COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES

Senate

Official Hansard

No. 14, 2006
Friday, 1 December 2006

FORTY-FIRST PARLIAMENT
FIRST SESSION—SEVENTH PERIOD

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SITTING DAYS—2006

<table>
<thead>
<tr>
<th>Month</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>February</td>
<td>7, 8, 9, 27, 28</td>
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<tr>
<td>March</td>
<td>1, 2, 27, 28, 29, 30</td>
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<td>June</td>
<td>13, 14, 15, 16, 19, 20, 21, 22, 23</td>
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<td>August</td>
<td>8, 9, 10, 14, 15, 16, 17</td>
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<td>September</td>
<td>4, 5, 6, 7, 11, 12, 13, 14</td>
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<td>October</td>
<td>9, 10, 11, 12, 16, 17, 18, 19</td>
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<td>November</td>
<td>6, 7, 8, 9, 27, 28, 29, 30</td>
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<td>December</td>
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Network radio stations, in the areas identified.

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- **SYDNEY** 630 AM
- **NEWCASTLE** 1458 AM
- **GOSFORD** 98.1 FM
- **BRISBANE** 936 AM
- **GOLD COAST** 95.7 FM
- **MELBOURNE** 1026 AM
- **ADELAIDE** 972 AM
- **PERTH** 585 AM
- **HOBART** 747 AM
- **NORTHERN TASMANIA** 92.5 FM
- **DARWIN** 102.5 FM
FORTY-FIRST PARLIAMENT
FIRST SESSION—SEVENTH PERIOD

Governor-General

His Excellency Major-General Michael Jeffery, Companion in the Order of Australia, Commander of the Royal Victorian Order, Military Cross

Senate Officeholders

President—Senator the Hon. Paul Henry Calvert
Deputy President and Chairman of Committees—Senator John Joseph Hogg

Leader of the Government in the Senate—Senator the Hon. Nicholas Hugh Minchin
Deputy Leader of the Government in the Senate—Senator the Hon. Helen Lloyd Coonan
Leader of the Opposition in the Senate—Senator Christopher Vaughan Evans
Deputy Leader of the Opposition in the Senate—Senator Stephen Michael Conroy
Manager of Government Business in the Senate—Senator the Hon. Christopher Martin Ellison
Manager of Opposition Business in the Senate—Senator Joseph William Ludwig

Senate Party Leaders and Whips

Leader of the Liberal Party of Australia—Senator the Hon. Nicholas Hugh Minchin
Deputy Leader of the Liberal Party of Australia—Senator the Hon. Helen Lloyd Coonan
Leader of The Nationals—Senator the Hon. Ronald Leslie Doyle Boswell
Deputy Leader of The Nationals—Senator the Hon. John Alexander Lindsay (Sandy) Macdonald
Leader of the Australian Labor Party—Senator Christopher Vaughan Evans
Deputy Leader of the Australian Labor Party—Senator Stephen Michael Conroy
Leader of the Australian Democrats—Senator Lynette Fay Allison
Leader of the Australian Greens—Senator Robert James Brown
Leader of the Family First Party—Senator Steve Fielding
Liberal Party of Australia Whips—Senators Jeannie Margaret Ferris and Stephen Parry
Australian Democrats Whip—Senator Andrew John Julian Bartlett
Australian Greens Whip—Senator Rachel Siewert

Printed by authority of the Senate
<table>
<thead>
<tr>
<th>Senator</th>
<th>State or Territory</th>
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(1) Chosen by the Parliament of Queensland to fill a casual vacancy vice Hon. John Joseph Herron, resigned.
(2) Chosen by the Parliament of Victoria to fill a casual vacancy vice Hon. Richard Kenneth Robert Alston, resigned.
(3) Term expires at close of day next preceding the polling day for the general election of members of the House of Representatives.
(4) Chosen by the Parliament of Tasmania to fill a casual vacancy vice Susan Mary Mackay, resigned.
(5) Chosen by the Parliament of South Australia to fill a casual vacancy vice Hon. Robert Murray Hill, resigned.

PARTY ABBREVIATIONS
AD—Australian Democrats; AG—Australian Greens; ALP—Australian Labor Party; CLP—Country Labor Party; FF—Family First Party; LP—Liberal Party of Australia; NATS—The Nationals

Heads of Parliamentary Departments
Clerk of the Senate—H Evans
Clerk of the House of Representatives—I C Harris
Secretary, Department of Parliamentary Services—H R Penfold QC
**HOWARD MINISTRY**

<table>
<thead>
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<th>Role</th>
<th>Minister</th>
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<tbody>
<tr>
<td>Prime Minister</td>
<td>The Hon. John Winston Howard MP</td>
</tr>
<tr>
<td>Minister for Transport and Regional Services and Deputy Prime Minister</td>
<td>The Hon. Mark Anthony James Vaile MP</td>
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<tr>
<td>Treasurer</td>
<td>The Hon. Peter Howard Costello MP</td>
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<tr>
<td>Minister for Trade</td>
<td>The Hon. Warren Errol Truss MP</td>
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<td>Minister for Defence</td>
<td>The Hon. Dr Brendan John Nelson MP</td>
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<tr>
<td>Minister for Foreign Affairs</td>
<td>The Hon. Alexander John Gosse Downer MP</td>
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<tr>
<td>Minister for Health and Ageing and Leader of the House</td>
<td>The Hon. Anthony John Abbott MP</td>
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<tr>
<td>Attorney-General</td>
<td>The Hon. Philip Maxwell Ruddock MP</td>
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<tr>
<td>Minister for Finance and Administration,</td>
<td>Senator the Hon. Nicholas Hugh Minchin</td>
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<tr>
<td>Leader of the Government in the Senate and Vice-President of the Executive Council</td>
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<tr>
<td>Minister for Agriculture, Fisheries and Forestry and Deputy Leader of the House</td>
<td>The Hon. Peter John McGauran MP</td>
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<td>Senator the Hon. Amanda Eloise Vanstone</td>
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<tr>
<td>Minister for Education, Science and Training and Minister Assisting the Prime Minister for Women’s Issues</td>
<td>The Hon. Julie Isabel Bishop MP</td>
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<tr>
<td>Minister for Families, Community Services and Indigenous Affairs</td>
<td>The Hon. Malcolm Thomas Brough MP</td>
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<td>Minister Assisting the Prime Minister for Indigenous Affairs</td>
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<td>Minister for Industry, Tourism and Resources</td>
<td>The Hon. Ian Elgin Macfarlane MP</td>
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<td>Minister for Employment and Workplace Relations and Minister Assisting the Prime Minister for the Public Service</td>
<td>The Hon. Kevin James Andrews MP</td>
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<tr>
<td>Minister for Communications, Information Technology and the Arts and Deputy Leader of the Government in the Senate</td>
<td>Senator the Hon. Helen Lloyd Coonan</td>
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<tr>
<td>Minister for the Environment and Heritage</td>
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*(The above ministers constitute the cabinet)*
### HOWARD MINISTRY—continued

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<thead>
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<th>Position</th>
<th>Minister/Parliamentary Secretary</th>
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<td>Minister for Justice and Customs and Manager of Government Business in</td>
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<td>and Minister Assisting the Prime Minister</td>
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<td>The Hon. Frances Esther Bailey MP</td>
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<td>Parliamentary Secretary to the Minister for Finance and</td>
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<td>Parliamentary Secretary (Foreign Affairs)</td>
<td>The Hon. Teresa Gambaro MP</td>
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### SHADOW MINISTRY

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<th>Position</th>
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<tr>
<td>Leader of the Opposition</td>
<td>The Hon. Kim Christian Beazley MP</td>
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<td>Deputy Leader of the Opposition and Shadow</td>
<td>Jennifer Louise Macklin MP</td>
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<td>Minister for Education, Training, Science and Research</td>
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<td>Leader of the Opposition in the Senate</td>
<td>Senator Christopher Vaughan Evans</td>
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<td>Shadow Minister for Indigenous Affairs</td>
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<td>Shadow Minister for Family and Community Services</td>
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<td>Deputy Leader of the Opposition in the Senate</td>
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<td>Shadow Minister for Communications and</td>
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<td>Shadow Minister for Health and Manager of</td>
<td>Julia Eileen Gillard MP</td>
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<td>Shadow Treasurer</td>
<td>Wayne Maxwell Swan MP</td>
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<td>Shadow Attorney-General</td>
<td>Nicola Louise Roxon MP</td>
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<td>Shadow Minister for Foreign Affairs and Trade</td>
<td>Kevin Michael Rudd MP</td>
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<td>and Shadow Minister for International Security</td>
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<td>Shadow Minister for Defence</td>
<td>Robert Bruce McClelland MP</td>
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<td>Shadow Minister for Employment and Workforce</td>
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<td>Participation and Shadow Minister for Corporate</td>
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(The above are shadow cabinet ministers)
**SHADOW MINISTRY—continued**

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<td>Shadow Minister for Consumer Affairs and Health Regulation</td>
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<td>Shadow Minister for Agriculture and Fisheries</td>
<td>Gavan Michael O’Connor MP</td>
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<td>Shadow Assistant Treasurer, Shadow Minister for Revenue and Shadow Minister for Small Business and Competition</td>
<td>Joel Andrew Fitzgibbon MP</td>
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<td>Shadow Minister for Transport</td>
<td>Senator Kerry Williams Kelso O’Brien</td>
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<td>Shadow Minister for Sport and Recreation</td>
<td>Senator Kate Alexandra Lundy</td>
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<td>Shadow Minister for Homeland Security and Shadow Minister for Aviation and Transport Security</td>
<td>The Hon. Archibald Ronald Bevis MP</td>
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<td>Shadow Minister for Veterans’ Affairs and Shadow Special Minister of State</td>
<td>Alan Peter Griffin MP</td>
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<td>Shadow Minister for Defence Industry, Procurement and Personnel</td>
<td>Senator Thomas Mark Bishop</td>
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<td>Shadow Minister for Ageing, Disabilities and Carers</td>
<td>Senator Jan Elizabeth McLucas</td>
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<td>Shadow Minister for Justice and Customs and Manager of Opposition Business in the Senate</td>
<td>Senator Joseph William Ludwig</td>
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<td>Shadow Minister for Overseas Aid and Pacific Island Affairs</td>
<td>Robert Charles Grant Sercombe MP</td>
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<td>Shadow Minister for Citizenship and Multicultural Affairs</td>
<td>Senator Annette Hurley</td>
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<td>Shadow Parliamentary Secretary for Reconciliation and the Arts</td>
<td>Peter Robert Garrett MP</td>
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<td>Shadow Parliamentary Secretary to the Leader of the Opposition</td>
<td>John Paul Murphy MP</td>
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<td>Shadow Parliamentary Secretary for Defence and Veterans’ Affairs</td>
<td>The Hon. Graham John Edwards MP</td>
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<td>Shadow Parliamentary Secretary for Education</td>
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<td>Shadow Parliamentary Secretary for Treasury</td>
<td>Catherine Fiona King MP</td>
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<td>Shadow Parliamentary Secretary for Science and Water</td>
<td>Senator Ursula Mary Stephens</td>
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<td>Shadow Parliamentary Secretary for Northern Australia and Indigenous Affairs</td>
<td>The Hon. Warren Edward Snowdon MP</td>
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CONTENTS

FRIDAY, 1 DECEMBER

Chamber
Notices—
  Presentation ................................................................................................................... 1
Copyright Amendment Bill 2006—
  In Committee .............................................................................................................. 1
  Third Reading ............................................................................................................. 1
Independent Contractors Bill 2006 —
  In Committee ............................................................................................................. 1
  Third Reading ........................................................................................................... 90
Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006—
  In Committee ............................................................................................................. 1
  Third Reading ........................................................................................................... 91
Environment and Heritage Legislation Amendment Bill (No. 1) 2006—
  In Committee ........................................................................................................... 91
Adjournment—
  Donor Insemination ................................................................................................. 120
  Child Sexual Abuse ................................................................................................. 122
The DEPUTY PRESIDENT (Senator Hogg) took the chair at 9 am and read prayers.

NOTICES
Presentation
Senator Nettle to move on the next day of sitting:
That the Senate calls on the Government to bring Mr David Hicks home from Guantanamo Bay.

COPYRIGHT AMENDMENT BILL 2006
In Committee
Consideration resumed from 30 November.
Bill, as amended, agreed to.
Bill reported with amendments; report adopted.

Third Reading
Senator ELLISON (Western Australia—Minister for Justice and Customs) (9.02 am)—by leave—I move:
That this bill be now read a third time.
Question agreed to.
Bill read a third time.

INDEPENDENT CONTRACTORS BILL 2006
WORKPLACE RELATIONS LEGISLATION AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006
Consideration resumed from 29 November.

In Committee
INDEPENDENT CONTRACTORS BILL 2006
Bill—by leave—taken as a whole.
Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (9.03 am)—by leave—I move government amendments Nos (1) and (3) to (9) on sheet QU340:
(1) Clause 7, page 6 (line 30) to page 7 (line 3), omit paragraph (1)(c), substitute:
(c) without limiting paragraphs (a) and (b)—expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground:
(i) make an order or determination (however described) setting aside, or declaring to be void or otherwise unenforceable, all or part of the contract;
(ii) make an order or determination (however described) amending or varying all or part of the contract.
(3) Clause 7, page 7 (line 21), at the end of sub-paragraph (2)(b)(ii), add “or”.
(4) Clause 7, page 7 (lines 22 and 23), omit subparagraph (2)(b)(iii).
(5) Clause 8, page 8 (line 32), omit “rights”, substitute “protection”.
(6) Clause 12, page 10 (after line 28), at the end of the clause, add:
(3) In reviewing a services contract, the Court must only have regard to:
(a) the terms of the contract when it was made; and
(b) to the extent that this Part allows the Court to consider other matters—other matters as existing at the time when the contract was made.
(4) For the purposes of this Part, services contract includes a contract to vary a services contract.
Note: The effect of subsection (4) is that a contract to vary a services contract can be reviewed under this Part, as the contract to vary will itself be a services contract.

(7) Clause 14, page 11 (lines 23 to 26), omit the definition of other review proceedings, substitute:
other review proceedings means proceedings in relation to a services contract:

(a) under a provision of a law of a State or Territory that makes provision as mentioned in paragraph 7(1)(c) and is not affected by the exclusion provisions; or

(b) under a provision of a law of the Commonwealth, or of a State or Territory, that is specified in regulations made for the purposes of this paragraph.

(8) Clause 15, page 12 (lines 11 to 16), omit subclause (2).

(9) Clause 15, page 12 (lines 26 and 27), omit subclause (5).

Senator WONG (South Australia) (9.04 am)—There are a range of amendments we are dealing with today. Are these amendments dealing with unfair contracts and then are there a number of amendments dealing with owner-drivers et cetera?

Senator Abetz—That is right.

Senator WONG—The government has moved a number of amendments, including to Work Choices legislation, so I am trying to clarify exactly what we are doing. Labor will be opposing these amendments. I ask the minister to explain what is intended by amendment (1) in relation to the introduction of a new paragraph (c). Perhaps you can explain why that is being done.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (9.05 am)—Prior to doing that, I table a supplementary explanatory memorandum relating to the government amendments to be moved to this bill. The memorandum was circulated in the chamber on 28 November 2006.

Coming to Senator Wong’s question, amendment (1) would clarify the intended effect of clause 7(1)(c) of the Independent Contractors Bill, which is to exclude the operation of state and territory unfair contracts jurisdictions which apply to independent contractors. It would ensure that only state and territory laws which expressly empower a court, commission or tribunal to amend, vary, set aside or find void or otherwise unenforceable parts or all of a services contract are excluded to the extent that they apply to independent contractors covered by the proposed legislation.

This amendment would also ensure that antiavoidance protections for vulnerable workers in state and territory laws, such as laws requiring a court to construe a contract with an outworker to contain certain minimum conditions, are not overridden by the Independent Contractors Bill. I am advised that Minister Andrews’s office negotiated these amendments with the outworkers’ stakeholders.

Question agreed to.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (9.08 am)—by leave—I move government amendment (2) on sheet QU340:

(2) Clause 7, page 7 (lines 10 to 14), omit paragraph (2)(a), substitute:

(a) a law of a State or Territory, to the extent that the law deals with matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers), other than matters mentioned in paragraph (1)(c); or

The government opposes part 4 in the following terms:

(10) Part 4, clauses 18 to 30, page 15 (line 2) to page 27 (line 26), to be opposed.

Senator WONG (South Australia) (9.08 am)—Is the government in fact seeking to not proceed with part 4, clauses 18 to 30, of the original bill?
Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (9.08 am)—We are proposing to remove part 4 of the Independent Contractors Bill which would have established a minimum remuneration guarantee for independent contractor textile, clothing and footwear outworkers in the absence of any state or territory law setting a minimum level of remuneration. This proposed part would also have established a record-keeping regime, under which a person who engages a contractor TCF outworker must keep certain documentation relating to pay. These provisions had been modelled on existing protections in part 22 of the Workplace Relations Act, which provide a minimum rate of pay for contracted TCF outworkers in Victoria. It was intended that this proposed part of the Independent Contractors Bill would guarantee a minimum level of wage protection for outworkers not entitled to a similar protection under a state or territory law.

However, during Legislation of the Senate Employment, Workplace Relations and Education Committee inquiry into the provisions of this bill it became apparent that the existing state and territory protections were comprehensive in this regard and that it was unlikely that the proposed remuneration guarantee would be relied upon to set the rate of pay for any TCF outworker. The government, therefore, considers that it is preferable to remove this proposed protection and repeal part 22, as neither had any practical application. This will reduce the regulatory burden on all players within the textile, clothing and footwear industry.

I also indicate to the chamber that this amendment has been agreed with representatives of FairWear, of the Textile Clothing and Footwear Union of Australia and of the Victorian government. It also implements one of the unanimous recommendations made by the Senate committee that inquired into the provisions of this bill.

Senator WONG (South Australia) (9.10 am)—Labor will be supporting the government’s proposal. We do so because, as we said from the beginning, whilst the original bill purported to protect outworkers’ terms and conditions, in practice it did not. It is interesting to note that the government refused to respond to Labor’s propositions on this and has been faced with the embarrassment of its own senators, on examination of the bill, agreeing that part 4 should be removed because it serves no useful purpose. So really the proposal that is now before the chamber is an embarrassing backdown for the government, demonstrating that the errors inherent in the legislation which were pointed out to the government were in fact proved to be there. The government now has to delete aspects of its original bill in light of the Senate committee and its own backbench demonstrating this to be the case.

Senator MURRAY (Western Australia) (9.11 am)—The Democrats support the government’s proposal. In my view this outcome exposes the Senate committee system at its best. We experienced concerted and admirable advocacy by the outworker representatives that was considered, objective and passionate, but not political. They made a great impression upon committee members, and the committee members unanimously supported changes to the government’s originally intended provisions. Of course the chair of the committee played a particular role because it is important for the chair to carry the campaign into the ranks of the government itself, so she is to be congratulated on her efforts in this.

With respect to outworkers, this chamber on all sides has generally speaking had a strong and positive approach in the 10½ years I have been in this chamber. So I am
pleased that these proposals have come forward, and we fully support them.

The TEMPORARY CHAIRMAN (Senator Brandis)—The question is that government amendment (2) be agreed to.

Question agreed to.

The TEMPORARY CHAIRMAN—The question is that part 4 stand as printed.

Question negatived.

Senator MURRAY (Western Australia) (9.13 am)—by leave—I move amendment (1) and (2) on sheet 5062 revised:

(1) Clause 3, page 3 (lines 1 and 2), omit paragraph (2)(a), substitute:

(a) the definition of employee in the Workplace Relations Act 1996;

(2) Clause 5, page 4 (line 8), at the end of subclause (1), add:

; but (d) is not a contract for the supply of labour as an employee within the meaning of subsections 5(1A) to (1F) of the Workplace Relations Act 1996.

These amendments relate to the definition of employee, which I will be moving later in the Workplace Relations Act amendment. I need to put these in context now, because obviously if they relate to provisions that are going to go into another act you need to put them in their context.

The bill claims that one of its objectives is to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, but in fact the bill offers no solution and no further enlightenment as to who is a genuine contractor or employee or who is a disguised contractor or employee. As the chamber knows, various state legislatures have grappled with this but at the federal level the common-law provisions continue to prevail. The bill only includes a very minimal definition of an independent contractor; instead it defers to the common-law definition, which in any case is subject to change over time as jurisprudence advances. Many, including the Democrats, believe relying on the common-law definition of employment is fraught with problems.

As noted in my minority report on this bill, the common-law definition of an independent contractor is not a definition as such; it is a set of principles established through jurisprudence and it is not about defining who is an independent contractor but defining who is not an employee. The common-law approach relies on a test which involves the consideration of a number of court established factors or indicia. This means effectively a case-by-case approach, which is an unsatisfactory way to proceed with employee contractor definitional disputes that may affect many hundreds of thousands of Australians. I think it is important to recognise that this issue is at the heart of a genuine policy contest between the government and people of my persuasion.

Both the government and the Democrats agree that there should be a national regime which establishes the nature of independent contracting. The difference between us really comes down, at its heart, to the issue of the definition of an employee. The government has, as a policy matter, adopted the common-law approach. We think—and we agree with the states, because they have tried to address this fundamental issue as well—that you do need a definition of employment. The government, in another field, has attempted to address this issue in a different way in tax law, through the alienation of personal services income test, which does seek to provide specific indicia of what constitutes an employee.

Because we have looked at the matter carefully, we have paid great attention to the work of Professor Stewart. I should point out that he is not only an academic researcher in
labour law but also a labour law consultant to a national law firm that advises and acts for business, so he cannot be categorised, if you like, as someone with a particular political or industrial bent. He argues that a common-law test is unreliable, and I quote him:

The approach is necessarily impressionistic, since there is no universally accepted understanding of how many indicia, or what combination of indicia, must point towards a contract of service before the worker can be characterised as an employee. In effect, this “multi-factor” test proceeds on the assumption that the courts will know an employment contract when they see it.

The danger, as everyone knows, is that to get to the courts requires a time and cost factor—and I would rather avoid that. Professor Stewart also argues that it can result in different outcomes depending on the adjudicator’s starting point. He says:

If a judge (whether consciously or subconsciously) starts with the assumption that a relationship is one of employment, and looks for factors that suggest otherwise, they may well reach a different conclusion to one who proceeds from the opposite direction. It is this, more than anything else, which I believe explains how the same facts can be viewed so differently by judges apparently asking the same questions and applying the same basic principles.

There are people in this chamber more familiar than I with the varying views of judges—that is both one of the attractions and one of the drawbacks of common-law determinations. Of concern is Professor Stewart’s assertion that any competent lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor thereby avoiding the effect of much industrial legislation.

Stewart also refers to another, even surer method of avoiding an employment relationship, which is:

... to interpose some form of legal entity between the worker and the client business, since in the absence of a direct contract between the two there cannot be an employment relationship... that entity might be a personal company, or a partnership constructed for the purpose between two or more workers, or some kind of family trust. Whether or not the worker is technically an employee of the interposed entity, they cannot and will not be an employee of the ultimate user of their services.

He continues:

In a purely legal sense there is nothing “illegitimate” about either of these arrangements (the carefully drafted contract for services or the use of interposed entity). As the law stands it is quite lawful to set out about creating a relationship that is not one of employment. They are not “shams”, in the very strict sense of that legal term. It is only a sham when parties construct what they would both understand to be an employment relationship and then try and disguise it as something else by adopting an arrangement that does not genuinely reflect their intentions.

Nonetheless, for the reasons advanced at the beginning of this submission, it should not be lawful to contract out of labour regulation by exploiting these possibilities.

For an increasing number of contractors, the notion of independence is a myth and any choice and flexibility in their arrangements have been constructed for the benefit of those who hire them, not their own. That is a legitimate motive on the part of the employer but, in my view, an illegitimate outcome. So this legislation not only does not define what a genuine independent contractor is but also does not prevent business from exploiting loopholes in the common law that allow workers to be classified as contractors when for all practical purposes they are employees. As Stewart notes:

Various approaches can be and have been adopted by legislators to bring “employment-like” arrangements within the scope of particular regulation.
As I said earlier, the states have used deeming provisions which deem workers in various occupations or circumstances as employees. As already noted, one drawback is the broadbrush nature of deeming, where some genuine contractors may get caught up in such provisions. Of course that is a weakness. The flip side to this, as Stewart points out, is that business can avoid the deeming provision by rewriting a contract and an employee can be converted into what a common-law test would regard as a nonemployee.

Stewart also points to some state payroll tax statutes which he considers very effective in identifying employment characteristics, but he notes that the drafting is so convoluted that only the most dedicated lawyers can make sense of it. In 2000 the federal government introduced the alienation of personal services income legislation, which the Democrats supported, which amended the tax laws to ensure that contractors were taxed as if they were employees unless they satisfied certain tests showing that they were genuinely running a business.

I note that the report to the House of Representatives inquiry into independent contracting and labour hire, Making it work, noted the difficulties with the common-law distinction between an employee and an independent contractor. The report also analysed other possible distinctions that could be used to distinguish an employee from an independent contractor. In particular the report looked at the possibility of relying on the test used in the Australian income tax assessment alienation of personal services income legislation. The report in the end recommended that the government maintain the common-law definition and—and I emphasise 'and'—adopt components of the PSI legislation test to identify independent contractors. This bill does not implement this recommendation, and that is to be regretted.

The House of Representatives did a thorough and interesting job in analysing this area.

In his second reading speech the minister explained that the government decided not to include aspects of the PSI legislation as it is ‘easily manipulated’. In their submission to the House of Representatives inquiry into independent contractors, the Civil Contractors Federation identified how tax laws are being manipulated and the need for them to be tightened. They said:

There are some operators who may genuinely believe that, because they have an ABN number, they are an independent contractor for this reason alone. It is acknowledged however that some operators who are not independent contractors claim to be purely to obtain a taxation benefit. Minimising or avoiding taxation is an incentive to claim to be an independent contractor and a comprehensive formula in the Taxation legislation that proof that certain requirements have been met would reduce this incentive.

The Democrats agree with the minister that the PSI is still problematic and is unlikely to fully address the problem. However, it is ironic that, while the government was quick to protect its revenue back in 2000—and we supported that—it made no attempt then and is making no attempt now to ensure that workers who are taxed as employees are also treated as employees for other regulatory purposes such as in this legislation. The Democrats support Stewart’s assertion that a more effective approach is to tackle the problem at source, the common-law definition, and define employees in legislation. The aim would be to draw a more realistic boundary between the two categories of genuine contractors and employees and to reduce the ease with which hirers can presently disguise employment arrangements.

On 11 August 2003 and again on 22 March 2004 I moved an amendment to the Workplace Relations Amendment (Termination of Employment) Bills Nos 1 and 2 re-
respectively to define an employee, in an attempt to bring precarious and atypical employment into the unfair dismissal system. The Democrats drew heavily on Stewart’s work in drafting the definition. Here I want to record my gratitude to him for his continued assistance. I note that he was a significant witness to the House of Representatives inquiry. I noted in my second reading debate speech on the Workplace Relations Amendment (Termination of Employment) Bill No. 1:

One would assume that the federal government would support such an amendment as the federal system has always supported access to genuine employees, so the government should have no objection to provisions that ensure genuine employees—and I stress ‘genuine’ employees—are captured by the unfair dismissal system. To further make the point: you cannot at one level deem an employee for tax purposes and then for workplace relations purposes exclude them. We have made it quite explicit in our suggested amendments that any person who is categorised as an employee for tax purposes will also fall under this act for unfair dismissal purposes. I regret that this bill before us will still result in this situation—that people who are designated as employees for tax purposes will be designated as independent contractors for other purposes. Neither the government nor the ALP supported that amendment on either occasion. I regret the fact that Labor did not because I think this matter is at the heart of the policy contest. This issue is not about politics; it is about what you think is the best way to categorise a person as an employee.

The definition before the parliament—the one that we are going to be moving later—is a rework of our previous definition and replicates the definition outlined by Stewart in his submission to the House of Representatives inquiry into independent contracting and labour hire. The Democrats recognise, as does Stewart, that the definition does not have to be universal and that there may be particular policy arguments for why a particular type of worker—for example, an owner-driver—should or should not be covered. We have followed the current bill in its exemptions of owner-drivers and outworkers in recognition of their unique circumstances and in the knowledge that the government have indicated they will look further at both these industries with respect to rights and protections.

We believe it is highly desirable in the private and public interests to be able to readily determine when a person or a business is subject to laws of employment or the law of contract. The Democrats recognise it is a complex area but believe that the current situation in the bill before us fails to address the fundamental issues. It is our view that a definition of ‘employee’ is the best solution.

Mr Temporary Chairman, Minister and shadow minister, I have deliberately detained you with a lengthy dissertation on a busy day because we think this is a fundamental area which will need to be resolved. I believe that what the government is proposing will not resolve the issue of who is a genuine contractor and who is a genuine employee. This particular issue is at the heart of our belief that we cannot support the bill because it has chosen a policy direction which we disagree with. We base it on fundamental policy considerations. With that motivation and context, I hope you will support those two amendments.

Senator WONG (South Australia) (9.28 am)—I thank Senator Murray for his contribution. He might be pleased to know Labor is supporting his amendments. There are a number of issues I want to touch on. The first is—and this really goes to the heart of some of the problematic policy in this legislation—the difficulties with the common-law test in determining who is an independent contractor and who is an employee. Senator
Murray has outlined some of those. Certainly anyone who is practised in the area of employment law or is an industrial relations practitioner on either side of the fence would know that there are a great many arrangements entered into by parties where the name and title of the relationship probably does not indicate the true nature of the relationship.

Certainly many of us would have experience in dealing with people where they have been termed and treated as independent contractors when, for all intents and purposes, they have been employees. And often, as Senator Murray has pointed out—and this really is the critical issue—there are occasions when the principal clearly has a fairly strong vested financial interest in continuing to treat somebody as an independent contractor, notwithstanding that the person might, for all other intents and purposes, effectively be an employee. It is arguable that the difficulty with the common-law test—and this was alluded to in quite some detail in the second reading debate—is that it is possible, because of the multiplicity of factors, for justice not to be done, that the common-law test application may not yield what we as legislators and as policymakers would think is an appropriate outcome that is fair to the person who is working.

Labor does believe there is clearly a place for genuine independent contractors. There are a great many Australians who choose to work under those arrangements, but our concern is for those who do not have a choice, for those who are effectively employees but are being made into, essentially, sham independent contractors because the principal concerned has a financial interest in having that occur. I indicate to Senator Murray that Labor does support a statutory test. As we indicated in our second reading contributions, we do believe that we need a better statutory test. We are going to support Senator Murray’s amendment to this bill, and I think there are related amendments to the Workplace Relations Legislation Amendment (Independent Contractors) Bill.

One of the points that Senator Murray made, which is a good one, is the inconsistency with income tax legislation. The government is happy to have at least the inclusion of a statutory test in looking at personal services income but is not prepared to look at a statutory test, other than to pick up a common-law test, in the context of this legislation. Labor will be supporting this amendment. We think it is critical to any regime that you have a sensible and clear statutory test to determine who should be an independent contractor—someone who is genuinely in such an arrangement—but equally there should be a statutory test for those people who really, from a public policy perspective and from a legislative perspective, should be regarded as employees and have the benefit of entitlements pursuant to industrial relations legislation which would normally accrue to employees.

Senator MARSHALL (Victoria) (9.32 am)—There are many flaws with this legislation, but the fatal flaw is the very thing which Senator Murray’s amendments seek to address. The legislation does not seek to define the term of independent contractor beyond its meaning under common law. And Senator Murray is dead right: the problem with the Independent Contractors Bill is that it does not meet a single one of the stated objectives of the government.

At common law, employees are engaged under a contract of services, whereas contractors are engaged under a contract for services. In other words, an independent contractor is generally a person who is engaged on a labour-only contract, usually determined as a one-off flat rate. Generally, the independent contractor remains responsible for a number of aspects of the relationship that
would usually be the responsibility of an employer—for example, superannuation payments and remitting income tax to the ATO. We say this is very problematic, and it means that an independent contractor is seen to be a person who contracts for services to be provided without having the legal status or protections of an employee even if they are dependent upon that contract. Of course, owner-drivers are a good example of that.

The common-law test that has been applied by Australian courts and tribunals for many years is quite difficult and complex. The criteria applied by the courts involve many factors, and I just want to go through them to demonstrate the test’s complexity and why we get substantially different outcomes from different judicial rulings. The criteria go to the question of the degree of control the worker has over the work; the degree to which the worker is treated as part of the principal’s enterprise—for example, whether the worker wears the principal’s uniform or, for owner-drivers, whether their truck is painted with the employer’s logo; whether the worker is using his or her tools and equipment; how the principal pays the worker; whether it is at the worker’s discretion to work; whether the principal has the right to dictate hours of work and whether or not the worker can refuse those hours; the provision of leave, superannuation and other entitlements by the principal for the worker; the place of work; whether the worker has the right to delegate work to others; whether the worker provides similar services to the general public; and whether the worker is providing skilled labour or labour that requires special qualifications. They are not all of the provisions, but they are the main criteria used under the common-law test.

While we were conducting the Senate inquiry into this legislation, Professor Andrew Stewart, who appeared before us—and Senator Murray has touched on this to a degree—said in relation to the common-law test:

The fact is that any competent employment lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor … thereby avoiding the effect of a wide range of regulation which is typically applicable only to employees, such as industrial awards, registered agreements, leave and superannuation legislation and unfair dismissal laws—

if they apply to companies with more than 100 employees. What this bill really does is try to stop the attempts of state legislatures to overcome the difficulty of the common-law test by putting in their own legislation. While we agree that some of those efforts are not perfect, dismissing them, disregarding them and overruling them through this legislation just takes us back to something which is considerably worse. That is why we say the real motivation of this legislation is not to define what independent contractors, dependent contractors or genuine contractors should be; it is simply another government legislative attack on any form of regulated employment standing.

Through the Work Choices legislation we have seen the push to drive people—and only employees are covered by the legislation—onto AWAs, which simply fail to protect the standards, wages and conditions that they have enjoyed for many years. Of course the independent contractors legislation provides the second avenue of pushing people out of an employment relationship altogether into what this bill calls ‘independent contracting’. If you are an independent contractor, whether genuine or not, under this legislation the minimum standards of Work Choices—the lowest wages and conditions that are allowed for—do not apply. Under independent contracting, there is no protection of wages and conditions. There is no
regulation for even the minimum wage. We say that this legislation in its entirety is flawed. We will certainly be voting against it. We understand the numbers and the reality these days that the legislation will get up, but if the government is serious about trying to address the problem of genuine independent contractors having rights and people being properly and easily determined as employees, it will seriously consider the amendment.

Senator SIEWERT (Western Australia) (9.39 am)—For the Greens this issue goes to the heart and the intention of this legislation. It is about removing even more workers from a regulatory system that protects their rights at work. A critical element of this legislation is that it takes them further away from any structured process where they can have their conditions protected. As I articulated in my second reading contribution and as has been said in the chamber today, there is a contradiction in terms of a worker being defined as an employee under common law and the taxation act when, under this legislation, it only applies to common law. What is good enough for the taxation act should be good enough for this piece of legislation.

The legislation clearly moves the balance even more in favour of employers and leaves employees further out in the cold. It makes it even easier for employers to shift people so they become so-called independent contractors and thus exempts them from the further requirements of providing the normal conditions that people expect as an employee rather than an independent contractor. By failing to define what an employee is it makes a farce of the supposed intent of the legislation. Basically, it makes a farce of the whole legislation. The Greens will be supporting the Democrats’ amendments. I think Senator Murray provided an excellent articulation of the deep faults and flaws in this legislation as it applies to the definition of employees.

Senator STERLE (Western Australia) (9.41 am)—I think it is imperative that I direct my comments to honourable senators opposite. We talk about employees, independent contractors and employers, but there is a huge group in the Australian workforce who are left out of this discussion—that is, dependent contractors. Quite frankly, I am getting annoyed at the way in which the government and those opposite try to muddy the waters and make it look like every contractor in Australia is independent. I can assure you that in the trucking industry they certainly are not. I dispute some figures put out by the Independent Contractors of Australia. I wanted an opportunity to do so at the committee hearing on 3 and 4 August but the person representing the industry was very well shielded by the chair of the committee and made sure I could not ask my questions.

Senator Abetz interjecting—

Senator STERLE—I hope the minister is listening. In the other house the minister said in his second reading speech that the bill recognises that owner-drivers, like out-workers, have particular vulnerabilities. To lead up to how they have these particular vulnerabilities I would like to point out a very few pertinent facts that seem to have been missed through the whole debate from those opposite. We always referred to these people as ‘subcontractors’—before the government started making promises at the last election to their mates at the top end of town. I will still refer to them as subcontractors.

The majority of subcontractors perform work for one employer. In performing work for that one employer, they are directed as to the time they commence work, where they go and where they load and unload. The company also directs them as to the time they will finish, when they and their truck
will be available to perform transport duties and when they can have some time off. If they want to have a holiday, in many circumstances the transport company requires that they go out and find drivers. So their trucks are locked into the transport company. In the majority of cases the trucks of the subcontractors are painted in the company’s livery or they carry the company’s stickers on the sides of their doors. The majority of subcontractors who are dependent upon these employers wear the uniform of the company. There is this great myth being generated from the government side of this chamber that subcontractors can walk into a trucking yard and just demand what they are going to be paid, when they will make themselves and their truck available and when they will work. I can assure you, Mr Temporary Chairman, with the greatest of respect, that that could not be further from the truth.

If we want to talk about independents and sham arrangements, I suggest we do an investigation into who the heck the Independent Contractors of Australia are. As I said in my speech in the second reading debate a couple of days ago, when they were quizzed as to how many members they represent in the transport industry, they could not tell us. Mr Ken Phillips had no idea. All you do is pay $5 and make an application then they ring you up—they were his words—and have a little chat and you are in. And these people turn up purporting to represent the transport industry.

While I am on that I would like to make this comment—and I will be interested to hear the minister’s response the states of New South Wales and Victoria have been granted exemptions to have state legislation to protect them, deliver safe sustainable rates and give them the opportunity to have access to a dispute settlement procedure that does not keep a certain group of bottom feeders actively engaged. It gives them the opportunity to sort out problems they have on their worksite. I take this opportunity to read to the chamber a letter from the National President of the Transport Workers Union, Mr James McGiveron. I am disappointed that I did not have the opportunity to do this when we had the committee hearings. Mr McGiveron, who is the National President of the Transport Workers Union and the state secretary of the Western Australian branch of the Transport Workers Union, says:

Under no circumstances could anyone truthfully describe the vast majority of owner-drivers in Western Australia as ‘independent contractors’.

The TWU in WA has approximately 2000 owner-driver members and only a mere handful of them could be put under that heading.

Most owner-drivers in WA are ‘dependent’ upon a single prime contractor in the same way as they are in NSW and Victoria—in fact as they are in all states and territories. Our submission has fully canvassed the extensive nature of this dependence and there is ample evidence of it for all to see.

The industry in WA, owner-drivers and their families and the TWU anticipate the imminent tabling of the Road Freight Transport Industry (Contracts and Disputes) Bill. This Bill seeks to address the very vulnerabilities expressed by the Minister in his recent press releases ... To override its benefits, (which have the full support—I repeat ‘full support’—of the transport industry in WA) through the Independent Contractors Act would cut from under the feet of owner-drivers and the broader industry agreed solutions for fair, sustainable and therefore, safe minimum standards and derail the constructive basis upon which the industry has been tackles the problems facing owner-drivers. We ask the Committee to recommend an amendment that will permit the imminent industry agreed WA provisions to have full operation.

