



**COMMISSION OF INQUIRY INTO THE CFMEU AND MISCONDUCT IN
THE CONSTRUCTION INDUSTRY**

**COMMISSIONED UNDER THE PROVISIONS OF THE
COMMISSIONS OF INQUIRY ACT 1950**

PUBLIC HEARING 10 - BRISBANE

**THURSDAY, 11 JUNE 2026
AT 9.58 AM**

DAY 31

APPEARANCES

**Mr James Mclean - Counsel Assisting
Mr David de Jersey KC – Counsel for the State of Queensland
Ms Megan Brooks – Counsel for the State of Queensland
Mr Chris O'Grady KC - Counsel for the CFMEU Administration
Ms Felicity Fox - Counsel for the CFMEU Administration
Ms Amelia Hughes - Counsel for the CFMEU Administration**

<THE HEARING RESUMED AT 10.00 AM

COMMISSIONER: Deal with appearances. Mr McLean, you appear as counsel assisting the Commission?

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MR McLEAN: Yes, may it please the Commission.

COMMISSIONER: Mr O'Grady, you continue to appear with Ms Hughes for the administrator of the CFMEU?

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MR O'GRADY: Yes, Commissioner.

COMMISSIONER: And Mr de Jersey, you continue to appear with Ms Brooks for the State of Queensland?

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MR DE JERSEY: Yes, Commissioner.

COMMISSIONER: Thank you. Mr McLean.

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MR McLEAN: Thank you, Commissioner. There's been an application by the administrator to cross-examine each of Mr Jenkinson and Mr Hadgkiss. They've both made themselves available for cross-examination today. Mr Jenkinson will be the first witness to be called.

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COMMISSIONER: There's a written application by the administrator to cross-examine Mr Jenkinson. It goes for four pages, 5 June 2026. There's no objection by you to that application?

MR McLEAN: No objection.

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COMMISSIONER: Very well. Mr O'Grady.

MR O'GRADY: Yes. Thank you, Commissioner. The Commission will appreciate we filed, as I said yesterday, a bundle of documents that we want to rely upon in respect of the cross-examination of these two witnesses. There are some additional documents that we've also provided to counsel assisting this morning. We have a folder of those documents in hard copy and also those documents on a USB. Now, I understand the Commission has probably prepared those documents for you, but if it would assist, I can provide you with that folder as well.

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COMMISSIONER: I can tell you what I've got. I've got a thing called a schedule A bundle, indexed documents, which runs to some 375 pages, plus document 23 to schedule A. Then four lots of ABS statistics, and then a national dataset from Safe Work Australia.

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MR O'GRADY: Yes. Well, it might assist, Commissioner, if I then just provide you with this folder and the additional documents so that you've got it there, and then, as I understand it, the operator will be able to bring up these documents other than the additional ones on the screen in any event.

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COMMISSIONER: Do you want to tender these documents?

MR O'GRADY: Yes, I would seek to do that.

10 **COMMISSIONER:** All right. Well, do you want to do that through the witness or just do it now?

MR O'GRADY: I'll do it now. These aren't documents of the witness.

15 **COMMISSIONER:** Of course they're not.

MR O'GRADY: Yes.

COMMISSIONER: All right.

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MR O'GRADY: So you'll see there, Commissioner, you have the schedule A, and that's the documents in the folder. In addition, there are a small number of documents with a bull clip and there's also a USB stick which has the documents that are in the folder there for you.

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COMMISSIONER: Well, the folder you've handed up to me has got an index of 23 documents, and there are 22 in the printed version. The last one is a PowerPoint presentation that's going to be tendered electronically?

30 **MR O'GRADY:** Yes, it is, yes.

COMMISSIONER: And then I've got another document which is index to additional documents, another four documents there.

35 **MR O'GRADY:** Yes. And I have also a hard copy of the PowerPoint presentation, which is document number 23.

40 **COMMISSIONER:** Perhaps I could have that as well. Thank you. So of these initial 23 documents, including the PowerPoint presentation, are the first three already in evidence?

MR O'GRADY: Yes.

45 **COMMISSIONER:** I see. I'm sorry, I shouldn't say "evidence", should I, because number 3 wasn't in evidence; it was just admitted for, if you like, I think subject to your description of it, having - and counsel assisting agreed that it

wouldn't be relied upon as evidence, merely as the submissions that counsel was making.

MR O'GRADY: Yes. Yes.

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COMMISSIONER: Do you have a copy of these documents, Mr McLean?

MR McLEAN: I do. Thank you, Commissioner.

10 **COMMISSIONER:** And is there any objection to receiving to receiving the documents numbered 4 to 23 in the folder and the additional documents numbered 1 to 4?

15 **MR McLEAN:** No, there's no objection. I just make the observation that a large number of the documents that are included in that bundle probably are more properly matters for submission, but there's no objection to them being received and marked.

20 **COMMISSIONER:** Well, there will be some time given to something I want to talk to you about afterwards, after the evidence, about when you might make some submissions on whether or not there is a need for a code and, if so, what form should it take, and obviously the parties will have a chance to respond to whatever your submissions might be. But you have no objection at the moment to the receipt of these documents?

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MR McLEAN: No objection.

COMMISSIONER: What about your position, Mr de Jersey?

30 **MR DE JERSEY:** No objection, Commissioner. I mean, I note that, for example, number 18 is a newspaper article, but no doubt the tender of all these documents, including, for example, that one, are tendered on the basis of what they are on their face.

35 **COMMISSIONER:** Yes.

MR DE JERSEY: Not meaning to cast any aspersions on the AFR.

40 **COMMISSIONER:** I understand. It's just going to be a question of weight; this Commission can receive hearsay material.

MR O'GRADY: We accept that, Commissioner.

45 **COMMISSIONER:** All right. How would you like me to describe these documents numbered 4 to 23, Mr O'Grady?

MR O'GRADY: Bundle of documents filed by the administrator for the purpose of cross-examining Mr Jenkinson and Mr Hadgkiss.

5 **COMMISSIONER:** And what annexure will we give this?

MR O'GRADY: Well, Administrator 1, I think, Commissioner.

COMMISSIONER: A1.

10 **MR O'GRADY:** A1. It's a promising start for the day's proceedings, Commissioner.

15 **COMMISSIONER:** All right. Bundle of documents numbered 4 to 23, entitled Schedule A - Index to Documents provided for the purposes of cross-examination of Mr Jenkinson and Mr Hadgkiss will be A-1.

20 **<EXHIBIT A-1 BUNDLE OF DOCUMENTS NUMBERED 4 TO 23 ENTITLED SCHEDULE A - INDEX TO DOCUMENTS PROVIDED FOR PURPOSE OF CROSS-EXAMINATION OF MR JENKINSON AND MR HADGKISS**

COMMISSIONER: And additional four - additional bundle of four documents provided for the purpose of cross-examination of Mr Jenkinson and Mr Hadgkiss will be exhibit A-2.

25 **<EXHIBIT A-2 ADDITIONAL BUNDLE OF FOUR DOCUMENTS PROVIDED FOR PURPOSE OF CROSS-EXAMINATION OF MR JENKINSON AND MR HADGKISS**

30 **COMMISSIONER:** I won't separately receive the electronic versions of the documents. I don't think I need to, do I?

MR O'GRADY: No.

35 **COMMISSIONER:** Very well. Thank you. What do you want to do now? Recall Mr Jenkinson?

MR O'GRADY: I would ask that Mr Jenkinson be recalled.

40 **COMMISSIONER:** Mr Jenkinson, would you come forward into the witness box?

<WAYNE JENKINSON, RESWORN

45 **<CROSS-EXAMINATION BY MR O'GRADY**

COMMISSIONER: Thank you, Mr Jenkinson. Please take a seat. You were in the body of the hearing room and you've heard what's happened this morning at the bar table. Mr O'Grady has been given leave to cross-examine you, and he will now do so.

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MR JENKINSON: Thank you.

MR O'GRADY: Good morning, Mr Jenkinson.

10 **MR JENKINSON:** Good morning.

MR O'GRADY: I'm appearing for the administrator of the CFMEU.

MR JENKINSON: Yes.

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MR O'GRADY: And if at any stage you can't hear me or you need clarification, please let me know and I'll try and ask a better question.

MR JENKINSON: Thank you.

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MR O'GRADY: As you've just heard, the Commission required the administrator to file the documents we wanted to use in support of cross-examining you and Mr Hadgkiss last Friday. I take it you've had an opportunity to look at those documents?

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MR JENKINSON: No.

MR O'GRADY: I see. All right. All right. You would agree with me that numerous Royal Commissions and inquiries into the CFMEU have identified that at the heart of the problem, if I can use that language, is the culture of the CFMEU?

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MR JENKINSON: Yes, I understand that's been some of the findings, yes.

35 **MR O'GRADY:** Yes. And that there's been findings that there have been officials of the CFMEU who have generated that culture and encouraged that bad culture?

MR JENKINSON: Yes.

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MR O'GRADY: Yes. And there have also been findings, and in the Heydon Royal Commission in particular, one of the recommendations that Justice Heydon made was that in effect get necessary to get rid of those bad officials, to remove them from their roles in the CFMEU?

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MR JENKINSON: I don't recall exactly what the Commissioner found in that instance, but I wouldn't be surprised if that was something he recommended, yes.

MR O'GRADY: And that was a recommendation the government didn't accept, following on from the Heydon Royal Commission.

5 **MR JENKINSON:** That's right.

MR O'GRADY: Yes. And the issue of culture in the CFMEU was also something identified by Commissioner Cole when he did his Royal Commission?

10 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And you're aware, aren't you, that by virtue of the administrator being appointed, the recommendation of Justice Heydon has ultimately been accepted by government, because the officials that were identified as being responsible for that bad culture have now been removed, haven't they?

MR JENKINSON: Well, some of the officials have been removed, certainly. I don't - I don't know that appointing an administrator is exactly in compliance with Justice Heydon's recommendations to the letter, but it goes a long way towards it.

20 **MR O'GRADY:** Yes. Well, Justice Heydon made a recommendation that the officials who he identified who were encouraging bad culture be removed. You've admitted that.

25 **MR JENKINSON:** Yes.

MR O'GRADY: And the result of appointing the administrator has been the removal of, for example, Mr Ravbar and Mr Ingham and numerous others?

30 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And you would agree that when Mr Hadgkiss gave numerous presentations when he was in charge of the ABCC and the FWBC, he also identified the importance of trying to change the culture of the CFMEU?

35 **MR JENKINSON:** Yes.

MR O'GRADY: But on a number of occasions, Mr Hadgkiss has acknowledged that during his time in charge of the FWBC and/or the ABCC, he was unable to effect cultural change?

MR JENKINSON: Well, I don't want to speak for what Mr Hadgkiss has acknowledged over the years.

45 **MR O'GRADY:** I see. You're not aware of that?

MR JENKINSON: Well, no, I'm not aware of it, no, but I would concur that, you know, during Mr Hadgkiss' time and during my time in the ABCC the culture of the union hadn't changed.

5 **MR O'GRADY:** No. And Mr Hadgkiss also indicated that notwithstanding the numerous prosecutions that were brought by the ABCC and the FWBC, they were having little, if any, deterrent effect.

10 **MR JENKINSON:** I'm not sure what Mr Hadgkiss said in that regard. It's my view that they had - they had little deterrent effect.

15 **MR O'GRADY:** Yes. I understand. And I put it to you that productivity didn't improve across the first ABCC, that on the ABS data, it was 106.74 in 2005-2006 and 104.87 by 2009-2010.

MR JENKINSON: I haven't seen those figures.

MR O'GRADY: All right. You can't comment?

20 **MR JENKINSON:** No.

MR O'GRADY: I understand. All right.

25 **COMMISSIONER:** You just have to explain to me what that statistic means, Mr O'Grady. I mean, you can do it now if you want, or we can do it - the witness says he doesn't -

30 **MR O'GRADY:** Yes, he doesn't know, and as you would appreciate, Commissioner, in part, I'm doing this to be fair to the witness so that he's got an opportunity to reply if he can.

COMMISSIONER: I understand. And you will have the chance to make submissions, so -

35 **MR O'GRADY:** Yes. All right. Would you accept that an organisation that perceives itself to be under attack may be less willing to engage in cultural change because it's on the defensive?

40 **MR JENKINSON:** I - I don't understand that - that question.

MR O'GRADY: All right. Well, what I'm putting to you is I think you've acknowledged that at the heart of the problem is a need to change the culture of the CFMEU.

45 **MR JENKINSON:** There was a need to change the culture, yes.

MR O'GRADY: And what I'm putting to you is that if an organisation perceives it to be under attack and indeed unfairly being attacked, then that may impact upon its willingness to engage in cultural change because it might bunker down.

5 **MR JENKINSON:** Are you suggesting that this was back in the days of the ABCC when -

MR O'GRADY: What I am - yes, I am suggesting that the attacks or the perception in the CFMEU that it was being unfairly attacked by the ABCC is
10 arguably a reason why there was resistance to cultural change.

MR JENKINSON: I don't accept that the ABCC was attacking the CFMEU.

MR O'GRADY: I didn't say that. What I'm putting to you is you would accept
15 that the CFMEU perceived that it was being attacked unfairly by the ABCC, surely?

MR JENKINSON: I don't think the CFMEU had grounds to think they were
20 under attack. We were an independent statutory authority who was there to police the workplace relations laws across the entire industry.

MR O'GRADY: Yes. And yet you consistently focused upon the CFMEU as
25 opposed to dealing with wage underpayments, sham contracting, unlawful activity by employers?

MR JENKINSON: No, I dispute that. I deny that. We did take action against
employers for wages and entitlements. We did look at sham contracting. And the
third point you made -

30 **MR O'GRADY:** Unlawful activity by employers.

MR JENKINSON: By employers. We did take action against employers. I
concede that much of the work the ABCC did was investigating alleged
35 misconduct by the CFMEU and taking court action when there was sufficient evidence to do so. I concede that much of the court cases involved the CFMEU. That's not to say that we weren't prepared to take action against employers or anybody else who was found to be in breach of the law. It was the case that most of the work we did was against the CFMEU. That was where the complaints came
40 from.

MR O'GRADY: Well, it's not just a matter of most of the work being actioned
against the CFMEU. I put it to you there was a disproportionately high level of
action taken against the CFMEU when compared to the action taken against
45 employer groups.

MR JENKINSON: Yes, like I said, most of the work.

MR O'GRADY: Yes, well, not just most. It's not just 51 per cent. It's 90 per cent or 95 per cent, wasn't it?

MR JENKINSON: That's - that's correct.

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MR O'GRADY: Yes. And in circumstances where the ABCC and the FWBC had an obligation to have regard to the interests of all stakeholders in the industry, including organisations, I put it to you that that disproportion is reflective of a bias against the CFMEU.

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MR JENKINSON: No. When I took over the role of the state director for the northern region, or for Queensland back then, of the ABCC, I reached out to each of the state secretaries for all of the construction sector unions in Queensland, including the CFMEU's state secretary, and endeavoured to establish a line of communication, introduce myself. There was no interest from any of the parties to engage with me or the agency at all. They had no interest in coming to us with complaints about employer conduct, complaints - yeah, they had no interest in coming to us. They dismissed us as an agency irrelevant to them.

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MR O'GRADY: But you're there referring to individuals who have now been removed, aren't you?

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MR JENKINSON: Yes.

MR O'GRADY: Yes. And they've been replaced by the administrator.

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MR JENKINSON: In the case of the CFMEU, yes.

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MR O'GRADY: And the administrator has made it very clear that he is about effecting cultural change within the organisation that he's in charge of.

MR JENKINSON: I have read that.

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MR O'GRADY: Yes.

COMMISSIONER: Just remind me, Mr Jenkinson, when was this that you said you reached out to all -

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MR JENKINSON: It was approximately 2005, Commissioner.

COMMISSIONER: Thank you. Sorry, Mr O'Grady.

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MR O'GRADY: And you'd accept that during the time that you were with the ABCC, there were significant numbers of employers who were not complying with their statutory obligations.

MR JENKINSON: I - I have no - I have no evidence of that.

MR O'GRADY: Well, in 2014-2015, the Fair Work Ombudsman undertook a targeted campaign of the building and construction industry and found - audited some 700 businesses and found that only 59 per cent of employers were compliant with all requirements.

MR JENKINSON: We had a - we had a role to play in relation to wages and entitlements audits. The ABCC had an arm that did that work.

MR O'GRADY: Yes. Just didn't exercise that arm.

MR JENKINSON: We did. We did exercise that arm.

MR O'GRADY: On a couple of occasions.

MR JENKINSON: On many occasions. The couple of occasions you refer to, perhaps you're referring to court cases.

MR O'GRADY: Yes.

MR JENKINSON: We didn't always - we didn't often bring court cases against employers. We worked with the employer who was in the wrong who had underpaid. They rectified their error. We - they exercised - they showed contrition and put steps in place and demonstrated the steps they'd put in place to make sure their payroll systems were working next time. Now, that - as a government agency, that's what we would prefer to have done. We don't go straight to litigation for every contravention.

MR O'GRADY: Well, I put it to you that can be contrasted with the way in which you dealt with the CFMEU, where the default option was to go to litigation.

MR JENKINSON: No. That's not the case. Towards - towards the end of the ABCC - well, for many years, the ABCC brought litigation against the CFMEU. There was - there was - because of the culture you identify that was back in the day, there was no preparedness to demonstrate any contrition. There was no preparedness to work with us as the regulator to put steps in place to have the officials who had breached the laws to not do so in the future. There was no preparedness to work in any way or show any contrition and so we went to litigation, and we continued to go to litigation for that reason.

MR O'GRADY: Well, I put it to you that a reason why the CFMEU may not have been willing to cooperate with the ABCC was that it was perceived as being unfairly biased against it.

MR JENKINSON: Well, again, I don't accept that they should have had that understanding. All they needed to do to have us stop attacking them, if that's what they thought we were doing, was to comply with the law.

MR O'GRADY: All right.

MR JENKINSON: Work within the bounds of the Fair Work Act.

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MR O'GRADY: All right. Well, there's nothing in the Fair Work Act that prohibits an employer inviting a union official onto site without them having to exercise their right of entry, is there?

10 **MR JENKINSON:** You're correct. That's in the code.

MR O'GRADY: Yeah, okay. So the Fair Work Act makes it very clear that it's open for an employer to have somebody enter, whether they be a union official or otherwise, if they're the occupier of premises.

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MR JENKINSON: There's no prohibition in the Fair Work Act to invite people onto your building site.

20 **MR O'GRADY:** And yet the ABCC brought a prosecution against an official of the CFMEU because he had attended a work site to discuss social matters with his friend.

MR JENKINSON: That wasn't - that was a breach of the right-of-entry laws. That was a southern - a southern investigation -

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MR O'GRADY: Yes.

MR JENKINSON: - which I wasn't directly involved in.

30 **MR O'GRADY:** Yes.

MR JENKINSON: There was sufficient evidence, and - there was sufficient evidence that came to my southern colleagues' attention that justified action being brought under the right-of-entry laws in the Fair Work Act.

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MR O'GRADY: Well, do you have - perhaps if I could provide you with - have you provided with a folder containing the documents that we filed in support of the application so that you've got it conveniently.

40 **COMMISSIONER:** Just remind me, Mr O'Grady, where did that statistic of 59 per cent of employers were not complying come from?

45 **MR O'GRADY:** It is in the material that we've filed, Commissioner, in one of the submissions from the ACTU regarding the reinstatement of the ABCC, and it's at page 269 of the bundle.

COMMISSIONER: Thank you.

MR O'GRADY: It should be 269.

COMMISSIONER: Thank you.

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MR O'GRADY: It's item 15 on the index, and it's paragraph 7. But perhaps if the witness could be provided with a copy of the documents so that I can -

COMMISSIONER: Yes, very well.

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MR O'GRADY: Now, could I ask to you go to page 331 of that bundle. So this is item 21, Commissioner.

MR JENKINSON: Which page, I'm sorry?

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MR O'GRADY: 331.

MR JENKINSON: Yes.

20 **MR O'GRADY:** Now, that's - hopefully that's a decision of ABCC v CFMEU (the cup of tea case).

MR JENKINSON: Yes.

25 **MR O'GRADY:** And you're aware of this proceeding, aren't you?

MR JENKINSON: I'm aware of it loosely, yes.

30 **MR O'GRADY:** Yes. And you're aware of the fact that the individual who attended was a Mr Travers.

MR JENKINSON: No.

MR O'GRADY: And he went over to see a friend of his, a Mr Duggan.

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MR JENKINSON: I don't know the name of the individuals.

MR O'GRADY: I understand. But there was no suggestion that he was exercising his right of entry when he attended the site, was there?

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MR JENKINSON: Well, I would suggest there would have been evidence of that, or the ABCC wouldn't have commenced that action.

45 **MR O'GRADY:** Well, you're aware of the fact that his Honour Justice North in that case found there was no attempt to exercise right of entry when there was an attendance.

MR JENKINSON: I'm aware the ABCC lost that case, that litigation. I'm not exactly aware of the details or Justice North's findings.

5 **MR O'GRADY:** Well, the ABCC lost both alleged contraventions, and the CFMEU was vindicated in that proceeding.

MR JENKINSON: Yes.

10 **MR O'GRADY:** Yes. And his Honour Justice North was very critical of the resources that the ABCC had used in prosecuting what he says was a storm in a teacup.

MR JENKINSON: I recall there was some criticism from the judge.

15 **MR O'GRADY:** Yes. And I put it to you that that prosecution is not consistent with the, dare I say it, educative, benign approach that you were describing the ABCC took in respect of employers.

20 **MR JENKINSON:** We took - we would have taken an educative approach many years ago had the CFMEU been prepared to work with us, as employers usually did, when we identified contraventions. The CFMEU long displayed - as I said earlier, the CFMEU long displayed no intention or desire to work with us as the regulator, unlike the employers who we identified as underpaying various employees from time to time. That's why our - we had such a high rate of
25 litigation against the CFMEU and a low rate against employers.

MR O'GRADY: Well, certainly, as at this time, you'd agree with me that the ABCC was not adopting an educative approach, was it, in respect of the CFMEU?

30 **MR JENKINSON:** No. By this time, in 2015, and years beyond that, there was no - there was no education being provided to the CFMEU. They wouldn't accept it.

35 **MR O'GRADY:** I see. And you'd agree with me that the cost of a prosecution like this would have run into the hundreds of thousands of dollars?

MR JENKINSON: Probably, yes.

40 **MR O'GRADY:** Yes. Because you've got external solicitors and counsel?

MR JENKINSON: Yes.

MR O'GRADY: You've got internal administration?

45 **MR JENKINSON:** Yes.

MR O'GRADY: You've got the investigation that preceded the launching of the proceedings?

MR JENKINSON: Yes.

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MR O'GRADY: And do you accept that to spend hundreds of thousands of taxpayers' dollars on a prosecution about whether or not somebody can have a cup of tea with his mates to discuss four-wheel driving is a disproportionate use - is an ill-advised use of government resources?

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MR JENKINSON: Well, again, this was a court case brought by my colleagues down south. I think it was Victoria. I don't accept that it was simply about a cup of tea. It was - that's the name it's been given subsequently, but this was a right-of-entry investigation that was launched by the investigations team in Victoria on a complaint from a building industry participant. The investigation was launched. There was external prospects advice on the prospects of the litigation sought from counsel external to the agency, and that prospects advice would have come back with positive prospects, which was why it was launched. I accept that we lost that case eventually, but we didn't go into it frivolously, on a whim.

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MR O'GRADY: Well, you're aware of the fact that the individual who was the safety officer being visited, he had no difficulty with Mr Travers coming and having a chat with him?

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MR JENKINSON: I'm not aware of that. I don't know the details.

MR O'GRADY: Thank you.

COMMISSIONER: Keep going if you want, Mr O'Grady, but I think the witness has said three times he's not in control of the southern division. This was a southern division case.

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MR O'GRADY: I accept that, Commissioner. I understand. You would agree with me that it's important that guidance material put out by the regulator is accurate and does not mislead?

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MR JENKINSON: Yes.

MR O'GRADY: Yeah. And that a failure of the regulator to make sure that whatever material it puts out is accurate is likely to significantly undermine the perception that the regulator is acting fairly and impartially?

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MR JENKINSON: Well, it's important that material be accurate, yes.

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MR O'GRADY: Yeah. Well, I put it to you it's a core responsibility that the regulator is accurate about the regulatory regime it's required to police?

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MR JENKINSON: Yes.

5 **MR O'GRADY:** Probably there's no more fundamental obligation for the regulator?

MR JENKINSON: Well, it's an important part of the work, yes.

10 **MR O'GRADY:** Yes. Yes. And to deliberately or recklessly put out misleading material involves a fundamental breach of trust, doesn't it?

MR JENKINSON: Yes, to do that deliberately and recklessly would be - would be wrong.

15 **MR O'GRADY:** And it reflects a lack of judgment that brings into question whether the organisation or those running it can be relied upon in respect of anything they might do or say?

20 **MR JENKINSON:** Oh, well - what's the question there?

MR O'GRADY: Well, it reflects a lack of judgment that brings into question whether the organisation or those running it can be relied upon in respect of anything they might do or say?

25 **MR JENKINSON:** Well, it would depend on the error that we were referring to. If there was an error in some of our educational material, it would depend on - on the nature of that error and how long it was - how long it was on public display for and other things like that, I guess.

30 **MR O'GRADY:** Okay. All right. Well, let's go through those things. So you'd agree with me that the ability of officials to meet with their members at a work site is an important right?

35 **MR JENKINSON:** Yes.

MR O'GRADY: And you'd agree with me that it can sometimes be a contested issue?

40 **MR JENKINSON:** Right of entry can be contested, yes.

MR O'GRADY: And you'd also - you also understood that the legislative regime has changed in respect of right of entry, in respect of meeting officials at lunchtimes?

45 **MR JENKINSON:** Changed since when?

MR O'GRADY: Sorry, just bear with me. Well, perhaps I put it in broader terms. There was a period of time where there was an ability for an employer to direct the official to a room for the meeting with membership, and then that position changed so that the - if no agreement could be reached, the official could meet with their members in the lunchroom.

MR JENKINSON: Yes, there was always - there had been a little bit of grey area around what arrangements could be made about meeting places and the like, yes.

MR O'GRADY: And are you aware of the fact that despite the fact that that had changed so that there was, in effect, a default capacity to meet in the lunchroom, the ABCC, or, sorry, the FWBC maintained on its website for some years material that suggests that there was no default right to meet in the lunchroom?

MR JENKINSON: Look, I recall that there was - there was some incorrect information on one of our fact sheets on our website for a period of time some years ago.

MR O'GRADY: Yes.

MR JENKINSON: I obviously wasn't involved in posting that material -

MR O'GRADY: Yes.

MR JENKINSON: - or managing it. I am aware that there was an issue with some information in one of our websites at one point.

MR O'GRADY: And are you aware of the fact that there's been a finding made by a Federal Court judge, Justice Collier, that Mr Hadgkiss was made aware of the fact that there were inaccuracies in the material that was on the website?

MR JENKINSON: I know there was some criticism brought against Mr Hadgkiss for that fact sheet.

MR O'GRADY: And that he declined to remedy that situation?

MR JENKINSON: I don't know the details of that.

MR O'GRADY: I see. All right. You'd accept that that would be a very serious error of judgment on Mr Hadgkiss' part if that's what occurred?

MR JENKINSON: I don't want to comment on what Mr Hadgkiss would have done as the commissioner.

45

MR O'GRADY: All right. Now, you were an investigator with the building industry taskforce, then an inspector, and the Queensland state director of the ABCC?

5 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And you were the first director of the building and construction compliance branch, the body that administered the 2013 Queensland guidelines?

10

MR JENKINSON: Yes.

MR O'GRADY: And you later became the director of the ABCC's northern region?

15

MR JENKINSON: Yes.

MR O'GRADY: And you are now the project industrial relations manager for Fulton Hogan?

20

MR JENKINSON: Yes.

MR O'GRADY: And Fulton Hogan tenders for and performs government-funded construction work?

25

MR JENKINSON: Yes.

MR O'GRADY: And your opinion that a Queensland code and regulator are needed rests on your experience?

30

MR JENKINSON: That's right.

MR O'GRADY: You're not an economist?

35 **MR JENKINSON:** No.

MR O'GRADY: You've conducted no study of construction productivity in Queensland?

40 **MR JENKINSON:** No.

MR O'GRADY: Your evidence of improvements in productivity is based on what you observed and what industry representatives remarked to you?

45 **MR JENKINSON:** That's right.

MR O'GRADY: All right. Now, you say that the 2016 code and the ABCC improved compliance and this improved productivity.

MR JENKINSON: Yes.

5

MR O'GRADY: All right. And you also say that the reintroduction of industry guidelines and an ABCC-like body is essential to improve productivity on construction sites?

10 **MR JENKINSON:** It would a long way towards improving productivity, yeah.

MR O'GRADY: Well, I put it to you that there is no clear correlation between productivity and the times when the ABCC and/or the FWBC has been in operation.

15

MR JENKINSON: Well, as - as we agreed, I'm not an economist, and I haven't prepared productivity material, but my observations in my time in those roles leads me to believe that there is a correlation between an effective regulator in the industry and increased productivity on the ground.

20

MR O'GRADY: But to the extent to which there's been statistical analysis done in respect of productivity and the times when the ABCC and/or the FWBC was in operation, you're not in a position to comment on that, are you?

25 **MR JENKINSON:** No.

MR O'GRADY: No. And do you accept that there's a distinction between productivity and lost days of work?

30 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. Because productivity is really a measure of output per hour worked.

35 **MR JENKINSON:** That's right.

MR O'GRADY: Yes. And a decrease in days worked says nothing about productivity, does it?

40 **MR JENKINSON:** A decrease in days worked?

MR O'GRADY: Days worked - says nothing about productivity?

MR JENKINSON: Well, a decrease in days worked is a day lost.

45

MR O'GRADY: Yes, but it says nothing about productivity if you look at what productivity is measuring, namely, output per hour worked.

MR JENKINSON: Well, if a day's work is lost, there's no output.

MR O'GRADY: Yes. But there's no hour worked, is there?

5

MR JENKINSON: There's no - there's no work, no.

MR O'GRADY: No.

10 **MR JENKINSON:** That's - that's the whole point of it, though, isn't it? If there's no work, there's no productivity.

15 **MR O'GRADY:** Well - but what I'm putting to you is if one is looking at what productivity means in a technical sense, it is output per hour worked. And that's a different thing, I put to you, from days lost.

MR JENKINSON: I'm not - because I'm not an economist, I'm not going to try and split those hairs, Mr O'Grady.

20 **MR O'GRADY:** Okay. You'd accept that there are - under our legislative regime, there is a capacity to lawfully take industrial action, including strike action?

MR JENKINSON: Yes.

25

MR O'GRADY: Yes. And that can occur in particular in pursuit of an enterprise bargain.

MR JENKINSON: Yes.

30

MR O'GRADY: And you'd also agree with me that enterprise bargaining rounds can be cyclical?

MR JENKINSON: Yes.

35

MR O'GRADY: And that industrial action taken in pursuit of an enterprise bargain can be protracted?

MR JENKINSON: Yes.

40

MR O'GRADY: And you've undertaken no analysis, have you, to distinguish between what might be described as lawful industrial action and unlawful industrial action?

45 **MR JENKINSON:** That's right. But I can say from - again, just from my experiences and observations from time on the ground, is during that the time that

there was an effective regulator in the industry, there was fewer days lost to unlawful industrial action.

5 **MR O'GRADY:** Well, you just haven't - you haven't undertaken that analysis. You told the Commission that a moment ago. You've made no effort to distinguish between lawful and unlawful industrial action.

10 **MR JENKINSON:** No, as I just said, it's not an analysis. It's my observation from my time on the ground that unlawful industrial action dropped off when there was an effective regulator.

MR O'GRADY: Yes. But that analysis hasn't been done, has it?

15 **MR JENKINSON:** No.

MR O'GRADY: No. And so that's just your gut speaking?

MR JENKINSON: That's my observations, yes.

20 **MR O'GRADY:** I understand. Now, at paragraph 33 of your statement, you set out a table dealing with working days lost in Queensland.

MR JENKINSON: Yes.

25 **MR O'GRADY:** And you draw a distinction between times when the -

COMMISSIONER: Can we bring that up, Mr -

30 **MR O'GRADY:** Yes. And perhaps if you could enlarge it. And the green band reflects the time when the ABCC was in operation?

MR JENKINSON: Yeah, the second iteration of the ABCC, yes.

35 **MR O'GRADY:** Yes. And you understand that that coincided with COVID?

MR JENKINSON: Yes.

40 **MR O'GRADY:** Yes. And you'd agree with me that COVID had a significant depressive effect on industrial activity?

MR JENKINSON: Yes.

45 **MR O'GRADY:** Yes. And if one looks at your table, one finds that the lowest point where working days were lost, ie, in 2020, was in the heart of COVID, wasn't it?

MR JENKINSON: Yes, that's right. I think we made that point when I was here in April. That's clearly the year that COVID was at its peak.

5 **MR O'GRADY:** Yes. And that says nothing, does it, about the effectiveness of the ABCC?

MR JENKINSON: Well, the 2020 year is certainly a glitch, but those years before it tell a story of falling industrial action. The years after are low - low periods of industrial action. I also concede that that graph is not industry-specific.

10

MR O'GRADY: No.

MR JENKINSON: But it's consistent with my recollections and observations of the construction industry during the period that there was a regulator in place.

15

MR O'GRADY: Yes. But, as you say, it really says nothing about what was happening in the construction industry, does it?

MR JENKINSON: Not specifically, no.

20

MR O'GRADY: No, no. All right. And the ABCC was confined to the construction industry, wasn't it?

MR JENKINSON: Yes.

25

MR O'GRADY: Yes. So to the extent to which there was a reduction in industrial or working days lost in Queensland in industries other than the construction industry, the ABCC could have had no responsibility for that?

30 **MR JENKINSON:** That's right.

MR O'GRADY: And the ABCC, of course, was a national body?

MR JENKINSON: Yes.

35

MR O'GRADY: And I put it to you that if it was responsible for the reduction in working days lost in Queensland, one would have expected there to be a similar trend in respect of other states.

40 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. Now, the data that you used to compile this table was catalogue 6321.0.55.001, which measures industrial disputes in Australia.

45 **MR JENKINSON:** I know the data came from the Australian Bureau of Statistics.

MR O'GRADY: Did you compile this table?

MR JENKINSON: No.

5 **MR O'GRADY:** No. Who did?

MR JENKINSON: People from the Commission.

10 **MR O'GRADY:** I see. Did you independently verify that it was accurate?

MR JENKINSON: Not independently, no.

MR O'GRADY: No. Did you have a look at the raw data itself?

15 **MR JENKINSON:** No.

MR O'GRADY: Well, I'm putting this to you as a matter of fairness. In New South Wales, according to the same data, working days lost per 1000 employees peaked in 2021 and 2022.

20 **MR JENKINSON:** Okay.

MR O'GRADY: And that's at a time when the ABCC was in operation.

25 **MR JENKINSON:** Yes.

MR O'GRADY: And would you accept that, to the extent to which this data can say anything about what's going on in the construction industry, because it's not confined to the construction industry, it would appear that the suppressive effect that you attribute to the ABCC in Queensland was not - did not occur in New South Wales?

30 **MR JENKINSON:** Well, I haven't seen the data that you refer to. It no doubt - it no doubt says what you say it says. Again, my experience and from my observations were that the ABCC, in every state, saw a reduction in days lost through unlawful industrial action while we were in place.

MR O'GRADY: Well, again, that's your gut reaction, isn't it?

40 **MR JENKINSON:** Yes.

MR O'GRADY: Because you haven't done the analysis?

45 **MR JENKINSON:** No.

MR O'GRADY: And the analysis that appears at paragraph 33 really says nothing useful about whether or not the ABCC had a suppressive effect on industrial action in the construction industry, does it?

5 **MR JENKINSON:** It's not a specific chart for the industry, no.

MR O'GRADY: No. And you would agree with me that if there was a general suppressive effect, then one would expect that effect to be found in other states where the ABCC operated?

10

MR JENKINSON: It would be fair to expect that.

MR O'GRADY: Yes, and you don't dispute that. That certainly wasn't the case in New South Wales.

15

MR JENKINSON: Okay.

MR O'GRADY: Now, I touched on COVID a moment ago, and you haven't done this analysis, but I just want to put it to you as a matter of fairness, that excluding the COVID-affected quarters, the non-COVID average for the second ABCC period was six working days lost per thousand, and that the post-ABCC figure was 6.8 working days lost per thousand, and I put it to you that's a marginal difference.

20

25 **COMMISSIONER:** What's that figure? Is that all industries? Is that across the nation?

MR O'GRADY: No, no, this is - this is in respect of the construction industry.

30 **COMMISSIONER:** Across -

MR O'GRADY: Sorry, I apologise. It's all industries.

35 **COMMISSIONER:** All industries. Is it a lot of utility asking the witness about that?

MR O'GRADY: No. No, I won't pursue that. Before I depart this area - and you may not be able to answer this - but do you accept that the ABS data doesn't distinguish between lawful and unlawful stoppages of work?

40

MR JENKINSON: Actually, I don't know that, actually. I don't know whether it does or not.

45 **MR O'GRADY:** But you'd agree with me to that the extent I'm right about that and it doesn't make that distinction, that's another issue about relying upon this ABS data in respect of trying to attribute any impact of the ABCC.

MR JENKINSON: It's also worth me pointing out that whilst we've agreed that bargaining for enterprise agreements is cyclical and it comes around regularly, there was far fewer days lost to lawful industrial action bargaining for EBAs than there were in just unlawful strike action.

5

MR O'GRADY: Well -

MR JENKINSON: That was by far the number of days lost.

10 **MR O'GRADY:** But, Mr Jenkinson, you haven't done that analysis, have you?

MR JENKINSON: No, that's just my observations.

MR O'GRADY: It's your gut.

15

MR JENKINSON: It's my observations, and also what I was hearing from industry as well. People were talking to us and people would tell us that they are seeing less industrial action, unlawful industrial action, on their projects.

20 **MR O'GRADY:** So it's your gut reaction and the gut reaction of others?

MR JENKINSON: Yeah, it's my experience.

25 **MR O'GRADY:** But nobody's done the hard yards to work out what is the true situation, have they?

MR JENKINSON: Well, I haven't.

30 **MR O'GRADY:** No. Now, the ABCC was abolished in February 2023?

MR JENKINSON: Yes.

35 **MR O'GRADY:** And - sorry, I withdraw that. Now, as I understand it, you were the first director of the BCCB from 2013?

35

MR JENKINSON: Yes.

COMMISSIONER: Just remind me what that body is, Mr O'Grady.

40 **MR O'GRADY:** Well, perhaps -

MR JENKINSON: The Building and Construction Compliance Branch, Commissioner.

45 **COMMISSIONER:** That's the state body?

MR O'GRADY: Yes, the state body. And it had five staff?

MR JENKINSON: Yeah, that's right, yes.

MR O'GRADY: And you were recalled to the FWBC in 2014?

5

MR JENKINSON: Yes.

MR O'GRADY: And the BCCB was disbanded after a change of government in early 2015?

10

MR JENKINSON: Yes.

MR O'GRADY: So the organisation you headed operated only for a very short period and with very limited resources?

15

MR JENKINSON: That's right.

MR O'GRADY: Now - sorry, just bear with me. Now, could I ask you to go to paragraph 42 of your statement. You talk about prohibitions on accommodating non-compliant right of entry. Now, I think you've agreed with me that there's nothing in the Fair Work Act that prevents a union official from attending a site at the invitation of an occupier?

20

MR JENKINSON: That's right.

25

MR O'GRADY: Yeah. To the extent to which there is any such obligation, that's in the code?

MR JENKINSON: Yes.

30

MR O'GRADY: Yes. And that's an obligation that is inconsistent with the provisions of the Fair Work Act, isn't it?

MR JENKINSON: Well, it's not - it's not inconsistent. It takes the Fair Work Act requirements a little further.

35

MR O'GRADY: Yes.

MR JENKINSON: The Fair Work Act doesn't specifically say that a builder is entitled to invite someone on. It just says they're entitled to stop someone coming on under certain circumstances.

40

MR O'GRADY: Well, you'd accept that just as it's an important fundamental right that an occupier can refuse entry to a site, it's an equally important fundamental right that an occupier can allow somebody to have entry to the site if they want to?

45

MR JENKINSON: Generally speaking.

MR O'GRADY: Yes. And the Fair Work Act does not make any attempt to impede the right of an occupier to allow somebody or invite somebody onto site?

5

MR JENKINSON: That's right.

MR O'GRADY: Yes. And the code seeks to punish an occupier if they allow a union official onto site unless they're exercising a right of entry?

10

MR JENKINSON: That's right.

MR O'GRADY: And I put it to you that by taking something that the Fair Work Act allows and, in effect, prohibiting it through punishment, there is an inconsistency between what the code provides and what the Fair Work Act provides.

15

MR JENKINSON: There is an inconsistency, yes.

MR O'GRADY: And there's an erosion of the rights of an occupier, because an occupier who is subject to the code is going to be punished if they exercise their right to allow somebody who is a union official onto site who is not exercising right of entry.

20

MR JENKINSON: Well, they mightn't be punished straight up. There's not a mandatory - a mandatory sanction for every single instance of a potential breach. But I take your point that it does remove the occupier's right to invite an official on outside the framework of the right-of-entry laws.

25

MR O'GRADY: They allow somebody on at their peril, don't they?

30

MR JENKINSON: That's one way of putting it, yeah.

MR O'GRADY: And indeed, that was the circumstances surrounding the cup of tea case, wasn't it?

35

MR JENKINSON: Again, I don't know the circumstances, I'm sorry.

MR O'GRADY: Okay. That's fine. And you'd agree with me that there might be all sorts of legitimate reasons why an occupier might want to invite a CFMEU official onto site who is not exercising right of entry?

40

MR JENKINSON: There may be reasons, yes.

MR O'GRADY: They might be good friends, as was the case in the cup of tea case.

45

MR JENKINSON: Sure.

MR O'GRADY: There might be issues coming up that they want to discuss informally with the union?

5

MR JENKINSON: Yes.

MR O'GRADY: Yes. They might want to consult with the union about issues?

10 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And those legitimate reasons are impacted upon by a code that punishes an occupier if they allow a union official onto site who is not exercising a right of entry?

15

MR JENKINSON: Yes.

MR O'GRADY: Yes.

20 **MR JENKINSON:** I think it's also - it's also worth pointing out that the code - whilst it does provide what appears to be a blanket prohibition on inviting someone on without exercising a right of entry, that the intention is or the intention was that the official wasn't to have wholesale access to all the workers on the project without exercising a right of entry. If the situation was that an official
25 came on or was invited on to talk about something informal or to discuss something - one of the scenarios you mentioned a minute ago, there would not be - that would not trigger the application for a sanction against that builder.

30 That clause was put in there because it was clear from the industry providing the feedback and anecdotally that organisers would threaten site managers and coerce site managers into allowing them to come on under the guise of an invitation, and the site managers would often feel they had no choice but to accept that proposition, and then the organisers would be on the project, stopping work, walking the project, creating potential safety concerns, without
35 exercising - without having exercised right of entry properly.

40 That was the reason - that was the foundation to that clause. It wasn't designed to capture coming on for an informal chat that you mentioned before. I - I concede that it doesn't go into that level of detail, but that's the nature of that clause.

MR O'GRADY: Well, I put it to you that that description that you've just provided to the Commission is fundamentally at odds with the facts and circumstances surrounding the cup of tea case.

45 **MR JENKINSON:** The cup of tea case didn't involve the code. The cup of tea case involved the Fair Work Act.

MR O'GRADY: Well, again, just in fairness to you, Mr Jenkinson, because you've already said you're not that familiar with the case, the cup of tea case involved a union official coming onto site to have a discussion with his friend, the manager of the site being concerned that that attendance would give rise to a
5 breach of the code because of action that had been taken by the ABCC previously in respect of such an attendance, and he - and the manager directing that the union official leave, and that was the scenario that gave rise to the prosecution by the ABCC. So, certainly, the manager of McConnell Dowell didn't see the code operating in the way that you've just described, did he, if that be right?

10 **MR JENKINSON:** Well, I can't say what the manager thought.

MR O'GRADY: And you would accept that the record that is contained in the decision concerning the cup of tea case is an indication of how the code operated
15 in practice as opposed to your conjecture about it?

MR JENKINSON: Well, I don't concede that, no.

MR O'GRADY: I understand. Now, at paragraph 46 and following, you discuss
20 project agreements.

MR JENKINSON: Yes.

MR O'GRADY: And you make the criticism at paragraph 49 that project
25 agreements prevent subcontractors from competing on labour costs.

MR JENKINSON: Yes.

MR O'GRADY: Now, you don't identify any data supporting that proposition, do
30 you?

MR JENKINSON: No.

MR O'GRADY: Once again, we're relying on your gut?
35

MR JENKINSON: Yes.

COMMISSIONER: I just want to clarify what you mean by "gut". It's been put
40 to you a few times before, and you have answered it by reference to your observations, your experience and what industry told you. Is that the basis for what you say at 46, or some subset of those three things?

MR JENKINSON: No, Commissioner, it is the - it is the same. It's based on
45 my - my experiences, my observations, and - yeah, that's what I refer to, and I agree with Mr O'Grady's comment about my gut feeling.

COMMISSIONER: And what about the third point you made, what industry has told you? Is that part of the basis for what you say at 46 and 47?

5 **MR JENKINSON:** Oh, I don't know that I've spoken to too many people from industry about project agreements. That's probably more my observations and feelings, Commissioner.

COMMISSIONER: It wasn't a criticism. I just wanted to know what you meant.

10 **MR JENKINSON:** Yes. Yes.

MR O'GRADY: And, again, Mr Jenkinson, you don't identify any data supporting that proposition, do you?

15 **MR JENKINSON:** No.

MR O'GRADY: And you haven't identified any comparative analysis of projects with and without project agreements?

20 **MR JENKINSON:** No.

MR O'GRADY: And are you aware of the fact that since 2016, since the 2016 code, Parliament has enacted what are commonly called same job, same pay provisions?

25 **MR JENKINSON:** Yes.

MR O'GRADY: Yes.

30 **COMMISSIONER:** The 2016 code is a federal code?

MR O'GRADY: Yes. And those provisions reflect a legislative objective that workers performing the same work should receive equivalent pay?

35 **MR JENKINSON:** Yeah, that same job, same pay legislation, as I understand it, relates to labour-hire employees, versus permanent employees.

MR O'GRADY: Yes. But it reflects a legislative objective that workers performing the same work should receive equivalent pay?

40 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And you don't address that legislative development in your statement?

45 **MR JENKINSON:** No.

MR O'GRADY: And you don't consider whether project agreements may serve a similar objective by setting common baseline terms for workers performing work on the same project?

5 **MR JENKINSON:** Well, as I understand project agreements, it goes beyond the same job, same pay legislation. That legislation, as I understand it, as I said, is in relation to labour-hire workers working next to people doing the same job. Project agreements, as I understand them, apply to all the subcontractors on a project
10 having to pay their workers the same, whether they're doing the same job, whether they're plumbers or electricians or steel-fixers.

MR O'GRADY: Well, you haven't done any analysis in respect of that issue, have you?

15 **MR JENKINSON:** No.

MR O'GRADY: No. And I put it to you that the objective, ie, that if two people are doing the same work, they should be paid the same baseline rates, is the same as between same job, same pay and a project agreement that requires
20 subcontractors doing the same tasks to pay their employees equivalently.

MR JENKINSON: Yes, there is similarity, yes.

MR O'GRADY: Yes. And would you accept that individuals who are working
25 on a particular project but are subject to terms and conditions that are significantly less than others doing essentially the same work might resent that fact?

MR JENKINSON: Yes.

30 **MR O'GRADY:** Yes. And that might in turn give rise to an increase in disputation?

MR JENKINSON: Yes.

35 **MR O'GRADY:** And it might impact upon employee morale?

MR JENKINSON: Yes.

MR O'GRADY: And it might result in employees working less efficiently than
40 they would otherwise do?

MR JENKINSON: Yes.

MR O'GRADY: Yes. Just bear with me, Mr Jenkinson. Now, you mentioned in
45 respect of the table that I took you to at paragraph 33 that you didn't prepare that and you didn't check the stats behind that.

MR JENKINSON: Yes.

MR O'GRADY: Yes. Is there anything else in your witness statement that was prepared by others?

5

MR JENKINSON: Much of the document was prepared in draft form by the Commissioner's people.

MR O'GRADY: I see.

10

MR JENKINSON: And I reviewed it and changed it where appropriate, amended it and worked to get it to its final product.

MR O'GRADY: Yes. But you didn't check it?

15

MR JENKINSON: Well, what particular part are you referring to?

MR O'GRADY: What I'm putting to you is, as I understand your evidence, to date anyway, that where what was prepared - drafted for you by the Commission accorded with your gut, ie, your observations and what other people had told you. You accepted that?

20

MR JENKINSON: Some of the material in my initial statement was - the earlier versions of my statement were changed as I marked things up and went back and forth to settle on the final product.

25

MR O'GRADY: Yeah, I understand. But you undertook no independent analysis in respect of any of the propositions that you set out in your statement, did you?

30

MR JENKINSON: A lot of them don't need an analysis. They're just my experience and observations.

MR O'GRADY: I understand. Thank you. Now, at paragraph 52 and following, you deal with workplace relations management plans.

35

MR JENKINSON: Yes.

MR O'GRADY: And you say that contractors were required to provide compliant workplace relations management plans before they could be awarded government-funded building work?

40

MR JENKINSON: Government-funded building work over a certain value.

MR O'GRADY: Yes. And you describe it as one of the most effective mechanisms in the 2016 code?

45

MR JENKINSON: Yes.

MR O'GRADY: Sorry, just bear with me.

5 **MR JENKINSON:** I don't know that I said it was one of the most effective. I said it was part of the effectiveness of the code.

MR O'GRADY: Yes. I understand. And at paragraphs 54 and 55, you say that the workplace relations management plans provided a document against which the contractor could be audited and assessed by the ABCC.

10

MR JENKINSON: Yes.

MR O'GRADY: In your statement, you don't identify any criteria governing the approval or rejection of a workplace relations management plan?

15

MR JENKINSON: No.

MR O'GRADY: No. And you don't identify any requirement for the regulator to give reasons for rejecting a workplace relations management plan?

20

MR JENKINSON: Not in my statement, but if a workplace relations management plan was rejected, there would have been reasons given.

MR O'GRADY: I see. Well, there's no requirement to do that under the Act?

25

MR JENKINSON: Under the code?

MR O'GRADY: Under the code.

30 **MR JENKINSON:** No, I don't think it specifically deals with that, no.

MR O'GRADY: No. And you don't identify any transparent process through which contractors or industry participants can understand how those assessments are being made?

35

MR JENKINSON: No.

MR O'GRADY: No. And in circumstances where the assessment of a workplace relations management plan depends substantially on the regulator's own view of what's acceptable, there is a real potential, I put it to you, for the process to be corrupted.

40

MR JENKINSON: Well, I - I don't know that it was - well, how do you mean "corrupted"?

45

MR O'GRADY: Well, you would accept that the acceptance or rejection of a workplace relations management plan could have very significant consequences for a particular contractor?

5 **MR JENKINSON:** It could do, yes.

MR O'GRADY: It could be worth hundreds of millions of dollars?

10 **MR JENKINSON:** Well, if a workplace relations management plan was rejected in the first instance, the contractor would be given an opportunity to amend it and resubmit it.

15 **MR O'GRADY:** Well, there's no procedure outlined in your statement as to how that would occur, is there?

MR JENKINSON: No.

20 **MR O'GRADY:** No. And there's no procedure described in the code as to how that would occur?

MR JENKINSON: No.

MR O'GRADY: It depends on the discretion of the persons doing the assessing?

25 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And I put it to you when we're talking about potentially hundreds of millions of dollars, that gives rise to scope for corruption?

30 **MR JENKINSON:** Yes. Well, yes, it could, if it all comes down to the regulator looking at it. Of course, a decision by the regulator could be appealed -

MR O'GRADY: To whom?

35 **MR JENKINSON:** - by the contractor.

MR O'GRADY: To whom?

40 **MR JENKINSON:** The Administrative Appeals Tribunal.

MR O'GRADY: Under the code?

MR JENKINSON: Under the administrative law.

45 **MR O'GRADY:** I see. You don't know whether that's the case or not, do you?

MR JENKINSON: I suspect it is.

MR O'GRADY: All right. So you're guessing?

5 **MR JENKINSON:** I suspect it's an opportunity that was available to the contractors if they wanted to, Mr O'Grady.

MR O'GRADY: I see.

10 **MR JENKINSON:** But I'm not an expert in administrative law.

MR O'GRADY: I understand. You would agree with me that there is a potential for contractors to form relationships with employees of the ABCC?

15 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And that might impact upon the way in which they undertake their task in assessing whether or not a workplace relations management plan meets the requirements of the code or not?

20 **MR JENKINSON:** Well, in theory, it could.

MR O'GRADY: Yes. And there's no legislative prescription of what has to be in a workplace relations management plan, is there?

25 **MR JENKINSON:** No.

MR O'GRADY: No. And you'd agree with me that the workplace relations management plan is a mechanism through which the regulator gets significant control over the contractor's workplace relations arrangements?

30 **MR JENKINSON:** No, they don't have control over their arrangements, no.

MR O'GRADY: No, well, if they don't pass muster in their workplace relations management plan, they don't get the work.

35 **MR JENKINSON:** That's a simplistic view of looking at it, I guess.

MR O'GRADY: But that's the effect of it, isn't it?

40 **MR JENKINSON:** It's certainly an important part of the tender process.

MR O'GRADY: Yes. And if they don't get the work, they're not going to have a successful business.

45 **MR JENKINSON:** Yes.

MR O'GRADY: Yes. And I put it to you that that provides the regulator with significant control over the workplace relations arrangements on site?

5 **MR JENKINSON:** Well, yes, if the - if the regulator is approving a workplace relations management plan, they're ticking off that that's - that's the arrangements that are going to be put in place.

MR O'GRADY: And that degree of control is not something that's been conferred upon the regulator by the Fair Work Act?
10

MR JENKINSON: No.

MR O'GRADY: Indeed, it may be inconsistent with various provisions in the Fair Work Act?
15

MR JENKINSON: I - I don't know of any that it is inconsistent with.

MR O'GRADY: Well, it might put in place obligations in respect of what type of agreements are entered into that are not found within the Fair Work Act?
20

MR JENKINSON: I - I don't think there was anything in the WRMPs that dictated what agreements a contractor had to have to win a government-funded project.

25 **MR O'GRADY:** Well, there might be an agreement that includes a jump-up clause, for example.

MR JENKINSON: Yes, if - yes, if the - if the agreement had a jump-up clause, it would - it would have been inconsistent with the code.
30

MR O'GRADY: Yes, that's right. But that's something that's perfectly permissible under the Fair Work Act, isn't it?

MR JENKINSON: Yes.
35

MR O'GRADY: Yes. So I put it to you again that there's an inconsistency between what Parliament has said is appropriate to be in agreements and the types of agreements that you had to have if you were to get approval under the code.

40 **MR JENKINSON:** There was an inconsistency in that respect, yes.

MR O'GRADY: I have no further questions, Commissioner.

45 **COMMISSIONER:** Any re-examination? Do you want to take a break now and -

MR McLEAN: Commissioner, if that's convenient, that would be appreciated.

COMMISSIONER: - get some instructions and do the re-examination after the break?

5 **MR McLEAN:** Thank you.

COMMISSIONER: We'll adjourn till 25 past 11.

10 <THE HEARING ADJOURNED AT 11.11 AM

<THE HEARING RESUMED AT 11.25 AM

COMMISSIONER: Mr McLean.

15 <RE-EXAMINATION BY MR McLEAN

MR McLEAN: Commissioner, just a couple of brief matters for Mr Jenkinson in re-examination. Mr Jenkinson, you were asked some questions about the number of proceedings that the ABCC pursued against the CFMEU. Do you have any
20 recollection as to why the number of proceedings or prosecutions of the CFMEU was larger than the number of proceedings that were commenced against, for example, other unions or employers?

MR JENKINSON: That was where the complaints came from. We received
25 complaints from industry in relation to, largely, the conduct of CFMEU officials.

MR McLEAN: And where the ABCC did receive complaints about employers, how did the ABCC respond to those?

30 **MR JENKINSON:** We investigated every complaint we received. As I said earlier as to whether we took court action against everybody we investigated, that wasn't the case, no. There was a process we went through. It just was the case that much of the litigation we commenced was in relation to the conduct of CFMEU officials.

35 **MR McLEAN:** And just to be clear, then, why was the majority of the litigation commenced against CFMEU officials rather than, for example, employer groups, if you were receiving complaints about the conduct of each?

40 **MR JENKINSON:** Well, we didn't get many complaints about employers' behaviour, and where we identified proactively conduct by employers - for instance, wages underpayments - that wasn't based on a complaint we received. Our own wages auditing team identified underpayments of wages and entitlements and then worked with the employer to resolve those problems, and as I said, those
45 employers would generally show contrition, they would put steps in place within their organisation and their systems to ensure that the conduct didn't happen again.

That was not the case with the CFMEU. They weren't prepared to work with us to put systems in place or show any contrition for their conduct.

5 **MR McLEAN:** And you were asked some questions towards the end of the cross-examination about the process of workplace relations management plans. During your time with the ABCC, was there ever any suggestion raised with you that the process of approving or not approving those plans had been corrupted?

10 **MR JENKINSON:** No.

MR McLEAN: Was there ever any complaints from industry that that process was corrupt or not impartial?

15 **MR JENKINSON:** Not that I became aware of, though.

MR McLEAN: That's the re-examination.

20 **COMMISSIONER:** Thank you, Mr McLean. Thank you very much for your evidence, Mr Jenkinson, and I'm sorry it was stretched out over a couple of months. Appreciate you coming and giving your evidence.

MR JENKINSON: Thank you, Commissioner.

25 **COMMISSIONER:** You're excused.

MR JENKINSON: Thank you.

<THE WITNESS WAS RELEASED

30 **COMMISSIONER:** What's next, Mr McLean?

35 **MR McLEAN:** Commissioner, we have Mr Hadgkiss here to be recalled for cross-examination. As with Jenkinson, there was an application that's been made by the administrator. I might let the administrator speak to that.

COMMISSIONER: Let me look at the application. This is a written application, three pages, 5 June, by you, Mr O'Grady, to cross-examine Mr Hadgkiss?

40 **MR O'GRADY:** Yes, Commissioner.

COMMISSIONER: What's your attitude to this, Mr McLean?

45 **MR McLEAN:** There's one objection to one of the topics for cross-examination, Commissioner.

COMMISSIONER: All right. Which topic is that?

MR McLEAN: Topic 9H.

COMMISSIONER: 9H. So the rest of it you've got topics 4 through 11, except for 9H, you've got no objection to?

5

MR McLEAN: No objection to the balance of the application:

COMMISSIONER: And what is 9H?

10 **MR McLEAN:** 9H refers to the circumstances surrounding Mr Hadgkiss' resignation. Now, the thesis that has been developed by counsel assisting is that a well-designed code and regulator are capable of delivering improvements to productivity in the construction industry in Queensland. An exploration of the circumstances of a particular individual's resignation from a regulatory body
15 cannot rationally bear upon the thesis that is being developed. Now, if this is being advanced as some part of personal attack on Mr Hadgkiss, then in my submission that would be inappropriate and improper. If it's instead directed towards the thesis that's being developed, then it's a misguided area of exploration and it's frankly irrelevant. So in either of those circumstances, cross-examination
20 on that particular topic should not be permitted.

COMMISSIONER: It doesn't strike me as relevant to my task, Mr O'Grady, but what do you say about that?

25 **MR O'GRADY:** There's really two bases upon which we seek to explore that issue, Commissioner. The first is - and you might recall the opening that was given by counsel assisting, the written opening that was handed up. As we see it, and particularly at paragraph 6, Mr Hadgkiss is being put forward, in effect, as an expert in respect of the matters that are touched upon in his witness statement. In
30 our respectful submission, the circumstances that gave rise to Mr Hadgkiss' resignation represented a fundamental lack of judgment and inappropriate conduct by him in the context of the regulation of the ABCC.

Now - and that is, in our respectful submission, reflected in the reasons of Justice
35 Collier, who found that he had contravened the relevant provisions of the Fair Work Act, which finding triggered the resignation, where she, among other things, described his conduct as:

40 "Exhibiting a degree of carelessness and indeed somewhat arrogant ignorance."

Now, in circumstances where a judge of the Federal Court has made findings of that nature against a witness who is being held forward as an expert, in our respectful submission, we're entitled to explore that issue, so that you in due
45 course can form a view as to the weight you give to Mr Hadgkiss' evidence.

COMMISSIONER: I understand. What's the second basis?

MR O'GRADY: The second basis is the one that I touched upon with Mr Jenkinson, namely, that if there is a perception that the ABCC is not behaving fairly or is disproportionately targeting the CFMEU and/or is putting forward material that is misleading on its website, that is going to impact upon the willingness of that organisation to engage in the cultural change that Cole, Heydon and others have said is necessary in this area. In our respectful submission, for a judge to have found that the ABCC, on Mr Hadgkiss' watch, were putting up material that was misleading and inaccurate and inconsistent with the Act at the time, that's going to inhibit people or organisations like my client from engaging with them. So it's really on those two bases, Commissioner, we say that it's relevant.

COMMISSIONER: And what do you say about that, Mr McLean?

MR McLEAN: As to the second of those bases, Commissioner, we're obviously not re-establishing the ABCC. That was a federal body, and there's no suggestion that if any body was re-established that Mr Hadgkiss would be involved in it. So any concerns that the administrator might suggest that the CFMEU or industry participants might have with Mr Hadgkiss can't rationally bear upon how the industry might perceive a new body which has no connection with Mr Hadgkiss. As to the first of those bases for pressing this topic, Mr Hadgkiss is being put up as an expert as to the benefits of the code. He's not being advanced as an expert as to his particular judgment or administration of a regulatory body. This line of cross-examination is not going to assist the assessment of Mr Hadgkiss' evidence as to whether or not a code is going to be of benefit to the industry.

COMMISSIONER: It does strike me as somewhat opportunistic, Mr O'Grady, and something that might descend into an ad hominem attack. I'm going to allow you to - give you leave, but I'm going to watch the cross-examination. If you believe it goes too far, Mr McLean, on this topic, then feel free to object.

MR McLEAN: May it please the Commission.

COMMISSIONER: You have leave to cross-examine on all topics, Mr O'Grady.

MR O'GRADY: Thank you, Commissioner.

COMMISSIONER: Is Mr Hadgkiss - yes, he is - here in the hearing room? Mr Hadgkiss, would you come back into the witness box, please.

<NIGEL CLIVE HADGKISS, RE-AFFIRMED

<CROSS-EXAMINATION BY MR O'GRADY

COMMISSIONER: Please take a seat, Mr Hadgkiss. You were in the hearing room since the morning break, Mr Hadgkiss, and you've just heard what's gone on

at the bar table, and Mr O'Grady has been given leave to cross-examine you. Mr O'Grady.

5 **MR O'GRADY:** Yes. Thank you, Commissioner. Mr Hadgkiss, as you know, I'm appearing for the administrator of the CFMEU.

MR HADGKISS: Yes.

10 **MR O'GRADY:** And we were required to file with the Commission a bundle of documents going to topics that I might want to cross-examine you about last Friday. Have you had an opportunity to peruse those documents?

MR HADGKISS: I'm sorry? No, I have not.

15 **MR O'GRADY:** No, that's fine. I just wanted to see whether you'd had an opportunity to look at that.

MR HADGKISS: No, sorry.

20 **MR O'GRADY:** No, that's fine. Now, as director of the Victorian CCCU, you drafted the 2014 Victorian code and its associated guidelines?

MR HADGKISS: I'm sorry, the question?

25 **MR O'GRADY:** I'm just putting these propositions to you. Do you accept that when you were the director of the Victorian CCCU, you drafted the 2014 Victorian code and its associated guidelines?

MR HADGKISS: Yes, correct.

30 **MR O'GRADY:** Yes. And then as Commissioner of the ABCC, you administered the Commonwealth 2016 code?

MR HADGKISS: Correct.

35 **MR O'GRADY:** Yes. And you consider the 2014 code, Victorian code, to be one of the most - more robust and effective versions of an industry code?

MR HADGKISS: Yes.

40 **MR O'GRADY:** And you hold up the 2014 Victorian code and the 2016 Commonwealth code as commendable models for Queensland?

MR HADGKISS: Yes.

45 **MR O'GRADY:** Now, that's a recommendation that's based on your experience?

MR HADGKISS: Yes.

MR O'GRADY: You haven't done any broader analysis to support that recommendation?

5

MR HADGKISS: No.

MR O'GRADY: And you've conducted no independent empirical study of the Queensland construction industry?

10

MR HADGKISS: Since my retirement, no.

MR O'GRADY: No. And you have a law degree, and you've also got a commerce degree?

15

MR HADGKISS: Correct.

MR O'GRADY: But you're not an economist?

20

MR HADGKISS: I'm sorry?

MR O'GRADY: You're not an economist?

25

MR HADGKISS: No.

MR O'GRADY: No. And do you accept that the construction industry is not like a typical industry found in, say, economic textbooks, due to factors like the physical nature of the product, the variability of demand and the contractual relationship between clients, contractors and suppliers?

30

MR HADGKISS: I'm sorry?

MR O'GRADY: No, I'm happy - please don't - at any time, Mr Hadgkiss -

35

MR HADGKISS: Yeah. If you could - bite-size chunks, I could -

MR O'GRADY: I'll try and - what I'm putting to you is that there are fundamental differences between the construction industry and other industries because of the physical nature of the product, the variability of demand and the contractual relationships within clients, contractors and suppliers.

40

MR HADGKISS: Like all industries, yes.

45

MR O'GRADY: I see. Well, there are some fundamental differences, I put it to you, between -

MR HADGKISS: Like all industries, yes.

MR O'GRADY: All right. Would you accept that applying issues like productivity or increases in productivity is a highly technical and complicated task?

5

MR HADGKISS: Yes.

MR O'GRADY: And it's one that requires a degree of expertise in economics to perform?

10

MR HADGKISS: If in empirical nature, yes.

MR O'GRADY: And you don't have that expertise, do you?

15

MR HADGKISS: No.

MR O'GRADY: All right. Could I hand up to you, Mr Hadgkiss, a hard copy of some slides that we have prepared that I want to take you to. This is the revised PowerPoint presentation that we filed with the Commission earlier. Perhaps, Madam Tipstaff, if you could provide a copy to the witness. The Commissioner has got a copy. Now, could I ask to you have a look at the second slide, which is Construction Industry Regulation Key Dates. That deals with the various roles that you've held but also the other persons who've been responsible for managing the ABCC and like bodies?

25

MR HADGKISS: Yeah, I'm familiar with those dates, yes.

MR O'GRADY: And you'd accept that that's an accurate description of the various times where you have been the head or had a position within either the building industry taskforce or the ABCC or the FWBC?

30

MR HADGKISS: Yes, it appears so, yes.

MR O'GRADY: Yes. And, similarly, it's an accurate description of where other people like Commissioner Lloyd or Commissioner Johns held equivalent roles?

35

MR HADGKISS: I assume so, yes.

MR O'GRADY: Yes, okay. Thank you. And the first ABCC commenced from 2005?

40

MR HADGKISS: Yes.

MR O'GRADY: And at that point in time, Mr Lloyd was the Commissioner and you were his deputy?

45

MR HADGKISS: Correct.

MR O'GRADY: And then from October 2010, Mr Johns ran the ABCC and then the FWBC from 2012?

5 **MR HADGKISS:** I understand so, yes.

MR O'GRADY: Yes. And then you took over the FWBC in October 2013?

MR HADGKISS: Yes, correct.

10

MR O'GRADY: Yes. And you were the Commissioner of the second ABCC from December 2016 until your resignation in September 2017?

MR HADGKISS: Correct.

15

MR O'GRADY: And the second ABCC continued under your successors until it was abolished in February 2023?

MR HADGKISS: Yes.

20

MR O'GRADY: All right. Now, would you agree with me that in seeking to reform the conduct of the CFMEU, culture is at the heart of the problem?

MR HADGKISS: Yes.

25

MR O'GRADY: Yes. And that that culture was, at various times, promoted by officials who behaved inappropriately?

MR HADGKISS: Behaved inappropriately, yes.

30

MR O'GRADY: Yes.

MR HADGKISS: And employers as well, yes.

35

MR O'GRADY: Yes. And that in order to effectively reform the conduct of the CFMEU, there has to be a change in the culture?

MR HADGKISS: Yes.

40

MR O'GRADY: Yes. And that was something that was observed by Justice Cole in his Royal Commission report?

MR HADGKISS: By numerous Royal Commissions, yes.

45

MR O'GRADY: Yes, well, Justice Cole made that observation?

MR HADGKISS: Yes.

MR O'GRADY: Yes. And Justice Heydon made a similar observation in his Royal Commission report?

5 **MR HADGKISS:** Correct.

MR O'GRADY: And it's an observation that you have endorsed on numerous occasions and in numerous publications?

10 **MR HADGKISS:** Yes.

MR O'GRADY: And are you aware of the fact that in order to try and address the culture issues within the CFMEU, Justice Heydon recommended that there be special legislation disqualifying CFMEU officials from holding office?

15

MR HADGKISS: Yes.

MR O'GRADY: Yes. But that legislative recommendation wasn't accepted by government?

20

MR HADGKISS: I don't recall, but I - I take it as read that they didn't, yeah.

MR O'GRADY: Yes. But you are aware of the fact that by virtue of the appointment of the administrator, a number of those officials who were behaving inappropriately have now been removed from office?

25

MR HADGKISS: That - that may be so, yes.

MR O'GRADY: Yes. Well, you're aware of the fact that, for example, Mr Ravbar was removed by the instrument that put in place the administration?

30

MR HADGKISS: That may be so. I'm not familiar with that. I retired in 2017, you must bear in mind.

35 **MR O'GRADY:** Well, obviously, Mr Hadgkiss -

MR HADGKISS: If it's on the public record, then yes.

MR O'GRADY: Yes. And similarly, and just for completeness, I put to you that Mr Ingham was also removed by that same instrument appointing the administrator.

40

MR HADGKISS: That may be so, yes.

45 **MR O'GRADY:** And are you aware of the fact that the new administration has made it very clear, both in various pronouncements but also in evidence to this

Commission, that it intends to try and address the cultural issues that have bedevilled the CFMEU?

5 **MR HADGKISS:** I wish them well, yes. It may be so.

MR O'GRADY: And they've put in place numerous initiatives in order to try and achieve that?

10 **MR HADGKISS:** That I'm not familiar with, but I don't disagree.

MR O'GRADY: Sorry, you don't disagree?

15 **MR HADGKISS:** I'm not familiar with these matters, I'm sorry. I left the industry in 2017.

MR O'GRADY: I understand, Mr Hadgkiss. You'll appreciate that part of my questioning is really as a matter of fairness to you, that if I'm going to put a proposition in submissions, I need to at least have done you the courtesy of letting you know what the proposition is. Now, if you can't comment, you can't
20 comment. But if you can, I need to at least give you the opportunity to do so.

MR HADGKISS: Thank you. But I can't comment, no.

25 **MR O'GRADY:** I understand. Now, in your 2014 interim BIT report, you set out Commissioner Cole's conclusion that significant cultural change is necessary if the rule of law is to be reintroduced within the industry?

MR HADGKISS: That may be so, yes.

30 **MR O'GRADY:** Yes. And the purpose of the framework that you were in command of was to change the culture of the industry, not just to rack up fines or penalties?

35 **MR HADGKISS:** That was an ultimate aim, but obviously we had to - to achieve that goal, we had to take operational activity.

MR O'GRADY: Yes. So do I take it that the end was cultural change, but the means or one of the means that you employed to achieve that was to bring proceedings against my client?
40

MR HADGKISS: Against your client and other parties in the industry, particularly builders.

45 **MR O'GRADY:** Yes, I understand. Well, do you accept that when one looks at the proceedings that were instituted by the ABCC under your watch, there were a significantly greater number of proceedings brought against the CFMEU than there were brought against builders in the industry?

MR HADGKISS: That - that would be so, yes.

MR O'GRADY: Yes. And it's not - sorry.

5

MR HADGKISS: That was a mere reflection of the information that came - came to our attention.

MR O'GRADY: Yes. Could you perhaps turn to page 271 of the bundle that's beside you. Commissioner, this is item 15, which commences at page 268.

10

COMMISSIONER: The ACTU submission?

MR O'GRADY: The ACTU submission. And if you go to page 271, Commissioner, you'll see at paragraph 15 the following appears. In the second sentence, from October 2005 to June 2011, the ABCC brought a total of 86 prosecutions against unions and union officials.

15

MR HADGKISS: Correct.

20

MR O'GRADY: Compared to a mere five prosecutions against employers in the same period.

MR HADGKISS: Yes.

25

MR O'GRADY: In the period 1 July 2009 to 30 June 2010, there were 29 prosecutions brought against unions and union officials and none were brought against employers.

30

MR HADGKISS: Correct.

MR O'GRADY: From 1 July 2010 to 1 June 2011, the prosecution of unions still outnumbers the prosecution of employers by almost three to one.

35

MR HADGKISS: That may be so, yes.

MR O'GRADY: You'd agree with me that that reflects a significant imbalance between the number of prosecutions brought against employers when compared to the prosecutions brought against -

40

MR HADGKISS: No, on the contrary, it reflects the - the state of the affairs that we were confronting. The unions were blatantly breaching the law, and if builders did the same, they would be brought to task.

45

MR O'GRADY: Yes. Well, you'd accept that -

MR HADGKISS: But you're only as good as the cards that you're dealt with, Commissioner.

5 **MR O'GRADY:** Well, I put it to you that there are a number of bad actors, as far as employers are concerned, in the industry?

MR HADGKISS: Of course, yes.

10 **MR O'GRADY:** Yes. And that there are employers who commit wage theft?

MR HADGKISS: There are what, sorry?

MR O'GRADY: There are employers who commit wage theft.

15 **MR HADGKISS:** I'm sorry, I didn't get the last word.

MR O'GRADY: Wage theft. Who underpay their workers?

20 **MR HADGKISS:** Oh, yes, sorry, yes.

MR O'GRADY: And you were aware of the fact that there is now federal legislation that, among other things, describes underpayment, if it occurs in a particular way, as wage theft?

25 **MR HADGKISS:** Yes, I agree.

MR O'GRADY: Yes. There are a number of employers who engage in sham contracting?

30 **MR HADGKISS:** Yes.

MR O'GRADY: There are a number of head contractors who don't pay their subcontractors.

35 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. There are a number of companies that are, in effect, phoenix companies that set themselves up and then disappear and then arise again from the ashes.

40 **MR HADGKISS:** Correct.

MR O'GRADY: Yes. And all of that is very damaging to the construction industry?

45 **MR HADGKISS:** It is.

MR O'GRADY: And all that is capable of constituting breaches of obligations imposed by both the Fair Work Act and the pieces of legislation that set up the various bodies that you were involved in?

5 **MR HADGKISS:** Yes.

MR O'GRADY: Yes.

MR HADGKISS: If they came to our attention, yes.

10

MR O'GRADY: Yes. And yet, notwithstanding that - those facts, there is this disproportionate focus upon the CFMEU in the prosecutions that you initiated in your role as either the head of the ABCC or its predecessor bodies.

15 **MR HADGKISS:** Is that a question or a statement, sorry?

MR O'GRADY: No, it's a question. Do you agree or don't you agree?

20 **MR HADGKISS:** I agree there was a disproportionate - but as I say again, it was only as good as the cards that we were dealt with. If people complained, then we would act upon a complaint.

MR O'GRADY: Yes. And are you aware of the fact that in 2014-15, the Fair Work Ombudsman undertook an audit of employers in the construction industry?

25

MR HADGKISS: That may be so. I don't recall.

MR O'GRADY: All right. And as part of that campaign, they audited some 700 businesses nationally?

30

MR HADGKISS: That may be so.

MR O'GRADY: And that it found that only 59 per cent of employers were compliant with all requirements?

35

MR HADGKISS: That may be so.

MR O'GRADY: Yes. So according to the Fair Work Ombudsman, some 40 per cent of a very large sample of employers were not compliant with their obligations under industrial law?

40

MR HADGKISS: That may be so.

MR O'GRADY: Yes. Thank you. Now, in your various roles, you have backed a prescriptive code, backed by a coercive regulator?

45

MR HADGKISS: A code, but a coercive regulator? I'm - sorry, I'm not sure what you mean by that.

5 **MR O'GRADY:** Well, a regulator willing to institute prosecutions.

MR HADGKISS: Oh, yes, yes.

10 **MR O'GRADY:** And a regulator that had powers to compel people to provide testimony?

MR HADGKISS: To get to the truth, yes.

15 **MR O'GRADY:** Yes. And you accept, don't you, that notwithstanding the numerous prosecutions that the ABCC and its predecessors engaged in, and notwithstanding its extensive coercive powers, it was unable to effect cultural change within the CFMEU?

MR HADGKISS: I disagree.

20 **MR O'GRADY:** I see. I put it to you that you said publicly in May 2016 that:

"We have not been effective in changing the culture of the building and construction industry."

25 **MR HADGKISS:** I don't know what context that was made in.

MR O'GRADY: I see.

30 **MR HADGKISS:** But we certainly made an impact. That was based on the feedback we got from industry stakeholders.

MR O'GRADY: Yes.

35 **MR HADGKISS:** But more could have been done, yes.

MR O'GRADY: And that was reported in the Australian Financial Review on 2 May 2016.

40 **MR HADGKISS:** That may be so. I'm not familiar with that.

MR O'GRADY: Okay. And in the same article, you accepted that the agency's success in the courts was having little, if any, deterrent effect on that conduct.

45 **COMMISSIONER:** I think this is the document that Mr de Jersey advised us to be careful about. I wonder if the witness can be shown it.

MR O'GRADY: Yes. I'm happy. Yes. It's number 3 in the documents that have been sent to the Commission. Perhaps if it can be brought up. If I could ask if that could be brought up. So this is number 3 of the additional documents.

5 **COMMISSIONER:** This isn't the actual document, but the type of document.

MR O'GRADY: Sorry?

COMMISSIONER: It doesn't - doesn't matter.

10

MR O'GRADY: Mr Operator, are you able to do that? Ewin Hannan:

"Nigel Hadgkiss and Mitch Fahey to stamp out unlawful conduct."

15 Australian Financial Review, online, 2 May 2016. Yes, thank you.

COMMISSIONER: I just wonder whether the witness might be able to read it. It's a short article, Mr O'Grady.

20 **MR O'GRADY:** Yes. I'm happy for him to do that, Commissioner. And I apologise. We thought we had sufficient copies, but we obviously didn't.

COMMISSIONER: I can give the witness my version.

25 **MR O'GRADY:** If that will speed things up, that would be - Madam Tipstaff, I think the Commissioner would like you to -

COMMISSIONER: Just give that to the witness.

30 **MR O'GRADY:** So Mr Hadgkiss, if you can just read that.

MR HADGKISS: Right.

35 **MR O'GRADY:** Yes. So perhaps in fairness to you, I'll put the propositions to you again, that you said in that article:

"We have not been effective in changing the culture of the building and construction industry."

40 **MR HADGKISS:** That's what the - that's what the reporter's attributed to me, yes.

MR O'GRADY: Yes.

45 **MR HADGKISS:** I don't recall saying that.

MR O'GRADY: I understand, but you're not suggesting that he made it up?

MR HADGKISS: I - I really don't know.

5 **MR O'GRADY:** I understand. And, again, you said in that article that unlawful conduct had not improved since the time of the Cole Royal Commission.

MR HADGKISS: Oh, that was true.

10 **MR O'GRADY:** Yes.

MR HADGKISS: There was still horrific unlawful conduct taking place on building and construction sites. That's most definite.

15 **MR O'GRADY:** And you also accepted that the agency's success in the courts was having little, if any, deterrent effect.

MR HADGKISS: Yes. It was not - there was still a great deal of unlawful activity going on, notwithstanding our prosecutions, yes.

20 **MR O'GRADY:** Yes. And so based on those observations, even with a coercive regulator with the power of - the power - sorry, even with a coercive regulator with the power to compel the giving of testimony, the culture had not changed?

25 **MR HADGKISS:** The culture was - was bad. And still is.

MR O'GRADY: Yes. Now, perhaps, Mr Operator, could we bring up - well, I put it to you that there have been significant changes in respect of the culture since Mr Irving was appointed as administrator.

30 **MR HADGKISS:** I'm sorry?

MR O'GRADY: I put it to you there have been significant changes in the culture of the CFMEU since Mr Irving has been appointed as administrator?

35 **MR HADGKISS:** I can't comment on that.

MR O'GRADY: I understand.

40 **MR HADGKISS:** Only what I read in the newspapers.

MR O'GRADY: Yes. Thank you. Perhaps, Mr Operator, if we could bring up the PowerPoint presentation and go to slide 4. Now, Mr Hadgkiss, these are statistics that have been derived from ABS data, and I think you've already agreed with me that you're not an economist?

45 **MR HADGKISS:** No, I'm not an economist, no.

MR O'GRADY: And you haven't sought to interrogate the ABS data in respect of productivity in the construction industry?

5 **MR HADGKISS:** It was available to us, yes.

MR O'GRADY: Yes.

MR HADGKISS: But in terms of breaking it down or querying it, no.

10 **MR O'GRADY:** No, I understand. If you could have a look at this table for me, please, you will see that at 2005-2006, which is the time around the commencement of the first ABCC, labour productivity had a figure of 106.74.

15 **MR HADGKISS:** That's what it says, yes.

MR O'GRADY: Yes. And at 2009-2010, which is at the conclusion of the first ABCC, if I can use that language, there was a productivity index figure of 104.87.

20 **MR HADGKISS:** That's what it says, yes.

MR O'GRADY: Yes. And I put it to you that that suggests, if anything, that there was a decrease in productivity, based on the ABS data, during the time of the first ABCC.

25 **MR HADGKISS:** Based on those statistics, yes.

MR O'GRADY: And that would suggest that notwithstanding the extensive powers that the first ABCC had and the number of prosecutions that were instituted by it, that did not improve productivity in the construction industry?

30 **MR HADGKISS:** No, I take that as a ridiculous statement.

MR O'GRADY: I see. But you haven't looked at the ABS data?

35 **MR HADGKISS:** No, I mean to say that it's because it does not reflect what the ABCC was doing.

MR O'GRADY: I see.

40 **MR HADGKISS:** I can't agree with your proposition.

MR O'GRADY: All right.

45 **MR HADGKISS:** Productivity is one thing. What it's not reflecting is unlawful conduct taking place on Australia's building and construction sites.

MR O'GRADY: All right.

MR HADGKISS: Intimidation, harassment, etcetera.

5 **MR O'GRADY:** Now, would you accept that if you're trying to effect cultural change in an organisation like the CFMEU, you're unlikely to be assisted if the perception of that organisation is that they are being unfairly targeted?

MR HADGKISS: I agree.

10 **MR O'GRADY:** In order to minimise any sense that an organisation is under attack, any new regulatory regime needs to be perceived as fair?

MR HADGKISS: It has to be fair, yes.

15 **MR O'GRADY:** Yes. And the people running it need to be perceived as fair?

MR HADGKISS: Yes.

20 **MR O'GRADY:** And the BCIP Act required the ABCC to carry out its functions in a way that ensured that the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations are to the greatest extent practicable, having regard to industry conditions, based upon complaints by the ABCC, applied in a reasonable and proportionate manner to each of the categories of building industry participants.

25 **MR HADGKISS:** That's what it says. That's what it says, yes.

MR O'GRADY: And by referring to building industry participants, that included the CFMEU, didn't it?

30 **MR HADGKISS:** Absolutely, yes.

MR O'GRADY: Yes. But you'd accept that - or you've already accepted that the ABCC launched significantly more prosecutions against the CFMEU than it did against employers?

MR HADGKISS: Yes.

40 **MR O'GRADY:** And that was notwithstanding the fact that according to the Fair Work Ombudsman, there was some 40 per cent of employers who weren't complying with their obligations.

MR HADGKISS: With wages and entitlements, yes.

45 **MR O'GRADY:** Yes.

MR HADGKISS: But our concentration was more on harassment and other unlawful activity, not wages and entitlements.

5 **MR O'GRADY:** Yes. But wages and entitlements are very important matters, aren't they, Mr Hadgkiss?

MR HADGKISS: And they were being handled by a very competent agency, too.

10 **MR O'GRADY:** Well, for various periods, the responsibility of the ABCC included pursuing employers for underpayments?

MR HADGKISS: Towards the end, yes.

15 **MR O'GRADY:** And you didn't, did you?

MR HADGKISS: Didn't what?

20 **MR O'GRADY:** You didn't pursue employers for underpayment in anywhere near the level of regulatory enforcement that you sought to impose upon the CFMEU?

25 **MR HADGKISS:** No, the - we were as good as the cards that we were dealt with, and at the time the more heinous conduct was on the part of the CFMEU and their intimidation of the industry.

30 **MR O'GRADY:** You would accept, wouldn't you, Mr Hadgkiss, that from the point of view of the union movement generally, and the CFMEU in particular, you were perceived as unfairly targeting the CFMEU?

MR HADGKISS: Oh, the CFMEU most definitely, but I would not say from the general union movement, from the AWU or the Plumbers Unions, etcetera.

35 **MR O'GRADY:** All right. Perhaps, Mr Operator, if we go back to the ACTU document, which is at page 268. Now, Mr Hadgkiss, if it's easier, you should be able to find this in the folders that are next to you if you're having difficulty, but this is a submission of the ACTU, reviewing - on the review of the Building and Construction Industry (Improving Productivity) Act. Do you see that from the top of that page?

40 **MR HADGKISS:** That's what it says, yes.

45 **MR O'GRADY:** Yes. And the ABCC - sorry, the ACTU were critical of the operation of the BCIIIP Act and said that it hadn't achieved the objects set out in section 3, which is the one I read to you a few moments ago.

MR HADGKISS: Right. That's what it says, yeah. I take it - I can't read it, but I'll take your word, yeah.

5 **MR O'GRADY:** All right. And the ACTU was of the view that the way in which the ABCC had operated had unfairly targeted unions, including the CFMEU?

MR HADGKISS: That's what it says, yes.

10 **MR O'GRADY:** Yes. And the ACTU, of course, is the peak body of all unions in the country?

MR HADGKISS: Yes.

15 **MR O'GRADY:** Yes. And you'd agree with me that the ACTU believed that the ABCC, under your watch, had unfairly targeted the CFMEU?

MR HADGKISS: That's what their - that's what their agenda was, yes.

20 **MR O'GRADY:** Yes. All right. And that that had had consequences in respect of the failure to pursue underpayments and the like?

MR HADGKISS: I'm sorry, I don't understand the question.

25 **MR O'GRADY:** That your unfair focus or targeting of the CFMEU had consequences in respect of the failure to pursue underpayments and the like.

MR HADGKISS: That's what the ACTU were apparently arguing, yes.

30 **MR O'GRADY:** Yes. And it also had had consequences in respect of workplace safety, including workplace deaths?

MR HADGKISS: I'm sorry, I'm not aware of where you're reading from.

35 **MR O'GRADY:** No, I'm happy to take you to it.

MR HADGKISS: If that's what the ACTU was saying, that's what the ACTU was saying, but I don't agree.

40 **MR O'GRADY:** Yes. Could I take you to paragraph 67. And perhaps if you could blow up paragraph 67 for me, Mr Operator, of the ACTU document. All right. You will see there that the submission says:

45 "There was a significant increase in the rate of workplace deaths in industry during the first iteration of the ABCC and a decrease after the ABCC was closed."

MR HADGKISS: That's what it says, yes.

MR O'GRADY: Yes. Well, you have no reason to doubt the accuracy of those figures, do you, Mr Hadgkiss?

5

MR HADGKISS: No.

MR O'GRADY: And you haven't undertaken any analysis yourself?

10 **MR HADGKISS:** The statistics, yes, but I don't agree with what paragraph 67 is suggesting.

MR O'GRADY: All right. Well, paragraph 67 is simply stating what the statistics show.

15

MR HADGKISS: Yeah, but it's also - it's - it's an attack on the work of the ABCC, that's for sure.

MR O'GRADY: Yes. And then if we could -

20

MR HADGKISS: As though the ABCC is responsibility - is responsible for those deaths, the inference.

MR O'GRADY: Well, what it's putting is that the ABCC certainly didn't improve safety if one is concerned with workplace deaths. You'd accept that?

25

MR HADGKISS: No, I would not accept that, no.

MR O'GRADY: Well, how can the ABCC be said to have improved safety in respect of workplace deaths if they've actually gone up under your watch?

30

MR HADGKISS: I'm not saying it improved. I can't agree that it - it flew in the face of safety.

MR O'GRADY: No, sorry, please listen to my question, Mr Hadgkiss. You're not saying that the ABCC improved safety in respect of workplace deaths during your watch, are you?

35

MR HADGKISS: And I'm not saying the contrary either, no.

40

MR O'GRADY: Well, you can't say the former, because it didn't. The stats show that, don't they?

MR HADGKISS: The stats are the stats, but the relevance of the ABCC I fail to distinguish.

45

MR O'GRADY: Well, just bear with me. Could I ask you just as a first proposition, according to these statistics, there is no basis for any assertion that the ABCC had improved safety so far as it concerned workplace deaths during its first iteration. You'd accept that?

5

MR HADGKISS: Yes.

MR O'GRADY: Okay. And, indeed, according to these statistics, there is at least a correlation, if not a causation, between an increase in deaths -

10

MR HADGKISS: No, I totally - totally disagree. Safety on sites has a multitude of causal factors, and the ABCC or whatever body's presence, I fail to see where you're making the connection.

MR O'GRADY: Well, I'm simply pointing out the fact that deaths went up when the ABCC was in operation.

MR HADGKISS: Are you suggesting that that's because of the ABCC? And I do not agree.

20

MR O'GRADY: No, what I'm suggesting is no more than when the ABCC was in operation, deaths went up, and I think you accept that.

MR HADGKISS: According to these statistics, yes. I'm not arguing with these statistics. I'm arguing with the premise that the ABCC somehow was a causal factor in those deaths.

25

MR O'GRADY: Well, you haven't undertaken any analysis of these deaths, have you?

30

MR HADGKISS: No.

MR O'GRADY: So you don't know what the causal factors were?

MR HADGKISS: Indeed, no.

35

MR O'GRADY: And perhaps -

MR HADGKISS: I'm certainly not aware of where the ABCC was involved in any of those deaths.

40

MR O'GRADY: I see. I'm not suggesting, Mr Hadgkiss, that the ABCC killed anybody. All I'm putting to you is that during the period of the first iteration of the ABCC, deaths went up, not down.

45

MR HADGKISS: Yes.

MR O'GRADY: And perhaps, Mr Operator, could we pick up paragraph -

MR HADGKISS: But I fail to - I fail to see a connection between those deaths and the ABCC. That's all.

5

MR O'GRADY: I see. Could we pick up paragraph 68, Mr Operator. Now, have you heard of Professor David Peetz?

MR HADGKISS: Never heard of him, no.

10

MR O'GRADY: Okay. That's fine. And are you in a position to take issue with what he says in this paragraph, that there were 36 fatalities -

MR HADGKISS: Yes, I do. I cannot see the connection between the ABCC and the deaths.

15

MR O'GRADY: Well, again -

MR HADGKISS: As though there's an inference that the ABCC somehow caused these deaths.

20

MR O'GRADY: Well, Professor Peetz makes the point in the last sentence that observance with occupational health and safety tends to be lower where unions are weaker.

25

MR HADGKISS: No, I don't agree with that.

MR O'GRADY: I see.

COMMISSIONER: There's something wrong with the stats, though, aren't there, Mr O'Grady, if you look at - there's a disconnect between 67 and 68. If the stats in 67 are true, then how can the stats in 68 be true?

30

MR O'GRADY: Well, I think - that might be right, Commissioner. This is what was in the report. I'm taking the witness to it. But on any view, there's an increase, not a decrease. It's a question of the magnitude of it.

35

COMMISSIONER: It depends which stats you're looking at, but unless - unless the size of the construction industry fell to half its level in 2007-08 from 2004-05, which seems unlikely, then what Professor Peetz says is inconsistent with the stats in 67.

40

MR O'GRADY: Yes. I can't take that any further, Commissioner. You would accept, Mr Hadgkiss, that if one has regard to these - the statistics in 67, forgetting what Professor Peetz says, that they don't suggest that there has been an improvement in safety insofar as it concerns fatalities during the watch of the ABCC in its first iteration?

45

MR HADGKISS: Fatalities, yes.

MR O'GRADY: Yes.

5

MR HADGKISS: But as I say again, fatalities are due to a multitude of reasons.

MR O'GRADY: Yes. Now -

10 **MR HADGKISS:** One other point I might make is I'm not sure that construction is confined to the building industry. From memory, it may also encompass the mining industry, but I may be wrong.

15 **MR O'GRADY:** I see. All right. Now, would you agree with me that it's important that the guidance material put out by the regulator is accurate and does not mislead?

MR HADGKISS: Yes.

20 **MR O'GRADY:** And that a failure for a regulator to ensure that its material is accurate and does not mislead is likely to significantly undermine the perception that the regulator is acting in a fair and impartial way?

MR HADGKISS: Yes.

25

MR O'GRADY: And that more fundamentally, it's a core responsibility that the regulator is accurate about the effect of the regulatory regime it is required to police?

30 **MR HADGKISS:** Yes.

MR O'GRADY: And indeed I put it to you it's hard to imagine a more important function.

35 **MR HADGKISS:** It's an important function, yes.

MR O'GRADY: And -

MR HADGKISS: Education, yes.

40

MR O'GRADY: And to deliberately or recklessly put out misleading material involves a fundamental breach of trust?

MR HADGKISS: It could lead to, yes.

45

MR O'GRADY: And I put it to you it reflects a lack of judgment that brings into question whether the organisation or those running it can be relied upon in respect of anything they might do or say.

5 **MR HADGKISS:** It - it would be improper to do so, yes.

MR O'GRADY: And I put it to you that the same applies in respect of a failure to correct any error as soon as it is discovered?

10 **MR HADGKISS:** Yes.

MR O'GRADY: Now, in September 2017 you resigned from the position with the FWBC following revelations you'd breached the Fair Work Act?

15 **MR HADGKISS:** Yes.

MR O'GRADY: Because you directed your staff that no changes were to be made to FWBC right-of-entry educational material which you knew was inaccurate and inconsistent with the Act at the time?

20

MR HADGKISS: Yes.

MR O'GRADY: And in short compass, the circumstances of the contravention were that in December 2013, you were the director of the Fair Work Building Industry Inspectorate?

25

MR HADGKISS: Yes.

MR O'GRADY: On 19 December 2013, you directed your staff that no changes were to be made to the FWBC's right-of-entry educational material?

30

MR HADGKISS: Correct.

MR O'GRADY: That material conveyed that an employer could make a reasonable request to a union official about the rooms to be - or areas to be used on site?

35

MR HADGKISS: Yes.

40 **MR O'GRADY:** And those materials remained on the FWBC website in that form until July 2016?

MR HADGKISS: Yes.

45 **MR O'GRADY:** And that was inconsistent with the statutory provisions in place at the time?

MR HADGKISS: Correct.

5 **MR O'GRADY:** And by August and September 2013, your own staff had drafted corrected materials to reflect the actual legislative position and senior legal officers of the FWBC had cleared them?

MR HADGKISS: I've been made aware of that since, yes.

10 **MR O'GRADY:** And you directed that no changes be made?

MR HADGKISS: Yes.

15 **MR O'GRADY:** And senior staff were concerned and the court found it uncontested that you were fully aware of their concern at the time?

MR HADGKISS: Yes.

20 **MR O'GRADY:** Yes. And on 9 January 2014, your executive director, operations north west, emailed that the agency was running something of a political and industrial risk by withholding information on the law as it currently stands.

MR HADGKISS: I understand so, yes.

25 **MR O'GRADY:** Yes. And on 10 January 2014, your director stakeholder engagement recorded that you were absolutely adamant that you didn't want us to change anything and extremely comfortable handling it in Estimates or media or wherever.

30 **MR HADGKISS:** At the time, yes.

35 **MR O'GRADY:** Yes. So the position in short compass is this, Mr Hadgkiss: your organisation had on its website material which was inaccurate in respect of the law at the time?

MR HADGKISS: Yes.

MR O'GRADY: You were aware of that?

40 **MR HADGKISS:** When I became aware, I had steps taken to rectify it immediately.

MR O'GRADY: Well -

45 **MR HADGKISS:** I also might point out that at the time when this - when this literature was being drafted, there was a bill before the House to amend that, and I held fire on the basis that the legislation was about to - about to change, and it

would have created great confusion in the industry. One minute it's this, then it's that, and then it's cancelled again. I made a decision. As it turned out, it was wrong.

5 **MR O'GRADY:** Yes. Well, just dealing with that in parts, you'd accept, wouldn't you, that just because there is legislation before Parliament doesn't mean it's going to pass?

MR HADGKISS: Agree.

10

MR O'GRADY: Yes. And it's, dare I say it, very uncommon for legislation to pass at least unamended through the vast majority of parliaments that we've had?

MR HADGKISS: I can't comment on that.

15

MR O'GRADY: I understand. And that you were made aware of the fact that the material on your website was not consistent with the current law by a number of people within your organisation?

20 **MR HADGKISS:** I can recall at least one, yes.

MR O'GRADY: Yes. And notwithstanding having been made aware of it, you maintained or you did not immediately alter the content of the material on your website?

25

MR HADGKISS: Not immediately, no.

MR O'GRADY: And indeed, it stayed on the website for a number of years?

30 **MR HADGKISS:** And it was never - it never came to light that anything - anyone had been harmed as a result.

MR O'GRADY: Yes. Well, you'd understand that employers may well go to the regulator's website as the authoritative statement as to what they can and can't do in respect of, for example, right of entry?

35

MR HADGKISS: Yes.

MR O'GRADY: Yes. And you were telling them that they could do things that the legislation at the time didn't allow them to do?

40

MR HADGKISS: In one aspect, yes.

MR O'GRADY: Yes. And you only corrected the materials in July of 2016?

45

MR HADGKISS: Yes, I made - made moves to have it removed immediately.

MR O'GRADY: Yes. And that was only after the CFMEU wrote to you and said, "What's going on here? This is wrong."

5 **MR HADGKISS:** The CFMEU made a number of complaints at the time, which were all taken on board, and some were rectified, some were not.

MR O'GRADY: And the Federal Court declared that in so directing your staff you contravened section 503 of the Act?

10 **MR HADGKISS:** Yes.

MR O'GRADY: And you were ordered to pay a pecuniary penalty of some \$8500?

15 **MR HADGKISS:** Yes.

MR O'GRADY: And that was 87 per cent of the maximum fine at the time?

20 **MR HADGKISS:** Yes.

MR O'GRADY: And the total cost of the proceeding against you cost the taxpayer - so these are in, effect, the ABCC's costs - some - or more than \$436,000?

25 **MR HADGKISS:** That I can't comment on.

MR O'GRADY: I see. But it's not an unrealistic estimate, is it, Mr Hadgkiss?

30 **MR HADGKISS:** I really don't know.

MR O'GRADY: I see. You'd accept that that's a significant waste of public money?

35 **MR HADGKISS:** I can't comment on the figure.

MR O'GRADY: All right. Well, whatever it cost, you'd accept that for the government to have to pay for lawyers to defend a proceeding where you have deliberately or recklessly maintained inaccurate material on your website is a waste of government money?

40 **MR HADGKISS:** I don't agree, no.

MR O'GRADY: I see. And you resigned on the day the decision was handed down?

45

MR HADGKISS: Yes.

MR O'GRADY: Yes. And in her decision, Justice Collier said, and this is at paragraph 43:

5 "The conduct of the director was serious. The director admitted to
contravening a law he was required to police. The consequences of his
conduct was the dissemination by the FWBC at his direction of false
information to the industry of which the FWBC was not only the regulator
but supposedly a trustworthy source of reliable information for industry
10 participants. The wrongdoing was exacerbated by the fact that the right of
entry is commonly a source of industrial dispute. Indeed, the director has not
hesitated to commence legal proceedings against the CFMEU where CFMEU
officers or agents infringe rights of entry."

15 Now, that's got a number of propositions tied into it, Mr Hadgkiss, but you'd agree
that the conduct you engaged in was serious?

MR HADGKISS: Yes, and I admitted my conduct.

20 **MR O'GRADY:** And among other things, it involved you contravening a law
you were required to police?

MR HADGKISS: I contravened the law, and I admitted that immediately.

25 **MR O'GRADY:** But it's not just - well, you didn't admit it immediately.
Initially, you sought to defend the proceedings.

MR HADGKISS: Initially what, sorry?

30 **MR O'GRADY:** You sought to defend the proceedings?

MR HADGKISS: I don't recall that, no.

MR O'GRADY: I see.

35 **MR HADGKISS:** I certainly don't recall that. In fact, I don't think that was the
case.

40 **MR O'GRADY:** I see. And you will also agree that the consequence of what
you did was to disseminate information that was false?

MR HADGKISS: It was misleading, yes.

MR O'GRADY: Yes. Well, it was false.

45 **MR HADGKISS:** It was an omission, yes.

MR O'GRADY: Well, it was false, Mr Hadgkiss.

MR HADGKISS: It was misleading, yes.

5 **MR O'GRADY:** All right. And that was particularly egregious, I put to you, because you were the head of the body that was required to be the source of trustworthy information for people in the industry?

MR HADGKISS: Yes, and I resigned as a consequence.

10 **MR O'GRADY:** And you'd agree with me that right of entry is commonly a source of industrial disputation?

MR HADGKISS: Yes.

15 **MR O'GRADY:** And you'd also agree with me that you have or the ABCC has commenced numerous proceedings against the CFMEU where it was thought that CFMEU officers or agents infringed their rights of entry?

20 **MR HADGKISS:** Yes, but not the particular aspect that's now in question. It had not been amended. And I - in fact, research showed that there was no case where that had come to light that anyone had been harmed as a result of my oversight.

25 **MR O'GRADY:** Yes. Well, whether or not somebody's harmed or not, to deliberately or recklessly put up material that is, to use your language, at least misleading is fundamentally wrong?

MR HADGKISS: It was reckless, yes.

30 **MR O'GRADY:** Yes. And indeed, her Honour went on to say that:

"The conduct in question exhibited on the director's part a degree of carelessness and indeed somewhat arrogant ignorance in respect of the truth of information concerning the right of entry of industry participants in an often charged industrial environment."

35 You'd accept that that's what your conduct reflected?

MR HADGKISS: If that's what it says, that's what it says. I don't take issue.

40 **MR O'GRADY:** And that your careless conduct resulted in incorrect information remaining on the FWBC website for several years, in apparent disregard of the reputational risk to the FWBC and in circumstances where the director promoted the supposed accuracy of the information in communications with industry and the general public.

45 **MR HADGKISS:** Indeed, and I say again, no one was harmed as a result of that.

MR O'GRADY: Now, just going back to what you said about that you didn't believe you had initially defended the decision, could you perhaps go to page 353 of the bundle. And perhaps if you could blow up paragraph 2 of her Honour's reasons for judgment, Mr Operator. So it would appear, Mr Hadgkiss, that the proceeding was listed to commence on 11 September?

MR HADGKISS: Yes.

MR O'GRADY: And then there were a number of adjournments sought for the purposes of discussions?

MR HADGKISS: Yes.

MR O'GRADY: So it would appear that prior to those discussions, you were seeking to defend the proceeding?

MR HADGKISS: We were considering the matter.

MR O'GRADY: Well, the proceeding didn't commence on 11 September. There had been a statement of claim filed and processes had been entered into -

MR HADGKISS: Yes, and backwards and forwards, yes.

MR O'GRADY: Yes. And it was only on the following day that the parties returned to the court and informed the judge that they had an agreed statement of facts wherein the director made a number of admissions, and the statement of agreed facts was formally filed on 13 September.

MR HADGKISS: Yep.

MR O'GRADY: So it would appear that up until the first hearing date, you had not admitted the alleged contraventions.

MR HADGKISS: What, sorry?

MR O'GRADY: Up until the first hearing day, you had not admitted the alleged contraventions?

MR HADGKISS: Correct. It was - I was still in discussion with legal representatives.

MR O'GRADY: Yes. And you only admitted the alleged contraventions on 13 September?

MR HADGKISS: Following the - the adjournment that was sought on the 11th, yes.

MR O'GRADY: Yes. Thank you. Well, you would agree with me that your conduct in respect of this issue showed, with respect, Mr Hadgkiss - and I'm not trying to be inflammatory, but with respect - an appalling lack of judgment?

5 **MR HADGKISS:** It was a lack of judgment, yes. It was oversight on my part.

MR O'GRADY: Yes. It meant that the entity that the public and employers - and employers specifically were being misled regarding - sorry, regarding this issue by the entity who should be the most trusted source of information of their rights and obligations under the Act?

10

MR HADGKISS: There's absolutely no evidence that anyone was misled as a result of my oversight.

15 **MR O'GRADY:** Well, anybody who went to your website and read what was there and acted upon it - and read what was there would have been misled as to what their rights were.

MR HADGKISS: Hypothetically, yes, but I'm not aware of anyone that did such a thing as you're putting forward.

20

MR O'GRADY: And I put it to you, Mr Hadgkiss, that it reflected an ideological approach to the discharge of your functions as the head of the FWBC?

25 **MR HADGKISS:** That's totally incorrect.

MR O'GRADY: And I put it to you that it also brings into question the weight that can be given to the evidence you've given to this Commission?

30 **MR HADGKISS:** I agree. And that's up to the Commissioner to adjudicate upon.

MR O'GRADY: Yes. Thank you. Would you agree with me that an issue that has, in effect, bedevilled the ABCC and its predecessors and codes is that there is a bit of a pendulum effect, that a government of a particular persuasion gets in and puts in place certain requirements, and then there's a change in the persuasion of the government and there's a different approach taken?

35

MR HADGKISS: Absolutely.

40

MR O'GRADY: Yes.

MR HADGKISS: And that's at a federal level and a state level.

45 **MR O'GRADY:** Yes, indeed. And would you accept that, in those circumstances, there is something to be said at least from veering away from the

extremes, either extreme, and pursuing more of a middle course so that there is ongoing certainty as to how the industry is regulated?

5 **MR HADGKISS:** I'm sorry, I don't understand the question.

MR O'GRADY: What I'm putting to you, and I think you've accepted the proposition, and it's indeed acknowledged in your statement, that we have seen a pendulum effect whereby when, say, a Coalition Government is in place, there is a more prescriptive series of regulations put in place. When there is a Labor
10 Government in place, there is a significantly less prescriptive regime put in place.

MR HADGKISS: In a nutshell, one is sort of pro-union, one is pro-employer, it'd be fair to say.

15 **MR O'GRADY:** And that occurs both at a federal and state level?

MR HADGKISS: Yes.

MR O'GRADY: And I put it to you that that is problematic, because it means
20 that the industry is swinging from extreme to extreme?

MR HADGKISS: Absolutely. It's a fact of life, and there's great confusion on the part of the industry.

25 **MR O'GRADY:** And what I'm putting to you is that that is a reason why, in considering the issue of whether a code should be implemented and the type of code that should be implemented, the Commissioner should have regard to the potential benefits of steering a middle course, avoiding the pendulum effect?

30 **MR HADGKISS:** That's easier said than done, I'm afraid. The facts of political life is what it is, and in an ideal world, in an ideal democracy, that may be. But the state of affairs in Australia does not lend itself to such a proposition.

MR O'GRADY: Yes. And you would also agree that this pendulum effect
35 means that you could have a system with a particular focus operating at one level of government and a system with a very different focus operating at another. So, for example, you might have a federal Coalition Government and a state Labor Government or conversely, you might have a federal Labor Government and a state Liberal Government or Coalition Government.

40 **MR HADGKISS:** Absolutely.

MR O'GRADY: Yes.

45 **MR HADGKISS:** It's highly problematic.

MR O'GRADY: Yes. And it's particularly problematic if we're dealing with projects that might have a degree of funding both at a state and federal level?

MR HADGKISS: Yes, mixed funding, yep.

5

MR O'GRADY: Yes, because you could have a situation where what one level of government's code prohibits, the other level of government's code encouraged or mandates?

10 **MR HADGKISS:** They both have their - their agendas, yes.

MR O'GRADY: Yes. All right. Now, in questions I was asking you earlier, Mr Hadgkiss, you talked about you had to deal with the cards you were dealt with. You'd accept that the ABCC did not have to wait for a complaint before it could exercise its coercive powers?

15

MR HADGKISS: I'm sorry, did not have to -

MR O'GRADY: Wait for a complaint.

20

MR HADGKISS: We acted on complaints, yes.

MR O'GRADY: No, but you could, pursuant to section 10 of your Act, investigate suspected contraventions by building industry participants?

25

MR HADGKISS: Yes, and we did.

MR O'GRADY: And building industry participants included employers and contractors?

30

MR HADGKISS: Yes, and they were put before the court as well.

MR O'GRADY: Yes. All right. Now, at paragraph 21 of your statement, and in your oral evidence, you said that an effective code brings a corresponding improvement in productivity, safety and freedom of association.

35

MR HADGKISS: Yes.

MR O'GRADY: Now, in respect of safety, you'd agree that at least as far as fatalities are concerned, that would appear - it would appear to be a tension in that statement and what the ACTU was putting forward in its submissions?

40

MR HADGKISS: Yes.

MR O'GRADY: Yes. And you haven't undertaken any independent analysis yourself?

45

MR HADGKISS: No, I don't agree with the ACTU's proposition, though.

MR O'GRADY: But you haven't undertaken any independent analysis yourself?

5 **MR HADGKISS:** No, only on the statistics that we had and the feedback from the industry.

MR O'GRADY: All right. Now, in respect of productivity, you haven't undertaken any economic analysis of productivity figures?
10

MR HADGKISS: We relied on the Australian Bureau of Statistics, the Productivity Commission, and one other entity which I mentioned in my statement.

15 **MR O'GRADY:** All right. I just want to deal with that now. You deal with this, Mr Hadgkiss, at paragraph 26 of your statement. If that could be brought up, and if you could blow it up. And the only source of asserting that there had been a productivity gain was a crowd called Independent Economics?

20 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. And you relied upon their analysis to support your increase of somewhere between 10 and 21 per cent improvement in productivity?

25 **MR HADGKISS:** In that statement, yes.

MR O'GRADY: Yes. And are you aware of the fact that Independent Economics has been robustly criticised for the figures that it uses?

30 **MR HADGKISS:** No, I - I'm not familiar with that.

MR O'GRADY: All right. But I take it, Mr Hadgkiss, you would have heard and would agree with a saying that my father used to like, which is "garbage in, garbage out", that if the figures that Independent Economics were using were
35 garbage, then that is obviously going to impact upon their analysis.

MR HADGKISS: I disagree.

MR O'GRADY: I see. So if the figures that Independent Economics were using,
40 that wouldn't impact upon their -

MR HADGKISS: If they were using garbage, yes.

MR O'GRADY: Yes, all right. Thank you.
45

MR HADGKISS: But I'm not aware that they were using garbage.

MR O'GRADY: Yes, okay. All right.

MR HADGKISS: I had no evidence to that proposition.

5 **MR O'GRADY:** Okay. Well, perhaps if I can take you to an extract from the transition to Fair Work Australia for the Building and Construction Industry Act. And this is just an extract, Mr Hadgkiss. This is in the bundle of material I provided to you, Commissioner.

10 **COMMISSIONER:** Which tab is it?

MR O'GRADY: I think it's in the separate additional documents that I provided to you, Commissioner.

15 **COMMISSIONER:** Number 1 or number 2?

MR O'GRADY: Sorry, number 1.

COMMISSIONER: Number 1. Thank you.

20

MR O'GRADY: Now -

COMMISSIONER: So this is the Wilcox review that was commissioned by then Minister Gillard; is that right?

25

MR O'GRADY: Yes, that's right. Now, Mr Hadgkiss, are you familiar with this review?

MR HADGKISS: No.

30

MR O'GRADY: I see. And are you aware of the fact that Independent Economics is a rebranding of a firm called Econtech?

MR HADGKISS: No.

35

MR O'GRADY: And that the figure that you rely upon in your witness statement is derived from a study that Econtech conducted in 2007?

MR HADGKISS: No.

40

MR O'GRADY: All right. Could you have a look at paragraphs 5.48 and 5.49. So this is what his Honour Justice Wilcox said:

45

"Of course, Professor Peetz was not attempting his own analysis. He was concerned at the possibility that an economic analysis obtained at public expense and widely publicised had grossly exaggerated the contribution to productivity made by the BCCI Act and the ABCC. As Mr Murphy

implicitly concedes, Professor Peetz' concern was justified. The 2007 Econtech report is deeply flawed. It ought to be totally disregarded."

5 Do you accept that if his Honour Justice Wilcox was right, and if I'm right, that Independent Economics is a successor for Econtech and that the figures that you relied upon were derived from the Econtech report done in 2007, then that impacts upon the weight that should be given to what you say in paragraph 26 of your witness statement?

10 **MR McLEAN:** I object to that question, Commissioner. My learned friend has taken the witness to criticisms of a 2007 and 2008 report. The document that the witness has referred to in his own statement is a 2013 document. The connection -

15 **COMMISSIONER:** Sorry, you go on.

MR McLEAN: The connection between the criticisms of the 2007 and 2008 documents levelled in this transition -

20 **COMMISSIONER:** Is the 2013 report which is footnoted at footnote 3 - we just had it up on the screen, but it's gone down - in Mr Hadgkiss' statement, is that in evidence?

MR McLEAN: The 2013 report?

25 **COMMISSIONER:** Yes. What Mr Hadgkiss says is there were three bases for him forming the conclusions that he had, and they were, one, his - no, sorry, I've got that wrong - had the Productivity Commission, the ABS and one other report. This one other report is the one, the 2013 report at footnote 3 on the page that's just come up. Is that in evidence?

30 **MR McLEAN:** To my recollection, it's not independently -

COMMISSIONER: It is or is not?

35 **MR McLEAN:** It's not independently annexed to the statement.

COMMISSIONER: Say that again?

40 **MR McLEAN:** It's not annexed to Mr Hadgkiss' statement.

COMMISSIONER: Right.

MR O'GRADY: If it assists, Commissioner, it is in our bundle.

45 **COMMISSIONER:** It's in your bundle. All right, so it is in evidence somewhere.

MR O'GRADY: Yes, it's behind tab 11. And also, Commissioner, and this might address my learned friend's objection, behind tab 13 you have an analysis done by Professor Peetz, and in that analysis Professor Peetz explains the connection between the 2007 report and the subsequent reports by successors to Ecotech.

COMMISSIONER: So I could understand why we might call for the cross-examination of Mr Murphy or Professor Peetz, but what's the point of putting all this to this witness?

MR O'GRADY: Well, simply that this witness has relied upon a figure from Independent Economics and I want to explore with him what, if anything, he knows about the origin of that figure. Now, it may be the evidence to date is he doesn't know anything about that figure, and if he had accepted my proposition that garbage in is garbage out, I wouldn't need to explore these matters with him any further.

COMMISSIONER: Well, I'm happy - I don't want to prevent you from cross-examining, but this is a 72-page report that is one of the bases for this witness's view, criticised by a 52-page report from Professor Peetz.

MR O'GRADY: Perhaps if I can just deal with it this way, Commissioner, and just bring it to an end.

COMMISSIONER: Yes.

MR O'GRADY: I take it you haven't read the Independent Economics report that you refer to?

MR HADGKISS: No.

MR O'GRADY: Well, where did the - how did you have the basis for making the statement you make in paragraph 26 of your witness statement?

MR HADGKISS: I don't recall.

MR O'GRADY: Okay. All right. But is it fair to say that somebody wrote that for you?

MR HADGKISS: My statement was prepared in - by myself and also solicitors, yes.

MR O'GRADY: Yes. And in any event, you, not having looked at the Independent Economics report, aren't in a position to comment about the accuracy or otherwise -

MR HADGKISS: I'm not familiar with it, no, I'm not.

MR O'GRADY: I understand. And I take it you also haven't read the analysis undertaken by Professor Peetz into Independent Economics and its predecessors?

5 **MR HADGKISS:** No, I'm not familiar with that, no.

MR O'GRADY: And you'd agree with me that what you say in paragraph 26, as far as productivity, is solely based upon the figure that somebody found for you out of the Independent Economics report?

10

MR HADGKISS: No, it's not. No, it's not.

MR O'GRADY: Well, you don't cite any other basis, do you, Mr Hadgkiss?

15 **MR HADGKISS:** No, I don't cite any there, no, but it's certainly my - my considered opinion.

MR O'GRADY: I see. Thank you.

20 **COMMISSIONER:** Why is it your considered opinion?

MR HADGKISS: That that's correct, what I'm saying there.

COMMISSIONER: Yes, what's the reason there?

25

MR HADGKISS: It brought about significant improvements in productivity in the period that I mention there.

COMMISSIONER: And why do you say that?

30

MR HADGKISS: Feedback from the industry, from the stakeholders in the industry. That - that would be - at the time the industry needed a regulator, and they were - they were happy with the performance of the regulator. And to their mind, the productivity was improving and they were going about their business in a more lawful manner without intimidation and harassment.

35

MR O'GRADY: Yes. Now, Commissioner, I note the time, but I've got a couple more questions on this topic and then I'll move on, but I'm in your hands.

40 **COMMISSIONER:** How much longer do you think you will be with this witness?

MR O'GRADY: With this witness, I will be at least another hour.

45 **COMMISSIONER:** Right. We'll continue on, but only a few more questions on this topic.

MR O'GRADY: Yes. Thank you. Commissioner, if you could go to the document that I think is behind tab 2 or document 2 of the additional documents, and if the witness could please be shown this document. Now, I take it from the answer you gave to the Commissioner just a moment ago, Mr Hadgkiss, you haven't undertaken any systemic empirical assessment of productivity in the construction industry personally?

MR HADGKISS: Correct.

MR O'GRADY: And you don't have the skills to do so?

MR HADGKISS: Indeed.

MR O'GRADY: But you'd accept that the Productivity Commission does have those skills?

MR HADGKISS: Yes.

MR O'GRADY: Yes. And this is - the excerpt I have given you is taken from volume 2 of the Productivity Report Into Public Infrastructure?

MR HADGKISS: That's what it says, yes.

MR O'GRADY: Yes. And this is a report that is footnoted at footnote 5 of your witness statement?

MR HADGKISS: Footnote 5?

MR O'GRADY: Yep. I don't need to take you to it, but I'm just putting the proposition.

MR HADGKISS: Oh, okay.

MR O'GRADY: And I take it, did you read that report or did somebody else make that reference for you?

MR HADGKISS: I don't recall.

MR O'GRADY: I understand. All right. Could I ask you to go to - and because it's quite a bulky report, I have only given you the index and then some select pages, but if I could ask you to go to page 536, and you will see that at that page, the Productivity Commission is dealing with days lost from industrial disputes.

MR HADGKISS: Sorry, page 536 of -

MR O'GRADY: Page 536. The numbering is down at the foot of the page.

MR HADGKISS: Sorry, Commissioner, what are we referring to?

MR O'GRADY: I'm referring to page 536 of the document that the tipstaff just gave you?

5

MR HADGKISS: Oh, this one. Okay. Thanks.

MR O'GRADY: No, that one there. Perhaps if I can have it back and I will find the page for you, Mr Hadgkiss.

10

MR HADGKISS: I'm completely confused, I'm sorry.

MR O'GRADY: No, no. Perhaps we can swap. And you will see there, there is a heading Days Lost in Industrial Disputes.

15

MR HADGKISS: Yes.

MR O'GRADY: And you'll see there's a table that sets that out per thousand employees?

20

MR HADGKISS: Yes.

MR O'GRADY: And you'll see that the Productivity Commission is of the view - and this appears at the paragraph immediately below that table - that:

25

"Accordingly, set against the size of the construction industry, the apparent economic impacts of industrial disputes are very low."

MR HADGKISS: Yes, that's what it says.

30

MR O'GRADY: And you're not in a position to take issue with that proposition, are you?

MR HADGKISS: No.

35

MR O'GRADY: No. And then if you go to page 543, and if you go to the paragraph, the third paragraph on that page, where the Commission says:

40

"The Commission's view is that given the case studies, industrial surveys and other micro evidence, there is no doubt that local productivity has been adversely affected by the union and associated employer conduct on some building sites and that the BIT/ABCC is likely to improved outcomes."

Do you see that?

45

MR HADGKISS: Yes.

MR O'GRADY: But then they go on to say:

"However, when scrutinised meticulously, the quantitative results provided by IE..."

5

And that's a reference to Independent Economics, the people that you relied upon:

"...or others do not provide credible evidence that BIT/ABCC regime created a resurgence in aggregate construction productivity or that the removal of the ABCC has had material aggregate effects. Indeed, the available data suggests the regime did not have a large aggregate impact."

10

Now, you're not in a position to dispute that, are you, Mr Hadgkiss?

15 **MR HADGKISS:** No.

MR O'GRADY: And then if you could go to page 786, and if you go to the second-last paragraph on the page, where the Productivity Commission says:

20

"The Commission still considers that BIT/ABCC had positive effects in its heyday from 2002/2003 to 2007-08 (effects that probably endured to some extent in its later years), but its impact is likely to have been masked by many other factors, including aggregate productivity. Likewise, it cannot be maintained that the data show even an indicative sense that aggregate productivity improved because of BIT/ABCC."

25

Now, again, Mr Hadgkiss, you're not in a position to dispute that?

MR HADGKISS: Correct.

30

MR O'GRADY: And if one goes to the last page, at page 796, you will see under the heading 1.6, What Does This Mean for Analysis of IR Changes, the Productivity Commission says:

35

"There are three distinct hypotheses about the impact of more stringent IR arrangements that emerged with the creation of BIT/ABCC. H1, they made no difference to productivity at all. H2, they improved productivity but not to the degree that they could be statistically discovered with any precision in the aggregate data for the entire construction industry. H3, they markedly improved productivity in the entire industry. While there are devotees for all three hypotheses, the Commission's position is that H2 is the most reasonable."

40

Again, you're not in a position to dispute that, are you, Mr Hadgkiss?

45

MR HADGKISS: No. No.

MR O'GRADY: Those were the additional questions I wanted to ask on this topic at this point in time, Commissioner.

COMMISSIONER: Very well. Thank you. We'll adjourn till 2 pm.

5

<THE HEARING ADJOURNED AT 12.54 PM

<THE HEARING RESUMED AT 2.00 PM

10 **COMMISSIONER:** Mr O'Grady.

MR O'GRADY: Yes. Thank you, Commissioner. Mr Hadgkiss, in support of your productivity claim, you also rely in paragraphs 23, 25 and 27 on what are said to be lost work - work days lost. Do you recall that?

15

MR HADGKISS: Sorry, which document?

MR O'GRADY: In your witness statement at paragraph -

20 **MR HADGKISS:** Oh, my witness statement. Sorry.

MR O'GRADY: At paragraph 25, for example.

MR HADGKISS: Right.

25

MR O'GRADY: Yes. And then you have a similar analysis in respect of the second ABCC period in paragraph 27.

MR HADGKISS: Yes.

30

MR O'GRADY: Now, putting to one side whether working days lost is actually a factor going to productivity, I take it that you didn't do that analysis of the ABS statistics yourself?

35 **MR HADGKISS:** I'm sorry, I didn't do - no, I didn't work for the ABS, no.

MR O'GRADY: No, but you didn't go and look at the ABS figures?

MR HADGKISS: Yes.

40

MR O'GRADY: You did?

MR HADGKISS: Yes.

45 **MR O'GRADY:** All right. Okay. And in respect of those figures, why didn't you take into account, in respect of paragraph 27, what occurred during COVID?

MR HADGKISS: I could have gone for any period, but I chose to highlight some abhorrent behaviour going on at that time.

5 **MR O'GRADY:** Yes. But what I'm putting to you, Mr Hadgkiss, is that when one has regard to COVID, it had a suppressing factor on working days lost, didn't it?

MR HADGKISS: Productivity, yes.

10 **MR O'GRADY:** Yes. And you understand, don't you, that under our enterprise - or under our Fair Work Act -

MR HADGKISS: But, sorry, COVID was long after I left.

15 **MR O'GRADY:** I see. That's your explanation. Okay.

MR HADGKISS: No, I can't really comment on a period when I was not - I was not working.

20 **MR O'GRADY:** I understand. In respect of - sorry, just bear with me. In respect of those figures, you understand that it's perfectly lawful for people to take industrial action in the pursuit of an enterprise agreement as long as the requirements in the Act are complied with?

25 **MR HADGKISS:** In accordance with the law, yes.

MR O'GRADY: Yes. And you don't seek to differentiate in those paragraphs between working days lost that are due to lawful industrial action and any other cause for working days lost?

30

MR HADGKISS: No.

MR O'GRADY: No. And you understand also that enterprise -

35 **MR HADGKISS:** But, sorry, any working days lost is not good for productivity, in fairness.

MR O'GRADY: All right. But what I'm putting to you is working days lost due to lawful industrial action is something that the Fair Work Act explicitly
40 authorises?

MR HADGKISS: Indeed, yes.

45 **MR O'GRADY:** And, indeed, the enterprise bargaining system would be, dare I say it, impossible to maintain if there wasn't the capacity to take lawful industrial action in the pursuit of pursuing claims.

MR HADGKISS: Absolutely. Yes.

MR O'GRADY: It's a baked-in feature of the system, isn't it, Mr Hadgkiss?

5 **MR HADGKISS:** Yes.

MR O'GRADY: And enterprise bargaining, in a particular industry sector, can occur on a cyclical basis?

10 **MR HADGKISS:** Sorry, I don't know what you mean.

MR O'GRADY: Well, you might have a round of bargaining where a number of agreements are coming up for renegotiation at around the same time.

15 **MR HADGKISS:** Yes, that is commonplace in the building industry, yes.

MR O'GRADY: Yes. Thank you. Just bear with me, sir. Now, can I turn to safety. At paragraph 21, you make the assertion that an effective code has given rise to corresponding improvements to - productivity, we've discussed - safety and
20 freedom of association. So just turning to safety, have you done any empirical analysis in respect of safety incidents at the time that there was a code in place?

MR HADGKISS: I'm sorry, I don't recall.

25 **MR O'GRADY:** No. I understand. Operator, could you bring up the PowerPoint presentation for me, please, and in particular slide 17. And if you could blow up what appears under the All Tables heading. Is it possible to blow that up any further? It's a bit hard to read, Mr Hadgkiss, but these are tables based on Safe Work Australia analysis.

30

MR HADGKISS: Yes.

MR O'GRADY: And you haven't gone to the effort of looking at that data in respect of safety, have you?

35

MR HADGKISS: No.

MR O'GRADY: No.

40 **COMMISSIONER:** What data are you talking about?

MR HADGKISS: In fairness, this is industrywide, not the commercial sector.

MR O'GRADY: Yes. This is the Safe Work Australia national dataset for
45 compensation-based statistics.

COMMISSIONER: Which tab of -

MR O'GRADY: Sorry, this is in the PowerPoint presentation, which is -

COMMISSIONER: Oh, it's in the PowerPoint presentation, sorry.

5

MR O'GRADY: Which is extra material, and it's slide number 17, Commissioner. And it has a definition of "serious workers' compensation claim", which means 10 or more days lost.

10 **MR HADGKISS:** Yes.

MR O'GRADY: You're aware of that. And then if you could go to slide 18, it has dealt with the construction industry -

15 **MR HADGKISS:** As a whole, yes, including the housing sector.

MR O'GRADY: Yes, but the construction -

MR HADGKISS: But not matters pertaining to the CFMEU necessarily.

20

MR O'GRADY: No, I understand. But it does deal with the construction industry discretely.

MR HADGKISS: The whole of the construction industry, yes.

25

MR O'GRADY: Yes. And it shows that there has been - that in 2014-15, there were 12,397 serious claims in construction, and in 2023-2024 that went up to 17,609 claims, an increase of about 42 per cent?

30 **MR HADGKISS:** Yes.

COMMISSIONER: But don't you need to know how many people were employed in the construction industry over that period? I assume it increased during that decade.

35

MR O'GRADY: I'd accept, Commissioner, that that could impact upon the weight you can give to these figures, but it doesn't - on the data that we've got, it doesn't support the assertion that there has been a reduction in serious injuries during the time that the ABCC was in operation.

40

MR HADGKISS: As an industry as a whole, yes.

MR O'GRADY: Yes.

45 **COMMISSIONER:** Depends if you mean serious injuries as a separate number or serious injuries as a percentage of the number of workers in the industry.

MR O'GRADY: And indeed, that's dealt with to an extent in the next slide, slide 19, Commissioner, because as you will see in the note on the right-hand side of the slide -

5 **COMMISSIONER:** Yes.

MR O'GRADY: - claims frequency rate is defined as the number of claims per million hours worked. All right. Thank you.

10 **COMMISSIONER:** And you still see a slight increase.

MR O'GRADY: Yes. And if you could then turn to slide number 20 -

15 **MR HADGKISS:** Sorry, again, in respect of that slide, it's the whole of the industry.

MR O'GRADY: Yes.

20 **MR HADGKISS:** Including the housing industry, which is notorious for safety issues.

MR O'GRADY: Yes. But that would have been the case both prior to the ABCC and subsequent to the ABCC?

25 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. And if we could look at slide 20, and this is a table showing the number of serious workers' compensation claims by year of lodgement.

30

MR HADGKISS: Again, across the whole of the industry.

MR O'GRADY: Yes.

35 **MR HADGKISS:** Not necessarily the commercial industry in which the CFMEU are involved.

MR O'GRADY: And you'd agree with me that it does not reflect any significant dip in respect of the times that the ABCC and/or the FWBC were in operation?

40

MR HADGKISS: In terms of across the whole of the industry, I agree.

MR O'GRADY: Yes.

45 **MR HADGKISS:** But we were concerned with the commercial industry or where unlawful activity was taking place, which is predominantly the CBD areas of capitals.

MR O'GRADY: I understand. And you'd agree with me that, indeed, that shows that there is an ongoing trend of gradual increase in claims.

5 **MR HADGKISS:** Across the whole of the industry, yes.

MR O'GRADY: Yes, I understand. All right. Now, am I correct in understanding that you haven't done any - not only didn't you - sorry, I think you said you did look at some of the - sorry, I'll withdraw that. You haven't done any
10 assessment of - empirical assessment of safety issues in the construction industry, have you?

MR HADGKISS: No.

15 **MR O'GRADY:** No. And are you aware of a report done by Ms Elsa Underhill evaluating the role of CFMEU OH&S representatives in improving occupational health and safety outcomes in Victorian construction industry?

MR HADGKISS: No, I've never heard of it, no.
20

MR O'GRADY: So you can't take issue with what she says in that report?

MR HADGKISS: I could take issue. I'm not aware of the contents.

25 **MR O'GRADY:** I understand. All right. Just bear with me, Mr Hadgkiss. Now, your principal example of an effective code is the 2014 Victorian code?

MR HADGKISS: I'm sorry?

30 **MR O'GRADY:** Your principal example of an effective code is the 2014 Victorian code?

MR HADGKISS: Yes.

35 **MR O'GRADY:** Yes. And these are policy documents. They don't - the code and its guidelines are policy documents; they don't of themselves make any conduct lawful or unlawful?

MR HADGKISS: Yes.
40

MR O'GRADY: Yes.

MR HADGKISS: There are prescriptions in there that if industry participants, ie
45 builders, contravene the code, there are consequences.

MR O'GRADY: Yes. But it doesn't, as a matter of law, prescribe anything?

MR HADGKISS: Well, it - as a law, no. It's a guideline upon which governments can act.

5 **MR O'GRADY:** Yes. And you're aware of the fact that Parliament has, through the Fair Work Act, put in place laws governing the way in which unions and employers and employees operate?

MR HADGKISS: Over the years, yes, there's been a number of iterations of that.

10 **MR O'GRADY:** Yes. And a contractor faced with an unlawful union demand already has protections under that Act, including under section 343 and 348?

MR HADGKISS: I take it that's the case, yes. I'm not familiar with the precise provisions.

15 **MR O'GRADY:** I understand. And what can be put into an enterprise agreement is also governed by the provisions in the Fair Work Act?

MR HADGKISS: Yes.

20 **MR O'GRADY:** Yes. And what your code and guidelines seek to do is take things that - is to put in place sanctions for employers and unions agreeing to things that the Fair Work Act allows them to agree to?

25 **MR HADGKISS:** I don't think the Fair Work Act actually addresses these issues.

MR O'GRADY: There's no prohibition in the Fair Work Act -

MR HADGKISS: It's a contractual arrangement with government that if I build a certain project, I will comply with certain guidelines.

MR O'GRADY: Yes.

MR HADGKISS: And there are consequences if I fail.

35

MR O'GRADY: Yes.

MR HADGKISS: To bring about greater productivity, greater safety, etcetera.

40 **MR O'GRADY:** The Fair Work Act does not contain any prohibition on putting in place a clause in an enterprise agreement in respect of minimum manning levels, does it?

MR HADGKISS: No.

45

MR O'GRADY: No. And yet your code and its guidelines seek to put in place sanctions if a contractor puts in place minimum -

MR HADGKISS: Yes, with very good reasons.

5 **MR O'GRADY:** Yes. And the Fair Work Act does not put in place or does not prohibit an employer and a union agreeing to limit casual or daily hire employees?

MR HADGKISS: Indeed, and that is why the code was brought in, because of that.

10 **MR O'GRADY:** And your code seeks to put in place sanctions in respect of employers who do that?

MR HADGKISS: Who - yes, who do not comply with the guidelines.

15 **MR O'GRADY:** Yes. And, again, the Fair Work Act does not prohibit or prevent an employer putting in place a last-on, first-off seniority-based redundancy practice?

20 **MR HADGKISS:** No, these are practices that have crept in.

MR O'GRADY: And, again, your code does put in place sanctions if -

MR HADGKISS: Absolutely, for a very, very good reason why.

25 **MR O'GRADY:** And that's if an employer does something that the Fair Work Act says they can do, your code puts in place sanctions in respect of that?

MR HADGKISS: Yes.

30 **MR O'GRADY:** Yes. And the same would apply in respect of consultation?

MR HADGKISS: I'm sorry, I'm not familiar -

35 **MR O'GRADY:** Sorry, I'm making the same point, that it is not uncommon for enterprise agreements made under the Fair Work Act to put in place clauses dealing with consultation between employers and unions?

MR HADGKISS: Yes.

40 **MR O'GRADY:** Yes. And, again, your code seeks to punish somebody for doing something that the Fair Work Act allows them to do?

45 **MR HADGKISS:** I disagree. It's trying to bring in a level playing field that employers will not be stood over by union tactics.

MR O'GRADY: Yes. But the effect of your code is that if an employer complies with an enterprise agreement clause that provides for consultation, then there will be sanctions imposed upon under the code?

5 **MR HADGKISS:** Yes, if they breach the code, yes.

MR O'GRADY: Yes. And the same applies to demarcation and limits on the allocation of work?

10 **MR HADGKISS:** Absolutely, yes.

MR O'GRADY: And the term on which subcontractors are engaged?

15 **MR HADGKISS:** Absolutely, yes.

MR O'GRADY: Jump-up clauses, yes. All right.

20 **MR HADGKISS:** And these are all provisions that are taken advantage of by unscrupulous union officials and builders.

MR O'GRADY: Yes. And in respect of the last topic that I touched on, namely, the terms on which subcontractors are engaged, or jump-up clauses, you're aware of the fact that Parliament has recently passed same job, same pay legislation?

25 **MR HADGKISS:** I'm not familiar with that, no.

MR O'GRADY: I see. All right. And the idea behind that legislation is that people who do substantially the same work should receive the same pay, at a particular site?

30 **MR HADGKISS:** I'm not familiar with it.

MR O'GRADY: Okay. I understand. All right. Now, one of the components that you point to as being necessary for an effective code is rules that preserve a tenderer's right to manage resourcing?

35 **MR HADGKISS:** Yes.

40 **MR O'GRADY:** And an aspect of that is minimum manning?

MR HADGKISS: Is what, sorry?

MR O'GRADY: Is minimum manning?

45 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. And you describe minimum manning arrangements as self-evidently inefficient.

MR HADGKISS: I - if you point to the clause -

5

MR O'GRADY: Of course. Paragraph 37. It's the last sentence, Mr Hadgkiss.

MR HADGKISS: Yes.

10 **MR O'GRADY:** Yes. Yes.

MR HADGKISS: It's a case of one size fits all, which is preposterous.

15 **MR O'GRADY:** Well, you'd agree with me that these things need to be looked at from perspectives other than just a cost perspective?

MR HADGKISS: No, they should - there were a number of issues.

20 **MR O'GRADY:** And safety is one of them.

MR HADGKISS: On both sides.

MR O'GRADY: But safety is one of those issues, isn't it?

25 **MR HADGKISS:** Safety is indeed an issue.

MR O'GRADY: Yes. And there may be manning levels set to take into account emergency responses?

30 **MR HADGKISS:** Absolutely, and I'm sure that a responsible employer would take that into account.

MR O'GRADY: Yes. And - but a union might seek to put - ensure that an employer who may not be responsible puts that in place?

35

MR HADGKISS: I'm sorry, I don't understand the question.

MR O'GRADY: What I'm putting to you is that you said "a responsible employer" -

40

MR HADGKISS: The responsible employer, yes.

MR O'GRADY: Yes, but not every employer in the industry is responsible?

45 **MR HADGKISS:** Absolutely, I agree.

MR O'GRADY: And a union has an interest in seeking to ensure that appropriate manning levels are set because of the fact that not all employers are responsible.

5 **MR HADGKISS:** I wish that were so, Commissioner, but unfortunately that is abused, or in my experience was grossly abused.

MR O'GRADY: And not only are we dealing with emergency responses, but there may be high-risk hazards that require levels of supervision and numbers of employees working on that project in order to minimise risk?

10

MR HADGKISS: And it's a case-by-case basis, yes. Not one size fits all.

MR O'GRADY: Yes. But, again, you've accepted that not all employers are responsible?

15

MR HADGKISS: I agree.

MR O'GRADY: And a means of ensuring that high-risk hazards are appropriately manned is for a union to seek to put in place minimum manning?

20

MR HADGKISS: Yeah, a responsible union official, yes.

MR O'GRADY: Yes, all right. Another matter you refer to under controlling resources are apprentice ratios, and this is dealt with in paragraph 38 of your statement, Mr Hadgkiss. You understand, don't you, that there is a looming skills shortage?

25

MR HADGKISS: Yes.

30 **MR O'GRADY:** And you'd be aware that one of the biggest drivers of cost in the construction industry is skill shortages?

MR HADGKISS: Yes.

35 **MR O'GRADY:** And the fact, the bottom line is we don't have enough people, new tradespeople coming through the pipeline to meet demand, and that increases labour costs?

MR HADGKISS: As I understand so, yes.

40

MR O'GRADY: Yes. And you would accept, wouldn't you, that one way of addressing skills shortages in the construction industry is to ensure that sufficient apprentices are trained and retained?

45 **MR HADGKISS:** On a case-by-case basis, yes, but not unilaterally.

MR O'GRADY: Yes. Well, the code doesn't seek to deal with these things on a case-by-case basis, does it?

5 **MR HADGKISS:** It - it leaves it up to responsible employers and responsible union officials.

MR O'GRADY: Yes. In an industry where, I think on a fair summary of your evidence, you would say that there are a number of employers who could not be described as responsible.

10 **MR HADGKISS:** Indeed, and if that were the case, they would not receive work from the relevant government -

MR O'GRADY: I see.

15 **MR HADGKISS:** - when they tendered, or their subcontractors.

MR O'GRADY: Yes. And apprentices can only become qualified tradespeople if employers are prepared to employ and train them?

20 **MR HADGKISS:** Yes.

MR O'GRADY: And apprentice ratios are directed, at least in part, to increasing the number of apprentices employed in the industry?

25 **MR HADGKISS:** But it's on a case-by-case basis, I say again. It's not one size fits all that we have a certain ratio of apprentices when they're not required and are superfluous to the job's needs?

30 **MR O'GRADY:** Yes, but the enterprise bargaining system enables these things to be dealt with on a case-by-case basis?

MR HADGKISS: It enables and it can also abuse the system.

35 **MR O'GRADY:** Yes. But you'd agree with me that apprentice ratios are capable of serving a purpose other than the immediate commercial interests of an individual contractor?

MR HADGKISS: I'm sorry, I don't understand the question.

40 **MR O'GRADY:** Well, the proposition is that it may be in the interests of the industry more generally to have contractors engaging a certain number of apprentices, even if they don't want to?

45 **MR HADGKISS:** You're suggesting that contractors should take people on for the sake of it, when there's no requirement for them. I find that quite ludicrous.

MR O'GRADY: I see. Thank you. In expressing your opinion, you haven't undertaken any analysis of the long-term benefits that may arise from increasing the number of qualified tradespeople in the industry, have you?

5 **MR HADGKISS:** No.

MR O'GRADY: And you haven't undertaken any analysis as to the impact of - the capacity of increasing the number of apprentices to increase the number of qualified tradespeople?

10

MR HADGKISS: I think Blind Freddy could see that to employ more apprentices for the sake of it would be absolutely crazy.

MR O'GRADY: I see.

15

MR HADGKISS: Where is the motive for an employer to take on people, pay them, because of some silly ratio?

MR O'GRADY: I see.

20

MR HADGKISS: I'm at a loss as to how you could suggest that that should be the norm.

MR O'GRADY: Well, the employer benefits if there are more tradespeople in a world where there are -

25

MR HADGKISS: The industry does. The industry. But it's on a case-by-case basis.

30 **MR O'GRADY:** I understand. Thank you, Mr Hadgkiss.

MR HADGKISS: It's never a generality that we'll take on extra apprentices for the sake of it. What employer's going to take on people that are not productive?

35 **MR O'GRADY:** Well, I put it to you that a responsible employer would in circumstances where -

MR HADGKISS: There are - there are a lot of responsible employers who take on apprentices, but to impose upon an employer to say, "You will have 10 when you only need five," is crazy.

40

MR O'GRADY: I see. I understand your evidence, Mr Hadgkiss. But what I'm putting to you is that - I think you've accepted that a mechanism of that type, at the very least, would benefit the industry more generally?

45

MR HADGKISS: It could in a way, but to have apprentices sitting around without meaningful work is preposterous. If they're not required, they're not

required. You cannot create work for them if there's no work there. So how are they going to learn their skills when they're sitting around making up numbers?

5 **MR O'GRADY:** Well, in circumstances where apprentices learn their trade, at least in part, from qualified tradespeople working on a site.

10 **MR HADGKISS:** If they have meaningful work. But if there's no meaningful work for them to do, are they going to sit in the shed and count numbers and get paid every week for doing nothing? That's preposterous.

MR O'GRADY: But there's no suggestion, in your statement at least, that that's what having a mandated ratio of apprentices gives rise to.

15 **MR HADGKISS:** Well, it was never, ever a thought in my mind that anyone would even suggest such a preposterous thing.

20 **MR O'GRADY:** Yes. And you have at no stage undertaken any analysis to see whether, in the construction industry, where there are minimum apprentice ratios, there are people sitting in the shed with no work to do?

25 **MR HADGKISS:** I think it's commonsense, with great respect, Commissioner. You cannot employ people for the sake of a meaningless ratio because the union demands that you take on 10 when you only need five. I say again, it's preposterous to suggest. No one is in the industry to employ people for the sake of ratios.

MR O'GRADY: But we're talking about -

30 **MR HADGKISS:** Any industry. That's not confined to the building industry. That's in any industry.

MR O'GRADY: You have an ideological opposition to the notion of apprentice ratios, don't you, Mr Hadgkiss?

35 **MR HADGKISS:** No.

40 **MR O'GRADY:** And I put it to you that the notion of a ratio means you have X number of qualified tradesmen or tradespeople and you have Y number of apprentices.

MR HADGKISS: It should be on a case-by-case basis. It cannot be simply a ratio, one size fits all.

45 **MR O'GRADY:** And I put it to you that where you set that ratio can be - where that ratio is set, if agreed by the employer and by the union, can take into account the need for there to be sufficient work for the apprentices to do.

MR HADGKISS: On a case-by-case basis, but not as a generality across the whole of the industry, "Thou shalt have a certain number of apprentices."

MR O'GRADY: I see.

5

MR HADGKISS: Otherwise it puts a - apprentices are there for meaningful work. If they're just going to sit around to make up numbers because the union wants that ratio, that's absolutely meaningless.

10 **MR O'GRADY:** But the ratios don't put in place a requirement that thou shall have a certain number of apprentices.

MR HADGKISS: Well, what do they do, then?

15 **MR O'GRADY:** What they do say is if this work or if this project involves 50 tradespeople, there shall be a number of apprentices per tradesperson.

MR HADGKISS: Yes, and I'm sure the employer or the contractor when bidding would take that into consideration when tendering.

20

MR O'GRADY: I understand. Now, at paragraphs 42 and 43 of your statement, you criticise restrictions on casual labour and daily-hire workers.

MR HADGKISS: Not having casuals, yes.

25

MR O'GRADY: Yes. And you say that those restrictions reduce flexibility available to contractors?

MR HADGKISS: Yes.

30

MR O'GRADY: And you say flexibility is important because labour requirements on the construction projects fluctuate over time.

MR HADGKISS: I should have said not important; it's essential.

35

MR O'GRADY: Now, you haven't undertaken any analysis of the extent to which contractors in the construction industry -

MR HADGKISS: No empirical analysis, no.

40

MR O'GRADY: - are presently unable to access labour when required?

MR HADGKISS: No. No empirical analysis, no.

45 **MR O'GRADY:** And you don't cite any evidence in support of your position?

MR HADGKISS: It's fairly commonsense to me.

MR O'GRADY: Yes, yes. And you haven't identified any particular project that was unable to meet its labour requirements -

5 **MR HADGKISS:** No.

MR O'GRADY: - because of restrictions on casual labour hire.

MR HADGKISS: No, it's industrywide, I would suggest.

10

MR O'GRADY: Yeah. And at paragraph 43, you identify what you describe as the CFMEU's reasons for resisting casual labour arrangements?

MR HADGKISS: Yes.

15

MR O'GRADY: Yes. And you say that it's because permanent employees are more likely to become union members and pay union membership fees.

MR HADGKISS: That is the motivation of the CFMEU, yes.

20

MR O'GRADY: Do you accept, Mr Hadgkiss, that it's a legitimate objective of a union like the CFMEU to try and provide secure employment for its members?

MR HADGKISS: If that were the case, yes.

25

MR O'GRADY: Yes.

MR HADGKISS: But, I mean, I -

30 **MR O'GRADY:** And insecurity of employment is an issue that has bedevilled the construction industry for decades, isn't it?

MR HADGKISS: What has -

35 **MR O'GRADY:** Insecurity of employment, because you might be employed to work on one building -

MR HADGKISS: Yes.

40 **MR O'GRADY:** - the building's finished and you're out of a job?

MR HADGKISS: That's the vagaries of the industry, yes.

45 **MR O'GRADY:** And indeed, such are the vagaries of the industry that governments in all states have sought to address the incapacity of construction workers to access or accumulate long service leave by putting in place portable long service leave entitlements.

MR HADGKISS: Indeed. A good measure.

5 **MR O'GRADY:** And so it's a real issue, I put it to you, Mr Hadgkiss, that people working in the construction industry often don't have secure, ongoing employment.

10 **MR HADGKISS:** Indeed, and that's not unique to the construction industry, unfortunately.

MR O'GRADY: But that's something that is perfectly legitimate for a union like the CFMEU to seek to address?

15 **MR HADGKISS:** It's - I can understand their point of view, yes. I don't agree with their point of view, but I can appreciate their point of view.

20 **MR O'GRADY:** And one of the ways in which it can seek to address that is by trying to put in place agreements whereby people are engaged on an ongoing basis?

MR HADGKISS: I agree it is a tactic, but it's a tactic of which I do not agree with.

25 **MR O'GRADY:** I understand. And to the extent to which the CFMEU is pursuing that matter, with a view to improving the security of tenure of its employees, that has nothing to do with obtaining membership fees, does it?

MR HADGKISS: Nothing to do with what, sorry?

30 **MR O'GRADY:** Obtaining membership fees, making money. It's a perfectly legitimate thing for a union to seek to do, irrespective of whether -

MR HADGKISS: To boost its numbers, yes, I can understand.

35 **MR O'GRADY:** And to benefit its members by giving them secure employment.

MR HADGKISS: But you also have to look from the employer's point of view. Why employ people on a permanent basis when they're not required?

40 **MR O'GRADY:** Well -

MR HADGKISS: That's a fact - that's not unique to the construction industry. That's across many industries.

45 **MR O'GRADY:** But, Mr Hadgkiss, you understand that -

MR HADGKISS: I mean, are you suggesting like Coles or Woolworths should employ people on a permanent basis when they're not required?

5 **MR O'GRADY:** No. What I'm suggesting to you, Mr Hadgkiss, is that as in many areas of industrial relations, there are objectives that employers have, and there are objectives that unions have.

MR HADGKISS: Yes.

10 **MR O'GRADY:** And the system that the Fair Work Act puts in place is that those various objectives are reconciled and/or compromises are made through the mechanism of enterprise bargaining.

MR HADGKISS: Yes.

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MR O'GRADY: And the Fair Work Act puts in place mechanisms to ensure that - or prescribes what can be included in an enterprise agreement -

MR HADGKISS: Yes.

20

MR O'GRADY: - and what can't be included in an enterprise agreement.

MR HADGKISS: Indeed.

25 **MR O'GRADY:** And the Fair Work Act does not prevent an enterprise agreement putting in place mechanisms that promote permanent employment.

MR HADGKISS: Indeed.

30 **MR O'GRADY:** Thank you. Now, at paragraphs 47 to 51, you criticise arrangements that require contractors to consult with unions about staffing decisions?

MR HADGKISS: Yes.

35

MR O'GRADY: Now, you understand that a requirement to consult doesn't require an employer to obtain the union's approval?

MR HADGKISS: Correct.

40

MR O'GRADY: Nor does it require the employer to adopt the union's position?

MR HADGKISS: What, sorry?

45 **MR O'GRADY:** Nor does it require the employer to adopt the union's position?

MR HADGKISS: Indeed.

MR O'GRADY: Yes. The ultimate staffing decision remains with the employer?

MR HADGKISS: Yes.

5

MR O'GRADY: Again, you haven't undertaken any empirical analysis of the impact of a requirement to consult on staffing decisions?

MR HADGKISS: No, I base that on my experience of engagement with the industry.

10

MR O'GRADY: All right.

MR HADGKISS: Longstanding experience.

15

MR O'GRADY: And you understand that one of the objects of the Fair Work Act is to promote cooperative and productive workplace relations?

MR HADGKISS: Yes.

20

MR O'GRADY: Yes. And consultation between employers and employees and their representatives is one mechanism through which cooperative workplace relations may be achieved.

MR HADGKISS: I'd say it's essential, yes.

25

MR O'GRADY: Yes. And you would also accept, wouldn't you, that staffing decisions can have safety implications on construction sites?

MR HADGKISS: Absolutely.

30

MR O'GRADY: And consultation about staffing may bring to management's attention matters relating to safety, fatigue, supervision or emergency response capability.

35

MR HADGKISS: Again, essential.

MR O'GRADY: Yes. So consultation about staffing is capable of serving purposes other than advancing what you describe as a union's agenda?

40

MR HADGKISS: If it was a - if it was a bad employer, yes.

MR O'GRADY: Yes. All right. Thank you. And I think you've accepted on a number of occasions there are a lot of bad employers out there, aren't there, Mr Hadgkiss?

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MR HADGKISS: Oh, there are. There's a lot of bad lawyers out there as well, but I mean, we can't make a general rule.

5 **MR O'GRADY:** None in this room, Mr Hadgkiss. All right. Now, in paragraphs 56 and 57, you criticise enterprise agreement clauses that prescribe the terms on which subcontractors are engaged?

MR HADGKISS: I'm sorry, you got a bit fast for me there.

10 **MR O'GRADY:** I apologise. At paragraphs 56 and 57 -

MR HADGKISS: Yes.

15 **MR O'GRADY:** - you criticise enterprise agreement clauses that prescribe the terms on which subcontractors are engaged?

MR HADGKISS: Yes.

20 **MR O'GRADY:** And your concern is that such clauses prevent subcontractors from competing freely on price?

MR HADGKISS: I'm sorry, you'll have to slow down.

25 **MR O'GRADY:** I apologise, Mr Hadgkiss.

MR HADGKISS: I haven't -

30 **MR O'GRADY:** I apologise, and thank you for reminding me. Your concern is that such clauses prevent subcontractors from competing freely on price?

MR HADGKISS: Yes.

MR O'GRADY: Yes. And that that, in turn, may increase labour costs?

35 **MR HADGKISS:** Unnecessary costs, yes.

MR O'GRADY: Yes. Yes. But you - and I just want to clarify one of your earlier answers. I understand you're not familiar with the same job, same pay legislation, but are you aware of it?

40 **MR HADGKISS:** I've heard of it, yes.

MR O'GRADY: Yes. And you understand that the rationale behind that legislation is that people who are doing the same work -

45 **MR HADGKISS:** Yes.

MR O'GRADY: - at the same site -

MR HADGKISS: Yes.

5 **MR O'GRADY:** - should in general be paid the same, irrespective of who they're employed by?

MR HADGKISS: I understand that's the principle, yes.

10 **MR O'GRADY:** And I put it to you that an enterprise agreement clause that puts in place the terms upon which subcontractors are to engage their employees is aimed at the same objective.

MR HADGKISS: I'm sorry, I don't understand the question.

15

MR O'GRADY: A clause in an enterprise agreement -

MR HADGKISS: Yes.

20 **MR O'GRADY:** - that puts in place an obligation to engage subcontractors -

MR HADGKISS: Yes.

MR O'GRADY: - who will employ their employees on a particular basis -

25

MR HADGKISS: Yes.

MR O'GRADY: - is a pursuit of the same objective as the same job, same pay legislation.

30

MR HADGKISS: Well, I'm advocating that - I'm sorry, I don't understand the question, but if the gist of it is that they should all get paid the same - no. It depends on a case-by-case basis. If Mary works harder than Jane, she should get remunerated accordingly. It shouldn't be one size fits all, to my mind.

35

MR O'GRADY: Yes, but under your proposed code, Mary might work harder than Jane and get paid less than Jane because she's employed by a subcontractor who has suboptimal rates.

40 **MR HADGKISS:** Well, then Mary would go elsewhere, wouldn't she?

MR O'GRADY: I understand. Well, you would accept the notion that two people working on a site doing much the same thing but employed by different subcontractors and receiving fundamentally different terms and conditions might be a cause of resentment for the person who was receiving the less beneficial terms and conditions?

45

MR HADGKISS: And that is a way of life. We cannot say one size fits all. It depends on the individual.

5 **MR O'GRADY:** And you'd agree with me that if that were the case, the person who is receiving the less beneficial terms and conditions might be demotivated by that fact?

MR HADGKISS: Yes.

10 **MR O'GRADY:** And that might affect the way in which they approach their work?

MR HADGKISS: It may affect their productivity, yes.

15 **MR O'GRADY:** Yes. And it might also give rise to disputation?

MR HADGKISS: It could, yes.

20 **MR O'GRADY:** Yes. Thank you.

MR HADGKISS: But it also could lead to them going elsewhere to a position more to their satisfaction.

25 **MR O'GRADY:** Thank you. All right. Now, just bear with me, Mr Hadgkiss. Now, you also deal with right of entry. You understand that conferring upon an individual a right of entry is an interference with the occupier's right to determine who does and does not come onto their site?

30 **MR HADGKISS:** Whoa, whoa, whoa, would you say that slowly.

MR O'GRADY: Of course. Sorry, Mr Hadgkiss. Conferring a statutory right of somebody to enter premises -

35 **MR HADGKISS:** Yes.

MR O'GRADY: - interferes with the occupier's normal right to decide who comes on and who doesn't come on their premises.

40 **MR HADGKISS:** In a fashion, yes.

MR O'GRADY: Yes. And similarly, I put to you, determining who can't come onto a site, unless they're exercising a right of entry, interferes with the occupier's right to invite people onto their premises.

45 **MR HADGKISS:** Sorry, I do not understand the question.

MR O'GRADY: No, that's fine. What I'm putting to you, Mr Hadgkiss, is that just as saying to an employer "You must have somebody on your site" interferes with their rights, saying to an employer "You cannot have somebody on your site" interferes with their rights.

5

MR HADGKISS: Yes.

MR O'GRADY: Yes. And that's the effect of the code provisions in respect of right of entry, because you're saying to an employer, "If you allow a union official onto your site, and they're not exercising right of entry, then you will be punished under the code."

10

MR HADGKISS: Yes. For a very good reason.

MR O'GRADY: And you understand that that mechanism is inconsistent with the right-of-entry provisions in the Fair Work Act.

15

MR HADGKISS: No, I disagree.

MR O'GRADY: All right. Well, the Fair Work Act doesn't say to an employer "You cannot invite a union official onto your site unless they're exercising a right of entry," does it?

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MR HADGKISS: Sorry, there's a double negative here. If -

25

MR O'GRADY: No, no. There is nothing in the Fair Work Act that says to an employer that you cannot allow a union official on your site unless they are exercising a right of entry.

MR HADGKISS: I think there's implicit in the legislation that the union official would act in accordance with the law, and likewise, the employer would comply with that.

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MR O'GRADY: But there's nothing unlawful between, for example, for a union official who's a mate of a safety officer and who is in the vicinity, calling onto the site to have a chat to him about his four-wheel driving activities?

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MR HADGKISS: And if that occurs and that's explained to the employer and you've got a responsible employer, he would permit that.

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MR O'GRADY: But he might be in breach of the code.

MR HADGKISS: Just as some housewife going on there saying, "My husband left his sandwiches behind, go and give it to him," they would be exercising their discretion.

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MR O'GRADY: But they would be in breach of the code, because the code requires that they only let a union official onto the site if they're exercising a right of entry.

5 **MR HADGKISS:** Yes.

MR O'GRADY: And if they're in breach of the code, they run the risk of losing their capacity to bid for government work.

10 **MR HADGKISS:** Not on just one occasion like that. It would have to be a systemic course of conduct.

MR O'GRADY: Well, there's nothing in the code that says it's got to be a systemic course of conduct.

15

MR HADGKISS: No, it's just like punishment generally within the law. It's on a case-by-case basis.

20 **MR O'GRADY:** Yes. And you're aware, aren't you, Mr Hadgkiss, of an instance where a union official who was a mate of a safety officer went onto a site to discuss four-wheel driving, and that subsequently led to a prosecution of the CFMEU by the ABCC.

25 **MR HADGKISS:** I'm - I'm not sure the facts are that simple, but anyway -

MR O'GRADY: But you're aware of the storm in a teacup case, aren't you?

MR HADGKISS: Yes, I recall that, yes.

30 **MR O'GRADY:** And that was the scenario in that case, wasn't it?

MR HADGKISS: I don't recall the facts.

35 **MR O'GRADY:** I understand. Thank you.

MR HADGKISS: Certainly, if we mounted a prosecution, it would have been abhorrent conduct that had been adjudicated upon not by my own lawyers but also external lawyers, and it would have been an action brought about by a member of the bar.

40

MR O'GRADY: Yes. Well, you were unsuccessful in that prosecution, weren't you?

45 **MR HADGKISS:** Yes, we were.

MR O'GRADY: Yes. And you'd accept that a prosecution of that type is likely to cost some hundreds of thousands of dollars of public money?

MR HADGKISS: That would have been taken into consideration by all parties concerned, including the presiding barrister that had carriage of the case.

5 **MR O'GRADY:** I understand. Now, you rely on your exhibit NH-12, the table of cases in support of a number of the opinions you express concerning right of entry and industrial conduct. This is at page 377 of Mr Hadgkiss' statement, Mr Operator. Now, there are 25 proceedings identified in this table?

10 **MR HADGKISS:** Yes.

MR O'GRADY: Of those, only 12 are right-of-entry cases?

MR HADGKISS: I - I'll take your word for it, yes.

15

MR O'GRADY: Okay. And your statement describes these cases as findings made since 2015?

MR HADGKISS: That's what it says, yes.

20

MR O'GRADY: But a number of those proceedings arose from conduct that occurred before 2015?

MR HADGKISS: Yes.

25

MR O'GRADY: Yes. The earliest incident identified is case 22, and that occurred way back in 2011? The conduct.

MR HADGKISS: Sorry?

30

MR O'GRADY: The conduct that that case involved occurred way back in 2011.

MR HADGKISS: Yes. So it says, yes.

35 **MR O'GRADY:** And only three of the proceedings in that table relate to conduct occurring within the last five years?

MR HADGKISS: I take your word for it, yes.

40 **MR O'GRADY:** And all of the conduct identified in that table occurred while the ABCC or the FWBC enforcement regime was operating?

MR HADGKISS: Its various iterations, yes, by the look of it.

45 **MR O'GRADY:** And none of the incidents identified occurred after the ABCC was abolished in 2023?

MR HADGKISS: If that's what it says, I take your word for it.

5 **MR O'GRADY:** Yes. And every one of the proceedings in that table was successfully investigated, prosecuted and determined under the existing statutory framework?

MR HADGKISS: If that's what it is. I take your word for it, yes.

10 **MR O'GRADY:** Now, did you - who compiled that table, Mr Hadgkiss?

MR HADGKISS: I'm unaware, sorry.

15 **MR O'GRADY:** Did you go through and individually check those cases before signing your statement?

MR HADGKISS: No, I did not.

20 **MR O'GRADY:** Thank you. Now, in paragraph 69 of your statement, you say that the improper exercise of rights of entry often serves as a precursor to unlawful industrial action.

MR HADGKISS: Yes, very common, yes.

25 **MR O'GRADY:** Yes. Now, you don't cite any data in support of that proposition, do you?

MR HADGKISS: In the - in my affidavit, no.

30 **MR O'GRADY:** No. And you didn't undertake any analysis -

MR HADGKISS: Sorry, that's - in the prosecutions we mounted, that is very common conduct.

35 **MR O'GRADY:** Yes. But you didn't undertake any analysis of the frequency with which unlawful industrial action follows an improper entry?

MR HADGKISS: No, I imagined that the prosecutions would speak for themselves.

40 **MR O'GRADY:** I see. Well, there's nothing in the table I took you to that demonstrates that consensual entry often serves as a precursor to unlawful industrial action, is there?

45 **MR HADGKISS:** Sorry, say that again.

MR O'GRADY: Of course. There's nothing in the table I took you to -

MR HADGKISS: Yes.

MR O'GRADY: - that demonstrates that entry often serves as a precursor to unlawful industrial action?

5

MR HADGKISS: I - look, I'm not familiar with the table.

MR O'GRADY: Okay. All right. That's fine. Thank you. Now, at paragraph 75 -

10

MR HADGKISS: But, sorry, in fairness, it is a precursor, but it may not necessarily be - there's a breach of right of entry. Then the action starts. So it's just one step in the process of unlawful industrial action.

15 **MR O'GRADY:** Yes, but you haven't -

MR HADGKISS: So it goes through - they breach the right-of-entry provisions, they hold a meeting as an unlawful industrial action or whatever, or there's harassment, bullying, whatever, but the right of entry may have been a factor leading up to the basis of the prosecution.

20

MR O'GRADY: Yes. But you haven't done the analysis, Mr Hadgkiss.

MR HADGKISS: No, I haven't done the analysis. It's just a fact.

25

MR O'GRADY: I understand. Thank you. Now, at paragraph 75, you say that a code should prohibit discrimination based on union membership.

MR HADGKISS: That's what it says, yes.

30

MR O'GRADY: And you understand that discrimination based on union membership is already protected by the general protections provisions of the Fair Work Act?

35 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. And those provisions apply whether or not there is a code in operation?

40 **MR HADGKISS:** It's industrywide, yes.

MR O'GRADY: Yes. And those provisions put in place a reverse onus?

MR HADGKISS: I'm not familiar with it.

45

MR O'GRADY: I understand. All right. Thank you. Now -

MR HADGKISS: But having said that, those provisions in the Fair Work Act are abused, and hence the code tried to address that abuse.

5 **MR O'GRADY:** Well, those provisions give a person who is discriminated against because of their union status the right to bring proceedings against the person discriminating against them.

MR HADGKISS: I'm sorry.

10 **MR O'GRADY:** Well, if I apply for a job -

MR HADGKISS: Yes.

15 **MR O'GRADY:** - and I'm not a member of the CFMEU -

MR HADGKISS: Yes.

20 **MR O'GRADY:** - and I don't get that job because I'm not a member of the CFMEU -

MR HADGKISS: Yes, commonplace.

25 **MR O'GRADY:** - I can bring a proceeding under those provisions under the Fair Work Act?

MR HADGKISS: You'd be very brave if you did, but hypothetically, yes.

30 **MR O'GRADY:** And if I brought such a proceeding, then the employer would have - the person who made the decision and/or who influenced the decision that I not get the job would have to prove that my union membership or non-membership had nothing to do with the fact I didn't get the job.

35 **MR HADGKISS:** This is highly hypothetical, because I can never imagine such a circumstance arising.

MR O'GRADY: Now, at paragraph 77 to 87, you deal with practices including no ticket, no start arrangements, show-card days and conduct directed to revealing union membership status, and you say a code should prohibit these practices.

40 **MR HADGKISS:** Yes.

MR O'GRADY: You understand that the Fair Work Act already contains provisions against coercion, misrepresentation and adverse action?

45 **MR HADGKISS:** Yes.

MR O'GRADY: And depending on the facts, those protections would apply to practices of the kind that you identify?

5 **MR HADGKISS:** Yes.

MR O'GRADY: Yes.

MR HADGKISS: But unfortunately are not enforced.

10 **MR O'GRADY:** Now, you cite - well, I put it to you that on occasions they are. You cite Pattinson as an example of a no ticket, no start conduct.

MR HADGKISS: Sorry, can you - paragraph?

15 **MR O'GRADY:** Sorry, I'll just try and find it.

COMMISSIONER: 79.

20 **MR O'GRADY:** Yes. Thank you, Commissioner. Paragraph 79. You make reference to a case of ABCC v Pattinson?

MR HADGKISS: Right.

25 **MR O'GRADY:** And you say that that is a no ticket, no start case.

MR HADGKISS: Yep.

MR O'GRADY: Well, Pattinson was a case brought and determined under the Fair Work Act, wasn't it?

30 **MR HADGKISS:** Yes.

MR O'GRADY: It had nothing to do with any code?

35 **MR HADGKISS:** No, the code did not exist then.

MR O'GRADY: No. And at paragraph 86, you say a code should require site controllers to remove offending signs.

40 **MR HADGKISS:** Yes.

MR O'GRADY: If a sign forms part of unlawful coercion, adverse action or discrimination, the Fair Work Act may already apply to the persons involved in that contravention. That's right, isn't it?

45 **MR HADGKISS:** That's in the Fair Work Act, yes, but unfortunately, it's not - not generally enforced.

MR O'GRADY: And the persons who could be subject to such a proceeding are those who are, directly or indirectly, knowingly concerned in the contravention?

5 **MR HADGKISS:** Sorry?

MR O'GRADY: The persons who could be the subject of such a proceeding are those who are, directly or indirectly, knowingly concerned in the contravening conduct.

10

MR HADGKISS: I'm sorry, I do not understand the question.

MR O'GRADY: What I'm putting to you is under the Fair Work Act -

15 **MR HADGKISS:** Yes.

MR O'GRADY: - the scope of these provisions is very broad -

MR HADGKISS: Yes.

20

MR O'GRADY: - because if you happen to be, directly or indirectly, knowingly concerned in the conduct that contravenes the Act, then you're in the gun?

MR HADGKISS: Yes.

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MR O'GRADY: Yes. And - sorry, I withdraw that. And Parliament has already described what is contravening conduct.

MR HADGKISS: Yes.

30

MR O'GRADY: Namely, adverse action or coercion.

MR HADGKISS: Yes.

35 **MR O'GRADY:** And what you're seeking to put in place in respect of the code goes beyond that, because the signs and paraphernalia that you're complaining about may not be adverse action and they may not be coercive.

MR HADGKISS: In fairness, it's not working. It's got to be fixed.

40

MR O'GRADY: Is this an occasion, Mr Hadgkiss, would you want to put in place a one size fits all as opposed to doing what Parliament has prescribed, namely, dealing with about this issue on a case-by-case basis?

45 **MR HADGKISS:** But it's been identified there are inadequacies with the Fair Work Act.

MR O'GRADY: All right.

MR HADGKISS: And there are loopholes being taken advantage by unscrupulous employers and union officials.

5

MR O'GRADY: I understand. Now, at paragraphs 88 to 92, you criticise clauses requiring union logos, mottos or insignia to be displayed on company property or clothing.

10 **MR HADGKISS:** Yes.

MR O'GRADY: And your concern is that those displays may convey that union membership is expected on site?

15 **MR HADGKISS:** Yes.

MR O'GRADY: Now, again, there's a difference between a union promoting itself and encouraging people to join it through paraphernalia and insignias on clothing and people being coerced to join the union?

20

MR HADGKISS: And employers being coerced to provide that memorabilia for clothing, etcetera.

25 **MR O'GRADY:** Yes, but there's a difference between - well, when you say the employer is being coerced to provide that memorabilia, what study have you done to show that where union paraphernalia are on site, that's the result of the employer being coerced -

30 **MR HADGKISS:** Well, I haven't done an actual study, but we - there were numerous cases where employers came forward saying that the union are demanding that all people who come on site will have to wear a CFMEU, or whatever it is, logo, and you will pay for it. You will pay for their shirts, their overalls, their helmets and all the memorabilia that goes on it.

35 **MR O'GRADY:** Well, again, Mr Hadgkiss, there are provisions in the Fair Work Act that provide protections in respect of an employer being coerced in the way you've described?

40 **MR HADGKISS:** Not in that precise detail, no.

MR O'GRADY: I see. In your statement, you don't identify any particular conduct said to have been emboldened by the presence of union paraphernalia, do you?

45 **MR HADGKISS:** In my statement, no, but I would have been happy to provide it in spades.

MR O'GRADY: And you don't identify any case in which union paraphernalia caused unlawful conduct?

5 **MR HADGKISS:** In my statement, no, I do not. But again, there are numerous examples.

MR O'GRADY: Now, at paragraph 72, you define freedom of association as including the choice to be a member of a union? It's the first part of the paragraph. Freedom of association -
10

MR HADGKISS: Paragraph 73?

MR O'GRADY: 72.

15 **MR HADGKISS:** Oh, sorry, 72. Yes.

MR O'GRADY: Yes. And workers who choose to be union members may also wish to identify themselves as union members while they're at work?

20 **MR HADGKISS:** Yes.

MR O'GRADY: Yes. And there's nothing wrong with that, is there?

25 **MR HADGKISS:** Absolutely nothing. I was a member of a union for many, many years myself.

MR O'GRADY: And they may seek to identify themselves as union members by displaying union logos, stickers, badges or insignia?

30 **MR HADGKISS:** Yes.

MR O'GRADY: And there's nothing wrong with that, is there?

35 **MR HADGKISS:** And the code never said that would be an action contrary to the code.

MR O'GRADY: I see. Well, you'd agree with me that a code which restricted the display of union logos, mottos or insignia would restrict one of the ways in which workers could express their union membership?
40

MR HADGKISS: Yeah, the flying of flags, etcetera, and the enforcement, as I say, of thou shalt - thou shalt - you, employer, shall buy union memorabilia on behalf of the employees.

45 **MR O'GRADY:** Yes. But coming back to my question, Mr Hadgkiss, the fact that - well, a code which restricted the display of union logos, mottos or insignia

would restrict one of the ways in which a member of a union might signify their union membership?

MR HADGKISS: Yes.

5

MR O'GRADY: And that is itself a restriction on freedom of association; it takes away one of the rights they would otherwise have -

MR HADGKISS: To wear "I'm a member of the CFMEU" or something, I suppose it does, yeah.

10

MR O'GRADY: Yes. Thank you. Now, at paragraphs 97 to 98, you deal with workplace relations management plans.

MR HADGKISS: Yes.

15

MR O'GRADY: And it's the case, isn't it, that what you're proposing is that a contractor should not be eligible to tender for government work unless the regulator approves its workplace relations arrangements?

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MR HADGKISS: Within certain parameters. I think there was a monetary figure given. It wasn't just for minor -

MR O'GRADY: I understand, but for major work?

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MR HADGKISS: Major projects, yes.

MR O'GRADY: Yes. And that gives the regulator a significant role in determining how employers organise their industrial affairs?

30

MR HADGKISS: Yes.

MR O'GRADY: Yes. And you'd agree with me - and that flows from -

MR HADGKISS: To monitor it, yes.

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MR O'GRADY: Yes. Well, a refusal to approve a workplace relations management plan may have significant commercial consequence for a contractor?

MR HADGKISS: It could, yes.

40

MR O'GRADY: Yes. It may prevent the contractor from tendering for government work?

MR HADGKISS: Yes, it could.

45

MR O'GRADY: And these - and the workplace relations management plan is something that's assessed by the regulator?

MR HADGKISS: Yes.

5

MR O'GRADY: Yes. There's no legislation governing the terms of any workplace relations management plan?

MR HADGKISS: No, again, it's under the guidelines.

10

MR O'GRADY: Yes. And the guidelines are something that the regulator is responsible for?

MR HADGKISS: Yes.

15

MR O'GRADY: Yes. So there's no legislative, if you like, regime governing what are to be the components of a workplace relations management plan?

MR HADGKISS: The entity still has to report to a minister, and in turn, the minister has to report to the Parliament. So there is a responsibility.

20

MR O'GRADY: Yes, yes. But other than that, the entity has carte blanche?

MR HADGKISS: Well, other than that, it's still a fairly substantial responsibility, I'd submit.

25

MR O'GRADY: Yes. And would you accept that not only are there components of the workplace relations management plan that are identified by the regulator, but the assessment of whether or not a particular workplace relations management plan adequately addresses those components is itself a decision being made by the regulator?

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MR HADGKISS: Yes, in conjunction with the tenderer.

MR O'GRADY: But none of this is prescribed by legislation?

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MR HADGKISS: No, it's -

MR O'GRADY: And none of this is subject to a review by the courts?

40

MR HADGKISS: Oh, no, no.

MR O'GRADY: No.

MR HADGKISS: Just a normal contractual relationship between an entity wanting to - it was the government using its - its purchasing power to bring about reform.

45

MR O'GRADY: Yes. And you'd accept that whether or not a particular contractor gets approval for tendering for government work may have very significant financial consequences for that employer?

5

MR HADGKISS: Absolutely, including when they breach the code and guidelines, or the legislation, it could involve sanctions by the minister -

MR O'GRADY: Yes.

10

MR HADGKISS: - in that they would not be able to tender for government-funded work as a result.

MR O'GRADY: Yes. And that - those costs implications may involve hundreds of millions of dollars or even billions of dollars on a large project?

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MR HADGKISS: Absolutely, yes.

MR O'GRADY: And I put it to you that that - that decisions having those potential consequences that are in the gift of the regulator poses a risk of corruption?

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MR HADGKISS: Within the regulator?

MR O'GRADY: Yes, within the regulator.

25

MR HADGKISS: Oh, of course. But also, they are subject - if the - if the tenderer was dissatisfied or thought the decision had been unfairly made or whatever, there was a right of appeal to the Administrative Appeals Tribunal or whatever.

30

MR O'GRADY: Yes. All right.

MR HADGKISS: But to go back to the corruption, if you're suggesting that there was corruption within these bodies, I take great offence to that.

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MR O'GRADY: Well, no, what I'm putting to you is that that is an inherent risk of these arrangements?

MR HADGKISS: There are risks, of course there are risks in any tendering process. But they have to be closely monitored to prevent such malpractice entering.

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MR O'GRADY: Yes, but there is no oversight by the courts. I think you've agreed with me on that.

45

MR HADGKISS: There was potential oversight, as I say, by the Administrative Appeals Tribunal. Of course, if there was a hint of corruption, one would go to the proper authorities, the police.

5 **MR O'GRADY:** I understand.

MR HADGKISS: But again, I know of no instance where that occurred or an allegation to that effect was made.

10 **MR O'GRADY:** Now, you also refer to the need for there to be an effective enforcement body, and really, by that, you mean an ABCC model?

MR HADGKISS: Sorry?

15 **MR O'GRADY:** Well, this is paragraph 104 to 106.

MR HADGKISS: 104 to 106.

20 **MR HADGKISS:** And your -

MR O'GRADY: And my proposition is when you mean an effective enforcement body, what you're really saying is, "Bring back the ABCC."

25 **MR HADGKISS:** No. Where are those words in -

MR O'GRADY: No, well, I'm putting the proposition to you, Mr Hadgkiss, I'm putting to you that what you mean by an effective enforcement body is a body that was similar to what the ABCC was?

30 **MR HADGKISS:** I was talking about an effective investigative and enforcement body.

MR O'GRADY: Yes.

35 **MR HADGKISS:** If it happened to be an ABCC, well, so be it.

MR O'GRADY: Yes. I have no further questions, Commissioner.

40 **COMMISSIONER:** Thank you, Mr O'Grady. Mr McLean?

MR McLEAN: There's no re-examination, thank you, Commissioner.

45 **COMMISSIONER:** There are a couple of things that you said, Mr Hadgkiss - you were being asked about your views about limiting the liberty of an occupier to prevent that occupier from inviting union officials onto site beyond the statutory right they have under the right-of-entry regime.

MR HADGKISS: Yes.

5 **COMMISSIONER:** And you were asked about whether or not you'd provided or undertaken any analysis, and you said no, but you said there's very good reason for this rule. What's that good reason?

10 **MR HADGKISS:** Yes, it was my experience that that kind of right of entry was abused. Ostensibly an official coming on to have a cup of tea, as it was put to me, would get out of hand. And above all, the occupier, the builder, is responsible for all conduct, all activity on his or her building site. To allow a third party to come on, unsupervised, or to do as they will, there's a duty of care on the part of an employer, and the person on the gate holds that responsibility, who comes on and whether they come on for a legitimate purpose or not.

15 **COMMISSIONER:** You were also asked some questions about paragraphs 88 to 92 of your witness statement, which deal with this question of union paraphernalia, and you were again asked whether you'd provided reasons for your opposition to the practice you describe in those paragraphs, and you said you have got reasons and you're happy to provide them in spades and there are numerous
20 examples. What were you talking about there?

MR HADGKISS: Well, the whole thrust of that - what that code provision was, you're sending out a signal that if you're not a member of a union, you're not
25 welcome on this site, and in fact, even further, woe betide you if you're not a member of a union. And the wearing of memorabilia, even though they may not be a paid-up member, they have an association with a union or in the past they have made a subscription to a union and therefore "I can freely come on the site or do the work that's involved", and what this provision was trying to do is just stop that things like flags and things like that, this is a union - "We run this site. The
30 union run this site, not the builder." And sites - no ticket, no start, etcetera, on site. "We control this site. We decide who comes on and does the work, not the employer, not the builder."

MR McLEAN: Commissioner, just on that particular issue, in fairness to the
35 witness, it might be appropriate to bring up page 313 into page 314.

COMMISSIONER: Of his statement?

40 **MR McLEAN:** Of his statement, yes.

COMMISSIONER: Yes. What are you -

MR McLEAN: In particular, Commissioner, the first bullet point on page 314.

45 **COMMISSIONER:** Why don't you deal with the questions you want to ask?

MR McLEAN: Just to bring it to the attention of the witness of what the actual obligation under the Victorian code was, as it related to the affixing of union logos, mottos or indicia to company-supplied property.

5 **COMMISSIONER:** Is that the type of thing you were talking about, Mr Hadgkiss?

MR HADGKISS: Yes.

10 **COMMISSIONER:** Is there anything else that you want to say about this particular requirement to fly union flags or wear union paraphernalia?

MR HADGKISS: No, I think I've said sufficient. The flying of flags particularly sends a signal that "This is a union-run site and woe betide you if you're not a member of the union or you don't have the appropriate enterprise agreement."
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COMMISSIONER: You've used that phrase twice: woe betide you if you're not a member or don't have a union enterprise agreement. What do you mean by that?

20 **MR HADGKISS:** Well, that you won't be allowed on the site. "Don't think of doing business on this site, because you simply won't get it. We will not permit it."

COMMISSIONER: Anything arising from that, Mr McLean?
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MR McLEAN: Not from my end. Thank you.

MR O'GRADY: Not from mine, Commissioner.

30 **COMMISSIONER:** Thank you.

MR HADGKISS: Commissioner, if I may say one thing, sir. Learned counsel was quite disparaging about the reasons for my leaving the ABCC. I think it should be put on record that following my resignation, shortly thereafter, the
35 Governor-General saw fit to bestow upon me the Order of Australia, and I'd like to put that in perspective, because one of the - there were three items I was identified for, and one of them was my contribution to Australia's building and construction industry. So I'd like to put that in context of the rather forceful cross-examination that counsel gave me.
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COMMISSIONER: Why did you resign?

MR HADGKISS: Sorry?

45 **COMMISSIONER:** Why did you resign?

MR HADGKISS: Oh, I thought it was in the public interest, plus I'd had almost 40 years of public sector life, most of it in law enforcement, in - in policing. It was time to go.

5 **COMMISSIONER:** When you say it was in the public interest, what do you mean by that?

MR HADGKISS: Well, as I admitted, I made a mistake, I paid the consequences, and I - I felt it best for the agency that I leave.

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COMMISSIONER: Thank you very much for your evidence, Mr Hadgkiss. You're excused.

MR HADGKISS: Thank you.

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<THE WITNESS WAS RELEASED

COMMISSIONER: Mr McLean, there are - there is a need to do something promptly in relation to any recommendations this Commission might make in relation to the subject matter of the evidence that Mr Jenkinson and Mr Hadgkiss have given. The Productivity Commission, the Queensland Productivity Commission, recommended that there be a new procurement code that could provide a unified set of rules that applies to all contractors, practitioners and trades involved in the construction industry to ensure compliance, integrity and efficiency. That report was published some time in the second half of last year.

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In the response to that report, the government indicated that it supports in principle the development of a new whole-of-government code, including to make clear processes for notifying if unlawful industrial action is taken. The development of a new whole-of-government code and subsequent enforcement will be subject to the outcomes of this Commission of Inquiry. That response was made at a time when this inquiry was due to report at the end of July of this year. It's now due to report at the start of December next year. One of the things that would be of assistance to the Commission - have I got those dates wrong, have I?

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MR McLEAN: No, it is October 2025, Commissioner.

COMMISSIONER: October 2025 was when the Productivity Commission produced its report. One of the things that would be of assistance to the Commission would be to make whatever recommendations it does in relation to this issue sooner rather than later, and given we have finished the evidence of Mr Hadgkiss and Mr Jenkinson, the Commission would be grateful if you could provide your submissions as to what ought be done in relation to this issue in the next few weeks. I was thinking by the end of the month.

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You might not know this, but at the same time as these hearings in the Commission have taken place publicly, there have been other officials of the

Commission undertaking consultation with stakeholders in the industry, and that's been carried out, I think - I'm not involved in it, but it's been carried out in the last few weeks, maybe the last six weeks or so. And I think your client is due to meet with representatives of the Commission next week.

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MR O'GRADY: I'm not aware of that.

COMMISSIONER: I could have the dates wrong, but I think that's right, Mr O'Grady. I assume that the people who are engaged in that stakeholder engagement on behalf of the Commission of Inquiry will produce a report that will set out what the views of the relevant stakeholders are. I don't imagine those views would be uniform. But I assume that can be done fairly quickly, because I think your client is the last of the engagements. Again, I might not be right about this, Mr O'Grady, but I think that's right.

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MR O'GRADY: Yes. Well, again, I'm sorry, I can't assist the Commission.

COMMISSIONER: No. Now, assuming such a report is provided, that could be something that's appended to whatever submissions you make, Mr McLean. Your submissions will be based on the evidence that's been received in this hearing, including the evidence that's been received today. And I won't tell you how you should prepare your submissions, but if they're prepared by, say, the end of the month - and I think it would be useful to have whatever comes from the consultative process attached to your submissions - they could be circulated to the parties then, and time given to the parties and the public more generally to respond to whatever you say as to the need for any new code, and for - and as to the form of that code. What is that timing like for you, in terms of providing whatever views you have on these issues which the government has been waiting now for for about six months, by the end of this month?

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MR McLEAN: Would it be possible to have three weeks, Commissioner, to attend to that? And again, subject to that consultation being completed and the report being provided.

COMMISSIONER: Three weeks from -

MR McLEAN: Three weeks from today or tomorrow.

COMMISSIONER: That takes us, what, to the end of the week of 30 June. So is that 3 July?

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MR McLEAN: That would be right.

COMMISSIONER: So three weeks from tomorrow, you can prepare submissions on this topic. One thing that you might want to consider - it's up to you, obviously - is that Mr O'Grady's given you some idea of the issues his client has with some aspects of what Mr Jenkinson and Mr Hadgkiss say, particularly in

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relation to the link between the code and improvement in the productivity of the construction industry, and I must say, the point - one of the points that Mr O'Grady makes on that topic seems to be supported, at least in part, by the report of the Queensland Productivity Commission. He also makes a point about whether there should be any limitations upon the occupier's right to invite persons onto their own property. He makes some points about project agreements and workplace relations management plans and other topics that you heard him deal with Mr Hadgkiss in his cross-examination this afternoon.

10 It's up to you about how you prepare your submissions, but it's going to be more useful if you deal with some of those issues at least in some way so that Mr O'Grady can respond to them, otherwise there's not going to be a meeting of minds on that issue unless I give you the opportunity to reply to whatever Mr O'Grady says. I'm a bit reluctant to do that, because that's going to push things even further out. So I know you should never anticipate a defence, but you've heard what Mr O'Grady said, and I think you should be prepared to deal with some of what he said, if not fully, but at least in some way in the submissions that you make.

20 **MR McLEAN:** I understand. We obviously have an indication as to what the administrator's concerns is with some of the proposals that have been floated. We'll do what we can.

25 **COMMISSIONER:** Mr O'Grady, if Mr McLean can file and serve and publish his submissions by - in three weeks, 3 July, would you be able to deal with your response within three weeks, 24 July?

30 **MR O'GRADY:** We'll endeavour to do so, Commissioner. I understand the time limits that the Commission is under, and we will endeavour to do so, and we can obviously get that in train prior to receiving anything from Mr McLean in any event. One issue that I'm reminded of by Ms Hughes is we might want the Queensland Productivity Commission data, so we might make some inquiries as to whether we can get that, but if we can't, we might approach the Commission to see if there's any assistance we can receive in respect of obtaining that.

35 **COMMISSIONER:** I thought, on my read of it, that - it's up to you, obviously, to interrogate what the Productivity Commission says if you want to, but I had thought that the general proposition you wanted to make about the lack of correlation between the existence of the ABCC and its predecessor and productivity improvements in the construction industry was supported by the various - by the data that was used by the QBCC in their figures 2.9, 2.10, 40 2.11 - not so much 2.11, 2.12.

45 **MR O'GRADY:** And that may well be right, Commissioner. I'm just foreshadowing that - we'll seek to do what we can. I'm just foreshadowing that if there is a difficulty, we might seek to write to the solicitors for the Commission to see whether there can be assistance provided.

COMMISSIONER: The data that's there is very similar. It might even come from the same datasets as the data that you've included -

MR O'GRADY: Yes.

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COMMISSIONER: - at figures 5 through - at least 5 through 8. They're very - show a very similar story.

MR O'GRADY: Yes. Yes. Well, we think the data all points in a particular direction.

COMMISSIONER: Yes, and the only point I'm making is - it's up to you, but at the moment, unless it's challenged, we're bound to have regard to the findings of the Productivity Commission, which would include the basis upon which these findings were made.

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MR O'GRADY: Yes. I understand, Commissioner.

COMMISSIONER: But anyway, that's up to you.

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MR O'GRADY: Yes.

COMMISSIONER: Mr de Jersey, do you want to say anything about the proposal that I've just floated?

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MR DE JERSEY: Nothing, Commissioner, except that depending on what comes from Mr McLean, it may be that the state wishes to make some submissions. If we could have leave - the state could have leave by the 24th that the -

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COMMISSIONER: The same timeframe?

MR DE JERSEY: The same timeframe. Thank you.

COMMISSIONER: I imagine that what we will do is, in effect, invite all the parties who've been given leave to respond by 24 July, and if that - they just - because they're not here, they don't have the opportunity to comment on that, whether that timetable is appropriate for them, but if we set that timetable, they'll have that opportunity, as you will.

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MR DE JERSEY: Thank you, Commissioner.

COMMISSIONER: All right. Is there anything else I need to say on that topic, Mr McLean?

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MR McLEAN: No, not for my part, Commissioner.

COMMISSIONER: Is there anything else that anyone wishes to raise this afternoon? No? Very well. We'll adjourn till next Tuesday.

<THE HEARING ADJOURNED AT 3.27 PM

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