COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

Corporate avoidance of the Fair Work Act 2009

(Public)

WEDNESDAY, 15 MARCH 2017

MELBOURNE

BY AUTHORITY OF THE SENATE

[PROOF COPY]

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

To search the parliamentary database, go to:

http://parlinfo.aph.gov.au

SENATE

EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

Wednesday, 15 March 2017

Members in attendance: Senators Marshall, McKenzie, Sterle.

Terms of Reference for the Inquiry:

To inquire into and report on:

The incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* with particular reference to:

(a) the use of labour hire and/or contracting arrangements that affect workers' pay and conditions;

(b) voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions;

(c) the use of agreement termination that affect workers' pay and conditions;

(d) the effectiveness of transfer of business provisions in protecting workers' pay and conditions;

(e) the avoidance of redundancy entitlements by labour hire companies;

(f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;

(g) the approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions;

(h) the extent to which companies avoid their obligations under the *Fair Work Act 2009* by engaging workers on visas;

(i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations;

(j) legacy issues relating to Work Choices and Australian Workplace Agreements;

(k) the economic and fiscal impact of reducing wages and conditions across the economy; and

(l) any other related matters.

WITNESSES

CAMERON, Mr Andrew (Charles), Chief Executive Officer, Recruitment & Consulting Services Association 40

CHAPPEL, Mr Anthony, Head, Government and Community Relations, AGL Energy 23

DAVIS, Mr Ben, Secretary, Australian Workers' Union Victoria 31

DINON, Mr Alan, Member, Victorian Branch, Electrical Trades Union 6

DRAICCHIO, Mr Daniel, Member, National Union of Workers 15

FITZPATRICK, Ms Keelia, Coordinator, Young Workers Centre 54

HEMINGWAY, Ms Catherine, Employment Project Senior Solicitor, WEstjustice 47

HILAKARI, Mr Luke, Secretary, Victorian Trades Hall Council 15

JACKSON, Mr Douglas, Executive General Manager, Group Operations, AGL Energy 23

KERSHAW, Ms Ruth, Director, Strategic Research and Special Project, Victorian Branch, Electrical Trades Union 6

KOSTELNIK, Mr Andre, Production Operations Manager, Esso Australia 1

LEWIS, Ms Claire, Organiser, National Union of Workers 15

McCARTHY, Ms Penny, Client, Young Workers Centre 54

MILLWARD, Ms Alison, Volunteer, Young Workers Centre 54

MOORE, Ms Heather, National Policy and Advocacy Coordinator, The Salvation Army Freedom Partnership to End Modern Slavery 47

MUJKIC, Mr Dario, Industrial Officer, National Union of Workers 15

NGUYEN, Mr Michael, National Research Officer, Australian Manufacturing Workers' Union 6

NOONAN, Mr Dave, Assistant National Secretary, Construction, Forestry, Mining and Energy Union 31

OWEN, Mr Richard, Chairman, ExxonMobil Australia Group of Companies 1

ROBERTS, Mr Tom, Senior National Legal Officer, Construction, Forestry, Mining and Energy Union 31

SCHWEIGERT, Mr Simon, Manager, Government Relations and Media, Recruitment & Consulting Services Association 40

THOMAS, Mr Andrew, National Industrial Officer, Construction, Forestry, Mining and Energy Union 31

WELLS, Mr Mike, Area Procurement Manager, Esso Australia 1

KOSTELNIK, Mr Andre, Production Operations Manager, Esso Australia

OWEN, Mr Richard, Chairman, ExxonMobil Australia Group of Companies

WELLS, Mr Mike, Area Procurement Manager, Esso Australia

Committee met at 08:29

CHAIR (Senator Marshall): I declare open this hearing of the Senate Education and Employment References Committee's inquiry into corporate avoidance of the Fair Work Act, and I welcome you all here today. This is a public hearing and a *Hansard* transcript of the proceedings is being made. The hearing is also being broadcast via the Australian Parliament House website.

Before the committee starts taking evidence, I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee generally prefers evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will then determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, be made at any other time.

I now welcome representatives from Esso Australia. I understand that information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I now invite you to make a short opening statement, and at the conclusion of your remarks I will invite members of the committee to put questions. I understand you are on a very tight schedule and really appreciate you making an effort to appear before the committee in person today. We will make sure we finish either precisely on time or in fact early, if we can. Mr Owen?

Mr Owen: Thank you and good morning. I am the Chairman of the ExxonMobil Australia group of companies, which includes Esso Australia, which operates the Gippsland Basin Joint Venture. The operation is a fifty-fifty joint venture between ExxonMobil and BHP Billiton. I am here today with our Australian Production Operations Manager, Andre Kostelnik, and our Area Procurement Manager, Mike Wells. Our Gippsland operation is currently producing oil, which is primarily used as a feedstock to local refineries; LPG, which is used by motorists and industry and serves as a feedstock to local chemical manufacturers; and natural gas, which makes up nearly 40 per cent of the eastern Australia domestic gas market.

I understand this committee is examining potential concerns regarding alleged corporate avoidance of the Fair Work Act, and I want to make it clear up-front that ensuring compliance with the law is of the utmost importance to my organisation. We have been a successful company in this country for over 120 years, and the key to that success has been our uncompromising commitment to being a good corporate citizen; maintaining high ethical standards; obeying all applicable laws, rules and regulations; and, above all, dedicating ourselves to running a safe and environmentally responsible operation.

We strive to be at the leading edge of competition in every aspect of our business and we ensure that our work practices comply with all laws, agreements and legislative obligations. We also hold the many vendors that we work with to that same high standard. Our vendor tendering process requires prospective contractors to demonstrate compliance with industrial relations requirements, including meeting relevant awards, agreements and legislative obligations.

I appreciate this opportunity to clarify our position on this important issue and I think it will help the process today if you understand exactly what it is we are trying to achieve. As an engineer, I like to be clear about our goals. With the Gippsland Basin Joint Venture, we are helping the nation to develop the Bass Strait resources wisely and responsibly. This means ensuring that our resources—financial, operational, technological and human—are employed wisely and evaluated regularly. This is a capital intensive, complex and dynamic industry, so we always maintain a long-term approach. There are many aspects to our industry that we cannot control, not the least of which is the fluctuating commodity markets. Therefore, it is imperative that we concentrate on the aspects that we can influence, and we are striving to improve efficiency and productivity through learning, sharing and implementing best practices.

There is a great deal at stake here, as I am constantly aware of the fact that there are many thousands of jobs across Australia's southern and eastern states that rely on the products that we produce in the Bass Strait. There is

hardly an industry in this country that is not dependent in some way on receiving reliable, affordable gas—industries involving things such as construction, chemicals, health, hospitality, food and farming. According to a recent study by ACIL Allen, our Gippsland operations have added over $570 billion to Australia's GDP. That is in real terms based on today's dollar value. It is equivalent to more than $780 for every man, woman and child in this country for each year of operation over the past 40 years.

Gas is in high demand in the east coast market right now. We have just invested $6 billion in order to maintain our gas production at its current level. Due to market conditions, we are implementing fundamental changes. We are high grading assets and looking at other efficiencies and cost savings to reduce our unit cost of production. In the Gippsland Basin we have seen this through a range of recent initiatives. We have changed the way that we operate some of our offshore platforms where the economics have been challenged by higher operating costs and declining production. We are exploring opportunities to market some of our offshore oil basin fields, licences and associated offshore infrastructure, as well as seeking proposals from potential new operators who would be able to better utilise our Barry Beach Marine Terminal, which is significantly underutilised. We also recently sold our Southbank office building here in Melbourne.

The objective is to ensure that our business remains competitive to attract the necessary operational and capital investments that will allow us to pursue further gas resource developments in the Bass Strait. That means that we need to review every aspect of our business to ensure that we are extracting maximum value from the resources we employ. Like any other business or individual, for that matter, we review the many goods and services that we procure on an ongoing basis to ensure that they align with our current needs and what the market can provide. We are ultimately delivering value so that we can continue to invest in our operations and continue delivering resources to the nation. We are happy to take questions.

CHAIR: You recently switched a contract from Sodexo to ESS for catering and cleaning services. Why did you do that?

Mr Owen: We routinely review our contractors, as I just said, to make sure that we have value for money. We periodically will have an open tender process to make sure that we have the most competitive pricing that we can get.

CHAIR: Did you know what agreement ESS was proposing to employ its new staff on?

Mr Owen: When we tender, we ensure that companies have agreements in place and that they meet all of the legal obligations and requirements of the Fair Work Act. That is part of the pre-tender qualification process. In fact, before we will agree to a panel of companies that might bid on any work that we do we make sure that they can meet our safety requirements and quality requirements and that they meet all of the laws and regulations they are required to.

CHAIR: Did any of the proposed new workers for ESS vote for the agreement they are now covered by?

Mr Owen: With respect, I think that is a question for ESS. We do not get into the individual relationships between the workers and the contractors in ESS.

CHAIR: You told me that you are a good corporate citizen with high ethical standards and that you hold your vendors to the same high standards. Well, would you do such a thing? Would you employ people on an agreement which none of them have the ability to vote on?

Mr Owen: As I said, we tender. We make sure that contractors have an agreement that meets the legal requirements in place. Then when they come in we make sure that there is a smooth transition from one contractor to another. I will just go back through a little bit of history here. ESS was the prior incumbent in this contract. Sodexo had the contract for about 10 years. During that period, we reviewed whether we wanted to go to the market to tender the contract perhaps every five years. Prior to Sodexo having it, ESS, then under the name Eurest, had the contract for about 20 years. During that period, they also participated in competitive tenders. So the process we go through is to make sure that we are achieving the requirements for both food quality and cleaning standards. That is what we are setting. Then we go to the market to test what the market can provide.

CHAIR: Are you suggesting that you are righting a wrong by now engaging ESS when they had the contract previously?

Mr Owen: Not at all. In fact, many of our contracts will change from one contractor to another. It depends on what a contractor can provide in efficiencies because of their logistics, supply chain and management processes.

CHAIR: Are you aware of how much lesser wages ESS are going to pay as opposed to Sodexo?

Mr Owen: I am not aware of the individual wage agreements between ESS workers and their management.

CHAIR: Were you aware that no Sodexo employees are going to be employed by ESS?

Mr Owen: I am not aware of that either. When ESS came in they went through a process of hiring. I believe that they offered workers. I also know that they are continuing to look at hiring local workers for the positions that are available.

CHAIR: Do you think it is fair that working people pay for your efficiencies with their jobs?

Mr Owen: We are looking after the long-term jobs that we have for a very long-term focused company. We are looking at making sure that we procure the highest quality and lowest cost goods and services that will allow us to maintain long-term and affordable energy for the country.

CHAIR: So you think kitchen workers and cleaners should pay for that with their jobs?

Mr Owen: Excuse me, Chair, but we are not talking about a reduction in the number of jobs in the Bass Strait or onshore. The number of jobs are approximately the same. We are talking about a contract company that can provide that service more efficiently.

CHAIR: So do you think that those people who were employed by Sodexo for 10 years doing that work who now do not have jobs deserve to pay for those efficiencies you just mentioned with their jobs?

Mr Owen: I think it is very unfortunate if people lost their jobs in this process, but our role is to make sure that we are providing reliable and affordable energy out of Bass Strait. I do know that Sodexo is a very large organisation and I would expect that they have looked at providing jobs elsewhere for those people who were displaced.

CHAIR: How much money are you saving on that contract?

Mr Wells: How much we save is related to how much we spend and to the volume of activity we have in Bass Strait.

CHAIR: But you got a new contract. One was cheaper than the other. Tell me how much you saved.

Mr Wells: Somewhere between 20 per cent and 30 per cent on an overall basis.

CHAIR: What is that in dollar terms?

Mr Wells: That would probably be in the range of $6 million.

CHAIR: How many employees were there in the catering and cleaning division?

Mr Wells: I would say approximately 50 to 60. I do not know the exact number.

CHAIR: Do you think you should know exactly?

Mr Owen: We are operating an oil and gas business, as you know. Part of that business is operating offshore installations and plants onshore. As part of the operations of those, we have arrangements with our workforce that have been negotiated that are around the standards of meals being provided as well as cleaning. As part of the process of continuing to run our business, we continually review the services that are provided. We seek, as I think any one of us would do in our individual arrangements, to provide cost-effective services.

CHAIR: I do get all of that. I am just wondering why it is cleaning workers and catering workers who pay for that with their jobs. Their livelihoods are completely and totally gone. I think Australians are getting sick of this, to be honest. Do you think Australians are getting sick of this—that people with those jobs are paying for multinationals' slivers of extra profit with their jobs?

Mr Owen: I would like to reflect back on the business that we are in. Part of that business is maintaining the supply of energy to Australia. We are the largest domestic supplier of gas in Australia. We are running a refinery in Australia. We are providing oil from the Bass Strait operations to our local refinery in Australia. As part of the running of that business, we are very mindful of the needs of all Australians. Part of the process of running those business is making sure that they remain profitable. We currently have three platforms in Bass Strait that are shut in because they do not make any money. These are shut in because we have not been able to reduce our operating costs to the extent that we can maintain a profitable business.

CHAIR: We will come to that. What is the reduction in wages for these workers with the new contract?

Mr Owen: We do not have visibility on their wages. We are contracting to ESS. Questions on the relationship between ESS employees and their management need to be addressed to ESS.

CHAIR: How do you know that they comply with the law, then?

Mr Owen: We make sure that they have a certified fair work agreement that is covered.

CHAIR: So you were not aware that the wages were being cut on average $40,000 a year under the new contract?

Mr Owen: Whose wages?

CHAIR: The wages of the catering and cleaning workers. **They are different workers, but under the new contract the wages are $40,000 a year on average, I am advised, less than what they were.**

Mr Owen: If you are asking me what I expect, I expect that they have negotiated an agreement with their workers. They have workers who are being paid above award wages, I would expect. And I would expect that they have the right structures and scale that they can provide efficiencies while still meeting our requirements for catering quality as well as cleaning quality.

CHAIR: I am glad those are your expectations. Would you be surprised to know that the agreement that gave them the $40,000 wage cut was negotiated with a handful of workers in Western Australia who are not working in Victoria under these arrangements? Do you think that is ethical practice?

Mr Owen: Again, I think these are questions for ESS rather than us.

CHAIR: So you do not hold your vendors to the same ethical standard that you hold yourselves?

Mr Owen: We do hold our vendors—

Senator McKENZIE: That is not what Mr Owen said, Senator Marshall.

CHAIR: No, I am putting that as an accusation.

Senator McKENZIE: You are putting words in his mouth.

CHAIR: No, I am putting that as an accusation to him. You said earlier, Mr Owen, that you hold your vendors to the same high ethical standards that you apply. But whenever I ask you about some of these details about ethical practices, you say it is a matter for someone else.

Mr Owen: With respect, our process is not to run ESS's business. It is not our business. Our business is the production of oil and gas in Australia. We contract services out and we go through our due diligence to make sure that those contractors meet our safety standards and that they comply with the laws.

CHAIR: What was the executive wages bill last year?

Mr Owen: I do not know. We will have to take that question on notice.

CHAIR: What was the executive wage increase last year?

Mr Owen: In the current cycle, that varied depending on people's careers from zero to probably two per cent.

CHAIR: No-one would have had a $40,000-a-year wage cut?

Mr Owen: If you are talking about our company and the business that I am running, no, no-one did.

CHAIR: I am just trying to differentiate between cleaners and kitchen workers whose wages get reduced by $40,000 per year and anyone else. People are paying for these efficiencies with their jobs. New workers who are coming in to fill those jobs are paying for those efficiencies with substantially reduced wages. It does appear that it is kitchen workers and cleaners who are paying the bulk of the price here.

Mr Owen: With respect, if you want my view, it is that the wages that are being paid are market rate wages. I think that they are very comparable, although I do not have visibility on them, to what we would understand wages are around the country for similar services. I am not sure what data you have available to you. Perhaps you actually have their annual wage rates.

CHAIR: So how do you know they are comparable with other industries? You told me before that wages were a matter for them and you did not know what the wages were.

Mr Owen: The way we determine whether they are comparable is by going to a larger tender pool to make sure we are getting value for money. We went to a panel of eight bidders, including the incumbent, to see what the market was providing.

Senator McKENZIE: The company that won through that tender process—the range was wide? Or were there certain outliers within that, including your previous tender contract?

Mr Owen: I did not actually review the individual data. I will again defer to my area procurement manager.

Mr Wells: The range was up to the 20 per cent to 30 per cent I referred to earlier, and it was probably reasonably evenly spread through that range.

CHAIR: Let us move on. In August 2016, did Esso apply to have any of their certified agreements terminated?

Mr Owen: I would not know the exact date, but, yes, we sought to terminate both our onshore and offshore agreements under section 226 of the Fair Work Act.

CHAIR: Why was that done?

Mr Owen: We had been negotiating a range of efficiencies and wage increases with our workforce for about a two-year period. We had had more than 50 meetings with the union organisers and their workforce delegates. We were not seeing much progress in those negotiations, so we sought to terminate the agreements to try to bring the negotiations to a head.

CHAIR: So it was a bargaining tactic?

Mr Owen: It is one of the paths within the Fair Work Act to essentially get to an end point, rather than ongoing negotiations.

CHAIR: All right. Did that work?

Mr Owen: We did not get to see: prior to a ruling on whether the section 226 would have been granted, the workforce threatened quite significant industrial action, which led to intervention by the Victorian government and the termination at the bargaining period.

CHAIR: Is that why you chose to stop the termination proceedings?

Mr Owen: We did not choose to stop; it was ruled on. It was a determination by the Fair Work Commission.

CHAIR: Was it? All right. What would have been the effect of terminating the agreement?

Mr Owen: It would have probably changed the dynamics of the negotiation and probably led to an outcome.

CHAIR: Thank you, we have no further questions. As promised, you will get out slightly early. You have agreed to take a couple of questions on notice. We may have a couple of other questions, which we will put to you on notice, when we review the *Hansard*. If you would be kind enough to answer those, that would be much appreciated by the committee.

Mr Owen: Most certainly. Thank you very much.

DINON, Mr Alan, Member, Victorian Branch, Electrical Trades Union

KERSHAW, Ms Ruth, Director, Strategic Research and Special Project, Victorian Branch, Electrical Trades Union

NGUYEN, Mr Michael, National Research Officer, Australian Manufacturing Workers' Union

[08:56]

CHAIR: Welcome. I understand that information on parliamentary privilege has already been provided to you. Is there anything you would like to add to the capacity in which you appear today?

Mr Dinon: I have recently retired, but I am a member of the ETU. Prior to that, I was working at CUB, where I was part of this disadvantagement that took place.

CHAIR: We have received your submissions. We are very keen to hear from you, after which we will ask you some questions.

Mr Nguyen: On behalf of the AMWU's members, I would like to sincerely thank the committee for inviting the AMWU to provide evidence today, in addition to the evidence that our members have also given in Collie and in Ballarat. In my opening statement today, I will highlight some key points from our submission. I would also like to, if the committee pleases, add some additional information that has come to light in relation to the Esso case study, which we mentioned in our submission, and also provide an update on the situation with the Fair Work Commission in relation to our request for information.

In terms of the key points from our submission, wage growth is currently at record lows. It is not unreasonable, we would say, to think that this is partially because of the loopholes that we have identified in our submission, which are creating this disconnect between employees and the wealth and the value that they are creating in the economy. The various loopholes, which we have addressed in our submission, highlight that employers are successfully hiding away from workers that they should be bargaining with and should be negotiating with about their share of profits.

We see from the cases that we have highlighted that the workers who are allowed in the door to bargain are casuals with no rights to unfair dismissal and no personal capacity to pursue legal actions. Even long-term casuals who do have access, because of their status as casuals, work in an environment of fear of losing their jobs if they do speak out. Personally, from my experience in interviewing casuals and long-term casuals for witness statements in various proceedings, they are very fearful for their positions and their employment.

The cases also highlight that there are workers in a small number of classifications that are being asked to approve agreements that eventually will cover a much larger group of classifications and workers. These loopholes are resulting in a distorted form of collective bargaining. Rather than collective bargaining that maximises employee bargaining power, we are getting collective bargaining that effectively mutes employee bargaining power.

Contracting and labour hire is another loophole that has really gotten out of hand in recent times. It is not a new phenomenon; it is something that has been happening over a long period of time, but we are really now starting to see the effects of this long-term utilisation of contracting and labour hire. Employers are successfully shielding their profits from the demands of workers by making a third party employ the workers which shields them from having to take any responsibility and, as you saw this morning, and having any concern or care for the welfare of those workers.

Also, we are now seeing the mutant form of labour hire and contracting, which is the gig economy, where they effectively remove the contracting company altogether and try and make the employees into contractors. Having been able to evade the demands of workers through contracting arrangements for a long time, employers are now shifting to a new form of this mutant labour hire arrangement. We see examples throughout the economy now with companies such as Uber, Deliveroo, Airtasker and such—called the gig economy.

There have to be changes to allow employees to collectively bargain with the company that they are generating value for through their work. Responsibility has to be borne by companies for workers that they are effectively getting a lot of value from. Central to being able to collectively bargain as a worker is having full rights as a worker. The existence of long-term casuals is eroding the ability for workers to come together collectively with full rights, whether those rights are real or perceived. We know, of course, that employers will say that long-term casuals effectively have a range of rights under the act, but in reality whether or not those long-term casuals can exercise or make use of those rights which exist under the act needs to be looked at very closely by this committee.

If there are not wholesale changes to the way that contractors and labour hire employees are able to bargain, there should at least be short-term fixes to stop these employees from being robbed of their access to entitlements. A few of these changes that we have recommended include ensuring that redundancy is payable by contractors and labour hire companies when they change or lose contracts; and ensuring that casuals are able to convert to permanent employment either with the contractor or with the host for whom they have been working for a long period of time—in some cases, as you heard this morning, up to 10 years through a labour hire company for a host employer. So it makes sense that those casual employee should be able to shift to permanent employment with the host company for whom they are generating value.

The most important fix that needs to occur immediately is to stop the termination of agreements during bargaining. It is fundamentally unfair for employers to wipe away successive collective agreements where employees in the past have bargained for wage increases in exchange for productivity and other efficiencies. It is fundamentally unfair for those agreements to suddenly be wiped away in the middle of a current round of bargaining, and, from what I have read, the decisions do not take into account the fact that previous rounds of bargaining have already taken into account productivity and efficiency exchanges between an employer and employees.

I have some additional information in regard to the Oceaneering agreement, which is the contractor providing non-destructive testing services to Esso. This is the case study which is at paragraph 75 of our submission. We recently obtained the F17, which is the employer stat dec for the Oceaneering agreement, which is the agreement to cover the employees who are to do the non-destructive testing. The F17 claims that the agreement is to cover only three employees. This is prima facie evidence of another agreement made with few employees but which subsequently goes on to cover many more employees. The stat dec also says that it intends for the agreement to apply Australia wide. We know that the F17 was signed in WA and, of course, now the agreement intends to cover workers at Esso in Victoria. Our members who worked for ALS, which is the old contractor, reported to us that they are being offered contracts with about a 10 per cent cut in wages. These offers are being made through informal discussions with the Oceaneering representatives.

The next update I would like to provide to the committee is in relation to the union's request for files in connection with the public hearings to approve the enterprise agreements. The Fair Work Commission has responded to our request, claiming that the Privacy Act is what they are relying on to redact certain information from the F17s which were part of these public hearings. We have written back to the Fair Work Commission seeking clarification as to why information that has already been released in the public domain through these public hearings suddenly would be caught by the Privacy Act. We are still awaiting a response to that request, which, I have to say in fairness to the Fair Work Commission, was only done on Monday. We received the response on Friday of last week and we sent a response back to them on Monday, so it has only been recent, but that is the current status of that request with the Fair Work Commission.

We do strongly recommend that the Senate request unredacted these documents which were part of a public hearing and have already been released into the public domain and therefore should not be subject to any laws or legislation relating to privacy, which should not cover information that has already been released into the public domain.

We also recommend that the Senate inquire into contact, if any, between the minister's office and the Fair Work Commission about this new practice—which is a new practice, as we understand—of scanning of public hearing files and redacting information before they are released to interested parties. This has not happened in the past in my experience as a researcher requesting files for public hearings, and this is a new instance which we believe arises from certain sensitivities arising from cases that have been made public recently.

That concludes my opening statement.

CHAIR: Mr Nguyen, we might invite you to make a separate and further submission in relation to that matter when you have got all the correspondence together. Ms Kershaw?

Ms Kershaw: I concur with the views of my colleague, Mr Nguyen, and thank you very much for holding this inquiry and attending today. We are particularly interested in this inquiry and in using CUB as an example because it demonstrates that the practical outcome of the Fair Work Act is that it preferences employers. I completely concur with what was said in that it understood that the intent of the act should be that agreements be representative of the workers that they cover. Our submission highlights the tactics that employers use, and they are doing it to undermine employees' rights to collectively bargain agreements and, similarly, to determination of agreements. In any other area of law, if one party were to breach a contract, the other party would be bound to remedy for the harm the outcome has caused to them. There is a completely different approach being taken under

the Fair Work Act, and we think it is wrong. We are seeing it increasingly being used tactically in a coercive manner by employers as a threat and as an action, and it is disturbing.

We also reiterate the point that Mr Nguyen made about the lack of transparency and accountability. The very fact that Catalyst agreement was certified by three people over in WA and that it was certified means that the Fair Work Commission needs to strengthen their due diligence and only make legal those documents that have met the procedural requirements. Further to the point about the lack of transparency in relation to the Fair Work Commission, we have been seeking the three signatories of the agreement, one of which was disclosed in the media as being a part-time casual. Another one, we have been advised from a couple of sources, was the husband of Cristina Ingleby, who was the HR manager at the time.

We can come and present you with the information that we have. What we believe you are also missing is how sophisticated and tactical the corporations are being in utilising their strategies. We would like to reiterate that we think that there would be a lot of value to the committee to invite the responsible management from Programmed and CUB and ask them exactly when and how long they were undertaking this tactic and not consulting with the workers. They knew that under a labour-hire agreement they have no obligation to consult workers even though this was a tactical decision.