I would love to hear the government’s explanation for that. It is a shame we do not have the ability to speak to Minister Andrews, but Minister Abetz is representing Minister Andrews in this chamber. Minister, we have
subcontractors in the transport industry in New South Wales and Victoria performing tasks that mirror what is performed by Western Australian subcontractors in the transport industry, and for that matter in South Australia, the ACT, Queensland, the Northern Territory and your good state of Tasmania. I assume that fuel is very close to the same price around Australia, bar Queensland. There are still truck payments, insurance payments, repairs and maintenance, truck purchases and the like. For the life of me, Minister, I cannot understand why Minister Andrews can accept New South Wales and Victorian legislation to protect owner-drivers in those states—legislation that was put together by both sides of industry, those representing the employers and those representing the employees, and government. In Western Australia it was a hand-in-hand operation.

I can go further, Minister, and give you some more insight into my thoughts and those of transport operators in Western Australia. Back in 2000 we were looking at a major shutdown of the industry. There was a dispute—I do not have it in front of me, Minister, but I can provide it to you. I think the cost to the economy of the port dispute was about $30 million. We were heading for a shutdown of the long-distance operations in and out of Western Australia. You can understand that, in the great state of Western Australia, if it is not going by road once it leaves Geraldton we rely on ships. But we do not have ships running regularly into our northern ports so you can appreciate that everything in and out of these mining centres and agricultural centres is by road.

But that shutdown was avoided at the last minute by good-faith negotiations between the Transport Workers Union representing these 2,000-odd owner-drivers and the Transport Forum of Western Australia, which is not a left-wing radical mob, I can assure you. They are the peak transport industry representative body in WA and they saw the problems that were being confronted too. They were getting absolutely squeezed by their markets—certainly, major mining companies were guilty of that. They wanted a resolution because they could not attract the men and women to the industry to carry on the transport tasks through the state of Western Australia.

I kept very close to that issue, as you can appreciate. It was wonderful to see both sides of industry, supported by the Gallop Labor government, saying: we have a responsibility not only to make sure we have a safe and sustainable transport industry but to provide a safe road system to other road users. Plus, in Western Australia, as around the rest of the country with the drought and all that, we have centres not in the major cities that are really struggling, and they rely on a safe and efficient transport system. Minister, I will give you the opportunity—I look forward to it—to explain to me: what the heck is the difference between contractors in New South Wales and Victoria and their counterparts in every other state and territory of this fine nation?

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (9.51 am)—A number of comments have been made in relation to the Democrat amendments moved by Senator Murray. As he put it, it is a contest of ideas. I intend to go back to what we are proposing and then deal, in that context, with Senator Murray’s amendments.

Clause 3(2) of the bill currently provides that the legislation would achieve its objects by providing that the rights, entitlements, obligations and liabilities of parties to a services contract are governed by the terms of the contract, subject to, among other things, the rules of common law and equity as applying in relation to that contract. This provi-
tion makes it clear that the Independent Contractors Bill 2006 does not exclude the usual common-law and equitable remedies available to parties to a contract.

The amendment proposed by the Australian Democrats would alter the objects provisions and remove the reference to these entitlements. This would create uncertainty about the status of fundamental contractual rights that are usually accessible by any person who enters into a contractual arrangement. On this basis alone, the government does not support the proposed amendment. However, the Democrats go further by proposing the insertion of a new provision that would make the operation of the bill subject to a new definition of ‘employee’ that is proposed to be inserted into the Workplace Relations Act by proposed Democrat amendments (1) to (3) to the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

The government does not support this definition of ‘employee’ and, as a result, does not support the application of it to the Independent Contractors Bill 2006. This definition does not approach the question of the person’s status with an open mind, as the common law does, but requires a court to presume that a person is an employee unless they can prove otherwise. The government opposes any amendment that places an increased burden on independent contractors to prove their status. This is a disincentive to flexible working arrangements.

More fundamentally, however, the government opposes the definition of employee proposed by the Democrats because that definition would include an exhaustive list of factors that point to a person being either an employee or an independent contractor. This is less flexible and narrower than the existing common-law test that allows consideration of all relevant factors and circumstances impacting upon the relationship between the parties. The government will not support amendments that reduce flexibility by departing from the long-established and well-understood common-law tests.

Amendment (2) proposed by the Australian Democrats would seek to unnecessarily confine the meaning of ‘services contract’ as defined by clause 5 of the Independent Contractors Bill 2006. In effect, the amendment would mean that a contract is not a services contract where it is for the supply of labour within the meaning of the definition of employee that is being proposed by the Democrats. As currently drafted, a person cannot be a party to a services contract if they are a common-law employee. Subsection 5(1A) of the legislation requires a party to a services contract to be an independent contractor. Because of this, the government considers that an additional provision stating that a person cannot be a party to a services contract if they are an employee is unnecessary. However, more fundamentally, the government does not support the operation of the Independent Contractors Bill being confined by reference to the definition of employee proposed by the Democrats. This definition does not approach the question of a person’s status, as I have indicated before, with an open mind, as the common law does.

That is all I need to say in relation to the technical aspects of the amendments. However, a number of issues have been raised such as why we would have a common-law definition as opposed to that which is used for income tax assessment purposes. The government position is that they are substantially and indeed materially different. The test in the Income Tax Assessment Act was developed with taxation and revenue considerations in mind and not suited for use in the Independent Contractors Bill.
There are two reasons for that which I would like to advance. Firstly, for tax purposes the test only applies retrospectively. It determines a worker’s status for the previous tax period based on the nature of the income earned in that time. This is problematic in the context of the Independent Contractors Bill as parties to a contract need the ability to determine their status at any point in time. It is not practical for them to wait until the end of the tax year to find out whether they are entitled, or obliged to pay, annual leave entitlements, superannuation, workers compensation insurance et cetera. Secondly, to apply the tax test, the principal must know details of all of a worker’s sources of income and claim base for the previous 12 months. As this information is particular to the worker, not the hirer, it would make it difficult for a hirer to know whether the person they have engaged in fact satisfies that test. The common-law test is a simpler, more flexible and better understood method of distinguishing an employee from an independent contractor. Indeed, the High Court has ruled in relation to the common-law test of what an independent contractor is. As much as these things can ever be settled, I think the common law is relatively stable.

It would be fair to say that the Labor Party’s approach, especially in relation to this, is to seek to have as many people as possible classified as an employee as opposed to an independent contractor. I do not think that would necessarily be the motivation of Senator Murray. From the Labor point of view, that is a difficulty they confront.

I forget who raised during the discussion the issue of implementation of the provisions, but I simply indicate that the government has allocated $15 million over four years for compliance and education concerning these bills, including assisting people to assess their status as an independent contractor.

In relation to the possibility of sham contracts being entered into, there are substantial new penalties for sham independent contractual arrangements in this legislation. As a government we are concerned that opportunistic behaviour is dealt with and that there is an appropriate disincentive for that. But, having said that, we do support flexibility, and the bill reflects that independent contracting is a commercial relationship. It strikes me as somewhat surprising that we believe that independent contractors have sufficient nous, skill and capacity to negotiate the purchase of their tools, their prime mover—

Senator Sterle—You’re off with the fairies!

Senator ABETZ—In fact, independent contractors usually do buy their own tools and equipment. They buy their own truck. They negotiate their commercial arrangements with a financial institution. They arrange their own commercial contracts for the provision of the supplies and services they need. They do all these things, but somehow, when it comes to negotiating their own terms of providing their services, they are completely unable to do so. I simply suggest to those opposite that, if you accept that independent contractors have those commercial capacities, chances are they have those commercial capacities in relation to themselves as well.

Senator Sterle did make a sort of a point, I suppose, in relation to the circumstances of owner-drivers in New South Wales and Victoria compared with those in Western Australia. The Owner-Drivers (Contracts and Disputes) Bill 2006 is currently before the Western Australian parliament. This government is not in a position to consider whether to exempt legislation that is yet to pass the
Western Australian parliament. The government has announced a review of owner-driver laws in 2007—that is next year—with a view to achieving national consistency where possible. So there is some degree of validity in Senator Sterle’s comments, and that is indeed why the government had already decided to have this review.

Where the legislation already exists, as it does in Victoria and New South Wales, we have been able to take that into account. In brief, regarding Western Australia, we cannot legislate in relation to legislation that does not exist. The review will be an opportunity for everybody to put their assertions and counter-assertions. We as a government encourage all stakeholders to participate in that review so that the truth can come out.

During this debate I think Senator Sterle made some comments about dependent contractors. The term ‘dependent contractor’ is used by some to refer to a worker who is at common law an independent contractor who provides a service to only one entity or to primarily one entity. Proponents of dependent contractors consider such workers to be employees. The term ‘dependent contractor’ incorrectly assumes that a contractor who performs work for primarily one entity is financially dependent on that entity and in an unequal bargaining position as compared to their principal.

This ignores the reality that independent contractors may be comfortable performing work for one principal or being engaged on a long-term contract. For example, IT professionals or contract engineers tend to be engaged on more complex and long-term contracts than independent contractor fruit-pickers. Highly skilled professionals are in a strong bargaining position as compared to their principals. The common law does not recognise the existence of dependent contractors. At common law, there are employees on the one hand and independent contractors on the other. Consistent with the common law, the government also does not recognise the existence of dependent contracting. The government considers that to adopt and use such a concept in the Independent Contractors Bill 2006 would blur the distinction between commercial arrangements and the employment relationship.

I think that deals with all the matters that have been raised during this bracket of discussion. It will not come as any surprise to Senator Murray that the government opposes his amendments.

Senator WONG (South Australia) (10.05 am)—I want to respond to a number of propositions put by the minister. The first is his point that there is no such thing as a dependent contractor because the common law does not recognise it. There are a great many things that the common law does not recognise, and that is generally why we have parliaments, legislation and policies. We are not governed entirely in our world by common law. We recognise that, whilst the common law has been one of the strengths of our system of democracy and law, at times—for good public policy reasons and to reflect the reality of people’s lives—parliaments need to legislate. So for him to fall back on a technical argument that the common law does not recognise anything other than an independent contractor or an employee probably demonstrates some of the problems with relying too much on the common-law definition.

There are a great many Australians who are effectively dependent contractors. In terms of legal form, their relationship may well be that of an independent contractor. But one would also argue that, in terms of their bargaining position, their ability to negotiate, their dependence for their livelihood and the terms and conditions of their engagement on a particular principal, they are
significantly removed from the kind of orthodox construction of what an independent contractor is.

There is a second point I want to make, and this is probably the more important one. Senator Abetz suggested that we on this side somehow do not believe that independent contractors have sufficient nous—I think that was the word he used—and capacity to negotiate with the contracting party. He seemed to suggest that, given that they had sufficient nous and capacity to negotiate the purchase of equipment, why would we think that they did not have the nous to negotiate with the contracting party? This demonstrates the heart of the government’s philosophy on this and its absence of understanding about who has economic power. This is actually nothing to do with whether people have the ability, intellectually or otherwise, to negotiate. Nobody on this side is saying that. We are saying that there are relationships where the economic power is such that, no matter how good you are, you are not in a position where you can negotiate better rates and conditions.

So yet again we have from the government this abstracted notion of choice that is removed from the reality of working relationships and of those who have economic power in those relationships. The same flaw that is at the heart of Work Choices is perpetuated in this legislation—that somehow people have this choice. In reality they actually have very little or no choice, because they have so few options for alternative work and do not have the sort of bargaining power that is ascribed to them. The government simply do not acknowledge it. They simply say, ‘That doesn’t exist.’

This week a person came to see me, and I understand he also spoke to the media. I believe his name was Mr John Murray. He was a contractor with, I believe, Downer Engineering, which is contracted to Telstra. His story was pretty compelling. This man has worked in this sector for a substantial period. He is a highly skilled worker who overnight effectively lost around $25,000 from his annual income because of changes that the principal imposed on his rates of work, conditions of work and conditions of engagement. I think he resides and works in Orange, and essentially he has no choice but to accept what has been altered in his contract of engagement with this firm.

To tell John Murray that Labor, in standing up for people in his position, is somehow saying that he does not have the nous is to completely misunderstand the predicament this gentleman and many like him find themselves in, where they are effectively dependent on a single entity for their work, and that entity has the ability to simply redefine, at will, the conditions of engagement. What is the choice that Mr Murray has? This is the fallacy at the heart of this legislation.

I want to make a point about vulnerable workers. In his contribution, the minister seemed to ignore the fact that legislatures around Australia have recognised that the common-law definition of employee simply does not adequately protect many vulnerable workers. Outworkers are an example of that, and the government has belatedly come to recognise that fact. In the regulation impact statement in the explanatory memorandum—not the supplementary EM but the EM to this bill—you can go through, at attachment A, which begins on page 27, a range of workers who are going to be affected by this legislation who previously were under state deeming provisions in industrial relations laws in the states. The parliament said that these workers may not or do not meet the common-law definition of employee but there are very good public policy arguments for giving these workers access to those rights which would normally be accrued by employees.
The minister countered this by saying, ‘The Labor Party just want as many people as possible to be employees.’ Do you know what we want? We want people to be reasonably protected. We think there should be legislation to deal with unfair contracts. We think there should be statutory definitions to minimise the prospect of sham contracts. We think those employees who are vulnerable and who have been deemed by legislation to be employees because they do not meet the common-law definition ought to be protected.

You can go through the sorts of people who are going to be left out in the cold—for instance, the milk vendors and cleaners who are under the New South Wales legislation. Cleaners have been deemed employees under South Australian legislation for some time. These are not people who have an enormous amount of bargaining power. The industry is generally dominated by women and has a high proportion of people from non-English-speaking backgrounds. Is the minister seriously saying, ‘It’s a commercial arrangement and we don’t have to worry about them’? This is the illogicality of the government’s position, which is actually driven by ideology and not by the reality of the experience of the lives of many working Australians. So Labor will be supporting Senator Murray’s amendments and we will continue to oppose this legislation.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (10.12 am)—To respond briefly, I am not aware of the particular situation of a Mr Murray.

Senator Murray—No relative!

Senator ABETZ—He is no relative of the honourable senator. I am not aware of the John Murray circumstance that was described to us by Senator Wong. From time to time I think it is not all that helpful to try to personalise these things. However, I would have thought that you cannot unilaterally cancel a contractual arrangement, but, of course, if it comes up for renewal or reconsideration then that is one of those things that contractors have to face. We make no bones about the fact that, when you enter into contractual arrangements, like any contract there are the advantages and, yes, there are the disadvantages. That is what people have to weigh up in their minds before they enter into these arrangements.

Whilst Labor and the Democrats are in support of these amendments, I do seek to separate out or quarantine the Democrats in relation to what I am about to say. The Labor Party clearly want to see as many people as possible classified as employees as opposed to independent contractors. I think most people around Australia would be surprised to know that, in New South Wales, the Labor government deems the following to be employees: carpenters, joiners, bricklayers, plumbers, drainers, plasterers, ready-mix concrete drivers and others prescribed by regulation. The Labor Party clearly want fewer and fewer independent contractors and more and more employees, and of course we know the reasons and the rationale for that. That is their trade union background. It is their right, but of course—as I think Senator Murray quite rightly said—this is a genuine contest of ideals and beliefs. The government approaches this on the basis that that which has been developed by the common law over many years is a good way to go. The common law is relatively settled in this area.

I simply say to Senator Murray: you legislate and put it down in black on white; lawyers and courts will nevertheless still argue about the interpretation, the meaning and the breadth and width. Just in recent times we had that sort of discussion within the Australian community about the highest piece of legislation in this country, if I can call it that—that is, the Australian Constitution—
and the breadth of the corporations power in relation to the Work Choices legislation. Well may you put it in black on white—you will have even the High Court splitting amongst itself five to two as to what a provision actually means.

So, with great respect to the honourable senator and the Democrats, I do not think that the legislative provisions that are being suggested will necessarily provide the certainty that the Democrats hope for. Albeit that I accept and understand that the motivation is to create that certainty, I just do not share the Democrats’ faith in legislation. I think Senator Murray and I have exchanged views on that from time to time in this chamber, where I—possibly uncharitably—accused the Democrats of immediately thinking, whenever they see a problem, that legislation is the means to fix it, whereas we do not necessarily take that legislative approach. But that is a difference in styles, a difference in philosophy. I indicate, as I did earlier, that the government opposes Senator Murray’s amendments.

Senator MARSHALL (Victoria) (10.17 am)—I am not surprised that it did not take Senator Abetz very long to come out with the true agenda of this legislation. He starts on ‘the ALP, captive of the unions’, saying that all we want is to have as many people as possible classified as employees. Just so that anyone who is listening does not misunderstand us and does not get sucked in by Minister Abetz’s political agenda, which is what is really driving this bill: what the ALP wants is to have genuine contractors classified as genuine contractors and to have employees classified as employees and having the rights and protections that go along with that classification. That is what we seek to happen—nothing more and nothing less. To suggest that we are anti independent contractor or anti genuine contractor in any way is an absolute fallacy.

Let me say this, and it is not just words: I am an electrician by trade, and I know full well that the union I was a member of had as members more contract electricians than the employer federation, the employer organisation—many more. Unions are actually excluded by legislation that this government puts forward from representing contractors in collective contract negotiations. Why do they do that? It is because, many genuine contractors wish to use the union movement to negotiate for them on their behalf in contract negotiations—

Senator Murray—Because that’s what they’re good at.

Senator MARSHALL—because they are good at it, because that is what they do. So I do not want anyone to think for a moment that the ALP does not have policies very strongly in support of contracting and people who contract. What we seek to do, though, is to have people properly classified so they have the appropriate protections. Senator Abetz says, ‘People will enter into these negotiations, and if they enter into negotiations they have to take the good with the bad.’ Again, we accept that in terms of genuine contractors. But this legislation allows for so many people to be forced into an arrangement where they are called contractors but where they are not contractors, where they have no say in it at all.

Does Senator Abetz really expect anyone to believe that those children who are employed as vendors at football matches, who are deemed by their employer as independent contractors, sat down and negotiated a genuine contracting arrangement with their employer? Does he really expect anyone to believe that? The reason the employers in those situations deemed those children to be independent contractors was simply to avoid pay-
ing them the rights that would normally have been available to them if they were employees. It was simply to avoid paying the casual loading. That is what they did. And what this legislation does is remove any state legislation that seeks to remove that sort of exploitation.

Does the minister really expect anyone to believe that a cleaner in an office block, at a school or anywhere else sits down and negotiates a contract of work with the employer? It is just a ridiculous scenario for him to put to us. And that is because he comes from the environment where he is really talking about lawyers and professionals at the higher level who may have those skills, who have unique skills to sell, and they can negotiate around and bargain for them. They may have some economic and some bargaining power in some of those situations from that area which Senator Abetz represents. But the people we represent are vulnerable. They can be exploited. They are people who live and work in ordinary circumstances. Having them deemed as independent contractors simply removes their rights as employees.

Senator Abetz can wax lyrical about freedom of choice and about people who want to be small business people, as if anyone who opposes this legislation wishes to stop that happening if it is genuine. We do not. We do not seek to stop that happening in any way. But we do say that if you are an employee you should be classed as an employee and it is not up to the employer to simply say, because it is cheaper for them and they can avoid their obligations as an employer, that you are an independent contractor.

Senator Abetz then says, ‘Oh, yes, but there are sham arrangements and there are penalties.’ How does a school cleaner take their employer to court to say, ‘I am an employee not an independent contractor’? How do you do that? You go and get a lawyer. I was part of the inquiry into this bill, so I actually went and got a legal quote, because the only way to determine this is to go to the Federal Magistrates Court or the Federal Court of Australia. So the school cleaner goes to a lawyer and says: ‘I really think I am an employee. I should get annual leave, superannuation and sick leave. I should get other provisions and other protections—all things that employee status gives me—and some security of employment.’ The lawyer says: ‘All right. We’ll run this case under this legislation in the Federal Court or the Federal Magistrates Court.’ The quote that they gave me if the employer was going to defend that action was that it would be a minimum of $30,000. Where does a school cleaner find $30,000 to get a determination from the court under this legislation to say, ‘I am really an employee’?

Just accept they do—someone might have $30,000 laying around in their back pocket—and they win and they are then determined to be an employee. The employer is not going to be very happy about that. They are covered by the Work Choices legislation and under the Work Choices legislation, of course, there is no more unfair dismissal. So what happens? The employer simply concocts a reason to terminate the employment of that person and then re-engages someone else on an independent contract status. The government says there are some protections in the act for sham arrangements, but those arrangements are shams in themselves, because ordinary people will not have the means to access that provision to have the determination made whether they are an employee or whether they are in fact an independent contractor.

So it is about ideology, and that is where I started. That is what Senator Abetz is all about and that is what this government is all about. This is simply an ideological piece of legislation complementing Work Choices. It
is not about the Labor Party saying, ‘We want as many people as we can to be classed as employees’; our objection is that the government want to ram as many people as they can into independent contracting when they know full well they should be employees, because it gives employers the ability to avoid their employer obligations.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (10.25 am)—I do not want to delay this debate for too long, but through all the rhetoric of Senator Marshall there may have been two points that people may have taken as being true and they are demonstrably untrue. In relation to child labour—very emotive; undoubtedly a lot of people got sucked in by Senator Marshall’s comments—he would know full well, and he should know full well, that child labour laws are specifically the jurisdiction of the state governments. They are specifically excluded by this legislation. Therefore, any assertion being made about child labour laws against the Australian federal government or against this legislation is simply unsustainable and untrue. Indeed, as a former union official, he should know that in his own home state of Victoria a child needs to get a work permit from the state Labor government. Let us be quite clear on this. This legislation specifically upholds all the child labour law provisions in each of the states and territories. So to try to draw child labour laws into this debate is disgraceful, is dishonest and has no basis in fact whatsoever.

We then got the other tear-jerker about the poor cleaner: how would that poor cleaner be able to go to the Federal Magistrates Court? Filing in the Federal Magistrates Court will be about 40 per cent of the cost of filing in the New South Wales Industrial Relations Commission. The current fee structure of the New South Wales Industrial Relations Commission will cost a worker $1,916 to file an unfair contracts application and have the matter set down for a one-day hearing. In the federal jurisdiction that we are proposing it will only cost $769.

So once again we have deliberate misinformation being peddled by the former trade union officials in this place. If they are genuinely concerned about the plight of workers, they should go to the New South Wales state Labor government and say, ‘You should reduce the fees charged to poor workers who want to get access to the New South Wales Industrial Relations Commission and you should follow the lead of the Howard government—the friend of the workers—who have reduced these sorts of fees within the federal jurisdiction right down to $769 in comparison to state Labor’s $1,916.’

I will not delay the chamber any further—there are a lot of amendments still to be dealt with—but I will not allow senators opposite to deliberately muddy the waters and mislead the unsuspecting public. I will not respond to their empty rhetoric but, when they make points that are either deliberately or unwittingly untrue, I will respond because I think the Australian people are entitled to the truth in this debate.

Senator WONG (South Australia) (10.29 am)—In the interests of correcting ‘unwittingly or deliberately misleading’, which I think was the phrase that the minister used, I want to make this point: I think it was filing fees that the minister talked about—how much it costs to file an application in either the New South Wales Industrial Relations Commission or the Federal Magistrates Court. Let us be clear: he is not including legal fees in that analysis. The Industrial Relations Commission of New South Wales is a lay jurisdiction and a reasonably accessible jurisdiction. The government is proposing in this legislation a process of determination before either the Federal Court or the Federal Magistrates Court, so frankly it is completely
misleading for the minister to make a comparison only on the basis of filing fees and not to address the issue that Senator Marshall was raising, which is the lack of access for an ordinary worker to a fully litigated and defended action to determine that they are an employee in the Federal Magistrates Court or the Federal Court.

The figures the minister is talking about do not include any legal representation, so Senator Marshall’s point is a very good one. How is a cleaner working for a school who thinks that she or he should be entitled to annual leave and the rest of the entitlements that employees would ordinarily get supposed to pay a lawyer to run a case in the Federal Magistrates Court or the Federal Court? It is simply justice beyond the reach of most ordinary working Australians.

This is the lie at the heart of the government’s approach in this area. They say: ‘Look, we have these sham contract arrangements. You can go off to these courts and you can get these remedies.’ The reality is that people will not and people cannot, because the sorts of employees who we are seeking to represent on this side of the chamber—the sorts of Australian workers we are concerned about in our position here—are not people who have tens of thousands of dollars to go to a lawyer to take an action through the Federal Court or the Federal Magistrates Court.

Senator STERLE (Western Australia) (10.31 am)—Talking about demonstrable untruths, I would like to comment on a couple of the minister’s statements earlier on when responding. He has painted the picture that truck drivers in Western Australia have gone out and negotiated wonderful contracts and that everything is rosy and mickey mouse. Sadly, Minister, I have to pull you up on that. This is with no disrespect to Western Australian truck drivers or, for that matter, subcontractors around the country. I will explain to you, Minister, how it has happened over the years—

The TEMPORARY CHAIRMAN (Senator Forshaw)—Senator Sterle, you will explain through the chair.

Senator STERLE—Through the chair, I would like to explain to the minister exactly how it happens. It is fantastic that the trucking industry attracts true people—people who are true to their word and are the salt of the earth. Unfortunately these people get tricked, conned or misled. They may work for an employer as a company driver on all the right rates of pay, conditions and superannuation and with the protection of unions that go with awards. Then the boss comes out one day and says to the truckies: ‘Boys, gather around. We’re going to put in a bid for this you-beaut contract. We’re going to be running up to the north. We’re going to have 40, 50, 60 trailers a week; freezers; general; chillers; car carrying—the whole lot is all rolled into one. We need trucks. We need trailers. We can’t get the money from the board. Who wants to be a subbie? You’ve been driving for us for 10 years. You know we’re decent; you know we’re respectful; you know we won’t let you down.’ A lot of times truck drivers have done that, but unfortunately they have gone out on the word of their manager, which most of the time has been honourable, but it is not honourable in three, four or five years time. I notice that the minister is not even listening. The minister has his head firmly planted in the sand, and he is not even going to take advice from people who know what they are talking about—

Senator Abetz—I am getting the advice—

Senator STERLE—They do know what they are talking about; they have not been stuck in an office all their lives. I can tell
you, Minister, it would probably do you good to get out to the trucking areas in Footscray or Kewdale and actually talk to real people who perform these duties and who rely on their unions to negotiate on their behalf. I would like the minister to take this in, as I would also like the senators opposite to take this in: a lot of them are members of a union because they do what they do best—that is, loading, unloading and driving their vehicles, their trucks, their road trains. That is why they went into it, because they are very good at what they do. In about 80 or 85 per cent of small businesses that are engaged in transport in this great country, the wife or the partner at home is running the business—the man drives the truck, although in quite a few examples the woman drives the truck, and they do that very well; they do not wear the blue singlet but they do that very well—and is taking the phone calls because another letter has come with a stamp and a finger with a ribbon tied around it saying: ‘Reminder: your tyre bill is now 30 days overdue. You know your $17,000 fuel bill? Guess what: that is overdue too.’ It is the wives and partners who are doing all the hard yards.

When the boss goes to renegotiate a contract with a major mining company or whatever, the major mining company normally says ‘Sharpen your pencil.’ When a contract like that is plonked down in front of these people, how the heck do they sharpen their pencil? I will tell you how they sharpen their pencil. For those opposite, who would not have a clue—if they do have a clue, they should hang their heads in shame if they are not defending truck drivers around this country who rely on certain bills to protect them—they go out and say: ‘Boys and girls, you pay so much for your fuel, you pay so much for your tyres and you pay so much for your insurance. We pay roughly the same. We might have a little bit more bargaining power, but we’re not buying vehicles. We’re not employing people; you’re doing all that. You need to sharpen your pencil. If you don’t like it, tough.’ That is exactly what happens.

So, Minister it could not be further from the truth to come out and lead Australia to think that truckies sit down and negotiate intense contracts when they enter into agreements when carting or hauling for a company, and that is no slur upon the great men and women in the trucking industry around this country. I think that it is quite insulting of the minister to even assume that and for him to jump up and attack my colleague Senator Marshall. If we are going to play by the rules, both sides should play.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (10.36 am)—Very briefly in relation to Senator Wong’s comments about contract cleaners: she would be aware that any cleaner who feels aggrieved could go to the Office of Workplace Services. And the Office of Workplace Services, undoubtedly depending on its consideration, depending on the merits of the case, would take that case for free. Of course, that is what those opposite do not like. There is an independent body now that is willing to assist workers in times of difficulty, and of course those opposite are concerned that that deals the trade union movement out of the game to a certain extent. That is why they are so vociferously opposed. I can also understand some of the excitement opposite, and I will not take it personally because I understand they are confronting a ballot on Monday and I wish them all the best in that.

On Senator Sterle’s comments, and this is going to surprise him: I agree with him. If truck drivers are, to use his term, tricked or conned, I think most of us would say that if it is a trick or a con it is a sham, and part 22 of our legislation deals with sham contracts. If an employer is engaged in a sham contract, if
they are listed as a company—and I assume most of them would be—they face a penalty of $33,000 per event and potentially, depending on the amounts involved, would be required to make back pay as well. So we as a government are quite clear on this. If people are being conned, if people are being tricked, then it stands to reason that they are sham contracts. That is why we have this increased penalty regime to protect people from those shams.

Senator MURRAY (Western Australia) (10.39 am)—I think I will try to close this section of debate and put my two amendments to the vote. In closing, I will just make a couple of summarising remarks. I think the nature of the debate has exhibited exactly what I said earlier: how you define employment is indeed at the very crux of the dispute on this bill between the conservative side and the non-coalition senators. I said earlier, in my opening remarks, that this was not a debate that was political, meaning that it was not political in the sense of a daily, tactical and tit-for-tat sort of contest. It is, in fact, ideological. It is about ideas.

There is a long history of conservative ideology in this area which essentially is market orientated, which says: if you remove as many impediments as you can to the relationships which exist between people in work, whether they are self-employed or employed, you will lower the costs, you will therefore create a more efficient marketplace, and the consequences are general in that you will grow employment and grow the economy. The contrary view is that, taken to its extreme, that is a recipe for declining living standards and declining civil standards and it results in a deterioration in the social contract. Essentially, the view of those who say that employees should be determined to be so wherever they are genuinely so is that accompanying the definition or the belief in an employee status are protections that society has built around that status which are designed to ensure that society operates to the greatest benefit of the country as a whole.

That approach goes back hundreds of years. It was the Iron Duke, Bismarck, who first introduced pensions to the world. We Democrats and, as you can see from the debate, the Labor Party and the Greens are of the strong opinion that we should maintain the wages, conditions and legitimate entitlements and security that attach to employee status. Our problem is that this law threatens to reduce those.

In his remarks the minister made a point that he has made before: that when the Democrats see a problem they throw up a statutory response. Sometimes that is true, but as I have done before I will remind the minister that this week we have probably had before us on the Notice Paper a couple of thousand pages of government statute. I have been here, as you know, for 10½ years. In that time there have been, I think, around 1,800 bills—

Senator Abetz—Far too many.

Senator MURRAY—all from the government.

Senator Abetz—Not all the time, but mostly.

Senator MURRAY—I take the minister’s interjection: ‘Far too many,’ he says, and I would agree with that. I am one of those who genuinely celebrated the Treasurer removing a couple of thousand pages of redundant tax law. I remind the chamber, in view of the minister’s remarks, that more legislation has been produced in the last 15 years than in the previous 85. So we are being swamped by legislation, and the government has got a lot to do with that.

Senator Abetz—But we are repealing some of them.
Senator MURRAY—Pot and kettle, Minister—through the chair. When I produce a—

Senator Abetz—If you were in control there would be even more.

Senator MURRAY—Yes, but it would be even better. So I will not detain the chamber too much in that respect, but whilst I accept the minister’s obvious point that any statute is open to interpretation in the courts, the purpose of a statute is in fact to reduce the number of times or the circumstances in which you go to the courts. The government recognises that constantly in its legislation. Our amendment, to which these two amendments lead in in the next bill, would seek to reduce the circumstances in which you would have to go to the courts. It would reduce the need for deeming provisions because it would be more certain and more apparent as to when employee status exists.

We are not going to get much further in this debate. The government have the numbers to overturn this. I urge the Labor Party, when one day they get into power, to maintain the national regime that is predicated on this bill but to make the national regime much fairer and to introduce an employee definition.

The TEMPORARY CHAIRMAN (Senator Forshaw)—The question is that Democrat amendments (1) and (2) on sheet 5062 revised be agreed to.

Question negatived.

Senator MURRAY (Western Australia) (10.45 am)—by leave—I move Democrat amendments R(3), (4) and (5) on sheet 5062 revised:

R(3) Clause 7, page 7 (lines 15 to 26), omit paragraphs (2)(b) and (c), substitute:

(b) a law of a state or Territory, to the extent that the law:

(i) applies to a services contract that relates to the performance of road transport work by the independent contractor, other than a services contract to which an independent contractor that is a body corporate is a party, unless the road transport work to which the contract relates is wholly or mainly performed by a director of the body corporate or a member of the family of a director of the body corporate; and

(ii) makes provision in relation to such a contract, including but not limited to provision about any one or more of the matters specified in paragraphs (1)(a), (b) and (c); or

(c) without limiting paragraph (b), any of the following laws:

(i) Chapter 6 of the Industrial Relations Act 1996 of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6);

(ii) the Owner Drivers and Forestry Contractors Act 2005 of Victoria;

(iii) any instrument made under a provision of a law referred to in subparagraph (i) or (ii); or

(d) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.

(4) Clause 10, page 9 (lines 29 to 33), omit subclause (2), substitute:

(2) To avoid doubt, subsection (1) has effect even if a law specified in regulations made under that subsection deals with matters that, because of subsection 8(2), are not workplace relations matters.

(5) Clause 10, page 9 (after line 33), at the end of the clause, add:

(3) Subsection (1) does not have effect in relation to a law referred to in paragraph 7(2)(a), (b) or (c).
Amendment R(3) allows future owner-driver legislation to have effect despite the provisions of section 7(1). In particular there is pending legislation in Western Australia and tabled legislation in the ACT. Amendments (4) and (5) aim to remove the owner-driver exemptions from the ambit of the regulation-making power in section 10. It is our view, and the view of owner-drivers and the Transport Workers Union, that the power as currently drafted is inconsistent with the government’s commitment not to override these laws. In making that remark, I would appreciate it if the minister would deal with that particular perception from the Transport Workers Union.

I am not going to speak at length on this because I think this is apparent on its face, but I think it is very important to highlight the inconsistency apparent in the government’s legislation, and we did bring this out in the committee hearing and in our minority report—and that is that if you recognise, as the government does, that owner-drivers have a particular circumstance which justifies exemption from many of the provisions of this legislation in New South Wales and Victoria then it does not make sense for owner-drivers in other states not to be included in that exemption, because they operate in the same industry and under the same conditions. In Western Australia, of course, they drive much further. I enjoy reminding visitors from overseas that Western Australia is the size of western Europe. It is a pretty big place to drive around.

The government then respond: ‘That may be so, but there is no legislation in those other states’—and that is a legitimate response. They also respond that they recognise this problem and are going to review the matter in 2007. That is fine, except that a review takes time, a government takes time to respond to a review and it takes time to initiate legislation. Let us assume, for argument’s sake, that the Western Australians get on with it and introduce and pass their legislation and it is operative in the first quarter of next year—and I do not know if that will be the case; it might be a year and a half before the federal government of the day gets around to having a look at that matter. Even then we do not have any certainty that they would respond favourably to that. So what this amendment tries to do is to anticipate future legislation and to allow for the same exceptions that apply to New South Wales and Victoria to apply to those states and territories that introduce legislation which is consistent with New South Wales and Victoria.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (10.49 am)—What Senator Murray has indicated, and I think I am quoting correctly, is that his amendments are trying to anticipate future legislation. That is really asking this parliament to engage in hypothetical legislation because, just as much as we might take 18 months to respond, we might be legislating on the basis of something that does not occur in Western Australia—the legislation could be withdrawn, deferred, delayed or whatever. Therefore, the government has taken the view that that legislation which is in place at the moment will be preserved—in other words, the status quo as it exists; where there is legislation it will be preserved and where there is no legislation in the states that position will be preserved. We will have a review next year, and depending on the outcome of that review we will take the matter forward. I indicate that we will be opposing amendment R(3) albeit that I think we will be voting on them together.

In amendments (4) and (5) the Democrats are seeking to alter amendment 10 of the bill to prevent the making of regulations that are inconsistent with the exceptions to the exclusion provision in section 7(2). Such regulations are currently permissible under clause
10. The exclusion provision and the exceptions to the exclusion provisions are very complex. Although I am confident that the provisions work as the government intends, it is always possible that there may be some unintended consequences. The regulation-making powers in clause 10 of the bill give the government the ability to promptly respond to any unintended consequences flowing from the operation of the exclusion provisions. The government does not intend to use these regulation-making powers to make wholesale changes to the exclusion provisions which enlarge their effect. Nevertheless, of course the parliament has a supervisory role over regulations and it can disallow those regulations. I think we would all agree that making a regulation to overcome unintended consequences is a lot quicker than seeking to amend legislation. So that is why we seek to have them stand as they exist. On amendments (4) and (5) I can also indicate that the government opposes the Democrat approach.

Senator STERLE (Western Australia) (10.52 am)—While we are talking about Senator Murray’s amendments, I am happy to report, for those listening who are not quite sure what is expected to go through the Western Australian parliament, that the road freight transport industry contracts and disputes bill went through the lower house yesterday and it is headed off to the upper house there. I would like to touch base on what the bill is about. I will not take up all the time in the chamber. I did say how it was done in conjunction with both sides of industry and the support of the government, so there was no-one forced into it. I must also note that it represents a heck of a lot more truck drivers than the 2,000 owner-drivers that are being represented by the TWU and the 700 companies who engage owner-drivers in Western Australia. That figure could be anything—who knows?

The road freight bill will provide owner-drivers with security of payment. It will require principal contractors to pay owner-drivers a safe, sustainable rate, enabling them to operate safely. It will also—and this is very important—establish a road freight transport industry council, which will establish a code of conduct, including guideline rates and other provisions regulating the relationship between the parties. And it will create—and this is another very important part of the bill—a low-cost conciliation focused road freight transport industry tribunal to hear disputes between the parties regarding breaches of contracts, codes of conduct and payments. It will also allow owner-drivers to appoint bargaining agents, and they can be either union or non-union. That is spelt out very clearly in the bill. It can even include an industry body. That shows how much good faith has been put into the road freight bill in Western Australia by the industry with the support of the Labor government.

In summary, what is so important about the bill in Western Australia and to Western Australians, particularly those engaged in the transport industry in Western Australia, is that it will help avoid disputation and disruption to commerce in Western Australia. Together with other laws to be introduced into WA, such as the chain of responsibility legislation, it will reduce road trauma and the WA road toll, which is currently being impacted upon by road crashes involving heavy vehicles. It will enable thousands of struggling WA small owner-driver businesses to become financially sustainable, viable and safe operations.

Minister, I note that you did answer my query about the minister you are representing in this chamber saying that there will be a review in 2007. I also note that we know of one person who has been paid a substantial amount of money to provide information and be the face for the Independent Contractors
of Australia—whoever the heck they are. There are no other names around; I think there is a Liberal Party candidate for a seat in South Australia or something like that—I am not sure. I have just heard things, and you will probably correct me if I am wrong. But these people are to pull their support of the bill should the exemption clause be left in there. That has been made very clear. I know that Mr Wilson Tuckey, the member for O’Connor in the other place, has been very busy trying to remove the exemption. So, Minister, on that, could you inform me—and who knows what is going on in your party room in between punches—

Senator Abetz—I think you ought to be talking about your party room.

Senator STERLE—and people being grappled and Nationals having to be sorted out.

The TEMPORARY CHAIRMAN (Senator Forshaw)—Order, Senators! I think we should be talking about the bill.

Senator STERLE—The bill is going to be looked at in 2007 in terms of the exemptions if the state parliament puts in the road freight bills in WA, which it will. But what is the guarantee, with the threat of the independent contractors association pulling support for the bill, that we will not be driven down to the lowest common denominator—‘we’ being dependent contractors? I know you did say that we will review it and look at it but, and you have to forgive my cynicism, that could lead to us going backwards—‘us’ being owner-drivers in New South Wales and Victoria. Minister, can you categorically confirm that that will be the case?

