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SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Wednesday, 23 October 2019

Members in attendance: Senators Chandler, Ciccone, Davey, Green, Hanson, Keneally, Lines, McGrath, McMahon, O'Neill, O'Sullivan, Paterson, Pratt, Roberts, Sheldon, Siewert, Marielle Smith, Urquhart, Walsh, Watt.
EMPLOYMENT, SKILLS, SMALL AND FAMILY BUSINESS

In Attendance

Senator Cash, Minister for Employment, Skills, Small and Family Business
Senator Payne, Minister for Foreign Affairs, Minister for Women

Department of Employment, Skills, Small and Family Business
Ms Kerri Hartland, Secretary

Enabling Services
Dr Jill Charker, Deputy Secretary
Mrs Kerryn Kovacevic, First Assistant Secretary, Digital Solutions
Mrs Nicolle Johnston, Assistant Secretary, Digital Solutions Division
Mr Glen Casson, Chief Financial Officer, Finance, Legal and Governance
Mr Luke de Jong, General Counsel, Finance, Legal and Governance
Mr Shayne Howard, Assistant Secretary, Finance, Legal and Governance
Ms Michelle Kirby, Assistant Secretary, Finance, Legal and Governance
Ms Helen Innes, First Assistant Secretary and Chief Risk Officer, People, Communication and Assurance
Mr Tim Matthews, Assistant Secretary, People, Communication and Assurance
Mr Kraig Lowes, Assistant Secretary and Chief Internal Auditor, People, Communication and Assurance
Ms Meredith Fairweather, Assistant Secretary, People, Communication and Assurance
Mr Scott Wallace, First Assistant Secretary and Chief Information Officer, Technology and Services

Outcome 1 – Employment and Small Business

Mr Nathan Smyth, Deputy Secretary
Ms Melinda Hatton, First Assistant Secretary, Delivery and Employer Engagement
Ms Helen McCormack, Assistant Secretary, Delivery and Employer Engagement
Mr Derek Stiller, Assistant Secretary, Delivery and Employer Engagement
Mr Ali Jalayer, Assistant Secretary, Employment Programs and Activation
Mr Ty Emerson, Acting First Assistant Secretary, Employment Programs and Activation
Mr Stuart Watson, Assistant Secretary, Employment Programs and Activation
Mrs Emma Hill, Acting Assistant Secretary, Employment Programs and Activation
Ms Jodie Wearne, Assistant Secretary, Employment Programs and Activation
Mr Alex Harvey, Director, Employment Programs and Activation
Ms Benedikte Jensen, First Assistant Secretary, Labour Market Strategy
Mr Ivan Neville, Assistant Secretary, Labour Market Strategy
Ms Carmel O'Regan, Assistant Secretary, Labour Market Strategy
Mr Malcolm Greening, Assistant Secretary, Labour Market Strategy
Ms Angela Hope, Assistant Secretary, Labour Market Strategy
Ms Melissa Ryan, First Assistant Secretary, New Employment Services Model
Mr James Peterswald, Assistant Secretary, New Employment Services Model
Ms Kellie Hippit, Assistant Secretary, New Employment Services Model
Ms Robyn Shannon, Acting First Assistant Secretary, Quality, Integrity and Evidence
Mr Brenton Alexander, Acting Assistant Secretary, Quality, Integrity and Evidence
Ms Fiona MacDonald, Assistant Secretary, Quality, Integrity and Evidence
Ms Jodie Chamberlain, Assistant Secretary, Quality, Integrity and Evidence
Ms Louise O'Rance, Acting Assistant Secretary, Quality, Integrity and Evidence
Mr Peter Cully, First Assistant Secretary, Small Business, Economic and Deregulation
Mr Alistair Beasley, Assistant Secretary, Small Business, Economic and Deregulation
Ms Rose Verspaandonk, Assistant Secretary, Small Business, Economic and Deregulation
Mr Bruce Cunningham, Assistant Secretary, Small Business, Economic and Deregulation
Mr Sean Macintyre, Director, Small Business, Economic and Deregulation
Ms Kate Woodall, Director, Small Business, Economic and Deregulation

Outcome 2 – Skills and Training
Ms Nadine Williams, Deputy Secretary, Skills and Training
Mr Bryan Palmer, First Assistant Secretary, Apprenticeships and Workforce Skills
Mrs Linda White, Assistant Secretary, Apprenticeships and Workforce Skills
Mrs Fiona Lynch-Magor, Assistant Secretary, Apprenticeships and Workforce Skills
Ms Mary McDonald, First Assistant Secretary, VET Quality and Policy
Ms Rachel Livingston, Assistant Secretary, VET Quality and Policy
Ms Clare Sharp, Assistant Secretary, VET Quality and Policy
Ms Renae Houston, Assistant Secretary, VET Quality and Policy
Mr Matthew Hardy, First Assistant Secretary, VET Reform
Mr David Fintan, Assistant Secretary, VET Reform
Ms Katerina Lawler, Assistant Secretary, VET Reform
Ms Kelly Fisher, Assistant Secretary, VET Reform
Mr George Thiveos, First Assistant Secretary, VSL, VET Compliance and TRA
Mr Chris Alach, Assistant Secretary, VSL, VET Compliance and TRA
Ms Belinda Campbell, Assistant Secretary, VSL, VET Compliance and TRA
Ms Kathy Dennis, Assistant Secretary, VSL, VET Compliance and TRA

Australian Small Business and Family Enterprise Ombudsman
Ms Kate Carnell, Ombudsman
Dr Craig Latham, Deputy

Australian Skills Quality Authority
Ms Saxon Rice, Acting Chief Commissioner and Chief Executive Officer
Mr David Garner, General Manager Regulatory Operations
Mr David Miller, General Manager Regulatory Support and Governance
Ms Jonella Welsh, Chief Financial Officer

Attorney-General's Department
Mr Chris Moraitis PSM, Secretary
Mr Martin Hehir, Deputy Secretary, Industrial Relations Group

Industrial Relations Programs
Mr Greg Manning, First Assistant Secretary, Industrial Relations Programs Division
Ms Sue Saunders, Assistant Secretary, Fair Entitlements Guarantee
Mr Benjamin Carmody, Acting Assistant Secretary, Recovery and Litigation
Ms Yvonne Uren, Acting Assistant Secretary, Protecting Overseas Workers
Mr Andrew Cameron, Senior Government Lawyer
Mr Henry Carr, Assistant Secretary, Recovery and Litigation

Work Health and Safety Policy
Ms Jody Anderson, First Assistant Secretary, Work Health and Safety Policy Division
Mr David Cains, Assistant Secretary, Workers Compensation Policy
Mr Adrian Breen, Assistant Secretary, Work Health and Safety Policy
Ms Jane Heffernan, Acting Assistant Secretary/Federal Safety Commissioner, Building Industry

Industrial Relations Legal
Ms Janey Kuzma, First Assistant Secretary, Industrial Relations Legal Division
Ms Rachel Volzke, Assistant Secretary, Employment Standards
Ms Kelly Hoffmeister, Assistant Secretary, Bargaining and Coverage
Mr Ben Mason, Assistant Secretary, Safety, Compensation and Institutions Branch

Industrial Relations Policy
Ms Alison Durbin, First Assistant Secretary, Industrial Relations Policy Division
Ms Sharon Huender, Assistant Secretary, Framework Policy
Ms Lace Wang, Assistant Secretary, Wages Policy and Minimum Standards
Mr David Denney, Assistant Secretary, Industry Engagement and International Labour

Asbestos Safety and Eradication Agency
Ms Justine Ross, Chief Executive Officer
Mr Shane McArdle, Director

Australian Building and Construction Commission
Mr Stephen McBurney, Commissioner
Mr Clifford Pettit, Deputy Commissioner, Operations
Mr Matt Kelleher, Deputy Commissioner, Legal
Ms Janine Drennan, National Manager, Building Code

Coal Mining Industry (Long Service Leave Funding) Corporation
Mr Bradley Neven, Chair
Ms Darlene Perks, Chief Executive Officer
Ms Suzanne Jenkins, Chief Governance Officer (Acting Chief Executive Officer)
Mr Peter Kembrey, General Manager, Legal

Comcare
Ms Susan Weston PSM, Chief Executive Officer
Mr Aaron Hughes, General Manager, Claims Management
Mr Justin Napier, General Manager, Regulatory Operations Group
Mr Michael Duke, General Manager, Scheme Management
Ms Natalie Bekis, General Manager, Strategic Partnerships and Engagement
Mr Matthew Swainson, General Manager, Legal Group
Ms Seyhan Aka, Acting General Manager, Corporate Management Group
Mr Anthony Blucher, Senior Director, Regulatory Operations Group

Fair Work Commission
Ms Bernadette O'Neill, General Manager
Ms Ailsa Carruthers, eCase Project Sponsor and Executive Director Corporate Service
Mr Jack Lambalk, Acting Executive Director Corporate Service
Mr Murray Furlong, Executive Director Tribunal Service
Ms Zoe Williams, Executive Director Client Services Delivery

Fair Work Ombudsman
Ms Sandra Parker PSM, Fair Work Ombudsman
Mr Michael Campbell, Deputy Fair Work Ombudsman
Ms Kristen Hannah, Deputy Fair Work Ombudsman
Mr Mark Scully, Deputy Fair Work Ombudsman
Mr Jeremy O'Sullivan, Chief Legal Counsel
Ms Janine Dennis, Special Counsel
Mr Russell Thackeray, Chief Finance Officer
Mr Anthony Fogarty, Executive Director, Policy, Analysis, Intelligence and Reporting

Registered Organisations Commission
Mr Mark Bielecki, Commissioner
Mr Chris Enright, Executive Director
Ms Joanne Fenwick, Financial Reporting Specialist

Safe Work Australia
Ms Michelle Baxter, Chief Executive Officer
Committee met at 09:00

CHAIR (Senator McGrath): I declare open this meeting of the Senate Education and Employment Legislation Committee. The Senate has referred to the committee the particulars of proposed expenditure for 2019-20 and certain other documents for the Employment, Skills, Small and Family Business portfolio, including Industrial Relations. The committee may also examine the annual reports of departments and agencies appearing before it. The committee has set Friday 13 December 2019 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 1 November 2019.

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, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The Senate, by resolution in 1999, endorsed the following test of relevance of questions at 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 purposes 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 committees, unless the parliament has expressly provided otherwise.

The Senate has resolved 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 prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

I draw the attention of witnesses to an order of the Senate of 13 May 2009, which will be incorporated in the Hansard, specifying the process by which a claim of public interest immunity should be raised.

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: Witnesses are specifically reminded that a statement that information or a
document is confidential or consists of advice to government is not a statement that meets the
requirements of the 2009 order. Instead, witnesses are required to provide some specific
indication of the harm to the public interest that could result from the disclosure of the
information or the document.

Department of Employment, Skills, Small and Family Business

[09:03]
CHAIR: I welcome the Minister for Employment, Skills, Small and Family Business,
Senator the Hon. Michaelia Cash, and officers of the Department of Employment, Skills,
Small and Family Business. The committee will commence with the department's enabling
services. Minister Cash, do you wish to make an opening statement?

Senator Cash: I don't, thank you.

CHAIR: Ms Hartland, do you wish to make an opening statement?

Ms Hartland: No, thank you.

Senator PRATT: Good morning, everyone. Thank you for appearing at estimates today. I
want to start by asking some questions about the Franchising Taskforce.

Senator Cash: That is actually outcome 1. We're in cross-portfolio. We've got the people
here, though.

Senator PRATT: No, it's all right; I'm just on the wrong page.

Senator Cash: But it does alert our outcome 1 people out the back that franchising is
coming up.

Senator PRATT: We had the same issue in our briefing this morning—finding the right
page!

Senator Cash: That's okay. I'm not sure if government senators have any questions in
cross-portfolio to assist you, Senator Pratt, if you—

Senator PRATT: No, I know I have a couple of questions in cross-portfolio. The
evaluation reports for Job Services and jobactive—are they in here?

Ms Hartland: They're outcome 1 as well.

Senator PRATT: I thought so. How about the APS Code of Conduct?

Ms Hartland: Yes, that would be in this part.

Senator PRATT: Great! I have some questions in relation to breaches of the APS Code of
Conduct. How many code of conduct investigations does the department currently have open?

Dr Charker: Currently we have—when I say 'currently', I mean the period 1 July 2019 to
31 August 2019—none under investigation. We have one that is pending a breach decision. I
can also provide, if that's of interest to you, data preceding the current financial year—so I can
give you 2018-19 data.

Senator PRATT: That would be great.

Dr Charker: In 2018-19 we had one matter that was under investigation at that time, one
matter that was identified as being a breach of the code and four matters that were identified
as not breaching the code, which had also been investigated but not found to have been a breach.

Senator PRATT: How many, if any, of those cases involved self-harm or attempted self-harm by the employee?

Dr Charker: I'm just having a look at the 2018-19 matters. I have no information to indicate that that was the case.

Senator PRATT: Are you able to take that on notice, if appropriate? I note that we're talking about a small number of cases here.

Dr Charker: That's right. Bearing in mind that it is a very small number, we would be loath to provide a lot of detail, given the potential for privacy considerations.

Ms Hartland: We're happy to take on notice whether there's some further detail that we can provide, noting what Dr Charker has said. We've just got to be careful with very small numbers like that.

Senator PRATT: Thank you. That's all I've got for cross-portfolio.

CHAIR: If there are no further questions for the department's enabling services, I thank you. We will call representatives of outcome 1 for the department.

[09:10]

Senator PRATT: I'm going to commence with some questions on employment services. The government released a number of evaluations of the former Job Services Australia framework, covering 2009 to 2015, and an interim report on the first year of the government's jobactive framework. Why is it an interim report that only covers the first year of the framework?

Ms Shannon: I think you're referring to the jobactive evaluation. The jobactive evaluation is being conducted in three stages. The first stage is the interim evaluation, and that's the report that was released.

Ms Hartland: It doesn't mean there aren't subsequent evaluations, as Ms Shannon has said.

Senator PRATT: I guess what I'm interested to know—it's a fair period back in time that we're looking at, pre-2012 and pre-2015. Why is it an interim report, given it's a fair way back in time now?

Ms Shannon: There's a fairly extensive body of evaluative work that's going on in the department, and we do take a structured approach. Our typical approach is to look at the early operation of a program to try and glean any particular implementation insights or early insights on how a program's rolling out, so that we can fine-tune any policy settings, but that doesn't mean that we're not at the same time compiling a body of evidence over a longer period of the program's operation. So that work is underway, and we've provided advice previously that that work is continuing.

Senator PRATT: External factors like the global financial crisis have clearly had an impact on employment outcomes. In terms of these reports, isn't comparing the labour market between 2016 and when the global financial crisis effects were being felt a bit like comparing apples with oranges?
Ms Shannon: I think that's a fair question. What the department does, as a very standard part of evaluation practice, is design the datasets and analyses to be able to take into account factors such as different labour markets and things like compositional changes in the jobseeker case load. So those analyses have been done. The interim jobactive report presents results in both adjusted and unadjusted terms. The adjusted terms have been adjusted using regression analyses to actually take into account changes in the labour market.

Senator Pratt: So that's already been done; okay. The interim report says:

Since evaluators are unable to accurately track the sustainability of employment outcomes after a job seeker leaves employment services, this report uses exits from income support and exits from the employment service program as proxies for employment.

I see that the Youth Jobs PaTH evaluation report stated 'unavailability of data once a person leaves the income support system'. So these reports, by their own admission, demonstrate that there's no legitimate way that the government can argue that these programs lead to secure and stable employment outcomes. Does the department agree?

Ms Shannon: I don't think I agree with the way the question's framed. By nature, we can only collect data on participants in programs while they're in the program, but we have a number of other methods to collect information. We track employment service participants when they receive a job placement at four, 12 and 26 weeks. In the evaluation, we construct data sets and we follow people for typically nine months, 12 months and, if we can, longer—24 months in some cases. We look at whether or not they remain off the employment services case load, and we look at any changes in their income support reliance. They are proxies—the reports are careful to say that—but, if somebody has left the program with a job and they don't return and they don't return to income support, we might draw a reasonable conclusion that they remain in employment.

Senator Pratt: So you do statistically track in all cases where they've returned to income support. What if they return to another form of income support?

Ms Shannon: Unless they're activity tested, they don't come back into the case load for employment services. They might go onto a parenting payment or onto the disability support pension or the age pension.

Senator Pratt: But you can't assume that there's a labour market outcome on that basis.

Senator Cash: I don't want to put words into the department's mouth, but I think the evidence that the official is giving is that, in particular post the 26 weeks, the research actually provides you with the ability to assume that there is a labour market outcome. I don't know, Ms Shannon, if you want to explain that to the committee in terms of what the research says.

Chair: I will just jump in quickly. The committee has resolved to authorise all media outlets present at the public hearing to record the proceedings, subject to the following conditions. We've got media in the room now. The committee or a witness can object to being recorded at any time. The committee can require that recording cease at any time. Recordings must not occur from behind the committee or between the committee and witnesses and must not otherwise interfere with the proceedings. Computer screens and documents belonging to senators and members must not be recorded. Flashes must not be used. The direction of the committee secretariat must be followed. Sorry, Ms Shannon.
Ms Shannon: The department also conducts post-program monitoring surveys, asking jobseekers about their labour force status, either during the course of their participation in the program or after their participation in the program has ceased.

Senator PRATT: Can you take on notice what percentage of participants in the programs undertakes those surveys? I want to move on now to asking some questions about jobactive placements. The government has claimed repeatedly that jobactive has achieved one million job placements. We note, however, that there are still more than 700,000 people who are unemployed. Can the government confirm that you do not mean that one million Australians have found employment through jobactive since 2015?

Mr Smyth: Since 1 July 2015 we've had 1,445,920 job placements occur under jobactive. That is putting people into employment through the program.

Senator PRATT: Where they have some kind of income from that. Can you confirm for us, please, that that includes the PaTH program, Work for the Dole, a wage subsidy scheme or other mandatory programs?

Mr Smyth: Work for the Dole is not a job placement as such, so the numbers there would not be included. It would include people who have received a job placement out of the jobactive program. It would include people who have received a job placement out of Transition to Work and obviously through the PaTH program as well. That would be not where we classify an internship as a job placement. It would be actually based on an outcome payment made to a provider following a four-, 12-, or 26-week outcome.

Senator O'SULLIVAN: You're saying that the internship is not counted?

Mr Smyth: It's not classified as employment.

Senator O'SULLIVAN: But when they go on from the internship into a job where they're paid by the employer, and they're off benefits, that's counted as a placement?

Mr Smyth: That's when it occurs. That's correct. Generally for employment services providers, they are not remunerated for job placements. They are remunerated for outcomes at four, 12 and 26 weeks. For four- and 12-week outcomes, it's where a person has their benefits reduced by 60 per cent, and it's 100 per cent off-benefit at 26 weeks—that classifies as an outcome payment.

Senator PRATT: So just to clarify, is a period in which someone is getting a wage subsidy included in your statistics?

Mr Smyth: It would be at the four-, 12- and 26-week mark, where we clarify those people as being employed, and so there are outcome payments that are made to providers, yes.

Senator PRATT: My question was about the one million job placements—

Senator Cash: I think the evidence was 1.4 million.

Senator PRATT: Yes, but my question is: are those wage subsidy places, Work for the Dole, PaTH programs or other mandatory programs included in those job statistics? You've gone some way to clarifying that by saying Work for the Dole is not.

Senator Cash: There are a number of programs you've put there. For example in relation to the wage subsidies, the person is actually in employment, so the employer is entitled to the wage subsidy. I might get the department to take you through exactly what is in the statistics to properly answer your question.
Senator PRATT: I would be keen to at least get an impression of what's in and out.

Senator Cash: That's what we'll get the department to do for you.

Ms Hartland: I think that's right because the answer to your question isn't yes or no—

Senator Cash: Because of the nature of the programs you've put forward.

Ms Hartland: Some of those programs are a definite no and some it's a yes.

Senator PRATT: So PaTH is in?

Mr Smyth: PaTH is certainly included. ParentsNext is a pre-employment program. However, there are a number of participants that, through that program, decide to move into employment. So their employment would be classified at the four-, 12- and 26-week mark as well. If they move off the benefits that they're receiving—60 per cent and 100 per cent at those intervals—they would be counted then as well.

Senator Cash: We've just going to clear up some information in relation to PaTH.

Ms Hartland: In terms of what Mr Smyth has said, there are aspects of PaTH that are not there because they're the sort of pre-employment training bit of it. The higher part is, but not other parts of PaTH, because there are three distinct parts of PaTH.

Senator Cash: Would it assist if we also provided that further information on notice to give you the clear explanation?

Senator PRATT: I'm happy for you to take that on notice. I would be interested in you including in that answer a breakdown of those jobs, so I can see how many jobs are post-26 weeks where there's an ongoing employment relationship where there's no wage subsidy.

Ms Hartland: I understand the question. You want to know what's included in those numbers and what's not included. I'm happy to step through that.

Senator O'SULLIVAN: Can I just clarify something? So the 1.4 million, did you say?

Mr Smyth: The 1.445 million.

Senator O'SULLIVAN: Those people, at that point in time, were off benefits?

Mr Smyth: They were placements that were made for four, 12 and 26 weeks.

Senator O'SULLIVAN: So they've gone off welfare and into work?

Ms Hartland: That's correct.

Senator PRATT: No. My understanding is that they could have a reduced welfare payment.

Senator O'SULLIVAN: If they're part time?

Mr Smyth: That's right: at 60 per cent at four and 12 weeks.

Senator PRATT: And that those with a reduced welfare payment, because they're in one of these programs, are currently counted in those one million placements?

Mr Smyth: That's correct.

Ms Hartland: So some of those are a pathway to employment and then that opens a range of other issues about those numbers that go on to full-time employment.

Senator Cash: They are in work. To put it simply, they are in work.
Senator PRATT: But it doesn't mean one million Australians finding full-time jobs who are no longer on income support, does it?

Mr Smyth: We can go through labour force statistics. What we are talking about here is a different set of statistics. These are jobactive people and then there are ABS labour force statistics and I'm happy to have my team come up and talk about what the—

Senator Cash: I think there is a conflation of two issues now.

Senator PRATT: No. Look, I understand that. But there's a difference between the government saying a million Australians have been assisted into employment and a million Australians have jobactive placements?

Senator O'SULLIVAN: Aren't they labour force statistics?

Mr Smyth: That's right.

Senator Cash: I think it's the conflation of two issues.

Senator PRATT: Yes, but the government is the one that's been conflating them by these figures.

Senator O'SULLIVAN: No, they're not. They're labour force statistics.

Senator PRATT: How many participants have received more than one placement? How many have received more than two placements? And how many have had more than three?

Senator Cash: What program? Are you still in jobactive?

Senator PRATT: Yes. I might also ask in that context that those placements aren't double-counted in the figures we were just talking about?

Ms Hartland: I think we've put these on notice before so we'll just track them down.

Mr Smyth: I've got some statistics here about the participants that have received one job placement through to those that have had multiples as well. This is from 1 July 2015 to 31 August 2019. We had 2,034,000 unique participants that commenced into jobactive. Of those, 825,000 people achieved at least one job placement. For two job placements, we have 185,150 people. Three job placements, 77,269. Four job placements, 34,585. Five job placements, 16,560. And six job placements, 8,071.

Senator PRATT: Thank you. Just to clarify, are those job placements double counted in that one million figure?

Mr Smyth: They're counted as a placement, yes, they are. They're unique placements.

Senator PRATT: So they're unique placements. So I can go away and add up the pool of each—

Mr Smyth: We can provide to you on notice a breakdown, if you like, a table around that.

Senator PRATT: The number of people in multiple placements is not the same as the number of placements overall. So, yes, a table would be helpful.

Senator O'SULLIVAN: On this particular issue, it's not unusual for a person that's been unemployed for a long time to go into a short-term job?

Mr Smyth: Absolutely.
Senator O'SULLIVAN: It's actually a good stepping stone for them? So they might do multiple short-term jobs, maybe harvesting-type work or Christmas casual sort of work. Is that correct?

Mr Smyth: That's correct.

Senator O'SULLIVAN: And then that can lead to other—

Mr Smyth: The important factor there is that employers generally like to have people that have a bit of a CV filled out. Also we're talking about people that may have a disability, a partial capacity to work. They may also have issues around mental illness, drug and alcohol problems, so the nature of some of those barriers that they actually face means they do come in and out of work.

Senator Cash: Senator O'Sullivan, I think you are aware, given the extensive work you've done previously, of the different streams, stream A, stream B, stream C. So for stream B and stream C, as Mr Smyth has said, the barriers are far more substantial than stream A.

Ms Hartland: I think as the employment growth has been strong, then you actually start to be dealing with some of those more complex issues as well.

Senator Cash: Which is a good thing.

Ms Hartland: So you're likely to see those number of placements, I'd say, looking at my officials, increasing for the reasons that Mr Smyth said as well, about getting experience in the workplace.

Mr Smyth: It's worth mentioning there that the jobactive caseload peaked at 790,000 people in February 2016. As at 31 August this year, it's down to 615,000 people, so a 22 per cent decline.

Senator O'SULLIVAN: A 22 per cent reduction in people?

Mr Smyth: That means that the people that the providers are now dealing with are generally more concentrated in those B and C categories, where people face more barriers to employment.

Senator O'SULLIVAN: So this system is called jobactive and the previous system was Job Services Australia. Is there a difference in the level of outcomes achieved between the previous system and this system?

Mr Smyth: There is, Senator. The outcomes under jobactive have certainly been stronger than under Job Services Australia. I'll just try to find the statistics for you.

Ms O'Rance: This is from the post program monitoring survey that my colleague spoke to earlier. For the period 1 January 2018 to 31 December 2018, 48.6 per cent of people who participated in jobactive in that period were in employment. That's an increase of 0.6 percentage points since the start of jobactive. It's also higher than the equivalent employment rate in the last three years of Job Services Australia.

Senator O'SULLIVAN: There have been evaluations of the program—Senator Pratt referred to one, but there have been subsequent ones. For full disclosure, I was involved as a volunteer adviser on a panel before parliament. Can you tell us, for the benefit of the committee, a little bit about the work that was done last year and the I want to work report? That evaluated the program and some of the ideas and suggestions that the government has taken up.
Ms Hartland: In terms of the new employment services model?

Senator O'SULLIVAN: Yes, looking at the new employment services model for 2020.

Mr Smyth: That was the largest consultation the department has undertaken; 1,400 people were involved in that consultation. The report was provided to the government. The government deliberated on that report and, on 20 March this year, the government made an announcement that it would move to a new employment services model, taking into account the views of the panel and the recommendations of the panel to move to a different servicing model for participants in employment programs.

We are now trialling in two employment regions. One is the Mid North Coast of New South Wales, which effectively runs from Bulahdelah to Woolgoolga and about 50 kilometres inland, so it includes major centres like Coffs Harbour and Port Macquarie. We have three providers up there. Our other trial region is in Adelaide's south, and runs mainly around Noarlunga, not quite out to Murray Bridge and down to Kangaroo Island. We are trialling a new model that the report to government recommended. Where people are able to self-manage and have digital capability, they should be able to use digital servicing in order to help them find employment. We are continuing to build a pretty sophisticated online system to enable that to occur. In the context of the current jobactive case load, you might liken it to stream A.

The report then recommended that, for the people who face more significant barriers to employment—streams B and C—we should have more intensive, face-to-face servicing by providers, where people are given the time and the attention to get them ready for employment and to address some of the barriers, be they non-vocational or vocational barriers. In doing that, service providers should have a different remuneration system. So the remuneration arrangements that we are trialling in the Mid North Coast and Adelaide's south with the new servicing model is higher up-front payments, performance payments in terms of progress of people towards employment, higher outcome payments and bonus payments for people who have been long-term unemployed—getting them into employment.

Senator O'SULLIVAN: So this is enabling providers to invest upfront early into the development of the jobseeker and their skills development and is particularly focused on those jobseekers that need that extra support. Is that correct?

Mr Smyth: That's correct.

Senator O'SULLIVAN: So jobseekers who are mostly job-ready will have access to a digital system. Is that system now in operation?

Mr Smyth: It is in operation. There are a few elements to that. There is what we're calling Digital First. They are the most job-ready people that are able to self-manage through digital services. That commenced on 1 July in the two trial regions. We've also established a second tier called Digital Plus, which is for those people that might also need some of the elements of the employment fund. They might need a little bit more consultation and help and advice from what we're calling a contact centre that we've established—a call centre that's staffed with people to be able to provide those participants with the advice that they need. And if one of those participants needs a licence in order to get into a job, or they might need some work boots or something, we're making our employment fund available for the contact centre with the participant to enable that to occur.
Senator O’SULLIVAN: Would that include being able to do digital literacy training?

Mr Smyth: That's right.

Senator O’SULLIVAN: So, if they’re using a digital system, they'll be able to access that support to be able to get it?

Mr Smyth: That's right. In parallel to that we've been running an online employment services trial, where people have been randomly selected through coming into employment services. It's stream A. We've had 23,160 referrals into that trial. It's voluntary. People can opt out of it if they wish. But, out of that, 0.5 of one per cent have opted out due to access issues.

Senator O’SULLIVAN: Were you expecting that?

Mr Smyth: It's certainly lower than we thought. We were constantly hearing that there were access issues around digital availability for people. But 0.5 of one per cent is quite a low number. The opt-out rate at the moment is about 8.9 per cent, and that is about 1,969 people that have opted out. About 990 of those people have opted out because they prefer face to face. We're still doing some analysis around that, and it may well be that the reason they prefer face to face is they've been previously in the employment services system and had contact and engagement with a services provider and got a job outcome out of that or were comfortable with the provider that they were previously engaged with, and so they're wanting to go back to that. We think that that is likely to be the case. But, out of the large number of people that have been referred into the trial, we've only had about 260 people that have said they're not confident using a computer.

Senator O’SULLIVAN: In engaging with that digital system, it's their own choice to be part of it?

Mr Smyth: That's correct. It's voluntary.

Senator O’SULLIVAN: And the feedback—

Mr Smyth: We've had very positive feedback from the users there and the experience. They're saying that it's more convenient. It gives them a greater sense of—

Senator O’SULLIVAN: Instead of needing to turn up to the service provider physically, they can do it online?

Mr Smyth: They can do it online.

Senator O’SULLIVAN: They can report their job search, the mutual obligation requirements, so they have the flexibility; is that right?

Mr Smyth: That is correct. The feedback we've received is that it gives them a greater sense of empowerment and reduces the burden and the costs associated with travelling to provider sites. And the interesting thing is that we're getting the same rates of outcomes through that online servicing trial as we are through stream A with providers.

Senator O’SULLIVAN: And is this helping people in regional areas?

Mr Smyth: There is no question that it would be helping people in regional areas.

Senator O’SULLIVAN: So they don't need to travel far. Back to the trial—

Mr Smyth: The new employment services trial? We call it the NEST.

Senator O’SULLIVAN: Are you trialling the new payment model there? You might have seen that there are existing providers, so, therefore, they’d already be contracted.
Mr Smyth: No. What happened is that when the government made the announcement that we were using two trial sites, on the mid-North Coast of New South Wales and in Adelaide south, current jobactive contracts for remaining providers were extended for a period of two years. They will complete in mid-2022. We've now signed new deeds with the eight providers in our two trial regions. Those new deeds are under the new employment services model. We are transitioning—it's a phased approach. We started Digital First on 1 July. We recently started Digital Plus. We will start moving people into the enhanced services model in late October or November. There's a kind of transition period that's occurring. The providers in those two trial regions will be remunerated under the new model.

Senator O'SULLIVAN: If we've got time, I might come back to the payment model. I know that one of the recommendations from the panel was 'flexible activation', which is flexible mutual obligations for jobseekers. Is that being trialled? If it is, can you describe how it's working?

Mr Smyth: I might get Ms Ryan or Mr Emerson to talk about it, but that will commence on 1 July next year. There's a whole period now of, I suppose, user centred design, consultation and focus groups that we'll be undertaking to ensure that we get that kind of model right before we commence it on 1 July.

Senator O'SULLIVAN: For the benefit of the committee, the current model is that you've got to do 20 job applications per month, and this trial is going to trial a bit more of a flexible approach to that.

Mr Emerson: Yes. One of the key features of the new employment services trial is the activation points based model, as Mr Smyth said. Currently we're co-designing that with a range of jobseekers, providers and other representatives of the community just to see how best to design it and implement it. You're right. It actually looks at how we can better tailor the number of job searches to their particular circumstances and to meet their mutual obligation requirements as well as build in a range of other things that are more meaningful. They'll be able to see at any given time, when the points based system commences next year, where they stand, how many points they've got to meet in order to achieve their activation or their mutual obligation requirements. It's still a work in progress; it's starting next year. We're just making sure that our user centred design is actually informing our design approaches.

CHAIR: I might cut you off there, Senator O'Sullivan.

Senator SIEWERT: Can I go to the targeted compliance framework. Have you got a comprehensive breakdown of the application of the TCF like you've given us twice before?

Ms Hartland: Yes, we have. We can provide that to you.

Senator SIEWERT: It would be great if you could have it now.

Ms Hartland: We thought you might ask that question, and we have that here.

Senator Cash: We anticipated you. We'll have copies provided for the committee, as well, Chair.

Senator SIEWERT: Does this correspond with the summary of the data, the timeline for the summary—no, it's different again, isn't it?

Mr Emerson: Yes. This is as at 31 August.

Ms Hartland: This a point in time, up to date.
Senator SIEWERT: This is at a point in time from 1 July last year. Is that right.

Mr Emerson: Yes.

Senator SIEWERT: Thank you. It's obviously quite difficult to ask questions about it when we've been given it right now, so perhaps I'll go to one of my other questions while I take time to absorb that shortly and come back to it. Going back to the issue that I touched on briefly, which came out of the number of people who are going back for reassessment following their capability assessment—the 44 per cent who are going back. What's happening with those people?

Have you been tracing them through the process subsequent to them being sent back? Obviously, I haven't had a chance to look at that for 31 August, but up until the last set of figures it was 44 per cent. You get the demerit point and a capability reassessment, and 44 per cent of those assessments have gone back to zero because the plans were found to be, for whatever reason, inadequate.

Ms Hartland: I might get some officials to clarify this, but not all of that 44 per cent is categorised in that way.

Senator SIEWERT: Can you tell me about what's happening with that 44 per cent.

Ms Hartland: We can take you through exactly what happens.

Mr Emerson: Senator, what you're referring to is the people who have, at the time of the capability interview, had their assessment by their provider and it's been determined, for a range of reasons, that they're not capable of fulfilling the items in the job plan. So they're being, therefore, sent back to the green zone. But that could be for a range of reasons. That could be for the fact that their circumstances have changed. That's exactly why the compliance framework is set up as it is. It's a safeguard so that the provider can, at that point in time, just check that they're capable of undertaking those activities as agreed in their job plan or their participation plan. A high proportion of those people who are sent back have a change of circumstances and, therefore, are reset to zero and go into the green zone.

Senator SIEWERT: My immediate question there is: what are the proportion who have gone back to zero and what are the reasons they've had?

Mr Emerson: Yes, we do have that, but we don't have that here. For clarity, if your question is on the number of people and for what reason they're moving back into the green zone, the high proportion of those would be, obviously, that they were not determined as capable of achieving their plans because of their particular situations. So we'd have to take it on notice—

Senator SIEWERT: Sorry, I was given this only a minute ago. I've just had a look. If you look at errors, you have actually provided in the green zone for the not capable—

Mr Emerson: This is flow data. There's stock point-in-time data, which is part of the public report, and then there's flow data. This is from 1 July to 31 August. These won't add up to the 44 per cent. This is because these are over a period of time. So if your question is 'What proportion of the 44 per cent?' we'd have to take that on notice. But you can see on the back of this A3 sheet the reasons they were—

Senator SIEWERT: Yes, and that's where I've just looked. But if you look at 'not capable—all', it's 38 in stream A, 46 in stream B and 43 in stream C. Then, when you look at
'errors in job plan', it's interesting that stream B is turning up higher there, too. 'Errors in job plan' is 58, 66 and 64 per cent. That's a pretty significant percentage. The point that I'm getting to here is that when people get to the third demerit point they've already had payment suspension. There's a big problem here, is there not, in the fact that people are getting inappropriate job plans to begin with? They're going through the stress of the suspension and getting to the third demerit point when you are realising there's an error in their job plan. Why aren't we doing the job plans better in the first place?

**Mr Emerson:** We are working very closely with providers on improving the way in which job plans are developed. This is actually a key focus. It will get to a point within the next six months where providers will have the error rate in those job plans factored into their performance. So that is an important feature of making sure that providers are, in fact, tailoring the job plans well to the specific situation of jobseekers.

**Ms Hartland:** Senator, as you'd appreciate, because I know you know the program very well, there are—and others can talk about this more—issues around disclosure as well. There is obviously a skill there for the providers, which is what Mr Emerson is saying. There is obviously a training issue. This is dealing with complex people issues—

**Senator SIEWERT:** We are how many years into jobactive and, previous to that, Job Services Australia, and we're still not getting the job plans right? I mean, come on!

**Senator Cash:** Senator Siewert, you're incredibly passionate about this, and I do acknowledge that, but I think you've got to listen to the evidence the secretary has just given in relation to the evidence that potentially the jobseeker is providing. We've been through this before, as you know, at previous estimates. The whole point of the targeted compliance framework is to actually identify, before you get into the final phase, where you move off to a different portfolio, whether or not there are capability issues and to work through them with you. This is actually a positive change, because it is now working with the individual to identify if they are having issues with their job plan, to seek to rectify them and to put them back into the green zone.

**CHAIR:** How many people have actually received a financial penalty compared to the previous system?

**Senator Cash:** When we say 'penalty', I think we also need to—

**CHAIR:** Under the targeted compliance framework.

**Senator Cash:** There are two parts to this system, and the words that are often used conflate the two systems. I might get the department—

**Senator SIEWERT:** This isn't coming off my time, is it?

**Senator Cash:** No, no.

**CHAIR:** No, it's not coming off your time.

**Senator SIEWERT:** We all know this.

**CHAIR:** You've had nine minutes so far.

**Senator Cash:** There is a difference in relation to a suspension. As you know, once you re-engage, the suspension is lifted.

**Senator SIEWERT:** I was very careful in my language. I said 'suspensions'.
**Senator Cash:** You did, but we might just clarify.

**CHAIR:** That would be very good. It's not coming off your time, Senator Siewert.

**Senator SIEWERT:** Okay.

**Mr Emerson:** I am happy to take you through how we're going in terms of penalties and suspensions, if you like, if that's what the question was. Mrs Hill will do that.

**Mrs Hill:** Just looking at the last year of the jobseeker compliance framework, from 1 July 2017 to 30 June 2018, we saw 394,444 financial penalties applied to 110,876 jobseekers. From 1 July 2018, when the targeted compliance framework commenced, to 31 August 2019, we've seen 24,892 financial penalties applied to 14,816 jobseekers.

**Ms Hartland:** There's been a 90 per cent reduction. As at 31 August 2019, the figure I've got is that 1.3 per cent of jobseekers were in that penalty zone. I know there is a difference in the things that are being asked here.

**Senator Cash:** That's what I'm trying to explain to the committee.

**Ms Hartland:** But that's in answer to your question.

**CHAIR:** Thank you. I'll go back to Senator Siewert.

**Senator SIEWERT:** I don't know whether you've had feedback from jobseekers, but I certainly have. When you get a suspension, depending on the timing, it's a financial penalty, because you don't get your payment when you need it, and, when you're living on Newstart, you're living from payment to payment. I understand that we've got a fundamental disagreement here, but the people I talk to who've had suspensions feel it very strongly.

**Ms Hartland:** We've worked really hard to ensure that there aren't those sorts of hardships in terms of the time frames. I think there are some stats that I can probably grab around—

**Mr Smyth:** It's about 14 per cent of people that have a suspension that occurs over a payment cycle.

**Senator SIEWERT:** I don't know whether you've had feedback from jobseekers, but I certainly have. When you get a suspension, depending on the timing, it's a financial penalty, because you don't get your payment when you need it, and, when you're living on Newstart, you're living from payment to payment. I understand that we've got a fundamental disagreement here, but the people I talk to who've had suspensions feel it very strongly.

**Ms Hartland:** We've worked really hard to ensure that there aren't those sorts of hardships in terms of the time frames. I think there are some stats that I can probably grab around—

**Mr Smyth:** Fourteen per cent of people that receive a suspension have that suspension occur over their payment cycle. There are 14 per cent of people that, in terms of getting a suspension, haven't re-engaged at the time that their payment is made, out of all of the people who are suspended.

**Senator SIEWERT:** What about when they get suspended just before the payment's due? Is that included in the 14 per cent?

**Mr Smyth:** Yes. That's right.

**Ms Hartland:** If you flip it round the other way—I think I'm right in saying this—86 per cent of people who have a suspension do not incur a financial penalty, if you like.

**Senator SIEWERT:** You would have heard the evidence we got from the ParentsNext inquiry that people, even if they haven't capped it, have to manage their money because they think they are going to cop it. So just because you haven't capped it doesn't mean it's not having an impact on your stress and anxiety level. That's certainly evidence we have received.

**Ms Hartland:** We understand that. I was just putting on the table what the actual figures are. But I take your point.
Senator SIEWERT: Looking at the suspensions that have occurred in the warning zone, 58.3 per cent are Indigenous people, 55.7 per cent are homeless and 59 per cent are ex-offenders. I'm trying to look at those vulnerable cohorts and see what impact this system is having. That's a high proportion of those cohorts that are coping some form of suspension.

Mr Emerson: Senator, you're correct. It is a feature of the evaluation—and we said this at the last estimates too. It is something we take very seriously. Obviously, we do look at the cohort data to see where there are, for example, differences between cohorts and the way the Targeted Compliance Framework is applied. This would be a feature in the evaluation which is currently being scoped and is currently underway.

Senator SIEWERT: I'll come back to that. Over half of stream C—52.6 per cent—are coping a suspension.

Senator Cash: I think you've got to overlay that the department's basic foundation in terms of the system is actually a better system because it is identifying up-front whether people have an issue—

Senator SIEWERT: But it's not identifying them up-front. 'Up-front' is when you go into the system, not when you've copped three demerit points.

Senator Cash: Based on the information that is often given, as you know, by the varying people within stream A, B and C. The whole point of this system is to identify as early as possible so they don't ultimately get to the part where they are—we'll agree to disagree on this system, and you and I have done that before. This system is about the individual and ensuring they don't go to the penalty phase. Suspension, as you know, is not a loss of money. I appreciate what you are saying, but it is not a loss of money, and it gives the person to identify whether there is an issue and have it rectified.

Senator SIEWERT: I want to go back to the fact that we are not picking up that group of people who for various reasons—I'm going back to that vulnerable cohort who get picked up at the third demerit point, where they get a capability re-assessment. My contention is that those people should not be getting to that point without being picked up. There is a slight change in figures here, but 44 per cent is still nearly half of people who are coping suspensions because there are errors in their plan, because their job plans are inappropriate or because of the disclosure of new information. I hear what you are saying, but my point is that we don't have a system up-front that's identifying people soon enough. If you go to stream C—

Mr Smyth: We've struggled with this, there is no question, because there are significant privacy issues that go to how much information we know about individuals coming into the system versus the self-disclosure regime that currently operates. It does require a lot of self-disclosure. People who don't disclose that they may have a drug and alcohol problem or a disability or some other elements that are a barrier to them being in the system, and therefore their job plan is not appropriate—if we don't have that disclosure, it is very difficult for us.

Senator SIEWERT: I understand, but 63 per cent of people with a disability have got to the point where there are errors in their job plan—and they have already identified a disability. Presumably, these are 'partial capacity to work'. Under the cohorts, in the demographics, for disability, 'errors in job plan' is 63 per cent. How can we get to a point
where 63 per cent of people with a disability are getting caught up under 'errors in job plan' when they have already copped three demerit points?

**Mr Emerson:** They've actually also had three demerits. For some reason, these people have also had a suspension. They have offered a reasonable excuse and it has not been deemed to be a valid reason—

**Senator Cash:** A reasonable excuse.

**Senator SIEWERT:** There are errors in their job plan.

**Mr Emerson:** But that has been sent back and re-tailored to meet their personal situation. That is a safeguard for that person.

**Senator O'NEILL:** A safeguard!

**CHAIR:** We have a document to be tabled. Is it the wish of the committee that this document be accepted as evidence? There being no objection, it is so ordered. Senator Pratt.

**Senator PRATT:** Thank you. I'm just trying to come to grips with how the information in front of us, which has been tabled, relates to my question. Is this the equivalent of the public data that has been released, or is this new data for us today?

**Ms Hartland:** This is more detailed data. It just goes into that data.

**Senator PRATT:** And this is not what you have generally and publicly disclosed. Your public data previously hasn't provided this level of detail, has it?

**Ms Hartland:** I'll start with an explanation and we can add to that. We have provided this level of detail publicly before. What we were getting to is that there is such granularity around this data that we were starting to get to very small numbers of people—ones and twos—and we were starting to worry about some of the privacy implications. So we were concerned about that. Obviously we are happy to provide it to the committee. There are a lot of complexities in explaining around this level of data. We are also concerned about that. Thirdly, the number of times people were actually accessing this data was very small. I think we had 100 hits on our website in total. There is a lot of detail that goes into providing that and providing the context around it. I am very happy to provide it to the committee and talk that through. We took a view that it was better to provide a truncated version of that and we would be happy, on request, to talk through it.

**Mr Smyth:** Since we have had the new higher level data, with more contextual narrative around interpreting the data up on our website, we had 400 hits within the first few days around that. So it was more digestible for people. As the secretary said, we have provided this level of data to the committee since the TCF's been in operation.

**Ms Hartland:** For point in time, over time, it becomes very complicated. We are very happy to take you through it line by line.

**Senator PRATT:** I would be concerned that the government is not trying to hide—as Senator Siewert has highlighted—the number of people and the reasons why jobseekers are returning to the green zone after dropping to—

**Ms Hartland:** I am absolutely not trying to hide it. As I said, we've provided all this level of detail. It's just that it is very complicated. It wasn't being used. It takes a lot of resource to do that. We just thought this was a better way of dealing with it.
Senator PRATT: One of the issues is that this is a paper version of it. Would you be prepared to email us the spreadsheet of this—because when you download it from the website you can see that—

Ms Hartland: We can send you a PDF version of it.

Senator PRATT: When you download it from the website, you can normally see it in a table format.

Ms Hartland: We can provide an electronic version of this.

Senator PRATT: Thank you.

Mr Emerson: My understanding is that this would be included anyway because—

Ms Hartland: We've tabled it now; it will be part of that. However the committee wants to get it, we are happy to do that.

Senator PRATT: When you have the data on a website, you can add it up, subtract it and look at what is actually going on inside it. But when it's tabled in this form it is very difficult to do that.

Mr Smyth: We probably wouldn't provide an Excel spreadsheet. We've probably provided it in PDF format. There is an issue around data manipulation in all of that.

Senator PRATT: Did you take it down from the website previously because that data was able to be manipulated?

Mr Smyth: No, because we haven't provided it in anything like the Excel spreadsheet arrangement. It is normally in a PDF—accessible reader arrangements that we have to comply with government on.

Ms Hartland: That's the protocol.

Senator Cash: Correct; that's what we're expected to do.

Mr Smyth: Yes, there are protocols.

Senator PRATT: So you will regularly publish this data with us and give us another set of this at the next estimates?

Mr Smyth: We'll provide it to the committee at the next estimates.

Senator PRATT: In a response to an FOI request for detailed compliance data, the Department of Employment said:

Since the commencement of the Targeted Compliance Framework, the department has decided to release data on an annual basis. This allows sufficient time for jobseekers to progress through each zone and the accrual of demerit penalty milestones and ensures the data for the period is robust and meaningful.

In terms of your public data, is the plan, following the inaugural report, just to release it annually?

Ms Hartland: No, it's not. It's actually to release it six-monthly.

Senator PRATT: Based on Senator Siewert's questions before, inside this data, how do we measure suspensions that weren't the fault of the jobseeker?

Mr Emerson: That won't be included in the six-monthly report, but you will be able to see the number of suspensions. I'll just check if you can see it on this report.
Ms Hartland: You can't see it. As you can see, there is a lot of data there.

Mr Emerson: The suspensions won't appear on this A3, but we are happy to answer questions about that.

Senator PRATT: My concern is that truncating in that publicly released data both the suspensions that are purportedly the fault of the jobseekers and those that are not demonises the quantity of people who are seen to have ended up in the red zone. I'm concerned about the public narrative around that. Why are you choosing to do that? Can you not recognise that that is an unfair thing to do?

Mr Smyth: Before people get into the red zone a capability interview and a capability assessment are undertaken to determine whether they are capable of meeting their job plan. If they are capable of meeting their job plan then they do move into the penalty zone. As the secretary said before, only 1.3 per cent of the case load are in the penalty zone. It is a small number. They are people who are deemed to be capable of meeting their job plan requirements but are not doing so, and, therefore, incur a penalty.

Senator O'NEILL: Is that assessment the one that is done by phone?

Mr Smyth: It's done by DHS.

Mr Emerson: The capability assessment is done by DHS.

Senator O'NEILL: Yes, but my question is: is it done by phone?

Mr Emerson: It can be done by phone, but most of the time it is done face to face.

Senator O'NEILL: Can we get the breakdown on that?

Mr Smyth: That would be a question for DHS.

Senator O'NEILL: In our own personal interactions with people, there is a significant difference between when you are in a room observing somebody and when somebody is on the phone.

Senator Cash: I think we would have to refer it to DHS. It is just a different—

Ms Hartland: I will have to take it on notice. I don't have those figures. As Mr Emerson said, the vast majority of those would be face to face. I take your point. We'll get you those answers through DHS.

Senator O'NEILL: Thank you. And I am interested in Senator Pratt's point about when it is something that is the responsibility of the jobseeker and when it is an error by the department.

Senator Cash: Again, you're in the penalty phase. So we'll need to refer it to DHS for you.

Ms Hartland: Just to be clear on what Mr Smyth is saying—and I think we might be getting a bit confused about red zones here, because we have the colour red on this chart—when we talk about the penalty zone, and the 1.3 per cent of the 578,000 people, we are talking about when there is a financial penalty. We are just being careful with the language.

Senator Cash: And they have moved to DHS; they are no longer within—

Ms Hartland: That's after the five demerit point process and then that penalty zone.
Mr Emerson: That's right. When they are in the red zone, that is when they are actually beginning to lose their income support—that is one week, two weeks and four weeks whereas a suspension is paid once they re-engage.

Ms Hartland: So we are talking about 7,400 people out of approximately 580,000 people.

Mr Emerson: That's correct.

Senator PRATT: In terms of the rest of my questions about data, now that we've got the table it's actually hard for me to prioritise those questions. It's quite difficult. I note that in September A Current Affair featured a welfare recipient who, under a drug-testing plan, may lose payments due to his drug use. Can I ask you, Senator Cash, if your office had any involvement in that report to the media?

Senator Cash: I would need to see the report. Do have it in front of you?

Senator PRATT: No, it was A Current Affair, about a welfare recipient losing payments, so I don't have it in front of me.

Senator Cash: Again, I'd need to see it. I don't know what date you're referring to.

Senator PRATT: Okay. If you could take on notice, Senator Cash, whether your office, or the Prime Minister's office provided any material to A Current Affair regarding that report.

Senator Cash: If you could just provide us with the date et cetera of what you're referring to.

Senator PRATT: Yes. It might well be, seeing as you're having to take the on notice—

Senator O'NEILL: How many stories are on A Current Affair about welfare recipients!

Senator PRATT: Are you aware of the story, Senator Cash?

Senator Cash: I would need to refresh my memory. There are a lot of stories out there. But, if you could just provide me with the details, I could take that on notice for you.