We believe that the decision and the way it was done in the beginning was designed to make the members so angry that we would boycott the facility, in which case they would have all the power then to sue us and the members for blockading. The imbalance is quite incredible. They were sacked after 30 years of doing exactly what was requested and required of them, having negotiated an agreement that still had two years to go that CUB knew about. They were thrown out with no rights to bargain, no rights to negotiate, no rights to take industrial action and no rights to be consulted with. It was horrendous that they were on the concrete for as long as they were before anybody even spoke to them. That is the meat of our submission. Thank you.

Mr Dinon: The point that I wish to get across is that during this process we were fed nothing but deception. We voted on a new EBA, a three-year EBA, in early January. It was mostly finalised in November, but it was not completely finalised until early January. The very week after that the management of CUB had a meeting for all of the people working at the Abbotsford plant, and they announced that they were going to change the agreement with Quant and that they were going to terminate the Quant agreement, which was the one we were working under for the last seven years. But they told us they did not know what they were going to do. They told us they had three ideas in mind, but they had not made up their mind about any of them then. This became the pattern for the next six months up to 10 June, when they summarily dismissed us.

Early in the piece, the union met with them and asked them if there was something that they particularly wanted from the workforce, and they asked if they wanted more flexible working arrangements—what the company wanted going forward. The company was saying it wanted something new, so the unions were asking the company what they wanted. But the company said they still did not know what they were doing. In the meantime we heard that they had signed a contract with Programmed. Once again, the union approached them, and they publicly denied it to all the working people inside the brewery, saying it was malicious rumours. Then, later on, they started advertising our jobs. Again, when questioned about it, they flatly denied that they were doing anything of the sort. Then, very shortly after that, we were invited to go to a hotel for a meeting, whereupon we were summarily dismissed.

We were given the opportunity of having an interview with Programmed, and on that day, when the union tried to contact the head of Programmed, he said they had not signed a contract and it was not his responsibility for anything that was going on. So then the union tried talking to CUB and said to CUB, 'If you don't do something'—this was on the Friday that they sacked us—'you won't have a workforce on Monday.' Then the union tried Programmed again. This time the Programmed gentleman told them that someone else was responsible for it, so the union rang him. Then he told them that the first guy the union had spoken to was in fact the one responsible for the contract, and so the merry-go-round continued. Both CUB and Programmed really did not recognise us for probably another four months during this dispute.

There was no-one on that day at the hotel from Programmed to say: 'This is our company. This is what you are coming to work for. These are the terms and conditions.' At this stage, we did not know that it was this dodgy EBA that had been generated out of Western Australia which would result in us having a 65 per cent pay cut—which was about 50 per cent of the hourly rate, a 10 per cent shift allowance, and then the other five per cent was made up of other smaller items: income protection and things of that nature. The worst thing about the wages rate, though, is that it could have been dropped, for a fitter, down to $19.50 an hour. For an electrician, I think it was about $21.90 or something. Even though they were offering you a wage in the $30 range, they could knock it down to $21 if they thought, at any time, that you were underperforming. In fact, when some of the workforce

that did cross our picket line went in there and made mistakes, they found that they had their wages cut down to about $27 an hour for making a mistake. I do believe they corrected that later on, but they still enacted what they had the capability of doing.

This deception just continued on and on for us. It is this part of the act, where you make an agreement—we had just signed a three-year EBA and then that got thrown out. They completely lied to us right up to the point of sacking us. Clearly, the Fair Work Act implies that it is fair and, clearly, in our case, we did not see any of that fairness. There was no transparency in the act and no transparency in the company's responsibilities in this issue.

CHAIR: We just heard from ExxonMobil on a similar situation: whose good corporate citizen status, ethical standards status and holding their vendors to the same high standards only goes insofar as making sure the technicalities of the law have been agreed to. Again, in their case, workers from a different state—again, Western Australia—none of whom were ever going to work there, formed an agreement which they could use as the enterprise agreement which they contracted out at significantly reduced wages in order to give them a competitive advantage. The workers paid for those efficiencies with their jobs and the replacement workers paid for those efficiencies with significant wage cuts, all because of a technicality where someone else made an agreement which was going to apply to them. In your case, you had a casual worker, potentially the husband of the human resources manager of a company, and two other people in Western Australia form an agreement which they then went to apply to a high-tech multimillion dollar plant in Victoria with a long-term workforce—and that was the justification. That reduced your wages by how much?

Mr Dinon: Sixty-five per cent.

CHAIR: Well, if you were able to get a job. You were all sacked.

Mr Dinon: That is right. We were offered an interview that day, but we were offered no information at all about the job prior to going to that interview. We requested that information through our unions, and they would not provide it.

CHAIR: So you did not even know, even if you were to be offered a job, what the terms and conditions would be, even though you had only just finished the year before negotiating a three-year agreement with the company?

Mr Dinon: Yes. It was some time before we found out the detail because they simply would not talk to the unions. In fact, we became invisible people. They simply would not deal with us at all or recognise that we existed.

CHAIR: Did they try to talk to individual workers?

Mr Dinon: They did. There was a group of seven people that had what we call a specialist role. That was a role that, I think, was paid about $50 a week extra. They were people who were considered to have extraordinary knowledge on different parts of the plant.

CHAIR: They spoke to those people?

Mr Dinon: They spoke to those people, and they offered them packages. I have been told what the package was, that they were offered 140 grand packages, but I do not know if that is true. That is only what I have heard second-hand. And those people went back and they worked full time there.

CHAIR: How many maintenance people were there all up?

Mr Dinon: There were 55 maintenance people, including those seven, then at least some of the people who were retrenched went and got other jobs. Then the majority of us, of course, maintained the picket out the front.

CHAIR: Did the company have a replacement workforce ready to go?

Mr Dinon: Yes. They came in that weekend, so even though we had rung them on the Friday saying they would not have a workforce on the Monday, they had people going in over the weekend. We confronted a group of contract electricians down at the car park to let them know what had happened to us; I think that was on the Sunday, from memory. I have probably got it in an organiser somewhere, so I could check that. We had our union delegate speak to them and appeal to their better sense of putting fellow electricians out of work by going and doing our job—what had been our job the day before, or two days before. But I think that group stayed there the whole time. They might even still be there today. I believe they are leaving, but they worked that whole time, those people.

CHAIR: Up until that day when you were all sacked, the company was denying that there were any contract negotiations going on, or that they had awarded a new contract?

Mr Dinon: Yes.

CHAIR: But then, nonetheless, they sacked you on the Friday and then immediately they had a replacement workforce ready to come in over the weekend?

Mr Dinon: Yes. They were completely prepared, and they had brought them in, of course, in covered vehicles with curtained windows. The ironic thing about that is that there is about seven gates going into that brewery and we had our picket set up in front of what we call the main gate—it is not really the main gate, but it is where Security is—and they brought their vehicle past that the whole time. For the whole six months we were out the front picketing they brought that vehicle past us every day. Regardless of what had transpired, regardless of when they had Fair Work declare that we could not swear at them or harass them, they still continued to drive them past us. It did not stop them from sticking their finger up out behind the curtains at us, or walking past on Sundays and trying to goad us.

Early on the management was laughing at us as they walked past us picketing out the front, so we copped a fair amount of abuse and harassment and intimidation but, of course, being unemployed, we are not protected. Probably one of the ironic things about the Fair Work order was that they printed them out on A4 paper, which was the order saying that we could not abuse them, and they wrote all the profanities that they could not say on these huge A4 pieces of paper, and the brewery pinned it up out in public space in the front of the brewery, where lots of people walk their dogs and bring their kids down to the river. Somehow that is all right, but us calling somebody a scab is not.

CHAIR: So all this happened while you had an enterprise agreement in place and all this happened while management had not raised with you any of their concerns about efficiencies or productivity?

Mr Dinon: No, we had asked them what they wanted. We knew that they wanted something different and we asked them what they wanted, but they said they did not know. They just kept saying they did not know, but all the time, clearly, they were putting all these other measures in place.

CHAIR: I guess the conclusion I am coming to—and tell me if I am wrong—is that what they wanted was your wages and conditions.

Mr Dinon: They did, yes. They wanted to reduce us down to Third World wages. I guess if they had come to us in January and said, 'Look, would you all take a 10 per cent pay cut?'—I was part of the group that was retrenched in 2009, where they did a very similar thing. That time we were only at the front for about 2½ weeks. I think we took about a 10 per cent pay cut that time, seven years ago, and we had virtually just ended up recovering that position. Then to come round with this grand design of 65 per cent—you can argue the semantics of what it is, and they will argue that they have made other offers and improved that offer, which is true, but they never came and made that offer to me. They never invited me to have that offer. In fact, they never actually offered me a job again, other than when we resolved the issue in December of last year. But then they had run for six months with this contract workforce, although I knew they had failed, because, like you had said earlier, it is a very complex plant, and each piece of equipment often takes years to learn, so I knew that they did not have years to get their plant running properly. And that is assuming you had people in with the right qualifications and the right standards, but they just pulled in people from anywhere. So they clearly were not going to get higher skilled people that they needed.

CHAIR: I always thought there was a bit of money in beer.

Mr Dinon: There is. I think they were making about a million dollars a day out of that plant in profit.

CHAIR: I understand the company has changed hands recently, but they are big companies, are they not?

Mr Dinon: They are.

CHAIR: It is not CUB anymore really, is it?

Mr Dinon: No. It got sold I think in 2010 the first time. That was bought by the world's second biggest brewer, SABMiller, and they brought in a whole new culture. This is where this role of specialists came in, because they had international standards for structure and they had international standards for their beer production. They made a lot of changes to their beer production. They actually make a better beer now than they used to in terms of the quality of their beer. They introduced some really good standards. And they forced the business to change, which was really encouraging.

CHAIR: And you participated?

Mr Dinon: And we participated in that. Then when they came to the restructuring of the workforce, what they call the manufacturing way, we participated once again. However, we got told that, when this structure was going into place, we were not going to get any more people because, by nature, the structure requires more people. So, if

you have X amount of tradesmen on the floor and you need the specialist role, then when you take the specialist out you need to replace that person on the production floor as a maintenance person.

CHAIR: You said it is the second largest brewer in the world—that is pretty big, is it not?

Mr Dinon: It is.

CHAIR: Do you have any idea of how big?

Mr Dinon: Their profit in 2014-15 I think was $3.3 billion. Probably out of that CUB could have made anything up to a billion dollars in profit.

Senator STERLE: Does this mob still own CUB?

Mr Dinon: No, they sold again in 2016. SABMiller were the second biggest fish in the sea, and the biggest fish in the sea, AB InBev, which are the Belgians and the American Anheuser-Busch, bought the second biggest fish. They paid $106 billion to buy them, and they took over in October, about the middle of October. When they came into the business and our dispute was happening and we were out the front picketing, they then set about investigating their business. After doing that for two months they decided that they thought they would be better served by having the workforce that was out the front picketing.

Senator STERLE: Where is this previous mob, SABMiller—

Mr Dinon: They assimilated into AB InBev.

Senator STERLE: Yes, and where are they from?

Mr Dinon: The new company, AB InBev, the Belgians—

Senator STERLE: The new one is Belgian and the Americans, but where was this SABMiller from?

Mr Dinon: They are London based, but it is South African breweries.

Senator STERLE: So it was under their leadership that the blue started?

Mr Dinon: Yes, it was. It was a company of about 200 breweries.

CHAIR: Do you think Australians are getting sick of improving by the smallest of slivers the profitability of these huge multinational companies with their jobs?

Mr Dinon: Yes, I do. I quite liken it to what I call 'a race to the bottom'. We are trying to do everything for the absolute minimum. If we can make this microphone at a tenth of the price, then they will today. The quality that is in this microphone will disappear, because you can buy 100 of the cheaper ones for one of these. This has been reflected in every item that we buy today. Everywhere you go the quality range is all disappearing. There are very few quality products left anymore in the market place, because you have this constant race.

In Australia what that means is that businesses are always attacking the wages of people. There is nothing else in the business to strip out anymore, because you have stripped out all the material in the product you are making. Let us say we are all making the microphone, but we are stripping everything out of the microphone. Now the only thing left to strip anything out of is people's working conditions. The Fair Work Act allows them to do that.

CHAIR: You were sacked and then for six months you fought to get your job back.

Mr Dinon: Yes.

CHAIR: Do you feel that that the Fair Work Act protected you in some way?

Mr Dinon: Not at all. It completely abandoned me. It gave all the advantages to the company and to the other workforce that went in there that scabbed and went in and worked inside the brewery. I had worked at a brewery for 40 years, so I clearly had a lot of skills. Even when I was retrenched the first time, seven years ago, about half of us went back in.

I have three trades. I have an advanced certificate in electronics. I have an advanced certificate in instrumentation. I also now have my A-grade electrical licence. In the early nineties, the breweries decided that they would cross-trade the instruments and the electrical trades to give the dual trade. For those last 20 years, we had been working as dual-trade tradesmen. Clearly, we have lots of skills, and to think you can throw it away is ridiculous.

Seven years ago there were 14 instrument people with dual trades. In the brewery there is a lot of instrumentation, because it is a process-driven plant. I do not know how much the committee is aware of what the instrument trade is, but, for your benefit, if you are running a plant and you have to cook something—the first stage of making beer is you cook things up. You mix up all the grains, the flours and the liquids. Then you cook that and you make a thing called 'wort'. You have to be able to measure things. You have to be able to measure temperature to be able to heat something. You have to be able to control that temperature and heating. You have

to be able to control levels. You have to be able to control flows. You have to be able to measure density. You have to be able to measure specific gravity of things like sugar, because you are adding it into a product. This has been a part of the industry for a long time. The trade that looked after all that instrumentation, as it is known, was the instrument trade.

In the early nineties they were marrying that instrument trade into the electrical trade so they could streamline the workforce a little bit more. But there still tended to be people that were instrument by design and electrical by design. I had worked most of the time in instrumentation and very little time on the electrical side, so I did not have as complete an understanding of motors as, say, an electrician who had worked on motors for 20 years. But then he did not have that same intimate relationship working with processes as I did. In a business like that, that skill is very important, and passing on that knowledge is very important.

CHAIR: Forty years at the brewery.

Mr Dinon: Yes.

CHAIR: I will take you back to prior being sacked on that Friday. Forty years is a long time to be in one place. Did you have some sort of stake in the company? What was your view of the company at the time?

Mr Dinon: It might have been in the late nineties that the company introduced a share scheme whereby we could buy shares in the company, which we all did. They kind of changed how they allocated those shares over the years. In the end, we got about $1,000 worth of free shares.

The year before we got sacked in 2009, that Christmas was one of the biggest Christmases in production terms. We did about a million cases a week for 12 weeks, getting ready for that Christmas. It was a big year. But somehow we did not get our bonus that year. Apparently we had not performed well enough. It was just into the new year, in our case, that year we were sacked, in the week of the Victorian bushfires. So when 180 Victorians died, the board of CUB thought it was a good time to sack us. Two of our people were fighting fires. They actually had to phone one of them up on the fire front to tell him that he was sacked.

For me, that does not discolour working at the company, because the company is the work you do and it is the people you work with, and I enjoyed those two things. It was a highly technical and challenging job with a lot of pressure, but I loved that. I embraced it. I worked with great people and we produced a good product, and we thrilled at meeting those goals and those performs things. We made ourselves available 24 hours a day, seven days a week to keep that place ticking. Even though I am retired now, I would still work there another 40 years, because it would be still another 40 years of fun and excitement. If you can take those few people out of management that make these sorts of decisions then it would just be a happy place. I do not see that what happened to me reflects on what my job was and why I enjoyed doing my job.

Senator STERLE: I would like to go to Ms Kershaw and Mr Nguyen. Mr Nguyen, you are ETU?

Mr Nguyen: Australian Manufacturing Workers Union.

Senator STERLE: You are metalies, okay. Chair, just indulge me for a second. It is a long time since I have had to deal with labour hire, but for grounding, unfortunately, in my previous years, 12 years ago with the Transport Workers Union, I found labour hire to be a pack of parasites that absolutely revelled in the misfortune of workers not having a permanent job, but I may be wrong nowadays. Do the metalworkers have any arrangements in terms of enterprise agreements with any of the labour hire companies?

Mr Nguyen: We do have some enterprise agreements with some contractors and some labour hire companies, but there are many who set up enterprise agreements without the union, as we have identified in our submission. In some places, where there is a long-term workforce, where there are a lot of members who join who become permanent with the labour hire or with the contractor and who join the union, we do have agreements in those places, but there are many agreements where the union does not have agreements where the companies have set up enterprise agreements with, say, one, two, three, four or a handful of casual employees and then subsequently used those agreements which they have bargained with these employees who have no bargaining power to apply to a wider range of employees in different contracts that they win in various companies.

Senator STERLE: That is where I want to go to. I do not know how the hell they can do it. Do any of these enterprise agreements address permanency with the employees? They are obviously not at CUB, because they are not that high up the pecking order to be that decent a pack of people, but if you have enterprise agreements with labour hire companies, do they address permanent employment? That is what I am talking about.

Mr Nguyen: They would generally have an ability for the labour hire to employ permanent employees. Some of them—for example, one which we have identified in our submission—did not have any ability for employees to be employed as permanent. All the employees—

Senator STERLE: Who was that?

Mr Nguyen: All the employees were casuals.

Senator STERLE: I don't want to know who the employees are but the company.

Mr Nguyen: If I can just find the—there was one agreement which only had an ability to employ casuals, but it was determined that it was a feature of that particular industry, that everyone was employed as casuals.

Senator STERLE: While you are looking, I suppose where I am trying to head, Mr Nguyen and Ms Kershaw, is that the precedent has been set, obviously, that enterprise agreements have been negotiated with labour hire companies and they have addressed permanent employment. That is what you are telling me?

Mr Nguyen: What I would say is that it is not correct to say that they only employ casuals. Some of them do employ a permanent workforce who at points in time would attract redundancy when the service contract comes to an end. In the past, until recently—until the Compass decision, which we referred to in our submission—they would have attracted a redundancy entitlement when the contract came to an end. Now, since the Compass decision, those permanent employees no longer attract a redundancy, because the Fair Work Commission has determined that because of the business type, which is a contract or labour hire arrangement business, it is the 'ordinary and customary turnover of labour'—those are the words which are in the act—which allow them to say it is ordinary and customary for contractor business and labour hire businesses to have to terminate their employees when their service contracts come to an end because they have lost the tender. So they do not have to pay the redundancy anymore, whereas in the past they would have had to pay the redundancy. I think, given that the redundancy is no longer payable, there are some contractors now who would possibly lean more towards a sort of fixed, more permanent, workforce where they are on fixed term contracts or say that they are permanent in the knowledge that the service contract only goes for three or 4½ for five years. The main thing that they get out of that, obviously, is that they do not get long service leave entitlement. That is a big reason why these service contracts are the length of time that they are.

Ms Kershaw: We also have labour hire agreements, but, to reiterate the point, the nature of the business means that there are a lot of labour hire workers will never be offered that agreement.

Senator STERLE: Sorry, I am finding it very hard to hear.

Ms Kershaw: If you look at the statistics there is a plethora of the growth in labour hire and they are morphing between recruitment and migration labour hire agencies. I have expanded enormously. There is no way we can get to the thousands of them that are out there, and even if we have in there a preference for continuing employment for current employees it is still legitimate under the law—even for any of these CUB guys—for CUB to tap the contractor on the shoulder and say, 'He's getting too old,' or, 'He's complained about safety,' and they can be gone without any consultation or dismissal. So despite the fact that some companies do the right thing and employ under our agreements, the thousands of them that are not are the ones that are undermining the decent employment and the ones that do the right thing with an agreement.

Senator STERLE: To the best of your knowledge, do these labour hire companies EBAs address training and career paths?

Ms Kershaw: We can put it in there, but—

Senator STERLE: No, I am asking you. I know what labour hire was like 12 years ago. I detest them. But I may be wrong. They may prove me wrong. They may be decent people nowadays—and I would be happy to hear if they are. So in your enterprise agreements you have with labour hire, do any of them—any of those agreements—address career pathing and training, apprenticeships?

Ms Kershaw: I will take it on notice, but, like I said, it does not change the dynamic.

Senator STERLE: I will come back to Programmed. That is the mob that was engaged to try and pinch all your jobs, is that right, Mr Dinon?

Mr Dinon: Several companies ended up being involved in that.

Senator STERLE: I heard Programmed mentioned.

Mr Dinon: Programmed was the company that won the main contract to supply.

Senator STERLE: Sorry, Mr Dinon, the chair is really starting to wind me up because of timing. Ms Kershaw and Mr Nguyen, do you have any enterprise agreements with Programmed?

Ms Kershaw: Yes.

Senator STERLE: Could you provide them to the committee?

Ms Kershaw: They used a subsidiary entity, Catalyst, to formulate the Catalyst agreement. We have agreements across a number of entities with Skilled and Programmed.

Senator STERLE: Do we need them tabled?

CHAIR: I think they are provided. They are there if you want them. Yes. On notice, could you table a sample agreement of Programmed and the replacement Quant agreement?

Ms Kershaw: I will provide them, yes.

CHAIR: The AMWU and ETU both made very detailed submissions with very specific recommendations. They are very valuable to the committee. Thank you for them. We have not had an opportunity to go through and explore them, but they are well argued and presented in your submissions. So even though we have not touched on many of those things, understand that we have them and that the committee is certainly considering them.

I thank you for your presentation to the committee today. Mr Dinon, a terrible experience for you to have to go through—six months—we never had an opportunity really to talk about some of the emotional and personal effects that that must have had not only on you and your family but on the other 54 people who were there. I have heard that it was enormously traumatic. I am pleased that, at the end of the day, there was a satisfactory outcome.

Mr Dinon: It was a very pleasing outcome. My goal throughout it all was to pass my job on to an apprentice, which I was successful in doing. That brought me a lot of pleasure. I was very pleased that that happened.

CHAIR: Thank you.

DRAICCHIO, Mr Daniel, Member, National Union of Workers

HILAKARI, Mr Luke, Secretary, Victorian Trades Hall Council

LEWIS, Ms Claire, Organiser, National Union of Workers

MUJKIC, Mr Dario, Industrial Officer, National Union of Workers

[11:51]

CHAIR: Welcome. I understand information on parliamentary privilege and the giving of evidence to committees has already been provided to you. I invite you to now make some opening remarks to the committee, to be followed by questions.

Mr Hilakari: Thank you to the senators for being here today and having us present before you. We are going to present together today, so what we thought might be a useful structure, through the chair, is that I might make some opening remarks and leave some room for questions, and the NUW will do the same. I know you want to spend some time talking to Daniel, so we just want to make sure you have some space to do that too.

The Victorian Trades Hall Council has existed since 1856. We represent some 430,000 workers through 40-odd affiliates at trades hall. We are a campaigning place. We have struggled for and won many of the benefits that workers rely on today: penalty rates, overtime, minimum wage, OH&S laws—and, more recently, struggles around family violence leave that you would have all heard about and seen in the media.

Today I thought this might be a useful space for us to give a bit of blunt assessment of what is happening out in the world of work. Every day I get complaints from workers about what is going on out there. At this moment I am not entirely sure that just tinkering with the Fair Work Act is going to be enough to just improve people's lives at work. We live in a country where every day we are seeing workers being ripped off. We have schemes that have been set up to avoid the Fair Work Act and to avoid EBAs that have been created and established. We have a system of triangular employment through labour hire that has destroyed the idea of what it means to have a job at work.

The most recent example you would have seen is the CUB dispute, and I understand there will be people talking to you about that. But the concept that people used to have, was largely: I come to this workplace. I work here for you as the employer. I do that job. You sort of control what I do at work, but there is a negotiation about the entitlements of which we work. That is the relationship, and people used to be able to be in that employment, as most of you know, sometimes for their entire lives, or for 10 years or 20 years. That has fundamentally changed now. The introduction of labour hire has made just such a massive difference to people's working lives. It has meant that large employers have been able to subcontract out their obligations to everyday workers. That has formed that triangular sort of relationship now, where it is not an employment relationship between the employer and the worker; it is the employer with a labour hire agency to the worker, even though the core organisation will still have people doing those jobs, but they might be paid less. But they will lose their entitlements to remain on site.

Labour hire is a huge issue, but it is not the only issue. Just two days ago I received another complaint from a worker about being asked to be signed up to an ABN. This was just a basic marketing job, but the worker said that the boss said, 'You need to sign this ABN—this happens all the time—otherwise you can't work here. The ABN will mean that you're an independent contractor. That means I will change that employment relationship. I will pay you less than the minimum wage and I'll try to make it up to you in bonuses.' It is all illegal, but it happens nevertheless.

The black market economy, in which workers are exploited, is everywhere. It is happening through our major companies—7-Eleven, Woolworths, Bakers Delight, Baiada, Grill'd, Caltex. If we as a group leave this office and walk down Little Bourke Street into Chinatown, every second restaurant there will be underpaying their restaurant. They will be paid cash in hand. They will not be paid the legal minimum. They will not be getting penalty rates. They will be not getting breaks. They will not be having their OH&S space respected. Fundamentally what I am trying to communicate to this committee is that I think we have stuffed work in this country. We have fundamentally stuffed work.

Putting aside the recent decisions around penalty rates, it has become a norm in this country that, in certain sectors of the economy, workers are going to be exploited. In hospitality, in retail, in horticulture—which I am sure the NUW are going to talk about—we hear and we see regular reports of young people and vulnerable people being ripped off, being harassed. I have had NUW members talk to me about being sexually assaulted. The NUW now have to have a relationship with CASA, the Centre Against Sexual Assault, because women are being raped on farms. Work is broken in this country, and we need to do something about it. That is what we want to talk

about today. We do not think this is just a couple of rotten apples. The whole orchard has gone to dust. There is a lot of work that needs to be done.

