



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Estimates

(Public)

TUESDAY, 8 NOVEMBER 2022

CANBERRA

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EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Tuesday, 8 November 2022

Members in attendance: Senators Cash, Davey, Grogan, Liddle, O'Sullivan, Payman, Barbara Pocock, David Pocock, Rice, Sheldon and Waters

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO**In Attendance**

Senator Watt, Minister for Agriculture, Fisheries and Forestry, Minister for Emergency Management

Executive

Ms Natalie James, Secretary

Corporate and Enabling Services

Ms Belinda Casson, Acting Deputy Secretary, Corporate and Enabling Services Group

Ms Kerry Kovacevic, Chief Digital Officer/First Assistant Secretary, Digital Services Division

Mr Scott Wallace, Chief Information Officer/First Assistant Secretary, Technology and Services Division

Mr Tim Ffrench, General Counsel/First Assistant Secretary, Legal and Assurance Division

Ms Kellie Spence, Acting First Assistant Secretary, People, Communication, Parliamentary and Governance

Ms Giorgina Strangio, Assistant Secretary, People, Communication, Parliamentary and Governance

Ms Dijanna Ratajkoski, Acting Assistant Secretary, People, Communication, Parliamentary and Governance

Ms Cha Jordanoski, Acting First Assistant Secretary/Chief Financial Officer, Finance and Budget Division

Department of Employment and Workplace Relations

Mr Nathan Smyth, Deputy Secretary

Ms Melissa Ryan, First Assistant Secretary

Ms Quyen Tran, Assistant Secretary

Ms Fiona MacDonald, Assistant Secretary

Ms Belinda Catelli, Assistant Secretary

Ms Sonya McCarthy, Acting Assistant Secretary

Ms Robyn Shannon, First Assistant Secretary

Ms Samantha Roberston, Assistant Secretary

Mr Derek Stiller, Assistant Secretary

Mr Tim Matthews, Assistant Secretary

Ms Miranda Lauman, First Assistant Secretary

Mr Stuart Watson, Assistant Secretary

Ms Eve Wisowaty, Assistant Secretary

Ms Jodie Wearne, Assistant Secretary

Ms Benedikte Jensen, First Assistant Secretary

Mr Alistair Beasley, Assistant Secretary

Ms Deborah Brown, Acting Assistant Secretary

Ms Heike Phillips, Assistant Secretary

Ms Carmel O'Regan, Assistant Secretary

Mr Jason Stott, First Assistant Secretary

Ms Helen McCormack, Assistant Secretary

Ms Cary Duffy, Executive Director

Ms Kylie Crane, First Assistant Secretary

Dr Louise O'Rance, Assistant Secretary

Skills and Training

Ms Nadine Williams, Deputy Secretary

Dr Nicky Antonius, Acting Senior Responsible Officer, Apprenticeships Data Management System

Ms Clare Sharp, First Assistant Secretary, Apprenticeships and Foundation Skills Division

Ms Belinda Campbell, Assistant Secretary, Apprenticeships and Foundation Skills Division

Ms Carmen Saunders, Assistant Secretary, Apprenticeships and Foundation Skills Division

Ms Laura Angus, First Assistant Secretary, National Careers Institute
Ms Linda White, Assistant Secretary, National Careers Institute
Ms Danielle Finnigan, Assistant Secretary, National Careers Institute
Mr Lewis Conn, Acting First Assistant Secretary, Skills Reform Taskforce
Ms Natasha Ryan, Assistant Secretary, Skills Reform Taskforce
Mr Leif Smith, Assistant Secretary, Skills Reform Taskforce
Ms Renae Houston, First Assistant Secretary, VET Quality and Policy Division
Ms Katerina Lawler, Assistant Secretary, VET Quality and Policy Division
Ms Rachel Livingston, Acting First Assistant Secretary, VSL, VET Compliance and TRA Division
Ms Kathy Dennis, Assistant Secretary, VSL, VET Compliance and TRA Division

National Skills Commission

Mr Adam Boyton, National Skills Commissioner
Mr David Turvey, First Assistant Secretary
Dr Damian Oliver, Assistant Secretary, Pricing and Performance
Mr Clifton Bingham, Assistant Secretary, Labour Market Research and Analysis
Ms Angela Hope, Assistant Secretary, Skills, Intelligence and Engagement

Workplace Relations

Mr Martin Hehir, Deputy Secretary, Workplace Relations Group
Mr Greg Manning, First Assistant Secretary, Employment Conditions Division
Ms Sharon Huender, Assistant Secretary, WR Strategy Branch, Employment Conditions Division
Ms Tara Williams, Acting Assistant Secretary, Safety Net Branch, Employment Conditions Division
Ms Jennifer Wettinger, Assistant Secretary, Economics and International Labour Branch, Employment Conditions Division
Ms Jody Anderson, First Assistant Secretary, Safety and Industry Policy Division
Mr David Cains, Assistant Secretary, Bargaining and Industry Policy Branch, Safety and Industry Policy Division
Mr David Denney, Federal Safety Commissioner, Office of the Federal Safety Commission, Safety and Industry Policy Division
Mr Timothy Johnson, Assistant Secretary, Safety and Compensation Policy Branch, Safety and Industry Policy Division
Ms Angela Wallbank, Assistant Secretary, Workplace Relations Consultation Branch, Safety and Industry Policy Division
Ms Alexandra Mathews, First Assistant Secretary, Employee Entitlement Safeguards and Policy Division
Mrs Sue Saunders, Assistant Secretary, Fair Entitlements Guarantee Branch
Ms Danica Yanchenko, Assistant Secretary, Workplace Compliance and Enforcement Policy Branch, Employee Entitlement Safeguards and Policy Division
Mr Henry Carr, Assistant Secretary, Recovery and Litigation Branch, Employee Entitlement Safeguards and Policy Division
Ms Anne Sheehan, Chief Counsel/First Assistant Secretary, Workplace Relations Legal, Workplace Relations Legal Division
Ms Sarah Godden, Senior Executive Lawyer/Assistant Secretary, Bargaining and Coverage Branch, Workplace Relations Legal Division
Mr Stephen Still, Senior Executive Lawyer/Assistant Secretary, Employment Standards Branch, Workplace Relations Legal Division
Mr Adrian Breen, Senior Executive Lawyer/Assistant Secretary, Safety, Compensation and Institutions Branch, Workplace Relations Legal Division

PORTFOLIO ENTITIES

Australian Skills Quality Authority

Ms Saxon Rice, Chief Executive Officer
Ms Christina Bolger, Deputy Chief Executive Officer
Ms Denise Lowe-Carlus, Executive Director, Qualifications Assurance and Market Entry
Mr Steve Maillet, Executive Director, Policy and Partnerships
Ms Carmen Basilicata, Executive Director, Market Performance and Engagement
Mr Ty Emerson, Executive Director, Business Systems and Capability
Mr Warren Rushby, Chief Financial Officer

Asbestos Safety and Eradication Agency

Ms Justine Ross, Chief Executive Officer
Ms Julia Collins, Director, Research, Data and Policy Team
Mr Shane McArdle, Director, Awareness and International Team

Australian Building and Construction Commission

Mr Stephen McBurney, Commissioner
Mr Matthew Kelleher, Deputy Commissioner—Legal
Ms Jill Jepson, Deputy Commissioner—Operations
Ms Janine Drennan, Chief Operating Officer/National Manager -
Building Code
Ms Madeleine Jones, Acting Executive Director, Wages

Coal (Long Service Leave Funding) Corporation

Ms Darlene Perks

Comcare

Mr Aaron Hughes, Acting Chief Executive Officer
Mr Michael Duke, General Manager, Scheme Management Group
Dr Leanne Blackley, Chief Operating Officer
Mr Justin Napier, General Manager, Regulatory Operations Group
Ms Megan Buick, General Manager, Strategic Partnerships and Engagement Group
Ms Chloë Eaton, Acting General Manager, Claims Management Group
Ms Louise Close, Acting General Manager, Legal Group

Fair Work Commission

Mr Murray Furlong, General Manager
Ms Joelle Leggett, Executive Director, Tribunal Support Branch
Mr Jack Lambalk, Executive Director, Business Services Branch
Ms Ailsa Carruthers, Executive Director, Client Services Delivery Branch
Mr Patrick McCarthy, Executive Director, Communications, Legal and Organisations Branch

Fair Work Ombudsman

Ms Sandra Parker PSM, Fair Work Ombudsman
Ms Kristen Hannah, Deputy Fair Work Ombudsman, Policy and Communication
Mr Michael Campbell, Chief Operating Officer
Mr Mark Scully, Deputy Fair Work Ombudsman, Compliance and Enforcement
Mr Rachel Volzke, Chief Counsel
Mr Steven Ronson, Executive Director—Enforcement
Mr Anthony Fogarty, Executive Director—Policy
Ms Michelle Carey, Executive Director—Large Corporates Branch

Registered Organisations Commission

Mr Mark Bielecki, Commissioner

Mr Chris Enright, Executive Director

Safe Work Australia

Ms Michelle Baxter PSM, Chief Executive Officer

Ms Amanda Johnston, Deputy Chief Executive Officer

Ms Rebecca Newton, Branch Manager, Chemicals, Occupational Hygiene Policy and High Risk Work Policy

Ms Meredith Bryant, Branch Manager, Evidence, Communications and Strategic Policy

Ms Sarah Costelloe, Branch Manager, WHS Framework and Workers' Compensation Policy

Committee met at 14:01

CHAIR (Senator Sheldon): I declare open this public hearing of the Senate Education and Employment Legislation Committee on Tuesday, 8 November 2022. I begin by acknowledging the traditional custodians of the land on which we meet today and pay my respects to their elders past and present. I extend that respect to Aboriginal and Torres Strait Islander peoples here today. The committee is due to report to the Senate on Friday, 18 November 2022 and has fixed Friday, 16 December 2022 as the date for the return of answers to questions taken on notice. The committee has resolved that written questions on notice should be received from senators by close of business on Friday, 18 November 2022.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence.

The Senate has endorsed the following test of relevance of questions for estimates hearings. Any questions going to the operations or financial positions of the departments and agencies which are seeking funds in the estimates are relevant questions for the purpose of estimates hearings. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committee unless the parliament has expressly provided otherwise. The Senate has resolved also that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Witnesses are reminded of the Senate order specifying the process by which a claim of public interest immunity should be raised. I incorporate the public interest immunity statement into the *Hansard*.

The extract read as follows—

Public interest immunity claims

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(13 May 2009 J.1941)

(Extract, Senate Standing Orders)

CHAIR: An officer called to answer a question for the first time should state their full name and the capacity in which they appear. Senators, departments and agencies have been provided with advice on the arrangements in place to ensure the budget estimates 2022-23 hearings are conducted in a safe environment. This guidance is also available from the secretariat. The committee appreciates the cooperation of all attendees in adhering to these arrangements.

Today the committee's focus will be on the employment and workplace relations portfolio.

Department of Employment and Workplace Relations

[14:04]

CHAIR: I welcome the Minister for Employment and Workplace Relations, senator the Hon. Murray Watt and representatives from the Department of Employment and Workplace Relations, including the secretary, Ms Natalie James. Minister Watt, do you wish to make an opening statement?

Senator Watt: No, I don't, thanks Chair. Congratulations on your election to the chairpersonship of this and congratulations to all the members of the committee. I am looking forward to the day.

CHAIR: Thank you, Minister Watt. Ms James, do you wish to make an opening statement?

Ms James: I seek the indulgence of the committee. I would also like to acknowledge the traditional owners of the land we're meeting on here today, the Ngannawal and Ngambri people. I extend those respects to Aboriginal and Torres Strait Islander people here in the room today and to people watching online. I am the secretary of the new Department of Employment and Workplace Relations. As this is our first appearance, as we came into being on 1 July, I did just want to set out a few things about the new department. It is a great privilege to have been appointed secretary of this department. I have certainly spent much of my career working in the areas that its functions encompass. It has a lot of work to do, I think it's fair to say. It's been a while since I've sat before an estimates committee. In our appearances over the next two days, I will be ably supported by some very experienced senior officials, including four deputy secretaries. We're pleased to respond to your questions today.

I thought I would introduce each of the deputies because that will also give you a sense of the functions of our new department and their responsibilities. First is Belinda Casson, who is with me at the table at the moment. She is acting in the role of chief operating officer and deputy secretary corporate and enabling services. She oversees the operating structures and supports for the department, including human resources, legal services, finance, budget and IT. This includes systems for supporting the delivery of all of our programs. Being the COO for a new entity, especially after a machinery of government change, is a big, challenging job. I thank Belinda and her team for their work supporting team DEWR to come together.

While we're talking about the machinery of government change, or MOG as they're well known, I would like to thank Dr Michele Bruniges, the secretary of the Department of Education, for helping us establish this department through that process, particularly before I commenced on 11 July in the role of secretary. Nathan Smyth is also with me today. He is the deputy secretary of employment and workforce group. This group is responsible for fostering a productive and competitive labour market through policies and programs that assist job seekers into

work, especially secure work, and meet employer and industry needs. It manages the employment services programs, which include the newly rolled out Workforce Australia. Rolling out a new employment services model is a significant exercise that in this case started in 2018 with an independent review and several trials. I thank the team for their work in this monumental task, including getting us through the formal transition period that began just as our new department was formed. This group also includes now the onshore delivery of the Pacific Australia Labour Mobility scheme, which is delivered in partnership with the Department of Foreign Affairs and Trade. I welcome the team of 34 people from DFAT who came across and joined us in the MOG. I thank the teams for facilitating that MOG, including the arrangements between ourselves and the Department of Foreign Affairs and Trade around the split of responsibilities between our departments.

Martin Hehir is the deputy secretary of workplace relations. This group is responsible for facilitating jobs growth, including secure work, through policies and programs that promote fair, productive and safe workplaces. I welcome the 333 people who came from the Attorney-General's Department who are currently leading the development of work on the government's workplace relations reforms. I thank Katherine Jones, secretary of the Attorney-General's Department, for her support of the crew during this transition at a time when their work was a top priority for the new government. I thank the team, all 333 of them, for their patience and persistence during the transfer into our department while they continued to achieve so much, in particular, and lest we overlook, the introduction and already the passage of the paid family and domestic violence leave legislation and, of course, the introduction of the secure jobs, better pay bill. The group also includes the Office of the Federal Safety Commissioner and manages workplace safety, employment conditions and safeguarding worker entitlements.

Nadine Williams, deputy secretary of skills and training, will be appearing tomorrow. That group is responsible for promoting growth in economic productivity and social wellbeing through access to quality skills and training. Early priorities for this team has been to establish the new jobs and skills Australia agency, another high priority for the government, and another bill that has been introduced and passed through the parliament. It is also delivering on an agreement with state and territory governments for fee free TAFE places and the new energy apprenticeship program along with increasing the proportion of women undertaking apprenticeships.

We would be happy to step you through the details of the machine of government change should you wish.

That is the end of my formal opening statement. I welcome your questions.

CHAIR: Thank you very much, Ms James. Welcome, Ms Casson, as well. If you have a copy of that statement and you could give it to the secretariat, it would be handy.

Ms James: I am happy to. I may have ad-libbed a little, but I am happy to hand it over.

CHAIR: Great. Thank you. We're going to Senator Waters first briefly. We will ask for corporate enabling services to join us.

Senator WATERS: Thanks for joining us today. I hope that my questions belong in this section because I have to get to another committee. I will try my luck. I want to ask about funding for the working women's centres and family and domestic violence leave.

Ms James: I'm sorry to disappoint you, Senator Waters, but those questions sit in the workplace relations outcome. I think they are due to arrive afternoon tea. I am happy to take your questions on notice.

Senator WATERS: I might attempt to come back. So you are absolutely confident outcome 3, workplace relations?

Ms James: Absolutely confident.

Senator WATERS: Funding for working women's centres and how the small business assistance money for FDV leave will be spent?

Ms James: Yes. That's right. They're due to be on at 4.45 pm.

Senator WATERS: Thank you. I will attempt to come back then.

Senator CASH: Chair, I'm glad you referred to Mr Watt as the Minister for Employment and Workplace Relations because Minister Watt and I know what that means; he gets to answer all the questions first-hand. Ms James—

CHAIR: That is the problem with reading the script.

Senator CASH: Exactly. I was listening, which is even worse. Ms James, Senator O'Sullivan, I understand, wrote you a letter on behalf of coalition senators on 31 October 2022 basically advising that whilst he understood the department attends Senate estimates, he requested certain information to be provided to us by Monday, 7 November 2022. Did you receive that letter?

Ms James: I did.

Senator CASH: On what date did you receive the letter?

Ms James: I actually don't recall. It was late last week.

Senator CASH: It was sent to your email address.

Ms James: It was late last week and dated 31 October. I will stand corrected if we did not receive it on that date.

Senator CASH: When did you respond to Senator O'Sullivan personally?

Ms James: I did not respond to Senator O'Sullivan. I responded to the chair of the committee.

Senator CASH: Is there a reason you did not respond to the person who wrote the letter to you given it was on behalf of opposition senators?

Ms James: I thought the proper thing to do was to write to the chair of the committee. I cc'd the committee secretariat. I presumed that you have that response.

Senator CASH: I do. Again, I am asking why you didn't respond to Senator O'Sullivan given the letter was to you. It was from Senator O'Sullivan on behalf of opposition senators.

Ms James: I responded. It related to our attendance at the hearing today. I responded to the chair of the committee, cc'ing the committee secretariat. I responded that we would be attending as scheduled before the committee and we would be attending with the appropriate officials and would be pleased to respond to questions and requests for information now, which I am very happy to proceed to.

Senator CASH: Basically, the letter that Senator O'Sullivan sent you requested certain information—

Ms James: It did, Senator.

Senator CASH: prior to the hearing so that we could inform ourselves more properly to ensure the efficient conduct of today's hearing. Do you not consider it discourteous that you did not respond directly to Senator O'Sullivan?

Ms James: I consider it appropriate and proper that I responded to the committee. We are accountable to the Senate committee. We welcome your questions now.

Senator Watt: I remember being in opposition. I remember it all too well. That is exactly the same practice as used to occur when we were in opposition. We would seek information.

Senator CASH: I am going to have to disagree with you there. I will shortly table a letter from Senator Kim Carr to the former committee to outline what the former secretary provided to opposition senators.

Senator Watt: Certainly in the committees that I was on, we would write in advance to the secretary, and the information sought was provided through the committee. I don't think it's anything out of the ordinary.

Senator CASH: As I said, I will shortly table a letter for Senator Carr just to show what the standards of the former committee were compared to where we have commenced today. Ms James, in Senator O'Sullivan's letter to you, he requested certain information be provided to the committee prior to Senate estimates by 7 November 2022. In relation to the 17 points, what information did you provide in writing to Senator O'Sullivan?

Ms James: As per my response to the committee chair, we have officials here today who would be pleased to respond to the committees and requests for information. I am very happy to proceed with that now.

Senator CASH: So the answer to the question, without verballing you, can I confirm for the *Hansard* record, is no?

Ms James: Can you repeat the question, please.

Senator CASH: You provided no information, as requested prior to Monday, 7 November, to Senator O'Sullivan?

Ms James: I made it very clear that we are very happy and would be most pleased to respond to your questions for requests of information here today as scheduled.

Senator CASH: I will move on to your response. Given that you have articulated that happiness, I assume that no questions in relation to the listed items one through to 17 will be taken on notice because your officials, I assume, have been presented with this letter. Can I confirm that they saw this letter?

Ms James: You can.

Senator CASH: Which officials were provided with a copy of this letter?

Ms James: The officials are here and are ready, willing and able to work through each of these questions and discuss each—

Senator CASH: Yes. I am just asking you which officials were provided with a copy of this letter.

Ms James: The deputy secretaries, Senator.

Senator CASH: When did you provide them with a copy of this letter?

Ms James: I would imagine it was the day we received it.

Senator CASH: On that basis, given that your answer was that you would not be providing any information to Senator O'Sullivan and that you would merely respond that officials would turn up today and would be ready, willing and able to answer questions, can I ask why a response was only provided to Senator Sheldon, as chair of the committee, on 7 November? Would it not have been better to advise Senator O'Sullivan that he would be receiving no information from you or your officials prior to this date?

Ms James: That is a matter of opinion.

Senator CASH: Correct. Is there a reason that you didn't give Senator O'Sullivan the opportunity to press this point further with the committee to ensure that coalition senators have the appropriate information? As I said, the reason we wanted the information was to ensure that these proceedings could move as expeditiously as possible.

Ms James: I am happy to expeditiously move to the questions.

Senator CASH: On that basis, for future reference, perhaps, I will table a letter that former Senator Kim Carr, Minister Watt, wrote to Mr Iain Anderson, who was then the acting secretary—he wasn't even the secretary—of the Attorney-General's Department. He actually sent it on 24 May 2021. He set out a list of specific information. He said, 'Dear Secretary, I write on behalf of opposition senators'—similar to what Senator O'Sullivan wrote to you. He basically said, 'I request that you be able to provide the following specific information when you attend Senate estimates on 26 and 27 May 2021.' He then set out 12 different areas, very similar to what we have done. That was sent to Acting Secretary Anderson, as I said, on 24 May. I only raise this in terms of the way other secretaries have responded—in this case, the acting secretary. I will also table, Chair, for the benefit of the *Hansard*, the response that was provided to Senator Kim Carr himself directly as a courtesy from the acting secretary dated 25 May. On 24 May, Senator Carr sent an extensive letter. On 25 May, former acting secretary Iain Anderson was able to send back quite an extensive list of information. I will perhaps table it—I'm happy to have copies handed out—just to ensure that you have it for future reference in the event that opposition senators do request information, as I said, to ensure that these proceedings do proceed as efficiently as possible. But, as you've said, the deputy secretaries were provided with a copy of the letter. The good news is that questions won't be taken on notice because we're all happy to proceed on that basis. I therefore turn to the number, Ms James. What is the department's attitude towards non-ongoing contracts within the department?

Ms James: What is our attitude towards non-ongoing contracts within the department?

Senator CASH: Yes.

CHAIR: Ms James, before you answer that, Senator Cash, is the correspondence from Senator O'Sullivan being circulated as well?

Senator CASH: Would you like that circulated as well?

CHAIR: That would be helpful, thank you.

Ms James: It did suggest it was cc'd to the committee secretariat, Chair.

Senator CASH: Non-ongoing contracts.

Ms James: My attitude?

Senator CASH: In terms of the—

Ms James: The department's attitude?

Senator CASH: The department, yes.

Ms James: Well, I'm not sure if we have an attitude towards non-ongoing contracts. Non-ongoing contracts have been used in the department. Ms Casson can give you some data around the extent to which they've been used.

Senator CASH: Excellent.

Ms James: It is certainly my preference, where it is within budget and appropriate and you have an ongoing role, to hire ongoing employees. But there are good reasons on occasion to use non-ongoing employees—for example, where you have a short-term need or perhaps a specialised short-term project.

Senator CASH: Ms Casson, would you have the number of persons within the department currently employed on non-ongoing contracts and persons within the department who are employed on non-ongoing contracts since 1 July 2022?

Ms James: Senator, can I just clarify whether you are asking for the total employed since that date or the number of new people engaged?

Senator CASH: New people engaged since that date.

Ms Casson: I have the staffing information as at 30 September 2022.

Senator CASH: Excellent.

Ms Casson: We can go back and have a look at how that has changed since 1 July. So out of a total head count of 3,025 employees of the department—that is ongoing and non-ongoing total—the number of non-ongoing employees is 109.

Senator CASH: That is the total. In terms of those who have been placed on an ongoing contract since 1 July, is that a figure that is available?

Ms Casson: We will probably have some information here. We will do what we can to assist today.

Senator CASH: Thank you.

Ms Casson: Certainly as Ms James has explained in her evidence, where we are able to offer ongoing work, we obviously seek to do that. There is a range of circumstances under which a non-ongoing arrangement is appropriate.

Senator CASH: Can you take me through the range of circumstances in which the department believes it is appropriate to place someone on a non-ongoing contract?

Ms Casson: I certainly can. As Ms James explained, one of the most common reasons is where there is a short-term need. There might be, for example, a surge in relation to the rollout of the new national employment system. There might be a surge to assist a corporate area with a particular initiative and it is the most effective use of Commonwealth resources to do it on a short-term basis. I might see if Ms Spence would like to provide some extra evidence.

Ms Spence: We do have a range of different arrangements. For non-ongoing, that can be in the form of an APS officer. We also have contractor arrangements. So it depends on the different types of circumstances as to where you might apply those different arrangements.

Senator CASH: Given that I'm sure you've come with this information, could you potentially table for the committee the concise list of when the department will bring someone on on a non-ongoing basis?

Ms Casson: Yes. We can table that.

Senator CASH: Can you also tell me whether and where that list comes into play when you look at the secure jobs, better pay bill and the restrictions on fixed term contracts?

Ms Casson: We can certainly take that on notice in relation to the first part, which is a more fulsome list of when we use non-ongoing contracts. I would note that it is around three per cent of our total head count, so they are certainly very low numbers compared to—

Senator CASH: With all due respect, given the government is rushing through industrial relations legislation—don't worry, Minister Watt; I'm not going to get too political here—and one of the clauses of the bill is a restriction on the use of fixed term contracts for employers, and this is my opinion so I won't ask you a question on it, it is irrelevant whether the department has three per cent or 30 per cent. This department, in drafting the legislation, I would have thought, Ms James, should lead by example. You are prepared to restrict the right of employers to utilise fixed term contracts as they see fit in their business. Did the department or the Office of Best Practice Regulation draft the legislation?

Ms James: The Office of Parliamentary Counsel worked on the drafting of the legislation as instructed by many officers in the workplace relations outcome, yes.

Senator CASH: What discussions have you had with Minister Burke in relation to the department leading by example and not utilising fixed term contracts?

Ms James: Well, I don't think I have had any conversations specifically with Mr Burke about that. I know we're not in the part of the proceedings where we are dealing with workplace relations yet. The legislation doesn't prohibit fixed term contracts.

Senator CASH: Hence why I requested the list in relation to the department and when the department deems it fit to utilise fixed term contracts. The title of the bill is secure jobs, better pay. I have in front of me the Australian Public Service *Gazette*. Senator Sheldon, I come prepared. I am happy to table this also for the committee.

CHAIR: If you could table it, Senator.

Senator CASH: Yes. It is an advertisement for a number of jobs advertised by the Department of Employment and Workplace Relations. Under the job description it says:

We have two non-ongoing opportunities reporting to the Branch Manager, Workplace Relations Consultation for 6-12 months. This is an opportunity to join a new team that will support the Government's workplace relations agenda.

Under the description of the job, it states:

... will lead one of two teams established to support consultation and stakeholder liaison on the Government workplace relations reform agenda—

et cetera. Given the title of the job includes secure jobs, what type of job security do you see for these people? When their contract comes to an end, is that it? They will no longer have a job on that contract?

Ms James: Well, Senator, in my experience, these roles—I haven't had the opportunity to read the detail to see whether this has been advertised externally or not—are often filled by people from within the Public Service. In the event that occurs, that often means that they do this role for a short period of time as long as it exists. In my experience also, these roles often do evolve into longer term roles, at which point we would look to fill them in an ongoing sense. Often at the beginning of a new government and the beginning of a new project, you're not clear as to how long the role will be needed for, so that is quite common. In the event that someone were to come from outside, I suggest that in the workplace relations area there would be a pretty strong chance of an opportunity for ongoing employment because they are very busy and they are looking for talented, experienced industrial relations practitioners. So I encourage anyone who is interested to check the *Gazette* and keep abreast of opportunities we have in our department.

Senator CASH: That's fantastic. It's a real shout-out to come and join the department on a non-ongoing basis. I'm assuming—this is a comment, Chair—we all get the irony of secure jobs and a six- to 12-month opportunity in the department to work on implementing a piece of legislation that allegedly is about job security.

CHAIR: I want to ask a supplementary question. The proposed bill doesn't prohibit fixed-term contracts, so leading by example means that there are a number of questions about secure employment. There is also within the terms of the proposed bill still the capacity for fixed-term contracts across both the private sector and government sector, where it's appropriate under certain conditions. Is that correct, Senator Watt?

Senator Watt: That's my understanding. That is correct, isn't it?

Ms James: It is my understanding.

Senator CASH: Hence, Senator Sheldon, why I asked for the list of reasons as to why the department may or may not utilise non-ongoing contracts.

Senator Watt: I have been listening to this quite closely. You have been a minister for a number of years. You would be familiar that within the Public Service it is very common for projects to be created and for people to be seconded for a period of time. From what it sounds to me, that is exactly what is going on here. As Ms James said, it's very common for public servants who have a permanent role to take a short-term contract or secondment for a particular project. When it ends, they go back to their substantive position. From everything I have heard, that is what has happened here. It is not talking about people losing their jobs.

Senator CASH: Thank you for raising that, Minister Watt. Of the 109 that you say are currently on contracts, where are they from, basically? Are they from within the Public Service? Will they continue on with their other role when they formalise their short-term contract or not?

Ms Casson: I will make a point of clarification, if I might. A non-ongoing contract has a fairly specific intent and description under the Public Service Act. The main difference between it and an ongoing role is it is for a fixed term. But it still attracts the superannuation, flex time and benefits.

Senator CASH: I understand all of that. It is just in relation to the particular contract itself.

Ms Casson: Temporary transfers are obviously an option under the Public Service Act as well. We would obviously welcome, as Ms James noted, temporary transfers as well as non-ongoing contracts. We probably don't have for a non-ongoing contractor—we can take this on in notice—consistent information that would help the committee know where they were before. You could rely on the information someone puts into the recruitment system, which we could validate.

Senator CASH: Are you able to tell whether or not they've come from within or outside the Public Service?

Ms Casson: I think we would, but I will take that on notice.

Senator CASH: I do appreciate that. The issue I have is the government is obviously lecturing others about insecure work. I just find this incredibly ironic that you actually have advertised two non-ongoing opportunities for six to 12 months in relation to—

Senator Watt: But you are potentially misrepresenting what these roles are.

Senator CASH: Absolutely not.

Senator Watt: We can get the facts.

Senator CASH: Please don't put words into my mouth. Ms James, I will go back to the letter from Senator O'Sullivan to you and the response. Did you discuss this letter with the minister or the minister's office?

Ms James: No.

Senator CASH: Were any instructions given to you or anyone else in the department from the minister or the minister's office in relation to how this should be responded to?

Ms James: No.

Senator CASH: Thank you. I have a number of other questions in relation to the contracting issue. Given the time, I will ensure that they are put on notice. I know that Senator O'Sullivan has some questions as well.

Senator O'SULLIVAN: I want to go to advertising. Can you please let us know the current advertising budget of the department.

Ms Spence: I will have to take on notice the budget for the financial year. I do have information on non-campaign expenditure in the social media area that we've done from 1 July 2022 to 30 September 2022. For that period, it is \$35,715.10. The area of campaigns is a different component. There is only one recently announced campaign that is for the new department. It has not commenced expenditure at this time.

Senator O'SULLIVAN: But the campaign has been announced?

Ms Spence: It is for the fee-free TAFE.

Senator O'SULLIVAN: Is there a budget item? Is there an amount?

Ms Spence: There is. The 2022-23 budget provided \$7 million in administered funding for the communications to support the fee-free TAFE campaign.

Senator O'SULLIVAN: What is the nature of that campaign? It is targeting young people?

Ms James: I imagine that it would be to encourage people to access the TAFE places. It might be best to save the details of that for tomorrow when Deputy Secretary Williams is here.

Senator O'SULLIVAN: That's fine. That hasn't started yet?

Ms Spence: Planning is underway for the campaign, but it's still in the planning phase.

Senator O'SULLIVAN: Have any campaigns ceased since May 2022? Do you have a list of them?

Ms Casson: There are campaigns that ceased in accordance with the caretaker arrangements during the election period. Officers of the department of education can answer any questions in relation to campaigns that were in that time. Since 1 July, as Ms Spence said, this is the only campaign that we have had announced and initiated. There has been nothing that has started and finished in that time.

Senator O'SULLIVAN: So there was nothing that started prior to May that was maybe just paused during the caretaker that is continuing?

Ms James: This may not be the first time we encounter this situation in these hearings. Because our department formed on 1 July, it's difficult for us in some cases to talk to things that happened before then because a different department and different secretary was responsible for them. When it comes to our programs that are ongoing, we can certainly talk to that. In terms of activities prior to 1 July, there are some limitations on what we can talk to today. The Department of Education is appearing tomorrow. We're also happy to take things on notice.

Ms Casson: We have one thing to add.

Senator O'SULLIVAN: Let's leave it.

Ms Casson: I will add to what Ms James has said. We do have some information to share about Workforce Australia, which obviously is in DEWR's ongoing portfolio responsibilities. With the employment outcome

appearing this afternoon, obviously we can have colleagues provide more information. We probably can give you some headlines on that now.

Senator O'SULLIVAN: Sure. If it has a headline value?

Ms Casson: Yes.

Ms Spence: In terms of the headline value, there was Workforce Australia funding for a campaign provided in the March 2022-23 budget. This was reversed in the October 2022-23 budget. The original funding was \$2.093 million in 2022-23 and another \$2 million in 2023-24.

Senator O'SULLIVAN: And that was reversed?

Ms Spence: That was reversed.

Senator O'SULLIVAN: I will go to research. Has the department commenced any market research contracts? Have any been entered into since May 2022? If so, can I get the value for each of those contracts, please?

Ms Casson: We will only be able to give you contracts since 1 July when the department was created, just to be clear. We may take that on notice, if we can.

Senator O'SULLIVAN: How does that work? I appreciate the MOG change. If the previous department had entered into a contract, how do you carry that into your own department?

Ms Casson: The way that the machinery-of-government changes took place this time—there are a couple of different ways that these things play out—is that the Department of Education, Skills and Employment became the Department of Education. That is the ongoing entity. It has discharged the responsibilities for the annual report and so on. So this department has been created as a completely new entity from 1 July.

Ms Spence: My understanding is that no market research has happened in the new entity of DEWR. It was previous to that. February 2022 was the last market research.

Senator O'SULLIVAN: Can you tell me how many departmental staff are allocated to support media monitoring?

Ms Casson: I'm not sure we have that information broken down to that level in terms of media monitoring as a particular type of a communications activity, so we'll take that on notice.

Senator O'SULLIVAN: Thank you. Tell us which media monitoring services they use and the value of the contract. What is the costing for them?

Ms Casson: We can.

Senator O'SULLIVAN: Has the department provided any of the minister's office with media subscriptions at all?

Ms Casson: We do provide obviously a range of communications and media support to both of our ministers' offices and their staff. We'll take on notice the detail of that for you.

Senator O'SULLIVAN: What subscriptions are they and to which offices, and what are the associated costs with each of them?

Ms Casson: Yes.

Senator O'SULLIVAN: I will share the call.

Senator CASH: I do have more questions. I turn to the resignation of the Fair Work Commission president. I see that it has been reported that Ian Ross will resign as the president of the Fair Work Commission as of 18 November. Ms James, when was the department first informed, either formally or informally, of Mr Ross's resignation?

Ms James: I think it best we respond to that question when the workplace relations outcome is at the table.

Senator CASH: If you prefer to do that, I am happy to do that.

Ms James: I can tell you I became aware on the day of—

Senator CASH: I am more than happy. If you think it's more appropriate to do it then, that is fine. We have a few more questions in cross-portfolio. What discussions, if any, have either you or the department had with the minister and his office in terms of meetings with stakeholders?

Ms James: Can I just check that you are asking about discussions we have had with the office about meetings with stakeholders?

Senator CASH: Correct. Has there been any direction provided to you? Have you had any discussions about who the department should meet with and who you should prioritise et cetera in terms of stakeholder meetings?

Ms James: We have been in a highly intensive period of engaging with stakeholders across the entire department. We've had the jobs and skills summit and a number of other programs and activities where we have been engaging very regularly with and in activities involving consultation across the board. I have no doubt we've had many conversations engaging with our ministers' offices around the nature of those discussions, the sort of feedback we're getting, who we are talking to and whether there are other people we should talk to. I couldn't give you a number. Consultation is business as usual for DEWR. It's something we are doing a lot of across our programs with a huge range of stakeholders. The answer would be yes, we've had conversations with our ministers and offices, but there would be so many, I couldn't off the top of my head give you details about that.