Senator WONG (South Australia) (10.57 am)—I indicate that Labor intends to support amendment R(3) on 5062 moved by Senator Murray. We agree with the views put by Senator Murray—particularly given that there is legislation, as I understand he and Senator Abetz indicated, before the Western Australian parliament. In other words, there is already a live issue of this legislation before the chamber potentially overriding legislation which could shortly become law in Western Australia and in other jurisdictions. We think it is appropriate to support Senator Murray’s amendments.

Question put:
That the amendments (Senator Murray’s) be agreed to.

The committee divided. [11.02 am]
(The Temporary Chairman—Senator MG Forshaw)

Ayes……….. 28
Noes…………. 33
Majority……… 5

AYES
Allison, L.F. Bishop, T.M.
Brown, B.J. Brown, C.L.
Carr, K.J. Crossin, P.M.
Evans, C.V. Forshaw, M.G.
Hogg, J.J. Hurley, A.
Hutchins, S.P. Kirk, L. *
Ludwig, J.W. Marshall, G.
McEwen, A. Moore, C.
Milne, C. Nettle, K.
Murray, A.J.M. Polley, H.
O’Brien, K.W.K. Siewert, R.
Ray, R.F. Sterle, G.
Stephens, U. Wortley, D.
Webber, R.

NOES
Abetz, E. Adams, J.
Barnett, G. Bernardi, C.
Brandis, G.H. Campbell, I.G.
Colbeck, R. Egglesston, A.
Ellison, C.M. Ferguson, A.B.
Ferris, J.M. Fielding, S.
Fierravanti-Wells, C. Fifield, M.P.
Heffernan, W. Humphries, G.
Johnston, D. Joyce, B.
Kemp, C.R. Lightfoot, P.R.
Macdonald, I. Macdonald, J.A.L.
McGauran, J.J.J. Minchin, N.H.
Nash, F. Parry, S. *
Senator Murray (Western Australia) (11.05 am)—by leave—I move amendments (6) to (9) on sheet 5062 revised:

(6) Clause 12, page 10 (lines 20 to 23), omit subclause (1), substitute:

(1) An application may be made to the Court to review a services contract on any of the following grounds:

(a) the contract is unfair, or became unfair because of any conduct of the parties or for any other reasons;

(b) the contract is harsh, or became harsh because of any conduct of the parties or for any other reasons.

(7) Clause 12, page 10 (after line 28), at the end of the clause, add:

(3) An application under subsection (1) may be made even though the services contract has terminated.

(8) Clause 16, page 13 (after line 2), after subclause (1), insert:

(1A) If an order under subsection (1) is made by the Court, the Court may also make an order in relation to the payment of money in connection with the services contract as the Court considers just in the circumstances of the case.

(9) Clause 17, page 13 (line 25), at the end of subclause (1), add “or unreasonably failed to agree to a settlement of the claim”.

Amendments (6), (7), (8) and (9) on sheet 5062 revised relate to the unfair contracts provisions. Amendment (6) amends the bill to give the court an express power to examine a contract that has become unfair because of the conduct of a party or for some other reason. The New South Wales provisions give the court this capacity, and it is pivotal in owner-driver cases, especially in what are known as goodwill and ‘starve out’ cases. I do not know if ‘starve out’ is special terminology they use, but it essentially means you hold out until the other side are so weary that they give in. Amendment (7) amends the bill to give the court the express power to examine the fairness of a contract where the contract is terminated. New South Wales provisions give the court this capacity.

Mr Temporary Chairman, I am having difficulties with a conversation next to me. I am easily distracted. My wife says my great weakness is that I cannot do more than one thing at a time! The conversation was becoming so interesting that I thought: ‘What the hell am I talking about? What are they talking about?’

The TEMPORARY CHAIRMAN (Senator Ferguson)—Senator Murray, I think the problem has been removed; you may continue.

Senator Abetz interjecting—

Senator Murray—I can assure you it was most interesting! The bill as written allows review of the contract only if it is still on foot. This is useless in the case of an owner-driver who has lost goodwill unfairly because of, or in association with, the termination of the contract.

Amendment (8) seeks to amend the bill to give the court an express power to make a monetary order where unfairness is found. At the moment the bill, unlike the New South Wales and Queensland provisions, allows the court to amend the contract only when unfairness has been found. If a party does not act in accordance with that amendment an
applicant would have to take a breach of
contract claim to get a monetary order—the
same monetary order the New South Wales
court can make in the first instance presently.
This inserts an extra and costly step for ap-
plicants. This is a problem. Under this bill
you have to do a two-step tango and in other jurisdic-
tions there is easier and cheaper ac-
cess.

Amendment (9) seeks to amend the no-
costs provision of the act to ensure that costs
may be recovered in circumstances where a party
has unreasonably failed to settle a mat-
ter. Absent such an amendment, respondents
with deep pockets will be able to unreasona-
bly refuse settlement and starve out an appli-
cant who will have to fund these costly
cases. On those motivations I have moved
the amendments.

Senator WONG (South Australia) (11.09
am)—Labor proposes to support Senator
Murray’s amendments. Amendment (6) ap-
ppears to expand the basis on which a contract
can be reviewed and also to look to the con-
duct of the parties. We think that is meritori-
ous—that there may be occasions when that
is merited. Obviously that would be a matter
for the court to determine. I also draw atten-
tion to amendment (7), which enables a post-
termination review—as Senator Murray said,
if a contract has been terminated—to enable
the court to look retrospectively at whether
or not some compensation should be ordered.

Amendment (8) deals essentially with en-
suring that there can be a quantum meruit
sort of claim for damages as opposed to a
damages claim which is only in terms of a
breach or a particular unfairness of a contract
provision. We think the flexibility to enable
the court to look to what is just in the cir-
cumstances of the case is sensible. For those
reasons we will be supporting amendments
(6) to (9).

Senator STERLE (Western Australia)
(11.11 am)—When you read amendment (6)
you see the power that the business lobby,
unfortunately, holds over this government.
Prior to the government’s amendment there
were problems with the unfair contracts pro-
visions. The amendments which have been
moved by Senator Murray and the Demo-
crats would have substantially rectified those.
But at least there was an avenue that could
be used by independent contractors to re-
dress unfairness in, or as a result of, their
contractual arrangements. This unfair con-
tracts provision of the bill has been held out
by the government as evidence that it was
putting in place protections for independent
contractors. Despite the faults prior to this
amendment, the provisions may have proved
of assistance to some independent contrac-
tors. This must have upset the big business
lobbyists, like the Independent Contractors
of Australia, because it seems they have con-
vinced the government to push through this
amendment which will make many, if not all,
applications pointless and doomed to fail.

Let me analyse the amendment a little
closer. In reviewing a contract, the court
must only have regard to, firstly, the terms of
the contract when it was made and, secondly,
other matters existing at the time the contract
was made. This is ludicrous. It is designed to
reduce to almost nothing the claims that
could be successful under the provisions. To
fully comprehend this just consider what an
unfair contract application entails. An unfair
contract application seeks to set aside or vary
the terms of a contract to rectify unfairness.
Take the example of an owner-driver. As the
courts have consistently found, it will be an
unfair contract if an owner-driver who has
paid goodwill for entry into a business has
their contract terminated without compensa-
tion for that goodwill or without the oppor-
tunity to sell the goodwill. It is only at the
point of termination that the unfairness crys-
tallises. Under this amendment, a court could not, as a matter of evidence, have before it the fact that a termination of the contract had occurred because the termination would obviously not be a fact existing at the time the contract was made. Therefore, despite the unfairness, the application would fail.

There are other important areas which we should also consider. Just imagine there is another hurricane off the Gulf of Mexico—let us hope there never is one, but we have to admit that it could happen—and watch what happens to fuel. We have witnessed massive spikes in the cost of fuel in this country within the last 12 months. Unfortunately, the price of fuel went up about 30c a litre. That might not sound a lot, but let me use the extreme example of owner-drivers. Take the road train operators running from Perth to Darwin on a round trip of nearly 9,000 kilometres who are using one litre per kilometre. It is not hard to work out that if the cost of fuel goes up 30c in one spike, and this was not allowed for in their contract when they initially signed it, it has a devastating effect on that small business.

Sadly, the majority of owner-drivers, who are small business men and women, have their family home on the line. It is as simple as that. They get in and buy a truck—well, they do not buy a truck but rather go to the bank, the bank graciously goes through what they own and what they have to their name and, as long as they have next week’s payment and equity in the home, the bank makes the loan and they can have a truck. So off they go. When you have a massive fuel hike like that, you, Mr Temporary Chairman Ferguson, would appreciate as much as any in this chamber, through your background in farming, what that can do to your business and to your family.

That gives us a lot of concern. Also, take your minds back to 11 September and that tragic event in America. One of the flow-ons from that was the massive hike in insurance premiums. I cannot talk in this place only about owner-drivers and the transport industry being badly affected by the spike in insurance premiums. It hit everyone in this country—every single business, homeowner and person insuring their car. The trucking industry in Western Australia and the TWU, with the support of the industry, used to have the truckies big rig day. Some 300 or 400 truckies—companies, owner-drivers, the whole lot—would shine up their vehicles, wash them, get the wheels polished, companies would donate vehicles and there would be a big fundraiser with rides for the kids, Ferris wheels and all sorts of things. There was very cheap food, and it was a good cheap day out. Entertainment was also provided. After September 11 the insurance for the park that used to be used in South Perth for this very special event—the money went to Make-a-Wish Foundation for sick children to try to make their lives that little bit better—went so high the event had to be cancelled. The insurance hike on that park went above the $20,000 we used to raise on that day. So you can understand that, if we let this go through, the industry will really be in trouble. The Labor side see this as the government promising something with one hand, if amendment (6) gets through, and taking away with the other hand. So the Labor Party fully supports Senator Murray’s amendments.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.17 am)—The government opposes the amendments. Amendments (6) and (7) would permit the court to find that a contract was unfair or harsh even if the contract was fair when entered into. So it would allow the rewriting of commercial contracts applying to independent contractors even when the terms of a contract are fair when entered
into. The government believes that that would create substantial commercial uncertainty. The current case law supports the proposition that the existing federal unfair contracts jurisdiction is concerned only with the unfairness or harshness of a contract at the time the contract is made.

Amendment (7) is unnecessary. The federal unfair contracts jurisdiction proposed by the bill allows applications to be made even after the contract has ended, and therefore the suggested amendment to clause 12 is unnecessary. The High Court in the Dingjan case indicated that contracts can be reviewed after they have terminated.

In relation to amendment (8), the current section as it stands provides that a court may make orders to place the parties to the services contract as nearly as practicable back to the position they were in before the unfairness or harshness occurred. This merely reflects the existing federal unfair contracts jurisdiction. The proposed amendment would broaden the scope of the orders that a court could make, consistent with the state Labor regime in New South Wales.

The government says that amendment (9) is unnecessary because clause 17(2) already provides that a court may order a party to pay costs if they have ‘by unreasonable act or omission’ caused another party to the unfair contracts proceedings to pay costs. That is already provided for and those sorts of provisions in all legislation—I say that as a personal comment—are always good to ensure that parties to court disputes do not behave unreasonably. It is an incentive for them not to do so if they think that costs can be visited upon them, but we already have that in clause 17(2).

Question negatived.

Bill, as amended, agreed to.

WORKPLACE RELATIONS
LEGISLATION AMENDMENT (INDE-
PENDENT CONTRACTORS) BILL 2006
Bill—by leave—taken as a whole.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.21 am)—by leave—I move government amendments (1) to (5) together:

(1) Clause 2, page 2 (at the end of the table), add:

<table>
<thead>
<tr>
<th>Schedules</th>
<th>The day after this Act receives the Royal Assent.</th>
</tr>
</thead>
<tbody>
<tr>
<td>3, 4, 5 and 6</td>
<td></td>
</tr>
</tbody>
</table>

(2) Schedule 1, item 1, page 3 (lines 24 to 31), omit subsection 900(2) (not including the note), substitute:

(2) A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

(3) Schedule 1, item 1, page 4 (lines 20 to 28), omit subsection 901(2) (not including the note), substitute:

(2) A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, if the contract were entered into, the contract would be a contract of employment rather than a contract for services.

(4) Schedule 1, item 1, page 5 (lines 16 to 19), omit subsection 902(3), substitute:

(3) In proceedings alleging a contravention of subsection (1) it is presumed, other than in relation to the granting of an interim injunction, that the employer’s sole or dominant purpose was the purpose referred to in paragraph (1)(b), unless the employer proves otherwise.

Note: Subsection 904(2A) permits the Court to grant an injunction for a breach of this section, and
section 838 deals with interim injunctions.

(5) Schedule 1, item 1, page 6 (after line 8), after subsection 904(2), insert:

(2A) If a person has contravened subsection 902(1), the Court may, on application by an eligible person, grant an injunction and make any other orders that the Court considers necessary to stop the contravention or remedy its effects.

(2B) Other orders the Court may make under subsection (2A) include (but are not limited to):

(a) if the contravention was constituted by dismissing an employee—an order to reinstate the person dismissed to the position that the person occupied immediately before the dismissal or to a position no less favourable than that position; and

(b) in any case—to pay to the person dismissed, or threatened with dismissal, compensation for loss suffered as a result of the dismissal or threatened dismissal.

(2C) The Court may make orders under subsection (2A) in addition to, or instead of, imposing a pecuniary penalty.

I table a supplementary explanatory memorandum relating to the government amendments to the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. The memorandum was circulated in the chamber on 28 November 2006.

Senator WONG (South Australia) (11.22 am)—Labor will be opposing these amendments. We have fundamental concerns with the entirety of the sham contract regime that is proposed in the bill and the range of remedies that are set out in the bill. In the second reading debate I set out the reasons for our concerns and they have been touched on today in the debate. We do not consider the government amendments do anything more than tinker around the edges. The fundamental problems with the legislation remain. We do not consider these amendments deal sufficiently with the core problems in terms of the enforcement provisions of the legislation.

Senator MURRAY (Western Australia) (11.23 am)—Government amendment (1) simply introduces new schedules. Government amendments (2) to (4) make changes to the sham arrangements, in particular misrepresentation of the employment relationship as an independent contract arrangement. Trying to attack sham arrangements is a good idea but it seems on the face of it that these changes soften the intended arrangements as originally put. The old provision said that:

A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person:

(a) believed that the contract was a contract for services rather than a contract of employment; and

(b) could not reasonably have been expected to know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

The new provision says that:

A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

My understanding is that is a softer version, and I am not sure of the government’s view. Amendment (5) seems to me to be an improvement on the current provision because it allows for an injunction to stop the contravention or remedy its effects. It also allows for a person incorrectly dismissed to be paid compensation. My instinct is that amendment (1) is machinery, so we do not have to worry about that, and amendment (5) looks as though it is one we could support. But I have the feeling that amendments (2) to (4) soften the existing provisions and therefore should be opposed. I would appreciate hearing the minister’s motivation.
Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.26 am)—I agree with Senator Murray’s assessment of the first amendment. In relation to the provisions that he spent some time on, the government believe that they are generally minor. Under the new defence, an employer would need to prove that at the time the misrepresentation was made the employer did not know that the contract formed an employment, rather than an independent contracting, arrangement and that they were not reckless as to the nature of the contract. The employer would bear the onus of proof in relation to that. Basically, what we are doing there is ensuring—which I think most people would accept—if it was an honest mistake, that in those circumstances the employer would need in effect to prove that it was so. That is the purpose of those amendments. We are concerned to protect people from sham contracts, as we indicated earlier.

Question agreed to.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.27 am)—by leave—I move government amendments (8) to (13) together:

(8) Schedule 2, page 10 (after line 6), after item 6, insert:

6A Subsection 75(2)
Repeal the subsection.

(9) Schedule 2, page 10 (after line 11), at the end of the Schedule, add:

Part 3—Consequential amendments relating to building contractors

Building and Construction Industry Improvement Act 2005

8 Subsection 4(1) (paragraph (a) of the definition of designated building law)
After “this Act”, insert “, the Independent Contractors Act 2006”.

9 Subparagraph 10(a)(i)
After “this Act”, insert “, the Independent Contractors Act 2006”.

10 Subparagraph 10(b)(i)
After “this Act”, insert “, the Independent Contractors Act 2006”.

11 Paragraph 10(d)
After “this Act”, insert “, the Independent Contractors Act 2006”.

12 Paragraph 10(e)
After “this Act” (wherever occurring), insert “, the Independent Contractors Act 2006”.

13 Paragraph 10(f)
After “this Act”, insert “, the Independent Contractors Act 2006”.

14 Paragraph 67(c)
Before “Workplace”, insert “Independent Contractors Act 2006 or the”.

15 Paragraph 71(1)(b)
Before “Workplace”, insert “Independent Contractors Act 2006 or the”.

16 Subsection 73(3)
Omit “subsection 84(5)”, substitute “subsection 167(7)”.

Note: This item updates a cross-reference.

17 After section 73
Insert:

73A ABC Commissioner or ABC Inspector may institute proceedings under the Independent Contractors Act 2006

(1) If a provision of the Independent Contractors Act 2006, or of an instrument under that Act, authorises a workplace inspector (within the meaning of that Act) to make an application to, or otherwise institute proceedings in, a court, the provision is also taken to authorise the ABC Commissioner or an ABC Inspector to make such an application, or institute such proceedings, in any case where the application or proceedings relate to a matter that involves:

(a) a building industry participant; or
(b) building work.

(2) If the ABC Commissioner or an ABC Inspector makes such an application, or
institutes such proceedings, the Independent Contractors Act 2006 and any such instrument have effect, in relation to the application or proceedings, as if the ABC Commissioner or the ABC Inspector were a workplace inspector (within the meaning of that Act).

(3) Directions under subsection 167(7) of the Workplace Relations Act do not apply to the ABC Commissioner or an ABC Inspector in relation to such an application or such proceedings.

18 Paragraph 77(1)(b)
Before “Workplace”, insert “Independent Contractors Act 2006 or the”.

19 Subparagraph 78(2)(d)(i)
After “this Act”, insert “, the Independent Contractors Act 2006”.

(10) Page 10, at the end of the bill (after line 11), add:

Schedule 3—Amendments relating to protecting redundancy entitlements
Workplace Relations Act 1996

1 At the end of subsection 347(7)
Add:

Note: However, a redundancy provision that was included in a workplace agreement that has ceased operating might be preserved for a period of up to 12 months (see section 399A).

2 Paragraph 393(4)(b)
After “by the agreement”, insert “, or a bargaining agent doing so at the request of the employer bound by the agreement”.

3 At the end of subsection 393(5)
Add:

; and (e) if the person giving the notice is the employer bound by the agreement, or is a bargaining agent doing so at the request of the employer bound by the agreement—state whether the parties to the workplace agreement will, under section 399A, continue to be bound by one or more redundancy provisions included in the workplace agreement; and

(f) if the parties to the workplace agreement will continue to be so bound—include an annexed copy of the provision or the provisions.

4 Paragraph 394(5)(a)
After “lodges”, insert “, or a bargaining agent lodges at the request of the employer.”.

5 Paragraph 394(5)(c)
Repeal the paragraph, substitute:
(c) a copy of the undertakings was not annexed to the declaration.

6 At the end of subsection 395(1)
Add:

; and (c) if the employer in relation to the agreement, or a bargaining agent at the request of the employer bound by the agreement, lodges the declaration to terminate the agreement under section 393, undertakings are lodged in relation to the termination if a copy of the undertakings is annexed to the declaration.

7 Subsection 395(2)
Repeal the subsection, substitute:
(2) If the employer in relation to the agreement, or a bargaining agent at the request of the employer in relation to the agreement, lodges the declaration to terminate the agreement under section 393, undertakings are lodged in relation to the termination if a copy of the undertakings is annexed to the declaration.

8 After subsection 396(1)
Insert:

(1A) If the employer in relation to a workplace agreement, or a bargaining agent at the request of the employer in relation to a workplace agreement, lodged a declaration under subsection 395(1) to terminate the agreement under sec-
tion 393, the receipt must state whether:
(a) the declaration so lodged states that the parties to the workplace agreement will continue to be bound by one or more redundancy provisions included in the workplace agreement that was terminated; and
(b) a copy of the provision or provisions was annexed to the declaration.

9 At the end of Division 9 of Part 8

Add:

399A Preservation of redundancy provisions in certain circumstances

(1) This section applies if a workplace agreement is terminated unilaterally, in accordance with section 393, by the employer in relation to the agreement or by a bargaining agent at the request of the employer in relation to the agreement.

(2) Any party who was bound by the workplace agreement immediately before it ceased operating continues to be bound, immediately after that time, by any redundancy provision that was included in the workplace agreement as if the workplace agreement had continued operating.

(2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subsection (2) as if the provision was a workplace agreement in operation.

(3) A party continues to be bound by a redundancy provision referred to in subsection (2), in relation to an employee who is bound by the redundancy provision, until the earliest of the following:
(a) the end of the period of 12 months from the time that the workplace agreement ceased operating;
(b) the time when the employee ceases to be employed by the employer;
(c) the time when another workplace agreement comes into operation in relation to the employee and the employer.

(4) In this section:

redundancy provision means any of the following kinds of provisions:
(a) a provision relating to redundancy pay in relation to a termination of employment;
(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

10 After Division 6 of Part 11

Insert:

Division 6A—Transmission of preserved redundancy provisions from workplace agreements

598A Transmission of preserved redundancy provisions from workplace agreements

(1) If:

(a) immediately before the time of transmission:
   (i) the old employer; and
   (ii) an employee;
   were bound, under section 399A or because of a previous application of this section, by a redundancy provision that was previously included in a workplace agreement that was terminated; and
(b) the employee is a transferring employee;
   the new employer is bound by the redundancy provision in relation to the transferring employee by force of this section.

CHAMBER
Note: The new employer must notify the transferring employee and lodge a copy of the notice with the Employment Advocate (see sections 603A and 603B).

(2) Subject to subsection (3), the redundancy provision prevails over any other redundancy provision included in any other instrument that would otherwise have effect, to the extent of any inconsistency.

Period for which new employer remains bound

(3) The new employer remains bound by the redundancy provision in relation to the transferring employee, by force of this section, until the earliest of the following:

(a) the end of the period of 12 months from the time that the workplace agreement referred to in paragraph (1)(a) ceased operating;

(b) the time when the transferring employee ceases to be employed by the new employer;

(c) the time when another workplace agreement comes into operation in relation to the new employer and the transferring employee.

Old employer’s rights and obligations that arose before time of transmission not affected

(4) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

Definitions

(5) In this section:

- instrument means any of the following:
  (a) a workplace agreement;
  (b) a pre-reform certified agreement (within the meaning of Schedule 7);
  (c) a preserved State agreement;
  (d) a notional agreement preserving State awards;
  (e) an award.

- redundancy provision means any of the following kinds of provisions:
  (a) a provision relating to redundancy pay in relation to a termination of employment;
  (b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
  (c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;
  where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

11 After section 603

Insert:

603A Informing transferring employees about transmission of preserved redundancy provisions

(1) This section applies if an employer is bound, by force of section 598A, by one or more redundancy provisions (within the meaning of that section) in relation to a transferring employee.

(2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subsection (3).

Note: This is a civil remedy provision, see section 605.

(3) The notice must:

(a) identify the redundancy provision or redundancy provisions; and
(b) state that the employer is bound by the provision or provisions; and
(c) specify the date that is 12 months after the time that the workplace agreement that included the provision or provisions ceased operating; and
(d) state that the employer will remain bound by the provision or provisions until that date, or an earlier date in accordance with subsection 598A(3).

(4) Subsection (2) does not apply if a workplace agreement comes into operation in relation to the employer and the transferring employee within 14 days of the time of transmission.

603B Lodging copy of notice about preserved redundancy provisions with Employment Advocate

(1) If an employer gives a notice under section 603A to a transferring employee, the employer must lodge a copy of the notice with the Employment Advocate within the period specified in subsection (2). The copy must be lodged in accordance with subsection (3).

Note 1: This is a civil remedy provision, see section 605.

Note 2: Sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.

(2) The notice must be lodged within 14 days after the day specified in paragraph (a) or (b):

(a) if the employer gives a notice to an employee in respect of a redundancy provision that was included in an AWA—the day on which that notice is given; or

(b) if the employer gives one or more notices to one or more employees in respect of a redundancy provision that was included in a collective agreement—the earliest day on which a notice was given.

Lodgment with Employment Advocate

(3) A notice is lodged with the Employment Advocate in accordance with this subsection only if it is actually received by the Employment Advocate.

Note: This means that section 29 of the Acts Interpretation Act 1901 (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

12 Subsection 604(1)
After “603”, insert “or 603B”.

13 Subsection 604(2)
After “603”, insert “or 603B (as the case requires)”.

14 Subsection 604(3)
After “603”, insert “or 603B”.

15 At the end of subsection 605(1)
Add:
; (d) subsection 603A(2);
(e) subsection 603B(1).

16 Subsection 605(5)
After “an instrument”, insert “, or in relation to a preserved redundancy provision that was previously included in an instrument,”.

17 Subsection 605(5) (table item 2)
After “bound by the agreement”, insert “or the redundancy provision”.

17A Section 717 (note 1 to the definition of applicable provision)
Before “This”, insert “Preserved redundancy provisions are treated as if they were workplace agreements (see for example section 399A).”.

18 At the end of subclause 3(4) of Schedule 7
Add:

Note: However, a redundancy provision that was included in a pre-reform certified agreement that has ceased operating might be preserved for a period of up to 12 months (see clause 6A).

19 After clause 6 of Schedule 7
Insert:

6A Preservation of redundancy provisions in certain circumstances
(1) This clause applies if a pre-reform certified agreement is terminated, on application by the employer in relation to the agreement, by the Commission in accordance with subsection 170MH(3) of the pre-reform Act.

Note: Subsection 170MH(3) of the pre-reform Act continues to apply because of paragraph 2(1)(k) of this Schedule.

(2) Any party who was bound by the pre-reform certified agreement immediately before it ceased operating continues to be bound, immediately after that time, by any redundancy provision that was included in the pre-reform certified agreement as if the pre-reform certified agreement had continued operating.

(2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subclause (2) as if the provision was a pre-reform certified agreement in operation.

(3) Subject to subclause (4), a redundancy provision referred to in subclause (2) prevails over any other redundancy provision included in any other instrument that would otherwise have effect.

(4) A party continues to be bound by a redundancy provision referred to in subclause (2), in relation to an employee who is bound by the redundancy provision, until the earliest of the following:

(a) the end of the period of 12 months from the time that the pre-reform certified agreement ceased operating;
(b) the time when the employee ceases to be employed by the employer;
(c) the time when a workplace agreement comes into operation in relation to the employee and the employer.

(5) In this clause:

instrument means either of the following:

(a) a preserved State agreement;
(b) a notional agreement preserving State awards;
(c) an award;
(d) a transitional award (within the meaning of Schedule 6).

redundancy provision means any of the following kinds of provisions:

(a) a provision relating to redundancy pay in relation to a termination of employment;
(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

6B Notification of preservation of redundancy provisions

(1) This clause applies if the parties to a pre-reform certified agreement will, under clause 6A, continue to be bound by one or more redundancy provisions included in the agreement.

(2) The Commission must issue a copy of the order terminating the agreement to:

(a) the employer who will be bound by the redundancy provision or the redundancy provisions;
(b) any organisation of employees that will be bound by the redundancy provision or the redundancy provisions.

(3) The order must:

(a) identify the redundancy provision or the redundancy provisions;
(b) state that the parties to the agreement will be bound by the provision or provisions; and
(c) specify the date that is 12 months after the time that the order terminating the agreement takes effect; and

(d) state that the parties will remain bound by the provision or provisions until that date, or an earlier date in accordance with subclause 6A(4).

6C Employer must notify employees of preserved redundancy provisions

(1) An employer that has, under clause 6B, received a copy of an order terminating a pre-reform certified agreement must take reasonable steps to ensure that all employees who are bound by the agreement immediately before the agreement ceases operating are, within 21 days of the employer receiving a copy of the order, given a copy of the order.

(2) Subclause (1) is a civil remedy provision for the purpose of this clause.

Note: Division 3 of Part 14 contains other provisions relevant to civil remedies.

(3) The Court may order a person who has contravened the civil remedy provision to pay a pecuniary penalty.

Note: Division 3 of Part 14 contains other provisions relevant to civil remedies.

(4) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.

(5) An application for an order under subclause (3) in relation to a pre-reform certified agreement may be made by the following persons:

(a) an employee who is bound by the agreement immediately before the agreement ceases operating;

(b) an organisation of employees that is bound by the agreement immediately before the agreement ceases operating;

(c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a) and has been requested by the employee to apply for the order on the employee’s behalf;

(d) a workplace inspector.

20 At the end of subclause 18(3) of Schedule 7

Add:

Note: However, a redundancy provision that was included in a pre-reform AWA that has ceased operating might be preserved for a period of up to 12 months (see clause 20A).

21 After clause 20 of Schedule 7

Insert:

20A Preservation of redundancy provisions in certain circumstances

(1) This clause applies if a pre-reform AWA is terminated, on application by the employer in relation to the AWA, by the Commission in accordance with subsection 170VM(3) of the pre-reform Act.

Note: Subsection 170VM(3) of the pre-reform Act continues to apply because of paragraph 17(1)(c) of this Schedule.

(2) The employer and the employee in relation to the pre-reform AWA continue to be bound, immediately after the pre-reform AWA ceases operating, by any redundancy provision that was included in the pre-reform AWA as if the pre-reform AWA had continued operating.

(2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subclause (2) as if the provision was a pre-reform AWA in operation.

(3) Subject to subclause (4), a redundancy provision referred to in subclause (2) prevails over any other redundancy
provision included in any other instrument that would otherwise have effect.

(4) The employer continues to be bound by a redundancy provision referred to in subclause (2), in relation to the employee, until the earliest of the following:

(a) the end of the period of 12 months from the time that the pre-reform AWA ceases operating;
(b) the time when the employee ceases to be employed by the employer;
(c) the time when a workplace agreement comes into operation in relation to the employee and the employer.

(5) In this clause:

instrument means any of the following:
(a) a collective agreement;
(b) a pre-reform certified agreement;
(c) a notional agreement preserving State awards;
(d) an award.

redundancy provision means any of the following kinds of provisions:
(a) a provision relating to redundancy pay in relation to a termination of employment;
(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;
where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

20B Notification of preservation of redundancy provisions

(1) This clause applies if the employer and the employee in relation to a pre-reform AWA will, under clause 20A, continue to be bound by one or more redundancy provisions included in the pre-reform AWA.

(2) The determination issued by the Commission under subsection 170VM(4) of the pre-reform Act must:

(a) identify the redundancy provision or the redundancy provisions; and
(b) state that the employer and the employee in relation to the pre-reform AWA will be bound by the provision or provisions; and
(c) specify the date that is 12 months after the time that the determination terminating the pre-reform AWA takes effect; and
(d) state that the employer and the employee will remain bound by the provision or provisions until that date, or an earlier date in accordance with subclause 20A(4).

22 After clause 21 of Schedule 8

Insert:

21A Preservation of redundancy provisions in preserved collective State agreements in certain circumstances

(1) This clause applies if a preserved collective State agreement is terminated, on application by the employer in relation to the agreement, by the Commission in accordance with subsection 170MH(3) of the pre-reform Act.

Note: Subsection 170MH(3) of the pre-reform Act applies because of subclause 21(2) of this Schedule and paragraph 2(1)(k) of Schedule 7.

(2) Any party who was bound by the preserved collective State agreement immediately before it ceased operating continues to be bound, immediately after that time, by any redundancy provision that was included in the agreement as if the agreement had continued operating.
(2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subclause (2) as if the provision was a preserved collective State agreement in operation.

(3) Subject to subclause (4), a redundancy provision referred to in subclause (2) prevails over any other redundancy provision included in any other instrument that would otherwise have effect.

(4) A party continues to be bound by a redundancy provision referred to in subclause (2), in relation to an employee who is bound by the redundancy provision, until the earliest of the following:

(a) the end of the period of 12 months from the time that the preserved collective State agreement ceased operating;
(b) the time when the employee ceases to be employed by the employer;
(c) the time when a workplace agreement comes into operation in relation to the employee and the employer.

(5) In this clause:

*instrument* means any of the following:

(a) a pre-reform certified agreement (within the meaning of Schedule 7);
(b) a notional agreement preserving State awards;
(c) an award.

*redundancy provision* means any of the following kinds of provisions:

(a) a provision relating to redundancy pay in relation to a termination of employment;
(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment; where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

21B Notification of preservation of redundancy provisions in preserved collective State agreements

(1) This clause applies if the parties to a preserved collective State agreement will, under clause 21A, continue to be bound by one or more redundancy provisions included in the agreement.

(2) The Commission must issue a copy of the order terminating the agreement to:

(a) the employer who will be bound by the redundancy provision or the redundancy provisions; and
(b) any organisation that will be bound by the redundancy provision or the redundancy provisions.

(3) The order must:

(a) identify the redundancy provision or the redundancy provisions; and
(b) state that the parties to the agreement will be bound by the provision or provisions; and
(c) specify the date that is 12 months after the time that the order terminating the agreement takes effect; and
(d) state that the parties will remain bound by the provision or provisions until that date, or an earlier date in accordance with subclause 21A(4).

21C Employer must notify employees of preserved redundancy provisions in preserved collective State agreements

(1) An employer that has, under clause 21B, received a copy of an order terminating a preserved collective State agreement must take reasonable steps to ensure that all employees who are bound by the agreement immediately
before the agreement ceases operating are, within 21 days of the employer receiving a copy of the order, given a copy of the order.

(2) Subclause (1) is a civil remedy provision for the purpose of this clause.

Note: Division 3 of Part 14 contains other provisions relevant to civil remedies.

(3) The Court may order a person who has contravened the civil remedy provision to pay a pecuniary penalty.

Note: Division 3 of Part 14 contains other provisions relevant to civil remedies.

(4) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.

(5) An application for an order under subclause (3) in relation to a preserved collective State agreement may be made by the following persons:

(a) an employee who is bound by the agreement immediately before the agreement ceases operating;

(b) an organisation of employees that is bound by the agreement immediately before the agreement ceases operating;

(c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a) and has been requested by the employee to apply for the order on the employee’s behalf;

(d) a workplace inspector.

21D Preservation of redundancy provisions in preserved individual State agreements in certain circumstances

(1) This clause applies if a preserved individual State agreement is terminated, on application by the employer in relation to the agreement, by the Commission in accordance with subsection 170VM(3) of the pre-reform Act.

Note: Subsection 170VM(3) of the pre-reform Act applies because of subclause 21(3) of this Schedule and paragraph 17(1)(c) of Schedule 7.

(2) The employer and the employee in relation to the preserved individual State agreement continue to be bound, immediately after the agreement ceases operating, by any redundancy provision that was included in the agreement as if the agreement had continued operating.

(2A) Parts 6 and 14 of this Act apply to a redundancy provision referred to in subclause (2) as if the provision was a preserved individual State agreement in operation.

(3) Subject to subclause (4), a redundancy provision referred to in subclause (2) prevails over any other redundancy provision included in any other instrument that would otherwise have effect.

(4) The employer continues to be bound by a redundancy provision referred to in subclause (2), in relation to the employee, until the earliest of the following:

(a) the end of the period of 12 months from the time that the preserved individual State agreement ceases operating;

(b) the time when the employee ceases to be employed by the employer;

(c) the time when a workplace agreement comes into operation in relation to the employee and the employer.

(5) In this clause:

instrument means any of the following:

(a) a pre-reform certified agreement (within the meaning of Schedule 7);

(b) a notional agreement preserving State awards;

(c) an award.
**redundancy provision** means any of the following kinds of provisions:

(a) a provision relating to redundancy pay in relation to a termination of employment;

(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;

(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

### 21E Notification of preservation of redundancy provisions

(1) This clause applies if the employer and the employee in relation to a preserved individual State agreement will, under clause 21D, continue to be bound by one or more redundancy provisions included in the agreement.

(2) The determination issued by the Commission under subsection 170VM(4) of the pre-reform Act must:

(a) identify the redundancy provision or the redundancy provisions; and

(b) state that the employer and the employee in relation to the preserved individual State agreement will be bound by the provision or provisions; and

(c) specify the date that is 12 months after the time that the determination terminating the agreement takes effect; and

(d) state that the employer and the employee will remain bound by the provision or provisions until that date, or an earlier date in accordance with subclause 21D(4).

### 23 After Part 5 of Schedule 9

Insert:

**Part 5A—Transmission of preserved redundancy provisions**

**27A Transmission of preserved redundancy provisions**

(1) If:

(a) immediately before the time of transmission:

(i) the old employer; and

(ii) an employee;

were bound, under clause 6A or 20A of Schedule 7, clause 21A or 21D of Schedule 8, or because of a previous application of this clause, by a redundancy provision that was previously included in an agreement that was terminated; and

(b) the employee is a transferring employee;

the new employer is bound by the redundancy provision in relation to the transferring employee by force of this clause.

Note: The new employer must notify the transferring employee and lodge a copy of the notice with the Employment Advocate (see clauses 29A and 29B).

(2) Subject to subclause (3), the redundancy provision prevails over any other redundancy provision included in any other instrument that would otherwise have effect, to the extent of any inconsistency.

**Period for which new employer remains bound**

(3) The new employer remains bound by the redundancy provision in relation to the transferring employee, by force of this clause, until the earliest of the following:

(a) the end of the period of 12 months from the time that the agreement referred to in paragraph (1)(a) ceased operating;
(b) the time when the transferring employee ceases to be employed by the new employer;
(c) the time when a workplace agreement comes into operation in relation to the new employer and the transferring employee.

Old employer’s rights and obligations that arose before time of transmission not affected

(4) This clause does not affect the rights and obligations of the old employer that arose before the time of transmission.

Definitions

(5) In this clause:

instrument means any of the following:
(a) a workplace agreement;
(b) a pre-reform certified agreement (within the meaning of Schedule 7);
(c) a preserved State agreement;
(d) a notional agreement preserving State awards;
(e) an award;
(f) a transitional award (within the meaning of Schedule 6).

redundancy provision means any of the following kinds of provisions:
(a) a provision relating to redundancy pay in relation to a termination of employment;
(b) a provision that is incidental to a provision relating to redundancy pay in relation to a termination of employment;
(c) a machinery provision that is in respect of a provision relating to redundancy pay in relation to a termination of employment;

where the termination is at the initiative of the employer and on the grounds of operational requirements, or because the employer is insolvent.

24 After clause 29 of Schedule 9

Insert:

29A Informing transferring employees about transmission of preserved redundancy provisions

(1) This clause applies if an employer is bound, by force of clause 27A, by one or more redundancy provisions (within the meaning of that clause) in relation to a transferring employee.

(2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subclause (3).

Note: This is a civil remedy provision, see clause 31.

(3) The notice must:

(a) identify the redundancy provision or the redundancy provisions; and
(b) state that the employer is bound by the provision or provisions; and
(c) specify the date that is 12 months after the time that the agreement that included the provision or provisions ceased operating; and
(d) state that the employer will remain bound by the provision or provisions until that date, or an earlier date in accordance with subclause 27A(3).

(4) Subclause (2) does not apply if a workplace agreement comes into operation in relation to the employer and the transferring employee within 14 days of the time of transmission.

29B Lodging copy of notice about preserved redundancy provisions with Employment Advocate

(1) If an employer gives a notice under clause 29A to a transferring employee, the employer must lodge a copy of the notice with the Employment Advocate within the period specified in subclause (2). The copy must be lodged in accordance with subclause (3).
Note 1: This is a civil remedy provision, see clause 31.

Note 2: Sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.

(2) The notice must be lodged within 14 days after the day specified in paragraph (a) or (b):

(a) if the employer gives a notice to an employee in respect of a redundancy provision that was included in a pre-reform AWA or a preserved individual State agreement—the day on which that notice is given; or

(b) if the employer gives one or more notices to one or more employees in respect of a redundancy provision that was included in a pre-reform certified agreement or a preserved collective State agreement—the earliest day on which a notice was given.