We have some ideas that we would like you to touch on that have not been thought of or communicated before but have been done in some other countries. They were in the submission. As a union official, if I want to go on a site, I have to need to pass a 'fit and proper person' test. But, if you employ a person and you set up a company and you are in control of their working lives, there is no 'fit and proper' test. Anyone can do it. You can set up a company and employ someone, and what happens is that these workers are being exploited. There is no test around that.

When it comes to recovery of wages, we think of the Fair Work Ombudsman. They have 600 people employed full time. In the last annual report, if memory serves me right, they did 50 prosecutions in this country. With the amount of exploitation that you see in the media and that you will hear about in this committee, 50 prosecutions does not seem enough. The penalties that can be imposed, which is 60 penalty units for a breach of the law, do not seem enough. We know that is not enough of an incentive for people to stop ripping off their workers. Quite frankly, the penalty regime almost encourages employers to do the wrong thing. Let's say we set up a cafe business and we decide to pay our workers less than the minimum award and pay them cash in hand. The turnover in hospitality is about 50 per cent year, so, every year, half your staff disappear and you have to recruit more. But, if you are ripping them off, the only time you have to pay them back is when you get exposed, and that is only the staff that tend to be still on site. So there is a large benefit to thinking, 'Maybe I won't pay these workers right.' If the only thing they have to do is pay workers back what they are already owed, isn't that the best interest-free loan that you have ever heard of? And it is happening in every second cafe and restaurant.

There needs to be a disincentive to do that. Through what I call a bounty hunter clause, workers would be able to go out and we as organisations would be able to represent these workers. We would chase that money back and use the instruments at hand to do that, and the penalties that would be imposed would include not just the worker getting their money back but a premium on that—because it is their money that has been kept away from them interest free. The people who have the job to expose that would also receive a financial outcome for it, where they would get paid for the work they do in doing that job. Six hundred people at Fair Work is not enough to get this job done. If you are serious about ensuring that wages do not get stolen from workers, there needs to be a larger crew to do that. It is a bit of a radical proposal, but something has to give. Something has to change.

On the subject of whistleblowers, across the US the Securities and Exchange Commission has the power to reward whistleblowers. Not only does it reward whistleblowers with a proportion of the money which they have exposed to have been rorted; they are also protected under law. This is something I think the committee should look at. It is in the submission and I do not think we have to spend too much time on it, but it is a similar concept to the bounty hunter idea.

The last point I want to raise is: what is a worker these days? I think the Fair Work Act has some problems when we talk about an employee. If you are an employee you have a series of rights like the NES that stick with you, but they do not cover people who are doing work. If you are a contractor, you are in some type of insecure work, you have been put on an ABN or whatever it may be, you might be doing work but you do not get the same rights as an employee. That is a fundamental problem. You could be engaged in a number of mechanisms that see you no longer counted as an employee, and as soon as that happens you lose your rights. So I think this committee needs to spend some time thinking about what a worker is. I might leave it there because I understand the time we have, and maybe pass over to the NUW to—

CHAIR: I want to ask you a question first. It is often put to the committee that employing someone is very technical. It is quite a difficult process and it is complicated to find out what someone should be paid, and most underpayments would be because someone was ignorant or made an honest mistake. What do you say to that?

Mr Hilakari: With respect, when someone makes that argument, I would say that is clearly wrong. You can go to the Fair Work site. It is pretty straightforward. You can sign up in your industry to get regular updates from Fair Work about what the entitlements are. There are pay calculators. We think it is pretty straightforward to work out entitlements. There are some problems with how Fair Work goes about communicating that information sometimes and there are problems that Fair Work has with relationships with some of its peak bodies. I might touch on that very quickly. You can go to the Fair Work website and pull up MOUs that Fair Work has with AHA or other peak industry bodies, in which they have gone into an agreement with these groups to say, 'There'll be no surprises in what we do. We will communicate how we go into our investigations, when we will do our investigations and what is coming up next.' If anything, workers should feel like the system is somewhat rigged against them, because Fair Work will have a relationship with the peak body that covers all that group of employers and will let them know what is coming, when it is coming and how it is coming. The workers do not

have anything like that. Anyway, I reject the notion that someone would think they could not work out how they can get workers paid. Many employers do it, but the ones who do not are deliberately trying to do this to make more money.

Mr Mujkic: Firstly, we are thankful to the committee for letting us both make a written submission and give evidence today. By way of introduction, we are a large national trade union representing about 60,000 members across a range of industries. That includes warehousing and logistics, food processing and manufacturing, including in the dairy industry and the poultry industry. It also includes the farm and horticultural sector, the oil industry and the pharmaceutical industry. I mention that because it shows that we operate across the economy.

The exploitation that we see daily is systemic and occurs across the economy, not in small pockets. That is an important point. In our view, the way we live and the way we work has changed dramatically over the last few decades, and our industrial framework and the Fair Work Act have been left behind. They have not kept up. What that has led to is increasing casualisation and increasing indirect utilisation of labour. What I mean by that is that the person who now employs you often has no direct control over the work that you do and has no ability to influence the wages and conditions that apply to you. The deregulated labour market allows for free and easy exploitation and free and easy utilisation of loopholes or what this committee has called 'corporate avoidance of the Fair Work Act'. What that has led to is increasing insecurity at work for millions of Australians—and that is not an understatement—and also increasing insecurity in their lives.

We say a number of things in our written submission about what is needed. I want to highlight a couple of them. As Luke said, tinkering is not enough. We need some significant structural change to the Fair Work Act. What we need is increased rights for casual and labour hire workers, and that would mean a national labour hire licensing scheme. It should also mean an ability for casual workers who effectively work on a permanent basis to have the ability to obtain permanent employment after a period of time.

What we also need is all workers at an enterprise to have the right to bargain. At the moment there is an ability to avoid the bargaining obligation in the Fair Work Act very, very easily by utilising a labour hire agency. The reason that Daniel is sitting to my right is that he works in a workplace that is a very good example of that, and you will hear more about that in a second. We need an end to sham bargaining. It is very easy now for an employer to effectively unilaterally determine the wages and conditions in a workplace through sham collective bargaining. We need an end to that. Collective bargaining should occur when the collective—that is, the workers—actually want to engage in bargaining. It should only be initiated when workers want to do it, and the workers should have control over the scope—that is, the coverage—of a collective agreement. We need an end to freeloading at union workplaces. What I am mean by that is that it is now very easy to obtain a union premium at a workplace but not put in, not join the union, not contribute in any way, whereas the majority of the workplace does so and obtains a union premium at that workplace. We need to find a way to make sure that stops.

These are some of the things that we say are necessary to return dignity to our workplace. There are a number of others in our written submission as well. Before we take any questions, I would like Daniel and perhaps Claire, who is our organiser, to supplement that.

Ms Lewis: I want to introduce you guys to Daniel's workplace. He works at a site in Laverton North called Oxford Cold Storage. If you drive down Doherty's Road, just past Hume Road you can see Oxford Cold Storage. It is a big warehouse containing massive freezers. It is one of the largest cold storage warehousing sites in the Southern Hemisphere. My guess is that there are about 400 workers on site. It is a very different site from most other warehouse worksites that we deal with in the NUW, because in most places the majority of workers are employed directly by the company. At Oxford Cold Storage only 21 workers are directly employed by Oxford. The rest of those roughly 400 workers are employed through eight other employing entities. Some of those are legitimate labour hire agencies that do recruitment and have workers placed at other worksites, but most of those agencies only have workers employed at Oxford Cold Storage. So, in our view, those are not really legitimate labour hire agencies.

In addition, further complicating matters is that four of those entities at Oxford have enterprise agreements registered to them, including Daniel's. Daniel is employed by a labour hire agency, you could say, which has an enterprise agreement which provides for lower pay and conditions than he is currently working on. So it is a very tenuous and precarious position that hundreds of the workers at Oxford are in, because technically their employer is not Oxford; it is a shelf company, more or less, which does not have office space and does not supply workers to any other worksite but nonetheless is the entity which technically has control over their pay and conditions.

Senator STERLE: Are they all casuals?

Ms Lewis: No, full time.

Senator STERLE: They are all full time?

Ms Lewis: There is a mixture. Daniel and a lot of his workmates are employed full time through labour hire agencies, so they receive annual leave, sick days and things like that. Other workers on site are employed casually under the award. What has happened at Oxford for more than 10 years is that, every few years, workers like Daniel and his workmates are asked to transfer their employment. What Daniel will tell you is a story about last year, when that happened to him and his workmates, and a bit about what that experience was like.

Since we did our submission, there have been a few updates on the site. In January this year, we campaigned for a majority support determination from the Fair Work Commission, so the Fair Work Commission attended the site and we held a ballot. So the workers, through one of these agencies, overwhelmingly voted yes to bargain with the employer, so we were granted a majority support determination, but this now means that, for those 65 or 70 workers through that particular agency, it will make it much harder for Oxford to transfer their employment, which would generally have happened around this time. It makes it much harder for the company to do that again, but it also puts those workers in the position of having to bargain with the service provider, so they are bargaining with an agency which is run by a sole director; there is just one guy. He does not have anything to do with the worksite, so he does not have an office or a presence on site. He really just comes out when someone is going to get written up or sacked. That is the only time that most of these workers would interact with this person very much. In our view, that is not really a fair position for workers to be in, where they have to negotiate with someone who does not actually have any say over their pay and conditions. The only way that they are going to be able to negotiate anything better is if Oxford says, 'Yes, that's okay.' We know that that is the reality. At the moment, in the current legislative framework, that is the position that these workers are in.

I might turn over to Daniel to tell you a little bit about last year.

Mr Draicchio: I will start from when I started. Four years ago I was employed by an agency as a casual, at a lesser rate than the full-timers were at Oxford. Then, six months later, we were put onto another company, with sick pay and holidays but the same pay rate, and then, nine months after that, we were put onto their permanent agencies, at a higher rate, with the holidays, sick pay and RDOs as well. Six months before the EBA expired, we were asked to come into the office and sign on to a new agency. I asked them about the EBA and if we had to negotiate with that. They said, 'No, an EBA has already been filed with Fair Work; you just have to sign over once it's been approved.' So we were called back in and signed over, and that was done; we were on to a new agency. When the EBA expired for Oxford under the 21 people that were doing negotiations, we were sent out a letter to say, 'If you don't sign the new common-law contract by a certain date, your pay will drop.' We did not know what the drop was, because we had never seen our actual EBA; we had never been told about it. We found out it was about $7 less an hour than what we are getting now. There are people that have been there for over 10 years and have never, ever bargained for an EBA—not once.

CHAIR: Do you get payslips that identify who you are working for?

Mr Draicchio: I get one from Heany Pty Ltd—that is my company that I work for—and in the corner it says 'Oxford'. That is it.

Ms Lewis: If someone is missing their pay slip on site, they go to the payroll office at Oxford, and the Oxford payroll officer reaches into a drawer and pulls out that person's pay slip. The names of all employees are alphabetical, and one might be one agency and one might be the next agency.

Senator STERLE: What a pack of shysters—seriously. Who owns Oxford? Sorry, Chair. Is it an international—

Ms Lewis: No. It is privately owned. It is a family business.

Senator STERLE: Here in Melbourne?

Ms Lewis: Here in Melbourne. It has been in business for several decades.

CHAIR: Mr Draicchio, can you explain the process of transferring from one company to another?

Mr Draicchio: From the first agency, HR at Oxford will call you into their office and say, 'Congratulations. You've worked well. We want to put you over to permanent.' Then they will get the director, whoever it is, to come in and sign you up. Any questions that we had about pay rates or anything like that, we were directed to ask HR at Oxford and not them, even though they are our employer. At the moment, they are not employing anyone onto full time. That is the last I heard.

CHAIR: So you do not actually resign from the former company?

Mr Draicchio: No. In our common-law contract, there is a clause that actually says that, if this company ceases, it is to transfer over to the new company. All your entitlements come with you.

CHAIR: So your entitlements do get transferred at the same time?

Mr Draicchio: Long service and all that do come through.

CHAIR: Is the sole purpose of this to ensure that you are transferring to a company that already has an agreement that is not getting close to expiry, so there are no negotiations?

Mr Mujkic: That is correct.

CHAIR: Do you think that is the sole purpose of this or is there any other—

Mr Draicchio: The company that I went to had three employees before we went there, so they—

Senator STERLE: Are you talking about a labour hire company?

Mr Draicchio: I was with a company called Cajetan first. That company was going to be made bankrupt or cease operation—whatever they did. There were three people already signed onto the new company, which was Heany, with the EBA already done. Once that had gone through, they signed the other 67 employees over to the new company.

Senator STERLE: On the same rates of pay?

Mr Draicchio: On the common-law contract, not the EBA.

Senator STERLE: Hang on; I am just a little bit confused—sorry, Daniel. So you were employed by whatever mob, who went broke, on whatever dollars per hour, and then you were transferred into a new labour hire company?

Mr Draicchio: On the same pay that we were getting originally, but a common-law contract is what we signed; we never signed an EBA.

Mr Mujkic: To be clear: the purpose of the transfers—whether it is the sole purpose or not is difficult for us to say, but it is clearly the main purpose, in our view—is to deny workers the ability to collectively bargain. So the transfers occur some months before a collective agreement is set to expire, and people are transferred to an entity that already has a collective agreement in place that will run for probably four years. That cycle has occurred a number of times in relation to a number of different entities at this workplace.

CHAIR: So the agreements that are actually in force—are they negotiated elsewhere with a different workforce and then just applied to this workplace?

Ms Lewis: No. I would use the term 'negotiated' really loosely. There is a draft which is written up. I know this because I have spoken to some of the workers on site who have been part of that negotiating party. With the agency that Daniel is currently employed by, there were three workers on the site who were chosen at random—maybe or maybe not randomly—to get moved over first. The director of the agency is generally the same director, who might have one agency and then start up another agency, employ a small handful of workers through that agency, sit down with them for the requisite number of times—maybe that is twice—to explain the agreement and see if anyone has any questions, and then it is sent to Fair Work, having been voted on by all three of the employees. Once that is passed by Fair Work, they then transfer the rest of the 60- or 70-odd employees. Those agreements are four-year agreements, so they are the maximum term.

CHAIR: Even though all those people on site are doing the same work they have always been doing anyway?

Ms Lewis: Yes.

Mr Mujkic: Correct. It is a very complicated framework—

CHAIR: It is getting clearer. It started off more complicated.

Mr Mujkic: The solution, though, in our view, is quite simple. There is one entity at that workplace that controls labour and has the ability to control or determine wages and conditions, and that is Oxford Cold Storage. The 400 workers there, regardless of their employer, should be free to bargain and negotiate collectively with Oxford Cold Storage about their wages and conditions. That would get around this legal fiction.

Mr Hilakari: You will hear other testimony today that this is not the only place where this takes place. The dispute with CUB was exactly about this. John Holland has done exactly the same thing. What they will do is: they will not only find workers who were at that company; they will find workers who will never work on that site—they will find someone's brother-in-law to sign up to this EBA. So we need to know who voted for it. Is there a test that means that they are actually going to have to work under the conditions set? And are they even in their own state, let alone in the actual workplace? So there needs to be some transparency about how EBAs are voted for and who votes for them, before they get approval from Fair Work.

CHAIR: And how it can be broadly applied anyway. I just want to come back to the question: you said you signed up to a common law contract. I do not understand what that can mean in this scenario.

Mr Draicchio: They say that they want to give us the pay rates similar to what the EBA is for Oxford—what the 21 workers vote on. They give us a letter stating that. They then write up a contract that looks like an EBA but is not; a common law contract is what they call it. Then you sign on to that and that gives you different pay rates and RDOs and all of that sort of stuff.

CHAIR: Does that have any status, Mr Mujkic?

Mr Mujkic: I think it does. The host employer, Oxford Cold Storage, is seeking to effectively have two sets of wages and conditions that apply: a document that is an enterprise agreement, that provides for lower wages and conditions than what you are actually employed on, which is the common law contract that has an expiry date. That creates tremendous uncertainty for people because—and I think those contracts can be terminated, with notice?

Ms Lewis: Yes.

Mr Mujkic: That allows the employer to effectively move you to that lower rate of pay that sort of underpins that common law contract.

CHAIR: Has that happened in your workplace, Daniel?

Mr Draicchio: I have not heard about it, but they did threaten us with it before December.

Senator STERLE: I want to be very clear here: with the eight labour hire companies here at Oxford, are they all on the same rate of pay?

Mr Draicchio: No.

Senator STERLE: So they are all different. But the highest rate of pay is the 21 who are employed by Oxford—is that right?

Mr Draicchio: No, sorry. There are the Oxford workers—

Senator STERLE: There are just 21 of them?

Mr Draicchio: Just 21. Then there are another four Oxford agencies.

Senator STERLE: What is an 'Oxford agency'?

Mr Draicchio: Well, we call them Oxford agencies, sorry, because we know that Oxford control them.

Senator STERLE: Labour hire.

Mr Draicchio: They are the permanent agency; that is what they call them.

Senator STERLE: Name them, Daniel. Tell me who they are, mate.

Mr Draicchio: There is Heaney, Dougham, Cold Unit, and there is a new one: Hagstone, I think it is called; they have just come up.

Senator STERLE: Christ! They are like viruses—popping up everywhere!

Mr Draicchio: I think there was another one; I am not too sure.

Senator STERLE: So they are four regulars that work there all the time?

Mr Draicchio: They are at the higher rate, so it gets the RDOs, the holiday and sick pay.

Senator STERLE: So when you say, 'higher', you mean 'level with the 21 Oxford workers'?

Mr Draicchio: Yes, that is right. Then there is an agency under that, which is TN. They are the ones that will then move on to the Oxford permanent, if they decide they want to take them on. They are on about $4 or $5 less an hour, I think—

Senator STERLE: All doing the same work?

Mr Draicchio: All doing the same work. And then there is labour hire—we call them labour hire agencies: ASAP, Third Party and QPSG. They handle the unloading of containers—

Senator STERLE: We need a labour hire Pied Piper so you can take the bastards off a cliff! Sorry—I did not mean to say that.

Mr Draicchio: That is all right. And they handle some of the picking stuff as well, at the moment. They do de-boxing and all that sort of work. And then there are also the Oxford managers, which is another agency, which is for all the supervisors.

CHAIR: So, Mr Mujkic, all this is legal, though, under the Fair Work Act, do you think?

Mr Mujkic: Yes, we think so, and I am sure that Oxford Cold Storage thinks so. I think it is a deliberately complicated, convoluted scheme that gets around the obligations in the Fair Work Act quite easily, to be honest.

Senator STERLE: I am sure there are some high profile lawyers in Collins Street having a ball here. I want to come back to something you said, Daniel. You gave us an example: what I will call labour hire company 1—I will not mention names; I will get too confused—went broke, so you were shifted across to labour hire company 2 on the same wages and conditions. Was labour hire company 1, which went broke, on any other site, or is this some pop-up ratty little outfit that started with this mob at Oxford who are flying way under the radar?

Mr Draicchio: We have someone that asked them if they have any work anywhere else. They said we deal only with Oxford.

Senator STERLE: So there could be a chance that it could be something else, but we are not sure?

Mr Draicchio: No, there is not.

Senator STERLE: No, there is definitely no chance; they are nowhere else.

Ms Lewis: I would add that a number of workers at Oxford have done their own independent research. I have done my own research; workers have also done their own research. They look up on Google and search for the name of the agency, find a PO box somewhere and go to that, and there is no office or any actual infrastructure in place. Last year when Daniel's agency were transferred over, they all received letters that said: 'Your agency is wrapping up and will cease operating, but because you're good workers we want to offer you continued employment. All you need to do to continue your employment is sign on to a new agency.' But that old agency is still trading; it has not ceased operating.

Senator STERLE: It has not?

Ms Lewis: No, it is still active with ASIC.

Senator STERLE: But they are not on that site—nor on any site, to the best of anyone's knowledge?

Ms Lewis: As far I know it is just a shell company sitting there, still active.

Senator STERLE: Let's go to this labour hire company 2 then. Are they on any other site, to the best of anyone's knowledge?

Mr Draicchio: No.

Senator STERLE: Just under this shammy umbrella at Oxford?

Ms Lewis: Yes.

Senator STERLE: I know you do not have the answer, but how can one go broke and then pay the same rates and conditions? Do you know where I am going?

Ms Lewis: They do not actually go broke, to my knowledge.

Senator STERLE: They just upset Oxford, so they took—

Ms Lewis: No, from what I can tell, the only reason they transfer people is that the enterprise agreement for the old agency is coming to its end, and so they tend to transfer people about six months before the nominal expiry, because they do not want to get close to that point where you can trigger bargaining.

Senator STERLE: Gotcha, so you are overflowing the same EBA, rolling it over. That was very clear.

Mr Draicchio: I had the same director from agency 1 to agency 2.

Senator STERLE: This is getting worse. Do this Oxford mob have any other businesses? Are they in any other industries or any other states? Maybe we should look.

Ms Lewis: Their main operation is in logistics here in Melbourne. I think they are hoping to expand—

Senator STERLE: I am sorry, Ms Lewis, I would rather be really clear here: have you done any research to find out whatever other pies this mob have their fingers in?

Mr Mujkic: Whether they operate other businesses or not, I think they own a number of properties, including large industrial states, I am not exactly sure where—

Ms Lewis: In the western suburbs.

Senator STERLE: If you do not know, that is not a crime. Are they interstate?

Ms Lewis: They have property interests interstate, but not interstate warehousing, logistics or cold storage, to my knowledge.

CHAIR: Unfortunately, we are out of time. I want to thank you for your submissions. Mr Hilakari, we have quite a detailed submission from the Trades Hall Council with some recommendations, apart from the terrible

font. We will certainly be considering those things, so thank you for them. Unfortunately, we do not have time to explore any other issues at the moment, but thank you for your presentation to the committee today.

Proceedings suspended from 10:28 to 10:41

CHAPPEL, Mr Anthony, Head, Government and Community Relations, AGL Energy

JACKSON, Mr Douglas, Executive General Manager, Group Operations, AGL Energy

CHAIR: Welcome. I understand information on parliamentary privilege and giving evidence to committees has already been provided to you. I invite you to make an opening statement before we proceed to questions.

Mr Jackson: In my role as executive general manager, Group Operations, AGL Energy I have overall accountability for the safe, reliable and cost-effective operation of AGL's electricity and gas operations. My key accountabilities include operations, engineering, maintenance, construction and safety, and environmental functions within the group, as well. I have over 35 years' experience in the power generation industry. Prior to my role at AGL I worked in a variety of roles in the United States and Canada, leading the safe, efficient operations in construction of electricity generation and mining assets. A copy of my opening statement will be made available to the committee after I give evidence today.

AGL has been associated with the Loy Yang A mine and power station site, as a minority shareholder, since 2004. In 2012 we took over full ownership of the operation—the station and the mine. The industrial arrangements in place at the Loy Yang mine and power station were recognised by AGL as complex, inefficient and outdated. The problem is not the wage rates or the other employment entitlements, such as superannuation, leave entitlements and the like. Our employees are valued because they are skilled and in many cases are highly experienced, and they are well paid for their work. I believe in having a well-paid and productive workforce.

The issue with AGL was with the industrial relations environment at Loy Yang. It is the inflexibilities that interfere with our ability to manage the operation efficiently. There are many examples. One key example is that the enterprise agreement bound us to inflexible fixed manning requirements in areas where, as a consequence of innovation and new technology, the staffing levels are no longer required.

Another example is the restrictions that unnecessarily limit our ability to deploy people to where the work was for each shift. These restrictions apply even though the employees had all of the skills and training to do the required tasks. There are many occasions where we had to call in additional people to work overtime, away from their families and on their days off, even when people on shift were quite capable of managing the workload.

At times the enterprise agreement would require that we fully staffed plant or equipment that was off-line and not operational. This meant paying employees, some on overtime, when there was absolutely no work for them to do. In addition, we cannot move these employees to other plants, where they could be productive. There were various other restrictions that severely inhibited our ability to adapt, innovate and change as required. Our business environment is changing constantly and if our industrial relations framework does not allow reasonable flexibility to adapt to change our business will be at risk.

AGL is committed to the Loy Yang site, the Latrobe Valley and the state of Victoria for the long haul. For us to achieve that objective, change is not optional. Change is absolutely necessary for the long-term survival of our business. Senators will be well familiar with the complex challenges faced by the energy industry in Australia, especially the brown coal fired electricity generation stations in the Latrobe Valley. Our operation, like others in the valley, is essential to the prosperity of the community, but we have no guarantee of continued existence. We must earn that right through good business practices, including the respect of our industrial arrangements.

When we made our decision to buy Loy Yang we did so with our eyes wide open in relation to these industrial relations arrangements. Even as a minority shareholder we knew in 2012 that work needed to be done in this area. However, we believe that through the enterprise negotiation process there will be opportunities for us to work methodically through the required changes. We are optimistic that our employees and the unions that represent them will be up for that discussion. If we had not been able to proceed with confidence that the outdated and unsustainable enterprise agreement could be modernised through negotiation, then our investment decision may have been different. It is AGL's firm view that without significant industrial relations reform the Loy Yang site will not be sustainable for the long term. Given the transformation of our industry, this reality would have confronted any owner of Loy Yang.

We started the bargaining process with our employees and their unions at an early stage. Although the enterprise agreement did not expire until December 2015, we kicked off bargaining in July 2015. Some observers have suggested that AGL's intention has been to reduce wages for our employees. This is not true. At the outset of bargaining in July 2015 we made a proposal to our employees that, if accepted, would have provided them with a five per cent per annum pay rise for each of the next four years. Our initial proposal took a step-change approach that proposed modest productivity improvements, which were identified as critical matters to resolve. We recognised that the changes would be unfamiliar and perhaps unwelcomed by some of our employees. Our

position was that we were prepared to take an incremental approach to reform, as long as the reform journey could begin.