Senator PRATT: So you're not aware of a welfare recipient who may lose payments due to his drug use, under the drug-testing plan—

Senator Cash: Again, this would actually be a separate—

Ms Hartland: If it's around the drug testing, it's probably DHS.

Senator PRATT: No, I understand that, but this is a question to Senator Cash about whether she recalls the involvement of her ministerial office.

Senator Cash: As I said, I don't have enough detail to actually respond, but I'll take it on notice.

Senator PRATT: Sorry, Senator Cash, it just sounds to me like you almost recall it. You're not able to say—

Senator Cash: If you can give me a specific time and date—but I don't have anything in front of me at this point in time. My understanding is that nothing was given from my office to A Current Affair. But, again, we'd have to also refer it to DHS, because this is actually a DHS policy issue. But, if you can provide me with the time and date, I can take it on notice for you.

Senator PRATT: Thank you. So, if I want to ask questions about wrongful suspensions, they'll be covered in this table; is that right?
Mr Emerson: Wrongful suspensions? No. They're not covered in this table, no.

Senator PRATT: Okay. I've got plenty of questions; it's just that the table has really thrown me. How many participants are engaged in jobactive, how many this time last year and how many at September 2013?

Senator Cash: September 2013 would have been Job Services Australia.

Mr Emerson: Yes.

Senator Cash: Are you happy for the department to take that on notice for you?

Ms Hartland: I've got some figures, but not across that particular time frame. As I think Mr Smyth said before, the jobactive case load at 31 August is 615,667 in the figures I've got. It's been gradually declining since February 2016, when it peaked at 790,555.

Senator PRATT: Are you able to tell us now the number of long-term and very long term unemployed across all of those streams now?

Mr Smyth: Yes, I can.

Mr Emerson: Yes, I've got that. For the jobactive case load stream, by stream as at 31 August 2019, I can give you a breakdown of stream A to stream A volunteer, stream B and stream C for LTU, long-term unemployed, first. The first number, 'eligibility to be determined', is 2,271; stream A volunteer, 2,269; stream A, 89,598; stream B, 221,108; and stream C, 87,531. That's just for long-term unemployed. For very long-term unemployed, with eligibility yet to be determined—these are people yet to have their situation confirmed—the number is 1,390; stream A volunteer, 1,510; stream A, 43,448; stream B, 166,851; and stream C, 72,493.

Ms Hartland: Chair, could I just correct the record? Earlier, I said that the drug trial was DHS's responsibility. I just had a message saying it's actually DSS's responsibility. I'm sorry. It was just the wrong acronym in my head.

CHAIR: Thank you.

Mr Emerson: Did you need anything else in addition to that, including the totals? I guess that's just a matter of adding them up.

Senator PRATT: No. I think we can work through that.

Mr Smyth: Could I also clarify? Our definition, in our case load, of long-term and very-long-term unemployed is a bit different from what the ABS data around those people is. Around 28 per cent of our case load at any one point in time is actually working on a part-time basis, but they're not receiving enough income through what they're doing to get off income support, obviously, whereas the ABS definition is the one hour.

Senator SIEWERT: Yes. So helpful—not.

Mr Smyth: I did want to clarify that. That's why you'll see that, when the ABS data comes out about long-term unemployed et cetera, it's quite different to the case load that we actually have within jobactive.

Senator PRATT: Is there any reason you don't include that data inside this table that you've provided for us?
Mr Emerson: That's a good question. The reason is that this table shows only those jobseekers who are part of the TCF—to what the TCF applies. Some of these people may not have the TCF applied to them.

Senator PRATT: Senator Cash, I've found that news article.

CHAIR: Is that the A Current Affair program?

Senator PRATT: Yes. It was on 16 September. The story for the period of 9 to 16 September.

CHAIR: Because it's a television program, I think the minister—

Senator PRATT: I'm happy to forward the email to you now.

Senator Cash: The answer to your question is no, but I'll take it on notice to ensure that it is no. My understanding is that the answer is no.

Senator PRATT: So it's 16 September.

CHAIR: Can you table it at all? Is that possible?

Senator DAVEY: Or make sure a link is provided to Hansard so that we can—

Senator PRATT: Yes. I'm sending the FOI to the chair and the secretary and Senator Cash now.

Senator Cash: Sorry—the FOI?

Senator PRATT: Yes, the FOI decision that shows the date of the—

Senator Cash: Okay. Chair, I'm confused now that we have an FOI involved.

CHAIR: I'm not going to tell you what to do. I'm getting a bit confused myself.

Senator PRATT: I raised, when asking you, that it was in the context of—

CHAIR: I think the minister has taken it on notice. It's probably the best thing to do.

Senator Cash: The answer to the question, I understand, is no, but I'm happy to take it on notice in case I'm looking at something different. I have nothing in front of me.

CHAIR: That would be good. Just to assist the committee and senators, the plan is that we will finish with outcome 1 at 10.30, as per the program. We can then go on to outcome 2 after the morning tea break. I remind senators that we have a private meeting at 10.30, so we've got 12 minutes remaining for outcome 1. Senator Pratt.

Senator SIEWERT: It says here 11.30.

CHAIR: That's tomorrow.

Senator SIEWERT: I beg your pardon.

CHAIR: There might be some questions that senators need to put on notice as such. Senator Pratt, we can give you a few more minutes. Senator Siewert, you might have one more question. If not, we'll take them on notice. I know Senator O'Sullivan wishes to ask a couple of questions. Senator Pratt, over to you.

Senator PRATT: Thank you. I'll let Senator O'Neill take the call.

Senator O'NEILL: I have a couple of quick questions around the franchising.

Senator PRATT: That's next. We're still on jobs and employment services.

Senator O'NEILL: Thank you.
CHAIR: We've got 10 minutes. Senator O'Sullivan, we might just go to you for a couple of quick questions.

Senator O'SULLIVAN: I'm just seeking a clarification, following on from Senator Siewert's question. Sometimes the impression that we're given is that jobseekers that find themselves on suspension—and, ultimately some end up with a penalty; although, as you've pointed out, only a very small number actually end up there—are left on their own to deal with the barriers. Can you explain the kind of supports that are around to help those jobseekers address their issues—the level of actual interaction that they have. It's not just a letter that they get, is it? There are people involved in helping them navigate the challenges and the issues before they actually end up on suspension and with penalties.

Mr Emerson: So each time a jobseeker does not attend an activity—this sounds like I'm coming at it from a deficit approach, but that's the only way to illustrate it.

Senator O'SULLIVAN: Well, they've got barriers; let's face it.

Mr Emerson: That's right. These people would have in their job plan a range of things that they've agreed that they want to do in order to help them find work. If they don't attend an appointment, all they need to do is call up. If they don't call up to say, 'I can't make the appointment' and to reschedule it, they will get a suspension and there'll be a demerit. But there'll be a conversation between that jobseeker and that provider as to why it is that they can't. That will, over time, build a better understanding with the provider. That's after the job plan has been negotiated and tailored to their needs. At the third demerit, they'll have an opportunity to come in and talk about what it might be

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Senator SIEWERT: That's not good enough.
reinforce: 60.3 per cent of people remain in the green zone. Very few people, as the secretary said—only 1.3 per cent—are actually in the penalty zone, so the Targeted Compliance Framework is therefore much more targeted at those people who are most wilfully and persistently non-compliant.

CHAIR: Thank you, Senator O'Sullivan. I will hand over to Labor who may wish to cede some time to Senator Siewert—I'll let you work that out amongst yourselves.

Senator PRATT: We've both got an unlimited number of questions.

CHAIR: I'm sure you do—on notice.

Senator PRATT: I might just ask the good people at the table: why is it that for those people who get to a financial penalty stage the number of men in that situation is three times higher than the number of women; and what are you doing about it?

Mr Emerson: Yes, we have noticed this, Senator. It's similar to the answer that I provided to Senator Siewert, which is that it is a really important part of the evaluation. I'm sorry if that's not a satisfying answer, but it is in fact—

Senator SIEWERT: All those men—it's good for the evaluation.

Mr Emerson: part of what we're looking at to develop the TCF into the future. You've given one example of men having a high proportion in the penalty zone. Why is that? So our evaluation will help to inform that.

I'm sorry. Are you able to point to any of those reasons now? I'm sure there must have been some analysis done.

Not at this stage.

Senator PRATT: Are you able to point to any of those reasons now?

Senator O'NEILL: There must have been some analysis done.

Mr Smyth: We're a bit over 12 months into the TCF, but my colleagues just said to me that there is some anecdotal evidence to suggest that younger male jobseekers are more likely to not fully engage with the system. But, again, we need to assess the data. We need to understand a little bit more about this before we actually draw firm conclusions around it.

Senator PRATT: I'm sorry, but everyone knows that young men are hard to engage with. Why don't you have a strategy embedded in the program from the start to address that? There are high school programs, there are mental health programs—they all target this cohort.

Mr Smyth: We do. And we have a program, Transition to Work, that targets young people that the TCF doesn't apply to. That program is achieving very good outcomes relative to jobactive. It gets higher outcomes, but it's really focused around a group of what you might call disengaged youth or youth who have not actually finished school or who have more significant barriers and the like. We have a more targeted approach to that cohort of people. We have one provider per region around that program, and that program is achieving good results.

Senator PRATT: So you've recognised that in the case of young people. Surely you would have assumed, in the case of these capability assessments and their progression through, that you were going to have similar issues and you would have built that into the programs.
Mr Emerson: We provided significant training to providers, and then providers themselves continue to develop really good awareness of their own case load, their own jobseekers, and how to support the particular needs of their jobseekers when they're applying the targeted compliance framework. We've got a large number of people out there who are delivering the services who do a very good job at tailoring the conversations in their interactions with their jobseekers.

Senator PRATT: In other words, you're saying, despite having those programs in place, you're not able to move that massive disparity which, in all cases that I can see in this table, is more than 50 per cent men versus women in some cases. If you look at Work for the Dole activity, you've got 431 women in the first penalty versus 1,500 men, and it's also an extraordinarily large statistic in terms of financial penalties.

Ms Hartland: Senator, as you were saying before—because the employment figures have been so strong, we're getting the complexity around the case load that is there in jobactive. You've seen that reduction in the numbers of jobactive clients and you've heard some of those figures in terms of long-term unemployed. We know that there's a more complex array of issues there that people have. It's why we're also changing the system, the NES system, to look at those more intensive services.

There's certainly much more that can be done, and this system, which has been in place for 12 months, is actually starting to raise some of those issues for us. We're using other programs, mature-age programs, TTW, those sorts of things. We've just changed the rules around TTW to extend the age of people who can access that from 21 to 24 years of age. We're making adjustments all the time. We understand that there are issues that need to be dealt with. We don't have all the answers—I wish we did—but I think we've made better progress with these programs than we have in previous programs. We need to make better progress again, and that's what we're trying to do.

Senator SIEWERT: Can you tell me how many people, who have been suspended over the five, have not re-engaged?

Mr Emerson: You asked that question as a question on notice last time. We have updated data.

Senator SIEWERT: Yes, I'd like updated data.

Mr Emerson: I might ask Mrs Hill to provide that to you. So when you say 'not re-engaged', does that mean they've gone off payment after 28 days and therefore not re-engaged back with Centrelink?

Senator SIEWERT: Yes, I have asked previously but I want the most up to date.

Mrs Hill: From 1 July 2018 to 31 August 2019—this is in jobactive—there was a total of 104,480 people. And 1,472 were from the penalty zone.

Senator SIEWERT: Sorry?

Mrs Hill: At the time, 1,472 were in the penalty zone.

Senator SIEWERT: So you said 140,000?

Mrs Hill: I said 104,480.

Senator SIEWERT: And they've dropped off. We don't know if they've got work or where they are? Is that correct?
Mr Emerson: That's right.
Ms Hartland: It could be that they have got a job.
Senator SIEWERT: So over 100,000—
Mrs Hill: Yes, in over a year.
Senator SIEWERT: Have been suspended and not reconnected?
Mr Emerson: Presumably, most would have got employment.
Senator SIEWERT: Presumably, but we don't know. Is that correct?
Mrs Hill: We don't have that information.
Mr Emerson: They would be sustaining themselves through employment, no doubt.
Senator SIEWERT: No, that's an unsafe assumption, particularly when you look at CBT.
CHAIR: It's 10.30 and we do need to break. There are lots of questions, I understand, that you'll put on notice.
Senator SIEWERT: On this particular one, do you have a breakdown? Because there's no point in me asking any further. Do you have a breakdown of the demographic of those people?
Mr Emerson: Yes, we do. We have stream A and stream B.
Senator SIEWERT: Are you able to table that today?
Mr Emerson: Yes.
Senator SIEWERT: Could you table that?
Mr Emerson: Yes, we have that breakdown.
Senator SIEWERT: Chair, can I also say, I understand that we are finishing this now. This is not on adequate time to go through what is effectively nearly a $7 billion program.
CHAIR: These are supplementary estimates. We have the budget estimates which have more time.
Senator SIEWERT: It's still not adequate, with all of the changes that have been made. I understand we are stopping now; I'm not arguing for us to continue. I do think that we should give consideration to spillover, because we haven't got anywhere near any of the programs that this program covers, which deserve examination.
Senator O'NEILL: Labor would support that.
CHAIR: Okay, what we'll do is there will be no further questions—
Senator SIEWERT: Well, there are.
CHAIR: apart from those that are going to be put on notice. I'd like to thank all of the relevant witnesses and wish you good speed home. Outcome 1 is finished.

Proceedings suspended from 10:32 to 10:47
CHAIR: To assist those watching at home, we're going to very briefly reopen outcome 1 for the purposes only of questions in relation to franchising. Senator O'Neill has questions on franchising for about five minutes.

Senator O'NEILL: Thanks for coming back, Mr Cully. I have a couple of questions, as I indicated, about the Franchising Taskforce. What's the budget allocation?

Mr Cully: There's no allocated budget as such. We're managing it within the existing funds of the division and Mr Beasley's branch.

Senator O'NEILL: Do you have an estimate of the costs to date?

Mr Cully: I wouldn't. It obviously involves a team of people working directly on it within the division but also drawing on some other people. There have been some costs in terms of the roundtables and the translation of the issues paper that we released. So we'd have some costs, but I don't know that I'd be able to give you the total cost to date. But we can take it on notice.

Ms Hartland: We can take it on notice.

Senator O'NEILL: If you can take it on notice and provide as much detail as you can on the breakdown, that would be appreciated. In terms of the task force work, when do you expect to finish?

Mr Cully: I think the task force terms of reference indicated that advice would be provided to government before the end of the year, but the task force will also work to then finalise the government response.

Senator O'NEILL: How will the people who are making submissions be protected? Will they remain confidential?

Mr Cully: Yes. We made a conscious decision not to publish the submissions to the task force for those issues of confidentiality, and we would do everything that we need to to preserve the confidentiality of people who've submitted and want them to remain confidential.

Senator O'NEILL: I'm sure you'd be aware of some comments that I've made in the last 24 hours about the lack of transparency around the work that's going on with regard to the taskforce?

Mr Cully: Yes, I am. With respect, I think we have been transparent. Obviously, the minister issued a media release about the task force and its work. We've had an issues paper, and we're out there consulting with stakeholders. We're not holding—

Senator O'NEILL: The product of those consultations and the submissions are not available for general perusal, are they? They're only available to you?

Mr Cully: They are available to us. They are the base informing the development of the work we do and the advice we provide to government. They will influence that, but, equally, we've just spoken about confidentiality and so on. People are giving us information on the basis that it won't be public. It's to inform the work of the task force and the advice to government. But, certainly, those views that have come out in consultations will be reflected, for instance, in the regulatory impact statement that will be issued and the other work of the task force in terms of its advice to government.
Senator O'NEILL: Will there be any breakdown of the sources of your advice?

Mr Cully: I can certainly give you some figures in terms of the number of people that we've met with and the types of stakeholders. As of 17 October this year, we've had 57 bilateral meetings, there were 31 roundtable participants and there were 75 responses to the issues paper. Of those stakeholders, eight were representative bodies, 16 were—

Senator O'NEILL: Sorry, I really appreciate the information, but you're going just a little fast for me and I can't quite hear you properly, so could you speak up as well. Was it 51 bilaterals?

Mr Cully: There were 57 bilateral meetings.

Senator O'NEILL: And 31 roundtables.

Mr Cully: That's correct. There were 75 responses to the issues paper. And, in terms of the types of stakeholders, there were eight representative bodies, 16 franchisors, 40 franchisees, 10 intermediaries and 14 other.

Senator O'NEILL: In terms of those participants, can you give me any further detail, even in confidence, about who submitted?

Senator Cash: We'll take it on notice to provide that to you.

Mr Cully: We'll take that on notice, Senator, and see what we can provide.

Senator O'NEILL: I just put on the record that there's quite a significant difference there, in terms of 75 responses to the issues paper compared with 406 submissions to the parliamentary inquiry, 190 of which were confidential—not for the process but because people were fearful due to intimidation in the sector, and that's why they submitted to that committee confidentially. So I think it's very important for the task force going forward, and for the minister, to understand that the very last thing that we need to have happen here is a reprosecution of the quality of the work or a questioning of the quality of the work of the committee that delivered the unanimous report. And I am a little concerned, looking at the breakdown of representative bodies, franchisors, franchisees, that the most populous group amongst those are the franchisees, not the franchisors. They do not look like they've dominated the task force's work so far. It looks like the franchisors and the franchisees are on a level playing field, almost.

Mr Cully: It was 16 franchisors and 40 franchisees.

Ms Hartland: I have to say that that stakeholder engagement continues as well. And, obviously, we're not working in a vacuum of not seeing that the other work that you've referred to is also being done. But, in terms of your point about that confidentiality which Mr Cully has answered, we're very much aware of that, too.

Senator O'NEILL: The parliamentary committee's report has already got a significant number of recommendations in it. Yesterday, we had people visiting us here in parliament who've continued to sign up to the old schemes that exist, and we've heard the stories of exploitation that has gone on of franchisees and of people who are working in franchises, in terms of wage theft. My understanding of the work of the committee as it was presented was that the task force was to be an implementation task force, not a reprosecution task force. When will the implementation commence?
Mr Cully: Just in terms of the role of the task force, the recommendation itself was that the task force be set up to examine the feasibility and implementation of a number of the committee's recommendations. It was looking at what could possibly be done in terms of some of those recommendations; it wasn't simply about just implementing what was there. So that is the work the task force is undertaking. They're looking at those recommendations and seeing whether they are feasible in practice, how they could be implemented and the most appropriate way for them to be implemented.

Senator O'Neill: Mr Cully, does it concern you that people today are signing up to franchise agreements that the committee found are profoundly in favour of franchisors, and that they are leading to people losing their livelihoods and losing their homes, with the consequent mental health and health challenges that arise out of that? Does it concern you that that continues because of the delay?

Senator Cash: I'll just jump in there. Just to follow on from what Mr Cully said, it was a bipartisan report, and the first recommendation of the fairness in franchising parliamentary report was to establish the interagency committee, which the government did. Key stakeholders—and I'm more than happy for Mr Cully to provide you with further evidence on this, and you'd know this as well—have indicated to us that, due to the complex nature of the laws, they want us to get it right. And that is what we're doing with implementing the first recommendation of what was the bipartisan report. We are taking a considered approach so that, when we do receive the department's advice, stakeholders do understand that it has had the necessary consideration, and we can move from there. And, in a matter of weeks, my understanding is that we will have that advice from the department.

CHAIR: Thank you. If it's okay, Senator O'Neill, I'll cut it off there.

Senator O'Neill: Just one question to the minister, if I can. Minister, you'd be aware of the recommendations or comments of Mr Keogh of the ACCC around this matter recently, with very serious concern about the nature of franchising and people signing up to franchising. He gave very frank advice to people to consider in this interim period between the government receiving the report, which was in March and here we are in nearly November. Are you aware of the advice of Mr Keogh from the ACCC to people considering purchasing a franchise?

Senator Cash: I'll get the department to respond.

Mr Beasley: We are aware of the speech that Mick Keogh gave, but I don't have the specifics in front of me at the moment. What was the specific question in regard to that?

Senator O'Neill: You are aware of that?

Mr Beasley: We are aware of that speech.

Senator O'Neill: Are you putting out any advice to people to very seriously reconsider signing up to any franchise until there is a new establishment of a safer reality for them?

Mr Cully: It's not our role to give advice to franchisees in this context. Mr Keogh has obviously given that position—

Senator O'Neill: That's why I directed the question to you, Minister. There is a long lag time between March and now, and people's lives are on the line here.
Senator Cash: The government has been very transparent in the process that it has followed. We have adopted and implemented the first recommendation of what is a bipartisan committee report to us. We have established the interagency Franchising Taskforce. We put out an issues paper, and we've taken you through the feedback that we have to date. The key stakeholders in this have also indicated that they want the government to get this right. For the reasons that actually you have articulated, they don't want the government to rush into something and not properly respond to the issues that have been raised. In but a matter of weeks, we will have the advice from the task force which the government will consider.

CHAIR: On that point—
Senator O'NEILL: That isn't an answer to the question—
CHAIR: No more questions, Senator O'Neill—
Senator O'NEILL: The question was: are you going to take interim action—
CHAIR: Senator O'Neill, please—
Senator O'NEILL: to raise your concerns for franchisees.
CHAIR: Senator O'Neill, they have come back for you. What we are going to do is thank the people from the franchising section for coming back for outcome 1. Run while you can! Thank you very much. This formally ends outcome 1.

[10:59]
CHAIR: We will now go on to outcome 2. By the way, one of the previous witnesses did table a document. Are there any objections to the committee accepting the document as tabled? No? It is so ordered. Can someone please walk me through how VET and skills funding works at the Commonwealth level?

Ms N Williams: I'm happy to walk you through that. There's a range of funding mechanisms that exist at both the Commonwealth and the state and territory level. I think it's important to start off by noting that VET is a shared system. Both the states and territories and the Commonwealth have some level of responsibility for funding the system. Essentially, the Commonwealth provides funding to the states and territories through a range of different agreements, including the National Agreement for Skills and Workforce Development, which is the primary agreement by which we provide funding to the states. Around $1.5 billion annually goes to the states under that agreement. It's an amount of money that has been gradually ratcheting up over the years and is increasing. That funding is essentially to allow the states to run the training system. The states have responsibility for delivery of the system and that includes making decisions around where within the system that funding is allocated—whether it's to TAFEs, or to private providers within the system, or whether it's to subsidies, and the types of subsidies that it's allocated to.

In addition to that, the Commonwealth funds a range of programs directly. These are things like the apprenticeship programs, the apprenticeship incentive programs and a range of other programs that support both employers and students directly. The Commonwealth puts in around $1.1 billion in funding per annum. In addition to that, of course, the Commonwealth provides funding directly to students to support them in their study, via loan arrangements. We're looking at, for example, the VET student loan arrangements that occur at the moment,
and things such as trade support loans. Around about $0.5 billion goes into the system annually in the form of loan arrangements from the Commonwealth directly to students.

There's also funding under other national partnership agreements, such as the Skilling Australians Fund, which the Commonwealth provides to states that have signed up to that agreement, directly to target outcomes or achievements around apprenticeships and traineeships and to lift the number of apprenticeships and traineeships in the system. Around $158 million this financial year will go to the states and territories via that agreement.

**CHAIR:** For layman's language here, does the Commonwealth government fund TAFE?

**Ms N Williams:** The Commonwealth doesn't fund TAFE, no. The Commonwealth provides funding to the states and territories to fund TAFE. Each state and territory makes decisions around how they allocate the funding we provide them. They also provide funding from their own budgets into the TAFE system or into the private system. Every jurisdiction across the nation differs in terms of the level of investment that it puts into its TAFE system.

**CHAIR:** You touched on some figures, but what's the annual amount the government spends on skills and training through the different mechanisms that the Commonwealth government uses to fund skills training?

**Ms N Williams:** In 2019-20, as an example, we spent in the vicinity of $3.4 billion of Commonwealth funding. That goes into the VET system. It's that combination of things: money paid to the states, money paid directly into Commonwealth owned programs, funding provided directly to students via loans, et cetera.

**CHAIR:** Is that investment growing, or is it falling?

**Ms N Williams:** That investment has stayed reasonably stable and it's projected to continue to grow over the forward estimates.

**CHAIR:** So, there haven't been cuts?

**Ms N Williams:** There's been some movement in funding. You'd be aware, of course, that there were some big changes to the funding levels in the system that arose out of the VET FEE-HELP issues that we experienced a number of years ago. That led to some fluctuations in funding—so, some sharp rises in terms of the amount of money that was going into the system via VET FEE-HELP, and then, of course, some decreases that occurred once we cleaned up the issues we were having with that set of funding streams. There have been those variations that have occurred. If we look back historically, around 2012-13 we were looking at around $3.8 billion being provided by the Commonwealth in the system, and now it's sitting at around $3.4 billion. We project that that will continue to rise over the forward estimates. And, in particular, that the money we provide to the states and territories, via that national agreement that I spoke to you about, is projected to increase by quite a substantial amount over the forwards as well.

**CHAIR:** How much is it? Are you able to tell us how much it's going to increase?

**Ms N Williams:** It's around $1.5 billion now. By 2023 it's projected to increase to about $1.6 billion. It continues to increase and it's done that since it was established. From 2011-12 it sat at $1.3 billion and it's continued to progressively increase over the last couple of years.

**CHAIR:** Am I correct to say, so I understand fully, that state governments are responsible for how that funding is spent?
**Ms N Williams:** We provide that funding to the states under the agreement, that's right. But the states have flexibility in terms of how they allocate that funding. The key requirements of the agreement are that they allocate it to the VET system, to training, but there are no input or output controls around that.

**CHAIR:** The federal government can't tell a state how to spend that money? For example, to cut spending to a TAFE or an allocation to TAFE.

**Ms N Williams:** No. The states do have full flexibility under that agreement to allocate the money wherever in the system they see fit.

**CHAIR:** So they're the decision-makers?

**Ms N Williams:** They're the decision-makers around that, that's correct.

**Senator Cash:** Often you'll hear the rhetoric Commonwealth equals TAFE. The Commonwealth provides the funding but the states administer the funding. The decisions in relation to TAFE are made by the states and territories under the national agreement on skills development, the NASWD. Does that clear it up?

**CHAIR:** Yes.

**Ms N Williams:** That recognises that it is a federated system so there's shared responsibility between the states and Commonwealth. The states do put their own budget funding into the system as well. In addition to the money that that the Commonwealth provides the states do allocate their own funding to the different elements of the system, including TAFEs or private providers.

**CHAIR:** There's been a bit of media commentary around the traps about cuts to TAFE. This is to clarify the point, who would be responsible for those cuts to TAFE if it's not the Commonwealth government that directly funds the TAFE?

**Ms N Williams:** As I was saying, states and territories have responsibility for allocating their funding within their jurisdictions, including allocating that funding to the TAFE system or to other parts of the system such as private providers or subsidies et cetera.

**Senator Cash:** The Commonwealth provides, is it the $1.5 billion, into the agreement?

**Ms N Williams:** That's correct.

**Senator Cash:** And then it is up to the states and territories what they do with it, including TAFE or not TAFE.

**Ms N Williams:** Or other things. Yes.

**Senator O'SULLIVAN:** What percentage of the VET system, the training, is provided by TAFE compared to—

**Senator Cash:** Do you mean versus other providers?

**Senator O'SULLIVAN:** Versus other providers, other RTOs.

**Ms N Williams:** The numbers do vary. I might have some colleagues here who can provide some advice on this if that's possible. We do have numbers around the numbers of students that are using the TAFE system versus the private system, but I think it's fair to say that the numbers are kind of skewed towards the private system in a large part. Maybe Mr Hardy might be in a position to provide some exact detail around that question.
Mr Hardy: Across the whole VET system there's around about four million students all up undertaking vocational education and training, and the TAFE system represents around about 16 per cent of that.

Senator O'SULLIVAN: I understand that it's a demand-driven system. Can someone describe to us what that means? Is it that students get to decide where they go? Is that right?

Ms N Williams: Yes, largely. There are subsidies in place, of course, where state governments subsidise particular qualifications or courses that can change the way in which students behave in the system. But, yes, largely students make choices around the types of courses that they study, the provider they will go to to study that course. Like Mr Hardy said, there's a real split between the public and private provision. A lot of students are doing a range of courses. They may not necessarily be doing full qualifications. They could be doing part qualifications or they could be doing short courses, and they may do a good proportion of those courses in either the public or the private system.

Senator O'SULLIVAN: If an employer or an industry group is an RTO and a student decides to go there rather than to a government-run TAFE, media commentary seems to say that that's somehow a cut to TAFE. If someone's choosing to go to a private provider, and there are examples of where those providers are actually run by industries and employers, is that a cut?

Ms N Williams: That explicitly is not a cut, no. Students do make choices based on a range of factors; it's true. They'll choose based on the type of course that they want to do and the quality of the course that's being offered by the different providers that are available to them. They'll look at the cost of the course and government subsidies. Whether or not they're able to access things like the VET Student Loans arrangement that we have in place is also a part of the decisions that the student will make. But you're quite right: there's a high level of student choice in the system.

CHAIR: You mentioned apprenticeship programs. What does the Commonwealth provide to support employers, and is this demand driven?

Ms N Williams: The Commonwealth provides funding for incentives directly to employers. I might get some of my colleagues to talk a little bit about the numbers. We have an incentives program that sits at around $393 million per annum in terms of the funding that is set aside to be provided to employers for incentives. This is a demand-driven program, so obviously it depends largely upon the interest and the demand that comes from employers as to whether they are keen to employ a person in that program or not.

CHAIR: Senator O'Sullivan has a follow-up question.

Senator O'SULLIVAN: Are you able to explain what have been the major items of reduced government expenditure in the skills space?

Ms N Williams: It depends a little on the time frame.

Senator O'SULLIVAN: I think you mentioned VET FEE-HELP before.

Ms N Williams: Yes, VET FEE-HELP is obviously an area where there have been significant changes in funding. We don't need to go back through the history of that, but, as you note, Senator, that was a big and significant change. There were also changes made to the apprenticeship program—I might ask Mr Palmer to talk to that a little bit—that were
designed, I guess, to clean up some of the issues within the program that related to existing workers. They were quite large funding changes to the program.

Mr Palmer: In the period 2012-13 there were a number of changes made to the program. Prior to those changes, almost all apprentices attracted an incentive. The changes were that only apprentices that were on the National Skills Needs List attracted incentives if they were an existing worker or if they were part time, and only apprentices or trainees that were full time attracted the incentive. As a result of that we saw quite a dramatic decline in the number of people, particularly in traineeships, because the incentive program wasn't there to provide funding to employers to undertake trainees in that capacity as existing workers.

Senator O'SULLIVAN: Senator Cash, yesterday we heard reports of a $900 million cut. Can you explain to us where that figure came from?

Senator Cash: It's not a cut, to be very clear. Labor Party members saying something does not make it true. This is a demand-driven program. Good governments actually will ensure that they're budgeting for more than what the demand is projected to be, to ensure that every single person who puts their hand up and says that they want to be part of it is able to do so. The demand was met by the program. It is an underspend. That is all it is. But I also think you have to properly put it into context in terms of what the Labor Party, when they were in government, ripped out of the system. The biggest fall in apprentices actually occurred under the former Labor government. I think it was 110,000—and I'll get the department to give you the time frame for that. But also $1.2 billion in employer incentives was ripped out of the system. I think the department have articulated for you how VET is funded, what the responsibility for the states is versus the Commonwealth. But, in particular, every well-resourced demand-driven program meets demand, which is exactly what happened in this case.

Senator O'SULLIVAN: There were examples of the system previously where it was exploited—

Senator Cash: The VET FEE-HELP system?

Senator O'SULLIVAN: VET FEE-HELP, the Tools For Your Trade program.

Senator Cash: Correct.

Senator O'SULLIVAN: These programs weren't successful.

Senator Cash: In cleaning up what was considered by some commentators to be one of the biggest policy disasters of all time, the VET FEE-HELP system—and I'm happy for the department to take you through what occurred—there was a spike in the number of people going into the system, because they were literally being signed up to a VET course for a computer, and there was going to be no outcome at the end of it. When you step in yet again and clean up a mess that has been created, the demand obviously goes down, because the dodgy providers were taken out of the system.

Senator O'SULLIVAN: And it was exploiting vulnerable people too, wasn't it?

Senator Cash: Unfortunately the evidence is all there. There are so many different stories you could tell. Signing up someone to a course in exchange for a computer, I would argue, is not a good business practice and in particular is not good for the vulnerable student, who ended up with nothing other than a debt, because they still incurred the debt. When we came
into office, we put in legislation to ensure that, if these students had realised the debt, they would be able to apply for the Commonwealth to come in and waive the debt.

**Senator PRATT:** The calculations in your annual report show that $919 million budgeted for education and training programs since 2014 was not spent. Is that correct?

**Senator Cash:** We just need to clarify this. Yesterday the department was shown a table that we could not find anywhere, but I think I've just articulated the response to that question. This is a demand-driven program. The allegations that were being put out yesterday—by the shadow minister, I believe—that there was a $900 million cut are absolutely false. It is a demand-driven program and the demand for that program was met.

**Senator PRATT:** You will admit, therefore, that there's an underspend of more than 17 per cent since 2014?

**Senator Cash:** It is a demand-driven program. Like any demand-driven program, it meets demand, regardless of whether the Labor Party or the coalition are in office. A demand-driven program is a demand-driven program.

**Senator PRATT:** But that's not what you promised in terms of expenditure. You can spend that money on investing more in the existing places. You can spend that money recruiting more people into the system.

**Senator Cash:** This is money that is allocated to a demand-driven program over a period of time. We'll call it the forward estimates. The demand for that program was met. I don't know how much clearer I can be in relation to demand-driven programs.

**Senator O’SULLIVAN:** No-one was turned away.

**Senator Cash:** Absolutely. The demand was met.

**Senator PRATT:** We've had what has been a more formal cut in terms of the $3 billion from TAFE—

**Senator Cash:** Hold on. Chair, the underlying premise of this statement that has just been made is false. I'm happy to yet again have the department take the committee through what funding the Commonwealth provides, the additional funding we have provided via the most recent budget into skills—

**CHAIR:** Would that assist you, Senator Pratt?

**Senator Cash:** Just because someone says something does not make it true.

**Senator PRATT:** That's fine. I'll try to refrain from statements that I know will politicise our discussion, so that we can get into the details.

**Senator Cash:** Yes, but I just want to make it very clear: just because someone calls something a cut and it is printed by a journalist does not mean it is true. The $900 million from yesterday is the perfect example of where that is just a deliberate misrepresentation of what occurred, for political purposes and nothing more.

**Senator PRATT:** Labor compiled that table. That's the source of it. But in fact the underspend—

**Senator Cash:** You compiled it. Can I just ask then: was it a table from an annual report?

**Senator PRATT:** Yes.

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EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE
Senator Cash: So you physically took that from the annual report. You just said Labor compiled the table.

Senator PRATT: That's correct. Based on the history of the—

Senator Cash: Could you refer us to the particular page of the annual report? We could not find that table in an annual report yesterday.

Senator PRATT: It's a compilation of the annual reports in your education and training programs since 2014.

CHAIR: So it's not a single table from a single annual report?

Senator Cash: It was made up.

Senator PRATT: It's not made up. They're using the department's figures.

Senator Cash: Can you refer us to a specific page in the annual report so we can all have a look at that table.

CHAIR: I think we're asking for pages, though. There were a number of—

Senator PRATT: They'll have different pages in different annual reports.

Senator O'SULLIVAN: So you took it from here and there and put it—

Senator Cash: Correct. It was made up.

CHAIR: To assist the committee perhaps we could get those pages of the different annual reports.

Senator PRATT: We've got the table here. It's taken from your annual reports. It says—

Senator Cash: Could we just confirm it's actually not taken from the department's annual report.

Ms Hartland: It's certainly not from the employment annual report. We did have difficulty replicating it. If you wanted to step through the individual items, when we tried to look at those programs, I think most are demand-driven and some are cost recovered. I think we have a whole comparison of apples and oranges.

CHAIR: From what I understand, this table is not a single table on a page of an annual report from a particular year; this is a table that our good friends in the Labor Party have compiled from a variety of sources.

Senator PRATT: No, I can tell you how we've done it. One year's annual report will put forward your actual expenditure from the annual report, and we've compared that with the variation from the allocated funding—

Senator O'SULLIVAN: To get a story.

Senator Cash: This is the issue—

Senator PRATT: which is also from your annual report data. You have to compare that, year on year.

Senator Cash: You have made up a report.

Senator PRATT: No, we haven't. We've subtracted your allocated funding from the actual spent funding.

CHAIR: I think we're comparing apples and pears and making fruit salad here.
Senator Cash: It is a demand-driven program.

Senator PRATT: Of course. I'm not denying that you might characterise it as a demand-driven system.

Senator O'SULLIVAN: Because it is.

Senator Cash: It is a demand-driven program.

Senator PRATT: Does this mean you're going to cut the budget in the future in these areas or are you going to leave that pot of money in the expectation that you don't think you want to meet demand?

Senator Cash: I think there's a fundamental misunderstanding in relation to what a demand-driven program is.

Senator PRATT: I understand what a demand-driven system is.

CHAIR: To assist me, perhaps you could take us through what a demand-driven program is.

Senator PRATT: We've lost enough of our time to the government already.

Senator SHELDON: This is my first opportunity to go to estimates in the last few days. This is the first estimates where I've had so much time that's taken up by the government. This is an opportunity for the crossbenchers and for Labor to ask questions of the government and the bureaucracy. You have those opportunities yourself with your own minister. This is part of the transparency issue, the transparency problem that you have in this committee. You shut people down who try to hold the government to account.

CHAIR: Senator Sheldon, I am speaking as the chair, so don't try to talk over me. I come from a large Catholic family; I can talk over anybody. I'll go through the timings on my little bit of paper.

Senator SHELDON: You're taking up time so there's less information and there's less opportunity to ask questions of the minister and the government.

CHAIR: The government had 21 minutes and 26 seconds, Labor had 50 minutes and the Greens had 18 minutes. If you'd been here from nine o'clock, you would know that I'm very fair in how I break up the timing of the questions, and Labor and the government have not—

Senator SHELDON: This is the fourth committee I've been to, and the other senators from the government—

CHAIR: Please, talk over me; I'm happy to keep on talking.

Senator HANSON: Gentlemen, this isn't debating. The chair is in control.

CHAIR: Thank you. When the chair is speaking, don't try to talk over, please. You've experienced my committees before. I'm very fair in how I allocate the questions and I always ensure that the opposition has more time than the government. We're here trying to ascertain certain information. The question was not a political question; it was assisting the
ascertainment of that information, and you'll find through the course of the day that that will be the case. If you'd been here from nine o'clock, you would understand that. Please don't try to play your political games with me, because it does not win any points out there.

**Senator PRATT:** Thank you very much. You characterise this as a demand-driven system. Is that why there are 150,000 fewer apprentices and trainees than when this government first came to office?

**Mr Palmer:** As I was explaining a moment ago, the decline in apprenticeship numbers is largely driven by the changes in 2012 and 2013 that reduced the number of incentives made. That saw quite a dramatic decline in apprenticeships. If we look at, for example, existing worker commencements, and I'll just go back and get myself a table—not on the NSNL, not in trade, they were running at about 22,000 per quarter in 2010. In 2012, prior to the reduction, they peaked at around 40,000 per quarter. They fell quite quickly as a result of those policy changes and they're now running at about 3,000 per quarter. In that 2012-13 period a number of changes were made that impacted on the take-up of apprenticeships and particularly of traineeships, rather than trade apprenticeships.

**Senator PRATT:** Are you concerned? What are you doing about that lack of take-up? You're the government.

**Senator Cash:** Thank you for the opportunity to respond to that. In the first instance, you needed to clean up VET FEE-HELP. Certainly all of the feedback that I received when I first commenced in the portfolio was in relation to how that had very much ripped the confidence out of the VET system. Progressively looking at the different policies that you can put in place to incentivise both employers—and I'm happy for the department to take you through those policies—

**Senator PRATT:** I want to ask more specifically about the $800 million allocated for the Apprenticeship Support Network, of which more than $200 million is unspent, with $50 million of that in the last year alone.

**Ms N Williams:** You're referring to the Australian Apprenticeship Support Network?

**Senator PRATT:** That's right. I note that your annual report lists positive growth in apprenticeship completion rates from the previous year as a key outcome. I'm just seeking your confirmation that that was not achieved in the 2018-19 financial year, with a completion rate of just 56.7 per cent.

**Ms N Williams:** AASN, like many programs we're talking about here, is highly reliant on demand and the number of apprenticeships that come through the door. There's an element of that program that relates to servicing of individual apprentices and individual employers. Like all of the programs that we're talking about, as the demand changes, the amount of funding that's required in order to service those apprentices can change from year to year. Mr Palmer may have more to add to that.

**Mr Palmer:** No, I think that's a fair description.

**Senator Cash:** Senator Pratt, you also asked in your question what the government is doing. I'm happy for the officials to take you through the skills package—the commitment in skills that was in excess of half a billion dollars—the target to get 80,000 new apprenticeships over the next five years and the impact of what has been a very successful rural and regional
wage subsidy for apprentices and the take-up in relation to that. There is a huge package of work being undertaken by the government—

Senator PRATT: I don't need you to take me through that.

Senator Cash: Sorry, you actually asked what the government is doing.

Senator PRATT: I'm just mindful of the time. My concern is that we have a low completion rate, just 56.7 per cent, while there's an underspend of some $50 million in the support networks. It seems surprising to me that you wouldn't take the extra money that's sitting there in the underspend to directly invest to lift that completion rate. Why haven't you done that?

Ms N Williams: It might be useful to talk a little bit about how the AASN model operates. AASN providers are paid to support apprentices through the system.

Mrs Lynch-Magar: The AASNs are a demand driven program. Apprentices work with AASNs, and the AASNs support both employers and apprentices from the commencement of an apprenticeship and throughout the lifetime of the apprenticeship. Some apprentices need more assistance than others. Some need support such as making sure that they're choosing the right apprenticeship and understanding the contract or training. Some require quite strong pastoral support and mentoring. Also, they're quite often very young people going into apprenticeships. I guess what I'm trying to illustrate is that the support per apprentice can be very different.

Senator PRATT: I know, and clearly you've got some of those programs in place. But how can you explain, then, a completion rate of just 56.7 per cent?

Mrs Lynch-Magar: I would also draw your attention to the recent review—I can't talk about it too much—of the AASN provision of service. The services have been re-tendered. The re-tendered services took into account the policy review of AASN services. For example, the review suggested that what we needed to do was focus a little bit more on gateway and in-training services—that entry point. In the new contract round, with the new contracts that we will have in place, we're looking to reflect the services more effectively for both employers and apprentices.

Senator PRATT: In that context, are you going to continue with this underspend, or are you going to invest that extra funding in these new programs?

Mr Palmer: It might be helpful if I explain some of the rules under which we operate. Because it's a demand driven program, it's not money that we can reapply to other purposes. We have to spend the money for AASNs on AASNs. We can't spend it on something else that takes our fancy or something outside of the contract with the AASN provider.

Senator Cash: And that's across government. They are the operating rules that people work under.

Senator PRATT: I understand that. What I'm trying to come to grips with is the extent to which this becomes a deliberate strategy by government to hide the fact that you're overpromising on training places and under-delivering on the outcomes.

Senator Cash: I'll need to reject the premise of the question. We had the Joyce review and we announced a skills package in excess of half a billion dollars in the budget, which we—

Senator PRATT: It won't help if you don't spend it.
Senator Cash: Well, half a billion dollars is spent; it's all been allocated. I could get the department to take you through that allocation of in excess of half a billion dollars.

Senator PRATT: It's all been allocated here, but you're not spending it.

Ms N Williams: I think it's an important distinction to make here. It's not money that's been allocated. It's an estimate of the amount of money that we think we will need in order to meet the demand in the system. There will always be an element of additionality built into that in terms of a bit of headroom to ensure that if demand increases then you've got enough money to provide to employers and students et cetera. But the way in which those estimates are worked through is to allow us to be able to have the flexibility to increase funding where there's additional demand—

Senator PRATT: Clearly you might not want to be seen to be cutting education funding, so are you now going to start assuming an underspend in each area?

Senator Cash: Again, Chair—

Senator PRATT: You understand my question, though?

Senator Cash: I don't want to get into the cutting of education funding, because that's actually—

Senator PRATT: You've had a $200 million underspend, out of the $800 million, with more than $50 million of that unspent, and this seems to be happening year on year on year.

Senator Cash: Again, I think that the department is giving evidence as to what a demand driven program is. The department officials—based on the evidence that I've heard—have clearly taken the committee through what funding is provided by the Commonwealth for skills. There seems to be either a misunderstanding—

Senator PRATT: No, I don't misunderstand. You could spend more of that money within the demand driven system by allocating more money per head or per course in order to lift the quality rates and the completion rates that you're talking about.

Ms N Williams: The way we look at this is: we need to have sufficient money forecast within the budget to accommodate increases in demand, and each program does have that. If we take the Apprenticeships Incentives Program as an example, there's about a 10 per cent headroom in there, in the numbers that you've been quoting to us. We consider that to be reasonable. You do need a bit of money in there, should demand increase, to be able to cover the funding that you'll need for employers and apprentices et cetera. It's not unreasonable or unusual to have those sorts of fluctuations in demand driven programs. By their very nature, they're going to move around a lot. That's what happens across government in a whole range of demand driven programs. We do need to ensure that we have enough funding within the budget to cover those fluctuations, which is why you see, over various years, very different expenditure patterns against each of those programs.

Senator PRATT: Why do you keep over-budgeting?

Ms Hartland: Maybe I can talk a little bit about it from a budgeting point of view in terms of the rules. I've got two options in terms of providing advice to government—what the Department of Finance will accept. One is that we provide a bit of that contingency and the 10 per cent on top of programs, which is—

Senator Cash: Which is across the board, though. It's across portfolios.
Ms Hartland: We'd look at the contingency.
Senator Cash: Yes, but it's cross-government, isn't it. It doesn't matter who's in office.
Ms Hartland: Yes, that's right. This is just general—
Senator Cash: This is the way it operates.
Ms Hartland: in a demand driven program. My second option is that we utilise that and then have to go back to government, which makes it hard in a budgeting process.

Senator PRATT: Yes, I understand those elements of how government works. But it seems to me that you haven't illustrated one iota of concern for what look like systematic underspends. Has the department been directed to take any action in relation to these underspends?

Ms N Williams: If you look at the decisions that were taken through the budget, in terms of the skills package, there are a range of initiatives there that relate to these programs, particularly programs that are designed to increase the number of apprenticeships and traineeships that are able to access incentives through the system. These programs are designed to work towards encouraging employers to take on more apprentices. Our view is that, as those programs start to roll out, we'll start to see a much higher uptake of apprenticeship and traineeship incentives, and that will work towards ensuring that there is more money spent, essentially, in these demand driven programs, because demand will be rising.

Senator PRATT: When I talk to employers in the manufacturing sector, they're crying out for skilled workers. Why is demand so weak that you can't meet your funding allocation, and what headroom are you planning for next year's budget, given these year-on-year underspends?

CHAIR: How long do you think you've got left, Senator Pratt? I know you want the rest of the day.

Senator PRATT: Senator Smith has at least 10 minutes on this.

CHAIR: Senator Hanson has five minutes. Forty-five minutes was allocated for the session. Do you want to stretch it out to 55 minutes?

Senator Cash: Are we also having a spillover?

CHAIR: I haven't received the letter yet. That's why we'll stick to the program. If we're going to have a spillover, there's no point running too late. We've got 10 minutes left if we are going to spill over—five minutes for Labor, and then, Senator Hanson, we'll go to you.

Senator MARIELLE SMITH: I want to ask about the South Australian Enterprise Scholarships. Can you talk me through where the $24 million in funding for this program is provided for?

Ms N Williams: I'm happy to walk you through that, and, Mr Palmer, you may be able to provide some more detail. There is some residual money that sits in the program to fund the existing scholarships. Some of that funding was redirected in the budget to set up a new scholarship program which sits a bit more broadly. It's not just limited to South Australia but is available to a whole range of students across the nation who are keen to undertake a VET qualification.
Senator MARIELLE SMITH: Rather than your colleague going through that in more detail, I'm happy to take that on notice. I'm seeking the year-on-year allocation, where that's provided for. How much of the $24 million in allocated funding on this program has been spent?

Ms N Williams: Mr Palmer may be able to provide some detail on that in a second. What I was mentioning is that we did redirect a proportion of that funding in the budget to a new Commonwealth scholarship program that was around $8.17 million. And that redirection of funding is to pay for 400 scholarships, essentially, for young Australians. My colleagues may have some more detail around expenditure under the residual program. Remember, there is still a program in place purely targeted at South Australia and people undertaking qualifications in South Australia.

Senator MARIELLE SMITH: So we've got $8.1 million redirected. I want a sense of what's been spent on the existing program, to date.

Mr Palmer: Of the $24 million you're speaking of, after the redirection, there is $16.2 million in the program. Of that amount of money, the actual amount spent is $10.9 million. With what's remaining, there are commitments for a further $1.7 million and there are remaining funds leftover at the moment.

Senator MARIELLE SMITH: So $10.9 million has been spent to date?

Mr Palmer: That's correct.

Senator MARIELLE SMITH: But there's $16 million left, after what has been redirected to another program. So $1.7 million of that is expected to be spent on commitments going forward?

Mr Palmer: So uncommitted is $3.4 million.

Senator MARIELLE SMITH: We're talking about a figure of $10.9 million that's been spent on this program to date.

Mr Palmer: To date.

Senator MARIELLE SMITH: So $10.9 million out of $24 million which was allocated.

Ms N Williams: And $3.4 million is left in the program.

Senator MARIELLE SMITH: So about half has been spent to date, or will be spent, on this program?

Ms N Williams: Yes.

Senator MARIELLE SMITH: Of the money that's been spent to date—that $10.9 million—how much was spent on administration?

Mr Palmer: I'd have to take that on notice. I don't have that.

Senator MARIELLE SMITH: That's fine. I'm also interested in how much was paid to contractors and third parties?

Mr Palmer: We'll take that as well.

Senator MARIELLE SMITH: How much was given as actual scholarships? You can take that on notice.
Mrs Lynch-Magor: We'll take that on notice, but can I clarify: do you mean the number of scholars or the amount of money per scholarship?

Senator Cash: We can give you both, if that would assist.

Mrs Lynch-Magor: We'll give you both.

Senator MARIELLE SMITH: There are meant to be 1,200 scholarships, so could I have the funding there. I'm also interested in how many scholarships were provided.

Mrs Lynch-Magor: Some scholarships are more expensive than others.

Senator MARIELLE SMITH: Could I have the breakdown.

Ms Hartland: I think you're interested in how much goes into the hands of the actual scholars?

Senator MARIELLE SMITH: Yes, and I'm also interested in the number of scholarships that were provided. Do you have that figure with you? I know the aim was 1,200. How many—

Mrs Lynch-Magor: Yes, I do. In round 1, we had 351 scholarships that were accepted, and in round 2 we had 339 scholarships that were accepted. That gives us a total of 690 scholarships.

Senator MARIELLE SMITH: So 690, but you had hoped to give 1,200? Is that correct?

Mrs Lynch-Magor: We had made provision for up to 1,200 scholarships, over—

Ms N Williams: Remember, as Ms Lynch-Magor noted, that different qualifications will cost different amounts, because different qualifications are a different length et cetera. But we've also put $8.1 million of that funding into a further 400 scholarships that are more widespread—

Senator MARIELLE SMITH: That's not a program just for South Australia, is it?

Ms N Williams: No, they're a national scholarship.