Lodgment with Employment Advocate

(3) A notice is lodged with the Employment Advocate in accordance with this subclause only if it is actually received by the Employment Advocate.

Note: This means that section 29 of the Acts Interpretation Act 1901 (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

25 Subclause 30(1) of Schedule 9

After “29”, insert “or 29B”.

26 Subclause 30(2) of Schedule 9

After “29”, insert “or 29B (as the case requires)”.

27 Subclause 30(3) of Schedule 9

After “29”, insert “or 29B”.

28 At the end of subclause 31(1) of Schedule 9

Add:

; (c) subclause 29A(2);

(d) subclause 29B(1).

29 Subclause 31(4) of Schedule 9

After “an instrument”, insert “, or in relation to a preserved redundancy provision that was previously included in an instrument,”.

30 Subclause 31(4) of Schedule 9 (table items 2 and 4)

After “bound by the agreement”, insert “or the redundancy provision”.

31 Application

The amendments made by this Schedule apply to agreements that are terminated after this item commences.

(11) Page 10, at the end of the bill (after proposed Schedule 3), add:

Schedule 4—Amendments relating to stand downs

Workplace Relations Act 1996

1 Subsection 4(1)

Insert:

authorised stand down means a stand down of an employee that is authorised as mentioned in subsection 691B(1).

2 Subsection 13(1) (after table item 6)

Insert:

6A Division 7 Stand Section of Part 12 downs 691C

3 At the end of paragraph 183(1)(b)

Add:

(iv) any hours in the week when the employee is stood down (but only if the stand down is an authorised stand down);

4 At the end of Part 12

Add:

Division 7—Stand downs

691A Employer may stand down employees in certain circumstances

(1) This section applies if:

(a) an employee employed by an employer cannot usefully be employed during a period because of a particular circumstance; and
(b) that circumstance is:
   (i) a strike; or
   (ii) a breakdown of machinery; or
   (iii) a stoppage of work for any cause for which the employer cannot reasonably be held responsible; and

(c) either:
   (i) there is no contract of employment, and no industrial instrument, that binds the employer in respect of the employment of the employee and that contains provision for the standing down of the employee during that period because of that circumstance; or
   (ii) a contract of employment, or industrial instrument, that binds the employer in respect of the employment of the employee contains provision for the standing down of the employee during that period because of that circumstance, but the employer’s right to stand down the employee is dependent on the employer having to apply to the Commission, a State industrial authority or another person or body for an order or determination (however described) authorising the employer to stand down the employee.

(2) If this section applies, the employer:
   (a) may stand down the employee during the period referred to in paragraph (1)(a) because of the circumstance referred to in that paragraph; and
   (b) if the employer stands down the employee under paragraph (a) of this subsection—may deduct payment for the period during which the employee is stood down.

(3) A period during which an employee is stood down under subsection (2) does not break the employee’s continuity of service.

(4) A period during which an employee is stood down under subsection (2) counts as service for all purposes.

(5) A provision of a contract of employment or an industrial instrument that provides as mentioned in subparagraph (1)(c)(ii) has no effect. However, this section does not otherwise affect the operation of any provision of a contract of employment or industrial instrument that provides for the standing down of employees.

(6) In this section:
   *industrial instrument* means any of the following:
   (a) a workplace agreement;
   (b) an award;
   (c) a pre-reform AWA;
   (d) a pre-reform certified agreement (within the meaning of Schedule 7);
   (e) a preserved State agreement;
   (f) a notional agreement preserving State awards;
   (g) a workplace determination;
   (h) an employment agreement (within the meaning of Division 12 of Part 21);
   (i) an exceptional matters order (within the meaning of Schedule 7);
   (j) a section 170MX award (within the meaning of Schedule 7);
   (k) an old IR agreement (within the meaning of Schedule 7).

691B Prohibition of unauthorised stand downs

(1) An employer must not stand down an employee from his or her employment if the stand down is not authorised by:
   (a) subsection 691A(2); or
   (b) a provision of a contract of employment, or an industrial instrument (within the meaning of section 691A), that is binding on the em-
ployer in respect of the employment of the employee (other than a provision that is rendered of no effect by subsection 691A(5)).

Note 1: Compliance with this subsection is dealt with as follows:

(a) the model dispute resolution process applies (see subsection (2));

(b) the Court may grant an injunction (see subsection (3));

(c) the compliance provisions of Part 14 apply.

Note 2: If the standing down of an employee is not authorised as mentioned in this subsection, the employee may recover any lost wages by taking appropriate enforcement action (whether under this Act or otherwise).

(2) The model dispute resolution process (other than section 697) applies to a dispute under subsection (1).

Note: The model dispute resolution process is set out in Part 13.

(3) The Court, or the Federal Magistrates Court, on application by an employee who has been stood down or by an inspector, may grant an injunction requiring the employer of the employee to cease contravening (or not to contravene) subsection (1).

Note: In this context, Australia includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the Acts Interpretation Act 1901.

Employee in Australia’s exclusive economic zone

(2) One condition is that the employee is in Australia’s exclusive economic zone and either:

(a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or

(b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the Legislative Instruments Act 2003.

On Australia’s continental shelf outside exclusive economic zone

(3) Another condition is that the employee:

(a) is outside the outer limits of Australia’s exclusive economic zone, but is in, on or over a part of Australia’s continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and

(b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia’s continental shelf. The regulations may need to do so to give...
effect to Australia’s international obligations.

Outside Australia’s exclusive economic zone and continental shelf

(4) Another condition is that the employee:

(a) is neither in Australia’s exclusive economic zone nor in, on or over a part of Australia’s continental shelf described in paragraph (3)(a); and

(b) is an Australian-based employee of an Australian employer; and

(c) is not prescribed by the regulations as an employee to whom this sub-section does not apply.

(5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

5 Section 717 (at the end of the definition of applicable provision)

Add:

; and (e) subsection 691B(1) (prohibition of unauthorised stand downs).

6 Subsection 718(1) (at the end of the table)

Add:

8 subsection 691B(1) (prohibition of unauthorised stand downs) (a) an employee to whom subsection 691B(1) applies; (b) an inspector

7 Subsection 718(2)

Omit “and (7)”, substitute “, (7) and (8)”.

8 After Division 7 of Part 21

Insert:

Division 7A—Stand downs

880A Additional effect of Act—stand downs

Without affecting its operation apart from this section, Division 7 of Part 12 also has effect in relation to the employment of any employee in Victoria, and for this purpose:

(a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and

(b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and

(c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

9 Section 891

Repeal the section.

10 After paragraph 89(1)(a) of Schedule 6

Insert:

(aa) section 691A (as applied by section 880A); and

11 After paragraph 95(a) of Schedule 6

Insert:

(aa) section 691A (as applied by section 880A); and

12 After paragraph 102(a) of Schedule 6

Insert:

(aa) section 691A (as applied by section 880A); and

(12) Page 10, at the end of the bill (after line 11), at the end of the bill, add:

Schedule 5—Amendments relating to the Australian Fair Pay and Conditions Standard

Workplace Relations Act 1996

1 Subsection 189(1)

Repeal the subsection, substitute:
APCS applies and contains frequency of payment provisions

(1) If:
(a) the employment of an employee is covered by an APCS; and
(b) the APCS contains frequency of payment provisions that apply in relation to the employee’s employment;
then:
(c) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions:
(i) that apply in relation to the employee’s employment; and
(ii) that provide for payments in respect of periods of one month or less;
the employer must comply with those provisions in relation to the employee; or
(d) if paragraph (c) does not apply, and the employee’s contract of employment contains frequency of payment provisions:
(i) that apply in relation to the employee’s employment; and
(ii) that provide for payments in respect of periods of one month or less;
the employer must comply with those provisions in relation to the employee; or
(e) if neither paragraph (c) nor (d) applies—the employer must comply with the frequency of payment provisions of the APCS in relation to the employee.

2 After subsection 226(1)
Insert:

(1A) An employer only contravenes subsection (1) if the employer requests or requires an employee to work more than the hours mentioned in subsection (1), and the employee works those hours.

3 Section 228
Before “In”, insert “(1)”.

4 Section 228 (at the end of the definition of shift worker)
Note: Subsection (2) enables regulations to be made providing that an employee belonging to a specified class is not a shift worker.

5 At the end of section 228
Add:

(2) The regulations may provide that an employee:
(a) who is covered by paragraph (a) or (b) of the definition of shift worker in subsection (1); and
(b) who belongs to a class specified in the regulations;
is not a shift worker for the purposes of this Division.

(3) Without limiting the way in which a class of employees may be described for the purposes of regulations made under subsection (2), the class may be described by reference to one or more of the following:
(a) a particular industry;
(b) a particular kind of work;
(c) a particular type of employment;
(d) a particular type of shift work (whether described by reference to the organisation or allocation of shifts or otherwise).

6 Paragraph 229(1)(a)
Repeal the paragraph, substitute:

(a) start with:
(i) the specified number of hours; or
(ii) if the specified number of hours is more than 38 hours—38 hours;

7 After subsection 229(4)
Insert:
Certain types of leave not to count as service

(4A) For the purposes of subparagraphs (1)(b)(i) and (4)(a)(ii), a period of authorised unpaid leave or unauthorised leave does not count as service in relation to an employee except:

(a) as expressly provided by:
   (i) a term or condition of the employee’s employment; or
   (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
(b) as prescribed by the regulations.

Note: For whether leave guaranteed under this Part counts as service, see subsections 238(2) (annual leave), 260(2) (paid personal leave), 261(2) (unpaid carer’s leave) and 316(2) (parental leave).

8 Subsection 229(5) (note 3)
Repeal the note.

9 Paragraph 233(1)(c)
Omit all the words after “no less than”, substitute “the rate that, at the time the election is made, is the employee’s basic periodic rate of pay (expressed as an hourly rate); and”.

10 Subsection 235(1)
Omit all the words after “a period;”, substitute “the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee’s basic periodic rate of pay (expressed as an hourly rate).”.

11 Subsection 235(2)
Omit all the words after “a particular time,”. substitute “the employee must be paid a rate for each hour (pro-rated for part hours) of the employee’s un-taken accrued annual leave that is no less than the rate that, immediately before that time, is the employee’s basic periodic rate of pay (expressed as an hourly rate).”.

12 At the end of section 236
Add:

Entitlement to leave for all nominal hours in a day also extends to other hours on that day

(7) If:

(a) an employee to whom subparagraph 229(1)(a)(ii) applies is entitled to take annual leave on a particular day; and
(b) the entitlement covers all the hours (or part hours) on that day that would count towards the nominal hours worked by the employee in the week that includes that day;

the employer is taken to have authorised the employee to be absent from work for any other hours (or part hours) on that day that the employee would otherwise have worked.

Example: Bianca is employed by BBB Bakers Pty Ltd. She works 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).

Under subsection 232(2), Bianca is entitled to accrue paid annual leave of 1/13 of her nominal hours worked for each completed 4 week period of continuous service with BBB Bakers. Because of subparagraph 229(1)(a)(ii), Bianca’s nominal hours worked in a week are capped at 38 hours. If Bianca works her normal hours for a 12 month period, she will
accrue 152 hours of paid annual leave.

The above subsection ensures that Bianca will be able to be absent from work for 4 full 40 hour weeks. Bianca’s absence for the additional 8 hours will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (8)).

(8) An absence that is taken by subsection (7) to have been authorised:
(a) is not annual leave; and
(b) does not break the employee’s continuity of service; and
(c) does not otherwise count as service.

(9) For the purposes of subsection (7), if a shift (or other period of work) occurs partly on 1 day and partly on the next day, the shift (or other period of work) is taken to be a day and the remaining parts of the days are taken not to be part of the day.

(10) For the purposes of subsection (7), the regulations may make provision for either or both of the following:
(a) determining what hours (or part hours) on a particular day would count towards the nominal hours worked by an employee in a week;
(b) determining what other hours (or part hours) on a particular day would be hours (or part hours) that an employee would otherwise have worked.

13 Section 240
Insert:

basic periodic rate of pay has the meaning given by section 178.

Note: See also section 243.

14 Paragraph 241(1)(a)
Repeal the paragraph, substitute:
(a) start with:
(i) the specified number of hours; or
(ii) if the specified number of hours is more than 38 hours—38 hours;

Insert:

15 After subsection 241(4)

Certain types of leave not to count as service

(4A) For the purposes of subparagraphs (1)(b)(i) and (4)(a)(ii), a period of authorised unpaid leave or unauthorised leave does not count as service in relation to an employee except:
(a) as expressly provided by:
(i) a term or condition of the employee’s employment; or
(ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
(b) as prescribed by the regulations.

Note: For whether leave guaranteed under this Part counts as service, see subsections 238(2) (annual leave), 260(2) (paid personal leave), 261(2) (unpaid carer’s leave) and 316(2) (parental leave).

16 Subsection 241(5) (note 3)
Repeal the note.

17 Section 243
Repeal the section, substitute:

243 Regulations may prescribe different definitions for piece rate employees

The regulations may prescribe:
(a) a different definition of basic periodic rate of pay for the purposes of the application of this Division in relation to piece rate employees; and
(b) a different definition of nominal hours worked for the purposes of the application of this Division in relation to piece rate employees.

18 After section 245
Insert:

245A Entitlement to cash out an amount of paid personal/carer’s leave
(1) This section applies to an employee if more than the protected amount of paid personal/carer’s leave is credited to the employee.

(2) The employee is entitled to forgo an entitlement to take any or all of the amount of paid personal/carer’s leave credited to the employee that exceeds the protected amount of paid personal/carer’s leave if:

(a) a provision in a workplace agreement binding the employee and the employer entitles the employee to forgo the entitlement to the amount of paid personal/carer’s leave; and

(b) the employee gives the employer a written election to forgo the amount of paid personal/carer’s leave; and

(c) a provision in a workplace agreement binding the employee and the employer entitles the employee to receive pay in lieu of the amount of paid personal/carer’s leave at a rate that is no less than the rate that, at the time the election is made, is the employee’s basic periodic rate of pay (expressed as an hourly rate); and

(d) the employer authorises the employee to forgo the amount of paid personal/carer’s leave.

Note: If, under this section, an employee forgoes an entitlement to take an amount of paid personal/carer’s leave, the employer may deduct that amount from the amount of accrued paid personal/carer’s leave credited to the employee.

(3) For the purposes of subsections (1) and (2), the protected amount of paid personal/carer’s leave for the employee is \(\frac{3}{52}\) of the number of nominal hours worked by the employee for the employer during:

(a) a continuous period of 12 months of service with the employer ending immediately before the day on which the employee makes an election under paragraph (2)(b); or

(b) a sequence of periods totalling 12 months of service with the employer, the last of which ends immediately before the day on which the employee makes an election under paragraph (2)(b).

Note: The protected amount of paid personal/carer’s leave for an employee whose nominal hours worked for an employer each week over a continuous period of 12 months service with the employer are 38 hours would be 114 hours (which would be equivalent to 15 days of paid personal/carer’s leave for that employee).

(4) An employer must not:

(a) require an employee to forgo an entitlement to take an amount of paid personal/carer’s leave; or

(b) exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of paid personal/carer’s leave.

(5) If, under this section, an employee forgoes an entitlement to take an amount of paid personal/carer’s leave, the employer must, within a reasonable period, give the employee the amount of pay that the employee is entitled to receive in lieu of the amount of paid personal/carer’s leave.

19 Section 247

Omit all the words after “a period,” substitute “the employee must be paid a rate for each hour (pro-rated for part hours)” of paid personal/carer’s leave taken that is no less than the rate that, immediately before the period begins, is the employee’s basic periodic rate of pay (expressed as an hourly rate)."

20 After section 247
Insert:

247A Entitlement to leave for all nominal hours in a day also extends to other hours on that day

(1) If:

(a) an employee to whom subparagraph 241(1)(a)(ii) applies is entitled to take paid personal/carer’s leave on a particular day; and

(b) the entitlement covers all the hours (or part hours) on that day that would count towards the nominal hours worked by the employee in the week that includes that day;

the employer is taken to have authorised the employee to be absent from work for any other hours (or part hours) on that day that the employee would otherwise have worked.

Example: Tina is employed by Terrific Videos Pty Ltd. She works 8 hours a day for 5 days a week, giving a weekly total of 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).

Under subsection 246(2), Tina is entitled to accrue paid personal/carer’s leave of 1/26 of her nominal hours worked for each completed 4 week period of continuous service with Terrific Videos. Because of subparagraph 241(1)(a)(ii), Tina’s nominal hours worked in a week are capped at 38 hours. If Tina works her normal hours for a 12 month period, she will accrue 76 hours of paid personal/carer’s leave.

The above subsection ensures that Tina will be able (subject to the requirements of this Division relating to entitlement to paid personal/carer’s leave) to be absent from work for 10 full 8 hour days. Tina’s absence for the additional 4 hours over those 10 days will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (2)).

(2) An absence that is taken by subsection (1) to have been authorised:

(a) is not paid personal/carer’s leave; and

(b) does not break the employee’s continuity of service; and

(c) does not otherwise count as service.

(3) For the purposes of subsection (1), if a shift (or other period of work) occurs partly on 1 day and partly on the next day, the shift (or other period of work) is taken to be a day and the remaining parts of the days are taken not to be part of the day.

(4) For the purposes of subsection (1), the regulations may make provision for either or both of the following:

(a) determining what hours (or part hours) on a particular day would count towards the nominal hours worked by an employee in a week;

(b) determining what other hours (or part hours) on a particular day would be hours (or part hours) that an employee would otherwise have worked.

21 Section 259

Omit all the words after “a period,”, substitute “the employee must be paid a rate for each hour (pro-rated for part hours) of compassionate leave taken that is no less than the rate that, immediately before the period begins, is the employee’s basic periodic rate of pay (expressed as an hourly rate).”.

22 Section 262

Before “This”, insert “(1)”.

23 At the end of section 262

Add:

(2) This Division establishes minimum entitlements and so is intended to sup-
plement, and not to override, entitlements under other Commonwealth legislation.

24 Section 263
Insert:

**basic periodic rate of pay** has the meaning given by section 178.

Note: See also section 264A.

25 Section 263 (definition of employee)
Omit “section 262”, substitute “subsection 262(1)”.

26 Section 263
Insert:

**piece rate employee** means an employee who is paid a piece rate of pay within the meaning of section 178.

27 At the end of Subdivision A of Division 6 of Part 7
Add:

264A Regulations may prescribe different definition for piece rate employees

The regulations may prescribe a different definition of **basic periodic rate of pay** for the purposes of the application of this Division in relation to piece rate employees.

28 At the end of subsection 268(2)
Add:

Note: An employer may ask an employee to give the employer a statement from a medical practitioner as to the employee’s fitness to work (see subsections 274(2) and (2A)).

29 Subsection 268(3)
Omit all the words after “a period,”, substitute “the employee must be paid a rate for each hour (pro-rated for part hours) of paid leave taken that is no less than the rate that, immediately before the period begins, is the employee’s basic periodic rate of pay (expressed as an hourly rate).”.

30 After subsection 274(2)
Insert:

(2A) If the employee takes paid leave under subparagraph 268(2)(b)(i) or (ii) during the period of 6 weeks before the expected date of birth, the employer may, at any time during the period of leave, ask the employee to give the employer a medical certificate from a medical practitioner containing a statement of the medical practitioner’s opinion of whether the employee is fit to work.

31 At the end of subsection 318(3)
Add:

Note: For the purposes of subsection (3), employer, employee and employment have their ordinary meaning. See sections 5, 6 and 7 and Schedule 2.

32 After paragraph 2(1)(g) of Schedule 2
Insert:

(ga) a reference in Division 7 of Part 7 so far as the reference relates to Division 6 of Part 7 as applied by section 689.

33 After paragraph 3(1)(c) of Schedule 2
Insert:

(ca) a reference in Division 7 of Part 7 so far as the reference relates to Division 6 of Part 7 as applied by section 689.

34 After paragraph 4(1)(c) of Schedule 2
Insert:

(ca) a reference in Division 7 of Part 7 so far as the reference relates to Division 6 of Part 7 as applied by section 689.

35 Saving provision—annual leave
The amendment of the Workplace Relations Act 1996 made by item 6 does not affect any entitlement to annual leave that an employee had accrued before the commencement of that item.
36 Saving provision.—paid personal/carer’s leave

The amendment of the Workplace Relations Act 1996 made by item 14 does not affect any entitlement to paid personal/carer’s leave that an employee had accrued before the commencement of that item.

(13) Page 10, at the end of the bill (after line 11), at the end of the bill, add:

Schedule 6—Other amendments

Workplace Relations Act 1996

1 Paragraph 165(1)(c)

After “purposes of” (first occurring), insert “this paragraph or”.

2 After subsection 165(1)

Insert:

(1A) To avoid doubt, a disclosure in accordance with subsection (1) of personal information (within the meaning of the Privacy Act 1988) is taken, for the purposes of that Act, to be authorised by law.

3 At the end of section 170

Add:

(5) To avoid doubt, a disclosure in accordance with this section of personal information (within the meaning of the Privacy Act 1988) is taken, for the purposes of that Act, to be authorised by law.

4 Subsection 337(5)

Repeal the subsection, substitute:

(5) If a waiver has been made under section 338 in relation to the workplace agreement:

(a) subsection (1) and paragraph (3)(b) do not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) either had, or had ready access to, the agreement in writing; and

(b) subsection (2) does not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) had been given an information statement in relation to the agreement that complies with subsection (4).

5 At the end of section 338

Add:

Note: For the effect of the waiver, see subsection 337(5).

Note: The heading to section 338 is replaced by the heading “Employees may waive 7-day period”.

6 At the end of Division 5 of Part 8

Add:

346A Employer to provide copy of lodged AWA to employee

(1) As soon as practicable after an employer lodges an AWA with the Employment Advocate, the employer must give a copy of the AWA to the employee whose employment is subject to the AWA.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

7 After subsection 347(2)

Insert:

(2A) If:

(a) an employer and an employee or employees of the employer, or an organisation of employees, make a workplace agreement (within the meaning of section 333); and

(b) the employer does not lodge that workplace agreement (the unlodged agreement), but subsequently lodges a declaration under subsection 344(2); and

(c) the declaration purports to identify as parties to a workplace agreement:
(i) the employer who lodged the declaration; and
(ii) at least one employee, class of employees or organisation; and
(d) the employer and the other parties identified in the declaration are parties to the un lodged agreement; and
(e) a document that is different from the un lodged agreement is attached to the declaration;
then:
(f) the un lodged agreement comes into operation as a workplace agreement at the time the declaration is lodged; and
(g) the document that is attached to the declaration does not come into operation as a workplace agreement.

8 Subsection 370(5)
Repeal the subsection, substitute:
(5) If a waiver has been made under section 371 in relation to the variation to the workplace agreement:
(a) subsection (1) and paragraph (3)(b) do not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) either had, or had ready access to, the variation in writing; and
(b) subsection (2) does not apply if, before the time the waiver was made, the employer had taken reasonable steps to ensure that all eligible employees in relation to the agreement (as at that time) had been given an information statement in relation to the variation that complies with subsection (4).

9 At the end of section 371
Add:
Note: The heading to section 371 is replaced by the heading “Employees may waive 7-day period”.

10 After paragraph 392(2)(b)
Insert:
(ba) in the case of an AWA—the employee whose employment is subject to the agreement;

11 After paragraph 393(2)(b)
Insert:
(ba) in the case of an AWA—the employee whose employment is subject to the agreement;

12 After paragraph 407(2)(j)
Insert:
(ja) for subsection 346A(1)—30 penalty units;

13 At the end of subsection 482(1)
Add “; whether or not the ballot is completed”.

14 At the end of subsection 482(2)
Add “; whether or not the ballot is completed”.

15 Subsection 482(3)
Omit “have effect”, substitute “are, in relation to completed ballots,.”.

16 After paragraph 483(1)(a)
Insert:
(aa) the ballot has been completed; and
Note: The heading to section 483 is altered by inserting “completed” after “of”.

17 Section 611 (after paragraph (a) of the definition of public holiday)
Insert:
(aa) a day that, under (or in accordance with a procedure under) a law of a State or Territory, is substituted for a day referred to in paragraph (a); and

18 Section 611 (subparagraph (b)(i) of the definition of public holiday)
Repeal the subparagraph.

19 At the end of section 710
Add:
; or (c) the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.

20 Subparagraph 846(2)(g)(i)
Omit “5”, substitute “10”.

21 Subparagraph 846(2)(g)(ii)
Omit “25”, substitute “50”.

22 Paragraph 864(1)(b)
Repeal the paragraph, substitute:

(b) is:
(i) of a rate provision; or
(ii) of a casual loading provision; or
(iii) of a frequency of payment provision.

23 Subsection 864(4)
Insert:

frequency of payment provision has the same meaning as in Division 2 of Part 7.

24 After paragraph 3(1)(h) of Schedule 2
Insert:

(ha) a reference in Division 2 of Part 4 of Schedule 7.

25 Paragraph 72H(2)(c) of Schedule 6
Omit all the words after “apply”, substitute “according to its terms, to the transferring transitional employee’s employment with the new transitional employer.”.

26 Subclause 72H(2) of Schedule 6
Omit “the transmitted award, to the extent to which it relates to the transferring transitional employee’s employment with the new transitional employer, prevails over that certified agreement to the extent of any inconsistency with that certified agreement.”, substitute “the certified agreement does not apply to the transferring transitional employee.”.

27 Paragraph 77(3)(a) of Schedule 6
Repeal the paragraph, substitute:

(a) the matter referred to in paragraph (1)(g) does not include one or both of the following:
(i) special maternity leave (within the meaning of section 265);
(ii) the entitlement under section 268 to transfer to a safe job or to take paid leave; and

28 Paragraph 97(4)(a) of Schedule 6
Repeal the paragraph, substitute:

(a) the matter referred to in paragraph (2)(ac) does not include one or both of the following:
(i) special maternity leave (within the meaning of section 265);
(ii) the entitlement under section 268 to transfer to a safe job or to take paid leave; and

29 Clause 1 of Schedule 7
Insert:

transitional award has the same meaning as in Schedule 6.

30 At the end of clause 2 of Schedule 7
Add:

Note: Clause 5 of this Schedule, section 16 and Schedule 8 may also affect the terms and conditions of employment of an employee in relation to whom a pre-reform certified agreement is in operation.

31 Subclause 5(1) of Schedule 7
Repeal the subclause, substitute:
(1) While a pre-reform certified agreement is in operation, it prevails, to the extent of any inconsistency, over:
(a) a preserved State agreement; or
(b) a notional agreement preserving State awards.

32 At the end of clause 17 of Schedule 7
Add:
Note: Clause 19 of this Schedule, section 16 and Schedule 8 may also affect the terms and conditions of employment of an employee in relation to whom a pre-reform AWA is in operation.

33 Paragraph 19(d) of Schedule 7
Repeal the paragraph, substitute:
(d) to the extent of any inconsistency, a notional agreement preserving State awards;

34 Before clause 22 of Schedule 7
Insert:
Division 1—Continuing operation of section 170MX awards

35 Clause 22 of Schedule 7
Repeal the clause, substitute:
22 Application of Division
This Division applies to a section 170MX award if:
(a) the employer in relation to the section 170MX award:
(i) is an employer (within the meaning of subsection 6(1)) at the reform commencement; or
(ii) becomes such an employer during the transitional period; and
(b) the section 170MX award:
(i) was in force just before the reform commencement; or
(ii) was made after the reform commencement because of Part 8 of this Schedule.

36 Subclause 23(1) of Schedule 7
Omit “the award”, substitute “a section 170MX award to which this Division applies”.

37 Clause 24 of Schedule 7
Omit “the award”, substitute “a section 170MX award to which this Division applies”.

38 Clause 25 of Schedule 7
After “section 170MX award” (wherever occurring), insert “to which this Division applies”.

39 Subclause 26(1) of Schedule 7
After “section 170MX award”, insert “to which this Division applies”.

40 At the end of Part 4 of Schedule 7
Add:
Division 2—Special rules for section 170MX awards that bind excluded employers

26A Application of Division
(1) This Division applies to a section 170MX award if:
(a) the employer in relation to the section 170MX award is an excluded employer at the reform commencement; and
(b) the section 170MX award:
(i) was in force just before the reform commencement; or
(ii) was made after the reform commencement because of Part 8 of this Schedule.
(2) This Division applies to the section 170MX award while the employer remains an excluded employer during the transitional period.

26B Cessation of section 170MX award
(1) A section 170MX award to which this Division applies ceases to be in operation:
(a) at the end of the transitional period; or
(b) when it has been replaced by a State employment agreement.
(2) To avoid doubt, this clause does not affect any rights accrued or liabilities incurred under a section 170MX award to which this Division applies before it ceases to be in operation.

(3) To avoid doubt, if the employer in relation to a section 170MX award to which this Division applies becomes an employer (within the meaning of subsection 6(1)) at a time before the end of the transitional period, subclause (1) does not apply after that time.

Note: On and after that time, Division 1 of this Part applies to the section 170MX award.

(4) Once a section 170MX award to which this Division applies has ceased operating, it can never operate again.

26C Continuing operation of section 170MX awards—under old provisions

(1) Subject to this Schedule, provisions of the pre-reform Act (including regulations made under that Act) relating to section 170MX of the pre-reform Act continue to apply in relation to a section 170MX award to which this Division applies, despite the repeals and amendments made by the Workplace Relations Amendment (Work Choices) Act 2005.

(2) Subclause (1) does not apply in relation to the following provisions of the pre-reform Act:

(a) section 170MN;
(b) subsections 170MZ(4) and (5);
(c) paragraph 170MZ(6)(b);
(d) subsections 170MZ(7) and (8).

26D Continuing operation of section 170MX awards—under new provisions

Subject to this Schedule, the following provisions of this Act apply in relation to a section 170MX award to which this Division applies as if it were a workplace determination:

(a) Part 6;
(b) section 494;
(c) subsection 451(2);
(d) Part 14;
(e) Part 15.

26E Interaction of section 170MX awards with other instruments

While a section 170MX award to which this Division applies is in operation, it prevails over a transitional award to the extent of any inconsistency.

41 Clause 30 of Schedule 7

Repeal the clause, substitute:

30 Relationships between pre-reform agreements etc. and Australian Fair Pay and Conditions Standard

(1) The Australian Fair Pay and Conditions Standard does not apply to an employee in relation to a matter if the employee’s employment is subject to any of the following instruments that deals with that matter in relation to the employee:

(a) a pre-reform certified agreement;
(b) a pre-reform AWA;
(c) a section 170MX award.

(2) In this clause:

matter means a matter referred to in subsection 171(2).

Note: This means that if a pre-reform certified agreement, a pre-reform AWA or a section 170MX award deals with basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave or parental leave and related entitlements in respect of an employee, the Australian Fair Pay and Conditions Standard will not apply to the employee in respect of that matter.

However, if a pre-reform certified agreement, a pre-reform AWA or a section 170MX award does not deal with basic rates of pay and casual load-
ings, maximum ordinary hours of work, annual leave, personal leave or parental leave and related entitlements in respect of an employee, the Australian Fair Pay and Conditions Standard will apply to the employee in respect of that matter.

42 At the end of clause 35 of Schedule 7
Insert:
Note: Section 898 may also affect the terms and conditions of employment of an employee in relation to whom a Victorian reference certified agreement is in operation.

43 At the end of clause 36 of Schedule 7
Insert:
Note: Section 898 may also affect the terms and conditions of employment of an employee in relation to whom a Victorian reference Division 3 pre-reform certified agreement is in operation.

44 At the end of clause 37 of Schedule 7
Insert:
Note: Section 898 may also affect the terms and conditions of employment of an employee in relation to whom a Victorian reference AWA is in operation.

45 Clause 15E of Schedule 8
Repeal the clause, substitute:

15E Relationship between preserved State agreements and Australian Fair Pay and Conditions Standard
(1) The Australian Fair Pay and Conditions Standard does not apply to an employee in relation to a matter if the employee's employment is subject to a preserved State agreement that deals with that matter in relation to the employee.
(2) In this clause:
matter means a matter referred to in subsection 171(2).

Note: This means that if a preserved State agreement deals with basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave or parental leave and related entitlements in respect of an employee, the Australian Fair Pay and Conditions Standard will not apply to the employee in respect of that matter. However, if a preserved State agreement does not deal with basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave or parental leave and related entitlements in respect of an employee, the Australian Fair Pay and Conditions Standard will apply to the employee in respect of that matter.

46 Clause 44 of Schedule 8
After “for a matter”, insert “in relation to an employee”.

47 Clause 44 of Schedule 8
After “also deals with that matter”, insert “in relation to the employee”.

48 Paragraph 20(2)(b) of Schedule 9
Repeal the paragraph.

Workplace Relations Amendment (Work Choices) Act 2005

49 Paragraph 5A(a) of Schedule 4
After “meaning of”, insert “paragraph 513(4)(b) of”.

50 At the end of item 5A of Schedule 4
Add “, to the extent that the term requires the payment of redundancy pay within the meaning of paragraph 513(4)(b) of the amended Act”.

51 Application of items 4 and 5
The amendments made by items 4 and 5 of this Schedule apply only in relation to waivers under section 338 of the Workplace Relations Act 1996 made on or after the commencement of this item.

52 Application of item 7

(1) The amendment of the Workplace Relations Act 1996 made by item 7 of this Schedule applies, and is taken always to have applied, on and from the reform commencement to an un lodged agreement, within the meaning of paragraph 347(2A)(b) of the Workplace Relations Act 1996, in relation to which a declaration was lodged on or after the reform commencement.

(2) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

53 Application of items 8 and 9

The amendments made by items 8 and 9 apply only in relation to waivers under section 371 of the Workplace Relations Act 1996 made on or after the commencement of this item.

54 Application of items 13 to 16

The amendments made by items 13 to 16 apply to a ballot in respect of which a ballot order is made under section 462 of the Workplace Relations Act 1996 on or after the commencement of this item.

55 Transitional provision—items 13 to 16

(1) This item applies to a ballot in respect of which a ballot order was made under section 462 of the Workplace Relations Act 1996 before the commencement of this item if:

(a) the authorised ballot agent for the ballot was the Australian Electoral Commission; and

(b) the Australian Electoral Commission certifies that the ballot had not been completed at the commencement of this item.

(2) After the commencement of this item, section 483 of the Workplace Relations Act 1996 is taken to apply to the incomplete ballot as if the ballot had been completed at the time of the certification referred to in paragraph (1)(b), so far as section 483 relates to costs:

(a) incurred by the Australian Electoral Commission; and

(b) in respect of which, had the applicant been liable for the costs of the incomplete ballot, the applicant’s liability would have been able to have been discharged under subsections 483(5) and (6).

(3) To avoid doubt, this item does not affect any liability of the applicant in relation to the cost of holding the incomplete ballot and, in particular, does not impose any additional liability upon the applicant.

56 Application of items 25 and 26

(1) The amendments of the Workplace Relations Act 1996 made by items 25 and 26 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to a transferring transitional employee.

(2) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

transferring transitional employee has the same meaning as in clause 72H of Schedule 6 to the Workplace Relations Act 1996.

57 Application of items 24, 29 and 34 to 40

(1) The amendments of the Workplace Relations Act 1996 made by items
24, 29 and 34 to 40 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to a section 170MX award (within the meaning of the Workplace Relations Act 1996).

(2) However, subitem (1) does not authorise the imposition of a civil penalty under Part 14 of the Workplace Relations Act 1996 for a breach that occurred before the commencement of this item.

(3) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

58 Application of items 31 and 33

(1) The amendments of the Workplace Relations Act 1996 made by items 31 and 33 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to a pre-reform certified agreement, a preserved State agreement, a notional agreement preserving State awards or a pre-reform AWA that is in operation on the reform commencement, whether or not the pre-reform certified agreement, the preserved State agreement, the notional agreement preserving State awards or the pre-reform AWA is in operation at the commencement of this item.

(2) However, subitem (1) does not authorise the imposition of a civil penalty under Part 14 of the Workplace Relations Act 1996 for a breach that occurred before the commencement of this item.

(3) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

59 Application of items 41 and 45

(1) The amendments of the Workplace Relations Act 1996 made by items 41 and 45 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to an employee (including, but not limited to, for the purposes of Division 7 of Part 7 of that Act).

(2) However, subitem (1) does not authorise the imposition of a civil penalty under Part 14 of the Workplace Relations Act 1996 for a breach that occurred before the commencement of this item.

(3) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

60 Application of items 46 and 47

(1) The amendments of the Workplace Relations Act 1996 made by items 46 and 47 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to an employee.

(2) However, subitem (1) does not authorise the imposition of a civil penalty under Part 14 of the Workplace Relations Act 1996 for a breach that occurred before the commencement of this item.

(3) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

61 Application of item 48

(1) The amendment of the Workplace Relations Act 1996 made by item 48 of this Schedule applies, and is taken always to have applied, on and from the reform commencement, in relation to a transferring employee.
(2) However, subitem (1) does not authorise the imposition of a civil penalty under Part 14 of the Workplace Relations Act 1996 for a breach that occurred before the commencement of this item.

(3) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

transferring employee has the same meaning as in clause 20 of Schedule 9 to the Workplace Relations Act 1996.

62 Application of items 49 and 50

(1) The amendments of the Workplace Relations Amendment (Work Choices) Act 2005 made by items 49 and 50 of this Schedule apply, and are taken always to have applied, on and from the reform commencement, in relation to a pre-reform award or a transitional award within the meaning of the Workplace Relations Act 1996.

(2) In this item:

reform commencement means the commencement of Schedule 1 to the Workplace Relations Amendment (Work Choices) Act 2005.

The repeal of section 75(2) of the Building and Construction Industry Improvement Act 2005 is a consequence of the repeal of section 47 of that act by other provisions of this bill. As section 75(2) refers to section 47 and that provision is to be removed, section 75(2) ceases to serve any useful purpose. That is the rationale behind our amendment (8).

Amendment (9) seeks to update an incorrect cross-reference in section 73(3) of the Building and Construction Industry Improvement Act to a provision in the Workplace Relations Act. Section 73(3) refers to section 84(5) of the Workplace Relations Act. However, section 84(5) was renumbered by the Workplace Relations Amendment (Work Choices) Act to be section 167(7). If honourable senators have any comments to make on those amendments, I invite them to do so.

The TEMPORARY CHAIRMAN

(Senator Ferguson)—Senator Wong, I am sure you are pleased to help the minister.

Senator WONG (South Australia) (11.29 am)—It is not very often that I extend a helping hand to the minister, but in the interests of getting these matters dealt with, I will do so. As I understand it, amendments (8) and (9) are consequential on the provisions of the Independent Contractors Bill 2006. They are unremarkable other than that Labor are opposed to the bill in any event. So, consistent with that, we are not going to support these amendments. I want to make some comments in relation to amendments (10) to (13), but it might be as well to do that after the minister has outlined those amendments.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.30 am)—I understand that amendment (10) deals with the insertion of a new schedule, which is not an independent contractor related issue. With the agreement of honourable senators, I would like to deal with amendments (8) to (9) at this stage and then deal with amendments (10) to (13). I seek leave to deal with the amendments in that manner.

Leave granted.

Senator WONG (South Australia) (11.32 am)—While the minister receives some briefing on that, I want to make some comments about amendment (9), which I think is a consequential amendment in relation to building contractors. As we understand it, these amendments give inspection and prosecution powers to Australian Building and Construction Commission inspectors. We have had a consistent position in relation to the building industry, which has been a
focus of much regulation and intervention by the government. Labor will never stand to support any corrupt practices, regardless of the industry in which they occur. However, we completely disagree with the idea that separate industrial rules and regulations for separate industries and workplaces is required. As I recall, Senator Murray, we have had fairly lengthy discussions, including some that went into the early hours of the morning, about this over a number of years. We made the point that, if there were issues with enforcement, they ought to be dealt with in the context of the existing legislation that applies to all sectors of Australian industry rather than in the context of an entirely new, separate regulatory system, which we consider is being set up to implement in large part a political agenda of the government. We will be opposing amendment (9).