Unfortunately, with strong union opposition to the proposal, it failed, with approximately 80 per cent of our employees voting against it. It appeared that only a small minority of our employees recognised the need to change. Following the rejection we did not give up on our objective of industrial relations reform. We still believe this is clearly in the long-term interests of our employees as well as the organisation. We looked forward different ways of reaching a breakthrough. At that stage we had not progressed to the option of applying to terminate the enterprise agreement. We used the support available under the Fair Work Act to gain the assistance of an experienced Fair Work Commissioner to take charge of the negotiations as an independent facilitator to try to draw the parties closer together. Progress towards an acceptable solution was slow, despite the very able support provided by Commissioner Roe. Eventually, we did make an application to terminate the 2012 enterprise agreement on 21 July 2016. However, we continue to participate in the negotiation process as facilitated by Commissioner Roe. We made it clear that our strong preference remains to reach agreement with our employees. I would like to emphasise that that is still our strong preference.

Eventually, on 24 August 2016, the commissioner made a recommendation to all parties that, if accepted, would have resulted in a new enterprise agreement. From AGL's point of view it is far from an ideal solution in that it would have maintained many of the inflexibilities and inefficiencies, including fixed staffing and other operational restrictions. This proposal also maintained our offer of four 5 per cent pay rises. While the recommendation did not reflect all of the changes that AGL believes are necessary to improve the flexibility and efficiency of the site moving forward, we also recognise that a compromise agreement will at least provide a resolution and a start to the reform process. On this basis we made the decision to put the recommendation, in its entirety, to a vote of employees. This was the second proposal that AGL put to its employees. Again, our position was that we were prepared to take an incremental approach to reform, as long as the reform journey could begin. Again, regrettably, 70 per cent of the workforce voted against it. Three of the four onsite unions were generally supportive of the proposal; however, one union, the CFMEU's mining and energy division, did not agree with the commissioner's recommendation and campaigned strongly against the proposal. The recommendation from Commissioner Roe represented the upper limit of what AGL was prepared to accept. After the recommendation was rejected by the CFMEU and the employees, we reached the conclusion that our objectives for reform were unlikely to be achieved, short of terminating the existing enterprise agreement. Given that we were unlikely to reach an agreement at that time, we pressed ahead with the termination process. Throughout this process we have continued to participate in the facilitated negotiation before Commissioner Roe, and we have done so at all times in good faith, genuinely trying to reach an agreement. That process is ongoing. A further bargaining conference was held last week, with another scheduled for later this month. In association with that application, AGL gave undertakings that it would maintain key terms and conditions while negotiating continued.

The preserved terms include a commitment not to reduce existing salary levels. Originally we gave this commitment for three months after the termination decision, which we thought was sufficient time to negotiate a new deal. The Fair Work Commission approved the termination agreement on 12 January 2017. Subsequently the CFMEU filed an appeal of the decision and, in response to some concerns which arose during the appeal process, we have extended the undertaking for a period of up to three years. This means that AGL has committed that we will not reduce wages for employees or amend other key terms or entitlements for at least another three years. During that period we have undertaken to continue negotiations with our employees and their bargaining representatives. We are still determined to reach agreement, if that is possible.

I hope from the history that I have recounted that the senators can understand that AGL did not begin this process with an intention of applying to terminate the enterprise agreement. It was a step taken and pursued as a last resort. When it became clear to us that negotiations were unlikely to succeed while the enterprise agreement was in place, we are hopeful that the termination of agreement will give new impetus to the negotiation and that agreement will be reached. Whatever comes next, my strong belief is that the future of our operation and its ability to continue to be a large employer in the Latrobe Valley will depend on us being able to modernise our industrial arrangements. We made the decision to terminate the enterprise agreement after trying very hard for a very long time to reach an agreement. Our action to apply to terminate the enterprise agreement was a last resort when all other options had failed. Our impression is that the bar for termination of an enterprise agreement is very high, as it should be.

When an employer can demonstrate that an enterprise agreement has become a serious impediment to the long-term viability of an operation, there must be the ability for an enterprise agreement to be terminated. This could occur for many reasons. It might be because the business environment has changed or because a new technology

or innovations are developed that cannot be implemented under the terms of the enterprise agreement. It might even be because decisions made by previous negotiators are no longer tenable. Whatever the reason, there must be enough flexibility for new approaches to be put in place to meet the reality of the situation.

When new approaches cannot be achieved through the negotiation process, the termination provisions act as a safety valve for employers and employees. If that were not the case, an enterprise agreement could not be terminated in any circumstances or, if the bar were placed higher than it is at the moment, then—speaking for myself and my organisation—I believe it would be very difficult to commit to an enterprise duration of any agreement. Without the termination safety valve being reasonably available to employers and employees, it is likely they would no longer see enterprise bargaining as a useful process for negotiating productive and mutually beneficial outcomes. Entering into an agreement which can effectively lock in and ratchet up potentially restrictive and costly terms and conditions would simply carry too much risk. The purpose and objective of the enterprise negotiation process is to ensure that businesses and their workforces have the ability to shape their industrial framework. Typically, enterprise agreements are intended to live for up to three to four years which, in my experience, is the limit of the ability to forecast our future operating environment. Long gone is the era of making investment plans that last 30 or 40 years.

AGL recognises the benefits of enterprise bargaining and the certainty enterprise agreements can bring for employees and employers alike. In fact, we have successfully negotiated four enterprise agreements over the past three years—at Torrens and Somerton, our hydro assets; and, most recently, at our newest power station at Macquarie. The bargaining process has been conducted with our employees and their union and non-union representatives and has been transparent, pragmatic and generally positive. Loy Yang, on the other hand, has been a very different experience. At Loy Yang we have found ourselves bargaining for more than 20 months with a union which, for the most part, appears to be an unwilling bargaining partner—neither understanding nor accepting the need to modernise the enterprise agreement and appearing unwilling to allow for a flexible and agile workplace.

Again, we did not begin the Loy Yang bargaining process with a mindset to terminate the enterprise agreement. AGL followed the pathway given to us by the Fair Work Act to renegotiate our enterprise agreement in a cooperative and mutually beneficial way. When it was not possible to achieve the necessary change through negotiations we followed the process under the Fair Work Act to terminate the enterprise agreement. Terminating the enterprise agreement was not our preferred course of action; it was a step we took after a year of negotiations, much of which took place with the assistance of the Fair Work Commission, and after we had put an offer to employees which included the pay offer of five per cent annum for four years. Even after making the application we put a further proposal to employees which reflected the recommendation of Commissioner Roe. After all of this, termination was an option which we felt we were obliged to take. If termination had not been available to us then I believe the system would have operated decisively against our interests and against the interests of sustainable business and employment in the region.

CHAIR: Thank you, Mr Jackson. Thank you for that background. The committee is not here to make judgements about the content of your agreement. That is a matter, quite rightly identified, between you and the parties. I am sure there will be some dispute in terms of the way you have presented some positions, and again it is not for the committee to make judgements about that. But we are interested particularly in the termination and you have concentrated on that, so you know why we are here. Thank you for that.

It has been put to us that agreements are a result of negotiations over a period of time and generally they involve trade-offs. Some of the productivity trade-offs, workplace change trade-offs and other things are never actually documented in the agreement; they just become normal work practices. It has been put to us that these things have been paid for. Not often is it just a wage increase for nothing. There is a process of negotiation, so then to have a position where you can arbitrarily lose all the wage rates and everything else that goes with them and simply go back to the award but the employer can keep potentially all of the benefits that have been negotiated is an unfair tactic to be used in enterprise negotiations. You still have not resolved your dispute?

Mr Jackson: No, we have not.

CHAIR: I will ask some general questions and then we might be able to drill down to some details. When was the agreement actually terminated?

Mr Jackson: Effective 30 January 2017 I believe it was. The appeal decision I think was 2 March.

CHAIR: So it was this year. That decision is a couple of months old. It has not actually led to a resolution at this point?

Mr Jackson: That is correct. It is currently the decision of the Fair Work Commission full bench that is being appealed by the CFMEU potentially to the Federal Court.

CHAIR: I see, so the decision to terminate actually has not been finalised yet?

Mr Chappel: It is still subject to appeal.

CHAIR: Right, so it is in fact terminated? So it is not stayed while the appeal—

Mr Jackson: No.

CHAIR: So it is actually terminated?

Mr Jackson: It is, yes, effective 30 January.

CHAIR: When is the appeal to take place?

Mr Jackson: It is subject to appeal but I think they have not made a final decision whether they will appeal or not.

Mr Chappel: We are happy to take on notice if we have a date.

CHAIR: You emphasise that you did not start out with the process to terminate the agreement but you came to a decision and made an application on 21 July. Did you do that after taking external advice on how to progress your industrial relations strategy?

Mr Jackson: We have mix of internal and external advice throughout the bargaining process. We could take on notice what specific advice we may have received. But in my role within the company I was trying to get to a bargained outcome. As I have mentioned, I have been in the business for 35 years. I negotiated a number of enterprise agreements or collective agreements in my former life in Canada and some time in the US. I have always been able to find a middle ground where people could reach an agreement. In this case it was just becoming more and more unlikely that we could reach an agreement. I think the option to apply for termination was taken as a last resort. We saw no real coming together of the parties at all.

Mr Chappel: Could I clarify the earlier point on the appeal. The full bench decision stands at the moment. We understand an appeal is potentially in the offing, but it has not officially been appealed. I just wanted to correct that.

CHAIR: Okay, but nonetheless the agreement is actually terminated in a practical sense and that may be undone if an appeal is successful at some point.

Mr Jackson: Our three-year undertaking, which preserves the wages, superannuation benefits and other key entitlements, is in effect as well. It is really the ability to negotiate, or change the restrictive clauses, to allow us to manage the business efficiently that is at stake.

CHAIR: Have you implemented those?

Mr Jackson: We have not. We are undertaking to work with our unions and our employees on a path forward. What we do not want to do is recreate hardened positions. We want to take a very pragmatic approach to implementing change.

Mr Chappel: There is a relevant example, which is contemporary in this context, which was announced last Friday by the Victorian Premier and industry minister, and that is the Latrobe Valley worker transition scheme. It is enabling the Loy Yang power station and AGL—and we also hope the other generators will formally agree to join the scheme—to run a voluntary redundancy process and open up positions for the workers who have been displaced at the Hazelwood power station and mine to compete for those positions at their skill level. Had the existing agreement still been in place, lateral entry would not have been allowed and they would have had to come in in much more junior positions, when these are people with 15 or 20 years experience who are highly skilled operators. That is one immediate example where we are seeing some benefits for the region and for the flexibility that our industry increasingly demands.

CHAIR: I want to come back to the external advice. I would expect companies like yours to get external legal advice from time to time and I am putting that to one side. I am more interested to know whether, in terminating the agreement, you were receiving strategic industrial relations advice through either law firms or other firms that provide it.

Mr Jackson: We work with Minter Ellison primarily as a labour firm. Again, we have internal advice from our internal employee relations team. So it would be a mix of views of how to go about the bargaining process. What happens at the end of the day, whether you make decisions or not, I guess is a business decision. Ultimately we have to try to get to a compromise position where we can, and in this case we could not even achieve that. So

we have taken this course, which is fairly well laid out under the Fair Work Act, on how to proceed. But I can take on notice any more questions you have around legal advice.

CHAIR: You have decided to terminate the agreement. You must think that that will give you a better negotiating position.

Mr Jackson: Yes. I think what is fair to say is that it will give some impetus to everybody to negotiate. Having the agreement terminated allows us the ability to modernise the agreement, to create the benefits that the employees and employers can receive. It creates, I would say, consistency and some flexibility. We are preserving the pay, benefits and key terms—entitlements—of the employees for three years, or, if we reach an agreement that is different prior to that we can adjust for that by agreement. So for three years employees will know what their wages and entitlements look like.

What we seek to do is negotiate a new outcome that seeks productivity and efficiency, enabling us to manage the business to respond to, as you hear today, the rising prices. As a company we feel obliged to manage as a low-cost operation so that we are not passing costs needlessly on to the consumer. There is a lot of pressure on the industry and our sector, both from the ratepayers and from, I would say, the shareholders, to find that balance of sustainable long-term operations and the ability to manage low-cost and efficient operations through that period. That is the key to success.

Mr Chappel: There are really two factors there. Primarily, termination gave us the operational flexibility to deliver some of the reform that we need in terms of our own operations.

CHAIR: You are not applying that yet, though.

Mr Chappel: No, but that was our intention in making the decision.

CHAIR: Mr Jackson said that it gives the parties the impetus to get to agreement. I just want to ask you what that impetus is.

Mr Chappel: On that point—and I will defer to Doug in a moment—there are a number of bargaining agents. As you heard, with Commissioner Roe's conciliated outcome we had three of the four unions on the site effectively comfortable with that outcome and willing to be supportive of it, but one union, over 18 months of negotiation, has simply not been a willing partner. It has not been willing to negotiate, certainly in my opinion, in good faith.

CHAIR: They may have a very different opinion, and, again, it is not for us to judge who is right in that aspect. I just want to come back to the termination of the agreement. I think your words were: 'would provide the impetus for the parties to negotiate'. What was that impetus?

Mr Jackson: I think through the three-year undertaking, people will hear that their key wages and entitlements are preserved, but it allows them to have a voice in change.

CHAIR: They are not really preserved. They are preserved at your discretion.

Mr Jackson: No, it is a three-year undertaking that we have made to the Fair Work Commission, that we will not change their wages or key entitlements.

Mr Chappel: So it is binding.

Mr Jackson: It is binding for three years, yes.

CHAIR: That is another matter.

Mr Jackson: The reason they would want to come and bargain more is the opportunity to engage in a new way of modernising the agreement. The agreement as it was was re-anchoring us to the past. It was anchoring the industry to the past and anchoring the plant and employees to the past. We need a move forward and a clean sheet, so that we can move in a progressive, productive manner—for example, the ability to invest in technology and to get the value of the business case of those investments. We have invested $60 million in a distributor control system, yet we still have the same restrictions in place that do not allow us to realise the efficiencies of that investment. That is because of the prescriptive nature of the current clauses and terms that were in the agreement. We now have the opportunity together, employers and unions and management, to work on a new deal that reflects productivity and reflects the needs of consistency and a future plan for the employees.

CHAIR: Does the opportunity come about because you now have the ability, even though you have given the undertaking on wages and conditions, in terms of work practices, to implement whatever the award would allow you to implement, regardless of what might have been in the old agreement? Is that the impetus?

Mr Jackson: I would have to take on notice the exact meaning of award.

CHAIR: Otherwise, what was the point of terminating the agreement then?

Mr Jackson: Let me be blunt: we are not seeking to reduce people's wages.

Mr Chappel: I think we would say that the dynamics of bargaining will improve, we would hope, in this regard, because we are at a logjam. After a very long, extended period of putting twice a 20 per cent pay rise over four years, and failing to reach—

CHAIR: Maybe you are missing my question, so let me explain it again. You have given an undertaking to the commission and have told me it is legally binding in terms of the wages and monetary-type conditions. And you have not implemented any change to work practices yet, but that is what you are telling me you want. I want to get down to the impetus. Is it that without the agreement in place, you can implement the work changes that are allowed for by the award? If that is not the case, why did you terminate the agreement?

Mr Chappel: I think that is right.

Mr Jackson: When you say 'award', what do you mean?

CHAIR: What is in place now, effectively, is the award. It is the agreement that is terminated.

Mr Chappel: That does not contain those operational restrictions that Doug was referring to.

CHAIR: No, they do not.

Mr Chappel: Those are all locked into the previous enterprise agreement.

CHAIR: It would be an award which probably has not been maintained for 20-odd years. No-one in this industry would have been on the award for probably forever—maybe in 1900.

Mr Jackson: I would just like to clarify—

CHAIR: I am not challenging or making a judgement on your motivation. Other people can dispute that, but I am not, because that is not my interest. That is something for you to negotiate. I am really just interested, because I think it is a fairly brutal act—and I understand you mitigated it. But the termination of the agreement takes away potentially many years, decades and decades, of negotiated outcomes. And it replaces it with the lowest legal minimum wage and set of conditions you are legally able to apply.

Mr Jackson: We would disagree.

Mr Chappel: We would say that not having the agreement in place really allows us the freedom to now discuss a way forward that the old agreement did not allow for. As we have made clear, there is absolutely no intention to reduce wages or to take that kind of extreme position you have articulated. Really, we are at an impasse, and we did not have that way forward. This is a safety valve, I guess, after a long and protracted period of good-faith bargaining. For us, it was not a decision made lightly. It is not where we had hoped to be, but it seemed to allow the best possible case to allow some meaningful discussion to proceed productively.

CHAIR: Do you think that, if an agreement is to be terminated during a bargaining round, it should automatically lead to an arbitrated outcome?

Mr Chappel: We will take that on notice. We would see both sides of that potentially, but let us give you a considered answer.

CHAIR: Senator Sterle, do you have any questions?

Senator STERLE: Thanks, Chair. Something has obviously spooked the CFMEU Mining and Energy Division. With the investment in technology, are jobs disappearing because of automation or something?

Mr Chappel: No.

Mr Jackson: Investment in the distributed control system was taking a plant that had 30-year-old technology in place and modernising it, which every other plant has done over the last decade. That work was done. It had always been discussed with the CFMEU in the investment phase that it would lead to a reduced number of operators being required on a crew basis. That was always recognised. The challenge with the agreement as it was was that there was a consult-and-agree clause and a minimum manning requirement on a per-crew basis that prohibited the company from making choices about when to staff the units, whether it was safe to do and whether we were operating or not. Those restrictions prohibited us from making the changes necessary to have effective and productive use of the workforce. While there could have been fewer jobs on a per-crew basis, there was not wholesale transformation of the industry; it was just doing what all other industries are doing to be competitive.

Mr Chappel: Just add to that, it is not a problem we have with the CFMEU. As Doug has said, we have negotiated a series of enterprise agreements recently. The CFMEU is a party to most, if not all, of those. It really is a particular cultural issue with the CFMEU in the Latrobe Valley, but in the Hunter Valley and in South Australia—of course, there are always disagreements and there is robust bargaining—but we have come to mutually value-creating positions and agreements that give people certainty and I think show the Fair Work Act at

its best. We have struggled here because we just have not been able to sit opposite a willing partner. The mindset that has been on display from this particular division of the CFMEU in this particular location is quite unique. We certainly would not want to impute any of these difficulties onto the broader union and its representatives and leaders in other states because we have excellent interaction with them and consider them key partners and stakeholders.

Senator STERLE: Yes, and they are. I get that. Can you tell this committee how many jobs would have gone? We are on the right track. Is there job security?

Mr Jackson: Today there are 120 operators and we thought 105 was the necessary number. Our plans were to do that through attrition and a voluntary process. It was not: 'Everyone is out of a job tomorrow.' It was through a natural process which we could quite easily accommodate given the size of our workforce.

Senator STERLE: Like the Chair, I do not want to get into the intricacies. Hopefully it will be sorted out soon. What are the other flexibilities that you sought that the CFMEU obviously have problems with?

Mr Jackson: Key among them would be 'consult and agree'. In the agreement, some of the clauses have a consult-and-agree requirement to them or interpretations much like that. Where we want to make a change, we can consult with the workforce and the union, as every good company would do, but there is no requirement for them to agree with any of the changes that we want to make, and that is absolutely kneecapping our ability to manage and operate the plant efficiently. As an example, we have large dredgers. There are four large dredgers in the mine and we schedule them to operate on the day we have the crews coming in. They are sent out to the dredgers and operate them. If one of them stops and breaks down, we do not have the right or the opportunity to take the workforce and move them to another available piece of equipment, even though they are trained and capable to do it. In fact, we have to call in people on overtime to staff the unmanned dredger. We see those kinds of very real things as restrictive and costly to maintain our business. We are not looking to reduce the wages of our employees; we are looking to create workforce flexibility with respect to modern times. The current agreement is anchored in the past. We need to be thinking about the future.

Senator STERLE: Okay. We are waiting on the possible appeal process. So at the moment the employees are all on the same wages and conditions—

Mr Jackson: Yes.

Senator STERLE: as prior to—what is the word you used? You went to Fair Work and got the enterprise agreement terminated, was it?

Mr Jackson: Yes.

Senator STERLE: What happens after this? I am not going to get pulled up by the chair for using hypotheticals, because this is a real case here. Should Fair Work uphold your desire to terminate—that's it, final—and the appeal is lost, what happens to (1) the employees and (2) the conditions and wages?

Mr Jackson: We continue to bargain. In fact, we have a meeting scheduled later this month. And so I am sure we will have many meetings over the next weeks and months to, we hope, negotiate. We are committed to the bargaining process.

Senator STERLE: I understand that, Mr Jackson, and I do not wish to put you in a position that the chair will tap me on the head for, but eventually it is going to come to an end.

Mr Chappel: We have said those conditions remain in place for three years. There is a three-year commitment.

Senator STERLE: A three-year negotiation commitment—

Mr Chappel: No—to retaining those wages and conditions.

Senator STERLE: I understand that. Okay. So, if you and the unions onsite and the employees cannot come to an agreed position, you will continue to pay these wages and conditions for the next three years?

Mr Jackson: That is correct.

Senator STERLE: And then, after that, who knows?

Mr Jackson: Correct.

Senator STERLE: All right. That clears that up. Thanks.

Senator McKENZIE: I was just interested in your commentary about the different divisions within the CFMEU. Is this a Gippsland problem, a Victorian problem?

Mr Jackson: I think the union we are having the most difficulty with is the CFMEU Mining and Energy Division, which is a division within the broader CFMEU. I would say it is not necessarily Victoria, because we have negotiated with our Hydro operations which are there, and our Somerton operations are in Victoria. It feels quietly constrained to the Latrobe Valley, and, in particular for us, to the Loy Yang mining station that we operate and have ownership of.

Senator McKENZIE: Are they the same organisers and officials that would be dealing with Hazelwood workers?

Mr Jackson: Different lodge presidents, I believe they are called, but the same state secretary—yes. So there is commonality at some level within the CFMEU. I am not familiar with all of their structure, but we could certainly provide that on notice if you like.

Senator McKENZIE: All right. Thank you.

CHAIR: Thank you for your presentation today. I think we all hope that there can be a mutually beneficial outcome agreed to resolve the impasse in the nearest of futures. But thank you for your presentation to the committee today.

Mr Jackson: Thank you, senators.

DAVIS, Mr Ben, Secretary, Australian Workers' Union Victoria

NOONAN, Mr Dave, Assistant National Secretary, Construction, Forestry, Mining and Energy Union

ROBERTS, Mr Tom, Senior National Legal Officer, Construction, Forestry, Mining and Energy Union

THOMAS, Mr Andrew, National Industrial Officer, Construction, Forestry, Mining and Energy Union

[11:19]

Evidence from Mr Roberts and Mr Thomas was taken via teleconference—

CHAIR: We now welcome representatives from the CFMEU and the AWU. I understand that information on parliamentary privilege and the giving of evidence to committees has already been provided to you. Thank you for your submissions. We now invite you to make some opening remarks to the committee, to be followed by questions.

Mr Noonan: Would you like me to kick off?

CHAIR: Yes, if you would like to go first, Mr Noonan.

Mr Noonan: I will take the liberty of assuming that the senators present have had the opportunity to read our submission, so I will be brief—mercifully brief—in addressing it. Part A simply tells you who the CFMEU is. As it says, we are the principal union representing workers in construction, coalmining, forestry, building products, pulp and paper, furniture manufacturing and power generation. It explains our divisional structure and the fact that we are a major union both in urban and rural Australia. It then goes on to make a number of comments about the position that the union takes in relation to current economic, political and industrial matters.

The submission you have before you deals primarily with a number of key areas where we see there are ongoing and serious issues with corporate avoidance of the provisions of the Fair Work Act. Those are enumerated through the body of the submission, and include the issues around labour hire, sham contracting, insolvency and phoenixing, and the interaction of the statutory safety net with the bargaining regime. We then go on to point out a number of case studies in the coal industry and, subsequent to that, a number of case studies in the construction industry. It is probably useful if I let those be subject to any questions that the committee has, rather than run through them here.

I think the crux of our submission is really at part D, where the union suggests a number of improvements that the parliament could make to promote secure employment. They include including a definition of 'casual employee' in the Fair Work Act that is consistent with common-law principles; the creation of new rights for embedded labour-hire employees; the removal of impediments preventing unions effectively bargaining for embedded labour-hire employees; allowing for site minimum rate agreements where existing single company structured enterprise agreements exist; and providing that an existing enterprise agreement also covers, and applies to, embedded labour-hire employees. We believe that parliament should prevent the certification of enterprise agreements involving probationary employees or a majority of casual employees—and that will be explained by some of the case studies that we have outlined in our submission. We support the removal of the 'operational reasons' defence in unfair dismissal laws, and believe that parliament should strengthen the adverse action provisions by making it absolutely clear that the termination of an employee to engage cheaper contract labour is unlawful.

Finally, the case studies that you see in front of you show many examples where bargaining structures, labour hire arrangements, sham contracting, phoenix arrangements and, indeed, voting arrangements for the making of enterprise agreements have been manipulated and, we would say, gravely abused in order to avoid the payment of legal entitlements and, in many cases, statutory entitlements to employees to create a second class of workers in a large number of workplaces in construction and coalmining and also to engage in phoenix activity, which has the effect of depriving employees, creditors and, indeed, the taxpayer of entitlements and income which is properly due to them. We commend the submission to the Senate.

CHAIR: Thank you, Mr Noonan. Mr Davis?

Mr Davis: I appreciate the opportunity to give evidence. We have also, obviously, put in a written submission. Today I do not want to run through that whole submission. I want to deal with two issues in particular that came out of that: Esso's proposed termination of their onshore and offshore enterprise agreements, as well as the ESS contracting-out case study that we referred to. I will start with the agreement termination piece.

Esso and the three unions involved, the AWU, the AMWU and ETU, started negotiating replacement agreements, both onshore and offshore, in mid-2014. To say it was a long and laborious negotiation is somewhat of an understatement. We believe, and believed during that process, that the reason negotiations were so

intractable was that Esso were pursuing what we believed, and continue to believe, was an increasingly aggressive industrial agenda around change and they had not actually tried to socialise that with their workforce during the life of the last agreement. If you are an employer who sees a need to change, whatever it might be, in your workplace, the smart way to go about that is to talk your workforce through that, not wait until you get to the bargaining table and then just throw it all on the table.