Senator CASH: That's okay. I might get you to take that on notice. Has the minister or the minister's office requested the department meet with specifically, as opposed to your general consultation, any stakeholders since the election?

Ms James: I am not sure. I think that might be something that each of the deputies would need to consider. You will get the opportunity to talk with them. I suggest that would be a normal thing for ministers and offices to sometimes do—to ask us to confer with a particular stakeholder. We would share information with offices about who we're talking with as well.

Senator CASH: Thank you. I will put some more acute questions on notice, then, in relation to that. I will also ask, as you said, the deputy secretaries. I do know that we need to move on from this section. Very briefly, how many decision briefs have been sent to the minister's office since the election?

Ms James: We would need to take on notice the number of decision briefs that have gone to both our ministers' offices.

Senator CASH: Thank you. How many briefs have been returned to the department with one or more recommendations not agreed?

Ms James: We'll take that on notice.

Senator CASH: How many briefs were signed off by the minister after the recommended due date?

Ms James: We'll take that on notice.

Senator CASH: Has the minister or the minister's office requested information verbally or in writing regarding terminating or amending the employment contract of any employee within a portfolio agency?

Ms James: Can you repeat that question, please?

Senator CASH: Has the minister or the minister's office requested information verbally or in writing regarding terminating or amending the employment contract of any employee within one of your relevant portfolio agencies?

Ms James: I will have to take that on notice. You are actually asking about not statutory agency heads themselves but employment contracts.

Senator CASH: Correct. I am also happy to take an answer in relation to the statutory agency heads.

Ms James: I'll take that on notice.

Senator CASH: On notice, if so, when was the information requested? How was the request made—for example, email, phone call or WhatsApp messaging et cetera? When was the information provided? What level was the individual in question employed at? Is the individual still employed by the Public Service?

Ms James: I will take that on notice. I will say not to my knowledge have we had a circumstance that falls within the range of what you have described there.

Senator CASH: This is a final question. I will put the rest on notice so we can move on. Ms James, I return to where we started. Former secretaries have given information to opposition senators in advance of estimates hearings. To ensure that we're able to analyse information and ask questions so that you don't need to take things on notice, are you able to commit that when opposition senators request information in the future, you will directly respond to the relevant opposition senator—in this case, the deputy chair, Senator O'Sullivan—and that your department will do their very best to provide that information prior to the estimates hearing?

Ms James: I will take it on a case-by-case basis and I will be very mindful of the discussion here today.

Senator CASH: Thank you very much, Ms James. Thank you, Chair. I'm happy to move on from this section.

CHAIR: Thank you. There are no other questions for corporate enabling?

Senator DAVEY: I want to talk about PARM, which is in this section.

Senator Watt: I think PARM is probably in the very next section.

Ms James: Yes, that's right—not far off.

Senator Watt: We're still in cross-portfolio.

Senator O'SULLIVAN: It would have been good to get some of these answers ahead so we could have asked questions on them. Some of these questions are cross-portfolio. I will ask that we do get an answer on notice as quickly as you can give them for some of them. Obviously, others go to various portfolio areas, so we will deal with them as they come. Thank you.

CHAIR: I thank representatives of corporate enabling services for their time.

[14:51]

CHAIR: I ask witnesses for outcome 1, employment, to come forward.

Senator BARBARA POCOCK: Thanks for being here for these questions. I have three areas of questioning. The first is around employment programs. The second is around apprenticeships. The third is around data and monitoring change in our labour market. I will start with the—

Ms James: I will give you a heads-up. The middle one around apprenticeships is in the skills part of our portfolio. They are actually appearing tomorrow. We would be happy for you to flag questions today and/or if you're able to come back tomorrow, whichever works for you.

Senator BARBARA POCOCK: On employment programs: I notice that the new government is ceasing a number of programs. Before I go to what you might replace them with, I am curious what the story is on those programs in the last couple of years. I recognise they've been hard years to run employment programs in. I will start with the mid-career check point pilot program, which had an expenditure over the two years from 2022-23 projecting ahead of \$56.2 million. That is a very sizable labour market program.

Ms James: So that is also—

Senator BARBARA POCOCK: I haven't got to my question yet.

Ms James: That is also part of the skills part of our department. I'm really sorry. I know it sounds so very bureaucratic.

Senator BARBARA POCOCK: No.

Ms James: Nadine Williams will be able to give you a really good overview of that decision and how the money has been reallocated into other things.

Senator BARBARA POCOCK: I will try a generic question and see if that is also appropriate for Nadine. I'm very happy to come tomorrow and do that. My observation of the last couple of years shows a very thin evaluation of labour market programs and their outcomes, especially their outcomes relative to the investment made for them. I wonder what your position and thinking is around that issue of evaluation and making sure that the Australian public are getting value for their investment and the targets for programs are being met, clearly specified and then reviewed.

Ms James: The evaluation piece is very important to the portfolio. We actually have a team that carries out evaluations of our programs. I'm going to ask Kylie Crane to come to the table and talk to this a little. This is obviously historical prior to the formation of this department. We also have built some pretty thorough and clearly independent evaluation pieces into Workforce Australia. We appreciate that with these programs particularly that use third party providers that it's really important that we understand what is and isn't working on the ground and that the incentives we have in place are delivering the right outcomes for the humans in this system in addition to the numbers we see on our dashboards.

Ms Crane: In terms of the evaluation function that sits within the employment and workforce group, we certainly have an extensive team that looks at the programs that we have responsibility for. The way that they conduct those evaluations picks up a range of things around both qualitative and quantitative data sources. They will look at the administrative data that is sitting there. They will survey participants, providers and employers depending on the nature of the program that is there. We do have a history of doing that work and publishing it, so there is a range of evaluations up on our website around that. Because evaluations by nature take an extended period of time, we will look at some of the early findings that come out of that and use them to inform the work. As Ms James has said, certainly when it came to the development of Workforce Australia, some of the evaluations that we had undertaken will have informed that as well as extensive consultation and work with other stakeholders.

Mr Smyth: It's fair to say that every time we put forward a budget program or anything like that in relation to a new policy proposal for a labour market program, there is an evaluation funding component that is built into

that. Pretty much all of our programs have an evaluation component. As Ms Crane said, they are then published on our website. We have an approach to ensure that they are published and publicly available.

Senator BARBARA POCOCK: Thank you for that. I have asked some questions on notice on the evaluation of these programs, which I will take up tomorrow. The evaluation was very thin and unconvincing in relation to the number of people who have gone through programs and the outcomes for them. I am hopeful of robust evaluation into the future but I am not reassured. I will get the opportunity to pursue that tomorrow with Ms Williams, as I understand it, thank you. On the question of evaluation, you spoke of Workforce Australia. You talk about evaluation of outcomes for people who are assisted into employment and then presumably also do training as sometimes part of what they are offered. So you are evaluating those outcomes. Do you go to the question of value for money, knowing that a sizable number of the funded bodies are for profit? Do you look at profit rates and look at value for money and compare costings and so on across providers, given the diversity of public and private providers in that sector now?

Ms Crane: I might answer that question from both an evaluation perspective and then assurance. One of the things I would say upfront is the evaluations we are talking about here are evaluations for those programs that sit within the group that Mr Smyth has responsibility for. Some of the programs you might be referring to may not actually be within the scope of the evaluation piece. Look at, say, the program of work that we have for Workforce Australia and what the evaluation will cover. It will run over a six-year period. It will look at longitudinal studies with participants long after they have left employment services to look at what is happening with them—whether they are still in work, obviously, and whether the services they were provided actually supported them into employment. Outside the evaluation piece, though, when it goes to value for money, value for money is one of the assessments that we do as part of the spend within the portfolio. It looks at the types of courses that people are doing or other supports that might be available. It certainly looks at that within the labour market and other employment regions. So if two providers were spending money on a particular course, is it equivalent? Are they spending roughly the same amount of money for that participant to go through that?

Mr Smyth: Your question went to the procurement arrangements that we put in place for Workforce Australia as well. The key determining factor that we looked at there was value for money, because it is clear in the Commonwealth procurement rules that we need to assess value for money. So all tender proposals were assessed in terms of value for money, be they for-profit or not-for-profit providers. We also have key data that we publish in our annual reports portfolio budget statements, which is costs per outcome and the like. So there are various proxy measures that we are able to interrogate to determine whether or not the public is getting value for money for the expenditure by providers. We're able to look at that in terms of the number of staff that they have logged into the system; it is their staff to participant ratio. We look at whether or not they are getting similar outcomes to similar organisations in similar labour markets et cetera. If we start to see anomalies or outliers occurring, we automatically intervene and ask questions and interrogate to ensure that something untoward isn't happening. So there are various, I suppose, assurance mechanisms that go over the top—data compliance and the interrogation of a lot of analytical data—to ensure that we're tracking value for money in terms of the significant expenditure that is undertaken in our programs.

Senator BARBARA POCOCK: Thank you for that. Do you specifically look at the phenomenon of creaming, of organisations that go for relatively easy placements with high profit margins on them relative to more complex placements? Is that something that you look at?

Mr Smyth: Certainly that is part of the redesign of the employment services system away from what was, I suppose, the incentive arrangements and payment arrangements that were in place for jobactive and its predecessors. So in Workforce Australia, for instance, we've now gone with an approach where the people who are more likely to attach to the labour market quickly and are at least risk of long-term unemployment are now serviced digitally and online by the department. Those people who have more barriers are now serviced by providers. The incentive structures have been built around investment in assisting those participants to overcome some of their barriers to ensure that they are not just placed into a job to receive an outcome but there's an investment made by the provider to ensure that those people overcome their barriers, be they vocational or non-vocational barriers to ensure that when they do get a job, hopefully it's a more sustainable, longer term job and they don't cycle back through the system. The way the incentives have been structured is to avoid that concept of creaming.

Senator BARBARA POCOCK: There has been some media discussion about companies or organisations in this line of business referring people to their own training programs.

Mr Smyth: Yes.

Senator BARBARA POCOCK: And the highly profitable relationship that self-referral can be. What steps are you taking to guard against, analyse or prevent that kind of profiteering?

Mr Smyth: I think Ms Crane went to that as well. We have an employment fund. Each participant that comes into Workforce Australia in the provider servicing has a \$1,600 payment. It is made into a notional fund that can be drawn on by providers to assist those participants to upskill, reskill, get work licences, driver's licences, see psychologists and the like and to undertake, I suppose, some other training, such as in-house courses et cetera. We monitor that expenditure and we look at what the market rate for those services actually is and determine whether or not the value for money principle is being applied by the provider. We have a randomised but rolling assurance process around all the expenditure through the employment fund. In some programs, we limit the amount of own party referral that providers are actually able to make. In some areas, a provider might be the only RTO in the region, so it makes sense for them to be able to utilise that. They might have the only psychologist available in the region as well. We want to make sure that the rate being charged by the provider for that service is value for money and is commensurate with market rates and is not excessive.

Senator BARBARA POCOCK: Thanks, Mr Smyth and Ms Crane. I will go to the question of analysis of change in our labour market. We may be about to embark on a significant change in industrial relations law. Historically, Australia has on occasion done major, significant surveys five years apart, for example. I'm thinking of the Australian workplace industrial relations surveys from 1990 to 1995. They told us a lot about what was happening, who was left behind, what workplaces fostered and what happened to productivity. Are there any plans within the department to beef up alongside, of course, what the ABS does, which is very specific and limited in terms of what it tells us about specific workplaces and the experience of working people and their employers?

Ms James: I also recall the AWIRS. I think many do grieve the loss of the data and information that came from it. I'm not sure if there are plans around reinvigorating that. When Mr Hehir and his crew are here from 4.45 pm, we could potentially go into that. Jobs and Skills Australia, the new institution recently created through the passage of legislation through the parliament, might provide you some of what you are looking for. I think that when the skills people are providing evidence around the ambit of Jobs and Skills Australia and its focus, you might want to put some of those questions to them. I don't think it will be quite like AWIRS. It's certainly something that we're happy to talk with you more about with those deputy secretaries.

Senator BARBARA POCOCK: Terrific. Thank you.

Senator GROGAN: I want to take you back to the issue of the employment providers and the amount of money that gets paid for various services. In July this year, there was a report in the *Guardian* of 19 contracted Workforce Australia providers referring business to themselves. I take your point, Mr Smyth, that there are some areas where the provider may be the only provider in the region. Under this, if they are referring business to themselves, is there a reporting line for that? Do you check that referral pathway?

Mr Smyth: We certainly look at the expenditure through the employment fund and assess whether or not that is appropriate. We have a rolling assurance process that looks at that arrangement. Then we look at that expenditure and whether or not it is actually leading to outcomes and improvements in the participant's journey towards employment as well. We look at those kind of arrangements. We do limit, as I said, some of the arrangements in terms of related party transactions. We've recently written out to all providers to ask them to provide us with details of all of their related party entities as well, so we've got a full picture around that, particularly around labour hire firms and the like. We don't allow providers to utilise wage subsidies for related party entities, so we limit it there as well. You are not allowed to, I suppose, garner a wage subsidy to employ somebody in a related entity.

Senator GROGAN: In your own or related entity?

Mr Smyth: Exactly.

Senator GROGAN: I want to unpack that a little further. You say that there is \$1,600 that they can draw down on as an employment service provider?

Mr Smyth: There is a notional pool. It's actually a notional sum of money. There are some arrangements around the funding that went into people already in the system versus those who are new into the system and all that. In general, if somebody new comes into the provider system, there is a \$1,600 notional credit that is made into what is called the employment fund. That money is not stapled to that individual. It's actually able to be utilised by the provider to achieve the best outcome. So it may well be that some people need a small amount but others can have wage subsidy of up to \$10,000. Obviously, the \$1,600 notional amount wouldn't fit with the \$10,000 subsidy. We leave that up to the discretion of the provider because they are closer to what is going on in

the labour market. They better understand the needs of the individual and the opportunities for that individual to make that decision.

Senator GROGAN: If they were to refer one of their clients, for want of a better word, into their own training organisation, do they attract a fee of \$950 in the EST arena? Is that correct?

Ms Ryan: For EST, there is a limit on the number of self-referrals by an entity. It is capped at 50 per cent.

Senator GROGAN: Fifty per cent of their total case load?

Ms Ryan: Yes. It's demand driven. Employability skills training is a demand driven program. But we have a cap. So if a provider were delivering Workforce Australia provider services and was also an EST provider, they could refer a participant to their employability skills training contract, but it would be limited at 50 per cent. I can check the figures.

Senator GROGAN: Of those 50 per cent, you could attract an additional \$950?

Ms Ryan: Let me just check the figures.

Senator GROGAN: Are they then able to claim the progress payments, which I believe is another—

Mr Smyth: It is \$750 every 24 months.

Senator GROGAN: Every 24 months?

Mr Smyth: That's right.

Senator GROGAN: Could you effectively refer to your own service, gain the \$950 fee and then attract the progress payment of \$750?

Mr Smyth: They could. But they have to demonstrate to us that the participant, by undergoing that course and achieving, I suppose, the finalisation of that course, has improved their prospects for entering the labour market and overcoming some of their barriers. So there has to be proof provided to us. It's not just do that course and suddenly you're able to claim the \$750. There's a bit more requirement around that for us to assess whether or not that actually meets what we would determine to be a relevant progress payment.

Senator GROGAN: Because there is a fair number of programs people talk of that are quite generic. It is about whether they actually have an impact and how many times a particular provider can claim a different payment for the same job seeker without an outcome. Again, this taps into what Senator Pocock was talking about in terms of the evaluation and the whole notion of profiteering.

Mr Smyth: Yes. I certainly understand that. That is why we monitor this very closely in terms of the assurance around expenditure within the employment code. There have to be justifications to ensure that we are actually then providing a payment in relation to that. If we feel that there seems to be something occurring in a particular area—an organisation is running a barista course and everyone on their case load is going through that barista course—we will be in there in a shot and basically demanding that money be reversed out and justification given as to why that provider should not be sanctioned by the department.

Senator GROGAN: Have you sanctioned very many people?

Mr Smyth: Not at the moment, but certainly within Jobactive we did. We recovered a number of payments made by providers that didn't meet the criteria or they weren't able to provide the evidence around why that payment was actually received through the employment fund. So we do. We monitor it and we recover it, where appropriate. Depending on whether or not it was just an administrative error or something like that, we can provide a sanction around that. I will get Ms Tran to talk to this as well.

Ms Tran: In terms of the progress payment, I would like to clarify that a participant will have to do more than one intervention and activity for the provider to be eligible to claim that progress payment. So in the case of an EST, they would have to do that and something else during that period within that 24 months before the provider would be eligible to claim that progress payment. In and of itself, it wouldn't be enough for us to be satisfied that they've demonstrated that they've fully met that particular progress payment eligibility criteria.

Senator GROGAN: So they could do two ESTs?

Ms Tran: They've got to do two or more activities to get that.

Senator GROGAN: Technically, they could do two ESTs?

Ms Tran: Yes.

Senator GROGAN: Could they do two training courses with the same provider that they are assigned to?

Mr Smyth: They could well do, yes, absolutely.

Ms Ryan: I will clarify. With employability skills training, which you were touching on earlier, what we introduced under Workforce Australia is a fee-for-service arrangement. In employability skills training, there are two types of training. There is training block 1, which is largely focused for those participants in our online case load. That is basically to help people with interview techniques and to help them with job search and the like. The expectation is that is part of their core service delivery for the provider. If they refer somebody to an employability skills training program from their case load, they need to pay \$1,250, which is sourced from their employment fund. So, yes, it might be going into an EST provider that they may have a contract with, but it has to come from one pool of funding to another. So we don't expect too many providers doing those referrals because they should be providing that service as a matter of course and that is what we procured them for.

Block 2 training is focused on meeting the needs of a local industry. It could have an employer coming and saying, 'I need to run a course on some sort of pre-employment training and the like.' For that one, if a provider identifies that they've got a participant on their case load that would benefit from that training, then we, the Commonwealth, will fund \$950 of that participation. But the provider still has to pay a \$300 fee, which is sourced from their employment fund, which is their notional allocation. They can choose how to direct that funding depending on the circumstances. We are closely monitoring this to make sure that there aren't any perverse behaviours and the like. It is likewise with progress payments as well. We haven't had too many yet because it is very early days in the launch of Workforce Australia, but we are reviewing them to make sure that they are appropriate and there's nothing untoward happening in that area as well.

Senator GROGAN: But you would be hearing quite a lot of noise out there in the ether about how many people believe there is a range of challenges with the policy settings?

Ms Ryan: We are reviewing the policy settings. If there is an adverse or unintended consequence, we will absolutely address that and make adjustments where appropriate.

Senator GROGAN: How many labour hire companies have contracts under the Workforce Australia system at this point in time and to what value?

Mr Smyth: We don't have labour hire firms as Workforce Australia providers. But Workforce Australia providers have labour hire firms. There is no question about that. That's why we have recently written to all providers. We want to know exactly what labour hire firms they actually have and in terms of related entities. It might well be common directors or something, but we want to know all of that.

Senator GROGAN: So you are writing to us now because you don't know?

Mr Smyth: Well, there are various regimes across different jurisdictions around labour hire—whether you need to have registered labour hire firms and the like. We could actually go into some of those records and determine whether or not they are. But we have asked for them to be very upfront with us and to tell us—

Senator GROGAN: All of their connections?

Mr Smyth: All of their connections, exactly.

Senator GROGAN: This is an employment service by all the different names. It has been running for a very long time—since the late 1990s, when we first started.

Mr Smyth: In 1998, it was outsourced.

Senator GROGAN: I was working on it then. It's been a long path.

Ms James: I was floating around in the department around that time as well, Senator.

Senator GROGAN: But you are saying that it is only at this point that you are in a position to look at how many connected services?

Mr Smyth: Well, we know a lot of that as well. We have now written out. We want a comprehensive and complete list of all of those. We've asked for it.

Ms James: In my experience in government, there is a difference between things you might know through your management of a program or come to understand through your management of a program and data that you collect. When you are asking us questions how many out of a total, you are asking for something definitive. It may be that for many reasons that is not a piece of data collected consistently and universally across a program. Our contract managers and our people in the department have good knowledge of what is going on out in the field, but it may be, for whatever reason, it wasn't an essential piece of data that we needed to collect and store in a way that is easily accessible. I think there has been—and I would say from my time as Fair Work Ombudsman—increasing interest in what labour hire companies do and which other entities they are connected with and how they go about their work. It's fair to say in government there's probably more work going on to

understand when you are working with what you might define as a labour hire company. It's not necessarily something that was an issue in previous years.

Senator GROGAN: But you are going about understanding at this point in time—

Mr Smyth: That's right.

Senator GROGAN: where all those pieces are to understand how those policy settings may need to be—

Mr Smyth: And it may well be that some of our providers have established labour hire firms subsequent to being awarded a tender as well. So we want to capture all of that information.

Ms Ryan: I need to correct the record. I said earlier the funding source for EST. It's not actually from an employment fund. If the provider is referring a participant to an employability skills training, they have to fund it from the other sources of their own bottom line, so to speak. So it's not from the national allocation. My apologies. I wanted to correct that. That is why we don't anticipate too many referrals—because they have to fund it themselves.

Senator GROGAN: Not to mention work out how it all works.

Ms Ryan: Yes. I want to clarify that it's not from the employment fund. My apologies.

CHAIR: Thanks, Ms Ryan.

Senator O'SULLIVAN: I have a quick follow-up on the questions about labour hire. You are asking the question of providers in relation to any connection they've got with labour hire. You are making a distinction between those that might actually utilise the services of a labour hire company from those—

Mr Smyth: That's right. We're just after the related party entities rather than knowing they might use a labour hire firm to place people into a particular position and have no association with that whatsoever. That's not what we're after. We'll pick that up through the placement process; we know where the individual has been placed in the particular employment, so we'll pick that up.

Senator O'SULLIVAN: Thank you. Can you give us a top-line description of the difference between Workforce Australia and Jobactive, please?

Mr Smyth: I suppose that the policy objectives that have been set are really around ensuring that we provide employers with the right candidates with the right skills and that we support eligible individuals to find secure employment through online and then provider-led services. But the real focus is on providers supporting high-need individuals, reducing the risk of those individuals remaining in long-term unemployment or actually going into long-term unemployment and really ensuring that the resources are directed towards the most needy individuals. What we've done through the recommendations of the *I want to work* report, which you would remember of the panel, Senator—

Senator O'SULLIVAN: A good report.

Mr Smyth: We've taken all of that on board and bifurcated the system. Those people who are more readily attached and shorter term unemployed and have the greatest opportunity to re-engage their own needs are able to self-manage their way back into employment via an online system. That achieves a lot of efficiencies. It enables us to have providers focus totally on people who need tailored, bespoke assistance to get them back into the labour market. So that's kind of the key focus. It also doesn't have a work first approach. Previous government employment services programs have had a work first philosophy to get people into a job because being in a job creates other opportunities et cetera. But what we want to ensure around the new model is that providers spend way more time with participants. We have lower case load ratios between provider and participant. It is that they spend the time and invest the effort to ensure that those people receive tailored, bespoke services that meet their needs. It is that it is supported, simple, connected and respectful. Hopefully, through that process we start to see a reduction in longer term unemployment or people potentially becoming long-term unemployed.

Senator O'SULLIVAN: The intent, as you've said, is about really helping those job seekers that are further away from the labour market get into work. I was on that panel several years ago that looked at the employment services system. One of the issues highlighted at that stage was the ratio of employment consultants to job seekers. Has there been through this change an improvement in the level of servicing for particularly those more vulnerable job seekers who have multiple and significant barriers to employment? Is there a high level of servicing that they are now receiving?

Mr Smyth: So it is early days, I have to admit. In Jobactive, we sometimes had case manager to participant ratios up to 200 to one, which clearly doesn't allow time and effort and a bespoke approach to be taken. We now have a system whereby there is an authentication process through myGov, so we know what providers and their staff are logging into their system. We know what number of, I suppose, people they have on their case load. In

March this year, in Jobactive, there were around 4,585 logins to myGov. That is now 8,009 logins. What we are starting to see is a much higher number of provider staff, which would indicate a much lower ratio in terms of case manager to participant. In a lot of the meetings I have had, providers I have visited around the country are talking about ratios of anywhere from 60 to 90 to one. So that ratio has come down substantially, which we hope affords greater time and effort by providers to be spent on individuals.

Senator O'SULLIVAN: You mentioned the *I want to work* report—that was my memory—from 2018. Did that kick-start the consultations with the various stakeholders, be they providers, job seeker groups and employers?

Mr Smyth: As you would know, through that process, I think there were 1,400 consultations conducted nationally. It was announced on 20 March 2019 that we would be moving to the Workforce Australia model and that bifurcation would occur. We then commenced trials in two employment regions—the Mid North Coast of New South Wales and Adelaide south—to trial the new model and some of the policy settings within it. We trialled, evaluated, analysed and adjusted. Throughout that entire process, there was ongoing consultation with the sector and with participants. An advisory group provided input to us on some of those policy settings that were ultimately, though, a decision of government.

Senator O'SULLIVAN: Have you got on hand the number of individuals who participated in that trial?

Mr Smyth: We would be able to get that if we could take it on notice. We selected two regions—one in South Australia that was a more urban kind of setting and then the Mid North Coast of New South Wales, which was more of a regional setting—that were kind of reflective of other labour markets throughout the country so that we could actually do a fair comparison of whether or not it was achieving the right outcomes for the policy settings that were in place. But we'll take it on notice as to the number of people who participated in those trials. At the same time, it's fair to say that we had a small trial of our online system that was running at about, I think, 8,000 or so participants pre-COVID. When COVID hit, that just went through the roof. I think we were over a 5,000 per cent increase almost overnight.

Senator O'SULLIVAN: Would it be fair for me to describe Workforce Australia as being developed with extensive consultation and engagement with various stakeholders? Have we designed it to a point where it will ultimately attempt to meet the needs of the labour market and where job seekers are at?

Mr Smyth: I would say that a comprehensive process was undertaken to design the new system.

Senator O'SULLIVAN: Thank you.

Mr Smyth: There were obviously policy settings that we weren't able to go towards. They were set. We had to operate within the policy constructs allowed.

Senator O'SULLIVAN: I want to turn to the select committee that has been established. Minister, this might be for you. I will start with you first, Ms James. Do you know if the minister's office provided any input into a speech given by the chair of the committee on Workforce Australia and employment services to the National Employment Services Association forum, the NESA forum?

Ms James: I don't know that one way or the other.

Senator O'SULLIVAN: Minister, do you know if the minister was providing assistance to the chair of that committee ahead of their speech?

Senator Watt: I don't know that either.

Senator O'SULLIVAN: Can you take that on notice?

Senator Watt: Sure.

Senator O'SULLIVAN: Has there been any communication between the minister and the chair of the committee on Workforce Australia employment services on the expectations of the inquiry?

Senator Watt: I don't know. But it's not uncommon, as I'm sure Senator Cash can tell you, for ministers to have some discussions with committee members about the nature of an inquiry and the sort of issues that it would look at. If there have been any, that wouldn't be uncommon.

Senator O'SULLIVAN: Just so I understand, for instance—

Senator Watt: For instance, there are some committees where—I can think of my own portfolio—the committee needs to seek my approval, effectively, on a topic for consideration by the committee. Other times, ministers and their offices and committees have discussions about the types of topics that would be useful to explore. I don't know in this particular situation. But if it did happen, it wouldn't be unusual.

Senator O'SULLIVAN: Are you aware of whether there was any particular direction given in terms of the desired outcome of the committee's—

Senator Watt: Not that I am aware, no.

Senator O'SULLIVAN: Could you take that on notice, please.

Senator Watt: Sure.

Senator O'SULLIVAN: Did the department provide any input into the speech by the Minister for Employment that was made at that same conference?

Mr Smyth: We provided a draft speech to the minister for the employment services conference.

Senator O'SULLIVAN: Are we able to have a copy of that?

Mr Smyth: I will take that on notice.

Senator CASH: Take it on notice whether or not we can have a copy or take it on notice that you will provide a copy to the committee?

Mr Smyth: I will take it on notice to go back and see whether or not we are able to provide you with a copy.

Senator CASH: I can't see why you wouldn't. In the event that you are unable, can you please advise of the reasons that you are unable to provide the draft copy.

Ms James: The speech delivered was not the same as the speech provided to him. The minister said that at the podium at the time.

Senator Watt: Yes. I remember that.

Ms James: With respect to the public servants who had done the work, he also told an anecdote about getting locked out on his balcony with his guitar the night before the conference, which I'm pretty sure Mr Smyth did not put in.

Mr Smyth: It's private information.

Ms James: In front of a room full of people. He thanked the person who alerted the hotel to the fact that he was out on the balcony. I think it's fair to say that the delivery differed from the draft by the department.

Mr Smyth: It certainly did.

Senator O'SULLIVAN: Was it substantially different or just different in style?

Mr Smyth: I would have to go back and check.

Senator Watt: Again, from my relatively short experience as a minister, it's so common for changes to be made to drafts of speeches that departments provide, it wouldn't be at all unusual.

Senator O'SULLIVAN: Would the draft speech have contained lines that threaten employment service providers with cutting their contracts if they raise concerns against these changes?

Mr Smyth: I don't think there was anything in that was either in our speech or that was delivered by the minister.

Senator O'SULLIVAN: In the delivery. That is certainly how stakeholders have interpreted it. I haven't heard the speech myself. I haven't read the transcript myself. What I've had relayed to me from stakeholders was that is how they felt.

Ms James: That is not what the minister said; I can assure you. In fact, he made it very clear that existing contracts would be honoured.

Mr Smyth: And that he wanted to see performance. He was very clear that if providers aren't performing—I've said this on numerous occasions as well—we will remove their licence and bring somebody off the panel because we owe that to the participants in the program.

Senator O'SULLIVAN: Yes.

Mr Smyth: But there was no implied threat given by the minister. In fact, the providers there were, to me—I talked to quite a number of them—quite positive about the speech and feeling that they heard a pretty honest assessment by the minister.

Senator O'SULLIVAN: Did you receive any feedback from providers with respect to the chair of the Workforce Australia employment services select committee? Was there any feedback from providers on his speech?

Ms James: I think they were two separate events. They were a week or so apart.

Mr Smyth: I think they were.

Ms James: Or maybe even more. The first speech was at a forum of providers we convened.

Senator O'SULLIVAN: I see.

Ms James: The second speech was delivered at a conference of one of the provider organisations.

Senator O'SULLIVAN: The peak body?

Mr Smyth: But I didn't receive any particular feedback from providers following the chair of the committee's speech.

Senator RICE: I want to start off with quite a few questions about Workforce Australia. I hope there is not too much overlap with what Senator Pocock and Senator Grogan were asking. Tell me if there is or if it has been covered. I'm happy to move on. I want to start with the procurement process for Workforce Australia. Obviously, it was undertaken by the previous government. Can you step me through the process and what that process was?

Mr Smyth: I will get Ms Shannon here to talk you through the process undertaken.

Ms Shannon: The precursor to the procurements was a consultation process. We issued a consultation paper on the licensing element of the Workforce Australia model and then we issued an exposure draft of the request for proposal. We also issued a notice to the market at the beginning of the year on AusTender indicating that we were planning to undertake seven concurrent procurements for the different elements of Workforce Australia. That was the sort of market notification element. We obviously got feedback through the consultation process as well. We then finalised the request for proposal documentation or, in some cases, requests for tender documentation, because we were running at least four separate processes at various times at different stages.

Senator RICE: Were they for different aspects?

Ms Shannon: That's right. The first procurement was actually a request for tender for the Transition to Work program, which is the youth specialist employment program that forms part of Workforce Australia. The second procurement was for the main service—Workforce Australia services now—as it was termed then under the new employment services model. It also included the request for proposal for employability skills training and career transition assistance. The next part of the separate procurement was for self-employment assistance. The program replaced the NEIS program and the entrepreneurship facilitators program. The final procurement related to workforce specialists. They were four separate approaches to market. Some of those approaches to market had more than one service bundled in the procurement. We were very conscious that this was quite a large procurement and it was occurring concurrently. We tried to give the market as much notice as possible. We were certainly very mindful that each time we put the tender documents out, we were trying to achieve more than the minimum required 25 business days under the Commonwealth procurement rules. In some cases, we were able to give respondents close to 45 days; I think 44 days was about the longest we were able to give. We notified the market. There was a period where we put the documents out. Obviously, the respondents had time to prepare their tender responses. At that time, the department ran a hotline. We did seminars to respond to questions. We were very mindful that, as part of the probity requirements for procurements, any clarification that we gave we had to share with the entire market and not just the single respondent that asked. We then went through a process of lodgement on an IT system that the department had developed that enabled tenderers to reuse information across multiple processes. If they were bidding for more than one employment region, they could reuse some of the information so they didn't have to rekey it. Once they lodged it, we checked that the bids had conformed. Then we ran assessment centres around the country in a hub and spokes model. We had large tender assessment centres in Brisbane and Adelaide but smaller centres in Canberra and a range of other regional locations.

We had a team of assessors who received training. Their work was moderated largely by departmental staff from the state network, who have quite a bit of experience in employment services and contract management. So there was assessment moderation, quality assurance and data analysis to look at things such as outlier scores. All of that information, including credential checks, financial viability checks et cetera, formed the basis of a business allocation report for each employment region, which was presented to a tender review committee mostly chaired by myself. Some of the committee was chaired by my colleagues. The business allocation reports were presented by our state managers to the committee. The committee thoroughly tested the recommendations in the reports against the value for money criteria, which go to things such as the strength of the quality of the claims against the selection criteria. It also looked at things such as the diversity of the market, the accessibility of services, the suitability of the providers' Indigenous participation plan and a range of things. It is quite an involved process, I am sorry.

Senator RICE: Yes.

Ms Shannon: At all stages we had independent probity advice. A key part of the tender review process was independent probity advice in the room. The tender review committee made a report to the delegate. The delegate for all of the procurements was actually Mr Smyth. Mr Smyth made a decision.

Senator RICE: Then, once you have procured people's services, are they on a panel?

Ms Shannon: It differs a little. For example, for transition to the successful respondents, all the respondents were advised at the same time. The successful respondents were offered a deed. There is a period where they consider the deed and the business that they've been offered. They sign it, and the department, on return, executes it. So it is a direct contract, if you like. Workforce Australia services is constructed as a panel. Firstly, we determined through the tender review process whether the organisation was suitable to be on the panel. Then we undertook a subsequent decision around those on the panel who would be offered a licence and what would be the allocation of business—that is, a share of the case load or people who—

Senator RICE: The particular services that they were going to be providing on that panel?

Ms Shannon: That's right. So it is a two-step process. Everybody on the panel got a deed of standing offer and then a subset of panel members were offered a licence.

Senator RICE: When were those contracts signed?

Ms Shannon: They were progressively executed as successful respondents returned their offers. So the last day for successful respondents to sign Workforce Australia services deeds was 25 March 2022.

Senator RICE: When were they signed between? That was the last one.

Ms Shannon: They would have been signed between when they were advised, which was 11 March and 25 March. They had 10 business days.

Mr Smyth: There was a two-week period there?

Ms Shannon: Two weeks, yes.

Senator RICE: Can you provide us with a copy of the contract for one or more of them?

Ms Shannon: I can provide you with the deed of standing offer. I can take out the commercially sensitive information, which is really just the business share allocation. I think that's fine. I will just do it on notice, if that's okay.

Senator RICE: Yes. How many altogether?

Ms Shannon: There were 99 organisations that accepted an offer to be on the panel, and there are 43 licensed providers for Workforce Australia.

Senator RICE: Are the contracts the same for all of them?

Ms Shannon: They are. The only variation is the location and the type of licence.

Senator RICE: When that contract is signed, there is an amount listed on AusTender?

Ms Shannon: Correct.

Senator RICE: That is the base amount, isn't it? That doesn't include incentive payments?

Ms Shannon: My understanding is that the amount that is on AusTender is really the amount in the forward estimates for the program and that provider's estimated case load share of it. I would see that as likely to be an upper threshold.