Senator SIEWERT (Western Australia) (11.33 am)—The Greens will likewise be opposing these amendments. The Greens’ views on the ABCC are well known; they have been articulated in this place. I am deeply concerned about the operation of the ABCC, particularly the way it has been functioning in Western Australia. I know more about that state than I do the other states. We will be opposing any expansion of the ABCC’s powers under this legislation.

Senator MURRAY (Western Australia) (11.34 am)—I do not want to rehash what was a very strongly motivated debate on the creation of the building commission and so on. I remind the chamber that the Democrats strongly support a single national unitary system of industrial relations law—we think that is a good advance for Australia—but we do not support the form in which it has emerged. The Work Choices legislation goes far too far in terms of what we consider to be good, sustainable principles of industrial relations law. Attached to that view is the need for a national regulator. The one thing labour laws lack in this country is an independent regulator. A tribunal or an industrial relations commission, whether state or federal, is not a regulator in the sense that I mean it.

We are hopeful that, when and if the Labor Party becomes the government of Australia, it will close the Office of Workplace Services, as well as that of the building commissioner, and instead create a new, independent, national regulator for workplace matters. It is important that we have such a body created. We do not support industry specific regulation of the type that is indicated by the building construction industry set-up at present. That being said, amendments (8) and (9) principally look to be machinery matters that are consequential to the Independent Contractors Bill 2006.

The TEMPORARY CHAIRMAN (Senator Ferguson)—The question is that government amendments (8) and (9) be agreed to.

Question agreed to.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.37 am)—I had a private discussion with Senator Wong about potentially dealing with government amendments (6) and (7) at this point. As I understand it, those amendments were in fact developed through consensus and therefore I assume are not controversial. But, if it is the intention of Labor senators who are currently not in the chamber to debate those amendments, I am happy to continue the schedule as planned.

Senator WONG (South Australia) (11.37 am)—The Labor Party will be supporting amendments (6) and (7), but I did understand that one of my colleagues wanted to make a contribution to the debate. Obviously, there are some fairly controversial provisions in amendments (10) to (13) and we had assumed we would deal with them first.
Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (11.38 am)—Government amendments (10) to (13) make substantial changes to the legislation. I could give a dissertation in relation to each of schedules, but, with respect to the time available to the chamber, I simply refer honourable senators to the explanatory memoranda that deal with those issues and I will take any questions that may excite the interest of honourable senators during the committee stage.

Senator WONG (South Australia) (11.39 am)—Amendments (10) to (13)—and I want to make this very clear—do not relate to the regulation of independent contracting arrangements. These are amendments which themselves propose to amend the government’s Work Choices legislation. They are fairly important, although obviously highly problematic, amendments, but I want to comment about the process. I think it was almost a year ago that we were in this chamber debating the Work Choices legislation. From memory, at that time 330-odd amendments were provided to the opposition and minor parties less than 40 minutes before the debate began. The bill and explanatory memorandum ran to over 1,500 pages in total, I think, and then several hundred amendments were provided less than 40 minutes before the debate began. I recall a number of senators, including Labor senators, very strongly making their views known about the inappropriateness of the government ramming through legislation with this level complexity in such a short time. Such concerns are obviously in addition to our concerns and our opposition to the extreme ideology which is at the heart of the government’s ‘Work No Choices’ legislation.

The government did not come in and say: ‘By the way, we need to amend the Workplace Relations Act because we’ve made some mistakes as you said we would. We need to deal with a range of issues where we appear not to have got it right, as demonstrated out there in the real world by subsequent events relating to how people have actually understood their rights and entitlements—in particular, employers getting more power to reduce wages and conditions than was originally planned.’ The government did not do that; what it has done, in the week the Independent Contractors Bill and consequential amendments are scheduled to be debated, is tack onto that legislative program a whole range of amendments relating to issues other than independent contracting issues. It really is another demonstration of the disregard for proper parliamentary processes that this government is demonstrating.

We have a situation where some reasonably technical amendments have not had the opportunity to go through the Senate committee process. They have not been considered by the relevant committee. On top of Labor’s opposition to the entirety of the government’s ‘Work No Choices’ legislation, we are also opposed to poor legislative processes. There is a reason why the Senate has used a process of sending bills—particularly complex, difficult or controversial bills—to committees, with the government then considering the committee’s recommendations. Australia’s laws have been better for that. We had an example today already where the outworker provisions of the Independent Contractors Bill have, after the Senate committee unanimously recommended it, been removed from the bill. That is an example of the Senate committee process working. And I want to add my acknowledgement of the work done by Senator Troeth in this regard. She has convinced the government to back off from what was extremely unfair legislation in relation to outworkers.

But such a process has not occurred in relation to these provisions. These provisions deal with issues such as redundancy entitle-
ments and stand-downs which Labor regards as entirely objectionable. They deal with the Fair Pay and Conditions Standard and a range of other matters contained in schedule 6.

It is yet another example of the way in which this government not only has failed the policy test and the fairness test but has failed the competency test. This is extremely complex legislation. The government ought to have redrafted the entire Workplace Relations Act. Instead it chose to bundle into this parliament 1,500 pages of amendments plus explanatory memoranda and then, on the morning of the debate commencing in the Senate, put up 330-odd amendments. Now, in the context of discussing another bill, the government is tacking on a whole range of amendments to its industrial relations laws. That is what is happening—without the benefit of the Senate having perused them properly through the Senate committee process.

Frankly, it is another abrogation of parliamentary responsibility, of legislative responsibility, on behalf of the government that it is choosing to bypass the Senate committee process and that it is choosing to tack on these amendments to this discussion today. I am happy to have a further discussion shortly about the content of some of the amendments. I am not sure whether my colleague wants to make a contribution—it does not appear so. Senator Murray and Senator Siewert may wish to speak in relation to these amendments first.

Senator MURRAY (Western Australia) (11.45 am)—Government amendments (10) to (13) before us are in fact the heart of the government’s proposed adjustments to the Work Choices regime. The issues just referred to by the shadow minister are indeed right. The way in which the Work Choices legislation hearing and debate were dealt with were in fact offensive, not just offensive to the senators who were opposed, because of the way in which the debate was managed, guillotined and cut off, but offensive to good process. Good process as a legislator means the opportunity to identify problems with complex legislation which even the brightest of advisers in the department will not be able to see all the way through to realise what the effects are.

We have here, again, a substantial swag of amendments: 39 pages on sheet RC275, which came in on 28 November, so that is four days ago. I will be frank: we as the Democrats have not had the opportunity to really understand and comprehend them to the fullest extent possible. We would have been considerably assisted by a committee process to establish where they were favourable, where they were unfavourable and where there were drafting problems. The fact is that, whatever the law, governments constantly need to amend it. It is far better to amend it in its primary form than to have to amend it thereafter, because of course those to whom the law applies then have to adjust their systems, their understanding and their own reference points.

While some of these amendments do appear to improve the Workplace Relations Act as amended by the government last year, with the limited time given for this chamber to examine them I am hesitant to give them full support. We did ask the whips to convey a message that we wanted these matters examined in a short committee process. That has not happened, although I note that the government did give a few extra days for us to get across these. There do appear to be drafting errors which might need correction.

We think this is bad process, frankly. The government is now referring bills to committees for inquiry with short reporting dates, and, in some cases, the very short inquiry is
then followed by a long gap before the bill actually gets to the parliament. That has certainly been the case with the Independent Contractors Bill.

Despite what we regard as increasing abuse of the Senate committee system, Senate committees are still working. Just last week, the minister removed from a social security bill a key and controversial schedule giving search and seizure powers to Centrelink officers. The Independent Contractors Bill itself benefited from the minister reacting positively to the committee’s views on outworkers. So the committee system does still work, despite what we regard as most unfortunate changes to the way in which committees operate. I must say that we would have appreciated running substantial amendments through the committee, and we ask the government to consider, for future significant amendments to workplaces legislation, giving sufficient time so that committees can examine these matters.

These amendments seem to address unintended consequences of the Work Choices legislation. The government is moving to address those unintended consequences. We think mistakes will have been made—and have been made—in that legislation. It is good to see the government correcting them, but of course, in the meantime, it puts business and employees in difficult situations where the legislation is imperfect to begin with.

The High Court’s recent decision to grant the federal government its right to exercise the corporations power in the way it has over the state industrial relations systems has, I think, three effects. Firstly, it stops people waiting for that decision before deciding how to deal with this legislation. I think there has been a bit of that going on. Secondly, it makes the community realise that, if they want that legislation to change, they will have to overturn the coalition government. It is my view, I might say, that, if the coalition government is returned at the next federal election, it will be an indication that that legislation has been given an official tick-off by the electorate, because this Work Choices policy was not taken to the last election. Thirdly, there is a danger that this wider power granted by the High Court will be used in other areas, which will make the states very unhappy.

There have been a number of high-profile cases that we have seen publicised, which these amendments in part address. Amongst the cases I can think of over the recent past are the Spotlight case, the Cowra abattoir case, the Lufthansa call centre case, the Heinemann Electric centre case, the Western Sydney construction site case, the Hilton IGA supermarket case, the Feltex carpet-making business case and so on. Those sorts of cases have a number of advantages. Firstly, they inform the political and policy debate amongst the broader community. Secondly, of course, they have the value of alerting the government to genuine issues and problems and, because the government want to get re-elected, they therefore react positively in some cases to fix this.

Having made those general comments I want to deal with some of the specifics before us. Government amendment (10) relates to protecting redundancy entitlements and preserves the agreement terms providing for redundancy pay where the agreement is terminated or where there is a transmission of business for a 12-month period, unless the parties agree otherwise. These measures would apply in relation to workplace agreements, pre-reform certified agreements and pre-reform Australian workplace agreements. In the case of a workplace agreement, redundancy provisions would be preserved where the agreement is unilaterally terminated by the employer with 90 days notice. In the case
of a pre-reform certified agreement or pre-
reform Australian workplace agreement, re-
dundancy provisions would be preserved
where the agreement is terminated by the
Industrial Relations Commission on applica-
tion by the employer, where it is not contrary
to the public interest.

The changes to schedule 3 would also
provide for the treatment to preserve redun-
dancy provisions on transmission of busi-
ness. These provisions seem to be a direct
response to the Radio Rentals case in South
Australia and the current Tristar case. In
spite of there being no work at Tristar, the
longest serving employees are being kept on
until after 30 September, when their enter-
prise bargaining agreement expires. While
the provision is an improvement on the cur-
rent situation, we Democrats have been
alerted to potential flaws and administrative
problems. The new provision preserves the
agreement for 12 months. The question then
is: what is to stop an employer keeping
someone on for 12 months, say in the trans-
mission of business, and after 12 months
letting them go? So it is effectively a transi-
tion arrangement and not a protective ar-
rangement. There are also concerns that the
new provision will not protect those let go
for operational reasons. The government’s
Work Choices amendments made it easier for
employers to use operational grounds for
releasing a worker. The new provisions also
leave it up to the employer to inform em-
ployees about redundancy entitlements rather
than an independent third party like the
commission. As I said, there are uncertainties
that the new provision will meet the stated
objectives, and we are not in a position to
form a final opinion.

Government amendment (12) relates to
the Australian Fair Pay and Conditions Stan-
ard. It makes a number of technical
amendments to part 7 of the act, relating to
the standard. It modifies the frequency of
payment guarantee so that a contract of em-
ployment or workplace agreement guaran-
tees an employee frequency of payment for
periods of one month or less and compels the
employer to comply with such provisions;
caps the accrual of annual and personal car-
ers leave so that leave does not accrue in
respect of hours worked above 38 hours per
week; changes the payment rule for personal
carers leave, compassionate leave and leave
for pregnant employees who cannot be trans-
ferred to a safe job so that an employee is
entitled to be paid a rate for each hour of
leave taken at his or her hourly basic peri-
dodic rate of pay, which is consistent with the
payment rule for annual leave; and enables
an employee to request to cash out an
amount of paid personal carers leave each
year, provided the minimum balance of at
least 15 days leave remains available after
cashing out for full-time employees and pro
rata for part-time employees.

This has been advocated by some unions.
Others are concerned that it will encourage
people to stay at work while they are sick so
that they can get more cash. It may discrimi-
nate against those with chronic illnesses if
they do not get to bank their sick leave. So
there are supporters for and those against.
The amendments do appear to be a result of
drafting errors in the original legislation,
which the government has been criticised for
and which have caused concern for business
in terms of calculating and paying leave in
accordance with the new standard. So some
of amendment (12) is an improvement on the
current act and some makes a return to pre-
reform conditions. There do seem to be a
couple of negatives within that amendment,
such as giving the minister greater power
under section 12(4) to exclude more catego-
ries of shiftworkers.

Government amendment (13) clarifies re-
relationships between standard and pre-reform
certified agreements; ensures that employees
may waive both requirements of a workplace agreement and the requirement to have the information statement for seven days; deals with notional agreements preserving state awards; and makes other miscellaneous technical changes. Again, without sufficient time to consult and examine the consequences of this amendment, it is difficult for us to form a final opinion. The parts of the amendment which we consider to look attractive are amendments which will require an employer to give a copy of an AWA to their employee and provide for penalties if they do not do so; those which allow employees to terminate AWAs as provided in the AWA or on 90 days notice after the agreement is expired; those which broaden public holiday provisions by allowing public holidays to be observed on substituted days when those are provided in state legislation; and those which increase penalties for contravention of the regulations.

Areas of concern include where an employer lodges the AWA and there is no way of checking if they lodge the correct one until it goes on the web. It was meant to deal with the issue of the OWS taking four months to put contracts up on the web, but the provision is convoluted. A simple solution would have been to require both the employer and the employee to sign a statutory declaration. I have a few other remarks to make but, in broad, I hope that indicates that we think it is a bit like the curate’s egg—there are parts of the egg we are not sure how to evaluate.

Senator WONG (South Australia) (12.00 pm)—I understand that Senator Siewert will want to make a contribution as well, but there are some comments I want to make in relation to the substance of this tranche of amendments. Senator Murray has laid out some of the background in relation to redundancy, and the government has been embarrassed by the Radio Rentals and the Tristar circumstances, which have had a significant amount of media and public attention. As I understand from the minister’s contribution and from the supplementary explanatory memorandum, amendment (10) tries to improve the situation for employees. Labor has a range of issues and concerns with these provisions, as with the Work Choices effect on redundancy entitlements which have been hard-earned and often negotiated in good faith by employees.

I think this has been demonstrated by the Tristar situation. I understand both from advice I have received and from the public discussion that with Tristar you have an agreement that has been in place for a number of years, negotiated by the employees and their union with the employer and relied on in good faith. The profile of the workforce is that you have quite a lot of people from non-English-speaking backgrounds and a number of employees with very long years of service. As I understand it, the employer has sacked the employees who have been at the workplace for only a short period of time, while the long-serving employees, as Senator Murray pointed out, continue to be in employment, despite the fact that there is little or no work being conducted, and the employer has applied to terminate the agreement.

The first question—and I wonder whether after I sit down the minister could address this—is whether it is the government’s intention by moving this amendment to avoid the Tristar situation. Does the government have any advice as to whether or not this amendment will protect Tristar workers? I would appreciate it if, in answering that, the minister could give the government’s view on the fact that the insurance bond protecting employee entitlements at Tristar expires on 30 December and our understanding is that there will then be no money to pay the employees. Does the government intend this
amendment to deal with circumstances such as Tristar? Does the government consider that this amendment will protect those long-serving employees at Tristar who continue to be engaged apparently to avoid reasonably generous redundancy entitlements? It appears the minister is getting some advice on that, so perhaps while he does that I will deal with the stand-down provisions, unless Senator Siewert wants to intervene at this point.

Senator SIEWERT (Western Australia) (12.04 pm)—The Greens will be opposing these amendments. These address a mixture of what were apparently drafting issues—and I will come back to that in a minute—and of substantive changes to the act, such as the stand-down provisions and the cashing out of carers leave and sick leave. The drafting errors are a result of legislation hastily rushed through last time, and both Senator Wong and Senator Murray have addressed this issue as well. As we all know, it was a large piece of legislation given very little time for review. About 700 pages of amendments with 40 minutes notice were dumped on us in the committee stage of the Work Choices legislation. At the time we all very carefully articulated our concerns that we had not had time to review them and that there would be drafting errors in the process. Surprise, surprise—of course there were drafting errors.

Then, to compound that, these series of amendments were given to us with about 40 minutes or less notice as well. Not only were those amendments attending to drafting errors; there were as I said substantive changes. We have not had time to adequately consider those substantive changes, and the point is that those substantive changes have not been out for community consultation and have not been subject to committee review. We managed to pick up some drafting errors last time—textile outworkers are a very good example of what was picked up last time through the committee process, and a number of other issues were also picked up—but this time the normal committee process has been circumvented and it has not been subjected to that, so we have not had time to see whether there are any substantial drafting errors and to make fixes.

It makes me wonder whether the stand-down changes in amendment (11) are the result of rushed drafting or whether it is intended that they be so wide open that they are absolutely certain to be subject to abuse by employers. People can be stood down for a downturn in work, ‘a breakdown of machinery’, ‘a strike or industrial action or any ‘stoppage of work for any cause for which the employer cannot reasonably be held responsible’.

Look at a breakdown of a piece of machinery as an example. As I articulated previously, I am deeply concerned that an employee could be held responsible for a breakdown of a piece of machinery. We have not had time to look at whether that would mean that a breakdown of a piece of machinery is not a cause for a stand-down or whether that overrides a stoppage for which an employer cannot be held responsible. I would argue that, if the machinery was being properly maintained, it is less likely to break down. However, I believe this is open slather for employers to abuse and be able to use any excuse to stand down any employee.

The same goes for carers leave and sick leave. I have heard both sides of the argument, but I have not been convinced by the side that supports being able to pay out sick leave. I think this is an essential part of what we should take as standard conditions in the workplace. That is, if people are sick they are entitled to take sick leave. The point is that nobody actually knows when they are going to get sick. If we knew when we were going to get sick, we could just wad it out as leave. But we do not: we do not know what the se-
riousness of the illness will be; we do not know when it will occur or with what frequency; and we do not know whether it will require a longer amount of leave.

I have heard several stories over the last couple of days of people saying that they have relatives who have suddenly become sick. In one case, the person has cancer and therefore needs to use their leave. Particularly when you are young, you never think anything is going to happen to you. You think you are well; you think you are healthy: 'Why do I need sick leave?' So in particular I am extremely concerned about young people being encouraged to think: 'Oh, it will never happen to me; I will trade some in.' I am also concerned about what it means for women, in particular those with family and carer responsibilities who might be tempted or subtly pressured into cashing out their leave. This would then directly impact on their caring abilities and their family relationships. It makes the family-workplace balance even harder than it was before—even harder than Work Choices has made it since last year.

Rushing this process through like this adds insult to injury. We could not properly analyse the first set of legislation, and now we have not been able to properly analyse this set of amendments. There are other concerns around clause 10, dealing with redundancy. I know there are a number of concerns around about what this actually means beyond some of the other issues that have been raised and what it means in terms of the supposed new greenfield arrangements. We went through a lot of debate during the last debate over Work Choices about the concerns we all had about greenfield arrangements. It affects what happens following a takeover or transfer of ownership of an existing business. We have not had time to analyse those provisions adequately. We have had no community input. We have not been able to go to experts to check on this legislation in the same way that the committee was able to get in experts over the Independent Contractors Bill and over the original bill in the first place. Despite the fact that the government did not take on many of the recommendations that came from those experts, at least we were able to talk to those experts and get their expert opinions.

We have not been able to do that on this substantive set of amendments. We do not know whether the amendments that are being brought in to fix the previous drafting arrangements actually fix them adequately. Other things that have been slipped into this package of amendments that do not specifically address independent contractors are not only on stand-downs and sick leave but also on the ability to waive your right to a seven-day review of your AWA. Again, this was another very big point of concern the last time we debated this legislation. Now this so-called drafting oversight is brought to us as well. We have not had time to analyse that. The community has not had time to assess it.

I do not believe this is the appropriate way to make legislation. The Senate process is being abused: not only do we now have the shortening of time in which committees can assess pieces of legislation—very short notice—but now we have circumvented the committee process altogether: 'Just slip these amendments into a piece of legislation that is currently being debated and give no-one time to look at them. Give no-one in the community time to look at them. Give no-one time to go to experts to have a look at them, and give nobody time to report to the Senate on what these amendments actually mean.' This is a bad way of legislating. It is likely to introduce more drafting errors into this already complex, error ridden legislation and it does not do anything to improve workers’ rights in this country. In fact it substantially under-
mines those rights. There are a few positive amendments in this package. Those are substantially and totally undermined by the negative amendments, such as the provisions on stand-down and cashing out sick leave, and by many others.

Senator WONG (South Australia) (12.13 pm)—The amendments we are currently discussing—I have dealt with the redundancy provisions—also include amendments relating to a stand-down power. Proposed new section 691A of division 7 sets out the powers of an employer to stand down an employee because of: a strike, a breakdown of machinery or any stoppage of work for any cause where the employer cannot be held responsible. There are a number of comments I want to make about this. First, it seems to the opposition reading this amendment that it is quite clear that it effectively gives employers the power to stand down their employees in quite a wide range of circumstances. It is a significant tilting of these arrangements in favour of the employer. We are extremely concerned that the move could further undermine job security. There is nothing in this amendment for employees.

There is one particular detail I want to focus on, and that is new clause 691A(1)(c)(ii). This essentially has the effect of saying that, even if you and your employer have agreed to a provision which deals with the process of stand-down—one that says, ‘There has to be this discussion or this notification,’ and the employer has the right to stand an employee down but first they have to go to the commission, a state industrial authority or another body which has been agreed—that agreement has no effect. That is the effect of the combination of clauses 691A(1)(c) and 691A(5). So even if you have an agreement with your employer to undergo a process before the employer can stand down employees—a process which includes going to the commission, a state industrial authority or another body which has been agreed—these clauses say that you do not have to comply with that.

It is interesting to note that this government gives a lot of weight to the notion of freedom of contract when it suits it. It gives a lot of weight to the notion of freedom of contract where it is the employer’s freedom to offer an AWA which removes entitlements. But here, where these are agreements which might give an employee some protection in terms of a process or a third party being involved prior to a decision by an employer to stand an employee down, the government say, ‘No, we want to bypass that.’ It is a bit like—and I think we had this discussion previously—the prohibited content provisions of the, ‘Work No Choices’ legislation which enable the minister to determine that something that has been agreed between industrial parties is prohibited content and therefore has no effect.

Again, as I said, the government are very happy to talk about freedom of contract when it comes to the Commonwealth Bank offering AWAs which remove 46 award provisions, including penalty rates, rostered days off and overtime. They are happy to talk about freedom of choice in those circumstances, but in other circumstances where there have been agreements made which give employees certain rights and entitlements they are also very happy to use the power of the legislation to override those rights—as, we would say, they have done in effect in a whole range of areas in the Work Choices legislation.

We are extremely concerned about the stand-down provisions. We on this side of the chamber are vehemently opposed to them. We think they unfairly tilt the balance of power in favour of the employer. We think there is very wide scope for those provisions to be misused and we will be opposing them.
So I ask the minister, if other senators are not making any further contribution on these amendments, whether he could respond, particularly to the Tristar redundancy issue that I raised.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.18 pm)—There are a whole host of issues to respond to in this segment of the debate. First of all we had a degree of rhetorical flourishes from senators generally, and I do not want to go into too much detail in responding to those other than to say that Minister Andrews did in fact issue a press release some 17 or 18 days ago indicating these releases. I might add that it was not just a normal one-page press release; it was a four-page press release. So there was some extensive material covered in that.

I was delighted to hear senators saying that on some occasions they believe the Senate committee system works and on others it is an absolute disgrace. Of course what that indicates is that when they get their way the system works and when they do not get their way it does not work. Really it is a bit of a churlish and childish argument. What I think we now have, by way of agreement, is that we accept that the Senate system is still working and working very effectively. When the Senate committee system comes up with good ideas, we as a government of course will take them on board. But we are the government that have been elected and we have to make the decisions as to whether the decisions thrown up by Senate committees are good, bad or indifferent. It stands to reason that from time to time we will say, ‘Good idea, we’ll adopt it,’ and at other times we will say, ‘Bad idea, we won’t adopt it.’ I do not think it a robust approach to the criticisms that are being sought to be made to try to say that the Senate system does not work when we reject certain proposals.

On one other matter—and I do not want to be too technical here, but just so that people listening do not misinterpret this—if I recall Senator Murray correctly, he talked about the High Court granting the power. In fact the power is granted in the Australian Constitution as voted for by the Australian people. The High Court’s role is to either confirm or deny whether that particular power exists. They do not have the power to actually grant extra power to the federal government. Suffice it to say there are previous examples of federal governments, especially of the other persuasion, using the corporations power in the area of industrial relations.

Dealing now with the comments made mainly in relation to schedule 10, this is a new protection of redundancy that in fact has not existed before. The government is concerned that employees bound by agreements may lose redundancy entitlements where the agreement is terminated by an employer and no replacement workplace agreement is made. If an agreement is terminated, an employee may no longer have any redundancy entitlements regardless of their length of service with their employer. Therefore, in order to protect employee entitlements, the amendments proposed by schedule 3 will preserve the operation of agreement based redundancy provisions for a maximum period of 12 months after the agreement is terminated.

Agreement based redundancy provisions will only be preserved where an employer unilaterally terminates the agreement. The government is primarily concerned that employers may seek to terminate an agreement unilaterally—that is, without an employee’s consent—in order to avoid meeting their obligations with respect to redundancy pay. Any redundancy provision in a workplace agreement, pre-reform Australian workplace agreement, pre-reform certified agreement or preserved individual or collective state
agreement will continue to operate post termination of the agreement. Redundancy provisions mean all provisions relating to redundancy pay where the entitlement or obligation crystallises because of a termination or proposed termination of employment at the initiative of the employer on the grounds of insolvency or genuine operational reasons. This definition is consistent with the allowable award matters definition of redundancy pay in items 9, 19, 21 and 22. All machinery and incidental provisions will also be preserved in order to ensure the workability of the provisions.

Moving to the contributions of honourable senators, just for a moment there I did think Senator Sterle was having a lucid moment when he indicated that he was agreeing to the government’s amendments, and I was shattered when I found out that he was in fact dealing with some other amendments. I look forward to his support in relation to those. In relation to Senator Wong’s comments, we are not embarrassed by moving amendments. We as a government have always said and always accepted that, when you bring in reform legislation, be it the goods and services tax or indeed Work Choices, there will be need for amendments when and as things come up. We as a government seek to be flexible and react to those situations as they arise, and I think this is a clear example of the government being responsive to some genuine concerns.

Senator Wong raised the Tristar situation. My advice is that Tristar employees will be protected by these amendments. The redundancy provisions at Tristar are in a pre-reform agreement. It can only be terminated by order of the Australian Industrial Relations Commission. The Tristar company has guaranteed the entitlements in an insurance bond. The union agreed to this arrangement when it make the pre-reform agreement. If Senator Wong thinks the union’s agreed arrangement is inadequate, I invite her to take that up with the relevant union, which I understand is the AMWU. In relation to the Radio Rentals circumstances, I understand their employees and their unions reached a new agreement which dealt with redundancy matters.

Senator Siewert talked about a number of issues. The one that I will deal with quickly is the issue of sick leave being able to be traded away. As I understand it, at all times an employee will need to have in their, if you like, bank balance of sick leave a minimum of 15 days. Anything above that can be traded away but only in circumstances where the employee is agreeable to that taking place. This, of course, is portrayed by some as the harshness of the Howard government et cetera. I say to those senators opposite: guess where we got the idea from? Out of a pre-reform industrial award negotiated by a trade union.

If you want to visit all that rhetoric upon us as the Howard government, have the decency and honesty to do so as well with the trade union movement. But you will never do that because all you ever want to do is, unfortunately, besmirch the Howard government and say this is extreme legislation, when of course these extremes are picked out of some of the better award provisions that exist around the country negotiated by the trade union movement. I just wish there was a bit more rigour and also a bit more acknowledgement in the debate as to how the industrial relations system in this country has moved on to where trade unions themselves have seen the benefit of allowing workers to trade off their sick leave entitlement whilst ensuring that there is at all times a balance of 15 days.

In relation to the stand-down provisions, it is interesting once again to be informed. Senator Siewert and I think Senator Wong
took delight in going through some of the bases on which workers could be stood down. As I have asserted about those on the opposite side from time to time, what they do is they tell half the truth, not the whole truth. What they say is that the employer has the capacity to stand down in a whole range of circumstances. That is true. What they will not tell you is that, if the employer does so unlawfully, penalties apply. Therefore, if an employer seeks to abuse those provisions and not abide by the tight provisions contained, they suffer a real penalty. I would invite those senators, when they engage in the detail of this debate, to tell the whole truth, to indicate the totality of the provisions and not just half.

In relation to the standing down of employees, I could have fun and ask where you would find the following:

14.2 An employer may deduct payment for any day or part of a day on which an employee cannot be usefully employed for the following reasons …

14.2.2 a breakdown of machinery—

I think that was an example Senator Siewert referred to—

14.2.3 rationing of power or the lack of fuel or transport;

14.2.4 any cause for which the employer cannot reasonably be held responsible …

How wide is that? How outrageous! This is the sort of thing you would expect from the extreme right-wing Howard government that wants to grind the workers into the ground. Oops, sorry—problem: it was a horticultural industry AWU award negotiated in the year 2000.

So if you want to visit all this empty rhetoric upon the government, do your research and find out that some of these provisions are in fact contained in industrial awards that are six years old and have worked well. In reading union negotiated awards and advising ourselves about the different awards and different approaches, from time to time we have found good information and good ideas in them—and we are willing to adopt them. But, when we adopt union award provisions, do not come in here and visit upon us all this rhetoric about our somehow being extreme. If you want to do that, you will have to look in the eye the trade union officials who negotiated these awards and say, ‘You’re no better than John Howard.’ I do not know which particular union negotiated this, but chances are, like John Howard, the trade union officials were concerned to get the best possible deal for the workers. That is why it is in these awards and that is why it is in this legislation as well.

The amendment would insert a right for employers to stand-down employees without pay in the circumstances outlined. The scope of the provisions is similar to the stand-down clause in the Metal, Engineering and Associated Industries Award 1998—an even earlier award which has been in operation for some eight years. The amendments provide a number of remedies to deal with unauthorised stand-downs—and that is the counter-vailing or balancing provision. As a result, the claims being made by those opposite are even more extreme than what they say about the government’s legislation. A lot of this is, of course, informed by what has been in the industrial system for quite some time. If the Howard government adopts in legislation the views and approaches of trade unions in particular awards, it is deemed to be extreme, nasty and grinding workers into the ground. But, of course, if trade union officials negotiate these agreements then somehow it is all okay. There is in fact enhanced protection in relation to stand-downs, which has not been provided for before, by providing the penalties I have referred to in relation to any
breach of the particular parts of the schedule that are being referred to.

Senator WONG (South Australia) (12.33 pm)—We might be able to vote on the bill fairly soon, but a number of the things that have been put by Senator Abetz require a response. He is quite mendacious in the way he has constructed his argument. Senator Abetz is very good at picking up on one aspect of something that has occurred previously and using it to put his point. The example he often uses is that unions have previously negotiated these types of provisions and, therefore, we should support them in the legislation. So, often, he conveniently overlooks anything that might have been negotiated in addition to those provisions. It is extraordinarily inaccurate to argue that, because penalties might have been traded away in a previous union agreement, it is okay for the government to give employers the ability to unilaterally remove penalty rates—that if penalty rates or other entitlements had been dealt with under the pre Work Choices arrangements by unions in general, you would see a range of other additional entitlements that they received, and unions or employees might say, ‘We agree to have a lower level of penalty rates across the week in return for other entitlements.’

But Senator Abetz never talks about what other entitlements or advantages the employee gets. Remember that the context prior to the ‘Work No Choices’ legislation was that there was a no-disadvantage test—a test against the award—so you could not be worse off overall. That is what the government removed. So now you can have an agreement where you are worse off. That is the core of the government’s legislation. What you are saying is that you want employers to be able to tell employees they are going to remove penalty rates, overtime rates, shift allowances, leave loading, redundancy, rostered days off and so on. But guess what? The Howard government does not think you deserve any compensation for it. That is your policy, so do not come in here, Senator Abetz, and say that unions used to do this, or this used to happen, because you know that the context was entirely different. The reality for employees was entirely different. People were entitled to get something for something. If they gave something away, they were entitled to get something for it. Your legislation says, ‘Give it away without getting anything back’—and you know it.

Senator Abetz says that the government legislated five minimum conditions. Whoopie doo! Through awards, employees had so many other conditions as a matter of right—well above the minimum five conditions. So do not come in here and say to people, as if they have been given something, that they have five conditions in law. They had them anyway—and many more. You just took away the many more. You chucked a few conditions into some legislation and tried to tell people that you were making things better. The reality is that you are actually making things worse. If we are going to talk about what has occurred under previous agreements, perhaps we could have a little more honesty and detail in the debate. Senator Abetz could acknowledge that, previously, where things were given away, people had to get something for it—but now they do not.

I think Senator Abetz, because he can never resist having a whack at a trade union—he is like Pavlov’s dog; you say ‘trade union’ and he jumps up—

Senator Abetz—I was supporting them.

Senator WONG—You see! Trade union, trade union—we will see if he jumps up. I think he had a whack at the AWU in his rant, saying that if there was a problem with Tristar we should talk to them. The question I was putting to him, and he successfully
avoided it, was whether or not these provisions would protect those Tristar employees.

In the context of the Tristar agreement, I do not necessarily want to get into the employer’s mind and discern their intention, but you could take a pretty good guess at why they have all the long-standing employees still employed so that they will pass the period in which they will be entitled to receive reasonably generous redundancy entitlements, after having dismissed everybody who does not have a reasonably generous redundancy entitlement. It does set off a few alarm bells as to what the employer is doing. The question is: is the government going to allow the kind of behaviour to occur which is clearly designed to undermine the employee’s redundancy entitlements and to disentitle these employees from redundancy? The minister says, ‘Well, it is a pre-reform agreement.’ You are putting provisions into this legislation which are supposed to be about preserving redundancy entitlements. My question is: are they going to preserve these people’s redundancy? Instead of just whacking a union, maybe answer the question, because there are a few employees who have worked for this company for a great many years who might actually like to know the answer. I think those are all the issues at this point I want to respond to Senator Abetz on.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.38 pm)—Just briefly, there are some things that do need to be responded to. I invite anybody to look at the Horticultural Industry (AWU) Award of 2000 and the Metal, Engineering and Associated Industries Award of 1998 and to go through the stand-down provisions and find any argument as to how they are materially different from those which we are proposing in this legislation. I will not be holding my breath for an answer.

In relation to the no-disadvantage test, yes, we did remove it, but once again it is only half the story. The opposition will not tell you—until interjected upon—that it was replaced by five basic minimum conditions and an Australian Fair Pay Commission that will set standards et cetera beyond which you cannot contract. In relation to Tristar, I in fact did respond to all those matters. This seems passing strange. If we did not legislate at all and if we did not have a package of amendments being debated here now, would the Tristar employees be any better off? The simple answer is absolutely not. So to somehow try to portray this legislation as being an affront to Tristar workers is absolutely disingenuous.

In relation to Work Choices, we have had the arguments time and time again in this place about whether or not workers are better off. What I do know is that since Work Choices came into being there have been another 200,000 jobs created in this country. Unemployment is now at a historic 4.6 per cent low and real wages are continuing to go up. Since the Howard government came to power, with all its industrial reforms, workers have enjoyed a 16.5 per cent increase in real wages over 10 years. During the 13 years Labor was in government, with a trade union movement with its feet under the cabinet table, the workers got a 0.2 per cent real increase in wages. That is why when the workers of this country look at their pay packets each week or each fortnight they see real wage increases the like of which the Labor Party could only dream of. Labor could only dream of it and we actually delivered it, because we were willing to make the tough decisions to reform some of the tax and industrial relations practices in this country.

The only thing I would ask my fellow Australians to consider in this is: if workers are so much worse off today under the Howard government, why is it that industrial dis-
putation in this country over the past 10 years has been at the lowest level since records were first kept in this country? You would have thought that if workers were dissatisfied there would be a huge spike in industrial disputes. In fact, it has come right down and it is at its lowest level since records were first kept. That is the record of the Howard government, and we stand by it. We are proud of that record, we are seeking to ensure at all times that workers are looked after, and the record of the government speaks for itself.

Senator STERLE (Western Australia) (12.42 pm)—The minister accuses us on this side of taking out little bits and pieces that suit us. But I will take you to task, Minister. I will tell you why we have had the lowest level of industrial disputation over the last 10 years. It is because, when the Labor government introduced enterprise bargaining, one of the key clauses in every enterprise bargaining agreement was a dispute resolution procedure. All the hotheads can cool down while we go through the process and work resumes as normal—work carries on. It is amazing how it can diffuse a problem when someone is unfairly dismissed or when there is a problem for some other reason. Minister, you are very good at picking out the bits and pieces that suit you but, with your government's latest shenanigans and Work Choices, I would like to know what the rest of Australia might think.

We are in a boom now in certain states of Australia. In my state of Western Australia and in the state of Queensland there is a wonderful boom. I do not think it is all that wonderful in Victoria and New South Wales. I hope it does pick up, but one thing I will leave you with, Minister, is the question of what will happen to our children. What will our children be confronting? What will they face when they leave school, and how the heck can a 15-year-old negotiate with the likes of the Commonwealth Bank of Australia? Answer that one, Minister.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.44 pm)—I will respond very briefly. This is the dishonesty of the Australian Labor Party being yet again displayed in this place. Child labour laws are not the province of the federal government. I have said this time and time again during this debate, and Labor senators deliberately seek to deceive the Australian people by saying that this somehow will impact on that. It is the responsibility of state Labor governments to deal with child labour laws. If there is a problem with child labour laws, do not point at us; point to your Labor premiers all around the country.

Let me indicate to the honourable senator opposite that when his Western Australian mate—the honourable senator's soon to be former leader—was employment minister under the previous Labor government, 104 working days were lost per 1,000 employees. That was under the Labor government with the regime that they introduced that is so good. Do you know what it is today? It is now 3.1 days. It is still the same regime that Senator Sterle promotes to this country as being the reason that industrial disputes are so low. If that is the case, explain to me why under your regime, while you were in government and while Mr Beazley was employment minister, this country used to have to endure 104 lost days per year per 1,000 employees, whereas today that figure is right down to 3.1. I will tell you what changed: the government changed. We have made reforms, workers are getting paid more, they know they are better off and as a result there is no longer the need for industrial disputation at the levels that we used to have to endure when Mr Beazley was employment minister and the Labor Party, with the trade union movement, used to run this country.
Senator MURRAY (Western Australia) (12.46 pm)—Regarding a previous remark that I made, Minister, I cannot remember exactly what I said but you thought that I had said that the High Court had granted the power. I am obviously aware that the High Court does not grant a power; they confirmed a power and enlarged it, in my view. That was the view of two of the minority judges, and I agree with them. That is where we are.

Returning to the nature of the debate, the minister’s job is to talk up the benefits of the Work Choices legislation. Minister, I want to ask a question that you might consider taking on notice, because I very much doubt that you will have the information available right now. As I understand the minister, the minister has claimed that 200,000 jobs have been created as a result of Work Choices—not since Work Choices but as a result of the introduction of the Work Choices legislation. My understanding is that somewhere between a quarter and a third of all employees are still under state industrial relations law. Perhaps the government could confirm whether that is so and be specific about how many are under laws which are not the Work Choices law. Secondly, I understand that there is a substantial swathe of workers still under transitional arrangements. In other words, they are under certified agreements and other industrial instruments which are still subject to the pre Work Choices regime. Therefore, it would seem to me that perhaps a minority or perhaps a small majority of all employees in Australia are not yet affected by Work Choices. Can you tell us how many workers fall under Work Choices in each state and how many do not, bearing in mind the fact that many people are still on transitional arrangements?

