SUBMISSIONS BY THE ADMINISTRATOR OF THE CFMEU

ON THE RE-INTRODUCTION OF A CODE OF PRACTICE AND INDEPENDENT REGULATOR

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A. INTRODUCTION

1. Counsel Assisting asks the Commissioner to recommend a code of practice (**code**) for the Queensland construction industry, in the form of the draft guidelines produced with its further submissions dated 3 July 2026 (**Further Submissions**),[1] and a new body to enforce it.[2] Neither should be recommended. There is no proper evidentiary basis for either. If the Commissioner is nonetheless minded to recommend a code, the recommendation should be directed to the process by which a durable code is to be developed, rather than the adoption of the Draft Guidelines.

2. There has been a significant, and revealing, shift in Counsel Assisting's case. In April, Counsel Assisting opened its case for the re-introduction of a code and a regulator as one of cause and effect. The Commission was told that a code and a regulator "would drive improvements to safety and productivity on construction sites in Queensland",[3] and that the evidence suggested that effective codes, administered by an independent regulator, "consistently deliver improvements in productivity, protect freedom of association, and promote compliance with statutory industrial relations obligations".[4]

3. Almost nothing of that case survives. What has replaced it is the language of possibility. Counsel Assisting now submits that a code "has the potential to address" unproductive practices.[5] It "represents an opportunity to improve productivity and efficiency".[6] It "may also improve safety".[7] The high point of the case is now put in these terms: even if the Commissioner were to find that a code and a regulator represented "no more than an *opportunity*", that "potential alone" should move him to recommend them.[8] This is an abandonment of the causal case, and an invitation to recommend a significant regulatory intervention on the chance that it *might* work.

4. Counsel Assisting has also ceased to rely upon the other justifications. Safety, freedom of association, compliance with statutory industrial relations obligations and the deterrence of misconduct were advanced in April as justifications in their own right.[9] The

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1 Draft Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry (**Draft Guidelines)**, Annexure 2 to the Further Submissions.
2 Further Submissions at [2], [67].
3 Opening Submissions dated 14 April 2026 (Exhibit JMC-1) at [5] (**Opening Submissions**).
4 Opening Submissions at [20].
5 Further Submissions at [12(a)].
6 Further Submissions at [26].
7 Further Submissions at [31].
8 Further Submissions at [28].
9 Opening Submissions at [5], [20], [43], and [48].

Commission is now told that the recommendation "should not be dependent on those measures concurrently delivering other benefits".[10] Counsel Assisting's case therefore stands or falls upon productivity. These other justifications are addressed at paragraphs [114] to [127] below.

5. The reason for the change in Counsel Assisting's case is clear. Between April and July, the two witnesses upon whom the whole of Counsel Assisting's case rests, Mr Nigel Hadgkiss AM and Mr Wayne Jenkinson, were cross-examined by the Administrator.[11] Neither comes to the issue of a code and a regulator at arm's length. Mr Hadgkiss was Commissioner of the second Australian Building and Construction Commission (**ABCC**), and had earlier been Deputy Commissioner of the first, from 2005 to 2009.[12] Mr Jenkinson was State Director of the ABCC's Queensland operations, the first Director of the Building and Construction Compliance Branch (**BCCB**), and later Director of Operations for the ABCC's Northern Region.[13] Each was asked to assess a regime he had himself administered.

6. Both witnesses were relied upon for a causal proposition: that an active regulator administering an effective code results in improved productivity. Cross-examination, however, established that neither witness has the expertise to measure productivity, that neither had measured anything, and that neither had verified the material in the statement he signed. No witness with relevant expertise, and no expert evidence, was called in support of the proposition that a code improves productivity. Therefore, the only evidence advanced for the proposition that a code improves productivity was the impression of two men who administered the earlier regime and who each conceded, in terms, that it rested on experience and "gut" rather than analysis. Their evidence is addressed at paragraphs [24] to [34] below.

7. The Australian Bureau of Statistics (**ABS**) data, which was tendered by the Administrator, supports a different proposition.[14] It discloses no consistent relationship

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10 Further Submissions at [29].

11 Statement of Nigel Hadgkiss dated 8 April 2026 (Ex NCH-1) (**Hadgkiss Statement**); Statement of Wayne Jenkinson dated 8 April 2026 (**Jenkinson Statement**) (Exhibit WXJ-1). Each was cross-examined on Day 31 (11 June 2026).

12 Hadgkiss Statement at [2] and [4](b).

13 Jenkinson Statement at [7], [9], [10].

14 ABS, Estimates of Industry Multifactor Productivity, Australia (Catalogue No 5260.0.55.002, 6 February 2026), 2024-25 release: Tables 1 (Multifactor productivity), 6 (Labour productivity) and 7 (Capital productivity), construction industry (ANZSIC E) series (An extract of the data is in the bundle of documents provided by Administrator for purposes of cross-examining Mr Jenkinson and Mr Hadgkiss at p 10 (**Bundle**)). All index values referred to in these submissions are on the quality adjusted hours worked

between the regulatory regime and productivity in the construction industry. The Administrator does not contend that the data establishes that a code or a regulator reduced productivity. The contention is narrower: the case advanced by Counsel Assisting, that the proposed regime will improve productivity, is not made out. The Administrator's position is consistent with the Productivity Commission's finding that the quantitative results "do not provide credible evidence that the BIT/ABCC regime created a resurgence in aggregate construction productivity".[15] The ABS estimates are addressed at paragraphs [60] to [63] below.

8. Counsel Assisting's remaining support is the report of the Queensland Productivity Commission (**QPC**).[16] What the QPC found does not carry the case. Of the decline in productivity since 2018, the QPC said it appeared to result from parts of the industry still recovering from the pandemic, and from "strong demand, partly resulting from an unconstrained Queensland Government capital program and a series of policy choices related to procurement", and it apportioned nothing between them.[17] The $19.9 billion advanced by Counsel Assisting as the direct cost of the Best Practice Industry Conditions (**BPIC**) is the upper end of a prospective range, produced by an analysis the QPC described as "stylised" and "intended to be illustrative", which assumed that BPIC ran to 2029-30 with no pause and that its conditions were interpreted rigidly at every site.[18] The QPC Final Report is addressed at paragraphs [64] to [108] below.

9. There is a further and more fundamental difficulty. Counsel Assisting submits that a code "is ultimately no more than the Government using its purchasing power to drive positive changes in industry behaviour and standards".[19] The Administrator agrees. But that is also what BPIC was. The proposed code and BPIC are the same mechanism, put to different ends. The dispute is therefore not about the use of procurement power. It is about purpose. Whether a practice is unproductive is a judgment about what the practice is for, and Counsel Assisting nowhere considers what the BPIC conditions were, or what they were directed to achieving.

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basis, for which the reference year is 2023-24 (**ABS Estimates**).

15 Productivity Commission, 2014 Inquiry Report, vol 2 at p 543 (**PC 2014 Report**), set out at paragraph [42] below.

16 Queensland Productivity Commission, Opportunities to Improve Productivity of the Construction Industry (Final Report, October 2025) (**QPC Final Report**).

17 QPC Final Report at p 13.

18 QPC Final Report at pp 112 and 421 (the figure of $19.9 billion); at p 111 ("stylised", and the period 2024-25 to 2029-30 assuming no pause had occurred); and at p 407, Table C.1 ("intended to be illustrative", and the rigid interpretation assumed).

19 Further Submissions at [25].

10. It is important to be clear about what Counsel Assisting's Draft Guidelines propose. The misconduct with which this Commission has been concerned is already unlawful. A code adds nothing to its prohibition. What the Draft Guidelines add is a body of prohibitions upon matters which an employer and its employees may lawfully agree between themselves. A contractor which agreed to any of them would be in breach of the code and liable to exclusion from tendering for government work.[20] For example, a contractor and its employees could not agree upon a minimum number of workers on a site,[21] or upon any restriction on the engagement of casual labour, part-time labour or labour hire.[22] Nor could a union require that union logos, mottos or other signage be displayed at the worksite.[23] None of that is directed at misconduct. The prohibitions and the machinery by which they would be enforced are addressed at paragraphs [152] to [209] below.

11. Counsel Assisting's own witnesses gave evidence that culture was at the heart of the problem, and that a regime of the kind now proposed, a code enforced by a regulator armed with coercive powers, did not change it when one was in place. Counsel Assisting therefore proposes a regime which its own witnesses say failed. Commissioner Heydon, in his Final Report for the Royal Commission into Trade Union Governance and Corruption, concluded that "any targeted action to combat the culture of the CFMEU should focus on the officials of the union".[24] The course Commissioner Heydon identified has since been taken, under the federal scheme of administration. The officials have been removed. And the evidence shows that the culture has changed: since the Administrator was appointed in August 2024, no court has found that the CFMEU contravened an industrial law, against 1,163 contraventions found by courts in the five years before.[25] Counsel Assisting's case is forward-looking, and urges the Commissioner to act on the footing that the conduct continues. It does not. The achievements of the Administration are addressed at paragraphs [128] to [151] below.

12. If, contrary to that submission, the Commissioner is minded to recommend a code, the recommendation should be directed to the process by which a durable code is to be developed. Codes and regulators in this industry have been made and unmade with each

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20 Draft Guidelines at p 16, Part 10.

21 Draft Guidelines at p 7, Part 4(e)(i). The prohibitions in Part 4(e) apply where the Workplace Arrangement is "not otherwise required by a relevant Commonwealth or state law".

22 Draft Guidelines at pp 7-8, Part 4(e)(i) and (iv).

23 Draft Guidelines at p 15, Part 9.

24 Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5 at p 406 [38] (**TURC Final Report**).

25 Third Bi-Annual Report of the CFMEU Administrator dated 23 February 2026 at p 5 [18] (Exhibit COG-3) (**Third Bi-Annual Report**).

turn of the political cycle. An instrument which does not outlast the government that makes it cannot deliver the improvement over time which is said to justify it.

13. Finally, the Administrator has sought the data and modelling underlying the QPC Final Report. He first sought that material on 10 July 2026 and pressed the request on 17 July 2026. On 21 July 2026, the Commission confirmed that it would make inquiries of the QPC, and accepted that if the material were produced the Administrator may require additional time to respond.[26] It is understood that the Commission issued a notice to the QPC to produce the requested material by 4pm on Friday, 14 August 2026. As at the time of filing these submissions, it has not been provided to the Administrator. These submissions are filed in that context, and the Administrator reserves the right to supplement them.

B. THE APPROACH TO SATISFACTION

14. The Commission is not a court. It is not bound by the rules of evidence, and no party bears an onus of proof. The Commission's function nonetheless requires that facts be found, and a recommendation can rest only upon material capable of supporting the findings upon which it depends.

15. Two findings are necessary to the recommendations Counsel Assisting seeks. The first is that a code of practice and an independent regulator have the potential to improve productivity in the construction industry. The second is that the conduct with which this Commission has been concerned will recur, such as to warrant the construction of a permanent regime directed to it.

16. Each finding would ground consequences of a substantial order. Together they would support an instrument regulating lawful bargaining across an estimated $119 billion of construction work,[27] with exclusionary consequences which, on the evidence of Counsel Assisting's own witness, may be measured in hundreds of millions or billions of dollars.[28] Where a finding carries consequences of that kind, the material relied upon must be cogent: as Dixon J explained in *Briginshaw v Briginshaw*, "the gravity of the consequences flowing from a particular finding" is a consideration which must affect the

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26 Letters from Gordon Legal to Seyfarth Shaw dated 10, 17 and 22 July 2026; letters from Seyfarth Shaw to Gordon Legal dated 15 and 21 July 2026; email from the Commission to Gordon Legal dated 4 August 2026. This correspondence is included with these submissions as **Annexure A**.

27 Opening Submissions at [13].

28 Transcript Day 31, 11 June 2026 at p 3017 at LL 1-17 (**Day 31**).

answer to the question whether the finding should be made.[29] For the reasons which follow, the material does not permit either finding.

C. THE PRODUCTIVITY CASE IS NOT MADE OUT

C1. What Counsel Assisting now asserts

17. Counsel Assisting asserts that the evidence "disclosed three clear justifications" for the measures proposed, the first being that "such measures have historically served to improve productivity, reduce project costs, and ultimately deliver better value for money for taxpayers".[30] That is a proposition of fact about what codes and regulators have achieved. It is not, however, the proposition the Commissioner is ultimately asked to accept. By the conclusion of the same section, the submission is put no higher than that a code and regulator "has the potential to deliver improvements to productivity, and reduce inefficiencies".[31] In the following paragraph, it is put lower again: "no more than an *opportunity* to improve productivity and efficiencies".[32] The movement from the first formulation to the third is not a matter of expression. It reflects what the evidence was able to sustain.

18. So qualified, Counsel Assisting submits that this conclusion follows from four circumstances, namely that:

    (a) to date no other party has called a witness to contradict Messrs Hadgkiss and Jenkinson;

    (b) their conclusions "withstood robust cross-examination";

    (c) the QPC has recommended a code; and

    (d) material tendered by the Administrator acknowledged that arrangements of this kind likely had a positive effect on productivity.[33]

19. Not one of those four circumstances is evidence that a code improves productivity. Each of these circumstances are addressed in these submissions.

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29 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.
30 Further Submissions at [14(a)].
31 Further Submissions at [27].
32 Further Submissions at [28] (emphasis in the original).
33 Further Submissions at [27].

C2. The absence of contradiction is not evidence

20. The first circumstance is not a reason to accept the conclusion. Evidence does not become sufficient because no witness was called to contradict it. This is not adversarial litigation between parties, and Counsel Assisting is not a party with a case to win. Counsel Assisting proposes the recommendation, and it is for the Commissioner to be satisfied that there is a proper foundation for it. The absence of a contradictor is not, in that setting, a forensic advantage. If the proposition that a code improves productivity required testing, it was for Counsel Assisting to test it.

21. In any event, the Administrator did test it. As Counsel Assisting acknowledges, its witnesses were subject to "robust cross-examination". Cross-examination is the means by which opinion evidence is tested. The calling of a witness to express a contrary opinion would not have tested that evidence; it would have produced another opinion. Cross-examination established that the proposition that a code improves productivity was no more than the impression of two men who were not qualified to measure productivity, had measured nothing, and had not verified the statements they signed (see paragraphs [28]-[29] below).

22. The Administrator also tendered material bearing upon the question: the ABS estimates on construction industry productivity, the 2014 report of the Productivity Commission, the Independent Economics report upon which Counsel Assisting and Mr Hadgkiss relied, and the published criticism of that report. That material discloses no consistent relationship between the presence of a code and a regulator and productivity in the construction industry.

23. The Commissioner must be satisfied that there is a proper evidentiary basis for the recommendation (see paragraphs [14] to [16] above). On the evidence, he cannot be.

C3. The evidence of Messrs Hadgkiss and Jenkinson did not withstand cross-examination

24. Counsel Assisting submits that Messrs Hadgkiss and Jenkinson "withstood robust cross-examination".[34] That submission cannot be accepted. Cross-examination established that neither witness had the expertise to measure productivity, that neither had measured anything, and that neither had verified the analysis in the statement he signed. Whatever

[34] Further Submissions at [27(b)].

else may be said of that evidence, it did not withstand cross-examination.

25. An assessment of productivity of an empirical nature requires a degree of expertise in economics.[35] Neither witness had the expertise to measure productivity.[36] Both witnesses accepted that they are not economists.[37] Mr Jenkinson put it in terms: "as we agreed, I'm not an economist, and I haven't prepared productivity material, but my observations … leads me to believe that there is a correlation".[38] Asked to distinguish productivity, measured as output per hour worked, from working days lost to industrial action, he answered that "because I'm not an economist, I'm not going to try and split those hairs".[39]

26. Neither had measured anything. Mr Jenkinson had conducted no study of productivity in the Queensland construction industry, and Mr Hadgkiss had conducted none since his retirement.[40] Mr Jenkinson repeatedly accepted that his opinion rested upon his observations and his "gut", and not upon any analysis.[41] Asked by the Commissioner what he meant by "gut", he said he meant his experiences, observations and "gut feeling".[42] When it was put to him that nobody had done the work necessary to establish the true position, he answered: "Well, I haven't."[43]

27. Mr Hadgkiss' evidence was to the same effect. He was asked to explain the basis of propositions in his own statement. Of his claim that restricting casual and daily hire employment leaves contractors unable to meet fluctuating demand, he accepted that he had done "[n]o empirical analysis".[44] It was, he said, "fairly commonsense".[45] Of his claim that unlawful right of entry often leads to unlawful industrial action: "No, I haven't done the analysis. It's *just a* fact."[46]

28. Neither witness had verified significant parts of the statement he signed. Mr Hadgkiss relied upon a 2013 report by Independent Economics (**2013 IE Report**) to evidence productivity gains by the Building Industry Taskforce (**BIT**) and the ABCC (2002-2012)

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35 Day 31 at p 2947 LL 1-11 (Hadgkiss).
36 Day 31 at p 2947 LL 12-15 (Hadgkiss).
37 Day 31 at p 2922 LL 33-35 (Jenkinson) and at p 2946 LL 22-24 (Hadgkiss).
38 Day 31 at p 2923 at LL 16-19.
39 Day 31 at p 2924 at LL 17-18.
40 Day 31 at p 2922 LL 37-40 (Jenkinson) and at p 2946 LL 8-11 (Hadgkiss).
41 Day 31 at p 2925 LL 16-18; p 2927 LL 38-44; p 2929 LL 10-27; p 2933 LL 29-36.
42 Day 31 at p 2933 LL 38-45.
43 Day 31 at p 2929 at LL 24-27.
44 Day 31 at p 2997 LL 36-43.
45 Day 31 at p 2997 LL 45-47.
46 Day 31 at p 3009 LL 22-24 (emphasis added).

of 10 to 21 per cent.[47] That figure was adopted by Counsel Assisting.[48] Mr Hadgkiss conceded that he had not read the report and could not recall the basis for the figure.[49] Asked if someone had written it for him, he said: "My statement was prepared in - by myself and also solicitors, yes".[50] He nonetheless asserted that the figure was his "considered opinion", on the basis of "[f]eedback from the industry, from the stakeholders in the industry".[51] Nor was he familiar with the table of 25 cases annexed to his statement in support of his opinions on right of entry.[52] He did not know who had compiled it, and had not checked the cases before he signed his statement.[53]

29. Mr Jenkinson's statement stood on the same footing. He relied on ABS data on working days lost to industrial disputes to show a correlation between the reduction of disputation in Queensland and the ABCC's operation.[54] Counsel Assisting described that data in its opening as "one of the most compelling empirical data points",[55] and reproduced the graph from Mr Jenkinson's statement.[56] Mr Jenkinson had not undertaken the analysis himself: the table had been compiled by "[p]eople from the Commission".[57] He did not verify that it was accurate, and did not look at the raw data.[58]

30. That lawyers assist in the preparation of a witness statement is unremarkable. What matters is whether the witness has satisfied himself of what it says. Neither of these witnesses did. Their evidence was nonetheless advanced as deserving of significant weight, and it is the only evidence relied upon for the proposition that a code and regulator improve productivity.

31. Counsel Assisting advanced Mr Hadgkiss' evidence as being, "in substance, akin to his expert opinion", and invited the Commissioner to treat it accordingly. On that footing Counsel Assisting opposed the adjournment of the cross-examination.[59] The Commissioner's response is instructive: "How are we going to determine, in the absence

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47 Hadgkiss Statement at [26], fn 3.
48 Opening Submissions at [23].
49 Day 31 at p 2978 LL 27-35.
50 Day 31 at p 2978 LL 37-41.
51 Day 31 at p 2979 LL 15-16 and LL 31-32.
52 Annexure to NH-12 of the Hadgkiss Statement; Day 31 at p 3007 LL 5-10.
53 Day 31 at p 3008 at LL 8-16.
54 Jenkinson Statement at [33]-[34].
55 Opening Submissions at [21].
56 Opening Submissions at [22].
57 Day 31 at p 2927 LL 1-7.
58 Day 31 at p 2927 LL 11-15.
59 Day 16, 14 April 2026 at p 1439 L 45 – p 1440 L 18 (**Day 16**).

of cross-examination, who's right and who's wrong?"[60] Indeed, had cross-examination not been permitted, none of this would have emerged.

32. The weight that may be given to an opinion depends upon the reasoning by which it was reached, and upon the expertise of the person expressing it. An opinion that a code improves productivity, given by witnesses who disclaim the expertise to measure productivity and who have measured nothing, cannot establish that a code improves productivity.

33. To the extent their evidence is of their own experience, limited weight should be given to it. Neither witness comes to the question at arm's length. Both are former regulators assessing regimes they themselves administered, and Mr Jenkinson is now the Project Industrial Relations Manager of Fulton Hogan Construction Pty Ltd, which tenders for and performs government funded construction work.[61] Nor is the experience relied upon disclosed. Their work histories are set out at length in the evidence; what they observed within those roles is not. An opinion drawn from experience can be tested only if the experience is described. Here it is not. The industry participants whose feedback is said to support the conclusions are not identified, no project is named, and no measurement is produced.

34. The evidence of Mr Hadgkiss and Mr Jenkinson does not permit a finding that a code improves productivity, or even has the potential to improve productivity, in the construction industry.

C4. The material relied upon by Counsel Assisting does not support the figures advanced

C4.1. The Independent Economics estimate should be disregarded

35. In both written submissions and in his oral opening, Counsel Assisting relied on the 2013 IE Report to supply the only quantification of a productivity benefit before the Commission. Counsel Assisting put before this Commission, as a matter of fact, that the 2013 IE Report "concluded" that the BIT and the ABCC produced productivity gains "somewhere in the range of 10 to 21 per cent".[62] This is the report that Mr Hadgkiss relied upon but had not read (see paragraph [28] above). The Administrator has tendered

60 Day 16 at p 1441 LL 11-12.

61 Jenkinson Statement at [2]-[4].

62 Opening Submissions at [23], citing the 2013 IE Report at p vi (Bundle at p 76); Day 16 at p 1397 LL 1-5.

material which is very critical of the 2013 IE Report. Mr Hadgkiss was asked about that criticism during his cross-examination. Unsurprisingly, given that he had not read the Report, he was also not familiar with the criticisms of it.[63] That material is discussed below. It makes plain that the analysis of Independent Economics must be disregarded.