Senator MARIELLE SMITH: As a South Australian Senator, you can see that I'm interested in where this goes into my state. But that really makes sense, doesn't it: you've allocated about half the number of scholarships that you provided for, and you've spent less than half of the amount of money that you've funded for. I know that there's a difference in values, but that sounds right.

Mrs Lynch-Magor: Yes.

Senator MARIELLE SMITH: Can you tell me how many applicants there were in each round?

Mrs Lynch-Magor: Yes, I can. In round 1, we received 1,188 applications. In round 2, we received 748 applications, which makes a total of 1,936 applications.

Senator MARIELLE SMITH: That seems like a lot of applications and not many scholarships awarded.

Mrs Lynch-Magor: There were criteria. Yes, there were a lot of applications received, but, as you'd understand, not all applications were compliant or met all of the criteria for receipt of a scholarship. There were also some scholars, of course, who withdrew.
Senator MARIELLE SMITH: Have you got any data on how many took up employment in South Australia following their study or placement? As you would understand, youth unemployment in South Australia has worsened since this program was announced, so it's something that I'm very concerned about, as a South Australian Senator. Do you have any data on how many took up employment and on the impact of the program? I'm concerned that there has been a considerable underspend—only half of the number of scholarships which are provided for have been given. There are a lot of applicants and it's a demand driven program, so I'm struggling to see the effectiveness. I'm happy for you to take that on notice, but could you just give me an answer now on whether you believe this program has actually achieved success in improving employment outcomes for young people in South Australia?

Mrs Lynch-Magor: I think I'd have to take that on notice. We were looking at such a range of occupations and scholars across such a range of areas that I wouldn't like to speculate. But I'm really happy to take it on notice, and we can give you a degree of granularity as well for the outcomes of the scholars who finished their study and those who, perhaps, ceased halfway through and why, and some of those sorts of things. We're happy to take that on notice.

Senator MARIELLE SMITH: As much data as you can give me would be great. But perhaps the minister has an answer on that one? Do you have something you can add?

Senator Cash: No, that's fine. The department have taken it on notice—they'll get you all of the data.

Senator MARIELLE SMITH: You can't give me anything about youth unemployment in South Australia, and whether you think that the program has been effective?

Senator Cash: It was actually the previous outcome, but I'm more than happy to take you through all of the programs that the government has in place to get youth off welfare and into work—

Senator MARIELLE SMITH: That's not what I asked. I'm specifically interested in this program, and if this program's had an impact on youth unemployment in South Australia?

Senator Cash: I think that any program that will empower an individual, which is what this program is doing, as you can see, and there are so many putting their hands up to get the scholarship—

Senator MARIELLE SMITH: But they're not getting the scholarship. Only half of them—

Senator Cash: There are criteria, but the department will provide you with the evidence. We don't have the evidence with us here at the moment.

Senator HANSON: I'm very interested in TAFE and apprenticeships, because I don't believe that everyone should be pushed on to further education at universities. For those who are not academically minded, this should be provided for them. My concern is that TAFE colleges are closing down and we're not providing enough TAFE colleges—for anyone of any age. You did state that $1.5 billion—correct me if I'm wrong—

Senator Cash: That's correct.

Senator HANSON: comes from the federal government to the states.

Senator Cash: Yes.
**Senator HANSON:** What proof of accountability for that money is put onto the states to ensure that that money is spent wisely and is put into the TAFE colleges?

**Ms N Williams:** As I said, around $1.5 billion is provided by the Commonwealth to the states and territories under the National Agreement for Skills and Workforce Development. The purpose of that funding is to allow the states to run the training system, and that includes where they allocate funding in terms of private or TAFE provision. The agreement is very broad. It gives the states broad flexibility to allocate that funding as they see fit. So that balance, or that mix, of funding between TAFEs and private providers and other parts of the system sits with the states and territories. It's their full responsibility around how they do it.

**Senator HANSON:** So they don't answer to you at all with regards to it? I've heard concerns from people that the college won't get paid—whether this is from the states—unless the students are passed. So the students are pulling the stunt on the teachers that they want passes before they get paid.

**Ms N Williams:** Arrangements differ from state to state. Different jurisdictions have different requirements in place around those sorts of things.

**Senator HANSON:** But don't you think that if the federal government's giving $1.5 billion there has to be accountability, if people are being pushed through the system? The minister's right about the VET bill to the Commonwealth, because it blew out to over $6 billion in 2015 over a matter of six years—from virtually nothing to a blowout. There's not enough accountability for taxpayer dollars. That's what I'm asking. If we have TAFE colleges closing down so that people can't go and their education there and are held to ransom, I think that $1.5 billion should be made accountable.

**Senator Cash:** I'll let Ms Williams answer you from the policy perspective, but you actually raise a very good point. This was an agreement that was negotiated in 2012, under a former Labor government. The Productivity Commission will be undertaking a review of this particular agreement and reporting back to government next year, and certainly the states and territories have input into that. But, as a Commonwealth government, I am currently working with skills ministers—and, I have to say, very productively; they've come on board—through the COAG process and the chief ministers to have a look at how we can improve the system for the reasons you've articulated.

**Senator HANSON:** Good, I'm pleased to hear that because—

**Senator Cash:** Ms Williams wants to add something.

**Ms N Williams:** I was just going to add that the raft of reforms the government brought through the budget that related to the establishment of a national skills commission are designed to actually give the Commonwealth better sight over its investment into the system and to give us a better way of looking at how we allocate that investment. So I think that it's fair to say that the government has recognised that this is an area where the Commonwealth needs to be more actively engaged and focused.

**Senator Cash:** Certainly at the COAG meeting some months ago, the communique that was issued by first ministers—the Prime Minister, the premiers and the chief ministers—did acknowledge that the VET system does need reform. We all have the end goal, which is that the student needs to get the best possible education to give them the qualification that industry actually requires.
Senator HANSON: On the apprenticeship scheme—you know I am passionate about this, and I'm glad to see that the government took up my initiative with the apprenticeship scheme. So I just want to ask you about that. Under that scheme, the government pays 75 per cent of the first year's wage, 50 per cent of the second year and 25 per cent of the third. I understand that that was rolled out in January of this year and 1,630 apprentices were taken up. It was so successful that you rolled out another program in July. Was that all taken up—the same program?

Senator Cash: The department will have the figures for you.

Mrs White: As you said, Senator, round 1 was rolled out on 1 January, and I can let you know that in that round 1,629 places were taken up. There are still a couple of places left in the Northern Territory. There was no time limit to when the places had to be taken up. We expect those will be taken up in due course.

Senator HANSON: Under the stipulation, it was apprenticeships in rural and regional Australia.

Mrs White: That's correct. All of the Northern Territory is regarded as rural and regional Australia.

Senator HANSON: So you've still got a couple of places left?

Mrs White: We have a couple of places in round 1 only in the Northern Territory.

Senator Cash: But you are right that the majority were taken up—in fact, it was within a very short period of time.

Senator HANSON: Three weeks, I understand.

Senator Cash: This is additional apprentices, as you know.

Senator HANSON: So you rolled out the program again in July?

Senator Cash: Yes.

Mrs White: On 1 July, we had phase 2 of the program. As at 30 September, 1,558 places had been taken up. We still have 11 in what I would regard as a due diligence check, where we are confirming that the arrangements are satisfactory, and there are still 63 places remaining in round 2. We have places for non-group training organisations only in the Northern Territory—for direct employers only in the Northern Territory. We need to fill round 1 first. In the second round, for group training organisations—this is for a small employer who chooses to use a group training organisation, so the eligibility is based on the small organisation rather than the GTO—we still have some places available in Queensland and Tasmania. But for the other states, all places have been allocated.

Senator Cash: It's a very successful program.

Senator HANSON: Will you consider rolling out another one? I do have businesses asking about putting on apprentices.

Senator Cash: It is a pilot program, as you know. Based on the success of the first round, we did make a decision, because it is additional apprentices—so it's over and above—or new apprentices. The take-up was very good. The feedback we've received to date is very good, in particular because it is concentrated, as you know, on rural and regional small businesses in Australia. Certainly the feedback and the evidence to date has been incredibly positive.
Senator HANSON: Just confirm for me, I've had a report that possibly a multinational company from Western Australia has taken up apprenticeships under the scheme.

Senator Cash: I'm happy for the department to do that.

Senator HANSON: You can take it on notice and get back to me.

Mrs White: I think that question did come to me previously and, if it is the organisation I think it is, we looked into that and found that it was not true. They were actually found by the department to be ineligible.

Senator Cash: You can apply, but you've got to meet the eligibility requirements, and in that case clearly not eligible.

Senator HANSON: I'm very happy about that.

CHAIR: I understand that there will be a number of questions on notice, but this concludes outcome 2. There will be no further questions for the Department of Employment, Skills, Small and Family Business, so everybody is excused. Run while you can.

Ms Carnell, do you wish to make an opening statement?

CHAIR: Very short would be great.

Ms Carnell: Thank you very much. It will be short in the interests of—

CHAIR: It will be very short in fact. The last quarter has been another very busy quarter for my office. During that time, the major issue, or one of the major issues we were addressing, was access to capital for small businesses. As we know, small to medium businesses traditionally got their access to finance from the big four banks—in fact, 85 per cent of funding has come from the big four banks. But since the royal commission into banking, it has become increasingly difficult for small businesses that don't have significant equity in bricks and mortar. With that in mind, and knowing that there is a large number of new products hitting the market—particularly in the fintech space but also in invoice, financing and other areas—we produced a document aimed first at accountants and other support people to help them understand what sort of funding is available outside the major banks. It runs through scenarios: the sort of thing you might be looking for funding for and what is the most appropriate form of funding for those sorts of issues.

There is also a secondary document—I've got some copies for anyone who is particularly interested and it's also on our website—for small businesses to help them to become finance ready; the sorts of things that they should be doing to give them the best possible chance of being able to pick up the funding that they need.

In August we also completed a comprehensive review of the Small Business Fair Dismissal Code introduced as part of the Fair Work Act by the Gillard government. We had a good look at it because there were some issues with how it was actually working, and we've produced a comprehensive document that we believe, if implemented, would help small businesses ensure that if they were dismissing somebody they were doing it in a fair and appropriate manner. We've updated our Small Business Counts document, which is a very comprehensive look at statistics in the small to medium business space. We've implemented the ATO
concierge service and also done quite significant work in the franchising code space. I could keep going, but I think that would be a bit of a run over the target. Our assistance team has seen about 1,600 contacts. That's in the area of the codes that we administer—that's the franchising code, the oil code and the horticulture code—as well as our standard assistance functions. Obviously, not all of those progress to be fully-fledged cases.

CHAIR: Thank you, Ms Carnell. Senator Pratt.

Senator PRATT: I understand the ombudsman's office is running at a surplus. Why is that, Ms Carnell?

Ms Carnell: It's one of those balls-in-the-air issues. We are by our legislation required to take on board inquiries given to us or referred to us by the minister, who is sitting beside me. And so, with that in mind, we keep an amount of money available so that we can do an inquiry if requested by the government. We did a piece of work for the minister late last year on the second phase of our payment times inquiry, but that's the only request we've had, so we ended up with a surplus at the end of the year.

Senator PRATT: Okay. So there are no other inquiries that have been generated by the government?

Ms Carnell: That's true. That's right.

Senator PRATT: But I'm sure you've suggested some. I'm just trying to come to grips with the minister's interest in small business given—

Senator Cash: Chair, I'm more than happy to respond to that question but I think it might take some time.

Senator PRATT: there have not been any inquiries requested. Surely there's work that you would like to give the ombudsman's office to do.

Senator Cash: There is work that's been undertaken. Again, I'm happy to take you through all of the government's commitments in relation to the small business portfolio.

Senator PRATT: No, no. I'm trying to come to grips with why you're not maximising the use of resources that the ombudsman's office should have.

Senator Cash: We do maximise the use of resources with the Ombudsman. The Ombudsman undertook a comprehensive inquiry in relation to payment times, of which the government is putting in place a substantial body of work. We have a number of election commitments and commitments made over the course of the last 12 months which we are now looking to implement. The ombudsman and I have had regular conversations on what the Ombudsman talked about in her opening statement: access to finance, our $2 billion securitisation fund and our growth fund. So there has actually been a substantial body of work done not just by the Ombudsman but across government. The government is now in implementation phase. This is all about ensuring that we are implementing the policies that small business had told us they need. That is what we are doing.

Senator PRATT: In terms of the generation of inquiries for the small-business ombudsman—that is, Ms Kate Carnell's office—to undertake, Ms Carnell, you would be aware of broad range of emerging issues that would be worthwhile to pursue.

Ms Carnell: If the minister doesn't refer formally to us, we do self-generated inquiries. We just recently announced one into insolvency practitioners because it's really interesting
that in the royal commission into banking the one area that was really left out was insolvency practitioners. We have ended up with lots of issues in that space. We've also nearly finished an internal piece of work into the workings of the R&D tax incentive because we've also had a number of small businesses that have had significant issues in that space. So we can self-refer and we do.

**Senator PRATT:** So you've had one inquiry generated by government. Are you able to tell me how many you've self-initiated?

**Ms Carnell:** The government asked us to do an inquiry into small-business banking. That was a government-initiated inquiry, as was the payment times one. The other inquiries that we've done have been self-generated.

**Senator PRATT:** How many of those are there? Can you take on notice the topics.

**Ms Carnell:** I'll take it on notice because I'm sure to forget. The government also asked us to do the Road Safety Remuneration Tribunal one, so there are three the government has asked us to do.

**Dr Latham:** I think I remember that.

**Senator Cash:** That's another estimates!

**Ms Carnell:** So over the three years we've existed we've done three direct ones and quite a number of others.

**Senator Cash:** I have to say that, as a result not just of those inquiries but of the substantial body of work, the government has obviously announced policies. They're incredibly substantial policies in terms of, you know, reforming payment times, in particular with the government leading by example. When I came into the portfolio, access to finance was one of the key issues that was being raised by small business. They weren't getting that access to finance. So obviously it's through the Treasury portfolio and the Treasurer, but certainly the $2 billion securitisation fund was announced and is now being progressively worked through to rollout. Again, that is a big structural reform for small business to enable them to get that access that they need.

**Senator PRATT:** Senator Sheldon's going to pick up our time now.

**Senator SHELDON:** I have some questions to Ms Carnell. I want to be clear that this is when you'll be giving evidence? You won't be available this afternoon if required?

**Ms Carnell:** I wasn't asked for this afternoon. I was just asked for now.

**Senator Cash:** It would normally be in this period.

**Senator SHELDON:** Could you give me an outline? Obviously, the ombudsman role requires impartiality, consideration for matters and independence. Last year you tweeted and you advocated by using social media against Labor policies, specifically in relation to Labor's proposal to increase the minimum wage. Does it go to the heart of impartiality if you're tweeting those sorts of comments?

**Ms Carnell:** Our job really clearly under our act is to act and advocate for policies in the interests of small businesses. The legislation defines small business as under 100 employees or under $5 million. You would be acutely aware that the dilemma for small businesses with regard to increases in the minimum wage above CPI is that a very large percentage of the award-dependent people in Australia are employed in the small business space. You will find,
if you look at all of our tweets and all of our media releases—and I do actually have all of
them here if you'd like—that we will be similarly negative to approaches that are taken by
either side. The reality is, though, that the minimum wage is not set by Labor or Liberal. It's
set by an independent entity, and we totally support that independence. But we will certainly
make comments when we believe that it's not in the best interests of small business.

Senator SHELDON: I did note that you also were on the ABC on 21 October in 2019,
commenting about details of the Liberal Party and its alternative government operations in
Canberra and giving them advice about how they should better operate.

Ms Carnell: Oh, okay. In that particular scenario, it was quite a long interview that was
done by me as a previous Chief Minister of the ACT on the issues that I thought needed to be
addressed. It wasn't just by the current opposition; it was more broadly in terms of what
needs to be addressed for the ACT going forward. It is not terribly surprising for an ex-head
of government to have a long-form interview of those sorts.

Senator SHELDON: So you believe that a person who is in public trust and should be
seen as acting impartially can make comments about Labor Party policy by tweets and
running commentary on the Liberal Party.

Ms Carnell: Sorry; I make comments about Liberal Party policy too if it's not in the best
interests of small business. It is really clear under the act that my role is statutory. My role is
to advocate on behalf of small businesses to ensure that legislation, regulation and policy are
small business friendly. Senator, I will do that aggressively and enthusiastically, whoever
makes the comments. If you look through all the work we do, you will find similar comments
made against Liberal Party policy as well where it is not in the best interests of small
business.

Senator SHELDON: You say that these are matters that are within your remit. I put to
you that that impartiality is seen through a different lens. We have differen
t views about that.
You responded by saying that you have made comments on various political parties.

Ms Carnell: Very few.

Senator SHELDON: I want to go back to the specific quote I mentioned before from 21
October. That article states:
If Canberrans believe the Liberal Party are an alternate government, if they believe they're a centrist
government that isn't going to be too right wing, and that they've got the skill sets needed to run the city
properly, they're in with a show.
I don't know what that has to do with your role as an Ombudsman and impartiality.

Ms Carnell: The interview was 12 months out from the election. The interview was with
me as a previous Chief Minister. The question was—and there were a lot of them because it
was a long interview—what do you think that the coalition would have to do to be elected?
That was the answer to that particular question. I'm sure that the ABC will give you a copy of
the long form of that interview if you ask for it. In fact, I'm happy to ask for it and give it to
you.

Senator SHELDON: I'm happy to move on to some further questions. There's a question
about small business. Small business is also the people who work in those small businesses.

Ms Carnell: Absolutely.
Senator SHELDON: They generate an income. We have all seen comments from the Reserve Bank and from the IMF regarding the wages in this country and the need for them to expand. You've also openly supported decisions to cut weekend penalty rates.

Ms Carnell: Absolutely, because that's what small businesses tell us that they need. This is a chunk of work we did in the past, so it's not in this estimates exactly, but I'm very happy to answer your question. We consult all the time with small businesses and people. We don't make up our policy or the things that come out of our office. We have 29 industry associations that represent small businesses that are part of our policy group. We consult with them on the issues that matter to them, and industrial relations is obvious a major one.

One issue that continues to come up for small businesses in retail and hospitality—restaurants, catering and so on—is penalty rates on weekends. For small businesses, who are increasingly having to operate seven days a week, penalty rates are a major issue. We have voiced their views and will continue to do so. We've also suggested that loaded rates are not a bad idea, in line with Iain Ross's views on this. We're not looking for lower wages at all in this space; we're looking for a scenario that makes it easier for small businesses to be able to trade seven days a week and reasonably long hours and to do that in a way that is fair to their employees and also allows the businesses to continue.

You'd be aware, Senator, that we haven't supported getting rid of penalty rates. We supported the independent umpire's decision—and you wouldn't put President Iain Ross as some sort of partisan person; he's probably more on your side of politics than others. The decision came from the independent umpire. We supported that decision because we really strongly believe that, if you're going to have a Fair Work Commission that looks at things like minimum wages—and it did a two-year investigation of penalty rates; had 30-something sitting days, from memory; and took a very large number of submissions—

Senator SHELDON: I'm happy to hear them all—

Ms Carnell: No, no—it was just asked. So it wasn't—

Senator SHELDON: That's fine. You've explained—

Ms Carnell: So our position was: we supported the Fair Work Commission's decision.

Senator SHELDON: I have a disagreement about how that was presented. Since 2017, how many jobs have been created in small business as a result of the penalty rates cut, and what research would you rely on?

Ms Carnell: Look, quite seriously, I have an office of 20-something employees, so to do that sort of work is way outside of our capacity. It's also incredibly hard, isn't it, to determine what would've happened if it hadn't happened. It's a hard thing to determine. There are certainly more jobs in small business now than there were then, but what the reason is I couldn't say, really.

Senator HANSON: Firstly, I'd like to congratulate you on your announcement on 10 October that the Australian Small Business and Family Enterprise Ombudsman had launched: … an inquiry into the insolvency system, to investigate if current insolvency practices achieve the best possible outcome for small and family businesses in financial trouble—

as well as the appointment of the former senator John Williams as the chair. Can you advise: is it the intent of the Australian Small Business and Family Enterprise Ombudsman to extend
that inquiry to include valuers, who work so closely with both the receivers and the managers?

**Ms Carnell:** Yes, very much so. The inquiry was meant to be into insolvency practices rather than just practitioners, and that includes, of course, the valuation issue, because a range of the problems that we've seen have run off the back of valuations that have happened as a result of practices in the insolvency space.

**Senator HANSON:** Yes.

**Ms Carnell:** I am absolutely on your side on that. So the answer is yes.

**Senator HANSON:** Are you aware of the US firm FTI Consulting?

**Ms Carnell:** Yes.

**Senator HANSON:** And that they're coming out here to Australia and buying up liquidators' and receivers' companies, businesses, around the country?

**Ms Carnell:** It is one of the areas that I'm sure we will be looking at in this inquiry, but, yes, we are aware.

**Senator HANSON:** To name one case, they bought up a liquidator, and it was before a mediation, and then, in that mediation, claimed no responsibility to the former liquidator. So they bought up the business, they then went into mediation, and then they said, 'Sorry, it's not our responsibility.' Where do you draw the line with this? Will your inquiry investigate this behaviour of multinational companies coming out here, buying up liquidators and these firms, and then claiming no responsibility? I'll let you answer that.

**Ms Carnell:** We will certainly have a look at that, because it is normal practice, when you buy a business, that you do take on board the obligations of the previous business. We will certainly be looking at what the contractual arrangements were, but it certainly doesn't seem reasonable for a company to buy a business and then leave those who might be having a dispute with the previous entity in limbo.

**Senator HANSON:** Yes. I don't know if you are aware of the case that I'm talking about. In that mediation, it took two years for the investigation that happened to find that the person was badly done by, by the liquidators and by the banks, to the tune of losing around $17 million. Then FTI Consulting, in that mediation offered, initially, $25,000; they then increased it to $50,000, and then came back to another. This has been a huge problem—which we've been looking into; we've been trying to work with people that've been done over by liquidators, administrators and receivers—which needs to be fully investigated. Do you believe that this should have been included in the banking royal commission inquiry?

**Ms Carnell:** Yes, and we said so at the time. So, yes, it is our view that it should have been. We also have said quite publicly that we would have liked the royal commission—and remember royal commissions have lives of their own once they get up and running—to have looked at more small business cases.

**Senator HANSON:** What do you think the answer is now? Should it go through another inquiry, a Senate inquiry? I don't think it's been properly dealt with.

**Ms Carnell:** That's why we announced the self-referral—to have a look not necessarily at individual cases, although in that particular case, I can promise you our office would have spent—
Dr Latham: Many hundreds of hours—

Ms Carnell: many hundreds of hours on that particular case, including getting an independent review done of that particular case. But what we need to do is have a look at what the practices are in this space, how expensive they are, how transparent they are—at the moment we'd suggest not very transparent for small businesses, for farmers, for people on properties and so on. In our view, we would want to make some recommendations with regard to how we make this process much fairer going forward.

Senator HANSON: You can actually refer this to ASIC, can't you? They've got greater powers and resources to deal with this.

Ms Carnell: In that particular case, we—

Senator HANSON: Have you referred it?

Ms Carnell: Yes. So it's a matter for ASIC to answer. I don't suppose we should. I don't—

Senator HANSON: Can you name any other number of cases that you've referred to ASIC in regard to that?

Dr Latham: Yes. Wherever there's a financial matter that's appropriate to go to ASIC, yes, we do refer them through. I could take on notice exactly how many of those there are. It's quite a significant proportion of the cases.

Senator HANSON: And they'll keep in touch with you? So it won't just be sidelined; ASIC are obligated to investigate it? Is that right?

Dr Latham: No.

Senator HANSON: You don't give me confidence there whatsoever.

Ms Carnell: Sorry, no, I don't think ASIC are obligated to investigate. I think they would look at a case and determine whether it were appropriate to investigate. But I'd prefer ASIC to answer for themselves.

Senator HANSON: Okay. I'll ask them.

CHAIR: Senator Hanson, do you have one more question?

Senator HANSON: No, I'm fine. Thank you very much.

CHAIR: I'll hand back to Labor to take us through to 12.30.

Senator PRATT: Minister Cash, as Ms Carnell has outlined, the small business ombudsman released the advisory report on payment terms, times and practices in March this year. Can I ask if the government has yet responded to that report?

Senator Cash: There's a substantial body of work that has been done on payment times that was actually—

Senator PRATT: No. It's in terms of a written response to—

Senator Cash: No, no. We've actually responded by way of policy and I think that's what we need to articulate for you.

Senator PRATT: Okay. But the issue is that we would like to see a public response to that.
Senator Cash: The public response is the policy that the government is implementing, and I'm happy to take you through what that is, because it is a substantial policy change that will have a very positive impact on small businesses.

Senator PRATT: No. I don't need to have you take me through the new policies. What I need to be able to do is compare those government policies to what Ms Carnell has raised in her report.

Senator Cash: The process you'd normally go through as a government in responding to a report is that, obviously, there will be other departments that are providing a response to that report, so the report is currently with the other departments for response. But, again, the body of work that was done largely complements what the government is doing in terms of actually now implementing policy on payment times.

Senator PRATT: Okay. I do understand that.

Senator Cash: And a lot of it is actually the Treasury department that would be responsible for the issues raised in the report.

Senator PRATT: Recommendation No. 5 of your report, Ms Carnell, was that your office should review the impact of supply chain finance strategies. Is that still your intention, and do you require government approval for such a review?

Ms Carnell: No, we don't need government approval to do it, but—

Senator Cash: They can self-initiate.

Ms Carnell: Obviously, we're always happy to have an official request in that space. So, when the minister asks us to do an inquiry, it gives us some extra power in the space. But it is one of the issues on our work plan. You would've seen the media in the last little while on some of the issues surrounding CIMIC and its subsidiaries going to 60 days end of month, with supply chain financing being part of that deal. We've also been on the public record with regard to the Gupta Group doing the same thing. There are some real issues in this space.

Senator PRATT: Ms Carnell, can you give us a quick overview of the key issues in that report around large companies extending payment times while also offering third-party supply chain financing? I understand that is reverse factoring. How is that being responded to?

Ms Carnell: At this point, they're doing is absolutely legal. They can do it. But we believe that it's really inappropriate, which is the reason we made the recommendation that there needs to be an inquiry into its use. At the moment, it's more of a little bit of public outing in this space.

Senator Cash: Absolutely.

Ms Carnell: Because I don't think anybody thinks it's reasonable to extend payment times and then say, 'But you can get paid quicker if you use this product, which, by the way, is going to cost you X amount of dollars.' The usage of this approach seems to be a bit broader than was the case six months ago.

Senator Cash: Just on that, Senator Pratt, it goes to the policy work that the government is doing in this regard, whilst at the same time getting the interdepartmental response to the Ombudsman report that you are referring to. One of the announcements that the government made, which was made by the Prime Minister, was in relation to implementing a reporting framework for this exact reason, so that small businesses have full knowledge of big
companies and how long it is taking them to pay an invoice, so you do have that transparency. Then the small business will be able to actively make a choice as to whether or not they do business with that particular larger business.

**Senator PRATT:** Senator Cash, will you let us know when that register will be up and running? What's the time line for that?

**Senator Cash:** The register?

**Senator PRATT:** Yes. What you've just disclosed—the announcement that the Prime Minister made.

**Senator Cash:** Yes, and I certainly would look forward to Labor's support on it because I think it is something that the sooner we can stand up, the better.

**Senator PRATT:** What's the date for that commencing?

**Ms Hartland:** Where we're at at the moment is that we've had a round of stakeholder consultation on the design of that reporting framework. It's actually quite a complex issue, and stakeholders want to have a lot of say in the design of that. Further consultation is now scheduled for later this month and for next month, looking at the options to assist in particular large businesses to be able to identify and report on their small business suppliers. Some of this—and Ms Carnell and I have spoken about this many times—goes to how you actually define this. Once those consultations have been completed, we'll go back to government. So—

**Senator PRATT:** So what's the date for implementation?

**Ms Hartland:** We're looking at later in the year. I don't have an exact date for you.

**Senator PRATT:** Are you expecting it before Christmas?

**Ms Hartland:** I'd expect to go back to government before the end of the year, yes.

**Senator PRATT:** Go back to government, as in—

**Senator Cash:** With advice as to how the reporting framework will work.

**Ms Hartland:** With advice on how to establish that.

**Senator PRATT:** No, no, I asked you when the system will be up and running, not how the reporting framework will work.

**Senator Cash:** The secretary's taking through the process of how you get to—

**Senator PRATT:** So there's no prospect of this so-called register being up and running—it doesn't sound like it's going to happen in the next 12 months, given what you've told us.

**Senator Cash:** The aim of the government is to get it right. It is an incredibly complex process to go through. We've undertaken initial rounds—

**Senator PRATT:** Surely you're better off just getting something started rather than—

**Senator Cash:** No, and that's the whole point. You can't just implement a policy because people say, let's implement it. That then sets people up for failure.

**Senator PRATT:** Okay.

**Senator Cash:** We want to get this right. The government is committed to it. The Prime Minister is committed to it. That's the consultation process that has been actively undertaken at the moment to ensure that the framework that is implemented is the right framework and achieves the outcomes we need it to achieve.
Senator PRATT: Ms Carnell, when did you complete that report on that payment system?

Dr Latham: I think it was 2018.

Ms Carnell: Yes, it was late 2018.

Senator PRATT: I wanted to ask whether the register would include reverse factoring arrangements and how they would be worked into the register. I'd be interested in Ms Carnell's views on that. And Senator Cash, the government committed that small and family business would receive payment for government contracts under $1 million in 20 days.

Senator Cash: Yes.

Senator PRATT: Is the 20-day commitment for the full invoice to be paid by that supplier? And it doesn't include reverse factoring arrangements?

Ms Hartland: Sorry—what was your question again? Whether it includes—

Senator PRATT: The government's made a commitment to—

Ms Hartland: To the 20 days, yes.

Senator Cash: To 20 days on 1 July.

Senator PRATT: Does that commitment include the exclusion of reverse factoring arrangements?

Ms Hartland: I might have to come back to you on that, sorry. The people who are involved in this aren't at the table.

Senator PRATT: Ms Carnell, do you have anything to add in that regard?

Ms Carnell: What needs to be in the register is what's in the contract. If the contract says 60 days end of month, then that's what should be there. Reverse factoring should not be and cannot be used to somehow artificially produce a shorter period of time. The register wouldn't work unless it was what the contract said was the payment time.

Ms Hartland: My colleagues have just confirmed that we don't use that mechanism. It's just a payment in full, so it doesn't apply. So the answer to your question is no.

Senator Cash: So, within 20 days, that's it. But obviously then—and we don't have time to go through this now—it takes you to the next phase of work, or the work on e-invoicing, and the ability to actually pay. Certainly this was put onto the COAG agenda—businesses that contract with the government within five days because of e-invoicing. Certainly the focus of the government is very much on reducing payment times to small business, and e-invoicing will enable us to take it even further.

Senator PRATT: Will the government formally pass an inquiry on this reverse factoring issue to the Small Business Ombudsman? Clearly they already take it seriously. It would demonstrate that the government takes it seriously if you were to commission that work.

Senator Cash: Well, I think the government also takes it very seriously, and I think the comments I have made in relation to my opinion of businesses that do not pay within 30 days is that, quite frankly, it is unacceptable. If the government is able to utilise a 20-day-or-less time framework, if e-invoicing is able to provide us with the ability to pay invoices—as long as the systems talk to one another—within five days, then the government, from the Prime Minister down, have been very clear: it is unacceptable for big businesses to do otherwise. Hence the policy work in relation to the reporting framework. But going back to where we
started: it's a comprehensive report, it is a cross-departmental response with a lot of the work being undertaken by Treasury, and certainly the response will be provided in due course.

Senator PRATT: Ms Carnell, can I ask you what difference it would make in terms of accountability if you were to receive a commission from the government on this question?

Senator Cash: Again—

Senator PRATT: My question was to Ms Carnell.

Senator Cash: But there is a government process that is currently underway—

Senator PRATT: My question was to Ms Carnell.

CHAIR: But the minister can answer it.

Ms Carnell: We can tell you the difference in powers.

Dr Latham: What we can do is require the production of information—of actual payment times—to be able to audit any views that are put forward by a business to check that they're right.

Senator PRATT: Is there a difference in your powers according to whether you do that by self-referral or the government gives it to you?

Ms Carnell: The difference between if the minister asks us to do something or if we are—

Senator Cash: And self-initiation.

Dr Latham: Sorry, yes. If the minister refers us an inquiry, the minister can direct us to actually hold hearings and take evidence at the hearings.

Ms Carnell: We can require people to turn up and give evidence.

Senator PRATT: Right. Will the government give Ms Carnell and the small business ombudsman a referral on these reversed payments so that they can hold such hearings?

Senator Cash: Again, there is major consultation with other departments going on—

Senator PRATT: That was not my question.

Senator Cash: No, but you are pre-empting something. There will be a government response in due course.

Senator PRATT: Is the answer no, Senator Cash?

Senator Cash: Absolutely not. The answer is that there is a major body of work being done to get a response to the report, and that—

Senator PRATT: 'Absolutely not', you won't give Ms Carnell a referral on that question?

Senator Cash: That's the exact opposite of what I just said.

Senator PRATT: So you will give her a referral?

Senator Cash: Again, Senator Pratt, there is a major body of work being undertaken at this point in time in relation to the response. But I think both the Prime Minister and I have made it very, very clear that cash flow is king. Small businesses should be paid on time—

Senator PRATT: Would it not be a good exercise in holding the government to account on these questions about the implementation if you gave the small business ombudsman's office an active and ongoing capacity to hold hearings, in which case you would be able to
have some scrutiny of the government's implementation of these programs. Is that not correct, Ms Carnell?

Senator Cash: The legislation is very clear. Are you suggesting changing the legislation?

Senator PRATT: No, I'm suggesting you give Ms Carnell a referral on these questions.

Senator Cash: I think I've answered your question on a number of occasions. The government already have a major policy implementation phase that we are going through in relation to part-timers—

Senator PRATT: I understand that.

Senator Cash: We lead by example in terms of contracts up to $1 million being paid within 20 days, preferably fewer. There is the ability—

Senator PRATT: But you're not open to independent advice and independent scrutiny—

Senator Cash: The ability—

Senator PRATT: as those—

CHAIR: Senator Pratt, please let the minister answer the question.

Senator Cash: There is e-invoicing to provide all governments, regardless of who you are, the ability to pay an invoice within five days. We have the report from the ombudsman. It is a substantial body of work. We are undertaking consultation. A large body of the response does actually come from Treasury. But the government's response will be provided—

Senator PRATT: I was seeking an answer from Ms Carnell—

Senator Cash: will be provided in due course.

Senator PRATT: not from the minister.

CHAIR: All right. Everybody, thank you very much for coming along today. Looking at the time, that concludes questions to the Australian Small Business and Family Enterprise Ombudsman. Thank you, Ms Carnell and Dr Latham; run while you can! I understand that Senator O'Sullivan and Senator Davey had questions for you; they're going to put them on notice. I appreciate you doing that, senators, to facilitate a timely program.

Australian Skills Quality Authority

[12:38]

CHAIR: I now call representative from the Australian Skills Quality Authority. I welcome Ms Rice, Acting Chief Commissioner and CEO. Ms Rice, do you wish to make an opening statement?

Ms Rice: No, thank you, Chair. I'm happy to go straight to questions.

CHAIR: Okay. I will hand over to Senator Pratt.

Senator PRATT: Thank you, Chair. Ms Rice, you put out a media statement this month, on 14 October, around internal challenges in relation to the timeliness of ASQA and perceptions of consistency in the regulator's decisions. In that context, how important is a comprehensive regulatory compliance and education framework in preventing shonky operators from ripping off students?

Ms Rice: We certainly welcome the opportunity to provide a more sophisticated educative program in relation to ASQA's compliance expectations. We do already provide a significant
educative program, which relates to a number of things—fact sheets and webinars. We recently also completed a significant program of provider briefings around all of the states and territories. But we are certainly very well aware of calls across the sector for ASQA to do more in that space, and we certainly welcome the opportunity to do so. We welcome the recent expectations outlined by skills ministers that will certainly see us take on more of a sophisticated educative program. We're looking at working with skills ministers around the mechanisms for doing so in the current period. I note the recent reviews of our legislation by Professor Valerie Braithwaite and also comments and recommendations made by the review by Steven Joyce. They are also very consistent with the feedback that ASQA has received around what's being asked of us. We have a number of updates to our current educative program that are currently in train around a new series of webinars and those sorts of things. We certainly welcome the opportunity to include those as very much the next evolution in our regulatory activities.

Senator PRATT: In terms of the downside of what appears to be a less stringent approach to regulation, audit and compliance in the sector, how do we focus on preventing shonky operators from ripping off students?

Ms Rice: We obviously have our regulatory activity. In recent years we have implemented a risk based approach to regulation. We comprehensively consider a range of risk factors to identify where to target our regulatory focus. We've been very transparent about that regulatory focus. Each year we provide a regulatory strategy where we outline exactly where our areas of focus will be. This year in particular we will be continuing to focus on the areas of international education. We've flagged an area of interest in relation to vocational education and training in schools. We outline a series of qualifications that we are particularly concerned about and keen to focus on. In this year's regulatory strategy we've also outlined a series of standards that of greatest concern and areas for ASQA to focus on when we conduct our regulatory activity. In the last financial year we undertook I think 1,685 audits. More than 600 of those were compliance audits. That's typically where we are applying our risk indicators and ensuring that we're able to undertake the necessary regulatory activity.

Senator PRATT: Does ASQA feel that it's adequately and comprehensively supported by the government in undertaking this regulatory role?

Ms Rice: I would note that in the budget statements of last year it was announced that ASQA was to have an additional budget funding component that was to take effect from 1 July last year. We have certainly been undertaking the activities associated with that additional funding. It has equally seen an increase in the number of compliance audits that we've undertaken to ensure that we are adequately addressing issues that we've identified in the sector.

Senator PRATT: Do you acknowledge that there are inefficiencies or inconsistencies in your regulatory processes or that there is a culture problem at the regulator?

Ms Rice: We have been very transparent in acknowledging challenges that we face in relation to things like timeliness. In relation to consistency, I think that is something that I would expect all regulators would say is a challenge. However, in order to address that challenge, we have significant internal processes to ensure that, as best as possible, we are absolutely ensuring consistency in our decision-making. I might defer to Mr Garner in relation to how a range of them operate at an operational level. There's no doubt that we face
challenges, but I think overall we are very transparent about them. We are absolutely working to address key aspects of them. From a consistency point of view, there are a range of internal checks and balances that we have around our decision-making processes. In terms of adverse decision-making, I'd particularly note that decisions about any key sanctions and particularly the major sanctions around cancellation and suspension are taken by commissioners. So, from that point of view, there's another check and balance in relation to the level of decision-making.

Mr Garner: Commissioner Rice spoke about some of the processes we have in the regulation space. There are a range of measures in place to ensure consistency to the best of our ability. As Commissioner Rice mentioned, consistency is always a challenge for regulators. We have very detailed procedural guidance and template materials to guide our regulatory officers in their work to make sure that they're examining and looking at things consistently. We have regular formal and informal moderation activities such as regular team meetings within each of our regulatory operations teams where people can discuss findings or new trends that they're seeing. We have more formal processes with our regulatory operations managers—the people who manage those teams across the country—where they bring together similar issues to make sure: Are we seeing new trends anywhere? How are we treating them? Are we all doing it the same way?

Senator PRATT: Ms Rice, we know that in July this year the member for Bowman informed the House of Representatives of his nationwide investigation into ASQA's performance in monitoring and regulating the training sector, and he held what he described as 'regulator reform forums' with training providers in each state and territory. He said:

… I know that for these trainers and providers there are enormous concerns about the shortcomings of ASQA.

How has ASQA responded to Mr Laming's investigation and how have your staff reacted?

Ms Rice: We certainly took on board the comments of Mr Laming. In a general sense I think we're very aware of concerns around the extent to which our decision-making might focus on administrative areas. We took a decision—I think from about 2017—to implement a student-centred audit approach that very much focuses on the stages or the phases of the student journey. It begins with marketing and recruitment and then enrolment and what have you. We understand that in the context of applying that regulatory model, while we intended having the standards very much aligned with those phases of the students in that audit approach, the administrative focus can actually begin at a marketing level. We understand that, in the context of the presentation of information back to providers through the audit process, it can very much appear that we might be focusing on administrative noncompliance.

Senator PRATT: Mr Laming, the member for Bowman, has gone through quite a politicised process, but that would be quite hard for you to manage. You have to be an even-handed regulator. Have you raised any concerns about his investigation with the minister? What's been the impact on staff when you've got a member of the government campaigning against the organisation?

Ms Rice: We've certainly taken on board the comments made by Mr Laming, as we always do whenever we receive feedback about our approach. What we've done with it internally is look at the areas that might have been reflected on in the comments that have
been made. I'm sure Mr Garner will have some comments in relation to how we've tackled this at an operational level.

Senator PRATT: The concerns—and I haven't looked at them; they may or may not be valid concerns, and I'm not saying that they are or they aren't. But your job as a regulator is not to be swayed by populist debate one way or the other.

Ms Rice: I wouldn't say that we're being swayed. What we're taking on board is feedback in relation to the way that we undertake our role. To the extent that we were able to identify the particular matters that Mr Laming referred to and have been able to piece those together, we would have a different view about aspects of those particular matters. What we were taking on board from the comments that Mr Laming made was the general concern across the sector about—I think he referred to administrivia. That's where we were really looking to, I guess, identify what within our regulatory processes might be fuelling that. The former chief commissioner set about quite publicly in seeking examples of that administrivia so that we could actually take those on board and see the ways that we could address that internally to the extent that we are able to—I'd probably take you back to that educative role, the extent that we are able to better communicate with the sector about what those concerns are.

Senator PRATT: Senator Cash, do you as a minister support the member for Bowman's campaign?

Senator Cash: What campaign are you referring to?

Senator PRATT: He has announced his own nationwide investigation of the performance of ASQA's monitoring and regulating of the training sector.

Senator Cash: The backbenchers are entitled to their opinions. What I can take you through is what the government is doing in relation to ASQA's regulatory approach—in particular, post the Joyce review and the recommendations—

Senator PRATT: No, no, that—

Senator Cash: You've asked me a question and I'm now responding. I think the government is very focused on the importance of having a trusted—

Senator PRATT: My question was in relation to the member for Bowman, not in relation to the overall agenda here.

Senator Cash: But the comments that you have put actually go directly to the overall agenda that the government is already implementing post both the Braithwaite review and the Joyce review, and, in particular—

Senator PRATT: Why are you letting him run around with his own inquiry rather than feeding it into more formal processes?

Senator Cash: He is a backbencher. He is entitled to do as he does.

Senator PRATT: He's also the chair of the Standing Committee on Employment, Education and Training, and he's not pursuing those issues there.

Senator Cash: He is. As I've said, the government already has an approach that it is putting in place. I'm more than happy—because you asked me what the government is doing—to have Ms Williams take you through what the government's approach is, in particular given the recommendations coming out of the Joyce review. One of those recommendations, in summary—I don't have the actual recommendation in front of me—goes
exactly to what Ms Rice has referred to, which is to take on a more educative approach. I'm more than happy for—

Senator PRATT: I didn't ask what the government is doing; I asked about the member for Bowman's campaign.

Senator Cash: I think I've responded to you in relation to the member for Bowman. He is a backbencher who is entitled to his opinion, as are all backbenchers. The government is implementing an approach in relation to ASQA and in particular post the recommendations coming out of the Joyce review.

Senator SHELDON: Senator, I just want to be clear: Mr Laming MP is the chair of the Standing Committee on Employment, Education and Training. He also went on to say:

From the highest levels, those who monitor the sector say it has become increasingly difficult to establish any form of rapport with ASQA. This stands in complete contrast to RTO relationships with New Zealand's regulator and Canada's regulator.

The reason we're asking these questions is that we're trying to work out whether Mr Laming MP is coordinating with the minister's office his concerns—obviously the concerns are serious. The investigation hasn't been completed. Is he coordinating with the minister's office?

Senator Cash: I don't, unfortunately, have Mr Laming's speech in front of me, so I will take you your word that you are quoting to me correctly.

CHAIR: Could you perhaps table that, if that's the case, Senator? You don't need to do it now.

Senator Cash: Mr Laming has certainly raised concerns with the government, but, again, we actually have undertaken the Joyce review, which made a number of recommendations. Some of those recommendations were in relation to ASQA, and in particular that ASQA—to be fair to ASQA, they are an independent regulator. Certainly post VET FEE-HELP they had to go in and ensure that dodgy providers were found out and removed from the system. I think the government itself, and in particular the recent skills ministers meeting that I had, issued a communique. There are aspects of ASQA's regulatory approach that can and should be improved. The skills ministers themselves in the communique addressed this issue. Certainly the government is making it clear that they also do believe that a more educative approach should be taken.

Senator SHELDON: I appreciate the answer you've given, the outline you've given. The chair of this committee has raised some serious concerns. Are department or government resources being allocated to the member to actually carry out his investigation?

Senator Cash: Not that I am aware of. This is a backbench committee, my understanding is, that you are referring to?

Senator SHELDON: That's correct. His personal investigation—

Senator Cash: You're not talking about this committee as such; you're talking about a government backbench committee?

Senator SHELDON: Yes.

Senator Cash: The answer to that question is no.

Senator SHELDON: Is there any assistance going to the member for Bowman on his investigation?
Senator Cash: No.

Senator SHELDON: Towards ASQA: has the member for Bowman met or spoken with you or written a request to ask for information?

Ms Rice: No.

Senator SHELDON: Are you aware of the comments from the member for Bowman?

Ms Rice: I'm certainly aware of the speech that was made in the House, yes.

Senator SHELDON: So you became aware when the speech was given or shortly after?

Ms Rice: Shortly after the speech was given. In relation to the earlier questioning around taking on board the comments, I would note that similar comments were also reiterated by key stakeholders. It's absolutely our duty to take on board the comments of the sector and stakeholders in order to ensure that we have the most contemporary regulatory model and are communicating well with the sector.

Senator SHELDON: So we're clear that the investigation isn't—

Senator Cash: I think that this is a private investigation that Mr Laming is doing based on what you've put to us. Just to not confuse the two issues, because, again, backbenchers are allowed to do what backbenchers do—Chair, it might useful to get on the record exactly what the government is doing in relation to ASQA, in particular post the Joyce review and the recommendations that were made, because this is Mr Laming. He is entitled to his opinion. He is a backbencher. He is entitled to meet with people. But the government is doing what the government will do.

Senator PRATT: That's not a question that we have asked.

CHAIR: I will ask that question. Labor, you've had roughly 20 minutes. With your permission: if you could answer the question that the minister has put to me.

Senator PRATT: If we're trying to avoid a spillover, it would be good to have some extra time.

CHAIR: It won't take too long, Senator.

Ms N Williams: In response to that question: as the minister said, there have been several reviews into ASQA that relate to better balancing ASQA's regulatory role and the educative role that it can provide within the sector. That includes recommendations from both the Braithwaite review and subsequent recommendations that have occurred through the Joyce review. I might ask Ms McDonald to talk through some of the explicit changes that we're making in this space. The changes in terms of this additional focus on the educative role, changes around transparency—in particular, looking at the recommendations that Professor Braithwaite made with respect to the NVETR Act—are areas where we're putting specific focus and looking at those opportunities for ASQA to provide better guidance and structure for the sector in terms of its compliance with the requirements. Ms McDonald, do you have something that you might be able to add there?

Ms McDonald: There's been a lot of work based on both the Braithwaite review and the Joyce review that has been undertaken by the department, working particularly with states and territories. In particular, we have had a look at the fitness for purpose of the legislation in terms of it supporting ASQA's role and its ability to act as a balanced regulator. By that, we
mean being clear that it takes compliance action against RTOs where there is an impact on
students and it ensures the quality and minimum standards are met. At the same time, it has
the flexibility to be able to assist the sector improve its quality, lift the performance and
support RTOs with clarity of information. We've worked with states and territories around
that. There will be some legislation coming into parliament in this sitting that helps clarify the
arrangements and provides better support to ASQA to be able to fulfil its role.

We have also had a look in line with the Joyce and Braithwaite recommendations as to how
ASQA could expand its activities in terms of providing more support and education to the
sector in terms of quality. There are resource implications for that. We've worked with ASQA
in terms of its estimates, as to how it might do it and the models under which it might operate,
and we've also worked with the states and territories in that regard. We've provided that
advice to government, and that is a matter for government in terms of the next steps. They're
probably the main components.

CHAIR: Excellent. Thank you.

Senator SHELDON: To the minister: is the minister aware that, in September 2019, the
member for Bowman circulated among training organisations a draft format and suggestion
that organisations contact the federal MP in the location where their organisation is based and
request that the MP submit their circumstances to the Commonwealth Auditor-General—that
they personally request an audit of ASQA's regulatory conduct?

Senator Cash: The member for Bowman is entitled to do what he does, but the
government has its very clear direction in relation to where it will be taking ASQA.

Senator PRATT: The question was whether you were aware that was taking place.

Senator Cash: I don't believe so—no. Mr Laming has made a number of comments. I'd
need to properly look at exactly what you have in front of you, but I don't believe so—no.

Senator PRATT: Did the minister meet with the member for Bowman about these issues?

Senator Cash: I've had discussions with the member for Bowman—yes. But, again, as I
would say to the member for Bowman, as I would say to this committee, and as outlined by
both Ms Williams and Ms McDonald, the government has a clear direction in relation to
ASQA. This is in particular post the work done with the Braithwaite review but, more
recently, the Joyce review. We have made some announcements in that regard and additional
work is being done.

Senator SHELDON: Could the minister table any correspondence or communications
received by ASQA or the minister or her staff from Mr Laming in relation to ASQA?

Senator Cash: I'd need to take that on notice.

Senator PRATT: Can I ask whether the member for Bowman has the minister's or
assistant minister's endorsement of the views expressed in his email, in particular that the
ANAO should audit ASQA's regulatory conduct?

Senator Cash: Again, I'd need to have the email provided to me so that I can read it in
full.

Senator PRATT: It's pretty obvious. If you've had these meetings with him, were you
aware that he was campaigning to send the—
Senator Cash: I am aware that Mr Laming has certain views in relation to ASQA. I think he's made those views—

Senator Pratt: Okay, but why do you need to see the email? If you know that he's campaigning for an audit—

Senator Cash: I don't want to respond to the document without seeing it.

Chair: I think it would assist the minister to answer the question.

Senator Pratt: You're being a bit precious there, Minister Cash.

Senator Cash: More broadly, Mr Laming has raised issues with ASQA.

Chair: I think that's harsh.

Senator Cash: I don't think that is news to anybody. He is entitled—

Senator Pratt: No, it's not news to anybody. What we're trying to work out is the extent to which the member for Bowman has tacit approval from the government to run an agenda against ASQA.

Senator Cash: The member for Bowman is a backbencher. The government's response is in relation to evidence that has been gained from the Braithwaite review and, more recently, the Joyce review. The government is responding to those recommendations.

Senator Pratt: Okay. In terms of his campaign to refer ASQA to the Audit Office, do you endorse the idea that ASQA should be audited by the ANAO or not?

Senator Cash: Again, that's a matter for the ANAO in the first instance. The mere fact that a backbencher calls for something does not mean that the government endorses it. I think I've been clear, Ms Williams has been clear and Ms McDonald has been clear in relation to what the government is doing regarding ASQA's regulatory approach but, more particularly, responding to the Joyce recommendations.

Senator Pratt: Okay, but parliamentary committees are able to make referrals and suggestions to the Audit Office, and we have formal processes that all committees can access in making suggestions about what the ANAO should audit. Instead you've got the member for Bowman, Mr Laming, running a campaign quite outside his role as the chair of the Standing Committee on Employment, Education and Training.