Following on from that, once all those people have been through their transitional arrangements, how many more jobs will that create? As I understand it, you are saying that as soon as people move on to Work Choices large numbers of extra jobs are created. I would like to know how many extra jobs will be created when those people move out of the pre Work Choices regime into the Work Choices regime. The minister knows what I am on about. Essentially, my belief is that you are entitled to say that your changes to law are assisting the creation of jobs. My difficulty is that I do not think that you are entitled to say that Work Choices has created 200,000 jobs. Many other circumstances come into play there. The point has been made that in some of the states, such as New South Wales, there are actually negative effects on job creation at present. But I would like to know the actual figures. If the minister was able to refer that to the department and provide that in due course, I would be grateful.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.50 pm)—I had thought that I could respond to Senator Murray. The advice is that about 85 per cent of workers are under the Work Choices legislation. That is my advice from the department. Therefore, about 15 per cent are not. I was quite confident, but then you asked a further question about the division between each of the states. Believe it or not, I do not carry that figure in my back pocket with me. I will accept Senator Murray’s chastisement that possibly it is not appropriate to claim that all the jobs that have been created since Work Choices are as a result of Work Choices. I accept that point. However, I would ask the Australian people to consider this: why did the unemployment rate in this country hover between five per cent and 5.3 per cent for well over 18 months—it was for about 20 months—and we could never break the five per cent unemployment barrier? Work Choices came in, and we are now down to 4.6 per cent. I invite people to ask
what changed since 27 March 2006 such that we have seen that huge spike in employment other than the new environment in which employment now operates under—namely, the Work Choices legislation.

In my assessment, the overwhelming reason for the huge spike in employment—the huge decrease in unemployment—was the removal of the unfair unfair dismissal laws, because, as soon as employers felt confident that they could dismiss an employee who was not performing, guess what? They were a lot more willing to employ. As a result, whilst I will not claim this for all 200,000 people who have got jobs since Work Choices came into being, I have a funny hunch that a fairly substantial proportion of them have got employment as a result of our reforms.

Senator MARSHALL (Victoria) (12.52 pm)—I also have a question for the minister, just to clarify some of his previous responses. Minister, can you confirm whether it is the case or not that someone under the age of 18 can enter into an AWA?

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.53 pm)—A person under the age of 18, I understand, can enter into an AWA as long as the AWA is countersigned by an appropriate adult, which clearly would be a parent or, I would imagine, a guardian or somebody of that nature.

Senator MARSHALL (Victoria) (12.53 pm)—So, when the minister has told us during this debate that it is the states that govern employment law for juniors, that is clearly not true. Will the minister correct the record?

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.53 pm)—There is nothing to be corrected.

Senator MARSHALL (Victoria) (12.53 pm)—I guess people interested in the debate and are listening to the debate will know whether it should be corrected or not, but clearly the Commonwealth employment law covers people under the age of 18. The minister can try and say otherwise, but the exploitation we have seen of people under the age of 18 since this government introduced its legislation—and we will continue to see it with the independent contractors legislation—is not the responsibility of anyone other than the Commonwealth.

The other point I want to briefly touch on is the no-disadvantage test, again just to correct the record. Senator Abetz wants to constantly say that they replaced the no-disadvantage test with five minimum conditions. What in fact they replaced in the no-disadvantage test was all of the other conditions, including the five minimum conditions which they have now legislated for. They took them away. The point that was made by my colleagues on this side of the chamber is absolutely correct: if there were going to be some changes to the award structure, there had to be a no-disadvantage test applied against all of the conditions so that in total people could not go backwards. If a condition was traded away—and this happened on a regular basis—it had to be compensated for in another way so that the totality of the package remained intact. People did not go backwards. People were unable to go backwards in totality under the old legislation.

Work Choices has taken that no-disadvantage test down to five minimum conditions. We see with the Commonwealth Bank issue that is bubbling away at the moment that 46 award conditions are going to be removed under the AWA and then tested against five conditions. For the minister to try to argue here, very disingenuously, that there is no real quantitative difference in what used to happen under the old legislation and what is now happening is simply wrong, and it simply seeks to mislead people about the truth of the effects of this legislation.
Senator SIEWERT (Western Australia) (12.56 pm)—I would like to ask what definition of employment we are using. Are we using the standard ABS definition of one hour per week?

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.56 pm)—As I understand it, the definition of employment that is used by the ABS is that which has been used for 30 years, so it has been the same methodology. If you have problems with that, I can understand that, but, if you want to compare like with like, that is what we have been doing in this country for the past 30 years. To Senator Marshall I indicate that AWAs do not override, as I understand it, the state legislation, and you would still need a permit in Victoria.

Senator SIEWERT (Western Australia) (12.57 pm)—Yes, I understand that it is the same definition that has been used for 30 years, but the point here is that there has been a significant shift in employment, a strong shift to casual and temporary employees. If anybody working an hour a week is classed as employed, I do not think that is an accurate reflection of what our employment market is in the year 2006.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (12.57 pm)—Very briefly on that: out of the 200,000 jobs that I have been quoting—and I do not think people have much difficulty with that figure—the interesting point is that 178,000 are in fact full-time jobs. That is a very significant proportion. With the figures of, I think, two months ago, there was a substantial reduction in casual employment, but that was offset by a huge increase in full-time employment, which I think confirms my thesis that, as soon as employers felt confident they could dismiss employees in circumstances where they were not up to scratch or failing, as soon as that shackle was removed from them, a lot of people who used to have casual jobs all of a sudden got full-time jobs, and that must be good for everybody.

Senator MARSHALL (Victoria) (12.58 pm)—I was not going to speak again, because I know people would like to go to a vote, but that has to be challenged. What has really been happening is that, under Work Choices, casuals are being converted to full time because under Work Choices there is no requirement to pay the casual loading now. You can spread the hours—and we have had this debate—split shifts and average people’s working hours over 12 months. What has been happening—and we see it all through the workplace—is that people who were working casual hours have simply been converted to full time on flexible hours, because you can spread the hours over 12 months and avoid paying the casual leave loadings because there is no requirement for that under this government. For this government to say that Work Choices has resulted in a conversion of casual to full time and that that is a good thing is simply a misrepresentation of what is really happening in the workplace.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (1.00 pm)—I have to correct the record. I said that 178,000 of those jobs were full time. I have been corrected by advisers in the advisers’ box: in fact, it was 184,000 who got full-time jobs. So the figures are even better. What Senator Marshall has just said defies belief, because I think it was the current deputy leader of the Labor Party, Jenny Macklin, who on TV said, ‘Casual jobs ain’t real jobs.’ That is what the Labor Party have been saying.

Under this government, employment growth started off with casuals. And we were beaten around the head for having extra casuals. Now that the casuals are leaving and
becoming full time, once again it is a conspiracy against the workers! The Labor Party really have to get their lines right on this. I suggest Senator Marshall have a chat with Jenny Macklin, get their lines right and then tell us what stance the Labor Party takes on this. Having said that, despite the provocation that might come from the other side, I will desist from responding so that we can get to a vote.

The TEMPORARY CHAIRMAN (Senator Lightfoot)—The question now is that government amendments (10) to (13) be agreed to.

The committee divided. [1.05 pm]
(The Temporary Chairman—Senator PR Lightfoot)

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AYES
Adams, J. Barnett, G.
Bernardi, C. Brandis, G.H.
Campbell, I.G. Chapman, H.G.P.
Colbeck, R. Eggleston, A.
Ellison, C.M. Ferguson, A.B.
Ferris, J.M. Fielding, S.
Fierravanti-Wells, C. Fifield, M.P.
Heffernan, W. Humphries, G.
Johnston, D. Joyce, B.
Kemp, C.R. Lightfoot, P.R.
Macdonald, I. Macdonald, J.A.L.
McGauran, J.J. Minchin, N.H.
Nash, F. Parry, S. *
Patterson, K.C. Payne, M.A.
Ronaldson, M. Troeth, J.M.
Trood, R.B. Watson, J.O.W.

NOES
Allison, L.F. Bartlett, A.J.J.
Bishop, T.M. Brown, B.J.
Brown, C.I. Crossin, P.M.
Evans, C.V. Faulkner, J.P.
Forshaw, M.G. Hogg, J.J.
Hurley, A. Kirk, L.
Ludwig, J.W. Lundy, K.A.
Marshall, G. McEwen, A. *

McLucas, J.E. Milne, C.
Moore, C. Murray, A.J.M.
O’Brien, K.W.K. Polley, H.
Ray, R.F. Siewert, R.
Stephens, U. Sterle, G.
Webber, R. Wortley, D.

PAIRS
Abetz, E. Stott Despoja, N.
Boswell, R.L.D. Conroy, S.M.
Calvert, P.H. Sherry, N.J.
Cooman, H.L. Hutchins, S.P.
Mason, B.J. Campbell, G.
Santoro, S. Wong, P.
Scullion, N.G. Nettle, K.
Vanstone, A.E. Carr, K.J.

* denotes teller

Question agreed to.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (1.08 pm)—I move:

(6) Schedule 2, item 2, page 8 (lines 9 to 12),
omit the item, substitute:

2 Subsection 819(1)
Omit “or subparagraph 906(2)(b)(iv),
paragraph 906(2)(c) or subsection
906(4)”.

The government opposes schedule 2, item 4 in the following terms:

(7) Schedule 2, item 4, page 8 (lines 15 to 21),
to be opposed.

The TEMPORARY CHAIRMAN (Senator Lightfoot)—The question is that government amendment (6) be agreed to.

Question agreed to.

The TEMPORARY CHAIRMAN (Senator Lightfoot)—The question now is that item 4 of schedule 2 stand as printed.

Question negatived.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (1.08 pm)—I think we might have finished the government amendments. I think Senator Murray has some amendments now.
Senator MURRAY (Western Australia)  
(1.09 pm)—We are dealing now with—

Senator Abetz—Mr Temporary Chairman, I rise on a point of order. We had delayed amendment (6) and voting on item 4 of schedule 2 to allow Senator Sterle to come back into the chamber. I thought Senator Sterle had forgone the opportunity to speak. Clearly, he has not. Given that I understand Senator Sterle will be supporting the amendments, we do not have to recommit the vote, but undoubtedly Senator Sterle would want to put certain matters on the record. Allowing him to do that and then moving to Senator Murray’s amendments might be the quickest way. If Senator Sterle were to seek to do that, I would be delighted on behalf of the government to permit it.

Senator Abetz—Mr Temporary Chairman, on the point of order, I think Senator Sterle, as a new senator, does not know that being granted permission means he buys us all lunch!

Senator STERLE (Western Australia)  
(1.10 pm)—I am not that new! I thank the chamber. I rise to say that Labor supports amendment (6). I would like to follow on from the comments of my colleagues. It was interesting that, when we had the committee down here, one of the best submissions I saw was the submission by the TCFU. Mr Barry Tubner came down from New South Wales. As part of the submission they brought with them some 30 outworkers who would be grossly affected by this bill had this amendment not gone through. Once we heard from these people and saw exactly what they were confronted with, it really did make you appreciate that things are certainly not what they seem.

I make that comment because most of us shop around and get our clothes, and we think clothes are not all that expensive in Australia and we get them cheap. After that submission, I can understand why. One of the witnesses who came and put a submission to us was a lady named Kim. Kim said, through an interpreter, that she considered herself one of the better clothes workers in the outworking industry. Some figures she passed to us showed that she gets paid $3.50 for a shirt, $3 for a long skirt and $2.50 for a plain cotton shirt. Coming from a background of living in thongs, shorts and singlets, it did not really click with me what that actually meant in terms of time—the time put into making these garments. Like I said, she considered herself a very good clothing maker, if that is what I can call them. She said that she cannot complete two garments in an hour. So it did not take long to work out that Kim was working for approximately $3 an hour. The sad part about this is that they are major labels that are in the major clothing stores. It was disgraceful.

To Senator Troeth, Senator Marshall and the rest of the committee’s credit, we found this amendment coming through. I notice that my colleagues have put Senator Troeth up on a pedestal. I would comment on Senator Troeth’s effort too. I tend to think that Senator Marshall was doing a heck of a lot of work behind the scenes, but I would probably liken it to banging his head against a brick wall. Eventually, it does hurt when you find the wall is not going to move. I also note that Senator Troeth is a bit of a snappy dresser. She probably thought that, if we do not look after them, she might not be snappily dressing quite as much!

Senator Abetz interjecting—

Senator STERLE—That is why she would want to look after the outworkers. She was happy to look after the outworkers.

Senator Abetz—It’ll make it more expensive for her.

Senator STERLE—No, I think the workmanship would get shoddier—who
knows? But I think Senator Troeth and the government could have done a lot better. If we can have the moral conscience to look after those who cannot look after themselves, or those who would be exploited, why the heck did we not move and do something more for the truck drivers who are the dependent contractors around this country?

It does make me wonder why. I have no idea. I know that, in the other place, Mr Tuckey, the member for O’Connor, has been furiously working behind the scenes to get his peers to knock out any exclusion for truck drivers. I use the term ‘knock out’ very loosely, because I know that that has probably been a touchy word to use in the coalition party room lately. Mind you—if you will indulge me, Chair—I recall that in 2001 when Mr Tuckey was minister for fisheries he was talking to a group of bluefin tuna fishermen. The meeting was going well until someone mentioned bluefin and then he wanted to knock them all out. I think the wording was that he offered to take them outside for a fight. So I can understand that a lot of senators opposite were probably very touchy on having the opportunity for truck drivers to have exemptions around the country.

I do not know what is in it for the government to make them so fixated on wanting subcontractors not to be represented. Ken Phillips from the Independent Contractors of Australia really must have them on the run. He is a paid talking head. I do not know how much he is paid; I know he has been paid a large amount of money by the courier companies in Australia and has a lot to gain from this. What I do not know is what the independent contractors have to gain out of this.

I would just like to make one comment while we are talking about these government proposals. I noticed when we had the last couple of divisions that Senator Fielding from Family First in Victoria slinked into the chamber. He has not been involved in any of the debate here, but he could not wait to vote with the government. I would like to see the family impact statement on these bills. It would be interesting, because Senator Fielding has been very conspicuous in his absence. He stands there and bleats about looking after families—the families of Australia happen to drive trucks as well.

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (1.15 pm)—I thank Senator Sterle for that intervention. I think it allowed us to reflect on the quickness of the vote. It may be appropriate for us to recommit the vote—which I was suggesting against only a few minutes ago—because, if we have a look at government amendment (6), we would be inviting the chamber to vote in favour and then, in relation to item 4, I understand ‘that item 4 of schedule 2 stand as printed’ should, in fact, be the question. We would not want it to stand as printed; therefore, we should be voting no. If we could recommit those two votes, I think that would allow for clarity.

The TEMPORARY CHAIRMAN (Senator Lightfoot)—Do you wish to seek leave?

Senator ABETZ—Yes, I seek leave.

Leave granted.

Senator MURRAY (Western Australia) (1.16 pm)—I just want to remind the chamber of our earlier remark. We support the government’s proposal very strongly.

The TEMPORARY CHAIRMAN—The question is that government amendment (6) be agreed to.

Question agreed to.

The TEMPORARY CHAIRMAN—The question is that item 4 of schedule 2 stand as printed.

Question negatived.
Senator MURRAY (Western Australia)  
(1.17 pm)—by leave—I move amendments (1) to (5) on sheet 5065 revised 1 together:  
(1) Schedule 1, page 3 (after line 4), before item 1, insert:  

1J After subsection 5(1)  
Insert:  

(1A) A person (the worker) who contracts to supply his or her labour to another party is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.  

(1B) A contract is not to be regarded as one other than for the supply of labour merely because:  
(a) the contract permits the work in question to be delegated or subcontracted to others; or  
(b) the contract is also for the supply of the use of an asset or for the production of goods for sale; or  
(c) the labour is to be used to achieve a particular result.  

(1C) In determining whether a worker is genuinely carrying on a business, a court must have regard to the following factors:  
(a) the extent of the control exercised over the worker by the other party;  
(b) the extent to which the worker is integrated into, or represented to the public as part of, the other party’s business or organisation;  
(c) the degree to which the worker is or is not economically dependent on the other party;  
(d) whether the worker actually engages others to assist in providing the relevant labour;  
(e) whether the worker has business premises (in the sense used in the personal services income legislation); and  

(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising his or her services to the public.  

(1D) A court is to have regard for this purpose to:  
(a) the practical reality of each relationship, and not merely the formally agreed terms; and  
(b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.  

(1E) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person’s employer, except where this results in a direct contract between the worker and the client.  

(1F) If:  
(a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or a chain of contracts involving another entity (the intermediary); and  
(b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in subsection (1C);  
the worker is to be deemed to be the employee of the ultimate employer.  

(2) Schedule 1, page 3 (after line 4), before item 1, insert:  

1K Subsection 5(3)  
Repeal the subsection, substitute:  

(3) In this Act, a reference to employee with its ordinary meaning is a reference to an individual who contracts, or usually contracts, to supply his or her labour as an employee (within the meaning of subsections (1A) to (1F)) to an
employer within the ordinary meaning of that term as defined in section 6.

(3) Schedule 1, page 3 (after line 4), before item 1, insert:

**II. At the end of section 5**

Add:

(5) Subsections (1A) to (1F) do not apply in relation to:

(a) a law of a State or Territory, to the extent that the law applies to a services contract to which an outworker is a party; or

(b) a law of a State or Territory, to the extent that the law applies to a services contract that relates to the performance of road transport work by the independent contractor, other than a services contract to which an independent contractor that is a body corporate is a party, unless the road transport work to which the contract relates is wholly or mainly performed by a director of the body corporate or a member of the family of a director of the body corporate; or

(c) without limiting paragraph (b), any of the following laws:

(i) Chapter 6 of the *Industrial Relations Act 1996* of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of a provision of Chapter 6);

(ii) the *Owner Drivers and Forestry Contractors Act 2005* of Victoria;

(iii) any instrument made under a provision of a law referred to in subparagraph (i) or (ii); or

(d) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.

(6) Notwithstanding anything else contained in this section, a reference in this Act to employee does not include, and is not to be taken as meaning, any of the following:

(a) a person who is a party as a carrier to a contract of carriage as defined in section 309 of the *Industrial Relations Act 1996* of New South Wales and to whom that State Act (apart from anything contained in this Act) is capable of having application;

(b) a person who is an owner driver as defined in subsection 4(1) of the *Owner Drivers and Forestry Contractors Act 2005* of Victoria and to whom that State Act (apart from anything contained in this Act) is capable of having application;

(c) a person who is a haulage contractor as defined in subsection 5(1) of the *Owner Drivers and Forestry Contractors Act 2005* of Victoria and to whom that State Act (apart from anything contained in this Act) is capable of having application.

(4) Schedule 1, page 3 (after line 4), before item 1, insert:

**1M Section 6(3)**

Repeal the subsection, substitute:

(3) In this Act, a reference to employer with its ordinary meaning is a reference to a person to whom another person contracts, or usually contracts, to supply his or her labour as an employee (within the meaning of subsections 5(1A) to (1F)).

(5) Schedule 1, page 3 (after line 4), before item 1, insert:

**1N At the end of section 7**

Add:

(3) In this Act, a reference to employment with its ordinary meaning is a reference to an arrangement whereby a person contracts, or usually contracts, to supply his or her labour as an employee (within the meaning of subsections 5(1A) to (1F)).
These amendments insert a definition of ‘employee’ into the Workplace Relations Act. I outlined in full the Democrats’ reasons for doing so when I moved amendments (1) to (2) on sheet 5062 revised to the Independent Contractors Bill 2006, which was considered earlier. We have had a very full debate and, in my submission, we do not need to speak further on this. Therefore, I would appreciate it going to the vote.

Question put:
That the amendments (Senator Murray’s) be agreed to.

The committee divided. [1.23 pm]
(The Temporary Chairman—Senator PR Lightfoot)

Ayes……………… 29
Noes……………… 33
Majority………. 4

AYES

Allison, L.F. Barratt, A.J.J.
Bishop, T.M. Brown, B.J.
Brown, C.L. Carr, K.J.
Crossin, P.M. Evans, C.V.
Faulkner, J.P. Forshaw, M.G.
Hogg, J.J. Hurley, A.
Kirk, L. Ludwig, J.W.
Lundy, K.A. Marshall, G.
McEwen, A. * McLucas, J.E.
Milne, C. Moore, C.
Murray, A.J.M. * O’Brien, K.W.K.
Stephens, U. Stewert, R.
Webber, R. Sterle, G.
Wortley, D. Wong, P.

NOES

Abetz, E. Adams, J.
Barnett, G. Bernardi, C.
Brandis, G.H. Campbell, I.G.
Chapman, H.G.P. Colbeck, R.
Eggleston, A. Ellison, C.M.
Ferguson, A.B. Ferris, J.M.
Fielding, S. Ferravanti-Wells, C.
Fifield, M.P. Heffernan, W.
Humphries, G. Johnston, D.
Joyce, B. Kemp, C.R.
Lightfoot, P.R. Macdonald, J.A.L.
Macdonald, I. McGauran, J.J.J.
Minchin, N.H. Nash, F.
Parry, S. * Patterson, K.C.
Payne, M.A. Ronaldson, M.
Troeth, J.M. Trood, R.B.
Watson, J.O.W.

PAIRS

Campbell, G. Mason, B.J.
Conroy, S.M. Boswell, R.L.D.
Hutchins, S.P. Coonan, H.L.
Nettle, K. Vanstone, A.E.
Ray, R.F. Scullion, N.G.
Sherry, N.J. Calvert, P.H.
Stott Despoja, N. Santoro, S.

* denotes teller

Question negatived.

Senator MURRAY (Western Australia) (1.25 pm)—by leave—I move amendments (1) to (3) on sheet 5072:

(1) Schedule 1, page 3 (before line 5), before item 1, insert:

1A Section 762
Repeal the section.

1B Section 813
Repeal the section.

(2) Schedule 1, page 7 (after line 17), at the end of the Schedule, add:

4 Section 165 of Schedule 1
Repeal the section, substitute:

165 Simplified outline
This Chapter deals with the types of employer and employee associations that can be registered and the conditions for their registration (see Part 2). Part 2 also prohibits certain kinds of discriminatory conduct by employers and organisations in relation to the formation and registration of employee associations.

This Chapter also provides that an organisation’s registration can be cancelled by the Federal Court or by the Commission. It sets out the grounds and procedures for cancellation, and the consequences of cancellation (see Part 3).

(3) Schedule 1, page 7 (after line 17), at the end of the Schedule, add:
5 Part 5 of Schedule 1

Repeal the Part.

In a moment of levity, which a day like today can occasion, one or two of your colleagues remarked to me that they were glad I was speaking because it enabled them to finish their lunch. With respect to amendments (1) to (3) on sheet 5072, I have taken the opportunity of the government seeking to amend the Workplace Relations Act to deal with the issue of conscientious objection, because it has been very much in the news of late. I have done so because the present conscientious objection provisions in the act are directly a consequence of an agreement between the coalition and the Democrats in 1996. The Democrats believe that the conscientious objection provisions in the Workplace Relations Act are now redundant and have been superseded by the introduction of freedom of association provisions in 1997, changes to the superannuation choice laws in 2004 and changes to the right of entry laws for small business in 2005.

The history of the conscientious objection provisions is outlined in a Parliamentary Library research note on conscientious objection. I record my gratitude for their historical work. The note says that earlier versions of the federal Labor legislation promoted the formation and registration of associations of employers and employees. One aspect of this encouragement principle was that workers should contribute to the relevant union by way of membership in return for award rates and the employment conditions secured by unions. The federal law allowed awards and industrial agreements to provide for union preference until 1997, although it did not promote compulsory unionism. However, at different times state laws have promoted union preference and/or compulsory unionism.

The first organisations to complain of labour law requiring union membership were religious groups such as the Exclusive Plymouth Brethren and the Jehovah’s Witnesses. These are religious groups which apparently do not tolerate their members joining unions or, for that matter, political parties. It was the Exclusive Brethren who persuaded the Queensland government in 1948 to legislate for conscientious objection to union membership on the basis of religious beliefs. Similar exemptions were introduced in other industrial jurisdictions. New South Wales introduced exemptions in 1951. In 1956, provision was made in the Commonwealth Conciliation and Arbitration Act 1904 for exemption certificates to be granted to non-unionists. This exemption was modelled on the provision in the New South Wales act. Thereafter, other states also allowed conscientious objection: Western Australia in 1963, South Australia in 1972 and Tasmania in 1984. Victoria did not make similar provision.

A campaign for voluntary unionism, based on the beliefs of the individual and not necessarily based on religious beliefs, manifested itself in Western Australia in about 1976, where it was held that society ‘can no longer tolerate a situation where it sits and has no freedom to work except under a licence from a union’. These fears went to coercion, intimidation and political association. Compulsory unionism and preference were made illegal in Western Australia in 1979. Queensland weakened preference clauses in 1976 and later in 1985.

In 1997, the Commonwealth prohibited union preference and compulsory unionism in the Workplace Relations Act 1996. It repealed union preference and introduced freedom of association and freedom of non-association. The Democrats supported freedom of association and it remains one of our key platforms. I must emphasise that we remain strong supporters of the right to join a union and the right not to join a union.
I referred earlier to this matter having had some publicity. On page 1 of the Age, of 21 September 2006, journalists Michael Bachelard and Michelle Grattan put out a story headed ‘Sect’s special treatment puts union out of business’. It said:

… in 1996, the Democrats insisted the provision be kept despite then minister Peter Reith’s attempt to repeal it on the grounds it was superfluous because the closed shop had been outlawed.

That he did intend that it be outlawed is correct, but that we insisted it not be is incorrect. The fact of the matter is that, with respect to the provision exempting the Exclusive Brethren from the Workplace Relations Act on conscientious religious grounds, Peter Reith rang me late in the final stages of our negotiated agreement to say he was being heavily lobbied by them and effectively wanted to be rid of the lobbying. He saw it as a minor nuisance, saw no reason not to continue past practice for a small religious group if it meant so much to them and asked whether I and the Democrats would object to their previous status being continued. I replied, ‘No.’ I saw it as a small, unimportant side issue amidst the broader controversy and bigger policy issues of the bill.

Some of the senators on this side of the chamber have always been surprised when I have publicly said that I rather liked Peter Reith. I found him an engaging and warm man, with a strong intellectual and philosophical base for his views. It did not stop us having some very feisty discussions, but I always found him good to deal with.

The problem is that Michelle Grattan and Michael Bachelard were relying on the Parliamentary Library’s understanding of matters, but they would not have been aware of the telephone calls between me and Peter Reith. Peter Reith and the coalition did intend to drop the provision and we Democrats were happy with that. Then they were lobbied and decided to backtrack, and we also accepted that. The phone call to me from Peter Reith produced the result that we now have in law.

A theme I have picked up in some of the stories about the Exclusive Brethren is that there has always been collusion or common interest between the coalition and the brethren, as witnessed by that 1996 law change. That was never my impression, and certainly Peter Reith never, ever indicated anything of the sort to me. At the time of the amendment, the government had initially sought to repeal the conscientious objection and then decided not to. In hindsight, perhaps I should have insisted on the repeal, but I had more pressing issues to worry about at that time.

The parliamentary research notes on conscientious objection state that later the federal conscientious objection provisions were to have a new function similar in nature to those in New South Wales. This happened in 2001, firstly in an unsuccessful stand-alone bill, then it was reintroduced in 2002 as a Workplace Relations Act amendment, this time attracting Labor support. Union entry was prevented where a small business employer objected to membership of organisations on religious grounds, where the employer obtained a conscientious objection certificate from the Industrial Registrar and where the employer’s staff did not oppose the denial of entry. The provision concerning denial of entry on religious grounds is at section 762 and the related provision is at section 812. About 30 current certificates are issued under that schedule, and it is advised that all have been issued on application from the Exclusive Brethren. So the conscientious objection grounds are not employed, to my knowledge, by any other religious group and, as we know, in Australia there are millions of people adhering to religious groups.
However, changes to the rights of entry laws that were introduced via the unfair Work Choices legislation in 2005 make the conscientious objection provisions in section 762 redundant, in my view. The right of entry laws now have more stringent requirements for officials who wish to obtain and then maintain an entry permit. The procedures they must follow when entering workplaces have also been tightened. Unions must obtain a permit for conditional entry to certain workplaces to investigate a suspected breach of the Workplace Relations Act or to hold discussions with employees. Unions may only enter a workplace to investigate a breach of an award or collective agreement, or of the act itself, if a member of the union is carrying out work at the premises and the suspected breach affects a union member.

If it involves an AWA worker then the worker has to request the union to investigate as per section 747(2). If all employees are on AWAs, or if there is a collective agreement to which the union is not a party, a union does not have a right of entry under the Workplace Relations Act for discussion purposes. However, the union does not need to have one member to enter for discussion purposes per section 760. It is my understanding of the Exclusive Brethren’s belief that members—and hence their employees—cannot belong to a union; therefore, under the new right of entry laws a union cannot enter the workplace of Exclusive Brethren business, because there would be no union members.

The Exclusive Brethren have also raised the issue of forced involvement in superannuation funds. At the Senate building and construction industry inquiry on 20 May 2004, Mr John from the Exclusive Brethren stated:

Because freedom of association is now enshrined in the act, union membership is not a serious issue. But the same principle of conscience applies to membership and participation in the union endorsed agreements and funds which, we believe, go well beyond the requirements of the law.

I would argue that the superannuation choice legislation negotiated by the Democrats and passed in 2004 does resolve this issue. If we ignore the political issues and just focus on the practical application of the Workplace Relations Act, the previous reasons for inclusion of conscientious objection provisions to avoid association and involvement with employee and employer associations on a compulsory basis no longer apply. My view, therefore, is that the provisions should be repealed.

The chamber is entitled to ask why I wish to bring this forward. Firstly, it is a contentious issue, according to media coverage. Secondly, the Democrats previously supported the conscientious objection provisions being in the act and I wish to advise the chamber that we no longer do. Thirdly, I believe that the way in which industrial relations law has now changed throughout the country, particularly with respect to the Workplace Relations Act, makes these provisions redundant. That is why I am taking this opportunity to move those amendments.

Question negatived.

Bill, as amended, agreed to.

Bill reported with amendments; report adopted.

Third Reading

Senator ABETZ (Tasmania—Minister for Fisheries, Forestry and Conservation) (1.39 pm)—I move:

That these bills be now read a third time.

Question put.
The Senate divided. [1.44 pm]
(The Deputy President—Senator JJ Hogg)

Ayes………….. 32
Noes………….. 28
Majority………. 4

AYES
Abetz, E. Barnett, G.
Bernardi, C. Brandis, G.H.
Campbell, I.G. Chapman, H.G.P.
Colbeck, R. Eggleston, A.
Ellison, C.M. Ferguson, A.B.
Ferris, J.M. Fielding, S.
Fierravanti-Wells, C. Fifield, M.P.
Heffernan, W. Humphries, G.
Johnston, D. Joyce, B.
Kemp, C.R. Lightfoot, P.R.
Macdonald, I. Macdonald, J.A.L.
McGauran, J.J.J. Minchin, N.H.
Nash, F. Parry, S. *
Patterson, K.C. Payne, M.A.
Ronaldson, M. Troeth, J.M.
Trood, R.B. Watson, J.O.W.

NOES
Allison, L.F. Bartlett, A.J.J.
Bishop, T.M. Brown, B.J.
Brown, C.L. Carr, K.J.
Crossin, P.M. Evans, C.V.
Faulkner, J.P. Forshaw, M.G.
Hogg, J.J. Kirk, L.
Ludwig, J.W. Lundy, K.A.
Marshall, G. McEwen, A. *
McLucas, J.E. Milne, C.
Moore, C. Murray, A.J.M.
Polley, H. Ray, R.F.
Siewert, R. Stephens, U.
Sterle, G. Webber, R.
Wong, P. Worthley, D.

PAIRS
Adams, J. Hurley, A.
Boswell, R.L.D. Conroy, S.M.
Calvert, P.H. Sherry, N.J.
Cooan, H.L. Hutchins, S.P.
Mason, B.J. Campbell, G.
Santoro, S. Stott Despoja, N.
Scullion, N.G. O’Brien, K.W.K.
Vanstone, A.E. Nettle, K.

* denotes teller

Question agreed to.

Bills read a third time.

ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT BILL
(No. 1) 2006

In Committee

Consideration resumed from 30 November.

Bill—by leave—taken as a whole.

Senator CARR (Victoria) (1.47 pm)—by leave—I move opposition amendments (1) and (2) on sheet 5151, on climate change:

(1) Schedule 1, page 5 (before line 5), before item 1, insert:

1A After paragraph 3(1)(ca)
Insert:

(cb) to protect Australia from the adverse effects of climate change; and

1B After subparagraph 3(2)(e)(i)
Insert:

(ia) establish a climate change trigger to ensure that large scale greenhouse polluting projects are assessed by the Federal Government; and

1C After paragraph 3A(a)
Insert:

(aa) decision-making processes should consider and minimise where possible the adverse effects of climate change on Australia;

1D After section 3A
Insert:

3B Climate change
The Parliament acknowledges that climate change:

(a) is the greatest threat to Australia’s natural environment;

(b) will have far-reaching impacts globally, in Australia’s region and in Australia, including:
(i) possible higher temperatures and lower rainfall in southern Australia;
(ii) possible more frequent extreme weather events such as storms, heatwaves and droughts; impacts to which Australia's natural, rural and urban environments, and many industries, are potentially vulnerable.

1E Subsection 5(5) (before the definition of Australian aircraft)
Insert:
\textit{adverse effects of climate change} means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

1F Subsection 5(5) (after the definition of Australian vessel)
Insert:
\textit{climate change} means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

1G Subsection 5(5) (after the definition of Australian vessel)
Insert:
\textit{climate system} means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

1H Subsection 5(5) (after the definition of Australian vessel)
Insert:
\textit{emissions} means the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time.

1I Subsection 5(5) (after the definition of Australian vessel)
Insert:
\textit{greenhouse gases} means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

(2) Schedule 1, page 16 (after line 14), after item 67, insert:

67A After section 25A
Insert:

25AA Requirement for approval of climate change actions
(1) A person must not knowingly, intentionally or recklessly take a climate change action that has, will have, or will be likely to have, a significant impact on the environment.
Civil penalty:
(a) for an individual—5,000 penalty units; or
(b) for a body corporate—50,000 penalty units.
(2) Subsection (1) does not apply to an action if:
(a) an approval for the person to take the action is in operation under Part 9 for the purposes of this section; or
(b) Part 4 allows the person to take the action without an approval under Part 9 for the purposes of this section; or
(c) there is in force a decision of the Minister under Division 2 of Part 7 that:
(i) the action is not a controlled action; or
(ii) the action is a controlled action but this section is not a controlling provision for the action.

25AB What is a climate change action?
A \textit{climate change action} means either of the following:
(a) establishing an industrial plant or other facility which emits, or is
likely to emit, more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year; or
(b) any other action, series of actions, or program of actions, which will lead, or are likely to lead, directly or indirectly, to the emission of more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year.

25AC Requirement for decisions about climate change actions
(1) In deciding whether or not to approve for the purposes of section 25AA the taking of a climate control action, and what conditions to attach to such an approval, the Minister must consider whether the direct or indirect emissions of carbon dioxide or carbon dioxide equivalent that are likely to result from the action will be minimised by the use of best practice environmental management and low emissions technology.
(2) For the purpose of subsection (1), best practice environmental management and low emissions technology are management and technology to achieve an ongoing minimisation of the emissions of carbon dioxide or carbon dioxide equivalent through cost-effective measures assessed against the measures and technology currently used nationally and internationally.

These amendments moved by the opposition will restore the five-yearly review of the matters of national environmental significance to ensure that the EPBC Act evolves to be able to consider new triggers for environmental protection. The opposition takes the view that legislation has to be able to adapt to changing circumstances and it is unfortunate that legislation of this type and complexity has been negligently put together in such a form whereby in 409 pages the government has failed to deal with the issue of climate change. It is the view of the opposition that the EPBC Act needs to be able to consider new triggers for environmental protection.

This was the view that former senator Robert Hill took. In 1999, when discussing the EPBC Act triggers, he stated: ... it will be an evolving situation reflecting community attitudes and what really is the best and the most appropriate mix at the time.

The act provides for a five-year review to assess the need of any new matters of national environmental significance, the key environmental challenges that trigger the act. The most recent review, undertaken in April 2005, failed to produce a report that was seen in public. There may well be a report but the government has not published its evaluation of the act, and so we can see by the amendments before the chamber that no new triggers have been added. In failing to publish the results of the review, the minister, in our judgement, has failed to fulfil his obligations under the act.

Section 28A is quite explicit. It states that every five years after the commencement of the act the minister must cause a report to be prepared on whether this part—the matters of national environmental significance—should be amended. It goes on to say that before the preparation of the report is completed the minister must cause to be published in accordance with the regulations, if any, a draft of the report and an invitation to comment on the draft within the periods specified by the minister.

As far as I can tell, Minister, none of that has occurred. In my judgement, if that assessment is correct—and I look forward to the minister responding to my question in that regard—and if the minister has not been able to fulfil the requirements of the act, he is in breach of that act. As far as I understand, rather than repealing this section of the act there needs to be an attempt made to strengthen the provisions, particularly in the
The point I make is that the climate change debate focuses—if it is focused where it counts—on two really important global challenges. Firstly, there is the challenge of providing substantially increased energy for the world. We know that, for example, there are many hundreds of millions of people in the world who do not have access to reticulated energy and do not get the benefit, as all of us do in this chamber, of being able to plug in an appliance, switch on a light, go to a refrigerator and get food that has been preserved because it has been kept cool, go to a hospital that has power provided to it or go to a workplace or an industrial facility that has power provided to it. So there are large numbers of people who do not have access to energy. We know that it is in the best interests of mankind and poverty alleviation in the developing world, and job security in the developed world, that there is an expansion of the energy used and produced in the world.

The International Energy Agency says that we will need to roughly double the amount of energy produced in the world in the next 30-odd years. However, we also know from science and particularly the work of the Intergovernmental Panel on Climate Change that, while we go down the path of producing substantially more energy, we will have to do so with substantially reduced greenhouse gas emissions. We know that to just stabilise greenhouse gases where they are at the moment—and we know that that is already causing climate change at an unprecedented rate in human history—we will need to find abatement over the next 35 or 40 years of around seven billion tonnes per annum. To simplify and clarify the issues facing mankind, we need to double the amount of energy we produce and consume, and halve the amount of greenhouse gas emissions or produce that extra energy with no additional greenhouse gas emissions. So climate change
is a substantial challenge, as is energy security. The issue of a greenhouse trigger is important. It is one of the regulatory tools you could use. When the government looks at it, you have to ask yourself: what is the policy benefit of putting what is a very blunt instrument into federal law? We saw with the Anvil Hill decision in New South Wales this week—the decision of Justice Pain—that it has focused Australian attention on what the costs and benefits of such a crude regulatory tool might be. It would ensure that all greenhouse actions all of a sudden become subject to federal environmental assessment and approval.

In terms of assessment, I think the Left of politics—the Labor Party and the Greens—say, ‘You should know what the emissions are going to be.’ What they ignore is 10 years of diligent hard work by the Australian government’s Greenhouse Office in developing in this country a very high-quality, very thorough, very accurate Kyoto-compliant greenhouse gas measurement database and the establishment of a greenhouse measurement tool—we need someone from the Greenhouse Office to get the acronym. We have a database which can collect information on greenhouse gas emissions from across Australia—from government and industry—and have it published for the world to see. We have the best measurement systems, not only in industrial facilities in Australia. We have established these measurement facilities through the Greenhouse Challenge program and its successor program, the Greenhouse Challenge Plus program.