36. The 2013 IE Report does not conclude what Counsel Assisting says it concludes. The figures of 10 and 21.1 per cent are not a measurement of any single thing. They are the lowest and the highest of five numbers Independent Economics collected, which measure different things over different periods: labour productivity, multifactor productivity, total factor productivity, the cost penalty for commercial as against domestic construction, and case studies of individual projects.[64] The Report says of those numbers that they are "not directly comparable", and that the range depends "on the measure and the source of information that is used".[65]

37. The cost penalty for commercial as against domestic construction requires closer attention, because the figure Independent Economics used in its modelling is derived from it. It is not a measure of productivity, in the sense of output per hour worked. Independent Economics compared what it costs to perform six building tasks in the commercial sector with what it costs to perform the same tasks in the residential sector, in the same State, and asked whether the difference between the two has changed over time. The six tasks are concrete to a suspended slab, formwork to a suspended slab, a plasterboard wall, painting, a hollow core door and a carpentry wall.[66]

38. The figure modelled in the 2013 Report is not the product of that exercise as performed for that Report. It is 9.4 per cent, which is the figure adopted in the original 2007 report and carried into every update since.[67] The reason given for adopting it, rather than a figure derived from the exercise performed for the 2013 Report, was that Independent Economics "conservatively" used 9.4 "because this is the same scenario that has been modelled in previous updates of this report". The 9.4 figure is therefore carried over rather than derived, and it lies below the bottom of the range which that exercise produced.[68]

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63 Day 31 at p 2975 L 27 – p 2979 L 5.
64 2013 IE Report at p v (Bundle at p 75).
65 2013 IE Report at p vi (Bundle at p 76).
66 2013 IE Report at p 18 (Bundle at p 98).
67 2013 IE Report at p 32 (Bundle at p 112).
68 2013 IE Report at p vi (Bundle at p 76).

39. An issue with continuing to use 9.4 per cent for its modelling is that the data used for the 2007 report contained errors. Those errors were identified after academic researchers attempted to replicate its findings.[69] They were unable to do so; their results were "vastly different".[70] Independent Economics has subsequently described those errors as "anomalies", in its 2008 report, and as "an error in compiling a single data series", in its 2009 report.[71] Once the errors were corrected, the narrowing upon which the figure depends almost entirely disappeared. It showed, for example, that in 2007 the difference in cost was 0.9 percentage points higher than it had been in 2002.[72] That is the opposite of the proposition the figure is advanced to establish.

40. Independent Economics has never revised the figure, notwithstanding its acknowledgement of the error.[73]

41. Both the figure of 9.4 per cent and the reports in which it appears have been the subject of significant criticism. Professor Peetz, one of the academic researchers who attempted to replicate the calculation, has described the 9.4 per cent figure as having "no basis in fact" and the claims made in reliance upon it as "nonsense".[74] The Hon Murray Wilcox QC, in his 2009 report to the Commonwealth, concluded that the "2007 Econtech report is deeply flawed. It ought to be totally disregarded".[75]

42. In his oral opening, Counsel Assisting told the Commission that there were "two independent reports of note" to which he wished to draw the Commissioner's attention: the 2013 IE Report and the 2014 Report of the Productivity Commission.[76] What Counsel Assisting did not identify, however, was that the second of those reports rejected the quantitative case advanced by the first. In its 2014 Inquiry Report the Productivity Commission accepted that "there is no doubt that local productivity has been adversely affected by union (and associated employer) conduct on some building sites, and that the

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69 C Allan, A Dungan and D Peetz, '"Anomalies", Damned "Anomalies" and Statistics: Construction Industry Productivity in Australia' (2010) 52(1) *Journal of Industrial Relations* 61 at 66-67 (**Anomalies article**), being Attachment A to David Peetz, Submission No 8 to the Senate Standing References Committee on Education and Employment, *Inquiry into the Government's Approach to Re-establishing the Australian Building and Construction Commission* (January 2014) (**Peetz Submission**) (Bundle at pp 165-227).

70 Anomalies article at p 67 (Bundle at p 188).

71 Anomalies article at p 68 (Bundle at p 189).

72 Anomalies article at p 67 (Bundle at p 188).

73 Peetz Submission at pp 2-3 (Bundle at pp 166-167).

74 Peetz Submission at p 13 (Bundle at p 177).

75 Murray Wilcox QC, '*Transition to Fair Work Australia for the Building and Construction Industry*' (Report, 31 March 2009) at p 46 [5.48] (**Wilcox Report**) (Additional Bundle at p 23).

76 Day 16 at p 1396 L 46 – p 1397 L 14.

BIT/ABCC is likely to have improved outcomes".[77] It continued, immediately:

> "…when scrutinised meticulously, the quantitative results provided by IE or others do not provide credible evidence that the 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 that the regime did not have a large aggregate impact".[78]

43. Nor, in any event, is the 2013 IE Report independent analysis. While Econtech Pty Ltd (now trading as Independent Economics) is an "independent provider of economic modelling services",[79] the original 2007 report was commissioned by the ABCC, and updated for the ABCC in 2008. Master Builders Australia, which advocates the re-establishment of the ABCC, has commissioned every update since, including the 2013 report upon which Counsel Assisting relies.[80]

44. Finally, the 2013 IE Report does not assist Counsel Assisting in Queensland in any event. The price difference it records for Queensland was wider in 2009, after six years of the Taskforce and more than three years of the ABCC, than it had been in 2004, and it narrowed only from 2011, by which time the regulator had largely ceased to use the coercive power upon which the case for it depends.[81] The Productivity Commission made the same observation:

> "On the other hand, in Queensland, relative costs actually increased for the initial years of the ABCC, and then fell significantly from 2009. The Commission confirmed with Rawlinsons that there was no anomaly affecting the Queensland data. It would be misleading to assume that the Victorian evidence favours the IE conclusion, while ignoring the implications of the Queensland data (which suggest other factors have played a role)"[82]

C4.2. The 2014 Productivity Commission report does not assist

45. Counsel Assisting relies upon the Productivity Commission's 2014 Report as having

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77 PC 2014 Report, vol 2 at p 543 (Additional Bundle at p 8).
78 PC 2014 Report, vol 2 at p 543 (Additional Bundle at p 8).
79 2013 IE Report at imprint page (Bundle at p 68).
80 2013 IE Report at p i (Bundle at p 71).
81 2013 IE Report at p 19, Table 2.3 (Bundle at p 99).
82 PC 2014 Report, vol 2 at p 796 (Additional Bundle at p 10).

found that the BIT and the ABCC had some positive effect upon productivity.[83]

46. The Report canvassed three possibilities: that the arrangements made no difference to productivity; that they improved it, but not to a degree discoverable with any precision in the aggregate data for the industry; or that they markedly improved aggregate productivity across the industry. The Administrator accepts that the Commission preferred the second.[84] That preference was expressly qualified. The Commission found the evidence "not supportive of" the third, and that the third required something beyond the second which neither Master Builders Australia nor Independent Economics had supplied.[85]

47. That finding cannot carry the case Counsel Assisting builds upon it, which is a case about scale. The Commissioner is urged to act because there is an estimated $119 billion of government funded construction work in prospect, such that even a potential improvement is said to warrant the intervention. But the Commission's conclusion, set out at paragraph [42] above, was that the quantitative results did not provide credible evidence of a resurgence in aggregate construction productivity, and that the available data suggested no large aggregate impact.[86] An effect which could not be measured, and was not large, cannot support a recommendation justified by the size of the State's construction programme.

48. The Productivity Commission also warned against the very course Counsel Assisting now urges:

> "the use of unconvincing evidence of a large effect [of industrial relations changes] may undermine the credibility of proposals for IR policy change. It may also distract policymakers from other factors important for productivity in the construction industry — such as better procurement practices, innovation and diffusion of technologies."[87]

C4.3. Working days lost is not a measure of productivity

49. Counsel Assisting's opening described working days lost to industrial disputes as "one

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83 Further Submissions at [24], [27(d)].
84 PC 2014 Report, vol 2 at p 796 (Additional Bundle at p 10).
85 PC 2014 Report, vol 2 at pp 796-797 (Additional Bundle at pp 10-11).
86 Further Submissions at [13]; PC 2014 Report, vol 2 at pp 536 and 543 (Additional Bundle at pp 7 and 8).
87 PC 2014 Report, vol 2 at p 544.

of the most compelling empirical data points",[88] and relies upon two sets of figures: a graph and table in Mr Jenkinson's statement recording working days lost per 1,000 employees in Queensland for each year from 2015 to 2024, and federal figures in Mr Hadgkiss' statement for the construction industry of 11.8 days per 1,000 employees across 2013 to 2016, 4.7 across 2017 to 2022 and 6.8 across 2023 to 2025.[89]

50. Days lost to industrial disputes are not a measure of productivity. Productivity is, as Mr Jenkinson accepted, "really a measure of output per hour worked".[90] Neither series measures output and neither measures hours worked. That disposes of this material as evidence of productivity.

51. Mr Jenkinson's evidence was that the data "discloses that the ABCC's operations directly correlated with a significant reduction in the number of working days lost to industrial disputes in Queensland".[91] He did not compile the table or the graph upon which it is based, did not check that they were accurate and did not look at the raw data (see paragraph [29] above).

52. Taken as evidence of a reduction in industrial disputation, the data does not show what is claimed for it. It records working days lost across all industries and is not limited to the construction industry. Mr Jenkinson accepted that it "really says nothing about what was happening in the construction industry".[92] He also accepted that the ABCC was confined to the construction industry and that to the extent there was a reduction in working days lost in Queensland in industries other than construction, "the ABCC could have had no responsibility for that".[93]

53. The data he has relied on begins in 2015, the *Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry* (**2013 Guidelines**) having been repealed following the change of government in January 2015.[94] Counsel Assisting describes the period in which those Guidelines were in force as "(albeit brief)".[95] It was not merely brief. The series begins in the year in which those

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88 Opening Submissions at [21].

89 Opening Submissions at [21]-[22]; Jenkinson Statement at [33]-[34]; Hadgkiss Statement at [24], [25] and [27].

90 Day 31 at p 2923 LL 31-35.

91 Jenkinson Statement at [33].

92 Day 31 at p 2926 LL 16-19; and see p 2926 L 9, where Mr Jenkinson said "I also concede that that graph is not industry-specific".

93 Day 31 at p 2926 LL 21-30.

94 Opening Submissions at fn 18.

95 Opening Submissions at [22].

Guidelines came to an end, and it contains no year in which they were in operation throughout.

54. The ABCC was a national body. If, as Mr Jenkinson says, its operations directly correlated with a reduction in working days lost in Queensland, one would expect a similar trend in the other States. Mr Jenkinson accepted that proposition.[96] There was no such trend. For example, in New South Wales, on the same data, working days lost per 1,000 employees peaked in 2021 and 2022, while the ABCC was in operation.[97] Mr Jenkinson had not seen that data. His answer was that in his "experience" the reduction had occurred in every State. That was, however, he conceded, his "gut reaction".[98]

55. The period relied upon also coincided with the pandemic. Mr Jenkinson accepted that COVID "had a significant depressive effect on industrial activity", and that the lowest point in the series, 2020, "was in the heart of COVID".[99] His answer was that "the 2020 year is certainly a glitch".[100]

56. Mr Hadgkiss' federal figures were advanced to the same effect, and he too did not account for the pandemic. Asked why he had not done so, he answered: "I could have gone for any period, but I chose to highlight some abhorrent behaviour going on at that time."[101] When it was put to him that the pandemic had a suppressive effect on working days lost, and he was asked what that meant for his analysis, he said: "COVID was long after I left" and "I can't really comment on a period when I was not — I was not working".[102]

57. That answer is significant beyond the concession. Mr Hadgkiss was the Commissioner of the second ABCC from December 2016 until his resignation in September 2017. The six year period upon which his comparison depends, and which is said to demonstrate the effect of the *Commonwealth Code for the Tendering and Performance of Building Work 2016* (**2016 Code**) and of the ABCC, is a period in which he held office for nine

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96 Day 31 at p 2926 LL 36-40.

97 ABS, Industrial Disputes, Australia (Catalogue No 6321.0.55.001), Table 3b, New South Wales series. The extract at Exhibit A1 (Bundle at pp 11-15) is the Queensland series (A2540888C); the complete underlying data files were provided separately.

98 Day 31 at p 2927 LL 33-44.

99 Day 31 at p 2925 L 34 – p 2926 L 2.

100 Day 31 at p 2926 L 7.

101 Day 31 at p 2984 LL 1-2.

102 Day 31 at p 2984 LL 4-18.

months, and about which he told the Commission he was unable to comment.

58. Neither witness separated lawful industrial action from unlawful conduct. Mr Jenkinson had undertaken no analysis of the question. His evidence that the greater part of the days lost was attributable to unlawful action was, as he accepted, his "observations" and what he was "hearing from industry",[103] and when it was put to him that nobody had done the work necessary to establish the true position he answered: "Well, I haven't".[104] Mr Hadgkiss accepted that he did not differentiate between days lost through lawful industrial action and days lost for any other cause.[105] He did not do so notwithstanding his acceptance that lawful industrial action is something the *Fair Work Act 2009* (Cth) (**FW Act**) authorises and is a "baked-in feature of the system".[106] Both sets of figures therefore count, in substantial part, the lawful operation of the bargaining system, which neither a code nor a regulator could lawfully suppress.

59. The Queensland figures do not measure productivity, are not limited to the construction industry, contain no year in which the 2013Guidelines were in force, and cover a period which included the pandemic. The federal figures do not measure productivity either, and average across a six year period which includes the pandemic and about which the witness who selected it said he could not comment. Neither distinguishes lawful industrial action from unlawful conduct. This is not a compelling empirical data point, and neither set of figures can support the conclusion that a code and an independent regulator would improve productivity in the Queensland construction industry.

C5. The ABS estimates disclose no consistent relationship between the regulatory regime and productivity in the construction industry

60. The claim that a code and an independent regulator have historically improved productivity in the construction industry is not borne out by the estimates of industry productivity published by the ABS, which the Administrator tendered. Table 6 of the estimates records an index of labour productivity for the construction industry on a quality adjusted hours worked basis, with 2023-24 as the reference year (the construction labour productivity index).[107]

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103 Day 31 at p 2929 LL 10-18; and see p 2928 LL 37-42, where Mr Jenkinson said, of whether the ABS data distinguishes lawful from unlawful stoppages, "Actually, I don't know that".

104 Day 31 at p 2929 LL 24-27.

105 Day 31 at p 2984 LL 27-31.

106 Day 31 at p 2984 L 39 – p 2985 L 5.

107 ABS Estimates, Table 6.

61. The first ABCC was established in October 2005 and ceased to exist on 1 June 2012, when the Office of the Fair Work Building Industry Inspectorate was established in its place. In the period from 2005-06 to 2009-10 the index fell, from 106.74 to 104.87. Mr Hadgkiss accepted those figures, and accepted they disclosed a decrease in productivity during the time of the first ABCC. Invited to accept that the ABCC's work had not improved productivity, he described the proposition as "ridiculous". He advanced no figure to the contrary. His answer was that the data "does not reflect what the ABCC was doing", because "[p]roductivity is one thing. What it's not reflecting is unlawful conduct taking place on Australia's building and construction sites".[108]

62. The index did rise before the first ABCC was abolished, reaching 112.43 in 2011-12. Professor Peetz, whose analysis is in the Administrator's bundle, identifies 2009-10 as "the last year of major use of coercive powers",[109] and records that the reversal came only after the ABCC "had virtually ceased using its coercive powers".[110] He does not suggest that the disuse of those powers caused the improvement. His point is that the evidence "refutes the possibility that the use of compulsory interviews led to a huge increase in [multi-factorial productivity] in [the] construction industry",[111] and, more generally, that "it is not feasible to assert that major changes in productivity in the industry are due to regulatory regimes and in particular to the use of coercive authority".[112] The Administrator adopts that submission.

63. The comparison between the two eras of the ABCC makes the point. From the re-establishment of the ABCC on 2 December 2016, and while the 2016 Code was in force, the index fell from 107.37 in 2016-17 to 99.15 in 2022-23, declining in four of those six years. The index stands at 97.07 in 2024-25, below the 104.01 recorded in 2001-02, before the BIT, and multifactor productivity discloses the same pattern.[113] Across the two eras the index moved in opposite directions, and the only sustained rise came after the coercive powers had fallen into disuse. Upon the ABS estimates, the regime cannot be found to improve productivity. The Administrator does not contend that the data establishes that a code or a regulator increased or reduced productivity. The data does not support a causal claim in either direction.

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108 Day 31 at p 2957 LL 10-25, L 31 and LL 35-45.
109 Peetz Submission at p 9 (Bundle at p 173).
110 Peetz Submission at p 7 (Bundle at p 171).
111 Peetz Submission at p 9 (Bundle at p 173).
112 Peetz Submission at p 8 (Bundle at p 172).
113 ABS Estimates, Table 1.

C6. The QPC's findings do not bear the weight placed upon them

64. Counsel Assisting relies upon the QPC's Final Report as the foundation for the wastage it attributes to BPIC. The QPC has not published the modelling on which its findings are based. Therefore, no party can test it.

65. The analysis which follows is drawn from the QPC Final Report itself, from data published by the ABS, and from evidence already before the Commission. The Administrator has sought the data and modelling underlying the Report. That material has not been produced, and these submissions are made without it. The Administrator reserves the right to supplement them if and when it is provided (see paragraph [13] above). The submission is not that the Administrator has been unable to test the QPC's figures. It is that no party can, and that upon what the QPC has published, those figures do not bear the weight Counsel Assisting places upon them.

66. Paragraph 11 of the *Commissions of Inquiry Order (No. 2) 2025* requires the Commission to have regard to the QPC inquiry "to ensure there is no duplication of the economic focus of that inquiry". That is a direction against duplication. It is not a direction to adopt the QPC's economic conclusions, and Counsel Assisting itself acknowledges that parties were free to adduce evidence contrary to the QPC Final Report.[114]

67. The third of the four circumstances relied upon by Counsel Assisting is that the QPC "has recently recommended the re-introduction of a code of practice".[115] That is not what the QPC recommended, and the recommendations it did make are conditioned upon the outcome of this Inquiry. Recommendation 6 is that the Office of Industrial Relations, in consultation with stakeholders, update the Building and Construction Code of Practice 2000 or develop a new code, directed to three matters: that contractors preclude unnecessary productivity limiting clauses in their enterprise agreements, that they not include provisions passing those conditions through to subcontractors, and that right of entry provisions prevent the misuse of workplace health and safety procedures. The QPC adds that "consideration should be given to whether the Code should initially be provided as guidance", and that enforcement "could be introduced sometime in early 2027, when most building and construction EBAs are due for renegotiation, and the outcomes of the Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

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114 Further Submissions at fn 10.

115 Further Submissions at [27(c)], citing QPC Final Report at pp 16, 46 and 119-120.

are known".[116]

68. Recommendation 7 addresses enforcement. Any enforcement mechanism "should focus on low-cost options, such as use of 'negative licensing' where there is material evidence of non-compliance, rather than requiring all firms to demonstrate compliance through procurement, tendering or prequalification processes".[117] That is not the mechanism upon which the Draft Guidelines depend. It is its opposite.

69. As to a regulator, the QPC made no recommendation that one be established. Recommendation 9 is that, "[s]ubject to the findings and recommendations of the Wood Commission of Inquiry", the Queensland Government undertake a review of regulator powers "with a view to establishing, if required in the future, a construction industry specific regulator".[118] The reasoning is to the same effect: there "may be" a need for a regulatory response "if there is evidence that the actions adopted, guided by this report, are insufficient", and government "should review regulator powers post the Wood Commission of Inquiry".[119]

70. The QPC therefore contemplated that enforcement of any code would not begin until the outcome of this Inquiry was known, and made the prior question whether a regulator is required subject to the Commissioner's findings. The Administrator does not submit that the deferral disables the Commission from acting; the question is for the Commissioner. The submission is that a recommendation which expressly awaits the outcome of these proceedings can supply no independent support for the outcome Counsel Assisting seeks.

C6.1. The nine per cent is an estimate, not a measurement

71. In its opening submissions Counsel Assisting places two propositions side by side: that BPICs "entrenched excess and unproductive work practices on major construction projects", and that "productivity in the Queensland construction industry is down 9% since 2018", the latter sourced to page 5 of the QPC Final Report.[120] The figure is qualified in the Report in terms which the opening does not reproduce. What the QPC says is that "[w]hile structural changes in the industry make assessing recent productivity changes difficult, the data suggest productivity in the construction industry has fallen by

116 QPC Final Report at p 46 (Recommendation 6); and see p 16.
117 QPC Final Report at p 46 (Recommendation 7).
118 QPC Final Report at p 47 (Recommendation 9).
119 QPC Final Report at p 124.
120 Opening Submissions at [3].

around 9 per cent since 2018".[121] Whether the decline can be attributed to BPIC is addressed at paragraphs [77] to [97] below.

72. The QPC quantified what it called "measured productivity",[122] which it defines as gross value added divided by hours worked; or more simply the value of what the industry produced, for each hour worked. It is not a measure of how hard anyone works, or of how fast anything gets built. Nor does it identify what moves it. The ratio will change with the mix of work undertaken, the volume of it, the amount of plant and machinery in use and the level of investment behind it, and the figure distinguishes none of these. It records a result. It does not explain one.

73. The ABS does not publish labour productivity figures for the construction industry by state. The nine per cent figure is an estimate built by the QPC on data that has not been published. The QPC records four sources of ABS data for its measured productivity: the State Accounts (2024a), the Labour Account (2025h), the monthly labour force publication (2025j), and the Estimates of Industry Multifactor Productivity (2025f).[123] In terms of method, the QPC records only that: "Queensland's construction inputs are calculated by allotting labour account hours worked using labour force data".[124]

74. The ABS does not publish hours worked in construction in each State and Territory. It records them for Australia as a whole, in its Labour Account, and notes that building a State and Territory dimension into that account is "not yet feasible, given the limitations of both resourcing and data sources".[125] Any State figure is therefore arrived at by dividing up a national total.

75. The difficulty is not that the hours had to be apportioned. It is that the result turns on how the division is made. Allot Queensland slightly more hours and productivity appears worse; slightly fewer and it appears better. The QPC has not disclosed how it divided them, and the working has not been produced. Further, the ABS publishes its own estimates of hours worked by industry for each State and Territory. Those estimates cover every year from 2011-12, and were published in September 2024 and again in September

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121 QPC Final Report at p 84.

122 QPC Final Report at p 82, fn 6.

123 QPC Final Report at p 82.

124 QPC Final Report at p 82.

125 ABS, *Modelled state and territory industry estimates: jobs and hours worked* (5 September 2025), 'Background', https://www.abs.gov.au/articles/modelled-state-and-territory-industry-estimates-jobs-and-hours-worked (accessed 14 August 2026).

2025, before the Final Report. The QPC did not use them and did not say why.

76. That does not make the figure wrong. It makes it a figure which cannot simply be adopted, because it is the product of a method which has not been disclosed.

C6.2. The QPC itself does not attribute the decline to BPIC

77. The real issue, however, is whether the decline can be attributed to BPIC. Upon the QPC's own analysis, it cannot.

78. The QPC attributes the decline since 2018 to two matters: parts of the industry "still recovering from the COVID era, where material shortages and rising input costs put significant strain on financial reserves"; and "strong demand, partly resulting from an unconstrained Queensland Government capital program and a series of policy choices related to procurement".[126] BPIC is at most part of the procurement limb of the second. The QPC does not apportion the decline between them.

79. The QPC puts the position no higher than that Queensland Government procurement (including BPIC) "appears" to have constrained productivity,[127] and that the evidence, "including stakeholder experience", "suggests the policy has had a significant negative impact on productivity".[128] Those observations rest upon feedback from stakeholders rather than upon measurement.[129] The QPC does not attribute any part of the nine per cent to BPIC, and its own key points record that "it is difficult to definitively attribute the cause of this decline".[130] The measurement does not distinguish Queensland from jurisdictions in which BPIC never applied.

80. The Administrator has calculated "measured productivity" for each State and Territory from two published sources:

    (a) Australian National Accounts: State Accounts, 2024-25 financial year (ABS 5220) supplies the value of the work.

    (b) Modelled state and territory jobs and hours worked estimates by industry (ABS

126 QPC Final Report at p 13.
127 QPC Final Report at pp 91-92.
128 QPC Final Report at p 13.
129 QPC Final Report at p 92.
130 QPC Final Report at p 104.

6150.0.55.003) supplies the hours, and begins in 2011-12.[131]

81. This does not purport to be a reproduction of the QPC's series, which cannot be reproduced because its method has not been disclosed. It is the same measure calculated using the ABS's published allocation of hours by State. The Administrator does not contend that apportionment is illegitimate. The contention is that an apportionment which cannot be inspected cannot be adopted, and that where the ABS has published its own the QPC neither used it nor explained why.

Table 1: Construction gross value added per hour worked, States and Territories

Year ended 30 June	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
2011-12	80.40	78.22	97.14	145.06	70.99	55.77	84.98	106.50
2012-13	85.51	82.56	97.53	150.05	74.06	65.16	148.20	102.75
2013-14	89.96	81.81	108.90	154.05	81.10	71.25	120.44	114.37
2014-15	82.25	85.23	95.61	135.09	84.76	80.50	88.79	107.00
2015-16	85.44	78.10	89.00	128.44	81.90	64.79	103.12	111.35
2016-17	89.44	84.76	83.42	112.55	76.98	57.66	132.60	123.01
2017-18	90.40	83.99	88.04	110.64	85.51	64.49	147.95	117.88
2018-19	89.23	86.93	81.74	96.01	74.64	75.76	97.08	109.30
2019-20	91.23	88.36	76.59	93.15	78.25	87.30	85.00	98.56
2020-21	88.86	87.06	81.46	98.96	77.22	83.08	90.15	122.34
2021-22	95.97	79.24	82.03	91.08	72.52	70.37	106.30	142.13
2022-23	82.10	77.40	81.16	99.03	79.29	76.41	110.00	130.33
2023-24	86.65	82.69	80.49	99.76	85.06	73.99	112.94	125.86

Dollars per hour, years ended 30 June. 2011-12 is the first year for which hours worked by industry are published at the State level. 2024-25 is omitted as the data only goes to the March 2025 quarter. Sources: ABS 5220; ABS 6150.0.55.003.

82. The QPC measured from the local peak in the series (2017-18), and does not explain why. Its own Figure 2.9 shows that year as a local peak between two lower years. On the

[131] The derivation, including the series identifiers for each jurisdiction and both underlying series, is at **Annexure B**. That series begins in the September quarter 2011, and quarterly hours have been summed to years ended 30 June, so the first complete year is 2011-12.

same series, and taking the comparison to 2023-24, the change is:

(a) from 2016-17, a fall of 3.5 per cent;

(b) from 2018-19, a fall of 1.5 per cent;

(c) from 2019-20, an increase of 5.1 per cent.

83. Only 2017-18 produces a figure approaching nine per cent.

84. The chronology contradicts the attribution. BPIC first applied in 2018, and then only to parts of a single project, the Townsville Stadium.[132] It was extended over time to Queensland Government projects of $100 million and above, and it was suspended on 14 November 2024.

85. Measured productivity fell by 13.0 per cent between 2017-18 and 2019-20, which is a fall larger than the whole of the decline upon which Counsel Assisting relies. It then rose by 5.1 per cent to 2023-24, and across the years in which BPIC was required it was stable, at $81.46, $82.03, $81.16 and $80.49 per hour in 2020-21, 2021-22, 2022-23 and 2023-24 respectively.

86. In Queensland the figure was $97.14 in 2011-12, peaked at $108.90 in 2013-14, and had fallen to $83.42 by 2016-17, a fall of 23 per cent from that peak, before BPIC existed. It stood at $80.49 in 2023-24. That decline began with the end of the resources construction cycle and well before BPIC was introduced. Table 2 states the change for each jurisdiction from 2017-18, the QPC's base year.

Table 2: Change in construction gross value added per hour worked from 2017-18

Jurisdiction	Change from 2017-18 to 2022-23	Change from 2017-18 to 2023-24	BPIC applied
Northern Territory	−25.7%	−23.7%	No
Western Australia	−10.5%	−9.8%	No
New South Wales	−9.2%	−4.1%	No
Victoria	−7.8%	−1.5%	No
Queensland	−7.8%	−8.6%	Yes

[132] QPC Final Report at p 107.

Jurisdiction	Change from 2017-18 to 2022-23	Change from 2017-18 to 2023-24	BPIC applied
South Australia	−7.3%	−0.5%	No
Australian Capital Territory	+10.6%	+6.8%	No
Tasmania	+18.5%	+14.7%	No

Calculated from Table 1. "BPIC applied" refers to the Queensland BPIC, and is not a statement that no other jurisdiction imposed procurement conditions of any kind.

87. The decline is also not unique to Queensland. Labour productivity fell in six of the eight jurisdictions. It fell further in Western Australia and the Northern Territory, where BPIC never applied.

88. From 2017-18 to 2022-23, the decline was greater in three jurisdictions in which BPIC never applied (Northern Territory, Western Australia and New South Wales), and by the same extent in Victoria.

89. From 2017-18 to 2023-24, the decline was greater in the Northern Territory and Western Australia. The Administrator acknowledges that upon the later comparison Queensland's fall was greater than those recorded in New South Wales, Victoria and South Australia. The point is that falls of this order, and larger, occurred over the same years and upon the same measure in jurisdictions in which the instrument said to have caused Queensland's fall did not operate at all.

90. There is a further difficulty, of scale. BPIC applied to Queensland Government construction projects valued at $100 million or more, and to declared projects. The figure of nine per cent measures the whole of the Queensland construction industry, including all residential building, all private commercial building and all engineering construction. For a policy of that reach to have moved the industry wide measure by nine per cent, its effect upon the projects it covered would have to have been extraordinary.

91. The QPC's best explanation is that BPIC-like conditions may have spread beyond government projects through enterprise agreements. It does not put that forward as a finding. In Chapter 4 the proposition is prefaced "[a]ccording to stakeholders", and in the 'Part A key points' it is reduced to "some" BPIC style conditions having "likely" spread. In Appendix C, where the costs are calculated, the QPC states that "the extent to which BPICs creates pressure on other building sites to adopt 'BPICs-like' conditions is

unclear", and offers a different explanation: "[d]ue to tightness in the labour market, sites competing for labour akin to those BPICs projects face pressure to lift wages and offer more worker-favourable conditions."[133]

C6.3. The QPC tested only the mix of work, and nothing else

92. Some construction work produces higher value per hour than other construction work. As part of its analysis the QPC therefore asked: how much of the decline had been caused by the mix of work changing?

93. It estimated what the figure would have been if the mix had been the only thing that changed, and compared that against the outcome.[134] Until about 2018 the two track each other closely, so for those years the changing mix explains most of the movement. The QPC attributes that movement "almost all" to "the rapid growth (and subsequent decline) in heavy and civil engineering activity associated with the LNG investment boom".[135] After 2018 the two series diverge, and the QPC concludes that the decline since then "cannot be explained by compositional change".[136]

94. That conclusion answers only the question the QPC asked. The difference between the two lines is not a measure of the effect of BPIC, or of government policy, or of anything else in particular. It is a measure of everything which is not the mix of work: how much work there was, what materials cost, the pandemic, how much firms invested in plant and machinery, and any inaccuracy in the figure itself. The QPC also observes that the causes of weak construction productivity "have not been well researched and there remains some conjecture about the factors behind it",[137] and "understanding trends in construction productivity is challenging".[138]

95. In particular, the QPC did not test whether the quantity of work explains any part of the movement. Between 2017-18 and 2019-20 the volume of construction work done in Queensland fell by around 10 per cent and measured productivity fell by 13 per cent. Between 2019-20 and 2021-22 the volume recovered, and the measure recovered with it. After 2021-22 the volume continued to rise while productivity did not. The QPC has

133 QPC Final Report at pp 107 and 104; and at p 406.
134 QPC Final Report at p 84, figure 2.11.
135 QPC Final Report at p 83.
136 QPC Final Report at p 83.
137 QPC Final Report at p 87.
138 QPC Final Report at p 83.

examined or explained none of this.

96. The analysis by the QPC does not establish that BPIC caused the decline in productivity. It is an estimate produced by a method which has not been disclosed. It is measured from a base year the QPC does not justify and which its own figure shows to be a local peak. The greater part of the fall occurred before BPIC was applied to any significant number of projects, and the measure was stable across the years in which BPIC was required. Falls of the same order occurred in jurisdictions where BPIC never applied. The QPC has tested the movement for a change in the type of work but not for a change in its quantity. And the QPC's own attribution is to three factors, of which BPIC is at most part of one, and between which it does not apportion.

97. The QPC did not find that BPIC caused this decline. A code cannot cure a cause that has not been identified.

C6.4. The QPC's modelling was prospective and illustrative

98. Counsel Assisting's submissions do not accurately state what the QPC did. Counsel Assisting submits that the QPC "modelled the cost impact of BPICs", and that it estimated the direct costs to the Queensland community "have been" as high as $19.9 billion, with further indirect costs of between $4.9 billion and $18 billion.[139] It then submits, separately, that the QPC "has *also warned* of the *potential* future net impacts of BPICs", being a net economic cost of between $5.7 billion and $20.6 billion.[140] The submissions accordingly present the QPC as having modelled both what BPIC has cost and what it may cost hereafter.

99. The QPC conducted a single prospective exercise. Its stated object was to "provide an indication of the potential impacts of BPICs".[141] BPIC was suspended on 14 November 2024. For the purposes of its analysis, the QPC assumed that BPIC continued to apply from 2024-25 to 2029-30, that is, for a further six years.[142] It modelled two scenarios: that BPIC is applied flexibly to sites over that period ("the low scenario"), and that it is applied rigidly ("the high scenario").[143] It was, as the QPC acknowledges, a "stylised"

139 Further Submissions at [7].
140 Further Submissions at [7].
141 QPC Final Report at p 404.
142 QPC Final Report at p 404.
143 QPC Final Report at pp 406-407.

analysis,[144] and the results are "intended to be illustrative" only.[145]

100. The figure of $19.9 billion is not an estimate of the direct costs to the Queensland community of BPIC. It is an estimate of the potential cost of BPIC in the high scenario, that is, upon the assumption that BPIC is applied rigidly to all sites for six years.[146] It was produced by setting every assumption to its least favourable value at once: the largest wage premium, the strictest reading of the weather provisions, the greatest number of stoppages and the longest delays.

101. Nor is it a finding. It is one end of a range: the same exercise run upon the assumptions for the low scenario more than halves the figure.[147] The QPC does not say where within that range the answer lies, or that either end is the more likely. Counsel Assisting quotes only the upper end.[148] Nor did the QPC assess individual projects: the impacts were assumed to play out uniformly across all sites.

C6.5. The cost-benefit modelling cannot be tested

102. Counsel Assisting also relies upon the costs the QPC attributed to BPIC. The difficulty is that the QPC has not published the modelling on which its findings are based. Rather, what the QPC has done is describe the modelling. That description is Appendix C to both the interim and final reports. Appendix C sets out the assumptions going into the modelling and the answers coming out. It does not set out the calculations between them.

103. The Report acknowledges "significant uncertainty around many of the parameters used in the modelling".[149] That uncertainty is most acute in the parameter which matters most. The QPC assumed that wages on BPIC sites are between 30 and 50 per cent above "the industry standard".[150] That assumption produces the largest single element of the modelled increase in project costs: 7.0 of the 10.1 per cent modelled for the low scenario, and 11.6 of the 24.6 per cent modelled for the high.[151] The Report does not, however, apply a single comparator to it. Table C.14 describes the same component as "[h]igher than award wages", and the case study which generates the assumption measures BPIC

144 QPC Final Report at p 111.
145 QPC Final Report at p 407.
146 QPC Final Report at p 407, Table C.1.
147 QPC Final Report at p 112.
148 Further Submissions at [7].
149 QPC Final Report at p 407.
150 QPC Final Report at p 411.
151 QPC Final Report at p 420, Table C.14; and see p 421, Table C.16.

rates against award rates.[152] The QPC accepts that "[i]ndustry wages are likely to be significantly higher than award wages", that there is "no standard measure for industry wage rates that provide a perfectly suitable comparison", and that the contention that industry rates are "around 40 per cent above the award minimum rates of pay" is "consistent with ABS employee earning data".[153] If the modelled premium was taken against the award, the instrument is charged with a gap which the industry pays in any event.

104. A further issue is that the QPC turned wages into a project cost by assuming wages make up 23 per cent of construction project costs.[154] The labour share of 23 per cent, however, is the average across the whole construction industry, including house building. Different types of work have very different ratios of labour, material and equipment. The large projects to which BPIC applies are not the average of that distribution. The ratio for them should have been specified separately.

105. The QPC's core modelled results are set out in its Table 4.1 (p 112):

Table 4.1 Estimated net impacts, Queensland, $ million, NPV

	Low scenario	High scenario
Construction workers	5,506	11,104
Taxpayers	-8,177	-19,856
Infrastructure users	-725	-2,901
Landlords	1,416	4,863
Existing homeowners	476	2,069
Renters and first home buyers	-2,760	-10,727
Businesses	-1,435	-5,140
Total	**-5,698**	**-20,588**

Source: QPC.

106. The QPC tested its wage assumption once, by running the model on the basis that wages on BPIC sites were no higher than elsewhere. It concluded that "even if wages were assumed to be unaltered by BPICs, significant net economic costs would still be imposed on the community", and that these "net costs are only slightly lower than the core modelled scenarios".[155] The results of that run are set out in its Table 4.2 (p 113):

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152 QPC Final Report at p 410, Table C.2; and p 420, Table C.14.

153 QPC Final Report at p 410.

154 The assumption is taken from the Victoria University Regional Model for Queensland.

155 QPC Final Report at p 113.

Table 4.2 Revised estimated net impacts, no wage differences, Queensland, $ million, NPV

	Low scenario	High scenario
Construction workers	1,207	3,939
Taxpayers	-2,588	-10,542
Infrastructure users	-725	-2,901
Landlords	1,416	4,863
Existing homeowners	476	2,069
Renters and first home buyers	-2,760	-10,727
Businesses	-1,435	-5,140
Total	**-4,409**	**-18,438**

Source: QPC.

107. It is noteworthy that when the wage assumption is removed, only two groups changed: the benefit to construction workers fell from $11,104 million to $3,939 million, and the cost to taxpayers fell from $19,856 million to $10,542 million. The other five did not change at all. Infrastructure users, landlords, existing homeowners, renters and first home buyers, and businesses are identical to the dollar in Table 4.1 and Table 4.2. The qualification the QPC attaches to that run, that the net costs are "only slightly lower", holds at the level of the community as a whole. The cost to taxpayers, which is the figure Counsel Assisting deploys, falls by almost half.[156]

108. The chain of reasoning by which the QPC arrives at the housing figures is that BPIC makes projects cost more, meaning fewer homes get built, meaning there are fewer houses, so rent goes up and renters are worse off. On that reasoning, if the wage element is removed, project costs are lower, meaning there will be less of a negative impact on renters. The same logic applies to first home buyers. However, none of those figures moves by a dollar. Whether there is another explanation cannot be determined, because the model has not been published. Until it is, they cannot safely be adopted.

C7. Possibility is not a sufficient foundation

109. Counsel Assisting's ultimate submission is that, even if a code and a regulator represented "no more than an *opportunity* to improve productivity and efficiencies", that "potential alone should move the Commissioner to recommend the re-introduction of the proposed measures".[157] That submission should not be accepted, for four reasons.

110. First, on Mr Hadgkiss' own evidence the proposed instrument is significant, with exclusionary consequences measured in hundreds of millions or even billions of

156 QPC Final Report at pp 112-113, Tables 4.1 and 4.2.

157 Further Submissions at [28] (emphasis in the original).

dollars.[158] It requires a rational foundation for satisfaction that the instrument will, or is at least likely to, achieve its purpose. Counsel Assisting's reformulation does not reduce what the recommendation requires. The proposition to be found has moved from "consistently deliver" to "has the potential", but the instrument it would ground, and the consequences that instrument carries, have not moved at all. The cogency required is fixed by what turns upon the finding, not by the modesty of the language in which the finding is expressed (see paragraphs [14] to [16] above). A bare possibility supplies no foundation for an instrument of this reach. Everything has "potential". A case expressed at that level of generality is incapable of being tested, and would justify any intervention whatsoever.

111. Second, the scale upon which Counsel Assisting relies cuts the other way. The estimated $119 billion of government funded construction work is deployed as the reason why even a possibility of improvement warrants intervention.[159] But scale magnifies the cost of error as surely as it magnifies the benefit of success. To apply an untested instrument, carrying untested compliance burdens, to the whole of that programme upon the strength of a possibility is not prudence.

112. Third, the possibility is not, in any event, established. The only measurements in evidence disclose no improvement in productivity in any period in which a code and a regulator have operated. A possibility which no measurement before the Commission supports is not a foundation for a recommendation of this kind.

113. Finally, a recommendation made upon possibility alone carries an opportunity cost. As the Productivity Commission warned, reliance upon unconvincing evidence of large industrial relations effects may distract policymakers from the factors that do bear upon construction productivity (see paragraph [48] above).

D. SAFETY IS NO LONGER PRESSED, AND IS NOT MADE OUT

114. In its opening submissions, Counsel Assisting advanced safety as a benefit which a code and a regulator would deliver: a code and a regulator "would drive improvements to safety and productivity".[160] That is no longer the case advanced. Counsel Assisting says only that it "would be reasonably open" for the Commissioner to conclude that a code

158 Day 31 at p 3017 at LL 1-17.
159 Further Submissions at [13] and [28].
160 Opening Submissions at [5].

"may also improve safety",[161] and that the recommendation "should not be dependent on those measures concurrently delivering other benefits".[162]

115. Nor could the justification be maintained. Mr Hadgkiss accepted that he had not done any "empirical assessment of safety issues in the construction industry".[163] He accepted that:

    (a) there was "no basis for any assertion that the ABCC had improved safety so far as it concerned workplace deaths during its first iteration".[164]

    (b) the claims data disclosed no significant dip while the ABCC or the Fair Work Building Industry Inspectorate operated, and that it disclosed an ongoing trend of gradual increase.[165]

116. He gave each of those answers about the construction industry as a whole. His point was that the figures include the housing sector, which he described as "notorious for safety issues", whereas the ABCC's concern was the commercial sector, "predominantly the CBD areas of capitals".[166] That does not assist him. He accepted that the housing sector was in the figures to the same extent both before and after the ABCC.[167] A constant cannot explain a change.

117. His remaining answer was that safety "has a multitude of causal factors", and that fatalities "are due to a multitude of reasons".[168] That is the same answer given upon productivity, and it cuts the same way. If safety outcomes are the product of many causes, that is a reason why a code cannot be shown to have improved them. It is not a reason to conclude that it did.

118. Counsel Assisting says that a code "that preserves the integrity of right of entry laws can limit the frequency with which union representatives enter and move around a construction site without proper justification".[169] The sentence which follows says it is

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161 Further Submissions at [31].

162 Further Submissions at [29].

163 Day 31 at p 2988 LL 7-13. And see p 2985 LL 20-22.

164 Day 31 at p 2962 LL 1-6; and see p 2963 L 43 to p 2964 L 12.

165 Day 31 at p 2987 LL 38-41 and p 2988 LL 1-5. The underlying data is Safe Work Australia, *National Dataset for Compensation Based Statistics – detailed data file, 2023-24* (1 October 2025), Tables 1.1, 1.2 and 1.3: Exhibit A1, document 8 (Bundle at pp 16-17).

166 Day 31 at p 2987 LL 12-20 and LL 31-47; and p 2988 LL 1-5.

167 Day 31 at p 2987 LL 21-25.

168 Day 31 at p 2962 LL 11-12 and p 2964 L 6.

169 Further Submissions at [31].

"axiomatic" that reducing the frequency with which "non-essential personnel" move around a site reduces preventable accidents. The union representative of the first sentence has become the non-essential person of the second. An entry permit holder attending upon a suspected contravention of the safety legislation, or a health and safety representative, is not non-essential personnel.

119. The premise assumes what it seeks to prove. It is not evidence, and cannot be reconciled with the concessions of Counsel Assisting's own witness. Mr Hadgkiss accepted that minimum manning arrangements must be considered from perspectives other than cost, including safety, emergency response and the supervision of hazards of high risk, and that consultation about resourcing surfaces matters he described as "essential".[170] A submission that fewer people upon site is necessarily safer cannot stand with that evidence.

120. Nor is the proposition self-evident, and Counsel Assisting offers nothing in support of it. The evidence before the Commission which bears upon the question is an interim evaluation, prepared by Dr Underhill of Deakin University with colleagues at the University of New South Wales and Cardiff University, of the role of CFMEU health and safety representatives in the Victorian construction industry.[171] It analysed 446 Entry Reports completed by WorkSafe Victoria inspectors across 94 matched sites in the central business district and greater metropolitan region of Melbourne — that is, in the commercial sector to which Mr Hadgkiss says the aggregate figures do not speak. It found that high hazard risks were less prevalent on sites with CFMEU health and safety representatives than on sites with representatives nominated by management or with none; that injuries on those sites were less severe; and that those sites were more likely to have undertaken appropriate risk assessments.

121. The Administrator does not submit that the evaluation establishes a causal effect, and acknowledges the limitations its authors identify. The submission is that it is drawn from the safety regulator's own records, that it concerns the sector said to matter, and that it tells against the premise of Counsel Assisting's safety case. It was put to Mr Hadgkiss, who had never heard of it.[172]

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170 Day 31 at p 2992 LL 12-31 and p 2993 LL 6-11; and at p 3001 LL 21-36.

171 Elsa Underhill, Michael Quinlan, David Walters and Emma Wadsworth, *Evaluating the Role of CFMEU OHS Representatives in Improving Occupational Health and Safety Outcomes in the Victorian Construction Industry* (Interim Report, Deakin University, May 2016): Exhibit A1, document 14 (Bundle at pp 228-267).

172 Day 31 at p 2988 LL 15-23.

122. Counsel Assisting says there is "certainly not a proper foundation for a finding … that an industry code would somehow increase the number of deaths on construction sites".[173] The Administrator does not invite that finding, and did not put his case that way. His submission is that no improvement has been demonstrated, which is sufficient to dispose of a justification framed as an improvement.

123. In identified respects the instrument proposed would impede the exercise of safety rights rather than advance safety. The prohibition upon relaxing right of entry is extended to entry under the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), while Part 2.6 of the Draft Guidelines protects only against inconsistency with the FW Act.174 Part 7.1 would require the reporting of lost time through "any work health and safety matter, or purported work health and safety matter", which treats the exercise of a safety right as a reportable event.[175] And the prohibitions extend to minimum manning, to the substitution of rostered days off and to consultation about resourcing. Each of these, upon the evidence of Counsel Assisting's own witness, may serve safety.

124. That approach does not sit with a view expressed in the Commission's own consultation, that safety should be left in legislation and approved codes, with the power to shut a site confined to the safety inspectorate.[176]

125. The safety justification should be rejected. It is not pressed as necessary; no analysis supports it; the concessions of Counsel Assisting's own witness establish that no improvement has been demonstrated; and the instrument proposed would in identified respects make the exercise of safety rights more difficult. To the extent that the integrity of the right of entry regime is advanced as a benefit in its own right, the Administrator addresses the proposed entry provisions, and the evidence said to support them at paragraphs [187] to [193] below.

E. FREEDOM OF ASSOCIATION IS ALREADY PROTECTED

126. Freedom of association was advanced by Counsel Assisting as the second of three "clear

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173 Further Submissions at fn 46. And see Day 31 at p 2962 LL 42-44, where the proposition was expressly disavowed in cross-examination.

174 Further Submissions at [68(e)]; Draft Guidelines, Parts 2.6, 4(f) and 9; and, as to minimum manning, the substitution of rostered days off and consultation about resourcing, Parts 4(e)(i), (vi) and (iv). Part 4(f) refers to the "*Work Health and Safety Act 2001* (Qld)"; there is no such Act, and the reference is taken to be to the *Work Health and Safety Act 2011* (Qld).

175 Further Submissions at [68(h)]; and see Draft Guidelines at Part 7.1, which requires that any time lost "through any WH&S matter or purported WH&S matter" be reported.

176 Stakeholder Report at p 12.

justifications" for a code and an independent regulator.[177] It is no longer pressed as a necessary one. The recommendation, Counsel Assisting now says, "should not be dependent on those measures concurrently delivering other benefits for the construction industry and its participants".[178] Nor could it be. Freedom of association is already protected by Part 3-1 of the FW Act, which prohibits adverse action, coercion and misrepresentation on the ground of membership or non-membership of an industrial association, and which imposes liability upon a person involved in a contravention.[179] Mr Hadgkiss accepted as much.[180]

127. Counsel Assisting's answer is that "the difficulty with the existing prohibitions is that they are often not enforced".[181] That rests upon an assertion by Mr Hadgkiss, unsupported by any analysis or evidence.[182] If it is right, the answer to a failure of enforcement is enforcement: an argument for enforcing the existing law and resourcing the existing regulators, not for making a code. That is what participants in the Commission's own consultation said. One industry stakeholder argued that the benefit of a new code over enforcing existing law had not been demonstrated; another industry group preferred enforcement through existing channels, by a negative licensing model administered by the Queensland Government's Office of Industrial Relations; and the union representatives said that the FW Act and the WHS Act already regulate the relevant conduct, and that the better course is to resource and refocus those regulators.[183]

F. THE CONDUCT HAS CEASED OR SUBSTANTIALLY ABATED UNDER THE ADMINISTRATION

128. Counsel Assisting's case is forward-looking: it urges the Commission to act "as a matter of priority",[184] on the basis that the conduct is persisting and will persist absent a code and a regulator. That premise is not made out. The Commission has received a substantial and consistent body of evidence, much of it from Counsel Assisting's own witnesses, that the conduct upon which the recommendation depends has ceased or substantially abated since the appointment of the Administrator in August 2024.

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177 Further Submissions at [14(b)]; and see [30].
178 Further Submissions at [29].
179 *Fair Work Act 2009* (Cth), Pt 3-1 Div 4.
180 Day 31 at p 3010 LL 40-45.
181 Further Submissions at [30(a)].
182 Day 31 at p 3011 LL 46-47.
183 Stakeholder Report at pp 16, 22-23 and 27-28.
184 Further Submissions at [78].

129. Since the appointment of the Administrator, no court has found that the CFMEU contravened any industrial law, against 1,163 contraventions found by courts in the five years before it.[185] Mr Balmer, chair of the Queensland Major Contractors Association, accepted that this was "a quite remarkable achievement", and that it "indicates that the steps that have been taken by the administrator to date are having a very positive impact on the conduct of the CFMEU."[186]

130. Mr Damian Long, Chief Executive Officer of the Civil Contractors Federation Queensland (**CCF**), gave evidence to the same effect: "the reports that I'm getting from my members is that disruption on sites is nowhere near as bad as what it was",[187] and that right of entry requests to CCF's members had "probably reduced down to a fraction" of what they had been.[188]

131. Mr Neile Rosenlund has worked in the industry for some 48 years. His evidence about the conduct of officials before the administration was adverse to the CFMEU. His evidence about the position since was not, observing that "Jared Abbott has been a breath of fresh air".[189] He also endorsed the Administrator's programme of delegate training and the code of conduct for delegates.[190]

132. There is also evidence that productivity on site has improved under the administration. Mr Newton explained: "there was still some tension on site, but productivity did start to improve", and that on the three case studies he presented "it was quite demonstrable that the productivity improvements were achieved off the back of" the Administrator's appointment.[191] The QPC records the same improvement. Its Final Report states that stakeholders "generally agreed there are some early signs that cooperation on construction sites is improving", and that this "is generally attributed to the pausing of BPICs, the CFMEU entering administration, and the response of the administrator to the Watson report".[192]

133. This is not the whole of the evidence that is before the Commission about the change under the Administrator. But it is sufficient: the case Counsel Assisting advances is

185 Third Bi-Annual Report at p 5 [18].
186 Transcript Day 37, 16 July 2026, p 3461 LL 8-18.
187 Transcript Day 7, 10 February 2026 at p 685 LL 13-14 (**Day 7**).
188 Day 7 at p 685 LL 38-39.
189 Transcript Day 19, 21 April 2026 at p 1775 LL 26-27 (**Day 19**).
190 Day 19 at p 1775 L 38 – p 1776 L 6.
191 Transcript Day 14, 18 March 2026 at p 1293 LL 20-25.
192 QPC Final Report at p 124.

directed to a state of affairs that no longer exists.

134. Neither Mr Hadgkiss nor Mr Jenkinson was in a position to give evidence about the position under the administration. Mr Hadgkiss was unable to comment on the Administrator's initiatives, explaining that he is "not familiar with these matters" having "left the industry in 2017".[193] He was unaware that Mr Ravbar had been removed from office by the instrument appointing the Administrator.[194]

135. Mr Jenkinson was aware of the removal of the officials, and accepted its significance.[195] In declining to recommend that the registration of the CFMEU be cancelled, Commissioner Heydon concluded that "any targeted action to combat the culture of the CFMEU should focus on the officials of the union".[196] On Mr Jenkinson's evidence, the removal of the officials under the federal scheme of administration "goes a long way towards" achieving what was recommended.[197]

136. In Queensland, 138 of some 413 delegates have ceased to be delegates since the administration began, whether by removal or because the project on which they were engaged came to an end.[198] Nationally, of approximately 320 employees at the commencement of the administration, Mr Irving's evidence in November 2025 was that about 110 had ceased to be employed;[199] by February 2026 more than half had.[200] The position is better measured by reference to the three levels of industrial leadership within the union. The senior leaders of the Victorian, New South Wales, Queensland and South Australian branches have all left. More than 90 per cent of the industrial co-ordinators in those four branches have left. Of the organisers engaged before the administration, about 90 per cent in New South Wales, more than 60 per cent in South Australia, and more than half in each of Victoria and Queensland have had their employment ended.[201]

137. The "ultimate aim" of the regime proposed by Counsel Assisting is, on Mr Hadgkiss' evidence, to "change the culture of the industry".[202] He accepted that "culture is at the

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193 Day 31 at p 2950 LL 13-14.
194 Day 31 at p 2949 LL 29-33.
195 Day 31 at p 2911 LL 12-30.
196 TURC Final Report, Vol 5 at p 406 [38].
197 Day 31 at p 2911 L 18.
198 Transcript, Day 3, 20 November 2025 at p 234 LL 32-43 (**Day 3**).
199 Day 3 at p 270 LL 36-39.
200 Third Bi-Annual Report at [10].
201 Third Bi-Annual Report at [10]-[11].
202 Day 31 at p 2950 LL 30-35.

heart of the problem".[203] Mr Jenkinson likewise observed that there "was a need to change the culture".[204]

138. Both gave evidence that a regime of the kind proposed failed to do so. Mr Jenkinson said that "during Mr Hadgkiss' time and during my time in the ABCC the culture of the union hadn't changed",[205] and that the numerous prosecutions brought by the ABCC and the FWBC "had little deterrent effect".[206] Mr Hadgkiss accepted that even with a coercive regulator empowered to compel testimony, the culture had not changed: "The culture was - was bad. And still is".[207]

139. Counsel Assisting therefore proposes a regime which its own witnesses say did not change the culture.

140. Counsel Assisting advances one further and distinct rationale: that the prospect of exclusion from government funded work supplies contractors with a commercial justification for refusing to accommodate unlawful demands, where acquiescence might otherwise be the more expedient course.[208] That rationale assumes that the unlawful demands are being made. On the evidence set out above, the conduct said to require resistance has ceased or substantially abated under the administration. And to the extent the rationale is historical, it is answered by the evidence of Counsel Assisting's own witnesses. Contractors held precisely that justification under the 2016 Code, backed by a regulator armed with coercive powers, and on Mr Hadgkiss' evidence there was "still a great deal of unlawful activity going on, notwithstanding our prosecutions".[209] An instrument which did not stiffen resistance when enforced by a coercive regulator cannot be assumed to do so now.

F1. The scheme is statutory but what it leaves behind endures

141. The administration is not an informal or voluntary arrangement. It is a statutory scheme determined under Commonwealth law, complemented by State legislation, which vests in an independent officer the whole of the decision making power of the organisation.

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203 Day 31 at p 2948 LL 21-24.
204 Day 31 at p 2912 LL 41-45.
205 Day 31 at p 2912 LL 1-3.
206 Day 31 at p 2912 LL 9-10.
207 Day 31 at p 2956 LL 21-24.
208 Further Submissions at [32].
209 Day 31 at p 2956 LL 13-18.

Mr Irving KC described the position in these terms:

> "In relation to - in relation to the arrangements a Chief Executive might be subject to a direction of a board of directors. There is no directors. I'm all of the directors as well. I'm Chief Executive and all of the directors and all of the decision-making bodies. I'm the Governor-General, the Prime Minister, all of the cabinet ministers, the parliament as well…so in that respect, the scheme is complete, and necessarily so..."[210]

142. The objective of the administration is to bring about the very outcome for which a code and regulator are said to be required: "to change the union so that it becomes a lawful and effective organisation".[211] It contains its own exit test: the Administrator may release a branch only if satisfied that it is operating lawfully and effectively, and with the concurrence of the Minister.[212]

143. It has already produced structural change which does not depend upon the Administrator remaining in office:

    (a) the mechanism which had neutralised the deterrent effect of existing law has been dismantled. The Administrator does not pay personal payment orders, does not permit related entities to pay them indirectly, and has ended the practice of indemnifying the legal costs of officials charged with breaching industrial laws, a practice which, on his evidence, meant that "the employee knows that if they contravene industrial laws it is okay, the CFMEU has got their tab".[213]

    (b) the disciplinary standard now applied is higher than that which any regulator could apply. The Administrator does not wait for a successful prosecution; if satisfied that an employee has engaged in serious wrongdoing of any kind he acts as employer, because "it sometimes takes years for litigation to go through".[214]

    (c) a documented programme of change in personnel, policy, rules and training is under way,[215] and the Administrator has said that he will attend to the internal rules before the administration concludes so as to prevent the organisation being

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210 Day 3 at p 216 LL 36-47.
211 Day 3 at p 216 LL 25-26.
212 Day 3 at p 217 LL 20-25.
213 Day 3 at p 280 LL 26-33.
214 Day 3 at p 279 LL 25-33.
215 Day 3 at p 283 LL 39-41.

"perverted again in the future".[216]

144. The administration also co-operates with the existing regulators. The Administrator has regular meetings with the Fair Work Commission, the Fair Work Ombudsman and the Australian Federal Police, supports a joint agency working group operating as a clearing house between police forces and regulators, and has referred matters identified by the administration to those bodies together with the underlying documentary material.[217]

145. Further, an internal audit, risk and integrity unit is to be established within the union and embodied in its Rules, and a new staff code of conduct is to be developed. A review of the rules and governance of the union forms part of the Administrator's approved 2026 workplan.[218]

146. None of those changes depends upon the Administrator remaining in office.

F2. That the administration will end is not a reason to recommend this instrument

147. Mr Irving's evidence was candid. He accepts that the administration "continues to be required",[219] that "there is a great deal of work still remains to be done",[220] and that the next election of officers will not occur for some time, possibly as long as another three and a half years.[221] A code is proposed because the administration will end and the problem is said to be enduring. Three things should be said about that.

148. First, a statutory scheme which is presently required, which is not complete, and which will continue for some years is a reason to allow it to run its course, not a reason to superimpose upon it a second and differently designed regime directed at the same conduct. The two would operate concurrently for the whole of the period in which the recommended instrument is said to be urgent.

149. Second, a procurement code cannot address the matter said to give rise to the residual risk. The risk identified is one of internal governance; that the organisation might in the future be led as it was led before. The proposed instrument does not bind the CFMEU or any union at all. Mr Jenkinson accepted that in terms: neither the guidelines "nor the code

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216 Day 3 at p 225 LL 20-28 and p 283 LL 35-45.
217 Third Bi-Annual Report at [19]-[21].
218 Third Bi-Annual Report at [26]-[27] and [30].
219 Day 3 at p 218 LL 1-2.
220 Day 3 at p 278 LL 38-39.
221 Day 3 at p 285 LL 33-43.

was binding on the CFMEU or any union".[222] An instrument which binds only contractors, and which operates upon union conduct indirectly by imposing commercial consequences on third parties, is not addressed to the risk it is said to answer.

150. Third, the scale of the conduct relied upon does not support an industry wide response. Mr Irving's evidence was that the 1,163 contraventions found over five years are to be compared with 21, 10, six and nil for the other largest unions in Australia.[223] He described it as being of a "wildly different scale".[224] The conduct was an extreme outlier confined to one organisation. That organisation is now under statutory administration. A regime binding every head contractor and subcontractor on government funded work, and on their privately funded work, and on the work of their related entities, is a response of a wholly different order from the conduct that has been proved and from the organisation to which it is attributed.

151. That the administration will end is therefore not a reason to recommend this instrument. It is a reason to allow a scheme which is presently working to complete its work.

G. THE PROHIBITIONS ARE DIRECTED AT LAWFUL INDUSTRIAL ARRANGEMENTS, NOT MISCONDUCT

G1. Efficiency is not the same as unconstrained managerial discretion

152. Counsel Assisting's submissions at paragraph [35] proceed from a narrow conception of efficiency. Counsel Assisting there submits that the "simplest way" for a code to improve productivity is to prohibit practices which prevent work being completed efficiently. That submission adopts, without analysis, the view of efficiency advanced by Mr Hadgkiss and Mr Jenkinson, upon which efficiency is treated as substantially synonymous with preserving the contractor's unilateral capacity to determine the number, composition and terms of engagement of the workforce.

153. That is not the only, or necessarily the correct, conception of efficiency in the construction industry. The efficient delivery of construction work may also depend upon safety, appropriate supervision, fatigue management, training and apprentice engagement, and workforce stability. A practice which constrains unilateral managerial discretion may impose an immediate limitation upon a contractor, but it does not follow

222 Day 16 at p 1450 LL 22-32.
223 Day 3 at p 218 LL 24-30.
224 Day 3 at p 218 LL 29-30.

that the practice is inefficient, still less that it should be prohibited as a class.

154. The difficulty is that the submission assumes the answer to the question the Commissioner must decide. The practices are described as "unproductive" because they do not conform to the model of efficiency preferred by Mr Hadgkiss and Mr Jenkinson. Neither witness undertook a systematic evaluation of those practices, their purposes, or their operation in different workplace contexts, and their evidence was in substance experiential opinion drawn from their administration of earlier codes and regulators. Nor is the vice merely that the label is contestable. It is that the same label is applied to a series of materially different practices as though each involved the same problem and called for the same regulatory answer. The practices identified at [37] are therefore addressed separately below.

G2. Minimum manning may serve safety, supervision and emergency response

155. Mr Hadgkiss' statement treated minimum manning arrangements as self-evidently inefficient. That characterisation assumes that a requirement to maintain a minimum number of workers necessarily involves surplus labour, and that the only purpose of such an arrangement is to satisfy a union demand for additional headcount. It excludes the possibility that minimum staffing may be directed to safety, supervision, fatigue management or emergency response.

156. That possibility was accepted in cross-examination. Mr Hadgkiss accepted that minimum manning arrangements need to be considered from perspectives other than cost; that safety is one such consideration;[225] and that manning levels may be set having regard to emergency response requirements.[226]

157. The significance of those concessions is that they acknowledge why employees and their representatives may have a legitimate interest in minimum staffing clauses. Mr Hadgkiss accepted that there may be high-risk hazards requiring particular levels of supervision, and particular numbers of employees, in order to minimise risk, and that the matter is to be assessed case by case.[227] He further accepted that, because not all employers are responsible, one means of ensuring that high-risk hazards are appropriately manned is

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225 Day 31 at p 2992 LL 12-16 and L 25.
226 Day 31 at p 2992 L 30.
227 Day 31 at p 2993 LL 7-11.

for a responsible union official to seek to put minimum manning in place.[228]

158. That evidence is inconsistent with the categorical approach for which Counsel Assisting contends. Minimum manning arrangements cannot be dismissed by describing them as inefficient. They may be directed to ensuring that hazardous work is performed with sufficient workers, supervision, rotation and emergency capacity. Counsel Assisting's position treats cost as the controlling consideration, and that is not supported by the evidence of its own witness. Mr Hadgkiss recognised that cost cannot be the only factor relevant to an assessment of efficiency. His evidence demonstrates the need to assess any asserted inefficiency against the purpose served by the arrangement. A blanket prohibition would treat safety-related staffing arrangements as a cost to be eliminated, and would be a retrograde step for safety on Queensland construction sites.

G3. Apprentice ratios were never analysed, and the skills shortage was conceded

159. The same difficulty arises in respect of apprentice ratios. Counsel Assisting submits at [41] that Mr Hadgkiss "cogently observed" that apprentice ratios do little to advance the skills of apprentices if they result in apprentices "sitting around without meaningful work".[229]

160. There is no evidentiary foundation for the proposition that apprentice ratios result in apprentices sitting idle. When it was put to Mr Hadgkiss that he had undertaken no analysis of whether minimum apprentice ratios resulted in apprentices "sitting in the shed" with no work to do, his answer was that he thought it was "commonsense".[230] The proposed prohibition rests not on analysis of the operation of apprentice ratio clauses, but on assertion.

161. Mr Hadgkiss made a number of concessions on this issue. He accepted that there is a looming skills shortage in the construction industry;[231] that skills shortages are one of the significant drivers of construction costs;[232] and that insufficient numbers of new tradespeople entering the industry increases labour costs.[233] He further accepted that one way of addressing those shortages is to ensure that sufficient apprentices are trained and

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228 Day 31 at p 2993 LL 13-21.
229 Further Submissions at [41]; Day 31 at p 2995 L 45 - p 2996 L 8.
230 Day 31 at p 2996 LL 7-21.
231 Day 31 at p 2993 L 27.
232 Day 31 at p 2993 L 33.
233 Day 31 at p 2993 L 39.

retained, albeit "on a case-by-case basis … but not unilaterally".[234]

162. It also became clear that Mr Hadgkiss did not appreciate how the proposed prohibition would operate within the enterprise bargaining framework.[235] His criticism proceeded as though apprentice ratios impose an industry-wide requirement that every contractor employ a fixed number of apprentices, irrespective of the work being performed. Apprentice ratio clauses in enterprise agreements are not industry-wide mandates. They are bargained terms agreed between an employer and its employees, and ordinarily operate by reference to the number of tradespeople engaged on the work. If the ratio operates by reference to the scale of the work, and the contractor prices the requirement when tendering, it is not properly characterised as an arbitrary industry-wide imposition. The objection rests upon a preference for unconstrained managerial discretion rather than upon evidence: Mr Hadgkiss did not analyse the terms of any apprentice ratio clause, how such clauses operate within enterprise agreements, or whether they contribute to the training pipeline in an industry facing skills shortages.

163. Counsel Assisting's submissions do little more than restate the opinion expressed in Mr Hadgkiss' statement, without engaging with the concessions he made in cross-examination. The Commission's attention is drawn to Chapter 16 of the QPC Final Report and to Recommendation 51, which are directed to the training pipeline and which were not put to either witness. A code which prohibited apprentice ratios entirely would risk undermining one of the conditions necessary for the efficient delivery of construction work in Queensland: a sufficient supply of trained tradespeople.

G4. No contractor was identified as unable to obtain labour

164. Counsel Assisting makes two related submissions. At [42], it submits that Mr Hadgkiss described as "commonsense" the proposition that prohibiting a contractor from engaging casual and daily-hire workers would inhibit its ability to meet fluctuating resourcing requirements. At [43], it submits that the benefits of proscribing such restrictions were not meaningfully challenged in cross-examination. Neither submission should be accepted.

165. First, Counsel Assisting and Mr Hadgkiss assert a problem that neither has proved exists. The asserted problem is that restrictions on casual or daily-hire employment are

[234] Day 31 at p 2993 L 45.
[235] Day 31 at p 2997 LL 10-19.

preventing contractors from obtaining labour when required. That proposition is then used to justify the code as the solution. Mr Hadgkiss accepted that he had undertaken no empirical analysis of the extent to which contractors are presently unable to access labour when required. He did not identify any project which was unable to meet its labour requirements because of restrictions on casual labour. His answer was that the matter was "fairly commonsense" to him.[236] The argument fails at the first step: the code is said to solve a problem which has not been shown to exist.

166. Second, Mr Hadgkiss accepted that insecurity of employment is a real feature of the construction industry;[237] that the industry's project-based nature means workers may be employed on one building and out of work when it finishes;[238] that governments have responded by creating portable long service leave schemes, which he described as a "good measure";[239] and that he could understand the objective of seeking to address insecure employment by pursuing arrangements under which workers are engaged on an ongoing basis.[240]

167. Mr Hadgkiss did not accept that the union was right to pursue security of employment; he said he could appreciate the point of view without agreeing with it. But the concessions establish that the objective is an intelligible industrial one, directed to a real feature of the industry, and that arrangements directed to it are not to be equated with inefficiency. The proposed prohibition would remove that subject from enterprise bargaining altogether, and it would do so without any demonstrated productivity benefit. Counsel Assisting's submission at paragraph [43] does not engage with that. It asserts that the benefits of the proscription were not meaningfully challenged. The cross-examination exposed the absence of any evidentiary foundation for the asserted benefit.

G5. Consultation is not control

168. Counsel Assisting submits at paragraph [44] that the cross-examination did not engage with Mr Hadgkiss' evidence that consultation about resourcing decisions enables unions to influence those decisions by threats, intimidation or sabotage. That evidence relies upon an asserted pattern of conduct without identifying any example. No project is named. No clause is analysed. No finding of wrongdoing is referred to. At most it is an

236 Day 31 at p 2997 LL 1-9 and LL 36-47.
237 Day 31 at p 2998 LL 30-42.
238 Day 31 at p 2998 LL 35-42.
239 Day 31 at p 2998 L 44 – p 2999 L 2.
240 Day 31 at p 2999 LL 10-22.

assertion that consultation may be followed by unlawful conduct. If unlawful conduct occurs, the law already deals with it. It does not follow that a code should prohibit or discourage consultation about resourcing decisions.

169. What Counsel Assisting does not address is the premise of the Administrator's cross-examination. Consultation is not control. It does not confer a veto, and it does not require the contractor to adopt the union's position. Its purpose is to ensure that employees and their representatives are heard before decisions are made about matters which affect them. Resourcing decisions may bear directly upon safety, fatigue, supervision, emergency response, the allocation of work and the practical performance of tasks on site, matters which Mr Hadgkiss himself described as "essential".[241]

170. A requirement to consult is not a restriction upon the contractor's decision. It is a requirement that those affected be heard before it is made.

G6. Parliament has identified the protection of bargained conditions as a legitimate objective

171. Counsel Assisting's response at paragraphs [45] to [46] is at cross-purposes with the point made by the Administrator. The point is not that the "same job, same pay" regime applies automatically to every subcontracting arrangement, or that the Fair Work Commission is bound to make an order in every case. The mechanics of the regime are not the point. The point is that Parliament has expressly identified as a legitimate legislative objective the protection of enterprise agreement conditions from being undermined through the use of other employing entities.[242]

172. That objective is directly relevant to the proposed prohibition. Counsel Assisting treats provisions directed to subcontractor terms or project-wide conditions as objectionable because they may prevent competition by reference to lower labour costs. Parliament has recognised that preserving enterprise agreement conditions from being undercut by other labour-supply arrangements is a legitimate regulatory objective. A code which prohibited clauses directed to maintaining common baseline conditions would cut across that objective.

173. Counsel Assisting's answer at paragraph [47] is that, absent legislative inconsistency,

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241 Day 31 at p 3001 LL 25 and 36.

242 See *Fair Work Act 2009* (Cth) Part 2-7A (regulated labour hire arrangement orders), inserted by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth).

Queensland is free to pursue a different objective through procurement rules. That avoids the issue. The Administrator does not advance an inconsistency argument, and does not concede that none arises. The question is whether the Commission should recommend a code which cuts across a legislative objective that the Federal Parliament has identified as legitimate, in circumstances where the case for doing so has not been made out. Counsel Assisting assumes that freedom to compete on lower labour costs is an efficiency gain, without establishing why. It treats managerial freedom to structure labour arrangements as neutral, and any bargained protection for common baseline conditions as inefficient. Mr Hadgkiss' evidence on this topic demonstrated that he had not grappled with the enactment of the same job, same pay provisions, and did not appear to appreciate the premise of subcontractor clauses of the kind under discussion.

174. The example given at paragraph [47], that if "Mary works harder than Jane, she should get remunerated accordingly", answers a proposition which is not advanced.[243] A provision establishing baseline subcontractor or project conditions does not prevent higher pay for skill, responsibility, effort or productivity. It establishes a floor. The question is whether a code should prohibit provisions directed to preventing bargained enterprise agreement conditions from being undercut.

175. The Commission's own Stakeholder Report records as common ground that "jump-up" clauses should be addressed, but "with care for the legitimate purpose some serve", and records that one industry peak body sought provisions dealing with sham contracting and collusive tendering.[244] Those matters support the Administrator's submission that clauses dealing with subcontractor terms cannot be condemned merely because they affect competition on labour costs. They may serve the legitimate purpose of preventing avoidance, undercutting or sham arrangements. A code which prohibited clauses of that kind would not remove an inefficiency; it would remove a protection which the Federal Parliament has identified as legitimate.

G7. The absence of cross-examination upon each clause supplies no foundation

176. Counsel Assisting submits at paragraph [50] that there has been no challenge to the suggestion that a new code should proscribe restrictions on the order of redundancies, limitations on a contractor's freedom to allocate work, and the use of unregistered written agreements. For the reasons given at Part C2 above, the absence of challenge supplies no

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243 Further Submissions at [47], citing Day 31 at p 3003 LL 33-34.

244 Stakeholder Report at pp 13-14 and 35-36.

foundation. The premise has in any event been challenged: the Administrator does not accept that the evidence establishes the need for a code at all, still less a code which prohibits matters of this kind, and Counsel Assisting cannot avoid that anterior issue by observing that particular examples were not each separately the subject of cross-examination.

177. It remains for Counsel Assisting to justify the components of its proposed code, and it has not engaged with the purposes these clauses may serve. A redundancy provision may be directed to transparency or fairness in the selection of employees for termination. An allocation-of-work provision may concern worker safety, qualifications, training or the orderly performance of work. As Mr Hadgkiss accepted, not all employers are responsible employers. The opinions proceed at a high level of generality, and no example or case study is identified to demonstrate the need for the blanket prohibitions proposed.

G8. The proposal restricts freedom of association rather than protecting it

178. Counsel Assisting submits at paragraph [51] that a code should include measures to protect freedom of association. The submissions which follow adopt a narrow and one-sided conception of that freedom. Freedom of association is not merely freedom from association. It is directed also, and primarily, to the right to associate: to join a union, to identify as a union member, to act collectively and to be represented collectively. Counsel Assisting's submissions give little weight to that aspect of the freedom.

179. That was the premise of the Administrator's cross-examination. Mr Hadgkiss accepted that his own definition of freedom of association included the choice to be a member of a union; that workers who choose to be union members may wish to identify themselves as such at work; that there is nothing wrong with that; and that workers may seek to identify themselves by displaying union logos, stickers, badges or insignia.[245]

180. Most significantly, Mr Hadgkiss accepted that a code which restricted the display of union logos, mottos or insignia would restrict one of the ways in which a union member might signify their membership, and that such a restriction "takes away one of the rights they would otherwise have".[246] That concession cannot be reconciled with the way Counsel Assisting puts the matter. The proposed restriction does not protect freedom of

[245] Day 31 at p 3014 LL 6-34.
[246] Day 31 at p 3014 L 36 – p 3015 L 10.

association. It restricts an important means by which workers exercise it.

181. Counsel Assisting's submission at paragraph [52] is that the "high point" of the Administrator's challenge was that the FW Act already prohibits coercion and discrimination based upon union membership. That understates the point. The Administrator does not dispute that coercion, discrimination and harassment based upon union status are legitimate subjects of regulation. His point is that those matters are already regulated, and that the proposal goes further, because it would treat ordinary displays of union association as though they were evidence of coercion.

182. Counsel Assisting's answer at paragraph [53] is that prohibitions on union paraphernalia are easier to enforce than the FW Act protections, which require proof of motivation. That answer reveals the difficulty. Ease of enforcement is relied upon to justify prohibiting conduct which is lawful and expressive of union membership. The need to prove the elements of unlawful conduct is not a defect in the law. It is a safeguard against overreach.

183. Counsel Assisting relies at paragraphs [54] to [55] upon Mr Hadgkiss' evidence concerning union paraphernalia. That evidence rested upon assertion rather than analysis. He accepted that he had undertaken no study to show that the presence of union paraphernalia on site was the result of coercion.[247] He accepted that his statement did not identify any particular conduct said to have been emboldened by the presence of union paraphernalia, and did not identify any case in which union paraphernalia caused unlawful conduct.[248]

184. Against those concessions, the submission at paragraph [55] invites the Commission to act upon evidence which Mr Hadgkiss says he could have given, but did not. The Commission is told that examples existed "in spades" and that "numerous examples" could have been provided. They were not. No study was undertaken. No case was identified. No causal link was demonstrated. Counsel Assisting asks the Commission to treat the absence of evidence as though it were evidence, and to use it as the basis for a prohibition upon otherwise lawful expressions of union membership.

185. As to the practices identified at paragraph [56] — "no ticket, no start" arrangements, "show card" days or other requirements that workers reveal their union status, and signs

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247 Day 31 at p 3013 LL 24-34.

248 Day 31 at p 3013 L 40 – p 3014 L 5.

which harass workers because they participate or do not participate in industrial activity — the Administrator's challenge was directed to the premise that these matters are already capable of being dealt with under existing law. It should also be noted that, when the evidence was opened, the Commissioner observed that there was "not a lot of evidence about the first two points so far: no-ticket-no-start policies and show-card days".[249]

186. Mr Hadgkiss accepted that the FW Act contains provisions against coercion, misrepresentation and adverse action, and that, depending upon the facts, those protections would apply to the practices he identified.[250] He accepted that *Australian Building and Construction Commissioner v Pattinson*, a case he had identified as a "no ticket, no start" case, was brought and determined under the FW Act and not under any code.[251] He accepted that, if a sign forms part of unlawful coercion, adverse action or discrimination, the FW Act may already apply to the persons involved in the contravention.[252] His answer was not that the law did not regulate the conduct. It was that the law was "not generally enforced".[253]

187. That answer exposes the function of the proposed code. It does not fill a gap in the substantive law. It shifts the burden of policing unlawful, or allegedly unlawful, conduct onto contractors, on pain of procurement consequences. That is a burden which the Commission's own consultation records stakeholders as opposing, and which is addressed at paragraphs [225] to [226] below.[254]

188. The result is that Counsel Assisting's freedom of association case takes one aspect of a legitimate objective, the right not to be coerced into union association, and uses it to justify measures which restrict another aspect of the same freedom, being the right of workers to associate, to identify as union members and to be represented collectively. That is not a balanced conception of freedom of association.

G9. The entry provisions duplicate the Fair Work Act, and go beyond it

189. Counsel Assisting submits at paragraphs [57] to [59] that a code should contain rules

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249 Day 16, 14 April 2026 at p 1407.

250 Day 31 at p 3010 LL 40-45.

251 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; Day 31 at p 3011 LL 10-35.

252 Day 31 at p 3011 L 35 – p 3012 L 7.

253 Day 31 at p 3011 LL 46-47.

254 Stakeholder Report at p 33.

preserving the integrity of the statutory right of entry regime. No evidentiary basis has been provided for a finding that the integrity of that regime is imperilled.

190. First, to the extent the concern is with unlawful entry, disruption, safety risks or the use of entry as a precursor to unlawful industrial action, the proposed code seeks to do what the law already does. The FW Act regulates rights of entry, provides mechanisms for dealing with entry otherwise than in accordance with the Act, and supplies a basis for proceedings where entry is associated with coercion, adverse action, unlawful industrial action or other unlawful conduct. A code is not justified merely because it restates, through procurement consequences, obligations which already exist.

191. Second, to the extent the proposed code goes further, it does so by restricting the right of employers to manage their own workplaces. It was put to both witnesses that the FW Act does not prohibit an occupier from inviting a union official onto site. Mr Jenkinson accepted that the Act makes no attempt to impede that right, that the code would punish an occupier who allowed a union official onto site otherwise than in the exercise of a statutory right of entry, and that this removes the occupier's right to invite an official onto site outside the right of entry framework.[255] He accepted that there may be legitimate reasons why an occupier might wish to do so, including to discuss issues informally or to consult with the union.[256]

192. Mr Hadgkiss' evidence was to similar effect. He accepted that, where a union official attended for an ordinary informal purpose and that purpose was explained to a responsible employer, the employer would permit entry. He accepted that the employer would thereby breach the code, because the code required entry only in the exercise of a statutory right of entry.[257] His answer was not that there would be no breach, but that exclusion from government work would not follow from "just one occasion" and would depend upon the circumstances.[258] The proposed code would therefore treat as a breach conduct which the witness himself did not regard as problematic, and would constrict an employer's capacity to engage productively with union officials in circumstances where the FW Act does not prohibit that engagement and where one of its objects is the promotion of cooperative workplace relations.[259]

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255 Day 31 at p 2930 L 19 – p 2931 L 46.
256 Day 31 at p 2932 LL 1-16.
257 Day 31 at p 3005 L 34 – p 3006 L 6.
258 Day 31 at p 3006 LL 7-16.
259 *Fair Work Act 2009* (Cth), s 3 (Bundle at pp 326-328).

193. Third, Exhibit NH-12 does not establish the need for such a code. Of the 25 proceedings identified, only 12 cases concerned rights of entry. A number concerned conduct predating 2015. Only three related to conduct occurring within the last five years. All arose while the ABCC or the Fair Work Building Industry Inspectorate was operating. None arose after the abolition of the ABCC in February 2023. Every proceeding was investigated, prosecuted and determined under the existing statutory framework. Counsel Assisting does not address that, nor explain how NH-12 can bear the weight now placed upon it. As to the circumstances in which the schedule came to be annexed to the statement, see paragraph [28] above.

194. Further, the contention is contrary to the Commission's own Stakeholder Report, in which participants consistently warned against the creation of a parallel industrial relations regime duplicating existing regulation. The proposed right of entry provisions would do that, and would shift responsibility for policing union access onto contractors, exposing them to consequences for otherwise lawful conduct.

195. The entry provisions therefore do one of two things. Where they restate the Fair Work Act, they add nothing. Where they go beyond it, they attach procurement consequences to conduct which that Act permits.

G10. The prohibitions taken as a whole

196. Taken together, the practices Counsel Assisting would prohibit are not the misconduct with which this Commission has been concerned. They are matters which an employer and its employees may lawfully agree between themselves. None was analysed. Each was described as unproductive. And upon each, the concessions of Counsel Assisting's own witness tell the other way.

H. THE MACHINERY OF THE PROPOSED CODE IS DISPROPORTIONATE AND UNREVIEWABLE

H1. Approval of a workplace relations management plan is neither governed by criteria nor reviewable

197. The Administrator does not dispute that workplace relations planning may have administrative utility. The issue is the power conferred upon the regulator by requiring a plan to be approved before a contractor may tender for government work.

198. That issue was exposed in cross-examination. Mr Jenkinson accepted that his statement

did not identify criteria governing approval or rejection of a plan, did not identify any requirement to give reasons, and did not identify any transparent process by which contractors could understand how assessments were made.[260] Mr Hadgkiss accepted that the components of a plan, and the assessment of whether it adequately addresses those components, are matters determined by the regulator; that this is not prescribed by legislation; and that it is not subject to review by the courts.[261]

199. Approval may determine whether a contractor can tender for work worth hundreds of millions, or even billions, of dollars.[262] Counsel Assisting misconceives the Administrator's contention at [62]. The Administrator does not submit, and has not alleged, that any approval has been affected by corruption. The point is structural. The proposed framework would confer upon a regulator substantial commercial power over contractors without sufficient attention to transparency, criteria for decision-making, reasons, or the ability to have an adverse decision reviewed. Whether, and to what extent, a decision made under a non-statutory procurement instrument of this kind would be susceptible to judicial review is not addressed by the Draft Guidelines. The absence of those safeguards creates a risk that decisions with serious commercial consequences may be influenced, or be perceived to be influenced, by considerations other than transparent and reviewable criteria.

H2. The implementation mechanisms convert a procurement instrument into an industrial relations regime

200. The mechanisms identified at [64] are significant. Requiring compliance with the code upon privately funded projects would extend a procurement instrument beyond government work. Requiring contractors to ensure subcontractor compliance would make head contractors responsible for the conduct of others. Extending consequences to related entities risks visiting them upon entities not involved in the relevant conduct. Requiring notification to the Australian Securities Exchange would add reputational and market consequences. These are not incidental implementation details. They are the mechanisms by which a procurement instrument would be converted into a broader industrial relations regime.

201. The Commission's own consultation records a broad concern that a code should

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260 Day 31 at p 2937 LL 13-36.
261 Day 31 at p 3016 LL 1-41.
262 Day 31 at p 3017 LL 1-17.

complement existing law rather than create a parallel industrial relations regime, and that contractors should not be made the auditors or police of code compliance. The mechanisms proposed at [64] would do precisely that. Those matters are developed at paragraphs [225] to [226] below.

H3. The instrument targets unions, contrary to the assurance given

202. Counsel Assisting opened its case upon the basis that "[a] code does not pursue its objectives by targeting unions".[263] Four of the departures from the 2013 Guidelines which Counsel Assisting itself identifies at paragraph [68] cannot be reconciled with that assurance.

203. The first is the new requirement that a workplace arrangement not provide for non-working workplace delegates.[264] The second is the prohibition upon any standing entitlement for employees to take paid time off to attend union activities, subject to modern award and legislative obligations.[265] A delegate or shop steward is a form of worker representation, which may assist communication, consultation, safety discussion and dispute resolution. Neither provision is directed at misconduct. Each is directed at the practical capacity of union members to be represented at work, and each cuts across the workplace delegates' rights now conferred by the FW Act.

204. The third is the extension of the prohibition upon relaxing right of entry to entry under the WHS Act.[266] The effect is that a contractor would face procurement consequences for accommodating the exercise of a statutory safety entry right. Notably, while Part 2.6 of the Draft Guidelines renders inoperative any provision which would require conduct contravening the FW Act, no equivalent protection is provided in respect of the Queensland safety legislation.

205. The fourth is the new proscription upon workplace arrangements which "recklessly or deliberately" ignore or seek to undermine the boundaries of union coverage as defined by union rules.[267] Counsel Assisting accepts that questions of coverage are "ultimately determined by union rules". A procurement instrument which reaches into the boundaries of union coverage is not directed at the conduct of contractors at all. A government

263 Opening Submissions at [11].
264 Further Submissions at [68(f)]; Draft Guidelines at Part 4(l).
265 Draft Guidelines at Part 4(h).
266 Further Submissions at [68(e)]; Draft Guidelines at Parts 4(f) and 9.
267 Further Submissions at [68(j)]; Draft Guidelines at Part 9.

participant in the Commission's own consultation cautioned that demarcation already sits within the powers of the Fair Work Commission, so that a code opening a separate process would duplicate them and add delay.

206. The justification offered for the provision is the evidence of a "turf war" between the CFMEU and the Australian Workers' Union (**AWU**) on civil construction projects. That conduct, to the extent it involved coercion or unlawful industrial action, is already actionable under existing law, and the boundaries of coverage which the provision would police are fixed by union rules, which a contractor can neither determine nor alter. A provision which visits procurement consequences upon a contractor for an inter-union rivalry the contractor cannot resolve is not directed at the conduct of contractors. Counsel Assisting itself puts the provision no higher than that it "may help cool inter-union tensions".[268]

207. The premise of the provision has in any event been overtaken. A comprehensive review of the union's demarcation issues is under way. In one long-running dispute the CFMEU has engaged a former member of the Fair Work Commission to arbitrate, all sides agreed to accept the outcome, and hundreds of members are being transferred in accordance with the determination made. The Administrator has stated that the resolution of demarcation is a priority for 2026 and that the union will represent only those it is lawfully entitled to represent.[269] A procurement code which visits consequences upon contractors for questions of coverage would duplicate that process, and would do so in a forum in which neither the unions nor their rules are before the decision-maker.

208. Taken together, those four provisions are directed at the presence and the practical organisation of unions on construction sites, and not at misconduct. The assurance given in the opening is not borne out by the instrument which has been produced.

H4. The consequences are disproportionate to the process by which they would be imposed

209. Finally, the consequences which the Draft Guidelines would attach to non-compliance are disproportionate to the process by which they would be imposed. The sanctions include full exclusion from tendering for any work for an unspecified period, review of prequalification accreditation, and publication of the breach.[270] Counsel Assisting further

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268 Further Submissions at [68(j)].

269 Third Bi-Annual Report at [22]-[25].

270 Draft Guidelines at Part 10.

proposes that consequences extend to related entities and that breaches be notified to the Australian Securities Exchange; although the Draft Guidelines as annexed contain no provision to either effect.[271] Yet the instrument does not say who makes the decision: the BCCB, a branch within a government department, is to "make recommendations for sanctions", and no provision identifies who acts upon them.[272] A contractor dissatisfied with it could seek review only by a person appointed by the Director-General of the same department.[273] The Draft Guidelines provide for no merits review and no recourse to a court. On Mr Hadgkiss' own evidence, hundreds of millions of dollars, and possibly billions, may turn upon the assessment.[274] The QPC recommended the opposite mechanism. Recommendation 7 provides that any enforcement of a code "should focus on low-cost options, such as use of 'negative licensing' where there is material evidence of non-compliance, rather than requiring all firms to demonstrate compliance through procurement, tendering or prequalification processes".[275]

I. THERE IS NO CASE FOR A NEW REGULATOR

210. The second recommendation sought is the establishment of an independent regulatory body to administer and enforce the code. Counsel Assisting says that the evidence as to what that body should look like "has not, at least to date, been challenged", and that it "ought be given significant weight".[276] For the reasons given at paragraphs [20] to [23] above, the absence of challenge is not a reason to accept a proposition. The question is whether the case for a new regulator has been made out. It has not.

211. First, the premise is contradicted by the evidence of Counsel Assisting's own witnesses. The proposition advanced is that a regulator with coercive powers changes behaviour. Both witnesses gave evidence that, when precisely such a regulator was in place, it did not (see paragraph [138] above).

212. Second, the source and the limits of the powers proposed are not identified. Counsel Assisting invites the Commissioner to recommend a body vested with "appropriate powers", including "appropriate coercive powers", without saying from where a State

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271 Further Submissions at [64(c)]-[64(d)]. The Draft Guidelines impose obligations upon related entities (Part 2.4) but do not extend the Part 10 sanctions to them, and contain no reference to the Australian Securities Exchange.

272 Draft Guidelines at p 17, Part 10.1.

273 Draft Guidelines at Part 10.1.

274 Day 31 at p 3017 LL 13-17.

275 QPC Final Report at p 46 (Recommendation 7).

276 Further Submissions at [71] and [76].

would derive them.[277] The Commission's own consultation records a government agency's caution that the powers of the ABCC "rested on the Commonwealth's authority over the employees of constitutional corporations, which a state regulator may not be able to replicate".[278] An enforcement regime whose validity is uncertain is not one which should be recommended upon this material. Nor is it a durable one.

213. Third, the consultation does not support it. A dedicated standalone regulator and any civil penalty regime are among the matters which the Stakeholder Report identifies as "[m]ost contested", as to which see paragraph [227] below.[279] A government agency assessed that such a body would take a long time to establish and be costly to resource, and that a procurement code "can be stood up faster than a new statutory regulator".[280] The union representatives' position was that bodies should not be created where regulators already exist, and that the answer is to resource and refocus the existing health and safety regulator.[281]

214. Fourth, the existing regulators are engaged. The only existing body Counsel Assisting addresses is the Queensland Building and Construction Commission, which it says lacks the experience and resources to enforce a code of practice relating to workplace relations matters.[282] That is a licensing and building regulator. The bodies which enforce industrial law in this industry are the Fair Work Commission, the Fair Work Ombudsman and the police, and Counsel Assisting does not address them at all.

215. Finally, the instrument Counsel Assisting has produced does not establish an independent regulator at all. Part 10 of the Draft Guidelines vests operational responsibility for monitoring compliance, assessing workplace relations management plans, investigating and reporting in the BCCB, a branch within a government department.[283] Counsel Assisting's opening submitted that the regulator "should be an independent body, rather than sitting within any government department", because otherwise there is "potential for the interests of government as a regulator and the interests of government as a client of construction contractors to come into conflict".[284] The proposed instrument does the

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277 Further Submissions at [70]; Opening Submissions at [42]-[43].
278 Stakeholder Report at p 23.
279 Stakeholder Report at p 36.
280 Stakeholder Report at pp 15 and 23.
281 Stakeholder Report at p 23.
282 Opening Submissions at [45].
283 Draft Guidelines at Part 10 and Part 10.1.
284 Opening Submissions at [44].

very thing the opening said should be avoided.

216. No new regulator should be recommended. If the Commissioner considers that the enforcement of industrial law in the construction industry requires attention, the Commission's own consultation indicates the course: resource the regulators which already exist.

J. IF A CODE IS TO BE RECOMMENDED, IT SHOULD BE DURABLE

J1. Codes and regulators in this industry have not endured

217. This Part is put in the alternative. The Administrator's primary submission, for the reasons given above, is that the evidence before the Commission does not support the recommendations sought by Counsel Assisting. If, contrary to that submission, the Commissioner is minded to recommend that Queensland adopt a code of practice governing standards of behaviour in the construction industry, the Administrator submits that the code must be one capable of surviving beyond the term of the government that introduces it.

218. Codes and regulators in this industry have been created and abolished with each turn of the political cycle. Mr Hadgkiss accepted that, as a result, the industry is "swinging from extreme to extreme", and that there is "great confusion on the part of the industry".[285] Of the pendulum effect between successive governments he had said: "In a nutshell, one is sort of pro-union, one is pro-employer, it'd be fair to say".[286]

219. Mr Hadgkiss did not accept that a middle course was practicable. He accepted that it might be available "in an ideal world, in an ideal democracy", but said that "the state of affairs in Australia does not lend itself to such a proposition".[287] The only reason he offered was that "[t]he facts of political life is what it is". He identified no obstacle to a durable instrument. What his evidence establishes is that the model he administered was not durable, and was never designed to be acceptable to more than one side of politics.

220. Mr Hadgkiss' evidence leaves Counsel Assisting with a difficulty either way. If Mr Hadgkiss is right that no middle course is available, the regime proposed will be repealed on a change of government, and it cannot deliver the long-run improvement in

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285 Day 31 at p 2973 LL 19-23.
286 Day 31 at p 2973 LL 12-13.
287 Day 31 at p 2973 LL 25-33.

productivity upon which the whole case for it depends. If he is wrong, the question is how a durable instrument is to be designed. That is the question Counsel Assisting has not asked.

221. Mr Hadgkiss' evidence in this respect is consistent with the analysis of the late Hon Geoffrey Giudice AO, former President of the Australian Industrial Relations Commission and of Fair Work Australia:

> "Most of the issues which are debated are not new and there can be an ebb and flow of regulation which has a repetitive element. … Since 1996 there have been changes on a regular basis, swinging from one side to another, and there is no guarantee that the current provisions will not be altered when a Government gets the opportunity. The history of right of entry is another example. In proceedings in the first Pastoral Industry Award as long ago as 1906, Justice O'Connor dealt with a claim for accommodation in connection with right of entry for union officials to remote pastoral properties - a claim which has echoes in the recent amendments to the Fair Work Act."[288]

222. It is not without significance that among the examples chosen is right of entry, an issue traced to 1906, and one of the matters Counsel Assisting proposes to regulate by code.[289] Mr Giudice's conclusion was that "extreme positions seldom provide a sound basis for change" and that "[p]olicy cannot be based on the views of the outliers at either end of the spectrum"; but that "[t]here is a realistic chance of identifying significant common ground if parties adopt the objective of a more stable workplace and industrial relations system."[290]

223. Reform also carries cost. Mr Giudice identified the transaction costs of consultation, lobbying and the parliamentary process, and the implementation costs of compliance, public information and industry education, and observed that the process itself "can be a distraction which displaces more productive activities". Those costs fall to be incurred whether or not the instrument endures. His conclusion was that "[p]riority should be given to changes which are likely to be enduring".[291]

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288 Geoffrey Giudice, 'Industrial relations law reform – What value should be given to stability?' (2014) 56(3) *Journal of Industrial Relations* 433 at 438 (**Giudice**). A copy of this article is included with these submissions as **Annexure D**.

289 Further Submissions at [57]-[59]; Draft Guidelines at Parts 4 and 9.

290 Giudice at 440.

291 Giudice at 433 and 438.

J2. The code proposed does not accord with the Commission's own consultation

224. The conditions for durability were identified in the Commission's own consultation, and are recorded in the Stakeholder Report under the heading 'Durability and the federal interaction'.[292] One construction industry group emphasised that a code must withstand regulatory and legislative change. Another made durability a central condition and offered a design answer:

> "a Code anchored to productivity, and able to show value to taxpayers, is harder to unwind on a change of government than one seen as directed at unions. It proposed a reciprocal behavioural and cultural standard applying to all parties on site, which in consultation was considered to give the Code legitimacy beyond the politics of the day, and was firm that the Code should not be capable of being cast as a return to earlier industrial settings."[293]

225. Those are the recorded views of industry stakeholders, in an annexure to Counsel Assisting's own submissions. Taken with the balance of the Stakeholder Report, they yield six criteria against which any code should be assessed:

(a) Reciprocity: the code binds all parties on site, not contractors alone. The Stakeholder Report identifies this as one of only two points of common ground across the divide between supporters and union stakeholders, and as among "the most useful findings for a government weighing how a Code might be received";[294]

(b) Anchoring: the code is directed to productivity and demonstrable value to taxpayers, rather than to the conduct of a single organisation;[295]

(c) Proportionality: low compliance cost, no audit-heavy processes, and contractors not made the auditors or police of the code;[296]

(d) Complementarity: the code complements existing law rather than duplicating it, and does not create a parallel industrial relations regime;[297]

(e) Alignment: with Commonwealth settings and with the National Construction

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292 Stakeholder Report at p 26.
293 Stakeholder Report at p 26.
294 Stakeholder Report at p 34.
295 Stakeholder Report at pp 26, 34.
296 Stakeholder Report at pp 17, 18.
297 Stakeholder Report at pp 15, 35.

Industry Forum (**NCIF**) charter, which one industry stakeholder and one union stakeholder each identified as the instrument most likely to change culture and behaviour;[298] and

(f) Legitimacy of process: an exposure draft, genuine consultation, an impact analysis, a managed transition and a formal review.[299]

226. Measured against those criteria, the code proposed by Counsel Assisting fails on at least four:

(a) Reciprocity: The Draft Guidelines bind contractors, their subcontractors, consultants and related entities. They impose no obligation upon any other party on site. The Stakeholder Report records the observation of an industry stakeholder that "a procurement instrument binds only the contracting party", and that change pursued through procurement alone "will not reach the other parties whose conduct matters".[300]

(b) Proportionality: Part 2.2 requires head contractors to secure subcontractor compliance and to procure consent to inspection of work, records and personnel. Part 2.3 requires notification to the regulator and the client agency within 24 hours of any "threatened, impending, possible, probable or actual unlawful industrial conduct or breach". The Stakeholder Report records as an item of common ground that "contractors should not be made the auditors or police of the Code, a lesson from earlier federal codes",[301] and records the audit and reporting burden of the 2016 Code as the "recurring complaint".[302]

(c) Alignment: Addressed at paragraphs [228] to [234] below.

(d) Legitimacy of process: Addressed at paragraphs [235] to [239] below.

227. It should also be observed that, on each of the matters the Stakeholder Report identifies as "[m]ost contested",[303] the Draft Guidelines adopt the most contested position. Those matters are: a dedicated standalone regulator and any civil penalty regime; the direction

298 Stakeholder Report at p 35.
299 Stakeholder Report at p 36.
300 Stakeholder Report at p 16.
301 Stakeholder Report at p 13.
302 Stakeholder Report at p 19.
303 Stakeholder Report at p 36.

of right of entry; "any restriction on the content of agreements"; and the reach of a code and the definition of a "government project".[304] An instrument constructed by selecting, on every contested question, the option least likely to command acceptance is not an instrument built to last.

J3. Alignment with Commonwealth settings

228. The proposed code would operate alongside Commonwealth procurement settings directed to different ends. Mr Hadgkiss accepted the difficulty:

> MR O'GRADY KC: And you would also agree that this pendulum effect 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. …
>
> MR HADGKISS: Absolutely. … It's highly problematic.
>
> MR O'GRADY KC: … you could have a situation where what one level of government's code prohibits, the other level of government's code encouraged or mandates?
>
> MR HADGKISS: They both have their — their agendas, yes.[305]

229. The potential for conflict is not theoretical. Section 354 of the FW Act, as amended by the *Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Act 2026* (Cth), permits the Commonwealth, in making procurement and grant decisions, to prefer an employer covered by an enterprise agreement, or by an enterprise agreement which covers an employee organisation. The explanatory memorandum records the purpose: the amendment operates "only to the extent reasonably necessary to support and facilitate more effective bargaining".[306] The Commonwealth has therefore determined that its purchasing power should be used to encourage enterprise agreements to which unions are party. The Draft Guidelines would use the State's purchasing power to penalise the content of such agreements. A contractor whose agreement contained any of the prohibited matters would be preferred at one level of government and excluded at

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304 Stakeholder Report at p 36.

305 Day 31 at p 2973 LL 34 – p 2974 L 10.

306 Explanatory Memorandum, *Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1 Bill)*, p 10.

the other.

230. This is not a difficulty raised only by the Administrator, nor is it confined to what the Commonwealth has already enacted. The Stakeholder Report records a government agency's caution that the federal *Secure Australian Jobs Code* "seeks to capture projects funded wholly or partly by the Commonwealth, which could extend to state-funded work and clash with a state Code", and that the interaction requires "current legal advice before a state Code took effect".[307]

231. The Commonwealth has announced that it will consult upon standards for the construction industry, to apply where Australian Government funding or financial arrangements support construction activity. The announcement was made by the Minister for Employment and Workplace Relations, and consultation is expected in the second half of 2026.[308] The matters under consideration include the prevention of unlawful and criminal behaviour, including bribery and inducements; the prevention of the engagement of inappropriate "industrial fixers" outside the requirements of the FW Act; fit and proper requirements for parties on construction projects; measures to ensure that enterprise agreements are genuinely agreed and that workplaces are free from coercion and intimidation; the fair and timely resolution of disputes; measures to prevent employee representatives dictating the choice of subcontractors; workplace flexibilities promoting productivity and the participation of women; support for safe, secure and well paid jobs; how to address over reliance on labour hire; support for the engagement of apprentices; and the payment of subcontractors and suppliers on time and in full. Those questions are being worked through in the forum described at paragraphs [240] to [242] below.

232. Two of those matters are directly opposed to the Draft Guidelines. The Commonwealth proposes to address over reliance on labour hire; the Draft Guidelines would prohibit a contractor from agreeing to restrict casual or daily hire engagement. The Commonwealth proposes to support the engagement of apprentices; the Draft Guidelines would prohibit apprentice ratios.[309] On a project supported by both governments, a contractor would be

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307 Stakeholder Report at p 24.

308 Media release, the Hon Amanda Rishworth MP, Minister for Employment and Workplace Relations, 'Proposed new federal standards to clean-up construction industry' <https://ministers.dewr.gov.au/rishworth/proposed-new-federal-standards-clean-construction-industry>.

309 Draft Guidelines at p 7, Part 4(e)(i) (no ratios of employees); and at p 8, Part 4(e)(iv) (no restrictions on labour, including casual labour and the source of labour). As to apprentice ratios, see Further Submissions at [41].

encouraged at one level to do the very thing for which it would be penalised at the other.

233. The Administrator does not suggest that the whole of the matters the Commonwealth has identified is inconsistent with the instrument proposed. Several of the matters under consideration — fit and proper requirements, genuine agreement, freedom from coercion, and the choice of subcontractors engaged upon a site — are matters the Draft Guidelines also address. That is the point. The same questions are being worked through at the Commonwealth level, by a tripartite process in which unions participate, upon a published timetable. A State instrument adopted now would pre-empt that work rather than complement it.

234. Counsel Assisting's submissions do not contemplate the potential for this conflict. The only treatment of Commonwealth law is at paragraphs [46] to [47], which concerns the 'same job, same pay' provisions and asserts that, "short of legislative inconsistency", a State may pursue a different objective. That may be accepted as a proposition of constitutional law without advancing the matter. It is not an answer to the operational impossibility for contractors, nor to the durability problem for the instrument. An instrument that places its subjects in conflict with the requirements of another level of government invites the very contest that will secure its repeal.

J4. Legitimacy of process

235. Counsel Assisting submits that it "does not rely on the feedback received for the purpose of these submissions save for two points".[310] The two reserved are the only two which assist it: that the feedback "discloses broad support from industry (although admittedly not from unions) for the re-introduction of a code of practice", and a union-initiated point about the attraction and retention of women.[311] The balance is disclaimed, notably the conditions attached to such support, the matters recorded as most contested, the objections to a standalone regulator, and the preference for enforcement through existing channels.

236. The first has since gone. The Administrator sought a de-anonymised version of the Report, on the ground that the asserted breadth of support could not be tested, nor its weight assessed, without knowing who the stakeholders were.[312] Counsel Assisting responded that it "no longer relies on the Stakeholder Engagement Report to the extent

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310 Further Submissions at [81].

311 Further Submissions at [81]; see also at [68(g)].

312 Letter from Gordon Legal to the Commissioner dated 10 July 2026 (**Annexure C**).

it discloses broad support from industry for the re-introduction of a code of practice".[313] It is left relying upon the consultation material for a single matter while disclaiming the rest. That is not open to it. If the material is relied upon, it must be taken as a whole. The Administrator relies upon it not for the weight of any body of opinion, which is what anonymity prevents, but for what the Commission's own process recorded.

237. Taken as a whole, it does not support the recommendation sought. No stakeholder has been consulted upon the instrument the Commissioner is asked to recommend. The Discussion Paper was released on 31 March 2026 and posed seven open questions.[314] The Stakeholder Report states that it "reflects engagement to 30 June 2026".[315] The Draft Guidelines were produced with the submissions on 3 July 2026. Whatever support the Stakeholder Report records is support for the idea of a code. It is not, and could not be, support for the Draft Guidelines.

238. Nor was the support recorded unqualified. The Stakeholder Report records that support "was, in most cases, conditional on the scope and design of a Code and its guidelines".[316] In particular:

    (a) two peak bodies conditioned support upon a code that complements existing law rather than duplicating it, and "[e]ven the strongest supporters raised duplication as a risk to be managed";[317]

    (b) one peak body "does not oppose a Code in principle, but does not support one on the basis of the Discussion Paper", arguing that the case "lacks a draft instrument and a regulatory impact statement";

    (c) another would implement a code only after "a formal Impact Analysis Statement covering cost, productivity, competition, regional workforce and investment, the publication of draft provisions and guidance, a reasonable transition for projects already in procurement or financing, and alignment with the Queensland Procurement Policy 2026";

    (d) one peak body proposed "a staged introduction — an exposure draft, targeted consultation, supporting guidance, a reasonable transition before enforcement, and

313 Letter from Seyfarth Shaw Australia to Gordon Legal dated 15 July 2026 (**Annexure C**).
314 Further Submissions at [79].
315 Stakeholder Report at p 5.
316 Stakeholder Report at p 10.
317 Stakeholder Report at p 10.

a formal review"; and

(e) "[m]ultiple industry stakeholders made the involvement of the unions their central condition, concerned that a Code imposed without genuine consultation could provoke a more combative response and work against the collaborative relationship it sought", one drawing "the lesson from 2013, when in its view the Code came in too quickly".

239. Counsel Assisting's own consultation report concludes upon precisely this point. Its final paragraph records that "[t]he consultation therefore leaves open how a Code can be introduced through a process durable enough to consider and act on stakeholder feedback in time for upcoming enterprise negotiations".[318] The report identifies the question. The submissions to which it is annexed do not answer it. This Part is directed to answering it.

J5. The matters proposed for the code are already before the National Construction Industry Forum

240. The NCIF is a tripartite body of unions, employers and government, and the CFMEU has committed to it. Its identified reform issues for 2026 include procurement processes, the development of fit and proper person standards, and the facilitation of project agreements.[319] Those are three of the matters Counsel Assisting invites the Commissioner to determine by code. A recommendation directed to process would allow that work to be taken into account. A recommendation adopting a drafted instrument would pre-empt it.

241. The Forum's work is well advanced. On 22 September 2025 it endorsed a Blueprint for the Future, a document developed by the industry rather than imposed by government.[320] It endorsed a forward work plan in late 2025, and a draft Joint Construction Industry Charter, setting out shared behavioural expectations for all industry participants. The Commonwealth describes the construction standards referred to at paragraphs [231] to [233] above as the next step in implementing the Blueprint, and as complementing the Charter.

242. The Charter is of particular significance to the first of the criteria identified at paragraph

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318 Stakeholder Report at p 36.

319 Third Bi-Annual Report at [32].

320 National Construction Industry Forum, Blueprint for the Future, endorsed 22 September 2025: Department of Employment and Workplace Relations <https://www.dewr.gov.au/australian-building-and-construction-industry/resources/blueprint-future>.

[225] above. It would set behavioural expectations for all participants in the industry, and not for contractors alone. That is the reciprocity which the Stakeholder Report identified as one of only two points of common ground between supporters of a code and the union stakeholders, and which the Draft Guidelines do not provide.

J6. The Commission should recommend a process, not an instrument or body

243. If the Commissioner is minded to recommend a code, the recommendation should be directed to the process by which a durable code is to be developed, and to the principles that should govern its design, rather than to the adoption of a drafted instrument.

244. A recommendation in that form is squarely within the Commissioner's function. Paragraph 3(f) of the Order in Council directs the Commission to review whether any law or policy change is needed.[321] A recommendation as to the manner in which a policy instrument is to be developed, and as to the principles that instrument must satisfy, is a recommendation as to policy change.

245. The process should comprise, in sequence:

(a) publication of an exposure draft of the code and of any implementation guidelines;

(b) a defined period for consultation upon the exposure draft, extending to contractors, subcontractors, industry associations, employee representatives and the relevant client agencies;

(c) an impact analysis addressing cost, productivity, competition, regional delivery and investment, and the interaction with the Queensland Procurement Policy 2026;

(d) current legal advice as to the interaction with the Secure Australian Jobs Code and the Commonwealth legislation and as to the source and limits of any State enforcement power;

(e) publication of guidance, model clauses and worked examples of compliant and non-compliant provisions;

(f) a defined transition period for projects already procured, financed or under construction, and for enterprise agreements already in operation;

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321 *Commissions of Inquiry Order (No. 2) 2025* at para 3(f).

(g) commencement; and

(h) a formal review at a defined interval, directed to whether the code is improving productivity, reducing disruption and delivering value for money, with the outcome of that review published.

246. The principles that should govern the design of any code are those identified at paragraph [225] above, namely reciprocity, anchoring, proportionality, complementarity, alignment and legitimacy of process. The Administrator does not contend that government procurement must be confined to price. The objection is to using it to determine, by prohibition, matters presently before other forums.

247. The bargaining round is also the forum in which the matters in issue can be addressed. In his Third Bi-Annual Report to Parliament, the Administrator stated that "[p]roject agreements, arrangements that facilitate the engagement of more women in construction, flexible and productive rostering and RDO practices, are all matters that should be the subject of discussion aimed at mutually beneficial reforms and fully debated in the lead up to the 2027 enterprise bargaining rounds across Australia".[322] Two of those matters the Draft Guidelines would determine by prohibition: rostered days off, and project agreements save where the client agency and the Attorney-General permit them. A third, the engagement of more women, Part 5.1(r) would convert into a tender requirement.[323] They are presently offered for negotiation.

J7. Urgency does not justify dispensing with process

248. Counsel Assisting presses for the proposed regime to be put in place "as a matter of priority", relying upon an estimated $119 billion of government funded construction work over four years and the imminent renegotiation of the agreements listed at Annexure 1 of the Further Submissions.[324] The Administrator accepts that the bargaining calendar is a material consideration. It does not justify dispensing with process.

249. Urgency in 2013 produced the precedent for what is now proposed. The instrument annexed to the Further Submissions is that model with amendments: Counsel Assisting describes the former Queensland Guidelines as "a commendable model … that could be readily re-introduced in Queensland", and sets out what it says are "the only material

322 Third Bi-Annual Report at [6].

323 Draft Guidelines at p 8, Parts 4(e)(vi) and 4(j); p 10, Part 5.1(r); and p 11, Part 6.

324 Further Submissions at [13], [77]-[78]; Annexure 1.

differences" between those Guidelines and the Draft Guidelines.[325] The Stakeholder Report records that "the model never ran long enough for those contractual consequences to be fully borne out", and that it was "stood up quickly by Cabinet and framed in anticipation of legal challenge".[326] An industry peak body which counts it an advantage that procurement settings "can be changed quickly" cautioned that "the downside is the speed with which the previous Code was unwound".[327] And of the stakeholders who made the involvement of the unions their central condition, one emphasised "genuine consultation with contractors, subcontractors and employee representatives before commencement and during review", drawing "the lesson from 2013, when in its view the Code came in too quickly".[328] To repeat that course would be to produce the same result, at greater cost, across a larger programme of work.

250. What makes a code durable is its design. The stakeholder which made durability a central condition observed: a code "anchored to productivity, and able to show value to taxpayers, is harder to unwind on a change of government than one seen as directed at unions", coupled with a reciprocal standard applying to all parties on site so that the code could not be cast as a return to earlier industrial settings.[329] A regime recommended in haste, directed at one industrial actor, and made without the involvement of those it would bind, is the opposite of that description on every element.

251. The conditions the consultation identified have not been met. The government agency which assessed that a procurement code could be implemented without a long lead time also "cautioned that timing must account for federal developments, including the prospect of a competing Commonwealth code, which would require current legal advice before a state Code took effect".[330] Union representatives did not engage with timing on its merits, treating it as premature: they could not give meaningful feedback on commencement "without knowing what work and which entities a Code would cover", which the Report records as the prior question.[331]

252. If, contrary to the Administrator's primary submission, the Commission is minded to recommend a code, an exposure draft released promptly would signal the Government's

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325 Further Submissions at [20] and [67]-[68].
326 Stakeholder Report at p 17.
327 Stakeholder Report at p 15.
328 Stakeholder Report at p 25.
329 Stakeholder Report at p 26.
330 Stakeholder Report at p 21.
331 Stakeholder Report at p 21.

expectations in time to inform bargaining, without committing the State to an instrument that has never been tested with those it would bind.

K. CONCLUSION

253. For the reasons set out above, the Administrator's primary submission is that neither the code nor the independent regulator proposed by Counsel Assisting should be recommended. If, contrary to that submission, the Commissioner is minded to recommend a code, the recommendation should be directed to the process by which a durable code is to be developed (see paragraph [245] above), rather than the adoption of the Draft Guidelines. A code developed in that manner has a prospect of outlasting the government that makes it.

254. Counsel Assisting opposed the adjournment of Mr Hadgkiss' cross-examination, on the footing that it was "not clear to us why Mr Hadgkiss would need to be cross-examined",[332] and now relies repeatedly upon the absence of challenge to that evidence. It opened upon the footing that a code "does not pursue its objectives by targeting unions",[333] and has produced an instrument which does precisely that. And it disclaims reliance upon the consultation material while deploying the single finding within it which favours its case. Not one of those matters would be determinative. Taken together they are a reason for scrutiny rather than for deference.

255. The Administrator makes these submissions from a position of engagement rather than resistance: monthly meetings with Master Builders Australia and the major employer groups, 28 meetings with significant subcontractors in a single month, meetings with the Fair Work Ombudsman, the Fair Work Commission, the Australian Federal Police and Victoria Police, and participation in the NCIF upon "a massive blueprint of change for the construction industry affecting all of [its] aspects".[334] As Mr Irving KC, in his capacity as Administrator, told the Commission:

> "…the CFMEU in Queensland stands ready and willing to engage with regulators, with government bodies, with the elected representatives of the Queensland people to move forward to a new relationship, to make sure the construction industry is conducted in a more productive manner, in a more collaborative manner and a less

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332 Day 16 at p 1440 LL 3-4.
333 Opening Submissions at [11].
334 Day 3 at p 283 LL 1-20.

disputatious manner."[335]

Chris O'Grady KC

Amelia Hughes

Felicity Fox

Ben Bromberg

Counsel for the Administrator

Dated: 14 August 2026

Annexures:

(a) Annexure A: Bundle of correspondence regarding request for the QPC data: Letters from Gordon Legal to Seyfarth Shaw dated 10, 17 and 22 July 2026; letters from Seyfarth Shaw to Gordon Legal dated 15 and 21 July 2026 and email from the Commission to Gordon Legal dated 4 August 2026

(b) Annexure B: Derivation of Tables 1 and 2 — construction output per hour worked, by jurisdiction, 2011-12 to 2023-24

(c) Annexure C: Letter from Gordon Legal to the Commissioner dated 10 July 2026 and letter from Seyfarth Shaw Australia to Gordon Legal dated 15 July 2026

(d) Annexure D: Geoffrey Giudice, 'Industrial relations law reform – What value should be given to stability?' (2014) 56(3) *Journal of Industrial Relations* 433

[335] Day 3 at p 283 LL 12-16.

ANNEXURES TO THE SUBMISSIONS OF THE ADMINISTRATOR

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

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ANNEXURE A

Correspondence regarding the request for the QPC data

10 July 2026

Brad Annson
Partner
E: [redacted]

Lana Dennis
Legal Administrator
E: [redacted]

Mr Stuart Wood AM KC
Commissioner
Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

By email only

Dear Commissioner,

Queensland Productivity Commission modelling – request for the undelying data and model

1. We write on behalf of the Administrator of the CFMEU (**Administrator**).

2. In the course of hearings, the Commission has indicated that it is bound to have regard to the findings of the Queensland Productivity Commission (**QPC**) in its final report, *Opportunities to Improve Productivity of the Construction Industry* (October 2025) (**QPC Final Report**), unless those findings are challenged.

3. That indication extends to the basis of the findings: the Commission has expressly said it would have regard to "the basis upon which these findings were made".

4. This is consistent with the Terms of Reference, which direct the Commission to have regard to the QPC's inquiry into construction productivity to ensure there is no duplication of the economic focus of that inquiry.

5. Additionally, the further submissions of Counsel Assisting dated 3 July 2026 concerning the re-introduction of a code of practice and an independent regulator (**Further Submissions**) rely on the findings of the QPC Final Report.

6. Appendix C of the QPC Final Report describes the modelling methodology used to estimate the potential impact of the Best Practice Industry Conditions (**BPICs**),

including that a standard cost-benefit analysis was used. Appendix C also lists the key assumptions and caveats, and sets out the principal results.

7. Appendix C does not, however, disclose the underlying analysis. In particular, it does not include the working model, the raw input data or the full sensitivity analyses (together, the **QPC material**).

8. The result is that it is not possible to test the reliability of the findings, particularly given the weight the modelling places on the assumed counterfactual, namely a world without BPICs.

9. As Counsel Assisting relies on the QPC findings in its Further Submissions, and the Commission has indicated that it will have regard to the basis on which those findings were made, the Administrator proceeds on the basis that the QPC material is available to the Commission or can be obtained by it from the QPC.

10. The Administrator therefore respectfully requests that the Commission provide the QPC material to the parties granted leave, to enable them to assess whether to put the QPC findings in issue.

11. Submissions in response to the Further Submissions are due by 24 July 2026. Given that deadline, the Administrator respectfully requests a response to this letter by **16 July 2026**.

12. We look forward to the Commission's response.

Yours faithfully

[redacted]

Brad Annson
Partner
Gordon Legal

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

15 July 2026

Mr Brad Annson

Partner

Gordon Legal

By email only: [redacted]

Dear Mr Annson,

Queensland Productivity Commission modelling – request for the underlying data and model

We refer to your letter dated 10 July 2026 regarding the above.

We understand that the Administrator seeks to obtain certain analysis underlying the QPC Final Report.

At pages 111 and 407 of the QPC Final Report, reference is made to the modelling methodology and assumptions presented in detail in the QPC Interim Report (Appendix C).

Noting Counsel Assisting's reliance on the QPC Final Report and Appendix C to the QPC Interim Report, please identify what exactly is sought in order for the Administrator to assess whether to put the QPC findings in issue. To be clear, this material will need to be sought from the QPC.

Yours faithfully

Chris Gardner
Partner | Seyfarth Shaw Australia
Lawyers for Commission of Inquiry
Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry
M: [redacted]
E: [redacted]

17 July 2026

Brad Annson
Partner
E: [redacted]
Legal Administrator: Lana Dennis
E: [redacted]

Mr Chris Gardner
Partner | Seyfarth Shaw Australia
Lawyers for Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

By email only: [redacted]

Dear Mr Gardner,

Queensland Productivity Commission modelling – request for the underlying data and model

1. We refer to our letter dated 10 July 2026 and your reply dated 15 July 2026.

2. We maintain the request made in our 10 July 2026 letter. This letter responds to the matters raised in your letter, identifies with particularity the material the Administrator requires, and addresses the timing of responses to Counsel Assisting's Further Submissions of 3 July 2026.

The location of the modelling methodology

3. As your letter notes, the Final Report records that the modelling was presented in detail in the Interim Report, the relevant appendix of which is Appendix C: Modelling of BPICs.

4. As we said at paragraphs 6 and 7 of our 10 July 2026 letter, the Final Report's own Appendix C likewise describes the modelling methodology, records that a standard cost-benefit analysis was used, and lists the key assumptions, caveats and principal results. Both are descriptions of the same modelling, and wherever that description appears, it does not alter the position.

5. The difficulty is the one we identified. A description of the methodology, however detailed and wherever located, is not the model. The working model, the raw input data and the full sensitivity analyses that underpin the methodology are not publicly available. Without those, the reliability of the findings cannot be tested, particularly, as we noted in our 10 July letter, given the weight the modelling places on the assumed counterfactual of a world without the Best Practice Industry Conditions (**BPICs**).

What is sought

6. In answer to your request that we identify what is sought, the Administrator seeks the following (together, the **QPC material**):

   a) the working model used to estimate the impact of the BPICs, in its native electronic form with formulae and calculations intact, and not as a locked or values only output;

   b) the input data relied upon in the model, including the source data, the sources from which it was drawn, and any adjustments, cleaning or transformations applied to it;

   c) the full sensitivity analyses, including all scenarios modelled and the results of each;

   d) the assumptions adopted in the model, including the counterfactual, together with the reasons each assumption was adopted and an explanation of how each was applied in the model; and

   e) in respect of each assumption, the references and any supporting data relied upon, and in particular:

      i) the assumption concerning the counterfactual, being a world without the BPICs, and the treatment of existing enterprise bargaining agreements within that counterfactual; and

      ii) the assumption concerning how any increase in the cost of the Government's capital program is funded, including the assumed excess burden of taxation; and

   f) any documents recording the assumptions, parameters or limitations of the model that are necessary to understand and test it.

7. This is the material necessary to assess whether, and if so on what basis, to put the QPC findings in issue, and to respond to Counsel Assisting's Further Submissions, which rely on those findings.

Provision of the QPC material

8. You state that the QPC material will need to be sought from the QPC. We respectfully request that the Commission seek the QPC material from the QPC and provide it to the parties granted leave.

9. The QPC findings are relied upon in these proceedings at several levels. The Terms of Reference direct the Commission to have regard to the QPC's inquiry into construction productivity, Counsel Assisting's Further Submissions rely on the QPC findings in support of the re-introduction of a code of practice and an independent regulator, and the Commissioner has indicated that the Commission will have regard to the basis upon which those findings were made. In those circumstances, and consistently with the requirements of procedural fairness, we respectfully ask that the Commission confirm it

will obtain and provide the QPC material, and indicate the timeframe within which it can be provided.

10. We note for completeness that the ability of a party to adduce its own contrary evidence is not an answer to this request. The reliability of the QPC's modelling cannot be tested without the QPC's own model, data and sensitivity analyses, and in any event any expert retained to respond to the modelling will require that material in order to do so.

Timing and extension

11. Responses to Counsel Assisting's Further Submissions are presently due by 4pm on 24 July 2026. That date cannot be met in a way that allows the QPC findings to be meaningfully addressed. The QPC material has not yet been provided, and until it is provided and reviewed, the Administrator cannot assess whether expert analysis is required or brief any expert.

12. The Administrator therefore requests that the date for responses to Counsel Assisting's Further Submissions be vacated, and that responses not fall due until an agreed period after the QPC material is provided. We are not presently in a position to specify that period, as it will depend on the volume and complexity of the material and whether expert analysis is required. We will provide an estimate once the material is received, and we reserve the right to seek further time.

13. We recognise the Commission's wish to conclude this issue promptly, and the Administrator's request for time is not intended to delay the Commission's work but to ensure it can respond meaningfully to material on which the findings depend.

14. Given the 24 July 2026 deadline, we would be grateful for a response as soon as possible, and in any event by close of business on 20 July 2026.

Yours faithfully,

[redacted]

Brad Annson
Partner
Gordon Legal

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

Brad Annson
Partner
Gordon Legal
Level 5, 500 Bourke Street
Melbourne VIC 3000

By email only: [redacted]

21 July 2026

Dear Mr Annson

Queensland Productivity Commission modelling – request for the underlying data and model

1. We refer to your correspondence most recently of 17 July 2026, together with your previous letter of 10 July 2026 and our reply of 15 July 2026.

2. The Commission will make inquiries of the Queensland Productivity Commission (**QPC**) in respect of the material the Administrator seeks at paragraphs 6(a) to 6(f) of your letter (the **QPC Material**).

3. The Commission appreciates that, if the QPC Material is provided to the Administrator, the Administrator may wish to test the findings and as a consequence require additional time to respond to Counsel Assisting's Further Submissions of 3 July 2026.

4. The Administrator's position is that it currently cannot comply with the Commissioner's Directions Order requiring responses by 24 July 2026.

5. The Commission considers that the question of any future timetabling ought to be addressed after the Commission makes the inquiries at paragraph [2] above and at the time the QPC material is produced (if at all).

Yours faithfully

Chris Gardner
Partner | Seyfarth Shaw Australia
Lawyers for Commission of Inquiry

M: [redacted]
E: [redacted]

22 July 2026

Gordon Legal
IT'S PERSONAL
Brad Annson
PARTNER
E: [redacted]
Legal Administrator: Lana Dennis
E: [redacted]

Mr Chris Gardner
Partner
Seyfarth Shaw
Lawyers for Commission of Inquiry

By email only

Dear Mr Gardner

Queensland Productivity Commission modelling — request for the underlying data and model; timing of responses to Counsel Assisting's Further Submissions

1. We refer to our letters of 10 and 17 July 2026, your reply of 15 July 2026, and your further letter of 21 July 2026.

2. We note that, in your letter of 21 July 2026, the Commission: (a) will make inquiries of the QPC in respect of the material sought at paragraphs 6(a)–6(f) of our letter of 17 July 2026 (the QPC material); (b) accepts that, if the QPC material is provided, the Administrator may require additional time to respond to Counsel Assisting's Further Submissions of 3 July 2026; and (c) considers that any future timetabling should be addressed after those inquiries are made and at the time any QPC material is produced.

3. In those circumstances, the Administrator proceeds on the basis that he is not required to file his responses to Counsel Assisting's Further Submissions by 4pm on 24 July 2026, and he will not be doing so. Consistent with our letter of 17 July 2026, the Administrator will file his responses within a period to be agreed following production of the QPC material (or, if it is not produced, at a time to be fixed by the Commission).

4. In any event, and without prejudice to the Administrator's position at paragraph 3, the Administrator is not in a position to file responses by 24 July 2026. The Administrator first sought the QPC material by his letter of 10 July 2026 and pressed that request on 17 July 2026. The Commission's confirmation that it will make inquiries of the QPC came only on the evening of 21 July 2026, and the QPC material has still not been provided. For the reasons set out in our letter of 17 July 2026, in particular that the QPC material has not been provided, cannot be reviewed, and no expert can be briefed in the time available, the 24 July 2026 date cannot be met in a way that allows the QPC findings to be meaningfully addressed.

5. The Administrator has acted promptly throughout; his inability to meet the 24 July 2026 date reflects the time taken to resolve the request and the fact that the material remains outstanding, rather than any want of diligence on his part.

6. We look forward to hearing from the Commission following its inquiries of the QPC, including as to the timeframe within which the QPC material can be provided, and remain ready to discuss an appropriate timetable.

Yours faithfully

[redacted]

Brad Annson
Partner
Gordon Legal

FW: Queensland Productivity Commission modelling – request for the underlying data and model

Summarise

BA **Brad Annson <[redacted]>**

Tuesday 4 August 2026 at 9:53 AM

To: Chris O'Grady; Amelia Hughes | 8PT Chambers; Felicity Fox; Ben Bromberg; **Cc:** Marcus Clayton; Vanessa Harkess; Joseph Mahony; Mia Pagonis

This message is high importance.

From: Legal <legal@cfmeuinquiry.qld.gov.au>
Sent: Tuesday, 4 August 2026 9:49 AM
To: Brad Annson <[redacted]>
Cc: legal <legal@cfmeuinquiry.qld.gov.au>; Christopher Gardner [redacted]; Gardner, Chris [redacted] John Mainland [redacted] Joseph Mahony [redacted]; Marcus Clayton [redacted] Lauren Trickey [redacted]
Subject: Re: Queensland Productivity Commission modelling – request for the underlying data and model

Dear Mr Annson,

By way of update, the Commission issued a notice to the Queensland Productivity Commission on 23 July 2026 to produce the material requested by your letter and an extension has now been granted to the Queensland Productivity Commission to produce that material by 4pm on Friday, 14 August 2026.

Once the material is received from the Queensland Productivity Commission, the Commission will confirm the extended timeframe for providing submissions responsive to Counsel Assisting's Further Submissions dated 3 July 2026.

Yours faithfully,

Legal Team

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE B

Derivation of Tables 1 and 2 — construction output per hour worked, by jurisdiction, 2011-12 to 2023-24

ANNEXURE B

Derivation of Tables 1 and 2 — construction output per hour worked, by jurisdiction, 2011-12 to 2023-24

Sources and method

1. Table 1 of the submissions states, for each State and Territory, the value of construction output produced per hour worked in that jurisdiction, for each year from 2011-12 to 2023-24. Table 2 states the change in that figure over the period. Each figure in Table 1 is the quotient of two published Australian Bureau of Statistics series. No estimate, adjustment or modelling of any kind has been applied to either series.

2. The numerator is construction industry gross value added, chain volume measures, in $ millions, taken from Australian Bureau of Statistics, Australian National Accounts: State Accounts (cat no 5220.0), 2024-25 financial year, Tables 2 to 9 (one table for each State and Territory), sheet "Data1", the series described as "Construction (E) ; Industry gross value added: Chain volume measures ;". The series are Original, annual, with a collection month of June. The series identifier for each jurisdiction appears in the second column of Table A below.

3. Chain volume measures are used, not current prices. This matters: the submissions are concerned with the volume of construction work produced for each hour worked, and current price figures would confound that with movements in construction prices. The distinction is material to the result. On a current price basis the figures in Table 1 do not follow, and the conclusions in paragraphs 77 to 83 would not be open.

4. The denominator is hours actually worked in the construction industry, in millions of hours, taken from Australian Bureau of Statistics, Modelled state and territory jobs and hours worked estimates by industry (cat no 6150.0.55.003), released at 11.30 am on 5 September 2025, sheet "Data 1", the column "Hours actually worked (million)" for the industry "Construction". That series is quarterly. It has been summed across the four quarters of each year ended 30 June to produce the annual figures in Table B below. No other operation has been performed on it.

5. The period covered is dictated by the hours series, not by any selection. That series begins with the September quarter 2011, so the first complete year ended 30 June is 2011-12. At the date of these submissions it extends to the March quarter 2025, so the last complete year ended 30 June is 2023-24. The gross value added series extends further, to 2024-25, but the corresponding year cannot be completed on the hours side.

6. Table C below reproduces Table 1 of the submissions. Every figure in Table C is Table A divided by Table B for the same jurisdiction and year, expressed in dollars per hour and rounded to two decimal places. The underlying workbooks are publicly available from the Australian Bureau of Statistics website and can be provided on request.

Table A — Construction (E), industry gross value added, chain volume measures

$ millions. ABS cat no 5220.0, Tables 2–9, sheet "Data1". Original series, year ended 30 June.

Jurisdiction	Series ID	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
NSW	A2715761W	44179	45417	48288	49660	52546	55202	57839	60459	57404	56498	56746	57484	58678
Vic	A2715041X	34989	34452	34722	36869	39213	40305	43239	46645	46424	44242	45386	46324	46747
Qld	A2715060F	43099	44494	48928	42625	36792	36021	38085	35942	33310	34620	36674	38047	37933
WA	A2715098L	37961	39779	40915	39175	36207	27125	26796	22303	21620	22711	24045	25115	26027
SA	A2715079F	8767	9095	9408	9358	9165	9114	9723	10128	9734	9861	10762	11117	11185
Tas	A2715117J	2097	2046	2173	2568	2352	2364	2573	2879	2942	2991	3082	3125	3152
NT	A2715136R	2082	4031	3577	2779	3434	3673	3906	2126	1700	1749	1924	2079	2112
ACT	A2715155W	2918	2692	2619	2921	3062	3186	3277	3454	3637	3560	3539	3532	3310

Table B — Construction, hours actually worked

Millions of hours. ABS cat no 6150.0.55.003, sheet "Data 1". Quarterly series summed to years ended 30 June.

Jurisdiction	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
NSW	549.5	531.1	536.8	603.8	615.0	617.2	639.8	677.6	629.2	635.8	591.3	700.2	677.2
Vic	447.3	417.3	424.4	432.6	502.1	475.5	514.8	536.6	525.4	508.2	572.8	598.5	565.3
Qld	443.7	456.2	449.3	445.8	413.4	431.8	432.6	439.7	434.9	425.0	447.1	468.8	471.3
WA	261.7	265.1	265.6	290.0	281.9	241.0	242.2	232.3	232.1	229.5	264.0	253.6	260.9
SA	123.5	122.8	116.0	110.4	111.9	118.4	113.7	135.7	124.4	127.7	148.4	140.2	131.5
Tas	37.6	31.4	30.5	31.9	36.3	41.0	39.9	38.0	33.7	36.0	43.8	40.9	42.6
NT	24.5	27.2	29.7	31.3	33.3	27.7	26.4	21.9	20.0	19.4	18.1	18.9	18.7
ACT	27.4	26.2	22.9	27.3	27.5	25.9	27.8	31.6	36.9	29.1	24.9	27.1	26.3

Table C — Construction output per hour worked (Table 1 of the submissions)

Dollars per hour. Table A divided by Table B.

Jurisdiction	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
NSW	80.40	85.51	89.96	82.25	85.44	89.44	90.40	89.23	91.23	88.86	95.97	82.10	86.65
Vic	78.22	82.56	81.81	85.23	78.10	84.76	83.99	86.93	88.36	87.06	79.24	77.40	82.69
Qld	97.14	97.53	108.90	95.61	89.00	83.42	88.04	81.74	76.59	81.46	82.03	81.16	80.49
WA	145.06	150.05	154.05	135.09	128.44	112.55	110.64	96.01	93.15	98.96	91.08	99.03	99.76
SA	70.99	74.06	81.10	84.76	81.90	76.98	85.51	74.64	78.25	77.22	72.52	79.29	85.06
Tas	55.77	65.16	71.25	80.50	64.79	57.66	64.49	75.76	87.30	83.08	70.37	76.41	73.99
NT	84.98	148.20	120.44	88.79	103.12	132.60	147.95	97.08	85.00	90.15	106.30	110.00	112.94
ACT	106.50	102.75	114.37	107.00	111.35	123.01	117.88	109.30	98.56	122.34	142.13	130.33	125.86

ANNEXURE C

Correspondence regarding the Stakeholder Engagement Report

10 July 2026

Brad Annson
Partner
E: [redacted]

Lana Dennis
Legal Administrator
E: [redacted]

Mr Stuart Wood AM KC
Commissioner
Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

By email only

Dear Commissioner,

Counsel Assisting's further submissions dated 3 July 2026: Annexure 3 (Stakeholder Engagement Report) – request for disclosure

1. We write on behalf of the Administrator of the CFMEU (**Administrator**).

2. We refer to the further submissions of Counsel Assisting dated 3 July 2026 concerning the re-introduction of a code of practice and an independent regulator (**Further Submissions**), and in particular to Annexure 3 to those submissions, the Stakeholder Engagement Report (**Report**). We also refer to the directions given on 11 June 2026, by which the parties granted leave are to respond to the Further Submissions by 24 July 2026.

3. The Administrator respectfully seeks disclosure of an un-anonymised version of the Report, on a confidential basis and subject to a non-publication order.

4. At paragraph [81] of the Further Submissions, Counsel Assisting states that the feedback recorded in the Report has been anonymised, and that Counsel Assisting does not rely on that feedback save for two matters:
   (a) that the feedback discloses broad support from industry (though not from unions) for the re-introduction of a code of practice; and
   (b) a union-initiated point concerning the attraction and retention of women.

5. The Administrator is required to respond to the Further Submissions, including the two matters on which Counsel Assisting relies, by 24 July 2026. The Administrator

cannot properly respond to, or test the weight to be given to, the asserted broad support from industry without knowing the identity of the stakeholders whose feedback is recorded in the body of the Report and in the stakeholder register, including which stakeholders are said to support, qualify or oppose a code, and the nature and extent of their interests in the industry. Those matters cannot be assessed on a de-identified basis.

6. The Administrator therefore respectfully requests that the Commission provide, or make available, an un-anonymised version of the Report be provided to the parties granted leave, identifying each stakeholder recorded in the body of the Report and in the stakeholder register.

7. The Administrator recognises the undertakings given to participants that any public-facing version of the Report would be de-identified. The Administrator does not seek public disclosure of the identities of participants. To give effect to those undertakings, the Administrator respectfully suggests that any such direction provide that:
   (a) the un-anonymised version be provided in confidence to the legal representatives of the parties granted leave;
   (b) the disclosure be made subject to a non-publication order; and
   (c) the parties granted leave refer only to the de-identified version of the Report in any submission forming part of the public record, and confine any submission that refers to the identity of a participant to a confidential schedule provided to the Commissioner and to the legal representatives of the other parties granted leave.

8. Given the response date of 24 July 2026, the Administrator respectfully requests a response to this letter by **16 July 2026**.

9. We look forward to the Commission's response.

Yours faithfully



Brad Annson
Partner
Gordon Legal

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

15 July 2026

Mr Brad Annson

Partner

Gordon Legal

By email: [redacted]

Dear Mr Annson,

Counsel Assisting's further submissions dated 3 July 2026: Annexure 3 (Stakeholder Engagement Report) – request for disclosure

We refer to your letter dated 10 July 2026 regarding the above.

In view of your request, and the fact that parties to the consultation process were promised that their input would remain anonymous, Counsel Assisting no longer relies on the Stakeholder Engagement Report to the extent it discloses broad support from industry for the re-introduction of a code of practice.

Formal steps will be taken to confirm this.

We trust this resolves the need for the disclosure sought.

Yours faithfully

Chris Gardner
Partner | Seyfarth Shaw Australia
Lawyers for Commission of Inquiry
Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry
M: [redacted]
E: [redacted]

ANNEXURE D

Geoffrey Giudice, ‘Industrial relations law reform — What value should be given to stability?’ (2014) 56(3) Journal of Industrial Relations 433

Check for updates

Practitioner Review

Journal of Industrial Relations
2014, Vol. 56(3) 433–441
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Industrial relations law reform – What value should be given to stability?

The Hon. Geoffrey Giudice AO

This article[1] is principally about past reform of the industrial relations system, whether further reform is needed and whether the way in which industrial relations policy is formulated is capable of producing a durable system which serves our long-term economic and social objectives.

It is suggested that Australia needs a stable and therefore predictable industrial relations framework which serves our long-term goals and enables business, both here and overseas, and other stakeholders to make strategic decisions with some confidence that the key elements of the system will not change. Industrial relations policy makers emphasize the need for change. They rarely advocate stability in our industrial relations system. Stability is important from an economic and social viewpoint, but is not always given a high value by union and industry representatives or by political advisers. After two decades of change, a great deal of which has been beneficial, further change is unlikely to lead to a net benefit for our economy unless there is an improved policy formulation process in which stability is a principal objective. This is not to suggest that other considerations such as improving productivity and efficiency and providing more secure and better paid employment are not important in policy formulation – clearly they are. But, as argued later, change involves significant costs. Those costs should be taken into account when assessing proposals for reform. Priority should be given to changes which are likely to be enduring. In this context, a broadly based inquiry into the industrial relations system which gives a high priority to stability in the system has the potential to result in sound policy proposals.

Corresponding author:
Geoffrey Giudice, Ashurst, Level 26, 181 William Street, Melbourne, Victoria 3000, Australia.
Email: Geoffrey.Giudice@ashurst.com

Twenty years of reform

Over the last 20 years, we have seen successive waves of reform. There were major legislative changes in 1993, 1996, 2005 and 2009. There have been many other less ambitious changes and unsuccessful attempts by Governments to get bills through an unsympathetic Senate.

What are the reasons for this ongoing restlessness about the industrial relations system? There are a number of them, but the underlying issue is the extent to which the system should limit the freedom of action of employers and of employees and their representatives – the trade unions. The importance of award and agreement wages and conditions both for employees, so far as living standards are concerned, and for employers, so far as labour costs are concerned, are central considerations but by no means the only ones. What rights should trade unions have and what should the boundaries of collective action be? What protection should the system provide to employers who are pursuing their legitimate business or other objectives and how should these rights be reconciled with the workplace rights of employees? These are all important matters. The way in which they are dealt with can influence the health of our society through the effect on economic growth, employment, incomes and the quality of working life.

The significant developments in industrial regulation can be identified by looking at the principal effects of the four major reform Acts.

The 1993 Act moved the system away from centralised fixation of wages and conditions and set it on a path towards bargaining over wages and conditions at the single enterprise level above a safety net of minimum wages and conditions set by awards. The Act was important for at least two other reasons: first, because it introduced the concept of protected industrial action and second, gave dismissed employees a right to claim remedies for unfair dismissal.[2]

The 1996 Act limited the number of matters that could be included in awards, reinforced the minimum character of award conditions and established a program for simplification of award content. The options for bargaining and individual agreement making were extended, in particular by the introduction of Australian Workplace Agreements.[3]

In 2005, the industrial dispute power was discarded and the corporations power became the main basis for industrial regulation at the federal level. Corporations which had previously been covered by State awards and agreements were taken into the federal system for the first time. Award conditions other than minimum wages were frozen. New forms of direct regulation of conditions were introduced and arrangements relating to bargaining, industrial action and individual agreements were also altered significantly.[4]

The Fair Work Act 2009 extended the use of the corporations power and entrenched a system of enterprise bargaining based on minimum conditions in legislated National Employment Standards on the one hand and modern awards on the other, covering eventually almost the whole of the private sector. The scope for compulsory arbitration was extended in some areas, and some existing workplace rights were re-enacted and some new workplace rights created.

It is not practical to detail all of the legislative changes over this period. There are four overriding developments or trends which provide a useful basis for analysis. They are the use of the corporations power, the rise of individual remedies and processes, the changed role and importance of registered organisations and the reduction in access to compulsory arbitration.

The use of the corporations power

The use of the corporations power underpinned the most significant change in the industrial relations system since Federation. It has enabled the creation of a national workplace relations system and removed jurisdictional obstacles to the operation of that system. Technical arguments about jurisdiction, which were often a prelude to proceedings in the Australian Industrial Relations Commission, have reduced in number and in some areas disappeared entirely. Arcane debates about the existence of an industrial dispute are a thing of the past.

We now have a national system for employers and employees in the private sector, except for employees in the non-corporate sector in Western Australia, involving minimum standards contained in a set of around 120 modernised awards and the National Employment Standards. These changes have eliminated inconsistency based on State boundaries and reduced inequality in basic wages and conditions of employment.

Awards as we know deal with minimum wages, hours of work, overtime and penalty rates and a number of other matters. Necessarily, there are various transitional arrangements designed to cushion the impact of the rationalisation of a wide range of sometimes inconsistent provisions in a multiplicity of federal and State awards. Subject to those arrangements, which will conclude on 1 July 2014, the award system is fairer, more efficient and far simpler to administer. There are significant associated savings in time and resources.

The National Employment Standards (NES) constitute the other main component of the safety net for employees. They deal with various forms of leave, public holidays, and a number of other matters. The NES are legislated directly by the Parliament and are in the Fair Work Act itself. This method of standard-setting has a number of implications. Debate about some minimum standards, and some other matters traditionally dealt with by awards but now in legislation, has become highly politicised. There have been recent examples in relation to right of entry and parental leave in the private sector. Altering legislated standards is usually quite difficult, arguably more difficult than making and justifying an application to an industrial tribunal in the context of a test case. The ability to change legislated standards will depend on political dominance, or at least the achievement of political compromise. This contrasts with the arbitral model in which standards are altered based on a balancing of interests.

Finally, the legislation is now far more prescriptive generally. Although the tendency towards a more prescriptive approach predates the use of the corporations power, the use of that power has certainly coincided with a further

significant increase in prescription. The functions the Commission can carry out and the powers it can exercise are narrowly defined and hedged around with conditions, criteria and other limitations.

Individual remedies

The development of individual remedies and processes in the federal system is almost old news. Although union members had always been protected against discriminatory behaviour by employers, there were very few other individual rights. The federal system was only open to employees through membership of registered organisations and even the ability to enforce awards required union membership. The trend towards formal recognition and protection of individual rights probably started with the development of anti-discrimination law, but really got underway in the industrial relations system 20 years ago when remedies for unfair and unlawful termination of employment were introduced. Since then we have seen an increasing emphasis on individual rights, including the protection of workplace rights through creation of the general protections jurisdiction. The most recent development is the introduction of anti-bullying remedies on 1 January 2014.

Statutory individual contracts were available between 1997 and 2009. At the present time they are not, but modern awards and enterprise agreements provide for some individual arrangements through individual flexibility agreements.

Finally, enterprise bargaining, once thought to be the preserve of unions, is open to individual employees, regardless of whether they have a union affiliation, through that peculiarly Australian invention – the non-union collective agreement. An employer can put forward an agreement for the approval of the workforce, subject to the observance of good faith bargaining obligations. If a majority of the voting employees accepts the terms proposed, an agreement is made. Under current arrangements relevant unions can become covered by the agreement, even though they may not have been directly involved in its making, which brings me to the next matter: the role of registered organisations.

The role of registered organisations

Registered organisations are no longer dominant participants in the industrial relations system. While organisations still enjoy privileges under the Act[5] in relation to awards and agreements and have significant representative rights, they do not have the near monopoly over representation and access to the Commission or to the system generally that they once had. In most cases registered organisations were accepted as the representatives of employees, although individuals could appear in proceedings, and often did so in National Wage hearings and similar cases. Individual employees now usually have direct access to the Commission and the industrial relations system. For example, employees can take action to enforce the NES and the terms of awards and agreements, regardless of union membership.

Another important change is that the modern award system is not legally dependent on registered organisations. Modern awards were created and are maintained principally because of obligations placed on the Commission itself. The Commission is obliged to conduct periodic reviews of modern awards conditions. No application is required – and any interested person or body, including but not limited to registered organisations, can be heard in relation to the review. Though they play a very important role in maintaining and improving minimum conditions in modern awards, registered organisations are not named in the awards. Organisations may apply to vary awards between reviews, but so can individual employees. Whatever objections might still be taken by some employers to the role of organisations, monopoly rights of representation, access and enforcement are largely things of the past.

The reduction in compulsory arbitration

A controversial issue since the inception of our industrial relations system has been the nature of the compulsory powers to be exercised by the Commission and its ancestor bodies. In talking about compulsory arbitration I am not including the many situations in which the Commission exercises a power of private arbitration by agreement between the parties. After reaching a kind of peak towards the end of the last century, the Commission's powers of compulsory arbitration were significantly reduced by the 1993 and 1996 Acts. The main area for compulsory arbitration was the power to make and vary awards containing minimum wages and a limited number of conditions. Apart from that the Commission could only arbitrate where enterprise bargaining was unsuccessful and protected industrial action was threatening the public interest in specified ways. The position was virtually unchanged until the 2009 Act, when the power to make a workplace determination was extended to cover low-paid employees in certain circumstances and to situations in which a negotiating party is in serious breach of a good faith bargaining order. There have been recent, unsuccessful, proposals to give the Commission powers of compulsory arbitration in two additional situations: to arbitrate the terms and conditions to apply to greenfields sites where the employer and the relevant unions are unable to agree and to settle so-called intractable disputes.

It is worth observing in passing that since 1996 the range of matters which can be included in awards has been a fertile field for policy legislation – contracting in 1996 and 2005 and then expanding again in 2009.

Although I have been referring to the reduction in compulsory arbitration, it should be remembered that until relatively recently conciliation was also compulsory in relation to industrial disputes. Parties were obliged by the legislation to notify the Commission if they became aware of an industrial dispute. The Commission could call the parties together and had powers to compel attendance at a conciliation conference. Many industrial disputes were resolved in this way, without the need for arbitration. While the Fair Work Commission (FWC) still has the power to compel attendance, it is subject to limitations.

Is there a need for further reform?

Is there a need for further reform? At one level the answer to that question must be yes. Society is always changing, and to be effective the legal framework must also change and keep up to date. The liberalisation of labour market regulation in the early to mid-1990s is a good example of the Government of the day responding to changing domestic and international economic conditions. However, it might also be said that after four major reform Acts in the last 20 years, further change should be approached with some caution. There are good reasons to be cautious. Let me suggest some.

First, reform has a cost. There are significant transaction costs associated with changes (and attempted changes) in labour legislation. There is the cost of consultation at many levels: for example, the internal deliberations of various representative bodies, Governments, community organisations and special advocacy groups. Lobbying, including representations to Government and Opposition parties, is not cheap. There can be public relations and advertising costs of various kinds. Then the cost of the Parliamentary process itself, including legislative drafting, the production of the associated Parliamentary materials and sitting time, needs to be considered. Should laws be changed there are usually significant implementation costs. In recent memory very large amounts of money have been spent on changing staffing and other public service arrangements in response to legislative change. There are other implementation costs related to compliance, including public information campaigns and industry education. Employers can incur staff training, legal and other consultant costs. Not all costs are measurable in financial terms. For example, significant amounts of management time can be directed to dealing with legislative proposals.

Apart from costs of this kind there are some other reasons to be cautious about further attempts at reform. When legislative change is proposed all of the steps along the way, from policy formulation, drafting, public debate and so on through to implementation in some cases and abandonment in others, can be a distraction which displaces more productive activities.

Most of the issues which are debated are not new and there can be an ebb and flow of regulation which has a repetitive element. Changes in the way unfair dismissal laws apply to small businesses provide an example of this pendulum effect. Since 1996 there have been changes on a regular basis, swinging from one side to another, and there is no guarantee that the current provisions will not be altered when a Government gets the opportunity. The history of right of entry is another example. In proceedings in the first Pastoral Industry Award as long ago as 1906, Justice O'Connor dealt with a claim for accommodation in connection with right of entry for union officials to remote pastoral properties – a claim which has echoes in the recent amendments to the Fair Work Act. Policy debates about the priority to be given to individual contracts on the one hand and collective agreements or awards on the other did not start with the introduction of Australian Workplace Agreements (AWAs) in 1996 or the individual contract disputes of the early 1990s, but pre-date Federation. Penalty rates are another issue which comes to a head on a regular basis then subsides. The list goes on. While the importance of these issues

cannot be disputed, the achievement of enduring solutions does not seem to be a priority.

The policy formulation process

It seems legitimate to ask whether our policy formulation process serves our economic and social objectives as well as it might. One aim of policy is to improve economic and social conditions, yet it seems that when it comes to the industrial relations system, the debate is generally narrow and politicised and, to some degree, simplistic as well. The result is that a reform bill pops up whenever the numbers in Parliament are favourable and sometimes when they are not. The creation of a durable system, reducing the frequency of change and permitting the users of the system to reap the benefits of a stable legislative regime, does not seem to be a policy objective.

But if it is accepted that greater stability *is* a desirable goal, what are the obstacles to achieving it? There are a number of factors. I mention some which appear to me to be important.

The first one is the alignment of the major political parties with the major interests in industrial relations. While this is not unexpected, it can be an impediment to good policy. Governments tend to be the patron of one side or the other and to give the perception of favouritism on important policy issues. The peak bodies are drawn into the workings of Government, depending on which Government it is, and their representatives may even have worked in Government policy roles or may be potential candidates for seats in Parliament. Politics is always an element in policy debates, but it seems to play a disproportionate role in relation to workplace relations policy.

A second factor is that many opinion leaders, because conflict between employer and employee interests is inevitable, find it difficult to function without an adversarial mindset. The unions/employers/Government, depending on the alignment of the body in question, are hostile forces that must be engaged in combat. If you are an officer of an organisation you may well be judged on how well you fight. Of course there are legitimate areas of disagreement, and resolution can be very difficult. But a predisposition not to agree is a major obstacle on policy issues, just as it is on disputes about wages and conditions.

A third and related factor is that the process for policy formulation is, with some exceptions, based on policy differentiation. At the political level, it is seen as important to provide an alternative to current arrangements to attract the support of those voters who are dissatisfied with them. Office holders in many representative organisations tend to demonise opposing industrial interests. One of the by-products of this environment is a widespread almost systemic distortion and magnification of the potential disadvantages of proposals advanced by policy opponents. Exaggeration and misrepresentation are not uncommon. To give an example, there was a case in 2011 involving the Transport Workers' Union (TWU) and a company called J J Richards & Sons Pty Ltd.[6] It concerned a union that wished to negotiate an enterprise agreement and an employer who would not agree

to bargain. The TWU wished to take protected industrial action to encourage the employer to agree to bargain. When the Commission and the Federal Court upheld the TWU's right to take protected action in those circumstances, the decision was widely described by its critics as the 'strike first negotiate later' decision. This description carries the implication that the TWU preferred to strike rather than to negotiate. That implication is plainly inaccurate as it was clear that the TWU wished to commence bargaining, but the employer did not. The error has been widely adopted. This kind of thing is not new, nor is it confined to one side. The point is that when sloppy use of language, sloganeering and political point-scoring infect the policy formulation process they obscure the issues, deepen divisions and ultimately affect the quality of outcomes.

Examples of real cooperation in industrial relations policy are relatively few. Employers and unions have been able to reach a common position in relation to matters such as discrimination, workers with disability and some training issues. The recent amendments dealing with bullying are also in this category. Perhaps the intensive Government-sponsored consultation process in relation to the drafting of the Fair Work Bill in 2008 should also be mentioned. Participants generally appreciated the opportunity to have direct input, and it is likely that the process resulted in a number of contested issues being resolved when they otherwise would not have been.

Is there a way forward?

I have suggested that further reform should be approached with some caution and that there are significant obstacles to the development of policies which will lead to a more stable system in the long term. Are there improvements which can be made in the policy-making process which might lead to better outcomes? In particular, is there an approach to policy formulation which can provide greater long-term stability?

There are some deep-seated differences in the positions of the major interests, but many of the fundamental elements of the system are widely accepted. Policy differences tend to be at the margins or to be based on special pleading. There are some proposals for radical reform it is true, but extreme positions seldom provide a sound basis for change. Policy cannot be based on the views of the outliers at either end of the spectrum.

There is a realistic chance of identifying significant common ground if parties adopt the objective of a more stable workplace and industrial relations system. While complete agreement cannot be achieved, attempting to narrow the areas of difference would be a good start. It will take strong leadership from employers and unions, and Government, to shrug off the dispute culture and the political influences – which are both deeply ingrained.

A broadly based inquiry has the potential to result in sound policy proposals. The prospects of it doing so would be enhanced if there were some consensus about the terms of reference and who is to conduct it. The terms should be broad enough to encompass agreed economic and social objectives such as growth, inflation,

productivity, employment and income levels. The recent Review of the Fair Work Act was limited in scope and was not embraced by some of the major interests, who tended to pick and choose the recommendations that suited them, rejecting the rest.[7] It would be desirable that the composition of the inquiry and the terms of reference, as far as possible, be negotiated or at least the subject of consultation with the major interests.

The Australian economy has proved to be extremely resilient over the last 20 years and robust enough to protect us from a number of external crises. A commonly asked question is how long can it last? Others can give a better assessment than I, but there is no doubt that the nature of our industrial relations system has the potential to affect economic performance and therefore living standards. There are signs that, increasingly, economic conditions are likely to provide an incentive for representative bodies on both sides to work more constructively to increase national prosperity. The stability of industrial relations regulation is an important element from that point of view. It might be better to make a start in the common pursuit of a more stable system now rather than wait for a significant negative shift in economic fortunes.

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Conflict of interest

None declared.

Notes

1. This is an edited version of an address given by the author on 22 July 2013 at the University of Sydney Workplace Research Centre's 21st Annual Labour Law Conference.
2. Industrial Relations Reform Act 1993 (C'th).
3. Workplace Relations and Other Legislation Amendment Act 1996 (C'th).
4. Workplace Relations Amendment (Workchoices) Act 2005 (C'th).
5. Fair Work Act 2009.
6. *J.J. Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.
7. *Towards more productive workplaces: An evaluation of the Fair Work legislation*. Australian Government, 2 August 2012.

Biographical note

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