Senator RICE: I thought AusTender amounts are usually the actual amount of a particular contract. So you are telling me that they are not?

Ms Shannon: Because it is demand driven.

Mr Smyth: It's a demand driven program, so we are unable to say because they change. Every six months, there are changes made.

Senator RICE: Where does that get reported, then, as to what is actually paid out to each one?

Ms Shannon: That would be in our annual report and portfolio budget. It is not per provider reported. It is reported at the program level.

Mr Smyth: At the program level, it's reported.

Senator RICE: But in AusTender, is there an actual estimate of what the individual contracts would be?

Ms Shannon: That is the estimate. It is the estimate. I guess I am saying that if the unemployment rate changes, it could be more. If it goes down, it could be less.

Senator RICE: I am interested to know whether there is information that is available of the amount paid out to each of these providers. Is it just at a high level? I would like to have that information.

Mr Smyth: We don't publish individual provider payments at all. We do that at the aggregate level in our portfolio budget statements as to what the Workforce Australia program expenditure actually is.

Senator RICE: Would it be possible to provide that?

Mr Smyth: We can take that on notice.

Senator RICE: Take the individual amounts paid out, both the estimates for each of the providers and then what is actually paid out to them. In the *Guardian* article in July, providers who won Workforce Australia contracts are listed.

Ms Shannon: That is exactly what was published on AusTender.

Senator RICE: That is the estimate?

Mr Smyth: That is the estimate.

Ms Shannon: That is the estimate over three years for their share of the case load and the estimated outlays for the program. That is the estimate of what that provider would get.

Senator RICE: You are saying that you are reporting an aggregate amount, what, after six months or 12 months?

Mr Smyth: Usually what happens is that at budget and then at MYEFO—it gets very complex—there is the projected unemployment benefit recipients that is derived from ABS statistics.

Senator RICE: I want to know what your reporting is. Is it six months or 12 months? What you are taking on notice is whether you can provide me with the actual amounts.

Mr Smyth: Whether we can provide you with the actual amounts.

Senator RICE: The actual amounts.

Mr Smyth: That's right.

Senator RICE: For each of those contracts.

Mr Smyth: Yes.

Senator RICE: In terms of incentive payments, are they estimated somewhere? Are they reported individually as well?

Mr Smyth: That is included within that aggregate amount that would have been on AusTender as to what the projected amounts would be.

Senator RICE: I thought you answered the question before that the amount listed was the base amount.

Ms Shannon: When you say incentive payment, what do you mean?

Mr Smyth: I am assuming outcome payments and the like.

Senator RICE: Yes. In terms of how many successful—

Ms Shannon: There are different components of the payments that providers receive. The figure reported in AusTender is all of that.

Senator RICE: I will continue on with the incentive payments. There are engagement payments. The engagement payment is what they get for each person who is referred to them.

Mr Smyth: That's right.

Senator RICE: That is \$1,200?

Mr Smyth: That is correct, Senator. For a new person coming into provider services, it is \$1,200.

Senator RICE: For people transferred from Jobactive, it's \$600?

Mr Smyth: That's right.

Senator RICE: For people who transfer between Workforce Australia agencies, it's \$600. In relation to that \$600 transfer payment, the agency they transfer to receives that payment?

Mr Smyth: Yes.

Ms Shannon: Yes.

Senator RICE: I will move on. In the deed of standing offer, there's a period of unemployment. If a person does a course or undertakes work for the dole or some other form of mutual obligation, does that end the period of unemployment for the purposes of the Workforce Australia framework?

Mr Smyth: No. The end of the period of unemployment is effectively when the person is 100 per cent off income support. We have payments made to providers at four, 12 and 26 weeks. There are partial payments and there are full payments. Partial payments are when their reliance on income support reduces by 60 per cent and full is when they are actually not receiving income support payments. So a 26-week outcome would be a payment made for somebody who is actually 100 per cent off income support and in employment. So that's when the period of unemployment for us would potentially end.

Senator RICE: They don't get that full payment, then, if they are only partially employed?

Mr Smyth: No. There is a partial payment made.

Senator RICE: How much is the partial payment?

Ms Ryan: It depends on whether or not the participant is either a moderate or high. It is what we call the jobseeker classification instrument. It varies. It depends on whether or not they've got one of those kind of scores. For a moderate jobseeker who has a moderate jobseeker classification instrument score, it is \$800. For a high jobseeker classification instrument, it would be \$1,650.

Senator RICE: So, for people with moderate or high scores, is there a differing amount that the provider would get the at the beginning?

Ms Ryan: No, not for the initial upfront engagement. It is the same figure. But when they are placed into paid work, the outcome payments are varied based on their scores.

Senator RICE: All of these payments are indexed?

Ms Tran: They will be once every six years. They will be indexed.

Ms Ryan: The next indexation will be 6.8 per cent. That is to be applied every three years starting from 1 July 2025. We made some adjustments to launch Workforce Australia in terms of the payments in place under Jobactive. We increased a number of the payments. That reflected that the baseline is now higher than what applied under Jobactive. In three years, we will index those payments by 6.8 per cent.

Senator RICE: So you've made that decision that 6.8 per cent indexation is what it's going to be?

CHAIR: It may be a good time to go to the coalition. I will come back to you.

Senator DAVEY: I have a few questions on some of the programs. In your opening statement, you mentioned that parts of the PALM scheme have been incorporated into your department now in partnership with the Department of Foreign Affairs and Trade. You have acquired 34 DFAT staff into your department. Is that correct?

Ms James: Thirty-four staff transferred over as part of the machinery-of-government change; that's correct. One of them is Mr Jason Stott, who has joined us at the table.

Senator DAVEY: Welcome, Mr Stott. Can you explain the split now between DFAT and your department when it comes to delivering on the PALM scheme?

Mr Smyth: Sure. I suppose the key thing is that we are responsible for the domestic operations of the PALM scheme. We look at how PALM operates with our providers. We also look at ensuring compliance with workplace laws and the like. We run the contracts with the approved employers. We also ensure that businesses are having their needs met et cetera. We deal with some of the domestic policy considerations that apply to the program. DFAT is more responsible for the overarching kind of policy in terms of our international engagement and strategic communications. They run the offshore training elements of the program as well. They do the key interaction with the sending governments as well. We do PALM operations administration onshore and the administration of the Pacific labour contracts onshore. DFAT do non-operational policy, external strategic communications, Pacific support and engagement. Home Affairs does visas. The Fair Work Ombudsman is obviously around compliance with workplace laws and the like. They get involved in arrival briefings, as do our staff. We have the taxation elements between the short-term visa holders and the long-term visa holders.

Senator DAVEY: Thanks for that split-up. I will try to focus on what is relevant to you and try not to go down the rabbit warren that is everywhere else. When it comes to things such as the overseas trained workers, for example, I know that we have aged care workers. The PALM scheme has been expanded. We are training them overseas. Are you responsible, however, for when they land in Australia, getting them placed with aged care

providers? My understanding is that we have about 50 at the moment in Australia. They are mainly in Queensland in regional areas.

Mr Stott: There are more than 50 people in the PALM scheme working in aged care right now.

Senator DAVEY: Good.

Mr Stott: It is about 380. It is about one per cent of the program. What I think was tacit in your question was the aged care pilot and what is happening to expand the program. That work is led by our colleagues at the Department of Foreign Affairs and Trade. What I can say about that generally is that there is a pilot running to consider how that program expands. If you like, it has been conducted to test models. The question that you put was whether those workers arrive and we deploy them. That question goes to the scheme operations more generally. To quickly answer the senator's question, generally, an approved employer would make inquiries with the host nation through a labour sending unit, which would assist that approved employer to locate employees suitable for deployment. If you like, they would directly employ those workers, who would then arrive in Australia with arrangements made with that approved employer. There are a lot of processes to ensure the welfare of the workers and the proper deployment of employment contracts so we comply with Australian workplace laws. We monitor the welfare of those folks. I am abbreviating that for you. When they arrive, they are in the care of, or working for, that employer, who then looks after those logistical arrangements. When it comes to that specific pilot, there is a little more oversight. We have colleagues at the Department of Foreign Affairs and Trade. It's best that it is explored with those colleagues on Thursday morning, who can explain the model in a bit more detail.

Senator DAVEY: That's great. That gives me a bit of an understanding about where to go. During the election campaign, the now government promised to assist with the PALM scheme. It would meet seasonal workers' international and domestic travel costs upfront, with costs to be recovered. Is that your department?

Mr Stott: Those measures that went into the budget are led by the Department of Foreign Affairs and Trade. The department did participate in the co-design of some of those measures and participate in stakeholder engagement, but, of course, not all of them. They are led by the Department of Foreign Affairs and Trade.

Senator DAVEY: So I'm best to ask them whether that commitment is ongoing? There have been claims that there has been a backtrack on that election commitment.

Mr Stott: Yes, Senator. You are best to ask them questions in detail on that matter.

Senator Watt: I will add one thing, Senator Davey. Obviously by all means ask questions at the DFAT estimates. As I mentioned yesterday, I think it would be fair to say that there was a mixed reaction to the commitments that our government made on this through the budget. I acknowledge that the NFF has been critical. The Australian Fresh Produce Alliance, who, as you would be aware, effectively represents some of larger horticulture producers, have been very supportive of these changes. AUSVEG, a group you would know that is a peak body for the vegetable and potato industries, is very supportive. So there has been a bit of a mixed reception. By all means, feel free to ask questions here or at DFAT.

Senator DAVEY: Thank you. I don't want to waste this committee's time by going down paths that need to go to DFAT. The government has advised that it will be introducing increased workplace compliance activities. That is your department, isn't it?

Mr Stott: Yes, Senator. We deal with assurance and compliance for the scheme.

Senator DAVEY: You will be implementing the recommendations of the Migrant Workers' Taskforce. Can you advise what some of those extra compliance activities are and how they will be applied to the PALM scheme?

Mr Stott: Yes. The scheme operates with a deed. When the Pacific Australia Labour Mobility scheme assesses an employer and vets employers for participation upfront, that assessment includes checks for compliance with, say, the Fair Work Ombudsman, Border Force, our own records and interactions. It looks at the long-term details of the employer choosing to participate in the program. We also do checks on things such as, in the seasonal program, the quality and suitability of accommodation and other records and checks. We then administer the program in compliance through adherence to the deed, which might include desktop assessments, monitoring visits—actually physically visiting the premises or the host where the work will be undertaken. The additional measures in this budget include support to other agencies, such as the Fair Work Ombudsman, which has a dedicated PALM enforcement and compliance strategy. Similarly, in the home affairs portfolio, there is the Australian Border Force. That is an overview and flavour for you.

Senator DAVEY: What sort of consultation was done with industry to develop these extra checks and balances?

Mr Stott: That represents a continuation of the work that already occurs. So it's historically how the program has operated. Just to go back a couple of years when borders closed, there were about 8,000 PALM scheme workers in Australia. As at 30 September, we had 29,075. So what we have seen is extraordinary year-on-year growth in the core components of the scheme that have combined to form the PALM scheme. This commitment keeps track with that growth in the scheme to ensure that those same integrity and transparency checks are able to be realistically maintained within the program settings.

Ms James: You mentioned the Migrant Workers' Taskforce recommendations. Mr Stott hasn't gone to them. The workplace relations outcome will be able to expand on what I'm about to say. To give you the sum total of my knowledge around that: the Migrant Workers' Taskforce was a taskforce established by the previous government and former minister Cash, as I seem to recall. I think it reported around 2018 because I was on it, as Fair Work Ombudsman. I think that was the rough timing. I don't believe that most of the recommendations were implemented. This government has agreed to implement the recommendations of the Migrant Workers' Taskforce. Some of those recommendations are operational. Some are legislative. There is at least one contained in the secure jobs, better pay bill before the parliament now that relates to increasing the threshold for small claims, which at the moment I think sits at \$10,000. It is proposed to increase it in the bill to \$100,000 to increase wage underpayment recovery options. The Migrant Workers' Taskforce also made some recommendations around labour hire regulation, which had not been implemented. This government has adopted that as well. It is not currently contained in the legislation before the parliament but is one of the commitments that the government anticipates bringing forward in future tranches of workplace relations reform.

Senator DAVEY: There would be consultation and an exposure draft before that reform?

Ms James: There would be consultation. Mr Hehir will be able to give you more details about this. I think the beginnings of the thinking around that are underway. Certainly there's some complexity. You would probably be aware that there are some state regulatory regimes around labour hire at the moment. The department and the government are most concerned to engage around those schemes and with other stakeholders prior to any regulation hitting the decks in parliament.

Senator DAVEY: Thank you. That's very informative. I have spoken to both employers and employees under the PALM scheme. Predominantly there is very good feedback. It is certainly filling a gap in the employment market. Most employees who come over are really valued in their communities and very hard workers. I don't want to cast aspersions on anyone. When there is a fault on behalf of an employer, we read about it very quickly and loud and proud. It has been brought to my attention, however, that occasionally some of the participants in the scheme may disappear from their place of employment. The employer has gone to significant cost to bring these people over and to create the facilities to employ them and is left holding the can. What actions are at the disposal of yourselves or the Fair Work Ombudsman—maybe I'll ask him as well—to help employers recover costs or take actions against the absolute minority of cases where this does occur?

Mr Stott: Thanks for passing on the positive feedback. I get that feedback too. I have spoken to employers, workers, unions, community groups and others. They share that narrative that the PALM scheme fills a really valuable role, allowing employers to access workers where there are no Australians to fill those jobs from nine Pacific island countries and Timor Leste. Those workers make a contribution to communities that they stay in as well as the employer, so Australian communities benefit, as do those communities overseas.

Senator DAVEY: Absolutely.

Mr Stott: We do from time to time hear of workers who have disengaged from the scheme. We use that language deliberately. There are many drivers for disengagement. We are still working to make sure we completely understand that. We know it is a minority of people who disengage. The first thing that employers can do to recoup some costs is take up the commitment just released in the budget. If an employee, a worker, disengages and through no fault of the employer there is a cost for the flight remaining, less the \$300 contribution from the employer, the employer will be able to recoup some of those costs.

Senator DAVEY: So they can recoup some of the costs?

Mr Stott: In the Seasonal Worker Program under those new arrangements when that measure commences. I have just put the commencement date out of my mind. I apologise for that.

Senator DAVEY: If you can provide that date on notice when it comes to hand, that's fine.

Mr Stott: Of course.

Senator RICE: I understand that there have been some questions about the referral cap. Do you have any figures from jobactive of referrals by providers to their own organisations or related entities or subcontractors?

Mr Smyth: I have to take that on notice because it is still early days in relation to the program. We're still running some assurance work over that. We would have to work out exactly what referrals are to programs such as career transition assistance, employability skills training and the like. I would have to take that on notice.

Senator RICE: But they do have to report those referrals to you?

Mr Smyth: Not necessarily.

Senator RICE: You have the caps now. Clearly they've got to keep some metrics over who they are referring.

Mr Smyth: Yes. There is a 50 per cent cap there around EST referrals and the like. When it comes to other services—it might be an RTO, it could be psychology services or an occupational therapist or something like that—we don't have particular caps. It would be very hard to give you an exact figure of what own party referrals are in those circumstances.

Senator RICE: What do they have to report to you?

Mr Smyth: Well, they have to report employment fund expenditure. We run a process of continuous oversight and assessment of whether or not that money has been appropriately accounted for and that the referrals to those particular services are relevant to the program and the individual.

Senator RICE: So they do have to report all of those referrals to you?

Mr Smyth: We track every dollar of expenditure under the employment fund.

Senator RICE: So you should be able to then report on what those referrals are?

Mr Smyth: Yes. We have broad categories that sit within that. I would have to get my team to look at the exact individual organisation. Certainly at the aggregate level we track whether or not there is expenditure in accredited training, non-accredited training, licensing et cetera. A whole raft of categories is allowed under the employment fund expenditure. We track all of that.

Senator RICE: It looks like Ms Ryan has some information she can share with me.

Ms Ryan: I was just going to add to Mr Smyth's comments. Under the provider employment fund, we have specific categories, as Mr Smyth said. There are 13 categories. We track them. For example, Mr Smyth said accredited training and certified interpreters. There are other things to do with work related training and licences, professional services and the like. We obviously check that and make sure it meets those criteria of value for money and so forth.

Senator RICE: Take on notice what you can provide me in terms of a breakdown. I acknowledge, Mr Smyth, it's still early days.

Mr Smyth: Yes.

Senator RICE: In particular, time frames and by provider would be of use to me. I want to go to the national customer service line and touch on complaints about Workforce Australia that have gone to the national customer service line. What data do you have since July of the volume of those calls?

Ms Ryan: I will just check that, Senator, for you. This is at the highest level. I know that previously you have asked us some questions in relation to the granularity regarding complaints and the like. I can answer at the highest level. Since 1 July this year, when Workforce Australia commenced, to 30 September this year, the key reasons for people calling the customer service line or emailing it related to requests for information about the new service, electing to either transfer or move to another provider. Unpacking that, they may have been allocated a provider and they've moved location, they want to move to another provider or they may be dissatisfied with the service they are receiving from that provider.

Senator RICE: Perhaps cut it short because I need to leave here in three minutes. I might get you to put some things on notice.

Ms Ryan: Yes.

Senator RICE: How do you measure complaints, then? Pull out complaints versus information about the service.

Ms Ryan: We track that through our data management system. We can unpack some of that for you. There are certain categories that our operators will record on that. I'm not saying that it's perfect, but we can unpack that to give you a bit more granularity about how that's done. Those complaints are fed into the performance

management framework that assesses the performance of those providers as well. We will feed that back to them through a formal complaints process but as part of their licence reviews.

Senator RICE: That goes to my next point about measuring outcomes. If you have these complaints, how do you know whether these complaints have been resolved? How do you track what has been done about those complaints?

Ms Ryan: I think in a previous question on notice we provided an answer that we may get a formal complaint where an individual may want to escalate that and then will want us to reach out to the provider. The provider will notify them that we've had a complaint from a participant about potentially servicing. We'll give them five business days to respond to that. We will follow up to see what remediation has been done. So that is the immediate complaint process.

Senator RICE: Take on notice the information you provided about that and the wait times on the customer service line.

Ms Ryan: Well, I can tell you.

Senator RICE: How long are people waiting to talk to someone?

Ms Ryan: For the national customer service line, the average wait time since the beginning of this financial year has been one minute and 12 seconds. For the digital services contact centre, which supports our online participants, it's 37 seconds. So there are no wait times generally.

Senator RICE: Different from that waiting, do you measure the time between when a complaint is made and when an issue is deemed to have been resolved?

Ms Ryan: I might have to take that on notice to see how we measure that, if I may.

Senator RICE: Okay. This is one last question in my last minute before I have to dash. In terms of the claiming of incentive payments by the providers, I want to clarify the significant increased payment. What evidence is required for a provider to be able to get that significant increase payment?

Mr Smyth: We don't have a significant increased payment. Can you be a bit more specific?

Senator RICE: I think it is an example where someone increased their level of employment.

Mr Smyth: A progress payment. There is a \$750 progress payment available to a provider for a participant every two years.

Senator RICE: The example I have here is that they were employed a few hours a week on JobSeeker and then they get several shifts.

Mr Smyth: An outcome payment? There is an outcome payment. I talked about this before. There are partial outcome payments and full outcome payments. A partial outcome payment is somebody who has reduced their reliance on income support by 60 per cent. A full outcome payment is when they are 100 per cent off income support.

Senator RICE: So there is an incentive payment if they do increase their rate of employment?

Mr Smyth: That's right. So 100 per cent off income support is a higher rate of payment.

Senator RICE: What information is needed in order to be able to claim that payment? Does the provider need to have asked the jobseeker for payslips, for example, or anything like that?

Ms Ryan: Yes, they can. What the provider may do, if they facilitated the placement of that participant into a role, is record it as a job placement. Our system will then track it for four weeks, 12 weeks and 26 weeks. We may sometimes ask for payslip evidence and the like.

Senator RICE: You may ask for pay slip evidence or do you require pay slip evidence?

Ms Tran: In some cases, we do system derived as well based on information we get from Services Australia. The system will derive it automatically for the provider. Where the provider may have further information that the system might not have caught up on yet, they can certainly provide us with the pay slip and documentation in evidence.

Senator RICE: Thanks.

Senator O'SULLIVAN: In the interests of time, I'm happy to put my questions on notice.

CHAIR: Thank you. It's now 4.16 pm, so we'll break for 15 minutes.

Mr Smyth: So this section is done?

CHAIR: And we are done with that, thank you.

Mr Smyth: We're finished?

CHAIR: Yes. We have finished. You are finished. Thank you.

Proceedings suspended from 16:16 to 16:32

CHAIR: I welcome everybody to the table. We will start outcome 3.

Senator CASH: I will now turn to the resignation of the president of the Fair Work Commission. Can I confirm that he will resign his position as at 18 November. Is that right?

Mr Hehir: That's my understanding. The president talked to his staff and then issued a press release yesterday indicating that he intends to retire both as president and as judge on the 18th.

Senator CASH: And as a judge. That was my next question. Thank you very much. When did the president inform the minister?

Mr Hehir: I'm not aware of the date of that.

Senator CASH: That's okay. Minister, when did the president of the Fair Work Commission inform the minister or his office either formally or informally of his resignation?

Senator Watt: I would have to take that on notice and come back to you on that.

Senator CASH: That's fine. Has he formally written to the minister, Senator Watt?

Senator Watt: Again, I will take that on notice.

Senator CASH: Ms James or Mr Hehir, has he formally written to the department or was it by way of a press release?

Mr Hehir: I became aware through the media yesterday.

Senator CASH: Minister, I do appreciate that Minister Burke's office will be listening in. Has the minister had discussions with the president of the Fair Work Commission either formally or informally regarding his replacement?

Senator Watt: I'm not aware of that. I did notice that at the end of Minister Burke's press release he stated that an interim president will be appointed shortly. But I'm not aware of any conversations to that effect.

Senator CASH: In relation to the appointment of the interim president, has a determination been made as to who that is?

Senator Watt: I'm not aware of that having occurred. I'm not sure whether anyone in the department knows.

Mr Hehir: That is a matter for government.

Senator CASH: Minister Watt, that hasn't yet been decided by the government or by the minister?

Senator Watt: I'm certainly not aware of that having been decided.

Senator CASH: That's fine. In relation to the actual replacement of the president—I appreciate that Minister Watt will already know this—section 627 of the Fair Work Act sets out the qualifications required for someone to be appointed as the president of the Fair Work Commission. It states:

(1) Before the Governor-General appoints a person as the President or a Vice President, the Minister must be satisfied that the person:

(a) is or has been a Judge of a court created by the Parliament—

as Mr Ross was. It continues:

or (b)—

I note it is an 'or'—

is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

(i) workplace relations;

(ii) law;

(iii) business, industry or commerce.

Minister Watt, how does the government intend to fill the position of president of the Fair Work Commission?

Senator Watt: As the representing minister, I'm not aware of the exact process that Minister Burke intends to take, but I am very confident that he will comply with those legislative obligations.

Senator CASH: Thank you very much. Clearly he has to, obviously, because it is a recommendation to the Governor-General, who would require that section 627(1) has been complied with. In the event that the person who is appointed is not a judge of a court or has been a judge of a court created by the parliament, it is then

obviously a person who is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields. As I said, it is workplace relations, law, business, industry or commerce. Can the minister guarantee that, consistent with Mr Albanese's comments on integrity and transparency, a merit based selection process will be undertaken?

Senator Watt: Again, I'm not aware of the exact process that Minister Burke intends to undertake. It may be that the department has had some discussions with him about that. Again, all I can say is that I am confident that the appointee will meet those legislative requirements.

Senator CASH: But you can't guarantee that, in the event section 627(1)(b) is invoked because the person is not or has not been a judge, a merit based selection process will not be utilised?

Senator Watt: I would encourage you to not use my answer to suggest that we're not guaranteeing anything. What I am saying is that I am not aware of the process that is intended.

Senator CASH: Are you able to take that on notice for me?

Senator Watt: Yes. I am happy to do that.

Senator CASH: You did say that the department may have engaged in conversations with the minister. Ms James, have you spoken to the minister about the resignation of the president of the Fair Work Commission, or has anyone in the department spoken to the minister or his office?

Ms James: The minister did call me yesterday to alert me to the fact that he was going to mention it in the chamber, I think. Obviously this has just happened so we're not in a position yet to comment on what might happen next.

Senator CASH: Not in a position to comment. Did you have any discussion with the minister or his office, formally or informally, in relation to the appointment of either the interim president or a new president?

Ms James: I did not have any discussion along those lines.

Senator CASH: So the discussions were only in relation to being alerted to the announcement?

Ms James: Yes. I was a little surprised because Justice Ross isn't due for a little while yet. I was a little sad to see him go, but it is also pleasing because he probably deserves a rest.

Senator CASH: Lots of people deserve a rest. He was very well remunerated for his role compared to others in life. I would say that he may well deserve a rest, but he was very well remunerated for his role, as will the next—

CHAIR: And highly respected.

Senator CASH: And highly respected by some, absolutely, including yourself, Senator Sheldon. You have admitted that before, absolutely.

Senator Watt: Does that include you?

Senator CASH: The good news is that I don't get to answer the questions anymore. That is fantastic news.

Senator Watt: I know that you do have an interest in the Fair Work Commission being stacked, so I guess we'll see.

Senator CASH: I'm actually not going to get political, seriously—

Senator Watt: We'll see.

Senator CASH: other than to ask Ms James: did the minister or the minister's office request a brief, or have they requested a brief, in relation to the appointment process for the new president or the interim president?

Ms James: I'm not aware of whether a formal brief has been requested.

Mr Hehir: Yes, it has been.

Senator CASH: Thank you very much. When did that request happen?

Mr Breen: That briefing was requested yesterday.

Senator CASH: Thank you very much. I will now move on from those questions. I have some questions in relation to the industrial relations legislation that will go to the process involved in putting it together et cetera. Before I get to that, though, I want to ask one question. I know that obviously Mr Burke has been on his feet in the parliament. Ms James, the department was responsible for putting together the legislation working with the parliamentary drafters?

Ms James: As I said before—

Senator CASH: I just want to confirm that for the record.

Ms James: that is correct, yes.

Senator CASH: In terms of the legislation itself, Mr Burke, in his second reading speech, had said that the legislation would be amended. As we've seen to date, he has announced a number of amendments. One of the amendments that he referred to was in relation to the written agreement from employee organisations before an employer requests employees to approve a multi-enterprise agreement. Has the department drafted that amendment?

Ms Sheehan: Yes, the department has worked with the Office of Parliamentary Counsel to draft the amendments, as mentioned in the minister's second reading speech.

Senator CASH: Thank you very much. What is the effect of that amendment?

Ms Sheehan: I think the minister indicated that he intended those amendments to be circulated today. I understand that they haven't been as yet, but we'll keep an eye on when that happens today. The effect of that amendment would be in the multiemployer bargaining streams. Before an agreement is put to the vote of employees, the employee organisation that is the bargaining representative would have to agree to the agreement being put to the vote.

Senator CASH: Ms Sheehan, what happens, though, if the employers and the employees agree to the agreement? Can that just be put to a vote then?

Ms Sheehan: The employees wouldn't be agreeing to the agreement until the employer made the request to put the agreement to a vote.

Senator CASH: If the employees are happy with the agreement and the employers are happy with the agreement, can you put it to the vote, or effectively does the union have what has been termed the right of veto and it can't yet go to the vote?

Mr Hehir: We're happy to talk at the high level at this point.

Senator CASH: I'm happy to talk at a high level as well. We'll obviously explore this in detail on Friday at a different hearing.

Mr Hehir: I was going to refer to that. The amendments also haven't actually been tabled yet, so they are really still a matter for government. So we're not in a position to go into much more detail than the minister did. Until they are actually tabled, they are the subject of government.

Senator CASH: Just to confirm, though, the minister in his second reading speech did actually state that the government would be amending the legislation so that effectively even though there was an agreement between the employers and the employees you would still need to get the agreement of the union before you could put it to a vote. That is what he said, effectively, in his second reading speech.

Mr Hehir: It is probably worthwhile going a bit sequentially there. There's no formal acknowledgement of whether the employees agree until they vote. The way that—

Senator CASH: I understand what you are saying. That is technically correct.

Mr Hehir: It conveys it; it doesn't actually work.

Senator CASH: Correct, yes.

Mr Hehir: The employees can't agree until there is a vote. The process, as described by the minister, is that the proposal can't be put to the employees to agree or not until the employee organisation has agreed.

Senator CASH: If the employer organisation does not agree, what then happens?

Mr Hehir: I think that's where the detail of the bill will be—

Senator CASH: Understood. We might come back to it depending on when the amendments are tabled. Obviously, there are things happening in the House as we speak. I will turn to the budget and wages et cetera and some of the assumptions made in the budget papers. Page 6 of Budget Paper No. 1 confirmed that wage increases are not expected to rise above inflation until 2023-24, when wages are expected to grow by 3.75 per cent against inflation of 3.5 per cent. That is an expected 2.5 per cent increase. At the same time, unemployment is expected to increase to 4.5 per cent, up from 3.5 per cent now. I do have copies of that if people would like it, but I am sure you are able to access it. Ms James, does the department of employment accept Treasury's figures?

Mr Hehir: The department's role is that we provide a set of information to Treasury. They then have the expertise and have traditionally undertaken the role of doing the forecasting. So we certainly have no view other than that is their role. We believe they do it well.

Senator CASH: I understand that. Thank you very much. You have now answered the next question, Mr Hehir, thank you very much. In terms of any information that the department may have provided to Treasury, were the government's proposed industrial relations changes taken into account when these figures were modelled by Treasury?

Mr Hehir: Our information that we provide is historical in nature. So on that basis, I would say that it didn't include any view from us in terms of modelling. But you would need to put that question to Treasury as to whether they do that.

Senator CASH: Understood. It has been put in a separate hearing. Minister, are you aware whether the government's proposed industrial relations changes were taken into account when the Treasury figures were modelled?

Senator Watt: There's not really much I can add to what Mr Hehir said. I did hear him say that traditionally that sort of modelling would be historical in nature.

Senator CASH: I understand that. It is a separate question. The government has said numerous times, both in the lead-up to this legislation and since the legislation was released, that the industrial relations bill is all about getting wages moving. There are figures in the budget—we'll go through them again shortly. My question is: given that is the purpose of the legislation, what modelling was done in relation to the legislation to understand the impact on wages? Can we go through the modelling that was undertaken?

Senator Watt: Well, again, if you're asking questions about the modelling undertaken for preparing the budget, that's probably—

Senator CASH: No. For this legislation.

Senator Watt: Another thing I guess I would say is that certainly in my experience Treasury modelling can only occur on the basis of the laws and facts as they currently stand. This bill has not yet been passed, so I'm not sure that Treasury would have been in a position to undertake modelling that was based on laws that are yet to be debated or passed. I definitely want to check this, but that would be my assumption.

Senator CASH: I struggle with that, because how is the government able to state so ferociously that this bill is all about getting wages moving if, as you say, no modelling has been undertaken?

Senator Watt: Again, the department might be able to elaborate on this. There is an enormous body of international evidence that demonstrates that making the types of changes that this bill intends to make to bargaining, to job security and to a range of other things is a key lever to getting wages moving again. If you would like any of that evidence, I'm sure there are people from the department who can talk you through it.

Senator CASH: Ms James, was any modelling undertaken in relation to the impact of this legislation on wages?

Mr Hehir: In terms of the ability to model down to particular figures in terms of wage growth, the information and the data points really aren't there looking forward. What we can and did do is look at international research. We also looked at the factors that were significant and where we saw higher wage growth occurring. So in looking at what is likely to drive both wage growth and productivity, the language that has normally been used is sustainable wage growth. It does absolutely rely on productivity growth. The evidence both internationally and, to a slightly more reduced extent in Australia—but certainly in terms of wages we can see it—is that enterprise bargaining actually does improve productivity outcomes across the board. It also provides significantly higher wages. So looking at the state of play, if you like, what we saw was a very significant decline in a number of active bargains, a significant decline in the percentage of employees that were on an agreement, be it a current agreement or a non-current agreement, and a significant increase in people on the minimum legal wage, so the award rates. Over time, we had seen that. I will ask either Mr Manning or Ms Wettinger to clarify this. I think it had moved from in the order of being about 15 per cent reliance up to about 23 per cent.

Senator CASH: I accept all of that. The issue comes down to whether any modelling was undertaken by the department in relation to the impact on wages. What is the projected percentage increase in wages based on the IR bill being agreed to as amended? The answer would appear to be none by the department.

Mr Hehir: As I said, there's not sufficient data and causal information for us to be able to undertake that modelling.

Senator CASH: So how do the Prime Minister and Minister Burke in particular go around so ferociously stating that the whole point of their IR bill is to increase wages when you have the forecasts in the budget and, more so, you have employers across Australia standing up and saying that is not what this bill will do and that this bill will only increase strike action and result in job losses?

Senator Watt: I will jump in first here, Senator Cash. I and Mr Hehir have now said that there is an enormous body of international evidence that demonstrates that putting in place laws such as those we are seeking to put in that you hope fix the problems with the bargaining system and improve job security will lead to both higher wages and higher productivity. That is a win-win for employers and workers. From everything I've heard so far, it doesn't sound like modelling has been undertaken. Mr Hehir has explained—

Senator CASH: Correct. That is what we just needed to confirm.

Senator Watt: Mr Hehir has explained why it's difficult to do that modelling. Of course, every enterprise bargaining agreement that would be struck under these new laws would be different. But the evidence is clear that if we actually want to get wages moving again and if we want to lift productivity, we need laws like those that we are trying to pass.

Senator O'SULLIVAN: Can you please provide to us which particular countries you are referring to when you say that there is international evidence?

Senator Watt: Sure.

Senator O'SULLIVAN: Is it an apples-versus-apples comparison? The evidence that we've heard so far through the committee points to Denmark. Denmark don't have awards. They don't have national employment standards. That is continually put up as the gold standard in terms of enterprise bargaining, but it's not an actual apples versus apples comparison. Could I get the list of the countries that you are relying on?

Senator Watt: I'm happy to provide some of that information on notice. I'm sure the officials would be happy to take you through some of it if you would like to hear any of it now.

Mr Hehir: I might turn to Ms Wettinger in a second. We do use OECD data and research extensively, which of course does do comparisons across a range of OECD countries. It also does analysis of particular countries. From my recollection, we relied on the broad OECD data analysis of different types of wage setting systems. You are correct; Australia's wage setting system is unique. We're probably not the only country that has a unique system. How countries determine their wages is, of course, up to them. What we do know is that nearly all of the literature describes as the best outcome flexibility and the focus on the primacy of single enterprise bargaining. There is also quite a bit of literature that describes that multiemployer bargaining can also increase productivity. It is also particularly useful for some groups that we would traditionally regard as disadvantaged or low wage. So the combination here of primacy of the single enterprise and trying to encourage multiemployer bargaining, particularly for groups that find it difficult to access that, such as small business, is a key part of trying to get people off the award and on to higher rates of pay. We're very clear that the enterprise agreement process delivers higher wages than the award wage system.

Senator O'SULLIVAN: Can we get that evidence?

Ms Wettinger: I have nothing further to add.

Senator O'SULLIVAN: With these reports and evidence that you are referring to, can we get that provided and preferably not by the estimates QON date, because we are going to be probably facing this legislation going to the Senate before that date comes?

Mr Hehir: We can provide you with the links. They are quite big reports, so you don't want to have them printed. We can provide you with the links.

Senator O'SULLIVAN: Thanks.

Senator CASH: Mr Hehir, based on what you've said, then, what percentage increase in wages can employees expect on the passing of this legislation?

Mr Hehir: That will be down to the individual business and the process of negotiation. That's a key factor.

Senator CASH: And that will be the issue, because businesses have said it will result in more strikes and job losses. That is what the businesses are actually saying across the board.

Senator Watt: No. Some business groups that you have chosen to listen to have said that, but I don't think it's fair to say that businesses across the board have said that.