Also, through the extension of the government’s energy efficiency measures, through the energy efficiencies opportunity legislation, we have made it mandatory for the top roughly 250 energy users in Australia to do energy efficiency audits and to publish those audits and plans. The concept of saying that we need to now require a whole new raft of assessment and approval for every greenhouse gas emitting industry across Australia would be massive duplication with no benefit in achieving what I talked about in the first part of this speech—balancing the needs of Australia and the world to produce more energy for poverty alleviation and job security with the need to do that with substantially lower greenhouse gas emissions.

There is fundamental philosophical policy difference on this between the Left of politics—Labor and the Greens—and the coalition. People such as Martin Ferguson, though, give credit to the government for taking practical actions—for example, working with our AP6 partners on practical measures for developing a more informed debate about the role that nuclear power can play and developing an informed debate about clean coal and carbon capture and storage technologies. Some Labor members engage in that debate in a constructive way. But most Labor people say to the public that we can somehow solve the problem if we amend the law by putting a greenhouse trigger in it and sign the Kyoto protocol. Of course, anyone who has spent some time looking at the challenges posed by greenhouse gas emissions, climate change and the need to balance energy provision and greenhouse gas abatement would know that the problem will not be solved by simply putting another few paragraphs into the federal law—legislating the problem away—or by signing an international treaty. That treaty, I might say, would, during its first commitment phase, see greenhouse gas emissions rise by 40 per cent. The world—including all the major economies—has recognised that the Kyoto protocol is ineffective at creating effective global action.

Labor’s two policies—which, I think, are supported by the Greens—are effectively to
address climate change by legislative action and by signing the Kyoto protocol. They are saying they will just pass a bit of law through the federal parliament. What will that do? I do not want to verbal the Greens. Senator Milne puts a lot more thought into this issue than the Labor Party do. At least she is absolutely consistent in her position, whereas the Labor Party have deeply conflicted positions on the role that coal technologies and nuclear technologies can play. When it suits them, Labor try to narrowcast their message to Greens constituencies by saying they are anti-nuclear and anti clean coal. When they want to talk to industry or other parts of the country, they send Martin Ferguson. He says to the forestry industry that Labor like forestry, and he says that Labor like uranium mining and coal. If they want to send the other message, they send Peter Garrett to say that they are anti clean coal and anti-nuclear and they think they can solve the problem by building wind turbines.

Labor will not get away with that for long. You could perhaps do a bit of narrowcasting 100 years ago when the media was not all-pervasive and instantaneous. But you cannot get away with sending Peter Garrett to one corner of the country to sell one environmental message and Martin Ferguson to another part of the country to sell another message on the same day. Sooner or later, you will be called to account. Sooner or later, you will have to come up with a policy that will address the substantial issues of providing the world with clean energy for poverty alleviation in the developing world and job security in the developed world, and doing so with reduced greenhouse gas emissions.

The people of Australia will not put up with a political party that pretends you can meet this historic intergenerational policy challenge by signing some law through the parliament and signing the Kyoto protocol. It is a challenge that requires a multitrillion dollar investment, a sophisticated approach at a national level and a sensible management approach—the sort of approach that the Howard-Costello team brings to this massive challenge for Australia. The Labor Party thinks you can look the Australian people in the eye and tell them that you can wish the problem away by passing some law through the parliament and signing the Kyoto protocol.

The problem is far bigger than that. It is a challenge that requires serious, well-funded, well thought-through solutions—not sloganeering, chanting and wishing. That is why we reject these amendments. We reject the notion of effectively putting into Australian law what I would call the ‘anticool amendment’. This would apply the Anvil Hill treatment to every coal mine, power station and industrial facility across Australia—and I know that the Greens motivation is to close down the coal industry.

I want to put one very important fact before the chamber on this occasion. I will limit my future interventions to be far shorter, but I want to cover this ground because it goes to the very core of climate change at the moment. Coal is portrayed by the Left of politics as a dirty, grubby, horrible fuel, although many of the people who are employed in the coal industry—there are some 5,000 of them across Australia—are historically Labor voters. I doubt that they will vote Labor in the future, because Labor and the Greens together could close that industry down.

Whether you like it or not, whether you want to demonise it or not, coal is the baseload fuel supply for Australia and it supplies around 80 per cent of baseload energy for the world. You can wish that away and pretend that it will go away, but the International Energy Agency has said that the amount of coal used, as a proportion of other
energy sources, will go up over the next 25 years. The amount of coal that is burned will increase from roughly four billion tonnes to 7½ billion tonnes in that time.

You can try and wish that way, you can hope it is not true, you can write a letter to President Hu in China and say, ‘We think you should stop burning coal,’ and you can have Justice Pain across the country saying, ‘No, we are going to shut the Anvil coal-mine,’ but the reality is that if you are serious about climate change you are going to have a serious policy that deals with the carbon emissions from burning coal, not a policy that says, ‘Let’s do away with coal mines.’ It is more sophisticated, it is harder and it requires more hard work to do that, but I say to the Australian Labor Party and the Greens: get serious about climate change by having a policy that addresses the reality that coal will be a part of our lives for the foreseeable future and that the technological challenge and the investment challenge is to capture the carbon, to clean the coal and to make it a clean energy source, not a dirty energy source, for the future. Recognise the fact that, if Justice Pain, the Labor Party and the Greens had their way and you closed down every coalmine in Australia, the amount of coal burned across the planet would roughly double in the next 30 years regardless. It will not make any difference. It might make you feel good to put 5,000 people out of work and close down that industry, but it will not save the world from climate change.

Senator MILNE (Tasmania) (2.08 pm)—I support the notion of a greenhouse trigger in the EPBC Act, and I note that the Greens have an amendment to do just this. The Labor Party’s proposal is for a trigger of 500,000 tonnes. The proposal of the Greens is more stringent, at 100,000 tonnes. By that, I mean the Labor Party’s proposal says that if a development proposal were to emit more than 500,000 tonnes then it would trigger environmental assessment under the EPBC Act. It would be a controlled action. The Greens are saying that should be 100,000 tonnes.

I note the Minister for the Environment and Heritage did not really discuss the trigger. I would like to get back to the specific trigger, because the Howard government has done a complete backflip and there is the opportunity to do another backflip and go back to where it was in the year 2000. I will read to the chamber what Senator Hill said:

In line with the Prime Minister’s May 1999 commitment, the Government has consulted widely on applying a Commonwealth greenhouse trigger under the Environment Protection and Biodiversity Conservation Act in relation to new projects that would be major emitters of greenhouse gases. Under the draft Regulations released in November 2000, the trigger would apply to actions likely to result in greenhouse emissions over 0.5 million tonnes of carbon dioxide equivalent in any 12-month period. The Minister for the Environment and Heritage is considering the views of State and Territory Ministers and key stakeholders on the proposed trigger.

Then Senator Hill actually released the details of the trigger on 5 May 2000, when he put out a press release ‘Greenhouse trigger design released’. He then gave the details of the greenhouse trigger. At that time the Greenhouse Office did all the work that was involved in inserting a trigger into the EPBC Act. Senator Hill went on to say:

Consistent with the United Nations Framework Convention on Climate Change and the National Greenhouse Strategy, it is proposed that ‘greenhouse gases’ would be defined to include carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. Emissions from proposed projects would be estimated using accepted methodologies used for the National Greenhouse Gas Inventory, those being developed for the National Carbon Accounting System, or where necessary those agreed between the Commonwealth and the proponent.
So the work was already done, the trigger was determined to be 500,000 tonnes and the regulations were out there—it was all in place. The reason for it was cited by Senator Hill, and this is why I want particularly to ask the minister why the government changed its mind and, having changed its mind once, why it cannot change its mind back again. Senator Hill said:

Diffuse emissions arising from a large number of small and dispersed sources are not intended to be subject to the greenhouse trigger.

That is why he set it at 500,000 tonnes in any one year. He went on to say:

All direct emissions (those that are within the boundary of an action) would be considered in determining whether an action is a controlled action. Major sources of indirect emissions would be considered where these emissions are one step upstream from the action, ie directly attributable to activities that are outside the boundary of the action and provide inputs for that action. Emissions from activities that use the outputs of the action (downstream emissions) will not normally be considered in the triggering process. However, during the assessment and approval processes, the option of examining all emissions from upstream or downstream processes at least one step removed from the action will be retained, to allow consideration of any net change in Australia’s emissions that may flow from an action.

This is the whole point. How can an Australian government run an inventory of Australia’s greenhouse gases and then determine whether it is on track to meet a target if the national minister does not have the potential to examine any major project proposal that is likely to result in more than 500,000 tonnes a year? That will significantly affect whether we are on track to meet a national target. If the federal minister is in charge of meeting a target and yet all these development proposals are being put forward around the country which allow for more than 500,000 tonnes of greenhouse gases to be emitted, then how is he ever going to keep track of whether or not he is on target? If you are not on target, then surely the minister can say, ‘We cannot afford any more of these large emitting proposals because they are going to blow out our national target.’

That was Senator Hill’s logic. The work has been done. The logic is sensible, everything was in place and then it all went away. The government abandoned it. Now we have the minister telling us that this is an anticoal proposal, this is an anti-jobs proposal, this will shut down industries and so on. Senator Hill did not think so. The Greenhouse Office did not think so. Nobody else thinks so. I feel sorry for the minister trying to justify a position that I actually think he does not believe in. He knows full well that this is what Australia needs to do and must do. What we have to do is somehow create the space for the government to change its mind and save face. Ultimately, that is what is going to have to happen.

The reason the Greens are moving for a much more stringent target than 500,000 tonnes is that at the time Senator Hill set that proposal—1999—the world was not aware of how rapidly greenhouse gas emissions were going to increase in terms of parts per million in the atmosphere. Scientists were also not as clear five or six years ago as they are now about the accelerating rate of climate change. The minister said that, while Australia is on track to meet an eight per cent increase on its 1990 levels, that is still not certain. We are going to have to take more action. I would be interested to know what other measures the minister has in mind to put into place to meet what is now clearly a trend that is not going to see Australia meet its target, even though that target is incredibly generous. We are the only country that got an increase on 1990 levels; everybody else accepted a decrease. But we are not going to make it. I am interested in the minis-
As for this notion that anybody is demonising coal, coal is a fossil fuel. Coal is a major driver of greenhouse gases around the world. Coal is one of the reasons that we have global warming. That is the fact of the matter. It is not a matter of demonising or not demonising; it is stating a fact. We have to get to renewables; we have to get to a low-carbon economy. We do not need to be driving coal exports. As to Justice Pain's decision, the minister has misrepresented Justice Pain. She is not closing down the coal industry. What her decision said was an environmental impact assessment of a project was inadequate because it did not take into account the greenhouse gases that were going to be emitted from that project. In the case of the Anvil Hill coalmine, it was 12.5 million tonnes a year, which is 0.1 per cent of total global emissions.

I would like the minister to explain to me how Australia is going to stay on track to meet its target and reduce its greenhouse emissions if the minister does not have to take that into account, if that is not referred to him. Queensland can go and approve new coalmines; New South Wales can; anybody can do what they like around the country. And the federal minister is left with how we are going to get our greenhouse gases down when everybody around the country is approving projects that are going to increase greenhouse gases. That is why this issue about the net change in Australia's emissions that might flow from any action needs to be taken into account by the federal minister. What Justice Pain is saying is that it needs to be taken into account in environmental impact assessments. Then a decision can be made as to whether you are prepared to take that risk or incur that damage. Her decision of itself does not shut down anything; it requires that that be taken into account.

This greenhouse gas trigger would require the federal minister to take it into account. It is a question of how far you want to go. I do not believe that half a million tonnes is stringent enough given the rate of climate change and given the real concern of the scientists. As I said in here yesterday, it is too late for the world's coral reefs. They have already passed their threshold of dangerous climate change. We are going to see coral bleaching occurring more frequently than every five years. We know that the reefs cannot recover in that time. We also know that the acidification of the oceans is such that the corals are already weakened and we know that there are several coral reefs around the world that are dead and now covered in algae. That is the future for the world's coral reefs. All we can do now is to try to strengthen the reefs' resilience in the face of climate change by stopping other forms of pollution and other forms of development to give them their best hope. But we are now faced with the reality that it is too late. And 100 million people around the world depend on coral reefs for their livelihoods. This is extremely sobering. We also know that the rate of melt on the Greenland iceshelf and the west Antarctic iceshelf is much faster than ever was anticipated previously. And we have scientists this week who have just got their results from the Ross iceshelf, saying that their study demonstrates that the sheet broke up once very quickly previously and it could happen again. That is the context in which we are talking about a greenhouse trigger.

Other countries, such as Germany, have made a rapid transition to solar. They have done that by helping people make the transition from jobs involved in industries which were heavily carbon dependent. They switched them across, retrained them and assisted them to move into other industries. The great benefit of solar is that the skills can be transferred. In solar, you have the
high-level jobs, which are in the universities, in R&D, and in the high-level engineering areas. But you also have maintenance, installation, retail and all the other jobs. It is not beyond the wit of Australians, surely, to work out a just transition for people working in certain industries to get them across to, and working in, the new low-carbon economy—a carbon constrained economy.

Let us not devalue the debate on climate change and the seriousness of this issue by starting at, ‘We love coal and jobs and you hate coal and want to put people out of work.’ The government, the Senate and the House of Representatives have a responsibility to the Australian people to do our best to secure their future. That is what dealing with climate change is about. That is why I support this trigger. I am going to support a 500,000-tonne trigger. I hope that the Labor Party will reconsider its position and vote for the more stringent trigger that I have put on the books here as an amendment, which is coming up a bit later. I believe that what Robert Hill, the former minister, thought was appropriate five years ago is no longer appropriate. We need something that is more stringent than that. I would like the minister to specifically address this issue. I would like him to specifically tell me why it was a good idea for the Prime Minister and Robert Hill to support it in 2000 but it is not a good idea to support it now. How is the federal government going to keep a handle on Australia’s greenhouse gas emissions if there is no requirement to check it? How are you going to keep a handle on that if you have no capacity to look at proposals that generate large volumes of greenhouse gases so as to work out any net change to Australia’s emissions that might flow from such proposals?

Senator IAN MACDONALD (Queensland) (2.21 pm)—I thought the evidence to the committee from the department was that the minister would have power to look at that under the existing provisions of the bill, but that is something that Senator Ian Campbell will no doubt respond to as he speaks. I do not have a running sheet in front of me, so I am not quite certain exactly which amendment we are dealing with—

The TEMPORARY CHAIRMAN (Senator Brandis)—We are dealing with opposition amendments (1) and (2).

Senator IAN MACDONALD—Thank you. I just wanted to take the opportunity to ask the minister, Senator Ian Campbell, what the government’s response is to the three recommendations of the majority report to the parliament. The minister might remember—I raised this in my speech in the debate on the second reading—that I do not think the committee has yet heard what the government’s attitude is to these recommendations. Recommendation 1 related to the issue of heritage properties within the Australian Capital Territory that are on designated Commonwealth land. It appeared there was an unintended consequence from the bill that needed some correction. The second recommendation related to issues with the wording of proposed new section 179(6). The third recommendation was simply a recommendation which hopefully the minister will be able to use in negotiations on the budget. There was quite a deal of evidence suggesting that perhaps the department was a fraction underresourced to do the very significant work expected of it in relation to this bill. At an appropriate time, I ask if the minister could indicate what the government’s response is to those three recommendations by the majority committee.

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (2.23 pm)—I thank Senator Ian Macdonald and Senator Milne. I have some detailed responses here for Senator Macdonald and I might just review them. It may
even be appropriate that we seek to incorporate them in the _Hansard_ rather than boring everyone by reading them into the _Hansard_. I might let Senator Macdonald and others have a look at them and see if it is appropriate, for the information of everyone, to do that. On the resourcing side, I think Senator Macdonald would not be surprised to know that particularly the resourcing of the compliance section of the department for EPBC matters is something that I have been keen to get onto a secure footing. He would respect that that is part of the budget process—but people cheering from the sidelines are always of assistance in that cause, and I appreciate his support. It is very important, when you have got an act that is internationally recognised as one of the best environment laws anywhere in the world, that it is properly resourced. That is something that I strongly support. I will have a look at those other bits.

**Senator IAN MACDONALD** (Queensland) (2.25 pm)—Mr Temporary Chairman, I am sorry about this and I will not interrupt the debate very much, but could the minister just indicate particularly whether the second recommendation is being adopted or if there is a reason that it is not? If it is not, I might have to go and prepare my own amendment in relation to it, so I am anxious to understand. I thought the government might have got back to the committee with its response to these things. If there is a reason that it should not be adopted, I would like to hear it. If it is going to be adopted as an amendment, I would like to hear that. If it is not, I will have to do some rapid work in preparing my own amendment.

**Senator IAN CAMPBELL** (Western Australia—Minister for the Environment and Heritage) (2.25 pm)—That is entirely reasonable. The proposed amendments are in relation to commercially harvested fish—is this the issue?

**Senator IAN Macdonald**—Yes.

**Senator IAN CAMPBELL**—Thank you. The proposed amendments are consistent with work recently accepted by IUCN, the World Conservation Union. In its guidelines, released in July this year, the IUCN noted the issue which the government is seeking to deal with in its amendments to the EPBC Act—namely, that a species of fish could become eligible for listing as threatened simply because it has been actively fished down to a target level. What the amendments seek to do is recognise this and provide a mechanism by which any such fish species that has fallen below appropriate levels can be managed to sustainability if an appropriate management plan exists to maximise its long-term survival in nature. The mere existence of a management plan which provides for the conservation of the fish species is not sufficient in itself to cause the species to be listed. The fish species obviously needs to be threatened. The government recognised that there are many commercially fished species that are not threatened that are covered by management plans that aid the conservation of the species. The EPBC Act will continue to provide the regulatory underpinning for the protection of such marine fish species. Should the recovery targets of a management plan not be achieved, the EPBC Act provisions will allow for the threatened species listing of that particular marine fish species to be upgraded to a higher level of threat with an accompanying higher level of protection.

**Senator IAN Macdonald interjecting**—

**Senator BARTLETT** (Queensland) (2.27 pm)—I think there are actually some questions that Senator Milne asked the minister—

**The TEMPORARY CHAIRMAN**—Should we call the minister first, Senator Bartlett? Is that all right with you?

**Senator BARTLETT**—Yes.
Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (2.27 pm)—I think Senator Ian Macdonald asked: does that mean we are going ahead with the amending bill in its current form? The answer to that is yes. Senator Milne asked a series of questions that I believe I have already answered in relation to the greenhouse trigger. She asked what has changed since what former Senator Hill—then environment minister and now ambassador—did in 1999-2000 in relation to the action of a trigger. I have gone into some extraordinary detail to explain how Australia has one of the most thorough—and Kyoto compliant—greenhouse gas accounting systems, which is one of the reasons we are able to report accurately to the world, down to a very fine grain, what our greenhouse gas emissions were in the latest accounting period, which for the latest report I think will be 2005. We are also able to give a very accurate prediction as to what they will be during the conclusion of the first commitment period out of Kyoto, and that is 2008-12. We have indicated in all of our reports up to date that we are on track to meet our Kyoto target and that in fact we will be one of the few countries in the world that will meet their Kyoto target or are on track to do so. As soon as it is ready, we will make our latest report.

I would like to answer Senator Milne’s question with another question. Let us say you know what the greenhouse gas emissions are from the Anvil Hill coalmine and from the burning of that coal by third parties who may import that coal from Australia or use it domestically. Let us say you know what those greenhouse gas emissions are because they are required to be assessed, as Justice Pain has said to the developers of that coalmine. As I have said quite accurately, if you put this trigger into the law today it would require every facility and mine and industrial activity across Australia above the trigger, including Anvil Hill mine, to be assessed. What would Senator Milne do faced with the information, knowing what the greenhouse gas emissions would be from the coal mined at Anvil Hill? That is the nub of the question. That is the nub of the policy issue. When you have made this assessment and you know how much greenhouse gas will be emitted, what would you do with that assessment? Would you approve that mine or not?

Senator MILNE (Tasmania) (2.30 pm)—I am delighted that Senator Campbell posed that question, because I would have a national greenhouse cap for Australia. I would then have an emissions trading scheme and a combined range of feed-in laws, a carbon levy or tax and a whole range of initiatives including an energy efficiency target, a vehicle fuel efficiency target and so on—none of which we have—and within that context, as a federal minister with a trigger and the ability to assess those projects, I would have a look at any project and see what that was going to do to Australia’s capacity to meet its target.

In particular, I do not support the Anvil Hill coalmine, but that is a separate issue from the capacity to assess a particular project. I argue that, regardless of the project, you should be able to assess whether its greenhouse gas emissions are above 100,000 tonnes—or in this case 500,000 tonnes—but I do not support expanded coalmining in Australia. It is totally and absolutely unjust.

Climate change is a justice and ethics issue. How can you possibly support putting 12½ million tonnes of additional carbon dioxide into the atmosphere from a project in Australia? How can you possibly support that, knowing what we know about the need to stabilise greenhouse gases? We need to rein in the particles per million in the atmosphere. We know that at 450 parts per million
we will get a two-degree rise. They are trying to stabilise it at 550 parts per million by 2050; the likelihood is that we will not do it.

All this talk about mining is about profits from export industries. I am saying we need to change the Australian economy so that it makes a transition to a low-carbon economy. I am saying that people currently employed in activities which generate vast amounts of carbon should be retrained and that we should give stimulus to those new industries which are capable of employing lots of people and building strength in the economy instead of hollowing it out. The government’s whole strategy has been to take us back to the sheep’s back. Our whole export income is dependent on digging up and cutting down.

We have lost the manufacturing sector and we are not building competitive advantage in new manufacturers, which we need to be doing. We are driving offshore all the new technologies. We have said bye-bye to the Roaring Forties. They have gone to China. Great! They are reducing global emissions by being in China but it is not assisting the Australian economy. Dr Shi took his solar business into China, where he became a billionaire. He is making a fortune in China. He could be doing that in Australia.

Origin Energy developed the SLIVER cell technology. It would have taken $100 million to commercialise it here but, no, it will probably go offshore. There has been a great march offshore from all the innovative technologies that are not being developed here and not creating the jobs. I think it is actually immoral to be arguing that Australia needs to maximise its profits from uranium mining and from coalmining in order to give tax cuts to people in Australia at the same time as we are seeing the devastating impact of climate change on farmers in this country and on ecosystems in this country.

You just have to look at the drop in agricultural production. That is a direct result of intensified drought and changed rainfall patterns—and no doubt there will be extreme fires this summer—because of what the Howard government has failed to do in the last 10 years. There are huge costs to the Australian economy. The absolute hypocrisy of this is shown in Queensland, where Peter Beattie, the Premier of Queensland, on the one hand is expanding coalmining, making the whole global climate change situation worse, and on the other hand talking about building cyclone bunker shelters from Cairns down the coast to protect coastal areas from the extreme weather events caused by climate change which is caused by his coalmining escapades and new coal-fired power stations.

Then we have the Great Barrier Reef dying, with a huge impact on tourism and a huge impact on ecosystems. And out comes the proposition that we make some floating pontoons and sail cloths and pump up some cold water from underneath to try to keep bits of the reef alive—not for their ecosystem value but for the fact that they may support the few resorts that still have access to that part of the reef. How stupid is that? We have to get consistent here. This nation needs to be committed to reducing greenhouse gas emissions and recognise that we cannot expand coalmining. That is not a possible option in a country that is supposedly responsible.

As I said yesterday, the rest of the world is going to take action through the World Trade Organisation to declare any Australian export as having achieved a subsidy because we have not ratified the Kyoto protocol and because we are not being seen as a globally responsible citizen. There will be European companies which will say that Australian exports are subsidised, and therefore we will start to see trade barriers as a result of this
freeloading that Australia is engaged in globally with greenhouse gas emissions.

So there are a lot of actions that you can take, but I would separate the two issues in terms of a federal environment minister. Whilst the minister said that the greenhouse gas accounting inventory allows the government to see what the emissions are from any project, it does not allow the federal government to intervene in determining the environmental impact—and whether it is appropriate or not—of any of the proposals that might be generating those emissions. Even though you can say, ‘Okay, that is emitting so much, and it is in the inventory,’ it does not give the federal minister any power in relation to the environmental impacts of any of those large-scale proposals and the accumulated impact in terms of the total environment of greenhouse gas emissions.

I am delighted that the minister asked the question because I think it is a moral and ethical question as to whether Australia should continue to expand its coalmines. The only reason the government is so focused on a technology that is not proven—that is, carbon capture and storage—is our huge dependence as an economy on coalmining and coal exports. If we were not in that position, we would not be so blinded to the fact that our major energy source in this country is solar radiation. In fact, coal is just a battery, if you like, of former solar radiation laid down as coal in previous epochs. We have the best solar radiation resource in the world through the University of New South Wales and the ANU, we have fantastic capacity not only in solar but also in wind, geothermal and so on—and we are blinded to that because there are a few large companies in Australia that have huge profits which are closely aligned to the government. There is a mutual arrangement such that on the very day that the nuclear report came out, for example, the Prime Minister came rushing out to reassure the coal industry that he would not be putting a price on carbon in the immediate short term. He had to reassure his coal industry friends that taking action to try to make nuclear viable would not adversely impact on the coal industry.

I think Australia has to get beyond this absolute dependence on export income from fossil fuels, because it is not a feasible proposition. It is exactly the same as Easter Island did before it drove itself into the situation where there was no life left on Easter Island. Easter Island kept on cutting down its forests in spite of the fact that it was all rapidly coming to an end. It is exactly the same situation here: we are expanding coalmining as global warming is accelerating, and that is an indefensible proposition if you believe that we have any moral or ethical responsibility as a global citizen to ensure survival not only of the human species but of the ecosystems on which we depend.

Senator BARTLETT (Queensland) (2.39 pm)—Before the minister responds I will throw a few more things in. This is one of those debates and issues where we probably have four distinct perspectives, which makes it perhaps a little more complex to differentiate. That no doubt explains the enormous interest from the press gallery at the moment, all clustered around listening to this detail about the most crucial environmental issue of our future! They are probably in their offices listening on the radio. This is an important issue, of course, and many people quite rightly call it the most important environmental issue facing not just our country but our globe. We have two amendments before the chair. The debate has ranged rather more widely than the specifics of the amendments; I think the amendments are serving as a proxy for the entire issue of climate change. All the amendments seek to do is put a specific trigger in the current legislation to re-
quire that the greenhouse impacts or climate change impacts of a project be assessed if a certain threshold is reached. The Democrats and the Greens both have an amendment that has a lower threshold than the ALP amendment. The Democrat amendment has a life cycle component as well as an annual threshold.

I think there are two issues. There is the issue of whether or not there should be a trigger in the federal environment law. The Democrats’ position is similar to the Greens on that, and it is a position we have had since the act was first put into place. Senator Milne has outlined a lot of valid points in that regard, although Senator Milne also has a view that the whole EPBC Act is a waste of space, is useless and should be scrapped. Why we would want to add a trigger into a useless act is another matter, but the Democrats’ view is that the act is not useless. It is quite strong and having an extra trigger would make it even stronger.

The other point—and I think Senator Milne asked this question but the minister has not answered it—which I think is valid is: what has changed from the government’s point of view? It is a question to which the Democrats deserve a response from the minister—if I might say, even more so than the rest of the chamber—because it was the Democrats that supported this act coming into being. That was for a lot of reasons, but in part we did it with a public commitment from the then minister, which he started to follow through, of seeking to include a greenhouse trigger down the track. Indeed, if we want to look at anniversaries, it is almost the seventh anniversary.

It was 10 December 1999 when Minister Hill released a consultation paper about the possibility of putting a greenhouse trigger into the act. He stated on record, including in this place in August 2000, that the government had a preferred model and that it was consulting with the states and others about putting it into the act. Obviously that did not happen, otherwise we would not be having this debate now, but all of us at the time thought it was a good idea. It seemed from Minister Hill’s statement that he thought it was a good idea but he wanted to consult with the states first, not surprisingly, for reasons such as Senator Milne has said. States like my state of Queensland were not keen on it at all, but the fact is that the government did have a preferred position, a preferred model, for putting a trigger in the act, and now clearly it has the view that a trigger is a bad idea, to paraphrase the minister’s statements both today and in the media during the week. I think it is at least appropriate, given the history of this legislation, to get an indication of why it is now not seen as a good idea.

The other point I would make from the Democrats’ perspective is that I am certainly not suggesting, and I do not suspect anybody is suggesting, that putting a greenhouse trigger in the EPBC Act will on its own somehow make a major shift in Australia’s performance in dealing with the climate change threat. It would be one measure as part of a whole package, and I do not see the amendments that Labor has put forward and the Greens and Democrats have foreshadowed as intrinsically, necessarily, anticoal.

If some of the suggestions that have been put around concerning the possibilities of geosequestration et cetera do actually have some validity—and that is still far from proven—and there could be a dramatic reduction in emissions from coal, it does not necessarily follow that amendments like this or even proposals of capping total emissions for Australia would therefore lead to the end of coal. It is a neutral amendment. It does not single out any industry; it simply singles out emissions, which is what we should be look-
I do not see it as an anticoal amendment beyond the simple fact that coal emits a lot of carbon. If it can be made to emit a lot less then that would be a good thing. Of course, we do need to be careful that, whatever the activity or resource, if we can make it emit half as much that we then do not go, ‘That’s good, we’ll consume twice as much.’ When we increase efficiencies, we tend to be in the habit of counterbalancing that by increasing consumption.

To move away from the coal debate, another very relevant example is from my own state of Queensland. It is completely inadvertent but nonetheless ironic that this Labor Party amendment will insert a definition of ‘adverse effects of climate change’ in the act straight before the definition of ‘Australian aircraft’. If there is one area of activity that is not being given much attention at all it is the climate change impacts of air travel. Perhaps we can all ponder that as we jump on our planes tonight and all jet back to wherever we live for the weekend and then all jet back here again. Perhaps Senator Campbell might be staying here over the weekend?

Senator Ian Campbell interjecting—

Senator BARTLETT—No? Oh well, I was going to give you a plus there! I use that example to demonstrate that this is about a lot more than just picking on coal or any particular industry or activity. It is about all of us realising that we are going to have to change our behaviour significantly. There is a proposal from the Brisbane Airport at the moment to build a second runway. There is some controversy locally about that because of aircraft noise. I appreciate that some people have concerns about that, although frankly if you compare it to a lot of other capital cities we are doing quite well in Brisbane. It is a very good airport; I am not against the airport. The simple fact is that, by building that second runway—quite logically, to increase capacity—it will facilitate a huge increase in air travel into Brisbane and air travel more broadly. That will lead to a huge increase in the use of what is a very significant emitter of greenhouse gases and, at least according to some of the science, in a way that has a greater impact than if it were emitted at ground level. But that is not being factored in in any significant way in what is an extremely large environmental impact assessment for Brisbane Airport.

Again, this is not to single out one development and say that it is bad and we should make ourselves feel good by stopping it or singling out one particular activity and saying, ‘If we ban this, everything will be fixed.’ I use this simply by way of an example, firstly, to demonstrate that it is a wide-ranging issue and an omnipresent one, which is why we need to be starting to assess it more comprehensively in our environmental impact laws, and, secondly, to indicate that, at present those sorts of things are really not being looked at in any significant way in environmental impact assessments because they are not comprehensive enough.

In some respects one could argue there is a second tier greenhouse check at the moment because, of course, triggers that already exist are World Heritage areas—including, of course, the Great Barrier Reef Marine Park, which we all know or should know is at risk of significant damage due to climate change—and threatened species, which are already on the brink of extinction. If there are significant changes in their habitat due to climate change, those are the sorts of things that can push them over the edge. There are second tier components, if you like, that are there. But I guess the simple fact is that seven years ago the view of the then Minister for the Environment and Heritage and the federal government was that they had a preferred position about a way forward—to have this as part of the triggers in the Envi-
To repeat, this on its own will in no way address climate change but I think it is an extra way to help us all shift our mindsets, attitudes, behaviours and the way we automatically assess the impacts of everything. We are going to need to make some significant shifts. Frankly, I do not think it is going to be as easy as some people suggest it can be, but it is very much necessary. This on its own will not make it happen but it would help in pushing it in the right direction.

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (2.50 pm)—I thank Senator Bartlett for that intervention. The reason I answered Senator Milne’s question previously with another question is that it goes to the nub of answering Senator Bartlett’s question of why a trigger is put into the legislation to require an assessment of effectively every coalmine and every other industrial facility across Australia if making that assessment then leads to the obvious decision that I am required to make virtually every day as the Minister for the Environment and Heritage: whether or not I approve the project. You make an assessment as part of the environmental approvals process. Senator Milne has been honest enough—although in a very longwinded way—to say that, if she were in the position of the minister for the environment, with this power, she would say no to the Anvil Hill coalmine. She said that, morally and ethically, she would have to say no to it. That is an honest answer.

Labor wants to put this provision in the law. Mr Albanese, and I presume Mr Beazley or Mr Rudd, if he is successful next week, would want to put this into the law. Either Mr Beazley or Mr Rudd, whoever leads the Labor Party next week—and I do not seek to make cheap politics of that; it is never—

Senator Lundy—But you are anyway.

Senator IAN CAMPBELL—I am not. The turmoil that the Labor Party is going through is not a fun process. We have been through it in the past. Whoever is the leader in the future, the Labor Party needs to answer this question. You cannot, as the Greens and I both accuse you of, narrowcast your message and walk both sides of the street on this issue. You cannot say, ‘We’re strong on climate change. We’re going to put a trigger in the federal law. We’re going to have a private member’s bill.’ It is good stuff to wave around the Waverley Council and Newcastle City Council, whistling to your friends in the green movement, trying to get Green preferences. The real question is: if you are going to put this provision in the federal law, will you use it?

This is a terrific debate to have. You have to deal with the facts. If you are serious about climate change you have to look at the real world. I had a terrific meeting with Dr Llewellyn from the United Kingdom fusion project. Europe, America, India and China are getting together to develop this new fusion technology to produce energy, fundamentally from hydrogen. It is a $5 billion investment. It is an international collaboration, and he is saying: ‘It may not work. It’s a multibillion dollar investment but it’s got the potential to provide baseload power with no emissions.’ He also said: ‘All we’ve got at the moment is coal and nuclear power. We’ve got to solve the climate change problem or we have to make this investment in fusion. It’ll take 10 years. We’re going to build this massive plant, and America, China, India and the European Union are investing. It’s a massive project to develop a whole new power source. It requires a nuclear
process, and I think Australia should be involved. It would be very good to get Australia involved. But if you applied the Greens logic, which is ‘Geosequestration is not proved and it’ll take 10 or 15 years to prove it up’, you would not waste your time.

You have to invest in all of these different technologies, and carbon capture and storage is one of them. We know that there has to be an expansion in nuclear power, we know there has to be an expansion of solar energy and we know we have to be pushing for geothermal. We need to do all of those things, and the government in Australia is investing very heavily in each one of those technologies in a technologically neutral way.

We also have to address the situation, say, if Senator Milne did become the environment minister. The Labor Party really need to answer this question. I think they should do it today. This is a test for Labor—and I put a press release out saying it was a test for Mr Beazley a few days ago. It really is. If you are going to put a trigger in the law—this is a simple question, and I think the Greens and I would like to have this answered—and it tells you that a coalmine like Anvil is going to produce millions of tonnes of carbon dioxide when they burn the coal, what will you do when you have to make that assessment? If you say, ‘Have a carbon market,’ that is not the answer. Senator Milne knows that. You do not need a trigger in the federal law to have a carbon market. We have the OSCAR web based carbon collection system that we have developed in Australia—I got the acronym right.

We know—and Justice Pain knows—how many megatonnes of carbon will come from the Anvil mine. We know what the answer is facility by facility, mine by mine, because we have the best tools anywhere in the world, developed by the Australian government’s Greenhouse Office. We know all that. We do not need to go through these assessment processes. If you are going to have a trigger, the question for Labor is: when you know that a facility is going to produce greenhouse gases, what box will you tick on the approvals brief that you get when you are minister? You will get a brief like the one I am holding, coincidentally. It will say ‘agreed’ or ‘not agreed’.

I have a decision right before me, as we talk, to approve a road, coincidentally—a very good road, by the way. It will have an assessment in it. I think Senator Siewert probably knows what the road is. It will say, ‘This mine will produce X million tonnes of greenhouse gas.’ It will have ‘agreed’ or ‘not agreed’. This gets to the nub of Senator Bartlett’s point—and the Greens have been honest enough to say that, if they knew that the Anvil mine was going to produce that amount of greenhouse gas, they would say, ‘No. It is morally imperative not to approve it.’

The question for Mr Albanese, Mr Beazley, Mr Rudd and Senator Lundy, here today representing them all, is: when Labor knows that you have got multiple millions of tonnes of carbon coming from a coalmine, what will you put a circle around—‘approved’ or ‘not approved’? Having a trigger and assessing every single industrial facility across the country is only one thing. It is yet another layer of red tape, another layer of bureaucracy. It does not help the environment one iota. It does not save a single tonne of carbon. It just employs a lot more people in Canberra to do a lot more assessments.

You talk about the moral and ethical issues in this. You could in fact make yourself feel moral and ethical and not just close down Anvil Hill, Sonoma in Queensland and every new coalmine proposed; you could close down all of the operations that mine 301 million tonnes of coal in Australia this
year. Regarding the rate of expansion of coalmining in the world, estimated by ABARE and in the World Energy Outlook of the IEA, as I said yesterday in the parliament, we have mined as a world around 4,980 million tonnes of coal this past year, 2005, and the world is expected to mine 7,557 million tonnes of it in only 20 years time.

The expansion in the world’s coalmining will entirely eliminate all of the coalmines in Australia in only three years. It shows you how ludicrous it is to shut down coalmining in Australia or shut down a single coalmine in Australia. I might have to say this every day that I am in this job: if you are serious about climate change, you cannot kid the world that closing coalmines is a solution. You have to recognise the fact that around 80 per cent of the world’s energy will come from coal even in 20 years time. That might be really hard for Senator Milne to appreciate. She might desperately prefer for the whole world to shift across to solar in that time or to another energy source. I know we are going to have to provide substantially more energy from renewable sources in the next 20 years. We are going to have to substantially improve all of the technologies we use to reduce emissions in that period.

But I also know that if 80 per cent of the problem is caused by burning fossil fuels then we do not address a substantial amount of your effort towards stopping carbon emissions from that fossil fuel means that you are effectively giving up on the problem. I think I have a particularly hard political case. It would be a lot easier to be in the Labor Party or the Greens and to say: ‘Coal is horrible. The coal industry is making too much profit; they’re all corrupt, immoral and unethical people’—I do not think Senator Milne is really saying that—but a chunk of coal is pretty dirty stuff. You can say to the Australian people, ‘This is really dirty stuff that is causing pollution; let’s stop it, let’s shut down the mines.’ I think it is a hell of a lot easier to make a case if you are a Labor or a Green politician. I have the difficult job, and the government has the difficult job, of telling the truth to the Australian people and saying, ‘If you’re serious about energy and climate change, cleaning up coal has to be part of the answer.’ It is a difficult case to make and I have to make that case.

Senator Milne was talking about the strides that Germany is making towards renewables. Even the European Union’s use of coal will go up at the same time. They will go from 176 million tonnes to 185 million tonnes during that same period. So they will invest in more renewables; Australia will invest in more renewables. I really want the Labor Party to answer this question. It is their amendment that we are talking about. You are going to get a new trigger if you get your way. If you get your numbers on the vote on this amendment and you get the trigger, I want to know what a future Beazley or Rudd government will do when the brief comes to you for the Anvil mine, or any other future coalmine, which says it will put millions of tonnes of carbon dioxide into the atmosphere? Or answer Senator Bartlett’s question: why would you put the trigger in if you are not going to use it? That is a fundamental question for the Labor Party to answer today before they vote on this legislation.