Senator Cash: I think he's a backbencher. He is entitled to do what a backbencher does. Again, the government has a clear direction, and that is the policy implementation that we are following.

Senator Pratt: You've said that he's a backbencher, but you've also said you've had a number of meetings with him on these issues.

Senator Cash: Well, I didn't say I'd had a number of meetings. I said that Mr Laming's views are clear. He's articulated them.

Senator Pratt: You said that you'd spoken to him about his views.

Senator Cash: Yes, and again I would have expressed to Mr Laming what I have expressed to this committee: the government is acting upon the recommendations made in particular by the Joyce review, and that is the policy approach the government is taking.

Senator Pratt: Have any resources been provided by the minister's office to Mr Laming for this campaign?
Senator Cash: No, and I've already answered that question. Just to be clear, I have answered that question.

Senator PRATT: Yes, you have. I'm sorry I've jumped over that, because we've just tried to reprioritise our questions. Can you take this on notice: we've asked about the email campaign, but we're interested to know if the minister's office—your office—was previously notified about his intention to do that.

Senator Cash: I've taken that on notice, I believe, in response to Senator Sheldon. But again I would just point out he is a backbencher.

CHAIR: He's a backbencher from Queensland too. Backbenchers from Queensland are particularly vibrant in their views.

Senator Cash: Backbenchers will do what backbenchers will do. The government, though, has a policy and it will implement that policy.

Senator Cash: But I would also say, in terms of that policy, that I don't believe we have the communique here but I'm more than happy to have the communique following on from the recent skills ministers meeting. Even the skills ministers were unanimous in their view that ASQA should take a more educative approach, which goes back to where we started, with the evidence Ms Rice gave the committee right at the very beginning, when this questioning started.

Senator PRATT: Okay. In that context, your annual report, Ms Rice, says the level of ASQA activity in audits has been strong and effective in detecting noncompliance and then applying proportionate regulatory sanctions. I note that the member for Bowman does not seem to agree with this. He said:

It appears to me ASQA is increasingly using the AAT as a vehicle for extinguishing RTOs simply by legal cost, reputational damage and delay.

Ms Rice, as an independent regulator, what do you say in response to the member for Bowman's enormous concern at this so-called 'aggressive and adversarial' conduct of ASQA?

Ms Rice: I would take a different view. ASQA regulates, as at 30 June this year, just under 4,000 providers. In the last financial year we undertook more than 1,600 audits. Within that, as I said earlier, there were more than 600 compliance audits. What we've demonstrated in the annual report, on page 18, is that, relative to the whole sector, there are actually small numbers for noncompliance across the sector. The vast majority of providers are either not triggering ASQA's risk indicators or demonstrating compliance at audit. In relation to what we're talking about, from a serious or critical noncompliance point of view it's actually very few numbers. In the last financial year we undertook 263 cancellation decisions, but, in terms of our proportionate responses to areas of noncompliance, we took significantly more decisions to implement written directions. They are much less of a sanction. They are where areas of noncompliance are identified that need to be addressed but are not up around cancellation or suspension.

Senator PRATT: Thank you. That does help. Leading on from that, because you've partially touched on it: is it true to say that half of decisions that organisations are seeking to have reviewed are simply forwarded to the AAT, and that ASQA gives no alternative and no internal independent review?
Ms Rice: Not at all. There are a number of opportunities throughout the regulatory process to provide additional information or rectification of identified noncompliance, or to demonstrate to ASQA that we might have got the findings wrong. There are a number of processes for that internally. I would emphasise that it is point-in-time regulation. Each time those intervals occur, more information is provided. That's why you might have, either internally or in the case of matters before the AAT, a different decision ultimately, and that will inevitably be because, at the end of the day, there is sufficient evidence provided to demonstrate compliance. So there are a number of processes for that internally, and I would reject—

Senator PRATT: And you would help companies step up to become compliant? It would be pretty extraordinary not to step people through that process?

Ms Rice: I might ask Mr Garner to comment, but throughout the process it is about providers demonstrating how they meet the standards. As I mentioned at the outset, we do provide a range of guidance around our expectations in that area. As to the terms of the actual audit process, would you like some further comment on that?

Senator PRATT: I might leave it, because I know we're short on time. What I will ask is: how many decisions were overturned in internal review and how many decisions by ASQA have been reviewed by the AAT since 1 July 2018?

Ms Rice: You refer to things being overturned internally. After a decision is made there is a reconsideration process for some decisions. As to the number where a different decision was arrived at following a reconsideration process—and, as I say, that follows additional information—in the last financial year there were 166 reconsideration processes, and on 96 occasions the decision was revoked. That's where the decision to implement the original sanction was not applied, on the basis of new material.

Senator PRATT: How many was that?

Ms Rice: Ninety-six.

Mr Garner: It's important to remember that that's not on the basis of saying the original decision was incorrect.

Senator PRATT: No. That's kind of what I meant by 'stepping up'. So clearly it's not clear that you're using the AAT as a vehicle for extinguishing RTOs by legal costs, because clearly once you've got through that process you would have providers that aren't meeting the regulatory standard, and you would have to do something about that, wouldn't you?

Ms Rice: We work through our regulatory processes and ultimately make a decision. The AAT is obviously a mechanism for having merits review of that decision, which is absolutely fine.

You asked earlier about the number of matters before the AAT. At 30 June this year—I think from ASQA's inception in 2011, so some eight years—there had been 484 matters concluded before the AAT. Around 53 per cent of those matters were settled by consent—that is, inevitably, ultimately, reaching compliance and they settled in some mechanism. Again, it's not saying that the original decision was wrong; it's just on the basis of the information at that time.

CHAIR: Being quarter past—
Senator PRATT: Sorry, we just wanted to enable that answer to be completed, which is about the overturning of the finding.

CHAIR: We'll complete the answer and then we'll go to the break.

Ms Rice: There have only been 32 occasions where a matter before the AAT has run its full course and there's been an actual decision by the AAT—that's as at 30 June this year. On 21 occasions, ASQA's decision was affirmed, and on 11 of those occasions ASQA's decision was either set aside or varied.

CHAIR: Being 16 past the hour, that concludes questions for the Australian Skills Quality Authority. Thank you very much. That also concludes the Employment, Skills, Small and Family Business portfolio. All officials are released; please return to your places of work—the secretary has asked me to remind you about that.

Proceedings suspended from 13:16 to 14:18
CHAIR: It is quarter past the hour, so we will recommence. I have the email from Senator Sheldon that you indicated before that you wish to table. Unless anyone has any objection to this, it is the will of the committee that we accept it as a tabled document.

The committee will now move to industrial relations matters, commencing with the Industrial Relations Group in the Attorney-General's Department. I welcome the Minister representing the Attorney-General, Senator the Hon. Marise Payne, and representatives from the Attorney-General's Department. I remind senators that questions concerning industrial relations corporate matters should be pursued in the Legal and Constitutional Affairs Legislation Committee hearing. Minister Payne, do you wish to make an opening statement?

Senator Payne: No, thank you, Chair.

CHAIR: Welcome, Mr Moraitis. Do you wish to make an opening statement?

Mr Moraitis: Given it's the first time we've appeared in this new configuration and, as you alluded to, corporate matters will be discussed in a separate committee, I thought it would be worthwhile just to summarise for this committee the context of the machinery-of-government changes that have occurred and how that's operating—if you would indulge me on that for a few minutes.

CHAIR: Certainly.

Mr Moraitis: I would very quickly like to say a few things about the machinery-of-government changes, and then I'll table the rest.

CHAIR: Thank you.

Mr Moraitis: I wanted to take the opportunity to outline the fact that, following the Administrative Arrangement Orders of 29 May this year, there was a transfer in responsibilities of industrial relations to the Attorney-General's portfolio. Our finances and staff were involved in that transfer. The date of effect of that transfer was 25 July this year. For your information, the full average staffing level transfer was 325.2 staff, including four staff from the service delivery office of the finance department. The full-year departmental funding transfer was about $62½ million, and administered funding was also transferred. These will form a separate outcome in our additional estimates statements in the future. I also should note that seven agencies from that portfolio of jobs have moved to this portfolio, and they will also be included in the additional estimates statements.

I'm sure you're aware of the role that the Attorney-General's Department plays, and I won't go into the details. That will be in the statement that I submit. I just want to make the point that, while this is a relatively new area for the current part of Attorney-General's, what's struck me in the last few months is the fact that there are synergies in terms of policy, in terms of how we go about stakeholder engagement and in terms of the legal matters that we deal with. So far the machinery-of-government process, in terms of structure, in terms of policy approach, is very similar, and we've already hit the ground running as a department. We've worked very hard and assiduously, certainly from my perspective and the perspective of my staff and the crew working to engage with all our colleagues in Industrial Relations. We've progressed quite a bit in engaging in that space. There are a few outstanding issues such as accommodation. The department are still accommodated in their current office space in Civic, and in the next five or six months we hope to move all Industrial Relations staff into our
building, the Robert Garran building, in Barton. We also want to finalise some of the IT transfers. We're quite committed to ensuring this happens smoothly and seamlessly so that we can support the Attorney in his role as Attorney but also as Minister for Industrial Relations—and, let me say, so far, so good.

I've spelt out in the statement some of the specific things we've done to ensure that we can maintain a positive level of engagement, given the two organisations coming together in the last few months. That will be outlined in the Hansard if you wish to peruse that in the future. Thank you for the opportunity to make that opening statement.

CHAIR: Thank you, Mr Secretary. It is the will of your committee that your opening statement is tabled, unless anyone objects to that. There being no objections, it is so resolved. Senator Keneally, I think you wish to kick off.

Senator KENEALLY: I'd like to start on the Senate inquiry into stillbirth. The government has accepted, in principle, all of the recommendations of the inquiry. The first recommendation of that inquiry was that the government would review and amend the Fair Work Act as it relates to paid parental leave provisions for parents of stillborn babies. Can the department advise if there has been any work commenced on this recommendation?

Mr Hehir: We are certainly aware of the report and we have been looking at the provisions in terms of the interactions within the Fair Work Act between what is allowed for live birth and stillbirth. I might pass to Ms Durbin to talk you through the detail.

Ms Durbin: At this point, there's probably not a huge amount of extra detail that I can provide. We certainly are aware of the report and aware of the government's response. We've undertaken a range of internal analysis. We briefed the previous industrial relations minister. We also have briefed the Attorney. There is work in progress in terms of working out a consultation process so that we can engage with stakeholders to get their views. We will be in a position to publicise that when we've got formal government agreement in terms of the consultation arrangements.

Senator KENEALLY: So the intention is to consult regarding what steps you might take before those steps are taken?

Ms Durbin: Absolutely.

Senator KENEALLY: Is there a time line in place? Do you have an anticipation of if there might be information available publicly before the end of the year?

Ms Durbin: I can't comment on that, I'm afraid.

Senator KENEALLY: Are you aware that the Minister for Health will commence a roundtable on 2 December regarding progressing the recommendations out of the stillbirth inquiry?

Ms Durbin: Yes. We work closely with officials from the Department of Health and other coordinating agencies.

Senator KENEALLY: Will the Attorney-General's Department be present at the roundtable?

Ms Durbin: I understand whether we send someone is still being finalised. We are certainly in discussions.
Senator KENEALLY: I have some other requests regarding migrant worker exploitation. The migrant worker task force report, which was provided and which the government then responded to in March 2019, states:

Migrant workers can be particularly vulnerable to slavery and exploitation by either those who facilitate their journey to Australia, or by employers once they arrive. Many suspected victims of trafficking and slavery have entered Australia on legitimate visas.

Is that an accurate statement and do you agree with that?

Mr Hehir: That was certainly the findings of the task force and we're represented on the task force. You would be aware that the government agreed, in principle, to all 22 recommendations of that report. A number of those recommendations are currently being progressed.

Senator KENEALLY: The Attorney-General's Department was on the task force that endorses the findings of the report?

Mr Hehir: This is a timing issue. The Attorney-General's Department, at that time, was on the task force and the industrial relations group was the secretariat and on that task force, and—

Senator KENEALLY: And as such endorsed the findings of the report?

Mr Hehir: We were part of the task force making that report, yes.

Senator KENEALLY: Has anything changed your view that that's no longer an endorsable position?

Mr Hehir: No. There is no new information that's come to light.

Senator KENEALLY: The Australian Bureau of Agricultural and Resource Economics and Sciences farm survey report said:

Using contract labour companies who may use undocumented workers, engage workers outside their visa conditions or underpay their workers is a risk for the farm.

Are you concerned about the risk to workers and employers that is highlighted in this Australian Bureau of Agricultural and Resource Economics and Sciences farm survey?

Mr Hehir: That statement is very similar to some of the findings within the migrant worker task force report.

Senator KENEALLY: It is, yes.

Mr Hehir: And that is why there was a recommendation around the establishment of a labour hire registration scheme.

Senator KENEALLY: Yes. I do have some questions about that, so thank you for raising it. I quickly want to also observe that assistant minister Jason Wood, when he was Chair on the Joint Parliamentary Committee on Migration, said in a chair's forward in February 2019:

Organised crime and illegitimate labour hire companies are using this loophole—

He is talking about the visa system—

to bring out illegal workers who are often vulnerable and open to exploitation.

Does the department accept the view that organised crime and illegitimate labour hire companies are using loopholes to bring workers Australia?
Mr Hehir: I am not aware that the migrant worker task force report identified organised crime as an issue. Certainly we are concerned about the behaviour of some labour hire firms.

Senator KENEALLY: You are concerned about the behaviour of some labour hire firms, why?

Mr Hehir: Certainly the principle behind the recommendation is that there seems to be some labour hire firms who are exploiting vulnerable migrant workers.

Senator KENEALLY: The migrant workers task force actually said:

Taskforce Cadena is working closely with the AFP to locate and remove victims of suspected human trafficking. This involves identifying Australian based syndicates and their offshore supply chains in order to develop appropriate disruption strategies.

That sounds like organised Australian and overseas operations are bringing people here.

Mr Hehir: Yes, certainly in terms of illegal workers or workers without appropriate documentation, yes.

Senator KENEALLY: Right. So it is a problem. Let me ask about the national labour hire scheme. When will the scheme be introduced?

Mr Hehir: At this point, the Attorney is intending to discuss this with relevant state and territory ministers to begin the process of how to establish a national labour hire registration scheme. You would be aware that three states currently have their own labour hire registration schemes and they all differ, and the recommended model from the Migrant Workers Taskforce is different again. So, rather than having multiple, varied schemes, we are looking to see whether we can coordinate a national approach.

Senator KENEALLY: Is there a time line for this work?

Mr Hehir: Certainly my understanding is that the minister intends to write to ministers shortly if he's unable to meet with them directly to discuss it.

Senator KENEALLY: So he hasn't written to them yet?

Mr Hehir: Sorry, he has written to them, yes.

Senator KENEALLY: He has written to them?

Mr Hehir: He has written to them.

Senator KENEALLY: Can you table a copy of the letter, please.

Ms Durbin: Sorry, we don't have a copy with us, but my recollection is that he wrote to state and territory colleagues on 11 October.

Senator KENEALLY: So this month. Have you had any meetings with the various stakeholder groups that have been calling for a national labour hire licensing scheme to be implemented urgently—for example, the Victorian Farmers Federation, AUSVEG or the Migrant Workers Centre?

Ms Durbin: Not recently.

Senator KENEALLY: When was the last time you would have met with stakeholder groups of that nature?

Ms Durbin: I'll have to take that on notice.
Senator KENEALLY: Can you take on notice whether you have you had any consultation with Victorian Farmers Federation, AUSVEG or the Migrant Workers Centre?

Ms Durbin: I'm happy to take the details on notice. My recollection is that, since the cessation of the task force, we've not engaged bilaterally with any organisation.

Senator KENEALLY: The government's response to the report of the Migrant Workers Taskforce was quite broad. It didn't make specific commitments to the 22 recommendations apart from in-principle support. So where is the implementation of this report up to? Can you tell us: has the government agreed to implement anything specifically beyond a national labour hire licensing scheme?

Ms Durbin: As you indicated, the government committed in principle to all 22 recommendations and there is work underway in a range of areas to progress those. Probably one of the most significant ones is the government released a discussion paper in September picking up a number of the Migrant Workers Taskforce recommendations, particularly around the penalties and compliance regime in the Fair Work Act. The task force made a number of recommendations, particularly as it applies to migrant workers, but obviously the Fair Work Act has broad coverage and would apply to all national system employees across Australia. That discussion paper looked at a range of recommendations and sought feedback. It particularly went to things like the operation of the current civil penalty under the Fair Work Act, which was a particular recommendation of the Migrant Workers Taskforce. It has sought feedback on the application of criminal penalties for the most egregious worker exploitation. That's quite deliberately spelt out in the feedback the government is seeking through that discussion paper. Similarly, it's seeking feedback on the deterrent effect about changes that the government made in 2017 under a range of vulnerable worker amendments that were made to the Fair Work Act and whether they've had the desired effect or whether further changes need to be made. That addresses a very wide-ranging number of the recommendations of the Migrant Workers Taskforce.

Senator KENEALLY: Can you specifically speak to whether the government has any plans to introduce legislation to criminalise serious worker exploitation.

Mr Hehir: That's the purpose of the discussion paper. So the government's committed, in principle, to that. The discussion paper clearly sets out and asks questions around what the possible criminality test should be and seeks feedback on that. The government has identified that we are drafting legislation at this point.

Senator KENEALLY: You are drafting legislation?

Mr Hehir: Yes. The minister and the Prime Minister have indicated that.

Senator KENEALLY: Can you please provide me—and I'm happy for this to be on notice—with the timing and actions that will be taken to deliver each of the recommendations from the response to the Migrant Workers' Taskforce report? I appreciate that you've just given me a general overview. I would just like to know what action is being taken on each, where it's up to and when they anticipate next steps and delivery.

Ms Durbin: For completeness, there is an interagency group that's been established, because a number of the recommendations go across other portfolios. Home Affairs, for example, and other portfolios have a particular interest—you've touched on the Department of
Agriculture. That is the group that is overseeing the implementation of the taskforce's recommendations.

**Senator KENEALLY:** This is a general question. I take it you would agree that there is exploitation, trafficking and slavery occurring in Australia?

**Mr Hehir:** Certainly, the evidence provided to the Migrant Workers' Taskforce indicated that there was serious exploitation of migrant workers. It identified the trafficking issue, which you quoted previously. I think as part of the work with Taskforce Cadena identified potential slavery, yes.

**Senator KENEALLY:** For the advice of people who may be listening to this, within what sectors of the economy does this type of exploitation and trafficking and slavery mainly occur?

**Mr Hehir:** In relation to the recommendation, the report identified four higher-risk sectors: horticulture—

**Ms Durbin:** Cleaning, security, meat processing and horticulture.

**Senator KENEALLY:** Do any of these sectors rely on undocumented workers?

**Ms Durbin:** I'm not sure we could comment specifically. The Department of Home Affairs may have some intelligence, but I couldn't comment specifically.

**Senator KENEALLY:** Did the Migrant Workers' Taskforce not consider that issue? Did that not come out in the report?

**Ms Durbin:** At the general level, but certainly not to that level of specificity.

**Senator KENEALLY:** So, at the general level it did. Do you have a sense of how widespread the issue is? Did the report make any findings in that regard?

**Mr Hehir:** My recollection is that there were a number of papers published that were referenced. I'm not sure that the taskforce itself undertook any specific analysis around how widespread it was.

**Senator KENEALLY:** So it would be hard for someone to make a claim based on that information? Are you saying that it's not possible to say how widespread it is or isn't?

**Mr Hehir:** My recollection is that the taskforce looked at a number of papers produced by academics, which varied in their estimates. But the taskforce itself didn't reach a conclusion on how widespread it was, in terms of numbers of people. I'll take that on notice to make sure, but my recollection is that they looked at the academic papers.

**Senator KENEALLY:** That would be really useful, thank you. I'm just surprised that you don't have a view to advise us. We've got Mr Woods' report in February 2019; the Australian Criminal Intelligence Commission in 2017-18 talked about the challenge of people being trafficked here, on valid visas, to work; the inquiry into human trafficking and slavery in 2017; the Joint Parliamentary Committee on Law Enforcement; we have your own civil justice division; and your submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Committee's inquiry into establishing a modern slavery act. It seems there are multiple government reports that document and chronicle that people being trafficked on valid visas to work in exploited conditions is a significant problem for Australia. We have Taskforce Cadena. We have the work that you are doing to respond to the Migrant Workers'
Taskforce. It seems odd to me that somebody might make a claim that this is not a problem in Australia.

Mr Hehir: Senator, I didn't make that claim. My—

Senator KENEALLY: No you didn't, but Peter Dutton did this morning.

Mr Hehir: As I said before, the task force identified it as a significant issue. But my recollection is that the task force itself did not attempt to quantify the level.

Senator KENEALLY: Thank you.

Senator SHELDON: Good afternoon, Mr Moraitis and Senator Payne. The Minister for Industrial Relations told the parliament on 31 July this year that under the provisions of the ensuring integrity bill, a single instance of unprotected industrial action—for example, the nurses union protesting unsafe nurse-to-patient staffing ratios—would not establish a ground for an application for a disqualification of that union. He said that the notion was 'fanciful' and 'patently absurd'. Minister, based on your understanding of the provisions contained in it, was the minister correct in this statement about the ensuring integrity bill?

Senator Payne: I don't have that detail with me, and I haven't seen the minister's comments. But I'm very happy to take your question and the details of that on notice, and respond to you through the committee.

Senator PRATT: Minister Payne, this is a policy question, so perhaps the department can explain the way the policy contrasts with the minister's statements.

Senator Payne: That's a secondary question. I was responding to Senator Sheldon's question to me.

Senator PRATT: No, that's fine. Because you've taken that on notice I thought I might assist Senator Sheldon by seeing if the secretary can explain it in a policy context.

Ms Volzke: One instance of obstructive industrial action can amount to a prima facie ground for deregistration. But unprotected industrial action without those additional features will not provide a prima facie ground for deregistration, so the action must also have relatively prevented, hindered or interfered with the activities of an employer or any relevant public service, or had a substantially adverse effect on the health, safety or welfare of the community.

Senator SHELDON: You said that the language in the bill does, in effect, turn around, and that one breach in the circumstances you've described is a ground for seeking deregistration?

Ms Volzke: One instance of obstructive industrial action. That is an existing provision and ground in the current registered organisations act as well.

Senator PRATT: But not for deregistration?

Ms Volzke: Yes, it is. It's in—

Senator Payne: It's in the current act, the official said.

Ms Volzke: Yes, it's in section 28.

CHAIR: In (1)(b)!

Senator PRATT: Thank you for clarifying that for us; we might come back to that—I just need a moment to digest the way you've put the answer to that question.
I want to begin by asking some questions about the Porter review of industrial relations that was announced back in June. What are the terms of reference for the review and what's the scope and its objective?

Mr Hehir: The Minister for Industrial Relations has been asked to examine the industrial relations system to identify where there may be impediments to shared gains for employers and employees. The Attorney-General has identified that potential reform should be measured against three criteria: driving jobs and wages growth; boosting productivity and strengthening the economy; and ensuring protection of employee's rights.

Senator PRATT: Is there anything else you can put on the public record that wasn't contained in the initial announcement of it back in June?

Ms Durbin: Probably the other public source is the information that the minister gave at the CEDA speech—I think that was 19 September—where he again reiterated the principles that Mr Hehir outlined, and outlined his intention to undertake comprehensive consultation through a range of discussion papers. The first two of those discussion papers have been released.

Senator PRATT: Sorry, the first two, did you say?

Ms Durbin: Yes.

Senator PRATT: In those discussion papers having been released, is there going to be a terms of reference for the review?

Ms Durbin: Each discussion paper, I expect, will put a caveat around what it's particularly seeking to get out of the engagement on a particular issue. The discussion papers, I think, will probably cover specific topics, so the stakeholder feedback being sought on each of those particular topics may vary but that would be outlined in each of the discussion papers.

Senator PRATT: So how will any set of particular stakeholders know whether issues of interest to them are going to come up in the context of the review, if it's just going to pop up on an ad hoc basis?

Ms Durbin: All of the discussion papers tend to be published on our website. We have stakeholders that we are in contact with. Where representative agencies have contacted us about a particular issue, certainly for the first two, we indicated to a number that we would advise them when the discussion paper was released and we followed that up. So it is really through those mainstream consultation bodies. Similarly, I am sure peak organisations will advise their members, as they would do through their normal course of business.

Senator PRATT: How many papers do you expect to be released?

Ms Durbin: It's a matter for government.

Senator PRATT: I did ask what the scope of the review is. If there've been two that have been released so far, and you don't know how many there are to come, how do we know what the scope of the review is in terms of the government's agenda in this space? We don't know how many or what topics.

Ms Durbin: I probably would again direct you to the Attorney's speech at CEDA, where he outlined the content of the two that he was releasing on that day and he foreshadowed at that point potential topics that may be considered for further discussion papers as part of the
review. They're included on page 7 of his speech. I'm happy to read that out if that would assist—

Senator PRATT: No, that's fine. I can find that. In terms of the consultations that have taken place so far, which stakeholders have been consulted with in the context of the two papers that have been done? Have you started consulting with other stakeholders in the context of other papers?

Ms Durbin: They are in the public domain. They're open for any party to engage with us through written submissions. They're published on our departmental website. So we have not, as a department, engaged bilaterally with stakeholders separate to that process.

Senator PRATT: So people need to write in to the department through the website? And you haven't held any meetings or discussions, so you're not doing roundtables or travelling interstate, or anything like that?

Ms Durbin: No.

Senator PRATT: So you can't tell us yet how many discussion papers there'll be or what the other subjects are. Will the review ultimately produce a single report?

Ms Durbin: I don't think that's the intention but that's really a matter for government.

Senator PRATT: So it's not the intention to have a single report?

Ms Durbin: That's my understanding, but they've provided no indication that that would be their—

Senator PRATT: How do we know what the government's industrial relations agenda actually is, Minister Payne?

Senator Payne: I think the official has said the Attorney has set out a number of his views in his CEDA speech, and of course the Prime Minister made a speech on 24 June which indicated what he had asked the Attorney-General to do. The Minister for Industrial Relations has said that any propositions around reforms should be measured against criteria such as driving job and wages growth, boosting productivity and strengthening the economy, and ensuring the protection of employees' rights. So as submissions are called on the series of discussion papers that are already under way, we want to see, and the Attorney wants to see, widespread input into what might be possible improvements or reform outcomes.

Senator PRATT: Through a discussion paper input process but with no roundtables or dialogue with stakeholders?

Senator Payne: I think the officials are describing the process as it stands. I think the Attorney-General has made it very clear that he's interested in receiving those views, and we want to enable that to progress reform.

Ms Durbin: If I can assist, one other thing I can add is this is obviously the beginning of the process. As we go through a policy development, we are obliged to undertake a range of consultative mechanisms under the act and under the intergovernmental agreement with the states and territories. So our normal processes would involve consultation as part of that.

Senator PRATT: When you get to needing to draft legislation or anything like that, do you mean?

Ms Durbin: Generally, yes.
Senator PRATT: Is there an expectation that these discussion papers will come through in the form of a single bill or amendments to the IR system?

Mr Hehir: It's a bit hard to pre-empt that. It's likely that there will be some individual bills. I mentioned earlier that we're drafting criminalisation of wage theft at the moment, so that's likely to be a separate bill at this point. It certainly won't be one single bill at the moment. A part of that will depend on the responses. Both the Prime Minister and the minister have made clear that was the evidence. They want to see a basis for changes. They are not looking for change for change sake; they are looking for an evidence base.

Senator PRATT: Were the first two discussion papers based entirely on the information provided through the website submissions or were there things added through other sources?

Ms Durbin: Both of those consultation processes remain open. For the first discussion paper, which was on the penalties and compliance regime I mentioned previously, that consultation closes this Friday, on the 25th. The second discussion paper, which is on greenfield enterprise agreements, closes on 1 November.

Senator PRATT: Thank you for clarifying that for us. Has the department been advised of the ACTU correspondence with the minister?

Ms Durbin: I'm certainly aware of that correspondence.

Senator PRATT: Is the department aware of correspondence from employer groups covering the review?

Ms Durbin: Similarly, I certainly can recall, off the top of my head, correspondence from other peak bodies who've taken the opportunity to write to the Attorney in his capacity as the new Minister for Industrial Relations.

Senator PRATT: Can I just clarify, you spoke of single bills and separate bills—

Mr Hehir: I spoke of a bill in terms of criminalising wage theft.

Senator PRATT: And that is currently being drafted. Is that right?

Mr Hehir: It's being drafted but, before it's finalised, we're awaiting the outcome of the consultation process.

Senator PRATT: The ACTU and other unions have asked to be consulted as part of these review processes. When will this happen?

Mr Hehir: The ACTU are welcome to make a submission into the discussion papers. There's certainly the opportunity for them to make that submission. Whether there's subsequent consultations required will depend on the inputs and how varied the input into those papers is. There are of course also the formal processes where the Workplace Relations Consultative Council committee meets, which includes representatives from the ACTU.

Senator PRATT: Can I ask why you're not running public consultations for employers, workers, unions and employer groups to be heard?

Mr Hehir: The decision was made to release them as discussion papers and to seek feedback broadly.
Senator PRATT: Do you think perhaps there's a role for talking to workers about their individual experiences of how the current policy settings affect them?

Mr Hehir: That's certainly a possibility depending on the subject matter. In relation to the penalties discussion paper, it's based on the extensive work undertaken by the migrant worker taskforce and as Ms Durban identified, while it's based on that, it will certainly have broader application than just migrant workers.

Senator PRATT: Can I ask what consultants have been engaged as part of the review of the IR system, for what purpose and at what cost?

Ms Durbin: The department, as part of this overarching process, has engaged one consultant—the Boston Consulting Group. They commenced work on 14 October, is my recollection. They have been tasked to do quite a specific and defined task, which is to develop some process maps to support the current enterprise bargaining and agreement-making process. That is being done in consultation with stakeholders. That consultant is in the process of reaching out now to employers and to employee representatives to seek their feedback on the processes that they have experienced in negotiating a single enterprise agreement. I think you asked about the cost. It was $137,500.

Senator PRATT: Sorry? How much?

Ms Durbin: Their quote was $137,500.

Senator PRATT: In that context, I understand the minister has already announced that the government is going ahead with lifetime greenfields agreements, even though consultations on that one close on 1 November. Is that correct? Why has the government pre-empted policy consultations by making an announcement like that?

Ms Durbin: Certainly we are aware that there have been reports in the press that have been putting that position forward. A better source is the response that the Attorney gave to question time—I think it was on Tuesday—where he quite clearly indicated that greenfields was in scope of one of the discussion papers that he had issued and he was looking forward to getting feedback on that.

Senator PRATT: What's the point of these consultation processes if essentially the government is pre-empting a commitment to implementing what's in the consultation paper? It is not true consultation then if an idea is not worth pursuing?

Senator O'SULLIVAN: Haven't they put a paper out?

Ms Durbin: That's correct. The Attorney is clear that he supports this idea. He thinks it is a good idea and that it would bring significant productivity and other benefits to large-scale infrastructure projects but it remains under consultation. He will consider the feedback both on the idea and on the technical detail about how such an idea could be legislated and put into operation.

Senator PRATT: What is the consultant's brief for Boston Consulting and when are they due to report?

Ms Durbin: They've been engaged for 20 days of work. That includes developing an end-to-end process map of the bargaining process, engaging with stakeholders and getting their feedback. They're due to report to us on 8 November.
Senator PRATT: So that's 20 days to do the substantive consultation and they're reporting on 8 November. Is that what you said?

Ms Durbin: That's when they're due to give the final product to us, yes.

Senator PRATT: That's a call-out to anyone who's listening to this estimates as to whether they've actually heard from Boston Consulting, if they've got an interest in these issues. Are you able to tell us how many stakeholders Boston Consulting Group are meeting with in that time?

Ms Durbin: I'll have to take the specifics on notice but we're certainly aware that they are engaging directly with employers, bargaining representatives and unions to get their feedback.

Senator PRATT: Did you give them a list of unions, peak councils, employers and employer groups you wanted them to talk to?

Ms Durbin: We've certainly given them some parameters around where we think it will be most beneficial to engage what is actually a very short-term and truncated project. We would be looking at people who've gone through this experience very recently, so have recently concluded a bargaining process.

Senator PRATT: But in that sense, it being mid-October now, which means they have 20 days, would you expect people to have heard from Boston Consulting by now if they were going to be part of this consultation on bargaining?

Ms Durbin: There is a consultative group that operates within the Fair Work Commission, which obviously has a key role in this, that comprises unions and employer representatives. We've used them as a first point of contact. We're in the process of contacting them to see if they're interested in participating in that project. I know some have indicated an interest and some have not, but we've not completed that process yet.

Senator O'SULLIVAN: Senator Pratt, if I may, it sounds like it's a very narrow body of work that Boston Consulting are doing. They're just mapping out—what are they doing? Are they looking at the current process map, is that right, and then giving that advice back?

Mr Hehir: Yes, they're certainly looking at the process map. They're looking to see whether there are duplicative steps within the process, whether there are redundant steps within the process. As part of that, they've been tasked to make sure that employee rights are maintained. As part of the consultation process with the employee and employer reps, they're looking at their personal experience in terms of use, or what we would describe as 'pain points'—what has worked well and what hasn't worked well; where are the frustrations—to try to identify, through that, if there are possible improvements to the process.

Senator PRATT: So you can't give us a list yet of which union peak councils that the department or Boston Consulting Group will talk to, other than you would expect they would be talked to if they're part of the existing consultation processes within the department. Is that what you're saying?

Ms Durbin: Within the Fair Work Commission, so they already operate a consultative forum across a range of bargaining issues that comprises unions and employers.

Senator PRATT: Okay. So if they don't hear from Boston Consulting then they need to get on to the Fair Work Commission to make sure they can be part of that if they want?
Ms Durbin: I can't comment on the process for engaging with the Fair Work Commission in terms of its normal consultative business, but if people have a particular interest, I'm sure I can say we'd be happy to hear from them.

Senator PRATT: How does the use of external consultants fit with the department's announced process of issuing discussion papers on specific topics? What's going to happen to this work on bargaining?

Mr Hehir: Bargaining is one of the potential papers, so part of this is a technical exercise to identify whether there are issues or areas of redundancy within the process, and whether there are any suggestions from parties on an evidence base that could improve the process. If there is then it's possible a discussion paper could be issued on it. But, really, the first point was trying to get a technical exercise done.

Senator PRATT: The Treasurer recently declared from Washington that industrial relations was a 'key target in a three-phase reform plan to expand the economy'. Does this mean the review will be fast-tracked or managed differently than was previously thought?

Mr Hehir: Not to my knowledge. The attorney has been working with us systemically, and that continues.

Senator PRATT: Okay, so is or is not industrial relations part of the government's approach to managing the economy?

Mr Hehir: Certainly when you have a look at what the potential reforms need to be measured against—driving jobs and wages growth, boosting productivity and strengthening the economy, and ensuring protection of employees' rights—it's clearly a key part of looking at boosting productivity across the economy.

Senator PRATT: The stated aims of the IR reforms under consultation are to 'create jobs, put upward pressure on wages and to help business by boosting productivity'. Can I ask what that means? And is decreasing the labour cost of a major project by having a project-length agreement rather than a three-year pay deal a productivity improvement?

Ms Durbin: Again, if you look at the preface of each of the discussion papers, it's quite clear that the objectives need to also ensure the protection of employee rights.

Senator PRATT: So in terms of the enterprise bargaining agreement processes, will you be using that assessment to look at this greenfields policy?

Ms Durbin: If I understand your question correctly, the Boston Consulting Group process that we talked about is just looking at single enterprise bargain making. It's not looking at greenfields, which is a separate bargaining process.

Senator PRATT: So you don't know yet how many unions have been contacted by Boston Consulting Group. I'm aware that perhaps one or two have, but it seems pretty extraordinary to me that—you say they're going to report on 8 November. Is that right?

Ms Durbin: That's correct.

Senator PRATT: So if people wanted to have input into working through this or putting their view about how bargaining works—and it can be very different in different parts of the economy, even though they're all working within the same laws—how do you make sure that what Boston Consulting maps out matches the diversity of what actually happens in the bargaining process?
Ms Durbin: Again, Senator, it's around the scope of this exercise, which really is around the process mapping. This is step 1, in terms of what will be an ongoing consultation process. Should the government wish to go forward with further ideas or reforms in the bargaining space there would be lots of further opportunities. This is purely just process mapping, building in some of the user-centred design principles that Mr Hehir talked about.

Mr Hehir: Certainly my recollection is that Boston Consulting have been in contact with at least four unions, and they're spread across a range of industries.

Senator PRATT: Are you going to tell us which four they are?

Mr Hehir: I can, but I'm going to need to search my document.

Senator PRATT: I'm sure they can probably tell us. I am concerned that the scope of how bargaining happens is pretty diverse. Are you going to make the mapping process public? Are you going to consult on whether you have got it right before the government leaps into making policy decisions based on what that mapping process looks like?

Mr Hehir: Do you mind if answer your previous question?

Senator PRATT: Go for it.

Mr Hehir: The four unions that have agreed to date are the AMWU, the AWU, the IEU and the ANF. Sorry; apparently I have a further email, which I will check, but that's is my understanding at this point. I'll clarify that if I need to. But they go across a range of sectors.

Senator PRATT: Okay. And would those unions be aware that not all unions have been invited to participate in this process? That they've been singled out as—

Mr Hehir: They've been approached based on their membership of the Fair Work Commission consultative group.

Senator PRATT: So all members of the consultative group have been asked to participate in this?

Mr Hehir: I'd need to check that as that isn't quite what I said. I said that they've been approached based on their membership of that consultative group. I'd need to check to see whether everyone has been approached.

Ms Durbin: At this point, no, they wouldn't. As you can tell by the fact that we are checking emails, it's actually underway at the moment. I know my staff are in the process of doing it throughout the morning, so I doubt they have completed it.

Senator PRATT: In terms of the invitations to unions to participate?

Ms Durbin: Yes.

Senator PRATT: So that's not being done by Boston Consulting. That's being done by the department or the Fair Work Commission, because they're members of the consultative group?

Ms Durbin: That's right. My recollection is we were providing an opening in terms of the department having engaged the consultant, and then the follow-up mechanics of organising meetings is being handled by the consultant.

Senator PRATT: We seem to have gone round in a little bit of a circle, because I asked quite clearly: who was being asked? You said, 'We're going to do it through the consultative group.' Therefore, it sounded like it was at arm's length from the department, but clearly that's
not the case. What is the rationale for approaching these unions and not other unions? Is it just because they're members of the consultative group?

Mr Hehir: When we looked at this matter, we thought the most appropriate mechanism was people who were already part of the consultative group. As Ms Durbin has just said, we are facilitating the invitation. We're not sure how well known BCG is to some of the union groups, so we're opening the discussion with them to say whether they'd be interested or not. And then it's over to the consultants to go from there. All we're doing is the introduction and testing their interest, and then we're back out of it.

Senator PRATT: But you're expecting who you've approached is going to be representative of the diversity of bargaining that takes place?

Mr Hehir: We're looking to get a range of views, including people who have recently bargained, people who are part of the consultative process who understand the bargaining system well. We're also looking to engage with people who may not have bargained recently, who may have bargained previously but not recently, to talk to them about why they may not have bargained recently. So we're looking for a range of views to inform it. It's part of normal process that I'm used to in looking at user centred design processes.

CHAIR: Senator O'Sullivan has a quick clarifying question.

Senator O'SULLIVAN: So, a future discussion paper would be created on enterprise bargaining—is my understanding correct that the work that Boston Consulting are doing is going to be used in that discussion paper so that there can be a broader discussion, so it's not just narrow?

Mr Hehir: That will depend. If there's nothing that comes out of this discussion process in terms of possible improvements to the bargaining process, then there may not be a discussion paper on it. That's still to be considered. This is a technical piece to identify if there are possible improvements.

Senator PRATT: In context of why this review has been divided up into all of these little pieces, is it because you don't want to reveal the scope of the agenda? It's just that it demonstrates that the government is being quite secretive about its approach to industrial relations.

Mr Hehir: In terms of the approach being taken, it's been determined by the Attorney-General. I think the fact that we're having discussion papers out there, that we are seeking to engage as broadly as we can, would say that's not a secret process.

Senator PRATT: No. But we don't know what's coming up as far as the rest of the agenda because there are no terms of reference and no scope for the review.

Mr Hehir: As I said, the minister's been clear and the Prime Minister's been clear on the need for an evidence base, so they're looking to identify where there are possible improvements. I think in the CEDA speech the Attorney said that there's got to be a will to do this as well, so there's no point in taking forward ideas that aren't going to be able to be progressed. So they're looking to try to establish an evidence base about what can be done.

Senator SHELDON: You've mentioned some unions that you've spoken to. Have you looked at unions that are covering the new economy? Have you looked at unions that are in the nursing profession? Have you looked at unions in the servicing industry? We've just had a
long discussion about the exploitation of migrant workers. It seems like there's a very narrow cast—of course, we're not aware exactly what the details of those discussions are as yet.

Mr Hehir: I need to clarify. I'm told that, with the update that Ms Durbin referred to, the AMWU is not participating; it is the AWU, the IEU and the ANF, so, yes, the nurses' federation is included. I'm not sure this is the final list; this is the list to date. As Ms Durbin said, our team are reaching out to engage further. I can come back with further information because we don't have a finalised list yet. As I said, we are approaching this from the existing Fair Work Commission's consultative group because they're already established and they know. There are also some broader issues that we're looking for in terms of some of the employer reps, including those who have engaged recently and those who haven't engaged for a while in terms of the bargaining process.

Senator PRATT: Have you started drafting a greenfields bill?

Mr Hehir: No.

Senator PRATT: You haven't started to draft the greenfields agreement bill?

Mr Hehir: That's correct.

Senator PRATT: No, even though the minister's made clear his like and support for that and you're engaging in a consultation process. Is that consultation process going to be based on the evidence or the minister's opinion of these issues?

Mr Moraitis: That's why we had a discussion paper go out—to get as much evidence as we can with some clear questions. In the case of the wage theft and criminalisation process, there was a corpus of evidence that was a sufficient basis to start on the process.

Senator PRATT: What I am worried about, Secretary Moraitis, is that the government has a consultation process for these discussion papers that is entirely in a written form and that is all the department is doing. In the meantime, we know what the government's natural constituency base is and who they're talking to and who they have active conversations with. I just worry about what has more weight in the final outcome on these issues. How do we see where the weight of balance comes through on these questions?

Mr Moraitis: As you know, Senator, I'm pretty new to this, but I've watched the way it's been outlined and have referred to the terms of reference, and the terms of reference have been outlined by the team here and that provides a pretty balanced, broad approach. We're adopting a process that's, from my perspective, pretty clear. It's aligned with how we as a department in the past have done legal matters. We consult. We have discussion papers that go out that ask a specific series of questions where we can progress things while the consultation process continues. On the greenfields, yes, the attorney has been out there saying what his preference is, but he certainly—as I know from experience having worked now for over a year for him—looks at the facts and the evidence before coming to a conclusion.

Senator SHELDON: So who are the employer groups that have been consulted?

Mr Hehir: I'm sorry, I don't have that list in front of me. I'm happy to take that on notice.

Senator SHELDON: Righto. I just wanted to clarify a question from before in the answer to the ensuring integrity bill and the comments from the minister in the House, which I was referring to before. I've got a copy of Hansard here, which may be of assistance to Senator Payne. I can read—
CHAIR: Are you able to table that?

Senator SHELDON: I'm happy to table it. I referred to it before. In the grounds of 28G and with the understanding that the minister has made a series of suggestions that associated interested parties, the minister and the registered organisation commission can make application—there's an expanded piece of legislation being proposed. The minister, in Hansard, said that it's not correct, that it's fanciful to say that one issue can be used for deregistration. In a reply, the minister said that, under the existing legislation, this new regime of deregistering unions is now not so fanciful, and it certainly is correct to say that if a union, such as the nurses union, were to take action regarding patient-nurse ratios, they could be deregistered.

Ms Volzke: Senator, if I can just unpack that. The way that the test works for deregistration is that the onus is always on the applicant to prove that, first of all, a ground has been made out and also that it would not be unjust to make the order that is being sought. So a mere assertion of a ground, whether it be the obstructive industrial action or another, will not suffice to meet that legal onus. Indeed, in relevance to the ground this we are talking to, 28G states:

(2) A finding of fact in proceedings in any court is admissible as prima facie evidence of the fact—

Senator SHELDON: Can I put this to you: if a ground is found that there was illegal industrial action by nurses on patient-nurse ratios—evidence was given during the Senate inquiry that the unions identified that that action is likely to be seen as illegal industrial action—and the ground is found on one action to that case, an application can be made for deregistration of that union.

Ms Volzke: As I said previously, that instance of industrial action would have to have those additional characteristics in order to provide a ground under 28G, so it's not sufficient for it just to be the industrial action; it also has to have hindered or obstructed or had that substantial adverse effect.

Ms Kuzma: Could I just add to that. These bills are before another committee in terms of the technical detail, and I understand that committee is reporting on Friday.

CHAIR: I think we are going to move on from this area; I don't want to be in breach of standing orders. If Labor could move on to another area of questioning, please. Before you do, I think Senator Davey has a quick question.

Senator DAVEY: Just a clarifying question. On that very example that Senator Sheldon raised, am I right, though, in my reading of the legislation, that it is still the court that decides who is going the be deregistered? It's not up to the minister and it's not up to the applicant who has made the application for deregistration?

Ms Kuzma: Yes, that's correct.

Senator DAVEY: Thank you.

CHAIR: Back to Labor, please.

Senator WALSH: These questions relate to appointments to the Fair Work Commission, and I think they are for you, Secretary Moraitis. In December 2018, the former minister made six new appointments to the Fair Work Commission to replace one vacancy. Is that correct? Can you confirm that?
Mr Moraitis: I personally don't know. I'll have to get someone who is aware of that.

Ms Kuzma: Yes, there were appointments to the Fair Work Commission in December 2018.

Senator WALSH: My understanding is that all of those six appointments were individuals with employer backgrounds. Are you able to comment on that or confirm that?

Ms Kuzma: I think we would be able to provide you with information about the backgrounds that I think was released at the time of the appointments.

Senator WALSH: Thank you. My understanding is that those additional appointments brought the total number of appointments by this government to 20 appointments in a row of people who had an employer background, and I understand from your previous answer that you'd need to take that on notice. But can you explain to the committee what the process is for the appointment of commissioners to the Fair Work Commission?

Ms Kuzma: Certainly. I'll just pull up the legislative provisions about the qualifications. The qualifications are set out in the Fair Work Act, so we'll just pull that up for you. I won't be a moment.

Senator WALSH: What I'm interested in is whether the department is involved, whether it makes recommendations to the minister and how the appointments are made.

Ms Kuzma: So these appointments are made by the Governor-General. That is also set out in the act. For commissioners, it states:

(3) Before the Governor-General appoints a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

(a) workplace relations;
(b) law;
(c) business, industry or commerce.

That is the qualifications for a commissioner. For a Deputy President, it states:

(2) Before the Governor-General appoints a person as a Deputy President, the Minister must be satisfied that the person:

... ... ...

(b) has a high level of experience in the field of workplace relations, including a high level of experience that has been acquired:

(i) through legal practice; or
(ii) in the service of a peak council or another association representing the interests of employers or employees; or
(iii) in the service of government or an authority of government; or
(iv) in academia.

That is section 627 of the Fair Work Act.

Senator WALSH: Are you aware or able to speak to what process the minister goes through to satisfy himself or herself that the potential commissioners to be recommended to the Governor-General meet those criteria?
Ms Kuzma: I think that, if you look at the qualifications that were announced at that time, the minister was satisfied on the basis of the qualifications of those individuals.

Senator WALSH: Is the department involved in making any recommendations to the minister, or is it purely up to the minister to make that determination?

Ms Kuzma: The statutory process is that the minister makes a recommendation to the Governor-General and the department supports that briefing process.

Senator WALSH: I think this question, then, is for the minister representing the minister. Can you give an assurance to this committee that all future appointments will be made not only in the spirit of appointing on the basis of merit but also with the spirit of maintaining the balance between employee representatives and employer representatives?

Senator Payne: I'm sure that the minister and the Attorney-General will propose appointments that are in accordance with the fair work legislation.

Senator WALSH: Does that mean that the minister doesn't think it's important to maintain balance between employer and employee representatives?

Senator Payne: No. I think that would be a completely unfair imputation. I think the fair work legislation outlines, as the officers have provided to you, the qualifications and requirements for members of the commission, and you would also always expect the minister to make appointments in accordance with the act.

Senator PRATT: Has the minister's office been the one supplying the names to the department, or have all of the appointments been generated by the department and put up to the minister?

Ms Kuzma: I'd have to take that on notice, Senator, from December 2018.

Senator PRATT: Secretary Moraitis, you'd be familiar with similar debates on appointments in the context of the AAT et cetera.

Mr Moraitis: I'm having echoes of other contexts, yes.

Senator PRATT: Can you outline at which point the minister influences this decision? Are these all the appointments that were made?

Mr Moraitis: You're alluding to the appointments of December last year as outlined? This is all based on my assumptions about how the department would work. They would prepare the paperwork for the minister's office to go to Executive Council and, in the case of the Attorney-General Department, we're usually informed of decisions and names and CVs and issues such as that or conflict-of-interest issues, and then we process that based on advice that we've been given by the relevant minister. In the case of the AAT, that has happened. There've been some changes, which we outlined yesterday.

CHAIR: We might break for now and then come back for 10 minutes.

Senator WALSH: Chair, can I just finish with one question on this?

CHAIR: Okay, as long as it's one question—not a Deb O'Neill one question!

Senator WALSH: I promise. I just want to conclude my question to the minister, and thank you for your previous responses. Do you think that 20 appointments to the Fair Work Commission of employer representatives represents merit and balance?
Senator Payne: I think that the appointments to the commission should be in accordance with the requirements of the legislation—the fair work legislation in this case—and I am confident that Attorney-General Porter is making appointments in that way.

CHAIR: On that cheerful note, we will break for afternoon tea. We'll have 10 minutes left of this group.

Proceedings suspended from 15:30 to 15:45

CHAIR: Thank you very much. We have 10 minutes left in this section.

Senator WALSH: These questions follow on about my questions about appointments to the Fair Work Commission. These questions are about appointments to the Fair Work Commission expert panel—that is, the panel that determines minimum wage and award rates for millions of Australians. We've heard, in the previous section, about concerns about the number of appointments with employer experience and the complete absence of any appointments, as far as we're aware, of any commissioners with employee advocacy experience. Can the department confirm that there are vacancies on that Fair Work Commission expert panel that will need to be filled and the number of those vacancies?

Ms Kuzma: Yes, there are vacancies on the expert panel.

Senator WALSH: Again, this expert panel deals with the needs of, particularly, low-paid workers, many of whom are on full-time wages of around $38,000 a year, so well below the poverty line and in many cases doing it tough. I'm sure everyone would agree that they need attention and assistance. My question for the minister is: will the minister give an undertaking to maintain balance on the panel between people with employer experience and people who have experience and knowledge of the needs of low-paid workers or employees in general?

Senator Payne: The minister would always make appointments consistent with the Fair Work legislation, but, in relation to the specific vacancies that you're asking about and prospective appointments, I will take that on notice. The minister will always make appointments according to the requirements under the law. I think that that is the appropriate rubric under which the minister should operate.

Senator WALSH: Do you think that, particularly in the case of assisting the Fair Work Commission to make a decision in relation to the wages of very low-paid workers, that it would be appropriate, if not entirely required by the act, for the minister to ensure that there are employee advocates or people with experience of advocating for low-paid workers on that panel?