Because those negotiations were as long and as tortuous as they were—they involved significant amounts of protected industrial action, and they involved legal action at both Fair Work and the Federal Court and now the High Court—we believe that Esso made application to terminate both their onshore and offshore agreements in the middle of last year simply as a point of leverage in the negotiations. That is not what those provisions of the Fair Work Act were put in there for in the first place. There have now been a number of agreement terminations, with a number of applications afoot. As we see them occur, the difficulty we in the AWU and in the union movement more broadly—and, more to the point, the people who are covered by these agreements—face is that each case makes the next one even easier.

We have a provision of the Fair Work Act which originally was there basically to allow employers and, in some cases, employees and unions to terminate agreements that were no longer in play: the companies had closed down; the terms of those agreements had long since expired and been replaced by subsequent agreements. Those provisions have now morphed into, effectively, a situation where the employer can go in, attempt to negotiate an enterprise agreement and then, if they cannot reach agreement for whatever reason—irrespective of who, if anyone, is to blame for that—they can pull the big club out of the bag and try to terminate agreements. If they had done so at Esso, onshore and offshore, it would have led to the pay rates being more than halved.

Now, I am a full-time union official, and I have been for a long time, so I am used to seeing those sorts of applications being made, although this was my first direct experience of it, but the impact on the workforce at Esso when that application was made was devastating. It is all well and good for me to see this as a legal play in a bargaining attempt to leverage out an agreement. The workforce were devastated. The first thing they did was ask us, the unions: what are the awards that we would default back to? And when we provided those to them and they realised that their pay would be cut, they realised that, simply at the whim of their employer, they would lose all of the things that they had spent the last 25 years bargaining for and paying for in previous rounds of agreements and previous rounds of negotiations. The shortcomings of the Fair Work Act, in the way in which those termination provisions have morphed into something that they were never intended to be by the legislature when they were put in there in the first place, have had a significant impact on Esso's onshore and offshore workforce, the vast majority of whom live within half an hour of the Longford heliport and the Longford gas plant. These are local people being potentially devastated by a much broader application that would have halved their pay and removed all of their over-award conditions.

We operate under a system in which the modern awards are supposed to be comprehensive safety nets. But in many industries, including the building and construction industry, including the oil and gas industry, including the manufacturing industry and also including any number of white-collar industries, the market rate of pay—that which has been bargained for either collectively or individually—is much higher than the award. In some cases, it is two or three times the award. The ability to give the employer the sledgehammer to go and terminate agreements is, in my view, not what the legislature intended when the Fair Work Act was put together, and, indeed before that, the Workplace Relations Amendment (Work Choices) Act, the Employee Relations Act and the Industrial Relations Act, and has, in fact, just given the employer the ability to try and filibuster a negotiation and then pull out the big stick

At Esso, we found that it worked. Our members were so panicked by what they thought was going to happen—not what might have happened and not what was a dalliance at fair work—and they assumed that, if the application was made, it would get up. We received written legal advice that said that the application, if it went the whole nine yards, would probably be successful. They were devastated by that, and it worked. The leverage with the onshore agreement, the leverage that Esso then had over its workforce, forced us and forced the workforce into basically trying to save the silver—that is not a legal term, but you all understand what I mean, I assume—and we reached agreement onshore.

Offshore, the workforce had no other choice, in their view, but to force the agreement into an arbitral process—a process that was opposed by Esso. They did not want their agreements arbitrated, but, by doing some fancy tap-dancing legally of our own, we managed to force that via fair work. That is not the way that the system is supposed to work. I have a real problem with the fact that employers are being given this opportunity to basically get, by legal means, what they cannot negotiate. In each of the cases that I have seen submissions on—and I have read a handful of the submissions, certainly in the case of Esso—the reason that the negotiations were as long and

as difficult as they were was because the employer did not try and socialise their change agenda during the life of the previous agreement. They just walked in with the big stick. We are now seeing much more broader applications as well.

Murdoch University recently made an application to terminate their agreement. That is not one the AWU is involved in, so I am relying on what I see in the media and other commentary. Again, if it is successful, it will extend and expand the scope of that part of the act. That is not why it is there, and it is, in my view, an improper use of those provisions of the act. But for the employers it is great. They can get what they want. If they cannot negotiate it, they can get it through legal means.

Obviously, it is our view that those provisions of the act need to be changed. You cannot have a successful enterprise-bargaining system if both parties are not coming to that from a position of some equality. Employees have the right to bargain for that, which they seek, and to pursue those claims, and the employer has the right to bargain for what they seek in that agreement and negotiation process. That is the way it is supposed to work, and it is coming from some sort of position of balance. Although, in any workplace, there is obviously an innate power imbalance between employees and employers, but that is how the system is supposed to work. But it now does not because the ability to terminate agreements—to get that which you cannot get through negotiations—skews the system irretrievably in favour of employers.

When employers terminate agreements—whether they give commitments around wage rates and the like or not—it means that they are threatening to, in fact, cut the rates of pay and conditions by anywhere up to a half so that workforces who have bargained for 25 or 30 years to enjoy the terms and conditions that they have, and they have paid for that through previous rounds of bargaining, then face the chance of losing it all. They face the reality of losing it all unilaterally. That is patently unfair, and it is not the way the act was put in place. When those provisions of the act were originally drafted, that was not the intent of the legislature at the time. I think that would have ended up being too ambitious for the then Howard government, who had a very ambitious agenda in WorkChoices, but this was even overreaching that. Obviously, it is my view and the view of the AWU—I do not think you will get anyone to argue with me in the union movement about it—that those provisions in the act need to change. There needs to be a better way. That is not reflecting on what has happened in other cases. I am not involved in those negotiations. I am simply talking about Esso and what happened with their on-shore and off-shore agreements.

CHAIR: In the off-shore agreement you indicated that you organised to be in a position where the commission arbitrated an outcome. Do you think that ought to be the default position? If there is going to be a termination during a bargaining process, do you think it ought to lead to automatic arbitration?

Mr Davis: I think there is some merit in that. I would need to consider it at greater length. It certainly is preferable to groups of employees facing their pay being cut in half, which is what the termination piece does. Our view with Esso was always: plan A was to negotiate agreements, plan B was to arbitrate if necessary, and plan C was to avoid, at all costs, terminating the agreements for the obvious reasons I have said repeatedly here today and in our submission. There is some merit to the default position of arbitration. Others would have different views in different industries. The problem is that it skews the power relationships in the bargaining process and makes, in many cases, the bargaining process worthless. If you are in one of those workplaces where the agreements have been terminated, what is the point of bargaining? If you have that hanging over your head in any round of bargaining at all, what is the point of bargaining? And yet that is what our system encourages.

CHAIR: Mr Noonan, do you have a view on that?

Mr Noonan: Our submission does not deal with it in deal. It is a complex issue. I certainly would echo Mr Davis's views in this way. For companies and workforces that have had a lot of agreements negotiated over a long period of time, what happens is that more and more of workers' income is at risk if you have a situation where termination of an agreement and a reversion to the award is a likelihood. Indeed, it appears, as I understand it and as I have seen it, the commission is almost always ready to terminate agreements and take people back to the award.

The longer you have been bargaining the longer your workforce has been in the enterprise bargaining system. If your workmates, their predecessors and your employer were early adapters to the enterprise bargaining system, what you have is a situation where an individual worker has a massive amount of their remuneration at risk and a massive amount, in some cases, of accrued entitlements that they thought they might have been able to rely on—things like redundancy—at risk. That, to me, seems to create a serious power imbalance in the bargaining relationship, one that was not contemplated or foreseen at the time that these sorts of provisions were put in place.

CHAIR: I understand modern awards have become, through the introduction of the Fair Work Act, effectively legal minimum rates as opposed to the old system of pay rates awards and minimum rates awards. Would a potential solution be that awards now should reflect the market or going rate in industries, so that the benchmark does not fall back to something that might be 20 or 30 years old but reflects something that is quite contemporary?

Mr Noonan: Of course, there have been some movements in awards over that 25- or 30-year period of time, but they have been minimal compared to the movements that people have been able to achieve through bargaining. Yes, the system promotes and contemplates bargaining as being the primary means of setting rates, but awards certainly, in our view, have become much less relevant than they should be. In industries where there is competition for bidding work, employers who have enterprise agreements can be severely compromised by employers who simply rely on an award rate or, as our submission spells out, rely on the award rate to formulate a bastardised system of bargaining which takes real bargaining rights away from the workforce and hands all the power to labour-hire companies, the large subcontractors and the large corporations. Effectively, it puts all the power in the hands of the large corporations who engage those contractors and labour hire companies.

CHAIR: Thank you. The committee has received—

Mr Noonan: Could I just say that we do not at this stage advance the idea that arbitration ought to be the immediate default position. I think that it is a complicated issue, and, if that is a matter that is being seriously contemplated by the committee in its final report, we would probably seek the opportunity to put in some supplementary thoughts about that.

CHAIR: We are not contemplating anything yet. We are at fairly early stages of where we are at, so we are just digesting a lot of the evidence we have got. But, if you do form a view on that, you are welcome to advise the committee. If you do not form a view on it, we will take what you have said there.

The committee has received a lot of evidence about agreements being made by cohorts of workers which the agreement then is never applied to. There are some well-known examples, but there seem to be quite a few examples around. There is the CUB example where four workers, mainly unknown, who did not have any of the skills, formed an agreement which was then applied to a highly skilled workforce in another state. How prevalent is that in the industries that you, Mr Noonan, and you, Mr Davis, cover?

Mr Davis: That very question takes me to my second case study, which I will come back to. The AWU are seeing in our industries—as well as both of us in the construction industry—a remarkable number of agreements being struck with what I believe are unfair cohorts in instances where probably in fact they should be greenfields agreements rather than live agreements, where a handful of people in one state are voting for agreements that apply in other states in which they do not work at all, not in the lead-up to the agreement, not when the agreement is made and not when the agreement is live either. We are seeing a number of those sorts of agreements done, national agreements that are voted on by—and this is my term—three men and a dog out the back of Bourke. They then become national agreements and severely undercut our established market rates of pay and conditions.

We see that in manufacturing. We see it in particular in oil and gas. We see it in metal construction and civil construction. We see it in particular through labour hire agreements but also with contractor agreements themselves. The more you look, the more you dig up on this. There has been an explosion in the number of agreements being done, and part of that—not all of it, not most of it, but part of it—is, we think, CUB-style arrangements that are simply there to undercut what are currently the established rates of pay and conditions either across an industry or in a workplace.

I note that the NUW made submissions around labour hire and maybe the proposition, which I support, that labour hire providers should be paying in-house agreements. They should be honouring in-house agreements. I think that has some merit because it ends the race to the bottom.

I will come back to ESS, which was the other case study, when you have finished pursuing this. But, yes, we are seeing this all the time in any number of our industries.

Mr Noonan: My colleagues might care to add some more comments, but we have made a number of examples in our submission of what we see as the abuse of voting cohorts. But let me say that it appears that we have a situation where corporate lawyers have looked at the act in the way that some of the more rapacious legal and accounting firms have looked at things like taxation and corporate law in order to try to find ways to shift the goalposts and significantly rebalance the power equation towards corporations. In doing so, they have clearly employed tactics which are deliberately there to deprive workers of the right which they should enjoy under the Fair Work Act to collectively bargain. It is a principle of the Fair Work Act that people should be able to collectively bargain for an agreement. It is enshrined in the conventions of the International Labour Organization

which Australia has ratified. What we see here is a situation where companies choose a group of employees—or in some cases we see a single employee—who are simply being used as a convenience by the company to establish an agreement which they would not be able to reach with a fairly chosen group of employees bargaining through their union. We see the likes of John Holland construction, not surprisingly, as one of the key players in that sort of disgraceful behaviour.

CHAIR: Mr Davis, maybe you might take us briefly to that issue, because I did discuss that with ExxonMobil this morning.

Mr Davis: Sodexo had been Esso's offshore caterer in Bass Strait for about 15 years. These are the people who do the cooking and cleaning and household maintenance, for want of a better term, on Esso's offshore oil rigs and gas rigs in Bass Strait. They had been the contractor for 15 years. They had always bargained with their workforce. They had bargained with the union. They, the old contractor, had come to us last year and said: 'We need to tighten the belt. Esso are looking to cut costs.' It is remarkable for a gas company to claim they need to cut costs, particularly given the current media, but where there is life there is hope. As a result, the Sodexo workforce agreed to a three-year wages freeze. And yet that was not enough. Esso retendered the contract, and Sodexo got knocked off by ESS.

ESS had done an agreement some four months before they won the contract, an agreement with six employees in WA to cover South Australia and Victoria. Those six employees had not worked in South Australia and Victoria either before or when the agreement was made or since then, and yet this agreement, which applies only in South Australia and Victoria, was 'bargained'—which is really, 'Here's a document; we want you to support it'—in Western Australia.

We are challenging that, but I believe it is a good instance of how ESS and to a lesser extent, as the client, Esso have gamed the Fair Work Act. I do not say that lightly, and I stand by that comment: they have gamed the Fair Work Act. The ESS agreement passed the BOOT, and again it is that undercutting of established rates and conditions. The award is at a level; the ESS agreement is a bit higher; the Sodexo agreement was a lot better than that again. The net impact of it was twofold: (1) the entire workforce at Sodexo lost their jobs.

Senator STERLE: How many, Mr Davis?

Mr Davis: 110. So, unlike most contracting situations, where contractor B picks up the workforce or a lot of the workforce of contractor A, ESS made it quite clear, to escape the transmission-of-business provisions of the Fair Work Act, that they were not going to employ anybody, and they did not. So people who had worked in that job for successive contractors—ironically including ESS, before Sodexo—all lost their jobs. They were not even welcome to apply. They were told that if they wanted a job with ESS they might try to find them something as a lollipop lady in northern Queensland—that is a literal example—or as a canteen attendant in northern Western Australia. That too is a real example. A hundred and 10 people, all of whom lived within an hour of the Longford Heliport, from where they embarked to Bass Strait, all lost their jobs—not on merit. They were told that they could not even bother to apply. And that is because ESS wanted to escape any transmission-of-business commitments on an agreement that quite frankly was shonky, an agreement that was done in Western Australia that does not apply in Western Australia; it only applies in South Australia and Victoria.

Senator STERLE: Do you have a copy of that agreement, Mr Davis?

Mr Davis: I do not with me; I will provide it to the committee. I did mean to bring a copy with me and forgot; my apologies.

The real kicker, though, is that—apart from the fact that 110 families were ultimately devastated because they were not told right up until about a week or two before the contract changeover that they would not be getting jobs—the pay rates that the incoming workforce, largely FIFO, are paid are about $65,000 less per annum than the outgoing contractors. That is $65,000 per annum each. So, before you move, there is a $6½ million save. Actually, it is a lot more than that because they also—

Senator McKENZIE: I think the evidence this morning was $6 million.

Mr Davis: Yes. I am not going to—I will not be—

Senator McKENZIE: Yes, I just—

Mr Davis: It is detail around the edges, but I do stand by my numbers on it. And those people who are now undertaking that are also working a 14-and-14 roster at the direction of the employer. ESS could do that by agreement but never managed to reach, never sought, agreement of their workforce to do it, but in the ESS agreement they have to work the roster that their employer tells them to, whether it is a week on and a week off, two weeks on and two weeks off or a month on and a month off. Whilst we are used to seeing rosters like that off

the north-western coast of Western Australia or in parts of Darwin or northern Queensland with workforces that are entirely FIFO, that has never been seen before in Bass Strait. I do not have a problem with FIFO workers. They are entitled to earn a living. But what that contract has done which is Esso's ultimate agenda is to force a 14-and-14, 14 days on and 14 days off, roster into Bass Strait.

But park all of that out. The important thing out of that case study is this: 110 people who had never been complained about, who were model employees, who their employer was happy with, some of whom had worked there for up to 40 years, lost their jobs and their livelihoods because of a change of contractor and because the new contractor wanted to avoid transmission of business and because the client did not take any sort of pastoral care notions around this new contracted workforce. They had dollar signs in mind and went out and achieved them. Esso did as the client, and ESS did as the contractor who came in. That means that 110 people were unemployed. They had been loyal. They had been productive. They had never had any complaints about their work performance for years. A group of 10-, 20-, 30- and 40-year employees, through no fault of their own, lose their jobs and have no ability to get those jobs back.

CHAIR: Mr Davis, you indicated that it was partially Esso's agenda to get this new shift process in. Are you saying that Esso had some role in the negotiations?

Mr Davis: Not in the negotiations of that agreement, but I assume that Esso would look at any incoming contractor's agreement to make sure there was one, and anybody can read an hours-of-work clause and understand what that means. It is not rocket science. It was a very clear, quite frankly brutal, hours-of-work clause, completely out of sync with anything I have seen in Victoria in any agreement. A month on, month off roster—this is 12-hour shiftwork we are talking about. They are not working eight hours; they are working 12, 14 days straight, half of which is night shift—really? So, yes, Esso would have rubbed their hands with glee as an opportunity to push that agenda of a 14-and-14 roster.

CHAIR: But can't the 120 workers be consoled with the fact that they have helped to improve by a sliver the profits of a great multinational?

Mr Davis: I think, with respect, that will come as cold comfort to any of those 110 employees, some of whom have worked on those oil rigs for decades.

CHAIR: That was my takeaway of the evidence given to us this morning.

Mr Noonan: I just have a general comment on the role of client companies in this. It is apparent to us that in many cases the principals, if you like, whether in construction or in another areas, have significant financial control over the operations of contractors, and they know precisely what is happening and why it is happening when these sorts of attacks on wages and conditions are made at the time that contracts are changed and renewed. There is no doubt about it. They are simply looking at it as a cost centre and making judgements accordingly.

Senator McKENZIE: Mr Davis, I just want to know: were the workers that are within that new contract new employees?

Mr Davis: I believe they were. I think a number of them worked for ESS in Western Australia and had lost their previous roles as part of the mining downturn. So they are FIFOing into Victoria.

Senator McKENZIE: They were previously employed over there, so now they have come, and now they are working in Victoria.

Mr Davis: In Victoria for less than they were working for in WA; that is correct.

Senator McKENZIE: Thank you.

Senator STERLE: Mr Noonan, if I can come to construction, I am very, very keen, even if you have to take it on notice to provide the opportunity for us, to know every major builder that uses the Fair Work Act to exploit workers on the site engaged with labour hire. I am going to be consistent here because I know the next mob are labour hire. I am no lover of labour hire and never have been a labour hire lover because I see them. They make absolutely stuff-all contribution to training and career paths. So there you go; you will have a chance to defend yourselves when you get up here! I want to know what enterprise agreements have been negotiated with the major builders, if you could, please, that labour hire companies have done. I want to know how many permanent jobs are addressed in these labour hire EBAs, if you have got that information, and what training, apprenticeships, traineeships and all that sort of stuff are addressed in them. Would you have that information, Mr Noonan? I know it is a hard ask.

Mr Noonan: I think we would have some but not all of that information. I ask that we take the matter on notice and respond to you in relation to those particular question if we could have them quite clearly spelled out in writing.

Senator STERLE: Yes please.

Mr Noonan: In relation to apprenticeships and training, it is unusual for labour-hire companies to have any apprentices at all. It simply is not the business they are in. I should say that overall I think unions have accepted that there is a role for labour hire in some circumstances: emergency circumstances, top-up, urgency, absentees and so on. But the proliferation of labour hire has not been about those things in our industry, in construction or in coalmining as I understand it. I am not an expert on coalmining but have seen a fair bit on it. It has been about increasing workforce insecurity. The fact that we see such a level of casualisation, labour hire and insecurity in the Australian workforce is not an accident; it is a clear approach by corporate Australia as to how they wish to restructure the workforce to alienate as much income as they can for themselves and to deprive working people of as much power as possible in the first instance. In the second instance, it is a result of the grievous failings of successive legislative regimes to protect the incomes, living standards and job security of ordinary Australians.

Senator STERLE: The invitation extends to you too, Mr Davis. Mr Noonan, you mentioned John Holland, and it pricked my ears because the other day I was chairing an inquiry to do with John Holland in Perth about asbestos from Chinese building products. What were the cases with John Holland that led you to refer to them? They sound like they are the baddies. Are they, or was that just my—

Mr Noonan: There are a number of companies that have used it.

Senator McKenzie interjecting—

Senator STERLE: No, that is not the case, Senator McKenzie; not at all.

Senator McKENZIE: I should not have distracted.

Senator STERLE: That is exactly right. Sorry; it is because I have been around this a long time in transport. This is what really drives me. I have seen full-time, permanent jobs go while some people are creaming a little bit of profit off the top.

Mr Noonan: In paragraph 66, page 18 of 45 of our submission, we talk about CFMEU v John Holland. It is a full court of the Federal Court. There was an appeal against a decision to approve an enterprise agreement made by three workers which had the capacity to cover a very wide range of employees. It is consistent with an approach that John Holland have taken in projects, including the children's hospital, to avoid any form of collective bargaining for employees or employees of their subcontractors. That is the approach that this company have taken in both their previous iteration, when they were owned by the Leighton Group, and in their current iteration, where they are owned by a Chinese state corporation. They do not believe Australian workers have a right to collectively bargain, and they use their financial muscle and legal tricks to bring that about.

Senator STERLE: Thank you. I am getting the wind-up, but I am dying to ask about sham contracts and phoenixing. But anyway.

CHAIR: Senator McKenzie.

Senator McKENZIE: I have a couple of questions. I go back to your opening statement about security of employment being a key driver for both of your unions. I completely agree. Can I get both of your commentaries around—particularly as a Victorian senator—the Heyfield mill situation with 250 forestry workers in the forestry industry down in Gippsland? Does the union have a view on the decision about opening and shutting coops that ultimately reflect in the milling jobs that are available?

Mr Noonan: Our union was with the workers who came to Melbourne yesterday. Our union strongly supports the case that those workers have to achieve job security through having access to renewable and sustainable resources. The support of the union in trying to secure those jobs will be strong and will continue.

Senator McKENZIE: So you have been lobbying the state Labor government around that?

Mr Noonan: Yes. Well, I have not personally—I am the construction secretary—but Mr O'Connor in our forestry division has been strongly supportive of those. I know they have been in contact with the company in question. They were there with the workers yesterday and they are working hard to try and achieve an outcome to protect jobs for those workers. It is an important industry. It is a regional community which deserve to have jobs in it.

Senator McKENZIE: Absolutely. Thank you. Secondly, the current state Labor government obviously has put a moratorium on coal seam gas exploration for both conventional and unconventional gas exploration. That obviously affects potential mining jobs out in regional Victoria. Does either union have a view on that particular policy objective of the state Labor government and its implication for mining workers in Victoria?

Mr Davis: I have been on the public record, expressing my views about gas more broadly, as has the AWU nationally. In particular, in a Victorian context I have said publicly and so am happy to say here again that I

understand the moratorium and the banning of fracking, as it is known, and I think that is the nature of the politics of the issue until such point as the science is settled, because the science is far from settled.

Senator McKENZIE: But even conventional gas does—

Mr Davis: However, when it comes to conventional gas, when the moratorium was extended for three years last year, I was publicly critical of it then and I remain publicly critical of it now.

Senator McKENZIE: Thank you.

Mr Davis: Conventional gas extraction is a known technology and a safe technology. We have been doing it for decades.

Senator McKENZIE: Thank you very much.

Mr Noonan: Could I add to that? In respect of the issue around energy supply and gas, our colleagues at the AWU—and we strongly supported them in this—have advocated gas reservation as a national Australian policy. Lots and lots of countries around the world—in fact, I think we are about the only major gas producer that does not—have domestic reservation, and much of the significant spikes in energy costs and many of the problems that are being faced at the moment are actually about the fact that manufacturers and consumers in Australia are being forced to compete with enormous industrial conglomerates overseas. That is where the price of gas is being set, and it is a serious problem for energy in this country. The AWU were talking about this at least two years ago that I recall, when no-one was, and it seems to me that there is still a failure, in a lot of the commentary around the very serious energy situation which faces Australia, to properly understand why we do not have gas reservation, why we are so beholden to the market that we are prepared to sacrifice the rights of consumers and our own manufacturing industry to neoliberal rubbish.

Senator McKENZIE: On that: the CFMEU still supports the Labor Party's 50 per cent renewable energy target?

Mr Noonan: The CFMEU has not voted specifically on the 50 per cent as a union to my recollection. Our mining and energy division may correct me on this. We support a proper approach to energy security in Australia.

Senator McKENZIE: I think at the national conference the CFMEU was the surprise backer of the Labor Party's 50 per cent renewable energy target. I am out in the regions, talking to regional manufacturers all employing 60 to 100 people in regional centres about the exorbitant increases in energy prices. We are all on the same page there. My question is: does the CFMEU still back the 50 per cent renewable energy target of Labor.

Mr Noonan: I think the union came to a position—whether it was a compromise position around that as laid out—and there is a 50 per cent target in the Labor policy. That is true.

Senator McKENZIE: And do you support that? What is your compromise position then?

Mr Noonan: That is not what has caused the enormous spike in energy prices.

Senator McKENZIE: My question is: what is your compromise position then? You have mentioned the CFMEU came to a compromise position. I would like to know what that is.

Mr Noonan: It is the position that was laid out at the conference and it is a position that the union ultimately—

Senator McKENZIE: Could you supply that to the committee? If you are unclear right now, that is fine; the conference was a while ago.

Mr Noonan: It can be supplied on notice, yes.

Senator McKENZIE: Thank you.

Mr Davis: Indeed, I note that, when the AWU ran our Reserve Our Gas campaign, your colleague the member for Mallee supported it at the time, which makes life interesting in terms of what the current federal government intends to do about the issue.

