a worker with a disability to seek guidance, given the confidentiality and privacy clauses and various other things in the way in which an agreement, once lodged, cannot be examined by anyone? Given those things, is there a problem for people who may have extra need for outside guidance and support?

Ms O'CONNELL: Certainly there is potential for considerable problems. People need independent, impartial support. The issue around that support is that it has to be informed support as much as anything else. I do not know who has that capacity. I do not see a lot of disability advocates. Some people are getting it. In New South Wales the Public Interest Law Clearing House, known as PILCH, is looking at establishing some pro bono system for employees. At this stage we have real concerns about support through the process and having the capacity to disagree. A lot of people with an intellectual disability are quite compliant and agreeable and have been conditioned to be that way

in some cases. There are a lot of issues around that. I suspect that this is the case for a lot of people without disabilities as well. Understanding the fine print of the agreements is really difficult for people as well, and the consequences.

CHAIR: Is one of the implications of what you said a moment ago, that people working in the disability sector would have to acquire a whole range of new skills in relation to employment, which have not been necessary up to now?

Ms O'CONNELL: There is a potential for that, for sure. We do not know. We are concerned that people might get pushed into "you are not employable", so just leave it, and others will need that support. At this stage I can see some real concerns. The privacy and confidentiality issues are a big concern as well. I do not have the details, but there is potential for support in the negotiation process. I have read that in the legislation, but probably not to the level that people need in an individual workplace agreement, particularly around the support they need to participate in the work. A lot of people with an intellectual disability stay in their positions for a long time. So there will be people in the position you talked about before who have been long-term employees and then an AWA has been negotiated. I can see some real problems for them having the assertiveness and the levels of understanding required to participate in that process.

The Hon. KAYEE GRIFFIN: With open employment as opposed to supported employment are there any quarantines in the legislation that protect some of those issues? For instance, in supported employment when someone is starting a new job, travel training is involved as well as a number of other support networks which are provided for that person. In open employment are those same things provided?

Ms O'CONNELL: If people are placed through a disability open employment service, yes. Both supports are provided as well as ongoing support in the position to actually do the job as well. But there are real limitations around that and how much that supports people in the long term. Then with employment performance, there is a lot of training offered to people, which is very important. Often people with an intellectual disability need on-the-job, ongoing support for a very long time to do the job and participate in a way that is meaningful. For employers often they are very reliable and consistent long-term employees. There are lots of advantages. Those things are provided but they are not guaranteed. The service providers do provide travel training and information about occupational health and safety matters and a lot of issues that people need to understand in the workplace.

The Hon. KAYEE GRIFFIN: You may still be working through this with your submissions, but how would that fit in with people having to agree to AWAs?

Ms O'CONNELL: The issues are the same in terms of understanding the process and understanding what is being expected of people. That would have to be negotiated. We have not tested it yet. If those things are not available for people or the time it is not put into making that happen, it would be really difficult. If people are expected just to sign up to something and they cannot achieve that because maybe their bus transport route changes or there is a train instead of a bus, which are also significant things for people with intellectual disability, that could get them into a position where they are considered to be not upholding their end of the agreement.

The Hon. KAYEE GRIFFIN: One previous witness spoke this morning about the accessibility of the agreement that is signed.

Ms O'CONNELL: Absolutely, that is the issue actually in terms of understanding the contents, yes. Communication is a huge issue for people with intellectual disability.

The Hon. KAYEE GRIFFIN: But also if there is an agreement signed in this new process and the person needs support in some way, whether in supported employment or open employment, what about accessibility to other people being able to have copies of the agreement?

Ms O'CONNELL: That is a concern for sure, because people would need to know what is agreed to in order to support the person to uphold their side of the agreement. I also think for people with intellectual disability that some may not even understand the concept of an agreement or that it is

binding or long term. They might agree to sign it on the day but not necessarily understand what it means in terms of their long-term employment.

CHAIR: Has there been any discussion with the Federal Government about the need for funding or short-term mechanisms so that people with disabilities might have assistance in learning about and navigating their way through the early period of the WorkChoices legislation?

Ms O'CONNELL: Not that I am aware of, not specifically, but I assume the understanding would be with the changes to the disability employment services, case based funding arrangements and other employment reform supports that there would be some expectation that funded services would support people through that but, as is coming out now, there are a lot of concerns about confidentiality, privacy and the capacity, particularly of disability support workers, to provide the support, so I am not aware of anything.

CHAIR: Can you tell us a little about how you see the welfare to work changes that came in on 1 July impacting on people with disability, with particular reference to the way in which those changes intersect with the WorkChoices changes?

Ms O'CONNELL: The area where there is potential for intersection is if people are unfairly dismissed, even though intellectual disability is supposed to be an exempting category. If people work in a small company and they are not able to uphold their side of their workplace agreement and are dismissed, there are real concerns about their capacity to survive on the Newstart allowance, which is less than the disability services pension and obviously less than the people who are working.

The other side to it really is that there is not much support for people with higher support needs, who may be able to work but they are put into a category of just staying on the disability support pension and because the system, while it has some advantages, it is relatively inflexible, so to move between jobs and the pension if they need to, there is not much support for people to do that. A lot of people will be considered never able to work.

The other issue is changing the capacity requirement from 15 hours to 30 hours per week. That will affect a lot of people with disabilities. Fewer people with intellectual disability—not many people with intellectual disability will be assessed as being able to work 15 hours—more than 15.

CHAIR: What happens then?

Ms O'CONNELL: Those people will be on part-pension and if they can work, they will have to report to Centrelink but that is another process of the welfare to work reforms that are difficult. People have to report every fortnight even if they are not working. That makes it quite difficult. I was speaking to someone yesterday who had his casual employer write to Centrelink, who actually sorted it out for him, but he was having to report every fortnight and he has not worked for the employer for a couple of months but there will be some more work coming up because he does training and consultation. They are difficulties for people. People get letters from Centrelink and they come into CRD and say, "Can you tell me what this is about" because they have no idea what it is about. That does not mean that they cannot work and do something meaningful but they often do not understand the communications they receive from Centrelink.

CHAIR: Even if someone is on a disability support pension and it is accepted that work is not available that they can do and they have not worked for some time, nevertheless, they still have to go to Centrelink fortnightly?

Ms O'CONNELL: Sorry, if they have a pattern of doing some work, they have to keep reporting. That is the point that I was making.

CHAIR: How long before the pattern is declared to be at an end?

Ms O'CONNELL: I think there is no consistency around it. That is our understanding because people attend different Centrelink offices and have different experiences.

CHAIR: In one place if you have had a job in the last 12 months there is an expectation to come in every fortnight but somewhere else it might be if you have had a job in the last two months?

Ms O'CONNELL: Yes.

CHAIR: It is very complex, is it not?

Ms O'CONNELL: It is complex, and we keep reiterating that a lot of people want to work. They see that as a very mainstream, regular thing to do, but they need the support and safeguards to do it or the fallback position of income support if they cannot work. The other issue for people with intellectual disability and other disability is the cost of disability. There is a lot of costs involved, particularly physical disability, that are often not taken into account. That is the issue with determining a minimum wage that we are really concerned about, that people may end up far worse off, even if they work full time, just because of the cost of transport if they have to take a taxi to work rather than public transport. There are a lot of difficulties for people.

CHAIR: The cost living can be considerably higher?

Ms O'CONNELL: Yes.

The Hon. IAN WEST: The effects on people with intellectual disabilities in rural and regional areas must be even worse than the norm?

Ms O'CONNELL: Yes. We talked about this in the office the other day and we went through a thought process where there is high unemployment, which is the case in many regional and rural areas, people with intellectual disability are likely to be way at the bottom of the line when it comes to employment yet if they lived in the city they would be expected to work. There is no equity in the system. It is not about whether people can work or not work; it is whether they can be assessed into a particular box and then sent off to look for a job and if they are looking for a job and considered not eligible for a disability support pension, then they receive the Newstart allowance and they will be considerably worse off.

The Hon. IAN WEST: Does that multiply if you add on top of that gender issues?

Ms O'CONNELL: Yes. Probably in terms of gender equity, women with intellectual disability tend to be 10, 15 or 20 years behind women in the mainstream population. That is something we noticed at CRD. More than half of our boarder people have intellectual disability and of eight people with intellectual disability we only had one woman and we are looking at getting funding to do leadership development with women because it is an issue. It is lagging with the general population. There are some savvy, smart women with intellectual disability; some fierce, vocal South Africans but in general if you count the speakers or the chairmen, they tend to be men. There is a level of awareness around that and we are doing our best to address it because it is an issue.

We often see in sheltered workshops or business services, where people get supported to move on into open employment and therefore more money is in that it is more often the men who are in those positions and supervisory positions because there is a common role in sheltered workshops for the workers/clients—because they should expect to get some support—and they are often men. I do not have any evidence of that but I have been to a lot of sheltered workshops and I have been introduced to the foremen and I have never met a woman who has been the foreman, and there are a lot of women working there.

The Hon. IAN WEST: Am I wrong in assuming that the supply is very much outstripped by the demand: the number of people with intellectual disabilities looking for a small pool of jobs, especially when that is exacerbated with geography and gender, people in rural areas, a female with intellectual disabilities—

Ms O'CONNELL: And Aboriginal and non-English speaking background—

The Hon. IAN WEST: Their chances of being in the position of having the luxury of negotiating something is a bit of a fallacy?

Ms O'CONNELL: Yes, I would say so. We do not have a huge population of people with intellectual disability but we do have people who want to participate in their communities and work as part of that. The point that we would like to make is that there needs to be a lot of safeguards in place and we are not convinced that with this legislation that will be the case for people. The other issue we have not touched on is the incentive for employers, which the supported wage system is part of, where people are paying wages relative to productivity. If people had the opportunity to employ a person with disability over a person without a disability, even despite the opportunities provided to employers with the supported wage scheme system, a lot of people are very reluctant to employ people with disability. There needs to be community promotion because Woolworths and McDonalds employ a lot of people and provide a lot of opportunities for people and there are really good systems and we are developing some here and other countries for supporting people to participate in meaningful jobs.

The Hon. IAN WEST: But to create some semblance of equality in the process of looking for a job and bargaining for a job, if there is no advocate and no independent tribunal that these people can present, their position is what?

Ms O'CONNELL: The position will be that they will be facing dismissal or they will not be getting into the system in the first place. The point we want to make is that we do not know because we have not seen how it is going to go. But we do know that people with intellectual disability often are not experienced in negotiating in any way and that they need additional communication supports to understand even the most basic processes. I think that the workplace agreement is something that would be way beyond the understanding of a lot of people and then there is the issue of support and then the issue of informed support, because a lot of advocates and disability employment services personnel would have difficulties getting their head around half of this stuff as well, so there are challenges.

The Hon. IAN WEST: The capacity of many employers that I am aware of, more so in the metropolitan area, to employ, because they tend to be in the very labour intensive areas, is usually determined by the level playing field of some award with a set rate, that is, a Federal supported employment award where, without that rate of pay, the areas of employment in those labour intensive areas must grossly diminish?

Ms O'CONNELL: For sure.

CHAIR: A much more competitive environment would perhaps lessen the opportunities for people with disability?

Ms O'CONNELL: The cynical perspective is while we have low unemployment there is a move to increase the work force so the reforms around welfare to work are going to achieve that by getting more people with disabilities into work which is a good thing if that is possible for them. However, the intersection with this legislation, the concern is if the economic climate changes and we have higher unemployment, our concern is the first people to go, and they will be able to be dismissed quite easily, given the new system if they work for companies where there are less than 100 people, the potential for the first people to go will be those with intellectual disability and other disabilities. While we support people to participate, and it is really important for people to have that opportunity, there needs to be a lot more supports and safeguards in place, and probably more community debate and encouragement from employers to employ people.

CHAIR: Under the scheme whereby employers are supported, in other words subsidised, to employ someone with a disability, am I right in thinking that the arrangements around that do not bring with them any other support or regime that would enable anyone to see that person, for instance, was being treated fairly in a new AWA? It is a straight "I am employing this person" and, in effect, a subsidy goes with it and that is where it ends? There is no other monitoring of progress.

Ms O'CONNELL: For people to be eligible to participate in that and use the supported wage system, most of those people will come through what is called a DOES—the disability open employment service. They will have some role, but I mean those services are around now and they are good services, but we know they have loads of people on their books and they are not able to get around to all the people that they have placed. Some people they do not see for months at a time. I

think they only stay on their books for two years as well. Depending on the level of support required for the person, there are different requirements from the organisation. So there are some safeguards, if you like.

CHAIR: It would place a huge extra load on those services to take on new responsibilities?

Ms O'CONNELL: That is right. Their role is to support the person to work and participate. Having the additional, if you like, burden but responsibility to ensure that the conditions are as they should be, or pay, or whatever issues there are, it is not possible for them to be able to do that.

CHAIR: Do you wish to make any comment on any other questions the Committee sent you? Do you have particular comments about injured workers or family responsibilities? Are you aware of any small businesses where there may be a major impact? The Committee has tended to send the same questions reflecting its terms of reference to each of its witnesses, some of which are more relevant to some witnesses than others.

Ms O'CONNELL: Yes, most of them are really beyond the scope of our interest. Having said that, most of the issues that impact on families and people in regional areas, they tend to be exacerbated for people. There is just a further level of disadvantage, I suppose. I want to make sure the point is made that people want to work, and they need to be supported to work.

The Hon. IAN WEST: The difficulty is determining the definition of "work"?

Ms O'CONNELL: Absolutely, yes, and establishing fair pay conditions.

(The witness withdrew)

BARRY JAMES TUBNER, Secretary, Textile, Clothing and Footwear Union, of 28 Anglo Road, Campsie, and

IGOR NOSSAR, Chief Advocate, Textile, Clothing and Footwear Union, of 28 Anglo Road, Campsie, and

DEBRA JANET CARSTENS, Co-Ordinator, Asian Women at Work, of Post Office Box 253, Bankstown, 1885, sworn and examined, and

QI FEN HUANG, member of Asian Women at Work, Post Office Box 253, Bankstown, 1885 affirmed and examined:

CHAIR: We have a submission. Do you want to make an opening statement before Committee members ask questions?

Ms CARSTENS: I want to make an opening statement on behalf of Asian Women at Work. I apologise that we have not been able to send you ahead of time our submission but we have been very busy dealing with the independent contractor's legislation that is about to have a huge impact on outworkers in the clothing industry, so we have been very busy. I have tabled our submission. The submission is in two parts. I will leave you to read the whole thing. The first part is a summary of some of the issues recorded by our members since the WorkChoices commencement and the second half is the submissions that were written by women from our network themselves for the WorkChoices inquiry last year when they expressed what they were concerned about in terms of the impact of the new laws on them.

Asian Women at Work is working with Asian migrant women. Our primary target group are women from Chinese and Vietnamese backgrounds, while we have contact with smaller groups of working women from other migrant ethnic backgrounds including Filipino, Lao, Khmer, Thai and Indonesian. We have a current membership of 1,100 working women.

CHAIR: You can take it as a given that the Committee will read the submission in full later. Tell us the main points you want to get across?

Ms CARSTENS: I can put into three categories the sorts of experiences the women in our network are describing since the implementation of WorkChoices. The first group I would put under the category of people who have had a reduction in conditions and an associated loss of income. Interestingly, most of the cases that have been reported to us of a reduction in conditions we believe fall into the category of being illegal where the employers have not actually used WorkChoices properly but WorkChoices has created an environment in which employers felt they could now get away with doing certain things.

So a factory in Campsie stopped paying penalty rates to its employees in January. This is obviously before WorkChoices commenced and the workers were not asked to sign an AWA which would actually concede that this was now their arrangement. A factory in Fairfield stopped paying overtime after the commencement of WorkChoices, again without an AWA.

The closest we have had to an AWA was an agreement written in Chinese, which spelt out some very basic wages and conditions. The worker was required to sign it at her interview as a condition of commencing work. The agreement specifies a 40-hour working week; the rate of pay is $14 an hour, with opportunities for increase every six months based on productivity and a statement about following the employer's instructions. Overtime pay was to be paid at the normal rate without actually specifying a rate. But, interestingly, the worker was to receive training for the first six months of her employment and for that $125 a week would be deducted from her wages. If she was a good learner and productive after three years she would have this training money paid back to her. It appeared that the agreement did not contain the five minimum conditions that are necessary under WorkChoices but also did not purport to even replace award conditions either. I am not sure whether the document has a status of an AWA at all, but that is the sort of agreement we are finding people are being asked to sign. And other stories go on.

We are having less stories of this kind of reduction in conditions at this point in time though. The single biggest issue that migrant women workers are reporting to us is the increasing stress and fear of workers in their workplace. Workers are fearful that they are going to be sacked and are not speaking out about issues concerning them in their workplace: they are not raising health and safety issues; they are not speaking up about unfair treatment and they are being bullied and abused by employers and supervisors to a greater degree than before.