I do not think it is fair to Australian companies, investors or the Australian government to misrepresent the position of government or industry in relation to investments in renewables. Senator Milne knows, because I have given her chapter and verse on what we are investing in renewables. I believe the Australian government has invested around $6 million in the Origin Energy SLIVER cell project. I have raised the issue of Origin sending it offshore. Origin
has said, ‘No, there is absolutely no plan to send it offshore. We plan to develop it here in Australia.’ I have raised it with Grant King, the head of Origin. He said, ‘No, we’re doing it here. We’re very appreciative of the federal government grant.’ I said, ‘Do you need any more money to keep it here?’ He said, ‘No, we’re very appreciative of the grant. We’re investing in the solar project up in Newcastle to develop solar concentrators.’

The Chinese gentleman you referred to has made a fortune in China because he has cornered the silicon market. The best solar technology going into China at the moment is Australian. It is being made at Homebush Bay by BP Solar. They are producing hundreds of millions of dollars worth of solar cells. They are leading the world, using Australian people and Australian executives. To date, the biggest solar facility built in China was built by BP Solar. So, if you are going to go around the world, please give some credit where it is due. Australians do very well in this area. Can we do better? I would love us to do better. I want more money to go into it. But do not talk Australia down. We are doing so well in so many areas.

In Nairobi my team helped lead the world towards a review of the Kyoto protocol. We could not have worked harder in all of the forums in Nairobi. Senator Milne went over there and put Australia down all the time. The team we had over there included Howard Bamsey, leading the international dialogue on future action, and Ambassador Adams. We worked hard, 18 hours a day, trying to move the world to a robust, timely review of the Kyoto protocol—working with our friends from Europe and the developing world and chairing the umbrella group. In the umbrella group we worked with Russia, Canada, Iceland, Norway and the United States, trying to get sensible outcomes, moving the world to a comprehensive agreement in the post-Kyoto period.

Aussies working hard, doing the work to move the world towards a sensible situation, never get recognised. We are held in very high regard because we work and work, yet you have an Australian senator who goes to Nairobi, puts that effort down and misrepresents it. I regard it as quite un-Australian, but it is also quite inaccurate. I think Senator Milne should have a good think about whether she wants to continue with her game of putting down the efforts of Australia and the efforts of people from the Department of Foreign Affairs and Trade, my own department and the Department of Industry, Tourism and Resources, which, year after year, work so hard to get a substantial international agreement that will actually reduce greenhouse gas emissions and not see them increase, as they have under the first commitment stage of the Kyoto protocol.

Senator MILNE (Tasmania) (3.05 pm)—I will just clarify for Senator Ian Campbell that article 9 of the Kyoto protocol is the review of the protocol. Australia has not ratified the protocol. The discussions to review the protocol were dealt with under article 9 and the decisions were made on article 9 on the last night in Nairobi after the minister had left. Whilst I recognise the work of Mr Howard Bamsey—he was chairing the dialogue which, as the Chinese pointed out, was not a negotiating session—the only product to come out of the dialogue was an oral report in Nairobi, and there will be a written report next year. There is no process for bringing the two together. It is a parallel process, so it is quite ridiculous to suggest Australia is leading the world in that regard. We are not in the discussions. We are an observer to the protocol. Australia is allowed to speak at the behest of other countries—

Senator Ian Campbell—You should be ashamed of yourself. You’re putting down the efforts of very good Australians.
Senator MILNE—I am not putting down the efforts of anybody. When I go around the world I point out that the leading solar technology in the world is coming out of the University of New South Wales and the Australian National University, and I talk at all times about the huge potential for improving the Australian economy by expanding the work in renewables.

But what I particularly wanted to address was fusion. I heard the minister talk about fusion. I too went down to the fusion laboratory a while ago only to discover that, whilst it is true that all of those other countries are putting a huge amount into fusion, Australia is not. In fact, the concern is that Australia is again going to lose some of its best and brightest because the excitement in physics around the world is in the fusion experiment that is being conducted by these other countries. Unless Australia has some role in that global fusion project, we will in fact hollow out the physics departments in Australian universities because there will be no excitement about physics here.

In fact, it was put to me that Australia would in no way realistically be able to match what other countries are putting into the fusion project. But it was argued that Australia should go into partnership with one of the countries involved in the fusion project so that we can develop a collaborative relationship, and Australian physicists and people in the physics departments would be able to benefit in that way. I think that is eminently sensible. I would be interested to know how the minister is going to advance Australia’s involvement in that particular technology and keep that university capacity that we have in Australia. I think that issue is important.

In terms of carbon capture and storage, I do not see the justification for taxpayers’ money going into subsidising the fossil fuel industry. It is the fossil fuel industry over 100 years which has made immense profits out of externalising the true cost. In other words, carbon dioxide pollution from coal and oil over the last 100 years has now resulted in greenhouse gas emissions and climate change, which is having a severe adverse impact and costing billions around the world. Those companies have benefited enormously by making profits without having to take into account the costs.

I argue that, if the coal industry wants to spend its own money on carbon capture and storage and if the oil industry wants to spend its own money, that is well and good. They can go and experiment all they like. But it should not be carte blanche to continue business as usual while the technology to capture carbon is unproven, because all you are doing is exacerbating the greenhouse gases and not reducing them over the years it might take. The bigger point here is that we have only 10 to 15 years to reduce greenhouse gas emissions. We cannot wait for the coal and oil industries, with government subsidies, to prove up a technology. We have to put in place the technologies that we know can reduce emissions today and get those reducing emissions. Then the coal industry can go and spend its own money—the profits that it has made on the back of the community for the last 100 years.

That is where ABARE gets this so wrong all of the time. ABARE is still stuck in the old economics that externalises pollution and does not regard it as a cost. So it privatises the profits and socialises the costs. That is what the coal industry has done for 100 years. Now the coal industry continues to do it, wanting government subsidies.

I want an answer, as does Senator Bartlett, as to why the government will not pursue the notion of a trigger. We have an inventory, as you say. But why will you not pursue a trig-
ger? What you are almost admitting to is the fact that you know and this chamber knows that coalmining does lead to the emission of a large amount of carbon dioxide and, if that were taken into account, you would have to not allow them to proceed. That is an acknowledgment of why it is a bad idea to be approving coalmines. You just do not want to be in a position to have to disprove them because you know that it is morally and ethically indefensible in a world with climate change.

While I am on my feet about the emissions, it would be very useful to the chamber if you could table documents on the volume of greenhouse gases emitted from forestry operations in Tasmania in particular, but certainly in Victoria and New South Wales as well. Also, it would be good to have that separated out in terms of regeneration burns and conversion from old-growth and native forest to plantations. That would be a very useful statistic for us to have. I would appreciate the inventory which can take us down to the very last gram, according to your explanation earlier, so as to have that on the record.

Senator SIEWERT (Western Australia) (3.12 pm)—I would like to ask the minister if he could table documents on the volume of greenhouse gases emitted from forestry operations in Tasmania in particular, but certainly in Victoria and New South Wales as well. Also, it would be good to have that separated out in terms of regeneration burns and conversion from old-growth and native forest to plantations. That would be a very useful statistic for us to have. I would appreciate the inventory which can take us down to the very last gram, according to your explanation earlier, so as to have that on the record.

Senator SIEWERT (Western Australia) (3.12 pm)—I would like to ask the minister if he could tell us how many controlled actions the government have approved and how many they have said no to. Could I also ask that the response that the minister gave to Senator Macdonald’s questions on the government’s response to the committee report be tabled so that we do not have to wait for Hansard to get a copy of that?

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (3.12 pm)—I think the terms are the number of proposals that are referred to us, the number that actually get made controlled actions, the number that are approved with conditions, the number that are approved without conditions and those that are not approved at all. So there are a range of things. Two thousand referrals have been made, resulting in decisions that approval was required in relation to around 420 development proposals. There were 200 assessments completed and 150 approval decisions made. One hundred and twenty fisheries have been assessed and changes in management made. Nearly 200 new species, communities and processes have been included on the list of threatened species and ecological communities. You wanted to know how many have not been approved. I think there were four that were not approved. I think that, of the 150 approval decisions made, 90 per cent of those would be with conditions.

The TEMPORARY CHAIRMAN (Senator Moore)—Senator Siewert, we are just checking on the request that you made for the documentation.

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (3.14 pm)—I can table that.

Senator SIEWERT (Western Australia) (3.14 pm)—I am just having trouble, I must admit, with the line of argument that if we make climate change a trigger the minister will have to say no. Does that mean that we can expect him to say no from now on to all the other actions that are considered under the current triggers? I am talking about Ramsar, all the threatened species—he knows the list of triggers as well as I do. I am specifically interested in mining on Christmas Island. Can I expect the minister to be saying no to that mine that affects a number of critically endangered species?

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (3.15 pm)—I was actually asking the Labor Party to tell the chamber when they have this trigger, when they get into power—
Senator Marshall—When will that be?

Senator IAN CAMPBELL—For your sake, I hope it is very soon; for my sake, I hope it is a long, long time. What I want to know is: what will the Labor Party do with this power? Why would you make all these assessments as part of every assessment, depending on where the chamber ends up on its amendment—100,000 tonnes or 500,000 tonnes of carbon—if a future Labor environment minister would not stop a facility pumping 10 million tonnes of carbon into the atmosphere or one million tonnes of carbon into the atmosphere? What would the Labor Party’s decision be on the Anvil Hill coalmine? That is what I want to know, and I think it is a fair question. They are the ones proposing the amendment.

Senator BOB BROWN (Tasmania—Leader of the Australian Greens) (3.16 pm)—The answer, as far as the Greens in office are concerned, is that we want to take it on the criteria that Senator Milne outlined earlier, and if it were injurious to the environment, as Anvil Hill is, then it would not proceed. I ask the minister what he thinks of the power station in Victoria which, according to the report of Sir Nicholas Stern, is putting out greenhouse gases which, in a carbon constrained world where a price was put on carbon, would be costing $1.6 billion annually. That is the impost on the environment. Does the minister believe that calculations of the damage done by pollution, under the polluter-pays principle, should be taken into account? Besides the environmental impact, should the actual potential economic impact be assessed before such projects are given the go-ahead?

Senator LUNDY (Australian Capital Territory) (3.17 pm)—It seems that for some reason the minister has got a bit lost in his efforts to try to talk this out today. That is okay by us; we are happy to keep debating and moving through the long list of amendments on this bill. It is a bill that fails dramatically on just about all fronts. I note that the former environment minister, Robert Hill, clearly understood the need for a climate change trigger. On 10 December 1999, Robert Hill released a consultation paper on the possible application of a greenhouse trigger under the EPBC Act. At the time he stated:

Introducing a greenhouse trigger would provide another measure for addressing our international responsibilities in relation to climate change and ensuring Australia meets its Kyoto target.

I think that Robert Hill at least understood the need for a climate change trigger and he knew that it was a part of a comprehensive approach that does include Kyoto, emissions trading and support for renewable energy.

But I think that the time when we had a minister who understood the need for a climate change trigger and, indeed, the impact of climate change has long gone. The moderates in the Liberal Party have obviously taken a hiding and we have got an extreme government with a pretty extreme environment minister, who is now trying to tell a new story, a story that does not include a climate change trigger. I was appalled, and I know my colleagues were appalled, when the environment minister told the Senate the day before yesterday—and I think that he may have reiterated it yesterday—that Labor’s push for a climate change trigger was an anticoal amendment to the environment protection law. Isn’t that interesting? Senator Hill was never accused of being anticoal. Labor does support Australia’s coal industry and supports measures to develop clean coal. As our leader, Kim Beazley, has stated:

If the Labor Party is elected we will go down the path of clean coal and renewables. It is as simple as that.

And it is as simple as that. I note that the shadow environment minister, my colleague
Mr Albanese, has referred to the importance of clean coal technology in at least 73 speeches and media releases. I think that that is a pretty clear message. I also note that Mr Albanese was the keynote speaker at the Clean Coal Conference, to which the government did not even bother to send a representative—and that really says it all. On the point about environmental assessment, of course it is about looking at each proposal on its merit. What we are dealing with here is a minister scrambling about, trying to find some cover, given the dramatic change in this government’s position since Senator Hill was environment minister.

Senator BOB BROWN (Tasmania—Leader of the Australian Greens) (3.20 pm)—The minister is still doing his sums, I think, on the cost of Hazelwood power station at $1.6 billion a year and whether he believes assessments like that should be done or whether pollution should be zero rated—that is, not accounted for in any measured economic way at all. If so, what other parts of the market does he think should be assessed at zero? The other question that Senator Milne asked was about the greenhouse gas emissions coming out of logging in Tasmania, Victoria and southern New South Wales in the wake of the minister’s assurance to the committee that the Australian government had a system of assessment of greenhouse gas emissions which was the best on the planet and that the figures were readily available.

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (3.21 pm)—As I recall from our national greenhouse gas accounting publications, which I am quite sure are available on the internet, figures for forestry in Tasmania are available on the internet, and I would refer Senator Milne to those. I approved of the expansion of Hazelwood, which was a proposal that came from the Victorian government—so I have approved it. I approve of the idea of developing—as we are doing with one of the Low Emissions Technology Demonstration Fund grants—technologies that reduce the carbon emissions from burning coal.

I believe that a substantial and very important part of the solution to meeting the policy balance, which I described in my first contribution in this debate, is to provide secure energy sources for the world and Australia and to maintain job security and economic security for Australian families whilst doing so in a carbon-challenged world which demands that we produce substantially larger amounts of energy, both here in Australia and around the world, but with substantially lower greenhouse gas emissions. To do that you need to address the emissions from fossil fuel. In the case of Hazelwood, you need to address the emissions from burning brown coal. Part of that process must be to seek to dry out that coal—to clean up that coal—before you burn it and, in future, gasify the coal to get it to a much higher energy coefficient level and then capture the carbon and store that carbon safely. That is the serious challenge.

How you achieve that in terms of balancing the investment in the up-front infrastructure with finding mechanisms to address the ongoing and increasing costs associated with running that additional technology—the additional plant and equipment you will be required to apply to a place like Hazelwood or, in fact, many other power stations around the world like it—is something that the government is addressing. The Prime Minister has recently indicated that he is going to appoint a task force which will look at the interaction of emerging global emissions trading systems, pricing systems and market mechanisms that can be established in Australia. I think that announcement by the Prime Minister is a very sensible step forward for the
government. I expect that he will announce details of that shortly. It recognises the issues that were brought starkly to the world’s attention by Sir Nicholas Stern’s report. The important part of his work was to say to the world: there will not just be damage to ecosystems and potential damage to human habitation as a result of dangerous climate change if we carry on business as usual but, quite clearly, there will also be—as Senator Brown and Senator Milne would have recognised for a long time—substantial economic impacts. Delaying action will heighten those economic impacts, so there are benefits to acting early.

It is a hackneyed cliche to say so, but it is accurate in this case: regarding the course that Australia is setting—in the case of Hazelwood, in collaboration with the Victorian Labor government; in the case of another fossil fuel cleaning up and capturing project, in collaboration with the Queensland government; and, in the case of the Gorgon gas project in Western Australia, in collaboration with the Gorgon partners—we are providing substantial leadership in funding the sorts of breakthrough technologies you will need to stop carbon going into the atmosphere from fossil fuels. But that does not, in the mind of the government, provide the only part of the answer. You will need pricing signals and market mechanisms. The challenge that the world needs to address is: how do you do that in a way that does not push the carbon into another jurisdiction? That is the challenge the world has not substantially answered yet and it is a challenge in which the Australian government wants to play a positive part.

The announcement by the Prime Minister about addressing the need for a comprehensive post-Kyoto agreement, which we have called new Kyoto, allied with his announcement about a business and government task force to address the need for an appropriate market mechanism working globally and within Australia, was very well received by people around the world, particularly our European friends. It demonstrates the continuing commitment of the government to innovate in the area of climate change policy.

Senator MILNE (Tasmania) (3.27 pm)—I just want to follow up on the inventory. I went to the UNFCCC website to look at Australia’s sector by sector report. The 2004 report is there, but if there is a 2005 report I could not see it. When I looked specifically for forest regen burns and the contribution in particular to that, I could not see that it is differentiated. So, whilst I appreciate that some of the information might be in various forms, I would appreciate it if the department could table that. As the minister said, if it is readily available it should not be too difficult to find the regen burns and forestry activities for Tasmania, Victoria and southern New South Wales.

Senator BOB BROWN (Tasmania—Leader of the Australian Greens) (3.28 pm)—Likewise, having found the same shortage of information, I ask the minister: who did the assessment on the Tasmanian forests? Are forward assessments not thought sensible in view of the fact that something like 20,000 hectares of native forest will be cut down and large parts of those burnt in the coming 12 months? What is the minister’s knowledge on the tonnage of greenhouse gases coming out of the destruction of native forests in Tasmania for the current 12 months—or the current financial year, if he does not know the answer for the calendar year? I do not think he will have either of those figures, and he should have. The question is: which independent assessor is providing the information upon which the minister relies?

Secondly, the minister mentioned families and their security—and that terminology is
the Howard government’s mantra. I mentioned that, by not bringing in a polluter-pays principle, $1.6 billion per annum was being put on the sideboard for Australia’s children to pay. The government are not even assessing it. The minister does not know the cost of exudates from these power stations. He does not have any idea of the economic ramifications of it. But he is very happy to leave that to our children to pay. I agree with Senator Milne that something is lacking in ethics and morality here. It is easy to talk about the security of families and children, but they have a right to inherit from us a proper assessment of the damage done by the actions of this government and, in that particular case, the coal industry.

Finally, the minister has talked about the number of assessments the government is doing. We know that the first thing the Prime Minister wanted was an assessment of the nuclear option because his imagination did not go to the more obvious and readily available options. Could the minister advise the committee whether he has put a request to the Prime Minister, through cabinet, to do an assessment of the energy efficiency potential in Australia—the jobs that would be created and the cost benefit to the domestic retail, industrial and agricultural sectors? That would free up huge amounts of electrical energy that could be used by new customers. It is the cheapest way of doing it—looked at one way, it is neutral; if you look at it another way, it is positive—and it is a great creator of jobs. What is the assessment on that—and who is doing it? Has the minister asked for that assessment to be done by an independent authority? We should not just take the information that is available in the marketplace—like the Prime Minister did for nuclear energy—but look for an independent and authoritative assessment of energy efficiency.

Then, of course, there is alternative energy. Senator Milne has been pointing to the tragic loss of fantastic solar and other technologies to overseas—because the Howard government has failed to get behind it. I wonder if the minister has put a recommendation to cabinet for an independent assessment of the alternative renewable energy sector. What jobs would be created? What is the potential export income? What are the environmental advantages over coal, including less-clean coal—or so-called clean coal, which is a misnomer? What are the advantages even if, in decades down the line, there turned out to be potential for sequestration—not for current power stations but for some of the newly ordered power stations? That would be way after Sir Nicholas Stern’s time line for action. This action needs to be taken now, not in some future halcyon age when there will be answers which would allow this government and its allies to continue to burn coal at the expanded rate that is currently projected.

Senator IAN CAMPBELL (Western Australia—Minister for the Environment and Heritage) (3.30 pm)—I welcome the questions. I will ask the Australian Greenhouse Office to brief Senator Milne—and Senator Brown, if he is interested—on how we bring together the emissions data for our annual global report on emissions for forestry and land use activity in Tasmania and the other states referred to.

Senator Bob Brown—Just tell the committee.

Senator IAN CAMPBELL—Senator Brown says he does not want the briefing.

Senator Bob Brown—Madam Chair, on a point of order: I did not say that at all. The minister heard me say, ‘Get the information and tell the committee.’ The committee is asking the questions here. Answers to the
committee are what is required, not private briefings.

Senator IAN CAMPBELL—I am happy to get that information from the Australian Greenhouse Office on how they get the information that is provided to the world at large on all of Australians greenhouse gas emitting operations. I know, from reading the information thoroughly myself, that the change in land use and forestry activities in every state is reported on. I think it is entirely valid to ask how those reports are put together. If Senator Brown wants the whole chamber to be familiar with that, I would be happy to provide that information.

Senator Brown also asked about energy efficiency measures. He is quite right in pointing to the fact that energy efficiency can deliver substantial abatement at very low cost. The government has put in place a range of measures to ensure that the household sector—which creates about 20 per cent of Australia’s emissions—and the industrial sector have in place a number of policy measures to achieve energy efficiency.

Senator Lundy interjecting—

Senator IAN CAMPBELL—I would be very happy to, but, if you ask a question about energy efficiency, you deserve at least some answer. We have brought in minimum appliance standards for the household sector. Once again, that is a policy initiative of this government that has been put in place with the cooperation of the states and the electrical appliance industry in Australia. I suspect that Senator Milne and Senator Brown might find that this is one initiative we have taken that can be applauded. It is also an initiative that has been replicated around the world. We have worked with international associations for the use of the standards that apply in Australia’s minimum appliance standards. Our energy appliance labelling regime is also being replicated right around the world.

There are a range of energy efficiency measures being incorporated in the Solar Cities program, and we have announced the rollout of the first three at this stage—one in New South Wales, one in Queensland and one in South Australia.

Senator Bob Brown—Temporary Chairman, on a point of order, I would like to help the committee if I may. The question was: has the government established an inquiry into how energy efficiency is going? We will get a debate here about how far behind the rest of the world Australia is if the Minister for the Environment and Heritage keeps going this way. The question is: has he put a submission for an inquiry to cabinet to assess how well we are doing?

The TEMPORARY CHAIRMAN (Senator Moore)—Senator, you know that is not a point of order but I will draw the minister back.

Senator IAN CAMPBELL—I am saying that, rather than having yet another inquiry, we are in fact taking a whole range of actions across the household sector and the industry sector through regulatory approaches—for example, through building codes. Senator Brown may know that or he may not. He may be spending his time concentrating on policies to make drugs more available to young people. He spends a lot of time on processes to increase taxes on family homes. Now he is talking about increasing taxes on energy. We know that in the past he has promoted policies to make drugs more freely available to children and young people in Australia. Perhaps he should come to grips with climate change policy in Australia. We are changing building codes to ensure that buildings in the future are more energy efficient.

Senator Bob Brown—Mr Temporary Chairman, I rise on a point of order. The minister has engaged in a pretty despicable
representation, so I will ask for the opportunity to correct the record.

The TEMPORARY CHAIRMAN—That is not a point of order, Senator Brown.

Senator Bob Brown—Then I seek the opportunity to correct the misrepresentation.

The TEMPORARY CHAIRMAN—It is not a point of order, Senator Brown. You will have a chance to continue the debate.

Senator IAN CAMPBELL—Senator Brown always gets upset when we draw attention to the Greens’ policies on drugs and on taxes on the family home. Every time I mention it I know I can get him to rise in his place and take a point of order, but I will not stop mentioning the fact that the Greens misrepresent their own policies by pretending they are green when in fact most of their policies are quite destructive social policies that would actually tear communities apart.

On climate change, which is an incredibly important issue, and addressing energy efficiency, which is an incredibly important and effective way of reducing greenhouse gas emissions, we are ensuring that we have more energy efficient buildings through building codes and we are also encouraging, through best practice in both residential and commercial construction, energy efficient buildings. This is an incredibly important way to mitigate future greenhouse gas emissions in Australia and, indeed, around the world.

The Energy Efficiency Opportunities Act 2006, probably another key environmental measure that Senator Brown totally missed, requires Australia’s large energy consumers—I think anyone using over 0.5 of a petajoule, which is the top 250 energy users, who use about 80 per cent of Australia’s energy—to do an energy efficiency audit. If you read the papers and can get past the social pages, you will find advertisements throughout Australian newspapers reminding Australian companies that use that amount of energy that they are required to undertake those energy efficiency audits and then, once they are done, produce a plan to introduce energy efficiency actions within their companies and report against them annually. That is a mandatory requirement.

What you see in Australia, rather than the Greens saying, ‘Oh, let’s have another inquiry,’ is that we are taking action. We are taking action at the household level. We are producing green guides for people who are renovating their homes. We have a guide where anyone who is doing a home renovation can get access to information from the Australian Greenhouse Office website which will show them how to do renovations in a greenhouse-friendly manner. We are also doing that for commercial buildings. We are ensuring that when people buy appliances they can put energy efficient appliances into their home. So there is action both at the household level and at the commercial level to ensure that energy efficiency opportunities are used as one of the key measures.

It is important to understand that you cannot just do energy efficiency and you cannot just do renewables. We know that you need to have a substantial increase in renewable energy in the world if you are to address dangerous climate change. You need to do that, you need energy efficiency, but you cannot do that without addressing cleaning up coal or capturing carbon and storing it. The Greens and some people in the Labor Party say, ‘Let’s just close down the coal mining industry; let’s close down Hazelwood power station; let’s not build any more power stations that burn coal,’ when in fact the answer is that you do need energy efficiency measures, you do need clean coal technologies, you do need carbon capture technologies, you do need fuel switching. You need to sell Australian natural gas to China, Japan, Korea and North America and see as many
facilities as possible in those countries switching to gas from coal or oil. But again we have the Greens saying: ‘No, we don’t want a natural gas industry in the Burrup. We want to stop that industry because of impacts on rock art.’ The Australian Greens, who pretend they care about the environment, are saying: ‘No, we can’t spend money on carbon capture and storage. That’s an inappropriate thing for the public to spend money on.’

We cannot even have an inquiry into nuclear power. That has been out of bounds for 30 years in Australia because of the ideological hang-ups of people like Senator Brown and people in the Labor Party. We are saying you need a whole range of technologies, and yet the Greens would rule out carbon capture and storage. They would rule out the gas industry and they would rule out the nuclear industry. So there you have three billion tonnes per annum of abatement across the globe and the Greens are saying no to it. You wonder just how serious they are about climate change.

We know they are serious about drugs policies that hurt families; we know that they are serious about tax policies that hurt families. From their actions and their policies, we know that they are not serious about climate change. I will not be lectured to by Senator Brown on the need for an inquiry into energy efficiency when this government sees energy efficiency as a substantial and important part of a portfolio based approach to addressing climate change that includes action on renewables, action on energy efficiency, action on carbon capture and storage, action on making vehicles more efficient, action that encourages fuel switching and action that encourages land use changes—such as stopping deforestation. Land clearing in Australia has virtually come to an end under this government and the planting of new trees has never been greater. We are on track to plant somewhere between 750 million and a billion trees under this government, all of them out there growing and sequestering carbon in a very natural way. We have also had the political boldness to say, ‘If you’re serious about climate change, you also need to use nuclear power in the world. Let’s address Australia’s role in the nuclear fuel cycle.’ You need all of these seven technologies, but the Greens would rule three of them out because of ideological baggage.

Progress reported.

**ADJOURNMENT**

The ACTING DEPUTY PRESIDENT (Senator Moore)—Order! It being 3.47 pm, I propose the question:

That the Senate do now adjourn.

Senator Bob Brown—I rise on a point of order. Acting Deputy President Moore, I drew to your attention words from the minister during the last 10 minutes that were highly offensive to me. I think that you were wrongly advised on the matter. I ask you again to revisit the accusation that I or any other member of this place would want to give drugs to kids. That is highly offensive to me personally. I do not believe that that should stay unchallenged on the record. I draw your attention to rule of debate 193(3) and I ask you to reconsider that ruling or refer it to the President for a ruling, because not only was it offensive but absolutely untruthful. It is a slander and it should not stand on the record, and I ask that the senator withdraw it.

The ACTING DEPUTY PRESIDENT (Senator Moore)—Thank you, Senator Brown. I will refer that to the minister and ask for a withdrawal of that particular comment.

Senator Ian Campbell—I have no intention of withdrawing that comment. I referred to the Greens’ policies in relation to making drugs more freely available and putting taxes
on the family home. That is a matter of record. They have been up on the Greens’ website. They were so embarrassed by these policies that they changed some of them recently. But they are a matter of record.

The ACTING DEPUTY PRESIDENT—
I am going to stop the debate at this stage. Senator Brown has made a point of order. I will refer it to the President for consideration when we return.

Donor Insemination

Senator HOGG (Queensland) (3.47 pm)—Thank you, Acting Deputy President Moore, for occupying the chair at a time when I am supposed to be there. This afternoon, I want to speak for the time allocated on an issue that is very important to me and very close to me. In the year 2004, I undertook a study tour to look into the problems that were being confronted by donor inseminated conceived adults—adults who were finding out late in their life in most instances that they were brought into this world through donor insemination conception. The issue that prompted that study tour in the first instance was an inquiry of this Senate into IVF and related matters some time before.

Donor inseminated conceived adults are an emerging group of disadvantaged people, not only in Australia but world wide. The problems that they face, simply put, include the fact that: these people do not know that they are donor inseminated conceived in the vast majority of cases—almost overwhelmingly; they do not know who their parent is or parents are in many instances; they have psychological and emotional problems when eventually they find out that they are DI conceived; they have no support mechanisms provided by the state that sanctioned their conception; they have in some cases numerous full or half siblings in the broader community; and there is no compulsory register of donors to enable these people to establish their identities.

Recently, the Donor Conception Support Group contacted me once again in the wake of my previous study tour and my statements in this area. I will quote briefly from the letter that they sent to me, which highlights the frustration that they are experiencing. I am pleased to see Senator Murray here, because I know that Senator Murray is a very good supporter of this group. I quote from their letter to me dated 25 September:

As you know our group has been trying to convince all state governments to follow the lead of Victoria and enact legislation that would give future donor offspring the right to know who they are related to and would give those donor offspring already in existence a chance of finding our information about their donors and half siblings. What is really needed is for the Federal Government to step in and create a national register. We have asked the Federal Government on a number of occasions to consider doing this but each time we are told that they cannot do legislation for a register because ‘health’ is a state matter.

The frustration that this organisation is confronted with is that they are told it is a state matter yet they see things being done federally. As you will find, in many instances donor insemination comes about as a result of funding that is provided through Medicare for assisted reproductive technology.

The pamphlet that they included highlights their case better than I can outline it. It says:

Victoria is the only state to have put in place legislation that gives donor conceived people the right to their medical and genetic identities.

That is almost true; it is a voluntary register, not a compulsory register. They go on to say:

Why should other donor conceived Australians be discriminated against by being denied information about their medical histories, biological parents, brothers and sisters? It’s wonderful that we
now have a National Register for organ transplantation this will surely save many lives. However, when will Australia follow the UK in legislation and establishment of a National Register so that all donor conceived people in this country can have access to their full medical and genetic histories?

They go on to say:

Millions of tax payers dollars are spent via Medicare on ART every year

Donor semen, eggs and embryos are coming into this country from Denmark, Sweden, USA, UK and Greece

Donor semen crosses state borders: from Qld into NSW, WA into Victoria, NSW into Qld. One member of our group has discovered that he has 29 half siblings, 20 in South Australia and 9 in NSW.

The cost to the mental health of Australian families because of secrecy in donor conception.

Who will be accountable when any of these people inadvertently form a relationship with their full donor embryo siblings or half siblings?

As I said, their document says it in its own right. So this is not a debate about the right of an adult or adults to have a child. No-one, in my view, has the right to have a child. A child is not a possession, an object of ownership. A child is an individual in their own context and it is the child that has the pre-eminent rights. The UN Convention on the Rights of the Child says at article 8:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

This led me down the path to do my study tour and my report. In my report I made a number of recommendations, which obviously are not binding on anyone other than me. In my report, which I submitted to the then Special Minister of State in 2004, I made these points:

5. DIs must be told of the way they were conceived by their parents no later than the age of majority.

That seems reasonable to me. I then said:

6. DIs must have this fact indicated on their birth certificate for any certificate issued within 12 months of achieving their age of majority.

Otherwise the birth certificate is a fraud. Then I said:

7. A register of donors must be kept centrally to allow the identity of the donor to be gained.

I went on:

10. Counselling must be made available independently of the clinic providing the procedure to the donor of the sperm/egg to the parents, and to any DI child/adult upon discovering they were donor conceived.

11. Counselling must be audited to see that it is delivering the desired goals.

12. There seems to be an almost complete lack of research on the impact of donating sperm/eggs on donors on a longitudinal basis and no research on those who discover later in life that they are DI as to what their needs (including support) might be.

This is an area that has just flourished. It is now clearly funded through the federal taxpayers’ purse. Last year, assisted reproductive technology was funded to the order of $65 million. Over the last five years, it has been $205 million. Yet these people have no support whatsoever—absolutely nil. They are out there on their own. It is quite wrong that we have a class of people who are not only denied their identity and their right to family but denied the support of the state which sanctioned their conception in the first place. There needs to be, in my view, a federal parliamentary inquiry, given that the occurrence of DIs is most likely to have taken place with federal funding. Someone has to accept that responsibility. The buck-passing between the states and the federal government has to stop. DIs as a class of
citizens should not be discriminated against. A joint federal-state solution must be found in equity and good conscience for this group of people who have been denied their fundamental rights by a selfish and non-caring society. Is there no compassion left in our society for this group of people?

Not everyone knows that they are DI conceived, but it is upon discovery that they are DI conceived that people have the psychological and mental traumas that none of us who know who are natural parents are are faced with. DI-conceived adults can be left no longer as social lepers. They have an entitlement to their dignity. I would urge the federal and the state governments, through the appropriate ministries, to get together, address this issue and help this group of people who are seeking help to come to grips with the position that they find themselves in because of the state sanction.

(Time expired)

Child Sexual Abuse

Senator MURRAY (Western Australia) (3.57 pm)—Before I commence my own adjournment speech, I want to congratulate Senator Hogg on raising in his adjournment speech the issue of identity for donor-inseminated children. I am unusual in having met large numbers of people who do not know their identity. The vast majority of Australians who know their identity cannot understand what trauma it is for a person to not know their origin, where they come from and what their biological and genetic origin is. So I congratulate Senator Hogg for drawing attention to this very big, difficult and important issue.

For my adjournment speech today, I turn to the troublesome problem of child sexual assault in the context of the family and the Family Court. The reason for doing so is that for some years now activists against child abuse have contacted my office complaining of how ill equipped the Family Court is when assessing child abuse cases. The essence of the concern relayed to my office is that the Family Court—as protector of ‘last resort’ for many abused children—is failing to consistently act ‘in the best interests of the child’.

Some trial documents are shocking to read because of judgements that have ignored the expert evidence of doctors and specialists in the field of child abuse and that have delivered children into the hands of apparently abusive fathers. They are also shocking to read because of the continued behaviour of defence lawyers who think that earning a dollar and getting someone off is more important than what they have done to that child and the future of that child.

Tony Koch reported this reality in an article titled ‘Family Court “putting children last”’, published in the Australian on 29 August 2005. He wrote of how a growing list of medical experts and specialists refuse to become involved in Family Court litigation because they feel that their evidence is basically ignored. He cited the respected chairman of the national body Kids First Foundation, Dr David Wood, who stated:

I know a number of medical experts who ... are not prepared to be part of an adversarial game that seeks just to discredit them so the parent with the most aggressive and expensive lawyer wins. This is a Family Court that should be looking at the best things for children. This is not about the parents. It is about children, and I do not believe the current system cares about, or seeks, that outcome.

To understand this state of affairs requires an understanding of a set of circumstances that lead defence lawyers to use many stratagems, one of which I want to comment on—and that is the stratagem termed the parental alienation syndrome.

The circumstances are these. Every parent’s worst nightmare is the discovery that their child has been abused, especially if that
abuse is sexual assault. This nightmare gets even worse if the perpetrator happens to be the other parent. Inevitably, separation follows, with custody battles often being played out in the Family Court. And, inevitably, the allegations of abuse are made against the father.

It is against this background that the theory of parental alienation syndrome emerges. The brainchild of American psychiatrist Dr Richard Gardner, it is used to gain advantage in child custody litigation. The theory goes like this. To gain advantage, mothers will do everything in their power to alienate the children from the father. An apparently protective parent, the mother will make false and malicious allegations of sexual assault against the father. This is, Gardner argues, achieved by mothers coaching children to say they have been abused by their fathers.

The legal use of parental alienation syndrome has been effectively promoted and flourishes as a defence in the Family Court of Australia, I am advised. However, its use has never been matched by acceptance within the international scientific community. In fact, Dr Gardner’s work has been widely discredited on a number of grounds. Dr Gardner has been criticised for taking the exception and making it the rule. He has been criticised for being sympathetic to abusers. For instance, in his 1991 self-published book titled *Sex abuse hysteria: Salem witch trials revisited*, he writes at page 118:

... there is a bit of paedophilia in every one of us. Well, excuse me, there is none in me! This quote and the title of the book indicate a lack of balance when it comes to child sexual assault. I have been told his work is self-published. If that is true, it has not been subject to the peer review that comes from publishing in respected and relevant journals.

Most significantly though, the fundamental assumption that children frequently lie about being sexually assaulted is contradicted by all the major research in this area. However, as the Family Court lacks powers to investigate child sexual assault claims, the reports are that skilful defence lawyers are able to use the pseudoscientific parental alienation syndrome most effectively.

There is also the underlying problem of a deep reluctance to make findings of fact in the Family Court that one of the parties has committed what amounts to a criminal offence. A specialist in family law and child protection, Professor Patrick Parkinson of Sydney University, stated in his address to the 1998 National Conference of the Family Court that this reticence is not found in civil courts overseas. Nor is it a feature of adjudication in the care and protection work of children’s or youth courts around Australia.

However, it is reflected in the High Court’s judgement in M v M that the Family Court should not be distracted from its primary task by feeling a need to reach a conclusion about whether child sexual abuse had occurred. That is all very well, unless you are the child! Granted, this judgement also said the court should not grant custody or contact to a parent if the child would be exposed to an unacceptable risk of sexual abuse. But adept defence lawyers, armed with the pseudoscientific symptoms of the parental alienation syndrome skilfully argue there is no acceptable risk. Additionally, with the policy and cultural shift in favour of equal parenting rights in custody issues, dangerous decisions all too often fail to protect children.

The point is that, if the government has moved to balance the law with respect to both parents in Family Court custody battles and to provide better for fathers than was formerly the case, it also has the obligation
to pay attention to any dangers that exist in the present system.

This state of affairs has been recognised by the Family Law Council, and in 2002 it called for the establishment of a national protection unit to investigate child abuse allegations made in the Family Court. Reporting on this recommendation, Adele Horin stated in the *Sydney Morning Herald* on 3 May 2003:

Unless the Federal Government acts on the recommendations of its key family law body, the Family Court will blunder in the dark, mothers will be treated as liars, and children will continue to pay a high price to satisfy a father’s “right to contact”.

Of course, what she should have said is that ‘some children will continue,’ because, for most, having a father’s right to contact is vital.

Former chief justice of the Family Court, Alastair Nicholson, also recognises the need for changing the Family Court’s adversarial system. On his retirement in 2004, and as reported in the *Age*’s editorial on 24 September 2006, he suggested that a single court to preside over all matters concerning children is worth considering. The same editorial also points out that, back in 1998, retiring Family Court Justice John Fogarty claimed that the Children’s Court and the Family Court should be amalgamated because they work in virtual ignorance of each other.

These are but two of the many people calling for the removal of child sexual assault cases from the Family Court. It is said that unless this occurs its credibility will continue to diminish among child related professionals. A good start would be for the government to revisit recommendation 17 of the 2005 Senate Community Affairs Committee report, *Protecting vulnerable children: A national challenge*. This called for the establishment of a national commissioner for children and young people that would drive a national reform agenda for child protection.

The government, however, in its lack of wisdom in this case, would not support this recommendation. A change of heart and a display of political will to tackle child abuse at a national level would be welcomed. The government consistently says that it is a states’ issue, but it is everyone’s issue. We are not seeking for the federal government to take over state rights but to coordinate and lead in this area—and that is a different matter. Should a national commission for children be established, its reform agenda could examine ways to address the allegations of dangerous decisions emanating from the Family Court in child abuse cases. I would even predict that such an announcement would do the government a deal of good in the coming election. It would indicate a more caring, more committed government, leading in an area where fundamental leadership is needed to address those issues which negatively affect children at risk.

**Senate adjourned at 4.07 pm**