LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Crimes (Industrial Manslaughter) Amendment Bill 2003)

Members:

MR B STEFANIAK (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS K TUCKER

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 29 APRIL 2003

Secretary to the committee:
Mr D Abbott (Ph: 6205 0199)

By authority of the Legislative Assembly for the Australian Capital Territory)

Submissions, answers to questions on notice and other documents relevant to this inquiry which have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

The committee met at 2.06 pm.

THE DEPUTY CHAIR: Thank you very much for coming. I'd like to declare the proceedings open—a public hearing into the legislation concerning industrial manslaughter. You have, I believe, before you the buff-coloured card which tells you what will happen. I'm obliged to read this into the *Hansard*.

You should understand that these hearings are legal proceedings of the Legislative Assembly protected by parliamentary privilege, which gives you certain protections but also certain responsibilities. It means that you're protected from certain legal actions, such as being sued for defamation for what you say at this public hearing. It also means you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter.

It is the usual practice for us to invite you to make an opening statement. We will see where that takes us with questions and that sort of thing. Before you take up that invitation, could I ask you to identify yourselves into the microphone, and state the organisation you represent, for the purposes of Hansard.

MICHAEL PYERS and

KATE WILSON

were called.

Mr Pyers: My name is Michael Pyers. I am the Executive Director of HIA for the ACT/Southern New South Wales region.

Ms Wilson: My name is Kate Wilson. I am a solicitor at Chamberlain's Law Firm.

THE DEPUTY CHAIR: Michael, would you like to make an opening statement?

Mr Pyers: The committee has our submissions. Whilst I don't intend to go over those in significant detail, I wish to add a few points, if I may.

The HIA supports measures that will improve occupational health and safety in both the construction industry, where it is directly involved, and in industry generally. However, we believe that this bill does not achieve those objectives. I'd like to go over a few points as to why we believe that's the case.

First and foremost, the HIA is pleased to see that the bill does not contain some of the more onerous provisions from the employer perspective—if I might put it that way—which were debated in other jurisdictions such as Victoria. I talk specifically about the fact that the reversal of onus of proof upon the defendant was the subject of specific debate in Victoria. However, we question the need for the legislation. We also question—and we say it's debatable—whether this legislation will lead to an improvement in occupational health and safety in the ACT.

We believe another important question in this debate is: why is the ACT going one-out, all-out? As we've said, in Victoria an attempt was made previously to introduce industrial manslaughter legislation. Victoria has publicly stated that it will not proceed to reintroduce industrial manslaughter legislation, despite having a significant parliamentary majority in both houses of the parliament in Victoria. Queensland—the other jurisdiction where the concept of industrial manslaughter was the subject of significant debate—has taken a similar approach. We all know what the political numbers are like in Brisbane, from that point of view.

THE DEPUTY CHAIR: They're comfortable.

Mr Pyers: From your side of politics, they undoubtedly are. I wouldn't like to be on the other side.

I'd also like to talk about the existing legislative regime. We say that there is already in existence an extensive regulatory regime to deal with the issue of deaths in the workplace. We say that that can be done—and done adequately—by the provisions of the Occupational Health and Safety Act and also by way of the criminal code.

The criminal code was amended in 2002 to make specific provision for corporate responsibility, which is certainly what we understand to be at the heart of this bill. We understand that the heart of this bill is to make both officers of corporations and corporations, which have separate legal personalities, responsible for deaths in the workplace. But we say there is no need to do that because the existing criminal code contains provisions for corporate responsibility.

Also emerging is a debate regarding national standards for occupational health and safety. Regardless of what you think of its set-up or its report, the report of the Cole Royal Commission into the Building and Construction Industry has made recommendations regarding national standards of occupational health and safety for the building and construction industry. It took the view that a bricklayer, for example, is subject to the same safety issues in Canberra as they would be in Brisbane, Perth, Melbourne or anywhere else.

Our view is that, if you take that argument to its extreme, or to its extension, there may be an argument to extend that debate nationally across industry generally. If that is the case, and if that debate occurs, we would say that, once again, it raises questions as to why the ACT is attempting to go one-out on this issue at this point in time.

I'd also like to talk about alternatives to the legislation. Knowledge is, at the end of the day, the important key to reform. While the importance of an appropriate penalty and sanctions regime cannot be ignored, it is knowledge and training that will achieve OH&S reform. In that regard, the HIA supports appropriate education and training, including OH&S induction training for the building and construction industry.

The HIA has been active in OH&S training, in the absence of a regulatory regime in the ACT at this point in time, by offering New South Wales induction training for its members in the ACT. The HIA has also recognised the importance of OH&S by establishing an occupational health and safety business unit.

I'd like to talk about the economic impact. The HIA is of the view that, if the ACT goes one-out on this piece of legislation, it may have a negative impact on investment in the ACT. If a potential investor is making decisions on where to invest in Australia. All other things being equal—I use those words advisedly—we believe that the industrial manslaughter legislation may tip the scales against the ACT.

What is the bill trying to achieve? In the debate surrounding the legislation thus far, there has been little discussion of the occupational health and safety position in the ACT. What is the incidence of workplace death and injury? I've had some difficulty obtaining statistics which highlight the number of workplace deaths in the ACT. In the absence of that information, is this legislation an appropriate response or is it too much, given the existing regulatory regime that's already in place?

We believe the legislation will have an impact on small, rather than big, business. It will be easier for big business to defend itself in any proceedings, and also to create the perception of an appropriate workplace culture at the end of the day. That is important for the building industry, where 94 per cent of businesses employ less than five people.

The HIA's position on the bill, which is before both the committee and the Legislative Assembly, is that we welcome the fact that the bill does not contain some of the provisions that were the subject of debate in other states and territories, but we still oppose and question the need for the legislation. We contend that the onus is on the government to establish the need for a change in the regulatory regime and that that onus has not been made out. We will be happy to answer any questions on that basis.

MS TUCKER: There are a couple of points I'd like you to elaborate on. In your submission, you're asking for an improved emphasis on compliance regimes, rather than prosecution. So you're challenging whether this will have an impact anyway, as I understand it—a deterrence effect.

Mr Pyers: Indeed. That's correct. We say that, when you look at issues of compliance, you need to look at what some people call the compliance model. In the compliance model there is a small group of people who, regardless of the issue you're talking about, will, at the end of the day, never comply with the law. We all have to accept that. There is also a small group who will always comply with the law. And there is a group in the middle which swings, depending upon the circumstances.

We say that, if you want to get more of the swinging group of people over the line, more towards compliance than non-compliance, you need to take them forward with you. Holding a big stick over their heads is not going to take them forward. If you hold a big stick over people's heads, that engenders resentment against the law. It could engender a situation where people may, hypothetically, say, "I've been in business for 20 years and there's never been an accident in my workplace. I'll take my chances."

You can show them how occupational health and safety training will benefit their business by, for example, reduction in workers compensation premiums, reduction in lost time and down time—and how it will add to their bottom line, at the end of the day. We believe that, if you go down that path, you will get a better record in occupational health and safety compliance—rather than waving a big stick at someone.

MS TUCKER: What do you see as the main issues around compliance at the moment?

Mr Pyers: The main issues around compliance are probably, first of all, understanding and information. Even though people have an obligation to comply with the law, they need to be informed as to what their legal obligations are. So we say the onus is on government and organisations like the HIA to make sure as much information goes out to people as possible.

MS TUCKER: What needs to happen there now? How much more work needs to occur, in your view?

Mr Pyers: I think everybody is proceeding in the right direction. I know WorkCover are running significant seminar programs on workers compensation and other matters to do with occupational health and safety. There is a significant amount of information on their website. We run training programs and our website has a significant amount of information on it.

I think everybody is going in the right direction, and we need to keep going down the path we're going. This isn't a commercial—I'm just using this is as an appropriate example. At the HIA, we have the website capacity to do on-line self-paced learning. That means that a builder who is busy building houses—especially in the current environment of the Canberra building industry—can do various courses from home, rather than take time out to go to the HIA, the Ainslie Football Club or wherever we've got the course running.

We believe in working on measures to make it easier for people to learn and easier for people to understand. The other thing we need to consider—particularly in the ACT, as we're surrounded by New South Wales—is that businesses in the ACT, principally in the building industry, are constantly complying with two different sets of regulatory regimes. If you lessen the compliance burden and make it easier for people to comply, without necessarily lowering the standards of compliance, then I believe you'll get the result you're looking for.

MS TUCKER: Do you know how many people have used the training package on your web page?

Mr Pyers: It's just been launched—it's in the formative stages of development. I'm not sure of the exact figures, but there are training courses on various issues up there at the moment. As I said in my opening statement, we've put a number of our ACT members through the New South Wales package for occupational health and safety induction for the building industry.

That package sets out, in a basic form, their legal obligations—basic issues regarding site management and those sorts of things. So we're already going one step ahead of what the mark currently is in the ACT. That's why we welcome the moves and have been participants with WorkCover in the discussions regarding the introduction of occupational health and safety induction training for the industry. As I say, it is training and knowledge which improve compliance. I'm not aware of any research which suggests that compliance will automatically be improved by the imposition of a greater level of penalty.

THE DEPUTY CHAIR: I'm a bit concerned about accountability for people who, through their actions, are responsible for industrial deaths. Taking subcontractors for example, how easy or difficult do you think it's going to be under the current legal regime, or even under this proposed act, to get a successful prosecution out of the principal?

For example, you might get a company which has a head contract, which subcontracts twice or three times down the line—and it is the pressure that the head company is putting on the ultimate subcontractor which results in the death of the subcontractor or employee. How easy is it, under the current legislation, to get a conviction against that top contractor?

Mr Pyers: I will let Kate answer that one.

Ms Wilson: I'm not completely sure, but my understanding is that, if the necessary elements of fault, recklessness and so forth are involved, under the common law and the Crimes Act, anyone who has contributed to or caused the incident can already be charged—under the Crimes Act.

This new legislation doesn't seem to change much of that. There is still a requirement for causation, and there is still a requirement for negligence or recklessness. So, even if the Crimes Act might not be sufficient at the time, and it might be very difficult to bring high members of corporations and senior officials into, or to be held accountable under, the current legislation, there are certain things.

It's been recognised for a long time under the common law that they have to be present for the person to be held accountable, or to have caused the incident. You've got intent for murder, but in manslaughter you might have negligence or recklessness. Under this new piece of legislation, that doesn't seem to change to a great extent. There is still a requirement for recklessness or negligence, and there is still an element of causation.

So you might still come across the same difficulties in trying to grab someone four or five steps above. Unless the elements are already there, which are enough under the Crimes Act, or potential criminal code, depending on how it's slowly being enacted, this legislation isn't specifically going to help you in that area anyway.

THE DEPUTY CHAIR: Are you suggesting that, under the current regime, it's possible to prosecute up the line but it just hasn't happened a lot—that this legislation here doesn't finger people all the way up the line?

Ms Wilson: What I'm saying—and from my understanding—is that, under the current legislation, if the person had caused the incident, or caused the death, then they could be held accountable under the Crimes Act. This new legislation doesn't fix that problem. Fair enough, evidence obviously is a problem, and proving causation is a problem. You've still got to prove that they caused it; that the conduct caused it—and omissions are included—and you've still got to prove recklessness or negligence.

So, even though it's very difficult to go up the ladder, or the chain, I don't believe this is going to fix that difficulty, and I'm not going to suggest anything that does. Maybe

corporate responsibility rather than individual officers or directors might be the best way to go. But I don't see how this assists.

THE DEPUTY CHAIR: What is your response to the notion that the presence of this legislation makes that accountability more obvious to people—such that people who are advocating after the death of an employee now have something a little more obvious to hang their hat on than exists at the moment?

Mr Pyers: I would say, in response to that, that it's already there. The occupational health and safety legislation places an absolute obligation on an employer in respect of their employees at the workplace, and also with regard to those not in their employment while they're at their place of work. So that absolute obligation is there.

Whether those prosecutions are proceeded to the extent that they should be; whether the penalties imposed by the courts on prosecutions that have come before them have been appropriate to the circumstances; and whether people have got off lightly by way of a guilty plea, I don't know—I'm not going to speculate on those possibilities. However, at the end of the day, it is there—it is there in the context of the occupational health and safety law, and it's also there in the context of criminal law.

Ms Wilson: It gives the impression that these people are easy to reach. Someone reading it might say, "I can see that I can go after the directors and officers of the corporation, if necessary." In relation to individuals, I don't think this provides anything more than the Crimes Act already does. You're still going to have the issues of causation—the issues I've already been through. So it might be face value. They can say, "We're looked after"—but whether the actual application—

THE DEPUTY CHAIR: So you're confident that the existing laws—the Crimes Act and the Occupational Health and Safety Act—could, by way of this example, hold the people at the top responsible?

Let's suggest we have a developer who has a contract with a builder, who has subcontracted down to an electrician, and the developer is putting pressure on the builder to get the job, or a series of jobs, done significantly quicker than they should be done. The electrician is getting pressure from the contractor and the builder. The electrician takes short cuts and one of his employees gets electrocuted. Are you confident that we can pursue the developer for part responsibility for that death, under the existing legislation?

Ms Wilson: Obviously, I'm not confident that you could be successful. However, if you were able to establish that they were negligent and reckless and, through that negligence, it's reasonable to assume that someone could be injured or death could be caused, then there are applications—or there's room for that under the Crimes Act and common law as it exists at the moment. How difficult it's going to be to prove that, I certainly can't say.