Senator Payne: It is not necessarily for me to say what is or is not appropriate from the perspective of your question. What I have said and will consistently say is any minister will always make appointments that are consistent with the requirements of the legislation, which is the Fair Work legislation in this case. I'm sure Minister Porter will take that approach.

Senator WALSH: So, Minister, if it were consistent with the act to appoint six employer representatives to that panel, you would think that that would be appropriate?

Senator Payne: I said that the minister should always make appointments consistent with the requirements of the legislation.
Senator WALSH: Could you assist us to understand how the minister might go about making recommendations for appointments to this panel? What are the considerations or the processes that he might undertake?

Senator Payne: I can't speak for the Minister for Industrial Relations in terms of what might be in his mind on that, but I can take questions of that nature on notice.

Senator WALSH: We talked before about the review into industrial relations. We know that wage growth across the country is very low. We know there is a particular struggle for people who are on award minimum wages—people who are low-paid workers. Is it the intention of the government to give special consideration to the needs of low-paid workers in its review of industrial relations?

Mr Hehir: The topics for discussion papers haven't been finalised; I can't pre-empt what the minister's intention is for that. I note that the Fair Work Commission, in its minimum-wage decisions over the past three years—of course, minimum-wage decisions then flow into the awards—has made increases by three per cent or above. So, in actual fact, wages set by the independent body for minimum-wage and awards increases have been higher than the average wage increases.

Senator Payne: And, as I said earlier in response to a question from Senator Sheldon, the Attorney-General and the Minister for Industrial Relations has said that there are three criteria against which to measure the addressing of potential reform: driving of jobs and wages growth; boosting productivity and strengthening the economy; and ensuring the protection of employees' rights. That is the focus of any potential reform.

Senator WALSH: Is there scope in the review to consider how low-paid workers might be disproportionately locked out of the bargaining system and to consider measures that might assist low-paid workers? Do we understand that that may be a strong focus of the review?

Mr Hehir: I might be able to give an answer to a previous question which might help with that. The unions that we're contacting which are from the Fair Work Commission's consultancy group—my understanding is it is the User Group—are the AMWU, the ANMF, the AWU, the CFMMEU, the HSU, the IEU, the CPSU, the SDA, the NUW and UV—so United Voice. So there are quite a broad range of unions and representatives—

Senator PRATT: That's in relation to the bargaining stakeholder assessment?

Mr Hehir: I think that's where the question was going in terms of the bargaining process. It's entirely possible that United Voice, for example, may say, 'We have trouble at bargaining.' I don't want to pre-empt them, but there is that possibility given the range of people contacted.

Senator WALSH: Thank you.

Senator SHELDON: That doesn't include peak employee bodies?

Mr Hehir: That's the list of unions that we're contacting; as I said before, we're going through that process at the moment. I don't have the list in front of me for the—

Senator SHELDON: I just note it doesn't include all the unions in the gig economy area, in that future-of-work area. Since the Fair Work Commission ruling in 2017, penalty rates in the retail, fast-food, hospitality and pharmacy sectors have been abolished in wages for hundreds of thousands of workers across the country. The final cut to penalty rates in the...
pharmacy sector is due to take effect on 1 July 2020. How many extra jobs have been created through the cuts to penalty rates that have already occurred?

Mr Hehir: I can start on that question before I pass to Ms Durbin. The penalty rates weren't abolished; they were reduced, my understanding is, for Sundays. In addition to that, the Fair Work Commission has more recently increased penalty rates for casuals in some awards. So it hasn't been a universal cut; we've had increases and decreases. It was, from my recollection, for awards and Sundays only. In terms of the substance of your question, in terms of jobs, I might pass to Ms Durbin or Ms Wang.

Ms Durbin: As you know, both the Fair Work Commission, as part of its four-yearly review, and the Productivity Commission, prior to that, looked at the issue of penalty rates. Both indicated that it was their view that changes to Sunday penalty rates based on the issue around the disutility of Sunday would increase services for consumers and therefore lead to a range of other changes, including an increase in jobs and hours. The issue we have is that it is very difficult to measure that, because you can't detangle the range of economic factors that change over time, and employers' behaviour is obviously influenced by a very wide range of factors.

There are other issues. As Mr Hehir said, it is a subset of awards that apply across the retail, trade, accommodation and food services industries—so it was not all awards. Similarly, it was not all workers under those awards; for example, casual employees under the hospitality award did not have their penalty rates affected. Similarly, the changes to the fast-food award only applied to one level of employees; it didn't apply across the board. So not all workers under those awards were affected anyway.

As you just indicated, Senator, the Fair Work Commission made a decision to phase in the changes to penalty rates. A number of those awards have now finished the transition, and a number of the awards are now in year 3 of a four-year transition—so there was a phased approach. The commission also took the decision that changes to penalty rates would come into effect on 1 July each year; that is the same time that the annual wage review decisions also come into effect. As Mr Hehir said, those decisions by the Fair Work Commission have seen award wage increases of at least three per cent over the last three years. That's a long answer to say that, unfortunately, we cannot detangle the effects to provide a quantitative indication of the change.

Senator SHELDON: Thank you. The Council of Small Business, which has given subsequent consideration to the question of jobs being created as a result of penalty rates being abolished, says:

There's no extra jobs on Sunday. There's been no extra hours. Certainly, I don't know anyone ... It's been just a waste of time.

That was on 26 April 2019. What new research have you taken out—or do I take from your answer that there is no research that verifies the fact that one single job has been created from tens of thousands of workers losing their weekend penalty rates?

Mr Hehir: That wasn't quite the evidence given by Ms Durbin. Her evidence was that it isn't possible to detangle all the other influences that are happening. The economy doesn't operate in a steady state. There are a number of other factors that can change at any point in
time, and it's impossible to detangle those effects from each other when we look at what the actual job numbers are.

CHAIR: The committee will now move on to the next section. We will release the Industrial Relations group within the Attorney-General's Department. Thank you for coming along this afternoon.

**Coal Mining Industry (Long Service Leave Funding) Corporation**

[15:59]

CHAIR: We now welcome representatives from the Coal Mining Industry (Long Service Leave Funding) Corporation. I welcome Ms Jenkins and Mr Kembrey to their first estimates appearance. Do you wish to make an opening statement?

Ms Jenkins: No.

Senator ROBERTS: Thank you for coming today. This is a very complex issue; we've listened to about eight people, and it's a very serious issue. I have never seen anything like it before. So unless I say otherwise, my questions are directed to Suzanne Jenkins, the acting chief executive officer. Would you please explain why you are accepting payments for supposedly casual production employees when there is no such classification in the federal black coal award?

Ms Jenkins: Thank you for the question. Under our missing service review processes, we assess each application on its merits based on the duties of the employee. On that basis, we will assess them as an eligible employee or not. On the basis of that, we will then ask for an employer to pay a levy for any eligible wages due to that employee.

Senator ROBERTS: Are you saying that all production workers in the black coal industry in New South Wales are full-time?

Ms Jenkins: No.

Senator ROBERTS: Is their classification full-time?

Ms Jenkins: No, I'm not saying that.

Senator ROBERTS: How can you be sure, because the black coal award requires that only full-time employees be working on production.

Ms Jenkins: If it's okay, I'll ask my colleague Mr Kembrey to answer.

Senator ROBERTS: No, I'm asking you.

Ms Jenkins: As I explained, we operate under our legislation, which is the Coal Mining Industry (Long Service Leave) Administration Act. Under that act, we have a definition of what an eligible employee is. It's on the basis of that definition that we assess whether or not an employee is eligible.

Senator ROBERTS: So if there were—

CHAIR: Senator Roberts, if Mr Kembrey is able to assist Ms Jenkins, that certainly would be of benefit to the committee.

Mr Kembrey: Could I just get you to clarify the question again?

Senator ROBERTS: Sure. What I'm really looking at is: has your corporation taken any steps to ensure the information as supplied by the employer to you is correct?
Mr Kembrey: We work with employers that are registered to pay.

Senator ROBERTS: Have you taken any steps to ensure that the information that comes from the employer about the employees they're paying is correct?

Mr Kembrey: Yes.

Senator ROBERTS: What are those steps? What specifically?

Mr Kembrey: Clarification around the payment of the levy. We take it on board from the employer if they're paying a levy in regard to an employee; that the employer considers that employee an eligible employee for the purposes of the act.

Senator ROBERTS: My understanding is that LSL has to report to the federal minister every year, Ms Jenkins.

Ms Jenkins: On a number of matters.

Senator ROBERTS: Correct.

Ms Jenkins: What specific matter are you referring to?

Senator ROBERTS: I understand that when the employers send you a report, it is self-audited. How do you know it's correct?

Ms Jenkins: Every employer is required to undertake an independent audit of their levy returns over the previous financial year. It's not self-audited; it's audited by an independent auditor.

Senator ROBERTS: But it's provided by the employer.

Ms Jenkins: That's correct.

Senator ROBERTS: How do you make sure it's correct?

Ms Jenkins: We have our technical compliance team that reviews audit reports for any notation of error—which there are from time to time—and adjustments are made from that. We don't take it upon ourselves to go and audit the audit reports.

Senator ROBERTS: Have you had any complaints from employees? Have you been approached by employees?

Ms Jenkins: About what?

Senator ROBERTS: About providing pay slips and providing time sheets that disagree with the employer?

Ms Jenkins: Sorry, can you rephrase that question. Have we—

Senator ROBERTS: Have employees, specifically of Chandler Macleod, come to you and shown you that their employers' records are not correct?

Ms Jenkins: We have dealt with a complaint along those lines.

Senator ROBERTS: I've seen eight people, spoken with eight people, and they tell me there are hundreds more.

Ms Jenkins: In terms of how we receive information, we liaise and receive information from an employer. So if an employee—

Senator ROBERTS: Have you done anything about employees who have come to you with records and pay slips and time sheets showing that their employers' records are wrong?
Ms Jenkins: We've had one specific complaint where we've had to take the issue up with the employer, again to ascertain whether or not the records or information we've received was correct, and the employer in that instance confirmed that the records we had received were correct.

Senator ROBERTS: Records from who?
Ms Jenkins: The employer.

Senator ROBERTS: The employer. How is it then that we know of people whose records were incorrect and we know that casual employees have been underpaid and not credited the full 35 hours?
Ms Jenkins: For Coal LSL, our response to an issue that an employee has with their employer is that it's a matter between the employee and the employer.

Senator ROBERTS: So you don't take responsibility for the accuracy of the payments?
Mr Hehir: If it's a matter of an underpayment, that's better addressed to the Fair Work Ombudsman if there's an underpayment of wages.

Senator ROBERTS: We will be doing that, thank you. I'm specifically interested in LSL, because we have met with people in the Hunter Valley, working at a coalmine full-time on a two-year roster projected out, treated as casuals. Whether or not they're underpaid is a separate issue—they have been underpaid. But I'm concerned that they haven't got their full LSL entitlements, and I want to know what you're doing specifically to check.
Ms Jenkins: If we're advised of that through an employee complaint, we take up the issue with the employer, because that is the line of information that we—

Senator ROBERTS: So you accept the employer?
Ms Jenkins: That's what we required to do under the legislation.

Senator ROBERTS: So you've never audited the process?
Ms Jenkins: Excuse me, sorry?

Senator ROBERTS: You've never audited the process to make sure the employer is not correct and the employee is correct?
Ms Jenkins: No.

Senator ROBERTS: You've never investigated the details?
Ms Jenkins: No, we've raised it with the employer to investigate the details, because current—

Senator ROBERTS: So you've taken the employer's word for it?
Ms Jenkins: Yes.

Senator ROBERTS: You say that you've only received one complaint?
Ms Jenkins: Along those lines. I can't be sure. I know of one specific complaint, because I personally handle formal complaints for the corporation.

Senator ROBERTS: You said a minute ago only one complaint, now you're not sure whether it was one complaint. What is it?
Ms Jenkins: We may have received informal complaints, which wouldn't have come through to me. But I can take that on notice and follow up for the committee.
Senator ROBERTS: Yes, please. When inaccuracies occur, why are you only accepting evidence from the employer and not the employee? You're in charge of or responsible for corporate governance, correct?

Ms Jenkins: That is correct, yes.

Senator ROBERTS: So why are you only taking the evidence from the employer?

Ms Jenkins: It's my understanding that that is our requirement under the legislation—that we receive information from employers.

Senator HANSON: Is that correct, Minister?

Senator Payne: I don't have the Coal LSL legislation with me, but I'm very happy to seek advice on that from the relevant agency. Unless Mr Kembrey has anything to add on the provisions of the legislation, I'll take that on notice.

Mr Kembrey: Senator, I think the questions you're asking are quite broad. But, when we have instances where employees—and these are particular employees that may not be receiving a long service leave benefit—provide us with information around what they may have been paid, or argue around their eligibility, that is material that we will review and we will approach employers. We have had cases where we're in disagreement with employers and we have used powers within our legislation to request further documentation for the validation of that. In a situation where we have approximately 50,000 active employees in the industry, it is difficult for us to monitor—

Senator ROBERTS: We know of hundreds of people who are currently being underpaid—not your responsibility—and being underreported for LSL, and they're not being treated fairly. It seems to be that they have complicity in this with a major union, a major employer and a major employer of labour hire people—casual employment under a black coal industry award that is for only full-time employees. I want to know what you're doing to make sure those people are treated fairly, because they haven't been treated fairly. That's why I'm asking Ms Jenkins.

Mr Hehir: If I may assist, my understanding is that there is some disagreement between some employers and the coal long service leave board in relation to who is required to pay levies. My understanding is that the coal long service leave board is attempting to recover funding from those companies. My further understanding is that the Ai Group has made an application to the Fair Work Commission to vary the scope of the Black Coal Mining Industry Award in terms of who's eligible to pay. It's difficult, of course, to know whether the employees you're talking about might be employed by someone who believes they aren't required to pay the levy. There's a possibility—

Senator ROBERTS: These people are being paid the levy. The levy is being paid on their behalf, but it's being underpaid. They're casual workers. They're significantly underpaid, their levy is underpaid, their hours are not reported correctly and LSL is just going along with it.

Mr Kembrey: I can't speak to the specifics of who you're talking about, because I don't have the information in front of me, but if you were to be prepared to provide that information it is something we'd take on notice and investigate.

Senator ROBERTS: Sure. We will be happy to do that. I've never seen such deceitful practices as those I heard about from eight people in the Hunter Valley recently. They've had
far-reaching consequences on the lives of these miners. They've suffered with depression, illness and suicide from mistreatment—that's not your responsibility. They're emotionally, physically and mentally exhausted, and the worst of it is that they cannot even access workers compensation. This breach of trust is enormous. I've had a long history in the coal mining industry, and I've never seen people so badly abused. I've been a miner myself. I've been a coal-mining union management member. I've never seen this. The coal miners of New South Wales have a tough reputation. They deserve that and they are entitled to have it. But if this can happen to them, no worker is safe. Every worker should be concerned that this has happened as a result of systemic fraud and abuse by big union, big company, big government. We're going to have more to say about this, but I'll have to constrain myself because this is about LSL. You are not looking after responsibilities for casual employees who are employed on a full-time roster, who work shoulder to shoulder with full-time employees with a roster out two years, who are 40 per cent underpaid, who's hours are not reported correctly with LSL and who are not getting their entitlements. Many leave before they're even paid out their LSL, and I want to know what's happening to that money. If someone leaves the industry or leaves because they just can't keep up with it anymore, what happens to their money that's been paid in?

Ms Jenkins: The money stays in the fund. They have up to eight years to return to the industry, when they could start accruing long service leave again.

Senator ROBERTS: I've sighted correspondence from your corporation to Chandler Macleod in relation to an employee where you did request such advices. That's probably the employee you're talking about. What action has your corporation taken in regard to that particular matter? If no action has been taken, perhaps you might care to explain to this Senate hearing why no action has been taken?

Ms Jenkins: The action that we took was to take the issue up with the employer. When the employer verified that the information we received was correct we went back to the employee and advised him as such.

Senator ROBERTS: Any further action?

Ms Jenkins: No.

Senator ROBERTS: Any investigation of the employer's records?

Ms Jenkins: That was undertaken as part of the investigation prior to contacting the employer. All of that information has been released under an FOI, as well.

Senator ROBERTS: Isn't it the case that if the understatement of the reported hours from employees would result in lost benefit to the employee and in a longer time to accrue long service leave entitlements?

Ms Jenkins: Possibly. We would have to assess that, the merit of that case.

Senator ROBERTS: Wouldn't the eight people who we saw indicate a corporate governance failure?

Mr Kembrey: We aren't able to comment on that without the details. If you provide us with that evidence we will look into it.
**Senator ROBERTS:** The crux of the issue is, that in the black coal award, all production workers must be full time. You are handling people on a casual employment basis who are classified as casual and under-reporting hours. I will provide that information.

**Mr Kembrey:** Senator, the only nexus between the legislation and the Black Coal Mining Industry Award is in the definition of 'black coal mining industry'. The two aren't related. If we look at the eligibility of employees to be paid long service leave—

**Senator ROBERTS:** So you don't care what the classification is? You just act on the report from the employer?

**Mr Kembrey:** We do care what the classification is. But I think it's confusing the two documents. The only nexus is around the definition. To be an eligible employee for long service leave payments is a different criteria than the award. We refer to the definition within the act, which happens to refer to the definition of 'black coal mining industry' as a part of that definition.

**Senator ROBERTS:** So, whether they're classified as casual or full time, you treat them as full time when they come to you? You treat them as an employee?

**Mr Kembrey:** We treat them as an eligible employee for the purpose of the act, that's correct.

**Senator ROBERTS:** So you don't investigate whether they're casual or full time?

**Mr Kembrey:** Well, no. We do know that because the levy is paid in different ways, depending on whether the workers are casual, full time, or earning less salary—

**Senator ROBERTS:** Could you provide more details on that?

**Mr Kembrey:** In the payroll levy collection act, there are a number of different calculations in terms of how the levy is paid. The levy can be paid in regard to their base rate of salary, plus incentives over time and the like. I think it's 75 per cent of the base rate of pay plus incentives and overtime, or, if it is greater, the amount based on their base rate of pay plus allowances and bonuses. That's one category. There is another category in relation to casual labour, and there is another category in regard to how it's paid, if you're on an annualised salary.

**Senator ROBERTS:** Thank you.

**Mr Kembrey:** So that's in the levy collection act.

**CHAIR:** Just to assist you, Senator Roberts, we've got three minutes left.

**Senator ROBERTS:** Thank you, Chair. Ms Jenkins, you're only aware of one person that has complained to you?

**Ms Jenkins:** That's all I am aware of. We can have a look and see if there have been other similar cases, but that's the only formal complaint we have received and followed through with.

**Senator ROBERTS:** Perhaps you could also find out if it is true that the first two ministers to accept a report that included recognition of casual employees in an industry award that doesn't recognise casual employment were Ms Julia Gillard and Mr Bill Shorten.

**Mr Kembrey:** I'd have to take that on notice, Senator.
Senator ROBERTS: Sure. As I said, I've sighted correspondence from your corporation to Chandler Macleod in relation to an employee, where you did request advice. We know of other employees—we've talked with eight—who've got that same case. I understand that the LSL is underpinned by the black coal award?

Mr Kembrey: As I mentioned before, the definition of 'eligible employee' in the Coal Mining Industry (Long Service Leave) Administration Act refers to a definition of 'black coal mining industry' that is contained in the award. That is the nexus.

Senator ROBERTS: And the only employees in production in the black coal mining industry in New South must be full time. So how do you have casual employment?

Mr Kembrey: As I explained, the long service leave payment is—we don't discriminate on the basis of full time or casual. The nexus with the award is simply around the definition. So the 'eligible employee' piece in the award goes to the duties of that employee, or the industry that employer acts—so there are two limbs to it, if you like.

Senator ROBERTS: How can he or she be employed in the black coal industry as a full-time worker, on production, unless they are a full-time employee?

Mr Hehir: That's probably not a matter for the Coal Mining Industry (Long Service Leave Funding) Corporation, but Ms Wang might be able to assist you with the answer.

Ms Wang: You are absolutely right: the black coal mining award doesn't allow casual employees for the production workers, but casual workers can be employed under other industrial instruments, such as the enterprise agreement.

CHAIR: That finishes questions for the Coal Mining Industry (Long Service Leave Funding) Corporation. Thank you very much for coming along this afternoon. I understand other senators may have questions on notice, but consider yourselves released and have a safe trip back.

Asbestos Safety and Eradication Agency

[16:20]

CHAIR: I welcome Ms Ross. Do you wish to make an opening statement?

Ms Ross: No, I don't.

CHAIR: Excellent. I'll hand over to Labor—Senator Pratt.

Senator PRATT: Thank you very much, Chair. One month ago, there was a press release where the agency said that Australia has one of the highest measured incident rates of mesothelioma in the world and it's likely to continue for many years. Given we're now at the end of 2019, I want to ask why we still don't have a new national strategic plan for asbestos management and awareness when the last one, from five years ago, expired last year.

Ms Ross: We actually do have a plan for 2019-23. It was signed by the minister at the time, which was Minister ODwyer. She approved the plan before the last federal election. She wrote to her state and territory counterparts seeking their approval of the plan. We have received approval back from state and territory work, health and safety ministers. All have approved the plan, apart from Western Australia, which has given in principle support to the four national priorities in the plan pending further consultation with other agencies within the government.
Senator PRATT: In Western Australia?

Ms Ross: In Western Australia. I guess the issue cuts across governments at all levels. It's not just work, health and safety; it's public health; it's the environment. They're just doing some further consultation. But our proposal is to formally launch the plan at the Asbestos Safety Conference, which will be in Perth on 11 November.

Senator PRATT: You said there are four national priorities. What are those?

Ms Ross: The first one is improving asbestos awareness to influence behavioural change. That's particularly important. You mentioned the rate of mesothelioma. I think there was a view, particularly at the time that the asbestos management review was conducted in 2013, that the rate would start peaking around now. It is what we call 'the third wave'. The victims are people who were undertaking DIY renovations: homeowners and occupiers. The first priority is really about getting the awareness message out, particularly to homeowners and DIY renovators but also to those working in the industry, particularly in the trades, including young apprentices. The second one is about identification and effective legacy management of asbestos-containing materials. There's still a large amount of asbestos-containing materials within the built environment. When the ban was put in place in 2013—the final ban which banned chrysotile asbestos—it didn't require the removal of what was already in place, so that legacy needs to be effectively managed. While asbestos stays within the built environment it's safe, but once it's disturbed it needs to be removed. That is why the third priority is about the safe removal of the asbestos—having assessed the risks and prioritising the asbestos-containing material that is presenting the highest risk, to start removing that.

Senator PRATT: Does that mean the plan will indicate how you go about teaching, for example, householders to examine whether they've got exposed and dangerous asbestos in their house?

Ms Ross: Although householders can remove asbestos themselves, the strong recommendation from the agency and, I think, from many of the regulators involved is to get professionals in.

Senator PRATT: My issue is to show householders how to work out whether they've got a problem to start with—

Ms Ross: Yes, that's right.

Senator PRATT: not necessarily what to do about it—for example, to recognise whether the asbestos fence I've got in my backyard is safe or unsafe.

Ms Ross: Yes. One of the areas of work, particularly under priority 2, is having a good picture of the extent of the materials that are still in the environment, particularly in the residential sector and particularly so we can get those awareness messages out as well.

Senator PRATT: You've got effective management, DIY—what were the other two?

Ms Ross: The other two were removal, and then the fourth one is international collaboration and leadership. This is where Australia led the way, in a sense, in imposing a total ban of asbestos-containing products. We work with countries in South-East Asia and help them work towards bans; this is work that is led by the agency. The World Health Organization has recommendations about a series of steps towards imposing bans, so we work with them. Under this plan we will be working with countries in the Pacific region as well.
Senator PRATT: What is the main differences between this new plan and the current plan?

Ms Ross: It's that we've actually put in a set of national targets. At the moment we have eight national targets. One of the difficulties we found in evaluating progress under the 2014-18 plan was that there were no targets included and no data that was collected. No proper measurement was done of what progress was made. That is another big chunk of work that the agency's been undertaking—identifying the data sources to measure the targets so that at the end of this phase of the plan, 2023, we will have quite a better picture of how far we've progressed.

Senator PRATT: There'll be performance measures for you as an agency—it will be your role to track performance across the whole country as to the outcomes?

Ms Ross: Yes, that's right.

Senator PRATT: Do you have any indication yet of what those benchmarks will be in the new plan?

Ms Ross: The targets are all there. I can read them out to you if you like.

Senator PRATT: No, that's fine. You can take them on notice. I note one activity listed in the review of the NSP is 'James Hardie: re-assessment and testing of asbestos disposal legacy sites'. Can you tell us about that, please?

Ms Ross: Sorry, Senator, I don't know. Can you repeat that?

Senator PRATT: That's fine, if you don't know off the top of your head. It was about reassessment and testing of asbestos disposal legacy sites, but I'm happy for you to take that on notice along with the other questions.

Ms Ross: I think that might be best.

CHAIR: I think Senator McMahon has a question. Does Labor have any more questions?

Senator PRATT: Yes. Finally, I wanted to ask about the review of the last plan in terms of its success or failures. What's the assessment of the effectiveness of the last plan and will there be a formal review of it that's published?

Ms Ross: We have published a final progress report; that's on our website. We concluded that, certainly, from the time the plan started a lot more action has been taken by the Commonwealth and by the states and territories. I think it focused attention on the issues, most definitely, and what needed to be done. But—particularly for the agency—it was very much a phase of building an evidence base. A lot of research was commissioned; I think we commissioned around 35 reports. We're using that evidence base to move forward. Our stakeholders are saying to us that they want to see a lot more actual action take place.

Senator PRATT: Does the new plan drill down into areas of Australian housing where you know there are likely to be high levels of asbestos?

Ms Ross: Yes.

Senator PRATT: It will?

Ms Ross: Yes. That's one of the concerns that came out of the evaluation: the first phase of the plan didn't have enough focus on the residential sector. We've made sure that we have included that in this one.
Senator McMAHON: Do you maintain any kind of log or register of known dump sites in the Darwin area of the Northern Territory where asbestos-containing materials have been found?

Ms Ross: Do you mean illegally dumped or—

Senator McMAHON: Either legally or illegally.

Ms Ross: We keep a record—and you can see this on our website—of licensed facilities to dispose of asbestos. We have a little tool on our website where you can put your postcode in and it will come up with a range of licensed facilities.

In terms of illegal disposal: we don't keep records of that. We have done research on that. If you don't mind, I could take that on notice to see what our research concluded on that. Illegal disposal of asbestos is a significant problem and one of the targets in the new plan is actually aimed at making disposal easier and cheaper, with the aim of preventing illegal disposal.

Senator McMAHON: Would that register of sites go back historically? Say, to post Cyclone Tracy, when a lot of material was disposed of?

Ms Ross: No. As I said, the tool on our website is just where there are licensed facilities currently where you can go to dispose of it. I don't know whether our research may have mapped some of those other sites. I think we have been looking at that. There was a big project in the Northern Territory to clean up some of the land where some of the debris from Cyclone Tracy had been dumped. So I'm happy to take that on notice and see what information we have on that.

Senator McMAHON: Thank you. Which agency or agencies do you work with in the Northern Territory to get that information?

Ms Ross: I get confused what these are called throughout the country, because they all have different names! It's either safe work or work safe—

Senator McMAHON: NT WorkSafe?

Ms Ross: Yes. That's the main agency that we work with in the Northern Territory on asbestos matters. Although other areas are involved, they're the central point in that regard.

Senator PRATT: Is there a difference between tracking legal and illegal dump sites? Some of them might be historical disposal sites, so which of those are legal? Surely, it can't be legally possible to dump asbestos these days?

Ms Ross: No. As I said, we just have a tool so you can find a licensed facility in your area. That's what we have. If you put your postcode in it will come up with a licensed facility where you can go to dispose of it.

Senator PRATT: That's good to know, seeing I have asbestos in my yard!

CHAIR: There being no further questions for the Asbestos Safety and Eradication Agency, consider yourselves released. Thank you for coming along this afternoon. I now welcome representatives from the Australian Building and Construction Commission.

Australian Building and Construction Commission

[16:34]

CHAIR: Mr McBurney, do you wish to make an opening statement?

Mr McBurney: No, thank you.
Senator SHELDON: Has the ABCC ever investigated to ascertain what role employer associations played in suspected breaches?

Mr McBurney: I'm not aware of specific cases. I'd need to take that question on notice.

Senator SHELDON: So, you're not aware that there have been any employer associations that have been investigated?

Mr McBurney: I know that employer associations have been investigated. I'm aware of one case, which we advised the committee of last year and earlier this year.

Senator SHELDON: Can you remind me of that?

Mr McBurney: That was the Royal Hobart Hospital site. Part of our investigation, on which we corresponded with the committee, concerned the inductions performed by the MBA in Hobart in relation to that site.

Senator SHELDON: That's correct, and I'll come back to that. On your website the ABCC says that in certain circumstances it will institute proceedings for contraventions of the Building and Construction Industry (Improving Productivity) Act and the Fair Work Act, particularly in relation to wages and entitlements. How many proceedings has the ABCC commenced since it was re-established in 2016 for the recovery of unpaid or underpaid employee entitlements.

Mr McBurney: One.

Senator SHELDON: One very big one? Or one very small one?

Mr McBurney: One proceeding.

Senator SHELDON: Only one proceeding?

Mr McBurney: Yes.

Senator SHELDON: How much has the ABCC recovered for employees who have been underpaid in that one example?

Mr McBurney: That matter remains before the court.

Senator SHELDON: So, there's been no successful prosecution or recovery of wages?

Mr McBurney: We assumed that responsibility on 2 December 2016. Since that time we've commenced one case, and that case is currently before the court. So, there's been no recovery referable to that case.

Senator SHELDON: What's been the total amount of legal costs, internal and external, incurred by the ABCC in proceedings commenced against employees, unions and union officials, as opposed to employers and employer associations?

Mr McBurney: I'd need to take that question on notice.

Senator SHELDON: I'd hazard a guess that, with one case of underpayments, there hasn't been a great deal when it comes to employers. And thank you for drawing my attention to the matter that was raised before at estimates. As you're aware, there was a question raised regarding the inductions of 1,150 workers on a project performed by Master Builders, who charged $99 per worker, receiving an estimated $113,000 in construction, and you made a complaint to John Holland regarding the potential breach of the 2006 building code, which prevents inductions being delegated to Master Builders. The union said the induction courses for the Chinese plasterers were inadequate and many had told the union that they were not
provided with access to an interpreter, despite their speaking little or no English. Master Builders Tasmania also confirmed executive director Matthew Pollock said in September the contracting companies did not identify the need for interpreters during its induction sessions. It also was revealed in September about 130 mostly foreign nationals were allegedly not paid by subcontractor Accuracy Interiors for up to two months. Have you investigated the 130 people, mostly foreign nationals, who were allegedly not paid by subcontractor Accuracy Interiors for up to two months?

Mr McBurney: Yes, Senator.

Senator SHELDON: Have you commenced prosecutions against that company?

Mr McBurney: No, we have not.

Senator SHELDON: And why not?

Mr McBurney: I'll take you through that, Senator. If I can explain our involvement, that will then lead to what the current status is and what the outcome of our investigation was. On 6 September 2018 we received information from the John Holland Fairbrother Joint Venture that a plastering subcontractor, Accuracy Interiors, was allegedly not paying its employees. On 11 September 2018 we attended at the project to speak with representatives of the principal contractor. Our inspectors attended the project on three subsequent occasions to speak with workers, including through the use of an interpreter. In addition to trying to engage with Accuracy workers in person, we sent translated letters and emails to the workers.

On 2 October 2018 Accuracy Interiors was placed under external administration. Subsequently, we engaged with the liquidators to seek access to employment records held by Accuracy. Unfortunately, very few relevant documents were available. We also engaged with the principal contractor to gather information and gain access to records regarding Accuracy and the Accuracy workers. On 12 October 2018 a request was made to the CFMMEU to assist my agency with our investigation; however, no response was received to that request. On 8 February 2019 the CFMMEU did provide information to my agency that was in response to a statutory notice issued under my act.

On 10 May 2019 we closed the investigation due to insufficient admissible evidence to substantiate any contravention of the Fair Work Act, resulting from the paucity of written records and the lack of cooperation from potential witnesses. Furthermore, there was an inability to directly pursue Accuracy as a result of it entering into external administration. One further fact to note is that Accuracy's director left Australia—left the country, left the jurisdiction—and there was a lack of other identifiable accessories to the potential contraventions. When we looked at the potential contraventions we were looking specifically at whether the employees has been correctly paid. The second investigation we commenced was into whether employees were required to pay fees for induction training prior to commencing work on the project.

Senator SHELDON: What action did you take regarding the payment of induction fees?

Mr McBurney: In relation to the payment of induction fees, that was an investigation that was commenced in September 2018. There were two aspects to that investigation: firstly, whether Accuracy Interiors’ employees had been forced to pay to the MBA for induction training fees which would be in potential contravention of section 325 of the Fair Work Act; and secondly, where the John Holland Fairbrother Joint Venture had unlawfully imposed an
obligation on Accuracy Interiors to make payments to Master Builders Tasmania for induction training in potential contravention of sections 345, 348 and 349 of the Fair Work Act. The investigation into the arrangements between the parties identified that the payments were required to be made in accordance with a lawful contractual term which did not breach or contravene the 2013 Building Code. Had it been a 2016 Building Code site, the arrangement would have been in breach of the code. Because it was a 2013 Building Code site, it was not. I wrote to the committee on 22 March 2019, advising that the investigation into the payment of induction fees had been completed and the investigation into the underpayment of wages was ongoing.

I'll just complete the picture for you. In relation to the induction fees, during the course of the investigation we attended the project site on four separate occasions to speak with Accuracy Interiors employees. Unfortunately, our efforts to gather evidence from them was frustrated and hampered by interference being run by the CFMMEU who instructed the workers not to speak to the ABCC even though we were investigating both the issue of underpayments and the induction fees. But that was as far as we could take our investigation.

Senator SHELDON: I hear your assertions. Are you aware that John Holland Fairbrother paid $1.5 million in wages and entitlements to those plasterers?

Mr McBurney: Yes.

Senator SHELDON: So, even though that company paid that money, you have not taken action against the directors that wound that company up?

Mr McBurney: No. The company's in external administration, and the sole director has fled the jurisdiction.

Senator SHELDON: It's a notorious industry, isn't it? But there's one company you've gone after, and the Master Builders Association got a tick. Can I ask you some more questions?

Mr McBurney: Yes.

Senator SHELDON: In its history, since December 2016, how many employers has the ABCC prosecuted or referred to other relevant agencies for investigation for the following: sham contracting?

Mr McBurney: We've not prosecuted an employer for sham contracting since 2 December 2016. In relation to referrals, I'll take the question on notice.

Senator SHELDON: Wage theft?

Mr McBurney: As I explained earlier, I've got one case before the court.

Senator SHELDON: One case and one case only. Are you aware how much money is owed in this industry? The Master Builders Association has stated publicly that over $6 billion, as I understand, occurs in wage theft.

Senator PRATT: Just in the construction industry?

Senator SHELDON: Just in the construction industry.

Mr McBurney: All I can do is advise you of what steps we've taken to fulfil our statutory remit to recover wages in the building and construction sector.
 Senator SHELDON: Has the ABCC prosecuted or referred other relevant agencies for nonpayment of superannuation?

 Mr McBurney: We've not commenced a prosecution for that.

 Senator SHELDON: So there are hundreds of millions of dollars owed by employers in this industry and you've taken no action. Breach of award or enterprise agreement?

 Mr McBurney: I can take you to the work we've done on recovering wages and entitlements since we assumed that responsibility on 2 December 2016——

 Senator SHELDON: No, I'm asking if you've taken action against any employers for a breach of award or enterprise agreement?

 Mr McBurney: We've not taken court action for that.

 Senator SHELDON: A breach of occupational health and safety laws?

 Mr McBurney: At this stage, I might defer to my deputy commissioner, Mr Pettit, who's responsible for our wages and entitlements operations.

 Mr Pettit: The one proceeding we would've filed would have been for a breach of an enterprise agreement on a modern award. I'm not sure which one it would have been for, but I can get you that detail if you'd like it.

 Senator SHELDON: The detail would be helpful. It's obviously not high on the priority list, even though I do note that my opening comments and questions from the statements that the ABCC says that they're supposed to be pursuing since December 2016. A breach of immigration laws?

 Mr McBurney: We're not responsible for prosecuting breaches of immigration laws.

 Senator SHELDON: Have you referred to other relevant agencies for investigation?

 Mr McBurney: We have made referrals, but I'd have to take the question of the number of those referrals on notice.

 Senator SHELDON: Breach of taxation laws?

 Mr McBurney: We're not responsible for prosecuting breaches of taxation laws. I do have an information-sharing power to make referrals to the Australian Taxation Office, and I have done that and I can provide the details of the referrals to you on notice.

 Senator SHELDON: So we've no sham contracting, one case of wage theft and nothing with regard to superannuation. We may have one with regard to enterprise agreements. The Fair Work Commission has a detailed litigation policy, the latest version of which was published in October 2018. Can you point me in the direction of where I can find the ABCC's formal litigation policy?

 Mr McBurney: We are subject to the Attorney-General's legal service directions, and all of our litigation complies with those legal service directions.

 Senator SHELDON: The ABCC was provided the opportunity to respond to allegations, which you have, regarding this matter, which I've been bringing your attention to. There's another matter, which I'd like just to briefly raise. The ABCC brought proceedings in 2015 and a decision was made by Justice North, which was later dismissed. The ABCC's application for penalty orders in March 2018 was also not successful. The court ruled that the site was solely entered for the purpose of a social visit to a friend and described the case 'as a
storm in a teacup’. By this stage former Commissioner Hadgkiss had resigned in disgrace and Mr McBurney was at the helm.

Mr McBurney, there have been a number of appeals within this matter. During the appeals against cost judgements, which was unanimously dismissed on 9 March 2019, in the court's judgement they said that none of the commissioner's three alleged errors in the cost judgement had any merit. The court reiterated Justice North's finding, that there was no indication at any stage that the commissioner developed any insight in respect of the triviality of the claim he was pursuing nor the cost burden he was imposing on the respondents in the process.

I understand the ABCC was provided the opportunity to respond to allegations regarding these matters, and they have. ABCC’s activities, since it’s established together with the strategic priorities identified by the ABCC commissioner, are consistent with its full service regulator function. I don't think the court had the same view as you do. This report was tabled prior to a court deciding that an application brought by the ABCC was tainted with unreasonableness. Is that true?

Mr McBurney: Can you repeat the question, please?

Senator SHELDON: There are a series of court actions which you—

Mr McBurney: Sorry, can I first clarify the case you refer to was a case in the Federal Court before Justice North?

Senator SHELDON: Yes, that's correct.

Mr McBurney: Justice North delivered his judgement. We did not appeal his decision on the substantive case. There was only one appeal and that appeal was an appeal against a limited costs order made against the ABCC.

Senator SHELDON: That's correct.

Mr McBurney: That appeal was heard by the full court and was decided against us. The case has been finalised on that basis. We are now liable for a limited costs order for the initial proceeding before Justice North, and we are liable for the costs on the appeal, that appeal being confined to the first decision by his honour to make a limited cost order against us in a no cost jurisdiction.

Senator SHELDON: Can you give me a break down of the proportion of time, effort and resources directed at enforcing security of payments laws?

Mr McBurney: Yes, I can. We have assumed a responsibility for security of payments, and that arises in two respects. Firstly, it arises under the Building and Construction Industry (Improving Productivity) Act 2016, because that act creates the Security of Payments Working Group, and I sit on Security of Payments Working Group.

Secondly, we have responsibility for monitoring security of payments. Although it is a state function and subject to state laws, we have a remit, because of the Building Code 2016. Under the Building Code 2016, contractors must comply with state security of payments laws. If they fail to comply with those laws, they can be subject to action by my agency and a referral to the minister for an imposition of a sanction under the Building Code 2016.

To directly answer your question, I understand that the current staffing for people who are predominantly involved in security of payments for my agency is within the building code group and within the desktop audit team, and I'll confer with my code manager to give you
that number. We have three people in that team. We have recruiting processes underway to supplement that team with three further members of staff. That’s as a result of the government’s additional funding provided to the agency. When the minister announced that additional funding it was earmarked in part for our security of payments function and jurisdiction. Quite aside from the dedicated desktop audit team, the investigators and the inspectorate, who are responsible for all of the matters arising under our act and the Fair Work Act, have responsibility for proceeding with code inspections, code audits and other compliance activity to assess and monitor compliance with security of payment laws.

**Senator SHELDON:** Thank you. What percentage of the Australian workforce comes under your jurisdiction?

**Mr McBurney:** I don’t know what the percentage is but I understand it's 1.1 million workers.

**Senator SHELDON:** Can you explain to me why there's a comparatively low amount of underpayments rectified as enforced by the ABCC?

**Mr McBurney:** I don’t regard it as a comparatively low amount. We've recovered over a million dollars since we assumed responsibility on 2 December 2016. That is a significant amount, and it is a significant amount for the individual employees who've been the subject of underpayments and whose wages we've recovered for them.

**Senator SHELDON:** I pointed out to you before, and I gathered you weren't disagreeing with the figure and I'm hoping for you to contradict it, that over $6 billion in underpayments in the construction industry exist and you're telling me that $1 million is a good job well done?

**Mr McBurney:** Senator, if I can take you to the break-up of the figure and explain to you why I say that is the case. We recover underpayments in two respects. The first is where a complaint is made to us. So a worker claims to have been underpaid and contacts and the ABCC and we investigate the matter. The second is through our proactive audit activity. So in respect of wages recovered, last year we recovered $823,724 for 1,376 employees. In respect of those 1,376 employees—

**Senator PRATT:** From how many employers?

**Mr McBurney:** I don't have that figure. I'll take that on notice.

**Senator PRATT:** But you do have that data?

**Mr McBurney:** We do have that data, yes. I'll ask—

**Senator PRATT:** Why don't you put the number of employers in your report?

**Mr McBurney:** The relevant information for inclusion in our—are you referring to our annual report or our quarterly report—?

**Senator PRATT:** That's right.

**Mr McBurney:** In our annual report we report on the amount of wages recovered and the number of employees that relates to.

**Senator PRATT:** Maybe I suggest to you that you put the number of employers that were involved in that behaviour.

**Mr McBurney:** We can take that under consideration.
Senator PRATT: Thank you.

Mr McBurney: In relation to those figures for last financial year, of the $823,724 recovered, $722,211 was as a result of our proactive audit activity and $101,512 was as a result of investigations conducted by our agency as reactive—that is, a complaint's been made or an inquiry has been made by the worker. So the vast majority of the money recovered was as a result of our proactive audit activity. We haven't recovered as much money from workers coming to us to say they've been underpaid. I want to make it clear we're available to assist any building industry participant. We will take a referral from any worker who has a concern about their pay. We have published guidance and education materials, and we have an app on a phone which provides building industry participants, workers in our industry, with direct information about their wages and entitlements, and we encourage them to contact us at any time.

I'll just add one further thing. We welcome referrals from any union. Under the act, I need to act without distinction between building industry participants. If the union is minded to refer matters relating to underpayment of wages to my agency, you can rest assured I will take all necessary action under my act.

Senator SHELDON: You annual report states: 'Employers are provided with education and an opportunity to voluntarily rectify any underpayments.' Is this consistent with the approach that all industry participants are provided after the ABCC identifies possible contraventions of the act it's meant to be enforcing?

Mr McBurney: Yes, it is. Firstly, we look at education and prevention. Secondly, one of the key components of our activities is voluntary rectification. That's voluntary rectification by any building industry participant who has breached the code, who has breached the act or who has, in the circumstance you were talking about, underpaid workers. We use litigation as a last resort where those avenues have failed or where the matter, the underpayment, is serious enough to warrant having the matter put before the court.

Senator SHELDON: So in an industry that has more than $6 billion worth of wage theft you educate people by talking to them. Do you see that as being a deterrent to the $6 billion?

Mr McBurney: Could I just clarify your $6 billion. Are you putting to me that it's $6 billion in underpayment of wages to employees, or is that inclusive of security of payment—subcontractors?

Senator SHELDON: I am saying theft within the industry. If you want to clarify your view of what the wage theft is and what the theft from the industry is, contrary to the Master Builders Association or inconsistent with them, I'm happy to hear it.

Mr McBurney: What we'd need to examine is the extent to which it falls within our jurisdiction, where it falls within the definition of building work under the BCIIP Act—how much is within and without. Putting that to one side—

Senator SHELDON: How many billions is it roughly, Mr McBurney?

Mr McBurney: I don't have those figures. We are unable to do a calculation of how much money is underpaid when we're not hearing from the victims of those underpayments. What we can do, and what we do, is act on every complaint that is made to my agency, and we assist those people. But we do more than that. As well as assisting those who complain to us we do proactive audits to recover underpayments for those who don't even know they've been
underpaid. That's what our audit activity found last year. And the 1,346 employees who we recovered $722,211 for had not referred those matters to the agency. We found those underpayments and we recovered those underpayments.

**Senator SHELDON:** So I can just be clear: you're saying you don't know whether a figure exists about the amount of wage theft and nonpayment that exists within the construction industry that you oversight. You have a responsibility also to enforce wages and entitlements.

**Mr McBurney:** Yes.

**Senator SHELDON:** Would you be surprised if I found that disappointing?

**Mr McBurney:** Senator, you don't know what you don't know. We can't be expected to know what underpayments are occurring if they're not referred to us and are not subject to our audit activity. We cannot audit every employer in the building and construction industry, but we expend significant resources on our audits, which are producing results in the recovery of wages to date.

**Senator SHELDON:** Mr McBurney, I suggest—and, hopefully, this is helpful—that you talk to various government departments, you talk to employer associations and you pick up the paper and read it. You would find out that many billions of dollars are being stolen in this industry in the form of wage theft. Do you have any KPIs or performance indicators for your enforcement techniques?

**Mr McBurney:** Yes, we do.

**Senator SHELDON:** Could you outline those for me?

**Mr McBurney:** Yes, I can. There are KPIs referable to our litigation. The average time taken to commence a civil penalty proceeding must be less than 12 months. We have set the KPI for successful civil penalty proceedings at 80 per cent, and we achieved that KPI last year. That's across all of our investigations. Wages and entitlements are included in those totals.

**Senator PRATT:** Mr McBurney, why do you think workers aren't coming forward to you to disclose possible wage theft from them? I've certainly seen circumstances in which that takes place. Sometimes it's because people are in vulnerable visa situations and they don't want to come forward, for example.

**Mr McBurney:** Yes, I agree with you. That's certainly one reason why people would not complain or refer a matter to us. There are a variety of reasons for it not occurring. I believe the reason you have just offered was a factor in the Royal Hobart Hospital investigation. It's also a matter of us educating the industry that we have responsibility for wages and entitlements, and we've spent a significant amount of our educational resources on doing that. We've made it prominent on our website. It's also fair to say—and it's a matter for individual workers—that those represented by unions in many cases take it up with the union, who can represent them and act on their behalf, and recover wages through the union.

**Senator PRATT:** So it doesn't happen through your process?

**Mr McBurney:** No. We can act only on matters that are brought to our attention and are referred to us.

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EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE
Senator PRATT: But, essentially, you're saying that many of those issues get fixed through the union's advocacy, which is the ordinary business of unions.

Mr McBurney: Yes, and the same situation would apply for the Fair Work Ombudsman.

Senator PRATT: Yes. I understand that, but you would be well aware in this industry that there are many cohorts of vulnerable workers which the union has no access to and some companies go out of their way to organise themselves accordingly, which goes some way to highlighting the robust industrial nature of the construction industry. What are you doing to get in amongst those workers to make it easier for them to report?

Mr McBurney: I'll defer to Deputy Commissioner Pettit because it does inform our audit strategy on wages and entitlements as to the parts of the industry that we target with our audit activity.

Mr Pettit: As a starting point, we've done those things that all Public Service agencies do in making sure education materials are available in a variety of languages. If workers go to our website, they can find the information they need in their language. In terms of actually accessing those cohorts of workers, one of the key things that our inspectors do is go on building sites to hold a conversation, look at the site and see if there are breaches of any of the laws that we administer.

Senator PRATT: But how do you actually go about making workers feel safe in coming forward to tell you their story without feeling their job is at risk? Because, in the main, people won't want to come forward, not necessarily through a lack of understanding language or even through a lack of your visibility, but because they would be frightened in the knowledge that their employment might cease, or that their migration status might be at risk, if they came forward.

Mr Pettit: Senator, it's a vexed issue for all the workplace regulators. The best we can do are simple things like offering to meet people outside of the workplace. Last year, in one of our education campaigns, rather than leaving large flyers and the like, we left small business card sized flyers that workers could simply pick up and put into their phone case without other workers seeing them doing it. They could then contact our 1800 line, and we could meet them after hours.

Senator PRATT: Do you have the power just to audit the employers themselves without a complaint? For example, if you have visibility of isolated networks of people in particular companies, do you ever go in and just do an off-the-cuff audit of them?

Mr Pettit: We definitely do. That was one of the things I was saying about our staff visiting building sites. If they go onto a building site and they've got suspicions that there's a large group of, for example, Korean tilers or Chinese plasterers, they bring that back and pass that intelligence to our wages team. We keep a register of those companies to fit into our audit program to go out and we seek a one-month sample of that employer's records and go and check those against the award.

Senator PRATT: Is that where you are generating the $1 million that you've recovered? Are you doing that through your own audit process? That's pretty much what you said before.

Mr Pettit: Yes, that's right.
Senator PRATT: Does that not demonstrate that that's where the efforts of the ABCC should be going?

Mr McBurney: It is, Senator, and we are doing that and we're seeing a better return on our audit activity than on reactive investigations to complaints and queries coming in.

Senator PRATT: I'm not surprised, given the vulnerabilities of the workers in this context. We will be asking the Fair Work Ombudsman later about progress and the activities of the sham contracting unit announced in this year’s budget. But can I ask you, in the ABCC, where you focus your own activity in relation to phoenixing and sham contracting. It's relevant to this discussion as well.

Mr Pettit: I'd say that sham contracting and underpayments are intertwined. Normally sham contracting is undertaken to underpay the worker. So I think, when you look at our numbers, the two numbers blend together. However, the problem we have is that in the construction industry—in particular, commercial construction—a lot of the workers who are on ABNs want to be there. I'm not talking about your people from culturally-and-linguistically-diverse backgrounds but, for example, a trades qualified worker wants to be on an ABN for a range of reasons. Normally, they only come to us when the relationship breaks down, which makes it quite difficult.

Senator SHELDON: Just a quick question—I don't want to break your train of thought—on that point about most people wanting to be on ABNs, is that from a survey that you have carried out?

Mr Pettit: The ABCC in its former reincarnation did a sham contracting inquiry, and that was one of the findings of that former inquiry.

Senator SHELDON: That's a public document as well, is it?

Mr Pettit: Yes. But I will say that, when we do our audit activity, we do actually look for sham contracting as well. So, where we find employers who say they actually don't have any employees but they're engaged in the construction industry, that's a red signal to us. We normally then go out, make further inquiries and look through invoices to try and determine if they're actually engaging, particularly when you look at the trades—plastering, tiling and those sort of trades. If we come across an employer who says they have no employees yet they're doing those sorts of trades in the industry, we'll look further into those and we may try and contact some of the workers to find out what the employment arrangements are.

Senator PRATT: Chair, I think you had—

CHAIR: I think we've got some other questions here.

Senator PRATT: We've certainly got plenty more, but we've had an extremely good run.

CHAIR: We still intend to shift to the Fair Work Ombudsman at 5.30. We've got about 10 minutes of questions here and then we'll come back to you in the last five minutes, if that's okay. Senator Davey.