Senator McKENZIE: I know the National Party policy. I am asking about the Labor Party policy, the CFMEU's policy and indeed the AWU's policy. Because we are running out of time, I would appreciate if you could also provide on notice your union's position on Labor's 50 per cent renewable energy target. Thank you.

CHAIR: That would be lovely. Thank you for appearing before the committee today and thank you for your detailed submissions with detailed recommendations.

Mr Thomas: Could I slip something in?

CHAIR: All right. Make it in 30 seconds.

Mr Thomas: I make mention of the list of agreements that we say are undervalued. In our submission we have a reference to a case study of an organisation called One Key. In the last few weeks after our submission was put in, an agreement has appeared on the Fair Work Commission website by a company called WAMC Pty Ltd. When we did a search of WAMC Pty Ltd, it turns out that their former name or names are One Key. When you look at the agreement, which I am certainly willing to provide to the committee, its rate is the award rate plus what they term a boot allowance of one per cent of the hourly base rate of pay. One per cent of the hourly base rate of pay for a level-3 mine worker is 2c an hour, and that is paid on ordinary rates. So the agreement is the award rate plus 70c a week on a 35-hour week. Under no circumstances can any reasonable person believe that that would satisfy the boot test, and we have currently put submissions to the Fair Work Commission, objecting to this agreement. This is the third manifestation of the One Key organisation. They have been One Key Resources and now they are popping up as WAMC Ltd. This is an example of what we are dealing with. In the last 12 or so months, the mining and energy division, either on its own or together with destruction and general, has dealt with some 30-odd enterprise agreements that we have objected to in the submission. We have 11 or so agreements that we are currently objecting to on the basis either that the employer has not followed the decision-making or pre-approval process, that the agreements are not genuinely agreed, that they fail to pass the boot, that they do not meet the national employment standard or that they are in another way, shape or form invalid.

I will finally say that, of all of the agreements that we have put before the Commission other than the one that is currently in action—of all of the agreements that we protested about—not one has got through unscathed. They have either been refused by the commission, withdrawn by the applicant or approved with undertakings. If the committee so requires, I can provide a list of those agreements in which we have raised our objections.

CHAIR: Thank you. If you do provide that information, refer to it as a supplementary submission with some explanatory comments around that.

Thank you for your submissions. I appreciate many of them are very detailed with very detailed recommendations. While we have not had an opportunity to canvass all of those today, we do have them and we thank you for your input.

CAMERON, Mr Andrew (Charles), Chief Executive Officer, Recruitment & Consulting Services Association

SCHWEIGERT, Mr Simon, Manager, Government Relations and Media, Recruitment & Consulting Services Association

[12:09]

CHAIR: Welcome. I understand information on parliamentary privilege and the giving of evidence to committees has already been provided to you. We now invite you to make some opening remarks to the committee, to be followed by some questions.

Mr Cameron: Thank you to the committee for what we feel is an important opportunity for us to provide a balanced and broad insight into what on-hire worker services, contracting services and broader employment services are in 2017.

CHAIR: You might start with explaining a little about who your organisation is and what you do.

Mr Cameron: The Recruitment and Consulting Services Association is the peak industry body representing employment services generally, excluding the provision of government sponsored employment services, which are otherwise represented by the National Employment Services Association. I am happy to hand up, if it is of assistance, some diagrams and/or recruitment industry definitions that categorise the types of services that our members provide. It might also be helpful with the terminology we use, which is aimed at being a little more precise than the use of simply the generic term 'labour hire'.

It might be easiest to turn to the back page of that document, which describes five types of services primarily provided by our members. Our membership is made up of both corporate members and individual members. The individual members are the consultants and the professionals that look to provide recruitment and employment service and, indeed, consulting services. This diagram explains more of the corporate services provided by our members. In Australia, we have some 700 corporate members ranging from the largest multinational on-hire firms, or what more broadly in other countries is known as staffing. In this industry in Australia, it can be known as everything from temping to contracting to employment agency services and otherwise. I think it is really important at that level to come up with terminology that defines the type of service being provided.

CHAIR: When you say members, do you mean clients?

Mr Cameron: No. Our members will be everyone from Adecco, Manpower and Programmed Skilled Workforce right through to recruitment placement firms, which could, of course, include multinationals as well as individual, small entities. We have recently changed our constitution to include those who do not want to operate as a corporation but may operate as partnership or sole trader. On the other hand, our professional membership is individuals, as I mentioned, who might be providing the frontline service as a recruitment consultant or a workforce management consultant. Determining the scope and influence is very difficult. The industry of on-hire employment services or employment services is one that is difficult to define. The Productivity Commission and others have had some difficulty in defining it. Part of the issue there is that there is a low barrier to entry and there are a number of providers, corporate and sometimes non-corporate, who come in and leave the industry, which is very much an issue that we are trying to address as the peak industry body.

We estimate that our members represent around 65 per cent of the volume in Australia of on-hire employees or on-hire contractors where they are engaged. However, when it comes to the total numbers of corporations that fall within the industry, if we could define what the size of the industry is, it is probably closer to around 30 per cent. So, as you can appreciate, we represent the larger organisations, which have large amounts of volume, but equally we have concerns around the low barriers to entry—and I am happy to talk about that a little as well.

As you can see in the documentation, on-hire employees services is what you might traditionally know as labour hire. The reason we do not use or, indeed, like the term 'labour hire' is that it has very much what I will call an industrial, construction, blue-collar connotation. It is not that we have a problem with that, but the reality is that our members provide employees and, at the professional level, independent contractors. They will on-hire them or assign them out to perform work under the general guidance and instruction of a client, which we might in this case call the host organisation. Those employees will be on-hired or assigned. I think it is very important to delineate between on-hire employee services and what we will call contracting services—the committee is of course examining contracting services in this context as well. Very simply, what is the difference? We say that contracting services would typically be payment by result—it is the completion for scope of work. You are not simply providing a worker who works under the general guidance and instruction of the client or the host

organisation, but you would typically also provide supervision, systems of work, capital, equipment and otherwise.

If I could provide a simple examination of it from the point of view of electrical or manufacturing, you could indeed have one of our members who could provide on-hire employee services for a shutdown, where they will go in and work underneath and at the direction of the engineers of the host organisation, or , indeed, work alongside the fitters, turners, boilermakers and otherwise during that shutdown. On the other side, there may well be the outsourcing of the shutdown, no different to some others—Broadspectrum, for example, might come in and provide the contracting services for the shutdown. In those circumstances, they will typically take full ownership and control of the site, but they are providing contracting services as opposed to on-hire employee services.

The reason we do not like labour hire is that it tends to be used as a term to throw all of these forms of non-traditional third-party work into this big bucket. When we are trying to increase professionalism and accountability—and no doubt that is part of the purpose of this committee's terms of reference—we think it becomes counterproductive to simply throw everything into the bucket of labour hire.

So we talk about on-hire employee services and we talk about on-hire contractor services. We do not support, as the RCSA supports, on-hire contractor or independent contractor services in unskilled, semi-skilled, or even most trade relationships. We say that it should be the reserve of those who have the bargaining power, the professional insight and the know-how and the back-end capacity to manage what is essentially meant to be a business-to-business relationship. So, if any circumstances arise where we see workers with low bargaining power—especially unskilled and semi-skilled—being engaged as independent contractors, we will call out that behaviour with our members under our code, and we are also prepared to pull them into line to the extent that we have the power to do so.

CHAIR: Would you be able to provide us with a copy of the code?

Mr Cameron: Of course.

CHAIR: I would also be interested to know, if you collect these stats, how often that actually happens. Maybe you could also take us through how your members react to that being called out.

Mr Cameron: Sure.

Mr Schweigert: The code comes in two pieces. I have a copy of the key principles, which I can leave with you now, and we can also provide an electronic copy of the fuller code document.

CHAIR: We probably will not have time to go through it now. If you could provide an electronic copy, that would be great.

Mr Cameron: Could I take the opportunity to allude to the fact that our code has been authorised by the ACCC. Furthermore, we have made moves recently to move to pursuit of a broader code—an employment services industry code—that we are soon going to be submitting to Treasury with the hope that they will agree to implement that as a prescribed code, similar to the franchise code and the hort code that you may be aware of. Why? Because many of the complaints that our full-time ethics registrar receives around poor behaviour are unable to be dealt with because they relate to the practices of nonmembers, and, of course, we cannot compel nonmembers to be bound by a code. We will be pursuing that.

We will be very happy to provide you with a copy of the submission in support of that, as well as give you further insights into our employment service certification program, which is essentially designed to address six key areas of what we think have been market failures in the area of horticulture and some meat processing, and, we understand, cleaning as well. Very simply, it deals with issues of fit and proper people to run these businesses. We think it is absolutely appropriate to do so, and we are working with the ATO around phoenix activity—I think Senator Sterle may have referenced that previously.

The second one is worker status and remuneration, which goes to the Fair Work entitlements, ensuring that individuals are paid in accordance with those minimum entitlements; work health and safety; migration—we are very mindful of vulnerable workers around migration, and we are working with the foreign worker task force and are about to present to them on our certification program—and financial assurances as well, making sure that there is evidence of them having a sustainable and proven record of reporting and otherwise, so that you do not simply get a mobile phone and say, 'Hey, here's Jimmy the Afghan's labour hire,' as it was recently referred to in the media, 'and I can find you a whole heap of people.' The final one relates to suitable accommodation to try and address the issue of foreign workers being housed in inappropriate conditions.

CHAIR: There are a couple of examples that relate directly to you. You may not have this information with you but would program be one of your biggest?

Mr Cameron: They are the biggest. That is correct. They are the biggest in the Australian market.

CHAIR: So it was actually program that was involved in the CUB issue, where they took an agreement formulated by four people, I understand, in WA and then applied it to the CUB workforce with none of those people ever going to work on that site or do the work. None of those people, as I understand it, had any type of qualifications that might reflect that agreement. What did you do in that circumstance? I can imagine that for you, being a professional body, it is pretty hard to take on effectively your biggest, most powerful and influential member? Or do you not think that was inappropriate?

Mr Cameron: Our interest there is to ensure that any of our members are complying with the legislation that applies in the circumstances. I am sure you and I understand that the Fair Work Act does not prohibit the engagement of individuals for the purpose of making an enterprise agreement.

CHAIR: You excited me earlier when you said: 'When we see our members being used to undermine other workers' pay and conditions, we call them out.' I am just wondering whether you called out program?

Mr Cameron: I am not sure whether it was around undermining other workers' pay and conditions. It was about ensuring they are paid in accordance with the Fair Work Act, the work health and safety legislation and otherwise.

CHAIR: I missed that.

Mr Cameron: That being said, we have thrown around and pushed and prodded the issue in our workplace relations working group around the suitability or the appropriateness in some industries or some sectors or even some occupations of having an internal policy that establishes a requirement to mirror terms and conditions of clients. We have done that because we think it is important to remain progressive on that front. The difficulties always come back to the fact that there are clearly a number of clients and industries under pressure and stress—financial, international competition. This is not referencing Programmed Skilled Workforce directly; indeed they have been on our workplace relations working group previously but not currently. It has been very much that our clients call out for the capacity to operate more effectively, more efficiently. To that extent, we have examined it. We have pulled back from that on the grounds that there are so many different variables of what matching might look like. You are probably aware that the European parliament has the temporary worker agency directive that requires the mirroring of certain employment conditions after a period of 12 weeks.

CHAIR: I was not aware of that but we are going to be aware of that.

Mr Cameron: That was introduced and imposed. The UK is a really good example of where that was introduced but it does not agree with collective agreement mirroring; it deals with issues around individual like worker mirroring. I think it would be fair to say it has not made a marked difference to the UK market. It has created red tape and issues.

I have a background in workplace relations and, as much as we are all about fairness and ensuring people are paid appropriately for the work that they do, we are very concerned—and this is the message that we get back from our members—that ultimately our members would be in a better commercial position if they married or indeed mirrored the terms and conditions of all clients, employees even if they are under are an enterprise agreement. But the reality is that it is very difficult to determine which of those provisions would you actually mirror? Which would you not? Would it just be hours of work? Would it actually be the casual provisions? What are those provisions that are enterprise specific versus those provisions that are more appropriate for general application? We have not sat here and idly stood by and not questioned what should we as the industry peak body be leading with when it comes to ensuring fairness? I think it ultimately comes backs to the fundamental push, which is there is a lot of international competition occurring, and we will be very mindful of getting the balance right to ensure that the clients of our members are able to operate within Australia and not be forced to go offshore. Of course, we think that, through professional organisations taking on responsibility under the minimum legislative obligations, we get that balance right. It is a challenge, it is a push-and-pull between flexibility and security and that is a really difficult one. Many other countries around the world have dealt with issues around what is that right balance. Unfortunately, to lock and enshrine that balance at this point in time may not cater for the next five years or, indeed, let's hope that the economic times are significantly better then, where we can offer more permanent full-time work.

CHAIR: Isn't it sometimes as blatant and simple as 'cut the wages'?

Mr Cameron: It is interesting. We looked at, and I am happy to provide you with, the RMIT university research. Again, one of the things that we may contemplate—or, indeed, invite the committee to contemplate—is better analysis of what the motivations of clients or host organisations are for using on-hire services.

CHAIR: To give you an example, with some of the evidence we have had today about ExxonMobil and their catering and cleaning staff, I think it is fairly hard to come to any other conclusion, given the discussions we have had, that that was simply a contract that was $6 million cheaper. I do not know whether that was over the life of the agreement or that that was per year but, as a result, 120 people got sacked and the people who replaced them were more on $40,000 a year less. It is a pretty simple formula.

Mr Cameron: My experience, from 20 years of working within this industry, specialisation and having a pretty good understanding of contracting, is that there is always more than the simple view. Again, I say the simple view of those who sit outside and say, 'That must be a cost-cutting exercise'. Of course—

CHAIR: That is effectively what ExxonMobil said. They said they did not want to be involved in any of the other matters; they simply looked at it on a cost basis.

Mr Cameron: It is obviously difficult for me to comment on that, as they are not a member and they are not a host of a member. Again, that would be a good example of what I would define as contracting services rather than labour hire services, presumably. I am assuming they are providing the food, if I can be as simple as that; the catering equipment; the supervision; the management solutions. Of course, once you start involving those elements it becomes a lot more complex than purely cost. I am not going to sit here and lie to you and say that in my 20 years I have never seen a circumstance where a client will simply say, 'I just want to undercut an enterprise agreement,' because I have been aware of that. Do I think—and I say this honestly—that that is the primary driving motivator of host organisations in 2017? I absolutely do not.

CHAIR: What do you think is, then?

Mr Cameron: I think it is around flexibility. I think that we have a circumstance—and I am not commenting on the Esso example here—where we have an increasingly volatile economy; we have increasing volatility around contracts; and we have increasing volatility across—I guess, maybe not volatility, but the changing nature of why individuals are actually choosing to work in a non-permanent manner. I will give you a quick reference taken from our submission to the Victorian labour hire inquiry—we seem to be almost inquiried out at the moment, given how many are going on.

CHAIR: Hopefully we will fix it with our recommendations, and that will do us for the next decade.

Mr Cameron: We look forward to those balanced solutions, Senator. In 2014 Flinders University conducted research into workers—and we see this come up quite often with experiences of non-standard employment and how it relates to health and wellbeing—and the most striking findings were that the majority of the businesses made a deliberate choice for casual employment. To explain this, almost all of those cited improved health and wellbeing as the motivator. Am I saying that we do not have rogue operators within the industry? Through our certification program, through our code, we—probably even more than you, Senator—absolutely want to knock them out of the industry, there is no question. But I think what we are seeing is a change in approach and attitude of workers looking beyond the horizon and saying that a permanent job for life is only as good as the contract, it is only as good as the economic conditions that will sustain that, and I think we have got to get that balance.

I think the danger for this committee, if I could be so bold, is to focus purely on labour hire within the construction and manufacturing sector.

CHAIR: We are not. One of the other good examples given today, and I know you were not here, but you might have a look at the *Hansard* later when it is available, it was from the NUW and it was a place called, I think, Oxford Cold Storage. The evidence presented to the committee is that Oxford effectively controlled several labour hire contractors on site and rotated people through different labour hire contractors, simply to avoid having to bargain with any one particular group. Some of those might be your members, and I think they were all named on *Hansard*, but I would not mind you having a look at that. How would you deal with a situation like that if it came to your attention and you believed there might be another logical explanation? It is hard to imagine what it might be.

Mr Cameron: We are challenged by that. Why? Because we have a 15-employee staff and we employ at least half as part-time working mothers—to live the dream of flexibility, so to speak. We would find that difficult, because we would need to present, or garner, a huge amount of evidence to determine whether what they were doing was by design and whether it was the clients directing them or otherwise. I think, from our policy positioning, we can be bolder and a little bit more forthright around that, to try and stop what is—

CHAIR: They are unlikely to be your members, though, are they?

Mr Cameron: It is interesting. If I can just turn your attention to category 3, which is what we call contract or management services, even this, developed two or three years ago, is out of date. What we are seeing here, and I think it is very important for the committee to look at it, is a manifestation of not labour hire—and, if I could

touch on that point, we have not seen an increase. The previous witness, from the CFMEU, talked about the proliferation of labour hire. You only need to look at the Productivity Commission inquiry to realise that in fact labour hire is, I think, currently about 1.3 per cent of the workforce. It has not increased. If anything, it has decreased. Casual employment has actually decreased over the last five years. This idea that labour hire is proliferating and causing problems, I think, is in part caused by the fact that, as I mentioned earlier, every non-standard form of third-party workforce supply or provision is lumped into the bucket of labour hire. If I could ask the committee to examine the proliferation of what we call the gig economy, the circumstances—

CHAIR: We are going to, actually.

Mr Cameron: I think it is absolutely critical. Why? You squeeze the legitimate, genuine labour hire or on-hire employee service providers. I can tell you one thing: there are many innovative, opportunistic individuals and organisations out there that will simply come and replace them. In an environment where enforcement is particularly challenging—there is not the resourcing or indeed the number of inspectors within the Fair Work Ombudsman, or it might be WorkCover, to go out there and enforce the law—we are almost seeing a movement towards what I call the proliferation of freelancing. Forget about corporate avoidance in relation to undercutting enterprise agreements of a host organisation. Talk about individuals out there who are being paid piece rates, with no minimum entitlements. Of course, they are covered by work health and safety, because we know that that applies to all workers. I will give you an example. I actually felt sorry—and I do not want this to be taken out of context—for Domino's recently, who are sitting there, of course, rightly being challenged around franchisors correctly paying their workers who are delivery riders or drivers who are being overtaken by certain contemporary—

CHAIR: Deliveroo. I think our next witnesses have actually got some very good and precise examples of some of those Deliveroo contracts, which are just extraordinary.

Mr Cameron: I am very passionate about it. We are sitting there in a quandary at the moment, saying, 'We want to establish professionalism, accountability and responsibility within the context of the existing legislation,' but I am equally being challenged by members saying, 'Who is pulling into line those that somehow, simply because you find work through a cool app'—

CHAIR: The irony of this is that the people who accuse you of doing that very thing—I know you are suggesting other people are doing it—

Mr Cameron: The irony here is that we are sitting here as a committee focusing on, I think, a legislative response to a problem that has passed us by, and the consumer demand, the change in the market, says, 'Go ahead and make legislation that restricts legitimate labour hire.'

CHAIR: I can assure you we are going to have a good hard look at that. I am not suggesting we will find the right answers at this particular point in time, but it is not lost on us, and we are going to—

Mr Cameron: If I could go back to your point—very well made—around the multitude of entities: we end up in a situation where, absolutely, how are we or indeed you going to make recommendations to change the legislation to deal with what we call tied labour hire, where there are organisations created within a corporate structure for the purposes of on-hiring back to yourself—

CHAIR: If you have got any ideas, we are happy to hear them.

Mr Cameron: Indeed. We are seeking to address that through our certification program, which we will provide you with a copy of. Do we agree with the licensing of labour hire?

If I felt it was going to be pure—and I will be completely up-front with you—and not a backdoor mechanism to pursue what I think the union movement want to do. Indeed, there are some circumstances that we have heard of where academics and some politicians want to get rid of all forms of labour hire. I would love to see that bar jumped over. Our concern is that it is going to become a political solution, and we have seen that right through all the states. It has come, it has gone, it has come and gone and it has created massive issues in terms of understanding our industry.

CHAIR: Thank you. I know it has been interactive and I have actually enjoyed this. I think it is very valuable, so we might continue in the same vein.

Senator McKENZIE: Mr Cameron, this area of industrial relations interests me. I am interested in the role of Airtasker et cetera in how people source labour et cetera. Do you have a list of apps that are available out there?

Mr Cameron: If we do not have one, we could get one. The problem there is that it would be out of date within one hour.

Senator McKENZIE: By the time you submitted it. I think that is exactly the point. We have got Australians prepared to undercut other Australians and indeed the industrial relations system more broadly by offering their labour and their services at an increasingly lower cost, which is essentially what these apps facilitate. I am really interested in that space. If you could provide any information in that area—

Mr Cameron: On that point, I will add that we have established, through our workplace relations policy or our working group, what I see as nine minimum criteria that should apply to any non-employment working relationship that go back to the fundamental pillars of respect, I think. Is it mirroring enterprise agreements? No. I think we are fighting a battle that, as I say, is a yesteryear battle, to some extent. I do not want to be silly or dismissive of those in construction and manufacturing and other areas. But, absolutely, we are trying to take a progressive approach, and we are looking at it and working with some law firms that actually represent those gig economy providers to say, 'What is their social contract? What is their responsibility? How does the market rely upon them?' For example, if Airtasker supplies a worker to clean Aunty Margaret's gutter out in Oakleigh in Melbourne, why is that any different to that same individual being assigned or on-hired to perform work cleaning BHP's gutters at the same height et cetera? We think we actually have different rules playing out here. It sounds cool and freelancing is a state of mind, but I am challenging a lot of the younger people and younger generation and saying, 'Be careful what you create here,' because we are actually—and I think it is the case in that circumstance—creating a race to the bottom. I do not use that term often, but I do think it applies in that regard.

Senator McKENZIE: What is the time line on your prescribed code?

Mr Cameron: We have, since I commenced as CEO in May, refined the code and we are focused more upon the development of the certification model. Why have we done so? Because there are more pressing issues, as I would describe them, around those six points I mentioned earlier. We are working with the NFF, the National Union of Workers has participated in our working group, the Australian Workers Union is there and they support it in principle. Yes, there are some political issues around the role of unions. I get that, but we prefer making sure that the demand side pressure changes behaviour rather than putting on another 20 Fair Work officers or inspectors or otherwise. We are focused on that. The time frame for lodgement of our submission with supporting evidence is within the next month. We will be lodging it then. We actually went up there to have a discussion recently but it was cancelled, unfortunately, but we hope to have the code within the next month. We would be delighted if any of you wanted to come to southern Gippsland, Renmark in SA or the Lockyer Valley in Queensland—we have a pilot program running for our certification program. It is run by SGS, the largest international auditing firm. We are even happy to invite unions and others to sit on an overarching governance body to ensure that it is not a stitch-up or has any illegitimate purpose.

CHAIR: If you extend that invitation to us, we may not go formally as a committee—we may—but I think some individual members would be interested. If we can get a time together to do it as a committee, I think we would like that.

Mr Cameron: We actually think that is so valuable, because we see a lot of armchair critics of labour hire without actually understanding how the really good ones do it.

CHAIR: I would much rather be a fair dinkum critic than an armchair one.

Senator McKENZIE: We probably need to have a good look at it to make sure our comments are informed. Thank you.

CHAIR: I think Senator Sterle had one or two questions, which you may take on notice.

Senator STERLE: Yes, take it on notice. I have to tell you: my experience comes from dealing with labour hire in the transport industry in Western Australia, where it is really bitter. I want to put this to you—you can prove me wrong: you supply truck drivers, forkies, receival staff, furniture removalists, offsiders, loaders, the whole lot. The labour hire industry never provided one ounce of training, whether it be dangerous goods licensing, working at heights or any single thing—blue card training, anything. There was never an opportunity, because the transport companies used you as a brilliant wedge and they would refuse to pay you guys enough money, your members. And I spent years chasing your members around and having to take it out on the people you were working for. It created two classes of employees, make no mistake about that.

My other big bugbear was that the transport industry attracts a lot of young people who do not want to go to university, like my good self. They have young families, and, while the labour hire companies used you guys to wedge the permanent staff, they could not get a permanent job, and I am still to find a casual that can run off and get a housing loan. If you have any examples that can prove me wrong, I will eat a shit sandwich and apologise to you.

Mr Cameron: Can I respond to that quickly—

Senator McKENZIE: Parliamentary language, Chair.

Mr Cameron: We wrote to the ACTU in 2011 inviting Ged Kearney to sit down and talk about many of these issues. Of course we will have differences in other regards. Many of them were about exploitation, around training, about coming up with a solution that provided for almost what I will call gig training, because of course we cannot provide, other than through the group training schemes, apprentices and otherwise. I did not get a response. I got essentially a back-door response which said, 'Unless you can deliver us members, we're not interested.' We are absolutely committed to having a social dialogue, but it requires a proper examination.

The other thing I am very proud of, Senator Sterle, is here in this state of Victoria the claims per million dollars of remuneration, where we can actually compare labour hire to non-labour hire, are significantly lower for labour hire in transport, postal and warehousing, and that is because we have absolutely committed to training and otherwise. Can I vouch for the fact that there are dodgy operators out there who do not have a commitment—absolutely. We are very happy—and this is why we go back to the seeking of an overarching structure—to call them out for that bad behaviour.

Senator STERLE: You prove me wrong in the transport industry, okay.

Senator McKENZIE: So that is one of the certification process is so important.

CHAIR: Mr Cameron and Mr Schweigert, thank you very much. I was not sure what to expect, because we did not get a submission from you, but I have found that very valuable. Please extend to the committee those dates, and we will certainly consider that. Given the discussion we have had, if you want to provide any further information, I invite you to do so. We are not reporting until August and we have a lot of work to do, but we are particularly interested in the gig economy and other things. So, if you think you have something more to add to the committee, please feel free to provide extra submissions to us during the course of our inquiry.