Senator CASH: I personally think it is fair to say that there is no business group out there that is saying this will result in an increase in wages. What is worse is that the government has no modelling. You can't say what the projected increase in wages actually is based on this bill going through.

Senator Watt: What I can say without a shadow of a doubt is that, if we don't change this country's IR laws, we will continue to see the 10 years of stagnation of wages that we saw under your government. I would hope that, having gone into opposition, you might reflect on that 10 years and might think that continuing to do the

same things will result in the same outcome. The new government wants to see wages get moving. That clearly is going to require a change to the laws. We hope that you come around and support those laws.

Senator CASH: Well, Minister Watt, with all due respect, unemployment reached a 48-year low under our government and we had to battle COVID-19.

Senator Watt: And remember that we were always told that if we got unemployment low, wages would go up? Remember we were always told that if unemployment went down, wages would go up? It didn't happen. We needed more than that. It needed changes to the laws. That is what we are doing.

CHAIR: Minister Watt, I am mindful that the shadow Treasurer—I'm not usually a person who would quote the shadow Treasurer as a font of knowledge—has at least partially made clear that this legislation will push up wages. He made the additional observation that this is a bad place to go. What is your response to that sort of observation?

Senator Watt: Well, I suppose it says to me that the opposition hasn't learned anything. We remember that the former finance minister, one of the most senior people in the former government, Mattias Cormann, said that keeping wages low was a deliberate design feature of the former government's economic policy. If the shadow Treasurer is now making comments like that, that says to me that they haven't learned anything. They want to lock in low wages and they want to lock in low productivity, which doesn't help business and it doesn't help workers.

Senator CASH: And I'm more than happy that we accept that as political comment and nothing more.

CHAIR: I would say a learned comment.

Senator CASH: Learned comment. George Brandis is not here. You keep saying that wages will go up, but there is absolutely no evidence to back it up other than businesses saying—

Senator Watt: Well, other than the international evidence that we've referred to.

Senator CASH: This has the ability to actually produce strike action across the economy. The National Farmers Federation is coming out and saying it could impact the ability to get food to the supermarkets. You have the unions coming out and openly admitting that they want to increase strike action across the board. That does not increase productivity. If you are not increasing productivity, how do you increase wages without sustainability?

Senator Watt: Senator Cash, I know that you seem to want to not only lock in low wages but lock in conflict in the industrial relations system. We want to actually generate a system that produces more agreements. You keep trying to run this scare campaign about strikes. I presume you are aware that the bill actually puts forward additional safeguards before industrial action can be taken. The requirement for parties to attend the Fair Work Commission for conciliation before—

Senator CASH: Senator Watt, you and I both know what conciliation is. You can actually pick up the phone, conciliate and move on five minutes later.

Senator Watt: Actually, as a former industrial relations lawyer, I have been through conciliation many times. As a former industrial relations lawyer, I found conciliation to be a very helpful way to resolve disputes without the need for protection action by workers or employers. The safeguards also require 120 hours notice for industrial action in a single interest and supported bargaining streams and they require that a protected action ballot in voting in multi-enterprise agreements takes place on an employer by employer basis. So I know that you want to go out there and scare everyone that we're heading for strikes and conflict everywhere, because that is the kind of IR system that you had in place. What we are actually doing is putting in additional safeguards before industrial action can be taken to promote a system based on agreements, which generates higher wages and higher productivity. It is a shame that you are not supportive of that kind of a system.

Senator O'SULLIVAN: Your budget doesn't even demonstrate that.

Senator Watt: The budget was prepared on the laws as they currently stand. You don't do a budget based on laws that are yet to be passed.

Senator CASH: Minister, how many meetings did Minister Burke attend with the unions and business representatives about the legislation before it was tabled in the House of Representatives?

Senator Watt: I do have some information on this. I may not have the precise information that you've sought. What I do know is that there has been consultation on the specific reforms being proposed since August with over 50 meetings and hundreds of hours of conversations with business groups, unions, academic and civil society. I heard Minister Burke on the radio this morning saying that he spent a considerable part of last week in direct negotiations with a range of employer groups in particular.

Senator CASH: No. I said before the legislation, not after. Before the legislation. Before it was tabled in the House.

Senator Watt: I would have to come back to you with those specific details. There can be no doubt there has been extensive consultation on this bill before and after it was tabled by both the minister, his office and the department.

Senator CASH: I'm actually interested in before.

Senator Watt: Sure. So I'll come back.

Senator CASH: If that's alright. Could I get the minister's office to break it down in terms of how many meetings Minister Burke attended with union representatives, which unions and which representatives, and how many with business representatives, which businesses and which representatives. As part of the department's consultation process, Ms James, how many meetings prior to the legislation being tabled did the department have with union representatives?

Ms James: The department had many discussions with many parties.

Senator CASH: But I asked about union representatives. I will get to others shortly. This is specifically in relation to union representatives.

Ms Anderson: In terms of the consultations that occurred before the bill was introduced, there were just over 50 in total. I will have to get the exact figure. I know about 20 per cent of them were with union affiliates of the ACTU.

Senator CASH: Could you provide on notice a list of who attended those meetings? You said there were around 50 in total. Could I get the time and date of each of those meetings? In the department's consultation process with employers as well, how many meetings did you hold? When were the meetings? Who attended? Excluding the COIL meeting, which I assume you held—as I former minister, I understand that meeting would have been part of the process—how many meetings did you jointly hold with union and employer representatives?

Ms Anderson: I might take it on notice. We did have an NWRCC meeting.

Senator CASH: Put aside the WRMC. Any statutory meeting put that aside. How many meetings did you jointly hold with union and employer representatives? If you had none, just say none. If there was one, one.

Mr Hehir: Aside from COIL, I don't think we had a joint meeting.

Senator CASH: No. There were no joint meetings. Thank you very much. When did you hold your first meeting with union representatives?

Mr Hehir: I think we have agreed that we will take that full list on notice.

Senator CASH: I agree. Do you have in front of you when you had your first meeting with union representatives?

Ms Anderson: I think we would have to take the exact date on notice, but I do recall, as the minister advised at the job summit, that he asked his department to start consultations straight away after the job summit. Certainly my recollection was we started the following week.

Senator CASH: Remind me when the job summit was.

Ms James: It was 1 and 2 September. The outcomes of the jobs summit actually committed our department to commencing detailed consultation with business and unions on these matters.

Senator CASH: Hence my question: when was the first meeting with union representatives?

Mr Hehir: We will take that exact date on notice. It was the next week, as it was with a number of business peaks.

Senator CASH: That would be my next question. When was the first meeting with employer representatives? In relation to both of those answers, who attended those meetings? In terms of the employer groups themselves that were consulted, which employer groups were consulted?

Mr Hehir: There is quite an extensive list. I think we did agree to take that on notice. If we can get back to you, we can give you the full list. Not only were there a number of employer groups; there were a number of employers.

Senator CASH: Did you consult the Minerals Council?

Mr Hehir: Yes. We did consult with the Minerals Council.

Senator CASH: Could I get the date on which that consultation occurred?

Mr Hehir: Again, I will need to get that.

Senator CASH: The Australian Bankers Association. Were they consulted?

Mr Hehir: I will need to take that on notice. I didn't attend all of the consultations myself, so I will need to just check.

Senator CASH: The Retailers Association?

Mr Hehir: Again, I will take that on notice.

Senator CASH: Is that because you just don't recall?

Mr Hehir: I don't recall because I didn't attend all the—

Senator CASH: Who attended the consultations from the department?

Ms Anderson: There was a mix. As you can appreciate, we have been consulting over a couple of months now. Depending on areas of subject matter, some organisations had a stronger interest than others, for example. For example, we had some consultations where the sole interest was bargaining. We would have the team there responsible for policy and legal in relation to bargaining. So it would have been different for each consultation process.

Senator CASH: Ms James, do you know the answer to any of these questions in terms of who was consulted?

Ms James: I don't know the specifics. That is why we have agreed to take them on notice. As I said, there have been a large number of consultations both—

Senator CASH: These are pretty obvious—

Ms James: before and after the introduction of the bill.

Senator CASH: I'm asking about before the introduction of the bill.

Ms James: I appreciate that. But sometimes one's mind struggles to distinguish because, for us, it has been one very long period of consulting.

Senator CASH: Do you recall consulting with the Master Builders Association?

Mr Hehir: Yes. I do.

Senator CASH: Could I get the date or dates on which you consulted with the Master Builders Association? The Australian Resources and Energy Employers Association?

Mr Hehir: I would need to take that on notice.

Senator CASH: Can you take that on notice, thank you. The Restaurant and Caterers Association?

Mr Hehir: Again, I'll need to that on notice.

Senator CASH: The National Farmers Federation?

Mr Hehir: I will take that on notice as well.

Senator CASH: The Australian Constructors Association?

Mr Hehir: Again, I will take that on notice. I know that I have consulted with them. I need to check.

Senator CASH: Any state based chambers of commerce?

Ms Anderson: We would normally consult through ACCI and then ACCI would normally consult with the states.

Senator CASH: Again, in relation to all, I will ask the specific dates of the consultation and who from those associations attended the consultation. In terms of the departmental consultation process—again, we're talking prior to the legislation being tabled—did the department seek written submissions from all of these groups?

Mr Hehir: Yes, Senator, we did. Not from all these groups, but from a number of groups.

Senator CASH: So what determined whether or not you sought a written submission from a particular group?

Mr Hehir: I will need to take that on notice. We went out quite broadly, from memory. I will need to check.

Senator CASH: Could you provide a list of those who provided a submission and a list of those you asked to provide a submission?

Mr Hehir: I will take that on notice.

Senator CASH: You might be able to answer here. Apart from the ACTU, which individual unions did you consult with?

Mr Hehir: I personally didn't, so I will need to take that on notice. I'm not sure.

Senator CASH: Again, times and dates. Did the department seek the views of any other parties—for example, community groups, think-tanks, economists?

Mr Hehir: Yes. We certainly went out broader than just employers and employees. There were a number of groups interested. I will take that on notice. We went to both academics and groups with a particular interest in gender and pay equity.

Senator Watt: Senator Cash, I have just been given some information that might help a bit here. I have some examples of groups that have been consulted by the department. I am sure the department will let me know if any of these are wrong. I will preface it by saying this is not an exclusive list. These are examples.

Senator CASH: The information will be forthcoming regardless?

Senator Watt: We'll provide you with a full list. The department has led consultations with the ACTU and a number of other unions. I don't have the precise details of which ones.

Senator CASH: We'll get that on notice.

Senator Watt: Yes. Key business peak groups, such as the Business Council of Australia, ACCI, AI Group and COSBOA on multiple occasions; many business groups representing single interests, such as Clubs Australia, the Master Builders Association, National Farmers Federation, Australian Resources and Energy Employer Association, the Australasian Convenience and Petroleum Marketers Association and Manufacturing and Installation Association consultation; individual employers such as Qantas, DP World, Team Global Express; the National Women's Alliances, comprising groups such as Harmony Alliance representing migrant and refugee women, the National Rural Women's Coalition, Women with Disabilities Australia; a number of academics with a focus on workplace practices and law; and other employers, such as Woolworths. So it's a pretty comprehensive list. As I say, there are probably many more than just those that I have examples of.

Senator CASH: And you will provide that to me on notice, which is what you've said you will do?

Mr Hehir: Yes. We will provide that on notice. Another thing that is probably worthwhile noting is whenever somebody asked to meet, we met with them. We didn't refuse a meeting. We were very happy to engage with anybody who wanted to talk to us.

Ms James: I have been involved in a number of consultation processes on a number of pieces of legislation, including the Work Choices legislation and the Fair Work legislation. I would describe this as an engagement process that was adopted with an appreciation of the urgency of the government's desire to get wages moving and to implement its election commitments. I would describe it as agile, and perhaps unusually so, and often at a conceptual level. In other words, it is not putting a predrafted bill with predrafted proposals in front of people but seeking their views conceptually based on the framing of the jobs summit and the election commitments.

Senator CASH: During the consultation process itself, how many employer representatives suggested to the government that you should make multiemployer bargaining compulsory?

Mr Hehir: It's not our practice to disclose the national outcome.

Senator CASH: It's fine. I can read the newspapers.

Mr Hehir: What I would also note is that there's nothing in the bill that makes multiemployer bargaining compulsory.

Senator CASH: Well, it does if you are an employer and you don't want to be part of a multiemployer bargaining process.

Mr Hehir: The existing process within the low paid system remains.

Senator CASH: That is the low paid system.

Mr Hehir: In relation to low paid bargaining.

Senator CASH: Renamed?

Mr Hehir: Renamed to supported bargaining.

Senator CASH: And the right to industrial action.

Mr Hehir: But the process for being joined to that is the same as is currently within the act.

Senator CASH: Apart from the definitional differences and the common interest test, which we will explore on Friday.

Mr Hehir: Yes. There's no doubt that there were definitional changes. That provision had not been used effectively at all. One of the clear tasks arising from the summit was that we were to look at whether there were any unnecessary restrictions on the bargaining. In relation to the previous multiemployer bargaining stream, now

renamed the cooperative bargaining stream, there is no capacity to be pulled in. That is a completely voluntary stream, as it has been.

Senator CASH: I think most employers are more worried about what the changes are to the single interest stream.

Mr Hehir: In relation to the changes to the single interest stream, the substantive change there is the introduction of a majority support determination. That is a completely democratic process, where 50 per cent plus one of the employees of an organisation must indicate that they want to be joined in that. That is a concept that is well-established. It sits within the single enterprise stream and has done so for a long time. Certainly it's not something that makes it compulsory. What it means is that employees have a say in the form of bargaining that they want through the same processes that they have in relation to single enterprise bargaining.

Senator CASH: Mr Hehir, based on those comments, why are employer groups across Australia opposed to this legislation?

Ms Anderson: I might just add to Mr Hehir's answer. While there might be an MSD by employees where the employer may not consent to entering the single interest stream, that isn't an automatic entry point into the stream. The Fair Work Commission still needs to apply a test in terms of that scope of employee. So they will still need to meet the common interest tests that you mentioned as well as a public interest test as well as consider the views of all the parties involved. All those things together need to be considered as well as that MSD process before entering into that stream.

Senator CASH: I want to ask about the COIL process. When was the COIL process held?

CHAIR: Senator Cash, I don't want to break your train of questions, but there are others.

Senator CASH: We will move to the COIL process later. That was the beginning of my next section.

Senator WATERS: I flagged earlier in the day that I had some questions about working women's centre funding and family and domestic violence leave funding. Hopefully, I am now at the right place.

Ms James: You are. We just need to change the bench.

Senator WATERS: Thanks very much. I will start off with working women's centres. I was obviously very pleased to see the \$32 million in the budget, as recommended by the Jenkins report in recommendation 49. I am interested whether the government has received any proposals from organisations to set up working women's centres across the country, particularly, obviously, in locations where they don't already exist.

Ms Mathews: We did have a range of early discussions with a number of different stakeholders. Our formal consultation process in terms of the implementation of that measure hasn't commenced yet. We intend to consult very broadly with, obviously, the women's sector and other community services groups, employee groups and states and territories.

Senator WATERS: I have some polite questions on that. Who were the early discussions held with, please?

Ms Mathews: I might need to take that on notice. Certainly the existing working women's centres, the ACTU and other Commonwealth government agencies.

Senator WATERS: That was the totality, was it?

Ms Mathews: I will take it on notice in case there were others. There were a number.

Senator WATERS: Can you tell me the timeframes for when that formal consultation period will commence, how long it will run for and what happens after that?

Ms Mathews: We're expecting that will commence imminently in the coming weeks. How long it will run for will depend on the number of different proposals that we receive and how long it might take to develop ideally a consensus but otherwise an agreed model.

Senator WATERS: Is that essentially a bidding process? What is the shape of that consultation?

Ms Mathews: We've designed a number of pages of questions that we want to ask different stakeholders. We will develop a number of different models if there are more than one and then seek government's consideration in terms of the preferred model. Obviously we'll also need to talk to the states and territories and the state and territory ministers in terms of the implementation of that measure.

Senator WATERS: Are you working to a date when you expect that you will have a model selected?

Ms Mathews: We don't have a specific date other than as soon as possible.

Senator WATERS: Do you have a ballpark sense of roughly how long that might be?

Ms Mathews: I am hesitant to provide one only because it will depend on the extent of the consultations. But we are certainly seized of the priority of that.

Senator WATERS: Thanks. Can you confirm that the existing working women's centres in Queensland, Northern Territory and South Australia will be recognised and funded as the working women's centres in their jurisdictions?

Ms Mathews: Those existing centres are already receiving Commonwealth funding. That is secured until 31 December 2024, so a further two years. Questions in terms of how the funding that has been recently announced in the budget will be distributed still needs to be sorted through with all the stakeholders. But they have confirmed funding for two years.

Senator WATERS: Is that \$24 million? What is the quantum of the existing confirmed funding?

Ms Mathews: They are currently receiving approximately \$350,000 each per centre. That is pursuant to different grants. The funding that was announced in the recent budget was for \$32 million over the forward estimates.

Senator WATERS: So you are saying there are two blocks. The one that they've already received is \$250,000 each?

Ms Mathews: It is \$350,000.

Senator WATERS: Sorry. Each year or over the two years?

Ms Mathews: Each year.

Senator WATERS: And then you are saying that they're not guaranteed that \$32 million funding, but they can essentially bid in along with others in that consultation?

Mr Hehir: It's probably worthwhile clarifying. We're not able to pre-empt the decision of government. We haven't put a proposal to government and government hasn't made a decision. So that whole process needs to be followed.

Senator WATERS: I understand that, thank you. I am trying to understand what Ms Mathews advised me earlier. Am I correct in summarising that there's no guarantee for those existing working women's centres post 31 December 2024 but they may well put their hand up for part of the \$32 million through whatever process you determine? Is that right?

Ms Mathews: It is correct that no decision has been made. By logical extension, no, they wouldn't be guaranteed. But as Mr Hehir said, we haven't put a model to government as yet.

Senator WATERS: I want to ask you about the process that will be used to determine how funding is allocated. You have told me a bit about the consultation process. Can you tell me about any factors that might influence who will get the dough?

Ms Mathews: I might ask Ms Yanchenko to provide some further information.

Ms Yanchenko: As Ms Mathews indicated, we're undertaking a consultation process starting in the next couple of weeks. I think it's fair to say that there are a range of different ways that funding can be distributed for a program that operates across the whole of Australia. One of the key questions that we have for the consultation process is to work through some of those questions. Obviously a jurisdiction of the size and geographically dispersal of the ACT needs a totally different sort of funding to somewhere like Western Australia. They are the sorts of questions that we will be looking to put to stakeholders and inform ourselves through the consultation process so that we can then put forward some recommendations for government.

Senator WATERS: Again, what factors will be relevant to determining how funding is allocated?

Ms Yanchenko: I think we're interested in the stakeholder feedback as to what factors we should be alive to. We are certainly open to any recommendations there.

Senator WATERS: Will the existing working women's centres in Queensland, Northern Territory and SA be included in a consultation process about how the new working women's centres will be established?

Ms Yanchenko: Yes, absolutely. We still are working on an exact date. We are hoping to meet with the centres again as early as next week to kick off the consultation process.

Senator WATERS: Can you confirm that the \$32 million new funding will only go to organisations that can provide community based gender specialised service delivery to vulnerable women affected by sexual harassment and other intersecting forms of discrimination?

Ms Yanchenko: Certainly it is the intention of government to faithfully implement the recommendation as put forward in Commissioner Jenkins's report with all that entails. We are looking to work through that with stakeholders in consultation.

Senator WATERS: Thank you. I will move now to family and domestic violence leave. There is \$1.2 million allocated to the department for small business assistance. How will that be spent? Thanks for your help.

Ms T Williams: The \$1.2 million allocated to the department will be spent to support peak bodies develop tailored workplace relations guidance and support as well as funding for the independent now statutory review of the provisions.

Senator WATERS: How much for the review and how much for the support?

Ms T Williams: I think at this stage we are looking at that. Typically, in my experience, reviews cost about \$500,000.

Senator WATERS: Have you identified the peak bodies that will be the folk to do the tailored support?

Ms T Williams: We have already started a process of consultation with employers, unions and domestic violence organisations to really understand where the gaps are in services and support and ensure that those pathways are there. We are really trying to make sure we spend that money where it's needed and in a targeted way that will help small business and their employees.

Senator WATERS: Who are you envisaging will be the people to deliver that?

Ms T Williams: We'll actually approach the market on the basis of those consultations which will inform our approach to market to ensure that we are delivering the small business support that is needed.

Senator WATERS: Have you yet developed the parameters that might guide your selection—say, trauma informed expertise? Do you have a sense of what features will need to be demonstrated by the peak body in order to be chosen to do the training?

Ms T Williams: I think we are really looking at making sure that training and advice is through a trusted support network—that was the feedback from small business—in a tailored way that can assist them. Some of the things, I think, that have been mentioned when we have talked previously are things like helping them design workplace policies around those things. They don't have access to big HR departments. I think from the department's perspective what we're really trying to do is make sure that the support available to small business and their employees connects across government. We're also working closely with the Department of Social Services and the Fair Work Ombudsman in those consultations to bring government together and make sure that all those services connect up and the pathways are there.

Senator WATERS: Thank you. I have certainly taken this up with DSS, so I will ask them about funding for frontline services. I know that is not your responsibility. Who will conduct the 12-month review, which is meant to be a review of the operation of the leave provisions and the impacts on victim survivors and on small business?

Ms T Williams: That will be a matter for government to decide at the time of the review. My previous experience in reviews is that there can be a range of ways that is undertaken. It can be through an independent reviewer or the department can lead the review. It can be an expert panel. It will really be a matter for government to determine those parameters at the time of the review, which will be from 1 February 2024 or as soon as practicable from there.

Senator WATERS: Will there be any extra funding allocated, or will you think roughly the \$500,000, or how much it costs, will come out of the \$1.2 million?

Ms T Williams: Again, obviously it depends on the form and shape of the review as to how much it ultimately costs.

Senator WATERS: Will the cost be met from the \$1.2 million allocation?

Ms T Williams: Yes. That is the intention.

Senator WATERS: Lastly, what data collection will be undertaken to inform the review?

Ms T Williams: We've already started speaking, I think, to the Institute of Health and Family Studies and the Workplace Gender Equality Agency just to make sure that we are on the front foot in terms of the collection of data and how they might record that. Obviously, the provisions don't start for larger businesses until 1 February and then August for small business. I think the department is acutely aware that there is an opportunity now to get ahead of the data and make sure that we are best able to collect appropriate data from those organisations. So that's something we're already thinking about.

Senator WATERS: Thank you. I will ask you a bit closer to February. Thank you very much for your time.

Senator CASH: Before I go to the COIL process, Mr Hehir, in terms of the changes to the single interest stream, not the other two streams, isn't it the case under the majority support determination that a business can be compelled to bargain—this is the key—with other employers if a majority of their employees vote for it?

Mr Hehir: That is the usual process with a majority support determination. As it sits within the single enterprise scheme, here for the single interest stream that in and of itself isn't sufficient. They can be brought into the question of whether they should join the authorisation. The Fair Work Commission still actually has to apply a series of tests.

Senator CASH: Common interest?

Mr Hehir: Common interest, public interest.

Senator CASH: I understand all that. The answer effectively is, putting aside that, if the employees vote for it, even if the employer doesn't want it, the employer can be forced to bargain with other employers that it does not want to?

Mr Hehir: There are other limitations.

Senator CASH: I understand all that. Are you prepared to guarantee that no employer in Australia—in particular, someone who has a smaller business—will be actually compelled into bargaining against their will—

Mr Hehir: The existing IR workplace relations framework—

Senator CASH: under what is being proposed by the government?

Mr Hehir: The existing framework already includes the concept of majority—

Senator CASH: Employers and employees agreeing to bargain in a single interest stream, yes.

Mr Hehir: I will just qualify that statement a bit. The Fair Work Act currently provides for majority support determinations, which then require the employer to bargain even where the employer doesn't want to. The concept of an employer being compelled to bargain—

Senator CASH: Against how many employers?

Mr Hehir: As I said, the Fair Work Act requires that in the single enterprise stream.

Senator CASH: Correct.

Mr Hehir: It is probably worth noting that, in our estimation, there are approximately 100 majority support determinations within a year. So out of the entire bargaining system it's a very small proportion. But it is a new concept that an employer who doesn't have an existing bargain can now, subject to the passage of legislation, have their employees express their wishes to bargain and bargain with other employers.

Senator CASH: We got there. Thank you so much. I will leave it there. I will now turn to the COIL process. When was the COIL process held? On what date?

Ms Sheehan: It was held on 20 October.

Senator CASH: How long were the groups who attended COIL given to look at the legislation?

Ms Sheehan: I would have to double—

Senator CASH: Two days, three days, a few hours? They were presented with it on attendance?

Ms Sheehan: It's on the same day.

Senator CASH: On the same day—so 20 October—as they were walking in that morning, by email? How were they presented with the legislation?

Ms Sheehan: Participants are provided with a hard copy of the legislation.

Senator CASH: Before the COIL meeting? After the COIL meeting had started?

Ms Sheehan: When they arrived.

Senator CASH: At the COIL meeting?

Ms Sheehan: At the COIL meeting.

Senator CASH: The participants received a copy. Was that 251 pages plus a 260-odd page explanatory memorandum? Were they given both documents or just one?

Ms Sheehan: They were given a copy of the draft bill. I should note that is usual practice.

Senator CASH: I'm not saying that it's not; I am just asking, thank you very much. How long were the groups given to digest the legislation at COIL?

Ms Anderson: I will have to take it on notice.

Senator CASH: How long did the COIL meeting go for? From 1 pm until 4 pm, or from 1 pm until 6 pm, or from 10 am until 11 am? You are telling me on probably one of the most significant pieces of legislation this parliament has ever seen you do not know how long the COIL process went for?

Ms Sheehan: We were just double-checking. It was from 10 am until 4 pm.

Senator CASH: How many participants attended?

Ms Anderson: Again, in line with normal practices, we have the members of NWRCC attend. So we have the ACTU. They will also invite a number of their affiliates. I would have to take on notice exactly the number of affiliates that attended. Again, I will have to probably take on notice how many representatives each organisation brought. We also had ACCI, Ai Group, BCA, AREERA, NFF, MBA, HIA and COSBOA invited.

Senator CASH: Invited but not necessarily attended. So will you get back to me as to who attended?

Mr Hehir: My understanding is that COSBOA did attend.

Senator CASH: In terms of the legislation itself, attendees first saw the legislation and were presented with a copy of it in hard copy when they arrived at the COIL meeting?

Ms Sheehan: Correct.

Senator CASH: Are you aware whether any group, employer or employee organisation, saw the proposed legislation in the form provided at the COIL or in another form prior to the COIL?

Ms Sheehan: No. I'm not aware.

Senator CASH: You are not aware of it. Minister, are you aware of whether or not any group saw the legislation prior to the COIL meeting?

Senator Watt: No, I'm not aware of that.

Senator CASH: Could you take that on notice? Thank you very much. Ms James, are you aware if any group saw the proposed legislation before the COIL?

Ms James: No.

Senator CASH: You are not aware?

Ms James: I'm not aware.

Senator CASH: How many days was it between the final consultation that the department held and the COIL process on 20 October? When was the last consultation that you held? It was so extensive and it's so fresh in people's minds.

Ms Sheehan: We might have to take that on notice.

Senator CASH: A day, two days, three days, four days? Ms James, you were so excited by this process, I actually thought you probably had it burned in your mind when the last consultation was.

Ms James: Actually, I think, I said that because we're still consulting it's kind of all blurred in my mind. But they've been very good—

Senator CASH: It's even worse if you're still consulting, because, seriously, the legislation has been tabled.

Ms Anderson: I have the answer here now. It is 17 October and it was COSBOA.

Senator CASH: And the COIL was held on 20 October. In terms of the COIL, can I confirm that participants were asked to sign a deed of confidentiality?

Ms Sheehan: Yes. That is the standard practice.

Senator CASH: I'm just asking. Did the deed stop participants from being able to talk to colleagues about the provisions of the bill—in other words, to seek feedback on the provisions of the bill?

Ms Anderson: In terms of how the COIL operates, usually there's a period of time where participants read the bill.

Senator CASH: That was 10 am to 4 pm?

Ms Anderson: I think there's a period of reading. I think that was about until—

Senator CASH: Can we go through that? There was a period of time for reading. So COIL commenced at 10 am. When did the period of time for reading the 251 pages commence?

Ms Sheehan: It would have been probably about a quarter past 10.

Senator CASH: Around a quarter past 10?

Ms Sheehan: Yes. The way it works is it's a very short opening from me, who chaired the meeting.

Senator CASH: So they had 15 minutes to get over the 251 pages?

Ms Sheehan: No. There was a short introduction and then participants have quite a number of hours to read and then we reconvene.

Senator CASH: When you say quite a number of hours, it is 251 pages, to be fair.

Ms Anderson: We can put some time figures to that period now, if you wish.

Senator CASH: Yes.

Ms Anderson: They had from 10.15 am to 1 pm formally. They were given until 1.45 pm, where we provided—

Senator CASH: An extra 45 minutes is good.

Ms Anderson: lunch. The employer associations were contained in one meeting room. Union affiliates were in a separate meeting room. They had time to confer with each other during that process.

Senator CASH: But not outside the COIL process; that is my point.

Ms Anderson: That is consistent forever and a day, I believe.

Senator CASH: I'm not saying it's not. It is a significant piece of legislation. Did the deed stop participants from consulting with members and getting their feedback before the bill was introduced?

Mr Hehir: I might take that on notice.

Senator CASH: I don't care whether it is an employer organisation or an employee organisation. How were you meant to get feedback from your members prior to the introduction of a 251-page bill if you were unable to because you were bound by a deed of confidentiality?

Mr Hehir: I will take that on notice. My recollection is that we use the same form for the deed of confidentiality, but I will check that to make sure. I am just conscious that this issue arose a couple of times during the consultation. I was very clear that they were confidential processes and that in the consultation we ask people not to discuss more broadly. The issue raised was whether they could talk to colleagues et cetera or some members came back. At that point, we said, 'Of course during the consultation we're comfortable with you engaging with your membership and/or key stakeholders to engage in this consultation properly.' The formality of the COIL process is, however, different. I will check, but my understanding is that we use the same model and process that has been in place over quite a number of years now. I think we probably used it in previous models.

Senator Watt: That would mean the same process was used as when you were the minister.

Ms James: I recall during the Fair Work consultations that I'm pretty sure we took people's phones away from them.

Senator CASH: I'm pretty sure that this Prime Minister said he was elected on a basis of transparency and integrity. Let's continue with the COIL process. Were amendments proposed at COIL to the legislation that they read between 10.15 pm and 1.00 pm to 1.45 pm?

Ms Sheehan: I will add to the previous answer in terms of the consultation. Obviously we have heard that there were consultations leading up to COIL but continuing consultations after COIL as well on the policy parameters of the legislation.

Senator CASH: I understand all of that. At the COIL process, were amendments put forward to the legislation?

Ms Sheehan: The purpose of the COIL process is not for participants to open up, I guess, the policy rationale behind the legislation.

Senator CASH: I didn't ask that question. At the COIL process, regardless of whether or not it was the role of the participants, were amendments proposed at COIL?

Ms Sheehan: There were technical suggestions on drafting raised.

Senator CASH: So only technical suggestions?

Ms Sheehan: Yes. That is the purpose of the COIL meeting. It is not for participants to give their views on a particular policy rationale behind the legislation. They know by that point this is the policy rationale behind the bill and this is how we have drafted it. It is how they see that technical drafting working?

Senator CASH: In terms of the technical drafting, did the department or the minister take on board any of the suggestions?

Ms Sheehan: Where suggestions were made for any amendments, we consult with the minister's office on that.

Senator CASH: So that didn't answer my question, with all due respect. Did the department and/or the minister take on board the suggestions as proposed at COIL?

Ms Sheehan: The minister has flagged that he is introducing a number of government amendments. I think it would be premature of me to advise what they are before he has introduced them.

Senator CASH: The legislation that was introduced to the House was the same as was put forward at COIL?

Ms Sheehan: No. We were continuing to draft after the COIL meeting.

Senator CASH: Is it possible to get tabled a copy of the legislation that was put forward to the participants at the COIL process and a copy of the legislation as it was introduced and tabled into the House of Representatives?

Mr Hehir: I'm sure we can provide you with a copy of the bill as it was tabled.

Senator CASH: Clearly, I could Google that myself right now.

Mr Hehir: You asked for it. I was offering to provide it.

Senator CASH: I want to see it by way of comparison, though. Unless I have a comparison, it doesn't assist me.

Mr Hehir: I will take that on notice. The question I want to clarify is whether it goes to government decision making processes. I need to sort that out before I provide it.

Senator CASH: During the extensive consultations that were held in relation to the proposed bill that is now in the parliament, did the department put firm legislative proposals to the participants?

Mr Hehir: We've outlined that it's not our practice to talk about the consultation process.

Senator CASH: I am merely asking whether you put firm legislative proposals to the participants.

Mr Hehir: As the secretary has outlined, we went from the jobs summit, where we were specifically tasked with looking at unnecessary limitations on bargaining. The form of consultation responded to that tasking. So, it was conceptual. It was looking at—

Senator CASH: That's all I need to know, thank you. No; very simple. Thank you very much, Mr Hehir. In terms of the consultation, did you say that you had consulted with AREERA?

Mr Hehir: No. I took that on notice.

Senator Watt: I think I said that.

Senator CASH: Yes. Sorry, it was the minister. What consultation was undertaken with AREERA? What was the extent of the consultation? When did this consultation occur?

Mr Hehir: I think the minister said he had a list but he could be corrected by the department. I have taken that on notice. I will take the full—

Senator CASH: No. I am asking for that exact detail in relation to that specific organisation to be taken on notice. Who during the consultation process and at COIL supported multi-enterprise bargaining in the form that was put forward in the legislation?

Mr Hehir: As I said, it's not our practice to disclose the consultations. There were a wide range of views.

Senator CASH: Yes. They are being played out in the newspapers at the moment and potentially on the floor of the House and the Senate. Was there widespread support across all groups, as the minister has suggested?

Mr Hehir: In terms of the engagement around the breadth of multiemployer, there was certainly a range of views that were supportive of a broad range of the multiemployer, not all of it.

Senator CASH: I know the time and I want to move to another topic. We have a hearing on Friday in relation to this particular bill. Can you undertake to look at the questions that we've placed on notice, because the answers to them will greatly assist the questioning on Friday, given that we have a hearing on Friday, a hearing on Monday, a hearing on Tuesday and then we have to report? It will be very difficult to write a report absent the information that we've asked for and have placed on notice. Secretary, do you believe it will be possible to answer those questions?

Ms James: You have put a large number of things on notice. We'll do our best.

Senator CASH: In other words, it may not be possible. If it's not going to be possible, are you able to let the coalition senators know?

Ms James: Yes.

Senator CASH: Thank you very much. When will you be able to let us know? I know today is Tuesday.

Ms James: We will need to review the large number of questions that you've given us on notice. Some of them might be a little repetitive. Some of them are more straightforward. We'll need to review them. We'll come back to the committee secretariat as soon as we are able.

Senator CASH: Thank you very much. I do appreciate that. I do look forward to as much of the information as possible. Otherwise it's very difficult to write a report when you don't have the information.

CHAIR: Senator Cash, before you go to your next line of questions, we have some questions.

Senator PAYMAN: I will change the topic slightly but keep it on topic at the same time. It is about the gender pay gap. Could the department please outline what the current gender pay gap looks like. What does it mean in dollar terms for women?

Ms Wettinger: The current gender pay gap is 14.1 per cent. What that means in dollar terms is, if my memory serves me correct, it is around \$263.90 per week.

Senator PAYMAN: Moving on from that, how do wages in feminised sectors such as child care and aged care compare to historically male dominated sectors, such as construction and mining?

Ms Wettinger: I can confirm that currently the average hourly ordinary time earnings of wages in the childcare sector are \$28.80. That is by occupation, I should say, just for clarity. By comparison to male dominated sectors, such as construction, we have the average ordinary time earnings for construction distribution and production managers at \$75.40 per hour.