Senator DAVEY: You were talking before, during questioning from Senator Sheldon, about underpayments, and you made the comment that you don't know what you don't know. How many referrals for underpayment have you actually received from unions themselves?

Mr Pettit: Since we've been the ABCC—from December 2016—I don't think we've received one.
Senator DAVEY: So the unions who are representing the employees' interests have not referred any instances of underpayment to you?

Mr Pettit: No. But, to be open with you, the unions have complementary powers to our powers, so they can investigate and commence their own litigation as well. If they would like to refer any matters to us, we would be happy to investigate and litigate them as well.

Senator DAVEY: That's great. So you'll openly investigate any referral that comes your way from any party?

Mr McBurney: From any source. To add to Mr Pettit's answer, we've not received referrals from the union. When we've asked for their assistance, when we've asked for their cooperation to help workers who we say have been underpaid, there has been no voluntary cooperation from the unions. The Royal Hobart Hospital is the most recent example of that.

Senator PRATT: But that's a somewhat difficult situation given you also regulate those unions.

Mr McBurney: Yes.

Senator PRATT: It is not a very 'complementary' situation, in terms of asking for their assistance.

Senator DAVEY: Are you concerned about underpayment or not?

Senator PRATT: The issue is that unions resolve underpayment cases themselves.

CHAIR: Order! Let's not debate across the table. Put questions to the witnesses, please. Senator Davey.

Senator DAVEY: Can you give us an overall figure for the number of court-ordered penalties levied against the CFMMEU in cases taken by the ABCC and its predecessors?

Mr McBurney: Yes, I can. In the last financial year, the penalties imposed on trade unions were $4.221 million. Penalties imposed on the CFMMEU comprised all of that figure. Since the ABCC commenced on 2 December 2016, total penalties imposed on the CFMMEU have been $1.8 million, $2.6 million and $4.2 million. Other unions accounted for $182,000, and the rest of the penalties imposed were against employees and employers. Total penalties to date against the CFMMEU by the ABCC and its predecessor agencies are $16.74 million.

Senator DAVEY: Talking of litigation, I understand that you continue to be involved in proceedings against a number of unions, with a number of cases taking place since your last estimates appearance. Can you take me through the case concerning Aldi Altona's construction and what the court's ultimate decision was?

Mr McBurney: I might defer to my deputy commissioner legal, who's across the details of that case.

Mr Kelleher: The Aldi Altona decision was handed down by the Federal Court on 11 October 2019, imposing total penalties of $92,000 against the CFMMEU and an experienced organiser for their involvement in a blockade of Aldi's Altona store during its construction in 2014. The blockade in that case followed the union's demand that the construction company sign an enterprise agreement with the union. On 5 December 2014, CFMMEU organiser Drew Macdonald blocked the entrance to the site with a vehicle, preventing trucks carrying equipment and materials from accessing the site. As a result of that blockade, work—including the installation of precast concrete panels, structural steel work and concrete—
preparation work—could not proceed. On 8 December 2014, Mr MacDonald again blocked the entrance to the site with a vehicle, preventing work, including excavation and formwork for a concrete pour and structural steel work. The CFMMEU was penalised $80,000 and Mr MacDonald $12,000, and, in that case, Justice Bromberg also ordered Mr MacDonald to personally pay his penalty, and that personal payment order is one of, now, six imposed by the Federal Court.

Senator SHELDON: I don't want to break your full train of thought, but what was the difference in wages between the workers that were working for the company that was the contractor, and the amount of money that was being pursued under the EBA for those workers to be covered by—

Mr Kelleher: I'd have to take that question on notice.

Senator SHELDON: Thank you.

Senator DAVEY: Can you also go over the Geelong Grammar case, because I understand that case concerned some contrived safety claims.

Mr Kelleher: Yes. The Federal Court found, in that case, on 9 November, that Mr Murphy had contravened section 500 of the Fair Work Act on 3 December 2014 by:

… intentionally hindering and obstructing Harris HMC, its subcontractors and their workers by calling and conducting a meeting on the Site, causing the subcontractors and their employees to leave the Site and causing work to cease …

and also by:

… acting in an improper manner by failing to provide notice of his entry in contravention of the FW Act …

and also:

… refusing to leave the Site when requested, making threats about not re-opening the Site and acting rudely and aggressively on the Site.

On 13 September this year, the Federal Court handed down penalties totalling $34,500 against the CFMMEU and its official Brendan Murphy. In the liability judgement in that matter, the Federal Court rejected Mr Murphy's claim that he was concerned about safety at the site. Her Honour Justice Mortimer said: 'I am not satisfied there were any real health and safety issues,' despite Mr Murphy's reference to people working in the dark, and, in handing down the penalty judgement, Justice Mortimer took into account Mr Murphy's conduct, including:

… his aggression, his language, the interference with work on the site, the refusing to leave when told to, the contrived OH&S concerns, the threats not to allow the site to re-open …

and Her Honour went on to say that Mr Murphy's conduct was:

… confrontational, aggressive and rude. Mr Murphy was bullying and overbearing, and deliberately so.

And Justice Mortimer also said of the CFMMEU:

This level of contravening conduct can only indicate a continuing readiness to disregard and flout the industrial laws of this country, when it suits the CFMMEU and its officials to do so.

Senator DAVEY: I'm seeing a bit of a pattern: they're both cases where the union's taken action to prevent or block or otherwise inhibit the activities of subcontractors. Would you say that that is a pattern of behaviour? How do the courts view it? Is this a pattern of discrimination, and what do you think the reasons behind it might be?
Senator PRATT: They're trying to protect the wages and conditions.

Senator DAVEY: Taking action against subcontractors—

CHAIR: Not across the table; to the witnesses, please.

Mr Kelleher: Certainly that sort of conduct is conduct that the agency does see regularly. That case that I just spoke of—Geelong Grammar—occurred at a time prior to the Building and Construction Industry (Improving Productivity) Act coming into force, which now includes a picketing provision, making such conduct unlawful, which also increases the maximum available penalty that a court can impose to $210,000 for a corporate body, such as the CFMMEU, and also $42,000 against an individual, and the agency does have before the court at the moment cases involving such allegations around the country.

Senator DAVEY: Would you say that in certain instances this sort of behaviour could have safety concerns? I understand the Living City project actually went one step further and involved a union official putting a worker in danger. Can you explain that case to us?

Mr Kelleher: Yes. That case is currently the subject of appeal on the question of penalty. That's the union's appeal. The facts of the case were such that, at the Living City project in Devonport in June 2017 during an unlawful entry onto the project, CFMMEU organiser Mr Hassett put the safety of workers at risk by climbing into the cabin of a crane while it was being operated. In that case, Justice O'Callaghan imposed penalties, which are under appeal. The court, in that decision of Justice O'Callaghan said:

… the conduct of Mr Hassett on 5 June 2017 was a serious breach … It was serious because it was very dangerous, which Mr Hassett must have known, and it was serious because Mr Hassett gained entry to the site purportedly in respect of safety concerns—only to place the crane operator and others potentially in harm’s way. And it was made all the more serious by the fact that when he was told to get off the crane, he refused.

Senator DAVEY: Thank you.

Senator O'SULLIVAN: Commissioner, we heard Senator Sheldon refer to the PUG's case in which you were unsuccessful. Can you clarify for me: of all the matters that you took to court in the most recent financial year, how many were unsuccessful?

Mr McBurney: One case out of 17. We were successful in 16 out of 17 cases—94 per cent.

Senator O'SULLIVAN: So it is the case that Senator Sheldon has selected one particular loss on the organisation's otherwise sparkling record?

Senator Sheldon interjecting—

Senator PRATT: Indeed.

CHAIR: Not across the table, please.

Mr McBurney: Senator, the case I was questioned on earlier was our only unsuccessful case.

Senator O'SULLIVAN: Your only loss. We also heard the good senator refer to comments made by the court in the PUG's case that were critical of the ABCC. In the interest of balance, can you give us a couple of brief examples of the courts making comments that were critical of the CFMMEU and its conduct in the many, many, many more cases in which the ABCC was successful?
Mr McBurney: Probably the best way to answer that is to provide you with the most recent statement of the Federal Court about the offending of the CFMMEU, and I will defer to Deputy Commissioner Kelleher, who can provide that to you.

Mr Kelleher: Senator, in a decision on 14 October this year, the Federal Court imposed penalties totalling $69,000 against the CFMMEU and Kevin Pattinson for contraventions of section 349 of the Fair Work Act. In handing down his judgement, Justice Snaden said:

The Union is a "serial offender" that has, over a long period, exhibited a willingness to contravene workplace laws in the service of its industrial objectives, and one that appears to treat the imposition of financial penalties in respect of those contraventions as little more than the cost of its preferred business model.

His Honour went on to say:
I regard the Union's Agreed Contraventions—viewing them, as I do, against the backdrop of its sorry record of statutory contravention—as very much of the gravest, most serious kind. It is bad enough that it should so casually intrude upon rights of free association so valued by societies of conscience; much worse that it should do so, yet again, in deliberate defiance of the law that it has been told time and time again that it must obey.

His Honour went on to say:
… it appears to be wholly unmoved by the prospect that it might be forced yet again to dig into its members' "big pots of gold" in the name of "fight[ing] the good fight" …

Senator PRATT: Mr Kelleher, do you have any similar quotes from judges pertaining to their findings and determinations in relation to underpaid workers who've been exploited in their visa conditions? You're supposed to be bipartisan, to treat the two parties equally—that is, employees and employers and the union.

CHAIR: Looking at the time, it is 5.30. We did agree that we'd move on to the Fair Work Ombudsman. At this point, I'd like to thank representatives from the Australian Building and Construction Commission. Consider yourselves released from further appearances today.

**Fair Work Ombudsman**

CHAIR: We now have representatives from the Fair Work Ombudsman. I welcome Ms Parker, the Fair Work Ombudsman. Do you wish to make an opening statement?

Ms Parker: No, I don't.

CHAIR: Excellent.

Senator WALSH: Ms Parker, your annual report shows that the Fair Work Ombudsman has recovered the highest amount of underpaid wages on record—over $40 million for almost 18,000 workers. That's a fantastic result for those workers, and it is a reflection of the Fair Work Ombudsman's work. There are reports that about one in five Australian workers may be underpaid. Certainly, we know that underpayment or wage theft is higher in some industries than in others—industries like hospitality, horticulture and so on. Do you have any ability to give an estimate of what the rate of underpayment is across the country as a whole? If not, from your work, would you agree that this amount of money, while really significant, and this number of workers is probably the tip of the iceberg in relation to underpayment?

Ms Parker: Thank you for the question. We can't say what the figure is, and it would be great if we could say. What we do as an agency, as you will see from our annual report, is that
with the resources we have we prioritise. We prioritise the effort we put in on the basis of requests for assistance that come in to us and intelligence that we gather through research and through working with stakeholders. We look at a whole range of other things. Reporting, media and a lot of other information gets put together. We've announced for the first time annual priorities on that basis. There are a number of industries—such as fast food, restaurants and cafe sectors, Harvest Trail and other areas—that we have concerns with. It's those that we focus our discretionary effort on, if you want to call it that, and they are industries and sectors where we get significantly more requests for assistance and more issues are raised with us, including through media and others as well. When we audit in those areas, we do it on the basis of intelligence. We don't do random audits. So, when you come up with a figure that says, 'We did these audits and there was 50 per cent noncompliance,' you do need to take account of the fact that it's not random, so you can't actually extrapolate that across the whole of Australia. What you can say is that, in the areas we've gone after because we had concerns, there was 50 per cent noncompliance. That shows that we're probably targeting quite well when we do audits, because we are finding noncompliance in areas we were expecting it in.

Senator WALSH: So you're not able to give an estimate of what the rate of underpayment is, but there's obviously a lot of evidence of underpayment out there in the community, and you've found a lot of it. What are some of the factors that limit your ability to deal with more incidents of underpayment and to recover more money?

Ms Parker: We have a range of functions. A large part of our function is education and assistance, and responding to inquiries and requests for assistance. We also have a promotion and education role. So a lot of the work we do is not just about compliance and going out and enforcing the law. A lot of the work that staff in the Fair Work Ombudsman do is to educate people about their rights and entitlements and also to educate employers about what they should actually be providing to workers. It's important to remember that function is quite a significant part of our work, so I'd say we play a very large prevention role.

In terms of our ability to then enforce, we enforce based on what we find through the audits that we target. As I said, we do that on the basis of risk. So we do quite an extensive risk assessment based on all the things I mentioned before, and we determine annually what we're going to focus on. We do a business plan—basically a program of work for the year. That involves a whole range of audits in a whole range of areas—some of them announced, some of them unannounced. I suppose that like any regulator, if we had more resources, we could do more audits. If we had more resources, we could do more education. But we work with what the parliament has given us, and I think we do that, as I said, very much through a risk based approach. I think we're getting much better at that in terms of really homing in on the areas. The areas we home in on are the ones I mentioned, but we also, as has already been mentioned in previous discussions today, look for areas where there are vulnerable workers, such as migrant workers and young people, where there are people who are less likely to be represented by unions and where we know people will be wanting our help. That's where we put our efforts.

Senator WALSH: If we have time we may come back to some of these questions about resourcing and priorities. Can I turn your attention to the sham contracting unit, which was provided for in the government's 2019-20 budget. I understand the Fair Work Ombudsman
will receive $9.2 million to establish a sham contracting unit and that the money was to start flowing to you from 1 July. Has the sham contracting unit begun its work?

Ms Parker: Correct, Senator. We received $9.8 million over the forward estimates to establish a dedicated sham contracting unit. Its role is education, compliance and enforcement. That unit has been established. We have inspectors responding to requests for assistance, undertaking proactive activities relating to sham contracting and, of course, it's one of our priorities. It's one of our 2019-20 compliance enforcement focuses. I will say that in the past five years we've achieved over $2.3 million in court-ordered penalties against businesses that have been found to be sham contracting. We've recovered around $631,000 for 140 workers affected by sham contracting. But there's plenty more to do. That's what the funding is there to do.

Senator WALSH: I'm after a bit of specific information, if you've got it at this stage, about the progress of the sham contracting unit in its very early days. I wonder if you know and if you can advise the committee at this point how many people will be working within the unit and in what types of roles?

Ms Parker: Mr Campbell will answer that. He is responsible for the unit.

Mr Campbell: The sham contracting unit has been set up. It commenced operations on 1 July. There have been 10 new officers appointed to different roles within the sham contracting unit. They are part of a broader compliance and enforcement branch within the operations group. The staff are based largely in east coast offices. They've designed a program of work, which they will be executing over the course of the next 12 months. As Ms Parker pointed out, we have some experience in this space, so the additional resources will help us to expand and, I suppose, increase and improve the number of compliance enforcement outcomes that we are capable of doing.

Senator WALSH: You have 10 people on board in compliance roles?

Mr Campbell: Yes.

Senator WALSH: Will they be out and about in workplaces doing inspections—

Mr Campbell: Absolutely, as part of the broader inspectorate. As the Fair Work Ombudsman, this unit will operate with a focus on sham contracting. It is led by an assistant director and has two senior team leaders and then operational staff underneath that—all Fair Work inspectors, all carrying workloads. As Ms Parker identified, our model includes both a responsive aspect, in that we will respond to complaints about sham contracting, but equally we will design and execute targeted work, where we have concerns about instances of sham contracting.

Senator WALSH: The 10 officers who are focused on sham contracting and are going to be doing visits and audits, are they out and about and doing that yet?

Mr Campbell: Yes, absolutely. Those appointed to these roles are all experienced operators. We have brought in some new people from other backgrounds, but, largely, we've got people who are trained and experienced Fair Work inspectors, knowledgeable about the Fair Work Act and sham contracting law.

Senator WALSH: Have you yet identified any employers for action by the unit?
Mr Campbell: Yes. We have a number of active lines of inquiry into different employers with whom we have some concerns that they might be engaging in sham contracting. As Ms Parker pointed out, we have a very active litigation practice that involves sham contracting matters, as well. Last year we had some success in bringing litigations to a conclusion and having significant penalties imposed by the courts. So, it is a very active enforcement unit.

Senator WALSH: What are your priority industries?

Mr Campbell: We'll be targeting a number of different industries, but where we previously have seen instances of sham contracting is in cleaning, transport, the construction sector and security. That's not to say they're the only industries. They're industries where we have concerns that, certainly, misclassification of workers and ultimately sham contracting does occur.

Senator SHELDON: I want you to take me to a matter which has been dealt with by the Fair Work Ombudsman, about the Escarpment Group, which owns Lilianfels and Echoes in Katoomba, the Hydro Majestic in Medlow Bath, the Parklands Country Garden and Lodges in Blackheath and the Convent Hunter Valley. Could you tell me if you're aware of where that investigation might be up to with Escarpment?

Ms Parker: I probably can't provide detail, but we can say it's still under active investigation.

Senator SHELDON: I have another question regarding job advertisements—a separate matter. You may be aware of allegations of job advertisements in newspapers—both the English-language press and the migrant press—that advertises amounts that are illegal wages. Does the Fair Work Ombudsman do an analysis of those adverts, does it investigate those adverts and does it take action as a result of those adverts? What are its powers to do that?

Ms Parker: I think the Migrant Workers Taskforce recommended that that be specifically prohibited, and we supported that at the time when we were on the Migrant Workers Taskforce. In terms of responding, it would be a request for assistance, I imagine. We don't scan newspapers or look for it. But, if someone brought it to the attention of the Fair Work Ombudsman, we would look into that. It depends on the issue. Part of it could simply be to say to the employer, 'Fix it.' But, if we get complaints that they're actually paying less than that, it would go into the normal track of finding out what's happened and trying to rectify that.

Senator SHELDON: There was a report by Unions NSW released in July 2017, _Lighting up the black market: enforcing minimum wages_, and it found that 78 per cent of positions are advertised with unlawful wage rates on Chinese-, Korean- and Spanish-language websites. I appreciate you've made submissions regarding the department's concern about this activity as well.

Unions NSW also released a report in December 2018, _Wage thieves: enforcing minimum wages_, which said that, in other-than-English-language newspapers, 70 per cent were advertising illegal amounts. Also, on the matter of English-language advertising—I'm in the hands of the chair with regard to this—there are two examples that I have of adverts for truck drivers, requesting HR truck driver numbers, on a Jora Australia website. Please take this on notice.

Ms Parker: Okay.
Senator SHELDON: QLS Logistics in Berrinba say that they'll pay a truck driver $300 plus GST day rate if they work from five to six days long, guaranteed each week. It goes on to talk about their work arrangement. However, they have to have an ABN number. There's another example, on SEEK, of an MC truck driver requested at a company called Semmens Transport from Brisbane. It is also offering 38 to 70 hours per week, immediate starts. The job is full-time hours but a casual position. That is a question about correct classification of payments. I'm not suggesting this is a proper or improper way to approach these issues—not regarding those two examples; I have serious concerns about them—but I note in the case of welfare recipients that the government has a policy of robo-debt. If that policy were applied in a similar fashion to migrant workers that have been ripped off under their visa arrangements, maybe more humanely, if that were applied automatically when you were checking immigration employment contracts and tax department responses, and correlating that to potential for wage theft, what would be the potential consequences of that?

Ms Parker: These things that you read out are completely unacceptable, obviously. We're happy to take those and look at those. What I will say is that we do work closely with the tax office and Home Affairs. There is ongoing work with them. We refer to each other, we alert each other. We regularly share information where we can where there are related issues. There often are related issues: if a worker is being underpaid, often tax isn't being paid, superannuation isn't being paid and all the other things that go with it. We have pretty good relations with our colleagues on these issues. Yes, this is going on and it is a real problem. Employers need to find out what they should be required to pay and they should be paying it.

Senator CICCONE: I have a few questions with respect to overseas worker policy. I understand that there were some recommendations that came out of the Fels report?

Ms Parker: Yes.

Senator CICCONE: I just wanted to get some clarity about the report. It talks about some responsibilities between the Fair Work Ombudsman and the Australian Border Force. Would you be able to explain the different roles that your agency has and ABF?

Ms Parker: Are you referring to the assurance protocol or more broadly on that one?

Senator CICCONE: More broadly. There were some recommendations that came out of the Fels report, and I think one of the major considerations was about the interrelation between the two agencies.

Mr Campbell: I suppose the simplest delineation between the work is that there's a workplace entitlement that can be pointed to that is derived from either an industrial instrument or the Fair Work Act and it involves a visa worker, then it is our jurisdiction. When there is a work entitlement that is derived from the visa itself, such as the old 457 visa, for example, the enforcement of that wage rate would sit with Border Force. Largely the work of our inspectorate with regard to visa workers goes to award entitlements and minimum wage entitlements under Fair Work Act. So if there is a visa breach, for example, if an employer has taken action against a visa holder because of their visa right, then Border Force would look to enforce that under the Migration Act; whereas the underpayment aspect would sit with us.
Senator CICCONE: In the report it talks about the need for 'a much stronger enforcement response'. Is that enforcement in what sense—from the Fair Work Ombudsman or from the ABF?

Ms Parker: I think it refers to both. In the taskforce there was discussion about how we can jointly do more of that. For example, we would like to see more cases where, if employers who are found to be underpaying we'd like to be able to say to immigration that they shouldn't be employing workers, really. These things are not always in our gift, but we certainly share information with each other.

Senator CICCONE: Since that report have you conducted any review into where you can make improvements in terms of how you enforce current procedures and policies?

Ms Parker: Professor Fels, at the time, was of the view that—obviously migrant workers was the focus. He was of the view that there was significant underpayment going on with migrant workers. The taskforce was of the same view. We have prioritised migrant workers as part of our forward work, if you like. They are one of the highest priority areas for us. So we have responded to that. We have reviewed our compliance and enforcement policy after the taskforce reported. It's fair to say that we're toughening up our approach. We'll be using more instant, immediate improvement notices. In a range of ways we're taking a view that we need to act more quickly and we need to put it onto the employer to make good on underpayment. With migrant workers there's a whole range of things we're doing there. In addition to migrant workers as a cohort, we've got sectors—harvest trail, fast-food, restaurants and cafes, where we know there are a whole lot of migrant workers. So we're doing it in a couple of different ways—migrant workers as a whole and then sectors where they're likely to be concentrated. We're honing in on those.

Senator CICCONE: How confident are you that the agency has the capacity and the resources to implement and oversee the measures that have been recommended by the Fels report?

Ms Parker: We're making a good stab at it. We certainly think that focusing the way we've done, putting our resources where we have, and making it a high priority is doing a pretty good job. We can always improve. We'll keep on working on that and keep on improving

Senator CICCONE: Have you asked government for additional funding or resources?

Ms Parker: No, we haven't. The government has provided additional funding. We've also been given new powers under protecting vulnerable workers legislation. We have 11 matters that we're taking before the courts using those amendments. We welcome those. They're very welcome. They will allow us to get better outcomes for migrant workers. But, no, we haven't specifically asked for additional resources.

Senator CICCONE: It's all well and good to have extra powers, but if you haven't got the resources to back it up, how can you enforce the very laws that you've been asked to enforce?

Ms Parker: The government has provided us with additional resources. We've just spoken before about the sham contracting unit and funding for that. There is an expectation of labour hire registration. We know that labour hire does attract vulnerable workers, migrant workers again. That will go some way towards assisting. We will continue to target this area.
Senator CICCONE: Has the Ombudsman's Office had to cut any programs or any other resourcings internally to fund the important work you've just outlined?

Ms Parker: No, we haven't had to cut any programs. As I said before, we have a large education and communication response. We have a very large call centre. We have a website. There is a lot of information on our website. We maintain that. We do lots of back and forth with workers and employers via that website. That's a lot of our work. That's our discretionary work. We can decide where to put our efforts year to year. We review that year to year. If something comes up we can put additional efforts into that as well. We do have some flexibility in where we put our efforts.

Senator GREEN: Talking about migrant workers and cafes and targeting those sections, there has been a report today that a Brisbane cafe has been accused of paying its staff with food instead of money. You've been quoted in that article. Can you tell me just a little bit more about that case and how much money you expect the underpayment to be?

Ms Parker: As you said, it's 11 employees at the Cafe 63 Chermside. They were paid in meals, desserts and drinks between August 2017 and January 2018. Those were visa holders. Seven juniors under 21 were cooks, kitchen attendants and food and beverage attendants. I should clarify that they weren't only paid in meals, desserts and drinks. They were given some wages as well. But it is not lawful to be paid in anything other than money. You've asked me how much they were underpaid overall. We've only commenced legal action, by the way, so these are allegations. They are facing penalties of up to $63,000 per breach, and, potentially, the owners, maximum penalties per breach of up to $12,600. In this case we're seeking an independent audit of their wage payment practices and we are hoping for courses for employers as well. But as I said, these are allegations at this stage. We haven't completed the matter.

Senator GREEN: They are pretty shocking allegations. As you know, Brisbane was one of the hotbeds of the 7-Eleven case and the exploitation of migrant workers there. Are there any changes that we need to make to help you do that work, so we don't have a repeat? 7-Eleven happened in 2015, and this is still happening now with these particular migrant workers. I know it is an allegation, but this seems to be continued behaviour. Is it a Brisbane issue or is it just this type of work that we are talking about?

Ms Parker: This is an issue that used to be common practice. People would be given payment in a whole range of different ways. In some cases, we find that it is pure ignorance. They think it is acceptable. The food is good and you should—

Senator GREEN: From the employers or the employees?

Ms Parker: Sometimes the employees think it's fine. Other times, the employer thinks it is fine and is ignorant about it. So part of our role is education. But in this case our view is this is deliberate and they should know better. Therefore we are taking the matter to court.

Senator GREEN: In the report it says that you were alivened to the case after hearing allegations. Where did the report of allegations come from? Was it the employees themselves or another party? Are you able to tell me that?

Ms Parker: Mostly it is the employee. One of the things that came up earlier, I think with the ABCC, is that we have a line that is anonymous that workers can call in without saying...
who it is and just alert us. That means that when we do go and investigate there doesn't have to be any mention of which worker or any worker. It can be seen as popping in randomly.

Senator GREEN: Do you know if that is what happened in this case?

Ms Parker: I am not sure. We can take it on notice. I am not sure who reported it.

Senator PRATT: In terms of how the Ombudsman deals with unpaid superannuation guarantee contributions, in 2017 the ATO said in its submission to the Senate Economics References Committee, 'Assuming that employees are promptly informed and are willing to take action there are limited avenues for them to directly pursue the matter of unpaid superannuation guarantee contributions.' They can inform the ATO, who are empowered to take action, and then the question is whether this law should change so employees have better direct access to avenues of redress. It was also noted that this is problematic, as they often do not have the resources and funds to pursue the matter. So, given the size of those problems, what is the Ombudsman's view on whether employees should be given better access to direct avenues of redress?

Mr Campbell: Without looking to comment on the commentary in that report, what is probably important for me to do is talk about our role with regard to superannuation guarantee. We as an agency aren't the primary regulator responsible for enforcement of superannuation entitlements. That sits with the tax office. They have very capable recovery functionality. They recover a significant amount of money each year. Our role tends to be focused on where an award—and that's very rare—or a collective agreement provides for an entitlement to superannuation. That therefore becomes enforceable—

Senator PRATT: I'm not trying to conflate the two issues. What I'm trying to look at is the size of reported wage theft. You have obvious limitations on your resources. Who are the other regulators who play a role in ensuring workers are properly paid? The ATO has a role in relation to superannuation, but should we be using the ATO more broadly because of the limits of your resources, for example? What steps do you take to coordinate with other regulators?

Ms Parker: We do work closely with the others, as I said. One thing that might be of interest is that, when a court enforceable undertaking is accepted by this agency, one of the requirements in that is usually for them to pay back what they owe plus interest. That flows on, of course, to superannuation, and we would check that as well. So part of the requirement of that is that superannuation that has been foregone because they've been undergone is paid as part of the deal they have to do with us through the court enforceable undertaking. So we do have a role there and we do, obviously, refer matters to tax when we find underpayments through audits and inspections and requests for assistance.

Senator PRATT: Okay. In that context, when did you first realise that there was a problem with your reliance on enforceable undertakings under section 715 of the act? I note you do now use compliance notices under section 716 more.

Ms Parker: I'll give you some context. In the Migrant Workers Taskforce, of which we were a member participant, Professor Fels identified that we had the power to issue compliance notices and that we were, in his view, taking a conservative approach to that. So, when I started in the agency, I commissioned a review of our compliance and enforcement policy, including our use of compliance notices. As a result of that review, it was
recommended to me that we had been too conservative in our use of compliance notices and that was slowing up our investigation. Just briefly, what was happening was the inspectors were concerned they had to determine what the underpayment was. They had to calculate it and decide on every dollar exactly how much had been underpaid. Our interpretation post the review is that we don't have to do that; the onus is actually on the employer to do that, and it's the roll of the regulator to be satisfied with how they have determined what the underpayment is. So a notice is now issued and we oversight that. They have to satisfy us that they have determined and have paid back the money owed. That's it. So we have addressed that issue.

**Senator PRATT:** I note that Senator Cameron first raised issues with the Fair Work Ombudsman, which is on record from previous estimates, about the use of enforceable undertakings.

**Ms Parker:** That's a different tool.

**Senator PRATT:** It is a different tool. When did he first raise that issue? We did have some questions about enforceable undertakings as well.

**Ms Parker:** I'm happy to talk about those.

**Senator PRATT:** Do you recall how long ago it was that the issues with enforceable undertakings were raised?

**Ms Parker:** My recollection is that he has a predisposition to litigation.

**Senator PRATT:** Okay. Are you still using enforceable undertakings, and could you provide us details of how many undertakings were recovered and the total amount of underpaid wages?

**Ms Parker:** Yes. We absolutely are still using court enforceable undertakings. They're a very important tool, and we have signed up some very large ones recently, including MAde, which you'll be aware of. I mentioned before that we take a risk based approach to compliance and enforcement. A risk based approach means that you reserve litigation for your larger cases, where there are significant issues and where you want to create a significant deterrent, or where there has been significant underpayment. We do use them, absolutely.

**Senator PRATT:** Could I have the total amount of underpaid wages and for how many you did not recover the total amount of underpayment?

**Ms Parker:** With the enforceable undertakings, unless they breach the undertaking, the total is repaid. If they don't repay then we will litigate, because they would have breached the court enforceable undertaking if they didn't pay back every dollar that we have determined they owe. In terms of the number—was it the number of enforceable undertakings or was it the amounts recovered?

**Senator PRATT:** How many undertakings recovered the total amount of underpaid wages?

**Mr Campbell:** We executed 17 enforceable undertakings last financial year. I don't have the total recoveries under those enforceable undertakings. I could get that for you.

**Senator PRATT:** Thank you. I know Senator Walsh has questions that are relevant to this, so with the indulgence of the chair I will hand to her.

**Senator WALSH:** I'd like to ask you, Ms Parker, about the enforceable undertakings in relation to George Calombaris and MAde Establishment Group. As you know and we now all
know, George Calombaris underpaid his staff by $7.8 million in wages, and paid a contrition payment of just $200,000 for that repeated and systematic wage theft. That came after he also entered into an enforceable undertaking in relation to the Press Club in 2015.

Ms Parker: No, not an enforceable undertaking. He didn't enter into one earlier. The first one was the one we've just done.

Senator WALSH: Can you tell me what action was taken against George Calombaris in relation to the Press Club in 2015? I think he was warned and required to do annual reconciliation checks of his employees' salary arrangements.

Mr Campbell: We had previously undertaken investigation with regard to one individual working at Press Club where we had identified contraventions of annualised salary arrangements. That was resolved voluntarily with the company. We advised them that they need to take steps to ensure that annual reconciliations of annualised salary arrangements are conducted. Mr Calombaris at the time made a commitment to do so. It is obviously apparent that he failed to act on that commitment. As a result of that, he and then his business and the people that took responsibility for that business underpaid a large number of employees, which then saw our investigation take place and, therefore, an enforceable undertaking was executed at the conclusion of that and saw the recovery of $7.8 million for workers who had been underpaid.

Senator WALSH: Ms Parker, I'm sure you're aware that there has been some commentary about the amount of the contrition payment, $200,000, in relation to the $7.8 million in underpaid wages. How does this relatively small sum create a lesson or disincentive for other employers who may now see wage underpayment as part of their business model and contrition payments like that as simply just a cost of doing business?

Ms Parker: In using court enforceable undertakings, we consider a whole range of factors. One of those factors is what's appropriate. I will go straight to the contrition payment, because that was obviously a consideration. I will say that they aren't fines. They are recognition that the company got it wrong and is sorry. There are a whole range of things we take into account, so we do use a case-by-case approach to these. A key one is the attitude of the company. Whether it came to us and told us what it had done—self-disclosure is obviously a far better thing for us than if we find out through an investigation or through a worker coming forward and telling us. Then it is how they behave: how open were they about it, whether the workers affected were vulnerable or more impacted by the underpayment, whether the company fully cooperates with the Fair Work Ombudsman and with unions if they are in the picture, whether we think they've made a mistake or they were deliberately blind to their obligations and whether they are resisting our requirements.

A key requirement that we have introduced in the last six months or so, perhaps longer, is a requirement for every company that signs up to a court enforceable undertaking to be subject to external audits that they pay for. We don't think it's up to the taxpayer to fund that, and we don't think it's up to us to have to do the assessment. They need to get a third-party auditor that we oversee. The third-party auditor's role is to check the methodology they're using to figure out exactly how much underpayment there is and whether there's any other that they haven't identified. That's what happened with MadE; they started—
Senator WALSH: I'll respectfully interrupt you there. You're going into the factors that led you to decide on an enforceable undertaking and arrive at this amount. Do you think that that amount of $200,000 was enough, on reflection, to dissuade other employers from engaging in the same behaviour?

Ms Parker: A couple of things: we will use a case-by-case approach. We do listen to responses. That was the largest contrition payment we'd ever done. One of the other factors we do take into account—they were all factors, by the way, we take into account in terms of determining the contrition payment. As well as an enforceable undertaking there is also the contrition payment.

Senator WALSH: Do you think it's enough of a disincentive to stop the behaviour?

Ms Parker: One of the other factors we take into account is the financial position of a company. We require them to provide statements. We discuss those with them, we assess those and we get those verified. Those are matters that are commercial-in-confidence. They were a factor in this case. What I would say is that we will in future take into account the size of the underpayment as a major factor. We didn't take it into account in this case. We didn't make it as perhaps as high a priority as we think, clearly, the public and others believe we should. I think it's probably fair to say that, because we are taking a new approach to this, as in requiring a court enforceable undertaking when someone self discloses—as a minimum—we are learning and evolving. We will do that for each separate one.

Is it too low? It depends. The attention that came to that matter, the media coverage and the vilification of Mr Calombaris, was something that—we would have taken two years to get that matter into court. We think that there was a huge deterrence factor gained from the publicity around that. That's only for the good in terms of what we're trying to achieve. As I said, we will continue to evolve and work on our methodology.

Senator WALSH: Thank you. On reflection, given the size of the underpayment of $7.8 million, the contrition payment perhaps could have been higher?

Ms Parker: It's probably fair to say we would have liked it to have been higher, but there were reasons why it wasn't higher.

Senator WALSH: In relation to your process for arriving at these enforceable undertakings, what is the process for involving or consulting the people who have been underpaid to contribute to the decision about whether the employer should be prosecuted or whether they should make a contrition payment?

Ms Parker: In terms of deciding whether they will be prosecuted, we use all of those factors that I mentioned. We're quite open about those. We assess what approach we will take based on all of those factors. There is a view from some in the community that if it's not taken to court it's not serious. We think that enforceable undertakings are very significant regulatory tools. One of the things that will happen with Mr Calombaris—and people may think this is a minor thing; we don't—is that he will be doing seven or eight presentations to the industry at places we select, and he will get up and say, 'I broke the law'—

Senator WALSH: I appreciate that. Can I just ask, for my information, whether the employees—

Ms Parker: Sorry, whether they're consulted?
Senator WALSH: who've been underpaid have any say in whether you pursue a prosecution or an enforceable undertaking?

Ms Parker: No, not specifically. But we do talk to employees. The workers come forward and tell us, so we're in consultation with them all the time around telling us what's going on. So, in terms of finding out what the extent of the underpayment is, workers are consulted, but not as to whether it should be litigated or not. That's the role of the regulator; that's not the role of the community.

Senator WALSH: It was reported in October in The Sydney Morning Herald that Australian restaurateurs would like an amnesty on their underpaid wages. Do you support an amnesty for underpayment for restaurateurs?

Ms Parker: I think that would have to be a matter for someone other than the regulator. I would have some concerns with an amnesty; I think that's fair to say, yes. But ultimately it's not a matter for us to give amnesties, and we wouldn't give amnesties.

Senator SHELDON: Recently the Fair Work Ombudsman made an assessment with regard to Uber—that they were not employees but contractors. I appreciate that the jurisdictions and the legal systems are different to the UK, and recently California has passed legislation giving gig workers rights, specifically ride-share workers. That follows on the heels of New York City providing minimum standards of payments and conditions for ride-share workers there. Can you explain how the decision was made in this context, despite the fact that it was clear drivers had no power to negotiate rates with Uber, nor any of the terms and conditions of their employment? That's something a regular person would consider a normal process for an independent contractor.

Ms Parker: My apologies—do you mean explain the decision?

Senator SHELDON: Yes, in the context that drivers have no power to negotiate rates or any terms and conditions of their employment with Uber, which would be a normal process for an independent contractor.

Ms Parker: I will say that we announced our investigation in June 2019 and we asked for drivers to come to us. Ten of them were reviewed in quite some detail. All of those circumstances were looked at, including the one that you mentioned. We can explain it more at law if I get our chief counsel to explain it, but what this comes down to is that, for us to have been able to find an employment relationship to exist, there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer. Our investigation found that the 10 Uber drivers subject to our investigation were not subject to any form or operational obligation to perform work. In our examination, we had a range of evidence: drivers, contracts, log-on and log-off records, interviews with drivers and Uber Australia, ABN documents, payments, statements, banking records and pricing schedules. For an employment relationship to exist, there has to be an obligation for an employee to perform work when it is demanded by the employer. In other words, we found that they could work when they wanted to or not work when they wanted to—that there was no employment relationship under the law.

Senator SHELDON: Could I put it in this context. Those are laws which are created for specific circumstances. They came out of the 1800s, 1900s and the year 2000—certainly before the turn of this century. If a worker is not able to negotiate their rate of pay, it is
controlled by an app on the basis of performance. They are either disconnected or connected or allowed to continue to work based on that algorithm, which is constantly with the worker, which means they are being oversighted literally every moment of the day. And, when they knock back work, they are terminated. They are disciplined and they find their rating system, which gives them the capacity to earn income, is also affected. Doesn't this sound a little like we are applying an old system rather than a new system to what is now the new work environment for many, many tens of thousands of workers, and particularly in this case Uber.

Ms Parker: We are applying the law as it stands—what the courts have determined, which is that the employee must have an obligation to perform work on demand by the employer. We were not able to find that in the case of those 10. We only looked at 10. We invited more to come forward and 10 came forward to assist us, and that was our finding. We can only apply the law as it stands currently.

Senator SHELDON: On the basis of the communication about how Uber operates, they are economically required to operate for the company if they want to earn a living, feed their family, pay their rent and pay for the vehicle. So they are economically controlled because they have a desired income to be able to actually live. They have control over their work moments during the day and everything they do is rated, literally minute by minute. In fact, the intensity of oversight is more intense, except through estimates! That is more intense! Are you concerned that it says to employers that, if you adopt a similar sort of arrangement, we will see a further multiplier effect of people not receiving what we see as common entitlements for working people?

Ms Parker: You're asking me to comment on policy or what should be. You are right: work has changed. There is no question. I would say also, though, that we assess each gig type of work, if you like, on a case by case basis. They're all different. The finding that we have made on Uber doesn't mean that it applies to other gig examples. You would be aware of Foodora. We took them to court. We were of the view that they were employees. So we don't take a blanket approach to this. Unfortunately, Foodora announced it was ceasing operations and went into voluntary administration. We might call that a success. We drove them out of town. We don't see this as applying necessarily to anyone else. I would also say that others can take this to court, if they don't agree with our assessment.

Senator SHELDON: Are you able to make the legal advice that you have available to parties that are involved in these matters?

Ms Parker: The legal advice?

Senator SHELDON: Is there a caveat that's able to be made on the availability of that legal advice?

Mr Moraitis: It's legal advice provided to the organisation by AGS, I think. Is that correct?

Ms Parker: That's right—yes.

Mr Moraitis: That's obviously privileged.

Senator SHELDON: You rightly raise the question about Foodora and they left three other jurisdictions around the world. Deliveroo, one of their competitors, has been found in the Netherlands to have to pay employee conditions. So these companies can operate if they wish to. We are also very mindful that Foodora left many millions of dollars of unpaid payments in
its wake. Deliveroo operates in the same market as companies like Uber Eats and Menulog are companies that operate in the same market. I certainly would say, as would the equally important common person in the street, that they operate in a very similar fashion. What's the progress of investigations into those companies? Are they ongoing?

Mr Campbell: We don't have any active investigations into Deliveroo at the moment. We have previously investigated them. We had concerns about their model but not to the extent that we felt there was sufficient evidence to prove there were sham contracting arrangements in place. We gave that advice to the company and put them on notice of those concerns. It appears that they've made adjustments to the way their model works. That said, we haven't had any complaints come through about Deliveroo that I can point to.

Senator CICCONE: I want to ask a couple of questions with respect to Taskforce Cadena. I want to get a better understanding about the relationship between the Fair Work Ombudsman and the Australian Border Force. Are you able to provide me with how your agency and the ABF separate the different tasks with that taskforce? Certainly.

Ms Parker: We are a member of Taskforce Cadena and we're also on the phoenixing task force. Part of what we do is share information and intelligence. We refer matters between agencies I've mentioned, but we also do some joint activities. Your question is specifically who does what?

Senator CICCONE: Does one agency chair it? How do you work out who has what responsibilities, who takes lead on certain raids? For instance, I've got particular interest in agriculture. When raids are conducted, how do you go about conducting such raids? Is intel fed through ABF? Is intel fed through the Fair Work Ombudsman? If you could elaborate on that, that'd be great.

Mr Campbell: One of the key aspects of Taskforce Cadena is to identify and disrupt serious noncompliance and organised noncompliance. We're talking about the really systemic, high-end attempts by actors, often overseas, to design systems where labour is exploited in Australia in a range of different sectors. Horticulture is one of those ones. We work with Border Force, which is generally the lead agency on these matters given they've got a criminal jurisdiction and powers to address and deal with those actors. AFP plays an important enforcement role for Cadena as well, particularly with regard to the execution of warrants. In-field activities often involve multiple jurisdictions, so Border Force will be involved, AFP will be involved, we'll be involved, state regulators can be involved too, depending on the circumstances—occupational health and safety, for example, and the new labour-hire organisations in different states as well.

We all have an interest in the circumstances, but the idea is to identify and disrupt the serious organised crime aspects of it. Where we identify illegal workers—for example, on a farm—our intent is not to round those workers up and put them on a pathway to departure. Our intention is to work with Border Force to follow the money, I guess, to the top of that labour microcosm or system and try to identify those players who are responsible for it. So workplace relations jurisdiction is part of it. We gather a lot of intel which is helpful for Border Force, but ultimately the primary goal here is to bring criminal charges against people.

Senator CICCONE: How many people in total work under Taskforce Cadena and how many of these are from the ombudsman's office?
Mr Campbell: Border Force has a standing secretariat and intel unit for Cadena operations. We assign inspectors to it on a case-by-case basis, so it depends on what the operation is and what it involves. We have inspectors all the way around the country, so, if there's an operation in regional Queensland, we will allocate officers to assist with that operation from our Queensland regional network as well. We don't have to allocate full-time operatives to Cadena; we do it on a case-by-case basis.

Senator CICCONE: What's the process that Cadena follow to decide which agriculture properties it will raid? Is that something that you have input in?

Mr Campbell: Sure. We have intel as well. We receive anonymous reports from the community, and we have good relationships with the unions involved in that sector as well, who are happy to identify employers or actors within the sector. We share that with Cadena. Border Force obviously has access to an intel capacity that is more expansive than ours. They ultimately shape up an intel perspective of a particular employer or farm, and that will shape the activity.

Senator CICCONE: So it's fair to say that ABF are the ones who generally will take the lead in raids?

Mr Campbell: Yes. We've been lead in some where we've had full focus on workplace relations issues, but the majority of the cases have involved—

Senator CICCONE: Do you know how long it takes to plan and execute a raid?

Mr Campbell: I suppose it's case by case a little bit. We've been able to turn them around pretty quickly where we've had hot intel come to us that we need to move quickly on a particular farm or an operation, but generally a fair bit of meticulous planning goes into the execution of these activities, particularly when they involve bringing forth the AFP to execute warrants under our behalf. And then we've obviously got to share the evidence as we can under our various jurisdictions.

Senator CICCONE: I'm happy for you to take this on notice to provide any further details—maybe not specific dates of raids but how many raids have been conducted maybe by month or in the last financial year. And break down by state and/or industry if possible.

Ms Parker: As a result of Cadena?

Senator CICCONE: Yes, specifically to do with Cadena. You can take this on notice too. How many officers are typically involved? That might be some of the statistics you might be able to provide to the committee.

Mr Campbell: Let me say for sake of this conversation that we'd generally allocate a minimum of four inspectors to a property. Okay. If it's a bigger property or there are multiple sites we've got to hit, we'll obviously attach more, but generally we want to be on the perimeter, in sight, where the targets are and, obviously, in field as well if we case we need to speak to witnesses.

Senator CICCONE: All right. If you could also provide how many raids there have been since its inception as well, that would be great.

Mr Campbell: Yes. It's better that we describe them as operations, I think.

Senator CICCONE: Operations? Fine. That's all right. I'm happy to work with you on that one.
Senator Payne: To be clear: there won't be a possibility of providing operational details.

Senator CICCONE: No. I'm not after that—just statistics about how many operations have occurred.

Senator Payne: Home Affairs also has significant equity in this area, so agencies will of course consult in terms of the response.

Senator CICCONE: Sure. When a raid is taking place, how long—

Senator Payne: Operation.

Senator CICCONE: I know. I guess what I'm trying—

Senator Payne: You've been watching too many movies!

Senator CICCONE: Well, if only I had more time, Minister!

Senator Payne: Tell me about it!

Senator CICCONE: Is there a standard procedure or policy manual that the ombudsman follows when they do come across an individual? I'm assuming that there'll be a series of standard questions that are asked and, once it is identified that there is an issue on site—let's say at an agricultural site—a determination is made one way or another that that individual will stay or conversations will be had with the farmer or the employer. Is that something you can elaborate on a bit further, Mr Campbell?

Mr Campbell: I can elaborate on what our interest is. If we're speaking to a witness or someone we believe can provide us evidence that's going to assist either our activities or that of our colleagues, we're obviously going to go through a process of understanding the circumstances by which an employee came to work on a particular site. From our perspective, we're interested to know what they've been paid, who they believe their direct employer is, how long they've been working there, their classification and status, any industrial instruments that might take place and any deductions that might be relevant or imposed upon them. They're the types of workplace relations issues that we're particularly interested in and our jurisdiction is responsible for. Quite often those conversations will point to other circumstances which are of interest to Border Force and others. Whether or not someone has had to pay for a visa or has paid a third party to facilitate access to a visa would be information that is relevant to Border Force's activities onsite, too.

Senator CICCONE: So there is a procedure in place, I guess is where I'm going.

Mr Campbell: I suppose it's standard investigative practice, depending on what circumstances we're looking at and the evidence that we're looking to elicit from a person.

Senator CICCONE: When someone is found to be an illegal, is that dealt with by the ABF officers onsite or is there shared responsibility?

Mr Campbell: The descriptor 'illegal' is a little hard to work with. If there is a person we identify as being in breach of their visa conditions that will be of interest to Border Force, and a matter for them, I suppose. We as an agency tend to be reasonably neutral on that subject. We're interested to know, if there was a work right, whether they were paid and whether or not they were paid correctly. Where they weren't we seek to make those recoveries for them.

Senator CICCONE: That's what your inspectors will do onsite?

Mr Campbell: Yes.
Senator CICCONE: What steps are taken against the employer or contractor? How do you go up that food chain—the supply chain? How do you work out where these people have arrived?

Mr Campbell: I'm moving into the operational—

Senator CICCONE: Can you provide anything further in relation to how many successful prosecutions you've had or how many times you've taken people to court over this?

Mr Campbell: As I said before, the prosecutorial activity of Cadena is led by Border Force. They have commenced proceedings for various breaches of the Migration Act and criminal law regarding activities that have been identified as part of Taskforce Cadena, which is the whole point. In terms of articulating Border Force's operational tactics and strategies, I'm not in a position to give you those insights.

Senator CICCONE: Thank you, Chair.

CHAIR: Labor, we've got time for one more question from you. We've got questions from the government, which we'll probably have to put on notice to facilitate the smooth running of the committee.

Senator PRATT: I have one.

CHAIR: One question.

Senator PRATT: Senator Cameron's been watching intently.

CHAIR: Former Senator Cameron, get a life!

Senator PRATT: He said to me: 'You should pursue this question of compliance notices not recovering the total loss of workers' wages.' He said, 'I was told they didn't go back more than six months, but I didn't have the evidence.' I won't read what he said next.

Ms Parker: We did address that, because of Senator Cameron's work on cleaning.

Senator PRATT: That's good. He's keen to check that you're not covering your behinds on enforceable undertakings, so we want to dig down on compliance notices, to see the extent to which someone will be properly protected by a compliance notice. I know we've covered that in part.

Senator GREEN: In his accent, though.

Senator PRATT: No. I'd never do a Scottish accent.

Ms Parker: Is that the question?

Senator PRATT: I know we've covered it partly, but we've worked through the enforceable undertakings and the extent to which there might be gaps in wages paid and that you go to court if it's not. Are there any remaining gaps in getting all entitlements paid in relation to the application of a compliance notice?

CHAIR: That'll be the last question from Labor.

Ms Parker: A compliance notice sets out quite clearly what the—to issue a compliance notice, the inspector needs to have a reasonable belief, only a reasonable belief, that there's been underpayment, in which case they can say: 'Here's the award that you're supposed to be paying. We need you to show that you've been paying correctly.' We then oversee that. The inspectors then oversee and make sure that the money is paid back. We can give Senator—not Senator Cameron—
CHAIR: Former Senator Cameron.
Ms Parker: ex-Senator Cameron comfort that these notices are quite—
Senator PRATT: Robust?
Ms Parker: They're robust, and if they're not complied with we can take the employer to court, and we seek the underpayment and a penalty for not paying.
CHAIR: Thank you, Ms Parker. Senator Sheldon referred to two ads. It is the will of the committee that they have been tabled—thank you very much. I'd like to thank you, Ms Parker, and your officers from the Fair Work Ombudsman for coming along. Consider yourselves released from the hearing.