THE DEPUTY CHAIR: I accept that. The discomfort I have is that it's not easy under the existing laws, given the difficulty of proof. I think that's going to apply, no matter what piece of legislation anybody comes up with. But, in fact, what this legislation does is identify those people in the chain, where other legislation does not.

Ms Wilson: Basically, it may identify them, but I don't see how that might overcome the difficulty of establishing causation, or their part in the death.

THE CHAIR: Having looked at this legislation, one of my biggest problems is that it establishes a very different type of offence from what we have in the criminal law—and a much easier offence for people who would probably be so far removed that they would never have a chance of being prosecuted for this type of crime under existing laws—and in this particular case.

John has highlighted an example where it may be difficult, under normal manslaughter laws, to prosecute some of the people in the chain. One of the comments made when we had the government here was in relation to the fact that people in a chain will all be able to be prosecuted along that chain for this—and that that in itself may cause some problems, in that that is very different from the current criminal law.

I'll give you the example I gave then, and I'd ask for your comments. Let's expand John's case. Someone who wants a job done quickly puts pressure on, say, the subcontractor, who is the electrician. He puts pressure on his employees and someone gets electrocuted. There are two people in that chain. Under this, it would seem to me that both could be prosecuted.

Let's put another person in the chain, on top of the bloke who gets the subcontractor to do the work with his apprentice. Let's say that person is a sort of site organiser. Say the developer tells the person running the site to hurry it up. He then tells the subcontractor to hurry it up. The subcontractor then takes some steps he shouldn't take and someone gets electrocuted. Under this, it would seem to me—correct me if you have a different view—that all three people up that line would be able to be prosecuted for this occurrence.

There is a considerable difference, it would seem—again, correct me if you have a different view—in respect of the current laws for manslaughter. Take, for example, a group of mates having a few beers—quite a few beers. The owner of a car lets a mate, who is obviously very drunk, drive. They're all yahooing around. He knows the fellow is very much affected by alcohol, but they want to take another bloke home. The fellow hares off at high speed, has an accident and kills the passenger. That may be rather difficult. I'd imagine the driver could, quite properly, be prosecuted for manslaughter, but the person who owned the car and lent it to him would be one step removed. That might be a little more difficult.

If you think there's something wrong with that sort of scenario and that I'm going off at a tangent there, please tell me. But there is naturally a very high standard for proving a serious offence like manslaughter. It obviously has to be proved beyond reasonable doubt—but also, in respect of the elements of the offence, there is usually a high degree of negligence. The facts must gel with the elements before you get a conviction.

It would seem to me that the potential in parts of this legislation is to make it much easier for a greater group of persons to be prosecuted for this type of offence. That's a departure from what we would normally see in the criminal law. I'm not talking about

occupational health and safety law, I'm talking about straight criminal law—because this is an amendment to the Crimes Act.

Ms Wilson: Yes. My understanding of our position is that, if they are responsible enough to be pursued under the Crimes Act, and if they are too removed from the injury, then there's a question of whether they should be pursued in the first place. If you've got a developer and there are five levels down the middle, this new legislation will say that you can chase after the developer. You might still have evidence problems, but, if there's someone so far removed that you can't get them under normal legislation, then should they be pursued?

Does the top developer have a responsibility if four or five people have also instructed otherwise? Should it be put on them to take account of every single person underneath? You'd still have to prove recklessness and negligence. But, if they're so far removed not to be taken under the Crimes Act, which has a lot of common law supporting the rules—I mean the Crimes Act and the common law working together—there's no reason why we should have new legislation which automatically brings people in.

MR HARGREAVES: I can understand what you're saying but I'm having a bit of difficulty in respect of your submission. You may be able to clarify it by addressing the first dot point on page 5. Halfway down, the association disagrees with the minister's statement about the line of accountability, if you like. You say that in fact, the legislation will mean that employers, directors, managers and many other persons connected with a corporation will now be open to prosecution who previously were not.

When we talk about any level of prosecution, you don't go down that track unless you've got proof, causation, negligence and all that sort of stuff. So those people, who have made a decision in good faith, are not going to get prosecuted anyway.

From my reading of it, there was an intent in the legislation to try to pick those people up. But you may have somebody who has had active participation in the events, who has displayed negligence, who won't be picked up. That's the position you've given here. You've said that they will now be open to prosecution—of course subject to the matters you mentioned before—where previously they weren't. Isn't that a good part about this?

Mr Pyers: We don't resile from that. Our issue with that is more fundamental. We don't resile that that's the intent of the application of the legislation. Our position is more of a fundamental one as to whether the legislation should be introduced or not.

One thing we shouldn't lose sight of is something I mentioned earlier—that, at the end of the day, the big end of town will be able to buy enough legal muscle to defend themselves adequately against these sorts of legislative provisions.

Perhaps I can illustrate that with an example, without naming names, of something that happened to a HIA member in this region in the last couple of years. This guy was a builder. He had been in business for 20 years or so and had engaged a subcontract painter, who he had known quite well over the years, to do some painting work for him. This happened on the other side of the border. He erected a scaffold in accordance with New South Wales regulatory requirements for the erection of scaffolds. The painter got there and moved the scaffold. The scaffold collapsed on the painter and the painter died.

This guy was prosecuted extensively under New South Wales occupational health and safety law. I don't take issue with that because that's what the law says. The net effect of that prosecution, and the subsequent events surrounding the prosecution, is that the guy has gone out of business.

The fact is that he erected the scaffold in accordance with the requirements and the painter came in. That's the nature of the building industry. If builders have five or 10 jobs going, they can't be on all of them at once.

Given all of those circumstances, surely somebody in that situation has paid enough penalty by losing their business, being fined and having to live with the fact that somebody died at their workplace—rather than throwing at them the additional burden of possibly going to jail—given that they did everything they reasonably could to make sure the work environment was safe.

THE CHAIR: The second dot point reads:

> It will be relatively easy for the prosecution to prove that, even if the person thought they had taken all reasonable OHS precautions, there was something that they (as well as many other people) could have been done which might have prevented the accident;

And, despite that, they could be guilty of an offence under this Act. That concerns me. I'd like you to elaborate on that sort of situation. I take it that the situation you mentioned is a case of one death.

Mr Pyers: Yes, but that's the best example of it.

THE CHAIR: That the person who erected the scaffold thought he was doing the right thing?

Mr Pyers: It was erected in accordance with the regulations, but somebody came and moved it.

THE CHAIR: Someone moved it, and died.

Mr Pyers: Exactly. It is my view, and it's certainly the HIA's view, that the builder has paid enough penalty, by those circumstances, without having the possible burden of going to jail thrown on top of him as well.

THE CHAIR: I think the maximum fine in our current legislation is $125,000, under the Occupational Health and Safety Act. A number of submissions have listed a series of things they say are problems with the proposed bill.

As you point out in your submission, other states have not gone down this path. However, I think other states might well have upped and might have different penalties. There may also be some different sections in their occupational health and safety legislation, including perhaps a more severe fine than, I think, a maximum $125,000.

Mr Pyers: That is indeed the case.

THE CHAIR: Would your organisation—the HIA—have any points to make, or issues, if, for example, this committee were to recommend enhanced occupational health and safety legislation—perhaps upping penalties to bring them into line with other states, if appropriate?

Mr Pyers: We have a fundamental position in relation to industrial manslaughter legislation, which we would argue here and in any other place where it came up around the country. The position we put to this committee is the position we would put to any government. You're absolutely right.

My main experience in this area, prior to coming to Canberra, was in Sydney. If the maximum penalty here is $125,000, the penalties under the New South Wales occupational health and safety legislation are significantly higher than that. I would say that, because of our fundamental position in relation to the need for the industrial manslaughter legislation, if the committee were to recommend appropriate increases in penalties, then we would see that as being the lesser of two evils.

THE CHAIR: You wouldn't really like it, but you'd see that as the lesser of two evils?

Mr Pyers: Yes. As I say, the honest way to answer that is the lesser of two evils.

THE CHAIR: I want you to be honest, obviously—you're meant to be. As I said, no-one else has this sort of legislation. Coming to the ACT's specific situation, when the government officials were here, they presented us with a paper which had a very useful attachment—page 15, attachment 1—Work-related fatalities in the ACT.

Thankfully, probably because of the nature of our industry here, there have been relatively few fatalities. I went through, highlighted and asked them about ones which obviously were on-the-job fatalities, as opposed to people driving to and from work, heart attacks, et cetera. There were a couple on which they weren't too sure, but we've given the benefit of the doubt there, saying that it's a work-related death if there's any doubt. There are some 30 listed. There appear to be about 10 which are obviously deaths on the job, through something going awfully wrong.

Mr Pyers: Are they the ones in bold?

THE CHAIR: Yes. Have you got that?

Mr Pyers: We have now, yes.

THE CHAIR: For example, year of injury, item No 6, 1990-1991—male—crushed by granite slab. The next one, which is No 7, was crushed beneath a scraper. No 9 is crushed by machine and Nos 12, 13, 14 and 15 are electrocutions. Then No 18 is heat exhaustion in the building industry. We assume something went wrong on the job there. No 21 is asphyxiated on vomit in the printing business. That might have been a genuine sort of accident but, again, there could have been something terribly wrong there. No 23 is crushed by roller. The other ones, apart from perhaps a plane crash for an airline instructor, don't appear to be necessarily to do with what happened on the job.

Looking at the statistics, we are lucky here in the ACT—we are relatively fatality-free. The housing industry, with the building industry, is one of the areas where injuries are more likely to occur. I've asked the government officials this too and they're getting back to us. Do you have any knowledge, in respect of any of those deaths on the job, of cases where clearly someone had been very negligent and if something had not gone wrong on the job, which was the fault of someone there in authority, that death could have been avoided?

Mr Pyers: I don't have any specific knowledge of that, or of any of the matters referred to in this table. I can endeavour to find out, but it's very difficult for us at the HIA. Members may ask us for advice on workers compensation matters from time to time, particularly if there is a death in the workplace. We have the example I mentioned earlier, but people coming to us about matters like that are probably the exception to the rule. More than anything else, our advice about workers compensation is whether somebody was an employee for the purposes of the act. We will find out what we can but, for that reason, it might be difficult for us to respond to that.

THE CHAIR: All right. Would the MBA be a better employer group for knowledge on that?

Mr Pyers: I don't even know, from looking at the statistics or this table, whether these happened on housing or commercial sites. It might be appropriate to ask the MBA. For example, I'm looking at No 23 there—crushed by roller; construction industry; roads and bridges. They would probably have more knowledge of that than we would at the HIA.

MS TUCKER: For me, the key issue is about the current legislative framework. This is the proposed one in the context of it being possible to hold accountable people who have been found guilty, in some way, of negligence, recklessness or intent regarding a death. Your legal view appears to be that it is possible, under current law, to do that. The government's view is that it is not, and that's why they put this legislation.

I'm not quite clear what your point is here. You seemed to be saying before—and I'd like you to clarify it—that your concern is that this proposed legislation could potentially make people vulnerable who are not currently vulnerable. Is that correct?

Ms Wilson: The proposed legislation, in my view, intends to make other people who, for various reasons, might not be found responsible under the Crimes Act liable because of negligence and recklessness—and it goes further up the chain. I guess my major issue is that, if there were good enough reason to hold them responsible, it could be done under the current legislation.

MS TUCKER: That's where there seems to be disagreement.

Ms Wilson: With the corporations, I'm not sure if we're talking about senior officers or directors. That is what I'm talking about. They are the same as any other person who is responsible for a death. There's no reason why a manslaughter charge can't be brought against a director, if there's enough evidence to support them being responsible for it, or that they caused the death, if they were negligent and reckless in their conduct. There's no reason why they're different from any other person on the street in relation to this.

That's covered, for individuals, under the Crimes Act. From my understanding—I'm not sure if I'm correct—the criminal code, parts of which have been enacted, but not completely, has also brought in corporation liability.

MS TUCKER: That's the bit I'm not sure about. You seem to be acknowledging that there are issues around corporations under the current legal framework.

Ms Wilson: No.

MS TUCKER: You're not acknowledging that?

Ms Wilson: No—senior officers and directors.

MS TUCKER: But you're saying senior officers and directors at the moment could not be?

Ms Wilson: They could be, under the current framework. At the moment, corporations cannot be held responsible for deaths, as I'm aware. From my reading of the criminal code, which is slowly being enacted—chapters 1, 2, and 4, the section on corporate criminal responsibility—there seems to be an intent to bring that in and adopt it in the current Crimes Act. From my understanding, it will eventually be implemented in relation to all offences in the ACT. So there's no reason why this isn't already going to be covered by the criminal code in itself.

MS TUCKER: So you're hinging your argument on the criminal code—

Ms Wilson: And the Crimes Act.

MS TUCKER:—taking up the slack on the corporations?

Mr Pyers: To a large extent, yes.

Ms Wilson: There's no real reason for this legislation.

MS TUCKER: If the criminal code picks it up—which you're arguing?

Ms Wilson: For all intents and purposes, it seems that it's going to be done anyway.

MR HARGREAVES: To pick up on what Kerrie's talking about, we're talking about holding people individually accountable. I understand the argument you're putting; I understand the argument the government is putting; and there are contrary arguments. But how about where a corporate culture is responsible for somebody's death? It's not an individual per se, it's a corporate culture—something that comes out of a boardroom. It's a collective issue and it's a creation of a corporate culture, which permeates down the line.