Senator McKENZIE: I was going to add also if you have particular members or people in local areas, we would really appreciate hearing from them while we are travelling around over the next few months.

Mr Cameron: I do apologise for not making a written submission. You can probably appreciate that labour hire is the flavour of the last decade almost, but certainly the last year. We are, as I mentioned, probably an FTE equivalent of 10. We have three labour hire inquiries and we are putting our focus into actually coming up with certification mechanisms rather than responding to the washing machine of allegations of poor practice. Let's get on with doing something about it, industry led. Thank you for the opportunity.

Proceedings suspended from 12:44 to 13:29

HEMINGWAY, Ms Catherine, Employment Project Senior Solicitor, WEstjustice

MOORE, Ms Heather, National Policy and Advocacy Coordinator, The Salvation Army Freedom Partnership to End Modern Slavery

CHAIR: Welcome. I understand that information on parliamentary privilege and giving evidence to committees has already been provided to you. I now invite you to make some opening remarks to the committee, and that will be followed by some questions.

Ms Moore: I would like to start by thanking the committee for the opportunity to provide evidence and for your continued attention to this very important subject. Noting the breadth and depth of evidence that has already been considered by the committee, in this and no doubt previous inquiries, I thought it best to use our time today to focus on solutions and areas for improvement.

Over the past couple of years there have been a range of responses to the issue of migrant worker exploitation and corporate avoidance of the Fair Work Act. While not outcomes in and of themselves, processes like inquiries, task forces and reviews have assisted to shed light on a hidden problem, and to secure greater attention and resources to finding its solutions. The 7-Eleven case provides an example of good practice where the government's reserved discourse and action towards workers, coupled with increased scrutiny and now legislative reform, has created a culture of safety, which arguably has fostered higher reporting and cooperation rates with authorities. Most recently, the vulnerable workers bill, introduced into parliament, includes strong and necessary elements that will empower the regulator and offset the financial benefits that have historically made the risk of exploiting workers one worth taking.

Yet, despite these actions, there is much more to be done. I think we need to look at the approach and make sure that it is comprehensive. Right now the risk based approach has limits, because it is unlikely that resources will ever be sufficient to conduct enough audits to make any kind of systemic or structural change in the industry. As important as it is to focus on disseminating information on rights and responsibilities, to both workers and employers, simply relying on the provision of information has limits, because it does not address so many reasons why people remain in exploitative work, including fear, shame, debt, powerlessness and the perception that they will not be protected if they do seek support from the government. I refer the committee to some comments that, I think, we alluded to in our submission where in a consultation with some workers up in Queensland they said, 'We simply have to endure. We just endure. We know what our rights are. We just endure to get to a better situation.' Finally, the punitive approach has limits because it does not address the power imbalance, which enables unscrupulous employers to leverage control over workers. Some areas for improvement include making greater use of available penalties, such as the employer sanctions provisions within the Migration Act, and considering whether we are effectively negotiating priorities when it comes to workers who are being exploited whilst working in breach of their visa conditions.

Today, I was hoping to discuss three overarching areas for recommendations. First, we need to maintain efforts to deter unlawful conduct, and we need better research and data into the labour hire industry itself. How it is actually functioning and particularly the role of offshore labour recruitment agents. Second, is increasing accountability for the labour hire industry through greater transparency. Third, is increasing the security for the workers themselves. I think that, arguably, is the most important element that is missing from our current approach, and that is the bottom up empowering workers to feel safe to come forward and make unlawful conduct known.

Under the issue of research, I draw the committee's attention to a recent report that was published by the Australian Institute on Criminology, which looks at the role of the migration broker in facilitating workplace exploitation, human trafficking and slavery. This came out after we put our submission in. It was published in December. There are some interesting insights and recommendations there, including the need to consider licensing and regulation of the industry.

On accountability, if possible, I am happy to refer the committee to some research that supports licensing and regulation, from international research, including support from the business sector. We support other strategies, including expanding accessorial liability provisions in the current vulnerable workers bill to other supply chains. I think my good colleague will talk about that.

The third is about workers requiring safety and security to come forward. The issue we would like to discuss is that we are appointing people to help, but we are not making help accessible. It is simply the impact of immigration compliance activity. It is creating a culture of fear. That is something that we need to look at. Some specific provisions that we have recommended to increase safety include a right of stay for workers to seek legal redress, proportionate penalties, linkages into communities to reduce the social isolation that drives exploitation

and providing meaningful and ongoing access to information and support. With that, I will turn you over to my colleague.

CHAIR: Before we go on to Ms Hemingway, can I just take you to one of the case studies in your submission. It is on page 10. It is about Korean hospitality workers doing their final year as an internship. In the last paragraph on page 10 say that:

The professor/lecturer visited the "interns" in Sydney. One of the students complained to the professor/lecturer about their working conditions and was verbally abused by him, being told that she had no choice but to do the unpaid work.

Was that because of the obedience cultural thing and being told, 'Just do as you're told and suck it up.' Or is the inference I am supposed to take that the school in Korea was in on all this exploitation and that the professor was actually there making sure they behaved themselves?

Ms Moore: We actually do not know to what extent the university is involved in it. I have a colleague who is much better versed in the role of universities overseas in facilitating this kind of exploitation. We do not know if the university was in on this particular case or not, but there are efforts underway now to get a better sense of what is happening there and the extent of the role of universities.

CHAIR: I think that is interesting, because they are two quite distinct things. People can come here in a vulnerable situation and get exploited because they go to a shonky employer in the first place or there can be that orchestrated delivery of workers to be exploited to different places.

Ms Moore: The first part of your question was around whether they were just being told, 'Suck it up and bear it,' or whether there was something else going on. What this case study highlights is the very grey area. Where actors collude to create vulnerability, that can be extremely difficult to assess. In this particular case, the student felt that she had to accept the terms because she had already paid school fees and the professor had told her that completing the internship was a condition of graduating. So while it might not amount to a full case of forced labour, there are certainly some elements there, including that collusion. Regardless of the university's involvement, it appears the professor and the employer here in Australia were colluding to get students here. This is certainly by no means an isolated case.

CHAIR: Thanks for that. I just wanted to clarify that element of it. Let's go to you, Ms Hemingway.

Ms Hemingway: Thank you very much for this opportunity today. Further to our submission, I have handed up some copies of our report and an overview. I would like to make three points to open. Firstly, newly arrived and refugee workers face widespread exploitation at work. To stop this exploitation, law reform is urgently required. To ensure that the law is enforced effectively, targeted education and services are essential.

We are a community legal centre that provide free legal assistance and financial counselling in Melbourne's western suburbs. The western suburbs of Melbourne are home to a diverse range of new and emerging communities, and employment is consistently recognised as a vital step for successful settlement.

The western suburbs are also home to the birthplace of the Australian minimum wage. In 1907 the court determined that a fair wage for workers at the Sunshine Harvester factory should be based on:

… the normal needs of the average employee regarded as a human being in a civilised community.

Unfortunately, despite our laws maintaining a commitment to universal legal minima, the lived experience of refugee and migrant workers does not always match up. As one client described in 2015:

Living in that hostel made me see a very different side of Australia, the dark and uncivilised side.

Joyce worked on a tomato farm in regional Victoria and was promised less than $10 an hour. In fact, she was never paid at all. She describes it in this way:

The machine started to move straight away once we all sit on our seats. You couldn't stop picking or go the loo when the machine was running ... There was no toilet so we had to pee wherever we were. There were no sheds at all so some of the workers had hot stroke sometimes, also because we didn't get chance to have a sip of water.

The universal feeling we had was a mixture of confusion, anger, helpless and loss-of-dignity.

When Joyce returned to Melbourne, she was employed in a large franchise. She was underpaid thousands of dollars in a three-month period and, when we helped Joyce to write a letter of demand in her own name, she was told by the franchise that she was in fact a volunteer and had never worked there. When we wrote back to the franchisee with significant evidence, she was eventually paid.

Unfortunately, Joyce's case is not unique. The exploitation of migrant workers in Australia is widespread. The *Not just work* report documents systemic exploitation across numerous industries. Current systems are failing to stop the abuse. Exploitation not only damages vulnerable workers but undermines the workplace relations framework. Businesses that do the right thing are being undercut by those who are breaking the law. Our findings

are based on extensive research and practical experience, including face-to-face consultations, surveys, a literature review and a two-year pilot employment and legal service and community education program. Our legal service has helped over 200 clients from 30 different countries, including refugees, asylum seekers, international students and other temporary visa holders. As at September last year, we had successfully recovered or obtained orders for over $250,000 in unpaid wages, entitlements or compensation for unlawful terminations. We have also delivered over 60 community education presentations face-to-face to over 600 community members and a 10-day Train the Trainer program for community leaders, as well as working with agency staff who work with newly arrived communities.

Many of our clients do not understand Australian laws and processes, do not speak English and would not have enforced their rights without our help. Importantly, the *Not just work* report documents key findings from our work and advocates 10 critical steps to stop exploitation. I would love to talk about all of them in detail, but I am happy to answer questions on them as well as giving a brief overview of the key recommendations. Targetted services and legal reform are urgently required. For the purposes of this inquiry, necessary legal reforms are documented in steps 6 to 10 and include a reverse onus to stop wage theft, measures to address sham contracting and abuse in labour hire supply chains and franchises, and reforms to better protect vulnerable subgroups, including temporary visa holders. Targeted services are also essential. Without enforcement, the law will do little to protect vulnerable workers who currently slip through the cracks. Newly arrived and refugee workers generally understand little or nothing about Australian employment laws and services and, due to this limited understanding, along with significant language, literacy, cultural and practical barriers, agencies and laws are inaccessible. Telephone based self-help models and fact sheets and websites are simply ineffective. There is a significant unmet need for targeted legal assistance. Trusted community organisations can play a key role in facilitating access and ensuring compliance. Steps 3 to 5 of the report relevantly recommend targeted face-to-face education programs, accessible agencies and the establishment of community based one-stop shop employment law hubs to assist vulnerable workers to navigate the system and enforce their rights.

In conclusion, as the *Not just work* report notes, migrant voices must be heard. It is essential that the committee considers the particular experiences of newly arrived and refugee workers and how our laws can work better to protect the most vulnerable. The Harvester factory gates still stand in Sunshine and serve as an ongoing reminder to strive for a civilised community free from exploitation.

Senator McKENZIE: Thank you so much for your evidence and the work that you do that community. This committee did an inquiry a little while ago into a whole range of these issues—7-Eleven et cetera. One of the areas that I am very interested in is the treatment of international students and the role of agents who are in home countries, what the parents are told about how much it will cost to live and what the work opportunities are, how much they are prepared to support the student, how much the family will have to put in and how much they will be able to get from 7-Eleven or Domino's or wherever else they end up.

Can you flesh out for us any recommendations you make around international students or their agents? I am wondering how much our home institutions or pro-vice-chancellors international may know about those practices and what responsibility our university vice-chancellors should be taking. They are very happy to take the students' dollars. Where does that oversight go? Is that something you have thought about?

Ms Hemingway: I cannot speak much about agents in home countries—it is not something that our service has had direct experience with—but I think our second biggest cohort of clients is international students. So we have seen significant cases of horrific underpayment, which I am sure you are really familiar with. Some of the key recommendations that we make around international students are about the need to provide targeted support to international students within the university context, because, as you suggested, universities are quite happy to accept full-fee-paying students and do have responsibilities under existing laws to look after those students. But currently there is really nothing allowing them to enforce their rights.

In some of the cases that we have seen, there has been no payment at all—horrific sham contracting in cleaning situations. The international student that I am thinking of in particular ended up being employed directly by the shopping centre that he worked at after having a dodgy subcontractor employ him for a number of months and not pay him anything at all. I think there really needs to be more targeted support for those students. The role that universities can play in providing information back to home countries is certainly something that needs to be looked into. It is not something we have had contact with.

Senator McKENZIE: We heard evidence to the inquiry about the efforts that the Fair Work Ombudsman makes to ensure that those who are coming in with certain visas are aware of their work rights and are aware of the Fair Work Ombudsman and its role in ensuring vulnerable workers in particular have access to an avenue of redress. Are you saying that what the Fair Work Ombudsman does is not enough?

Ms Hemingway: The Fair Work Ombudsman and other mainstream service providers do a lot of work in this space, but if you are faced with particular language or cultural barriers it is going to be difficult, even if you have the requisite level of English to be studying in a university course. Interpreting awards, calculating underpayments over a period of months and arguing before the Federal Circuit Court that you have been involved in a sham contracting arrangement is virtually impossible. So the sort of support that we would provide as a community-based organisation, in addition to what the government agencies provide, would be to assist the clients to do those calculations, to draft the documents—

Senator McKENZIE: Sorry, so you are saying what is occurring is enough at that end and we need more support?

Ms Hemingway: I could not comment in full on what the Fair Work Ombudsman—

Senator McKENZIE: Can you take it on notice? At the end of the day, either one of our teams is in government and that is an area where we are interested in effecting change. If what we currently have in place is not good enough, I would like to know how we can make it better.

Ms Hemingway: Absolutely. Some of the suggestions that we make in the report are around agencies being more accessible, ensuring that when people phone the helpline—the Fair Work Ombudsman helpline, for example—there is a method to identify whether they are newly arrived or on some sort of temporary visa. If so, they should be put through to a specialist service with staff who are trained—

Senator McKENZIE: Surely the goal is to make sure they do not sign up with a sham contractor in the first place, rather than sorting it out when they have already been there.

Ms Hemingway: That is right, but I think it goes both ways. We certainly need to ensure that there is better prevention, but once people have experienced some sort of breach they need to be assisted to enforce their rights effectively. I think part of that is agencies being more accessible and part of it is providing community-based support so that people can use the information they are given in these self-help model services, which is generally difficult for people with cultural and language barriers, so they can take action to try and stop that exploitation happening again.

One example of that would be a client that we had. He was not an international student; he was a refugee. He did not speak much English. He had not been paid for his last two weeks of work. He had a sense that that was wrong and rang up the Fair Work Ombudsman, with the help of a financial counsellor, and they explained to him that he had not given notice, so that was why he was not paid his last two weeks of work. What our client had not managed to articulate, because he did not realise that it was wrong, was that he was only being paid for five hours each shift when he was working a 14-hour shift overnight. And there was not that targeted assistance to help him to articulate that complaint. The financial counsellor contacted us and said, 'Look, this just doesn't seem right.' I said, 'Let's have a chat to him.' We were then able to have that complaint reopened. We helped represent him at a mediation that the ombudsman had arranged—so we work collaboratively with the ombudsman—and managed to get him back paid. We later found out that he had informed two of his colleagues, who also did not speak any English, and they had negotiated that back pay for themselves as well. I think that would be an example of how we could be more responsive to people once they have a problem, but we will certainly look more into the issue of what could be done beforehand and we will let you know any further thoughts we have.

Senator McKENZIE: I would really appreciate that.

CHAIR: On that case and the mediation, was the employer knowingly underpaying these people or was this an accident because it such a complex system, apparently?

Ms Hemingway: I think we see both cases. We see employers that are knowingly doing the wrong thing. For example, we had two clients who were a couple, and they were told that they were being paid as a package, which was one salary between the two of them. There was just no way the employer could not have known that that was completely unlawful. I think at other times—and these are always the cases that we endeavour to resolve really quickly for our client—an employer may have made a genuine mistake. That is why, in our recommendations for legislative reform, we always try to put measures in so that if employers are reasonable and try to do the right thing they are not going to be unfairly punished.

CHAIR: But it cannot be a mistake if you are paying someone for five hours when they are actually working 14, can it?

Ms Hemingway: No. In that particular case, no.

CHAIR: They may get the actual wage rate a little bit wrong or they might have picked the wrong award, but—

Ms Hemingway: In most of the cases that we see the exploitation is just so gross that it would be unbelievable that a person would not know: people being paid $8 an hour, people being dismissed when they ask about their wages—the list goes on.

CHAIR: On your records, how many people did you say you deal with each week? And is it mainly migrant workers or is it anyone that comes in saying that they have been underpaid?

Ms Hemingway: Our service is targeted specifically at newly arrived and refugee workers, so that includes permanent arrivals who have come as refugees and their families, international students, temporary visa holders and asylum seekers.

CHAIR: How many people do you deal with for worker exploitation?

Ms Hemingway: It depends on the week, but generally we would aim to see at least 100 clients face-to-face every year.

CHAIR: Do you get multiple offenders?

Ms Hemingway: We do from time to time. One example of that would be a community leader who had completed our Train the Trainer program, and he was approached by a number of community members who all worked as cleaners at one place and who had all been treated inappropriately in terms of wages. He was able to convince them to feel safe enough to come and speak with us about the issue, and we then assisted a group of workers by letting them know about their rights and assisting them to make a complaint to the ombudsman, and working with the ombudsman—again collaboratively—we managed to resolve that and recovered nearly $30,000 in wages for a group of people at once.

CHAIR: I was not necessarily talking about a group. Do you get complaints about the same employer back again?

Ms Hemingway: Yes, we do see that as well.

CHAIR: Even after the ombudsman has been involved? One of the things that has been raised is that there seem to be some employers who are just determined that they will continue to underpay. They have obviously made some calculation that, for the times they get caught, they are still ahead of the sheriff, because ultimately all they have to pay is what they were supposed to pay anyway.

Ms Hemingway: That is exactly right. We certainly feed any intelligence that we can into the Fair Work Ombudsman around any employers that we see, particularly when it is happening over and over again. In the case of some employers, we have not seen a significant change in their approach.

CHAIR: If you have a number of examples of those repeat offenders, I would like to know how often that happens. One of the things I think we need to give some consideration to is that, once, you might be able to say, 'I made a mistake. I am sorry,' but you cannot say that twice. And then it ought not simply be, 'If I get caught, I'll just have to pay what I was supposed to pay anyway.' There needs to be a bigger disincentive than that.

Ms Hemingway: Yes.

CHAIR: Can you talk to me a little bit more about your proposal for the reverse onus? I would have thought that there is a reverse onus. An employer is obliged to pay what they are legally obliged to pay, and I would have thought they had to actually establish that.

Ms Hemingway: Essentially, under the Fair Work Act currently, section 535 requires employers to make and keep employee records and section 536 requires employers to provide a pay slip, and there are some associated regulations in 3.42 around what needs to be in it and providing those employee records to employees upon request.

A pretty common thing that we will do, when a client comes to us and says that they have been underpaid but they have not received any pay slips or do not have any record of what they have done, is write to the employer and make a formal request for the records in accordance with the act. But what we see is that employers are in fact being advantaged by failing to comply with that law, because if they do not give us a copy of the records or they do not keep the records then the onus still rests with the worker to establish the hours that they worked. That is notwithstanding the fact that the employer will have access to things like CCTV or clocking in and clocking out records and also that they are required, under the law, to keep those records as a starting point. So I guess what we are recommending is that, if an employer has failed to keep records or to provide records in accordance with the act, what a worker says they worked should stand and the employer should be required to disprove that. That is what I mean in terms of shifting the assumption. And that is only when employers have not kept the records that they are meant to have done under the act. If some mistake has happened, they will be able to, presumably, disprove that in some other way.

We have clients coming to us who do not know to keep a work diary and do not know to write down what they have done, and then it is virtually impossible for them to establish their claim, or we give them advice saying, 'You can give verbal evidence that this is what you have done but, without more, it could be really difficult for you to prove on the balance of probabilities.'

CHAIR: With regard to employers that may keep time and wages records but may simply be underpaying for whatever reason or not paying the penalty rate et cetera, what access do you have to them and who has that access? Is it simply the worker only? Does the worker—

Ms Hemingway: Who has access to the time—

CHAIR: Yes: who has access to the time and wages records when an employer does keep them?

Ms Hemingway: I would have to check the wording of the regulations exactly but I know that an employee is entitled to make that request—

CHAIR: Right.

Ms Hemingway: and that we would do that on behalf of our clients. I am not sure who else.

CHAIR: Often, even when we are representing constituents at Centrelink, we have to go through several hoops before those government departments will provide us with any information about individuals. It is quite frustrating, I have to say.

Ms Hemingway: It would be, I imagine. We would be requesting those records when we act for our clients at their request, on their behalf.

CHAIR: Do you have to provide a certificate or proof that you are acting on behalf of someone?

Ms Hemingway: In some situations we might attach our authority to act form, which our clients would fill our when we commenced representing them. Further to that, I would say that this is one of the key amendments that we would be proposing to the vulnerable workers bill. At the moment, there are suggestions of increasing penalties when people fail to make or keep records. We say that without more it is not going to change current practice and that the reverse onus would be a really effective way to incentivise compliance with the act.

Senator McKENZIE: Some of the evidence we heard yesterday was around mutually beneficial arrangements where workers are prepared to accept cash in hand or an illegal rate of pay, for instance, for a variety of reasons. Do you have any examples of those? It sounds wrong calling them mutually beneficial. They are mutually beneficial for the worker and the employer but both are illegal. Do you have any sort of cases of those sorts of issues arising?

CHAIR: I suppose the specific examples were given that the benefit to the employer is that they are not paying any tax, they are not paying workers' compensation and they are not paying superannuation or leave accruals or anything else. The benefit for the worker may be that they are also on some employment benefit or other arrangements.

Senator McKENZIE: And I was probably thinking maybe if it was their second job—you know, so that they are not paying that higher rate of tax. That is where I was trying to go, but they went somewhere else.

CHAIR: There are those examples, too.

Mr Moore: I think this is actually a good example of why we need more research. I have heard similar concerns. But that should not hold us back from taking important action like this. And I am not saying that you are suggesting that. But I think the fact is: often you hear concerns raised about, 'Oh, well, the workers know what they're doing,' or, 'The workers are benefiting, as well. We shouldn't introduce protections or any measures that that would in any way seem to be rewarding unlawful behaviour.' I just do not think there is evidence to support that that is actually a bigger problem. We just do not know how often that is happening, but the status quo is not acceptable. The power imbalance is why we have repeat offenders and why 7-Eleven—there was an article; in fact I think I even mentioned it in my submission—even despite the last inquiry was still doing cashback scams. The risk of getting caught is not proportionate to the penalties. So you have to increase both—

Senator McKENZIE: We are underestimating, maybe, the intellect of those involved.

Mr Moore: in order to have any impact on human behaviour in this.

Senator McKENZIE: I was also wondering about the disruption that certain apps like Airtasker, or those apps that help people to acquire labour to do a variety of jobs and, basically, undercut the industrial relations system in an increasingly alarming way. Do you have any comment to make around that?

Ms Hemingway: The gig economy is something that we have identified in the report as an area that needs further consideration because it is something that we have just started seeing come through. I think our colleagues

at the Young Workers Centre are going to speak a little bit about some of the issues around sham contracting that are arising in that context. What I would add to that would be the same thing—that is, we just need to be making sure that we are addressing relationships that are in fact genuinely employment based and ensuring that these models are not being used to erode those minimum entitlements. That started before the gig economy emerged around areas like cleaning and distribution. We just see clients all the time coming through engaged as contractors when they are clearly not running their own businesses. I think there is a risk that that will continue. And there are a whole lot of other issues to think about in that space, as well, that we have not yet.

Senator McKENZIE: Would having labour hire companies subject to a prescribed code within the ACCC address some of these issues?

Ms Hemingway: I would have to take that on notice.

Mr Moore: I have considered this—I assume you are referring to the RCSA code. One of the arguments that I have heard put about enshrining this in the ACCC is that it would increase the options—or the Fair Work Ombudsman does not have enough powers. If our key regulator for the labour market does not have enough power, then we need to start there as opposed to looking at other options.

Senator McKENZIE: So giving them similar powers—for instance, the ACCC can compulsorily acquire information, et cetera?

Mr Moore: I understand that is in the vulnerable workers bill, is it not?

Senator McKENZIE: I am pretty sure that bill might come before our committee.

Mr Moore: I think there are certainly other issues with that in—

CHAIR: One of those questions is: 'What is a vulnerable worker really like?' Anyone that is working at the award level is probably vulnerable. But that is a discussion for another day. Unfortunately, we have run out of time. Sorry, we had a little bit of a late start. Thank you both for your very detailed submissions and very constructive recommendations. It is a valuable contribution to the committee's inquiry.

FITZPATRICK, Ms Keelia, Coordinator, Young Workers Centre

McCARTHY, Ms Penny, Client, Young Workers Centre

MILLWARD, Ms Alison, Volunteer, Young Workers Centre

[14:05]

CHAIR: Welcome. I understand we have two young workers with us today, from two areas that we are very interested in. We are looking forward to hearing from you. I understand that information on parliamentary privilege and giving evidence to committees has been provided to you. Ms Keelia Fitzpatrick, you can make some opening remarks, and then we can hear from both Penny and Alison.

Ms Fitzpatrick: Thank you, Chair. I thought it would be worthwhile, for your background, to describe the Young Workers Centre and what we do. We are based in Trades Hall here in Melbourne. We were established in 2016 to break the cycle of exploitation at work for young Victorians. As well as providing legal assistance to young people with employment law and industrial problems, we also carry out an education program available to all Victorian high schools, TAFEs and technical colleges.

The issue of young worker exploitation is hopefully something that you have heard about in the hearings that you have been at so far. One example, just to set the scene and draw your attention to the issue, was the large amount of exploitation of young people that was exposed in Wollongong, a university town, where it was uncovered that week-long unpaid trials, $10- and $12-an-hour pay rates and even instances of young workers not getting any pay at all were taking place in that town. Another example, of course, is the exploitation of Domino's delivery drivers: significant underpayments, forced unpaid overtime and unpaid super. We were very pleased, at the Young Workers Centre, to hear the ombudsman announce last month that young workers are a key priority area for them. The ombudsman said that young workers make up about 16 per cent of the Australian workforce but account for a disproportionately high 25 per cent of requests for assistance from the agency.