The third category of workers I would like to talk about are those workers that prior to WorkChoices actually were not receiving their award wages and conditions and who, post WorkChoices, continue to not receive their award wages and conditions. There are some people who have been working for 20 years in Australia and have never had what I would call a real job where they actually receive all their entitlements. Equally, there are new arrivals to Australia that we talk to in the adult migrant English program to come to our information session about rights at work and say to us, "Well, that might be our rights but we are not ever going to be able to achieve that". The women in these workplaces that have never received award wages and conditions are reporting a worsening situation since the implementation of WorkChoices in a sense that the industrial relations environment has changed and employers seem to believe that they can get away with even more than what they were getting away with before.

I would like to hand over to Qi Huang to tell a couple of actual stories of women who are amongst our membership and her friends and, indeed, her own situation.

Ms HUANG: My friend's sister works in one of the clothing factories in Surry Hills. She is a very quiet woman. Because her language is not good at all she is fearing the people. She is working very, very hard. At the moment she told me she is very scared because all the factory workers are very scared they will be sacked by the employer at any time. During their work they are yelling at the people. They have two storeys in the factory. When she wants to go to the toilet she is scared to go from the top down to the ground floor to go to the toilet. She is very, very scared. Because of the stress over a long period of time her hair at the moment drops a lot, and her kidneys have got a problem. She cannot have a good sleep at night every night.

When she went to the doctor the doctor asked her to maybe rest for a while, for a few days, she said, "No, I could not do that because everyone is scared". She is worried she will be sacked by the employer over her health issues.

Ms CARSTENS: So if she takes time off she is worried that she will be sacked?

Ms HUANG: Yes. She does not want to take the time off, she is worried she will be sacked.

CHAIR: How long has she been working at this place in Surry Hills?

Ms HUANG: As I know, 10 years. She is still working. This is one lady I know. The other workers were in the meat wholesale and retail shop. They work from seven o'clock in the morning and some from 7.30 to one o'clock. They are paying by cash the casual rate. But work with meat is a heavy load for them and it is more physical work. They are without any breaks—teatime. The supervisor will just criticise them in front of the whole people, the clients. They say, "You need to cut fast. Don't be lazy". When the supervisor heard about the new workplace law that was just introduced they said, "You know at the moment anytime you can be sacked if you are not working hard?" When this woman found that a few of these women after work went to yum cha, then she said, "Why don't you report to me?" Now she is very unfriendly to these people who went to yum cha.

At the moment this worker tell me his back is sore because they carry the whole lot of meat. They are scared to talk to the supervisor. They are very scared to talk to the doctor because they are getting a work injury. One person take off one week of work but she said it is not related to the injury, she said her son is sick.

Ms CARSTENS: She told her supervisor that her son was sick instead of reporting the injury?

Ms HUANG: Yes. This is one other person I meet. One of the other workers at the moment in the high season she needs to work. In the busy season she worked long hours working for either $4 or $6 an hour. She got a sum of money in the bank because the employer pay her by cheque. But now the Social Security said when she apply for the job or want to get a benefit because she is a single mother, that she is not ready for any benefit from Centrelink. That means she had to work but she could not find work anywhere. But one person introduced her to go to the RSL club to work as a kitchen hand to handle 120 places. She had to push the trolley on her own and she had to carry all the dishes. She told me her elbow is really sore; she could not carry things up to the work. The doctor told her to take time off work but she said, "I could not do that. I need to pay all the bills". That means she had to work. I met her years ago. She still tells me she could not stop work. She had to ask for someone to help her to push that trolley. I said to her, "Why don't you just allow 16 instead of the 120?" She said, "I had to do", because she needs to do; she worries she cannot find any job.

For me, I am an ex-committee worker in Asian Women at Work, and I am still a member of Asian Women at Work. During the time of my work, since May last year, I could not find any job during the eight months. Then I find work in the two-dollar shop at the moment as a cashier. I just got $10 cash in hand.

Ms CARSTENS: That is net, after tax?

Ms HUANG: Yes, after tax. But if I did not request the boss he would not pay me cash because I request for tax, I said I need it for the law. He pay me for the tax deduction. He only happy to pay five months tax and then I had to pay the rest of those. I work from nine to six or sometimes 11 to 8 in the evening. That is $10 without any teatime, and I get a lot of physical work. I take the cash and then hand over, delivery of the things. There is no guarantee for anything, just the $10 in my hand.

Ms CARSTENS: And you are actually being employed casually, are you not?

Ms HUANG: Yes.

Ms CARSTENS: That does not sound like it is an award rate.

Ms HUANG: It is the casual rate to me. But I feel tired. There is no chair for me to sit, you are just standing whole days. If you go to the restaurant that means you can have it. There is only one person to serve a lot of people in the queue because the boss will not allow the people to do the cashier's job. My husband's factory, the majority of people there are of English-speaking background. In the factory they are going to reduce all the penalties. The people in the factory are really upset the new law is coming to their company. They say they will not re-elect the Federal Government—John Howard—again. That is what the workers say because they are upset. They said any benefit to the workers must have a reason—like annual leave and the overtime rate and the sick leave, because when they are sick if you ask a worker to work on their duty they will say it will create a precedent.

They do not want people to have their annual leave because anyone in the workplace they are getting more physical work, they need to have time for recovery of their body, for the stress from work. It is a benefit. Actually they say it is a benefit to the workers but actually it is a benefit to the employer as well. But now they are cutting stupid things. That is what the workers say. People are getting more RSI—they are hardworking. But now they need them to extend their working hours. You force them to work or you need to have a good reason for not going to work but you need to give the right pay to the workers. The cut to them is not reasonable. They say they are really upset their government do these stupid things.

CHAIR: Mr Tubner, would you like to start and then we might ask questions of the four of you.

Mr TUBNER: I will not have a long lead-in. I think there have been unions before me who have made it quite clear what they believe the effects of WorkChoices have been for what I would call our traditional members because our industry is pretty unique. We cover people in textile factories, clothing factories and in areas that get more publicity—illegal sweatshops and outworkers. At the moment we have submissions before the Federal Government dealing with the independent

contractors legislation that is going through at the moment and we have put submissions into WorkChoices to try and protect the protections that we have for outworkers. It is a bit of deja vu for us because what we call the first wave of WorkChoices was in 1996 with the simplification of the award and one of the clauses, because they originally only wanted to have 19 and number 20 is the outworkers' allowable matter and we had to fight to keep the outworkers' allowable matter in.

When WorkChoices raised its ugly head again we had to fight to protect the outworker clauses again. We have been successful, and we thank the Government a second time for allowing outworkers to be protected, because we had to convince the Government the first time in 1996 with the award simplification. Now we are faced with the fact that the promises and the commitment we were given by the Federal Government under WorkChoices look like they will be wiped away with the independent contract of legislation.

CHAIR: A couple of witnesses have mentioned the impact of the independent contractor legislation that is proposed, but no-one has gone into any detail about just how it will impact and how it will work in conjunction with WorkChoices.

Mr TUBNER: That is why I brought Mr Nossar with me. No doubt, we will be happy to explain as best we can for our group that we cover in our industries. We have documentation here that we are quite happy to leave, which points out our different submissions. The plight of outworkers has not changed in 10 years. Outworkers are still being exploited. The protections we were able to gain for outworkers in 1996 and illegal sweatshop operators and their employees in 1996, we have been able to keep the protections for outworkers, but I am concerned that we have not been able to protect the conditions for people who work in sweatshops. WorkChoices will affect people who work in small factories and, traditionally, we would have had the right to go in there and make sure that their wages and conditions were in line with the award. Now we will only be able to help those people if we have union members.

In a traditional area, like textile factories, our members get paid the right money. The only issue is whether they get paid more. But in these illegal sweatshops and in the sweatshop situation the award is the highest these people ever aspire to get, and they get it only when a union has visited and when the employer is forced to pay the award. I can take you now, today, all of you to a non-union factory and we will go in there and we will see the same thing we did 10 years ago and the same thing we did when Justice Glenn did her inquiry into outworkers. We will go in there and there will be no wages books, there will be no workers compensation, there will be no holiday guide there will be no sick pay and these people will be paid by the hour. It has not changed. The difference is that we could have done something about it before, but we will not be able to do something about it in the future.

What does that mean? It means that you could have a situation that we dreamed about many years ago, that the outworkers would come out of the homes and work in traditional factories. Because with a special protection for outworkers you actually could have a situation where the outworkers are going to come from their homes to work in factories, illegal sweatshops, so that they can be exploited, only you will not be able to use the word "illegal"—they will be legal sweatshops. That is my opening statement, and I am quite happy to take questions. Thank you very much.

CHAIR: Perhaps Mr Nossar could tell us about the impact of the Independent Contractors Bill. As I said, it has been mentioned in passing by some witnesses but no-one has yet gone into any detail about it with us.

Mr NOSSAR: At the heart of our analysis is, firstly, the fact that there have been commitments given by the Federal Government in relation to the situation of outworkers that preceded the 1996 legislation. I delivered the National Union submission to the Senate inquiry on that occasion. There were commitments given to the National Union in the lead-up last December to the WorkChoices amendments being passed, and those commitments were to the effect that, among other things, existing State jurisdiction protections for outworkers would be maintained. I think it is important to make a distinction between the fact that the commitment was given and then an examination of the WorkChoices legislation to see to what extent that promise has been delivered. It is a bit like putting together a jigsaw puzzle—to put together what happened last December with WorkChoices with what is being proposed in the Independent Contractors Bill, which is forthcoming. Our big concern is what happens when you put those pieces of the jigsaw puzzle together.

I would like to take you to probably the most obvious, glaring example of what happens, and this is not in relation to the sweatshop workers who, in a sense, have already been sacrificed by the WorkChoices legislation, as Mr Tubner described, but specifically what is supposed to be the legally protected category of outworkers in relation to whom a promise has been given by the Federal Government to maintain existing State jurisdictional protections. In the independent contractors legislation the relevant section that relates to this is a section called section 7 of the Independent Contractors Bill. It is a structure a bit similar to the structure in the WorkChoices legislation, insofar as it first purports to wipe out State jurisdiction in regard to a whole variety of matters and then comes what you might call the next clause, being a savings subclause, which says that wipe-out will not occur in relation to certain matters, such as outworkers, occupational health and safety or things such as that. That was a structure that was in the WorkChoices legislation and it is the general structure that you will find in section 7 of the Independent Contractors Bill.

One last aspect that is in both those pieces of legislation is that none of the apparent savings of State protections that you find in the savings subclause, which is section 7 (2) of the Independent Contractors Bill, are secure because there is a regulation-making capacity that resides at the discretion of the Federal Minister, whereby the Federal Minister can elect at his or her individual discretion by way of regulation to remove that protection. What is apparently a concession to entrench the protection of outworkers is a very provisional contingent one, dependent on the good humour of the Minister from day to day. That is our first concern. Our second concern, if we put that aside for a moment, is the fact that when you look at the so-called savings provision in the Independent Contractors Bill, which, as I say, is section 7 (2), it is broken up into two categories. The second category deals with a different group of workers, which is the owner drivers. The first category, which you will find in section 7 (2) (a) of the Independent Contractors Bill, purports to maintain the State jurisdiction protections for outworkers by saying, "This isn't going to be covered by the wipe-out in the rest of the Independent Contractors Bill".

When you go to that provision, section 7 (2) (a), there is a further subsection, (ii). Section 7 (2) (a) (ii) is a short provision, and half of the short provision has an exception built into it. The words are "otherwise than as mentioned in paragraph 1c". When you read that together with the preceding wipe-out clause, which includes paragraph 1c, and you read that together with a further definition clause, which is section 9, which deals with unfairness grounds, the scenario that is created under the current draft Independent Contractors Bill and notwithstanding the promise given by the Federal Government is that, after the passage of this draft of the Independent Contractors Bill, somebody giving work to an outworker can use their bargaining power to effectively impose an agreement for the terms of the contract, and that contract explicitly is permitted to be designed to avoid, or to avoid, all the State outworker protection laws.

I think you might agree with me that it immediately raises the question as to why that exception is built into there in the first place. And it leads to the conclusion that the draft Independent Contractors Bill, as it has been released by the Federal Government, flagrantly does not meet the commitments given by the Federal Government in a public announcement by the Minister to maintain State jurisdiction protections. There is a built-in escape hatch whereby an exploiter, dealing with an outworker, can lean on the outworker through the balance of bargaining power to build into the contract, clauses that actually avoid the protection of the State laws. If you want me, off the top of my head, to speculate on what such a clause might say—I am not giving legal professional advice, I am just looking at a commonsense way that it could operate—a clause in such an unbalanced agreement might say that the outworker agrees, as part of the terms of this contract, not to initiate any proceedings under the State outworker protection laws.

Alternatively, if the outworker initiates such a proceeding, for example to recover wage underpayments, which I know was changed in the New South Wales law by the amendments on 9 March in the Legislative Council to create new provisions, sections 129A to J of the Industrial Relations Act (New South Wales), that is where the outworker protections are in New South Wales, in sections 129A to J, if an outworker under those provisions were then to set in place a recovery claim to recover money, the clause built in by the exploiter might say, "any money recovered by the outworker must be refunded to the party from whom it is recovered." The contract would not purport to invalidate the State laws—the contract cannot do that effectively—but it could effectively avoid the

operation of those laws. That is a particularly noxious and flagrant breach of the commitment that I would like to draw your attention to.

CHAIR: That legislation is due to be introduced into the Federal Parliament shortly?

Mr NOSSAR: My understanding is that it has been introduced into the Federal Parliament and that it is now awaiting the further processes of second reading and subsequent passage.

CHAIR: And the draft you are talking about is, therefore, the final bill because it has been introduced.

Mr NOSSAR: That is correct.

CHAIR: It may be subject to amendment, but it is not out for discussion any more.

Mr NOSSAR: Absolutely.

Ms CARSTENS: Amendment is now the only way that we can resolve the problem it creates for outworkers.

Mr NOSSAR: I thank you for your patience in allowing me to explain the detail. Just as a final point: to answer your questions, I have merely drawn your attention to a very flagrant example of a failure to maintain the Federal Government's commitment. There are a number of others built into the Independent Contractors Bill, which means that when you read the WorkChoices legislation passed last December by the Federal Parliament together with the Independent Contractors Bill, as foreshadowed to be passed, you will have not only an escape hatch of the type I have described, you will have the potential in addition invalidation of most of the State protection laws.

CHAIR: Are most outworkers involved in the clothing industry in New South Wales?

Mr TUBNER: Can I answer that? Most machining operations can be done at home and the best way to explain that, in my 23 years of dealing with outworkers is I have found everything from Australian army uniforms to bridal gowns, to parachutes, to T-shirts. At the last Senate inquiry into outworkers we could not find one lady's garment that was made inside New South Wales. We have some very good designers and we have some very good labels that we can buy in the shops that have the Australian made label and come out of New South Wales. Basically, the total production for ladies fashion is done via a contracting chain, which eventually leads to somebody working at home and the person who is working at home will be paid either the award rate of pay or they will not. In most cases they are not. That has been recognised traditionally by all sides of government, and that is the reason we have the outworker clauses. That is the reason we were able to keep them as the 20 allowable matter, and that is the reason, we believe, that under WorkChoices those protections were given. The unfortunate thing is that the drafters of WorkChoices may not have been the drafters of the Independent Contractors Bill, which has skilfully taken away all the protections that were given.

Ms CARSTENS: If I may add to that, Asian Women at Work, through our work with women beyond the clothing industry, is starting to discover women working from home in other industries as well. We have found people doing packaging and also food preparation. Some of the yum cha dumplings, for example, and things like that are made at home. So there seem to be some areas of outwork beyond the clothing industry but the protections have been specifically built up around the clothing, textile and footwear industries as the areas in which there is the most prolific development of outwork.

Mr TUBNER: We found during our investigations a butcher shop working from a residential address. It is quite obvious that we have found brothels too, but the butcher shop was unique, complete with cooling. We also found cutting areas. There is a home industry out there. We only cover clothing—we concentrate on clothing. But, as I said, clothing covers a broad spectrum from making parachutes to making car seat covers. It all happens at home and there is an enormous work force. I would say that at least 80 per cent or more of school uniforms for private and public schools, if they are not imported and are made in Australia, will be made by outworkers.

CHAIR: Debbie, do you share Mr Nossar's concerns about the independent contractors bill or have you not got your head around it yet?