Senator PAYMAN: That is a massive gap. How have wages in the aged-care industry fared over the past 10 years? What impact has the new government support for a pay rise for aged-care workers had?

Ms Wettinger: In terms of the first part of your question, over the last 10 years, we know that the average ordinary time earnings of childcare workers have gone from \$20.10 to the figure that I quoted previously, which is \$28.80.

Senator PAYMAN: And the second part of the question?

Ms Wettinger: The second part of the question in terms of the government? I might need to—

Mr Manning: On Friday, the Fair Work Commission handed down an interim decision in a work valuation case in the aged-care industry, which indicated that they would be awarding a 15 per cent increase for direct care workers. The government did put in a submission in that case that was supportive of a wage increase for workers in the aged-care sector. It acknowledged the government's role in funding an increase. It is an interim decision. The commission will have two further stages where they will take further submissions in relation to the final figure but also whether or not it should also be extended to all aged-care workers or just those direct care workers. It is worth noting in relation to aged care and feminised industries that a number of parts in the bill that has been discussed today are relevant to this issue. For example, the government is looking to amend the objects of the act to install gender equality as one of the objects of the act. It is also looking to amend the equal remuneration provisions and work valuation provisions to make it more likely that there will be successful equal remuneration cases. That is to overcome some jurisdictional issues that have arisen in how the commission has interpreted it and making it clear that work valuation doesn't require a male comparator but you do need to look at traditional undervaluation. The third aspect in the bill, which was supported with measures in the budget, is establishing two expert panels in the Fair Work Commission, one on pay equity generally and one on the care and community sector. The intention is to appoint commissioners with expertise—so knowledge and experience—in those sectors and to establish a research unit; from memory, it was 10 staff. That is so the commission can have the benefit of expertise in these areas.

In its interim decision handed down on Friday, the commission did point to those traditional societal values that have led to the undervaluation of feminised work but also some of the institutional factors and interpretations that have led to that undervaluation. Some of those systemic changes I've outlined in the act I think will start to lead to a more systemic change in that appreciation to build on the commission's interim decision.

Senator PAYMAN: Thank you, Mr Manning. In terms of analysing the trends in enterprise bargaining recently, can you help the committee? It might be to our benefit if we could go through what the trends have recently shown and perhaps what the trend has been like for the last 10 years.

Mr Manning: Certainly the wage increase in enterprise agreements has been more than the wage increase generally over the last 10 years. I might have to refer back to the earlier conversation about international evidence. There is certainly evidence in Australia that employees who have the benefit of enterprise agreements get larger pay increases. It's fair to say that is not in every industry. Again, in more feminised industries, the

increases haven't been as large. Ms Wettinger might have some of those details. The final thing I will say, though, before handing over is that there has been quite a big decline in enterprise bargaining. If you look at, for example, accommodation and food services, which is quite a feminised industry, from 2016 to 2022, there was a 75 per cent decrease in the number of current agreements. The number of staff covered by, for example, education and training showed over a 50 per cent decrease. It is also quite a feminised industry with high levels of bargaining traditionally. As I said earlier, it's not the same high salaries as in some of the more male dominated sectors, such as mining and construction, which also have high levels of enterprise bargaining. I might see if Ms Wettinger has any other data that might help with that.

Ms Wettinger: Thank you, Mr Manning. In terms of overall numbers, I can confirm that the number of current and non-expired agreements has fallen by 56.1 per cent since the peak of bargaining. That is from a number of 25,152 agreements as at 31 December 2010 to 11,053 at 30 June 2022. Employee coverage has fallen by 33 per cent over this period from 2.6 million employees to 1.74 million employees. We know that only 14.7 per cent of employees are covered by an enterprise bargaining agreement that is currently in date. They are some overall figures to support that answer.

Senator PAYMAN: Am I correct to say that the trend is inconsistent across various industries, as you have mentioned?

Ms Wettinger: That's correct.

Senator PAYMAN: What relationship do you consider that our current bargaining system has to our persistently low wages growth and persistently high gender pay gap?

Mr Manning: As we said earlier, given that the history over the last 10 years shows that the average annualised wage increase from bargaining is higher than wage increases generally, a decrease in bargaining is worrying in terms of what it means for wages overall. As we also said, given those increases in some of the more highly feminised industries are still not leading to hourly rates of pay that are anything like some of those increases in the more male dominated industries, it means that whilst the position may be better for women if they were bargaining, it's not as good as it is for men in those areas where there's a lot more bargaining.

Senator PAYMAN: I appreciate that. Minister, can you please tell me what you think about our current bargaining system? What are your thoughts?

Senator Watt: I think it's completely broken, Senator Payman. That is why we see such a small proportion of employees on enterprise bargaining agreements. It's why we see wages having barely grown for 10 years. It's why we see low productivity from employers. It's not working for anyone. As you know, that is why we are keen to change the laws so that we can get wages moving again, we can have higher productivity for businesses, close the gender pay gap, promote job security and all those things that Australians voted for in May.

Ms Wettinger: I would like to correct the record. I apologise. I gave you the incorrect figures for the aged care workforce, which is what you had asked me. I gave you figures for child care. If I may just correct the record on that. I apologise again. In terms of the pay of aged care workers over the last 10 years, it has gone from \$23.60 an hour to \$33.70 an hour. Just to add to the story, it's quite a difference from the average ordinary time earnings. It is roughly about 25 per cent less than the average earnings. Apologies for giving an incorrect figure initially.

Senator PAYMAN: Thank you for clarifying.

Senator CASH: I will now change topics. I still have a number of questions in relation to just the process around the COIL meeting and the bill. I have one final question. You said that the COIL meeting was held on 20 October. That is correct?

Ms Sheehan: That is correct.

Senator CASH: When was the introduction of the bill?

Ms Sheehan: On 27 October.

Senator CASH: A week later. When was the commencement of the Senate inquiry?

Ms Sheehan: I would have to double-check.

Senator CASH: But it was only a week between the COIL process and the introduction of the bill and the bill being made public so people could then outside of the deed of confidentiality actually start providing feedback whether you are an employer organisation or an employee organisation and the commencement of the Senate inquiry. So the 20th was COIL and the 27th was the introduction of the bill into the House. And it was made public at that time?

Ms Sheehan: Upon introduction.

Senator CASH: I will turn to some matters in relation to the ABCC. The first series of questions that I have is in relation to the amendments that were made to the building code by the minister. Ms James, when was the department first advised that the minister would be making those changes to the Building Code?

Mr Hehir: I would need to check the timing in relation to the Building Code. Given that the ABCC was an election commitment—

Senator CASH: I know all of that. I am not disputing that it was an election commitment. I am specifically asking about when the department was made aware of the amendments to the building code by the minister.

Mr Hehir: The point I'm making is that it was an iterative process from early on, so I will need to check the exact date. So we did commence discussions early with the minister in relation to the broad abolition. As to when we looked at how that would be done, I would need to check the exact date, unless my officers have it.

Ms Anderson: Certainly the intention of repealing the code obviously was initially announced through the election process. I think the minister has also made it clear that he also had a meeting with his state and territory counterparts, for example, on 5 July, where he mentioned to that group that he was also looking to amend the code. That gives you a framework in terms of when he—

Senator CASH: I thank you. I do actually have an extract from the *Hansard* from 28 July, where Minister Watt was kind enough to provide to me an answer in relation to consultation on the abolition of the ABCC and who had been consulted. On 17 June, a meeting was held with the CFMEU construction division. On 21 June, it was with the AWU national executive. On 29 June, it was with the ACTU. I think the meeting you are referring to is 5 July, which was a meeting of Commonwealth, state and territory ministers with responsibility for workplace relations. Sorry; you are referring to 19 July. A meeting of the National Workplace Relations Consultative Council was held. At that meeting, the minister informed stakeholders that the building code would be amended to ensure that workers in building and construction are subject to the same rules as those in other industries. Is that what you are referring to?

Ms Anderson: There was the Commonwealth, state and territory workplace relations ministers meeting on 5 July. There was a Workplace Relations Consultative Council meeting on 19 July.

Senator CASH: When was the ABCC advised that the building code itself would be amended?

Mr Hehir: Again, that was very public information. It was an election commitment. It was clear that the government intended to repeal or amend the building code.

Senator CASH: I know all of that. I'm happy to move on from that. When was the ABCC formally advised that the building code was being amended?

Ms Anderson: I think I would have to take that on notice in terms of when they were advised.

Senator CASH: Would it surprise you to know that they weren't informed by the minister that the building code was being amended and they heard it as it was being announced on the *Insiders* program?

Senator Watt: On what basis do you make that claim, Senator Cash?

Senator CASH: That is the evidence given by the head of the ABCC, Stephen McBurney. We actually discussed that in question time.

Senator Watt: In Senate question time?

Senator CASH: Yes.

Senator Watt: I've said that in Senate question time?

Senator CASH: No. I put that to you in Senate question time, I understand.

Senator Watt: Did I give you that information?

Senator CASH: No. That information is from a transcript from Stephen McBurney on the *Insiders* program. They had not been formally advised. I'm happy to go through that with Mr McBurney sitting next to you later on this evening.

Senator Watt: Sure. I'm looking forward to that session.

Senator CASH: Was the department aware of the evidence of Mr McBurney that the ABCC were not formally advised and that they heard about it on the *Insiders* program?

Mr Hehir: No. I wasn't aware that Mr McBurney had given that as evidence in any—

Senator CASH: Not evidence. In a radio—

Mr Hehir: I didn't hear the interview from Mr McBurney. What I would note is that—

Senator CASH: Did the department advise Mr McBurney?

Ms Anderson: I recall that interview. I think I might have to go back to the transcript of that radio interview. I think the question related to the announcement.

Senator CASH: Correct, yes. The announcement.

Ms Anderson: I think the question to Mr McBurney at the time was in fact around—

Senator CASH: The announcement of the Building Code, correct.

Ms Anderson: Was he aware of the minister making that announcement?

Senator CASH: So did the department know that the ABCC weren't aware?

Ms Anderson: Of the?

Senator CASH: Announcement?

Ms Anderson: I suppose announcements are often a decision for government or the minister, so it probably wouldn't be unusual for that announcement.

Senator CASH: The department didn't know?

Mr Hehir: I will need to take on notice whether the department had advised Mr McBurney that the minister was going to announce something. Certainly Mr McBurney has been aware that the department has been working on the abolition of both the code and the legislation for the ABCC. He has been aware of that from the election of the government that we were working on that.

Senator CASH: Are you able to take on notice, Minister—

Senator Watt: It was a pretty clear election commitment. I can't—

Senator CASH: I'm talking about the announcement itself. It's difficult to wake up and find that a minister is making an announcement in relation to what you do and you had not been told about it.

Senator Watt: I would accept that if it hadn't been a matter of public record for years that it was our policy to abolish the ABCC because it had turned into a witch-hunt against unions that did nothing about wages, nothing about productivity and nothing about anything else.

Senator CASH: Honestly, Minister Watt, I am trying my hardest to get through without being political today.

Senator Watt: Well, my point is—

Senator CASH: But I'm glad that you have decided that—

Senator Watt: My point is that it can hardly have been a surprise to Mr McBurney or anyone else at the ABCC that the government announced it was abolishing it, because that was our policy.

Senator CASH: Do you think in the interests of integrity and transparency it may have been nice for the minister to give the head of the ABCC a heads-up that the announcement was being made on the *Insiders* program?

Senator Watt: It was a clear policy of the government and had been a policy proposition—

Senator CASH: Do you think it would have been nice if the heads-up was given in relation to what they were doing to the Building Code?

Senator Watt: Well, the ABCC was probably given a heads-up for at least three years that it was our intention to abolish them, so it can't have come as any surprise.

Senator CASH: We now have the bill in the parliament. What consultation has the department had with the Fair Work Ombudsman in relation to the abolition of the ABCC?

Mr Hehir: There has been a weekly meeting. I will need to check the commencement.

Senator CASH: Did you say a weekly meeting?

Mr Hehir: Yes.

Senator CASH: A weekly meeting, yes.

Mr Hehir: Where the ABCC, the FWO, or Fair Work Ombudsman, and the department have been facilitating the necessary changes. We are supporting both organisations in ensuring that the communications between the parties are effective, particularly about the requirements, the steps that are going to be necessary and the process around staffing. So that has been undertaken on a weekly basis for a number of months.

Ms James: Since early August, I think.

Senator CASH: Can you get the exact date as to when the first meeting occurred and then the dates in relation to when the ongoing meetings have occurred?

Mr Hehir: I will take it on notice.

Senator CASH: In terms of the clarity regarding the future of current litigation matters, have any staff been transferred from the ABCC to the Fair Work Ombudsman?

Mr Hehir: I recommend that be put to the Fair Work Ombudsman or the ABCC.

Senator CASH: In relation to the clarity regarding the future of current litigation matters, will these matters be continued by the Fair Work Ombudsman?

Ms Sheehan: The legislation provides for any litigation on foot to transfer to the Fair Work Ombudsman.

Senator CASH: So the intention is for all of the legislation to go over to—

Mr Hehir: The litigation.

Senator CASH: The litigation to go over to the Fair Work Ombudsman. In terms of staffing for the Fair Work Ombudsman, given that these are additional matters, what additional staff have been provided to the Fair Work Ombudsman to undertake this litigation?

Ms Anderson: In terms of the actual breakdown, I would have to take that on notice. It may well be a matter for the Ombudsman themselves to answer. Through the budget process they have received 80 ASL per year.

Senator CASH: Could you say that again?

Mr Hehir: I think the figure was 80 ASL.

Senator CASH: Additional ASL?

Ms Anderson: That's correct. I don't have the breakdown.

Senator CASH: Can you provide on notice the breakdown of that ASL for me?

Mr Hehir: It's probably best if that comes from the Fair Work Ombudsman.

Senator CASH: That's fine. We'll ask them that as well. In terms of the ABCC being abolished, the Fair Work Ombudsman is then taking on, within reason, some of what the ABCC does. Is it the case that the Fair Work Ombudsman has all the powers of the ABCC to properly enforce compliance on building sites?

Ms Sheehan: The Fair Work Ombudsman and the ABCC currently under the Fair Work Act have what I would call concurrent jurisdiction.

Senator CASH: Concurrent jurisdiction?

Ms Sheehan: They both have jurisdiction over provisions in the Fair Work Act. Once the ABCC is abolished, the Fair Work Ombudsman will then, I guess, take up that role and become the regulator in that space using their existing—

Senator CASH: Their existing powers?

Ms Sheehan: enforcement powers.

Senator CASH: Does the Fair Work Ombudsman have the power to commence enforcement actions on behalf of employers?

Ms James: Senator, you say on behalf of employers. The Fair Work Ombudsman initiates action in its own name.

Senator CASH: Yes.

Ms James: When you say on behalf of employers—

Senator CASH: Will the Fair Work Ombudsman be able to investigate an allegation of the union coercing contractors to only engage with subcontractors who have union approved collective agreements in place?

Ms James: If that is a breach of the Fair Work Act, the answer is yes.

Senator CASH: And if it's not but it was a breach of, say, the Building Code?

Ms James: Well, the answer is no because the Building Code—

Senator CASH: No. That is okay?

Ms James: The building code is—

Senator CASH: Correct. That's my point. None of what was in the building code transfers over to the Fair Work Ombudsman?

Ms Sheehan: The building code would be repealed by the legislation.

Senator CASH: Correct, yes.

Ms Sheehan: And the provisions in the BCIIIPA, Building and Construction Industry (Improving Productivity) Act. Some particular provisions in that act will be repealed. The Fair Work Ombudsman would have jurisdiction over the current provisions that are in the Fair Work Act for the regulation of the building industry.

Senator CASH: Could you put together for me the differences between the powers that the ABCC currently has before it's abolished and then the powers that the Fair Work Ombudsman has and then literally whether or not there are any differences.

Mr Hehir: Is table form okay to come back with?

Senator CASH: Yes. Whatever is easiest.

Mr Hehir: We will take that on notice.

Senator CASH: How many ASL did the ABCC have?

Ms Anderson: The data we have received from the ABCC themselves as at June 2022 was that the agency had 156 staff.

Senator CASH: What actually happens to them, since we believe in secure work? What actually happens to the 156 staff?

Mr Hehir: That might be a question better put to the ABCC.

Senator CASH: That's okay. They had 156 ASL. How many additional had the FWO been given in assuming all of these powers?

Mr Hehir: The Fair Work Ombudsman was given an additional 80 ASL for the resumption of its role in the Fair Work Act in relation to building and construction.

Senator CASH: So 156 currently down to 80?

Mr Hehir: Yes.

Senator CASH: Minister, why is there such a gap between the 156 and the 80 given the powers transfer over?

Mr Hehir: If I may?

Senator Watt: I don't know the circumstances so it's probably better from Mr Hehir.

Mr Hehir: A number of staff were responsible for the Building Code.

Senator CASH: For the Building Code?

Mr Hehir: Yes. That will be a reasonable proportion. Again, I suggest you talk to the ABCC about what proportion that was. There were corporate staff. There were some data analysts. There was a range of functions that already existed within the Fair Work Ombudsman, so there wasn't necessarily a need to transfer them. Again, I suggest you confirm this with Mr McBurney, but my recollection is that the figure of 80 reflects Mr McBurney's advice to us of how many staff were responsible for Fair Work Act matters. In fact, I think it was slightly under that. I think it was 77 or so.

Ms James: Mr Hehir is right that it is appropriate that you put some of these detailed questions to Mr McBurney. I would like to place on the record that in these conversations that have occurred between the department, the ABCC and the Fair Work Ombudsman, the question of what happens with the staff has been front and centre. Mr McBurney has gone out of his way to ensure that, where appropriate, staff have been transferred to other departments. He highlighted particular examples of staff on parental leave and graduates and the process between the agencies of taking the transfer of function and which staff may go over. You should talk to them about it. Obviously, there may have also been some attrition from the ABCC over this period of time. But there have been best endeavours on the part of these organisations at the most senior levels to ensure that the staff are treated well and respectfully. I had a conversation with the CPSU about the fact that they may well have members there and to assure them that this would be the case.

Senator CASH: One of the issues that has been raised with me is what happens with the security of payments investigations under the ABCC. Can you take me through what happens with them?

Mr Hehir: With regard to the security of payments aspect of the ABCC, the actual working group will be terminated as part of—

Senator CASH: It will be terminated?

Mr Hehir: As part of the legislation. As you would be aware, the security of payments legislation is a state and territory legislation. Certainly that remains their responsibility to look at. In relation to any Australian government projects, it would be the relevant department that would need to be engaged with.

Senator CASH: What do you mean when you say the relevant department will need to be engaged with?

Mr Hehir: The department that is funding the project.

Ms Anderson: I will elaborate on that. Obviously, under all procurement guidelines in the Commonwealth there is a requirement on agencies who are undertaking that procurement on behalf of the Commonwealth to ensure that those undertaking that work don't breach relevant laws et cetera.

Senator CASH: Correct, yes.

Ms Anderson: Agencies obviously have that ongoing obligation with or without the code to ensure that whoever they are contracting with is law abiding.

Senator CASH: Just so I understand, can you take me through how subcontractors are to be protected on the head contracts? That is something I am now getting asked time and time again.

Ms Anderson: That continues to be the responsibility of state and territory jurisdictions. I don't know all the frameworks there, but they have relevant frameworks in place within their own jurisdictions to deal with security of payment breaches and the like.

Senator Watt: I will say one thing here, Senator Cash. Just in case there's any doubt, our government absolutely is concerned to make sure that security of payments is ensured. I have had personal experience dealing with subbies who have been ripped off through the lack of security of payments rules and laws. We are giving consideration to how to best protect those sorts of payments now. One of the things—

Senator CASH: This is the issue; there will be a gap with the abolition of the ABCC.

Senator Watt: Well, I'm not properly qualified to tell you what the direct effect of this change is and whether there is a gap, but what I know is that the government is working on the best solution to put forward here. Part of that is about determining which is the correct department to have overall responsibility for that.

Senator CASH: Is this absent the Australian Building and Construction Commission and what it would normally have done?

Senator Watt: It's probably best at this point if I hand over to people who know more about it.

Senator CASH: Could you just elaborate now on what the minister has said? Unfortunately, what it sounds like to me is there is now a problem that has been created by the abolition of the ABCC, and in particular in relation to the security of payments. You recognise that. Has the department been tasked to look at the solution that Minister Watt referred to?

Mr Hehir: I might clarify a few things. Remember that the actual process was a working group that provided advice to government. I might pass to Ms Anderson in a minute to give more detail around that. But it was a working group and it generally provided advice. So I'm not sure that a gap is the right way of expressing it. The laws that enforce you to pay are state and territory laws and there is no gap there.

Senator CASH: Yes.

Mr Hehir: In terms of the government taking it seriously, yes. I have been asked to work with other agencies to try to identify the best process going forward. There's a number of possible areas. This could be a broad procurement issue. It could be a construction procurement issue. You might remember, Senator; I actually think the work was undertaken within the department of industry in terms of the national model. We're just working through what is the best way for the Commonwealth to engage with states and territories and how we get advice in to support that engagement.

Senator Watt: I think I might be right in saying as well, Senator Cash, that the new national construction industry forum will also be looking at this issue. What I am hearing from Mr Hehir is that there is no gap in the sense of the security of payments because that's still ensured through state and territory legislation. It's more a matter of what is the mechanism for the federal government to engage with states and territories about those issues.

Senator CASH: When that solution might be forthcoming, what is the time frame around that?

Senator Watt: I'm not sure, but Mr Hehir have some information.

Mr Hehir: It has been given to me as a matter of some urgency.

Senator CASH: What is defined as a matter of urgency?

Mr Hehir: I have been told to try to prepare advice to government as quickly as possible. But I don't have a particular time frame.

Senator CASH: In terms of the ABCC's security of payment program, what did it actually do?

Senator Watt: That might be again something better to put to the ABCC.

Senator CASH: I understand that. In terms of the abolition of the Australian Building and Construction Commission, did the government ask the department for advice about the potential impact on the Australian economy of abolishing the ABCC?

Mr Hehir: This was an election commitment that the department provided advice on the implementation of.

Senator CASH: I understand it was an election commitment. I'm not disputing that at all.

CHAIR: I don't want to break your train of thought. I will come back to you. Senator Pocock has a few questions.

Senator CASH: Not a problem at all. That's fine, absolutely.

Senator DAVID POCOCK: Thanks for your time. I am keen to learn a bit about the secure jobs, better pay bill 2022. When did the department start work on that bill?

Mr Hehir: The department was tasked following the job summit. It was one of the outcomes of the job summit that we begin consultation on that. We commenced the following week.

Senator DAVID POCOCK: There was no drafting done before the job summit?

Mr Hehir: That depends on which elements. There were a number of elements that were election commitments. There were aspects of the bill that we had previously started. In terms of the bargaining, no, I don't think we started prior to that. We started with the task of the consultation process. Again, I will clarify. Bargaining, yes. But as part of the election commitments and public statements, we had already started work on zombie agreements for the termination, and then the application for termination, of agreements.

Senator DAVID POCOCK: So there was no drafting for multi-enterprise bargaining prior to 1 September?

Mr Hehir: Not to my recollection.

Senator DAVID POCOCK: How long in total did you have to prepare the omnibus bill?

Ms Sheehan: I would say that there are a number of provisions in the bill that implement election commitments. So the department was aware of those obviously during the caretaker period. It started to think at that point in time what it would do to prepare for the incoming government of either side. The abolition of the ABCC, for example, which we've just been talking about, was a clear election commitment. We would not start drafting anything immediately. We started to, I guess, think during caretaker period and then obviously start to talk to the government about when they wanted to implement certain reforms upon the commencement of the new government. For quite a few matters of the bill that were election commitments, we would have started conversations with the government early on.

Senator DAVID POCOCK: As soon as you could, yes, okay.

Ms Sheehan: And then there were other reforms that came out of the jobs summit in September.

Senator DAVID POCOCK: Which parts of the bill weren't election commitments?

Mr Hehir: Some of the detail in the bill in terms of mechanisms to implement government commitments. I think the multiemployer bargaining is a mechanism. There was a broad commitment to increase productivity and get wages moving.

Senator Watt: And having commitments around fixing the bargaining system in general. My recollection is that we did make an election commitment around pay secrecy clauses, which has obviously now been picked up in the bill. Some of the issues around gender pay equity were election commitments that are being addressed through the bill. There are probably other examples.

Ms James: Forgive us if there is some overlap between some of the job summit outcomes and the election commitments as well. For example, one of the job summit outcomes was to remove unnecessary complexity for workers and employers, including making a better off overall test simple, flexible and fair. That was also sort of an election commitment, but the detail of that very much evolved after the job summit and in the context of the agile consultation process we have been describing this afternoon.

Mr Hehir: There was a clear election commitment to increase productivity and improve sustainable wage growth, but the mechanism for doing that was then identified at least in part at the jobs summit. There were other elements, particularly in relation to gender equality, which were also seen to increase wages, that were election

commitments. There were elements that we were working on relatively early and then there were elements which, in terms of the mechanics for delivering the election commitment, were identified at the jobs summit.

Senator DAVID POCOCK: In terms of the single interest stream, when you were drafting and consulting, were any concerns raised with stakeholders that you consulted with?

Mr Hehir: It is not our practice to give the detail of the consultations. We're clear with all the stakeholders that they are in confidence. I think it's clear to say—and there's public comment around it now—that people are interested in how it works and keen to understand how it works. There are some people who are expressing concern about it.

Senator DAVID POCOCK: How long was that consultation period for the department?

Mr Hehir: We have taken that on notice. I think the broad period is we commenced the week following the job summit. I think the job summit was Thursday and Friday. We commenced the following week in terms of consultations. We were still consulting three days before COIL, which was on the 20th. We were still consulting on 17 October. It was from very early September through to mid-October. I think the evidence we provided before is we did 54 consultations, or something like that.

Senator DAVID POCOCK: In your experience, is that the usual amount of time that you would get to draft something as big as multi-enterprise bargaining?

Ms Sheehan: Every piece of legislation—

Senator DAVID POCOCK: It's always rushed?

Ms Sheehan: is different. Every piece of legislation is different, so I don't think it's possible to give a usual time frame in which legislation is prepared.

Senator DAVID POCOCK: Did the department ever express concerns about the deadline and being able to make it to the minister?

Mr Hehir: We always provide advice to ministers on achievability. I don't go into advice that I provide to the minister, but we always provide advice.

Senator DAVID POCOCK: So that's confidential?

Mr Hehir: I would need to take it on notice.

Ms James: I have been involved in several big drafting exercises—Work Choices, Fair Work—as chief counsel. They are always complex. We always wish we had more time. Drafters are incredibly smart perfectionists, as they should be. The laws of our nation are very important. We need them to work. In my experience, ministers are always receptive to advice about weighing up complexity, how much you're trying to do and timeframes. Almost universally ministers have taken that advice. This minister absolutely listens to our advice about what is achievable within timeframes.

Senator DAVID POCOCK: From that I am hearing that almost every time you are saying to the minister that it's unlikely we can do this in time?

Ms James: I would not put it in those terms.

Senator DAVID POCOCK: I'm just trying to understand what you are saying.

Ms James: When I was sitting in the chief counsel chair, I would be saying, 'Wouldn't it be great if we had more time.'

Mr Hehir: What I can say is that there's quite clearly a number of different tranches here in terms of this piece of legislation and this other legislation, which are election commitments that will follow. So part of that is about trying to make sure that we're not trying to do everything at once.

Senator DAVID POCOCK: The reason for my questioning is that you are an amazing department with so many smart people. Clearly, there's a whole bunch of drafting errors that are being corrected in amendments. I'm just trying to find out. To me, it says that you guys have been so under the pump that you haven't necessarily had the time to do the checks that you usually like to do.

Ms James: I will let the chief counsel go into the nature of amendments. I am not sure if they've been circulated yet. Obviously, some have been discussed. I don't think we would characterise them all as errors. I would also say that with every piece of workplace relations legislation that I have ever been involved in, there's always a process of amendments, particularly when we continue to listen to feedback and take that on board. So in the scheme of things, perhaps our chief counsel could elaborate that perhaps there are some errors in there. I think very many of them are about responding to feedback and acknowledging the need to balance different points of view in getting the best outcome we can in terms of policy.

Senator DAVID POCOCK: Clearly, we're not having a crack at the department.

Ms James: No. I very much appreciate that.

Ms Sheehan: Obviously, the minister has indicated that he will be circulating some government amendments, which I understand have not appeared yet, so I can't talk in detail about what they are. The minister indicated himself in the second reading speech that he was continuing to consult and indicated six in particular government amendments that he was looking at bringing forward. So I wouldn't characterise those things as drafting errors. I would characterise them as being informed by further consultation.

Senator DAVID POCOCK: Thank you.

Mr Hehir: I have been involved in only two significant drafting exercises in relation to workplace relations legislation. I have certainly observed it in the past. It remains a contentious area of public policy. The engagement within the parliament is a very normal process and with the stakeholders.

Senator DAVID POCOCK: Thank you. That really isn't my concern. My concern here is the pressure being put on the department to deliver something that is potentially not on a reasonable time frame. Thank you very much. I appreciate your answers.

CHAIR: It is now 6.45 pm, so we will go on a break. I will ask outcome 3 representatives to come back. We expect it will be about 50 minutes to an hour. We will bring Comcare back after that, followed by the ABCC.

Proceedings suspended from 18:45 to 19:45

CHAIR: We will recommence.

Senator CASH: I will return to the issue of the economic impact of abolishing the ABCC. The question I had asked prior to the suspension was whether the government asked the department for advice about the potential impact on the Australian economy of abolishing the ABCC. My understanding was the answer to that question was no.

Mr Hehir: Yes.

Senator CASH: Did the department itself ever provide any formal or informal advice to the government about the economic impact of abolishing the ABCC?

Mr Hehir: Not to my knowledge.

Senator CASH: Is the department aware of the report by Ernst & Young from April 2022 that shows that the abolition of the Australian Building and Construction Commission could see a decline in economic activity in the Australian economy of \$47.5 billion by 2030?

Mr Hehir: Yes. I am aware of that report.

Senator Watt: Can you clarify it?

Senator CASH: It is the Ernst & Young report.

Senator Watt: Who was that commissioned by?

Senator CASH: I knew you would get political in relation to this. It was the Master Builders Association.

Senator Watt: No. I am asking who it was commissioned by.

Senator CASH: This was the Master Builders Association in relation to the Ernst & Young report.

Senator Watt: The Master Builders Association.

Senator CASH: It is April this year on the economic modelling in terms of the impact of the abolition of the Australian Building and Construction Commission. Ms James, have you managed to read that report?

Ms James: I haven't personally read that report.

Senator CASH: But someone in the department would have read the report? Was any of this information ever provided by the department to the government about the impact of the legislation?

Mr Hehir: Did we summarise the report? Not to my knowledge. But we are aware that the minister was aware of the report.

Senator CASH: The minister was aware of the report. Minister, could I confirm with you that is the case—that the minister is aware of the report?

Senator Watt: I would have to check that with him and take it on notice.

Senator CASH: That is fine. I'm happy for you to do that.

Mr Hehir: I am aware the minister's office was aware of the report. I will clarify.

Senator CASH: That's fine. Thank you very much. Has the government asked the department to commission external or internal modelling about the potential impact of abolishing the Australian Building and Construction Commission?

Mr Hehir: No.

Senator CASH: The answer was no?

Mr Hehir: No.

Senator CASH: I don't know if your voice is too soft.

Senator Watt: One thing I do know, Senator Cash, is that the Productivity Commission data shows that labour productivity in the construction sector declined every year while the ABCC was the regulator pre-pandemic. In thinking about economic modelling and the impact on the economy, in 2017-18 after the ABCC was introduced, labour productivity fell 2.4 per cent. It fell another 2.6 per cent the following financial year. It fell another 2.6 per cent in 2019-20. So I think there's some evidence to say that it hasn't quite been the economic driver that the former government claimed it would be.

Senator CASH: Has the department done any modelling of its own which assesses the cost to the Australian economy of abolishing the ABCC?

Mr Hehir: I don't believe there's the capacity to do that modelling in a comprehensive fashion. The number of assumptions that you would need to make is too high. In fact, I think that's one of the issues that other parties have identified with the Ernst & Young report. It relies on a high number of assumptions to actually reach the conclusion that it reaches. That sort of modelling, I think, is very difficult to do without quite a number of assumptions within it. I would note that report was also done before the final model was produced. It's unclear whether actually it was aware of the role that the Fair Work Ombudsman would be playing. In my view, it isn't feasible to provide accurate modelling without a high number of assumptions.

Senator CASH: But the answer is no?

Mr Hehir: Yes.

Senator CASH: I know in the interests of time I will put a lot of questions on notice. I will go to what is referred to as the union demerger legislation. This was the Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020, which obviously passed the parliament with the support of then Labor opposition. Minister, what is the government's position in relation to this legislation?

Senator Watt: Are you asking our position in terms of whether we're going to keep it, repeal it or amend it?

Senator CASH: Yes.

Senator Watt: I'm certainly not aware of any plans to do that. I think I would probably be aware if there were. But the department may have some more information about that.

Senator CASH: That's fine. I just recall at the time Tony Burke, who was in opposition, said the bill made a commonsense change to allow withdrawal from amalgamations. It's a democratic process involving a ballot of the members. Ms James, are you aware of any changes in the government's stance in relation to this legislation?

Mr Hehir: That's an aspect that we haven't provided a significant amount of advice on yet.

Senator CASH: Have you been asked to provide advice to the minister in relation to this legislation and potential changes to it?

Mr Hehir: We've certainly provided initial advice to the minister on that piece of legislation. I would need to check and see whether it recommended changes or not.

Senator CASH: When was that advice requested?

Mr Hehir: I would need to take that on notice.

Senator CASH: Has the department ever prepared talking points for the minister which state:

I am also committed to repealing changes made in 2020 to the Registered Organisations Act that allow registered organisations to withdraw from amalgamations more than five years following an amalgamation.

This will restore and clarify the long-standing requirement that an application from a part of a registered organisation to hold a ballot of members about withdrawing from the organisation must be made within five years of the amalgamation.

Mr Hehir: I will need to take that on notice. I don't recall seeing any talking points to that effect, but I will need to check that.

Senator CASH: That is okay. I will actually table them so we can go through them together.

Senator Watt: What are you saying these documents are, Senator Cash?

Senator CASH: They were provided to me in response to a question on notice.

Senator Watt: And you are saying they are talking points for the minister?

Senator CASH: My understanding is they were in an email attachment entitled 'Final talking points sent to minister's office from the department, AWU national exec meeting'. I will, to be fair, provide a copy so you have a copy to look at. Dated Tuesday 21 June, it states:

Hi Jody.

The Minister is giving a short presentation at 4pm today to the AWU National Executive meeting, and I'm wondering if you could send up some talking points addressing the following issues? Dot points are fine.

- 1) Current status of the WR reforms—legislative timetable/priorities/ process
- 2) Latest information that we can disclose on the Employment Summit, including how it fits into the above timetable.
- 3) ABCC:
 - a. Funding—current status
 - b. Code—plan to amend
 - c. Cases—transition issues
 - d. BCIP Act—plan to repeal (dealt with in the above item)
- 4) Plan for ROC—including an answer to why it can't be defunded immediately.
- 5) The Minister might also be asked about energy policies and gas—are you able to liaise with the relevant department to provide some points on this?

Please give me a call if you have any queries.

Thanks very much.

The name is obviously deleted. Then there is an email attachment entitled 'Final talking points sent to minister's office from the department: AWU National Executive meeting—talking points'. It goes through 'Current status of WR reforms—legislative timetable/ priorities/process'. It then goes through the jobs summit. It then goes through the Registered Organisations Commission. It states at the bottom of page 3:

If points on withdrawal from amalgamations are required:

It then says the following, and I will read it again:

I am also committed to repealing changes made in 2020 to the Registered Organisations Act that allow registered organisations to withdraw from amalgamations more than five years following an amalgamation.

This will restore and clarify the long-standing requirement that an application from a part of a registered organisation to hold a ballot of members about withdrawing from the organisation must be made within five years of the amalgamation.