In our submission, we have chosen to highlight two areas that we see as a priority area impacting young people, and give examples of the corporate evasion of the Fair Work Act and company evasion of their employer obligations under the act. We will be talking about the gig economy, and specifically talking about Deliveroo, where Alison formerly worked. We will also be talking about the prevalence of Work Choices era collective agreements that have not yet been terminated, which we have identified in various Subway stores, and Penny will be speaking about her experience, having been a Subway employee for about five years.

I will speak quickly to what we have seen as sham contracting in the gig economy. I am sure you will all be familiar with what the gig economy is: modern-day piecework, essentially, where workers are engaged to deliver an individual service that is generally structured and paid according to delivery, pick-up or ride. They are generally engaged as independent contractors, meaning that, in order to get the gig with the company, they are required to get their own ABN and, essentially, run their own business in continuing to do that work. We have seen that there has been an explosion in the number of corporations, which structure their businesses around such contracting arrangements, operating in this rapidly growing gig economy.

Deliveroo is what we focused on in our submission. It is a British multinational corporation which hires hundreds of young people in Victoria. We estimate it is in the thousands across Australia, and that is just strictly Deliveroo. There are other companies operating in this space—foodora and UberEATS—and they engage riders. Sometimes they are on vehicles, on scooters, or on motorbikes—

Senator McKENZIE: Horseback?

Ms Fitzpatrick: I have not seen horseback, but maybe, when they reach areas of regional Australia, we might.

Senator McKENZIE: I wish!

Ms Fitzpatrick: They are all about innovation, after all. They engage these workers on independent contracts to work as food bike couriers. We believe that Deliveroo are employing these young workers on sham contracts to deliberately circumvent their obligation to provide safety insurance, minimum pay rates and minimum work conditions provided for in the National Employment Standards and relevant industry awards, and it is our belief that they are doing this in order to minimise their labour costs.

The young riders are often visa workers in Australia, and they are here as backpackers or international students—so certainly relevant to some of the evidence provided by WEstjustice. They are left with piecemeal work, with no entitlement to minimum wages or minimum shift hours, no entitlement to leave entitlements or loading for being casual workers and no assurances that they will go home from work safely, and, in the event

that they are injured at work, no assurances from their employing company that they will have provided for them by paying appropriate WorkCover.

Another point, which Alison can speak to, is that there are no minimum standards across Deliveroo contracts in themselves. We have seen over a dozen different contracts that have been rolled out by Deliveroo over the past 18 months that employ people doing the same work on different hourly pay rates, and in some circumstances no minimum hourly pay rate at all—so just simply a drop rate or a piece rate.

What this means is that across the country, depending on when these riders started work with Deliveroo, they are actually getting paid different amounts for doing the same job. I think this is a consequence of Deliveroo and the other gig economy companies just trying out new ways that they can get more work out of the riders while reducing costs—for example, we were informed several days ago that in the South Yarra area, where Deliveroo is very popular, they have such a high number of riders now that they have moved completely off any hourly rates to just a piecemeal rate entirely, whereas in other areas that is not the case.

Senator McKENZIE: Ms Fitzpatrick, for those listening or reading *Hansard* at a later date who are not from the great state of Victoria, would you be able to preface South Yarra as a suburb by giving some context of why that might be a place where you have a lot of Deliveroos.

Ms Fitzpatrick: Sure. It is an inner-city Melbourne suburb that would be regarded as quite a wealthy area.

Senator McKENZIE: Thank you.

Ms Fitzpatrick: I might finish there on Deliveroo and the gig economy and move now briefly to zombie Work Choices agreements.

CHAIR: Just before you do do that: when you are talking about the Deliveroo contracts, apart from the different rates that are now being offered—which you mentioned and we will come back to—do you think these contracts are legal?

Ms Fitzpatrick: We think that there is a strong argument that they are sham contracts, and Alison might be able to speak to the number of elements, when she carried out her position, that she thinks was a signifier of an employment relationship as it would be defined under the act.

CHAIR: Clearly the company is purporting them to be legally binding documents, but that has not been tested. That is really the question I am asking.

Ms Fitzpatrick: No, it has not been tested in Australia.

CHAIR: Thank you.

Ms Fitzpatrick: I will speak briefly now about zombie Work Choices agreements. 'Zombie' is a term that we use and that has been used in the media because these are agreements that have expired—so, they have gone past their formal expiry date as detailed in the agreement—but, due to the fact that neither party has applied to have those agreements terminated, they continue to live on despite their death. That is why we call them zombie agreements, so hopefully we are all fine with using that term.

What we have seen through the Young Workers Centre is that employers are employing young workers on agreements made under the supposedly dead, buried and cremated legislation that was Work Choices. We have seen a large number of these agreements in places—largely franchises but not exclusive to franchises—like Subway, where Penny works, and Bakers Delight. Generally this was a period under Work Choices where legal firms were engaged to roll out identical agreements during the Work Choices period, so when you find these individual agreements often they look almost identical to those that you would see at other Bakers Delights stores or other Subway stores from that period.

In our view none of the zombie agreements that have been seen by our legal team would pass the modern BOOT TEST if they were negotiated today. Hallmarks of these agreements, in terms of what they are missing, are: penalty rates and a range of entitlements, including overtime provisions, rules around uniform allowances, and minimum shift lengths, which if these agreements were made today under the Fair Work Act, in our view, they would not pass the BOOT test.

It is important to note that during the Work Choices era one of the most alarming and controversial elements of that legislative package was the removal of the no disadvantage test. That element of the legislation was highly controversial, and a watered-down version of the no disadvantage test, called the fairness test, was introduced in the later period of Work Choices, and I am sure some senators would know about that in more detail. But we contest that there are hundreds if not thousands of workers in Australia still covered by agreements made during that period, not subject to a modern BOOT test and missing out on some of those entitlements that I have just outlined.

I want to make one brief point about the lack of specifics I have given about how many of these agreements are in place today. There is a reason for that: it is because the Fair Work Commission and the Fair Work Ombudsman cannot give you a concrete number of how many of these agreements still exist today. As a result, we see this loophole, meaning that hundreds of young people, who may not be completely familiar with our employment law and industrial system, are simply not understanding that they are missing out on pay and entitlements because of the period when they were often—

CHAIR: That was a long time ago.

Ms Fitzpatrick: Yes, it was. I think Penny was nine years old when Work Choices was introduced, and she is still working under a Work Choices agreement today.

CHAIR: Can I just then ask this question: if the parliament was minded to simply legislate that all Work Choices agreements are now terminated, do you think there would be anyone who is working on one that would be disadvantaged, given that they reflect wages and conditions of that era of legislation? There could not still be one in place that legally did not expire, or had a final expiry date, later than 2012, I would not have thought.

Ms Fitzpatrick: 2014. Some of them would have been made in 2009, with a maximum of five years.

CHAIR: Right.

Ms Fitzpatrick: I cannot speak with clarity, because there is just such uncertainty about where these agreements are, what industries they are in. But our view is that they should be subject to a BOOT test in the Fair Work Commission. Another point to be made—

CHAIR: But if you do not know where they are, or who has them, or where they are operating, that is a bit hard. You effectively have to say they are gone, I suppose, but people then fall back to the award.

Ms Fitzpatrick: If you terminate them, they would revert to the award. It is our view, having tried to do significant research and speaking to the registry officials at the Fair Work Commission about where these agreements are and how many of them there are, that it would mean a significant amount of resources—

CHAIR: That may be a question that we need to direct to the Fair Work Commission to answer.

Senator McKENZIE: I was going to suggest that.

Ms Fitzpatrick: I might now hand to Alison to speak about Deliveroo.

Ms Millward: I was hired by Deliveroo in late 2015 and worked for them until mid-2016. I was hired as a sole contractor, as is everyone who works for Deliveroo. When I was hired, they sent out instructions for how to get an ABN to all employees—sorry, to all contractors.

I was hired on an $18-an-hour contract, with $2.50 per delivery, and then there were also people who were hired a couple of weeks after me who were on a rate of $16 an hour and $2.50 per delivery, and then there were other people I worked with on contracts with $9 per delivery and no hourly rate. So everyone I worked with would have completely different amounts that they were being paid and ways that they were being paid.

I believe that there were certain things that they did that would mean that they were not meeting what a normal sole contractor is. We had no ability to negotiate our pay. Also, whereas normally as a sole contractor you would send in an invoice and then get paid, what would happen is that we would get paid and be sent invoices from Deliveroo that were, in effect, a payslip but actually, if you looked closely, were an invoice addressed from us to them. So they used things like that to get around treating us as employees. Also, it was mandatory to wear uniform, and we also had to pay a deposit for that uniform, so from our first four pay cheques we had a total of $210, I believe, taken out for that uniform that we were obliged to wear.

CHAIR: Lycra, was it?

Ms Millward: Unfortunately, that would actually have been better. When I first started, we were given a raincoat that was black, without reflective strips at all. It was also not fully waterproof. They have since updated to a lighter coloured jacket that is waterproof, thankfully. When I started, the box on your back that you ride around with was also black with no reflectors. So things like that, safety-wise, were definitely not taken into account. Then you also have the costs of bike maintenance and the costs of owning the bike. All of that was on you. Also, because it is all done by app, you were required to be able to use the app, so it had to be an iPhone or an Android, and you had to have enough data to be able to use it non-stop during your shifts, so I had to update to, I think, an extra $30 on my plan to be able to have enough data to do the job. Those all came out of our own pockets, and superannuation was not taken out, so workers were also expected to put into that from their own pockets, and my understanding would be that most of us would not.

Senator McKENZIE: Why?

Ms Millward: A lot of young people just do not know about super. I would say I have a better understanding than most, mostly just because one of my best friends works at a super company, but most young people just do not know about it. There is no education around superannuation, and there is no education coming from these companies, because companies do not want to draw attention to the things that the workers are missing out on, so they are not going to send information about what people should be putting in their super. So a lot of people just would not think about it. When you are also earning under the award rate and then—

Senator McKENZIE: For piecework, was it under the award rate?

Ms Millward: Yes.

Ms Fitzpatrick: Yes, in our submission we provided calculations.

Senator McKENZIE: Sorry.

CHAIR: I cannot find it. I read it last night.

Ms Millward: I think it would be around $23 an hour that I would have been eligible for under the award.

CHAIR: I think you said you averaged out the calculation on 20 deliveries an hour.

Ms Millward: No, definitely not 20 an hour. Sometimes I had 10-hour shifts where I had no deliveries at all. Especially when we were first starting up, I would go 10 hours with no deliveries, and then other weeks you would have a three-hour shift that had five or something. Per hour you would tend to get between zero and four deliveries. Four would be unusual, and you would probably average around two—in peak periods, anyway.

CHAIR: Have you found that page with that calculation?

Ms Fitzpatrick: Yes, it is page 7 of our submission. There is a table, and we have attached three different versions of delivery contracts, because they change very regularly.

Senator McKENZIE: I did not mean to interrupt, Ms Millward.

Ms Fitzpatrick: We have calculated what we see as missing income and then missing superannuation as well. In the November 2015 agreement, we estimated there was approximately $72.91 of income missing and $32.20 in superannuation missing. But moving down to April 2016, when the contracts changed in a way that we view as less favourable to the riders, the riders were missing out on $158.91 in income.

Senator McKENZIE: Ms Millward, did you need an ABN?

Ms Millwood: Yes, I did.

CHAIR: I thought you said the company helped you get the ABN?

Ms Millwood: Yes. When you were getting hired, the company would send you out an information sheet of exactly what to select on the online ABN form when you were applying for an ABN. They would tell you what boxes you had to tick to be eligible to get it.

Senator McKENZIE: Was that to become a small-business owner?

Ms Millwood: Yes. I already had an ABN for another type of work I do but the vast majority of people who I worked with got it purely to work for Deliveroo, and they just followed the instructions they were given.

Senator McKENZIE: On your tax return, did you claim bike repairs, your phone?

Ms Millwood: I did not need to because I earned under the tax-free threshold. I would have probably if I had needed to.

Senator McKENZIE: But you did not get over the $18,000? What about insurance?

Ms Millwood: One thing that is especially not good is that we are not covered by Deliveroo's insurance. We are not insured as riders.

Senator McKENZIE: You had to take out your own insurance, didn't you?

Ms Millwood: My parents bought me insurance for Christmas. It is a dangerous job. A lot of people get car doored or slip on tram tracks, things like that. My brother was deployed at the time but my mother would say she was much more worried about me out on the streets than him in Iraq. It is not the safest of jobs. If someone is injured at work and cannot work, not only are they not insured and would have to either have their own insurance or cover their own medical bills but it also means when they are out sick from work they are not getting paid at all. For any shifts they are not able to work, there is no income coming in. I think that is something that is not good.

CHAIR: If you did not turn up for work or you could not do a shift because you were sick, were you then penalised by not being given other shifts?

Ms Millwood: The shifting was done through a website called STAFFOMATIC. You would have some shifts assigned to you and then each week those same shifts would carry over to the next. So if you were to cancel one of those shifts, the next week you would not have that shift. The only way to get more shifts would be to trade with other riders so if one rider is sick, you might trade with them and you would get that shift and then the next week that shift would still be yours.

Among riders we have groups where we work out a system where you could ask people to cover your shift just for one week and they would trade it back to you. But when you are sick, if you take time off, you are relying on the other riders to be nice to give you those shifts back. Generally you are working with nice people so they are happy to do it but there is nothing in place in the system that protects a worker's right to have a certain number of shifts. So someone could be working full-time for months, be sick for a week and then have to trade their way back to get all their shifts. There is absolutely no security around shifts.

There are also weird shift lengths. On STAFFOMATIC, you are trading for blocks of shifts. Some of them are like one-hour, two-hour, three-hour blocks. You might end up only being able to trade into a one-hour shift for that day when, I think, if you were under the award, you would be required to do four hours.

Ms Fitzpatrick: Yes, there are minimum shift lengths in modern awards.

Ms Millward: There are also no breaks put into these shifts. If you are on for a six-hour shift there is no break in there. So you—

Senator McKENZIE: But you might not get any calls.

Ms Millward: You might not, but you might. I always found that when you go and get yourself some food that is when the calls come in.

Senator McKENZIE: It is usually the way, Ms Millward.

CHAIR: You are obliged to pick it up, too, under this agreement, aren't you?

Ms Millward: You can message them and say, 'Please, don't give me that shift,' but if you do that a lot you are going to get in trouble. It is all done by Staffomatic. But if Deliveroo decide to give you fewer shifts, they could just take them off Staffomatic. They have the ultimate—

Senator McKENZIE: Are there regional coordinators? Who runs Staffomatic?

Ms Millward: It is unclear.

CHAIR: It is an algorithm.

Ms Millward: There are definitely people working in the system. There is not a lot of clarity around that.

CHAIR: It says here: 'The algorithm will select the contractor and notify the contractor about the order.'

Senator McKENZIE: Senator Marshall used to use a slide rule.

CHAIR: I am reading from the agreement, the contract. They are actually telling you how you will get your jobs, and the algorithm will determine it.

Ms Millward: That is for the individual jobs. That is for the actual orders you are getting on delivery, not for the shifts.

Senator McKENZIE: I imagine in systems like this—the abuse of the system itself aside—that rather than playing favourites and saying, 'Well, I like Uber driver Y; I'm going to give all the tikka masala to Uber driver Y,' having an algorithm would spread the work. Is that why they do that? Do you know why they spread the jobs?

Ms Millward: There is really not a lot that we are told about how they work. Sometimes you will be talking to people and someone will say, 'I had six jobs this night.' and someone else will be like, 'Oh, I had zero jobs.' It is very unclear about how much of it is just an algorithm and how much of it is chosen by Deliveroo.

Senator McKENZIE: By somebody.

Ms Millward: Yes. So that is unclear. When we started there were no maximum shift limits, so you could do 10-hour shifts with no breaks. I think later on, midway through when I was working for them, they sent out an email saying, 'Please only pick seven hours worth of shifts per day,' but it is not enforced. People can be working really long shifts and not have any breaks in those as well.

Senator McKENZIE: At the end of the day, it is their choice, isn't it? You are the one who says that I want to work for 10 or seven hours, or I want to work for three hours on a Monday night?

Ms Millward: Yes, you are choosing that. However, there is nothing built into the system for taking breaks. In terms of safety, there is not just the lack of safety around doing the rides. When you are not on a delivery you are asked to wait in a waiting zone. I was in Brunswick in a small park call Foletta Park, which had no shelter. It was

dimly lit; it had no water—things like that. Most of the parks that people are waiting in are similar. So they are definitely not really safe places to be waiting in alone, late at night. Also, in winter, without the shelter, it is absolutely freezing.

CHAIR: Is that just on the basis that it is a centralised point—

Ms Millward: Yes. It is done by zones. I was in the Brunswick zone, and previously I worked in the Carlton zone and the CBD zone. There are all these different zones. There is the South Yarra one. That was the central base for the zone that I was in. They ask you to wait there when you are waiting for orders.

CHAIR: You started on $18 an hour and $2.50 per delivery, and the hourly rate slowly went down and ultimately there was no hourly rate and it was $9 per delivery. Did they try to push you off your hourly rate? Based on your calculations, the last situation they were at was the worst pay rate for you, and of course the worst pay rate means that, if it is a dollar out of your pocket, that dollar is appearing somewhere else.

Ms Millward: There is high turnover with delivery riders, because a lot of them are backpackers and international students. So there is not really that continuity—

CHAIR: It is going to happen anyway.

Ms Millward: Then I was fired by text message, an automated text message, for not doing enough shifts.

CHAIR: Tell us about the firing. What didn't you do to satisfy the algorithm?

Ms Millward: I was told I wasn't doing enough shifts. It was an automated text message, and when I tried to email about it I never got a response. How much of that is them wanting me off the contract and how much of that is me not doing enough shifts or whatever? It is hard to tell. It may have been because I was on one of the better contracts or it may have been because of the number of shifts I was doing. I do not know.

CHAIR: I am tempted to be flippant and say: do you feel liberated not working there? From what you tell us you have got a family and community around you to support you.

Ms Millward: Yes.

CHAIR: But of course many people are doing these jobs because they actually rely on this money to live day-by-day. It is hard to step into someone else's shoes, but you must have been working with some people who were in that situation too.

Ms Millward: Definitely. I had multiple jobs at the time so it was not the thing I was relying on to survive. I also have a support system, but a lot of people, especially international students, would not have had that. If I cannot pay my rent, I can always move back in with my parents. I would rather not, but there is always that option there. For a lot of the people I was working with this was their sole source of income and it was like a full-time job for them. They would work every day and for long shifts. The lack of security was a big issue for them, especially if they got sick and suddenly had no income for the week and had to work back up to all of their shifts. That has a huge effect on their lives.

Ms Fitzpatrick: We might go to Penny, if that is okay.

CHAIR: Yes, we should.

Senator McKENZIE: Sorry, Penny, but this is fascinating.

Ms McCarthy: I work at Subway. I still work there. I am 20 years old. I am a full-time nursing student as well. I have worked there since I was 15 years old, so it is my first job. As Keelia mentioned, the Work Choices agreement covering my Subway was created back in 2009 when I was only nine years old, so it has long expired but we are still using it today.

When I first started working at Subway at 15 I had no knowledge of agreements whatsoever. I had never heard the word before, let alone know what an expired agreement was, what a zombie agreement was or that they did expire. I had no idea about any of that until a co-worker at the time contacted the Young Workers Centre for help regarding underpayment of the 2009 wages. That was about a year ago. That was when I learnt there were all these problems. Since then I have been made aware of the main problems with having an expired agreement at Subway. The biggest one would be the pay. We still to this day do not get any penalty rates whatsoever for Saturday work, Sunday work or work after 9 pm.

The second big issue with having an expired agreement is that we are employed under preferred hours part-time, which means that there is an expectation that we would get permanent shifts weekly, although our boss has no regard for this. We may get no shifts for a few weeks or we might get one really short shift. I was continuously relying on about 12 hours a week for a couple of years and then all of a sudden I had none. That was of course

very difficult and stressful. So there is no financial stability. They will give you random days and random hours. If you cannot make that day, you will miss out on money for the week.

The third main issue I have come across with having the expired agreement—

CHAIR: Sorry. Just before you go on, are you saying that the agreement allowed that to happen or that was not allowed in the agreement and the employer was just ignoring it anyway? Just for that element because I understand about the penalty rates.

Ms McCarthy: I think Keelia might be able to explain this a little bit better. It is preferred hours part-time. Maybe you can answer this.

Ms Fitzpatrick: I think it is a combination of both. Penny has not yet explained, but the workers had all signed a petition to apply to terminate this expired agreement and then all of a sudden the franchise got sold and a new boss came in. He indicated he was going to change the agreement anyway. That is why we held off on proceeding with the termination application, but that has not yet happened. But, if I can just speak to the preferred hours, I am absolutely convinced that there is no way that this structure of preferred hours part time would get through a BOOT or a commissioner's eyes. I think it speaks to the fact that, during WorkChoices, agreements were registered by administrators—public servants—and not commissioners because the responsibility for processing those agreements changed to a different authority than it currently sits with today, which is obviously in the Fair Work Commission. That is how the BOOT is conducted. I do not think that this structure would get through the BOOT, but I also think that, unfortunately, the workers at Subway Mitcham have had multiple bosses who do not comply with the agreement in the first place.

CHAIR: Sorry Penny—I should not have interrupted you.

Ms McCarthy: No, that is fine.

Senator McKENZIE: She was just trying to tell her story!

Ms McCarthy: It is a bit confusing! The third issue with having the expired agreement is that, in the past, we have been required to complete hours and hours of online training courses, which is called 'Subway university', and they have several modules which took me days to do. It took everyone a long time, and we were told—it was all unpaid—that if we did not complete it by a certain date, then we just would not get shifts ever again. Also, we had to attend meetings which were sometimes held just for the benefit of upselling drinks in the store, and all of that was unpaid as well.

CHAIR: They were held for what? Upselling—

Senator McKENZIE: Drinks.

Ms McCarthy: That is the first one that popped into my mind. They just taught us techniques to get people to buy drinks, so it was a couple of hours out of our time, which was unpaid, learning that particular skill. Those were the three main issues I have encountered from having the old agreement.

Senator McKENZIE: Can I ask: have you been working at Subway for a while?

Ms McCarthy: Yes.

Senator McKENZIE: You would have developed a lot of skills in this space. Why don't you go and work somewhere else?

Ms McCarthy: I actually have done several other jobs as well Subway. Also, I am in my last year of uni , so I do not know if I am going to start looking for a new job for the sake of another year or so, even if I am just still at Subway.

CHAIR: Thank you. We really need to, as a committee, find out how many WorkChoices agreements there are, and we will try and do that. I just want to, again, get your opinion. There is a long way to go yet, but, again, if the parliament was minded to simply legislate to abolish them, that is a pretty full-on tool. I am trying to think of some downsides to that, and I am just thinking: could there be any negative consequences that—apart from getting rid of these agreements—you can think of? Maybe it is something you can think of—

Ms Fitzpatrick: I am sure there are examples out there of good agreements that were registered during that period. Our view is that, firstly—

CHAIR: But if it was a good agreement negotiated at the time, and I agree there probably were some, the chances are that that was a rare example of when people did genuinely agree to an agreement. It has probably been replaced by something else.

Ms Fitzpatrick: I agree. If an employer would be surprised by an automatic termination process implemented through parliament, they have had almost eight years—

CHAIR: Do they all automatically end unless there is an application made to save it? And, if an application is made to save it, it would then have to pass the boot test?

Ms Fitzpatrick: Precisely.

Senator McKENZIE: We might have questions on notice, though, because this is all part of the—

CHAIR: We have a couple of minutes if there is anything you think we have missed which you would like to tell us.

Ms Fitzpatrick: There is only one point that I would want to make in relation to the gig economy, in relation to occupational health and safety and workers compensation. I think the main point to make around workers compensation is that the extent to which there is cover if a rider has an accident on the road in Victoria is really, really unclear. We think at least it would be covered by TAC, if there was a vehicle involved, but if there was a bike track accident or bike-on-bike injuries it is not clear that the rider would be covered. We are also very unclear on what would happen if something happened to a rider when they were in a park or in an apartment complex. There is a complete lack of clarity. The recommendation is that federal government work with state health and safety regulators to review work and occupational health and safety and workers compensation and legislation to ensure that these companies are operating correctly, because there is a complete lack of clarity about what happens to these workers.

Senator McKENZIE: And this is where I think it all gets a bit muddy—other people with an ABN. Do we want the whole of society covering my dad who owns a dairy delivering business in Leongatha? And he doesn't, but you know. That is where we need some real clarity around if you have an ABN and are operating as a small business owner, how do we separate those two things in this gig economy? I am really interested in nutting that out.

Ms Fitzpatrick: Yes. I think a useful model to examine is the model health and safety rules that have been implemented at a national level that look at what an appropriate definition of 'employer' is, because at the moment under the Fair Work Act—and you probably heard this from other people who appeared before you—the definition of 'employer' and 'employee' is completely inadequate in capturing these types of workers. But the model rules under the health and safety legislation use a definition that would capture contractors. If your business is food delivery, then it seems kind of crazy that the people who are doing that delivery work would not be covered under your health and safety duties.

CHAIR: This is probably happening in Europe, too, where there are good workplace relations, regulations and standards—not so much the States. Do you know whether anyone else has attempted to address some of these issues that you might point us to?

Ms Fitzpatrick: Do you mean in Australia, or around the world?

Senator McKENZIE: No, internationally, because this disruption is not happening just here.

Ms Fitzpatrick: My understanding is that the legislation introduced in France covering rider safety and paying entitlements for riders is quite good.

CHAIR: Well, we might have a look at that.

Senator McKENZIE: And broader than just the rider stuff, because this will be across the entire workforce.

Ms Fitzpatrick: And it is growing at a very fast pace.

Senator McKENZIE: Yes. We do not want to be out of date by the time we write the report.

CHAIR: Thank you very much for coming along and sharing with us your direct experiences of work. We really appreciate your time and effort. So, thank you.

Committee adjourned at 14:47