Ms CARSTENS: We do share those concerns. We perhaps should comment that both the Textile, Clothing and Footwear Union and Asian Women at Work are members of the Fair Wear Campaign, which has led the campaign to draw attention to the issues of workers and the need for legal protections. In my involvement with Fair Wear we have done a lot of research on the bill and written a submission to raise concern. Yes, we share the concerns about the bill. There are other concerns beyond what Mr Nossar has talked about as well. For example, we were hoping that there would be some specific clauses that addressed outworkers and sham contracting arrangements. We were looking for a component of the bill that would specifically make it illegal, with penalties applying, for an employer to attempt to enter into an independent contracting relationship with an outworker. We are continuing to ask for that.

CHAIR: But you have not made any progress on that yet?

Ms CARSTENS: No.

CHAIR: We will hear from the transport workers this afternoon so presumably they will be able to give us their view on the other major side of it: the owner drivers.

Mr TUBNER: There are three main areas. One is the protection of State rights—the State protections. The second one is that in Victoria when they lost their State awards the Government set up a system that covered outworkers in that State that the union believed was inferior to the textile award that was there before it. The Government is attempting to broaden that across from Victoria to all State boundaries. We are concerned about that—it is called part 4. In principle, the sham arrangements are a good concept that Fair Wear actually championed. But the point is that it is so easy for somebody to escape the penalties of the sham arrangements. You could actually drive one of Tony Sheldon's trucks through it. You have only got to think that it is not a sham arrangement and it is not a sham arrangement. If the Government is going to put in legislation to stop sham arrangements there are no protections there. It is so easy to opt out.

You have got the independent contracting lobby saying that unions should not be involved in prosecutions in that area; only the Government should be involved. So there are quite a few concerns in those three areas for us. But, for us, as I said, WorkChoices started 10 years ago. We are probably ahead of the game when it comes to most unions in trying to defend the rights that we have for this very vulnerable group of workers.

The Hon. IAN WEST: In terms of Fair Wear and the extremely important work that was done by Asian Women at Work and the Textile, Clothing and Footwear Union and being mindful of the regulatory powers—Henry VIII clauses or whatever you want to call them—in the independent contractors legislation that confer the ability to contract out by way of an AWA or a similar instrument, are some employers that were party to Fair Wear coming out in support of your concerns in regard to these Henry VIII clauses and the ability to contract out?

Mr TUBNER: I think it is safe to say that not one legitimate employer would not be concerned about these. It is not the honest employers who will take advantage in the first place. It is the dishonest employers who will try to legitimise their illegal behaviour. The honest employers will be dragged in over time because they will not be able to compete. There is nothing wrong with using subcontracting chains and there is nothing wrong with using outworkers; we actually encourage it as long as they are paid in accordance with the award and as long as they are not being exploited. So for the group of people who have a good, quick response supply chain based on using subcontractors and outworkers, it has taken us years to get them into a position where they are doing it and now they will be looking at what their competitors are doing to see whether their competitors take a leap backwards.

In this industry—anything to do with fashion—you have got to be on top of your game. You have got to be able to take advantage of every scenario that comes your way, whether it is something that is fashionable or whether it is some way of cutting your costs. So I believe over time it will force the honest people to compete—to use it. As far as the people who have currently got a sweatshop and do not have workers compensation, do not pay annual leave and do not even have wages books, they

well say, "Well, when the union visits you do not have rights to come in here and check our books; you don't have any employees." Does that mean that the Federal Government is going to invest in an enormous DIR to actually go out there and police it?

It will be interesting for me because in the 23 years that I have been involved in this industry the DIR has basically had the philosophy that they will act on complaints but they do not police awards. That means that if someone is brave enough, after losing their job, to put in a complaint that they have been exploited that complaint will be investigated by the Federal DIR. They will recover money for that worker but the other 20 or 30 people who work in that factory will not be tapped on the shoulder and told, "You've been underpaid and we will collect money for you." They will continue on. The smart employers will actually use that scenario. They will say, "The Government has been in here and I am doing nothing wrong; I am doing everything legal so don't complain any more." We have seen that when we have followed inspectors in. They have recovered money for one individual but they have not put the employer on notice that they have to clean up the whole system that they have in place. So there is a flaw there. If you are not going to have a union policing an award you have to have a very vigorous government instrumentality that is going to fill that void, and I do not think there is the willpower to do that.

The Hon. IAN WEST: In terms of the outcomes of the Fair Wear Campaign that were universally acclaimed by all players in the industry as a fair and reasonable outcome, one of the issues before us in terms of the WorkChoices legislation is that employee organisations have done such a fantastic job that they have priced workers out of the labour market. What is happening is that workers in these places are getting too much money and therefore there needs to be a reduction so that you can compete in the global market. What comments can you make about that?

Ms CARSTENS: Can I make two comments on that? First of all, in terms of the fantastic protections that have been put in place by the State Government and the commitment to addressing the exploitation of outworkers, I see that WorkChoices has actually become a distraction to getting on with the job of doing the work. The monitoring mechanisms were created but from the moment they were created the New South Wales Office of Industrial Relations has been fighting for its life and the Textile, Clothing and Footwear Union has had to be very focused on addressing the threats that WorkChoices has presented to the monitoring mechanisms. Asian Women at Work and Fair Wear, equally, have been engaged in, "We've got to protect this stuff", instead of doing the grassroots organising work that we want to be doing with outworkers, connecting with the union and making greater use of the monitoring tools. I think there has been an inability to pursue to the maximum potential the ability for these monitoring tools to make a difference because of WorkChoices taking our energy in a different direction.

As for international competition, the other parallel thing that is occurring at the same time as the increasing protections in relation to outworkers is that the Federal Government has been reducing the tariffs on the clothing industry. So you have had the clothing industry shrinking during the same period of time as the protections have been increasing. There are lots of people who would like to say that the protections have caused the decrease in the work available for outworkers but the reality is that the tariff protections have gone and the clothing industry is moving offshore. That process has been occurring over 20 years that has accelerated. Some businesses, not only because the tariffs have been reduced but also because they are becoming more savvy about international business, are choosing to go offshore when they were previously based here. From where we are seeing it at the grassroots and what is going on, the increasing protections cannot be blamed as the reason for the reduction in jobs in the clothing industry.

Mr TUBNER: That is a good question. I was asked the same question 10 years ago. The facts are that it is more relevant now. Ten years ago when I was asked, "Isn't it better for an outworker to get $3 an hour than to get nothing?", I thought, "Judging by the fact that the person who asked that question is probably on about $150,000 a year, I find it strange they should suggest that it is better for someone to get $3 an hour than $10 an hour", as it was at that stage. Now I find that there is a concept of bringing truck drivers in from China with international licences and paying them Chinese wages. The concept of bringing Third World wages into this country, even though it is something that we have been dealing with for almost 25 years, is maybe something that WorkChoices was designed to deliver—rather than us, in Australia, having a regulated system under which people are guaranteed minimums, you are going to have a system where there are Third World wages.

People can take advantage of Third World wages now in clothing by going to China, Vietnam or any Third World country. But if they decide that they are going to produce their product in Australia because they want a quick turnaround time, most of those people produce a product that does not sell for $5; they produce a product that sells for $100, $200 or more.

They can afford to pay more than the award wage and still make a profit that most car manufacturers would dream about. If you are talking about percentage of material, a yarder of material can deliver a 300 per cent or 400 per cent profit margin. The exploitation of outworkers, the exploitation of people who work in illegal sweatshops and the justification that they are going to price themselves out of jobs because they are not prepared to work for $3 an hour—10 years ago I said this is Australia, Parliament sets awards and they guarantee minimum rates and they are the law of this country. For anyone to state should these people not be prepared to accept a portion of what the law says, to me it is abhorrent, I could not accept it then and I cannot accept it now but I do understand why you asked the question and it is just as relevant now as it was 10 years ago and the answer is the same today as it was 10 years ago. We cannot accept in this country to have a society that is prepared to say that there are people who are less than the rest of us and who should be prepared to accept less than what the rest of us take for granted as a wage.

Mr NOSSAR: There is one other aspect that arises from that question in addition to what Ms Carstens and Mr Tubner have referred to. There is the notion in the question being asked or that was asked to Barry 10 years ago, "is it not better to have $3 an hour rather than nothing?" In reality it is not just $3 an hour, it is also the consequences of the $3 an hour, because there has been very good scholarly work into the occupational health and safety consequences of exploitative work arrangements.

CHAIR: Some of what Qi pointed out before in her case studies?

Mr NOSSAR: As she did anecdotally. I refer you now to the fact that there is a body of scholarly reputable work to confirm what she was talking about. Perhaps the foremost international expert in the field of the occupational health and safety consequences of precarious employment is Professor Michael Quinlan of the University of New South Wales. I co-authored an article with Professor Quinlan and Professor Richard Johnstone of the faculty of law at Griffith University which appeared in 2004 in the *Australian Journal of Labour Law* and which reviewed and summarised among other things that body of scholarly material. It was unequivocal to the effect that exploitative work arrangements drive work injuries and you do not only get $3 an hour, you get $3 an hour plus pain, plus injury, plus effect on the family. I would like to see those asking the question ask the full question, that is, "is it not better to get $3 an hour and to get injured at work?", and then we might see what the answer might be.

Mr TUBNER: You also have to deal with the issue of the honest businessman. If you have a factory and you pay all award wages and conditions and you are paying, for argument's sake, $10 an hour and somebody is paying $3 an hour, that same somebody is not paying tax and is not paying workers compensation. They are a burden on the workers compensation system. They are a burden on the people who pay tax. So, the employer who is trying to survive by paying cheap wages is being subsidised by the rest of the taxpayers in Australia and by the legal employer who is trying to do everything right. It is a lot more on society than the concept of the $3 an hour. In reality, the other worker may be getting a lot more than $3 when you allow for what happens when they get injured, when you allow for the fact that they have not paid tax. So, there is so much on the social side of it, the impact of not paying the person, because if you have a worker you pay them the right wages and they pay tax, they are covered by workers compensation and they have superannuation for the future. These people who are working at home and getting exploited may be on social security but it is a burden on the rest of the industry.

The Hon. IAN WEST: So you are suggesting there are not too many rehabilitation and return to work programs in some of these outworker shops?

Ms CARSTENS: Outworkers work until they cannot work any more and then they stop work and they usually do not seek workers compensation.

Mr TUBNER: As I said, if we were to take this Committee for a walk around and visit a little sweatshop, we would find there is no workers compensation. These people would be described to us either as family or as contractors. They have not been able to wrap their minds around the concept of this new thing called independent contractor but for 23 years they have been able to say these people are not my employees, they are contractors. They do not have any employees even though they are deemed to be employees in any test. It is not until either a New South Wales Government inspector or a Federal Government inspector or the union goes in there and says you have to run a business and you have to have these things in place. All I am saying is, if there is not an active DIR or OIR, then it is up to the union to cover that. If the union is not able to cover that, you will find these illegal sweatshops will mushroom, whereas the reverse happened. The more of these factories that we visited and made them get workers compensation and closed down—not closed them down but make them become award compliant—they closed the factory and set up in their backyards, in their houses. There are houses in Cabramatta, Fairfield, Marrickville and Auburn areas that have basically been completely gutted and are for all purposes factories. They are not houses.

The Hon. IAN WEST: Are you suggesting to me that as an organisation you have not been involved with an employer's rehabilitation co-ordinator in organising rehabilitation programs in any of these sweatshops? I assume that in this area you would have a lot of repetitive strain injury?

Mr NOSSAR: You made the assumption about there being repetitive strain injury. The leading study on injuries in the clothing industry found a considerably higher incidence of overuse injuries among those working at home compared with those even working in the clothing factory sector. So, there is no assumption that there might be; there is demonstrable evidence that outworkers do have a higher rate of those injuries.

Mr TUBNER: There is also the fact that the sweatshop that we visit we would class as a finishing area. In most cases there is not even a sewing machine there, because they get the order, give the work out to outworkers, and bring it back to this small sweatshop and they may have a pressing service or an ironing service or they may clip the cottons or may attach the bar tags. The machining is done by outworkers. When they realise or wise up to the fact that we will not have the same ability to police them they may be able to bring more machinists in that area and we will not have the ability to police them as we did in the past.

CHAIR: What do you see as the future for your industry, including Asian women at work, the broad industry, say, in the next year or two? Given the WorkChoices, given the independent contractors bill, if we assume it becomes legislation in the next few months, do you see more of the industry going offshore or do you see a growth in the illegal sweatshop area, exploited outworkers area, so the jobs remain here but they are the $3 an hour type jobs you are describing? It is a hypothetical question.

Ms CARSTENS: It is, Just talking to industry people about this issue, with the tariffs and so on, there seems to be a sense that the going offshore stuff is slowing down now and that the industry we have now is more likely to be the industry we will have into the future. For us it is an important time to intensify our efforts to make the part of the industry that is retained here award compliant.

CHAIR: Which is the more high cost, more luxury, more expensive end of the industry?

Ms CARSTENS: That is right. We are still finding the Target, Suzanne end of the spectrum in outworkers' homes at times, and low rates, but that seems to be the extra-run stuff. It is not the big order that was needed, it was the backup extra bit that was needed in order to backfill because this garment was more popular than they expected.

Mr TUBNER: My view is that at the moment—and it has been explained to me by some of the largest players like Pacific Brands and that—that the cheapest outworker in Australia, if we find an outworker who is prepared to work for $2 an hour, compared to the prices they pay for garments in China and the rest of the Third World countries, those people, even on $2 an hour, could not survive against that competition. The industry here is quick response or it is the high-end stuff. We are talking here about margins. We are talking here about profit. We have been fighting to set up legal supply chains and we are getting to a stage now that without WorkChoices we were confident there was going to be a legitimate industry here in Australia that we would all be proud of. WorkChoices will

create a difficulty for us but, like I said before, I have been here 23 years, I have seen people come and go and I have seen people try to destroy this industry from Keating all the way down to Johnny Howard.

The point is we will survive WorkChoices. We will take our argument over the independent contractor legislation to the Government, as we have done before. We believe there will be amendments to the independent contractor legislation because it is not an issue that any government wants to be painted with, the exploitation of migrant women. So, we are confident. But that is for the people in this very vulnerable section. If you ask me the same question for my people who are working in the textile factories or in the sweatshop area, my answer will be the same as Andrew Ferguson and all the people who have spoken before me, that we are concerned. In the factories where we are fully unionised and we have strong people, these people are on far above the award. They will see Johnny Howard out also. But in the other areas where you have these small factories that have been set up for quick response and they are competing against other small factories, at this point in time they are honest businessmen and we have helped them become honest businessmen. Whether they continue to be so will depend on the pressures put on them by their competitors—not by the union, but by other employers. It is the other employers and what they do and what they are able to get away with that enables an employer to be honest or forces him to be the opposite.

That is what is going to happen. Whether people see this, and we have seen it in the past, people have taken advantage of it. Yet, you have other companies, and I spoke to one of the largest factories only two days ago, one of our largest employers, and he said to me, "You do not have to worry about WorkChoices. WorkChoices is not an issue in this factory and it will not be." But then he said, "as long as I am here." I am hoping he will be here as long as I am, and my members are hoping the same thing, but he does not have the same competition. He employs more than 300 workers. He has a good solid area, but someone who survives on cents compared to somebody who has their own product and it is an established brand and it is international, the pressures on them are completely different.

Mr NOSSAR: With the indulgence of the Committee, I wish to make some important remarks, particularly to the Deputy Chair. We have talked in the abstract about State jurisdiction protections for outworkers. I was present in this Parliament in December 2001 to watch the passage of the Industrial Relations (Ethical Clothing Trades) Bill. I recall the fact that that was passed not only by the Government's vote, to its credit, but also by the crossbenchers and smaller parties as well as the Liberal/National coalition, representing a very important social consensus that said, for these vulnerable people, this is not a political issue; it is an issue of social justice, and that there is a certain minimum that must be protected. The State outworker protections we are talking about are not the product of a party; they are the product of a social consensus that spans all parties.

In relation to that observation, I request the Committee to consider the following: that at this crucial time as the Independent Contractors Bill is under consideration in the Federal Parliament, when there is already an in-principle promise by the Federal Coalition Government to retain all of those valuable State jurisdiction outworker protections, something that could be practically done that would be most important and useful at this time would be for this Committee to consider issuing a communiqué to the Federal Parliament which notes the commitment given by the Federal Minister to maintain all of those valuable State jurisdiction protections for outworkers; which draws the Minister's attention to three clear areas of deficiency in respect of that commitment in the Independent Contractors Bill, being section 7 (2) (a) of the bill; the provisions relating to sham contracting arrangements; and, finally, the presence of the very anomalous Part 4 of the bill that takes a provision that applied only to Victoria and applies it to New South Wales for the first time.

Very briefly, that is a concern because, if it is passed, it will mean that the Part 4 provision takes the Victorian provisions and makes them apply to New South Wales. You will have two bodies at law covering the same subject, the outworkers. As the High Court ruled in authorities such as *Telstra v Worthing* that can be interpreted as indirect inconsistency between Federal and State jurisdictions and that can lead to the inadvertent and complete invalidation of those valuable State protections. We ask the Committee to consider communicating directly and openly with the Federal Parliament to seek an amendment of section 7 (2) (a) of the bill, the deletion in its entirety of Part 4 of the bill, and the reconfiguration of the sham contracting provisions seeking to make sure that the Federal Government's own commitment is maintained. Thank you.

Mr TUBNER: I table our submissions.

Documents tabled.

CHAIR: Thank you for giving the Committee your stories.

(The witnesses withdrew)

(Luncheon adjournment)

JOHN DUNCAN AWALAN BUCHANAN, Acting Director, Workplace Research Centre, University of Sydney, and

CHRISTOPHER MARK BRIGGS, Workplace Research Centre, University of Sydney, affirmed and examined:

CHAIR: Do you wish to make an opening statement?

Dr BRIGGS: I plan to speak very briefly to the list of questions from the Committee.

CHAIR: The prepared questions basically reflect the Committee's terms of reference.

Dr BUCHANAN: Presumably we are not talking about WorkChoices only; WorkChoices is only one part of it. The Independent Contractors Bill and the welfare to work reforms are all part of the package.

CHAIR: Yes. The witnesses who appeared before the Committee this morning from the Textile, Clothing and Footwear Union, spent quite a bit of time going through the Independent Contractors Bill. Until now the Committee had very little evidence about that. A lot of witnesses talked about the impact of the welfare to work legislation.

The Hon. ROBYN PARKER: Madam Chair, the Committee's terms of reference are in relation to the WorkChoices legislation.

Dr BUCHANAN: Okay.

CHAIR: It is where they coalesce or intersect. Do you wish to say anything, Dr Buchanan?

Dr BUCHANAN: I will leave my overheads, which is a summary of what Chris and I think. It is probably better to interact.

CHAIR: Tell us a little about the Workplace Research Centre, and what you do.

Dr BUCHANAN: Okay. The centre has been around since 1989. It was funded as the Australian Research Council Key Centre, so we received an initial block of untied funds from the Australian Research Council. It was always assumed that that money would end and we would become self-financing. After six years the money tapered away. Initially we had $200,000 a year, which tapered down to nothing nine years later. We now finance our activities through three types of work: we do contract research work; we produce commercial events, which disseminate the findings of our results through conference and briefings; and we provide a range of information services that subscribers pay for to get ongoing updates about what is going on in the world of work.

We are probably best known for our research activities. Our clients for that research are very diverse. We work for all levels of government, Federal and State, and we have worked for both sides, the Coalition and the Australian Labor Party. We have alienated governments on both sides and because we run an independent analysis of what is going on we also work for employers and unions. For example, in the coal industry we have done large studies for the mining and energy division of the Construction, Forestry, Mining and Energy Union and equally have done work for BHP and Rio Tinto. In the wider realm of public policy we have done work for the Smith Family and the Brotherhood of St Laurence as well as for the Reserve Bank and quite high-powered bodies

Basically to maintain that diverse client base we have developed respect for our ability to extract quite difficult-to-get information. We all have our own views, and all have our own philosophies, but the thing we live and die by is the quality of our daily use to form our analysis, and that is what clients commission us for.

CHAIR: Is that the context in which the Committee should view the report you have provided, when John Howard formed the shape of things to come, last year?

Dr BUCHANAN: That was commissioned by Unions New South Wales, and Chris had a complete free hand in how we wrote it.

Dr BRIGGS: They thought they were commissioning a report on unfair dismissals and there was a breakdown in communication and they ended up with this instead. So they had no hands-on involvement at all.

Dr BUCHANAN: Initially they were a bit disappointed that they did not get a report on unfair dismissals.

CHAIR: But then they decided that this may be useful as well. Have you done research to update this since November?

Dr BRIGGS: No.

CHAIR: What you say is based on your detailed knowledge of this and what has happened?

Dr BRIGGS: Yes.

CHAIR: What effect will the WorkChoices legislation, bearing in mind its intersection with other things, have on the ability of workers to bargain, particularly the more vulnerable groups with young people and casual employees?

Dr BRIGGS: In relation to the ability of workers to bargain and the effects that WorkChoices will have on our bargaining position, the major result will be to shift people off awards and onto agreements in the context in which the law is practically tilting bargaining power towards employers. In relation to the ability to bargain, the simplest indicator is to look at the portions of those groups that are on the award safety net. A large number of those groups are on the award safety net some 15 years after the introduction of enterprise bargaining. According to Australian Bureau of Statistics figures about 40 per cent of low-skilled white-collar and blue-collar employees remain on the award safety net. About one in four women remain on the award safety net.

In areas where we know there are large numbers of young people and casuals, the figures are particularly high. In accommodation, cafes and restaurants, the figure is about 60 per cent. In retail it is about 30 per cent. Obviously numbers of that magnitude are not choosing to be paid the minimum rate. The fact that they are still there, 15 years after the introduction of a bargaining system, reflects their general inability, the lack of bargaining power skills and knowledge to negotiate better wages and conditions. In fact, when you are looking at those groups, those types of jobs, it is primarily employers who determine the employment arrangements. The reason employers keep these people engaged under an award is because they decided the costs of making an agreement outweigh the benefits.

They have made some sort of calculation, because a lot of them are small businesses that are quite happy to get on with their business and have people on the award. I think that will now change primarily because of the change, the removal of the award safety net and its replacement with the five standards under the fair pay standard, where all sorts of incentives and costs savings can be made through removal of things such as overtime, penalty rates, casual loadings, and so forth. On the other hand, the costs of making an agreement will also be streamlined through procedural streamlining.

If New Zealand is any guide, what you will see over time as employees turn over they will slowly turn these employees off awards onto AWAs; that young people and casuals, when they turn up to a new job, will simply have a standardised AWA put in front of them, often with a single hourly rate, rolling all these things together, without fully compensating them, and so you will get the growth of low paid jobs through that.

Everywhere where you see the deregulation of labour standards, whether you look at Australian State jurisdictions, New Zealand or other English-speaking nations, you see growth of wage dispersion and inequality as standards and the bottom end of the labour market fall and I think that is what we will see under WorkChoices.

CHAIR: Did you say wage dispersion?

Dr BRIGGS: Wage dispersion or inequality, you choose the term.

CHAIR: Can I clarify one thing? You referred to percentages on the minimum award safety net. Does that relate to full-time work?

Dr BRIGGS: That is everyone.

CHAIR: So we are not talking necessarily about a fixed sum because a lot of casual employees, particularly women and young people, would not be working full-time?

Dr BRIGGS: No, it is all encompassing. It is all employees.

CHAIR: It is the rate rather than the weekly income. That is what your figures refer to?

Dr BRIGGS: It is not the rate; it is the numbers who have their wages and conditions set by the minimum award rate as opposed to an agreement or a common law contract.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Can you compare things across countries? One of the waste contractors said that Australia was now the most deregulated in the OECD and that other countries, I think he mentioned the United States, the United Kingdom and New Zealand, had fairly major deregulation a few years ago and had the ability to see what had happened then, but they were not going into that and suggested we get an academic person like yourselves to discuss that more quantitatively and in more detail than their general points. Could you tell us what the effect has been of deregulation across those economies and how those economies differ from how ours used to be?

Dr BRIGGS: Firstly, in terms of comparing where we stand, the OECD did an index of what they called employment protection, a sort of proxy for deregulation. We are towards the bottom end already but we still have more regulation, more employment protection than New Zealand, the United Kingdom and the United States.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: We do?

Dr BRIGGS: Yes, we still sit marginally above those.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is that only in the transition phase or is that permanent?

Dr BRIGGS: This was an index compiled a couple of years ago so it was before the effect of WorkChoices. It was after the 1996 Act.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So now we would be at the top or the bottom, depending on which way you run your scale, the most deregulated?

Dr BRIGGS: I do not know about the most, but we would certainly be in the group on the bottom, yes.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: What were the effects of the other deregulated economies?

Dr BRIGGS: Obviously it depends on what sort of measures you are taking. I have already explained that you tend to see very high levels of wage dispersion, high levels of wage inequality. They were interested to look at employment as well in this OECD report. They looked at the ratio of employment to population, which is usually considered a better measure than unemployment. Where we sit, our employment to population ratio is a little lower than the United States and the United Kingdom, which have lower rates in employment protection but the highest rates, the best, were actually those with the highest level of employment protection, the Nordic countries and Switzerland.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: They have the best participation rates?

Dr BRIGGS: The higher level, yes, that is right.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So the myth that you get better participation rates with less deregulation is actually not true?

Dr BRIGGS: It is not borne out in the OECD study. People tend to refer to the United States a lot and it is true, they do have a higher jobs record than we do, but when you look at the best performing ones, it is actually the most regulated economies, the Nordic ones and the Swiss.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I have heard it said and I have dabbled in a bit of industrial relations when I did various courses along the way in economics or it might have been my management for occupational medicine—I have been to a lot of university courses, is what I am saying—and it was said that unions made no difference to average wages. Is that true and, if it is true, is that because there is simply more difference between rich and poor and the average stays the same? Is it simply a distribution function?

Dr BRIGGS: I think most studies find there is what is called a union wage differential, which is that unions do negotiate a higher wage premium. Obviously the effect that has on average wages depends on rates of unionisation, but I think there is a reasoning you can find across a range of countries that there is a union wage premium.

Dr BUCHANAN: And that it usually flattens as well.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But that is comparing unionised and non-unionised in an economy, if you are comparing the average wage in an economy with regulation, do you see what I am saying? In other words, let us assume that the wages of a cafeteria worker were to go down but the price stays the same, the profit of the cafeteria becomes greater and therefore the boss effectively makes that money: the average wage stays the same, but the profits to the boss goes up by the wages not paid to the worker?

Dr BUCHANAN: But average wages are determined more than by the industrial relations [IR] system. The United States pays quite a high average wage because it has got one of the highest levels of productivity. One of the reasons it has got one of the highest levels of productivity is that it is the single biggest economy within the OECD, so they get huge economies of scale in the provision of goods and services and they have huge research and development primarily provided through the research of the Defence Department.

Just taking average wages in the abstract cannot be taken as an indicator of the strength or failure of the IR system. The IR is more important for the quality of the jobs, not where they fit in the absolute level of the world ranking on averages.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So you are saying that the average wage is not a meaningful index?

Dr BUCHANAN: Well, it is useful.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So in a sense my question is not of critical importance?

Dr BUCHANAN: It is important. The Germans—I have not looked at the latest data, but historically the Germans have had the highest level of wages. The Bureau of Labour Statistics produces this out of the United States and they compare manufacturing workers because those jobs are comparable across the economies and traditionally the Germans have been extremely high in that regard because their wages are so high so they have got to have a high level of productivity. The determinants are both IR and wider economic settings. I think unions do make a difference but at the margins there are a whole lot of other factors at work and you have to look at the total policy mix, not just your IR data.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I suppose I am investigating the question of the economy will do better if it is deregulated and I am taking average wage as a proxy for the economy, whatever that means.

Dr BUCHANAN: I think the OECD studies, the latest ones that have been released on the employment outlook, have basically shown that IR systems do not have an effect on most macroeconomic variables except distribution of equity. There are a number of ways to skin a cat. You can get high productivity growth, you can get high output growth, you can get high employment with either a market-based system or an interventionist a system. The one thing where unions and IR systems make a difference is in the level of the inequality.

Dr BRIGGS: Yes. A major topic of debate of course is the United States versus Europe where there are more market-based IR systems or what they call more co-ordinated systems in Europe which produce different outcomes in terms of employment, productivity and so on. The comparisons are very sensitive to when you start them and which countries you include and exclude. I think the general finding is that over a reasonable period of time the economic performance is actually very similar except on the question of inequality and that you get much more inequality in low paid jobs in the more deregulated systems but in terms of productivity, employment and things like that, the longer term performance across these two different types of systems is actually pretty similar.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: You may have heard of a book called *The Future of Capitalism*, which got a fair bit of publicity about a year ago.

Dr BUCHANAN: Who was that by?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The basic thesis was that the countries that had more flexibility in their economies did not carry much welfare advantage and were able to invest more intelligently into the future and those countries, of which the United States was the leading one, and assuming the Asian economies did not have welfare systems, and that they were investing far more intelligently than the Europeans, who were carrying such a burden of welfare payments that was such a cost on their economies that they could not invest prudently for the future and, thus, they were going to do badly.

Dr BUCHANAN: That does not square with what the OECD has found. What you said has been fairly longstanding in the research.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The OECD is looking at historic stuff. This is the postulate for the future.

Dr BRIGGS: I think again this is a broader debate than the IR system but if anything it has normally been seen the other way around that Europeans have more patient systems of finance more focussed on the longer term investment rise than the short-term shareholder value based systems of the US. People argue the US might be more dynamic. That argument goes back and forth but I do not know that not investing for the future is a charge that has been made against.

Dr BUCHANAN: If you take, for example, the airline industry, the US airline industry is in all kinds of trouble because it has been dealing with in patient capital. European airbuses are making major gains around the world in sales and that is basically because it is underwritten by a co-ordination of States and each of the States has taken a view that they would invest over a 20-year period. If the airline industry flourished they were then going to make super-normal profits, which is in fact what has happened but if that industry did not flourish they were going to let it die. But it was because of the co-ordination of the States that the Europeans were able to build up a sector that did not exist before.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The Americans argue that was subsidies versus non subsidies?

Dr BUCHANAN: Well, then the US airline industry gets huge subsidies from the US defence department. It is called fighting a war on terrorism. There are ways of getting subsidies, some are more transparent than others.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you think it is about equity and presumably you do not study the effects of equity in terms of social harmony?

Dr BUCHANAN: There is big literature on that. I mean the social policy literature has shown when you look back over the past couple of hundred years there is a very strong relationship between systems of social protection and social cohesion. So you can maintain social cohesion through high labour standards and active welfare or you can maintain social cohesion through the criminal justice system. Where you reduce social protection through the social welfare system or through reduced labour standards the criminal justice system picks up the slack. So in the US a large number of adult males are incarcerated in the prison system. So the US does not have a long-term unemployment problem it just calls them inmates. There is quite of lot of literature on that point.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is there?

Dr BUCHANAN: Yes, Freeman wrote the classic article.

Dr BRIGGS: Yes, a group of American labour market economists examined the question of how it impacts in fact on comparison of unemployment rates and I think the ratio between long-term unemployment and the incarcerated population was as high was 1:3 in the US and it ranged from 1:20 and 1:50 across different European States. The conclusion was essentially European countries put people in welfare that America puts in the prison system. Because the populations of low-skilled males who tend to end up in prison were exactly the sort—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: who were on welfare in Europe?

Dr BUCHANAN: Yes, but there is a long history of that. If you go back to the Industrial Revolution vagrants were handled through things called "work houses" and as you look back from the twenty-first century it is a little hard to pick whether a workhouse is a prison or a social policy institution.

CHAIR: You could make a similar point, I guess, about mental illness?

Dr BUCHANAN: Yes, absolutely. That is why the changes in welfare to work are very important because if the State withdraws in that area then other social institutions are going to have to pick up that slack and it will not necessarily be the labour market.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: As globalisation comes, I think part of the future of the capitalism argument was that if you have a wage structure too high the jobs all leak and gradually if temporary visas are used and technology is used there will be fewer and fewer jobs able to be done by the poor and their wages will approach—the wages will be global, if you like, and it would seem that is what is happening. Do you have any comment on the ability to maintain wages at the bottom end in the face of globalisation? Obviously somebody in India cannot clean this office, and there are some jobs, which by definition have to be done here, but to what extent has that been effected and what is the long-term effect of that?

Dr BUCHANAN: I think that is a question of industry policy not of our policy because you have actually got to look at the structure of an economy and how it fits itself into the world trading system. If you take the kind of thesis you were implying there is essentially no limit to how far wages have to fall before they hit the China rate. That is a bit of a silly proposition. I mean, what you should be thinking about when you are framing your industry policies is how you position your allocation of resources so that you can distribute your population into those sectors that are flourishing with future demand.

We are facing quite serious challenges at the moment about where we put our workers of the future. Do we hack away at the bottom of the labour standards and try to turn them all into cheap workers competing with the Chinese or do we think about moving into IT, biotechnology or advanced

medical services? Each of those industries require support staff. Unless you take a conscious decision in industry policy to nurture those sectors you will not flourish in those areas. It is no mistake that the US dominates IT because all the infrastructure was developed by the US defence department. The US defence department helped build up C&C Equipment which is now dominant throughout automated manufacturing. The US is in the position it is at because there have been huge public goods provided by the State.

I think if Australia is thinking about what it is going to do about the future it does not sit back and wait for the wonders of the market to solve all problems. Anyone who does that will just be slaughtered by another State that does act intelligently and uses resources to cultivate the industries that will flourish in the future. But you cannot solve that through your IR system. All your IR system can do is put a break on cutting out the cheap options. It can put a floor on entrepreneurs developing marginal jobs in sectors that have got no future.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So you argue it the other way around: if you simply lower the wages you are merely postponing the evil day when your lack of planning crucifies you?

Dr BUCHANAN: Well, it becomes never ending. You have just got to keep on hacking away at the standards and you have just got to keep on lowering expectation so that people are ultimately satisfied with a whole lot of low-paid dead-end jobs. Let us be quite frank, in the US today 28 per cent of the work force is employed at an hourly rate that could not keep a family of four out of poverty if the breadwinner worked 40 hours a week. That is 28 per cent—more than one worker in four. That percentage went up over the 1990s when the US had the strongest growth it has had in a generation. These are not academic arguments, these are actual facts on what the structure of the US economy is. The New Zealanders have had a similar sort of experience and there is a public debate in New Zealand now on how to get themselves out of the low-wage trap. Chris knows more about that than me.

Dr BRIGGS: Yes, it was interesting in the past election that the Conservatives were campaigning on the fact that wages were too low in New Zealand and they were running a political campaign around this. They have locked themselves into a low wage, low productivity economy. New Zealand's productivity rates used to more or less track Australia's for a couple of decades until around about 1990 when it introduced the Employment Contracts Act. It flat-lined after that and now it has the second lowest productivity levels in the OECD, just ahead of Portugal and it is locked in this sort of low wage, low productivity cycle. Low productivity means there is no capacity to increase wages and you get this sort of cheap labour, low value added economy.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is that because New Zealand cannot invest in labour saving? Is that what you say?

Dr BUCHANAN: Well, there is no incentive to.

Dr BRIGGS: If you make labour sufficiently cheap and disposable then it removes a lot of incentive to make it more productive and what is more you set up competition to occur on the basis of the cheapening of labour, rather than making it more productive. Then the firms that would actually like to make a longer term investment in things like skills, which requires to get a return back, they lose that capacity because the competitor down the road has simply cut their costs by removing overtime, penalty rates and so on and you either follow suit or you get out of the market because they have jumped a march on you. Whereas if you have an effective minimum safety net which sort of effectively takes this basic labour costs out of play then it is on productivity, skills training quality and things like that that business is competing against each other.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is Australia likely to follow the New Zealand example having followed that deregulation or were there other factors involved?

Dr BRIGGS: There were certainly other factors involved. New Zealand was in the middle of a recession. The New Zealand economy is a lot less diversified and sophisticated than the Australian economy. There are certainly New Zealand-specific factors involved but in certain sectors, service

sectors like cleaning where labour costs is everything then you are likely to get this race to the bottom-style dynamic in those sort of sectors as well.

Dr BUCHANAN: Could we also take issue with you? Chris and I do not like the expression "deregulation". I mean WorkChoices is 700 pages long and the regulations are 300 pages. It is not actual deregulation. This is actually very deliberate regulation designed to lower labour standards. It is more important to define what is actually going on. This is an attack on publicly defined labour standards. The legacy of the Howard Government will be to weaken Australia's standing as a civilised nation as defined by labour standards. So it is not whether you deregulate or not regulate, what we are seeing is a shift to market forms of regulation and highly proscriptive forms of market regulations. And a lot of employers are very unhappy because it is not the way they want to run their businesses. They are being told how they will do things.

CHAIR: Would you make that comment in relation to the international economies you have been talking about as well? For instance, what you said about New Zealand and the United States of America or are you making a comment that is specific to how Australia is going about dealing with its industrial relations?

Dr BUCHANAN: Chris and I are very much of the view this is not Reagan/Thatcher/New Zealand Nationals unleashed on Australia. This could only happen in Australia. When we talk to researchers overseas they are actually shocked at the degree of detail and proscription that is written into an Act. The kiwi Act was 100 pages?

Dr BRIGGS: It really was a form of deregulation. It was very streamlined whereas this is quite unique.

CHAIR: In a funny way this actually fits in with our history?

Dr BUCHANAN: Absolutely. It could only come out of Australia.

Dr BRIGGS: Where else could you get statutory regulated individual contracts?

CHAIR: In the international comparison you have been making are we still talking about apples and apples or are we talking about comparisons that are about the results of the process rather than how it is brought about?

Dr BUCHANAN: I suppose what Chris and I are doing is that at one level you say it is a very distinctive policy regime but underlying it is that you are weakening labour standards and that is why I was saying it is not so much deregulation. You know, Thatcher, Reagan, the New Zealand Nationals were all about reducing the role of publicly defined labour standards and structuring the labour market and that is the same thing with WorkChoices. At the end of the day, the key thing with WorkChoices is the five statutory minima which drops to three for casuals: that is the single most important part of that Act that completely changes the reference point around which all labour market standards will evolve in this country.

The Hon. IAN WEST: Can you comment on the extent of the eradication of the right to strike and the independent tribunal in the United States of America, New Zealand and Britain? In Australia effectively there are proscriptions in regard to protective action and the eradication of unfair dismissal and the ability to go to an independent judicial umpire. What is the extent of that in those other countries? Can you provide some comparisons?

Dr BUCHANAN: On the right to strike you have to look at it in the context of strikes and lockouts. What is distinctive about our approach is that in every other country the legislators put extra regulation on lockouts on the grounds that lockouts are reserved for exceptional circumstances when employers are considered to have an inequality bargaining power when they have got a very strong union using industrial action. We are in the unusual situation where strikes are more regulated than lockouts. We are the only country in the OECD that actually makes it easier to access lockouts and strikes. So it is quite a unique system. I guess one of the distinctive features also is that the Minister has effectively given himself the power to terminate a bargaining period and therefore terminate the

capacity for industrial action, with no right of appeal whatsoever. So the Minister has given himself open-ended fiat to end any strike he sees fit. These sorts of things are unparalleled.

The Hon. IAN WEST: What about an independent judicial umpire?

Dr BRIGGS: New Zealand abolished its IR tribunal but it has set up other types of more low-key institutions. The Australian tribunal system is reasonably unique although other countries usually have some form of tribunal redress.

Dr BUCHANAN: The tribunals are just a shadow of their normal selves. The Federal Government says it has still got a tribunal but it is really just an echo of what it used to be. It does not do anything about minimum wages. The legislation is specifically set up to encourage private mediation. The tribunals are essentially there at the end of the day to police unions.

The Hon. IAN WEST: Your previous comment about comparisons with the OECD was really talking about a decade ago?

Dr BUCHANAN: That is true?

Dr BRIGGS: Which comment?

The Hon. IAN WEST: Your comment that Australia is not at the bottom but it is near the bottom?

Dr BRIGGS: No.

The Hon. IAN WEST: That was a comparison you made in 1996?

Dr BRIGGS: No, it is more recent than that. That is an OECD report from a couple of years ago looking at employment protection in terms of things like unfair dismissals, minimum wage regulations and things like that rather than tribunals. Different countries construct their systems of employment protection differently but it is looking more at the level of employment protection rather than the actual system.

The Hon. IAN WEST: So in terms of looking at quality in those issues of distribution and equity that the IR system can look at, in terms of measurements, for example, how we measure unemployment, is there statistical information about the way we measure unemployment as opposed to how they measure unemployment in New Zealand and America?

Dr BUCHANAN: Yes, they lay standards on that. Australia is pretty good. The ABS is a well-respected body for following the IR standard. The problem is the definition of unemployment is pretty hopeless everywhere around the world. Australia is not particularly bad on that. If you work for an hour a week you are not unemployed. That is not just Australian, that is an IR standard.

Dr BRIGGS: Some countries broke. I think Germany requires 10 hours or something like that.

CHAIR: Before you are categorised as employed?

Dr BRIGGS: Yes. But that is the standard, one hour a week.

CHAIR: You said before that the WorkChoices legislation cannot be looked at in isolation and that the independent contractors bill and the Welfare to Work changes have to be considered. Can you enlarge on that a bit on how they all affect one another?

Dr BUCHANAN: Chris in the Shape of Things to Come makes it pretty clear that WorkChoices is essentially about reducing the reach of labour law, centralising labour law and tilting the balance of bargaining power. That seems to be what it is about. At the end of the day the net result of that will be to limit the ability of labour law to evolve in ways that can grapple with the changing nature of work, and that is the only way you can breathe life into a system of labour standards, that it

has got to change and evolve as society changes and evolves. WorkChoices kills it dead; it freezes it. It does not give the tribunals any capacity to really update awards; it does not give unions any real power to negotiate new standards. And that is where the Independent Contractors Act is so important because it is obviously designed to stop principles of labour law shaping the contractor form of employment.

What has been happening over time is that as contractor forms of employment become more economically significant, labour standards have emerged to ensure that this is not used as an abuse of process. New South Wales has pioneered the way with section 106 in the Unfair Contracts Act in that regard, while the Independent Contractors Act is designed explicitly to stop labour law having the capacity to respond to that phenomena. So my view is in the longer term the Independent Contractors Act is probably just as, if not more, significant than WorkChoices because it is actually creating the space for a particular type of employment form to flourish and WorkChoices is doing its best to limit the kind of forms of employment as we currently know them, particularly in the standard wage earner model, to kind of stagnate.

Welfare to Work is essentially about massively increasing the number of low-paid, unskilled workers on the labour market to drive wages down. So if the Government stops paying the most vulnerable that will make them desperate to take any job possible. WorkChoices will limit their capacity to organise any industrial tribunals to look after their standards. So the two working together will create a significant number of low-paid jobs for a large number of unemployed people which will keep the wages for low-skilled jobs down. Then in the longer term I would see that people will then be engaged as contractors not as employees, and that has major implications for the tax system for superannuation and workers compensation. That is why when you are looking 10, 20 years down the track the actual categories around which people think and define their rights will be quite different.

CHAIR: Most people probably think of independent contractors as better-paid or more skilled workers. Is that a false picture?

Dr BUCHANAN: If you look at that ABS data, and that is all there in forms of employment in the survey of employment arrangements and superannuation, the big battalions for contractors are in construction and road transport. I have looked in detail at the question of contractors in construction and hours of work and rates of pay do not differ that much between contractors and employees in that sector. What does differ is the tax that they pay. So that by being a contractor you use your income by basically cutting out your contribution to paying for hospitals and schools.

The Hon. IAN WEST: And workers compensation?

Dr BUCHANAN: Yes.

CHAIR: Before lunch we had evidence from the Textile, Clothing and Footwear Union, Fairwear and Asian Women at Work and they talked a little about their concerns about the independent contractors legislation, but also to the extent that outworkers in the clothing industry, perhaps not normally seen in those terms, are in fact independent contractors.

Dr BUCHANAN: But I thought the ICA actually protected the outworkers in clothing and footwear.

CHAIR: We had very detailed and complicated comments from Mr Nossar, their legal person, reading out various sections of the bill—and we have to look at this obviously because I think it was a bit over the heads of most of us—but basically arguing that if you read the fine print the protections that have been promised are not necessarily there, partly because of the power of the Minister and partly exception clauses which, once you read various sections together they were expressing considerable fears about how that will work in practice.

Dr BUCHANAN: To be fair though if you are going to run that way you should talk to Ken Phillips from the Independent Contractors Association to get his take on it because they know they are very upset with those glosses on the legislation; they regard them as quite substantive. They looked pretty substantive to me when I read it.

CHAIR: What do you mean? That those exceptions are there?

Dr BUCHANAN: But I do not work in the sector. If you had an advocate in the industry saying that, that is obviously pretty important, but I would also look at somebody who has tried to get contractors into that area and hit that legislation already.

The Hon. IAN WEST: It has been suggested that by regulation the Minister can change those protections.

Dr BUCHANAN: Okay. As it stands it is okay, it is the capacity to adjust it in the future.

CHAIR: Can you tell us a bit about where we are going to be, if you can predict it, in a year or two years or five years? What is going to be the effect of everything you are talking about on the economy and on how the economy performs comparatively internationally?

Dr BRIGGS: I think we tended to limit ourselves in this to making rather more smaller-scale projections than that. It is a bit hard to predict the implications on an economy because there are so many factors, of course, mostly beyond the IR system and this legislation.

CHAIR: I probably should add on the society as well as on the economy.

Dr BRIGGS: I think the first thing is that we think it will take quite some time for the implications of WorkChoices to flow through. It will be an incremental process; it will not happen in a year or two years, it will be more like five to 10 years and it will particularly be whenever the next market downturn, whenever the next recession arises when you will really see the implications of this flow through and the removal of the safety net at the bottom and what that will mean. As I have said, we mostly limited ourselves to arguing around the IR system and I think what you will see in the long term is very few people on awards. Awards will still be there but there will be virtually no-one on them. We will have this very fragmented system with large swathes of people on contractors, casual or AWAs, the removal of common standards across the labour market and enormous growth in inequality, and that has social implications as well.

Dr BUCHANAN: It is hard to predict. The main thing you have got to watch is, like Chris said, underlying economic conditions, but there is also what happens at sectoral level, and what happens at sectoral level would depend on demand and, in particular, employer strategy. Chris cites the case in that paper of the contract cleaning industry in Perth where for about three or four years after the court legislation was put in place all the employees in that industry said, "We are not going to cut the wages of cleaners because they are already so low", and that maintained standards. But then one year one of those employers said, "I don't have to do this anymore".

Dr BRIGGS: Someone came over from the eastern States. It was a new entry.

Dr BUCHANAN: And did not honour that standard and drove the rates down. That is why I am a great believer in John Stuart Mill's dictum: under conditions of competition standards are set by the morally least reputable agent, and that really depends on when will the rogue move, and you cannot predict it.

CHAIR: In terms of long-term outcomes—and leaving out the High Court challenge and all that—to what extent do the States and others have a capacity to hold out and to set up little areas fenced off from WorkChoices?

Dr BUCHANAN: I think that is the exact right question you guys should be asking and I think there is significant capacity within the Australian setting to do something about having a parallel system, particularly around the union heartlands of education and health. I think if you are thinking five, 10 years out it is quite conceivable you could have a quite separate set of systems as showing that there are two evolutions possible.

CHAIR: When you pick areas like education and health do you mean public sector or public and private?

Dr BUCHANAN: You will only really have control over your Crown employees, I would have thought—I am not an expert on constitutional law; I have not studied constitutional law for 20 years, but from my recollections of that 20 years ago you did have complete control of your Crown employees and I think the Government has been pretty active in clarifying that issue for a lot of its employees.

CHAIR: So you are deliberately stressing legal and constitutional powers? You are not talking about something akin to the power of the market to actually insulate or fence off certain sectors of the workforce or the economy?

Dr BUCHANAN: Let us be quite clear about what is going on here. The Federal Government is involved in very advanced social planning. The rhetoric of the market has been this is advanced social engineering, and all the machinery of the Government—and its executive as well as legislative—have been mobilised to make people behave in a certain way. Markets will then operate within that plan that has been put down and, equally, any response to it is going to have to use State power and that is where the State jurisdictions will be important in countervailing that planning tendency coming from the top.

CHAIR: Say the Federal Government were to change, say there were to be major political changes at the Federal level, or even if public opinion were to mobilise and so on, how easy is it to turn back? How easy is it to change the system to either something more like it was before or to move in another direction?

Dr BRIGGS: I think there is a big opportunity because there is definitely a space to create a national system with a safety net. Labor could easily use, for instance, the external affairs power under which it can pass legislation which complies with international treaties and through that constitutional power set a safety net which covers 100 per cent of employees, not constitutional and non-constitutional. So the next election is important in terms of Labor's standards. If the Labor Party were to be elected there would be a space, I think, to set up a genuine safety net. Whether that happens or not, of course, is another question.

CHAIR: Is that something that can be done in a short space of time or could you do it in a year or two or three?

Dr BUCHANAN: It is having the inclination and the capacity, and I think there are questions about whether the current Federal Labor Party is showing a strong commitment to working through that stuff.

Dr BRIGGS: But it is something you can do through legislation the same way that WorkChoices has taken it away. I do not think you can perhaps resurrect it on the same level the award safety net had; it will be more difficult to get back there but certainly you can put in place an effective safety net through legislation in some way.

Dr BUCHANAN: You would want to redefine it, would you not? I mean, that is the thing. The award safety net was good but it had its problems. It was very incomplete, it was a patchwork. There are benefits in thinking about having a national system.

CHAIR: And you have both used that word "national" either because you think it should be this way or because you think it must be a national system, that the days of large sectors being within the State jurisdictions are numbered?

Dr BRIGGS: I think if WorkChoices is upheld in the High Court, it depends how early it happens. If there is a three, four or five-year transitional period, if large numbers are imagined in the Federal system then I do not see why any national government can unravel that and send them back to the State system.

Dr BUCHANAN: There would be significant resistance.

Dr BRIGGS: I think there are obvious reasons why setting out a uniform safety net that applies to everyone makes sense.

The Hon. IAN WEST: However, that is in the wages and conditions setting in terms of the instruments, but I am interested in your comments about the timing. I would have thought that the two most fundamental issues in terms of the environment and the psychology of the conduct of the industrial environment would be the two fundamental issues of unfair dismissal and the rights of appearance before a cost-effective, judicial, timely tribunal. Those two issues, I would have assumed, would pave the way for an environment to be conducive to the issues you are talking about.

Dr BUCHANAN: That is fair enough, yes.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Perhaps it is a stupid question, but what is the difference between the independent contractor and the AWA? In a sense both are contracts.

Dr BUCHANAN: But they are different. One is a contract of service and one is a contract for service.

Dr BRIGGS: One is a commercial contract and one is an employment contract.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: An independent contract says, "He will do this task."

Dr BUCHANAN: Yes, essentially. But then you can have performance payment, an incentive payment scheme within an employee contract as well, but the defining thing is the nature of the relationship between the parties. It is a commercial relationship as opposed to an employment relationship. But what you are getting at is that this is not an easy distinction to draw.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: That is what I am saying. Let us say all the sick pay, holiday pay and workers compensation is pushed down out of the AWA and it says, "You will work in this restaurant or wash the dishes. How is that different from, "You will be an electrician and fix my electricity"? Admittedly, presumably, one has an outcome that says at the end of the day I can turn the light on and the other one just says I have a pile of clean dishes, but while one is more concrete and the other might be ongoing you still have a contract with fewer and fewer conditions beyond the immediate task. Is that not true?

Dr BUCHANAN: What you are talking about there is the degrading of standard employment. As standards drop within it the employee drops then at the bottom of the labour market and the distinction between an employee and a contractor will be pretty marginal. That is kind of what you are getting at.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: That is what I am saying, yes.

Dr BUCHANAN: That is why Dr Briggs' and my argument is that labour standards should be crafted with a view to workers living standards and the conditions under which work is performed. There should not be any real distinction about whether you are an employee or a contractor. We should actually deal with the substance of the reality of work, not get lost in debates about whether they are a contract of or for a service, or whether they are commercial or labour arrangements. Where labour is expended there should be certain rights attached. New South Wales has pioneered, within a world context, the way in which you do that, and that is section 106. If there is one thing your report talks about, it should be preserving and nurturing 106 because that is the way into the future. The independent contractors legislation was designed explicitly to kill that dead.

The Hon. IAN WEST: Unfair and unconscionable contract.

CHAIR: Where does it leave occupational health and safety legislation, for instance, and the way in which WorkChoices accepts the need for that and the need for it at a State level? In many ways the independent contractors record and the expectations in reality in terms of things like safety are very much less than they are on the traditional employer and employee.

Dr BUCHANAN: Occupational health and safety is organised around the concept of safe systems of work so that he does not get too caught up with these legal technicalities. What is critical, though, is the reality of enforcement on the job. If you have a building site that is full of contractors and no union representation then you usually find that accident rates go up. But the underlying structure of right to enforcement is there and that is why the question of industrial relations is so important for safety. It is not just the occupational health and safety laws that are the key to outcomes, it is how they work in concert with your IR. I know that the Cole royal commission had a whole special day summit talking about safety because they knew they were about to weaken the power of unions. They know the correlation is you weaken unions and accident rates go up. That is fantasyland stuff. You cannot weaken the institutional forces that enforce standards and then expect, miraculously, through wishing that safety standards were more strictly enforced, that you will overcome that problem. You just cannot have your cake and eat it too.

CHAIR: You would not see any doubt that the WorkChoices legislation will reduce safety?

Dr BUCHANAN: Absolutely no doubt at all. And it is not because bosses are evil people or that employers are out to wound workers, where you are under commensurate pressure and you have to preserve your margins you will respond to that incentive structure. It is only by having a collective instrument, like a union or an active inspectorate, that will stop you taking shortcuts.

CHAIR: Even if your will is good you need someone who comes along and says, "You have not actually realised that this is dangerous."

Dr BUCHANAN: And at specific unions they have a delegate structure that is out there in the workplace. That is where Australia had a very low-cost labour market regulation system. Australian unions were really cheap. The whole Australian IR system was really cheap because you had awards publicly defined and any enforcement defined through unions. I do not think we should lose sight of that fact. People seem to think that because it was altered it was bad. In fact, when you are designing a system from scratch it is not that bad any way.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Continuing with occupational health and safety, the model I have is that if you have a whole bunch of contractors each doing a task focused on that task the problem is when they interact with each other and they are not thinking about the interaction but the task. For example, if an electrician comes to put wires in he makes the assumption that the site is safe, that nothing will fall on his head, that he can drill anywhere and that there is not a problem. The other person who comes in assumes that he will not be electrocuted and that he can do something else. When the two of them interact, that is the problem. You are saying that the individual focus and the lack of teamwork, if you want to say that, or an overview is what causes the problem.

Dr BUCHANAN: The other way you can get around that, and WorkCover did some very good work on this a couple of years ago, is that they had a memorandum of understanding about safety procedures in the construction industry that was signed off by all the 14 head contractors in Sydney and then that was enforced through all their project agreements. That is called pattern bargaining. That is the other way you can do it.

CHAIR: That has now been outlawed.

Dr BUCHANAN: That is all outlawed.

The Hon. IAN WEST: For workers, not for bosses.

Dr BUCHANAN: That is right**.** That was not necessarily done with the unions. In fact, the unions were very passive in that process. It was the head contractors basically telling the subbies, "This is the way it is going to happen", so that you standardised safety procedures.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So there is no competitive advantage.

Dr BUCHANAN: And it did not matter if you moved between sites, you knew there were certain protocols and everyone had to work to those protocols, and that was what was important for

safety standards. But, once again, that is a collective structure. The MOU process was independent of safety. That was a tacit IR process. That was multi employer co-ordination.

CHAIR: To take up the example given by the Hon. Dr Arthur Chesterfield-Evans of the electrician, a plumber or whatever and people being able to make assumptions about digging holes, putting in wires and not being electrocuted, does that same lack of co-ordination that he has raised in occupational health and safety have implications for the efficiency and productivity of workplaces and industries—the more you atomise the whole process, particularly one that traditionally has been fairly collective, the more you actually lose linkages that are productive?

Dr BRIGGS: If you have an army of contractors, casuals and what not coming in and out, they work much more fragmented hours and patterns, then there is less cohesion within that site as well as at large, and that is when you are likely to get those gaps in communication, understanding and so forth, gaps through which accidents and the like can occur.

CHAIR: Is there any literature on the productivity side as distinct from the safety side?

Dr BRIGGS: On the productivity side, as I said, I think the long run stuff tends to say that you are actually fairly similar in terms of productivity forms, but there are certain benefits in having co-ordinated outcomes. Again, it is a question of having an effective common wage outcome tends to lead to a greater focus on productivity as a means of competitiveness. It tends to mean more public accords in the form of training. If you can afford to train you can be assured that you are more likely to get a return on your investment.

Dr BUCHANAN: We did a paper for the Academy of Social Sciences, called "Wages Policy in an Era of Deepening Wage Inequality", and Dr Briggs wrote the section on co-ordinated flexibility. There is a little summary in there of the ways in which co-ordination versus economic performance, and there are the benefits of complementarities.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: This comes back to what I was asking before, you said that this is a very regulated approach, a very driven prescriptive approach to the future. Presumably that is on some sort of ideological basis that it believes it will achieve a good end. Do you think that this is about using the confusing industry policy and IR policy in the sense that IR, because it is a high percentage of costs in some industries, you say if you could drive the wages costs down you would drive the profit up, which would then help the economy. Do you think this is predicated on the idea that if you drive wages down the economy booms? In other words, something so simplistic and confusing industry policy with IR policy? Would you say that is the case, or can you offer an alternative suggestion as to why someone might have done this?

Dr BRIGGS: Absolutely, I think there are political dimensions to it of course. But to the extent there is an economic crush underpinning it, it is a very simple one that minimum wages are set too high and if you allow them to fall you create jobs. That is what I think you have seen already, I forget where it was, in a case where they were offering AWAs at lower rates, but they were offered new jobs in a different centre. I think the response was, "That's what you get out of this legislation." I think that sort of rhetoric has run through Liberal Party policy for the last 10 years. "One man's wage increase is another man's job."

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: It is that simple, is it? Obviously, I have heard that view, but I wondered if there was something a bit more civilised.

Dr BUCHANAN: If you wanted to anchor it philosophically, within the history of market economies there has always been an ideology of economic liberalism, and the ideology of economic liberalism is that prosperity is nurtured by fostering self-regulating markets. Historic economic liberalism has been associated with a strategy of laissez-faire, which is basically saying, "Leave it to the common law to regulate affairs." We are now living in an era that is not based on economic liberalism, but it's based on neo liberalism. The vision of neo liberalism is that you do not leave it to the vagaries of the common law to regulate. The State specifies we have a high degree of prescription on how markets will function. That is why, I would argue, we are living in a neo liberal era as opposed to a classical liberal era. Adam Smith would be shocked. If Adam Smith picked up WorkChoices he would say, "This has got nothing to do with me." It is not the kind of prescription he

was after. If you really want to get to the nub of the matter, the Federal Government, in economic policy, is pursuing a neo liberal agenda and the social policy it is pursuing is a neo conservative agenda. But you do not want to confuse the conservatism with its economic policies. This is advanced neo liberalism.

CHAIR: Earlier you made one reference to training, and it struck me that obviously there are a lot of implications in a package of legislation and the ideology that you were talking about. Who will look after education, training and skill development in the world that you are describing? I suppose it comes back to your earlier point about industry policy as well.

Dr BRIGGS: No-one takes responsibility.

Dr BUCHANAN: The attitude of employers is they say, "It's not my problem." They do not take responsibility for training. We have written extensively on this, and we have summarised that in chapter 10 in our book on futures. The irony is, and we are picking this up as commercial research at the moment, the rhetoric is individualisation, fragmentation and customisation of arrangements in the IR system, employers are screaming out that they cannot attract and retain the workers they need and they are now realising that trying to solve it on their own at enterprise level is futile. We have done jobs for the Victorian Farmers Federation. We are doing work with the Queensland aged care industry. These are not ideological employers who are out to foster collectivism. They are saying, "We've got to talk together to figure out how we position ourselves in the market to train the skilled labour we need to function as a sector." Reality is a biting.

CHAIR: We had a witness in Wollongong yesterday who mentioned that the local aged care centres are importing nurses from Zimbabwe, which is doing no-one any good: Zimbabwe needs the nurses and Australia needs a sufficient number of trained people here rather than relying on taking them from countries that are less well off. That seemed to be an example of an increasing tendency, would it be a fair comment?

Dr BUCHANAN: I think you will see clamouring for relaxing immigration controls. You will have the deregulation of the labour market. You will lose the capacity to reproduce skills, because skills are a public good and you will plunder them from elsewhere. That will be the logic. You just watch, the immigration debate will take right off.

Dr BRIGGS: Pacific islanders.

CHAIR: I know it is already happening to a large extent with teaching in New South Wales. Secondary teachers, particularly, are now being imported, and we are now competing with other people who are trying to import Australian teachers to fill the gaps. There is a globalisation of a lack of skills.

Dr BUCHANAN: We might have looked critically at the Liberal Party but we also have to say that the State Labor Government has problems of its own in the way that it has run its public services. A lot of those jobs are very unattractive. There are problems in the nursing profession not because there is a shortage of nurses but because of the structure of the jobs being created in the public health system.

CHAIR: There are more nurses not working as nurses than there are nurses in our hospitals.

Dr BUCHANAN: Once again, New South Wales might have a nice IR system but if its fiscal policies are screwing down public services then you will get the problems manifesting themselves anyway, not because of your IR but because of your public finances.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you mean that you are not paying them enough?

Dr BUCHANAN: Yes. The big problem in the public health system is that a managerial logic is at work and not one in which the clinicians define the quality of service. When you have a managerial logic at work the clinicians get alienated very badly. I am talking not just about doctors but about nurses and allied health and support staff.

The Hon. IAN WEST: It is partially true: there are some difficulties with the funding arrangements. I understand what you are saying.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Certainly the inquiries that we have done into Campbelltown Hospital and so on would suggest that that is the case.

Dr BUCHANAN: You have all the advice you need to solve that problem in the Greater Metropolitan Clinical Task Force. The clinicians get together and tell you how to improve the system—but that is another story.

CHAIR: For some other Committee. Thank you very much for giving some very thought-provoking evidence. I think you are going to leave some papers with us.

Dr BUCHANAN: Yes.

Motion by the Hon. Ian West agreed to:

That the tabled documents be accepted.

CHAIR: Can you either give us the references that you mentioned or can the secretariat contact you at a later date and get a list of the things that you said we should read? With the aid of the transcript we can work out exactly what you have recommended to us and check the references.

Dr BRIGGS: Yes, no problems.

CHAIR: So that will be next week. Thank you very much.

(The witnesses withdrew)

MARK CROSDALE, Secretary, Newcastle and Northern Sub-branch, New South Wales branch, Transport Workers Union, affirmed and examined:

TONY McNULTY, Member and delegate, Transport Workers Union, sworn and examined:

Mr McNULTY: I am also a career owner-driver and a contractor.

CHAIR: Do you want to make an opening statement before we turn to questions?

Mr CROSDALE: Yes, if I may. The Transport Workers Union represents approximately 35,000 transport workers in New South Wales across a range of areas. We have just under 100,000 nationally. We cover people in all forms of road transport from semitrailer drivers and B-double drivers running on interstate routes to people involved in the waste collection and recycling industry as well as people in the airline industry and the milk industry. My experience in my capacity as a union official goes back nine years. I am engaged by the union. I am also formerly a long-distance and interstate truck driver and most of my friends are still engaged as predominantly long-distance drivers but certainly as working truck drivers.

I have been involved in a range of matters over the years with the union in terms of investigating issues of underpayment and unfair dismissal and general dispute resolution issues in a range of transport companies effectively from Gosford and north to the Queensland border and as far west as Narromine, Armidale, Tamworth and Dubbo—those sorts of areas. In short, I am particularly concerned about the WorkChoices legislation. I think it will have very detrimental effect, certainly for the long-distance sector of our industry. Road transport is actually quite unusual in the sense that the Government has had to pass laws to stop us working too hard. I do not mean to make light of it by putting it that way, but, quite seriously, our industry can legally work 14 hours a day. It used to be able to work 12 hours a day and then after a campaign by people within the road transport industry it was extended to 14 hours a day. In my experience, particularly in the long-distance sector, that is an absolute minimum. You have got a pretty good job if you are working 14 hours a day.

Many people in our industry regularly work 18-odd hours a day. They do not have one day in seven off. It is not unusual for me to come across people who work for small companies, particularly in rural areas, where drivers, at the worst excesses, will go without sleep for between 36 and 48 hours. Their employment is under threat if they do not complete those hours. I am not talking about owner-driver; I am talking about employees. In a small country town, or even in a relatively large country town, the transport community is quite small. You are often pretty well known because you share the road with a whole lot of other transport workers who are usually based in or go through that centre. If you get a bad name as someone who, first, cannot do the hours you might find yourself having trouble getting a job. Secondly, if you then do something like call in the union because there is a problem that gives you a bad name as well and causes you a lot of difficulty in getting a job.

In terms of the WorkChoices legislation, I see that WorkChoices is stripping away some of the protections that employees in New South Wales currently have and which, I would have to say, are quite difficult to enforce in some country areas under the New South Wales IR Act, let alone the way that things have changed under the WorkChoices legislation—particularly the removal of unfair dismissal for organisations of less than 100 employees. The result of that is that in the areas that I outlined, from Gosford to the Queensland border and out west, I could probably name on the fingers of one hand the transport companies that have more than 100 employees. That means that the vast majority of our rural and non-metropolitan area organisations now have no unfair dismissal.

CHAIR: You say that there are probably only four or five large companies. Do they have huge numbers of employees or are most people working for the smaller ones?

Mr CROSDALE: Most people are working for the small ones. Even the large ones, when you get into rural areas, have relatively small depots. In some cases, the large ones have corporate structures that mean that someone is engaged for a particular corporate entity.

CHAIR: I was going to ask about that. Therefore, they have fewer than 100 employees.

Mr CROSDALE: Yes, in some cases. Our industry is notorious for working too hard. One of the protections that people have is their ability to organise. I see that has a very positive safety benefit. I deal with some large transport yards that are fully unionised. I can name one on the Central Coast of New South Wales that is engaged in carrying groceries for Coles Myer. That transport yard is fully unionised. It does trips as far away from the Central Coast as Armidale and Coffs Harbour. That operation has been going for 20 years and, ironically, it recently announced that it will shut down as Coles Myer is shutting its distribution centre up there. That operation has operated for 20 years without a major accident. The reason is that that yard does not work excessive hours because it is a fully unionised yard. If any employer or manager came in and said to one of those drivers, "You must work an 18-hour day", they would simply say, "No"—end of story. It would not go any further than that.

CHAIR: Are you saying that this company is going out of business because of the announcement by Coles?

Mr CROSDALE: Coles has announced that they will shut down their Somersby distribution centre. That means that there is effectively no work for the employees of that company. We are currently going through a negotiation process to relocate them to another site. That site—some workers have been based there for the 20 years that the company has been in operation—has been major accident free. They have had some very minor scrapes, but certainly a major accident has never happened on that site. When you consider that about 90 drivers are based there that is a lot of drivers doing a lot of kilometres. Consider that every day there would be three or four trucks heading to Coffs Harbour or Armidale and out west to Dubbo and so on. They cover a lot of kilometres and they do it accident free because they cannot be put under any sort of pressure to do anything illegal, certainly in terms of fatigue.

Stripping away those protections that have allowed those employees to have that level of protection I think will have a very deleterious effect on safety—both their own and that of the general public. Road transport in New South Wales kills, on average, two people a week in truck-related accidents. They may not be truck drivers but someone taking the kids to school. A driver comes through who has not taken enough drugs or who simply does not want to but is being forced to do the hours, he falls asleep and crashes his truck. It is a horrendous record.

My working experience, both as a truck driver and as a union official, indicates to me that the one thing that stops those sorts of pressures on drivers is being able to say no, and certainly in more regional areas that I have had experience in it is very difficult. I have some other examples of what WorkChoices is doing to transport workers currently engaged on the Central Coast as well, much more local work, and I would like to come back, but I will let Tony have a say as well.

The Hon. IAN WEST: Can you clarify that two people a week in New South Wales—

Mr CROSDALE: Two people a week are killed in truck-related accidents.

The Hon. IAN WEST: In New South Wales?

Mr CROSDALE: In New South Wales. The number for the last year that we had statistics—I think two years ago—was 104.

Mr McNULTY: My experience in the courier industry as an owner driver dates back more than 20 years, going through companies owned by Mayne Nickless, Mayne Logistics and now I work for Toll, a multinational company. In our local fleet here we have close to 380 drivers. We are a fairly well-organised company, about 90 per cent union membership. Through that structure it is a very useful tool to talk to drivers to make sure they are on board with regards to safety, rates and conditions. The union has done a lot of good things for this industry over a number of years as well as, dare I say, Parliament has helped to introduce legislation in the past that has helped to protect owner drivers, who are very vulnerable in this industry.

One of those tools is chapter 6 of the Industrial Relations Act. I have to thank the Labor Party and the Liberal Party because both those parties through the years have helped to introduce legislation that has strengthened chapter 6, way back when it was instigated in the early 1960s. There has been

the Rolf report, a Liberal Party report done by Hilda Rolf many years ago. The outcome of that, through the Labor Party and the Liberal Party getting together, was to strengthen chapter 6 again. There was the motor lorry loophole some years ago in regard to courier drivers. That was another protection put in place to stop vulnerability in this industry, and also pushbike legislation was introduced a couple of years ago. There has been a fair amount of history between courier drivers and New South Wales chapter 6. Without that chapter 6 in place we would see the rates of pay not have a bottom rung in the ladder—basically it would always be pushed downwards. Through having those protections here in New South Wales we have gradually been able to keep our reimbursement of costs in place by yearly or over a couple of years increases in the minimum rate structure.

That minimum rate structure does not create a high benchmark. At present our minimum rate structure is $25.73 an hour. but it does not stop people from earning more than that. It is an incentive-based system here in New South Wales so it provides an incentive to the drivers who have the ability and the productivity nous to increase their earnings. As well as that there are also safety standards inside the industry in regard to driving hours and things like that. Inside our contract determination that we work under there are interaction systems so new drivers are inducted through levels of safety and things like that.

CHAIR: So that legislation, at least in part, gives independent owner drivers some of the rights or protections of employees, brings you within the ambit of the industrial relations system?

Mr McNULTY: Yes. It allows contractors who contract to a principal contractor—multilateral or whatever—the ability to collectively bargain incentive rates above that minimum.

CHAIR: Tell us a bit about yourself. Do you have a large vehicle or a small vehicle?

Mr McNULTY: I drive a small vehicle, just a white one-tonne vehicle.

CHAIR: Are you mostly around the city?

Mr McNULTY: I worked a number of years around the city and that was enough for me. I used to work between Chatswood and Mascot. That was a high-density area. Because of my experience I was able to do more work, turn over more work in that sense. We have one driver who works in the city all day. He is here for about 13 hours but he does not move south of Goulburn Street, but he loves his job because he has the protections there to help him earn way above the minimum.

CHAIR: So would you agree with Mr Crosdale's comments about the importance of the union representation and the ability to make sure the law is implemented and policed?

Mr McNULTY: Yes. That is what is so important. The companies that are highly unionised and can utilise the services of the union, the companies will not force their rates down or try other methods. It may have happened in the past before chapter 6 came in. Some companies would force their drivers either to work for less or would change their work yard agreements that were not of benefit to those drivers.

CHAIR: Given what you have said too, Mr Crosdale, the companies that do not fulfil their requirements, the companies that force people to drive longer or for less, does it not become a competitive advantage? What protects the companies that are keeping to the rules? What protects them against the competitors that are not?

Mr CROSDALE: It depends on the type of transport you are talking about. In some cases a transport company will provide a core fleet of its own vehicles and it will then contract out a percentage of the work to other fleets or to owner drivers or, indeed, to other fleets who then contract it to third-party fleets or owner drivers again. That mix will change as the contract becomes less profitable. A major company may have 50 of its own vehicles in there but once it may have had 10 contractors and it may change that mix or will contract out the work to someone potentially from Lismore or Tamworth who is servicing that area and has a different industrial relations basis and therefore a lower cost basis. That is the way many things are done.

Talking about the competitive nature of the industry, we are seeing at the moment a development called Internet tenders. The stage where it is currently in place is that people bid in real time for the work. Client X has a freight task which may be 50 loads a week going from Sydney to a range of non-metropolitan areas, and it will get the transport companies who are bidding to put in a price and that price comes up on the Internet. The next company says if we want that work we will have to put in a lower price. Then the next one puts in a lower price, until we get down to the contract being awarded to one of these transport companies. We know from experience that the rates they are going in at are significantly less than—in some cases, the contract is held by one company and it gets that contract renewed at a significant discount to what it was previously doing the work for.

I do not have to tell anyone here what the price of fuel is at the moment, but diesel fuel is equal if not more expensive than petrol, so costs are going up. However, the rates are coming down because people have been bidding against each other. The only way a transport company can then make money in that environment is to contract the work down the chain, if it is a major company paying its people properly. What then happens is, when you contract it down the chain, in transport it is fixed costs versus rolling costs. It costs you X amount of dollars to have that vehicle purchased, insured, et cetera, and sitting there, and the more you drive it, the more kilometres you can get it to do, the more profitable that vehicle becomes. Therefore, it feeds into the incentive to drive your drivers harder and longer and, as I say, I think WorkChoices just enables that more so.

That is how large companies who are getting paid a reasonable freight rate survive, by contracting some of it out. Others are in a very significant freight sector where it is difficult to compete, and some of those barriers to entry are the prices of equipment. Off the top of my head it might be fuel haulage, where significant training is required of drivers and where the price of a B-double fuel tanker is quite expensive. So you are probably looking at, truck and trailer, truck and two trailers, around $550, 000, $600,000. So, it is not easy for someone to come along with half a dozen of them and take the work.

CHAIR: We had the association of waste contractors and recyclers, the employers, in to talk to us last week. They made some similar points about their industry. They mentioned that the average modern garbage truck was $300,000 worth, or thereabouts, so it is not an industry where a cowboy can just hop in and tender for collecting this bit of garbage.

Mr CROSDALE: I might take issue with some of those points, though, simply by experience at the moment. Currently we have the waste collection contracts at Gosford and Wyong councils up for tender. The contract does not change hands for 18 months but the tender process is going on now. There is a form of open information sharing about contracts. As I understand it, each prospective tenderer can ask the council any question about it and the council publishes its response to each of the questions from all prospective tenderers without telling them who asked the question. One of the questions that was asked is what is the minimum rate of pay that we can use when tendering for this contract?

The response was the Government's fair pay and conditions standard. For a transport worker engaged in either collecting garbage or sorting it out in a municipal recycling facility, and there is one at Wyong, that is quite scary, because it is $12.75 an hour, the fair pay and conditions standard. The award rate of pay is $15.06 for someone who is sorting the product, and for someone driving the truck it is $17.28. So straight away the truck driver loses $5 an hour, that is the difference.

To bring it into more stark relief, I suppose, the people who sort the garbage are on a productivity-type basis and have other rates which brings it up to $21 an hour, depending on how the productivity goes at that particular time. We have calculated that if someone came in and bid for that work at $12.75 an hour with clauses in an AWA to compensate for holidays and sick leave, effectively comes to $12.75 an hour as a casual employee versus someone on $23 an hour with on costs. The average pay cut for a person to move from one rate to the other is about $350 a week. In the reusable recycling facility we have about 10 employees, that is $3,500 a week difference in wage rate. You do not have to think too hard to see who might be awarded five new contracts with a $3,500 difference a week. That is a significant incentive to someone to come in and bid at the WorkChoices fair pay and conditions standard rate. And I use the term "fair pay" advisedly.

CHAIR: You would see the race to the bottom being quite likely in that industry?

Mr CROSDALE: I think the starting gate is open and they are off at the moment. We are waiting for that contract to be awarded in about two weeks time. They are extremely concerned.

CHAIR: Is the labour cost proportionately high, low or medium in terms of equipment in comparison?

Mr CROSDALE: I am less sure of that environment than I am in general transport. I believe it would be somewhere between 35 to 45 per cent of the cost.

CHAIR: What is it in general transport?

Mr CROSDALE: The amortised cost of the trucks are over a longer period and they are not high kilometres like a long-distance interstate truck.

CHAIR: What is the figure for general transport?

Mr CROSDALE: Around 50 per cent.

CHAIR: Labour cost around 50 per cent?

Mr CROSDALE: Yes. It is very hard to generalise because of long distance and short distance.

The Hon. KAYEE GRIFFIN: For Gosford and Wyong was it two separate tenders, or did they tender together?

Mr CROSDALE: As I understand it they are being encouraged to undertake a joint tender. Prospective tenderers can either tender for the joint work or tender separately or can tender separately with a recycling component as well as a waste collection component. I am not sure what the straight answer is to that question.

The Hon. KAYEE GRIFFIN: Presumably whatever the tender process is at the moment, you said the tenders have closed?

Mr CROSDALE: Yes, the tenders have closed, it is about 14 days now until the council hands down the contract.

The Hon. KAYEE GRIFFIN: Both councils would have to make a joint decision or a separate decision, or the tenderers are just tendering for separate things, or may be a joint process?

Mr CROSDALE: Some tenderers have tendered for a particular area. We understand that some tenderers have tendered for Wyong work and others have tendered for Gosford work. Others have tendered for joint work with set criteria of how they want to do a waste collection and recycling component. Basically comes down to the type of bin that people use. Some processing can use two bins, some have a single bin with a split and some companies believe their expertise is in a different area.

The Hon. KAYEE GRIFFIN: Relating to local government recycling processes and the collection of household garbage with green waste and recycling, has your membership expressed concern in relation to an argument as to whether councils are constitutional corporations and changes that may occur because of that, depending on the High Court decision and also on possibly further legal argument?

Mr CROSDALE: I understand there are some issues that are waiting on the outcome of the High Court decision. However, because councils congregate to constitutional corporations, there is no question that if WorkChoices is upheld the rates of pay a tendering company can pay clearly falls under WorkChoices, as the High Court challenge has upheld. Regardless of whether a council is a constitutional corporation, a council is simply the client and the client says to three or four transport companies, "You are all corporations. Which one of you can do the work the cheapest gets the work."

Therefore, whether the council is a constitutional corporation or not, I understand there are legal issues about that. I do not profess to be a lawyer, although I am not a bad truck driver, but I know my limitations.

The Hon. KAYEE GRIFFIN: An example of the rate of pay currently given by Gosford and Wyong councils in the tendering process would be less than award rates and agreements that are in place at present?

Mr CROSDALE: That is correct. The council simply said that the fair pay and conditions standard is the minimum rate that can be used. It does not stipulate the processes. Obviously New South Wales awards are protected, or preserved, for 2½ years. Anyone coming in and engaging an employee would have to pay the minimum award rate. However, if an incoming contractor engaged its entire work force on individual contracts the rate can drop to $12.75 an hour.

The Hon. KAYEE GRIFFIN: The concern would not be so much about what may happen to local government entities but just what they are giving out as part of their tender documentation; what they see as the minimum rate. It certainly could happen down the track, as with Gosford and Wyong, there could be undercutting of award rates and conditions as they currently stand with some of the conflicts in local government waste contracts?

Mr CROSDALE: Absolutely. We are very concerned about that. We have made quite strong representations to the council asking it to make a condition of its tender that the existing enterprise agreements that are in place for companies that tender be used as the basis for those enterprise agreements for work under Gosford and Wyong contracts; that existing employees currently engaged by the two contractors, who have to work, be guaranteed ongoing employment with the new contractor; and, finally, that their entitlements be transferred over as part of that process.

This is quite typical in waste collection areas. We have someone who works for company A who has the contract for 4½ years. That is lost and company B comes in. I get finished up with company A, over to company B, company C, et cetera. I can be on contract, in some cases, for 20 years and never receive long service leave, because they are always being rolled over. We have made representations to the State government along that line. We would like to see people's service rolled over so that they have continuity over time, given the fact that they are doing their job for that period for company A or company B, whatever patch is on their arm. Also there is a degree of uncertainty every time a contract comes up. If the company I work for does not get the contract, and you do not get picked up by the incoming company, effectively you are out of a job.

The Hon. KAYEE GRIFFIN: Basically at the present time one concern that the Transport Workers Union has in relation to waste and recycling contracts is that when each new contractor takes over, if an entity chooses a different contractor, even though your members may be picked up by the next contractor, they have no guarantee that lots of cases that their service already has will be continued with the new contractor, or the fact that none of this counts towards long service leave?

Mr CROSDALE: That is correct.

The Hon. KAYEE GRIFFIN: As well as other entitlements?

Mr CROSDALE: That is correct. Typically an incoming contractor will not want to pick them up with their existing service. The incoming contractor will want to have been finished up by the previous contractor and employ them as new employees. Therefore, their service starts with them. If you pick up someone who has spent 4½ years with the previous contractor and you carry their service over, after they have been with you for six months they are building up their long service base in the event of redundancy. Contractors do not want that.

The Hon. KAYEE GRIFFIN: So their expertise is worth something to a new contractor but not the carryover of entitlements?

Mr CROSDALE: That is correct.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: If you are carrying that it would be a big disadvantage to hiring that person because they could come in with an added cost, in a sense?

Mr CROSDALE: Yes, that is not an unfair cost I would argue, but it certainly is a cost. I was speaking of someone who had worked in a job for 20 years and never received long service leave.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: That is a fair comment. A person who paid you off would have to put enough in the kitty for your long service leave. Presumably the reason they lost the contract was because they were not doing that well?

Mr CROSDALE: And also the fact that you have a legal entitlement in the case of long service of being paid your long service in the event of redundancy, but only after you have worked more than five years.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: That is why every one stops work at four years and 364 days?

Mr CROSDALE: Exactly.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: If a contractor wins and then another contractor wins, presumably the second one tenders lower than the first, presumably from a lower cost structure, or hopes for a lower cost structure. Does that mean that every time you get rehired to do the same job you are hired at less money? Or at least it is not going up with inflation?

Mr CROSDALE: Certainly not if you are engaged on the award. Secondly, if you are engaged by a major operator who has an EBA, the EBAs are brought in similar. So you might have major company A with a union EBA, major company B. Major company A loses the work, and major company B gets it and you get rehired by major company B, effectively your rate of pay—

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Similarly, it may be up or a bit down?

Mr CROSDALE: Yes. The big difference now is that the base level has gone down to $12.75 an hour if you engage people individually. It is a huge incentive. On the Central Coast I had a meeting of our members in Wyong where the drivers were standing around having pretty full and frank discussions. Someone made a very strong point about what they could do with their trucks if I was expected to drive for $12.75. Someone else said, "Hang on, whose wife here works?" Most of the hands went up at the meeting. He said, "Well, you are not going to get the dole, because your wife works. It is going to cost you around $150 a week to drive your car to Sydney and back if you have to go to Sydney to get a job every day." So the guy said, "I'm going to have to take this job. I don't like it, but I'm going to have to take it."

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: So that was a $5 an hour pay drop, which is nearly a third.

Mr CROSDALE: More than a $5 an hour pay drop, because I quoted you the award rates of pay. Those drivers up there are engaged on industrial agreements above the award.

CHAIR: You commented on the likely impact of the Independent Contractors Bill. This Committee's inquiry is into the WorkChoices legislation, but a number of witnesses have mentioned two other things which intersect with that; one is the Independent Contractors Bill and the other, which may not affect your works so much, is the welfare-to-work changes that came in on 1 July. What is the union's position? What are your views about the effects of the Independent Contractors Bill?

Mr CROSDALE: The rates of pay that Tony referred to are underpinned by, in New South Wales, contract determinations. Those contract determinations are a bit like, for want of a better term, an award for owner-drivers. The areas that they cover depend on the type of product. In some cases general freight, general carrying, the contract determination covers only areas in the County of Cumberland, the greater Sydney area if you like, and for trips which originate and terminate within 50

kilometres of its point of origin anywhere in the State. If you are picking up a load in Newcastle and taking it to Taree you are not covered by this contract determination,

Therefore, within the State, we can see the difference between people who are underpinned by the award, for want of a better term, and without it rates are significantly lower for single truck owner-drivers in the County of Cumberland in terms of that because the safety net effectively does not apply.

CHAIR: So all the people that Tony is talking about are covered because the people you are working with are all driving in the metropolitan area?

Mr McNULTY: That is right. The courier and contract determination that we work under protects anyone, in the job description, who picks up and delivers goods in the Sydney metropolitan area.

CHAIR: The comments you made earlier made it fairly clear that the WorkChoices legislation will impact on your industry workers in rural areas for the reasons you described but in relation to this protection for local rural work, there is actually an advantage because of the 50-kilometre clause?

Mr CROSDALE: Yes, although the other part of the jurisdiction under chapter 6 allows us to run reinstatement cases for owner-drivers but under WorkChoices there is no jurisdiction that covers the owner-drivers. With respect to the Independent Contractors Act we understand that the Federal Government has announced that there would be an exemption for owner-drivers within New South Wales and that chapter 6 will still apply, although the Minister has the power in the legislation to make changes after it is enacted, similar to the WorkChoices legislation. We hope that an incoming he or she continues to maintain chapter 6.

CHAIR: We have some evidence earlier from the Clothing, Textile and Footwear Union talking about the same sections and the same commitment from the Federal Government. They were not only drawing attention to that residual power in the Minister but what they saw as a bit of a conflict when you read the fine print of the legislation between some sections, which allowed exemptions or exceptions and when you went back and read other sections. I imagine your union would have the same concerns.

Mr CROSDALE: Yes, we are concerned about those areas.

CHAIR: What would happen if the rights you enjoy under the New South Wales legislation were not to be kept by the Commonwealth legislation? What would happen to your members?

Mr CROSDALE: I come back to the point that I made with respect to the macro sense that if the owner-drivers do not have those protections the rates are driven down and as an industry they have trouble making money as it is and many people go broke as owner-drivers in road transport. An even starker contrast is interstate owner-drivers because no contract determination covers across State borders. We see interstate drivers—I have been in this industry for 20 years and many of my mates are owner-drivers. Some have gone broke, some have been killed trying not to go broke, unsuccessfully.

One of the reasons I am not in the industry is because it is too hard and you cannot make a reasonable living. Part of that, as an owner-driver, is that I have seen horrendous things. When your entire business livelihood, house and family are on the line, without any protection and without a reasonable method to get a reasonable return out of your business, you will do whatever it takes to keep your vehicle going, if that is your only means of not having your house taken, and if your truck is your only means to make a living, to not have your truck taken.

CHAIR: Are you saying that the checking stations, the log books, the various road transport and RTA controls can be got around if people want to?

Mr CROSDALE: Never underestimate the average Australian truck driver when put under extreme pressure and their ability to be forced to step outside the normal checking processes. Logbooks can be falsified, weighbridges can be dodged. Dodging a weighbridges means it will cost

you a lot more to go around the weighbridge because you will have to travel further, so if you are going to overload and you are not going to go over a weighbridge, you may as well put a good overload on, so instead of putting an extra five tonnes on, you put an extra 15 tonnes on, in some people's eyes, which means that the truck is effectively 100 per cent overloaded, which has a whole range of vehicle safety issues. Once again, if it is a case of thinking you can get away with it by driving a little bit more carefully and hoping not to break any bridges on the way versus "I am about to lose by truck and my house", it is no contest for many people.

CHAIR: Tony, did you want to make any comment about the impact of the Independent Contractors Bill?

Mr McNULTY: I just want to talk about road safety. Road safety is compromised. Road safety does not become an option let alone the owner-drivers, truck drivers and others because the rates dictate what you are going to do for that day. When you wake up in the morning and you realise that you have got to earn a minimum amount of money just to keep that vehicle on the road, safety does not become an option. That is how I see it. If you have no chance of having a minimum standard of remuneration, as we have here in New South Wales, you will take those risks. Safety will not be an option and you will drive that truck as much as you can to earn enough money just to keep that truck on the road for the next day.

Couriers in New South Wales: compare the rates of pay in other States, where there is no chapter 6 or legislation to cover owner-drivers, basically there is no bottom rung of the ladder, they keep on falling down and down, and when they work for multinational companies, there is no ability to negotiate with a multinational company if you have no union representation, which most of the other States do not have—say you compare the minimum rates for courier drivers here in New South Wales and other States, there is about a 20 per cent difference: It is about $21 an hour in Victoria; $18 an hour in South Australia and round about on average $17 an hour in Brisbane. We all do the same type of job.

But in New South Wales we have protections that ensure that I can keep my vehicle on the road. I can earn a minimum amount of money to at least cost recover. I will put my vehicle in for a service when it needs to be done, not when I have the money. If I need to change the tyres, I will change them because I know I will be recompensed through the structure here in New South Wales to recover the costs of operating my vehicle, so if the tyres are running low, I will change them, I will not wait another two, three or four weeks, and the same with the brakes.

There is no pressure on me to change my maintenance schedules on my vehicle here but some drivers from the other States have told me that the squeeze is on them, especially in regards to fuel at the moment. Their wages are not going up, they are not being recompensed for the cost of fuel so they have got to find other methods; whether it is to drive longer hours.

CHAIR: So all the costs, such as fuel, is on the owner-driver?

Mr McNULTY: Yes.

CHAIR: You basically do the job and however much fuel or maintenance expenses it costs you, that is it?

Mr McNULTY: Yes. As an owner-driver I run and operate the vehicle and I pay all the costs, fuel and everything. One of the benefits we have in New South Wales is a fuel levy, which has been provided to our contract determination via chapter 6 for courier drivers. It is a 4 per cent fuel levy, which helps the costs at the moment with the high fuel prices. If for some reason by magic fuel goes down below a certain level we will lose part of that fuel levy but that is part of the contract determination that has been negotiated by the union with the principal contractors here in this State.

With regards to drivers from other States who do not have those protections, you might have a good employer who will look after you, but when that good employer is put under pressure to compete against other companies which do not have safety nets, the cost of the contract might mean him having to drop the rates to compete because there is no bottom rung on the ladder in the other States; it just keeps driving things down and ultimately you can only get to a certain point of driving

the costs down and before long ultimately you start bargaining with time. You all have contracts to pick up and deliver certain items, "We will pick up and deliver that item in one hour", and all of a sudden you start competing with time and contract drivers are actually forced to get into contracts that relate to time based schedules, which puts not only him at risk but the public at risk and that is what we do not want in New South Wales. Having a contract determination allows us not to have those sorts of unfair type contracts here in New South Wales.

CHAIR: Is the industry dominated by owner-drivers? Do principal contractors prefer or mandate the use of the owner-drivers rather than their own trucks?

Mr CROSDALE: Depending on the industry.

Mr McNULTY: Yes, in what you call the same day courier industry I think it fluctuates between 4,000 to 5,000 just in the Sydney area, I would say that over 90 per cent of those same day couriers are owner-drivers because it is a cost thing. Companies do not want to put a vehicle on the road and pay all the expenses. The company that I work for one has about 380 drivers. We have only two employee drivers. The company rents two vehicles for the week and puts two employees in that, but that is as far as that company will go. Not too many other companies actually do that. Most of them are owner-drivers.

CHAIR: Mark, you said depending on the specialised nature of the goods carried.

Mr CROSDALE: It can be specialised or just the particular segment.

CHAIR: Say cement trucks for instance. Are they owner-driver?

Mr CROSDALE: It is about 50:50, may 60:40 in the Sydney metropolitan area bias towards the owner-drivers.

CHAIR: If you fall out with your company you are stuck with the truck.

Mr CROSDALE: Yes. Owner-drivers are slightly different because we have got collective agreements for all the major concrete companies but I will give an example. I was up in the Hunter Valley on Wednesday speaking to a guy I have known for 30 years who is an owner-driver. Let me tell you, if you have survived for 30 years without ever going broke, you actually know your business pretty well. When I first met him my dad got him to agree to teach me how to drive because my dad was a truck driver, but I was too young, so I had to wait a couple of years and someone else taught me—it gets in the blood, road transport.

I was talking to him on Wednesday and he told me that he had not had an increase in the rate that he was getting for the job that he was doing carting outside of the contract determination area from Newcastle up to the Hunter Valley in 12 months. His fuel bill is $6,000 a month. You think of the increase in fuel prices over the last 12 months, and he is carrying explosives! If something goes wrong it will go wrong in a big way, so he is under more and more pressure. He said, "I don't want to do this. I have had enough but what else do I know how to do. But I have got no option." They cannot bargain collectively because of minimal barriers of entry into that particular segment of the market and that company can bring in new people at any time, so, yes, if he does fall out with his company—

CHAIR: Does he have a very specialised truck?

Mr CROSDALE: No, he has a tipper, just a tipper that can be used for grain or coal. He carts this particular product.

CHAIR: What about people who do have highly specialised vehicles?

Mr CROSDALE: Often they are covered by a collective agreement because, once again, of the highly specialised nature and I would think of bulk cement haulage, where you have large pneumatic tankers where if you buy it, own it and do not cart it for someone else, it is probably around $350,000 now. Plus you are looking at another quarter of a million dollars for a prime mover. Once again it means if you are going to go into that segment of the market you need to have a reasonable

return and it means that you are quite specialised and can therefore bargain and get a registered agreement under chapter 6. You have also got the protections of someone running a reinstatement case for you if you are dismissed.

CHAIR: Getting back to our terms of reference specifically, in the period up to 2009 most of the people you are talking about are protected against the WorkChoices legislation and if the Federal Minister's promise is correct you are protected in terms of the independent contractors legislation. Is that a fair summary?

Mr CROSDALE: No, I do not think any employee is protected from the WorkChoices legislation because, first, if you have under 100 employees you have got no unfair dismissal. Second, any employer regardless of whether they covered by the preserved State award or by an EBA can be forced onto an individual contract.

CHAIR: You gave us the example about the tenders being reduced to the award at Gosford and Wyong and you are talking about an industry where a lot of people are on above-award payments so the impact is being felt already?

Mr CROSDALE: Yes. You have also got the situation where I believe there is going to be a review of the independent contractors Act in about a year's time. I am not overly certain of that but that also gives a level of uncertainty to those protections. We talked about the mechanism whereby it can be reviewed at any time anyway.

The Hon. IAN WEST: The protections in relation to chapter 6 of the New South Wales Act, not to anything else. You are still subject to all those other problems with WorkChoices, for example, the unfair dismissals?

Mr CROSDALE: Yes. Also, in relation to the terms of reference and individual contracts, the AWAs, I want to relate an example of an individual contract that we have come across. We had a group of employees who were engaged on a collective agreement doing a seasonal transport task up on the far North Coast. There were about 100 employees, quite a large transport task with one client across three major basis. Some of those employees had been there 10 or 12 years with that company which every year would engage them to do that work. We were just finalising a new enterprise agreement and another company came in under the old legislation, the old workplace regulations Act and won the work and offered to only engage these seasonal contractors on an individual contract that broadly replicated the EA that we had negotiated which was once again underpinned by the New South Wales State award anyway.

Now with WorkChoices coming in the company has just picked up a new job out in central western New South Wales to fill in the period where the trucks were not engaged. The rates are lower but one of the most horrendous things I have seen in this contract is a clause that says that if you damage the vehicle you authorise the employer to deduct the money from your wages until such times as that amount is paid off—no qualifiers. My point would be that if you were unfortunate enough to roll over a vehicle and do $70,000, $80,000 or $90,000 worth of damage to that vehicle you effectively are working to pay that off at an agreed amount. You have to pay that back over—once again you are a seasonal worker—the season and work for nothing for the rest of that season if you wish to keep your job.

Alternatively, I would imagine you could be terminated because I think the corporate entity that engages them has got less than 100 employees for rolling the truck. All your entitlements would go to pay the damage. Maybe they could even think about taking some sort of action against you to recover any further monies. This is bringing industrial relations to a whole new low.

CHAIR: What would be the current practise in relation to damaging a vehicle?

Mr CROSDALE: The vehicle is insured by the person who owns the vehicle and repaired by the insurance company. As a professional you work very hard not to damage the vehicle but accidents do happen. I would argue that accidents are more likely to happen if you are working at a lower rate of pay and have to work harder to make the same amount of money and have to do what you are told because you are concerned about your job going.

CHAIR: You wonder about the legality of some of these clauses but the problem is where is the tribunal to deal with it.

Mr CROSDALE: Exactly.

Mr McNULTY: Even in our own industry there are certain statutory requirements that owner/drivers have to have throughout all the contract determinations here in New South Wales. Things like public liability, transit insurance, cargo insurance and also vehicle insurance are what each owner/drive has to have.

CHAIR: Before they can get a job?

Mr McNULTY: Exactly, he has to show documentation that he has those insurances. That is only through chapter 6 and contractor determinations. In a way chapter 6 is not only for owner/drivers it also helps protect the companies as well so the companies can use this legislation to actually say to their owner/drivers that are in employment that they must have this, this and this. All those statutory requirements are there in place but in the other States there is no legislation to say that they have to do that. There are cowboys out there who do not have those types of insurances, public liability, transit and cargo insurances and are out there uninsured. So if accidents happen and other people's property is damaged the reality is there will be no recompense for insurance company claims through that system. But in New South Wales we have those things.

CHAIR: What do you want to see come out of this inquiry? Given our role as a New South Wales parliamentary Committee what can we recommend that would help your members?

Mr CROSDALE: From a road transport perspective and the position of employees generally—I do not want to detract from that—I would argue that the protections we have under the New South Wales Industrial Act both for employees and owner/driver's have a direct impact on our ability to regulate safety in road transport. So if I had a perfect world I would ask that you recommend that road transport employees and owner/drivers be given an exemption from WorkChoices and from independent contracts on a permanent basis. We have a significant difference to other industries where if someone fatigued on a building site falls over and falls over a building site they will hurt themselves and they may hurt some others—and I do not seek to detract from the seriousness of that. However, when people in our industry fall asleep they can take out a school bus and drive through a bus stop or crash into a shopping centre. We touch every community across New South Wales and Australia.

We have a proven bad record of safety in our industry and people often pass off track crashes as accidents. They are not. They are workplace accidents and if two people a week were killed walking past building sites in Sydney I am pretty sure that there would be some swift legislation and perhaps a royal commission at a national level into safety in that industry. Yet our industry seems to have to survive, and in some cases not survive, with a level of casualties and fatalities that is horrendous.

CHAIR: Because they are seen as road accidents, not workplace accidents?

Mr CROSDALE: Yes. No-one gets into a truck on a Sunday afternoon 500 kilometres from home because they are out for a Sunday drive: they are going to work. They are at work. Single vehicle accidents are rife in our industry. Once again I would argue if you have a professional long-distance truck driver who does 200,000 or 250,000 kilometres a year driving down a straight stretch of road on a fine night and finds themselves on their lid in a ditch, and potentially could be dead, what happened? I would argue the driver went to sleep. I know certainly from my experience I have gone to sleep behind the wheel after being pushed. I was lucky that I did not cause damage to myself or someone else as I happened to be out the back of central Queensland but it happens. Our industry is rife for exploitation and I think for that reason if we had made a case for exemption for owner/drivers from independent contractors ideally I would like to see our industry exempted from WorkChoices.

CHAIR: A lot of other industries—

Mr CROSDALE: I do not want to detract from the importance of their position.

(The witness withdrew)

(The Committee adjourned at 4.25 p.m.)