Who prepared those talking points? Bear in mind that they were for the AWU national executive meeting.

Ms Anderson: They would have been prepared by the relevant policy and legal teams.

Senator CASH: When were you advised by the minister or his office that the Albanese government was committed to repealing changes made in 2020 to the registered organisations act that allows registered organisations to withdraw from amalgamations more than five years following an amalgamation?

Mr Hehir: As I said, I will have to take that on notice. I am aware we have provided a brief on this. I need to check the content of that brief and the timing of that brief.

Senator CASH: Minister, you've said that you are not aware of any potential changes by the government. What is the government's position, then, in relation to the registered organisations act and this section of it?

Senator Watt: Again, I'm not aware of any proposed changes to that legislation.

Senator CASH: Were you aware of the minister's comments to the AWU national executive meeting?

Senator Watt: No, because I wasn't in the room. But I would note that, unlike the former government, our government is happy to have ministers attend union meetings, business group meetings and a whole range of meetings. We think it's healthy for democracy.

Senator CASH: I have no issues with the meetings that the minister is attending. Is it the government's position, given the talking points prepared for the minister clearly state:

I am also committed to repealing changes made in 2020 to the Registered Organisations Act that allow registered organisations to withdraw from amalgamations more than five years following an amalgamation.

Is that the minister's stance?

Senator Watt: I would have to check that with the minister. You would obviously be familiar, having been a former minister, Senator Cash, that draft talking points don't necessarily find their way into remarks that ministers say.

Senator CASH: I also know that talking points aren't provided at a whim by departments to ministers in relation to potential changes to legislation unless they've been asked for—

Senator Watt: With the greatest of respect—

Senator CASH: by a particular minister.

Senator Watt: With the greatest of respect to public servants, who I do respect greatly, public servants who draft talking points don't necessarily have access to the latest thinking of ministers. So I would want to check the background to these talking points having been prepared before I could even give you an answer about whether they represent the minister's position or not.

Senator CASH: Can you also state, then—I know that the minister's office will be listening in—the government's position in relation to the two paragraphs, which state:

I am also committed to repealing changes made in 2020 to the Registered Organisations Act that allow registered organisations to withdraw from amalgamations more than five years following an amalgamation.

This will restore and clarify the long-standing requirement that an application from a part of a registered organisation to hold a ballot of members about withdrawing from the organisation must be made within five years of the amalgamation.

From the minister's perspective, what instructions were given to the department in relation to these talking points and by whom in terms of the preparation? At the AWU national executive meeting, was this canvassed in any way whatsoever? Has the minister made a commitment to any union, including the AWU, that the Labor government will proceed with these changes? Ms James, has the department received instructions from the government to commence any form of drafting in relation to changes to the registered organisations act in this regard?

Ms James: I'm not sure of the answer to that.

Senator CASH: When you say you're not sure, would someone here be sure? You are the secretary.

Mr Hehir: I believe I have taken the substance of that one on notice. It's possible in terms of the brief that was provided that it had decisions attached to it. As I said, I need to review that brief.

Senator CASH: Thank you very much. I look forward to receiving that on notice. I'm going to try to proceed as quickly as possible. I will now turn to what was known as the Rossato decision.

Senator Watt: Same job, same pay decision. The decision regarding the same job and same pay issue.

Senator CASH: The Rossato decision in relation to what was at the time referred to as fixing the double-dipping loophole in relation to the WorkPac v Rossato case.

Senator Watt: That might be your spin on it. It was a case about labour hire casual coalminers being paid worse and having worse conditions than permanents. That is how I remember it.

Senator CASH: No. It was actually a case in relation to whether or not employers should actually have to pay entitlements twice if they've been discharged to the casual employee.

Senator Watt: As I say, that might be your interpretation. Having spent probably a lot more time with rank and file coalminers than you have, Senator Cash, I would put it a different way. It was about coalminers being engaged as labour hire casuals year after year after year when they were actually permanent workers. But we obviously have a different interpretation.

Senator CASH: Well, do you recall the decision of the High Court?

Senator Watt: I do.

Senator CASH: What did the High Court say on 4 August 2021?

Senator Watt: Well, I would have to go and get the exact decision to be able to tell you.

Senator CASH: Well, my understanding is the High Court agreed with the decision—

Senator Watt: I know it was a decision that was—

Senator CASH: and the legislation that the coalition government at the time put forward.

Senator Watt: Yes.

Senator CASH: But I digress. Minister, on 4 August 2021, the now Minister for Employment and Workplace Relations did commit an Albanese government, if elected, basically to overturning the government's scheme. Is this still the position of the Albanese government?

Senator Watt: It's certainly the position of the Albanese government that people who effectively do the same job should be paid no less than their colleagues. It is our intention to legislate to fix what is a grossly unfair flaw in the current employment law of Australia.

Senator CASH: Despite the fact that the High Court of Australia agreed with the position that the coalition took in the legislation?

Senator Watt: No. The High Court of Australia gave a ruling as to the current legal position of those employees. Labor went to the election with a commitment to change that because we did not believe it was fair.

Senator CASH: That is what I want to confirm. The commitment has not changed?

Senator Watt: Correct.

Senator CASH: Thank you. That's all I needed. Thank you very much.

Senator Watt: We believe that people should not be engaged as casual employees, be it as miners or anything else, year after year doing the same roster and be paid less than permanent workers who they work alongside.

Senator CASH: One might also say that small businesses should not have to assume an up to \$39 billion liability.

Senator Watt: Well, you know that is a false figure.

Senator CASH: And actually double-dip in terms of paying casual loadings and permanent entitlements.

Senator Watt: I know you used to put that figure around, but you know that even the High Court ruling does not have that implication. Labor's commitment is in relation to long-term casuals who work the same roster week after week, month after month, year after year. I'm not sure about you, Senator Cash, but I have been to coal mines in Queensland and have met with coalminers who have been engaged as casuals for seven, eight and nine years working exactly the same roster week after week, month after month, year after year. They don't get sick leave. Even when they are paid a casual loading, their take home pay is less than the permanent workers they work alongside. I would be very happy to go and take you out to meet some of those miners so that you can understand the situation they are in.

Senator CASH: All I needed was you to confirm the government's position.

Senator Watt: Well, it's a shame that you never went and met with those miners before you took the legislative position that you did.

Senator CASH: I do appreciate that you have confirmed the government's position. I will wrap up here, Chair, with some questions that I will place on notice here tonight. I have a whole lot more questions on notice. They relate to the current rate of casual employees in Australia, the current rate of independent contractors and the current rate of labour hire workers.

Mr Hehir: Are you asking that on notice?

Senator CASH: I'll put that on notice for you. That's fine. I'm happy to move on given the time.

Senator O'SULLIVAN: I want to understand a little bit about the national construction industry forum. In September, Minister Burke stated that the government would establish a national construction industry forum. Can you please tell me whether you were aware that the minister was going to make this announcement prior to it being made early in September?

Mr Anderson: My understanding is that the announcement was part of the outcomes of the job summit. I think Senator David Pocock put it on the table at the job summit.

Senator O'SULLIVAN: So how did the department find out about the forum? Was it when Senator Pocock raised it, or was it raised with you earlier?

Senator CASH: Had the government previously raised this with you, or was this raised by Senator Pocock and then adopted by the government?

Mr Hehir: Not necessarily in that exact form, but something for a construction industry engagement had been raised with us, yes.

Senator O'SULLIVAN: Had you or anyone else in the department received a formal briefing from the minister or his office?

Mr Hehir: I will need to take that on notice in terms of whether it was a formal briefing. As I said, it was certainly raised with us as a broad concept, not in its final form or as it was announced or suggested by Senator David Pocock. I will explain it this way. The concept of tripartism had been raised on a number of occasions by the minister. We talked about that and a range of factors, including a commitment to ongoing tripartism in the building and construction area. That broad concept in terms of having parties around the table talking about it, yes, had been raised. I'm not sure it was raised formally apart from being a very strong theme within the election material. We were in discussions about how that might look rather than necessarily a formal briefing.

Senator O'SULLIVAN: Since it was announced, what conversation has the minister had with the department?

Mr Hehir: Some of them go to government decision-making, so I will need to take that on notice.

Senator O'SULLIVAN: Have you or anyone else in the department been briefed by the minister or his office about what the forum might actually entail?

Mr Hehir: Again, that goes to the formal government decision-making. I will need to go back and check what can be shared publicly and what can't be.

Senator O'SULLIVAN: Are you able to tell me what the forum might entail, then? It has been announced.

Mr Anderson: We're not in a position to pre-empt.

Senator CASH: The government has announced a new forum. It would appear that Senator Pocock raised it and the government has taken this on board. There has been an announcement, given that we have the abolition of the Australian Building and Construction Commission imminent, but the department has no further information in relation to the announcement at this point in time?

Mr Hehir: This is one of the things that the minister has raised and discussed. My recollection is that it has been raised and discussed in terms of amendments. Those amendments haven't yet been tabled so I am restricted in what I can say.

Senator CASH: So this is part of the deal with Pocock is what you are saying?

Mr Hehir: No.

Senator Watt: You are having a go at Senator Pocock?

Senator CASH: No. It is a part of the deal with Senator Pocock in terms of the abolition of the ABCC?

Senator Watt: You're having a go at Senator Pocock—

Senator CASH: Absolutely not. I'm asking that—

Senator Watt: He's working with the government to get wages moving again.

Senator CASH: Whether this is something that Senator Pocock—

Mr Hehir: Senator, not that I'm aware of.

Senator CASH: had put forward.

Senator Watt: There are two Senator Pococks.

Senator CASH: I do apologise. It's not Senator Barbara Pocock. The government has adopted the idea that has come from Senator Pocock and is now being fleshed out.

Mr Hehir: As I said, there was a broad discussion around tripartism, particularly the need for ongoing and improved tripartism in the building and construction sector. Senator David Pocock put it on the table at the summit. There are a number of other people who spoke to support that. I am reluctant to say that anything raised at that meeting was then about the costs. It was a broad public discussion with a range of stakeholders, and lots of people had ideas or suggestions.

Senator O'SULLIVAN: So in terms of any of the discussions that you've had regarding the forum with the minister, who else has been involved in those discussions? Is it just departmental officials, the minister and the minister's staff, or are there other people involved?

Mr Hehir: There are things that I can't discuss because they go to government decision-making. I need to go back and look at the material and see what I can share. It does go to government decision-making.

Senator O'SULLIVAN: Can you give us an idea of the composition of the forum? Who would be on it?

Mr Hehir: The amendments haven't been tabled yet. I'm not able to go into more detail.

Senator O'SULLIVAN: The bill makes it difficult for unions that have shown repeated recidivist behaviour by breaking the law to be able to engage in multiemployer bargaining. Will those organisations also be able to participate in the forum in this regard?

Mr Hehir: As I said before, the amendment haven't been tabled. I'm not able to go into detail about them.

Senator O'SULLIVAN: So you can't tell me if the CFMEU was included?

Mr Hehir: I'm not able to disclose any aspect beyond what the minister disclosed.

Senator CASH: Minister, can you guarantee that the CFMEU will not have a seat at the table in relation to the national construction industry forum? In this bill that abolishes the Australian Building and Construction Commission, the government has also acknowledged that they are recidivist offenders and will be banned from multiemployer bargaining for 18 months.

Senator Watt: I will try to get some information for you.

Senator CASH: Minister, do you think, based on your knowledge of the CFMEU and the findings against them, that they should be given a seat at the table of the national construction industry forum?

Senator Watt: I am here representing the minister. It's the minister's role. It is Minister Burke. I will do my best to get an answer for you on that as quickly as I can.

Senator CASH: You see the minister in cabinet. You sit around the cabinet table. Do you believe it is appropriate for anybody from the CFMEU to actually have a seat at this table?

Senator Watt: I'm very happy to speak about my opinion about matters in my portfolio. I respect—

Senator O'SULLIVAN: You are representing him.

Senator Watt: I respect my ministerial colleagues. I would like to confer with the minister before I tell him.

Senator CASH: So what you are saying, then, at this point in time is—

CHAIR: The minister was still giving his answer.

Senator Watt: I think it's only right to check with the minister, who is actually responsible for these issues, to understand what his position is.

Senator CASH: So what you are saying is John Setka at this point in time could be a part of this new body?

Senator Watt: That is your hyperbole.

Senator CASH: No. I'm asking. Given that you haven't ruled anyone out, could you confirm that John Setka could be part of this new body?

Senator Watt: I have told you that I am going to check with the minister about what his plans are because I am here representing him.

Senator CASH: You are here representing him.

Senator Watt: If I was—

CHAIR: Just stop for a minute. The minister is trying to answer the question. There have been very few interjections. I have to say that I have been tempted numerous times to interject and I have held my own. I would ask others to do the same.

Senator Watt: Leadership is very becoming of you.

Senator CASH: It actually is.

Senator GROGAN: You've been very balanced.

CHAIR: I am always balanced. I am more balanced sometimes than others.

Senator CASH: I want to ask one more question and then we will wrap up. In relation to cost orders, Ms James, are you aware whether the minister or his office has given any direction to the Australian Building and Construction Commission not to pursue a cost order that has been made in its favour?

Ms James: I'm not aware of any such direction.

Senator CASH: Is anyone else in the department aware of any such direction? Minister, are you aware of any such direction from the minister to the Australian Building and Construction Commission?

Senator Watt: No. I am not. I remember you asked similar questions in the Attorney-General's estimates.

Senator CASH: To the Attorney-General. That is why I am asking it here.

Senator Watt: No. I'm not aware.

Senator CASH: Thank you very much.

CHAIR: Senator Pocock has some questions.

Senator BARBARA POCOCK: Nothing very significant. I want to ask you about the national employment standards. I have been reflecting on them. I think there are two provisions at present in the current law that are not enforceable. There is the right to request flexibility and the right to request an extension of unpaid parental leave. Is that correct?

Ms James: When you say unenforceable—

Senator BARBARA POCOCK: No right of appeal or civil remedy.

Ms James: I understand what you are talking about. Both of those entitlements involve decisions about the right to seek a certain decision.

Senator BARBARA POCOCK: The employer can reasonably refuse.

Ms James: The employer then makes a decision. You are talking about the ability to seek an enforceable or binding type review.

Senator BARBARA POCOCK: If you are refused by your employer, the grounds are clearly set out, as I recollect, in the act.

Ms James: I think that's correct, but I would defer to colleagues in detail.

Mr Mann: In relation to the flexibility provision in section 65, there is dispute resolution in the process. The bill in parliament at the moment proposes to introduce the ability to also have dispute resolution in relation to the outcome.

Senator BARBARA POCOCK: The outcome of both kinds of requests?

Mr Mann: The process and substance of the request.

Mr Hehir: That was for section 65.

Mr Mann: For flexibility. Just for flexibility. The government, in the job summit, committed to look at the unpaid parental leave right further. It has indicated that it is something it will be doing in 2023.

Senator BARBARA POCOCK: Does the department have any kind of recordkeeping or any analysis of whether it is a very frequently made request for an extension to unpaid parental leave, how broadly it's used, whether there's any information about refusal rates or any kind of research findings at all?

Mr Mann: I would have to take that on notice. We'll take that on notice.

Senator BARBARA POCOCK: Great. Thank you.

CHAIR: That is the end of outcome 3. Thank you very much. We will now call Comcare. The committee will suspend briefly.

Proceedings suspended from 20:20 to 20:30

Australian Building and Construction Commission

CHAIR: I welcome representatives from the Australian Building and Construction Commission. Mr McBurney, do you wish to make an opening statement?

Mr McBurney: Yes, just a short opening statement, which I can also table. I expect this will be the final appearance for the ABCC before this committee, for both myself and my leadership team. I want to take this final opportunity to thank all members of the committee for their interest in the important work undertaken by the ABCC.

The past five months have been a very difficult time for our staff. Despite being ongoing Commonwealth public servants, they have faced significant uncertainty as to their continuing employment in the APS. I am acutely aware of the personal toll on them. My staff have demonstrated the resilience and professionalism that I have come to expect from them.

I acknowledge and express my appreciation to the heads of other Commonwealth agencies who have reached out to me during this time to consider and identify suitable staff to be transferred to their agencies. Five APS agencies presented to the ABCC staff on current and future vacancies and accepted the CVs of staff interested in applying for or transferring to new roles. My thanks go to those agencies, in particular the Fair Work Ombudsman, the Australian Commission for Law Enforcement Integrity, the Australian Skills Quality Authority, the Commonwealth Ombudsman and the Office of the Australian Information Commissioner.

I acknowledge the Fair Work Ombudsman, who will ultimately take on board 16 of our staff as part of the transfer of function to the Fair Work Ombudsman. This includes our graduate cohort, who otherwise had no entitlement to the redundancy provisions available to ongoing ABCC staff. I also acknowledge the engagement

and understanding of our current secretary, Nat James, and her staff from the Department of Employment and Workplace Relations. They have assisted us in placing some of our most vulnerable staff.

The department has ensured that staff on paid parental leave had a clear pathway to ongoing employment by way of transfer to ongoing positions within the department. All of these engagements have to date facilitated the retention of highly-skilled ABCC staff within the APS and ensured their wealth of knowledge and expertise is not lost to the APS.

I don't have anything further for my opening statement, Chair, but I can address the committee in due course on the current state of the ABCC's operations and the important transfer of function to the Fair Work Ombudsman, which will be fully implemented on and from Thursday 10 November.

Senator CASH: Thank you very much, Commissioner, and thank you for that opening statement and, in particular, acknowledging the toll this has taken on so many of your staff. I do hope that they've had every opportunity to seek whatever counselling et cetera they may be able to. Once we've got your statement—and I'm sure that it is being brought to us, thank you—we will have further questions in relation to the statement.

This is your last estimates. There is quite a bit to get through tonight, so we'll take it topic by topic. Could I start, though, with the results of costs orders in relation to cases that the ABCC has been a part of. In the first instance, can I ask you to confirm how many cases have had cost orders made or cost orders agreed since the ABCC was re-established in December 2016?

Mr McBurney: Since that date, we'll need to take it on notice. We've provided a recent answer, a written answer, to the department, which I understand—

Senator CASH: Yes, was that question No. 567?

Mr McBurney: Yes.

Senator CASH: I believe I asked some questions in relation to cost orders. In terms of that, it stated:

1. As at 1 June 2022, the Employment and Workplace Relations portfolio had 34 cases in which a cost order, or the ability to pursue costs, were to be finalised.

Then, I understand, you set out what those cases were. You were then kind enough to set out the outcome of each cost order below. Can I confirm that in relation to the cost orders—and these ones are costs that have been made in favour of the Australian Building and Construction Commission—the Australian Building and Construction Commission is pursuing all costs?

Mr Kelleher: If I could perhaps go back to the first part of your question, the legal costs that have been paid to the ABCC since its re-establishment on 2 December 2016, I have, as at 31 October this year, 13 cases totalling \$1.276 million. That's—

Senator CASH: One point—

Mr Kelleher: That's \$1,276,543.

Senator CASH: And that is cost orders in which the ABCC has been successful and recovered back \$1.2-odd million?

Mr Kelleher: That's correct.

Senator CASH: Are there any outstanding cost orders?

Mr Kelleher: There are. I'd note that that was responded to in our QON. A small number of those relate to matters in the wages and entitlements space that I don't expect we'll be in a position to recover because of reasons including that the particular respondent didn't comply with the compliance notice to repay an employee, for example. Aside from that, there aren't any that are otherwise cost orders that we wouldn't pursue, save for one cost order that has recently been the subject of a resolution in the Lendlease matter.

Senator CASH: I've just got to understand this slightly better. You have outstanding cost orders.

Mr Kelleher: That's right, yes.

Senator CASH: The normal course of events is that you would pursue that, subject to, you've said, that there are some in the wages and entitlements that you wouldn't. Most people would pursue a cost order.

Mr Kelleher: Correct.

Senator CASH: You're owed the costs; you'll take the costs. And you've been successful in pursuing the 13 cases to the value of approximately \$1.276 million. I do have the question on notice in front of me. What did you say in relation to the last case?

Mr Kelleher: I said that there was a cost order that was made in the agency's favour and that a direction not to pursue that has been given.

Senator CASH: I want to work through that. You got a cost order made in the agency's favour. What case was that in, please?

Mr Kelleher: The cost order was made on 31 March 2022 in the case colloquially known as the Lendlease case—Lendlease v ABCC.

Senator CASH: When you say a cost order was made, what was the order that was made?

Mr Kelleher: The order that was made was in Federal Court proceeding VID56/2020 by Justice Snaden. On 31 March 2022, the court ordered by consent that the intervener, which was the CFMMEU—

Senator CASH: My understanding is they weren't a party to the proceedings—they intervened in the proceedings.

Mr Kelleher: That's correct. The order was simply:

The Intervenor pay the following costs on a party-party basis, as agreed or assessed:

a) 50% of the Respondents' costs in respect of the issue concerning the proper construction of s 13(2)(j) of the Building Code from 12 February 2020 onwards; and

b) 100% of the Respondents' costs in respect of the constitutional law issues from 12 February 2020 onwards.

Senator CASH: Deputy Commissioner, what would be the cost value that you would seek to pursue, approximately?

Mr Kelleher: I can say that the total external costs expended on that matter were \$509,442 plus disbursements.

Senator CASH: So you are entitled, pursuant to the costs order, to recover that in the normal course of events, just like in the 13 cases where you've recovered the moneys?

Mr Kelleher: Subject, obviously, to the terms of the order that was made on 31 March 2022, and party-party costs wouldn't enable a party to recover 100 per cent of those, of course.

Senator CASH: Right. I don't understand—

Mr Kelleher: Sorry, party-party costs, which—

Senator CASH: No—meaning: why aren't you pursuing it? There's half a million dollars of taxpayers' money that has been awarded to you. Why are you not pursuing it?

Mr Kelleher: I understand. The reason is this particular matter is classified as a significant matter under the Legal Services Directions, and that means that it is not able to be settled without the agreement of the Attorney-General. That was the—

Senator CASH: Right. I do recall. I signed off on significant matters myself. So one would assume the Attorney-General wants to recover taxpayers' money. Senator Watt, would that be correct—the Attorney-General wants to recover taxpayers' moneys that have been awarded legitimately by a court, pursuant to the normal practice?

Senator Watt: I'm just trying to get my head around the finalisation of this matter. My recollection is that it was settled. I didn't catch all of the evidence from the deputy commissioner, but I'm not sure there actually was a costs order issued. Or have I misheard?

Senator CASH: Sorry, I think you misheard. Did you not just read out the costs order?

Mr Kelleher: I did, Senator.

Senator Watt: Because I guess I'm wondering—

Senator CASH: Could you table the costs order for us, please?

Senator Watt: why there's a costs order in a matter that's settled.

Senator CASH: Well, perhaps, Deputy Commissioner, you could take us through this, please?

Mr McBurney: What I might just ask the deputy commissioner to do is step you through the fact that there was an appeal that this was the subject of. The costs order was made at the initial hearing before Justice Snaden. The CFMMEU filed an appeal. I'll just have Mr Kelleher take you through that and explain what the process was for us to seek—

Senator CASH: The normal course of events, the recovery of costs.

Mr McBurney: Yes.

Senator Watt: But hang on. What Mr McBurney has just said is that—remember, this is the case about the ABCC suing or prosecuting, whatever is the correct word, Lendlease over workers displaying a flag. The ABCC won that case at first instance. The union appealed that case, and the matter was then settled. So it would be ordinary practice in litigation of that kind for the parties to agree, as part of a settlement of an appeal, that whatever orders had been issued by the lower court would not be pursued. So, so far, what I'm hearing is that that's what occurred, but I'm happy to be corrected if I'm wrong.

Mr McBurney: Mr Kelleher can take you through the sequence of events.

Senator CASH: Thank you very much, Commissioner.

Mr Kelleher: Thanks, Senator; I was just about to get to the time line. It helps, I think, to step back to the start. On 6 April 2022 the CFMMEU filed an appeal challenging Justice Snaden's findings that were made in the ABCC's favour regarding the construction of section 13(2)(j) of the code and its constitutional validity and made a costs order, which I have recited, on 31 March 2022.

That matter was then listed for hearing before a full court of the Federal Court on 18 to 19 August 2022. As a result of amendments to the building code which took effect on 26 July this year, section 13(2)(j) of the code became no longer operative. Accordingly, the August hearing dates were vacated by consent between the parties whilst the parties sought to determine the terms of settlement.

As I alluded to, pursuant to the Commonwealth's Legal Services Directions, certain litigation that's identified as significant under the directions is not to be settled without the agreement of the Attorney-General, and this matter was identified as significant because the CFMMEU raised an argument regarding the constitutional validity of that particular provision of the building code, which meant that the matter could raise a significant precedent for the Commonwealth or other Commonwealth agencies, either on a point of law or because of its potential significance for the Commonwealth or other Commonwealth agencies under section 3.1(d) of the Legal Services Directions. On 5 August 2022, a revised significant issue settlement request was sent to the Office of Legal Services Coordination, which is a part of the Attorney-General's Department.

Senator CASH: So you sent that?

Mr Kelleher: That was provided to the OLSC, yes. The request there sought the resolution of the costs, the subject of the 31 March order, by having the CFMMEU pay costs of up to \$150,000 on 9 September this year. The agency was advised by OLSC that the Attorney-General had considered the ABCC's request and would approve the ABCC settling the appeal that I mentioned on the following terms: that (1) the appeal proceedings be discontinued; (2) there be no order as to costs in the appeal proceedings; and (3) the ABCC, underlined, does not, end underline, enforce the Federal Court costs order dated 31 March 2022.

Senator CASH: So the Attorney-General of Australia gave you a direction that you were not to enforce a costs order that had been made in the favour of the ABCC in litigation that was found in your favour to the tune of \$509,442?

Senator Watt: I don't think that's a correct way to characterise it, Senator Cash.

Senator CASH: We are now clearly running a protection racket for the Attorney-General on this—

Senator Watt: No, no.

Senator CASH: The Attorney-General refused to sign off on the ABCC pursuing costs from the CFMMEU.

Senator Watt: No. Here's what happened. Let's remember—

Senator CASH: Mr Kelleher has just told me what's happened.

Senator Watt: This case concerned the ABCC's attempts to use the building code that was enacted by you or your government to ban workers from displaying Eureka flags on worksites. The infamous case where Lendlease was prosecuted—

Mr McBurney: Sorry, that's not true.

Senator Watt: Okay, well, feel free to rephrase it.

Senator CASH: Mr McBurney, I will give you the opportunity.

Senator Watt: This was litigation—

Senator CASH: Are you reading out the minister's talking points?

Senator Watt: No.

Senator CASH: Has the minister's office provided you this?

Senator Watt: No, this was litigation—

Senator CASH: Has the minister's office just provided you, Minister Watt—

CHAIR: Excuse me. Can we just stop for a moment. The question's been asked. Minister Watt is responding to it. If there's a follow-up question, obviously, you're more than welcome to go ahead, Senator.

Senator Watt: You've had a fair go, Senator Cash. I'd like to put some facts on the table.

Senator CASH: I was just asking: has the minister's office provided you with this?

CHAIR: Let's not start again. Minister Watt can answer the question, and then there'll be a follow-up question, I'm sure.

Senator Watt: This case related to the building code that was enacted by you and your government, and it involved a case involving a prosecution, litigation—whatever is the correct word—relating to workers displaying Eureka flags on worksites. It's well understood that our government thought that was a gross misuse of taxpayers' money to undertake that litigation in the first place. When the change of government occurred, the case was on appeal by the union to the full court of the Federal Court. At first instance, a single judge of the Federal Court had ruled in favour of the ABCC and ordered the union to pay a percentage of the ABCC's legal costs before that judge.

We were elected. As an interim measure on the way to abolishing the ABCC, Minister Burke stripped the ABCC of a number of powers by repealing large parts of the building code, including the provision the ABCC used to try and ban the Eureka flag or to undertake this litigation. The rollback of the code rendered the appeal to the full court of the Federal Court moot, and under the Legal Services Directions 2017, Commonwealth agencies such as the ABCC are required not to waste taxpayer money or resources on unnecessary litigation. The building code was being rolled back. It was under the building code that this litigation was undertaken. The case was moot. Our view was that it was a gross waste of taxpayers' money for this litigation to occur in the first place, let alone to be strung out in appeals. A settlement was arranged and, as I said earlier, it is entirely ordinary that when an appeal is settled, costs ordered at first instance are not enforced as part a global settlement. That's what's happened here.

Senator CASH: In relation to the talking points you're referring to, who provided you with them? Was it the Attorney-General's office or Minister Burke's office?

Senator Watt: Everything I have said to you today—

Senator CASH: I'm asking in relation to what you just put out, Minister Watt.

Senator Watt: Everything I've said today, including information that I've provided tonight, is informed by advice I've been given by the minister's office because I'm here representing the minister. There's no conspiracy that I'm here as the minister representing the minister for IR, conveying information from the minister and the minister's office. Again, I've seen you do that on multiple occasions at estimates, Senator Cash, and that's what I'm doing here. No conspiracy.

Senator CASH: Can I confirm that the Attorney-General refused to sign off on the ABCC pursuing costs from the CFMMEU, effectively saving this union \$509,000?

Senator Watt: That's not right. That's your characterisation of that. That is not right. There was a settlement.

Senator CASH: Mr McBurney, given you've now heard—and I know you've heard this many a time—the Albanese government's interpretation of the Lendlease case, can you please advise what actually occurred in that case and in relation to the law as it stood?

Mr McBurney: Yes. This is just a point of clarification on what this litigation was about. Section 13(2)(j) of the Building Code regulates the application of building association flags, logos and indicia to employer property. On 29 November 2019 an ABCC inspector issued a compliance notice, pursuant to section 99 of our act—the Building and Construction Industry (Improving Productivity) Act—to Lendlease building contractors. We did not prosecute Lendlease building contractors. We cannot prosecute any company under the Building Code.

Senator CASH: I don't understand. Why are you accused of prosecuting Lendlease?

Mr McBurney: I think that's the colloquial term that's being used but it's a misunderstanding of how this matter got to court. We did not bring this matter to court.

Senator CASH: Sorry, you didn't bring the matter? Now I'm getting even more confused because according—Well, Senator Watt, you just said they prosecuted Lendlease. If you didn't bring it to court, how did it occur?

Senator Watt: Are you proud of the fact that your government, through the ABCC, spent God knows how many hundreds of thousands of dollars on taking action over a flag?

Senator CASH: Minister Watt, if I was sitting in your position and had just knocked back the taxpayer not being able to recoup over half a million dollars because of a protection racket with the CFMMEU, you would be ripping strips off me. This is an absolute disgrace. The Attorney-General of Australia, who on one hand is bringing in a national corruption commission, is actually himself saying to the ABCC, 'Do not go after a costs order made in their favour in relation to the behaviour of the CFMMEU.'

Senator Watt: This is about flags on a worksite, and your government thought it was okay for God knows how much taxpayers' money to be spent in litigation over flags being put on a worksite. That's how much your government had lost touch with reality.

Senator CASH: As the commissioner was stating, that is not the correct interpretation of the case—

Senator Watt: It was a compliance notice about flags.

Senator CASH: and Commissioner, I will now allow you the opportunity to correct the record in relation to the case itself. I do apologise. He was saying the case was not brought by the ABCC.

Mr McBurney: If I could just place on the record the correct context in which the case was brought. I said a compliance notice was issued. Lendlease exercised their legal right to challenge that compliance notice and made an application to the Federal Court under section 100 of our act seeking a review of the compliance notice. We were the respondent to that application. The CFMMEU sought to intervene in that proceeding. I opposed that intervention and the court permitted the intervention. That's one reason why I sought the Commonwealth legal costs to be reimbursed in respect of that.

Senator CASH: Can I just take a step back. The CFMMEU applied to intervene and you opposed the intervention?

Mr McBurney: I opposed the intervention. The case was originally between Lendlease, as the applicant, and myself, as the respondent.

Senator CASH: Oh, you were the respondent to the case?

Mr McBurney: I was the respondent to the case—or my inspector was the respondent to the case—

Senator CASH: Right.

Mr McBurney: because he'd issued the compliance notice. And the CFMMEU sought to intervene to run a constitutional argument, which is their right. They ran that argument and they failed in that argument. We won the primary case against Lendlease, and we won the constitutional argument against the CFMMEU, and we sought a costs order against the CFMMEU. Justice Naden made the costs order. The costs order was made in favour of the Commonwealth.

I should point out that there were two respondents in this matter. It was the individual inspector who'd issued the compliance notice and me as ABCC commissioner. We were the respondents to the hearing at first instance, and we did not bring the appeal; we were the respondents to the appeal. Mr Kelleher has given evidence to the committee about the disposition of this matter ultimately on appeal. I just want to make clear that the position I put was that there was no utility in this appeal proceeding. That was agreed by all parties. And the appropriate disposition of the appeal was that it be dismissed with no order as to costs in the appeal—

Senator CASH: In the appeal.

Mr McBurney: On the question of costs made at first instance, there were significant costs incurred by the Commonwealth. There'd been an order for costs, and the submission put to the Attorney-General was that there ought to be a reimbursement of those costs in the amount of \$150,000. We provided the legal advice of senior counsel, setting out his advice on the matter. But ultimately it is for the Attorney-General to sign off on settlements, so I am bound by his decision on the settlement. Mr Kelleher has explained to you what that decision and what that direction was, and we acted in accordance with that direction and settled the matter with no order as to costs on the appeal and an undertaking that we not pursue costs that were made by Justice Naden in favour of me and the inspector—that is, the ABCC's senior—

Senator CASH: So, effectively—

CHAIR: Senator Cash, just be mindful that I'm going to rotate it in a few minutes, so if you want to continue on this—

Senator CASH: Finish up on this; yes. So, effectively the taxpayer is now \$509,000 worse off—

Senator Watt: Because of some flags on a worksite—

Senator CASH: and the CFMMEU is effectively \$509,000 better off because you were unable to pursue the costs as a result of a direction from the Attorney-General of Australia.

Senator Watt: No-one is better off here. Everyone is a loser, because of the ridiculous building code that prohibited people putting flags on worksites. No-one's better off.

Senator CASH: Minister Watt, this is a very, very serious matter.

Senator Watt: I know.

Senator CASH: The Attorney-General of Australia—

Senator Watt: What's a serious matter is—

Senator CASH: has given a direction to the Australian Building and Construction Commission not to follow up a costs order—

CHAIR: Senator Cash—

Senator Watt: What's a serious matter is that hundreds of thousands of dollars have been spent over flags on a worksite.

Senator CASH: made in its favour—

CHAIR: Senator Cash, Senator Watt was completing his answer. I'm very happy for you to have a couple more minutes before we rotate. Minister Watt?

Senator Watt: I was just trying to say, Chair—thank you—that what is a serious matter is that, because of the former government's ideological obsessions over flags being displayed on worksites, taxpayers have funded hundreds of thousands of dollars of litigation. That is a disgrace, and that sort of nonsense is not going to go on.

Senator CASH: Commissioner McBurney or Deputy Commissioner Kelleher: in relation to the allegation that flags on worksites is a serious matter, can you explain why flags are not allowed on worksites and what the implication of a flag being flown is?

Senator Watt: To be fair to the officials, I think you're asking them to justify your government's policy—

Senator CASH: No I'm not. I'm asking them for the explanation as to the law.

Senator Watt: The building code was enacted by your government, so you are responsible for the decision to outlaw flags on worksites.

Senator CASH: I'm asking Mr McBurney, in the context of the case.

Senator Watt: Mr McBurney and his team—

Senator CASH: Minister Watt, you are running a protection racket now, not just for the CFMMEU but clearly for the Attorney-General of Australia.

Senator Watt: No, no, no, no, no. Mr McBurney and his team do their job, which is to enforce laws that your government passed. You and your former government are entirely responsible for the law that tried to prohibit flags on work sites. If you think that's justifiable, you should defend that. You shouldn't put it on public servants to defend your government's laws. They enforce the laws.

Senator CASH: I am asking the commissioner to explain the legal basis for the case, and he is able to do that—

Senator Watt: Well, the legal basis for the case was that you enacted this law.

Senator CASH: Minister Watt, you are running a protection racket for the Attorney-General—

Senator Watt: No, I'm not.

Senator CASH: and the CFMMEU, to the tune of—

Senator Watt: You're trying to get public servants to justify your laws.

Senator CASH: half a million dollars.

Senator Watt: No, no. Earlier on—

Senator CASH: That is an absolute disgrace. There was a cost order that was made in favour of the ABCC, and the Attorney-General of Australia has directed them not to pursue it.

Senator Watt: No. The litigation was settled—

Senator CASH: You can spin it anyway you like, Minister Watt.

Senator Watt: Well, that's the truth.

Senator CASH: It doesn't actually cut it that there is \$509,000 of taxpayers' money—

CHAIR: As the chair, if we're just having a point of order on ourselves, or the hearing, or whatever we want to call it, it's now time to rotate and give other people an opportunity. Obviously if people want to follow the same

line of questions they are more than welcome to. It is their prerogative. I want to go to another serious matter that the ABCC has been involved in. We've heard evidence about flags on building sites and substantial amounts of money that have been spent. I note that some people have said how egregious that is, but I want to go to another matter which I suspect is seen by some as being egregious as well. That is 'teagate'. In 2018 the Federal Court blasted the ABCC for taking Federal Court action against two CFMMEU officials for the egregious crime of 'having a cup of tea'. Justice North said that the ABCC needed to be 'publicly exposed' for wasting taxpayer money on bringing that action. Justice North went on to describe the ABCC as 'morally inappropriate' for bringing a 'minuscule, insignificant affair' to trial. Can you remind me how much the ABCC spent prosecuting two CFMMEU officials for having a cup of tea?

Mr Kelleher: I'll take that on notice.

CHAIR: You've got the figures on flags. You haven't got the figures on cups of tea?

Mr McBurney: This matter arose prior to my commencement as commissioner, and this matter arose prior to Mr Kelleher's commencement as deputy commissioner. No-one here was involved in the case.

CHAIR: You're not seriously saying to this Senate inquiry that, because it was prior to your being here and Mr Kelleher's being here, there is not the capacity to turn around and answer that question? Is there somebody in the room who can answer that question?

Mr McBurney: We can answer questions. We've come prepared to answer questions about current matters.

CHAIR: Only on the period that you've been there?

Mr McBurney: No, no. We will answer the question on notice. We will provide that. I'm just providing context for this. Questions were answered about this case back at the time by the former commissioner and by the predecessor to Deputy Commissioner Kelleher. It's only fair that he be permitted to see the answers given by his predecessor to be able to provide you with an accurate answer to the question you're asking.

Mr Kelleher: I think it's also worth noting that this is one of the oldest cases in my file here. The full court decision was from early 2019. Last financial year, the agency succeeded in 100 per cent of its litigation. This is not a reflection of the agency's litigation success rate—

CHAIR: But this is one you don't know about?

Mr Kelleher: which, without being boastful, I think, for any regulator or common litigant, is remarkable in the litigious environment in which this regulator operates.

CHAIR: So, when it comes to cups of tea and suing union officials, that's one that you can't remember?

Mr Kelleher: Senator, like I said, the case was—

CHAIR: No, no. I'm just asking. That's not one you can remember the facts on at this point?

Mr Kelleher: Well, it was a case from a very long time ago. If you have the case in front of you—

CHAIR: It is from 2019, three years ago.

Mr Kelleher: Well, considering the number of cases that have been filed since then, it's a very long time ago, and, as the commissioner indicated, it predated both his and my time.

CHAIR: The question comes to the history of how the ABCC has been operating in this space and the culture that exists within the ABCC.

Mr Kelleher: I entirely refute that.

Senator SHELDON: The question goes to, certainly the most senior managers in the ABCC, I would have thought, would have a clear view about what went wrong with that case; it appears that you don't. But, certainly, Justice North has a very clear view: morally inappropriate, publicly exposed for wasting taxpayer money, a minuscule and insignificant affair, and it was over a cup of tea. It sounds like tea-gate to me.

Mr McBurney: Senator, I'm happy to answer any questions you have about that case on notice. The case has been published; the decision is there for all to read. We do two things; we act as a model litigant, and, secondly, we put cases before the court that we think have reasonable prospects. Mr Kelleher alluded to our record. If I'd been successful in eight out of 88 cases, I'd clearly have a case to answer. We've been successful in 80 out of 88. The CFMMEU has been unsuccessful in 80 out of 88 cases. Between ourselves and the agency, I'd prefer to be on our side of the score card.

CHAIR: I understand that it's a very combative approach that the agency has taken. I understand how politicised it is. I understand that you don't look at what goes wrong in the agency, and you don't look at culture issues within the agency. That is why you cannot give me answers on this teagate.

Senator PAYMAN: Mr McBurney, do you remember the toilet case?

Mr McBurney: I don't know of any case called the toilet case, Senator.

Senator PAYMAN: While the CFMMEU was out supporting victims of wage theft and sham contracting arrangements—the job that you were supposed to do, clearly—can you remind us how much money the ABCC spent on external and internal fees prosecuting the CFMMEU over a dispute about a woman's toilet?

Mr McBurney: I'll ask Deputy Commissioner Kelleher to address that.

Mr Kelleher: Senator, could you be more specific, please, in relation to the case?

Senator Watt: There's only one case that involved legal action over a woman's toilet.

CHAIR: I might be able to assist Mr Kelleher. I know that you don't look at cases where there are cultural problems; this is one of those with cultural problems. You're not seriously saying to this Senate estimates meeting that you do not know the matter that the senator is referring to? Or are you just playing games?

Mr Kelleher: No, I'm not playing games.

CHAIR: You seem to be, to me.

Mr Kelleher: Are you referring to the case that is colloquially known as the Bay Street case?

Senator PAYMAN: It was in 2021.

Mr Kelleher: Do you have a case citation?

Senator PAYMAN: I do not have a case citation.

Senator Watt: Have there been many cases involving women's toilet blocks on a worksite?

Mr Kelleher: I'm aware of one, but, in order to give informed evidence, I'd like to know what the particular case is.

Senator GROGAN: I wonder if it was something to do with a piece of paper that you took from your folder and handed to Mr McBurney?

Mr Kelleher: No, it's not anything to do with that, Senator.

Senator GROGAN: My understanding is the case was a stop work, where there were females on a construction site who were needing to use the male bathroom, and a handful of workers decided to stop work on the basis that there was no female toilet. Does that help you out there?

Mr Kelleher: On the basis of that, I'll assume that it's the case I mentioned, the Bay Street case, and I note recent public commentary and discourse has been quite regrettable, to the effect that the agency took on a case about female workers, and this is the premise of the question that's been put to me—

CHAIR: Mr Kelleher, if it gives you any assistance, you have, after this amount of minutes, worked out the one toilet case that involved female workers that you know has been a matter of controversy for a very long time. It sounds like you've hit the nail on the head, finally, after all this time.

Mr Kelleher: Thank you, Senator. As I was saying, the public commentary around this has been incredibly inaccurate and misleading. The case was not brought in respect of the inability of workers on site to have a female toilet. The case in fact went to the High Court of Australia, on a special leave application. If you look at the transcript of the High Court special leave hearing, you will not find one reference to a female toilet in that argument. The case concerned a particular interpretation of a provision within the Fair Work Act and a stoppage on a site that CFMMEU officials organised, despite the fact that the head contractor had agreed to organise separate amenities for the female worker and, additionally, prior to that head contractor agreeing to organise those separate entities, arrangements have been made, in consultation with WorkSafe and the female worker that would allow her to use the existing amenities.

The ABCC stands by its record very strongly of protecting female workers on construction sites, as indicated by the very recent cases that have been filed against the CFMMEU and its officials for conduct—quite egregious conduct—that has been alleged against those female workers. So the suggestion that a case was taken in respect of an inadequate supply or otherwise of female toilets could not be more inaccurate.

Senator GROGAN: If there are female workers there and there is no female toilet, which I think you have acknowledged yourself, then surely that is an issue.

Mr Kelleher: As I said, the CFMMEU officials in that case organised the stoppage despite the fact that the head contractor had agreed to organise separate amenities.

Senator GROGAN: But had not. Anyway, moving on. That's obviously a point we are going to disagree on. There was not a female toilet there, regardless of what had been put in place in terms of arrangements, and a

series of workers stood up for their colleague. Can you tell me what that actually cost? What did the ABCC spend on that case?

Mr Kelleher: I'll take that on notice, thank you.

Senator GROGAN: I just want to clarify, because my notes—and obviously I wasn't able to sight the case, so I would like a point of clarity about whether this is right—say the ABCC spent \$432,496 on fees to pursue this case of a toilet; is that correct?

Mr Kelleher: As I said, I will take that on notice, thank you.

Senator Watt: Senator Grogan, I can probably help you out.

Senator GROGAN: That would be great. Thank you, Minister.

Senator Watt: I'm aware of a news report in the *Sydney Morning Herald* from August 2021, so just over 12 months ago, which actually said that the then Attorney-General, Senator Cash, disclosed that the ABCC had spent \$432,000 on external legal fees over this matter. I'm not sure if that helps Mr Kelleher.

Mr McBurney: We will get the final cost figure for you on notice.

Senator GROGAN: Thank you. I suppose you're not aware—there was a final decision in the High Court.

Mr McBurney: Pardon?

Senator GROGAN: A final outcome of that case in the High Court—

Mr McBurney: It was a special leave application.

Senator GROGAN: And the outcome?

Mr McBurney: The special leave was not allowed; it was refused.

Senator GROGAN: Thank you. I have to say that I'm finding this a little difficult. I'm pretty certain your average weeks don't end up with these kinds of stand-out cases, yet your understanding or knowledge of them is very limited.

Mr McBurney: We can answer any questions you like on the Bay Street case. Mr Kelleher has just taken you through the facts of it. If you want clarity of any of our cases, successful or unsuccessful, we can provide it to you, particularly for the cases that have occurred on our watch.

Mr Kelleher: Since the agency was re-established, 89 cases have been filed and there have been 106 successful outcomes for the agency in that time.

Senator GROGAN: Sorry, can you speak up a little bit?

Mr Kelleher: I said that a large number of cases have been filed since the agency was re-established—89. There have been 106 successful outcomes. In the last financial year, 21 out of 21 cases were successful for the agency. In decided cases, 26 in a row have succeeded against the CFMMEU. This is a very isolated number of cases that have been put to me here. I can go through the stats, if you wish. There are 1,688 contraventions that have been found against the CFMMEU—

CHAIR: Mr Kelleher, you're welcome to put those on notice. I don't think that was the question asked. You were asked about specific cases, but you seem to have an inability to answer some of the details of those cases—

Mr Kelleher: I consider that I answered them.

Mr McBurney: Mr Kelleher has answered everything other than the final legal costs figure, and we'll provide that to you on notice.

Senator GROGAN: Okay. I'm just trying, because I don't know—this is very genuine. I've seen various things. Did you lose that case in the Federal Court? You said it was thrown out—the one that is or isn't about a toilet?

Mr Kelleher: In fact, the agency succeeded at the trial before Justice Bromberg. It was overturned on appeal.

Senator GROGAN: Overturned. Okay. So in the beginning, you won the case, and then there was an appeal, and then you lost that case. Is that correct?

Mr McBurney: That's correct. Justice Bromberg found in our favour on the facts—

Mr Kelleher: And the law as it stood at the time.

Mr McBurney: and the law as it stood at the time, and the full court overturned that decision on legal grounds.

Senator GROGAN: It's a little misleading for you to say you won that case without then providing that point of clarification that under appeal that you did not.

Mr Kelleher: Senator, I said—to my recollection; if I didn't, I stand corrected—that we succeeded before Justice Bromberg at trial and it was overturned by the full court.

Mr McBurney: And Mr Kelleher said that the High Court dismissed the application for special leave.

Senator GROGAN: It's taken a long time to get to this, hasn't it? It seems quite remarkable to me. Thank you. I'll leave that there.

Senator LIDDLE: Thank you for outlining the 106 successful outcomes. Some of the questions I'm going to ask you relate to South Australia, and Senator Grogan might even be able to help with some of the detail in these. The dates that I'm talking about are much more current dates than those going back quite a few years, so I'm hoping you can provide the detail. In August the CFMMEU received a penalty of \$428,250 for breaches of workplace laws at the Adelaide Airport. Can you tell us a little bit about what that related to. I understand it was about site rules and safety directions.

Mr McBurney: I'll ask Mr Kelleher to answer that.

Mr Kelleher: Adelaide Airport was the case that you referred to, wasn't it, Senator?

Senator LIDDLE: That's right.

Mr Kelleher: Here we go. Sorry, Senator, I have it here.

Senator LIDDLE: I've got a few here, so I can keep going through.

Mr Kelleher: No, I do have it here. The decision was handed down by the Federal Court on 13 August 2021, penalising the CFMMEU and six officials \$428,250 for making misrepresentations about the requirement to show entry permits, refusing to follow directions and acting in an improper manner during the \$165 million redevelopment of terminal 1 at Adelaide Airport. In that case, the court found that while on site, two officials, Desmond Savage and Te Aranui Albert, repeatedly abused a construction employee, with one or both saying, 'Eff you,' 'I'm not dealing with you,' 'You're an effing waste of space,' 'He's a piece of shit,' 'You're an effing idiot'—

Senator LIDDLE: I've probably heard enough.

Mr Kelleher: It goes on.

Senator LIDDLE: On 21 December ABCC penalised CFMMEU for the Adelaide construction project at Marion City Council. There's also another one: ABCC proceedings related to the Yatala Prison redevelopment. Could you tell me the outcome of that particular one, or both of those?

Mr Kelleher: Yes. I'll just pull that up.

Senator LIDDLE: Just to save time, because there are a few here, there's also the Norwood mixed development project and an incident in December 2021. In March 2022, the ABCC determined action that there was an alleged contravention of several sections of the Fair Work Act. Can you tell us a bit about that? I understand that might actually be a case that's underway.

Mr Kelleher: My apologies, the Yatala matter that you referred to is actually an ongoing matter. It's not a finalised matter, so they are allegations. What's alleged there is that CFMMEU officials in the Yatala matter abused site staff and ignored health and safety directions whilst exercising rights of entry at the Yatala Labour Prison. The ABCC alleges that on 30 August 2021 Ms Alexandria Russell, Mr Wyatt Raymount and Mr Travis Brook conducted a site walk. When Ms Russell and Mr Raymount became abusive towards the health, safety and environment manager, saying words to the effect of—if you wish me to go through them, I can—

Senator O'SULLIVAN: Without using expletives.

Mr Kelleher: Without using expletives, it's alleged that Mr Raymount said to the representative: 'You are F-ing useless at your job. I can't believe you call yourself a professional. You should be ashamed.' Ms Russell allegedly said: "Completely F-ing useless. You're going to kill someone." Ms Russell then said: 'Seriously? Aren't you ashamed? It's amazing how useless you. Mr Raymount allegedly said, 'How can you get up every morning and do a shit job? Aren't you ashamed?' The following day, it's alleged that Mr Raymount and Mr Brook disrupted a concrete pour by raising a safety concern, which the site engineer rectified immediately. Mr Brook then allegedly proceeded to stand close to the site engineer, raising his arms and allegedly stating aggressively: 'I hope to God that something goes drastically wrong and gets people seriously hurt. I really do. Then we can take the contractor to the cleaners in court, and you might learn your lesson.' In relation to the Norwood case that you referred to, Senator, that is a case, again, that's on—

Mr McBurney: I can help, Mr Kelleher. The December 2021 decision you asked about, Senator, is known as the Morphettville Park Sports Club matter. It was noncompliance with right-of-entry laws brought against the CFMMEU and its former official Michael Jackson. I won't go into the language used on that matter, but it was

improper—behaving in an improper manner, which is a breach of the Fair Work Act. The court found the CFMMEU and Mr Jackson liable. Mr Jackson was fined \$2,500 and the union was fined \$27,500. Total penalties in that matter were \$30,000. The court noted that neither Mr Jackson nor the union have made any expression of contrition or regret, and the CFMMEU has not provided any evidence of action taken by it with the view to ensuring that there will not be a repetition of conduct of this kind again.

Senator LIDDLE: In some of those examples, there was obviously a court imposed penalty. Have all of those penalties been collected?

Mr McBurney: With the ones we just referred to, those penalties have been paid in full. I should say that, to date, all penalties imposed by the courts—as opposed to cost orders—against the CFMMEU matters brought by my agency have been paid in full, other than those that are subject to appeal.

Senator LIDDLE: What happens to those ones that are pending? What have you been advised? What do we know about those ones that are pending?

Mr McBurney: I retain the responsibility for the cases currently. There are 38 cases currently before the court that my agency is responsible for. I'm responsible for bills being introduced, and if that bill is passed into law, it makes provision for the cases to be transferred to the Fair Work Ombudsman on the date of royal ascent. Ms Parker will then have responsibility for those cases and step into my shoes. It's important to note that the legislation does preserve those cases and ensures that those cases can be carried forward.

Senator CASH: You mentioned the transfer of the functional role and powers—depending on how you want to refer to it—of the ABCC to the Fair Work Ombudsman. Is there a difference in the powers that you currently exercise and what the Fair Work Ombudsman will be able to exercise on the final abolition of the ABCC?

Mr McBurney: Yes, there is. My powers are derived from the Building and Construction Industry (Improving Productivity) Act, and I have responsibility to investigate and prosecute matters under both that act and the Fair Work Act. The Fair Work Ombudsman has powers under the Fair Work Act. Mr Kelleher will take you through the critical differences between the powers she currently has for Fair Work Act contraventions. I've got to be careful because we have not analysed the bill. We haven't been through that, so we can only address you on the differences between my powers to investigate Fair Work Act matters now and the powers she has to investigate Fair Work Act matters.

Senator CASH: Understood.

Mr Kelleher: There are, without being exhaustive, some key differences. Firstly, the examination powers. The Fair Work Ombudsman's examination powers under the Fair Work Act are limited to investigations involving only a set number of conduct matters: underpayments, unreasonable deductions of amounts to employees, unfair dismissal, bullying or sexual harassment, unlawful discrimination, contraventions of the National Employment Standards and coercion of an employee by an employer. As I said, that's not exhaustive. But, relevantly, the Fair Work Ombudsman cannot conduct examinations relating to a number of matters that the ABCC would typically investigate, such as right of entry matters, unlawful industrial action, adverse action where that conduct falls within particular items of section 340 of the Fair Work Act, or coercion of a building industry participant by another building industry participant. Examinations have been particularly important to the ABCC's work; 43 examinations have been conducted in 14 matters for which proceedings were commenced. Moving on from examination powers, another key difference is, of course, the maximum penalties under the BCIIIP Act—

Senator CASH: Can you take us through them?

Mr Kelleher: and the Fair Work Act. The available maximums that may be imposed on body corporates and individuals for contraventions of civil penalty provisions in the Building and Construction Industry (Improving Productivity) Act are significantly higher than the penalties for contraventions of relevant provisions in the Fair Work Act. By way of comparison, the maximum penalties under the Fair Work Act are \$66,600 for bodies corporate and \$13,320 for individuals per contravention. The maximum penalties under the BCIIIP Act, on the other hand, are \$222,000 for bodies corporate and \$44,400 for individuals per contravention. That is an important difference. The High Court, in *Australian Building and Construction Commissioner v Pattinson*, recently observed:

the CFMEU's continuing defiance ... indicates that it regards penalties previously imposed as 'an acceptable cost of doing business'.

A Federal Circuit and Family Court judge, when imposing the Fair Work Act maximum penalty in that case on the CFMMEU, said:

this penalty will still be insufficient to deter the [CFMEU] who will, as I remarked during the hearing, regard such a sum as 'chump change'.

Senator CASH: On that: Minister, given the comments of the High Court in relation to the imposition of penalties on the CFMMEU, and the fact that they say they do see them as doing business—and based on the evidence of the deputy commissioner of the \$220,000 fine versus the \$66,600 fine—does the government intend to increase the maximum fines under the Fair Work Act?

Senator Watt: I've just sought advice on whether the penalties or powers of the Fair Work Commission are being amended in any way by the bill. Once I get that information I'll let you know.

Senator CASH: Thank you very much.

Senator Watt: Can I say that, obviously, the policy rationale for this is that the government's view is that it is important that there be an independent umpire in relation to workplace conduct—that is what the Fair Work Ombudsman is—and that the same rules should apply to all workers in all industries. Equally, we need enforcement bodies that take proportionate action against unions and employers. I note that, as we currently stand for the ABCC's 39 cases, 36 of them, I'm told, involve matters against 56 trade union representatives. There are 25 employees in another matter, and there are only three employers before the courts in relation to matters brought by the ABCC. I think those figures tell the story. I'm not having a go at the individuals at the table; they're doing their job, which is to enforce a law that your government passed, but I think those figures show where the effort has been going, and it's very one-sided.

Senator CASH: Commissioner, can you remind me what the success rate of the ABCC was in terms of the litigation?

Senator Watt: I am very happy for that answer to be given. I think we've already been told it's a very high success rate.

Senator CASH: Yes, I just want it confirmed.

Senator Watt: I suspect that, if matters had been brought against employers who'd breached the law, they might have been pretty high success rates as well, but that, of course, was never the point of the ABCC. It was only ever about going after unions.

Senator CASH: That is a political comment and nothing more—

Senator Watt: Well, the facts tell the story, don't they.

Senator CASH: particularly given the currents of the High Court in Patterson. I recall that, earlier on today, when we had the secretary here, you were prepared to take on a suggestion by Senator Pocock that you would have a construction industry forum. Why would you have a construction industry forum to advise the government in relation to the construction industry if you didn't believe, as Senator Pocock believes, that there should be some form of specific watchdog?

Senator Watt: There are a range of fora that this government undertakes concerning workplace relations, some of which existed under your government and which we've retained, some of which are being created, but I think there is a far cry between a consultative forum which tries to bring employers, unions, and governments together and an enforcement body that was clearly directed only to go after unions by the government of the day.

Senator CASH: Can I confirm: were you ever directed by the government of the day to go after unions, Commissioner?

Mr McBurney: No.

Senator Watt: It was just a coincidence that 90 per cent of action was against unions?

Senator CASH: But you directed by the Attorney-General of Australia not to pursue a costs order in relation to the CFMMEU?

Senator Watt: That's not true.

Senator CASH: Is that correct? He refused to sign off on you actually—

Mr McBurney: Could I provide one point of clarification? I accept what the minister put save for one detail, and that is that the proportion of cases that we have taken against unions is commensurate with the proportion of cases we've taken against employers when you take the CFMMEU out of the equation.

Senator CASH: Thank you.

Mr McBurney: We've taken a handful of cases against employers and a handful of cases—fewer than five—against the AWU, the CEPU and the AMWU, who by and large abide by the rules that we regulate. There is only one building industry participant that is overrepresented in our statistics. I keep hearing this charge that we're anti-union. I just rely on what the Federal Court judges have said. It's one union. They don't want to comply with the law. They have made a business model of breaking the law. They don't respect the law. The law we're enforcing is

primarily, in 75 per cent of cases, the Fair Work Act, which applies to all Australians. It's not our act; it is the Fair Work Act, and the Fair Work Ombudsman will be charged with reporting.

There is one further critical difference to Mr Kelleher's answer about the difference between the powers I have and the powers Ms Parker would have? The critical difference is that the building code will be repealed by the bill. Once the building code is gone, there's no mandatory reporting of unlawful industrial action. There's no mandatory reporting of breaches of the code. There's no ability to recover payments under the security-of-payments laws. I just don't want Ms Parker to be lumbered with false expectations that she will be able to mirror the job we do, because she does not have that power.

Senator CASH: She actually can't. In relation to security of payments—I was directed to ask the questions in relation to security of payments here—what, then, is the fundamental difference in relation to the security-of-payments issue?

Mr McBurney: The security of payments is set up under my act by creating the security-of-payments working group. I want to acknowledge the outstanding work of the security-of-payments working group, which brings together all sides of industry, including the MBA, Adjudicate Today, the ACTU, the Subcontractors Alliance, HIA and NECA. They've been able to advise us how best to discharge our responsibility to assist subcontractors with recovering disputed or delayed payments.

Senator CASH: So it's all about assisting subcontractors with recovering disputed payments?

Mr McBurney: Yes.

Senator CASH: That is the money that's owed to a subcontractor by a contractor. That is the role of the security-of-payments working group.

Mr McBurney: Yes. That's been the primary role of my agency, advised by the security-of-payments working group. They provide us with advice on how best to discharge our role, and we have discharged the role for the last 2½ years and done it very successfully.

Senator CASH: When you say you've done it very successfully, on what do you base that?

Mr McBurney: The primary measure we do is recoveries.

Senator CASH: That is recoveries of outstanding amounts?

Mr McBurney: From the moment it's reported to us as being disputed or delayed—so it hasn't been paid—by the time we intervene and it's ultimately paid, it's been \$13,548,154 since we assumed that function. That's the figure just on the recoveries, unpaid amounts which are paid once we intervene. I will ask Ms Drennan to give me the figure on the total value of reports to the agency for security of payments.

Senator CASH: In terms of getting this information, when we discussed this previously with the department, the evidence was to the effect that security of payments basically sits at the state level. I put it to them that there would be a gap, which seemed to be disputed. In terms of the \$13 million that you have recovered on behalf of subcontractors who are owed money—and that is a good thing; well done. You should be out there recovering this money if they're owed it. How does the Fair Work Ombudsman go about discharging this function and recovering the moneys?

Mr McBurney: As I understand it, there is no proposal for the Fair Work Ombudsman to do anything in the security-of-payments space. It is to be left to state regulators.

Senator CASH: This \$13 million would not be able to be recovered?

Mr McBurney: It can't be recovered if you don't have the code sitting behind it. Why do head contractors and subcontractors pay the sub-subcontractors? It is because they don't want an exclusion sanction.

Senator CASH: That is because that is the ultimate penalty, if I recall. I may have signed some myself when I was the relevant minister. You are right. You exclude someone from being able to undertake the work. So all of that is gone. This does not incentivise the payment by head contractors if it's gone to subcontractors.

Mr McBurney: No. There is just one more observation I will make about it and why the code is so effective in the space. Subcontractors are reluctant to come forward and report matters to us or the state regulators. They don't want to lose future work. The mechanism under the building code was that head contractors had to report to us when they were late or disputed, so the subcontractors had that protection and we were able to act for them. Our experience is that they're not going to go to the state regulators. We were the ones who had the most impact in this space for them, and that's why the code was so effective in the security-of-payments space.

We assumed this responsibility in the 2019-20 year. In that year we had reports totalling \$214 million; in the 2020-21 year, \$419 million; and, in the most recent financial year, \$409 million. Total reports since 2019 amount to \$873 million reported to the agency.

Senator O'SULLIVAN: Can you explain the difference between that and the \$13 million?

Mr McBurney: The \$873 million is total reports of disputed or delayed payments. By the time the report comes to us, if it's a delayed payment, it's already been paid, so there's nothing outstanding for us to recover.

Senator O'SULLIVAN: Is there a bit of an incentive there because of the process that has been—

Mr McBurney: Yes. There are two things we have been able to do. First, we have been able to recover payments that are properly owing—that is, \$13.5 million—in late or non-payments for subcontractors. Second, cash flow is critical for subcontractors, so we want them to pay on time, so, by requiring the head contractors to report to us when it is delayed, we can take action under the code. Again, the Building Code is the ultimate sanction but it forces a better turnaround on payments and better compliance with payments.

Senator CASH: But that has gone?

Mr McBurney: Yes, that has gone.

Senator CASH: So the minister no longer has the ability to exclude someone?

Mr McBurney: The moment the code was amended, we lost the ability; we lost the stick to take against employers to compel them to pay.

Senator CASH: I note that you had provided commentary on, I think, a radio station. When did you find out that the minister's announcement in relation to the code?

Mr McBurney: It was when I got a text message to tune into *Insiders*.

Senator CASH: Who told you to tune in to *Insiders*?

Mr McBurney: A colleague sent texted me to say that the minister was announcing what he was doing about the code on *Insiders*.

Senator CASH: How did that make you feel, as the head of an agency, with all due respect?

Mr McBurney: It is fair to say that we knew the government's commitment—

Senator CASH: The intention, yes—no, that is fair enough.

Mr McBurney: to abolish the agency. It would have been preferable to be forewarned so that I could provide support to the 39 staff—

Senator CASH: How many?

Mr McBurney: the 39 staff who found out that day that they no longer a job.

Senator CASH: Could we explore that. That is actually right. Given the government obviously talks a big game on job security and transparency, you were not—despite the fact that I agree their election commitment was to abolish the ABCC, and they have made remarks about you over many years and some have been made tonight—given the courtesy of knowing that the minister was going to make an announcement in relation to the future of 39 employees on an ABC program?

Mr McBurney: That is correct.

Senator CASH: When you got the text message, what did you do?

Mr McBurney: I was at a kid's football match.

Senator CASH: You were at a kid's football match? Was it your kid?

Mr McBurney: Yes.

Senator CASH: I do recall.

Mr McBurney: I was at my son's football match. I think I might have rung Miss Drennan; I can't be sure. I watched *Insiders* that night to understand what had happened. We spoke that night. We agreed we would speak to all the affected staff immediately on Monday morning and we did that.

Senator CASH: What was the reaction of staff on the Monday morning, to find out that an announcement had been made in terms of their job security—or should I say lack of job security—by the minister on an ABC weekend program?

Mr McBurney: Look, I think Ms Drennan is better placed to answer that; they are all her staff. She is the manager of the Building Code.

Senator CASH: Thank you very much, and my apologies to your staff.

Ms Drennan: I found out the same way. I was texted as well to find out the code had been amended, so I immediately let my directors know, because obviously all their teams would be affected. Then, as Mr McBurney said, I had a meeting with all the staff on the Monday to tell them, obviously, that this would affect the work they are doing and that it is now time really to encourage them to start looking for alternative work.

Senator CASH: Did you mean in the Public Service outside?

Ms Drennan: Well, that is a matter for them, obviously, where they want to go, but that there wasn't going to be a transfer to somewhere else.

Senator CASH: Were they offered roles in the Public Service they could be absorbed into?

Ms Drennan: That wasn't what was going to happen.

Senator CASH: When you say that wasn't going to happen, I don't understand what that means.

Ms Drennan: What I mean is that—

CHAIR: Sorry, Ms Drennan, we're getting close to the break. You might have a follow-up question, I appreciate that, but the break is at quarter to.

Senator CASH: I'm happy to continue after the break. I do feel for 39 staff members who lost their jobs by announcement on an ABC television show.

Ms Drennan: I was going to say at that time, we obviously explained to them that they are public servants and have entitlements under the enterprise agreement, they are not going tomorrow, there is a consideration period, and that we would do all we could to support them. That is really all.

Senator CASH: That was it? That was all you could do?

Ms Drennan: Yes.

Senator Watt: Senator Cash, you are not seriously going to try and hold yourself up as somebody who has consulted workers in a decent manner, are you?

Senator CASH: I am not even going to justify that with a comment, because you're now in government. This is a government that was elected allegedly on the basis of integrity and transparency that talks about respect and job security, and the minister did not have the common courtesy—we're not asking for anything else, the common courtesy—to notify the head of the Australian Building and Construction Commission, that 39 staff were about to lose their jobs. I would have thought, Minister Watt, it wouldn't matter what colour you are; that is inappropriate behaviour.

CHAIR: If you both can stop for a moment. Minister Watt is answering the question and then we will come back. There will be time to rotate but we will come back to the line of questions that you are welcome to ask.

Senator CASH: Thank you.

Senator Watt: Senator Cash, we were elected having made a very clear commitment at least three years before the election that this agency would be abolished. I recognise that's a difficult thing for the people who work for this agency, but we made a clear commitment and we were elected to do so. Please don't try and pretend, with your record, that you have respect for workers and that you consult them seriously, because we all know that your record was that your idea of consultation was a police raid on union offices that was leaked to the media.

Senator CASH: Seriously, let him go. He needs to get it out. I'm actually surprised you held off for so long. I'll be honest with you—

Senator Watt: Well, that is a record.

Senator CASH: I thought this would start earlier today.

Senator Watt: I would be ashamed of that as well.

Senator CASH: You are now in government and common courtesy costs you nothing.

CHAIR: On that exchange, we'll go on our break. We will back at 10 o'clock so you will have a chance to ask questions. You will have the opportunity to ask-up questions. Thank you, Mr McBurney, you will be back here at 10 o'clock.

Mr McBurney: If I could just indulge you when we come back, I cut off Mr Kelleher earlier, so he needs to finish his answer that was in response to Senator Cash's question.

CHAIR: I think that may have been the senators at the table.

Senator CASH: That was my fault.

CHAIR: Thank you, Senator Cash. I was not going to specifically name you but I was just making the point that it was from this table.

Proceedings suspended from 21:47 to 21:59

Senator GROGAN: To go back for a moment to the case that I colloquially call the 'toilet case', the one that you colloquially call 'the Bay Street appeal', I did look up its appropriate reference. I don't think it would have helped you because it is the CFMMEU v the ABCC. I doubt that you would have located it in any manner. The other issue I wanted to go to was what we call the 'Eureka flag' case, and for your reference it is the Lendlease Building Contractors v the ABCC. Throughout the original case, can you outline the engagement you had with the government at that time regarding that case?

Mr McBurney: The government would have been informed of the commencement of the case at the time it was commenced, and they would have been informed of the outcome of the case when the decision was delivered.

Mr Kelleher: My recollection, as I've given in evidence earlier, is that it was the subject of reporting under a significant issue to the OLSC, so the government is informed as OLSC is part of the Attorney-General's Department.

Senator GROGAN: So the Attorney-General would have been informed throughout that process.

Mr McBurney: I think from the time the intervention occurred because that's the point at which it was deemed significant.

Mr Kelleher: We'll take on notice the exact time that it became a significant issue. It may have been prior to that when it was initially commenced. Then typically a significant issue would be added to if there's a development in it such as the intervention.

Mr McBurney: And the appeal.

Mr Kelleher: But the precise timing we can take on notice.

Senator GROGAN: What engagement did you have, Mr Kelleher?

Mr Kelleher: As I just indicated, it's the subject of reporting by way of a significant issue to the OLSC, which is under—

Senator GROGAN: But you would have undertaken that engagement.

Mr Kelleher: Yes, I would have been involved in it.

Senator GROGAN: Mr McBurney, would you have been engaged in any of those conversations or engagement with the relevant ministers?

Mr McBurney: I was kept informed by Mr Kelleher. He had carriage of the legal matter, and I would have been copied in to the notification to the Office of Legal Services Coordination. That was the extent of it. I had no specific briefings with everyone from government about that particular case.

Senator GROGAN: But, Mr Kelleher, you would have had briefings with various people within the government to keep them apprised of how things were moving ahead.

Mr Kelleher: Briefings in the sense of this particular report that goes to the OLSC, which is a document.

Senator GROGAN: As that case went to appeal, what engagement did you have at that point in time and with whom?

Mr Kelleher: It's the same. If was the CFMMEU's appeal through our solicitors, the Australian Government Solicitor, on that matter. We would have been served with the notice of appeal. We, as you're aware, defended or responded to the appeal, and subsequently we updated, as we're required to do, our significant issues report to the OLSC.

Mr McBurney: That update would have been provided to the previous government and, after the election, any updates to the significant matters report still go to the OLSC and are made available for the current Attorney-General.

Senator GROGAN: Would you have briefed the previous or the current Attorney-General? I'm trying to get the time line of that appeal, when the activity and the case itself became public, in relation to 21 May.

Mr Kelleher: I'm sorry, I'm not following you.

Senator GROGAN: The briefing process throughout that appeal.

Mr Kelleher: A notice of appeal was filed by the CFMMEU on 6 April 2022, a notice of constitutional matter under section 78B of the Judiciary Act was filed by the CFMMEU on 11 April 2022 and the ABCC filed a notice of contention in the appeal on 27 April 2022.

Senator GROGAN: Right. So, all of that occurred—

Mr McBurney: April 2022.