Proceedings suspended from 18:45 to 19:46
Fair Work Commission
CHAIR: I now call representatives from the Fair Work Commission. I welcome Ms O'Neill, general manager. Ms O'Neill, do you wish to make an opening statement?
Ms O'Neill: No, thank you.
Senator PRATT: Welcome, Ms O'Neill and all your officers. I want to begin by asking if you're able to provide for the committee a list of matters before the commission in which the federal government have appeared or intervened in the last three years, and a summary of the positions that they've taken in each of those proceedings.
Ms O'Neill: I certainly don't have that information at hand, but I'm happy to take the question on notice.
Senator PRATT: Okay. Are you able to characterise some of the kinds of matters that they're intervened in for us this evening?
Ms O'Neill: The one that springs to mind immediately is an application for approval of an enterprise agreement covering the Metropolitan Fire Brigade in Victoria. There were various applications for review in that process. It's not a common occurrence; that is the other observation I'd make. It's not a common situation where the government intervenes or seeks to participate in proceedings before the commission.
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Senator PRATT: Yes, so they're selectively deciding what to get involved in—but that's the way I characterise it; clearly you can't and won't do that. What is the current average approval time for enterprise agreements that have been lodged with the commission?
Ms O'Neill: I'm happy to answer that. We've been very open that we've had some real challenges in dealing with the applications for approval of enterprise agreements in a timely way. We've had a significant backlog that we've now worked through, and the situation is literally improving week by week at the moment. From February to September this year, complete and compliant applications were approved in a median time of 17 days, and all applications, involving those that are very complex and require multiple interventions, have been approved in a median time of 34 days.
Senator PRATT: So the current rate is 17 days?
Ms O'Neill: If you're looking at all applications for approval in that time period, it's 34 days. That was through till September. There's been slight improvement, but that's the most—
Senator PRATT: So it has improved. What was it prior to that 17-day—
Ms O'Neill: In the 2017-18 financial year, for example, it was a median of 76 days.

Senator PRATT: Yes, okay. I was looking for a sense of the change over time. What has been the impact on parties negotiating agreements in relation to the issues with the time period?

Ms O'Neill: Obviously—well, not obviously—it's our objective to deal with applications as quickly as possible. Where we're not able to do that in a timely way, it's been because applications have either been incomplete—they've been missing required information—or there have been various technical defects or they've been ranging through to the substantive, highly contested applications. So there's a spectrum of scenarios. But whenever it takes an extended period of time for an application to be dealt with, then that is not something that we seek to do, because it creates anxiety for the parties that have gone through the bargaining process and seek to have their arrangements approved.

Senator PRATT: What's the reason for the drop? Have you had extra resources, or have you changed your processes?

Ms O'Neill: All of those, and more. It's been a combination of incredibly intense attention, focus and monitoring and dealing with issues that surface. In some areas, we've provided additional resources at various points in time. We've undertaken various engagement exercises with regular participants to try to help them lodge applications that are both compliant and complete and, therefore, can be dealt with much more quickly. We've undertaken various research along the way, and one of the pieces of feedback that we obtained was that they wanted—sorry, I'll just go back a slight step. The way that the process works is that applications are lodged and, initially, we undertake, through administrative staff, a review or analysis of the application against the various statutory criteria and provide that information in the form of a checklist to a member of the commission, who's then responsible for determining the application. One of the changes that we've made is that, from the time that that checklist is provided to chambers, any further interaction or engagement with the parties is done through chambers, whereas previously some of that had been undertaken by the administrative team. That's provided some efficiencies as well. We also had some significant delays in the time it was taking for the triage team to complete the checklist. For some time now, we've been able to ensure that all applications are given that initial assessment by the triage team and provided to chambers to deal with within two weeks.

Senator PRATT: That makes sense. At some point, you must have realised that the 76 days wasn't good enough and that there were systemic issues. Clearly there's a strategy there that you've used to drive that down?

Ms O'Neill: And we're not finished. We're not satisfied that we can't do more. We've done further things—for example, forming an enterprise agreement user forum, a reference group where we interact with users and seek their views and suggestions as to what we can do. We've just finalised the development of a smart form that, again, will provide prompts to applicants lodging applications and give them early flags as to where there might be issues they'll encounter. It's an ongoing exercise.

Senator PRATT: Mr Hehir, is that the same reference group we were discussing earlier today?

Mr Hehir: Yes.
Senator PRATT: Can I ask what the commission's view is on modern awards, noting that employers such as those in the restaurant industry have made claims that they're too complex?

Ms O'Neill: I wouldn't characterise it as the commission having a view about modern awards in quite that way. The commission has a very clear role under the legislation in relation to modern awards and is driven by the modern awards objective. Essentially, the commission's charged with ensuring that awards provide—a fair and relevant minimum safety net of terms and conditions, taking into account various factors. The act sets out various terms that the commission may include in modern awards, must include in modern awards and must not include in modern awards. So it's a fairly comprehensive regime that the commission is driven by. In terms of complexity—

Senator PRATT: But, to be clear—sorry, I won't interrupt.

Ms O'Neill: Part of what I'm trying to convey is that simplicity is in the eye of the beholder in some respects. If the awards only contained one thing, then that might be simpler.

Senator PRATT: But not fair.

Ms O'Neill: I'm really just drawing attention to the commission's obligation, which is to ensure that the modern awards provide a fair and enforceable safety net.

Senator PRATT: If you take all the complexity out, clearly that would drive other undesirable outcomes?

Ms O'Neill: That's not to say, though, that the commission doesn't, as part of its work—

Senator PRATT: Reducing complexity?

Ms O'Neill: ensure that the awards that are made and reviewed are expressed in simple and clear terms so that end users—employers and employees—are able to understand their rights and obligations under the awards, as I think it's been described, without needing a history lesson or a paid representative to make sense of it. So there's a number of things that we have done and continue to do to try to make the modern awards as simple as possible. We have them expressed in plain language. We've undertaken various user experience research to ascertain user preferences about how awards can be expressed more simply, and we'll continue to do that.

There are two other points. The first is that, in one view, the award system is now significantly simpler than it has been in the past. It wasn't, at least from my perspective, too long ago when there were something like 3½ thousand federal awards—

Senator PRATT: Yes, it is already a lot simpler.

Ms O'Neill: and a range of state and federal awards that employers and employees had to navigate. We're down to 122 modern awards. So some would say that that is, in itself, simpler. The other point to make—because this is an issue that we're very aware of and alive to, and we want to make it as simple as possible for awards to be complied with—is that there was a statement of the full bench of the commission last month. As part of that, the bench has invited any person to identify any term in a modern award that is ambiguous, uncertain or confusing so that it could be considered for plain language redrafting.

Senator PRATT: In that context, in terms of the issues that come before the commission, how do you tell the difference between someone's complaint about complexity being real
versus it being, perhaps, an employer dragging their feet on properly adhering to the delivery of the entitlements of the employee?

Ms O'Neill: The commission members deal with applications and the evidence before them, and it's common that they weigh up different arguments and different evidence and come to a conclusion overall as to their assessment of it.

Senator PRATT: In the context of the restaurant industry's claim that they are too complex, we've seen a public debate around that, which has been significant. There have been excuses made that things are, in their view, too complex, but clearly the commission's able to work through those issues themselves.

Ms O'Neill: All I can do is reiterate that we are endeavouring to make the instruments as simple as we can. One of the pieces of feedback that we had from user research that we undertook was that modern awards generally might provide the basic rates for various classifications in the award and then the overtime clause might say that it is time and a half for the first two hours, or whatever. One of the pieces of feedback that we've taken on board is that particularly employers and particularly small-business employers didn't want to have to do those calculations themselves and would benefit from having the actual dollar rates for every obligation spelt out in the instrument.

Senator PRATT: What a good idea!

Ms O'Neill: We're doing that. That makes the instruments a lot longer in some cases. I guess I'm just making the point that we're responding to that user feedback, but longer instruments may apply—but that doesn't necessarily mean more complex.

Senator PRATT: No. That's fine. In the case of a small business having an unfair dismissal claim against them, are they necessarily required to pay for legal representation?

Ms O'Neill: We go to some effort, and a lot of our energies are directed at making sure that the tribunal is accessible to all, employees and employers, without the need for legal representation. Some applicants and employers will nonetheless choose to be represented, but we aim to have our processes accessible so that that's not necessary. It's certainly the case that a very significant portion of parties do not engage legal representatives in unfair dismissal cases before the commission.

Senator PRATT: Last December the minister appointed six new deputy commissioners to replace one vacancy. Has the Fair Work Commission been properly resourced to fund these additional appointments? Or is it having to find savings elsewhere in its budget?

Ms O'Neill: The answer to that is slightly complicated. We did receive additional funding to support the appointments of those members appointed in December. We had already, in the course of that year, gone halfway through the financial year and allocated a full budget, notwithstanding that. So, there was a kind of shortfall that we needed to manage in the remaining six months of the 2018-19 financial year. And in the current year and beyond, there is a gap which comes more from the fact that the profile of members that we have, in terms of the number of presidential members as against commissioner-level members, is not aligned to our funding model. So, there's an element of discrepancy there.

The other point to make—and I will perhaps demonstrate it this way: in 2009-10 the proportion of revenue from government provided to the commission that was expended on direct member remuneration was around 18 per cent; it's now just over 25 per cent. Part of
that is also the cumulative effect on efficiency dividends, where, because of the proportion of member remuneration into our budget, that's almost hived off, in a sense—there's no efficiencies. So, the efficiency dividend is applied against the whole budget, but there's that element that we really can't achieve any efficiencies in respect of. It provides a kind of squeeze over time and makes managing within resources somewhat challenging.

**Senator PRATT:** Have you been asked by the government to participate in or provide input into Minister Porter's industrial relations review?

**Ms O'Neill:** In terms of the two discussion papers that have been released, we've got a good ongoing relationship with the department and engage formally and informally with them and provide information where appropriate.

**Senator PRATT:** Have you given them advice about what other kinds of areas need to be looked at?

**Ms O'Neill:** No, save to say this: the commission don't engage in the policy space, but, where there are, generally, minor technical amendments to the legislation that may assist the administration of the tribunal, from time to time the president may convey such views to the minister and the department. But, in relation to the current greenfields agreements and the enforcement penalties piece, we haven't provided any information to date in relation to those two matters.

**Senator PRATT:** Are you being consulted on wage theft at the moment, in the drafting of legislation for that?

**Ms O'Neill:** Not formal consultation, in any sort of formal sense. We have discussions with the department from time to time around our experiences.

**Senator PRATT:** Because you've got experiences in issues of wage theft perhaps coming before the commission? What do you mean?

**Ms O'Neill:** I'm sure I have at times mentioned to the department that, when somebody comes with an unfair dismissal claim at the commission, it's not uncommon for the applicant to allege that there have also been underpayments or unpaid entitlements as a result. It's those kinds of conversations—is as high as I'd put it.

**Senator PRATT:** Have you seen anything in writing from the government in relation to the wage theft issue?

**Ms O'Neill:** I don't believe so.

**Senator PRATT:** Is Mr Billson still working for the Fair Work Commission?

**Ms O'Neill:** No.

**Senator PRATT:** How much has he been paid in total, as at the conclusion of his appointment?

**Ms O'Neill:** Mr Furlong will be able to assist you with those details.

**Mr Furlong:** This matter was actually dealt with on notice. I can give you the question number if that would assist.

**Senator PRATT:** Yes. If you can give me the question number, then I can go back and find it.
Mr Furlong: EMSQ18-000292. The total cost of the consultancy—this is including the travel related expenses—was $28,058.45.

Senator SHELDON: You mentioned that, with the extra appointments and, particularly, the appointments of the deputy president, there was a need, Ms O'Neill, regarding managing the budget. What steps did you have to take to manage the budget? Were there cuts? What changes needed to occur to bring that within budget?

Ms O'Neill: We operate within pretty tight parameters all the time. In that sense, there was nothing particularly unique. We often find ourselves having to cast around and identify ways to trim our sails to achieve a balanced budget. At that particular time in December, one of the things that we did was postpone a planned conference of members. We cut down on some travel and we rescaled a small number of projects and matters of that nature.

Senator SHELDON: What sorts of projects would be rescaled?

Ms O'Neill: From memory, there was an information management project that we slowed down, I guess—would probably be a better way to describe that.

Senator WALSH: Just confirming there were no implications for anyone seeking the assistance of Fair Work?

Ms O'Neill: We didn't reduce service delivery, no, Senator.

Senator WALSH: Thank you.

Senator PRATT: Can I just briefly ask whether the commission's had any reaction from the minister after it was revealed that pre-Christmas in 2018 that Fair Work Commission Deputy President Gerard Boyce had posted anti-union and pro-Liberal tweets on social media?

Ms O'Neill: Senator, was your question whether the minister has made any comment?

Senator PRATT: Whether the minister has taken the issue up at all with the commission, or have you done anything—has there been any internal response to that?

Ms O'Neill: I can't speak for the minister. I'm not aware of any communication in relation to that, but I can't speak to that. It has been dealt with internally, I can say that, Senator.

Senator PRATT: So you would now have a policy around the use of social media or other statements that would undermine public confidence in the commission, undermine respect for the commission or undermine the reputation of the commission?

Ms O'Neill: It's not in the nature of a new policy, Senator. There's a code of conduct that applies to members that makes it essentially clear that they shouldn't engage in matters of a political nature—I'm paraphrasing slightly there, but that's essentially the flavour of it.

Senator PRATT: And, so, in that context, his actions pre-Christmas of 2018 triggered the response in upholding the code of conduct, or was there some other trigger for that?

Ms O'Neill: The code of conduct is essentially a guide to members. It's based on a judicial guide. It's not a prescriptive set of rules.

Senator PRATT: No, I understand that but, clearly, the code of conduct was invoked. I just wanted to ask: was there a particular trigger for invoking upholding the code of conduct in terms of who intervened?

Ms O'Neill: The president raised it with the member concerned.
Senator PRATT: Did anyone from the government also raise it with the commission?
Ms O'Neill: Not to my knowledge.
Senator PRATT: Can I ask you perhaps, Senator Payne or Mr Moraitis, when those events happened, if there was any reaction from the government?
Mr Moraitis: We'll take that on notice. It was a previous minister and a previous department, but I can take that on notice, if you like, Senator.
Senator PRATT: Thank you.
Ms O'Neill: Perhaps it might help if I just mention that the code is really the responsibility of members and, there is certainly no capacity for the president to enforce compliance for any breaches of the code and there's also not a role for the minister to enforce the code. Where there are complaints about the performance of a member's duties, there is a different mechanism and there are some circumstances where the president can refer a complaint to the minister. But those circumstances haven't arisen in this instance, and so I'm not even aware that the minister would be aware of it.
Senator PRATT: Clearly, commissioners need to be mindful of the code and uphold it at all times but, if someone starts breaching the code and doesn't prompt themselves that that's the case, what's the internal process? Ms O'Neill: The starting point is that each member's appointed as an independent office holder until 65 and they can only be removed by both houses of parliament other than in limited circumstances. The president got no power to discipline a member, including for a breach of the code. So, ultimately, members are responsible for their conduct to parliament. So it's really a matter for parliament rather than—
Senator PRATT: But in this case you say that the president reminded the deputy president of their obligations under the code and that triggered a response.
Ms O'Neill: It did. The member gave an undertaking not to engage in social media.
Senator PRATT: Thank you.
CHAIR: Thank you. We have 15 minutes left, which will be divided between One Nation and the government. I will go to you, Senator Roberts, first.
Senator ROBERTS: Thank you, Chair. Thank you all for coming today. Are you aware that there is a large collieme in the Hunter Valley that is deliberately exploiting and defrauding workers of their entitlements? This deliberate exploitation of hundreds of coalminers with the full knowledge of the Hunter Valley branch of the major Australian coal union—the employer's a major multinational employer, a major multinational labour hire firm—and with the disregard of New South Wales ministers in the past is astonishing. The dishonesty is both audacious and callous. Is it true that the Fair Work Commission is the organisation where disputes related to long service leave should be brought?
Ms O'Neill: It would depend, Senator. If, for example, under the terms of an enterprise agreement, long service leave was a matter dealt with in the agreement, then the disputes procedure under that agreement may enable disputes arising, including in relation to long service leave, to be referred to the commission.
Senator ROBERTS: I'll come to the EA. Thank you for that. Are you aware that not only are these casual coalminers being massively underpaid; they are being denied equivalent entitlements such as sick and holiday leave, redundancy and penalty rates for shift work, and,
while their full-time counterparts working side by side with them receive long service leave after eight years, these so-called full-time casual workers, whose actual hours worked are severely underreported to Coal LSL, rarely attain long service leave, as casual employment allows immediate terminations and intimidation, and fatigue from ill-treatment and burnout from limited time off causes many miners to leave the industry? Does the Fair Work Commission deal with issues that relevant to casual employees working as miners in the black coal industry in New South Wales?

Ms O'Neill: I'm not aware of the particular case that you're referring to.

Senator ROBERTS: Would you like my office to give you a briefing?

Ms O'Neill: Let me explain the role of the commission in those cases.

Senator ROBERTS: In view of the chair's comment, could you make it very brief?

Ms O'Neill: Okay. The role of the commission would essentially be to determine the terms in the relevant award—that would go to casual employment and other matters—after hearing parties and, secondly, to deal with disputes that arise under the award, if that is what the dispute's procedure provides.

Senator ROBERTS: How can this be when the black coal industry award does not allow casuals in the black coal industry other than office administrative personnel? These people I'm talking about—hundreds of people—are working in production side by side with full-time employees, doing the same job with the same skills and the same qualifications. They have an EA, an enterprise agreement, that was approved, apparently by the Fair Work Commission. Yet the EA cannot be less—correct me if I'm wrong—than the award, in terms of employment conditions, and an employment classification that is not in the award, casuals, cannot be added to an enterprise agreement. That leaves the employee worse off by far. These people are 40 per cent underpaid. They're far worse off than if they were covered by the Black Coal Mining Industry Award. There is no annual leave, no sick leave, no redundancy and no accident pay. How can that be?

Ms O'Neill: The requirement under the legislation that the commission administers, in terms of the comparison, is that any enterprise agreement must provide, amongst other things, that each employee covered by the agreement will be better off overall compared to the underpinning award. That's not to say—

Senator ROBERTS: Are they better off when they have no annual leave, no sick leave, no redundancy, a lower pay rate and no accident pay?

Senator Payne: Ms O'Neill just needs to finish her answers.

Ms O'Neill: I can't speak hypothetically. That is the requirement of the commission. In considering whether to approve an agreement, I don't know, there are appeal mechanisms available if there has been an error, but, on the face of it, I've got no reason to think that the agreement doesn't meet the statutory criteria.

Senator ROBERTS: Why would Coal LSL have referred people employed as casuals in the coal industry to bring their complaints to the Fair Work Commission, as has happened in the past?

Ms O'Neill: Senator, I am sorry. It's just really difficult in an abstract hypothetical way to—
Senator ROBERTS: Would you like our office to give you a briefing?

CHAIR: Or perhaps we could put some questions on notice that might assist the witness to have some more time to respond.

Senator ROBERTS: I am asking for general responses, Chair. For example, one of the miners appeared at the Fair Work Commission in front of Deputy President Hamberger nearly two years ago. We can get the documents to you, if you would like them. Reportedly, Deputy President Hamberger signed off on many of the same enterprise agreements. So, why has the Fair Work Commission in the past refused to assist casual workers in the black coal industry—as I said, coalminers doing the same work alongside the people classified as full-time workers—doing the same rostered work hours? How can that be?

Ms O'Neill: All I can say is that members of the commission, in determining the provisions in the award, follow the act. Similarly, in approving the enterprise agreements, they ensure that they meet the statutory tests, which include the BOOT, the better off overall test.

Senator ROBERTS: About two years ago a casual worker provided formal, written complaints over a period of 12 months. The then employment minister, Michaelia Cash, advised him to go to the Fair Work Commission. The Fair Work Commission said—and I am quoting him now, 'Yes, we identified an issue exists, but would not intervene because he had legal representation.' Then this miner had a phone conference with the Fair Work Commission to get accident pay. He requested his full accident pay and the Chandler Macleod Group refused. At that point the mediation ended and the Fair Work Commission said there is nothing more that they could do. People have been abandoned in the Hunter Valley.

Ms O'Neill: Again, sorry, but in the abstract I really can't add to my answers.

Senator ROBERTS: How many disputes from 2016 to date involving Chandler Macleod Group have been brought by coalminers to the attention of the Fair Work Commission, involving complaints about coal long serve leave entitlements, and have they all been resolved? You probably will have to take that on notice?

Ms O'Neill: I am happy to take that on notice.

Senator ROBERTS: How can two people doing the same production job, same roster, be paid so differently? How can one be casual and the other full-time?

Ms O'Neill: It depends on the terms of the award and the agreement that applies to their employment.

Senator ROBERTS: Would you like my office to bring the documents to you?

Ms O'Neill: I am not rejecting your generosity; it's just that I am not quite sure how that would assist, given the limited role that the commission has, but perhaps—

Senator ROBERTS: In what way is it limited?

Ms O'Neill: Well, in the way I have described. It is in terms of dealing with disputes that arise under an agreement and it is not appropriate for—it is a tribunal; it deals with matters through applications that are lodged and dealt with in an open and transparent way. Taking information outside those processes is not straightforward. What I am suggesting is that if I deal with the questions that I have taken on notice and if, in the course of doing those, further information would be of assistance then we would be happy to provide that.
Senator ROBERTS: Perhaps you could give these miners some advice. The CFMMEU says an EA must expand—as in having superior entitlements—on the award. The CFMMEU has not done anything about this atrocity. The major employer, a major Australian multinational, has done nothing. It condones it. It knows what is going on. The major direct employer, the labour hire company, a major multinational company, is aware of it. And the NSW Minerals Council is aware. Have you got any advice as to where these people should go next?

Ms O'Neill: Not at this point.

Senator ROBERTS: No, they have been failed. They have been failed by everyone they have approached, and they have approached all of these people. Thank you very much, Chair.

CHAIR: I appreciate your time on some of these issues you have raised on notice or perhaps to the Fair Work Ombudsman.

Senator O'SULLIVAN: I would like to ask you about the triage of issues. Can you let me know if any members undertake the initial triage of general protection conciliations?

Ms O'Neill: It is not triage. The commission's role in dealing with general protection claims involving dismissal is limited to convening a conference and providing an opportunity for the parties to resolve the matter by agreement. If the matter is not resolved, then essentially the commission considers issuing a certificate to that effect. That certificate is a necessary precondition to enable the applicant to then go on and make an application in Federal Circuit Court or the Federal Court. That mediation, if you like, and issuing the certificate is the role of the commission, other than and in very limited circumstances where, by consent, the commission can arbitrate. So in terms of your question, 'Do members of the commission undertake that work?' the answer is: at times, yes.

Senator O'SULLIVAN: So different members take a different role there? They have a different allocation; is that right?

Ms O'Neill: The work of members varies based on a model of regional allocation. We have regional coordinators that allocate work to members in their region, and there is an overlay of case type, and practice leads allocate particular types of cases to members in conjunction with the regional coordinator. I hope that makes sense.

Senator O'SULLIVAN: Yes, I think so. Are you able to provide us—and I'm happy for you to take this on notice—with a breakdown for 2018-19 of the proportion of matters allocated to each member that are general protection conciliations, including for those members appointed during the 2018-19 year?

Ms O'Neill: I'll take it on notice, but I foreshadow—and there have been multiple questions on notice in the past dealing with this, and discussions at estimates—we're not in a position to provide a breakdown of the work of individual members by case type.

Senator O'SULLIVAN: Why is that?

Ms O'Neill: It's essentially about protecting the independence of the tribunal, and there are a series of authorities that I'm happy to elaborate on in the course of the answer.

Senator O'SULLIVAN: The 2014 award review is still ongoing, isn't it?

Ms O'Neill: It is. We're at the end part, but it is still ongoing.
Senator O'SULLIVAN: And that has produced hundreds, possibly even thousands, of decisions. Is that right?

Ms O'Neill: It has. It has been a very significant body of work.

Senator O'SULLIVAN: Are these mostly full bench decisions?

Ms O'Neill: From the beginning through to the last month, there have been a total of 470 decisions and statements. I don't have a breakdown of the proportion of those that are full bench or single members. But, certainly, a significant amount of the work has been undertaken by the full bench.

Senator O'SULLIVAN: Most of them are full bench decisions?

Ms O'Neill: Yes.

Senator O'SULLIVAN: Okay. You said you can't identify the members, but can you break it down at all by member, like 'member A'—preferably by name, but if you can't then that's fine.

Ms O'Neill: How about I take on notice and see what we can do.

Senator O'SULLIVAN: Yes.

Ms O'Neill: So the question is: of the decisions in the four-yearly review, what's the breakdown of who has been involved in those decisions?

Senator O'SULLIVAN: I'll just state the question, so it's clear. Can you provide a breakdown of the number of decisions each member has been involved in over the period since 2014?

Ms O'Neill: In relation to the four-yearly review?

Senator O'SULLIVAN: Yes.

Ms O'Neill: I'm happy to take that on notice.

Senator O'SULLIVAN: Yes, that's fine. Thank you.

Senator DAVEY: I have just two questions about your reporting. In your corporate plan for agreement approvals, you have a benchmark for approvals that don't require undertakings, but you don't have any benchmark for agreements that do require undertakings. Can you explain why that is?

Ms O'Neill: We've got a number of benchmarks in relation to agreement timeliness. In terms of the portfolio budget statements, the measure there is timeliness in approving agreements without undertakings. We also publish information on the timeliness of simple and complex, and all agreements, so we cover the field in different ways, if you like.

Senator McDONALD: Can you explain to me why this year in your annual report you've only reported on agreements with no undertakings? My understanding is that most agreements that are reached actually have undertakings.

Ms O'Neill: We do publish that information. It's not the budget measure, but we do publish the information about the timeliness of all agreements, including complex ones. We did change the budget measure last year as a reflection of the significant increase that we've encountered in the last two or three years in particular of agreements that either have not been complete or compliant at lodgement and have therefore required, in many cases, undertakings.
in order for them to be approved. So we modified the budget paper measure last year, but, as I've indicated, we report publicly on the whole range of other measures.

**Senator McDonald:** Last year the government secured passage of amendments to the Fair Work Act that allowed the Fair Work Commission a discretion to waive noncompliance with minor procedural or technical requirements.

**Ms O'Neill:** Yes.

**Senator McDonald:** Has that improved approval times? And can you quantify those?

**Ms O'Neill:** Perhaps I can answer it this way: one of the really significant issues in the past, before the amending bill, was that when an application had a problem, even a minor technical one, because of the absence of the discretion a large proportion of applicants elected to withdraw their applications rather than have them determined, in all likelihood, by a dismissal. We've shifted from up to 17 per cent of applications being withdrawn before passage of the bill to under five per cent. That's a very significant impact that I think is largely attributable to passage of the bill.

**Chair:** Excellent, thank you. Thank you very much for coming along this evening. That ends the appearance by the Fair Work Commission. Thank you, Ms O'Neill, and your officers—you are released and excused. We will now move to representatives from the Registered Organisations Commission.

**Registered Organisations Commission**

[20:33]

**Chair:** I welcome representatives from the Registered Organisations Commission, and I welcome the Commissioner, Mr Bielecki. Thank you for coming along. Do you wish to make an opening statement?

**Mr Bielecki:** No thank you, Chair.

**Senator WATT:** Thank you very much for coming tonight. Mr Bielecki, it won't surprise you that some of the questions we wish to ask tonight relate to the recent decision of the Federal Court in the infamous investigation conducted by your organisation into the AWU. I assume you're familiar with the decision that was handed down on Friday?

**Mr Bielecki:** I am familiar with the decision, Senator. I reject your characterisation of—

**Senator WATT:** Do you think that it was a good investigation?

**Mr Bielecki:** I'm saying that there is no basis to say it was infamous.

**Senator WATT:** Do you get out much? Do you know what people are saying about that investigation and your organisation's role in it?

**Mr Bielecki:** I know what critics say about it.

**Senator WATT:** So you, to this day, consider that was an effective investigation and an effective use of taxpayer dollars, do you?

**Mr Bielecki:** No. In the sense that we've had a decision now from the court, there were seven grounds of review that were brought against us by the AWU and the Hon. Justice Bromberg rejected five of those and adjourned one of them for further submissions. So the matter is part-heard. It will come back to the court in late November. It did uphold, in part, one of those grounds of review.
Senator WATT: Do you take that as a five-to-one win for your organisation, do you?
Mr Bielecki: That's not what I said. I was explaining that the decision has more to it.
Senator WATT: Are you familiar with the fact that the judge found that your investigation into the AWU was invalid and didn't have a legal basis?
Mr Bielecki: I'm familiar with that part of his reasons, yes.
Senator WATT: So how can you describe that as a five-to-one win for your organisation?
Mr Bielecki: I never did describe it as a five-to-one win. They're your words.
Senator WATT: How can you say that that is anything other than a total condemnation of your organisation? You are set up to carry out the law and to ensure that other organisations carry out the law, and your own organisation can't even follow the law. How is that in any way acceptable?
Mr Bielecki: We do carry out the law. We've had this one decision where the judge has found on a technical ground—
Senator WATT: A technical ground? It's a legal basis—
Mr Bielecki: It's in relation to his interpretation of section—
Senator WATT: So is he wrong?
Mr Bielecki: I'm not saying he's wrong. You keep putting words in my mouth, Senator.
Senator WATT: I'm rather surprised that you don't just want to admit that this was a total disgrace and—
Mr Bielecki: It absolutely is not a total disgrace.
Senator WATT: You think it's a good job?
CHAIR: Senator Watt, we've been getting on so nicely throughout most of the day.
Senator WATT: If you'd previously been on this committee, Chair—
CHAIR: Thank you for patronising me!
Senator WATT: you would know this has been an absolutely infamous matter to the point where we can't even have the former minister in the room because she has to hide behind whiteboards. So there is a reason I'm pretty angry about it, and there are a lot of other people who are pretty angry about it as well.
CHAIR: There's no need to take your anger out on the witness.
Senator WATT: He is the chair of the organisation.
CHAIR: We can be nice and polite to each other and ask questions and have answers.
Senator WATT: Mr Bielecki, do you think it was polite for your officers to conduct an investigation that was invalid and then work with the AFP to raid a union office when that entire investigation was invalid? Was that a polite thing to do, to use the chair's words?
Mr Bielecki: When we made the decision to investigate, we made it on sound grounds. We now have—
Senator WATT: Sound? Are you serious?
Mr Bielecki: Yes, thank you.
CHAIR: Senator, can you please let the witness answer your question.
Senator WATT: You know that the judge found you had no reasonable grounds for your investigation. Are you serious in saying you had reasonable grounds?

Mr Bielecki: No, that's not what he found. He found that we didn't have reasonable grounds in relation to one aspect of the investigation.

Senator WATT: What aspect was that?

Mr Bielecki: That was the aspect in relation to investigation of officers' breaches of their duties.

Senator WATT: That's what this entire thing is about. This entire thing has been a witch hunt to go after former union officials who happen to now be in parliament.

Mr Bielecki: No. This is an investigation that was commenced on reasonable grounds. His honour has found that one of those was not reasonable and the matter is part-heard. So we're going to have a situation where the judge is still going to deal with the consequences of that. The fact of the matter is that the approach that the judge took in this matter is, as far as we're aware, quite novel. It doesn't reflect previous decisions in relation to section 320 of the act. What it does is say that, if an officer was in breach of his or her duties and that happened to also be in relation to the breach of a rule, that can't be investigated if it happened more than four years ago.

Senator WATT: How long ago were these events that you were investigating?

Mr Bielecki: More than four years ago.

Senator WATT: Yes, a lot more than four years ago. So you had no reasonable grounds for that aspect of the investigation according to the judge—correct?

Mr Bielecki: The judge found that we had no reasonable grounds on that one aspect of our decision to investigate.

Senator WATT: The court also found that Mr Enright, sitting next to you, understood, based on a reasonable assumption, that Senator Cash, who was then the minister, made the referral in order to discredit, embarrass or politically harm Mr Shorten—is that correct?

Mr Bielecki: No, there was no finding by the court to that effect. The evidence, as I recall it, was that Mr Enright—in his experience as a very experienced investigator—indicated that he understands that when matters are referred to investigators, there is sometimes a reason for that happening.

Senator WATT: What did the judge have to say about Mr Enright's understanding of Senator Cash's intentions?

Mr Bielecki: I don't have the judgement in front of me, but he said that Mr Enright had made some assumptions about what the minister's intentions might have been.

Senator WATT: He said—

Mr Bielecki: Mr Enright indicated that he had no knowledge, or direct knowledge, of what the minister's intentions might have been, but that as an experienced investigator he took issues like that with the knowledge that people who make requests of investigators may have a reason for doing so.

Senator WATT: Mr Enright, what was it that led you to have an assumption that Senator Cash made this referral in order to discredit, embarrass or politically harm Mr Shorten?
Mr Enright: Well, I reject that, Senator. That's not the evidence I gave.

Senator WATT: Do you think the judge is wrong?

Mr Enright: I reject what you've just put to me, Senator, and I'm not saying the judge is wrong—

Senator WATT: He must be, mustn't he, if you're rejecting it—

CHAIR: Let the witness answer the question, please.

Senator Payne: To be clear, Chair, Senator Watt is of course canvassing matters of ground over which he's gone many times. My understanding of the AWU's position on the proceedings is that the decision to investigate was influenced by an improper political purpose, including an allegation against the then Minister for Employment, the Hon. Michaelia Cash. The AWU failed on those grounds—

Senator WATT: I'm not going to that; I'm going to what the judge did find—

Senator Payne: Because that would be inconvenient, Senator?

Senator WATT: Do you think we should be talking about things that the judge didn't find? I can come up with all sorts of things that the judge didn't find.

Senator Payne: The judge did make a finding: the judge made a finding that the AWU failed in its application on that matter.

Senator WATT: But the judge did find that Mr Enright had a reasonable assumption, or formed a reasonable assumption, that Senator Cash made this referral in order to discredit, embarrass or politically harm Mr Shorten. What I'm hearing from Mr Enright is that you reject that finding—

Mr Enright: I reject your characterisation—

Senator WATT: How else can you characterise it?

CHAIR: Senator Watt, can we let the witness answer the question before you interrupt him even in his first sentence.

Mr Enright: My transcript is available of the evidence that I gave before the Federal Court. The evidence I gave was that, in my lengthy and extensive experience in investigations, it is not unusual for people who refer matters—who make complaints to law enforcement agencies, to regulators and similar agencies—to have preferred outcomes; to have some form of agenda, to have expected outcomes, or hope that particular things—I'm paraphrasing here of course, I haven't got my transcript in front of me. The court went on; there was cross-examination in relation to what my understand was. I had no knowledge, because I'd never met the minister, outside of being out at this estimates table. I had no understanding—no knowledge whatsoever—of what was in her mind when she sent letters to the commissioner.

But what I did know was that she was on a particular side of parliament, as you are, Senator, and I understood that people from one side of parliament take positions very much in opposition to the other side of parliament. That was the expression I was explaining to the court. I fully understood that; I understood what side of parliament the minister came from. The judge actually said, in his findings, Senator, as you would be aware, that he found it—his expression—'extremely unremarkable' that I would make those assumptions. He went on to
talk about how anybody in the community who follows politics to any extent is aware that there's one side of politics opposed to the other. He said it was nothing unusual for Mr Enright to form that view.

Senator WATT: So you did form that view?

Mr Enright: I formed a view that I knew what side of parliament the minister was on, and that clearly—as I've said in the context of in my extensive experience in lengthy police experience and in law enforcement of various kinds, and in regulatory experience—it is not unusual for people who either send or refer matters, or who ask for them to be investigated, to have preferred outcomes; to have an outcome that they might want or that they wish. In those circumstances, investigators, and experienced investigators like me, have to be very alive to that and very attuned to that and adjust their investigations in that way. That's the evidence I gave to the court.

Senator WATT: Putting that all together, you formed a view—based on your experience as an investigator, based on your experience that people make referrals for all sorts of these types of reasons—that Senator Cash made this referral in order to discredit, embarrass or politically harm Mr Shorten.

Mr Enright: I reject that.

Senator WATT: Well, that's what the judge found.

Senator O'SULLIVAN: That's not what Mr Enright said.

Senator WATT: The judge heard your evidence, and that's what he found.

Senator O'SULLIVAN: I don't think that's what Mr Enright said.

Senator WATT: It's a direct quote.

Senator Payne: Which is the direct quote?

Senator WATT: Mr Enright's assumption was that the referral was made—direct quote—'in order to discredit, embarrass or politically harm' Mr Shorten.

CHAIR: Perhaps you could table this document.

Senator WATT: I'm happy to get that for you.

CHAIR: The full document rather than just a standalone quote from this particular—

Senator WATT: I'm happy to get that for you.

CHAIR: If you could do that, that would certainly assist the committee.

Mr Enright: My response again is: I reject it. I had never formed that view, and that's not the evidence I gave to the court. The transcript will demonstrate that.

Senator WATT: I accept that that wasn't the evidence you gave to the court. You had a different version of events. But this is what the court found.

Mr Bielecki: But the court went on to comprehensively reject all of the AWU's claims that the investigation was affected by an improper political purpose or that it occurred at the minister's direction or dictation.

Senator Payne: Correct.

Mr Bielecki: In fact—

Senator WATT: And that's why I haven't alleged that.
Mr Bielecki: Sorry, Senator, just to finish: the decision acknowledges the ROC's status as an independent regulator and accepts that the ROC acted independently and free from any political purpose or direction. That's the key finding that has come from the judgement.

Senator WATT: So you regard this case as a massive victory for the ROC, do you?

Mr Bielecki: Stop putting words in my mouth. I'm just telling—

Senator WATT: Well, the way you're talking—

Mr Bielecki: I'm just telling you—

CHAIR: Senator Watt, stop hectoring the witnesses please.

Senator WATT: I'm not hectoring the witness.

CHAIR: You actually are hectoring.

Senator Payne: I'm not sure what the difference is between you reading parts of the judgement into the record and—

Senator WATT: I'm happy for him to do that. My question, therefore, is: do you see this as a magnificent victory for the ROC?

Mr Bielecki: No. I wouldn't put it in those words. We've had a finding of invalidity on one part of seven grounds. We need to consider that and take on the issues that His Honour has identified. What I am saying is: to the extent that you are focused on political issues or political drivers of the investigation, the court comprehensively rejected all of the arguments that were put on that basis or that had that character.

Senator WATT: Mr Bielecki, do you want to take the opportunity to apologise to members of the AWU and to taxpayers, who funded this entire circus?

Mr Bielecki: There's no need for an apology. We've had a court case. There's been a finding on one aspect of seven grounds, and we are considering that. What I might say, though, is that 90 per cent of the hearing days and probably over 80 per cent of the entire costs incurred in this matter were to deal with the allegations about improper political purpose or other improper purpose, all of which allegations were firmly rejected by the court. So, if we only dealt with the technical interpretation of section 320 of the act, and the case decision record, that could have been dealt with very quickly indeed.

Senator WATT: I must admit I expected a little bit more humility when I came in here tonight, after the court decision. Listening to you talk about how you won on this ground and won on that ground and you didn't lose on this ground and you didn't lose on that ground, it doesn't seem that you've really learned any lessons from this exercise whatsoever. What lessons have you learned?

Mr Bielecki: I reject that. I have acknowledged that we have a finding from the judge, in relation to one part of one ground, that we have an invalid investigation. There are issues that he has raised that haven't been ventilated in the court before that we need to consider. We're giving His Honour's remarks very careful consideration. I'm not sitting here saying His Honour is wrong or right or anything to that effect. I am simply saying that is the outcome of the hearing. The hearing is not yet over, and we're considering what His Honour has said with great care.

Senator WATT: Mr Enright, do you want to apologise for your actions here?
Mr Enright: I was actually expecting an apology from you, Senator.

Senator WATT: You are kidding!

Mr Enright: I genuinely expected an apology from you.

Senator WATT: You are kidding! You are in La La Land!

CHAIR: Senator Watt, please let the witness speak.

Mr Enright: The day we first appeared in this matter, aspersions were cast on members of the Registered Organisations Commission.

Senator WATT: In particular, you.

Mr Enright: I expressed my great confidence at that point in members of the Registered Organisations Commission and all the staff of the Registered Organisations Commission. I am even more confident now and appreciative of the quality of people we have in the Registered Organisations Commission who have been slandered by false assertions—

Senator WATT: No. It's mainly you, actually.

Mr Enright: My staff have been unfairly attacked by a number of people. This judgement has entirely rejected the allegations made about my staff and about me and about that impropriety, and I genuinely expected an apology from you.

Senator WATT: Your arrogance is astounding!

Senator Payne: Pot? Kettle?

Senator WATT: Mr Enright, a judge has found that you had no reasonable grounds for part of your investigation. And you're demanding an apology? What planet are you on?

Senator Payne: This is a willing exchange, and this is my first opportunity in my capacity representing the Minister for Industrial Relations in this committee—

Senator WATT: Because she can't come anymore.

CHAIR: It's the Attorney-General.

Senator WATT: You'd need a big whiteboard if she was still minister.

Senator Payne: I am the minister representing the Attorney-General—

Senator WATT: Yeah, I know. We know why that happened—because she couldn't be trusted.

Senator Payne: and the Minister for Industrial Relations.

Senator WATT: You haven't done what she's done.

Senator Payne: At paragraph 283, the judgement says:

However, there was no such evidence and no apparent support for the AWU’s proposition that in this respect Mr Enright was proactively accommodating the interests of Minister Cash.

That's fairly clear from the court, I would have thought, Senator Watt. I know that's a part that you don't want to talk about, but I do think that, in the interests of balance, it's important to have that on the record.

Senator WATT: You've just done that, so good for you. I'm not the one who has to get around parliament with a whiteboard in front of me, so I'm feeling okay about things at the moment—and nor do you; it's your colleague Senator Cash who has to do that. So, far from

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offering an apology to people, Mr Enright, you're actually demanding an apology from me and other Labor senators.

CHAIR: He wasn't demanding one.

Senator Payne: Mr Enright didn't demand anything, Senator Watt.

Senator WATT: He did!

CHAIR: He didn't demand an apology, Senator Watt. Don't put words in the witness's mouth.

Senator WATT: He said he thought he would be getting an apology from me. Is that right?

Senator Payne: I don't think that's a demand—unless that's how it work in the robust world of your faction of the ALP.

Mr Bielecki: Senator Watt, if you've studied the decision, as you seem to have, it would seem that His Honour made some specific observations and findings regarding Mr Enright. I will quote from paragraph 342 of his reasons. The judge said:

… the AWU has not presented any evidence or even suggested a case concept or narrative that provides a motive for the knowing and deliberate conduct that it ascribes to Mr Enright.

Further, the judge says:

There was no suggestion in the evidence that Mr Enright had any affinity, association or relationship with the Minister's side of politics … The evidence was that Mr Enright has held a range of positions and performed various roles serving governments of the Minister's political persuasion as well as those on Mr Shorten's side of politics.

He further said:

Mr Enright is a career public servant with a significant record of public service. So far as I am able to say from the evidence before me, he has had a successful and unblemished career. What he is alleged to have done is something that clearly would have been recognised by him as improper and, if discovered, highly prejudicial to his career as well as to his reputation. … As I have said, there is no suggestion in the evidence of such motivation.

His Honour went on to make the observation that the AWU's various attempts to impugn Mr Enright's conduct and character were harsh and implausible.

Senator PRATT: Well, perhaps he was just making those comments about the character of the minister.

Senator WATT: We'll get to some of the other things that the judge had to say about Mr Enright's behaviour. Again, it just staggers me that he is seeking an apology from anyone. Mr Bielecki, given the judge's findings that you had no reasonable grounds for this aspect of your investigation, why on earth should anyone trust your organisation with any more powers to go after unions?

Mr Bielecki: A party can lose part of a court case and still be trustworthy.

Senator WATT: The government is in the process of trying to hand your organisation immense new powers to go after unions even more than you have been doing up until now. And you should be trusted with those powers even though a judge has found you had no reasonable grounds for a part of your investigation?
Mr Bielecki: The fact of the matter is that, of the multiple grounds brought against us in this matter, on one part of one ground it was found that we invalidly made a decision to investigate. The other part of that ground, by the way, is a decision to investigate which the judge didn't disturb. As I've said, the issue that the judge has raised is something that requires us to consider both the section and the case decision record. I certainly accept that the decision gives rise to important public policy issues. But, at the end of the day, this is a court case that we have lost on one aspect of one ground. We are considering the position, and there is a limit to what I can say because the matter is still part-heard.

Senator O'SULLIVAN: How many cases have the CFMMEU lost? Can they be trusted to represent their members?

Mr Bielecki: I don't know the answer to that—

Senator WATT: What new powers are you giving them?

Mr Bielecki: but what I can say is that this is the only case the ROC has lost.

Senator WATT: And it's a bit of a doozy. It's the one that has the police being filmed by the media.

Senator Payne: There is a bit of selective reference to winning and losing cases, in my observation.

Senator WATT: Mr Bielecki, it's a bit of a doozy because you had the minister's office arrange for the media to be there to film your officers and the police going in there. That's why it's pretty interesting.

Senator PRATT: Which the government was using to smear the alternative Prime Minister.

Mr Bielecki: Senator Watt, I'm not here to give evidence on behalf of a ministerial office. That's not my role.

Senator WATT: I know—and we can't have them because that minister and her office can't be trusted to turn up to these estimates.

CHAIR: That is not correct.

Senator WATT: Well, why is she not here? Why did she get demoted? You know that she is an embarrassment—

CHAIR: There's only one bit of embarrassment going on here at the moment. Senator Watt, could you please continue with your questions.

Senator WATT: Mr Enright, I thought that there might be a bit of humility, that there might be an apology, because of a range of the findings and comments of the judge in this judgement. First of all, the judge found, at paragraph 164, that you thought this particular section of the act, which was about investigating matters more than four old, did not have any work to do and was not applicable in the case even though the case involved an investigation into matters that occurred 10 years ago or more. You had your own view about that and didn't bother getting legal advice. Why were you so sure that you didn't need legal advice to tell you whether in fact you had the power to go ahead in the way that you did?

Mr Enright: I reject that we didn't get legal advice. I had been dealing with this section for a number of years. It had never been interpreted in the way it has been interpreted in this
case. I was aware of, and had been getting advice about, that particular section over an extended period of time. In fact, I got formal legal advice from a Queen's Counsel. So I reject all of that.

Senator WATT: Again, the judge made the comment that you did not request your Senior Counsel, Mr O'Grady, to turn his mind to this particular section, which was the linchpin of the investigation.

Mr Enright: As it has turned out, part of this matter has been interpreted in that way. It wasn't a linchpin. I had been dealing with that particular provision in other cases and it had never been interpreted in this way before.

Senator WATT: So a provision which is quite clear that acts done more than four years after the commencement of the investigation—you thought it was fine to go ahead and investigate something that was 10 or more years old?

Mr Enright: Absolutely. Many of the matters we investigate are quite significant—10 years plus. There was a matter in the Federal Court, maybe a month ago, in relation to the Australian Hotels Association where matters went back far more than 10 years. What this particular section, section 320, says is that, after a period of four years, even breaches of the rules of any registered organisation—after the expiry of four years, they become compliant. That particular provision had never been interpreted in that way before. I was aware of that, and I made my judgements in accordance with my understanding of the law at that time. As the commissioner said, it's a matter that we're closely reviewing.

Senator WATT: How much money has the ROC spent on this litigation?

Mr Bielecki: The money we have spent on the litigation is to defend the proceedings. The amount we have spent is $928,000, excluding GST. As I have mentioned—

Senator WATT: So $1 million including GST?

Mr Bielecki: I haven't done the arithmetic.

Senator WATT: It is 10 per cent.

Mr Bielecki: I know what the GST rate is. I haven't got a calculator with me. I will point out, as I have already, that 90 per cent of the hearing days—nine of 10 days—were devoted to the allegations that the investigation was affected by an improper political purpose or occurred at the minister's direction or dictation. As it turned out, all of those allegations were comprehensively rejected by the court. The AWU had discovery of documents in relation to those issues for over a year before the case proceeded. If it had considered those carefully, it could well have come to the view that there was not much point in proceeding with those allegations. Our best estimate is that over 80 per cent of the cost that we've incurred in defending these proceedings—we didn't initiate them—relates to these allegations of improper political purpose.

Senator WATT: So $1 million on the litigation. How much has the ROC spent on the investigation overall?

Mr Bielecki: I don't have that information.

Mr Enright: It won't be very much, because we commenced the investigation on a Friday and the AWU issued its proceedings, I think, the following Tuesday or Wednesday.
Senator WATT: I'm presuming there was work done on the investigation before the raids occurred.

Mr Enright: There was lead-up. I haven't got the figures; we can take that on notice. But I am saying it won't be much in relative terms.

Senator WATT: I am talking about from the moment that Senator Cash referred this matter to you onwards.

Mr Enright: You use the term 'referred'. I actually commenced inquiries, as I said in evidence in the Federal Court about this matter, and staff of my commission assisted me, before Senator Cash wrote anything. Senator Cash provided two letters in one week. My evidence has consistently been that we commenced inquiries before Senator Cash had provided anything.

Senator WATT: Let's get it from that date then.

Mr Enright: From which date, sorry?

Senator WATT: From when you commenced.

Mr Enright: I commenced my inquiries on the date of the media articles relating to the $240,000-odd donations made by the AWU.

Senator WATT: We all know how those media articles started as well. So what I'm asking is: from the date of those articles, what was the cost?

Mr Enright: I'll take that on notice. That will be from that date to the commencement of the investigation, or a couple of days after it was commenced, on 20 October.

Senator WATT: So all up, between the litigation and the investigation, we are talking about more than $1 million. How can the ROC justify this expenditure of more than $1 million when it is based on an erroneous view held by Mr Enright, who didn't even seek legal advice on the issue? How can you justify that?

Mr Bielecki: The costs are justified because we defended a series of allegations raised against us. The majority of the time in the trial was occupied by allegations that the ROC's decision was affected by an improper political purpose.

Senator WATT: But the proceedings would never have been brought, would they, if the union didn't rightly have concerns that this investigation was partly based on grounds that, according to the judge, were not reasonable grounds. You can't say: 'It is not our fault. The union made this happen. They have racked up all of the costs. We won all but one point.' The entire thing started because there were no reasonable grounds for your investigation, or for part of it.

Mr Bielecki: If the challenge had been limited to the legal grounds, which, ultimately, the AWU has so far succeeded on, the cost of this would have been much less than it turned out to be.

Senator WATT: Are you going to appeal the judgement?

Mr Bielecki: The case is not over. It is premature to talk about an appeal. We are carefully considering His Honour's reasons.

Mr Enright: And I just want to reject your notion that we did not seek legal advice. We sought legal advice from a Queen's Counsel prior to commencing the investigation and in
relation to the investigation as to the grounds, and both senior and junior counsel were involved in various aspects of the matter before the investigations commenced. What more can you do except go to Queen's Counsel and seek advice?

**Senator WATT:** What more you can do is get Queen's Counsel advice, or any legal advice, about a provision that quite clearly validates certain acts after four years.

**Mr Enright:** And we did get such advice.

**Senator WATT:** From whom?

**Mr Enright:** From Queen's Counsel.

**Senator WATT:** On section 320?

**Mr Enright:** We have Queen's Counsel advice on section 320.

**Senator WATT:** In this case?

**Mr Enright:** No.

**Senator WATT:** Because you didn't think it was necessary.

**Mr Enright:** Well, because my view had been based on my understanding of the operation of that section over the period of six years and various court judgements about the operation of that section. My understanding was quite clear. I've given that evidence.

**Senator O'SULLIVAN:** Just a clarifying question: that four-year provision was introduced in 2009 under the Labor government; is that correct?

**Mr Enright:** I can't specifically recall now. I could take it on notice. I can't specifically recall when it was introduced. I became involved in industrial relations issues in 2013, and I was aware of it from that time, so I could take it on notice.

**Senator O'SULLIVAN:** My understanding is that it was the Labor government in 2009 that introduced the legislation, which means that something the union did must be taken to be correct if it was done more than four years ago—so, from that point. I just think it's an important context to have in this discussion and the prosecution that Senator Watt's hearing.

**Mr Bielecki:** Up until this judgement, the operation of that section was considered to be confined to issues around a breach of rules, as opposed to a breach of officer's of duties.

**Senator WATT:** Paragraph 319 of the judgement states:

...if Mr Enright believed that s 320 was inapplicable to the Investigation that he commenced, his belief was plainly wrong. But, if Mr Enright is to be believed, the extent of his error is deeper still. That is because the tenor of Mr Enright's evidence suggests that he took the view that the applicability of s 320 of the RO Act was not even arguable.