If there is the interpretation of a corporate culture by an on-site supervisor, and activity results in the death of an employee, my understanding is that this legislation can hold that corporation, as an entity, responsible for that death—provided you can prove all of the above. If you cannot, you don't mount a prosecution. I understand that you can't do

that under the current Crimes Act or the OH&S legislation, but you can under this. Can anyone respond to that?

Ms Wilson: From my understanding, the criminal code takes that into account in its drafting anyway. From my understanding, the corporate culture is specifically referred to in the criminal code, so there's no need for any other legislation to take that into account.

MR HARGREAVES: But is there a penalty under the Crimes Act and the OH&S act to hold the company responsible as an entity—as a non-real person?

Ms Wilson: Under the Crimes Act at the moment, the penalty provisions—which we haven't dealt with—aren't adequate to take into account corporations. But that doesn't necessarily mean that a whole new legislation has to be enacted, purely for that reason. New penalties can be incorporated under the criminal code that's been enacted, or amended, under the Crimes Act.

Mr Pyers: Perhaps I can respond to that in relation to the Occupational Health and Safety Act. Certainly it places an absolute obligation upon an employer. If an employer were facing proceedings for breach of the Occupational Health and Safety Act, if it could be established—or if it came out in court, in my experience—that there was a corporate culture of avoidance of one's obligations towards workplace health and safety, then I do not think that, as a matter of practicality, as a matter of policy and as a matter of a number of things, the courts would look favourably upon that. Any chances of a successful plea in mitigation would be minimised if that did indeed come out.

MR HARGREAVES: Isn't that application of court time on the company directors, secretaries or whoever, at the highest level I can think of—but it isn't on the corporation as an entity?

Mr Pyers: No. It is on the corporation as an entity. Certainly, under occupational health and safety law, individuals can be fined, and the corporation can be fined. There are deferential levels of penalty—if I can put it that way—for corporations and individuals. I agree with what Kate's saying as far as the criminal code is concerned but, in addition to that, as far as the occupational health and safety law is concerned, we would say it is picked up there.

THE CHAIR: Kate, it would be against the occupational health and safety laws, would it not—I assume it should be, if it isn't—that, if the corporate culture was one to effectively ignore the laws of occupational health and safety, that corporation would be in breach of current laws and would be prosecuted and prosecuted successfully, accordingly?

Ms Wilson: That's correct. If it's an unsafe work environment or corporate culture, then OH&S surely covers that anyway. Even so, the criminal code has got room for it. If that is going to be followed through, then we've already got an opportunity for corporations, where the corporate culture is unsafe or, as a result, leads to injury or death and so forth, to be made accountable.

MR HARGREAVES: But isn't that an inconsistency—where, although you can take an individual to task under the Crimes Act, you can't take the corporation to task under the

Crimes Act—you've got to do it under the OH&S legislation? Isn't there an inconsistency there?

Ms Wilson: That's the criminal code, from my understanding. Please correct me if I'm wrong but the criminal code, in section 49 and the few sections afterwards, deals specifically with corporate criminal responsibility.

Although the criminal code, from my understanding, isn't complete, from the reading of the explanatory memorandum, there is the intention for it to apply to all ACT offences. So there is no reason why it would not apply to manslaughter or grievous bodily harm, if that were to occur—not just in the workplace but all over. I don't think there's a need for two separate pieces of legislation where there's obviously an intention of the government to include corporate responsibility—corporate culture and corporations being held liable for crimes against an individual.

MS TUCKER: It sounds to me as if you're arguing, with regard to liability, that there is an issue at the moment, particularly for corporations to be dealt with under the Criminal Code, and that we don't need this legislation because the whole question's going to be dealt with. So why do you say, in your submission, that investors might come to the ACT if we have this legislation?

Mr Pyers: It seems to me—or it seems to us at the HIA—that, in trying to put yourself into the shoes of an investor, you're weighing up whether to invest here or in another part of the country. The situation may be that payroll tax is roughly the same, workers compensation is roughly the same, the economic environment is roughly the same and you can easily locate and house your employees—all those things are roughly the same.

All other things being equal, if those things are roughly the same, an employer may be weighing up where to invest—I put it as a maybe, I don't put it as a definite—but the fact is that you may be held criminally liable for an offence of industrial manslaughter. All I'm saying is that, at the end of the day, if the ACT is the only place in the country where you can be held criminally liable, it may put some doubt in people's minds as to whether to invest in the ACT or put their money elsewhere.

MS TUCKER: Okay, but this is what I don't understand: I thought you were just establishing that they're going to be criminally liable anyway, if they are guilty under the criminal code, which is across Australia.

Mr Pyers: Indeed, but that's criminally liable in general terms. That's criminally liable, potentially, for a death in the workplace. It's criminally liable if they run somebody over and that person dies. That's the same criminal liability that is attached to us all. It's not a specific criminal liability for a death in one specific place.

MS TUCKER: But I thought you said that you'd be criminally liable anyway, under existing legislation.

Ms Wilson: You can be, but it is also face value. You come in and you've got a new piece of legislation dealing specifically with industrial manslaughter. On face value, it appears that all these people can be held liable. The normal person's going to look at that. Whether or not there are evidential problems and causation issues and so forth,

they're still going to look at the legislation and think, "There's legislation here." When you look at it, that's what you're presented with.

I think that, as Mick says, it does make a difference as to whether or not it is followed through. It might not ever be used, because it might not be considered practical, and whether or not it is, is another question.

MS TUCKER: If a person comes into the ACT or is in any way involved in employing people here, as I understand your argument, they're going to have to understand that they can be found criminally liable for manslaughter in a workplace situation.

Mr Pyers: That's right. If you look at New South Wales or Queensland criminal law, they could similarly be held criminally liable where they are now—or in Brisbane. Let's say the hypothetical person we're speaking of is weighing up whether to invest in the ACT or Queensland. This legislation isn't here. Let's assume this legislation doesn't go forward and all other things are equal—this legislation does go forward and all other things are not equal as far as the ACT is concerned. That's really the heart of our argument.

THE CHAIR: I've got another issue, again in relation to this chain of command, as it were. A corporation or an entity may want to contract something out and they have a contractual obligation. They say to the subcontractor, "Listen, I want you to do the work here in strict accordance with the occupational health and safety laws, with due regard for safety of workers." That's basically one of the clauses in the contracting-out arrangement. If the subcontractor goes off and does something negligent and someone dies, it seems to me that there may even be a problem with this legislation, in respect of the person who contracts out to someone else to do the job, and they may still be potentially liable.

Mr Pyers: Even though that's stated as a specific provision in the contract.

THE CHAIR: Yes—even though they've stated that they must comply with the occupational health and safety law.

Mr Pyers: On the face of it, I would say that that's right. Speaking from the building industry's perspective—as it's an industry which relies significantly on contracting—that was a matter addressed in the report of the Cole Royal Commission into the Building and Construction Industry.

I represented the HIA at a conference the royal commission held, for two days in Melbourne, in September last year. One of the things discussed, which was mentioned in the final report, is the idea that there must be a contractual obligation to build on time, within budget, and to build safely. They were the themes emanating from that. I agree with you that, even though somebody has expressed an intent to their contractor that they must comply with the law and that they must do things in a safe fashion, that doesn't obviate their liability.

THE CHAIR: Effectively, to avoid this, they'd have to be there all the time supervising the subcontractor, which may be impossible.

Mr Pyers: That's right, with the nature of the building industry, or any other industry which relies on contracting. Let's take the transport industry where a person's workplace is the truck.

MR HARGREAVES: Not so. Therein lies an issue.

Mr Pyers:—I just mention that as an example of industries where people are away from the workplace all the time. It makes it very difficult to manage.

MR HARGREAVES: I take your point, but that little bit in the middle is one of the contentions.

THE CHAIR: All right. Does anyone have anything else? Are there any other comments you'd like to make, to assist the committee?

Mr Pyers: No, nothing specifically. I think we've covered it all this afternoon.

THE CHAIR: Perhaps I could ask you one more question. There was one comment you made in your submission about which I made a note. The Crown currently is not required to prove that the death was caused by the injury. You talk about clauses 49C and 49D. At the bottom of page 3, you say:

> The offence is made out if a worker—"is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies."

You stated:

> As currently drafted, there is no provision requiring proof that the death was linked in any way with the injury. The prosecution simply has to prove that there was a workplace injury and later the worker died, and it is irrelevant whether the death was caused by the injury or how much later the death occurred.

You then give an example—that a person might be injured, die later on of causes that are unrelated to, or only marginally connected with, the injury but yet the offence could still be made out. You obviously want that amended, were this to proceed. Why do you say that? I had a quick look at the section. I thought you'd have to have a causal link there, but I might have missed something. Could you explain what you mean there?

Ms Wilson: I'm not sure. Obviously under 49C(b) and 49D(b) there is a causation.

THE CHAIR: Yes, I would think it's 49C(b) and 49D(b). There seems to be a causal link there if the employer's conduct causes the death. In D, the senior officer's conduct causes the death. I take your other points, but I wondered about that one.

Mr Pyers: There's nothing we can add at this stage, above and beyond what is already there, although I note your point.

THE CHAIR: Is there anything anywhere else in the legislation that supports the point you're making there?

Mr Pyers: Not that I'm specifically aware of. I'll come back to you on that.

THE CHAIR: That seems to be a little incongruous, just as it is, from looking at those sections. So perhaps you'd like to address that and come back to us on that in writing.

Mr Pyers: We certainly will.

THE CHAIR: I'd appreciate that. Thank you very much for your attendance.

Sitting suspended from 2.59 to 3.13 pm.

NICK PROUD and

JANE BERGMANN-HANNA

were called.

THE CHAIR: Thank you both very much for coming on behalf of the AHA. For the purposes of the transcript, please give your name and the position in which you are appearing before the committee.

Mr Proud: Nick Proud, general manager of the ACT branch.

Ms Bergmann-Hanna: Jane Bergmann-Hanna, national manager, employment and industrial relations, Australian Hotels Association.

THE CHAIR: You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter.

Who would like to start off? I thank you for your submission. Would you like to say anything in relation to that? Is there anything you wish to add to your submission?

Ms Bergmann-Hanna: Thank you. We appear on behalf of the hospitality industry. We are a member-based organisation. We represent a number of different businesses throughout the ACT, generally of a general hotel nature or accommodation hotels. We have a wide range of small and medium-size businesses up to larger businesses—for example, the Hyatt Hotel.

In terms of the hospitality industry, we are obviously facing some real challenges at the moment—in particular, with our international visitor arrivals. Current statistics show the number of visitors to Australia in March was down 11 per cent on 2002 data, that is, Australian Bureau of Statistics data recently released.

Obviously, this decline is being blamed on the severe acute respiratory syndrome virus, the war in Iraq and terrorism threats. The Australian Tourism Commission has also issued a warning that the second quarter of 2003 could see one of the worst tourism slumps on record in Australia. There are already 40,000 fewer international arrivals, which is obviously going to impact on tourism in the ACT. I mention those statistics just by way of background on challenges facing this organisation and our membership at the moment.

In relation to the bill, we have put in a fairly comprehensive submission. In short, we believe there is no need to introduce new legislation to prosecute directors and senior officers, as proposed. We believe it's unwarranted and should be withdrawn. There's already a standard criminal law for manslaughter which exists and can be utilised for

exactly this purpose. We remain to be convinced that there is any demonstrable need to go any further and introduce legislation of this kind.

A main concern, I guess, in terms of if there is any kind of prosecution under the bill as it proposes to change the act is what it would do in terms of who would get identified within a company to be prosecuted. I guess it comes back to principles of corporate responsibility and how you designate who becomes prosecuted in this circumstance.

There was a famous case in the United Kingdom involving Tesco supermarkets which determined that the governing mind and will of the company is what has to be fixed upon in this sort of circumstance. Also, in that case it was shown that it was quite hard to determine who that person was. In these circumstance, I think there's enough ambiguity to make it quite difficult type of legislation to actually make it work and we obviously, on behalf of our members, have real concerns as to how it would be implemented.

THE CHAIR: What were your primary concerns in relation to this as it would affect your employees or members?

Ms Bergmann-Hanna: We welcome the fact that there is no vicarious liability aspect to this, as there was, I believe, in legislation introduced in other jurisdictions, but unsuccessfully—for example, in Victoria—but we are concerned that really this is already covered. Manslaughter is obviously a crime. Obviously, people will get prosecuted for it where there is a death. So it's already there. We think there should be increased emphasis on developing and delivering effective training and educational programs to raise awareness of occupation health and safety and, in particular, prevention. I mean, that's exactly what occupational health and safety aims towards; it is the prevention of these sorts of things. We can't see what improved objective would be gained through introducing this type of mechanism.

MR HARGREAVES: I take you back to something you said a minute ago which sparked me off. You talked about the Tesco case. Did you talk about corporate mind and will? I've forgotten the actual terms that you used, but I understand what you're saying. You were saying that what was highlighted in that case was the difficulty in trying to prosecute the company, per se, as opposed to individuals that have got a direct connection with a death or with significant injury. The difficulty was in actually proving causation, negligence and everything else in the context of a corporation.

Ms Bergmann-Hanna: Yes.

MR HARGREAVES: Do you think that the current Crimes Act and OH&S legislation are as good as or better than this proposed legislation in trying to define that corporate mind and will a little bit more, I guess, in response to the Tesco type of issue? As I understand it, individuals can be charged under the Crimes Act and the OH&S Act, but society is not holding people accountable at that corporation level. If the company itself, the non-real person, as it were, has a corporate culture which has contributed to the significant injury or death of an employee, they're not necessarily held accountable enough because of the sort of thing you're talking about with the Tesco case, the difficulty of actually attributing it to that corporate mind and will.

Do you think that this legislation is actually trying to attempt, at least, to have a structure that the prosecution can hang its hat on and hold those people accountable?

Ms Bergmann-Hanna: Perhaps. I guess I raised the case to show that it's inherently difficult to do that at all. Obviously, there is a legal distinction between the corporation, being the legal structure which runs the company or is the company, and then the people who run that company, who are those who would end up being personally liable for a crime under this type of legislation. There has to be a distinction between the two. But when it comes to the nature of a manslaughter charge, you are looking at an individual person, not at the company at all. The company is a separate legal structure. I guess the Tesco case highlights that inherent difficulty in sheeting that home as to who is going to be—

MR HARGREAVES: Shouldn't we really be doing everything we can to actually sheet that responsibility home to the corporation as an entity, because of the probability of a corporate culture which is something that has grown over the years, not necessarily something that a company director has said is going to happen now? It may be a culture which commenced 20 years earlier and has become a certain culture and people are working within it and then, bang, somebody suffers as a result of that. So we're actually saying that company itself, a non-real person, whatever the legal words are for that. Shouldn't we be struggling to find a way of holding that entity responsible?

Ms Bergmann-Hanna: Well, I think it's difficult, I still think it's inherently difficult, to do that. I guess the point I'm making is that it's a very difficult type of distinction to attribute.

MS TUCKER: But should we try to draw it?

THE CHAIR: Wouldn't they be guilty under the Occupational Health and Safety Act already?

Ms Bergmann-Hanna: Well, that's the thing. There are already sufficient penalties and so on under the occupational health and safety legislation, and if we're going to look for that prevention aspect of what the company is meant to do in all its liabilities to its employees, to occupiers and to the public, that's all there already. In terms of any individual transgression or crime, that is covered by the Crimes Act where a death occurs.

MR HARGREAVES: Can I ask for your opinion, then? In that case, and this is not a political statement by any measure, when the hospital implosion went wrong, the people who were actually charged under the OH&S legislation were the shot firer and a couple of people from Totalcare, but the Totalcare institution itself, the body, because it's a government business enterprise and not the public service, nobody ever considered holding that entity responsible and yet it could very well have been that the imperatives to get on with the job came out of the corporate culture of that particular organisation. They weren't ever considered for prosecution. Is that because the OH&S Act couldn't pick that up, or because there just wasn't a case, do you think?

Ms Bergmann-Hanna: I think defining and putting into evidence what is a corporate culture is going to be a very difficult exercise as well. To present that as objective

evidence, I think you're always going to have difficulty to prove to a court what is meant by a corporate culture. That's always going to be difficult.

MS TUCKER: It says, as I understand it, that you have to show that the action significantly contributed to the death. I don't think anyone is suggesting that it would be particularly easy, but it's necessary for it to be able to happen if it is the case that the culture of the corporation did significantly contribute to the death.

As I understand it, what the government is trying to do here is to pick up a loophole in the current legislative framework, although there is an argument that the criminal code now is going to cover corporations. That may be the case. That's what the committee is looking at as well. Are you aware of the criminal code actually now bringing corporations into law, you can find corporations liable? Are you aware of that, if that's happened?

Ms Bergmann-Hanna: Not in any great detail. I'm aware that they have been considering that as parts of reform.

MS TUCKER: It's there. We can give you a copy of it later, if you want. If you haven't seen it, it doesn't matter; we won't pursue it now. Basically, the position put by the previous witness was that the criminal code will deal with corporations. Your position seems to be that you wouldn't even support that necessarily.

Ms Bergmann-Hanna: I'd say there are difficulties in doing that. That's all I'd note.

THE CHAIR: We probably need someone who is quite expert in this and a lawyer to appear and assist us, but we have occupational health and safety legislation which enables a corporation and, indeed, individuals to be prosecuted. We have the criminal law in relation to manslaughter, which enables individuals to be prosecuted, and we will soon have, when that particular chapter of the criminal code is enacted, some new ability under that for corporations to also be convicted and, presumably, whopping big fines for criminal conduct including murder, manslaughter, whatever. Is that your understanding of the law?

Ms Bergmann-Hanna: That's correct and that's why our position is that we're concerned that there would be a further layer on top of that. We think that that scheme already would cover what is contemplated by this bill.

If I can go back to the significant contribution issue that was raised a bit earlier, that I think is going to be a difficult test as well. When you speak in terms of significant contribution, it's always going to be ambiguous as to who that would apply to, how that's occurred. It's going to be, again, a matter of evidence and a matter of testing how that concept works. So it's going to have to be made quite clear.

I guess it would be in terms of how the extrinsic materials would tease that out as well as to the intention of the parliament. But that is of concern to us. How significant is it? is it very significant; is it slightly? I mean, significant imparts a particular meaning, but to have some more clarity as to what that means. There are certain definitional things within the bill at the moment which are problematic.

THE CHAIR: Okay. Would you like to point to them?

Ms Bergmann-Hanna: Well, our submission, I think, points to a lot of them already. Maybe I should take you through which ones we're concerned with on the way through.

THE CHAIR: Yes, I think that probably would help us, for the record.

Ms Bergmann-Hanna: On page 6 of our submission, we have concerns that some of the definitional aspects of the bill are not clear: the definition of agent, the definition of control. Just to clarify, to provide a greater degree of certainty as to its meaning for the agent, like what degree of control is unacceptable?

There was also a concern—I guess this is more an industry specific concern—that hotels are workplaces at all times, that everyone is under the control there of the property owner or operator. That poses a concern where it's actually more of a smaller-size business, where it's family operated, and goes between being a workplace and a family gathering place, so that there is more domestic use of the property.

I think we've already discussed the concerns about "substantially contributed". Another concern we have is that the bill is going to cover the workplace, but it's not clear to us as to whether it's going to cover journey claims. The definition of work, does that cover work simply when you're at the premises or to and from work? If a mishap occurred to or from work, would that then be covered, would the employer be responsible for what had occurred there?

MR HARGREAVES: If, for example, an employer gave an employee a motor vehicle to take home and back on the basis that it's securely parked at their home but they did not maintain that vehicle properly and an accident ensued and the person died halfway home, that's the issue that you're talking about here, isn't it, that sort of thing?

Ms Bergmann-Hanna: That sort of control and journey, yes.

MR HARGREAVES: Or between premises, perhaps?

Ms Bergmann-Hanna: Yes, that's right. Or similarly, if someone had finished work for the day and was to go to a bar and have a drink for a workplace function—off the premises, but still at a workplace function—whether that sort of circumstance would be covered by the bill.

MR HARGREAVES: Are you saying that that's not clearly defined within the bill?

Ms Bergmann-Hanna: No, that's right, that sort of circumstance as to what might happen. Also, a real concern we have in the hospitality sector in terms of the scope of the bill is that you have people on the premises and some sort of violent incident might occur. It has not been unknown for stabbings, assaults or whatever to occur on licensed premises. It's usually patrons, but sometimes an employee may get hurt through that. How would the bill cover that type of circumstance? Obviously, our members do their utmost to ensure there's security to prevent anything like that, but if there was a mishap where some assault of that nature occurred, what is the bill's work in relation to that kind of incident?

MR HARGREAVES: Are those definitional problems also within the OH&S legislation, or is it clear within the OH&S legislation and therefore this needs fixing up to match that, if this is to go forward?

Ms Bergmann-Hanna: That's a good point. We would say, I guess, with the occupational health and safety legislation that what would be best is if both of them could be reviewed together to ensure that they match in together and are complementary. That's certainly a strong submission we have, that both should be reviewed together to ensure that they work together properly.

MR HARGREAVES: In terms of your concerns about definitions, I take it that it is possible that the definitions contained in the Crimes Act, the OH&S Act and this bill may pose definitional problems for your industry and perhaps what needs to happen is that whatever government is in charge has to pay attention to putting definitions into the legislation act, which is intended to cover all pieces of legislation, so that you don't have any contradictions between legislation on definitional terms. Could I take it that you're encouraging the government to look at all the definitions in all of the legislation covering your industry to make sure that at least they're clear, if nothing else?

Ms Bergmann-Hanna: Yes, that would certainly assist.

MR HARGREAVES: And they could do that under the context of the legislation act.

Ms Bergmann-Hanna: Yes.

MR HARGREAVES: Good call. I'd like to thank you very much for what your submission contains. It certainly focused my mind on quite a number of issues and I think it's quite a concise submission, so thanks very much for that. I don't have any more questions off the top of my head.

THE CHAIR: I note, having a look through the deaths of people involved in work-related fatalities, that some of them have been while going to and from work, car accidents which probably had nothing much to do with the job, but there have been some which have happened at work, thankfully only about 10. I cannot see the hotel industry featuring there, which is pleasing. It's pleasing to see that there have been so few deaths.

MR HARGREAVES: Are they compensable ones as well as others, Bill, those lists?

THE CHAIR: They are derived from workers compensation. It would seem that yours has been a fatality-free industry for as far back as these lists go, which is 1990. Sadly, in the industry you deal with some pretty difficult people in some establishments and there is always the potential, and it probably does happen occasionally, for employees to be assaulted. I suppose there's also the potential there for an employee going about their work to be killed as a result of an assault by a patron or something. Are there any issues in relation to this proposed legislation around that issue which, whilst hopefully a fairly remote possibility, is nevertheless a possibility, I suppose, for workers in your industry who potentially can suffer and sometimes do suffer violence at the hands of unruly patrons?

Ms Bergmann-Hanna: Yes, it is a concern. We've certainly seen violence increasing within our industry and it does tend to be probably more between patrons and perhaps away from the bar staff. But there can be circumstances where there may well be an attack or an assault; that's correct, it's a remote possibility, but where knives and so on are involved you could have a death, even where everything has been done in terms of security and so on to prevent that.

It would be a sad circumstance, I guess, where the employer in that situation would end up being involved with a manslaughter type of charge where they have done everything that they can to ensure that security of their employees, because obviously the security of our employees is very important to us. We launched a national anti-violence campaign last year to raise awareness of this and to work more closely with police, to increase police presence and to ensure that this sort of behaviour is deterred, because it was really concerning us that there seems almost to be, speaking of a culture before, almost a "let's go out and have a fight" type of culture occurring more and more, and in surprising circumstances.

You would think perhaps that it would be among the lower socioeconomic groups, but it's not; it's among any group you could think of that this type of behaviour and culture have arisen. That does raise difficulties for us. Obviously, we're campaigning against that sort of thing. But yes, it would be difficult if this type of bill then brought that remote possibility home to one of our members who was then up on a manslaughter charge. We'd be concerned about that.

THE CHAIR: Nick, do you want to say anything further?

Mr Proud: No, I pretty much think the submission speaks for itself. It's pretty clear that the OH and S bill already exists. There does need to be points of that that are reviewed. Whether we need to reinvent the wheel fully here is probably not the first point. There are issues which face our industry, which was mentioned, just about the violence surrounding hotels. We're trying to deal with that through the legislative process. We've made representations to the government and in those sorts of issues we think the way forward is to put policy first in regard to preventing the potential issues and violence which may bring a manslaughter charge. We feel that that is the way forward from our perspective.

THE CHAIR: I asked this of the other group, the Housing Industry Association, just in terms of existing occupational health and safety legislation: I noticed in one of the papers the maximum fine—it might even have been for a corporation—is $125,000, which obviously is a lot lower than it is for some other jurisdictions, having also seen in the paper some very significant fines being imposed on guilty corporations were several times higher than those in the examples given.

If this legislation were not to proceed but it was felt that certain improvements needed to be made to protect the safety of workers, would you have any issue—please say so if you do—with increasing penalties under the Occupational Health and Safety Act, or indeed perhaps making several changes to that act? You can take that on notice if you want to look at it.

Mr Proud: Yes. It's an issue by whatever is reviewed and what comes of the review process. We will make further comment as to any review of the OH&S Act as it stands at the moment. I think we'll take it as it comes, in principle.

MS TUCKER: Just on the question of violence—it is a bit off the track, but I wouldn't mind asking while you are here—which states have compulsory responsible service training of staff in bars?

Ms Bergmann-Hanna: It's not compulsory everywhere. We do have training in almost every jurisdiction. Do we have it here?

MS TUCKER: No, it's not compulsory here.

Ms Bergmann-Hanna: In New South Wales it's compulsory, Queensland, Western Australia, Tasmania, South Australia—

Mr Proud: Tasmania is not, actually, as far as I am aware.

Ms Bergmann-Hanna: It's not compulsory, but it does occur.

MS TUCKER: There are taverns in the ACT that don't.

Ms Bergmann-Hanna: I guess I'm naming the states where the training occurs and it has become more or less compulsory. In New South Wales it is certainly compulsory.

Mr Proud: The majority of our employers won't take people on unless they've got such certificates. I think we represent the cream of the industry.

MS TUCKER: Has there been any evaluation of the violence level related to alcohol intake and responsible service training? Has that analysis ever been done?

Ms Bergmann-Hanna: Not that I'm aware of. There may well be one, but we're not aware of it.

THE CHAIR: When we think of hotels, I suppose we're thinking of people working behind bars and perhaps on the restaurant side and in the kitchens, but hotels have cleaning services, laundry services and similar types of services as part of the suite of things you offer your clients. Do you have any concerns in relation to contracting out—I assume hotels do contract out—things like cleaning and laundry in terms of issues that might arise there if someone died as a result of something going wrong on the job?

Ms Bergmann-Hanna: I guess that would be a matter of the causation and what occurred in that circumstance, but we'd certainly have concerns about that coming back to any of our members. On the whole, it would probably only be some of those services, such as laundry, which are outsourced. Most of our stuff still occurs in-house. The food and beverage and the main guest relations role is still insourced and under the one employer as such. But yes, we'd have concerns. I guess it would have to be made clear as to who was the employer in that circumstance.

THE CHAIR: Yes. Thank you both very much for your attendance and your assistance.

MARK GOODSELL was called.

THE CHAIR: Thank you very much, Mark, for attending. If you could just give your name and the capacity in which you appear in front of this committee.

Mr Goodsell: Thank you. Mark Goodsell; I'm the New South Wales director of the Australian Industry Group.

THE CHAIR: Thank you for your submission and your attendance here today. I just need to read to you something which we read to any witness. It's highly unlikely that this will apply to you because of the nature of these proceedings.

These hearings are legal proceedings of the Legislative Assembly. They are protected by parliamentary privilege, which gives you certain protections and also certain responsibilities. The rights are that, basically, you are protected from legal action, such as defamation for what you say at the public hearing, but it also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter. We read that to every witness at proceedings like this. It's usually not really required, but some of the inquiries we do are a bit different.

Thank you very much for your submission. You've raised a number of concerns you have in relation to this bill. At this stage is there anything additional you'd like to tell us, any other points you wish to make in relation to what you've said already or any issues you want to highlight and bring our attention to?

Mr Goodsell: I'd like to correct perhaps one thing which may be a slight error in the submission. It's not numbered, but in the third page of the submission proper, under the heading "Submission", at the top of the page, we said, "There is no evidence of an increasing trend of workplace death in the ACT. There have been three workplace deaths." It depends on where you look, but that could be five, on my information. I didn't want the committee to believe that we tried to mislead you. It may be five on information I have found since then.

THE CHAIR: And that's basically the information you have?

Mr Goodsell: Yes.

THE CHAIR: We've been given a list of the fatalities either at the workplace or travelling to and from going back to 1988-89—a total 30, of which about 10 seemed to be very much at the workplace itself. Thank you for that. Are there any points you wish to raise in relation to this and just draw our attention to?

Mr Goodsell: Thank you, Mr Chairman. I'd like to say three things very much in support of our submission. The first goes to that issue about the trends in workplace injury and the trends in workplace death. In our submission, we think that there is a clear trend downward and a very welcome downward trend in both serious workplace injuries,

which most jurisdictions measure as injuries that result in people having more than a week off work, and in workplace deaths.

Looking at the second reading debate on the bill, there seemed to be a lot of emphasis put on Australia's comparative workplace death figures and the information we've put in our submission is different to the figure that was quoted in, I think, the originating minister's speech. I don't want to get into a debate with him or with the government about who is right, but I think the point to be made is that Australia has a very wide definition of workplace injury, firstly.

We have very comprehensive state jurisdictions in workers compensation which are pretty exhaustive in flushing out what the figures are. If the National Occupational Health and Safety Commission, in combining all the workers compensation jurisdiction figures, comes up with a figure of four per 100,000, we would think that's a pretty accurate figure. I don't know where the figure of 7.5 came from that was quoted in support of the bill originally.

But I think the primary point is that, if there's a perception that there's a real problem about workplace deaths requiring this kind of significant legislation, our submission would be that that is not the case and that the combined efforts of employers and employees at the workplace in pretty much every state is consistently towards a significant improvement in both injury rates, serious injury rates, and in death rates.

That's related to the second point. The second point and probably the most important point that we made in our submission and we'd make here today is: why is that occurring? In our submission, in truth it would be occurring because the demographics of industry are heading towards safer industries. There's a move towards service-based industries, which you would expect would be lower risk.

It would be foolish to deny that the demographics of industry, if there was no other factor at work, would be leading to slightly lower incident rates. But I think that the figures show an improvement beyond that because the number of injuries has also been decreasing. The real picture, we think, is that in a number of jurisdictions the concept of risk management has been adopted as a legislative basis underpinning the duty of care. In those jurisdictions where that hasn't been the case, it has probably been partially done.

In the ACT you can find references to risk management techniques being prescribed by the legislation, and we referred to some in our submission. But also, if you read the decisions in prosecutions under the general duty of care, it's clear that when the courts find a breach of the duty of care and examine what the employer really should have done, then the answer usually is that he should have been risk managing, not just relying on a long list of black letter safety prescriptions, but actually adopting a system of risk management, of identification of hazards and active management of the risks, assessment of the priorities against those risks and putting in control mechanisms—not about the things that the local WorkCover thinks may go wrong with the machinery, but any issue that you and your employees can think of in the workplace. You should be constantly turning over every rock and looking for ways to manage that.

Our submission is that it's this adoption of risk management as a management technique and as a philosophy at the workplace that is contributing to an improved workplace

accident rate. If that is the case, the essence of risk management, as we have said in the submission, is very much a sense of baring your soul, it's very much a sense of turning over every rock and being very open, consulting with your employees, actively looking for hazards in the workplace—not being shy about finding them because if you find them you might have to do something about them.

The legislation and the decisions of the courts tell you to be proactive about those things. That's a never-ending task and it's a task that an employer is always going to be found fault with. There are always going to be hazards. There are hazards in any workplace, there are hazards in this room. Risk management is about acknowledging those hazards, actively finding them and in a systematic way prioritising your actions to deal with those hazards that create the greatest risk. The greatest risk is a function of what could go wrong if something went wrong and how dangerous that could be and how likely it is that something could go wrong.

So there are two phases. You can get a hazard that could cause a death, but you may not do something about it ahead of doing something about something else because the chances of something going wrong in that area are so slim that you are actually encouraged to deal with the issues that may have slightly less serious consequences but are more likely to happen. That's what a risk management system obliges an employer to do. It obliges you to be open and not hide things and it obliges you to make decisions and prioritise the limited resources that any organisation has and focus them on the actions that will have the greatest good in preventing injury and illness.

Put industrial manslaughter on top of that and, in our submission, you'll change behaviour away from that, because you'll change behaviour towards a culture of "don't find things because you'll be held accountable for them". If you think about it, and I think we put this in the submission, with the issue of identifying hazards, the process of identifying hazards, in a jurisdiction where there's industrial manslaughter, you are in fact constantly coming up with evidence against yourself in a subsequent industrial manslaughter case.

Put yourself in the shoes of a person in charge of an organisation, whether it's a private sector employer, a public sector CEO, you've got that tension. Do you need to create that tension, first of all, if the safety records are improving? If, in fact, the fatality rates are not worse that Europe or worse than the US, then what is the public good being served in creating that particular tension, when in fact this model of risk management appears to be changing people's behaviour the way we want it to behave? That's what we are worried about in putting the industrial manslaughter philosophy on top of the risk management philosophy.

Turning back to the second reading debate, there seems to be, on all sides, a characterisation of employers into the two camps—those that are doing the right thing and those that are not. The reality is that the workplace is much more complex. Under an absolute strict duty of care which employers have under the legislation here and in most states, and under risk management, there's no such thing as a perfect employer who's complying. Everybody is in a state of non-compliance because it's legislated perfection. So you don't have this basis that we'll only get the bad influence with this.

In fact, you've got the situation where every employer is obliged to find fault with his own operations constantly and do something about it, but do something about it using limited resources and have priorities. If you look at the structure of the legislation, it creates an offence where, to apply a word that's probably not used in the legislation but is probably more useful, a manager's act or omission causes a death, and the omission can be no more than failing to prevent an injury happening, because the definition of omission includes failing to meet your duty, which is almost strict liability anyway. So, if an accident happens, then you have had an omission.

If you are reckless or negligent, I think the major concern is in the use of negligent, how does that concept of negligent foreseeability which is at the root of negligence fit with this regime where you're actually supposed to be going out and finding fault with your workplace. In fact, if you've got a long list of hazards and you've made a decision that some of them are low risk and some of them are high risk and it turns out that the low risk ones turned out to be a one in a million chance of it happening, therefore foreseeable, therefore you may be negligent, but you've actually done what the OH&S legislation, or good safety practice says you should do, because good safety practice these days recognises that you can't fix every problem within the first minute that you find it, so you've got to create priorities. So you've got this tension, and that's our concern.

The second issue about negligence, again in the second reading debate a number of speakers, a number of supporters and commentators on the bill, used the term "grossly negligent", but it's nowhere in the legislation. There was a feeling that we were out to get the grossly negligent employers, but this act doesn't talk about gross negligence; it just talks about negligence. So there's a disjoint between the intention as stated in the debate and the legislation.

THE CHAIR: In talking about the debate, I think you're talking about a debate somewhere else, because you say in your submission that this is very similar to the first Victorian—

Mr Goodsell: No, I'm talking about the second reading debate on this bill; if not on this bill, then on the motion for this bill to—

MS TUCKER: In the Assembly, do you mean?

Mr Goodsell: Yes.

THE CHAIR: You're referring to a debate in the Assembly.

Mr Goodsell: It may be actually in the Planning and Environment Standing Committee, sorry, 15 May last year.

MS TUCKER: I didn't think we debated this at all.

Mr Goodsell: It was a motion by Ms Gallagher calling on the minister for IR to introduce this legislation.

THE CHAIR: That's right, yes; so it was a debate in the Assembly which preceded this bill.

Mr Goodsell: Yes, sorry. I knew it was related to the intention to—

THE CHAIR: No, it wasn't the second reading speech, because we don't have those here, but you kept referring to a debate and I was scratching my head thinking what was the debate.

Mr Goodsell: My apologies.

THE CHAIR: There was a debate on a motion and you've identified the date of that.

Mr Goodsell: Careless terminology on my part.

THE CHAIR: That's okay. Most places have second readings, so it's understandable that you were using their terminology. You've referred to an Assembly debate.

MS TUCKER: She's now the minister; no wonder you're confused.

Mr Goodsell: I was aware of that, yes.

MS TUCKER: Yes, you know that, but she wasn't the minister when she moved that motion. She was calling on the minister at the time, who was someone else, and now she is the minister.

Mr Goodsell: Right. I make no submission on whether you should have second reading debates.

THE CHAIR: That's all right. We know what you're referring to.

Mr Goodsell: I apologise for that.

THE CHAIR: That's okay.

Mr Goodsell: In that debate the term "gross negligence" was used a number of times by a number of speakers and also there was this concept that we're only after the bad employers. Our submission is that it's not so black and white out there and what we would probably call a good employer may still technically be in breach of the OH&S Act because they're not perfect. That's the problem that we have in identifying the white hats and the black hats in this kind of legislation.

The third point I would like to emphasise is a similar point about unintended consequences. If you look at the history of this kind of legislation where it has been considered in other jurisdictions, one conclusion that has been widely reached is that, although this kind of legislation is introduced to get, in a word, the big end of town, the chairman of the board who negligently refused to authorise expenditure on safety and spent it on the boardroom bar or something like that instead, the reality is the way that this legislation would have to be structured, you are more likely to find that people very

much closer to the action are the people who are prosecuted, because it's much easier to prove the causation between an individual decision and a workplace death.

It is more likely to be the first line supervisors, the lower levels of the definition of senior officer, or people who run their own businesses, small business, because the causation chain is much shorter and much easier to show. That may not be an unintended consequence, but the perception is that, in trying to create the new crime, it will be unfairly skewed towards people whose decisions can be more closely linked to the eventual act that we're trying to avoid.

They're the three major issues that we would make in our submission. There are other issues. There are ongoing issues in safety management that this legislation would make even more difficult, and that's the interface between the employers' responsibilities under the OH&S Act and their responsibilities under anti-discrimination and under employment law not to employ people with physical or mental disabilities who may be, if you apply risk management, greater risks at work, but it's not fair to discriminate against them in employment decisions.

There are cases all the time in most states and federally, about dismissing people for safety breaches under unfair dismissal, and employers have a real tension in that area about when you can dismiss someone for doing something wrong in the safety area. Mandatory drug and alcohol testing is a very big issue. The OH&S principles, whether risk management applies or not, would appear to put a very strong onus on employers to assume that the demographics of their work force are the same as the demographics of the people walking up and down the street. There is drug and alcohol abuse in that demographic and there will be in your work force. The debate about being able to have mandatory testing goes on.

There are already lots of complications for employers who are trying to meet their obligations under OH&S now, but they're prevented by other worthy legislation and the intersection of that legislation makes it very difficult for employers to know what is the right thing to do. What we don't want to see is employers making the wrong decision for what are good reasons and then being held accountable under industrial manslaughter because they already had tensions about what was the right thing to do, so it's complicating the mix.

The other really big issue, I think, that we all have to deal with and the safety regulators have to deal with is that if you're applying risk management principles you're supposed to look at behaviour as well as environment. Why would you employ a male between 18 and 35 in an environment where you're supposed to have risk aversion? These are people whose lifestyle choices are to embrace risk. They go bungee jumping, they do extreme sports.

MR HARGREAVES: That's not limited to 35-year-olds.

Mr Goodsell: Psychological age rather than physical age. These are the difficulties employers face all the time in meeting this risk management thing. There are many organisations similar to us who think the risk management has gone too far. We've actually supported it where it has been introduced because of what I said earlier—that in the jurisdictions where you don't have it there's very little legislative guidance as to what

an employer is supposed to do and if he has an accident he usually finds out what he should have done because the judge tells him what he should have done when he's prosecuted. As I said, the judge usually says that you should have been a risk manager.

We have supported the application of risk management where it has come in in Victoria and in New South Wales even though, as I said, it is legislated perfection. The reason we have done that, and we hint at it in our submission, is that our major industries are manufacturing, construction-related service sectors, and they're not terribly sexy out there with the next generation and with new entrants to the work force. Unless we improve the safety of those industries, we are losing the battle for talent.

Improving safety is very much an industry development issue for us as much as it is a compliance issue. We've got a spontaneous interest in improving the safety of our members and our members have pretty much embraced that kind of philosophy. We're heavily involved in all the programs that the state governments operate in terms of safety management. We take it particularly seriously, independent of compliance issues.

In that environment, we would be concerned if the legislation went through, particularly in the form that it's in now with the issues of negligence versus gross negligence, et cetera. But I think the real issue is this philosophy about how we're trying to influence behaviour in workplaces, because this would introduce a different dynamic to what the risk management legislation introduces and we're not sure that would be terribly helpful in clarifying the thinking of people about how to deal with safety. It would create a negative environment of covering up and protecting yourself and getting the lawyers in at the first sign of trouble as opposed to risk management, which is very much about opening up your soul and not being afraid to turn over the rocks.

THE CHAIR: Thank you for that. I think that it will be very helpful to us. I have a couple of questions. Firstly, you spoke about negligence and you refreshed my memory in relation to that debate, which was on a motion in May of last year. This legislation, just quickly checking it again, does talk about negligence causing death, et cetera. Those are the terms it uses, even though you said that gross negligence was used.

I note that in the ACT—I haven't practised law here for a little while; somebody could correct me, perhaps, if I'm wrong—in establishing a culpable driving offence, the prosecution had to prove gross negligence, which is obviously a much higher standard than negligence per se. Under New South Wales law, it used to be and may still be that negligent driving causing death would amount to culpable driving. Neither would amount to an actual driving death which would sustain a charge of manslaughter in the ACT. I think that an issue is exactly what is meant by negligence here. You did refer to the debate saying gross negligence. That doesn't seem to feature in this. That's something we'd probably need to take up.

My other question just relates to your submission, which again you've touched on today. You said in your dot points that no examination has been made of the adequacy of the existing remedies or the potential for review and amendment of those remedies to improve outcomes. You may not be able to answer this, but in the ACT occupational health and safety legislation—I don't believe it's exactly the same as interstate—one thing I noticed where there is a difference, for example, is, I think, that the maximum penalties for corporations are a lot lower here than in some other jurisdictions. I read a

figure of $125,000 here. I know that in New South Wales corporations have been fined considerably more in excess of that. I seem to recall legislation there which has a maximum in the millions.

Are you able to comment in terms of whether another way the government could look at this, rather than going down this track, would be to enhance and improve our occupational health and safety legislation, including perhaps bringing some of the penalties into line with other states? Do you have any comment about that as being either desirable or a better way of doing it rather than this, or whether there's no need?

Mr Goodsell: From my position, it's difficult to argue for an increased penalty. But if I might take my partisan hat off for a second and go back to what I said about the philosophy that's adopted through mismanagement and through the OH&S Act, and again it would be difficult for us to say that it wasn't appropriate, if there is a feeling that the incentives or the disincentives aren't strong enough, then the place to do it is through the OH and S Act.

I noticed, again, that in that debate in May last year there was a comment about inadequate penalties. If that's a feeling, then I would imagine the parliament has got the power to do something about that. Again, if that's one of the building blocks, I would have thought you'd examine that first and see whether something can be done about that before taking this type of step. So, with a massive qualification from the position I sit, the answer is yes.

THE CHAIR: Sure, I appreciate that.

MR HARGREAVES: I'd like to ask you a question. In the list of oppositions you had to the bill, you talked about the reciprocity of the obligations between employers and workers and the bill has no such mutual obligations. Without wanting to appear frivolous, I would have thought being killed was a reasonable amount of retribution for a share of the action, if you like. How do you see an expression of mutual obligation appearing in legislation which deals with somebody's contribution to the death of another one? I don't quite see how it would work, because it would be pretty hard to charge someone for contributing to their own death, wouldn't it?

Mr Goodsell: Again, we're moving towards a philosophy in OH and S regulation, albeit slowly, towards the realisation that we're about influencing the behaviour of organisations, not just management, and that although it is sometimes politically and socially attractive to say that workplaces still work on the master/servant relationship and that if something goes wrong the boss is responsible, the reality is that it's much more complex in the workplace and HR theory, empowerment and that sort of thing fly straight in the face of a lot of legislative bases.

You find, for example, particularly in the New South Wales legislation and in other places, increasing quite detailed responsibility to consult with employees about safety issues. You find, and you have it here, an obligation that employees are responsible for their own actions if they lead to safety hazards for other people. They're supposed to comply with the measures that are put in place, wear their safety gear, et cetera.

In that environment of trying to take a more holistic view about managing safety rather than just saying that it's all about influencing management behaviour and that's where it ends, to have industrial manslaughter which is defined in terms of management is inconsistent with that. That's the point we were trying to make there. It's more of a philosophical point about a tension between how we are really trying to change behaviour in workplaces.

THE CHAIR: Thank you very much for your attendance here today. You've come from interstate and you've assisted the committee very much with both your submission and your very erudite explanation of what's behind it. Thank you for your assistance to the committee.

Mr Goodsell: Thank you for the opportunity.

PETER MALONE,

SARAH SCHOONWATER and

ANDREW WHALE

were called.

THE CHAIR: Thanks for your attendance here this afternoon. We aim to finish no later than 10 past 5. Thank you for coming a bit earlier because we had one group who got tied up at Melbourne airport and couldn't get here.

This is not particularly relevant, I would think, for this inquiry, but it's something I have to read out to any witnesses before an Assembly committee. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege, which gives you certain rights and also certain responsibilities. The rights mean that you are protected from certain legal action, such as being sued for defamation for what you say. It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter.

Do the three of you understand that? Okay. Please give your names, identify yourselves, and the capacity in which you appear before this committee.

Mr Malone: Thank you, Mr Stefaniak. My name is Peter Malone. I'm here as secretary of the ACT Trades and Labour Council, representing some 22 union affiliates and some 27,000 members in the ACT.

Ms Schoonwater: Sarah Schoonwater. I'm president of the ACT branch of the CFMEU.

Mr Whale: Andrew Whale, secretary of the Transport Workers Union, ACT.

THE CHAIR: I don't know who wants to start, but thank you. We received your submissions yesterday and I've had a quick chance to read them, as have my colleagues. Firstly, thank you for that. Is there anything any of you wish to say in relation to your submissions? Are there any particular points you want to draw our attention to?

Mr Malone: Yes, if I may, Mr Stefaniak. Firstly, of course, we make no equivocation in our support of this legislation. The union movement for many years has sought like legislation to ensure that the maximum action that can be taken is taken to recognise the deaths of workers in every workplace which are caused, specifically, by negligence or reckless actions of the employers.

We would strongly submit that the legislation, as put, is even-handed, as I refer in page 2 of my submission on clause 5, part 2A, sections 49C and 49D. These are the critical sections of the legislation and they are vital, but they are very restricted in their application.

This is not a bill that opens widely the legal questions at point. It rather specifies very specific circumstances where penalties can apply. It is really important that those restrictions are acknowledged, but their relevance and necessity be equally acknowledged and implemented. The offences can only apply if the worker is killed in the course of their employment. The employer's conduct must have caused that death and the employer's conduct must have been reckless or negligent and all of those points must be properly proven through the normal criminal justice system. That is absolutely fundamental to this legislation. If someone is found guilty of such offences, if they are found, through the criminal justice system, to have been reckless or negligent, then they deserve to be punished, they deserve to have the penalty applied as foreshadowed in this bill.

There are two points on which I would place further clarification before the committee. In relation to clause 5, part 2A, section 49A, the definitions, my colleague Mr Whale will be discussing some further detail concerning the definition of agent, employer and worker. I believe you also have the TWU's written submission on that matter. In putting that forward, we would submit that the issue raised by the TWU is very valid, but equally is in total sympathy, synergy, with the intent of the legislation as it is currently drafted; that is, it is meant to capture all those forms of employment and employer/employee relationship so that there cannot be a legal argument as to whether or not the legislation actually does or doesn't apply. The proposal, I believe, being put forward by the TWU simply helps to clarify that and make the legislation even clearer in its application.

The only other additional point I would seek to raise with you, members of the committee, is in regard to clause 5, part 2A, section 49E. The wording of the legislation as it stands in 49E, part 2, says that in addition to or instead of any other penalty the court may impose on the corporation (a) through to (c). Our submission highlights that these additional deterrents are very appropriate and are able to be applied with appropriate discretion of the court. But what we would suggest is that it would not be appropriate for the wording in 49E (2). Where it says, "In addition to or instead of" we would suggest that these penalties should be additional penalties available to the courts but should not be able to be replaced by the earlier penalties.

MR HARGREAVES: So as not to water down the penalty at all.

Mr Malone: So as not to water down the original intent of the penalties for the offences. It's certainly appropriate to have that range as additional issues and actions which the court has at its discretion to apply, but certainly the original penalties should not be watered down.

MR HARGREAVES: It would be possible, would it not, that you could find that sort of financial penalty apply to a company and then say, "You can do this thing instead of that," so that what, in fact, the company does is it does deliver that same penalty, if you like, but in kind and it doesn't actually detrimentally affect the company at all?

Ms Schoonwater: I think more what the point we're getting at is that it wouldn't be an appropriate penalty where an employer was found to be clearly negligent and there was the death of a worker to turn around and say, "Just issue an apology in the *Canberra*

Times," instead of any other sanction. I guess effectively what we're saying is in 49E (2) delete the words "or instead".

THE CHAIR: I understand what you're saying.

MR HARGREAVES: There is also, is there not, an inconsistency in the application of a penalty to a real person, as indicated earlier in the legislation, and a corporation? In fact, a real person can actually be held accountable through the Crimes Act and the OH and S Act, with real time penalties applied to that, whereas this legislation is attempting to bring to book full-on corporations as non-real persons and we could end up with a position where an officer of that corporation copped a decent financial penalty but the corporation itself put an apology in the *Canberra Times*; so there's an inconsistency in approach, with the more significant of the two getting away with it. I note for the *Hansard* record that you are nodding in agreement.

Mr Malone: That's correct, Mr Hargreaves. We concur with that position.

THE CHAIR: What you obviously intend there is something like, for example, if there were a corporation which was convicted as a result of a death through the act of an individual. You can't charge the corporation, I suppose, but you've got a significant penalty. I think it is $2.5 million. Let's say the corporation is fined $1 million and in addition to that, as opposed to as an alternative, for example, the court might wish to have the offence publicised and certain other actions taken to ensure that steps were taken by that particular industry to ensure greater safety in (a), (b), (c) and (d).

Mr Malone: Yes.

THE CHAIR: Significantly, under 49E similar orders could be made if it was about an individual. If a foreman was grossly negligent or really reckless, someone died and the foreman got three years imprisonment, for example, as well as that, what I have just listed as an example under 49E would apply.

Ms Schoonwater: Yes.

Mr Malone: That's correct.

THE CHAIR: I can understand that. Mr Whale, you've made a separate submission and you've got a few separate points. It might be sensible if, before we do some questioning, you just addressed that.

Mr Whale: Yes, I'll just give a very quick outline, if I can, Mr Stefaniak. The point that the TWU wishes to make is that, basically, we wish to seek better clarity within the definition of agent, and we are only talking about 49B and that paragraph before it gets to (i). I'll come to that clause promptly, but just to give you some background very briefly: the issue of agencies is critical to the TWU and our memberships. Contracting out is now standard. The old days of an employer having a direct relationship with the worker are almost beyond the norm now. It's not the norm in the transport industry.

An example would be Woolworths would have a contract with Toll Holdings, who would then have a further contract with a company such as Refrigerated Freightways,

who then may sub that contract through to, say, Abletts here in Canberra and Abletts may use an owner driver. That's not an uncommon structure. So you may have five, two or eight components in that chain. Within the industry it's referred to as a chain of responsibility.

There have been moves nationally, both from a Commonwealth level and to some extent at state levels, to try and make that chain accountable. The problem we're having and have had since trucks started running on the roads is that a truck driver may be involved in an accident and the authorities will come out and say that he was speeding or there was fatigue involved and then the driver will be hit with a penalty. There is no full investigation as to whether the contract which the driver was given through that chain meant that there was no other option but that that driver had to break the laws. The extent of the problem is showing that since 1998 there have been 750 people killed through truck crashes, so we're talking about a very significant number. A lot of these cases aren't just the truck driver; it's other people as well, so that's where there is a wider scope.

Relating to industrial manslaughter, we believe, as Peter said, that the intent of this bill, particularly if you refer to the then Minister Corbell's presentation speech, is clearly to try and rope in those agents, as they refer to them, but get that chain so it doesn't just stop with the driver. However, our concern is that in that definition there are two problems within (b) of that clause. The first relates to how it defines "agent". It uses the word "agent" to define the term "agent". It's a bit like saying, if you have to describe a horse, that a horse is a horse. It says:

> a person engaged by another agent of the first person, or by an agent of an agent (whether an independent contractor or otherwise) to provide services, in relation to the first person, to the other agent in relation to matters over which the other agent—
>
> (i) has control.

The agent is described in clause (a). We see that as a legal ambiguity that could see any prosecutions brought under this bill being thrown out due to that ambiguity, so we want to see that cleared up. The second issue is that by its definition in clause (b) it limits it to four steps in the chain. As I said before in that example, you can have five steps. Here as it's defined and by taking the definition scope that they've taken in respect of agents it stops at four. By limiting that, and knowing the industry fairly well, what they'll do is they'll just add another link to the chain and get around being held accountable under that clause.

What we're seeking to do is just to clarify the definition of "agent" in relation to clause (b). We don't think you have to reinvent the wheel. The best place that we've found, or the simplest place, is to go to the Victorian OH&S Act. I'll just point out, as we do in our submission, that the reason we've gone to the Victorian act as opposed to the ACT OH&S Act is that in the ACT act the definition in relation to the contracting arrangements deals quite definitively with the workplace and location and geography of that workplace, which, for a truck driver, can create some holes, whereas in the Victorian model the definition there overcomes that problem. I'll just quickly read it to you, but it's in the submission. Clause 22 of the Victorian Occupational Health and Safety Act 1985, under the heading "Duties of employers and self-employed persons", states:

> Every employer and every self-employed person shall ensure, so far as practicable, that persons (other than the employees of the employer or self-employed person) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.

So you're getting away from the definitive thing of agents and the limiting of the number of agents and the ambiguity of agent defining agent. The crux of this definition here is where it refers to the conduct of the undertaking. So it's where they're tied into the undertaking, which, in the case that I gave before, would be the carriage of goods that there is that accountability. You wouldn't be able to take that word for word, but what we're suggesting is for an adaptation of that clause to be incorporated into replacing the definition of clause (b) in that area I specified before.

The TWU is happy to draft up a mock or suggested proposal or we can recommend two experts. This is a report into the truck industry that was done by Professor Michael Quinlan of the University of New South Wales in 1999 or 2000. We could get Professor Quinlan to draw it up following that. That was done for the New South Wales government. He's an expert in the field. Also, somebody that worked on that is ANU law professor Richard Johnston, who is also an expert in the field and has an understanding of this contract arrangement.

If you want, to be perfectly blunt, somebody a bit more independent than the TWU for any reason, we'd be happy to recommend those. Alternatively, we're very happy to provide through our legal resources a suggested mock-up to clear up those two problems that we see with the definition—that it uses "agent" to describe an agent and, secondly, the fact that it limits the definition to four steps of agents.

MR HARGREAVES: Mr Chair, while it's fresh, we're talking about definitional issues here and we've spoken for the last few years about the issue of the cabin of the truck being a workplace and the fact that most jurisdictions don't recognise it as a workplace injury if something happens there; it's either start or finish, but in the middle is bad luck. Do you think that the definition of the conduct of the undertaking would equally apply to workplace injury and therefore ought also to apply to workers compensation, OH&S and anything else while we're at it?

Mr Whale: As far as applying that sort of clause, if I understand you right, to other acts in relation to workers compensation, occupational health and safety and all that in the ACT, I think that would go a long way to correcting those problems. That's the way the New South Wales government is starting to move as well.

MR HARGREAVES: That would sit possibly more comfortably within the definitions contained in the legislation act which cover any and all legislation in the ACT.

Mr Whale: Yes.

MR HARGREAVES: Perhaps I'm hearing a recommendation from your submissions that we should be looking at the possibility of including some thinking along those lines, because of the nexus between the OH&S Act, the Workers Compensation Act and industrial manslaughter issues.

Mr Malone: Yes, Mr Hargreaves, I believe you can take that to be part of our submission. A consistent approach in definition across all that legislation would be very useful.

MR HARGREAVES: In some of the submissions we've received there seems to be a reasonably common thread that people have difficulty with definitions.

Ms Schoonwater: Yes.

MR HARGREAVES: You were talking about the accountability of a corporation and taking away the business about four steps. I know that the unions generally, but TWU specifically, have had difficulty in holding responsible the major contractor. I'll use those terms for the sake of the argument. In your example it was Woollies, but it could be anybody, and the food chain is a long one, particularly in the transport industry. Often it's got to do with a corporate culture which finds its way into contract documents and then travels all the way down the line like a Chinese whisper and the pressure is on the person at the bottom who cops the injury.

Mr Malone: Another very good example is the textile and clothing industry.

MR HARGREAVES: The question I have is twofold. Will the elimination of the four by making it a larger number, a better definition of that, enable us to hold accountable those people at the very beginning of the food chain? Are you confident that that will do that? Secondly, do you have a view on the cross-jurisdictional differences? If, for example, the actual contract, the biggie, started in New South Wales, and your example was of Woollies in New South Wales, but ended up with Abletts in Canberra, which subcontracted down again and the accident happened in the ACT, how would we get on with applying the sanctions on a company in New South Wales? Is that a problem that we have and something that we ought to be applying ourselves to at the national transport ministers forums?

Mr Whale: No, I would have thought that the powers of the court in the ACT would be able to use that legislation to get anybody to be accountable under the bill.

MR HARGREAVES: Is there any constitutional issue in terms of free trade between the states about holding the major contractor accountable for something that happens right down the food chain? Would we end up with a logjam in the courts over that jurisdictional issue?

Ms Schoonwater: Whilst not being a lawyer, I can't see there being any major problem with the constitution-type issues you've addressed within the draft bill itself. I mean, what is the difference between the Crimes Act in one jurisdiction and somebody from New South Wales murdering somebody in the ACT?

MR HARGREAVES: I guess my worry, and I just want to make sure that we don't trip over, is that when we talk about the direct responsibility for a workplace death, that's easily fixed. When we start talking about the greyness of trying to attribute a significant contribution all the way up the line, I would assume that the further up the line you get

the lighter grey it becomes and there might be difficulties. I'm just wondering whether attention needs to be given to that.

Mr Whale: We think this has gone a long way to doing that. But, of course, as soon as you put something like this in the contractual lawyers working for all those companies will be looking at that and looking at ways around it. You can never make it watertight in a legal sense, but we think this is certainly a very positive step, in that example before, to being able to go up and ask Woolworths and Toll at the top of that chain the appropriate questions and make them accountable.

THE CHAIR: I have a question of Mr Whale about something that you raised earlier, John, about his address today, that is, the tragic deaths on the highway and the propensity perhaps of people to rush to ensure they can deliver on contracts. It seems to me to be a principle of law which I'm sure still applies that a contract is unenforceable—indeed, it's wrong—if its performance is based on someone actually breaking a law. It would appear that if, for example, people have deliberately put themselves in dangerous situations as a result of breaking traffic laws to satisfy a contract, there's something awfully wrong with that contract. Has the union actually tested that issue in any court? I wouldn't think it has been done here, but certainly in the bigger states.

Mr Whale: We have tried. There have been some successful prosecutions in South Australia and there has been a recent one in Queensland, but we're only just beginning to get slightly up the chain. We've had a couple of very successful prosecutions beyond the driver to the immediate boss that sent the driver out. There was awareness of the rorting of logbooks and they were told to do this and they were told to do that.

But to actually examine the contract, there have only been some very limited examples, but part of that has been because there hasn't been the appropriate legislation to go up and be able to take account of that. The National Road Transport Commission has spent the last three years trying to develop legislation that will allow that examination of the contracts and the accountability of the contracts to take place.

THE CHAIR: I appreciate that you guys obviously are very keen to see this in. It's government policy and I take it that you probably had a lot to do with that, which is fine, but no other state or territory has actually enacted such legislation, has it? New South Wales seems to have gone off and done something different; Queensland, too. Victoria almost got there, but seems to be now doing something different. You're well aware, obviously, that there are improvements being made to the occupational health and safety legislation in the other jurisdictions. We, of course, have our own occupational health and safety legislation, we have the ordinary criminal offence of manslaughter and we have a criminal code which is rapidly being enacted and which also will do something in relation to corporations when it comes in.

Is there anything in the occupational health and safety legislation, putting this to one side, that you would see needs to be improved upon to protect the legitimate rights of workers to address situations that it doesn't address at present, especially, perhaps, that might be more in tune with what occurs interstate? For example, our maximum penalty, I think, for a corporation is $125,000. I note in New South Wales some of the examples we have. There are fines of hundreds of thousands of dollars and, I think, the maximum penalty is in the millions. There may be a case in point there of our legislation in that

respect being deficient from what applies interstate, but I do know, also, that no-one interstate has actually gone down this path yet. If you don't want to address that now, fine, but any opinions you have in terms of the actual occupational health and safety acts would be helpful for us, too.

Mr Malone: Mr Stefaniak, we may seek to put in some further written submissions on that. But in terms of a brief comment now, what occurs in other jurisdictions is, as you're well aware, a matter of the politics of that particular state or territory. It is certainly not from want of effort from the trade union movements in those states and territories that action or legislation hasn't yet arisen, but we will continue through our respective organisations to pursue those matters interstate and would hope that eventually they will see the wisdom that the ACT government clearly possesses at this point in time.

In terms of how you would approach it differently, what would you do with the current occupational health and safety legislation, yes, there is a range of other matters which could be looked at. From the trade union perspective, we will always pursue strong occupational health and safety legislation to achieve as few injuries—ideally, zero—in every workplace.

There are two levels of it, though, when you're dealing with legislation. It's both what is in it and how it is resourced to actually be able to be implemented. I would tend to suggest that one of the biggest areas of problem for the operation of the current Occupational Health and Safety Act is the lack of resources able to be provided to the relevant occupational health and safety authorities to implement the legislation even as it stands. Unless and until those resources are properly given, then it won't matter what you change in one sense. You could increase the level of prosecution to $2.5 million, but if you don't have the resources to go out there and develop the case for prosecution, it won't happen.

THE CHAIR: I'd just like your comments on a couple of other points. Peter, you read out clause 5, part 2A, sections 49C and 49D and you talked about basically the elements that have to be proved, the third element being, of course, that the employer's conduct must have been reckless or negligent. There has been a debate briefly where people bandied about the term "gross negligence", but it does not appear here. Currently, for a normal prosecution for manslaughter, certainly recklessness but just ordinary negligence may well not be enough. I mean, for the offence, for example, of culpable driving in the ACT, mere negligence causing death isn't enough; it has to be gross negligence, unlike New South Wales, which I still think has "negligent act causing death".

Negligence would tend to be an element that makes this type of manslaughter very different from the current criminal manslaughter in the Crimes Act and it would be much easier for persons to fall within the ambit of this one than they would for normal manslaughter, which means we're creating a very different type of very serious offence from any other offence that currently exists in the criminal law. Obviously, that has caused concern to a number of groups. If that is so, do you see that as a problem or do you think there is something that means that there should be perhaps different standards for this type of manslaughter as opposed to non-industrial manslaughter?

Mr Malone: Before answering, could I ask the question: is the proposed solution from the groups raising that issue to insert gross negligence into this bill?

THE CHAIR: That could be a solution. It's a concern raised. I must say, being a former criminal lawyer myself, it is something that jumped out at me, that this seems to be a very different type of offence from what we understand manslaughter to be as it currently sits in the Crimes Act.

Mr Malone: I guess there are two points on that. Well, there are a number of points, but I won't be able necessarily to raise them all at this moment. Manslaughter in my personal view is manslaughter. I don't perceive from a lay person's perspective we need to differentiate between criminal manslaughter or any other form of manslaughter. If someone is dead as a result of the inappropriate or, as defined, reckless or negligent actions of another, then it's manslaughter, and I don't see the need for that differentiation.

THE CHAIR: Why isn't the current law suitable, then? I mean, there has been a successful manslaughter prosecution over an industrial incident and someone was convicted of manslaughter—not in the ACT, mind you, but in Victoria, I think.

Mr Malone: That is the point, though. In the ACT, as I understand it, it's not possible to successfully mount an industrial manslaughter charge at this point in time.

THE CHAIR: I'd be surprised at that. I can think of any number of instances where something could happen on a building site. Reckless behaviour, for example, by a foreman which went against every safety principle and someone died as a result. Quite clearly that person, I would think, could be charged with manslaughter currently.

Mr Malone: The person might as an individual, but the corporation potentially responsible for having created that situation isn't.

THE CHAIR: I might be wrong here and you probably have a better understanding of the occupational health and safety legislation than we have, but surely having a corporate culture that encourages people to break our occupational health and safety laws, that condones very bad safety procedures, is, in itself, completely contrary to our current Occupational Health and Safety Act and any company that had and condoned a culture like that surely would be liable for prosecution under that act now, even before anyone actually got injured, would it not?

Mr Whale: As an example, I go back to the transport industry. The reality there, very sadly, is that if somebody's waving a dollar there'll be somebody, be it a cowboy or somebody desperate to sell their vehicle or whatever, that will jump up and take that dollar. Until you stop that person waving that dollar in a way that can't be met, illegally, because they're trying to undercut this person over here, then you won't stop it; it will be continuous.

What happens in that case is that the driver gets hit and he gets knocked out, but drivers can be replaced very easily, so the practice continues. Until we start attacking these corporations and making them accountable for what happens underneath them, be it at one level, five levels or 10 levels, then you're not going to stop that sort of practice.

Ms Schoonwater: You're also talking about different levels of penalties being proposed than what are currently available under the Occupational Health and Safety Act. That does make a big difference. To a large corporation or to a $2 company, fines don't matter. The potential to have sentencing provisions does matter, does make a difference to the culture. So, in addition to what's been said, I think that's the important point as well.

THE CHAIR: You guys are aware that under the criminal code—I think it's chapter 4—that will be coming in soon corporations will be liable, just like individuals are currently, for serious offences such as this. There are obviously other things in here which won't be in there, but that principle you mentioned certainly will be taken up.

MS TUCKER: Are you aware of that?

Ms Schoonwater: Yes.

MS TUCKER: In your view, does it meet the same measures of accountability as this legislation?

Ms Schoonwater: No, and also it's about having the issue on the table and having the debate. Specifically identifying it as industrial manslaughter per se will go a long way to changing the current corporate climate. The very fact that there are employer associations appearing before you and there has been a debate within the ACT on this issue mean that people are now starting to take it seriously. Nobody is referring to the criminal code or any other piece of legislation when we're having this debate; they are referring to the proposed industrial manslaughter bill. If that goes to raising the level of awareness, then there is going to be a corporate culture change, and that's critical.

As you as committee members may be aware, I'm a director of two of the largest private sector employers in town, being through the tradies clubs, and I'm not scared about this legislation coming in because we'll ensure that we have strict occupational health and safety policies and practices in place that mean that we won't be held liable under this legislation.

THE CHAIR: That's a good point. Actually, the previous witness—I hope he doesn't mind me saying this—made an interesting comment in relation to a very good statistic in a decrease in the number of incidents recently in Australia. Some of that, the previous witness said, was because of the changing nature of industry, but also on a more positive note it was due to a change in culture on the reciprocity of obligation, that is, employees and employers are critically looking at how their industry and their workplace operate and making sure it is safer.

One of the comments in that submission which I found had a bit of power to it was that if you go down, say, a path like this you might get away from the one where employers are, at this stage, coming out and looking at how they can improve workplace safety, which things are dangerous and what they should do and being quite open about it, rather than getting into a defensive mode and saying "How can I make sure that I don't get pinned for this bloody industrial manslaughter?" and go away from that sort of constructive, boss/worker relationship to something where they're trying to look at ways in which they

can't be prosecuted. It was an interesting comment and something that did seem to have some sort of force to it in terms of not inducing a culture that we'd all like to see.

Mr Malone: The comment I'd make on that is that both sides, certainly unions and employers for the most part, are working constructively to improve occupational health and safety in workplaces. That will continue because there is a will from both sides, for the most part, for that to occur.

This legislation is restricted to a very particular circumstance. It is to deal with a particular circumstance where those actions of the employer have been proven to be negligent or reckless and to have caused the death of a worker. That does not put any limitation on the ongoing goodwill which will occur in workplaces that produce productive, constructive occupational health and safety practices, but it is important that the line is drawn in the sand and it is acknowledged that if you do that you have done a major criminal offence and deserve to be punished accordingly.

MR HARGREAVES: Can I just raise another issue with you? It is something I asked of the other people and I'd be interested in your response, that is, if you're talking about a real person and a death in the workplace occurs, let's say it's the supervisor's fault, that person can be charged under the Crimes Act and can also have proceedings mounted against him under the Occupational Health and Safety Act. Under this legislation, so too can the corporation in exactly the same way cop it under the Crimes Act, if what we're here told is true, and under the OH and S Act.

If we don't have this legislation here, the corporation's responsibility for the death of that employee can only be addressed under the Occupational Health and Safety Act. You're having a different level of sanction and accountability being applied to a real person under the Crimes Act and the OH and S Act, but against one under the OH and S Act.

I would imagine that the community perception is that the OH and S Act is a lesser sanction, a lesser act, in terms of criminality, so the perception out there in the community would be that a real person is held far more accountable than a corporation and that the danger if we don't match those up is that the corporations will adopt that attitude. One of the results will be greater pressure on the line supervisors, because they will know that really we haven't changed anything; corporations will not be held as accountable as real people are in the legal sense. Do you want to respond to that?

Ms Schoonwater: I guess the main issue is the accountability all the way up the line. There should be accountability for directors and there should be accountability at the senior manager level. I guess the issue of pyramid subcontracting touches on what Andrew was saying before, which is that the whole culture of contracting out has resulted in trying to push that occupational health and safety, along with other human resource management issues, down the line to the bottom of the food chain level.

It's about, and we believe that this draft legislation attempts to do that, reversing that and putting responsibility back at the top level. True, you can't jail a corporation, so what do you do? Issue maximum penalties and make the directors and senior management responsible. We see that as being the best way of controlling it.

It goes back to what I said earlier: the community is taking the issue of the Crimes (Industrial Manslaughter) Amendment Bill more seriously than what they currently do under the Occupational Health and Safety Act. It is not being taken seriously as an issue at this stage. It is raising the level of debate and raising the level of awareness. The best way of addressing occupational health and safety issues is via education. However, without enforcement, education doesn't mean anything, and history proves that. We've already had deaths in the ACT workplace this year—

THE CHAIR: It's like the normal criminal law.

Ms Schoonwater: Yes, that's right, that's exactly right. I think we've had two deaths in the ACT this year, and that's two deaths too many.

THE CHAIR: What were they from?

Ms Schoonwater: There was an electrical shock. What was the other one?

Mr Whale: Was it with scaffolding at Fyshwick?

Ms Schoonwater: No, that was an electrical shock; he fell off a scaffold.

Mr Whale: Sorry, there has been a truck driver killed.

THE CHAIR: We ask this of the government officials, too. Thankfully, the ACT, compared with other states, has not had a huge number of fatalities. One is always too many. I counted out of the 30 which are in the government's submission 10 which almost certainly occurred at the workplace through something that obviously went wrong and there may well have been negligence. There may not have been but, quite clearly, something went wrong at the workplace. I've asked the government for this, but do you have any individual incidents which your unions are aware of which quite clearly show that things could have been done a hell of a lot better at the workplace over the last 10 years?

Ms Schoonwater: I could give you thousands.

THE CHAIR: That could result in death. I think that it would help to have that. The record is pretty good, but there are some there still which—

Ms Schoonwater: That's a list of deaths? Yes, we've seen that, yes.

THE CHAIR: It's a list of deaths, but only 10 of them, you would probably say, were when something went wrong at the workplace other than things like heart attacks or someone travelling to or from work and being involved in a head-on prang.

Ms Schoonwater: Yes.

MS TUCKER: I want to follow up on a question asked before. I want to clarify your position on the criminal code. In answer to my question, as I understood it, you said that there was psychological value in focusing on particular legislation that's related to death in the workplace, but what I'm still not clear on is whether you see what is going to be in

the criminal code—I don't know if you're familiar enough with it; you can take it on notice, if you like, if you're not—would actually deal with the issues regarding corporate responsibility as well as this legislation, because that's an argument that has been put to the committee.

THE CHAIR: You can get back to us on this one.

Ms Schoonwater: I don't know the draft criminal code inside out, upside down. I do know what's being proposed. If you would like us to provide a written submission on that for you, we will do that.

MS TUCKER: Yes, I'd be very interested, because it is one of the key legal questions.

Ms Schoonwater: The other main aspect of this is resources. This legislation needs to be backed up strongly with resources.

THE CHAIR: I have one that you might take on notice, too. One concern I do have with this is that it seems to go off and is different from the norm. The criminal law to date is the chain. I suppose the potential is there for injustice from this in relation to how many people in the links of the chain could conceivably be charged and possibly convicted, and possibly wrongfully so, of industrial manslaughter.

It's very different in terms of criminal offences as we have now. Everyone really has to be guilty to quite a high degree in a chain for all to be convicted. You do see occasionally cases where that occurs, but in this there could be some missing links in the chain which might result in injustices. I don't know if you can address that or perhaps address the issue further by giving examples.

If you could give examples as to how you see the chain working, it might be helpful. We may not have any incidents in the ACT, we probably don't, but if you've got any factual things which indicate how you would see a series of very serious guilty conduct by people in an industrial manslaughter situation, any case studies which show that a series of people have done the wrong thing.

Mr Whale: Sorry, what do you mean by saying that you can see the potential for missing links in the chain?

Ms Schoonwater: Foreseeability-type issues?

THE CHAIR: Very much so for somebody to be convicted of a criminal offence, especially a serious criminal offence. That's why we have tests such as recklessness and gross negligence and everyone would have to be convicted of an offence—any offence; rape, manslaughter, murder or whatever. Take murder, for example. You don't actually have to pull the trigger. Mr Conway got two hit men to suffocate his wife. All three were charged and convicted of murder, and rightly so—the two hit men who suffocated her plus the former husband who took out the contract, so there were two links in the chain there.

Conceivably, if there was another person there and he had contracted a mate who knew where to get two other people to do the murder and they all knew about it, you would

have, effectively, a great conspiracy there and all three components of that chain would be, rightfully, convicted of murder. That was a case under the current criminal law where the jury would be satisfied about all those persons in that chain and there would be three links in that one.

Ms Schoonwater: So you want us to address you on the actus reus and foreseeability?

THE CHAIR: Yes, I'd like that just in terms of this because that's been an issue of concern raised by a number of groups.

MR HARGREAVES: Perhaps the way to address it is to address the hierarchy of responsibility and accountability in any number over four.

Ms Schoonwater: I understand the question.

MS TUCKER: Wasn't that what Mr Whale gave us an example of?

Mr Whale: Yes, that is what I was trying to identify.

MR HARGREAVES: He gave us an example of over five.

MS TUCKER: That's what he described, that chain of responsibility, contracting out, quoting Quinlan's report and all that. That's what I understood.

THE CHAIR: Yes, but the concern I have is that we are putting in a very different sort of offence here whereby it would be far easier to convict a much greater number of persons for industrial manslaughter than it would be for—

MS TUCKER: Can you explain for me why it's far easier?

THE CHAIR: Simply because the standard is, effectively, less in terms of people's responsibility within a chain.

MS TUCKER: Is the standard less? I don't quite understand why your saying it's far easier.

THE CHAIR: Among the concerns expressed by other groups was that somebody could be guilty of doing something wrong and could be charged and possibly convicted under the current legislation whereby their degree of culpability would be far less than what is needed currently under the criminal law to convict someone?

MS TUCKER: Is that right?

THE CHAIR: Yes, and that's a concern. If these guys have some examples, I would like to look at them.

MS TUCKER: I don't understand that point, though. I'm not saying that you are wrong, but why is the standard of proof less? Why is the standard of proof less?

THE CHAIR: No, the standard of culpability, effectively, of a person in charge.

MR HARGREAVES: It is a lessening of the culpability.

THE CHAIR: A lessening of the culpability of the person in the chain.

MR HARGREAVES: That's exactly what your talking about.

Ms Schoonwater: If I understand correctly, you're asking us to address two questions for you. One the actus reus of somebody that's further away from directly.

THE CHAIR: Yes.

Ms Schoonwater: And, secondly, the foreseeability issue.

THE CHAIR: Yes, I think that would help. I don't think we've had any lawyers as witnesses here apart from one or two who appeared today, and I appreciate that, but if you could just address that.

Ms Schoonwater: I'm not a lawyer.

MS TUCKER: So you're just saying it's easier to be charged under this legislation than previous legislation? Is that what you're comparing it to?

THE CHAIR: It could be.

MS TUCKER: That's the point of the legislation.

THE CHAIR: Well, that's a very significant issue, then. I'm saying that it could be. It may not necessarily be, because I could probably think of instances which might exist. But conceivably, yes, and that is a problem.

Ms Schoonwater: If Jimmy Woollies is sitting in his office in Perth and there are 10 down the chain, how does he know that Joe Bloggs here had an accident in his truck that resulted in a death?

THE CHAIR: That's true.

Ms Schoonwater: That's the question you're asking.

THE CHAIR: Or if someone who is No 7 in the chain could be pinged for this when, if you look at their actual culpability, it's nothing like what you'd expect to date in terms of a proper criminal prosecution for a serious offence.

Mr Malone: Obviously, we will prepare some submissions on the issues you've raised, I think it is important for the record to state that we don't accept the assumption that you are making in that regard in terms of the lessening of the culpability, but we'll certainly address that. Could you perhaps give us an indication of the timeframe?

THE CHAIR: How long would you need? A group were meant to come up from Melbourne today but, through no fault of their own, something went wrong at the airport.

MR HARGREAVES: We've got estimates and things like that, so a couple of weeks.

THE CHAIR: We've got estimates and we've got a couple of other witnesses. We've written to the DPP. The government lawyers might help out with something and even the Occupational Health and Safety Commissioner probably should appear. She was in the background on one thing, but there are a few issues there. We've certainly got one more hearing and we've got estimates, as John says; so about a month, but I wouldn't leave it past that. If you could get it to us by the end of May, I think you'd be pretty safe. We will have the budget next week and the Estimates Committee runs from the 17th through to the end of May, so about the end of May would be fine. Thank you.

Resolved:

> That, pursuant to standing order 243, the committee authorises the publication of evidence and submissions received by the committee this day.

The committee adjourned at 5.20 pm.