Senator GROGAN: And the decision came down on—

Mr McBurney: There was no appeal decision, because the appeal was discontinued. The actual Federal Court judgement was delivered on 11 March 2022. The hearing of it was from 3 to 9 December 2020.

Senator GROGAN: Lovely. Okay. So, then the government changed and the circumstances changed, and the decisions about what was going to occur next changed, as we've been through previously.

Mr McBurney: Yes.

Senator GROGAN: Throughout that time, were either you—Mr Kelleher or Mr McBurney—or anyone else within the ABCC engaged in conversations or briefings with any member of the government of the day, which was post the election, in terms of engaging with them? Obviously your view had been different previously. Had you had any conversations or briefings with the incoming government?

Mr McBurney: I had no conversations with the incoming government. The briefings continued. We're required to brief OLSC, and we continued to brief OLSC. My major dealing with the government was my referral to the Attorney-General through the OLSC in relation to the matter we gave evidence on earlier—that is, the question of the ultimate disposition of the matter.

Senator GROGAN: Thank you. A lot of the matters we've had today cause me to ask the question: since that point, have you had any briefings, be they formal or informal, or conversations, correspondence or emails with any member of the Liberal or National party?

Mr McBurney: Since the election?

Senator GROGAN: Yes.

Mr McBurney: I've had no correspondence, emails, engagement or anything with the former government since the election.

Senator GROGAN: Phone call, emoji exchanges—nothing.

Mr McBurney: No text messages, WhatsApp—nothing.

Senator GROGAN: Okay. Mr Kelleher?

Mr Kelleher: Same here.

Senator GROGAN: No engagement whatsoever?

Mr Kelleher: No.

Senator GROGAN: Anyone else from the ABCC—any engagement whatsoever?

Mr McBurney: None that I'm aware of, but all my senior executive team are here. I can get an answer from them if you'd like.

Senator GROGAN: That'd be lovely. Thank you.

Mr McBurney: No engagement.

Senator GROGAN: Great. Thank you very much.

Senator PAYMAN: Mr McBurney, I'd like to investigate some things here. How many meetings did you personally have with the MBA or any representative of the MBA in the six months prior to the federal election?

Mr McBurney: In the six months prior to the election I had two meetings with the representatives of the national office of the Master Builders Association. They were on 17 February 2022 and 16 June 2022. On 10 March 2022 I attended the Security of Payments Working Group meeting. There is an MBA representative who was appointed to that working group by the minister. So, that's a further meeting. That was with all the members of the working group—the ACTU, NECA, Adjudicate Today, Subcontractors Alliance and HIA; apologies if I've left anyone out.

I had a meeting the with National Industrial Relations Advisory Committee—when I say 'meeting', it was a virtual attendance to provide a presentation—on 24 March 2022 that had been requested by the MBA. I was invited to attend an International Women's Day event on 8 March 2022 which was hosted by Rebecca Casson of the Victorian MBA. And I attended a meeting with the workplace relations manager of MBA Queensland on 14 April 2022.

In relation to those meetings, section 16(1) of my act imposes statutory obligations on me, including to provide assistance and advice to building industry participants regarding their rights and obligations under the act, the

designated building laws and the building code; and to disseminate information about the act, the designated building laws and the building code, as well as any other matters affecting building industry participants. My door is open to all building industry participants. Many choose to actively engage with the ABCC—some don't. My approach to stakeholder engagement is to advise, assist and educate wherever opportunities arise.

Senator PAYMAN: Mr Kelleher, how many meetings did you have with the MBA? Did any other representatives or ABCC officials have meetings with the MBA in the six months prior to the federal election?

Mr Kelleher: I've had zero meetings with the MBA.

Senator PAYMAN: And no other ABCC officials have had meetings with the MBA, aside from Mr McBurney?

Mr Kelleher: I'm not aware. You'd have answer ask them.

Mr McBurney: I can answer that. Other officials have had meetings with the MBA. Our responsible minister requested those details be provided to him. He wrote me a letter on 20 June, requesting the information, and that information was provided in full on 18 July 2022. That was details of all meetings I'd had with the MBA and an explanation for those meetings, which was provided. He also asked for details of all other meetings by ABCC staff with the MBA, and that was provided. They have the full record. I don't have that here, but, if you'd like that detail as well, I can provide that on notice.

Senator PAYMAN: No, that's not a problem. Moving on—documents were released under FOI and reported on publicly in the media in June, which showed that you personally met with senior MBA members, including the MBA CEO, Denita Wawn, in Canberra on 17 February. The ABCC also met with the MBA in Tasmania in April. The FOI shows that you discussed, and I quote, 'the MBA election campaign' in support of retaining the ABCC and, I quote again, 'how it would be similar to the last election, running with the union bullying theme'. Do you recall that discussion?

Mr McBurney: Was that quote you've read from my meeting in February, or was it from the Tasmanian meeting? Because I wasn't in attendance at the meeting in Tasmania.

Senator PAYMAN: This is 17 February. It was your meeting in Canberra.

Mr McBurney: That question you've asked, I was asked at my previous estimates appearance, and I provided the answer to that at that previous estimates appearance. The upshot of all of that was the MBA confirmed that they would do what they'd done in the previous election, that they were going to campaign for the retention of the ABCC.

Senator PAYMAN: I only joined five months ago, so I'm brand new; I don't know what happened in the previous estimates. Were any ministers or members—or their offices—of the former Morrison government aware that these meetings were taking place?

Mr McBurney: I don't believe they were aware. I certainly wouldn't have advised my minister or the government of those meetings.

Senator PAYMAN: And the MBA wouldn't have told them?

Mr McBurney: I don't know what communication there was between the MBA and the government.

Senator PAYMAN: When the MBA informed you about their election campaign approach in that meeting, did you provide any feedback or view on that campaign?

Mr McBurney: No, I did not.

Senator PAYMAN: Can you explain their campaign plans, or—

Mr McBurney: I had no idea of what their campaign plans were.

Senator PAYMAN: did you just sort of sit silently while they were talking about it?

Mr McBurney: The campaign run by the MBA is absolutely a matter for them and it would be inappropriate for me to provide any input, feedback, assistance or advice on that to the MBA.

Senator PAYMAN: I respect that. Were you shown any advertising material, or any data, reports, or other unreleased campaign materials, by the MBA?

Mr McBurney: No, I was not.

Senator PAYMAN: And you weren't given any advice on the advanced preview of the material they would release?

Mr McBurney: Absolutely not.

Senator PAYMAN: I think that's it for me for now.

CHAIR: Senator Cash.

Senator CASH: Just following up on meetings: Commissioner, how many times have you met with the minister since the election?

Mr McBurney: I've not met with the minister since the election.

Senator CASH: Deputy Commissioner, how many times have you met with the minister since the election?

Mr Kelleher: Zero. We have had no communication—no meetings.

Senator CASH: Even though your entire agency is being abolished, you've had no meetings with the minister in relation to this?

Mr McBurney: No.

Senator CASH: In relation, then, to the 39 employees who unfortunately found out that they did not have job security when the minister made his announcement on the ABCC on the *Insiders* program, did you make any representations to the government in relation to that?

Mr McBurney: The only representations I've made to the government were in the incoming government brief, and—sorry; I'll correct that. We did the incoming government brief, as we do for any incoming government. We provided a brief as to the matters we understood arise from the new government's intention to abolish the ABCC. I made myself available for meetings. They didn't eventuate. That's the minister's prerogative. I did, at some point after the election, write to the minister. I think it was in the context of the MBA meetings. I outlined, in my letter to him on that occasion, the impact that was being felt by our staff in relation to the prevailing uncertainty as to their future. I do need to acknowledge that, after writing that letter, we were provided a bit more communication from the department.

Senator CASH: From the department, but not from the minister?

Mr McBurney: That's correct.

Senator CASH: Are you able to table a copy of that letter?

Mr McBurney: I can, subject to this. There is some sensitive information in that letter, which we alerted the minister to. If I could just step through that: it was the subject of an FOI request, about my meetings with the MBA and my staff's meetings with the MBA. I'm happy for all my meetings to be disclosed, and I said that to the minister, but, in relation to my staff that are below SES level, I don't want to publish their names. So, if I could be permitted to make the appropriate redactions, I can provide that.

Senator CASH: We always understand that staff cannot be compromised; we completely understand that.

Mr McBurney: So, subject to redacting that, I can table that letter.

Senator CASH: Thank you very much. Minister Watt, can you guarantee that any ABCC employee who wishes to be re-engaged in the public sector will be re-engaged?

Senator Watt: I think we've already heard that there are arrangements in place for a large number of ABCC personnel—

Senator CASH: No, I just want the guarantee that, if they want to be re-engaged, they will be re-engaged, given everything we've heard tonight.

Senator Watt: Well, I would need to take advice on the employment situation of employees, but certainly any permanent employees of the Australian Public Service who happen to be working in the ABCC I would expect would be entitled to the same rights as employees of the Public Service in the agriculture department or any other. I would expect that they would be treated exactly the same.

Senator CASH: So there's been no indication from anyone in the government that anybody who was employed by the ABCC should not be given the opportunity to continue working in the government—or working in the public sector?

Senator Watt: Certainly not that I'm aware of.

Mr McBurney: If I could assist on that, the situation as of today is that 64 staff have been subject to current transfers or prospective transfers. To date, 42 staff have had section 26 transfers to other agencies. There are 16 future transfers, and that includes 16 staff going to the Fair Work Ombudsman, 10 staff to the Commonwealth Ombudsman, six to the Department of Employment and Workplace Relations, five to Austrade and five to the Office of the Australian Information Commissioner, and then there are 10 other agencies.

However, there have been a number of redundancies. To date, they've all been voluntary redundancies. Twenty-five have been made redundant and a further 12 have confirmed future voluntary redundancies, which

brings us to 37. The bill that's been presented before parliament makes it clear that staff remaining on the date of abolition will have their employment terminated.

Senator CASH: So it will be terminated?

Mr McBurney: It will be terminated. Every staff member remaining at the agency on that day will be terminated. Their voluntary redundancy and involuntary redundancy rights are preserved under the bill, so they will be entitled to a redundancy payment. They do not have any automatic right of transfer, and even for those who want to remain in the Public Service there is no clear pathway.

Senator CASH: Right.

Mr McBurney: So everyone appearing here before you today—

Senator CASH: They may not have a job.

Mr McBurney: has no guarantee of employment.

Senator CASH: So much for job security! That's a political comment; you don't need to comment on that.

Senator Watt: Again, I just cannot believe that you, of all people, would want to come and lecture anyone about job security. That is absolutely astonishing.

Senator CASH: Well, considering your bill is referred to as 'secure jobs', it is unfortunate that the people sitting here, who are literally part of the abolition, are not guaranteed to have a job, Minister Watt.

Senator Watt: There are members of your party who believe in job security. You know very well you're not one of them, Senator Cash.

Senator CASH: I find that quite sad.

Senator Watt: Your record demonstrates that.

Senator CASH: I did interrupt you previously, though, Deputy Commissioner. You were taking the committee through the differences—and this is something we do need to understand—between what the ABCC is currently able to do, or was able to do when the Building Code was in force, and what the Fair Work Ombudsman will be able to do. What were those differences? I apologise—I did interrupt you. Could I get you to continue with your explanation?

Mr Kelleher: Certainly. My earlier answer covered examination powers and the difference in the maximum penalties under the two pieces of legislation. The commissioner addressed the fact that the Building Code will be gone. In addition to that, and with the caveat that I set out earlier that it's not exhaustive, another key difference is the intervention power that the commissioner has to intervene in court proceedings and Fair Work Commission matters. That includes matters such as when an official applies for an entry permit or if a court imposes a penalty against a particular official who is a permit holder under the Fair Work Act. There's the ability for that permit to be suspended or revoked, and the Fair Work Commission will often invite the ABCC to intervene in that and make submissions as to whether the individual should have his permit suspended or revoked, or whether, if they're applying, they're a fit and proper person or not. That's a difference.

Another key difference is that the BCI(IP) Act contains a provision that makes picketing unlawful. That does not exist in the Fair Work Act. It's a provision that has seen a number of cases filed. It carries with it, obviously, the higher penalty, and it's a particular industrial tactic that we have seen deployed, not infrequently, around the country.

Another key difference is the fact that the BCI(IP) Act is a costs piece of legislation. The Fair Work Act is, prima facie, no-costs. As we touched on earlier, that means that the successful litigant in a BCI(IP) Act proceeding should, as a matter of course, be entitled to their costs if they succeed. As I've set out earlier, that's enabled the ABCC to recover over \$1.2 million in legal costs following successful court outcomes.

Senator CASH: I'll come back to that shortly. Can I confirm that there is basically no right for ABCC staff who are terminated to go to other Public Service jobs?

Mr McBurney: That's right. There are two ways this could have been done. One is the machinery of government, where the staff transfer automatically to where the function transfers. If that facility had been made available, a significant portion of the 148 staff I had on board on 20 May—not all of them—would have been automatically transferred to the Fair Work Ombudsman. The government has chosen in our context to do section 26 transfers. Under the Public Service Act, a section 26 transfer means the receiving agency has to agree and the staff member has to agree, and if either of them don't agree, the transfer doesn't happen. The result of that is that of the 148 staff I had on board on 20 May, 16 will be transferring to the Fair Work Ombudsman, and only 16.

Senator CASH: Given that in the context they are effectively taking on some of what you did, you would think that the relevant expertise would be snapped up by the Fair Work Ombudsman. Why are only 16 transferring?

Mr McBurney: To provide you with context, it was announced about 11 or 12 weeks ago that there would be a transfer, but the funding for that was confirmed in the week of the budget, so the Fair Work Ombudsman was not able to offer certainty to any of the applicants that they could take up positions with them until they had the funding in place for it. Initially, we provided 45 CVs to the Fair Work Ombudsman, and people came off that list as they found jobs elsewhere. I'm happy to say that a number of staff have found really good transfers within the Public Service. That's a good thing for them and it's a good thing for the Public Service, but it has meant that at the end of the process the Fair Work Ombudsman will receive only 16 staff from the 148.

I know Ms Parker is appearing tomorrow, and I need to acknowledge that the government has provided significant funding for the Fair Work Ombudsman to assume the functions of the ABCC. I understand the funding is for approximately 80 staff—they just won't be coming from us. We will do our best to find jobs for our staff, and those who don't will be made involuntarily redundant on the date of abolition. The Fair Work Ombudsman will need to recruit to make up the difference.

Senator CASH: Minister Watt, what was the government's rationale for not undertaking the machinery of government change that would have seen the staff from the ABCC transfer over to the Fair Work Ombudsman?

Senator Watt: That's a level of detail that I'm not across as the representing minister. Clearly, Mr McBurney's evidence demonstrates that there have been a number of ABCC staff who have moved across to the Fair Work Ombudsman, and I guess it's a matter for the Fair Work Ombudsman to explain why they've taken that number and not others. I don't know whether it's about skill sets or a particular responsibility. I don't know.

Senator CASH: Could I get you to take on notice the government's rationale for undertaking a section 26 transfer as opposed to using the machinery of government? Commissioner and Deputy Commissioner, we have only 30 minutes left, and as you've indicated this will be your last estimates hearing. Commissioner, could I give you the opportunity to outline what you see the role of the ABCC has been; why, if you consider the role of the ABCC to be important, it is important; and what you see resulting from the ABCC being abolished, based on your experience?

CHAIR: You're not suggesting that's going to take 30 minutes?

Senator CASH: No, it's just because we're in the final 30 minutes, so I'll start now.

CHAIR: I really couldn't take 30 minutes of that.

Senator CASH: No, there will be other questions, I promise you.

Mr McBurney: I've been careful today to remain out of the debate about the retention or the abolition of the agency. The government took a clear commitment to the election. I acknowledge that in the incoming government brief, and we've tried to work with the department to carry out the government's wishes. I would like to talk about what we do and what we've done. We will work with the Fair Work Ombudsman to try and transfer our knowledge and our expertise to assist them to discharge the function once we're gone. The outcome and program for the agency is to enforce workplace relations laws in the building and construction industry and ensure compliance with those laws.

We set out clearly in our corporate plan what we set out to achieve and we are very much a creature of statute. The Building and Construction Industry (Improving Productivity) Act sets out my functions and duties. I don't get to pick and choose. I must discharge those statutory duties. Before we get to enforcement, which we talk a lot about, we have a function to advise, assist and educate, and we do that by including a specific KPI target of 150 presentations to industry per year. We will present to anyone who wants to understand their rights and obligations. In the last four years we've exceeded our target. We've presented 168, 176, 241 and 203 presentations year on year.

The next critical KPI we have is site visits. Why are site visits important? Because we need to be visible on site to industry, we need to be accessible on site to industry and we need to be on building sites, where it matters, supporting victims of unlawful conduct. We set ourselves a target of a thousand a year. In the last four years, we've done 1,382, 1,371, 1,543 and 1,326 site visits. Site visits are particularly important. During COVID we had a significant challenge: we couldn't get on site. We used innovation to pivot to virtual site visits. We visited sites virtually, contacted sites and did everything we do in a physical site visit, and that's where we really make ourselves available. We are providing our full training suite and our intelligence to the Fair Work Ombudsman to enable them to consider how best they're going to provide the visibility we did.

Next, we have a critical target of percentages of successful civil penalty proceedings. We aim for 80 per cent. It is fiercely contested in our space. In the last four years we've achieved 94 per cent, 95 per cent, 94 per cent and 100 per cent in civil litigation. It's critical that we get matters into court within 12 months. That's a KPI, and we've met and exceeded that KPI.

I'll deal with two further matters. One is wage recoveries. It is critical that we recover wages for underpaid workers. In the financial year just passed, and I set out full details in our annual report, \$2.569 million was recovered for underpaid workers. That's 4,330 workers. Every cent recovered is critical to them, and we accept nothing less than the full amount underpaid.

The final one, which I alluded to earlier, is in the security of payment space. I just want to acknowledge the work of Ms Drennan and her team. It is a new function we picked up, and they've done an outstanding job. That's along with everything else they have to do in the code space, including 11,000 enterprise agreements assessed by the agency in, I think, 3½ or four years.

Ms Drennan: Since 2 December 2016.

Mr McBurney: Since 2 December 2016, 11,000 enterprise agreements have been assessed, turned around and returned to all building industry participants, including one of our biggest customers in that space: the unions. We've assessed their agreements for co-compliance and we've returned them within 2.5 weeks as our average turnaround time. That's what we've done.

I don't want to get into the debate, as I said, as to our retention or abolition. I think the question really is: what comes in our place? I'll leave that for the department to answer because we've not been privy to the consultation on the provisions of the bill, and I don't pretend to understand exactly how that's going to work.

CHAIR: How many prosecutions this year on sham contracting—one of the greatest scourges in the industry?

Mr McBurney: I think we've had a similar number of sham contracting prosecutions as the Fair Work Ombudsman, which is zero. In the time I've been Commissioner—and we've given evidence at previous Senate estimate committee hearings about that—I deal with the building and construction industry. The Fair Work Ombudsman deals with all industries. We have the same challenges in relation sham contracting.

If you want some further detail on that, I've got Ms Jones available to repeat the evidence she's given at previous hearings about that.

CHAIR: No. I'm just asking, simply, how many cases on sham contracting have you pursued? And you've said there have been none that you've been able to prosecute. That's the answer I've got, thank you.

Mr McBurney: The answer is none.

CHAIR: The answer's none in an industry that has, as you're aware, a high reputation for sham contracting of any other industry, worth hundreds of millions of dollars in sham contracting a year.

Mr McBurney: We want to point to our wages record because what Ms Jones has given evidence on previously sets the context for this, and I'm happy for her to repeat that if you'd like.

CHAIR: Of the hundreds of millions of dollars of underpayments that exist within the building and construction industry, how much did you say you—

Mr McBurney: In the financial year just gone we recovered \$2,569,852, which was a record amount for the ABCC since it undertook this function on 2 December 2016.

CHAIR: That's roughly a quarter of what the CFMMEU has retrieved for workers.

Mr McBurney: I can't speak to the CFMMEU's figures. They don't publish them in any forum. I have written to Mr Noonan and I've said, 'We've got a vested interest in going after employers who underpay their workers. I don't want private details of your workers. Tell me the employers who are underpaying their workers. We will audit them and we will prosecute them.' He refused to give me any names or information. I can table those letters, if you wish.

Senator CASH: We would like them tabled, thank you very much.

Mr McBurney: I will arrange for that.

CHAIR: I won't cut into your time anymore, but I'm aware of the combative relationship with the CFMMEU. Mr Kelleher talked about it before and you talked about it before. I can understand why there isn't a relationship, but back to you.

Mr McBurney: I think that's fair comment, but I want to point out one difference. We're the model litigant. We observe our model litigant obligations, and not once in any of our cases has the court found that we're anything other than a model litigant. The same can't be said for the CFMMEU. On my watch none of my staff

have broken the law. The CFMMEU has done so 3,500 times. So I stand on our record both in litigation and, more generally, as a regulator.

CHAIR: I understand you're a model litigant on the basis of the legislation that was written up for you and the code that was written up for you to go after unions. And the evidence you've given has made that quite clear that's been your—but I'm not going to take any more of your time.

Senator CASH: Thank you, Senator Sheldon. Deputy Commissioner, would you like to make any comments—given, again, this is your last appearance in relation to your time at the ABCC—about the role of the agency, and what you've achieved?

Mr Kelleher: Yes. As you noted, this will, in all likelihood, be our last estimates. What I would like to acknowledge, firstly, are the tireless efforts of all of our staff across all divisions of the agency, some of whom have been with the agency for a number of years, who have worked in trying circumstances in the field in litigation environments. As we have heard at previous estimates, investigators have had to confront some quite appalling circumstances. That has led to the achievement of outstanding court outcomes, which I have referenced previously—including a 90 per cent success rate in court decisions since 2 December 2016, a 100 per cent of successful court decisions in financial year 2021-22. And in decided cases against the CFMMEU, 26 in a row to now. The agency has put before the court endless cases where egregious conduct has been called out by many, many judges—that I've lost count of—going to a common theme of the CFMMEU regarding penalties as simply the cost of doing business, and penalties not deterring their behaviour. This was most recently remarked upon by seven judges of the High Court of Australia. The agency has been, in recent times, led by Mr McBurney, a consummate professional, who has confronted some very difficult circumstances, particularly recently. The agency's performance is reflected, in the context of that environment, with a wellbeing index, in the APS staff census, of second and third out of 96-odd APS agencies. Staff have loved working for the ABCC. They have thoroughly enjoyed what they've done, and I'd like to thank each and every one of them.

Senator O'SULLIVAN: You said that your staff have endured trying circumstances. What did you mean by that?

Mr Kelleher: Inspectors on the ground have confronted abusive behaviour—

Senator O'SULLIVAN: Towards them?

Mr Kelleher: Towards them, including female inspectors, in a recently filed case. They, as you know, confront stickers on hard hats that have the rude finger up in front of the ABCC that they look at when they go about their work. It's behaviour that wouldn't, frankly, be seen in any other workplace.

CHAIR: Can I stop you for a moment? I wasn't clear what you said. You said they had stickers on their hats?

Mr Kelleher: There were stickers on the hats of workers on building sites disrespecting the work that they do.

Senator O'SULLIVAN: You said the rude finger—the middle finger?

Mr Kelleher: That's right.

Senator O'SULLIVAN: We all know what that means.

Mr Kelleher: That is but one example. There was the conduct in respect of two female inspectors in a recent case—the ACU matter that is currently before the court, the subject of allegations. They have called out numerous pieces of conduct that have led to substantial penalties being imposed by the Federal Court. This is staff in each and every capital city of each state and territory in the country.

Senator O'SULLIVAN: Is it across all levels of staff?

Mr Kelleher: The conduct has been across all levels across the journey, and that I think has led to an extremely resilient workforce, something that they should all be commended for.

Senator O'SULLIVAN: Yet they were told, by way of *Insiders*, that they are losing their jobs.

Senator CASH: Deputy Commissioner, you just referred to a case that you said had been recently filed in relation to bad behaviour against some of the ABCC's female inspectors.

Mr Kelleher: That's right.

Senator CASH: What case is it? Could you just take us through the case?

Mr Kelleher: It's proceedings that the agency has taken against the CFMMEU and its delegate Michael Powell, alleging that they hindered and obstructed two female ABCC inspectors from conducting an audit of the Australian Catholic University project. It's alleged that, during the audit, Mr Powell approached the group, allegedly shouting, 'What business do these effing women have going into the male toilets, taking pictures?' Mr Powell is alleged to have pointed towards one of the inspectors and stood a metre away from her whilst

demanding, in a loud and aggressive voice, that she show him the contents of her phone. Mr Powell is alleged to have said to the contractors' managers words to the effect of: 'You've got no effing right to take them into the male toilets or our sheds. Don't let them in our sheds.' Concerned for their safety, the ABCC inspectors concluded their audit early and were escorted to the site car park by the managers. Mr Powell is alleged to have approached the car park fence with two other men in CFMMEU clothing and said to them words to the effect of, 'Go to the car park entrance, and we'll get them there.' They are allegations that are before the court at the moment. And I've alluded to previous cases, not particularly in relation to ABCC employees but conduct towards female workers on building sites of a not dissimilar nature.

Senator CASH: In relation to that case, what has been the effect on the female inspectors of this behaviour?

Mr Kelleher: I'd like to approach it sensitively, because, as you could imagine, it has had a personal impact on at least one of them, and in respect of privacy I wouldn't wish to transcend into it any further.

Senator CASH: Okay.

Senator LIDDLE: You've got how many staff members currently right here in the room, from the ABCC?

Mr McBurney: Seven.

Senator LIDDLE: Those seven are all pretty senior, I would assume, in being here?

Mr McBurney: Five of them are part of my executive team.

Senator LIDDLE: How many of those people who are here today have job security confirmed as of today?

Mr McBurney: None.

Senator LIDDLE: None of all of those who are here today?

Mr McBurney: Everyone here, as we currently sit here, does not have a job to go to.

Senator LIDDLE: Can you give me some indication of the level of experience that's sitting in this room in the industrial relations workplace safety area?

Mr McBurney: Mr Kelleher's an experienced litigator and has worked exclusively in industrial relations. Ms Drennan has worked in the different iterations of the ABCC since 2005, with a couple of transfers to state government, and is both a lawyer and an experienced IR specialist. Ms Jones leads our wages function and is by far and away the expert I go to on any wages and entitlements related matter. She's an acting SES officer. Ms Jepson has extensive corporate experience as well as running our operations and investigations, both in the private sector and in the public sector. And I have two members of staff who are below SES level—my chief of staff and another member of her team—whom I value greatly and who are exceptional public servants.

Senator LIDDLE: How much time do you have to see whether you can secure tenure for these people in the room?

Mr McBurney: If the bill passes, it provides for a transition period of eight weeks. We think we have until the end of January, subject to the passage of the bill.

Senator CASH: There's not a lot you can say there, for a government that believes in job security. Again—and I know we don't have much time left—can I just be clear, returning to the issue of the costs order in the Lendlease case: by way of process, you requested that the new Attorney-General, Mr Mark Dreyfus, give consent for the ABCC to pursue the approximately \$509,000 costs order?

Mr McBurney: I'll refer to Mr Kelleher.

Mr Kelleher: The proposal that was put forward didn't propose the figure that you mentioned. It sought approval to settle on terms that provided for effectively the ability to negotiate costs up to an amount of \$150,000. It's not unusual in a costs negotiation to avoid further costs associated with the taxation to compromise an initial proposal. As I indicated earlier, because it was a significant matter, the appeal itself and everything underneath it couldn't be resolved without the approval of the Attorney-General pursuant to the Legal Services Directions.

Senator CASH: And that approval was not forthcoming?

Mr Kelleher: The approval, as I indicated, was that the appeal be discontinued with no order as to costs, and the ABCC does not enforce the costs order.

Senator CASH: And you'll table all that for us—the brief that you provided to the Attorney-General requesting that. Are you able to table that?

Mr Kelleher: I'll take on notice the ability to table that.

Senator CASH: Understood—subject to anything being—

Mr Kelleher: Yes.

Senator Watt: And I'm sort of wondering why the ABCC is providing this level of information, because I would have thought that at least some of it might be covered by some form of privilege, whether legal professional privilege or otherwise, but—

Senator CASH: Well, that's why it was taken on notice.

Senator Watt: Well, there's been a lot of information provided about this, but that's a matter for the ABCC, I guess.

Mr McBurney: We've had engagement with the department, and we understand that some evidence given to you earlier today is the subject of a correction.

Senator CASH: I did not know that.

Mr Kelleher: I understand that evidence was given by another official—

Senator CASH: I can't hear you. I apologise.

Mr Kelleher: I understand that evidence was given on this—

CHAIR: Stop for one moment. Sorry. I know there are only 10 minutes to go, but I just have a couple of very brief questions to ask as well.

Senator CASH: Understood.

Mr Kelleher: I understand that evidence was given by another official in a different committee yesterday.

Senator CASH: Correct—the Attorney-General's department.

Mr Kelleher: I've been provided with a letter that has been sent to that committee, clarifying evidence that that official had given on this topic.

Mr McBurney: And the evidence we're giving you today is consistent with his correction. We've been careful not to descend into the legal advice, which would infringe legal professional privilege, but it's on the public record about the basis upon which the matter has been settled, and Mr Kelleher has provided you with answers to questions which we understand are appropriate to be given without infringing legal professional privilege.

Senator CASH: I don't have a copy of that letter that you're referring to.

Mr Kelleher: It has been sent to that committee.

Senator CASH: Oh, sent to that committee. Sorry.

Mr Kelleher: Yes.

Senator CASH: Understood. And it was an official correcting some evidence that they gave.

Mr Kelleher: On this issue.

Mr McBurney: In answer to a question from you, Senator.

Senator CASH: That's fine. I'll follow that up. I think Senator Sheldon may have one or two questions for you.

CHAIR: Thank you. That's very nice of you. Is there any reason why we aren't reading out cases from employers? I just note that you're saying that you're doing a magnificent job of going after employers and—

Mr McBurney: Well, can I just address you—

CHAIR: No, I'm asking generically in this sense. You've been here for quite a long time and you have spent a great deal of time making sure that you don't have answers to questions about cases you've lost, and you haven't been giving details of cases against employers. I'm asking a broader question.

Mr McBurney: Yes.

CHAIR: Does that demonstrate your bias?

Mr McBurney: We answer the questions that are asked of us. We tend to be asked questions from your side about cases we've lost. We tend to be asked questions from the other side about cases involving the CFMMEU. There are other cases. There's the Jake Gray case on wages. There's the Shane Chivell case on wages. I'm happy to provide others.

CHAIR: Thank you for the answer. I've only got a short amount of time, and I want to hand it back to Senator Cash.

Mr McBurney: Yes. Thank you, Chair.

CHAIR: My point is that you haven't given us the details of cases you've lost. You weren't able to give that detailed information about the amount of money that was spent. You are aware that the cost of these case that are embarked upon has been an issue in previous hearings of estimates.

Mr McBurney: Yes.

CHAIR: Also, in a series of examples that you've given, you have failed to give examples, of your own volition when you had that opportunity, regarding cases against employers and details of those cases. So I'm just drawing a very clear picture about inherent bias in your approach to answering questions.

Mr McBurney: I think I said earlier in my evidence that one of the most significant achievements is our wages recoveries, and what's most important to me is getting the money back to the workers as soon as possible, with payment in full—not three years later after legal proceedings but immediately. I do have details of all of those matters in my published annual reports. I note that this year's report is embargoed. It hasn't been tabled by the minister yet. When it is tabled, I encourage all members of the committee to consider what I've said in my opening there and in the summaries contained, which include details of wages cases.

CHAIR: You haven't convinced me, but back to Senator Cash.

Senator CASH: When did you provide a copy of that report that you just referred to to the minister or his office?

Mr McBurney: The letter of transmission is 20 September 2022.

Senator CASH: 20 September?

Mr McBurney: On 20 September our annual report was provided to the minister.

Senator CASH: It's 8 November today, so it has been at least six weeks. Minister Watt, is there a reason that the minister has not yet tabled the report, seeing as they received it on 20 September?

Senator Watt: I'm not aware of one. I also am not aware of whether the minister has tabled other annual reports. It may not be that this is unusual.

Senator CASH: Could you confirm when the minister is going to table the report? Obviously, it would have assisted to have it for estimates.

Senator Watt: Sure. In my own portfolio there are legislated time lines. I'm not sure if we've hit any of them.

Mr McBurney: We understand that annual reports should be tabled by 31 October.

Senator CASH: That is correct.

Mr McBurney: We asked for it to be tabled. We followed it up. It's still awaiting tabling.

Senator CASH: When you asked for it to be tabled, did you ask for it verbally or in writing?

Mr McBurney: I understand the matter was followed up. We sought an indication from the DLO as to when it would be tabled. We're still awaiting the tabling to occur.

Senator O'SULLIVAN: If the abolition legislation goes through would it still have to be tabled? Are you aware?

Mr McBurney: As far as I'm aware, it would need to be tabled, because all annual reports are meant to be tabled. The earliest possible abolition date is January of next year. I'd be staggered if it's not tabled before then.

Senator CASH: Minister Watt, can you take on notice why the minister has failed to comply with a requirement to table a report that they received on 20 September by the due date of 31 October? And could you confirm when the minister intends on tabling this report?

Senator Watt: Sure.

Senator CASH: Does the minister intend on tabling the report?

Senator Watt: Would you like me to take that on notice as well?

Senator CASH: Yes.

Senator Watt: Happy to take it on notice.

Senator CASH: Unless you have information to the contrary—

Senator Watt: No—

Senator CASH: that the minister has no intention of tabling the report?

Senator Watt: Happy to take it on notice.

Senator CASH: Briefly, you've been accused on so many occasions of having some form of bias in your approach. Can you confirm that the ABCC has always had the same compliance approach for all building industry participants, regardless of who they are?

Mr McBurney: Yes, that's the case.

Senator CASH: How did that actually work in terms of how you determined what building industry participants you may or may not pursue?

Mr McBurney: The investigative process is that we act on all complaints made to the agency, whether it's employer, employee or other building industry participant. I want to make it clear, in relation to all litigation it must always be supported by an internal legal advice and an independent, external legal advice, as to reasonable prospects and the case being in the public interest. They all come to me on a recommendation from the deputy commissioner legal. I must consider that afresh, look at the legal advice and authorise the proceedings. That's the way we've operated. It has served us particularly well. I want to reiterate that we need to be there for all building industry participants. There are three things I ask of my staff from the day they start: to be impartial, professional and apolitical. It's what you required of me when I was appointed to the role. It's enshrined in our legislation and I cascade that down to all of my staff. There have been no findings, since I've been commissioner, of anything to the contrary from any court of law or any other tribunal.

Senator CASH: On that note, on behalf of the coalition, we would like to formally thank you for the absolutely outstanding work that you have done across the board. In particular, I think that is recognised in your success rate, in terms of your outcomes in court. Ultimately, it is a court of law that sits in judgement on the evidence that you bring before it. The court of law will determine whether you have sufficient evidence to sustain an action or not. In the majority of your cases a court of law has held that the ABCC has had that weight of evidence. On behalf of the coalition, I also thank you for the contribution you've made to our nation, because in ensuring that we have a strong Building and Construction Commission, you ensure that the jobs of over a million Australians are protected on a daily basis. You ensure that the 400,000 small businesses that rely on the building and construction sector are protected. And you certainly ensure that the rule of law is enforced regardless of who you are, by way of a building participant, in the construction sector—

Senator Watt: Why are you thanking them on behalf of the coalition? I wouldn't have thought this is a political matter.

Senator CASH: Excuse me?

Senator Watt: I'm just trying to understand why you're thanking the ABCC on behalf of the coalition—

Senator CASH: Because I think, Senator Watt, that given your comments over many, many years—

Senator Watt: Why make it a partisan remark by—

Senator CASH: you would not want to be part of the comments that I am making—

Senator Watt: I don't understand. On behalf of the government or on behalf of the opposition—why is it a coalition matter?

Senator CASH: Can I also say that your staff should be incredibly proud of the work that they have undertaken—

CHAIR: It is now 11 o'clock and this hearing is adjourned.

Committee adjourned at 23:00