Mr Bielecki, what steps does the ROC intend to take to ensure that Mr Enright's 'errors and plainly wrong beliefs', in the words of the judge, do not result in registered organisations spending large amounts of members' money defending actions by the ROC in the future?

**Mr Bielecki:** You're conflating separate issues. We didn't cause this expenditure. We defended a case that was brought against us.

**Senator WATT:** And why was that case brought against you? It was because of your organisation's actions.

**Mr Bielecki:** The case that was brought against us related to—
Senator WATT: Do you think the union just invented legal actions for nothing?

Mr Bielecki: The position is that we were presented with a wide-ranging challenge to a decision to investigate. We defended that, and in the result the judge has come to a view that on one aspect of one ground they couldn't have a reasonable basis for commencing the investigation. His Honour's views raised issues that we hadn't previously thought that section 320 applied. And, as I've said to you, in terms of your original question, we of course are studying what His Honour has said very carefully.

Mr Enright: Can I add that there are 368 provisions, sections, in the Registered Organisations Act. As you've heard today from other organisations, the legislation is not an easy area, and people like me take a great deal of time and effort in trying to understand and apply them. In this particular case, in relation to this particular provision, I was aware of various Federal Court discussions in various court matters about this particular provision—that it had been interpreted in a particular way—and I subscribe to that. And I was fully aware of the way that had been interpreted. It's not been interpreted in a different way. Courts interpret matters the way courts do. If everyone agreed to the interpretation of a particular provision, we'd be living in a different world. It is not a simple area of legislation.

Senator WATT: So, the ROC doesn't intend to take any steps to ensure that Mr Enright's 'errors and plainly wrong beliefs' don't cause similar problems in the future?

Mr Bielecki: That's not my evidence.

Senator WATT: I'm asking you.

Mr Bielecki: I'm asking you not to put words in my mouth. What I said is—

Senator WATT: I have asked you: what steps do you intend to take?

Mr Bielecki: The steps are, as I've said now several times, that we will read the judgement very carefully, analyse it very carefully, take advice in relation to the issues it raises, and that will inform our future steps.

Senator WATT: Can I take you to paragraph 339 of the judgement.

Mr Bielecki: I don't have the judgement with me.

Senator WATT: I'll read it out to you:

… I have already addressed—

This is the judge speaking—

my concern about the reliability of the evidence given by Mr Enright in relation to why he refused to disclose to Maurice Blackburn the second referral letter. The evidence given—

by Mr Enright—

involved inconsistency and was not plausible. I have also found that Mr Enright's evidence about obtaining legal advice about s 320 of the RO act involved him reconstructing events.

So we've got a highly paid senior official found by a judge to be giving evidence that 'involved inconsistency', was 'not plausible' and involved 'reconstructing events'.

CHAIR: Have you agreed to table that?

Senator WATT: Yes.

CHAIR: We should get it sooner rather than later.
Senator WATT: Understood. Have you counselled Mr Enright about the evidence that he provided?

Mr Bielecki: Mr Enright has obviously also analysed the decision. His Honour did make some observations. From my recollection, they related to things that Mr Enright didn't fully recall at the time. It was at the end of two days of cross-examination. As I mentioned previously, His Honour made a number of very positive findings about Mr Enright in relation to the overall investigation.

Senator WATT: All right. Let's accept that then. Do you accept that the giving of inconsistent and implausible evidence to a court is a very serious matter?

Mr Bielecki: Obviously it's something that every witness would wish to avoid.

Senator WATT: Have you spoken to Mr Enright about that finding from the judge?

Mr Bielecki: I've had general discussions with Mr Enright about the decision, but, as the case is not yet over, I haven't had cause to embark on the course you're suggesting.

Senator WATT: Do you intend to counsel Mr Enright about giving what the judge found to be inconsistent and implausible evidence to a court?

Mr Bielecki: Once we've finished our analysis of the decision and the case is over, it will be clear what needs to be done.

Mr Enright: Can I just add: in terms of reconstructing evidence, when I gave my evidence at the Federal Court for two days, of course I was reconstructing my evidence from something that had occurred two years ago. That's what you do when you are giving evidence: you're asked a question about something that occurred two years ago and you, to the best of your recollection, reconstruct what your response is.

Senator WATT: That might be one way of putting it, but the judge gave, as an example of your reconstructing of events—this is still at paragraph 339:

Mr Enright's initial evidence that a reason for chasing the Minister's second referral letter was the fact that a hard copy of the first referral letter had taken 10 days to arrive, a matter he—

You—

could not have known of at the time when he made enquiries with the Minister's office about the second referral letter.

Mr Enright: Can I entirely agree with you, and can I say to you that I entirely agree with the judge at this particular time. The evidence that I gave—what happened was that the media release came out, and I contacted the department because the media release said that a letter had been referred to the Registered Organisations Commission. I contacted the department, and the department said, 'You should contact the minister's office.' So I contacted the minister's office and said: 'I'm reading in the newspaper today that a letter's been sent from the minister's office. Can anyone help me? Is there a letter, and where is it?' And things went on from there. What I said to His Honour was that that letter, which we read about in the media reports, did not arrive at the ROC in hard copy, which is the way it was sent, for 10 days. His Honour said to me, 'You couldn't have known that when you were contacting the minister's office on the day.' I said: 'Of course not; I couldn't have known that, Your Honour. All I'm saying is that it did not arrive for 10 days.'

Senator WATT: Okay. Paragraph 340 of the judgement states:
It was unwise for the person about to embark upon an independent investigation in which he recognised Minister Cash to have a political interest, to have had direct contact with the Minister's office. In the context of Mr Enright's concession that he understood that the Minister had a political agenda in sending the referral letters, the contact he had with the Minister's office must have been understood by him as capable of being perceived by others as compromising the Commission's independence.

What action, Mr Bielecki, does the ROC intend to take against Mr Enright in response to his 'unwise conduct' to use the words of the judge?

**Mr Bielecki:** As I've said, we are analysing the decision in detail. When the case is over and everything is on the table that will then be the time to determine what future action needs to be taken, if any.

**Senator WATT:** And what action does the ROC intend to take against Mr Enright for having contact with the minister's office when that had the potential to compromise the commission's independence.

**Mr Bielecki:** I repeat my previous answer.

**Senator WATT:** Do you accept that this whole affair has severely damaged your organisation's independence?

**Mr Bielecki:** I accept that critics of the organisation have used the various of the allegations made in the course of this investigation to criticise and undermine the ROC.

**Senator WATT:** So you are utterly unrepentant about what happened here?

**Mr Bielecki:** Senator, they're not my words.

**Senator WATT:** I know. I'm asking you: are you just utterly unrepentant?

**Senator O'SULLIVAN:** Chair, this is disorderly. It's repeating questions.

**Senator WATT:** I'm repeating the question because I didn't get an answer to the first question. Mr Bielecki—

**CHAIR:** Well, I think you're interrupting him, to be fair.

**Senator WATT:** Mr Bielecki, I've already asked whether you're prepared to apologise. That turned into me being asked to apologise, which I still find completely bizarre. Are you in any way repentant for the actions of your organisation?

**Mr Bielecki:** Senator, I regret that we've lost this case on this ground.

**Senator WATT:** Wow!

**Mr Bielecki:** Of course I do—

**Senator WATT:** So the only problem here is—

**CHAIR:** Senator Watt—

**Senator Pratt interjecting—**

**CHAIR:** Senators, can we please let the witness answer the question and not hector the witness.

**Senator WATT:** So you're fine, except for the fact that you lost the case.

**Mr Bielecki:** The case isn't yet over, and our analysis of the reasons is not yet over.

**Senator WATT:** So you're upset, disappointed, whatever word you want to choose, that you lost the case, but not at all about the actions of your organisation?
Mr Bielecki: I was surprised, Senator, at the basis on which we lost the case, but I accept his honour's reasons, and they stand as they are. The investigation, as Mr Enright has already said, was commenced on a sound basis at the time it was commenced on our understanding of the law at that time.

Senator WATT: You must concede that for organisations like yours—and, let's face it, you were set up to go after unions—who are given immense powers it is critical to maintain your independence. We've got a judgement here which has found one of your most senior officers engaged in behaviour that—again, using the words of the judge—'must have been understood by him as capable of being perceived by others as compromising the commission's independence'.

Mr Bielecki: I accept the first part of your question, Senator, that it is critical that we maintain our independence and, indeed, the court has found that we're an independent regulator and that we acted independently and free from any political purpose or direction. From that point of view, that's the finding the judge made.

Senator WATT: How can anyone have any faith in your organisation's independence?

Mr Bielecki: Senator, I can't answer questions on behalf of 'anyone'. What I'm saying is we are committed to our independence, and we jealously guard that, and the finding of the court in this matter supports that.

Senator WATT: So you 'jealously guard' your independence by having your right-hand man engage in behaviour could be 'perceived by others as compromising your independence'?

Mr Bielecki: Senator, many things can be perceived by others. The fact of the matter is the judge made no adverse finding about Mr Enright.

Senator WATT: The final paragraph I want to take you to in the judgement is paragraph 341, where the judge stated that 'aspects of Mr Enright’s conduct can be characterised as overly enthusiastic or exuberant'. We've now heard that Mr Enright's 'overly enthusiastic or exuberant conduct' has led to taxpayers racking up about $1 million in legal costs defending legal action that was brought because of your investigation that has, at least in part, been found to be invalid. God knows how much money has been racked up by the union involved and their members' money spent in this litigation. What action does the ROC intend to take to rectify this situation for AWU members?

Mr Bielecki: It was a decision for the AWU to bring the case. It was their decision to bring the case on wide grounds, on numerous grounds. The AWU changed the grounds on which they brought the case during the period leading up to the case. The AWU changed the grounds on which they brought the case after the case started. We were simply left to deal with the allegations that were made against us and, as I've said to you now several times, the majority of those allegations, which relate to whether or not we were motivated or affected by an improper political purpose, were comprehensively rejected by the court.

Senator WATT: So if a union is faced with this situation in the future, a union that is the subject of an investigation by your organisation, an 'overly enthusiastic or exuberant' investigation that is found to be at least partly based on invalid grounds, they should just cop it sweet?

Mr Bielecki: Senator, you are mischaracterising what the judge said. He didn't say it was—
Senator WATT: You keep saying—

Mr Bielecki: He didn't say it was an exuberant—

CHAIR: Senator Watt, please let the witness answer.

Senator WATT: You keep saying it was the union's decision.

CHAIR: Senator Watt! Can you please stop interrupting the witness; let the witness speak.

Mr Bielecki: The judge didn't say the investigation was exuberant. The judge said that in some places Mr Enright's evidence was exuberant.

Senator WATT: His conduct was exuberant.

Mr Bielecki: You've got the judgment in front of you.

Senator WATT: Faced with this situation in the future, a union with this kind of an investigation should just cop it? It shouldn't challenge it in the courts? You keep saying that it's the union's fault, that it was the union's decision to bring this legal action—

CHAIR: The witness didn't say that.

Senator WATT: He has; he's repeatedly said the union made the decision.

CHAIR: He didn't tell us it was the union's fault.

Senator WATT: He's repeatedly said—

Senator O'SULLIVAN: The union brought the action.

CHAIR: The union did bring the action.

Senator WATT: Mr Bielecki has repeatedly said that it was the union's decision to bring this litigation. I'm asking you does that mean that in this situation in the future unions shouldn't bring litigation to challenge investigations they consider to be invalid?

Mr Bielecki: No, not at all. If a registered organisation considers that an investigation we are bringing is invalid for any reason, of course they have a right to challenge it.

Senator WATT: Yes. And so, given they did challenge that and given the investigation has been found—

Senator DAVEY: Only on one ground.

Senator WATT: Do you think that doesn't matter?

Senator DAVEY: No, it matters absolutely, but my understanding is that, out of the whole case, the one ground that they found was invalid was due to a technicality in the form of the deeming rule.

Senator WATT: It's not a technicality. It's the law.

CHAIR: If we could not debate across the table. We're here to speak to the witnesses.

Senator DAVEY: The court also found that another ground for the investigation was entirely legitimate.

CHAIR: Do not speak across the table.

Senator WATT: Mr Bielecki, does that mean the next time a union faces an investigation from your organisation they should say, 'It's okay; it is just a technicality.' Is that the argument that should be made?
Mr Bielecki: I don't really follow you, Senator. If a registered organisation has the view that there is some defect in an investigation that we've launched, of course I respect their right to challenge it.

Senator WATT: Senator Davey is passing this off as a 'technicality'.

Mr Bielecki: I'm not speaking for Senator Davey.

Senator WATT: And I'm asking you should a union in future, when faced with action by your organisation, which we know that you're are going to do, just come along and say, 'Look, it's just a technicality,' to follow Senator Davey's argument?

Mr Bielecki: I think any registered organisation who wants to deal with an investigation that they have a problem with should take their own advice and make the decision they want to make at that time.

Senator WATT: And what action do you intend to take to make sure that Mr Enright is not 'enthusiastic and exuberant' about pursuing cases against unions in the future?

Mr Bielecki: That wasn't what the judge found.

Senator WATT: He found that Mr Enright's conduct can be characterised as 'overly enthusiastic or exuberant'.

Mr Bielecki: I don't have the judgement to have the full context in front of me, but I don't think that relates to the investigation itself.

Mr Enright: You will see at paragraph 346, relating to the third allegation, his honour said:

… that, in commencing the Investigation, Mr Enright acted for an improper political purpose must be rejected.

Senator WATT: I haven't alleged that you've done it for an improper purpose. All I'm saying is that the judge found that you were 'overly enthusiastic or exuberant' in your conduct.

Senator DAVEY: But you can't selectively cherrypick. You've either got to accept that Mr Enright did not act for an improper purpose—

Senator WATT: I haven't alleged that he did.

Senator DAVEY: You virtually are by cherry picking parts of the report.

Senator WATT: Your words are 'cherry picking'—

Senator O'SULLIVAN: You are asking that he be reprimanded. Come on!

Senator WATT: The judge found that Mr Enright's conduct was 'overly enthusiastic or exuberant'—

Senator DAVEY: But not for an improper purpose.

Senator WATT: that he was 'unwise' to embark on an investigation when he recognised that the minister had a political interest, and that his behaviour must have been 'capable of being perceived by others as compromising the Commission's independence'. They're pretty serious findings from a judge.

Mr Enright: I reject that, Senator. That's not true at all.

Senator WATT: I'm quoting directly from the judgement.
Mr Enright: You're not quoting in context, Senator. What happened was I attended the minister's office, in company of the commissioner, on a routine meet and greet. That's the context we're talking about here.

Senator WATT: Mr Bielecki, does the ROC intend to ensure that Mr Enright is not directly involved in any matters concerning the AWU in the future, given his conduct in this matter?

Mr Bielecki: No.

Senator WATT: So it's fine for him to do another investigation into the AWU, despite all of this?

Mr Bielecki: No, Senator, I didn't say any of that. I just answered your question.

Senator WATT: But you're not going to stop him from being involved in matters concerning the AWU?

Mr Bielecki: No.

Senator WATT: You don't think that would help a little bit to salvage the perception of independence?

Mr Bielecki: The case is not over. We're studying the reasons very carefully. There's still a way to go with all of this.

Senator WATT: How do you expect unions and union members to have any confidence in Mr Enright properly performing his duties, given the findings of the Federal Court about his evidence and his actions?

Mr Bielecki: The vast majority of registered organisations we deal with, including the vast majority of unions, have a very productive and useful relationship with the ROC and Mr Enright.

Mr Enright: I have a very productive working relationship with very many unions and very many senior officials of many unions, who I engage with extremely regularly in a very positive and productive way.

Senator WATT: So is it just the ones who experience your overly enthusiastic or exuberant conduct who have a bit of an issue with you, is it?

Mr Enright: I reject that. I meet with members of registered organisations, employer and employee organisations, including very senior officials of registered organisations, and I enjoy an extremely productive working relationship with very many union officials and officials of employer organisations.

Mr Bielecki: That includes meetings with the AWU.

Mr Enright: Including with the AWU.

CHAIR: I think Senator Davey has a clarifying question.

Senator DAVEY: Drawing the long bow and selectively choosing things is virtually like saying that the CFMMEU should be ruled out of ever being involved in on-site safety work because of the findings that have been brought against the CFMMEU in other court jurisdictions. We need to be very cautious about cherry picking and targeting people for doing their job across the broader picture.
Senator WATT: It's more than just doing his job. If you read the judgement, it's more than just doing his job.

Senator O'SULLIVAN: I have read the judgement.

CHAIR: I don't have the judgement before me, so, Senator Watt—

Senator WATT: I encourage you to have a look at it.

CHAIR: Senator Watt, thank you for my bedtime reading.

Senator DAVEY: I've read judgements about the CFMMEU. I don't hear you making the same judgements about judgements that were brought against them.

Senator WATT: You might not have noticed, but the CFMMEU is not here. This is about the Registered Organisations Commission, who are spending their entire life going after unions. That's who we are here to examine.

Senator DAVEY: You should hold people to the same level of accountability.

CHAIR: We do need a break. We're going to break in seven minutes time because Labor asked for an extra five minutes. I want people to be aware of this.

Senator WATT: Just to wrap this up, Mr Bielecki, turning to the future, if the government gets its way, your organisation is going to be given massive new powers to go after unions. How can anyone have confidence that your organisation will be independent in how it uses these powers, given the experience to date, particularly in this AWU case?

Mr Bielecki: It's easy. We are independent, and nothing the judge said suggests otherwise.

Senator WATT: I notice that you haven't contested my characterisation that you are going to be given immense new powers to go after unions. Do you accept that?

Mr Bielecki: If you're talking about the ensuring integrity bill—

Senator WATT: Yes, I am.

Mr Bielecki: That will give us standing to make applications to the Fair Work Commission and/or the Federal Court of Australia. The powers would be that we simply get standing to make applications to those bodies in relation to the matters canvassed by those bills.

Senator WATT: To go after unions.

Mr Bielecki: As far as I am aware, those bills relate to registered organisations, so that includes employer associations and, in any event, it is a matter for the parliament to make the laws it wishes to make.

Senator O'SULLIVAN: It is currently before a committee.

Senator WATT: We do have other questions we might put on notice.

CHAIR: If you could, to help facilitate the time.

Senator PRATT: Mr Bielecki, are you aware that the AFP are currently reviewing its search warrant procedures when they exercise them on behalf of other government agencies?

Mr Bielecki: All I'm aware of is what I've read in the media. My understanding is that they're reviewing search warrants in relation to media, in particular. I don't know that it's wider but I don't know.
Senator PRATT: No, it makes specific reference not just in relation to the media but their capacity to exercise search warrants on behalf of other agencies. When we quizzed them about this in estimates on Monday—

Senator Payne: To be fair, Senator Pratt, for those who didn't have the pleasure of that engagement as well—

Senator PRATT: Yes, you were certainly there.

Senator Payne: It's fair to say that the commissioner indicated that he had former Deputy Commissioner John Lawler engage in a review for him, for new Commissioner Kershaw, on sensitive matters in which the AFP were asked to be involved. There is a number of subclauses or a number of terms of reference for former Commissioner Lawler under that, one of which pertains to this area, but it is a larger piece of work.

Senator PRATT: Yes, there are plenty of other reasons for the AFP to be reviewing their search warrants. There are other matters to do with this parliament. But explicit within that is their execution of search warrants on behalf of other agencies. The only sensitive politicised ones that seems to be on the public record are these decisions in relation to the ROC.

Senator Payne: I would have thought there's a number of matters relating to recent AFP search warrant executions which were discussed at that hearing on Monday, which are on the public record.

Senator PRATT: Yes, there are certainly others done on behalf of other agencies in relation to parliamentary privilege and the like. But I did want to ask you, Mr Bielecki, if you have had any discussions yet with the AFP about their confidence in the execution of search warrants on your behalf or looking at the processes in which you engage?

Mr Bielecki: No.

Senator PRATT: Not at this point?

Mr Bielecki: Not at this point.

Senator DAVEY: Just one final question. Because Senator Watt had so stringently suggested that the ROC only goes after unions, can you actually tell us what organisation has been the most recently penalised by the courts through the ROC's actions?

Mr Bielecki: The most recent action was an employer association, the Australian Hotels Association, Queensland branch.

Senator DAVEY: So you don't just go after unions?

Mr Bielecki: Not at all.

CHAIR: Thank you very much, Mr Bielecki and Mr Enright. We do appreciate you coming along this evening.

Proceedings suspended from 21:33 to 21:45

Safe Work Australia

CHAIR: I welcome representatives from Safe Work Australia, including Ms Baxter, Chief Executive Officer. Ms Baxter, do you wish to make an opening statement?

Ms Baxter: No, thank you.
Senator PRATT: Thank you, Ms Baxter. How many workplace fatalities have there been this year to date?

Ms Baxter: As at 21 October—and I believe my colleague Ms Raven will have a more up-to-date figure—there have been 121 work related traumatic injury fatalities.

Senator PRATT: Do you have a breakdown of the industries in which these tragic fatalities have occurred?

Ms Baxter: Yes, we do.

Ms Raven: In terms of the detailed breakdown of fatalities by industry of workplace, I can provide that data as at 10 October, which is a total of 121 Australian workers.

Senator PRATT: That'll be fine.

Ms Raven: For transport, postal and warehousing there have been 41 fatalities. For agriculture, forestry and fishing there have been 28. For construction there have been 17. For mining there have been eight. For electricity, gas, water and waste services there have been six. For public administration and safety there have been six. For manufacturing there have been five. For administrative and support services there have been two. For arts and recreation services there have been two. For other services there have been two. For professional, scientific and technical services there have been two. For wholesale trade there have been two. That's the total of 121.

Senator PRATT: Thank you. I note that those statistics in relation to transport workers won't surprise Senator Sheldon, unfortunately.

Senator SHELDON: No. I thought they were actually a bit low, but I have a question to ask about that.

Senator PRATT: In terms of the trends for this year versus previous years, how are we tracking in prevention of these tragic accidents and incidents?

Ms Raven: In 2018 there were a total of 144 workers fatally injured at work. In the previous year, 2017, there were 189 workers fatally injured at work. If we look at the fatality rate, which is the number of fatalities per 100,000 workers, in 2018 the fatality rate was 1.1 fatalities per 100,000 workers, and this is the lowest rate in the 15-year time series and a decrease of 52 per cent since 2009.

Senator PRATT: In terms of the drivers of prevention for these tragic deaths, is there a trend within those different parts of the economy where those decreases can be seen in terms of particular industries working harder to prevent workplace death and injury?

Ms Baxter: There are certainly occurrences in a number of different industries across Australia where there are improvements in worker safety. I think the issue for us at Safe Work Australia is we are aware of those improvements, but it's not possible for us to pinpoint a reason or an exact cause. These are multifactor issues that are occurring here and that's why we're seeing the improvements. We can't really point to, for instance, the work, health and safety laws or—

Senator PRATT: No. I guess I'm asking whether there are particular industries that have done better than others in improving their fatality statistics?

Ms Raven: I can provide some examples using the 2017 figures compared to 2018 figures. Regarding the agriculture, forestry and fishing industry, that decreased from 16.8 in
2017 to 11.2 in 2018. Transport, postal and warehousing decreased from 8.3 in 2017 to 5.9 in 2018.

Senator PRATT: Are you able to provide that over time as a statistical trend? That would be very good, because I know they're small amounts of data and it would be hard, really, to tell whether there are cultural or—as you, Ms Baxter, reflected on—other particular drivers for the change or whether it's good fortune.

Ms Baxter: Yes.

Senator PRATT: On a breakdown of the industries in which serious injuries have occurred, I imagine the statistics are somewhat larger. Do they follow the same kind of trend?

Ms Raven: Certainly both the rate and the number of serious workers compensation claims have been trending downwards.

Senator PRATT: Are you able to give us an overview of the industries in which serious injuries have occurred, and the numbers?

Ms Raven: For that particular data, I do have some high-level examples. We can take on notice to provide you with more detailed data for the industries. If we look at the industries with the highest frequency rate of serious workers compensation claims, that frequency rate is calculated based on claims per million hours worked. Agriculture, forestry and fishing had 8.6 serious claims per million hours worked in 2017-18, manufacturing had 8.1, and transport, postal and warehousing had 7.7.

Senator PRATT: Thank you. In terms of the agriculture sector and other areas included in those statistics, have you done an analysis of the number of migrant workers or people who are on temporary visas who work within those relatively high-risk industries?

Ms Raven: The data that we have available to us at Safe Work Australia is from the national dataset for compensation based statistics, and that data is provided by jurisdictions. Our ability to look at the dataset for workers on those types of arrangements would depend on their eligibility for compensation and whether a compensation claim was made and accepted. It is something that we can certainly take on notice and, if we can provide further detail—

Senator PRATT: Just to be clear, as Safe Work Australia, are you aware of all injuries or are you only aware of injuries where someone has an eligibility for workers compensation?

Ms Raven: Our datasets are based on claims for compensation.

Senator PRATT: How do you track injuries that occur to people who don't have access to workers compensation? Who tracks that? Why is it that they don't have access to workers' compensation? And how can you work out what's risky, as Safe Work Australia, if you're not tracking all people in the labour market?

Ms Raven: There is a range of other data sources available that are not collected by Safe Work Australia. They're collected by other organisations and groups that provide some insights into all work related injuries. For example, the Australian Bureau of Statistics undertakes a work related injury survey. The sample sizes for that survey are quite small, so it's not necessarily a true reflection of the picture of injuries. I think it would be fair to say that the data we have, whilst it is limited to compensation claims, does provide an indication of particular types of industries and occupations that have a higher incidence and frequency of claims.

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Senator PRATT: Might it be fair to say, therefore, that, in industries like agriculture where you might have a larger number of people working informally in the economy, the workplace injury rate and the death rate would be higher than the statistics you've revealed this evening?

Ms Raven: For the compensation data, we know that the data only includes those that are eligible for compensation. So yes, that is a true statement, in that there could be others that have been injured at work that are not included in that dataset. Safe Work Australia doesn't have any role in determining eligibility for workers compensation in the jurisdictional workers compensation schemes—

Senator PRATT: No, no—it's not so much that. Your role is, of course, to address safety in the workplace, but if you don't have access to the true data of where the danger in workplaces is—

Ms Baxter: We are dependent upon the jurisdictions to provide us the data. We are not a collector of data as such; we're more a collator of data. So whatever the jurisdictions are able to collect and then provide to us is what we can work with.

Senator PRATT: If you are trying to assess risky occupations—well, risk in agricultural sectors—you're therefore not relying just on the fatalities and serious injuries. What other data sources are you going to, in terms of assessing risk and the nature of risk in particular occupations?

Ms Raven: Just to clarify a point: with the fatalities dataset, it is—

Senator PRATT: Everyone.

Ms Raven: Yes. It's not, obviously, based on eligibility for compensation in any way. As I said before, we do look at data holdings at the AIHW or ABS. Where additional research is needed, we may commission pieces of research to have a look at particular industries or issues as Safe Work Australia members ask us to.

Senator SHELDON: I'm just going through the dataset. You mentioned the number of fatalities in transport and the related dataset that you had. You mentioned 41. In the case of deaths, do those include fatalities from truck crashes per se? Do you use that dataset? If there is a truck crash which involves either a truck driver being killed or another person involved in a truck incident being killed, does that go to your dataset?

Ms Raven: I think it would depend on the circumstances around that particular incident or accident, but our traumatic injury fatalities dataset includes workers that are fatally injured at work and also bystanders.

Senator SHELDON: When it's a worker, is the worker a contractor in that circumstance or an employee?

Ms Raven: That particular dataset isn't based on an employment arrangement; it's based on a range of data sources. So, to compile that data, we look at media reporting around fatalities. We're reliant on fatality reporting from the WHS regulators in each of the jurisdictions. We also access the National Coronial Information System. So there's a range of things that go into informing the compilation of that dataset.

Senator SHELDON: I appreciate you are collating this information from other state jurisdictions—if I've got that correct. In the case of serious injuries, do you include insurance...
claims for third-party involving a truck, for example? The reason I'm highlighting a truck is that there are many vehicles that are involved in commercial work. Do you have a truck or do you have other vehicles that are commercial vehicles that are involved when you're correlating the number of serious injuries that occur within that particular type of work?

Ms Raven: The number of serious injuries within that type of work or industry is based on either the worker's occupation or the employer's industry. It's not to do with whether it's a contracted arrangement or anything like that.

Senator SHELDON: If you're a truck driver and you're operating for, say, a major retailer and you're contracted to a transport company and your contract is as an owner-driver—you own your own rig—and you get injured whilst you're out on the road and you get seriously injured, under what circumstances would that be included and under what circumstances would it not be included in your statistics for serious injury?

Ms Raven: Within the national dataset, it would be included if that particular worker was eligible for workers compensation and made a claim to their workers compensation scheme.

Senator PRATT: What if they were self-insured or not insured at all?

Ms Raven: I don't know exactly what you mean by that, in terms of their insurance.

Senator PRATT: They're self-employed, so they don't have workers compensation. If they're eligible for compensation, it'll only be if they've insured themselves.

Ms Raven: As I've said, that particular dataset that we have is based on accepted workers compensation claims in each of the jurisdictions, so it's based on those that are covered by workers compensation schemes. If they're not part of those schemes—

Senator SHELDON: I want to highlight a substantial deficiency in the figures in the road transport industry. A third of road transport commercial vehicles are considered as owner-operators. The vast majority—I wish I could quote where the figures come from, but I can say that I'd be confident that it's well over 99.9 per cent—are not on workers compensation. If there is 0.1 per cent, they're probably employees being called contractors. Those people would not be included in your dataset. That's a significant question that is being raised about what is one of the most dangerous industries. What is the dataset giving us when we're trying to make decisions as a government, an opposition or the various state jurisdictions? I will just put you on notice that there is a suggestion about how that could be dealt with, because that is a serious failing in the keeping of data. I appreciate there are limitations on the data that's passed on, but there should be a proactive way of collecting that data.

Ms Baxter: As well as the datasets that we've got, I might just clarify: the traumatic injury fatalities database that we hold will pick up every fatality. It doesn't matter how someone's employment relationship is characterised, those are picked up in that database. But, as well, we have the Australian strategy, which is a 10-year strategy running till 2022, and one of the priority industries that has been identified in that strategy is road transport, logistics and warehousing. Certainly, the work health and safety regulators around Australia are very aware of the fact of the high risks involved in road freight transport, and we have had discussions about it at Safe Work Australia, and I'm aware that a number of regulators take action and take initiatives to address the hazards and the risks that they're seeing in that industry.

Senator SHELDON: I appreciate the issue with regard to fatalities. You explained that very clearly to me. On the situation regarding serious injuries and, I might add, other injuries,
there is not a set of figures that actually includes over a third of the workforce, because, if they're not on workers comp, they're either self-insured or not insured because they're owner-operators—and there are a multitude of reasons for that. There's a third of the workforce not being included, so, when you are trying to make decisions about particular industries which are dominated, in particular, by owner-drivers, because of the nature of those markets and of how they operate—it's hard to make a decision about what is a proactive way to deal with injuries. I'd like you to take on notice to come back to me to say how you're going to include a third of the road transport workforce that's not now included for serious injuries and other injuries. I think that's pretty fundamental.

Ms Baxter: We can certainly have a look at that and take that to our members. As you may or may not be aware, Safe Work Australia is not me. It's not my staff who are sitting here this evening. Safe Work Australia is actually our members body, which is constituted of representatives from each of the jurisdictions and also representatives from employer organisations and employee organisations. So I'd be very happy to have a look at it back in the agency and then take something forward to members for their consideration. It's they who make the decisions about what we do and what we pursue.

Senator PRATT: In that context, how do you manage representation from people who are self-employed within a work safety context, giving them a voice and representation within the policy development of Safe Work Australia?

Ms Baxter: For instance, one of the members of Safe Work Australia is the Australian chamber. They have a number of peak organisations that have membership of their body. It's also possible for people to make representations through their jurisdiction members as well. So their voices can be heard in those ways.

Senator SHELDON: Senator Payne, I am not questioning the accuracy of what has been put to me, but could I put on notice whether the minister could consider appropriate steps for this to be taken to a higher level—maybe COAG—because I know these conversations have been occurring in state and national jurisdictions for considerable time beyond this government. So I think, particularly in light of the serious injuries that we are seeing in the sector, let alone the fatalities, that are not being recorded, they could be considered.

Senator Payne: Thank you, Senator Sheldon, and thank you for the issues that you've raised. I'll take that on notice and also take it up with the minister.

Senator SHELDON: Thank you.

Senator PRATT: Senator Sheldon is going on to ask some questions in the context of the gig economy, but, before leading into that, I wanted to ask: if someone is participating in the gig economy—and many of those people are driving cars, bicycles, et cetera—are you picking up those injuries in the context of transport injuries, or are you not really able to tell if someone has clocked on or off work at the time they are injured?

Ms Raven: Whether they are included in the data set would depend on whether they were eligible for compensation and whether a claim was made or accepted.

Senator PRATT: Is there anyone in those statistics for serious injury or death who is part of the gig economy and working in transport?

Ms Raven: Certainly within the national data set for compensation there may be. I would need to take on notice whether we could potentially identify them. It may be that it would be a
subindustry or type of industry—for example, a food delivery driver category. We could provide data at that level, but it would be difficult to tell whether people were included, and that would depend on their employment arrangements.

**Senator PRATT:** Okay. In terms of you making an assessment on how safe this sort of work is, which Senator Sheldon is going to follow on, how do you know if your statistics are reliable if these workers aren't eligible for workers compensation?

**Ms Raven:** That is a good question. As we have said before, we are reliant on data that's provided from the jurisdictions and, in terms of the type of work that we undertake, it is determined by priorities or issues put forward by Safe Work Australia members. A couple of years ago with did do some work with the CSIRO, having a look at potential WHS and workers compensation issues, and certainly gig work was something that was included in that particular report. Safe Work Australia members have considered the findings of that report and have not tasked the agency with doing any particular follow-up work in relation to that at this point.

**Senator PRATT:** Thank you. That's helpful.

**Senator SHELDON:** I have already asked for one matter to be considered by the minister. Could I ask you to come back to us about raising it with your members on the issue in regard to the gig economy. I am not saying it is less serious. In actual fact there is a substantial overlap in some of the requests I have just made. Could you come back to your members about that?

**Ms Baxter:** Yes.

**Senator SHELDON:** The difference between the other question I put to the minister to consider on notice is that that matter has been on the books for a very long time. The gig economy is less important, but it has been on the books for a shorter period of time. I first want to hear if there is a response from the members, before I make any other requests.

**Senator Payne:** Understood.

**Senator PRATT:** We can put the rest of them on notice, I think.

**Senator ROBERTS:** Is it true that all workers must be covered by some type of workers compensation policy?

**Ms Baxter:** It is certainly our understanding that all employees are covered by state based workers compensation policy schemes. In terms of workers who would be categorised otherwise, my understanding is that it would be advisable for them to have their own self-insurance arrangements. Whether they do or don't, or whether industry by industry they are required to, I would need to take that on notice and come back to you.

**Senator ROBERTS:** Thank you. Comcare is a workers compensation insurer for Commonwealth government employees only?

**Ms Baxter:** Commonwealth government employees and some self-insured licensees.

**Senator ROBERTS:** Who is the insurer for labour hire employees in the coalmining industry in New South Wales?

**Ms Baxter:** I don't know. That would probably be a matter better directed at the New South Wales government.
Senator ROBERTS: Okay—it's Coal Mines Insurance. Does icare NSW, the nominal workers compensation provider in New South Wales, cover miners in the black coal industry?

Ms Baxter: I don't know.

Senator ROBERTS: Okay—they don't. Legally, they have not been able to since 2005, because Coal Mines Insurance does. Is it true that, under the black coal award, only full-time workers in black coalmines can work in black coalmines?

Mr Hehir: It is not a matter for Safe Work Australia. I think we have discussed this issue before, Senator Roberts. The award sets out the minimum standards. It is possible that workers can be covered by other arrangements, such as enterprise agreements—

Senator ROBERTS: Provided those enterprise agreements cover at least what the award covers.

Mr Hehir: As long as the Fair Work Commission makes the assessment that the better off overall test is met.

Senator ROBERTS: Are you aware that labour hire firm Chandler Macleod hires hundreds of people to work as miners in the black coal industry in New South Wales, but only calls them casuals, even though they work the same hours as full-time miners in black coal who are doing the same job with the same skills, right next to them? Therefore, Chandler Macleod is paying those workers at lower rates and conditions than those who come under the black coal award.

Mr Hehir: I am not aware of the employment arrangements for Chandler Macleod. I don't have their enterprise agreement in front of me. My understanding—

Senator ROBERTS: Okay, you're not aware—that's fine. Are you aware that claims for workers compensation for black coalmine workers injured in or about a mine have been denied compensation from Coal Mines Insurance, because they were classified as casuals?

Mr Hehir: I am not aware of that.

Senator ROBERTS: In summary, those New South Wales coalmine workers in the Hunter Valley, working full-time hours but classified as casuals for labour hire companies are not legally covered by an icare issued policy or Coal Mines Insurance policy. They are not covered. Are you aware of that?

Mr Hehir: No. It would be a matter for the New South Wales schemes. It is not a matter for the Commonwealth schemes. Work, health and safety legislation is the responsibility of the individual states. The work, health and safety legislation is harmonised legislation; however, there are some variations across the jurisdictions in relation to particular aspects that have changed since the model laws were introduced. But the work, health and safety laws for each individual state and territory are the responsibility for state and territory parliaments.

Senator ROBERTS: Is it of concern to you that there are hundreds of labour hire coal miners in New South Wales who have not been legally covered by the correct insurance policy if injured in or about a mine, and hundreds are now working with no cover or limited cover?

Mr Hehir: Certainly, on a personal level that sounds very concerning. However, it is not something that I have direct knowledge of, nor is it the Commonwealth's legislative responsibility. It remains the responsibility of the New South Wales government.
Senator ROBERTS: Who should these miners turn to?

Mr Hehir: Again, I am not aware of the specifics of any variation in the legislation within New South Wales. Workers compensation legislation is the responsibility of the state parliaments.

Senator ROBERTS: What about injuries being reported? Some of these miners have been told not to report injuries and are now crippled for life.

Mr Hehir: Again, Senator—

Senator ROBERTS: Would they come to someone in the Commonwealth?

Ms Baxter: No. They would be covered by the New South Wales work, health and safety laws. So the appropriate person to make representations to, as it were, would be the New South Wales work health safety regulator.

Senator ROBERTS: What about if they have gone to that regulator and they have been ignored? Then where do they go? They have gone to ministers. They have gone to representatives in parliament in New South Wales. They have gone to the regulator—nothing.

Ms Baxter: Senator, these matters that you are talking about fall within the remit of the states, of the jurisdictions. They are not matters that recovered by the model work, health and safety laws and they are not the responsibility of the Commonwealth workers compensation scheme.

Senator ROBERTS: Chair, I would like to comment—and it is a comment—that the Coal Mines Insurance in New South Wales, which supposedly covers coal mine workers and isn't doing that properly, is 50 per cent owned by the New South Wales Minerals Council and 50 per cent owned by the CFMMEU. The black coal industry has its own workplace health and safety company called Coal Services. It provides pre-employment checks and black lung checks and medical records. It's owned 50 per cent by the CFMMEU and 50 per cent by the New South Wales Minerals Council. In both of these cases the directors must come from the CFMMEU and the New South Wales Minerals Council. The superannuation for the black coal industry is 50 per cent CFMMEU, owned CFMMEU, 25 per cent New South Wales Minerals Council and 25 per cent by the Queensland minerals council—same directorships. There is another entity, coal mines long service leave, which is also controlled by the New South Wales Minerals Council and the CFMMEU. What hope have these miners got? That is a statement.

CHAIR: It is a statement.

Senator Payne: Senator Roberts, I was going to observe that during the course of this evening you have raised a number of issues across a number of sets of witnesses from the departments to agencies. There are, obviously, a range of concerns that you have brought to the committee tonight. I think it would be appropriate if you can bring those together in a way that they can be addressed in globo as it were. Then I would very much like to offer to have that discussion with you—not in my capacity in any official way, except perhaps as a New South Wales senator.

Senator ROBERTS: Thank you very much.

CHAIR: If there are no other questions for Safe Work Australia, I'd like to thank you for coming along this evening and consider yourselves released.
CHAIR: Welcome. Ms Weston, do you wish to make an opening statement?
Ms Weston: No, I don't.
CHAIR: Brilliant. I'll hand over to Labor.
Senator WALSH: Thank you very much for attending at this late hour. Ms Weston, in the government's 2019-20 budget it was announced that Comcare will establish new offices in Darwin and Launceston from 1 January 2020, and it was stated that those locations have a growing demand for a Comcare services, particularly for work health and safety inspectors. Could you give us a bit of an update on that? First of all, could you give us some further information on the rationale for the additional offices relating to the increased demand for Comcare services in those locations?
Ms Weston: Thank you for the question. As I understand, the decision was part of a government decentralisation approach. From my perspective, in Darwin there is significant Defence activity in that territory, and certainly we don't have a presence in Darwin at the moment and we do in the other states and territories, other than in Tasmania. The location in Launceston will also give us a presence directly in Tasmania.
Senator WALSH: So you don't have an office in Hobart?
Ms Weston: Not at all.
Senator WALSH: Are you on track to open these offices by 1 January 2020?
Ms Weston: I'm not sure about 1 January, but certainly in January we'll have a presence in those locations. We have been down already in Tasmania and in Darwin looking at potential locations for initial location. Then we will set up the offices in we expect January. We have a project officer already working on that and we have actually visited locations. We have agreed where we will set up our temporary offices for the first tranche of people and how we're going to locate some people there directly, and then we're going to work on where we might more permanently locate those offices as we go ahead.
Senator WALSH: Are you expecting that the positions in those two new offices will be new positions or relocations of existing employees?
Ms Weston: We are managing currently that within our current ASL and we expect that we can use natural attrition elsewhere and fill from our existing allocations.
Senator WALSH: If I can paraphrase to see if I'm right, they might be people but it will be within your overall staffing cap.
Ms Weston: Correct.
Senator WALSH: You might need to take this on notice. What will the cost of setting up new offices in those areas?
Ms Weston: Yes, we'll need to take that on notice.
Senator WALSH: I assume you were given extra resources for setting up those new offices, if not for the new staff—is that correct?
Ms Weston: I will confirm that, but I don't believe we received additional resources. We are cost recovered in a lot of elements of our work so I imagine that's how we will work through on that. Okay, I can confirm there are no additional resources.

Senator WALSH: Okay. I'll just take you to the media report in *The Sydney Morning Herald* on 3 October about a former Australia Border Force Customs officer who was diagnosed with PTSD and was told his workers' compensation payments would be cancelled after surveillance footage showed him walking his therapy dog and speaking at an event. I won't, obviously, ask you about the particulars of that case. But could you describe for the committee Comcare's general approach to claims for a psychological injury?

Ms Weston: I can and I will. The act that Comcare operates under, the Safety, Rehabilitation and Compensation Act, the SRC Act, sets out what we need to do to satisfy ourselves that a claim is able to be made. I'll ask my colleague to go through that in more detail. But, largely, the situation is that a claim is payable if someone has an injury. If that injury is of a psychological nature, it also needs to pass another step, which is that the reason for that injury was substantially work related, and then there is a materiality element to the test, as well, that we need to satisfy ourselves of.

Senator WALSH: So there's some sort of assessment process and, occasionally, some sort of review process in relation to people who may have been previously reviewed?

Ms Weston: Yes. For claims, there is a liability assessment by Comcare. If a person is not satisfied with that, there is an internal review undertaken by Comcare, in a separate area. If a person is not satisfied by that, they have recourse to the Administrative Appeals Tribunal and then further review channels after that.

Senator WALSH: In this article, it sounds like the review would have been initiated by Comcare after payments had already commenced.

Ms Weston: The Comcare scheme is a 'long-tail' scheme—not for two years or something, like some of the other compensation schemes—and so, from time to time, people will get better. I'm not talking about this case in particular. But some people get better, and it is appropriate to do reconsideration about whether the payments and other assistance compensation continues; and, if it's deemed that that is the case, there is a process then to work with the claimant to cease those payments.

Senator WALSH: I assume you keep statistics. Would you be able to provide the committee with statistics, de-identified, on how many claims for psychological injury you are currently assessing and how many approved claims might be under a review of the nature that you just described?

Ms Weston: Are you talking about whether we could give you some annual statistics about how many claims of a psychological nature there have been, how many had the next stage review and then how many went to the Administrative Appeals Tribunal?

Senator WALSH: Yes.

Ms Weston: We can certainly do that.

Senator WALSH: Would you be able to provide us with information, based on those categories that you just helpfully identified for me, on how many times surveillance is involved?
Ms Weston: I'll take that on notice.

Senator WALSH: Comcare has a preventative role as well—

Ms Weston: Yes.

Senator WALSH: in attempting to work with stakeholders to minimise harm. Are you able to talk us through some of the steps Comcare is taking to prevent psychological injury, in particular, in workplaces?

Ms Weston: We do have a role. One of our functions is to do research and trial things. In this last period of time, we have concentrated pretty significantly on early intervention activities, particularly focusing on mental health. I'm going to ask my colleague to outline three major initiatives we've got underway at the moment. In addition to that, there are other activities, particularly with our regulatory work. We also have some roles there as a workplace health and safety regulator. I might just get these major projects to be explained.

Ms Bekis: We have a number of initiatives underway. Firstly, we do offer education and supports to employers, both to those in the Australian Public Service and to our licensees. We have certainly lifted our efforts most recently in terms of our events and forums we've been running. We run an interdepartmental forum for mental health where we bring together leaders across the industry to talk about the key challenges and emerging issues. That's around trying to understand what is at the heart of the workplaces and what challenges they're facing. Secondly, we also have a community of practice. It's not a leadership forum, so we open it up to anyone to come in here, from industry experts to researchers, academics and other people to share their stories around what is currently going on.

We have also been piloting and trialling some initiatives, certainly in the prevention space. One of them has led us to a partnership with Beyond Blue, where we have been trialling new access to mental health coaching. New access in the health portfolio is certainly something that has been proven, at a community-wide level, to be successful in preventing early signs and symptoms of anxiety and depression. We have been trialling that, low scale, with a couple of agencies to looking at what we might want to do in the future around offering preventive services to people. This could be work or non-work related.

One of the most complicated factors around mental health is often the work related culture. It's complex. As we know, we're human beings and we're holistic. There are things that impact us that may be work or may be other things that are not work related. They all get pulled into the mix. That's a key challenge we're faced with as we continue to go down to this path. As my CEO has already alluded to, there is a legislative test around work being a significant contributing factor. We're keen to shift that conversation to thinking about wellness. How do we actually keep people well? That was the idea behind the new access pilot and partnership with Beyond Blue. Effectively that is an early intervention service open for anyone to access mental health coaching, which is confidential. Workplaces are advised of numbers, but they don't know people's identity. They could use that data to think about prevention in terms of the people who are reporting that they may be experiencing signs and symptoms of anxiety and depression. They're not diagnosed and they're not currently receiving treatment. The pilot that we ran had a very high recovery rate. They received six sessions of treatment and the recovery rate was at 78 per cent. At the community level, that
number is at 67 per cent. That has taught us, at this low-level scale, that workplaces are a good place to offer preventive services. That's one initiative.

Another initiative is around early intervention. This is about reporting. Again, irrespective of cause, we are encouraging workplaces to trial alternative services where, by any injury, you can report through to a service and a nurse will pick up that call, triage that call using clinical guidelines and effectively put that person on a pathway to receiving treatment, such as physio, GP services or psychology. We're in the midst of that moment. We have a number of agencies who are participating in that pilot. We hope to evaluate it at the beginning of next year or mid next year. That will form part of what prevention looks like in terms of practical supports and services for people as well.

There's one more: the leading indicators projects. We have a partnership with the University of South Australia. That is around using an evidence based tool called the Psychosocial Safety Climate, asking workplaces to measure their psychosocial safety. The evidence has been emerging and has started with the work of Safe Work Australia, but has progressed somewhat in actually looking at what the leading indicators are and what the factors are within workplaces that you could look at as a preventative measure. A lot of the data we talk about claims incidence data has lagged—it's already happened. The PSC, the Psychosocial Safety Climate, actually looks at how we predict what is likely to cause those events. We are doing some mentoring with agencies to look at how they could use the PSC, supported in the mentoring program with the University of South Australia—it is quite complex to use lead indicators—and effectively develop action plans within their workplace to address those leading indicators. Again, we'll have an evaluation, but that won't be till next year.

Senator O'SULLIVAN: I have a question about the claims management service. Are you able to tell me about the work Comcare has been doing to improve its workers' compensation claims management service?

Ms Weston: A lot of activity has been happening in this last period of time around claims. Last year we had a pilot for delegated claims arrangements, which is allowing a couple of the departments to run their own delegated claim arrangements with third-party providers. We had two agencies in that arrangement. Comcare has outsourced its own claims management to the ANU, who is a licensee under the Safety, Rehabilitation and Compensation Scheme.

In our own work in claims, we have more recently been looking at business processes. One of the things that we all struggle with in workers' compensation, not just Comcare but elsewhere, is: how do you better test whether people coming into the system are eligible for a claim and work through that process to minimise harm to them as they retell their story or as they are trying to get well? I might ask my colleague Mr Hughes to outline some more of the activities in the claims area.

Senator O'SULLIVAN: Great. I'd love to hear how it's going and what sort of change it's made.

Mr Hughes: Our claims management work is changing. I think it's fair to say that, across jurisdictions, claims management is continuing to change. That's being impacted by a couple of factors, the first being around digitisation—better claims management systems and, as Ms Weston has indicated, better entry into that claim process so that we are lessening the load on
the employee and the employer in terms of how we get to that liability determination. Then there is a raft of things in the injury and treatment space et cetera. There's better collaboration between us, providers and treating practitioners et cetera to work towards that return to health, and then there's working with employers to move towards return to work and trying to do that as effectively as we possibly can. In order for us to do that effectively, we need to keep monitoring the types of injuries that are coming into our system—the mix of injury versus disease versus psychological injury—and how we work to make sure the different processes will work in those spaces as well. In terms of where we're at, we've been on a bit of a journey for some time now, and our claims profile continues to change. We need to keep on top of that. So it's about keeping the operations going and improving but also working on these projects of improvement, which take a bit more time as well, into the future.

Senator O'SULLIVAN: And the feedback you're getting?

Mr Hughes: Feedback, generally, from employers is positive in terms of our collaboration, particularly working with agencies. So it's greater collaboration with agencies, working on collaborative efforts, particularly around return to work, remembering that in our scheme the design is that the employer is responsible for rehabilitation and return to work. Our role there is to manage the claim and work with the claimants in relation to the injury and the treatment but to then to work with the employer to get them back to work, potentially, as part of that recovery as well. In terms of the employees, we're still working on the best ways for us to receive the feedback from employees and also to work towards minimising disputes with employees. That progresses towards better practice in alternative dispute resolution but also better practices from a claims management point of view.

Senator O'SULLIVAN: Great.

CHAIR: Excellent. That concludes evidence from Comcare. Thank you very much, Ms Weston, and to your officers for coming along this evening. There being no further questions, this concludes the committee's examination of the Employment, Skills, Small and Family Business portfolio, including industrial relations. I thank Minister Cash and Minister Payne; officers of the Department of Employment, Skills, Small and Family Business and the Attorney-General's Department; and all witnesses who have given evidence to the committee today. Thank you also to my fellow senators, to the secretariat, to Hansard and Broadcast, and to the people who turn the lights on and off and who fill the jugs of water up and things like that. The committee stands adjourned.

Committee adjourned at 22:40

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE