



SPARK AND CANNON

Telephone:

Adelaide	(08) 8212-3699
Melbourne	(03) 9670-6989
Perth	(08) 9325-4577
Sydney	(02) 9211-4077

TRANSCRIPT OF PROCEEDINGS

THE ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

COMMISSIONER COLE

MELBOURNE

10.00 AM, TUESDAY, 19 FEBRUARY 2002

DAY THIRTY-EIGHT

Continued from 18/2/02

COMMISSIONER: Yes, Dr Bishop.

DR BISHOP: Commissioner, we now commence phase two of our study on the National Gallery of Victoria. The evidence will be very short. Detailed statements have been prepared. Very little oral evidence will be led. Phase two is centred on the events of 10 August 2000, though certain of the witnesses have something to say about the events before and after that date. All witnesses were employed at Able Demolitions in the year 2000.

Mr Rick Charylo does not play a part in the events of that date. He is a director of the company Able Demolitions and responsible for its general administration. He gives his recollection of the tender process, the awarding of the contract and the events thereafter. His name appears on a number of documents that have already been tendered in this hearing.

The other three witnesses are all intimately involved with 10 August. The first witness is Mr Victor Campisi. He was the project manager for the National Gallery project. On 10 August, he arrived at the site at 6.30 am. Mr John Saddington was employed as a carpenter. He arrived at 7 am. Mr Paul Rossi, the managing director of Able Demolitions, arrived at about 8 am.

By 7 am, between 300 and 400 demonstrators had gathered in the foyer area of the site, under instructions from Mr John Cummins and Mr Martin Kingham. At about 8 am, Mr Martin Kingham addressed those gathered in the foyer. He did so standing on the escalator that led up to the first floor. He demanded that Able Demolitions sign the CFMEU pattern agreement. The presence of Mr Cummins and Mr Kingham underlined the fact that the demonstration was planned, promoted, and directed by the CFMEU.

In his general opening, Mr Tracey indicated that \$100,000 worth of damage was caused at the site. I do not propose to refer in detail to this damage. It is particularised in the statements. My focus is on the danger created by the CFMEU during the demonstration. Any demolition site is a dangerous area. The National Gallery was no exception. There was any amount of inflammable material in the area. There was carpet, carpet underlay, rubber backing to windows, ceiling panels, thousands of paper posters used for exhibitions, paints and solvents, and even diesel fuel. The demonstrators had opened the diesel tank in the basement and flooded the loading dock.

Notwithstanding the danger, a large number of men were seen smoking around the site, even Martin Kingham. Mr Campisi said to Mr Kingham, "This is a no smoking site". Mr Kingham replied, "Not today it isn't". Mr Saddington explains there were numerous signs around the gallery forbidding smoking. There was another aspect of danger. There were many holes in the floor where ducts had been removed. There were also many holes that had been drilled by

Able Demolitions to provide drop zones for materials being removed from the upper floors. If a person fell through those holes, the fall could be anything from 10 to 15 metres. This notwithstanding, the demonstrators removed the bunting surrounding the holes and pulled down the barricades surrounding the
5 holes. This created danger.

That is my opening, Commissioner. Might I call my first witness, Victor Campisi.

10 COMMISSIONER: Yes.

<VICTOR JOHN CAMPISI, sworn

[10.08 am]

15 MR BUTLER: Commissioner, I seek leave to appear for Mr Campisi. My name is Butler, initial M, and also if Mr Campisi is recalled, any adverse evidence is given.

COMMISSIONER: And you also seek leave to appear for Mr Rossi and
20 Mr Charylo.

MR BUTLER: Mr Charylo, I do, sir.

COMMISSIONER: Very well. Thank you, Mr Butler. I grant leave to you
25 appear for Mr Rossi, Mr Charylo, and Mr Campisi whilst they are giving evidence or whilst any evidence adverse to them may be called.

<EXAMINATION BY DR BISHOP

30 Your full name is Victor John Campisi?---Yes.

That's spelt C-a-m-p-i-s-i?---That's correct.

Your work address is 6 McGlone Street, Mitcham?---That's correct.

35 You are a director of Able Demolitions and Excavations Pty Ltd?---No, I'm the project manager for Able Demolitions.

And you were the project manager during the year 2000?---That's correct.

40 For the whole of that period?---Yes.

You have signed a statement dated 18 February 2002?---Yes, I have.

45 Would you call up 071.0576.0787.0216. Looking at the screen, is that the beginning of your statement?---Yes, it is.

If you could scroll through to the end of the statement, please. That is your signature on the end of the statement?---Yes, it is.

5 Are the contents of the statement true and correct in every particular?---Yes, they are.

I tender that statement.

10 **EXHIBIT #116 - STATEMENT OF MR CAMPISI**

DR BISHOP: Mr Campisi, you have given a statement in which you refer to the fire hazard that was created at the National Gallery project on 10 August 2000. Do you recall that evidence?---Yes.

15 You have given evidence, in paragraph 24 of your statement, that you spoke to Mr Kingham?---Yes.

And you said to Mr Kingham that this is a no-smoking site?---Yes, I did.

20 And he replied with the words, "Not today it isn't"?---That's correct.

Did he make any other comment?---No, he just kept walking towards the foyer of the galley.

25 Did he make any attempt to extinguish the cigarette?---None whatsoever.

You refer also, at paragraph 33 of your statement, if that could be turned up - do you see paragraph 33?---Yes.

30 You speak about 30 to 45 fire extinguishers being discharged throughout the gallery site?---Yes.

35 How many fire extinguishers were there altogether?---It is hard to say. They were all over the place. There was a lot of extinguishers on the site and it's hard to say.

40 How many floors altogether in the site?---If we counted the two carpark basements, in effect, it was six levels.

Roughly how many extinguishes on each floor?---I couldn't say. I couldn't say.

45 Would the 30 to 40 be half the total?---No, I think there probably would have been more.

There would have been more than - - -?---There would have been more than, say - - -

60 to 80?---60 to 80, yes.

5

Right. You have indicated, in paragraph 34, that the fire hose reels and hydrants at various locations around the gallery site were turned on or damaged or both. Again, you've got fire hydrants on levels 1, 2 and 3 were turned on and as a result, those floors were flooded. Is that correct?---That's correct.

10

How many hydrants did you see that were damaged?---There was one damaged that was rammed with a bobcat and there were a number of other ones that were turned on and there were some that had already been shut down by some of our people, but the water around the floors was all still there.

15

COMMISSIONER: A riser was damaged as well?---That's right.

DR BISHOP: Whereabouts was that water riser?---That water riser was on level 2, on the south end of the building.

20

What is the effect, in terms of the damage to the water riser, in terms of the capacity of the site to fight fire?---We are obligated to maintain a fire fighting system on the site as a part of demolition. The damage to the riser meant that we had to shut down the whole system to repair that riser. That riser and, in fact, all the risers on that site, were serviced by what's called a ring main and to isolate that particular riser, we had to shut down the main ring main to repair it.

25

On the site, there was some carpet?---Yes.

30

Some carpet underlay?---Yes.

Some rubber backing for the windows?---Yes.

35

That would be highly inflammable?---Pretty well a lot of it would have been highly inflammable, yes.

There were ceiling panels?---Ceiling panels.

40

What were they made of?---A paper, a mashed-up paper type product, similar to these ones above us.

Again, highly inflammable?---Yes.

45

Thousands of paper posters?---Yes.

And were these the posters used for the displays in the gallery?---Yes. There was a lot of paper left in and around the rooms, stationery from the gallery and just anything that wasn't obviously needed, to be removed, was just left behind.

5 There were paints and solvents?---Yes.

And diesel fuel?---That's right.

10 Where did the diesel fuel come from?---The diesel fuel was our fuel tank for fuelling our equipment and it was stored in the upper basement and it was pretty well adjacent to the Sturt Street entry.

There were 800 litres of fuel in that tank?---That tank has an 800 litre capacity.

15 Was it all spilled out?---No, I don't think so.

20 Roughly how much?---It is hard to guess. It is hard to determine how much diesel was let go. The floor in that area was covered with diesel and some of it, we believe, went through the expansion joints in the building into the carpark below.

25 In paragraph 37 of your statement, you say, "The fire fighting system was totally ineffective in that section of the gallery site, creating an immediate health and safety risk." That section is what section?---That section would have been the southern end of the building, so to speak, south from the great hall, basically.

30 You have spoken about certain drop zones in the site. What do you call drop zones?---It is where we move the demolished material from floor to floor to get it to ground level, so it can be loaded out and disposed of.

35 How wide were the drop zones, what is the diameter?---For example, we removed some of the escalators and we used the gap that the escalator was in, so a metre. Some of them were a metre wide, some of them were four foot wide, 1.2 wide, and they just moved from floor to floor and we just had bobcat machinery on those floors, moving it down to each floor so it could be loaded out.

40 A person could easily fall through that size hole?---Most definitely.

45 You have distinguished the drop zones from no-go zones. What is the distinction?---Drop zones, we had timber barricading around those areas well back from the penetrations, to make sure that no-one was here them. The no-go zones were taped-off areas that either we weren't working in or we didn't want people to go into, and they were basically taped off with bunting tape,

with signage on it.

So the no-go zones had bunting tape around them?---Yes.

5 The drop zones had barricades around them?---Any areas that had unprotected edges where a person could fall were barricaded with timber, yes.

Had all the bunting tape been removed?---On the day of the invasion?

10 Yes?---A great deal of it had, yes.

Three-quarters of it?---I'd say so, for sure.

15 Had all the barricades been removed?---A good lot of the timber barricading had been removed, yes, and damaged, like handrails taken off, so people could just wander through.

Are we talking about three-quarters again?---A good half. I would estimate a good half of it was bowled over.

20

And the drop from going through one of these holes down to wherever anything landed could have been anything from 10 to 15 metres?---We had situations where we had risers coming through the building for the airconditioning system, and they went from the plant room, which is basically level 4, right down to the upper basement, so some of these drops went down three and four levels, so yes.

25

That could be much more than 10 to 15 metres?---For sure, yes.

30 What are we talking about, 20 or 25 metres?---Yes, it would have been hitting the 20 metre mark, for sure.

You indicate in your evidence that 300 to 400 people were there on the site at the height of the demonstration?---Yes.

35

That's correct, isn't it?---Yes.

40 And you say in another part of your statement that - this is paragraph 23 - "It is difficult to say how many workers were in the rest of the site. It was quite dark and there are a large number of side rooms and people were basically wandering everywhere around the site"?---That's correct.

So you are taking 300 to 400 as a minimum?---That is what I estimated to be downstairs, yes.

45

5 You say in paragraph 44 that Able lost control of the gallery site. What do you mean by that?---We had no control of the site whatsoever. If we had had an emergency situation where something had occurred, a fire or something, there would have been no way we could have accounted for the people that were in that place.

This day, 10 August, was a Thursday?---Yes.

10 An injunction was taken out later that day in the Supreme Court?---That's correct.

And at that point, the CFMEU people that had stayed on the site went off the site?---They started to withdraw once the order was placed.

15 And they were all gone by what time?---By approximately 3.30.

And you then set to put the site back in order?---In effect, what we did, we just tried to lock the site up for the night, because it was getting pretty late in the day, and then effect proper repairs the following day.

20 You worked on it on Friday?---Yes.

The full day?---Yes.

25 Did you work on it on Saturday?---Yes.

The full day?---Yes.

30 Was there any work done on Sunday?---No, I don't think so. I don't remember.

What was the situation on Monday?---On Monday, there was still a few people doing repairs.

35 When was it fully operational again?---I think Tuesday we were back into the full swing of demolition again.

40 I want to read to you a paragraph - in fact, there are two paragraphs - and in my statement, paragraph 50, but if we could take the first of the two paragraphs. I am going to read this paragraph out, "The following week, Rossi asked me to talk to the police and tell them that we wanted the invaders charged for what they had done. I did so, but was told off the record that the police could not do anything about the invasion because of the agreement between the police and the CFMEU, whereby the CFMEU would not cause disruption to the World Economic Forum meeting, along with the S11 protestors, and the police did not want anything to disrupt this agreement". Now, does that summarise a

45

conversation that you had with someone?---Yes.

Was that someone a police officer?---Yes.

5 Do you know the name of the police officer?---I don't recall his name, but I think I may have written it down in my diary.

You may have his name?---He was the acting sergeant at the St Kilda Road Police Station.

10

The St Kilda Road Police Station, and he was acting sergeant on that day when you rang?---Yes.

15 Do you remember the day when you rang? You talk about, "It was the following week"?---It was early the next week that I went down and saw them.

Are we talking about, then, the week beginning the 14th?---Yes.

20 Do you remember what day in that week?---No, I don't recall.

Was it early in the week or late in the week?---I think it may have been early in the week.

25 Perhaps Monday or Tuesday?---Yeah, somewhere around there, around Tuesday or something.

Does that accurately represent the conversation that you had with this police officer?---Yes, it does.

30 Mr Campisi, you refer, in paragraphs 2-8 of your statement, to certain events in Eastland Shopping Centre in May of 1994?---Yes.

And you talk about a problem that you had with the CFMEU at the time, and particularly the CFMEU shop stewards?---Yes.

35

Can you just state, in your own words, what the essence of that problem was? ---In effect, they wanted us to sign - the CFMEU, they asked me to get that document signed, this CFMEU agreement, and that we wouldn't be starting work on the site until it was signed.

40

The way you have expressed it in paragraph 4 is, "Paul Mazzocchi," is it? ---Mazzocchi.

45 "slapped a document on the table in the site shed and said that Able would not start the job until the boss signs this"?---That's correct.

Does that represent an accurate statement of what was said to you at the time?
---Yes, it does.

5 And you communicated that statement to Paul Rossi?---I certainly did.

You had no capacity, of course, to authorise the signature of an EBA?---No, I did not.

10 Did you have some difficulties, in respect of that particular site, after that particular point of time?---Yes, we did.

15 Just to go back a little bit, these statements were made during an induction process, is that correct?---We had all our team in there being inducted for the site.

When you talk about "all your team," who were there?---Our work crew, the guys that we had there at the time.

20 How many were there?---I think, from memory, there was about six or seven of us.

25 All of you involved with Able in demolition work?---All Able Demolitions, yes.

How long did that induction process take?---I think it took about an hour, an hour and a half, or thereabouts.

30 Were matters were explained to you during that time?---They discussed the issues of the job, the hazards, what's expected of us on the site, the amenities, and those sort of issues.

35 This particular event with Paul Mazzocchi, did that take place with you alone?--No, it took place in front of all the other guys that were on site.

You then detail some difficulties that you had with CFMEU shop stewards after that. Is that correct?---That's correct.

40 You were told that an Able truck was unroadworthy. Is that correct?---Yes.

45 What truck is that, in reference to what job you had to do?---It's what we call a bin truck that carries bins of various sizes, and we used it to bring a decontamination unit on to site and a Wayne Flett - he was an FEDFA organiser - started saying things about the truck, that it was unroadworthy and it's not allowed on the site and all this sort of stuff.

You are talking about Wayne Flett, who was a CFMEU-FEDFA official and organiser?---That's right.

5 That is the person that spoke to you?---Yes.

Did he give you any clue at all as to what it was about this truck that was unroadworthy?---Being a hook truck, or a bin truck, it had cables. He said the cables were frayed, or something. He was just nitpicking. I don't think he
10 knew what he was talking about.

Did you understand what he was talking about?---I understood what he was talking about.

15 Did you see that as in any way a matter that went to the unroadworthiness of the truck?---It had nothing to do with the way the vehicle presents itself on the road.

Then in paragraph 6, you refer to another problem with a person called Gary?
20 ---Yes.

Do you know the surname of that particular person?---No, I don't remember his surname.

25 You are told, "If you start removing asbestos, I will switch off the water to the site"?---Yes.

What would be the effect of switching the water off?---If we'd started asbestos removal, our guys wouldn't have been able to decontaminate themselves.
30

There is another reference, in paragraph 8, to your failure to satisfy an audit?
---Yes.

35 Can you explain what the audit form looked like?---It was just a sheet of paper with questions and a tick answer, I suppose.

COMMISSIONER: This is a union audit, is it?---Sorry?

40 This was a purported union audit?---It was just a one-page A4 document that had various questions; you know, has this been done, for example, and a tick, and Pat Preston walked around the site marking this document up. Later on, when we went back for a meeting in the induction room on the site, he put this document on the table and said, "Able don't comply," and I picked the
45 document up and read the document and you couldn't comply to it unless you started work, and we hadn't started work, so of course we didn't comply.

DR BISHOP: Is it correct to say that all of the questions on the audit form pertained to your performance after you had commenced work?---Yes.

5 So before you had commenced work, it would be quite impossible to answer the questions?---You know, "Are barricades in place?" Well, obviously not if we haven't started, so you get a "no" against that.

And Pat Preston was the person who put these matters to you?---Yes.

10

You refer to another problem with the Commercial Travellers Hotel in 1997? ---Yes.

15 In paragraph 12, you refer to a problem to do with a shop steward going home and you couldn't work?---Yes.

Was it as simple as that, that if the shop steward wasn't there, CFMEU shop steward wasn't there, you just had to stop work?---He made it clear, yep.

20 In fact, you had to move off the site. Is that the situation?---In effect, he was the man that said whether we could work or not. If he decided to go home, that was it, the site shut down.

25 Did he give any particular reason why his presence was absolutely essential to your continuing work?---I think that because he was the health and safety rep on the site also as a part of the committee, that if his representation wasn't on site, that was it, nothing else was going to happen.

30 In paragraph 14, you refer to a particular problem that came up to do with this fact that if he was not there, you had to stop work. Could you just explain it in your own words.

COMMISSIONER: I think I understand it, Dr Bishop.

35 DR BISHOP: Thank you. Commissioner, that is the evidence of this witness.

COMMISSIONER: Thank you. Mr Butler, is there anything you wish to expand upon at this stage?

40 MR BUTLER: Just one question.

<CROSS-EXAMINATION BY MR BUTLER

45 Mr Campisi, the Commissioner asked you whether the audit document referred to in paragraphs 7 and 8 of your statement was a union doc form. Was it

created by the union?---I'm not sure who created it, but Pat Preston was the one that was filling it in.

Had you seen that form before?---No.

5

Thank you.

COMMISSIONER: Mr Campisi, you are excused for the time being. It may be that somebody will wish to cross-examine you and that maybe I will allow that or maybe I won't. If I do, it may be necessary for you to return next week. You will be advised.

10

<THE WITNESS WITHDREW

[10.30 am]

15 DR BISHOP: I call John Saddington.

<EXAMINATION BY DR BISHOP

5 Mr Saddington, you have signed a statement for the purpose of this Royal Commission?---I have.

And that statement is dated 12 February 2002?---True.

10 Is that correct?---Correct, yes.

If your statement could be put up on the screen, 071.0576.0787.0064. Do you recognise the top of that statement as your statement?---Yes.

15 COMMISSIONER: Mr Saddington's statement will be exhibit 117.

EXHIBIT #117 - STATEMENT OF MR SADDINGTON

20 DR BISHOP: Could the statement just be scrolled down, Commissioner, to the end, to see whether there is an annexure that has been put on that statement. Apparently there is no annexure. In paragraph 13 of the statement - could paragraph 13 be scrolled up.

25 COMMISSIONER: I have a copy of it. Do you have a copy?

DR BISHOP: I've got a copy, but I am not sure that it's part of the - - -

COMMISSIONER: The exhibit will include the annexure.

30 DR BISHOP: It will be on court book. Perhaps it could be shown to the witness. The statement is headed, "Why the AWU is Australia's worst union". Is that correct?---Yes.

And it is a two-page document?---Yes.

35

Commissioner, that will appear on court book, so there is no need to take it further. I just want to ask you this. You saw a number of people smoking in the area on 10 August, when you were there at the National Gallery site. Is that correct?---That's correct, yes.

40

You were there in your capacity as a carpenter for a period from June or July to September 2000 in that year?---Yes, sir.

45 You were employed full-time at the site?---No, I was basically employed as a casual. I would be there some days and other days I wouldn't be there.

But you were there early in the morning of 10 August?---I was indeed, yes.

And you remember the events very well?---Very well.

5

You saw a number of people smoking, as you have indicated?---Yes.

Did you recognise any of the people that were smoking?---Yes. There were a number of people I recognised that were smoking.

10

Can you give their names?---Mr Martin Kingham was smoking.

Anyone else that you saw smoking that you can name?---There were a number of shop stewards that were also smoking, but there were just so many people there at the time, it was hard to, you know, itemise their names and who was not and who was smoking.

15

But you have indicated you saw some CFMEU shop stewards smoking on the day?---Yes.

20

And smoking is regarded as an absolute no-no on those sites?---You're right about that.

And particularly in respect of a demolition site?---Yes.

25

That is the evidence of this witness, Commissioner.

COMMISSIONER: Thank you, Mr Saddington. You are excused. It may be that somebody wishes to cross-examine you, in which case you may have to come back next week, but if that is the case, we will let you know.

30

<THE WITNESS WITHDREW

[10.35 am]

DR BISHOP: I call Rick Charylo.

35

<RICK CHARYLO, sworn

[10.35 am]

<EXAMINATION BY DR BISHOP

5 Your name is Rick Charylo?---That's correct.

Your business address is 6 McGlone Street, Mitcham?---That's right.

You are a director of Able Demolitions and Excavations?---Yes.

10

And you were in that capacity in the year 2000?---That's right, yes.

You have prepared a statement for the purpose of these proceedings?---Yes, I have.

15

And that statement is dated 15 February 2002?---That's right.

If you could call up 071.0576.0787.0213. Do you see the top of that statement? If you would scroll down to the bottom of the statement. That is your signature at the bottom of the statement?---It is.

20

You say that the statement is true and correct in every particular?---I do.

I tender that statement.

25

EXHIBIT #118 - STATEMENT OF MR CHARYLO

DR BISHOP: Mr Charylo, you were responsible for the general administration of Able Demolitions during the year 2000?---Yes.

30

And you were involved in the tendering process for the National Gallery of Victoria?---Yes.

And you were involved in certain events thereafter, continuing to the end of the year?---That's right.

35

That is the evidence of this witness, Commissioner.

COMMISSIONER: Thank you, Mr Charylo. You are excused for the time being. If it is necessary for you to return, you will be advised. Thank you.

40

<THE WITNESS WITHDREW

[10.37 am]

DR BISHOP: I call Paul John Rossignoli.

45

<EXAMINATION BY DR BISHOP

5 Your full name is Paul John Rossignoli?---That's right.

You are generally known as Paul Rossi?---That's right.

Your business address is 6 McGlone Street, Mitcham?---Correct.

10

You are a company director?---That's right.

And you are the managing director of Able Demolitions and Excavations Pty Ltd?---That's right.

15

And you were in that capacity in the year 2000?---That's correct.

You have prepared a statement for the purpose of these proceedings?---I have.

20 That was a statement where you gave instructions to Mr Michael Butler, your solicitor. That is correct?---Yes.

You have some difficulty with reading, Mr Rossi?---Yes.

25 So what happened then was Mr Rossi read the statement to you.

COMMISSIONER: Mr Butler?---Mr Butler, yes.

DR BISHOP: Sorry. Mr Butler read the statement to you?---Yes.

30

Are you able to say that, having heard the statement that was read to you, you're able to say that that statement is true and correct in every particular?
---Yes, it was.

35 COMMISSIONER: Mr Rossi's statement of 18 February will be exhibit 119.

EXHIBIT #119 - STATEMENT OF MR ROSSI

DR BISHOP: Commissioner, Mr Rossi is in the process - this particular
40 statement gives a basic view of events in the year 2000. We are in the process of preparing a wider statement concerning his relationship with the CFMEU, and you will recall, of course, that he was adamant that he would not enter into a relationship with that union in the year 1998, when he did so with the AWU, and he would not accept any compromise, in the year 2000, when various
45 things were put to him. There's a background to that and we want to bring that

out and we think, in the interests of Royal Commission hearing time, it would be better if we took him through this statement and, indeed, the additional statement, at the same time, so if he could be stopped at that point and we put it over.

5

COMMISSIONER: Are you content with that, Mr Butler?

MR BUTLER: Yes, I am, Commissioner.

10 COMMISSIONER: Mr Rossi, you are excused for the time being. Apparently, a second statement is being prepared and when that is ready, it will be necessary for you to come back again?---Okay.

Thank you very much.

15

<THE WITNESS WITHDREW

[10.40 am]

20 MR BELL: Can I ask whether the contents of the supplementary statement might contain matter concerning my clients? I want to accelerate the process of responding and to comply with the practice directions, it would assist me to know whether this document will be the fullness of what is put in relation to my clients.

25 DR BISHOP: It is a little early to be absolutely adamant, but the probabilities are no.

MR BELL: Yes, it seems like that. Thank you.

30 DR BISHOP: They are the four witnesses and Mr Tracey will take the next witness.

35 MR TRACEY: If the Commission pleases, an issue has arisen in the course of evidence thus far in relation to the National Gallery site relating to the imposition of a condition on Baulderstone Hornibrook, the successful tenderer, that their contract to perform the major works function at the site would not be signed until they had in place a site agreement. The evidence has been that that requirement was imposed by OMP because of a stipulation made by the trustees of the National Gallery. Accordingly, a statement was sought from the chairman of the trustees - I think his actual title is president - Mr Stephen
40 Vizard. That statement is on court book at 071.0576.0787.0177, and it is a statement signed by Mr Vizard. We understand the copy we have been provided with isn't signed, but our friends, I understand, hold a signed copy - I'm sorry, I am instructed we now have one. It's got two attachments to it.

45 Having read the statement, Counsel Assisting do not deem it necessary to call

Mr Vizard to elaborate upon it and we simply propose, having discussed the matter with those representing him, to tender that statement and we now do so.

COMMISSIONER: Yes. What is the date of it?

5

MR TRACEY: I will check the signed copy. It was signed on 15 February.

EXHIBIT #120 - STATEMENT OF MR VIZARD OF 15/2/2002

10 MR TRACEY: The next witness relating to the National Gallery site, and wider matters, will be Mr Bill Shorten. We are advised that he will be available at 11 o'clock. So with your leave, I would ask that there be a short adjournment until he arrives and is ready to give that evidence.

15 COMMISSIONER: Yes, very well. I will adjourn until 11 o'clock.

ADJOURNED [10.45 am]

RESUMING [11.05 am]

20

MR TRACEY: If the Commission pleases, I call William Shorten.

<WILLIAM RICHARD SHORTEN, sworn [11.05 am]

25 <EXAMINATION BY MR TRACEY

Mr Shorten, would you tell the Commission your full name?---William Richard Shorten.

30 Your address?---685 Spencer Street, West Melbourne.

You are the national secretary of the Australian Workers Union?---I'm the national secretary of the Australian Workers Union, yes.

35 Do you have a position in the Victorian branch of that union?---I'm the state secretary of the Australian Workers Union, Victorian branch.

40 Would you tell the Commission, please, the history of your association with the AWU?---I became a recruiter with the Australian Workers Union in about April of 1994 and I have been employed with the union. I was appointed or elected to the committee of management of the union in about 1996, I was elected as an organiser in 1997, and I was elected by the committee of management to be the state secretary in July of 1998 and last July, I was elected, unopposed, to the dual positions of state and national secretary of the
45 Australian Workers Union.

Mr Shorten, you have made arrangements, through your solicitors, to prepare a detailed statement in response to a request by Counsel Assisting the Commission?---Yes, I received a subpoena and it asked me to provide
5 information regarding a whole list of general matters. I understand that that statement will be provided to the Commission, on the general matters, at some point tomorrow afternoon.

I see. You will be available, if need be, to elaborate upon that statement on
10 Thursday morning?---I have certainly cleared the whole day.

In that event, Mr Shorten, we will deal with a number of additional issues today and when we have completed that evidence, we will ask that you be released, with a view to returning on Thursday morning to deal with the
15 statement that is under preparation. I would like to start by asking you some questions about demarcation disputes in the building and construction industry and the civil construction industry. The evidence before the Commission suggests that there has been a long history of demarcation disputes between your union and the CFMEU. Is that right?---Yes, and with the predecessor
20 organisations which now comprise the CFMEU. The earliest dispute that I have managed to acquaint myself with was in 1922, where the Building Workers Industrial Union were being established, and I'm not totally precise on that, but they were supporters of an international organisation called International Workers of the World; I think they were colloquially known as
25 the Wobblies. The AWU was a large union at that time and we managed to convince most people in most areas that the IWW wasn't the way to go, but I think we were unsuccessful in Broken Hill and that's the reason, to this day, why we cover metalliferous mining in our rules in nearly every other part of the Australia but the county which covers Broken Hill, because of that
30 ideological dispute in 1923. So there has been plenty of history; it is a very old dispute.

Bringing that forward to more recent times, there was, more recently, a revival of these issues in the Industrial Relations Commission in proceedings in which
35 the CFMEU were seeking to have its rules amended to move into what was previously AWU Territory. Is that right?---Yes, that's right.

And those proceedings were brought in 1997 and were proceeding 2004 of that year - I don't ask you to remember the number - but in the proceedings, the
40 AWU was an objector to that extension of the rules of the CFMEU?---I believe that to be the case, yes.

Did you play any part in giving instructions as to the AWU's position in those proceedings?---No, I didn't. That case was run by our national office. The
45 solicitors were Sydney-based. I am aware that a number of statements were

prepared for it, but other than one or two meetings filling in for other organisers, up till becoming the state secretary, my area of involvement in the AW did not involve construction.

5 It's a matter, of course, that you have taken an active interest in, I assume, since 1998, when you became the state secretary?---Yes, the issue of the legal bills has focused everyone in the union.

Mr Shorten, the result of those proceedings, has it been resolved or is it still
10 pending in the Commission?---Four years later - I don't claim to be able to give a proper explanation of every in and out - but, in essence, the train of events has been that, in the first instance, the Industrial Relations Commission basically upheld all the aspects of the CFMEU application, which we weren't very happy about. We then appealed it to a Full Bench of the Industrial
15 Relations Commission. Their reasoning is - they then made the decision that the first decision was wrong. I am not going to try and do justice to the Full Bench's reasons here. I would be happy to provide a copy of the decision, but I'm confident you probably already have that.

20 COMMISSIONER: Yes?---The CFMEU then appealed it to the High Court and the High Court has remitted it, on the agreement of the parties, to a Full Bench of the Federal Court, which is in fact meeting next week on the points of law of the CFMEU's appeal. The only court we haven't been to is the Childrens' Court.

25 MR TRACEY: So the position is this: the CFMEU's application has yet to be resolved finally?---We would say that the Full Bench decision means that they have effectively been stayed, but the position is very much up in the air, so I think there's a little way to go yet before we resolve the matters.

30 I want to take you to some examples of evidence that was called in those proceedings of incidents involving your union and the CFMEU on sites in and around Melbourne. Mr Henderson gave this evidence on behalf of the AWU in the proceedings in the Commission - I just want to ask you about your
35 knowledge in relation to some of these matters - he gave evidence about a dispute at the Melbourne Airport development. Are you familiar with those problems?---No, only to the extent that I have looked at the statements that were made.

40 Are they consistent with your understanding of what went on at Melbourne Airport?---The understanding I would have of what went on there is probably based on documents like the statements, so my understanding, otherwise than that, would not be - I wouldn't have a particular understanding beyond what I have taken from the statements.

45

One of the incidents that occurred there involved attempts being made to force your members to take out CFMEU tickets and become dual ticket holders. Were you familiar with that?---Perhaps if I had the statement, I could assist.

5 Yes. The particular statement can be called up on the screen. It was part of exhibit 114A, which was tendered yesterday, and it is Mr Henderson's statement, which was AWU 30, and I am referring to page 13 of that statement, paragraph 31. Do you have that in front of you now, Mr Shorten?
---Paragraph 31, yes.

10

If you could read that quickly and refresh your memory?---Do you want me to read it out aloud?

15 No, just read it to yourself. Do you recall those incidents?---I don't particularly recall them, but I'm sure that if it's in this statement and it's put in this way, I've got no reason not to believe this account.

20 It was at a time when you were a full-time official of the Victorian branch, and one imagines that in a situation in which another union was seeking to force your members, at their expense, or their employer's expense, to take out dual tickets, that would have been a matter that would have been dealt with at committee of management level, at least?---I guess two points, to make sure I have understood the question properly. One is no AW official, or indeed member, would like this story, so to that extent, it's not a good story. In terms
25 of how our organisation handles these incidents, if the organiser is capable of resolving the issue, then that's what happens, the issue is then resolved, so it wouldn't have come to committee of management.

30 And that would be so notwithstanding intimidation? Is that usual, that it wouldn't occur to anybody to report it to the committee of management?---I don't know if Mr Henderson did report it to the committee of management. I think there's another point implicit in the question. Clearly, this is work within our eligibility, clearly, we have negotiated a certified agreement with Abigroup and behaviour reported in this fashion is obviously outrageous.

35

40 Go down to paragraph 32 and you will see another incident referred to of a similar character at a John Holland site at Boronia, where, again, the CFMEU endeavoured to force your members to take out AWU tickets and, according to Mr Henderson, were successful in forcing their employer to pay to the CFMEU money so that they could become dual ticketed. Is that an incident of which you were aware?---Could you just assist me. What is the date of the incident, and I've got a reason for asking that.

45 Mr Henderson, I think, put it in 1998?---In 1998 at Boronia?

Yes?---I wasn't aware that this happened while I was the state secretary.
Before I was the state secretary - we have 27 organisers and our construction
organisers tend to hang out with other construction organisers, for want of a
more elegant expression, but, clearly, if subcontractors with AW tickets are
5 being pressured to take CFMEU dual tickets when we cover the work, when
we have an agreement, and we have the eligibility to enrol members, then that
isn't appropriate.

Let's pass beyond these specific examples. In your experience in recent years,
10 as the state secretary of the union, how widespread are incidents of the kind
that we have just been looking at?---In terms of my experience in this issue of
dual ticketing, I think there's - I would just like to get some precision about
dual ticketing, because I notice it is used in this statement in paragraph number
32. Some workers, by virtue of their itinerant work patterns, do move from site
15 to site and in one site , perhaps it is a shutdown, mechanical construction
shutdown of a chemical complex, where there are trades (indistinct), they
would have an AWU ticket. Perhaps then, temporarily, they might move into
an a labour hire company who's got some work doing some regular
maintenance in the automotive industry; that is covered by the AMWU. Then
20 this person may be dogging a crane on a building site. So it is not unusual,
although I couldn't quantify the number of people who hold multiple or dual
union tickets. The second issue, I think, inherent in the issue of dual ticketing,
is it's not the case where people choose because of their enthusiasm and it's
administratively easy to be in more than one union. But our union, and I have
25 read the statements for the 204 action, or the rules case, and that, I think, is
probably the best documented evidence on the issue. That behaviour of forcing
people where the union hasn't negotiated the certified agreement, which is
going to govern the terms and conditions, and where the union is not eligible to
enrol the workers anyway, then forcing dual ticketing is, in my opinion,
30 anti-trade union behaviour. The nature of how widespread it is, I'm not sure I
am in a position to quantify how widespread it is, but that it occurs is
inappropriate anyway.

What about the notion of the union fees of workers being paid by their
35 employers. Is that a matter on which you have a view?---In terms of the theory
of it, I guess I would have two comments to make. One is: if an employer
advance pays union dues and then deducts it from the workers, and this is done
with the consent of the workers, that's pretty good for cash flow for the
organisation. The issue is if an employer pays money for workers who don't
40 know they are in the union, or haven't asked to be in that union, well, I think
that's a pretty bold employer who does that. If that employer does it, and we
would never advise an employer to simply pay money, for instance, to the
CFMEU in the context of - in lieu of union membership, we don't think
employers should do that.

45

Have you ever become aware, during the time you've been state secretary, of employers paying CFMEU tickets for their workforces without the workers concerned, being your members, signing application forms to join the CFMEU?---I cannot think of a particular or specific employer that I could
5 name who has done that. I think that's probably the most precise answer I can give to that question.

Let's bring it to your union. Has your union, during your time as secretary or as a full-time official, ever taken money from an employer without, at the same
10 time, receiving application forms for membership?---Not to my knowledge. I would just make one point about it, and it is not so much in construction: sometimes companies with payroll deduction, someone may leave - the company has a system and they will pay a weekly membership, and if you're interested, it's \$6.20, but sometimes people will change jobs, some people will
15 start in a business, some will leave. So we will, I guess, from time to time receive amounts of money for a name which we mightn't have yet fully processed the membership card, but I am not really sure that's what you are getting at.

20 No. What I am getting at is the situation where, as a result of a demand by your union on an employer whose workforce is CFMEU, or some other union, that they become members of your union, that the employer simply writes out a cheque to the AWU to cover that workforce and the AWU does not have, at that time, signed application forms for membership of any or all of those
25 employees?---No, I'm not aware of that in the construction industry, for our union.

Does your union have a policy on such a matter?---I am not sure we have a policy, but our rules do require that I keep a register of members, and so what
30 we do like to have is a name and a form for each person for whom we are receiving union dues. It is not an affirmative policy, it is sort of a practical auditing mechanism.

Presumably, your office staff have instructions from you as to how they are to
35 respond in a situation where a cheque comes in from an employer, supposedly for the payment of union dues of a number of nominated persons, and it's necessary to establish whether those people have signed application forms to join the union. What instructions have you given to your office staff as to how to respond in such a situation?---I am not sure I have ever given a specific
40 instruction, but I do understand that if our office was ever to get a cheque or names where there weren't forms, what they would seek to do is contact the organiser for the site and reconcile it and work out who is this money for and whose membership account do we credit that to. I have no doubt that we have got that practice of lining up names, money and forms.

45

Are you aware of any circumstances in which cheques have come in in respect of named individuals who are not members of the union?---So I understand the question, you're saying am I aware of cheques that have come in with names for people who are not members of the AWU?

5

Yes?---No, I'm not, but I would say that if we got a cheque with some names, we would try and find the membership forms, because we would like to have them as members, I guess.

10 COMMISSIONER: I have been told from a number of people that it is not uncommon in the construction industry for an employer faced with a possible demarcation dispute between the AWU and the CFMEU to simply pay a sum the equivalent or the amount of union fees into the second union, whatever it may be, just so as to avoid industrial unrest?---I guess two points to make, to
15 see if I have understood your point, Commissioner. The first one is the AWU likes to have the names, the membership forms and the money, because we have to provide audited accounts to the industrial relations registrar every year under the act. The second point is I would be surprised if you had been told, and I'd welcome, if you have, to clarify - I beg your pardon. I would be very
20 interested if you have been told that the AWU in Victoria has been receiving money, if you like, in lieu of union membership, an employer pays just to have industrial harmony with us. I do not believe that is our reputation.

I am not suggesting that. I'm suggesting that it is a sum equivalent to the
25 membership application fees?---Well, all the money we receive has to be for some reason.

It's de facto dual ticketing for the purpose of avoiding industrial unrest?---All
30 the money we receive has to be accounted for, it has to be for some reason. To receive money in lieu of membership is not a line we can put in our accounts and statements, so I do not believe that the AWU is receiving this sort of income in the manner which you described.

MR TRACEY: In the event that a cheque did come in in those circumstances,
35 you've got a cheque that is supposedly attributable to the union dues of a nominated group of workers, what would your office staff do with that cheque if, having looked at the records, none of those people, or some of them, were found not to have ever signed application forms to join your union?---
Sometimes cheques which come in the mail - we get cheques in the mail - I
40 guess, can get separated from the paperwork that they are with. When you're sorting all the cheques, we obviously focus on the cheques and the forms, but we certainly focus on banking the money we receive. I have got no doubt, in terms of a practical day-to-day issue, that we may well encounter situations where people may have a private company and the cheque is signed under that
45 or it's a private cheque in the name of the wife of the construction worker.

What we try and do is then - normally, most people will send some sort of invoice back or receipt. What our office staff will do, I imagine, is contact the sender of the cheque and say, "Sorry, we can't quite work out why you have sent this," but we don't maintain sort of a suspense account, where we put the money in and then we'll hopefully work out, at some point in the future, why we have got the money. We will endeavour to reconcile all membership dues with names.

So you pay the money into the account. If you subsequently discover that people haven't signed application forms, does the money get paid back?---As I think I said earlier, I'm not aware of us ever receiving money for people who weren't members.

All right. Let me just ask you a related question. I take it that your union has agreements with many employers under which their workforce is exclusively AWU?---Yes, there are.

Just casting your mind back over the last couple of years, are you aware of any of these employers being brought under pressure by the CFMEU, or its officials, to have those workers join the CFMEU?---I can't name a particular instance where a company which has a membership purely covered by our union, working under a certified agreement negotiated between the members of our union and the company, where that has happened. On the other hand, the evidence led in the 204 case - I've got no particular reason why - in fact, I have no reason to disbelieve that either. I think there has been a little bit of a diminution of inter-union demarcations with most of the other unions I deal with other than the CFMEU. I think one of the other pressures, which might have been more around during the 204 case, which aren't around as much, of course, with a few notable exceptions, which I know you're coming to, is that the AWU - I've got this view that the future for our union doesn't lie in being a low-rate union. In other words, just because we might agree to lower than market rates in a particular sector of the construction industry just so the company will deal with us, I don't think that is a long-term proposition for our union. Fairly or unfairly, that perception, I think, existed in the mid 90s and early 90s in Victoria. So I think one of the things which other unions have detected, not that I would necessarily expect the CFMEU to ever say this, but we are becoming a stronger union in terms of our wage outcomes. So, if you like, some of the ground which caused the competitive unionism, at least one of the issues, that is, the AW being perceived as weaker, we have tried to eliminate.

Although you are not able to recall any specific illustration of the CFMEU trying to move in on your membership in recent years, the problem has been sufficiently acute in the industry here in Victoria, has it not, for there to be ACTU-brokered talks, at senior official level, between your union and the

CFMEU?---Yes. The ACTU-brokered talks haven't just been about Victoria, I have to say, but that doesn't take away from the point you make about the seriousness. The rules case, which the CFMEU initiated, has squandered a million and a half dollars, a million dollars, of the two unions' money just
5 fighting each other over the right to cover people. I think that was an ill-conceived initial application by the CFMEU. I think the ACTU was trying to broker - trying to see if we couldn't sit down and reach an agreement, rather than visit nearly every court in Australia. So I think that's where the thrust was going at. I do think, and I'm not saying that generally life is sweet between our
10 members when they go on to some sites and the CFMEU, but as a rule, what we will do is our organisers would talk the issues through at the coalface, so to speak.

Have you been involved in discussions, under the auspices of the ACTU, with
15 Mr Kingham about these matters, insofar as they arise in Victoria?---I have had - it wasn't auspiced by the ACTU, but I have had two informal discussions with Martin Kingham, Geoff Fary, to see what was possible to work out in Victoria, to get some clarity and who does what and who covers what. The talks were pleasant, but they haven't got anywhere, though.

20 When did they take place?---Last year, the second half of last year.

Mr Kingham has given some evidence to this Commission about one site where serious attempts were made to avoid potential demarcation disputes
25 before the project got under way, and that was the City Link site. Mr Kingham, in his evidence - it is at 386 and 395, Commissioner - undertook to provide the Commission with additional material in that regard, but has failed to do so. Do you have any knowledge of those negotiations, Mr Shorten?---When you talk about City Link, two things: first of all, I wasn't
30 involved with the negotiation of the agreement. Secondly, I did some organising, at the end of City Link, at one end of the tunnel, sorting out some industrial issues, but I have a working knowledge of the mechanism, or the principles behind resolving demarcations, but not a strict literal knowledge.

35 What occurred, Mr Shorten, you recall, was that at the time the industrial arrangements on the site or sites were being negotiated, the unions got together and demarked the work in advance of it being performed. Does that accord with your recollection?---I believe that to be the case, that there was a demarcation agreement reached before the work commenced.

40 And that was incorporated in a certified agreement, which the unions were party to, as were the joint venturers?---I'm not sure if it was ever actually incorporated into the certified agreement, but if you have a copy of it.

45 Have you ever seen the certified agreement?---I may well have.

5 You might recognise it if I call the front page up. It's 009.0890.0937.0098. Do you recall that document now you see the front page of it?---I'm not trying to be unhelpful, but it doesn't ring any bells. But I am happy if we went to the clause, to - - -

10 I will take you to the clause in a minute. But do you understand that agreement to have been signed by your union?---Without boring you with the arcane details, back in 1996, we had a separate construction branch of the union. I worked in the Victorian branch, but there was an adventure called the National Construction Branch, which was in existence for a couple of years as we were settling down our union amalgamation, and I think that was signed by the NCB.

15 Let me take you to the specific provisions. They appear commencing at 0109. Clause 14 of the agreement provides for demarcation of union membership, and it provides a procedure that is to be observed where demarcation problems were to arise in the City Link project. You will see there - before I ask you that, as an organiser working on the site, presumably you would have been
20 familiar with at least this part of the agreement?---I am familiar with the principles of this section. I have to say that when I was looking after one end of the tunnel, it was all AWU, so demarcations, thankfully, didn't arise. But certainly I have seen these sort of words and I am familiar with the thrust.

25 Without going through it line-by-line, the provision requires that if a dispute arises as between unions, work goes on and there are attempts to resolve the issue at various levels and ultimately, if agreement can't be reached, then a nominated arbitrator, or group of arbitrators, is brought in to rule on it. That is the scheme of this, isn't it?---That's the scheme of this. Just on the point about
30 the nominated arbitrator, is there any more after 14.1? I notice my screen says demarcation - - -

35 I can tell you that if - I will ask the operator to scroll on to the next page. You will see that the agreement specifically provides for demarcation panel members, nominated by both the ACTU and the Victorian Trades Hall Council, to be the arbitrators. Do you see that?---Yes.

40 Does that accord with your recollection of what was provided for on this project?---I don't have any recollection of this demarcation panel ever meeting.

45 In fact, I want to suggest to you that it never did. Despite the fact that there were many demarcation disputes on the project, their services were never invoked. Does that accord with your recollection?---I don't know if anyone sought to invoke their services. I mean, I don't know. It sounds like you're right, but I actually don't have the specific knowledge and I would make the

observation that this is a very good principle, this demarcation clause, but - - -

5 We will come back to its utility as a matter of principle and a matter of practice in a minute, but I want to take you to some other parts of it. In 14.2, in the second paragraph, it is provided that having regard to the process we have just been looking at, and an attached demarcation schedule in appendix 1, "the joint venture, the contractors, and the subcontractors will not participate in any discussions or take part in the promotion of one union to the detriment of another". Do you see that?---Yes, I do.

10

To your knowledge, were there breaches on that project of that provision by subcontractors and contractors putting pressure on workers to join particular unions?---I don't have any specific knowledge of any instances to that effect.

15 You are aware of evidence given in the proceedings in the Industrial Relations Commission that that did occur?---If it was listed in the 204 statements, then I am happy to look at them and see if that refreshes my memory, but as I said about those 204 statements, I have got no reason to disbelieve them.

20 You can take it from me that Mr Henderson gave evidence in those proceedings, and again here recently, that there was such pressure brought to bear by employers in order to secure industrial peace?---Well, if Don said that, but as we will no doubt deal with later, I didn't agree with everything he said in his evidence, but on this one, he may well be right. I don't know, I wasn't there.

25

Let's go to this appendix 1, which has got the agreed work allocation in it. It is 0159. In fact, it may be convenient to start at 158. This is what I have described to you earlier as the prior arrangement between the AWU and the CFMEU to demark work in advance, so that problems didn't arise in the course of the project. Are you familiar with the without-prejudice demarcation agreement that is in front of you?---I am familiar with the thrust of it. I don't know every occupation which got divided up, but I am certainly familiar with at least this idea that pre-existing tickets would be recognised, but I couldn't tell you which classifications that applied to, and if I saw the whole thing, I've got no doubt I could at least - - -

30

35

40 It is only a two-page document - a three page document, and we will certainly show you the lot, but on the way through, I just want to take you to some of its provisions.

40

COMMISSIONER: Is the thrust of this to avoid dual ticketing?---I have to read the whole document. I wasn't present when it was negotiated. I would have thought one I have seen the whole lot - I suspect what I say now won't change when I see the whole lot, that is, the thrust is not so much the issue of

45

dual ticketing, because I think I have said earlier that the AWU doesn't force other people into their union, except - we don't force people into our union. I think this is more about trying to draw some lines in the occupational callings, so that everyone knows what piece of the action is theirs.

5

But that is restrictive of the work that an employee belonging to a particular union can do?---I think you would have to - in order to give you the best answer possible, you would have to give me a specific example of that point, because the generalisation - - -

10

If there is something which falls within the coverage of AWU, but does not fall within the coverage of the CFMEU, it would have the practical result, would it not, that a person who is a member of the AWU could only work on such areas of work?---So-called areas of AWU work?

15

Yes?---The rules of the union, for better or for worse, set out the people we are eligible to enrol into that union. That is literally a Holy Grail of the AW, which goes back even earlier than that Broken Hill Wobblies dispute I mentioned. We would say that we are entitled to enrol people who are in our rules and then what we do is we then put our best efforts to achieve appropriate industrial standards. But beyond that - I know that is sort of a positive statement of what we do, I mustn't be quite understanding - a demarcation agreement, we shouldn't be handing away, in a demarcation agreement, parts of our rules that entitle us to enrol people.

25

I understand, whether fully or not is another question, the dispute between unions over demarcation. What I am trying to understand is any advantage that flows to an actual employee from demarcation disputes?---There's two types of demarcation disputes. There is demarcation disputes where a union is claiming to enrol people beyond their eligibility. Then you've got the more vexed issue of where unions have overlapping coverage, they can both enrol people. As a rule, competition theory is sound, that it brings out the best. I think when we have demarcation between unions where they are both entitled to enrol people, I think it is one of those exceptions to the general rules about competition.

35

I think in that case you can either - an employer can either engineer a race to the bottom, can play union off against union to get lower rates, or alternatively, an employer could end up being caught in a race to the top, where each union, to win the affections of the employee, will seek better industrial conditions.

40

I think a lot of this discussion about demarcation will be resolved if we could find a way of not having overlapping coverage.

45

I understand that, but that still means, doesn't it, that an employee who is covered by union A can only do work in respect of which that union has coverage?---Sorry, I now appreciate the question you're asking. No, a person can move to any number of jobs. The problem they have is they can't always

take their union with them.

And the reality is they can't get a job unless they belong to the union which in fact has coverage, at least on major CBD sites here?---No, I am not sure I agree with that proposition, because in most cases - I can only speak for the AWU, and we are not particularly involved in the CBD. For the areas and the people we enrol, in most cases, in nearly all cases, we should be enrolling only people we are eligible to cover. Then what we do is we do negotiate their conditions. I think that one of the sort of debates which observers of industrial relations, without necessarily being practitioners, the inherent contradiction they grapple with is on one hand, the Federal Government would have you believe is competitive unionism, workers should be able to choose any union at any time, on the theory that they are all basically different brands of washing powder and whoever provides the best service and the best benefits. But I think that doesn't fully recognise the nature of the workplace and industrial relations, where if you had 20 unions who could enrol anyone they want across any industry, I think that would potentially cause more demarcation hassles than a monopoly arrangement, because a worker always has a choice not to join a union, so they still have choice; they can either accept the union or not.

They have a theoretical choice?---They have a choice, then.

But in practice, I have been told, you can't get a job on a major city site unless you belong, for instance, to the CFMEU?---Well, I have to say that the AWU doesn't have a lot of construction that we cover in the major city, so what you say may or may not be correct, but I am not sure I can add a lot to it.

MR TRACEY: I will ask that the operator scroll down to the bottom of that page. You will see coming up, Mr Shorten, the subheading AWU/CFMEU Construction And General Division, and I draw what appears immediately below it to your attention, in the light of the question the Commissioner asked you a little while ago about the intention of this agreement, namely, to avoid workers who came on to the City Link site being forced into dual ticketing arrangements once they were on the site. Do you recognise those provisions?--
-No, I haven't seen them, but a demarcation agreement which is trying to prevent dual ticketing, that's good. I wouldn't be against that.

Not only that, but it is specific. If you were an AWU member working for a company on some other site and that company got a subcontracting role on City Link and brought that worker on site, then there could be no question of that worker being required also to join the CFMEU consistently with this agreement. That was the position, wasn't it.

MR BROMBERG: In fairness to the witness, I do recall that he did ask to be given an opportunity to read the document. He hasn't yet been given that

opportunity because I think we moved on to other questions. Perhaps he should, if he is now going to be asked specifically about the contents of these clauses.

5 MR TRACEY: It is on the screen. Have you read the three paragraphs - the dot points that I have just drawn to your attention, Mr Shorten? If you need more time, please say so?---Is this the whole document?

Of course not. It is the relevant part, however, dealing with the
10 Commissioner's question?---I beg your pardon. When I asked was this the whole document, is this the whole document relating to the demarcation agreement?

It is the first of three pages, and I am about to take you to the rest of it?---I do
15 think I can give more constructive and helpful answers if I can read the whole context.

I am happy for you to do that and then we will come back to it, if you feel more
20 comfortable doing it that way. I would ask that 0159, which is the second page of the document, be called up. You will see there a table setting out agreed work allocation as between unions?---Yes.

I will ask that 0160 also be called up, which is simply a continuation of that
25 table.

COMMISSIONER: Scroll down this one first.

MR TRACEY: Yes. I intend to come back to it, but I just wanted the witness
30 to see that. If you would go over, please, to the top of the next page. There is only one reference to the AWU there, and it's in the last block on the right-hand side?---Sure.

You have seen the whole document now, Mr Shorten?---Thanks.

35 Are you comfortable with that?---Yes, thanks.

You have seen it before?---Actually, I haven't, but it's still - I understand what it's doing.

40 Let's go back to 0158, please, and I will ask you again what the position was as between your union and the CFMEU in relation to dual ticketing. What I want to suggest to you is that, consistent with those terms that have been entered into by the two unions, in advance of this project, that if a company employing your members got a subcontracting job on this site, brought their members on site
45 with AWU tickets, they could not, consistently with this agreement, be

required to join the CFMEU. Is that right?---The answer is that this - and that's why I think it turned out to be useful I saw the following two pages of tables - it is not simply saying that if you have an AWU ticket, that is fine, you can go and carry that AWU ticket. My view is very clear, that you have to read that
5 also with the allocation about the eligibility and scope of the work. For instance, if you had an AW ticket or a CFMEU ticket - say someone had a CFMEU ticket prior to coming on to this site and they were going to work in an area covered by the AWU, I would not see that automatically working, that if you were going to work in the tunnel - perhaps you had been a Broken Hill
10 miner and you worked in the tunnel - no, I wouldn't support or see the value of an agreement which was to allow people to move into our traditional areas of coverage, and I can imagine the CFMEU would feel the same.

And that notwithstanding what appears adjacent to those three dot points on the bottom of the first page?---My view is very clear about the rules. The rules are
15 there - any particular generation of union officials in the AWU, our job, amongst others, is to ensure that we preserve the integrity of the rules. Our rules give us certain coverage. One of the reasons some other unions don't like us is because they give us a lot of coverage, but having said that, we should
20 never be agreeing to allow people to come into our areas where we have negotiated the agreements and set standards, where we are eligible to enrol them, and simply allowing any ticket to do.

Let me take you to a practical example. Who has got coverage, on your
25 understanding, of steel fixing work?---Well, I would have to go to my rules and go through it, because, as I said, there is overlapping coverage in some areas.

You wouldn't assert that the AWU did not have coverage of steel fixers, would
30 you?---No, I would not assert that.

So let's take a company that comes on site to do steel fixing?---I beg your
pardon. However, where the steel fixers are working has an impact as well. This is one of the difficulties with the rules of unions, where we have coverage
35 over callings and then we have coverage over occupations. So, if you like, there is a horizontal coverage of particular callings, but there is also vertical coverage, for the ease of description, of particular sections of industry. So it is not automatic that steel fixers would automatically be in the AWU, nor is it automatic they'd automatically have to be in the CFMEU.

40 MR TRACEY: Are you familiar with a company - - -

COMMISSIONER: - - - choose to join?---Pardon?

You are meant to choose to join, not have to be in?---Yes.
45

MR TRACEY: Are you familiar with a company by the name of Henshall Mammolito?---No, not particularly. I was aware that this issue may have come up in the transcript yesterday, but I have never dealt with Henshall Mammolito.

5 Are you aware they employed your members at the time of the City Link construction?---I honestly can't recall. I will say that at the time the City Link construction started, there were two distinct branches of the AWU. They then did join together, but an organiser at the time, which I was, I don't know every client company or every company that has AWU members.

10

Are you aware of part of the construction that was undertaken by the major contractor, Citra?---No.

15 COMMISSIONER: Why was there any need to have a demarcation clause such as this in the City Link agreement?---Well, I can't look into the minds of the people who did it. All I can do is offer an informed guess. Because of the changes in the nature of the construction industry and the CFMEU resolving that the 86 and 92 demarcation agreements were no longer relevant, the CFMEU certainly had been ambitious to enrol members. So I think there was probably a perception that rather than have these arguments
20 each time companies were involved on the site, set down the stakes of the relationship or set some tent pegs down on the issues before it started.

25 So it was aimed at avoiding industrial unrest?---I think it was also - once again, I can't see into the minds of my predecessors of the National Construction Branch, but I think it was also aimed at making sure they had a role, because I think that the CFMEU was enrolling people that were in the NCB, so I think they said, "Hey, we need to try and get a rope around it". So I am not sure it is purely industrial disputation. That may or may not have been an additional
30 issue, but I think it was also a view that all of these unions were affiliated to the Trades Hall, and it was far better to try and work out a trade union approach than resolve them as the contract went on.

35 Why would an employer be interested in this?---Interested in a demarcation agreement?

40 Yes?---I think that employers need to know what the sort of market rates are that workers are getting paid. I think that a demarcation arrangement does clear up any confusion, such that when workers, say, in the AWU who are asphalters or road surfacers turn up at a construction site, there is not a debate at the gate about who's got the right agreement, what are the right terms, what is industrially appropriate. So I think demarcation arrangements do assist in the clarity of who to negotiate with and how to identify your operations, in terms of their industrial - if you are going to have a union, if you're going to
45 have a union, which union is appropriate to deal with.

MR TRACEY: Who creates the problems at the gate to which you have just referred?---I would think that the issue is that - take, for instance, as I said, our road surfacers. Most of our asphalters are permanent workers, in
5 other words, their job is there week in, week out. Most construction workers, building construction workers, at, say, construction sites, they have agreements - they are itinerant workers. I think that does influence the nature of the industrial arrangements which occur. In other words, I think there's some differences in the way permanent year-round workers are paid as compared to
10 people who are not sure where their next job is coming from. However, when these people are on the same site and people are getting paid different conditions, that can create some tension, because obviously in the mind, and I don't have any particular instance to draw upon, but I can only imagine that if you are working on a building site and all of a sudden another crew come along
15 for another contractor and are paid remarkably different rates, that can cause a sense that the industry standards are being lowered. In the case of the road surfacers, that is an unfair conclusion because, as I have said, the nature of their work and their work patterns is different. But if you've got people coming on with lots of different conditions doing the same sort of work and the
20 perception is that the reason why they are at different rates is because of a union affiliation, then I think that is a complicated brew.

Perhaps you misunderstood the question, Mr Shorten. You said problems at the gate. We are not talking about grievances that arise after a contractor is on
25 site and his workers realise they are getting paid less than some other workers who are already on site. You said the problem would arise at the gate, in other words, when the contractor first turns up. Who creates the problem at the gate?---Well, I suppose using the term "problem at the gate" is a term where I am trying to say when a contractor first starts to work, if there are differences.
30 The gate, in my mind, is an image where you've got someone coming from outside the site on to the site. I think if you're looking for practical examples, as I said, my organisers deal with these issues; I don't tend to be at every work site every day. But looking at the 204 statements, I think there was some evidence led there that there are problems in terms of AWU people getting on
35 to CFMEU sites. Beyond that, I'm not sure I can help you any further.

Mr Shorten, you well know that there are many sites in this state where, over the past few years, companies employing your members have turned up at sites and have been incommoded, to put it mildly, as a result of CFMEU shop
40 stewards refusing to allow them on to the site?---I can tell you what I know, sir. What I know is the Workplace Relations Act 1996 has got a couple of fundamental flaws, that if the situations you're talking about occur, that is the core of the issue. The core of the issue is - and as much as a lot of people love competition theory, competitive unionism is destructive, in my opinion,
45 because what it does do is it forces unions to compete with each other to win

the affections of individual workers, when in fact I think that we would be far better off changing the act, in order to strengthen the rights of unions who feel there may be a demarcation issue possible to go to the Industrial Relations Commission, so it's got the power to actually make a decision before the
5 dispute occurs. I also believe that the changes in the Workplace Relations Act have helped sponsor some of the evidence which was led in our rules case, because once upon a time, we had a standard which was "conveniently belong". In other words, before a union could try and seek to enrol members, there was a test where the union aspiring to enrol outside its areas had to
10 satisfy. Now the onus has been reversed in that test. So in my opinion - I have no specific knowledge of any particular instance. Any other generalisation that you're asking me for, I don't wish to make, but what I will say is the law, as it currently stands, helps fuel these problems.

15 COMMISSIONER: I thought that, under the Workplace Relations Act, if there was a dispute in relation to demarcation, it could be referred by the relevant union or unions, or indeed by an employer, to the Industrial Relations Commission, and I further understood that under the VBIA, which your union is not a member of, I think, but under most EBAs that I have seen, there is
20 provision that there is to be no stoppage of work whilst the matter is sorted out through either negotiation or arbitration. Is that not so?---Answering the second point first, in terms of following disputes procedures, we have disputes procedures and, yes, they should be followed, and that applies to - - -

25 If they are followed, then you don't get stoppages of work?---There's a logic there which I can't disagree with. But when we talk about demarcations and there are mechanisms to resolve demarcations, like going to the Commission, my view is that the Commission only has any power to resolve demarcations once a dispute has occurred, and I think the nub of demarcation issues is to
30 prevent them before they occur, and I think the City Link agreement, or the example you referred to in terms of the process, Commissioner, I think that is putting tape around the issue. Fundamentally, I believe that if unions didn't have overlapping coverage, then you can't have a demark and that, to me, is the cleanest and clearest resolution.

35 I understand that view.

MR TRACEY: Now, Mr Kingham told the Commission that the negotiations that took place between your union and his, that is reflected in the three pages
40 of appendix 1 to the joint venture agreement, would serve as a good model for dispute prevention in future projects. Do you know sufficiently much about the terms of the agreement, and the way it operated in practice, to offer the Commission a view as to that issue?---Agreements are only as good as the people who make them. No amount of paperwork is going to create goodwill
45 where it doesn't exist. I would be very pleased if I could get the CFMEU to

even agree on a demarcation in writing, but I don't believe that is going to happen at the moment. We have been unable to achieve that so far. I think we need a far more thorough solution than just hoping that we will work it out from major project to major project. I think we need some legislative certainty
5 in terms of both the rules and the respect for rules of different industrial organisations, and I also believe that we need procedures with more teeth to fix the disputes and get binding decisions before the disputes occur.

10 Now, while you've been national secretary of the AWU, there was in place in Western Australia a task force run by the State Government that provided just such a quick resolution of disputes arising on building sites in that state. Do you have a view as to whether a similar task force might serve the sorts of purposes to which you have just been adverting?

15 MR BROMBERG: I object to the question. Is my learned friend saying that it is his evidence that the task force had this impact, or is he saying that there will be evidence called that the task force was successful in this way? It seems the question is pregnant with a presumption which is not, to date, based on the evidence and unless my friend has a source for it, it ought not be put to the
20 witness as a fait accompli.

COMMISSIONER: I allow it. Yes, Mr Tracey.

25 MR TRACEY: If the Commission pleases, I will take it by stages.

Mr Shorten, you were nodding assent, I take it, to the fact that you knew about the operation of the Western Australian task force?---I can't recall what I was nodding to. The first thing you said is national secretary, and I am aware there is a task force in Western Australia, but I was going to make a couple sort of
30 initial points. I have been subpoenaed here in the context of matters affecting Victoria. I am not averse to preparing a position, as the national secretary, to give those views. I think I am the first - it just so happens I have the dual position. That is the first point. The second point is - - -

35 COMMISSIONER: I would welcome any submission from your national organisation?---And we will prepare a statement. But the second thing is it is a rule in the AWU, somewhere up there with "we will fight to our death for the rules," that state branches have a large amount of autonomy over what we say about state branches. So I would need, in all fairness, to contact my Western
40 Australian colleagues and ascertain a view, and I just think that will inform my position. I do not think it is inappropriate that the national office has a view about the structures in terms of resolving demarcations, but I would feel very under-prepared and it would be inappropriate, at this point, for me to comment wearing my national secretary hat. I do stress to say that does not mean that
45 we would not be willing to deal with that issue, but I think at this point it's

premature for me to judge, without having more adequate consultation with my Western Australian colleagues.

5 MR TRACEY: The evidence you have given to the Commissioner in the last 10 minutes is evidence that applies nationally, surely?---I did understand - - -

10 You were saying that the Workplace Relations Act doesn't work. That is a nationally operative piece of legislation, is it the?---It is. This is a nationally operative Commission, but the point is I do take the view that I am answering the questions based on my experience as the Victorian secretary.

15 I invite you to cast your sights a little higher than that, Mr Shorten, and I understand you may not wish to speak about experiences in Western Australia of which you have no direct knowledge, but you have suggested to the Commission that there needs to be in place a quick dispute resolution mechanism to deal with on-site problems such as demarcation arising between unions. That is the position, isn't it?---Two points - that seems to be my favourite opening - the first thing is if I have in any way conveyed that I am speaking for every branch of the union in answer to these questions, I am most keen to correct that record. But it is not inappropriate for a Victorian to have a view on national reforms to the Workplace Relations Act, because that is the legislation which applies over here. More generally, I guess - if you could repeat the question.

25 Your evidence to the Commission a little while ago, as I understood it, and you correct me if I am wrong, was that the federal act didn't work as a mechanism to resolve demarcation and other disputes between unions on site and it needed to be improved by the provision of speedy mechanisms to resolve such disputes. That was the tenor of your evidence, was it not?---Not quite. It was certainly some of it, though. What I am saying is the Commission, the Australian Industrial Relations Commission, should get back some powers which were taken away from it, and then I think that will deal with some of the timeliness or the preventative issues. I also was saying that it is not just a question of the mechanism. I think that whilst - I know I have sort of made this point a couple of times, so I don't mean to overstay my welcome on it - the application of saying that competition amongst unions, because competition is a good thing per se, is not automatically a correct leap of logic to make. I would say that unions are regulated by the act already and that in many ways, you could view the rules of an organisation being the licence under the act to cover those areas. So, therefore, I think that what we need to do is clarify the issues of overlapping membership. Then it would be very - if we don't have overlapping membership, it is very hard to have a bona fide demarcation dispute and then if that is the case, then if the Commission has got the power to prevent them by reforming section - I think it's 118(1)(b), but I am happy to confirm that - I think then you've got a combination of a fool-proof system

with a timely remedy.

5 So what you are looking for is a provision whereby the Industrial Relations Commission can demark work, to the exclusion of all other unions, in favour of a single union?---Yep.

COMMISSIONER: What happens to non-unionists?---They stay non-unionists.

10 Have you given any consideration to the appropriateness or desirability of there being a special national act just to address the problems which may exist in the building and construction industry?---Not at this stage I haven't.

15 Have you given any consideration to there being one union only within the building and construction industry? It may not take you long to consider that? ---I'll give you that bolt of lightening from the AW gods. No, I don't necessarily think there should just be one union in all of construction, but I do believe that - I think some of my forebears would be reaching down to contradict me there and, of course, I don't make my comments for Queensland.
20 But I do believe that it would be useful to have patches, if you like, where basically one union has the ability to enrol or not enrol people to the exclusion of all others. I think that would have a good effect in the construction industry, because then it's a chance to demonstrate that unions are capable of making agreements, keeping their word - I am not saying they are not - but I think it is
25 a good opportunity to do that and I think we can demonstrate, if there isn't this issue of competing unionism, the ability to get the job done on time and within budget. I am not saying that doesn't happen, but I just think that would be a best practice outcome.

30 What about the notion of unions have fiscal responsibility for the conduct of their members?---Did you say "fiscal" or "physical"?

Fiscal?---Fiscal. When they are acting on behalf of the union or when they're - I think I probably need to understand the question better.

35 Let me put it this way: some people keep telling me that unions don't ever decide anything, it always comes from the bottom of the floor. Others keep telling me that that is not so, that the reality of the guiding force is the force of the union and it works down through people such as yourself, down to
40 organisers and shop stewards and the like. One view would be that that area for debate should be removed and that if persons are members of a union and act in concert, they should be taken to be acting on behalf of the union, or in some other methodology, removing the debate about whether it is the union or just the workers who happen to all be acting in unison. If you do that, one
45 view could be that there ought to be fiscal responsibility attached to the acts of

those persons or the acts of the union?---The answer is going to be longer than the question; the question covers a number of points. I will try and answer as best I can generally and I will just speak from the context of the AWU, but also the act which governs us. Where you have members and you are negotiating an agreement, obviously you would like to have membership input into the outcome of the agreement. But the act itself recognises there will be situations where the union, by nature, has to be the officials in negotiating the agreement ; obviously, I am referring to a greenfields agreement, where there is no members. You've also, when you are acting on behalf of members - I'm answering the first component, which is the sort of bottom up/top down theme in your question - you then also have got, if you like, another strata sort of issue which a secretary has to take into account. You might have a few members at one point who want to go one way but then you've got the majority of members in the majority of companies, or within the industry, who have another view. That is always a really difficult situation. So in that case, I think you have got to balance out what is in the best interests of the union as a whole. Members themselves have to deal with this issue; you may take a vote to take protected action and it may be a majority vote to a minority vote. At one level, you could say an individual shouldn't be made to do something that they don't want to do, but on the other hand, if you agree to participate in the process of a collective bargaining, having collective votes, then what role do we give to the majority, which is also a very important sort of theme in unions. So I'm not sure it is possible to simply answer is it always bottom up, should it be top down, what's the context of in particular sites or particular industries. A further issue that the AWU has to deal with is we are not just a one-industry union. Sort of the odd remark comes at the Trades Hall, when you get bothered going along, we should be behind the farm gate just looking after shearers. I mean, we have got news for that view; that is not correct. But it is difficult to automatically compare the pay rates that you may get in a fruit-packing shed up on the Murray to a CBD construction site. The industries are different. Quite often, though, we have to explain to members in one industry what the position is in another, but we wouldn't necessarily want to have shearers dictating to steel fixers or steel fixers dictating to shearers. So I think at its heart, the answer, for me, in terms of the first issue, is that unions have to be, in essence, democratic and so long as there are transparent processes about maintaining the general objectives - we do come up for election every four years, and I think that provides some accountability, which is pretty fundamental, and I do think, unlike many organisations - indeed, all companies - we are far more regulated than company directors. The AEC conducts our ballots, not shareholders at a meeting. So I do think, on balance, the answer to the first point is that so long as the organisation is conducted with democratic principles, the answers generally sort themselves out. There can be excesses from either side; you might have a few officials who negotiate agreements in isolation of anyone else, and I guess sometimes you can have members at a particular site, and I am still trying to move into the second part

of your question about fiscal responsibility, where do you draw the line, and I can speak not so much from construction, but in manufacturing, where I have been involved a lot, sometimes your members will want to go one way, sometimes you can get involved in a dispute where the company will take
5 section 127 or 166A proceedings, and sometimes you have got to go back and tell your members - you wouldn't say the parties; that was a colloquial - you'd say, "This is as far as we can go at this point". Then if members choose to individually protest - - -

10 They don't individually protest. They all individually protest together?---Yes. I am not sure what the collective noun for that would be, but the issue is if the union makes a recommendation and the members don't follow it, some would say, "Well, the union started this campaign, so they should be liable for any consequences," but, as you know, you have got this tricky issue. Sometimes
15 the members will want to go one way and the officials go the other. So I think there are existing tests about fiscal responsibility.

If you the accept democratic principle, then you do what the members want to do?---Yes. The question, though, is what is the franchise from which you
20 determine the democratic principle. I get elected for four years. To use a parallel, a politician gets elected every number of years. You could have people at a particular point in time say, "Hey, the majority wish you to do this." Well, the point is you are there every three years, you can't have an election every day. The Ross Perot style - and maybe we will come to that in union
25 work sites, where everyone has got an electronic button and they get to vote on a view every day. That isn't always possible and, as I said, you could quite often have one company versus an industry standard, who is right, who is wrong. You could also have, and I have seen this in areas, you could have an issue where different groups within the particular company with whom you are
30 trying to reach an agreement have a different view. To use an analogy , not related to construction, but to show how we arrive at our decision making, I have often seen in our factories where you might have the process workers are going one way but you might have the store people, who get to ride around in their forklifts all day, they might have a different view; they might see
35 themselves as superior. I know I am giving quite a long answer on the issue of who runs unions and what is the democratic principle, but I think it's a balancing act and I do think there is that ultimate accountability mechanism. The other thing is people can actually leave the union if they are not happy. At the end of the day, at particular sites you may have leverage, where the benefits
40 of being in the union and the agreement is so good that people won't leave it there. But if you are too arrogant to people too often, the next job they may move on to, they won't join. So I think there's a blend, if you like, of the act. Unions are inherently democratic institutions. We often get reported for the exciting exceptions to the rule, or the alleged exemptions, but, fundamentally,
45 unions, and I do believe the construction industry as well, unions are

fundamentally democratic. So to that extent, I do believe the members do control the proceedings.

5 You have addressed accountability as between members and their officials, but what about accountability as between unions and others in the community?---I do believe unions - I think the Workplace Relations Act sets out some legal processes in terms of the way organisations of employees or employers should conduct themselves, so I think the act sets that out. I can't speak for any other union, but for the AWU, and that's why I was so annoyed at the reporting
10 yesterday of that statement of what was said about me, but the AWU certainly is very conscious of having a good name in the community. But a good name for a union means more than just - it means a number of things. I think it means that you are seen to be strong and achieve good results, you are seen also not to be industrially unreasonable, and I think also the accountability of a
15 union to the community is that I think what the community expect of unions is that good unions know where to draw the line, and I do think in the case of AWU, that that is the perception.

20 MR TRACEY: I tender the Transfield Obayashi Joint Venture agreement in relation to City Link, which commences at 009.0890.0937.0098.

EXHIBIT #121 - TRANSFIELD-OBAYASHI JOINT VENTURE AGREEMENT IN RELATION TO CITY LINK

25 MR TRACEY: Mr Shorten, I want to take to you an express example of conduct that is the subject of examination by the Commission relating to the treatment of your members employed by Able Demolitions. I ask you to cast your mind back pre-March of 2000 and ask you whether you had any
30 knowledge of Able and its operations prior to that time?---I've been briefly aware of Able to the extent that they had done some demolition work at the Esso Longford plant, I think that was at Christmas - I don't know if it was Christmas - it must have been Christmas 99.

35 You knew Able employed workers who were members of your union?---I knew that doing the work at Longford, would have had AWU labour.

When did you first become aware that Able had tendered for the National Gallery of Victoria demolition contract?---I can't recall exactly when, but I have sort of got one reference point. I got married at the end of March and I
40 am sure that, before I went on my honeymoon, I had had a brief discussion with Don Henderson, I think Paul Rossi was at the meeting, I can't 100 per cent recall, but I think so. It wasn't a meeting initiated to particularly talk to me. I think I was passing through one of the meeting rooms in the union office. I think Don introduced me to Paul, said that this company, who had an
45 agreement with the AWU, a national agreement, were likely or had got a

contract to do some early demolition work at the National Gallery site.

5 Do you recall approximately mid-May being rung up by Mr Fary about the problems that had arisen in relation to Able getting that contract?---I believe Geoff Fary did ring me in mid-May. I think he had just started as the - he had just started as the then director of Industrial Relations Victoria.

You had known him before that, I take it?---I had met him before that, yes.

10 So he was somebody who you had done business with before?---I think our paths had crossed. I'm not sure I had done any business with him in terms of negotiating any industrial agreement or any sort of commercial transaction. I knew him from around.

15 He rang you up and what did he say to you?---I can't recall the exact conversation. I know everyone is busy, but just for the purposes, I average about a thousand outgoing mobile phone calls a month. I don't recall the exact words, but certainly he was saying to me that Able was going to do some work at the National Gallery. I don't know if he was saying they had got the contract or not got the contract. He basically said to me that Able, National Gallery, what did I know about them. I said that in the past they had had an agreement with us, that I imagined that the - then I think he talked about the CFMEU. I said I guess I wasn't surprised, clearly they have got the history of doing work. I think I might have indicated that we wanted to get an agreement to cover that work. That was about it.

25 Well, he recalls you asserting that the AWU had coverage of that work. Does that accord with your recollection?---No, that doesn't accord with my recollection on that particular point.

30 Did you say anything to him that suggested that you were surrendering coverage to the CFMEU?---No, I honestly don't think we talked about coverage, as far as I can recollect.

35 Mr Shorten, you have just told us he told you that the CFMEU were challenging your coverage. That was the whole point of the phone call, was it not?

40 MR BROMBERG: With respect, the witness did not say that he was told the CFMEU were challenging coverage. If you look at Mr Fary's evidence, as a second point, he doesn't say that he was told about coverage, he says it was an inference that he drew from the conversation, and that's at line 30, page 2352.

45 COMMISSIONER: Yes, Mr Tracey, go on.

MR TRACEY: I accept that, but I press the question nonetheless.

5 COMMISSIONER: Yes, go on?---I think your first question was that you asked me did Mr Fary ask me or did we discuss the AWU surrendering. You then asked a second question, which Mr Bromberg sort of raised. I would like you to actually repeat the question.

10 MR TRACEY: I am happy to do that. The whole purpose of the conversation, I suggest to you, was to raise with you anticipated problems because the CFMEU had told Mr Fary that it was challenging the AWU's coverage of the proposed demolition work on the National Gallery of Victoria site?---As I say, I don't recall the exact words. What I do recall is that I may well have indicated that Able has an agreement with the AWU. I believe I probably would have said that we will endeavour to get a new agreement. But
15 beyond that, I'm sure - I'm not sure, but I certainly don't recollect the discussion about CFMEU attack and a dispute.

You do know, however, that Able was eventually awarded the contract?---Yes.

20 And you know that, shortly after it started work in July, an agreement was negotiated between Mr Henderson on behalf of your union and the representatives of Able as to the terms and conditions of employment of your members on that site?---No, I do not know that. No.

25 Mr Henderson never told you that?---No. You asked me was I aware that Don Henderson had negotiated an agreement for that site some weeks or a period of time after the contract was granted.

30 No, I said a few days after, early July?---A few days. My point is that at no stage - unions have got processes for agreements, for certification. At no stage was an agreement presented to me for certification, to arrange for certification. I would like to say that my next recollection of them getting the contract, which you asked me earlier, was I believe I had a meeting with the company and Don Henderson. This was in June. Before that meeting, I started to
35 familiarise myself in some detail with the work which was being proposed and also started to have a good look at our rules, because earlier in March, as I said, I had a passing conversation with them. I certainly am very sure I suggested at that point in March that we would need to have a good agreement. The work was certainly unusual and I wasn't aware of us doing that sort of work in the
40 CBD or an art gallery before. So in June, I then met with the company and Mr Henderson. I indicated that I believe it was appropriate that we have a market rates agreement. I also raised the issue that the arguments about our eligibility to cover work at a demolition at a National Gallery was by no means clear, by no means clear. Don Henderson was certainly relatively relaxed
45 about our ability to cover it, and he's a very senior - formerly a very

experienced union official, experienced. But what I proposed to the company was a proper market level demolition agreement which I believed would at least start to make us a viable issue at the gallery.

5 Did you understand that, as a result of those and other dealings between representatives of your union and representatives of Able, an agreement was reached under which there were pay and condition provisions made available to your members on that site that were superior to any other industrial instrument that was arguably applicable on the site?---Are you referring to the
10 1998 agreement or to some subsequent arrangement?

I'm talking about an arrangement entered into to supplement the 1998 agreement?---No organiser under our rules has got the power to make an agreement. So there is no way that Don Henderson could make an agreement
15 for the AWU for that site.

My question was not confined to Mr Henderson, it was more general than that. Are you aware of any agreement entered into by representatives of your union with representatives of Able in or about early July 2000 which produced the
20 result that your members employed by Able and working on the National Gallery of Victoria site received terms and conditions of employment in excess of any other industrial instrument that was arguably applicable on that site?---If we are not talking about the 1998 certified agreement, and you're referring to
25 am I aware of an agreement reached in early July between people, not necessarily Don Henderson and Able, to cover the work at that site, which was superior to arguably any other instruments - sorry to repeat the question, but it's a long question and I want to make sure I answer it exactly correct - if that is the question, the answer is there was no agreement reached by the AWU and certainly there was some discussion about an all-up hourly rate higher than the
30 all-up hourly rate which previously existed in a certified agreement, no, I did not believe that an all-up hourly rate was the appropriate way to go on that site.

Do you know whether, nonetheless, it was paid?---No, I have no idea if it was paid.
35

Have you made any inquiries to establish - I will tie it to a time. Did you make any inquiries in July or August of 2000 with a view to determining precisely what your members employed by Able on the National Gallery of Victoria site were receiving by way of remuneration?---Did I make any inquiries to find out
40 what the people working on the Able site were getting paid during July and August?

Yes?---That's the question. I assumed that they were being paid under the 1998 agreement. I then further assumed, after a discussion on about 20 June, that the company was unclear what they had to do in terms of upgrading their
45

agreement. In fact, I was so unsure that the company understood what was required to be done and what the AWU was seeking that I actually suggested they go and get their own independent advice. The reason why I suggested that is because my perception during the meeting we had was that Don Henderson
5 was providing industrial advice to the company. I understood there had been a long-standing relationship, that when Don Henderson parted ways with the BWIU, that Able employed him, gave him some opportunities. So I understood and could respect the friendship that existed, but I certainly had the view that the company was not clear, when I was indicating what we needed
10 was an agreement which was consistent with the market conditions for demolition in the CBD. As to what they were getting specifically paid, I was told at one stage that the company was going to pay them an all-up rate, but what they ultimately got, no, I am not aware.

15 The answer to the question, very simply, Mr Shorten, is that you did not know in July and August what your members employed by Able on the National Gallery site were being paid by Able?---Two things: one is, if that's the answer, I'm not sure why you are asking me the question; and the second point is that is not my answer.

20 Did you know?---I am saying that it was indicated to me that the company's view of upgrading the agreement was to have a higher all-up rate.

25 Mr Shorten, it's a simple question: did you know precisely what amount of money was being paid to each of your members on that site in July and August 2000?---It sounds like a simple question, but the precise answer is, without knowing every hour of overtime, without knowing all of the work that they were putting in, I cannot tell you, nor would I suggest anyone can indicate, what someone gets unless they see every slip or their group certificates.

30 Let me cast it another way. Did you know what the hourly rate for each classification of your members employed by Able on that site in July and August 2000 was?---I understood - okay, I do you understand the question you're asking now. I understood that the Able certified agreement had certain
35 conditions in it. So, yes, I was familiar with the what the certified agreement had. After I had indicated to Mr Henderson and to the company that we needed to have a proper agreement reflective of market conditions, I subsequently learned that all that had been worked out was a higher hourly rate, and I understood that the trades or the trades classification, although my
40 memory is not precise, there was an all-up rate of approximately \$28.

Do you know whether Able paid that rate or not?---I don't know.

45 Was it a rate that you knew to be superior to any other industrial instrument that was arguably applicable on the site?---Certainly not.

How far behind did it fall?---Well, I think what we have to do is deconstruct this event, deconstruct the figure. When you say was it superior to what else may have been paid or may have been applicable, I think that the issue here is
5 breaking down what the hourly rate was and what were the other conditions which had been traded off for that hourly rate, and in my view the balance of the conditions traded off made whatever the final number rate was inappropriate.

10 COMMISSIONER: In your discussions with Able, in whenever they were, June, did you take the position that the 1998 agreement was applicable to this project, or did you take the view that it wasn't?---I had the view that the 1998 agreement wasn't applicable to the site. That doesn't stop us making a new agreement. But by June - okay, if someone comes to me in March and
15 says, "Here's a company, looks like we're going to pick up some new construction work," my vies is that's good and that's what I have organisers to do. By June, I sit down with the company, I say, "Listen, the 1998 agreement doesn't cut the mustard". I then also, having read the rules and having a bit of a look, say, "And, listen, we need to get the right agreement because I have
20 significant concerns about our constitutional ability to actually represent members in this particular work".

That would mean, if you were to get a new agreement, you would have presumably two registered agreements with Able?---Yes.

25 Covering different areas of work?---Yep.

And both containing a no further claims clause?---Yep.

30 MR TRACEY: Taking you on to early July, Mr Shorten, do you recall a meeting at that time, at which you were present, Mr Henderson was present and Mr Rossi, Mr Paul Rossi, was present?---I don't - obviously I have been thinking about when the meetings were. I do clearly recall the meeting where I suggested that Paul Rossi get some independent advice. I don't particularly
35 recall a subsequent meeting in early July. I do recall a meeting in August.

I'll leave August out of it for the moment. Do you recall a meeting, at which the three of you were present, at which you suggested to Mr Rossi that he ought to sign an agreement to which both the CFMEU and the AWU were
40 privy?---In terms of when the meeting took place, I cannot be precise. But I certainly was beginning to form the view that our eligibility to enrol these people was certainly unclear, putting the best light on it, but I also had the view that the company was going to need to sign an appropriate EBA with market rates and conditions. In terms of saying that they would have to be party to the
45 CFMEU in early July, I don't have any recollection of that.

Do you deny that you made that suggestion at a meeting in early July?---I would say that I have no recollection of making that suggestion, and I'm not even sure of when we met.

5

Do you recall, at a meeting involving the three of you, that after Mr Rossi left, you picked up the phone and dialled a number and then said, "I want Able out of that contract"?---Sorry, who was I meant to have dialled?

10 I didn't tell you that. Do you recall ringing anybody after a meeting at which Mr Rossi had been present, shortly after he left, and said to somebody at the other end of the phone, "I want Able out of that contract"?---I cannot recall making that - I cannot recall making that telephone call. I cannot imagine why I would say that, as I was still committed to try to work through a dubious
15 eligibility issue, but to try and deliver an agreement. Able had been very good to Don Henderson. Don Henderson is an official of our union. If you can resolve issues and if we can get a good agreement, that's what we were aiming to do, but I wasn't interested in seeing Able out of any contract.

20 Do you deny that you said that?---I cannot imagine the context within which I would have said it. I have no recollection of saying that, and I would also say that my subsequent actions wouldn't reflect that comment.

Well, let's examine that. The contract was operative, in the sense that Able was
25 on site and working in the first week of July of 2000 and during the month of July, your union serviced your members on that site, did you not?
---I understand that to be the case.

At or about 9 or 10 August, you gave a direction that Mr Henderson was to
30 stop servicing your members on that site. Is that so?---I think that the full context has to be put, that by the 8th/9th of August, not only couldn't I persuade the company to come up with an agreement which I felt confident in in terms of being the market rates, but the CFMEU had certainly formed a very strong view that this expansion of our coverage into the demolition of a
35 building was one which they viewed as being absolutely not on. And whilst I very rarely agree with the CFMEU, and that is just a matter of public record, I was certainly forming the view by the 8th, what were we doing there. Our eligibility wasn't - the argument against our eligibility was a lot stronger than our argument for it. Then when I can't convince the company about signing an
40 agreement, I am then thinking we are going through a lot of argument here, when the company doesn't want to take the advice of the union, when the union doesn't have eligibility, and what I was endeavouring to do was that if the company had a real objection to the CFMEU, and I certainly suggested to the company on about 8 August, sign an agreement with us, sign an agreement
45 with the CFMEU, that way they don't feel they have been excluded from their

5 traditional areas. The agreement with us will at least demonstrate that market rates were not being undermined. The company chose not to do that, and that's their prerogative, and it's a hard, hard issue and I don't think I have ever had to do it except in one or two other instances, to send organisers down and say to people, "Sorry, but we cannot negotiate an effective industrial agreement to be able to represent you on this site". So, yes.

10 The question I asked you was: on or about 9 or 10 August, you directed Mr Henderson to cease servicing your members on that site? That was the case, wasn't it?---Once again, I'm going to raise issue with one of the points in the question. If we are not eligible to cover that work, then they weren't members. Now, by all means, we have tried to look after the them because they wished to be in the union, but the point is a union cannot enrol people outside of their rules.

15 These people were already paid up members of your union, Mr Shorten, were they not?---They had been.

20 Did you give them their money back?---I'm not sure they asked for it back.

I didn't ask you that. Did you give them the money back?---No.

25 So the position was that you were telling your organiser to cease servicing people who were financial members of your union on that site?---No, absolutely not.

What's wrong with that proposition?---They weren't members, they weren't eligible to be members.

30 COMMISSIONER: But they were in fact members who had paid money to the union and presumably that membership lasts for a period of time, unless there is some provision in your rules which says the secretary or somebody can determine that, if coverage ceases, then you shall cease to be a member and presumably you have to tell them that?---There's two or three things there.

35 First of all, the membership of Able is a very - I have never fully got to the bottom of our Able membership in terms of the personalities. To my surprise, in preparing for this, I discover that Paul Rossi, the head of Able, the boss, unequivocally the main man, is paying union dues and still pays us union dues. Now, I believe that Able had an agreement with the AWU, but I also believe
40 that Able, some people in them, and Don Henderson, absolutely pathologically hate the CFMEU - for reasons I am not utterly sure, but if they do, they do, and I am not casting a judgment on that. But the union has got a right to ensure that we do negotiate appropriate industrial agreements. We are not merely a
45 garage of convenience so that people can avoid their obligations in terms of market rates.

I understand that. What do your rules provide if you want to tell a person who is a paid up member that he no longer is a member? Don't you have to give them some notice?---Well, what we indicated - - -

5

And some reason?---What we indicated, and what I sent Craig Winter and Don Henderson down to do, is to say that, for the purposes of working on that site, we did not have the rules to be able to effectively negotiate an industrial agreement. Now, for the previous month and a half, I actually believe that I tried the impossible task of reconciling Able's interests, Don Henderson's interests and the CFMEU's. After the meeting from June the 20th through to early August, I realised that it wasn't going to happen. Now, I can understand that perhaps one of the things - and it opened my eyes as I thought it through - if the Able agreement was inferior to the demolition agreement, but Able had tendered on the Able agreement, the existing Able agreement, then I can understand that having to sign a demolition agreement, a market standard agreement, might have caused some financial heartache within the business. But the problem is that 98 agreement, or whatever they tendered on, was never designed to be used as the low-cost tendering process for areas outside of our rules. So to that extent, we would still offer all the services. The point about financial and how do you tell them and what have you, I was not going to force people out of the union. But to the extent that we had capacity to represent them on this site, well, I took the view, after a lot of effort, that we couldn't; and it seemed to me that no-one wanted to find a fix.

25

MR TRACEY: Mr Shorten, over the lunch break, will you examine your union rules with a view to answering the question after lunch: what rule brought about the result that Able's employees, formerly your members, ceased to be members of your union as at 8 or 9 August 2000? Would you do that for us, please?---Yes.

30

That may be a convenient time, Commissioner. I have been advised that Counsel Assisting you in respect to Queensland matters would like to have five minutes at 2 o'clock, with a view to tendering some documents, and then I would propose that we resume with this witness immediately afterwards.

35

COMMISSIONER: Very well, I adjourn until 2 o'clock.

<THE WITNESS WITHDREW

[1.00 pm]

40

ADJOURNED [1.00 pm]

RESUMED

[2.00 pm]

COMMISSIONER: Yes, Mr Robberds.

- 5 MR ROBBERDS: Commissioner, could I interrupt your Melbourne hearing for a few moments, please. There are some additional documents I wish to tender concerning the Nambour Hospital dispute. They comprise a statutory declaration of Stewart Matthew Collins, declared on 15 February 2002, and a number of miscellaneous documents. On 15 February, the Commission wrote to the solicitors for the parties who have an interest in the statutory declaration, informing them that I proposed to tender the statutory declaration today and asking them to let the Commission know whether they wished to be represented today and whether they wished to make any submissions in connection with the proposed tender.
- 10
- 15 I later spoke with Mr Whyburn, the solicitor for those parties, and he informed me he did not see it was necessary to appear here today and that the matter could be dealt be which way of submission.

- Earlier today, the Commission communicated by email with each of the firms of solicitors who were involved in representing clients at the Brisbane hearing. A table of additional documents was emailed and they were informed that I proposed to tender at 2 pm today the table and the documents referred to in the table. They were asked to telephone the Commission, if they wished to oppose that course. No-one has telephoned to indicate they oppose the tender.
- 20

- 25 Accordingly, Commissioner, I would tender as exhibit 33A a copy of a statutory declaration of Stewart Matthew Collins, declared on 15 February 2002.

30 **EXHIBIT #33A - STATUTORY DECLARATION OF STEWART MATTHEW COLLINS, DECLARED ON 15/2/2002**

- MR ROBBERDS: I tender as exhibit 24A a document entitled Brisbane Hearings, January to February 2002, table of additional documents, exhibit 24A. I tender that document and also as part of that tender, each of the documents referred to in the table.
- 35

COMMISSIONER: Thank you.

40 **EXHIBIT #24A - DOCUMENT ENTITLED BRISBANE HEARINGS, JANUARY TO FEBRUARY 2002, TABLE OF ADDITIONAL DOCUMENTS**

- MR ROBBERDS: Thank you, Commissioner.
- 45

COMMISSIONER: You are on your former oath, Mr Shorten.

5 MR TRACEY: Mr Shorten, you were going to have a look at the union rules
over lunchtime and inform the Commission of any rule that brought about the
result that, on or about 8 or 9 August 2000, Able employees, formerly your
members, ceased to be members of the AWU. Have you found any such
provision?---Indeed, the rule expresses what I was trying to say better than I
10 am. I don't have photocopies.

What is the rule number?---Rule 15.

15 And what does rule 15 say, relevantly?---The heading is Ceasing to be a
member and purging the register of members, and it goes to 15(i), "A person
shall cease to be members of the union if," and then (a) it says, "For a
continuous period of 12 months, they have taken employment in industry,
vocational calling outside of he conditions of eligibility specified by rule 5, or
20 they have, for a continuous period of six months, been unemployed and have
not had a bona fide desire and made bona fide efforts to become employed in
the industry." So that is the rule which talks about resignation and I think what
the rule does is assists me to clarify what I said before. They can be members
of the union, but where we don't have eligibility, for purposes of dealing with
their industrial issues at that site, we can't represent them.

25 Was it not your evidence before lunch that they ceased to be members of the
union?---What I should have said is that they ceased to be members in terms of
that site and in terms of our ability to represent them in terms of an industrial
agreement. They don't cease to be members of the union.

30 They satisfied neither of the conditions that you have just read out from rule
15, did they?---Yes, in fact, I'm correct in what I said. They were still
members of the union under our rules, but where they work in callings outside
of what we are eligible to enrol, which was the National Gallery work, then we
35 are unable to represent them at that spot at that point in time.

COMMISSIONER: That rule doesn't say that?---No, that rule doesn't say that,
but we don't have, under our rules, the capacity to represent people outside of
the industries in which we are eligible to enrol them.

40 I understand what you say. Whether what you say is right is another question.
I understand what you are putting?---Unfortunately, I don't get to decide if
what I say is right. I'm confident in what I'm saying, though.

45 MR TRACEY: It was for that reason, is this your evidence, that you directed

Mr Henderson to cease to attend the site to render assistance to them?---What indicated to both Don Henderson and to Craig Winter is that I had to - obviously was not going to achieve an agreement and what I indicated - so there was no face-saver for everyone. I was keen to achieve an agreement
5 which would sort out Able's desire to have AWU people organising them/, the CFMEU had - and I can't speak for them - but were obviously concerned about maintaining market standards and their traditional coverage. So once we realised, from about June, there was going to be a problem in terms of the constitutional issue, we certainly, or I certainly, was still motivated to try and
10 assist Able work through the issues. But by about 8 August, the beginning of the 9th, I can't exactly recall when, I realised that no-one else was interested in my strategy to save face. So at that point, there was no further option for us to be able to even try and represent people on that site because they fundamentally weren't eligible to be covered by an agreement, and the existing
15 agreement, the Able 98 agreement, by its scope, could not cover that work.

I take it you are not disputing the proposition that you directed Mr Henderson to cease attending the site to service your members?---I think I have answered that question.

20

And how did you answer it?---I'd have to go to the transcript to read it out again, but my point is that - - -

You gave the direction, did you not?---I have provided the context and indicated to the organiser that we could no longer represent the industrial
25 interests on that site of those workers at that time.

Did you give him a direction not to attend the site?---After we'd decided that we couldn't represent them, yes.

30

Thank you. On 7 August, Mr Shorten, did you have a meeting with CFMEU officials to discuss Able workers on the National Gallery of Victoria site?---I can't recall if it was the 7th or the 8th, but obviously I was most keen to try and reconcile everyone's interests. So, yes, I did talk to representative from the
35 CFMEU.

Who did you meet?---I can't recall, but I'm certainly aware that I would have met representatives from the CFMEU.

40 Have you any recollection of what was discussed?---Not particularly, no, but I just think I listened to their point of view and I probably put some points of view, too.

45 And what points of view did you put?---The same ones which I suspect, although I can't recall a hundred per cent, the same that I'd been trying to do

from June, which was saying - identifying what the CFMEU's concerns were, which was eligibility and conditions, and I was probably making the point - I can't recall if I did - that clearly there is a particularly bad history between Able and the CFMEU, that mentioning either with the other seems to cause a real sense of frustration and anger. After leaving that meeting, I certainly formed the view that a possible - and this was really the last roll of the dice, as far as I could see, and when I say last roll of the dice, I mean because I'd certainly, after listening to the CFMEU, formed the view that our argument for eligibility as contrasted with their argument for eligibility, our argument about the scope of the agreement as contrasted with their argument, and the issue of the market rates and what was appropriate, I felt, on balance, that the CFMEU had some points to be made. So in leaving the meeting, I formed the view that I understood that both Don Henderson and Paul Rossi have a deep and abiding passion against the CFMEU and that certainly it had been indicated to me that Able didn't want to have anything to do with the CFMEU. So what I thought is the best of both possible worlds, if you can use that expression here, was both unions could be party to an agreement. Once we had a signed certified proper bona fide 170LJ agreement, then we might have been able to at least represent our members by having a signed certified agreement. And from what Don had told me, he had a rapport with some of the workers or some of the members, which incidentally seemed to include everyone from the managing director down - I felt that at least if they had Don Henderson there, they might have a bit of a safety blanket in case any of their concerns about the CFMEU came to light.

On 8 August, did you have a meeting with Mr Rossi, Mr Henderson and Mr Winter?---Yes.

And in the course of that meeting, did you tell Mr Rossi that the AWU did not have coverage of the National Gallery of Victoria site?---I don't know if I used those exact words, but I believe I would have informed him that I had very fundamental doubts that we could in any way cover that work.

Did you also advise him that Ables should sign the CFMEU's pattern agreement?---I suggested one way through the issue was to sign a pattern agreement with the CFMEU.

And the consequence of that would be that the workers would then be required to join the CFMEU?---No, not at all. You can encourage people to join, and I was severely sceptical that people from Able, based on what I had been told, would join the CFMEU. So, no, I didn't say that the consequence was that they have to join.

No, I'm not attributing that to you at the meeting. I'm putting to you the knowledge that, in suggesting to Mr Rossi that he should encourage his

workers to join the CFMEU, that was a logical consequence of the signing by Able of a pattern agreement with the CFMEU? Your industrial knowledge would have told you that very simply, Mr Shorten, wouldn't it?---The first question first. No, I don't see it as an automatic conclusion that, because you
5 are covered by an agreement, that you have to compulsorily be in that union. In terms of what my industrial knowledge would have told me, what my industrial knowledge was telling me is a number of things. One, I was really beginning to wonder was the issue the CFMEU or was it that Able had won a contract using artificially low rates and that it was a contractual dispute. I don't
10 know that, but the point is I was wandering was the AWU being used here in a manner which wasn't in the interests of our union. There has been much - there is a couple of media reports about the allegation of abandonment, which I find incredibly offensive on behalf of the organisation. We are a proud union, but the point is people do not have a right, be they organisers, delegates or
15 managing directors who feel motivated to be in our union, they do not have a right to engage our organisation in frolics beyond our constitutional coverage. So I had a number of industrial knowledge ideas going through my head. But, no, I did not tell, nor did I expect, that it was an automatic corollary of signing the CFMEU agreement that they would have to join the CFMEU.

20
Are you aware of any employees anywhere in the central business district of Melbourne, including the Arts Centre site, where the employers are party to an agreement with the CFMEU, that each and every one of the employees subject to that agreement is not a member of the CFMEU?---At one part, it would be
25 easy to make a generalisation that I suppose so. But if you ask me am I aware, I am not aware, because I do not know the full list of all the CFMEU companies and I do not know the full unionisation of those companies.

On 9 August, were you present when Mr Henderson telephoned Mr Rossi, with
30 a view to finding out whether Mr Rossi would sign a CFMEU agreement?---I don't recall if I was present or not.

I suggest to you that Mr Rossi told Mr Henderson that he would have to wait until 3 o'clock that day for an answer?---Well, as I can't recall if I was there, I
35 can't be sure what he said back at the other end of the phone.

I suggest to you that the phone was then handed to you by Mr Henderson and you were also told by Mr Rossi that the decision would be made at 3 o'clock?
---If I was present and if Paul Rossi was saying that he couldn't make a
40 decision till 3 o'clock, that could be correct. But as I say, I don't have a particular recollection.

I suggest to you that you responded that 3 o'clock was too late?---Once again, I don't recall the dialogue. However, I could understand that if I said that, if that
45 was correct, I did have a view that, as I say, I was working up a bit of a lather

about everyone else trying to fix it and I was developing a very strong sensation that I was probably the only one who was interested in actively fixing the issues by talking to all the parties.

5 Your fix was to seek to persuade your members to become party to a CFMEU agreement. That was the case, wasn't it?---No. My fix was that at this stage, where we really did have an untenable, a highly dubious, very fundamental doubts about our eligibility, and I will state what I was trying to do for each of the parties. You have got Able, the management, you also have Able the
10 union, but I regard them wearing their management hat. They hate the CFMEU and didn't want anything to do with them. So they have got a set of issues. We have got Don Henderson, who, justifiably or not, I am not here to pass judgment on his agendas, hates the CFMEU. We have got the CFMEU, who hate, I suspect - "hate" is too strong, but they don't necessarily have a
15 heigh regard for Able or Don Henderson. We have also got the AWU here, which is not interested in enrolling outside of its eligibility, but it's interested in trying, because I do believe that Paul Rossi's expectations had been pumped up over time by Mr Henderson, trying to at least fix it so that Paul Rossi, even if he is doing this work, can have an AWU organiser to give him access, to help
20 him work through issues. In the case of the CFMEU, I did believe they had an argument not only on the eligibility but in the case of the scope of the 98 agreement and indeed a view about the market rates. So what I was trying to do was to try and get everyone out of their corners with a sense that they had got something of what they wanted.

25 Did you tell Mr Henderson to go down to the site and tell your members to join the CFMEU?---I said to Mr Winter and Don Henderson that, once I realised there was absolutely no prospect of trying to resolve the matters, that the AWU could no longer represent the members on this site. I certainly did suggest to
30 them that they should be - that Craig and Don should go down and say they should be covered by the CFMEU agreement and certainly I would have said if they want to, they should consider joining the CFMEU as the union can represent them. That I told them to say they had to join, that is a different issue, and I do not recall giving that instruction.

35 Do you deny it?---I do not recall giving that instruction and I would have to say that, whilst I viewed that the CFMEU had some merit arguments in terms of eligibility, scope of the agreement and standards of the agreement, I am not sufficiently close to them that I believe insisting on people would have to join
40 the CFMEU. Our relationships are not that close with the CFMEU.

Did you hear then from Mr Henderson that he thought that if anybody was going to give that advice, it ought to be you?---No, I didn't, and what's more, I go out and visit all my members and I'm more than happy to go out and tell
45 people things that they mightn't want to hear. In this particular case, this frolic

was a Henderson/Able special, where the AWU was being used, in my opinion, at the end, and my view is that people who start things should be around to finish them.

5 Did you tell Mr Henderson that your views in relation to this matter had been influenced by political pressure?---No, I didn't. I'm sure you'll get to the point I'm going to say.

10 Has anyone, in the period leading up to - did anyone, in the period leading up to 8 and 9 August 2000, seek to persuade you that you ought to back off on the National Gallery site and let the CFMEU take coverage of the workers?
---No-one put any form of political pressure to ask me to back off.

15 Did Mr Bryan Boyd say anything to you about these matters?---Mr Bryan Boyd did not put any political pressure on me. I do not recall any dialogue with Mr Bryan Boyd about the National Gallery.

20 Did you have any discussion with anybody at the ALP National Conference in July about these matters?---Sorry for smiling. I appreciate the question. There was a reference, which I now work out, that Shorten was ringing people from Hobart. The ALP National Conference, which is triennial, was held on 31 July to about 3 August. Invariably at the ALP conference, you rub up along other union officials, but there was no pressure and there was no form of negotiation. It is a happenstance that I was there and I'd really like to put on
25 the record that the ALP National Conference had nothing to do with Able.

30 Did anybody at the ALP National Conference raise with you the question of the AWU's continuation of representing Able employees on the National Gallery site?---No, they did not.

35 Did you speak to anybody at the ALP National Conference about that subject?
---I no doubt talked to a lot of the union officials - not necessarily the ones from Able, but who were attending the conference. I can't recall if I talked about the AWU/CFMEU demarcation issue. It is possible, but I certainly can't recall it to the extent that I felt that there was any political pressure.

Can you recall any single individual raising the issue with you?---Over what - do you mean at the conference or generally?

40 Yes, at the conference?---No, I cannot recall the name of any specific individual who raised the issue with me.

45 You know that on 10 August, the CFMEU descended on the site in great numbers and did a great deal of damage. Is that right?---I have certainly been told by Mr Saddington, for instance, he informed me of what happened. I

haven't seen it for myself, but certainly John Saddington informed me about it, so I am aware.

5 And you are aware that, in that process, certain threats were made to your members working on the site?---I'm not aware of the threats that were made and I will just pick up this word. They were members of ours but when they were working at that site, we couldn't represent them.

10 And you are aware that a number of your members on that site were quite traumatised as a result of what the CFMEU had done on that day?---If the allegations are correct about what was done, it is outrageous, disgusting conduct. And if what I was told is correct, and I accept that I'm not in a position to finally determinely prove that, it is aberrant behaviour and I think it is - when I discussed with John Saddington afterwards how he was, certainly
15 there is no place for that sort of conduct.

You know there was theft of property from your members, don't you?---I understand that John Saddington was concerned that his diary had been stolen. I'm not aware of, in particular, any other details.

20

You are not aware of tools being stolen?---Now you come to mention it, certainly John informed me of the gamut of the issues.

25 Did you take up any of these issues by way of a protest to Mr Kingham, or any other CFMEU official?---Not such that I can recall, but I do make the point that I think that all trade unionists would be outraged if the allegations are proven correct.

30 You now know, as you did at the time, that, in the wake of the 10 August incident, your members continued to work on that site till the end of October, until Able completed its contract, don't you?---I'm not exactly aware, but I assume that happened.

35 And you are aware that they steadfastly refused to join the CFMEU, despite your recommendation?---That's all right.

Is that so?---Yes. I don't know if they did or didn't join, but if you tell me they didn't join.

40 And you know that they were not in any sense represented by the CFMEU during that period?---Well, that is right. If you tell me so, I'm sure that is right.

45 You knew there was an injunction in place throughout that period preventing any CFMEU official going near the site?---Yes. Thanks for reminding me of that.

5 So the consequence was that you knew that you had your members working for Able on the site for a three-month period without any representation from any union and you did not offer them any services at all. Is that the position?---No, not quite.

10 What services did you offer them?---If they required services which we offer members unrelated to their industrial conditions on that site, then, yes, they could avail it.

15 What offer did you make to them?---It is not what offer did I make. But I don't think you will find that any request for any services was refused.

20 That's not quite what I was asking you. Did you take any positive efforts personally or through officials of your union to represent the interests of those members while they were down at the National Gallery site?---Two points. One, I believe that, in an invidious situation created by Able and Henderson, we did make every endeavour possible to try and reconcile a situation. Having said that, we could not, and there is no escaping this point for me: if you are not eligible to actually enrol people in certain callings as members, then your capacity to represent then is, by nature, limited by our rules. I also make the point that the scope of the agreement that they were working under was never designed for this building work, and I also do make the point that I was not convinced, and indeed am still not convinced, that the arrangements which they were being paid under at that site were the appropriate market issues.

25 Did you tell Mr Henderson to tell Mr Rossi that if Mr Rossi didn't sign an agreement with the CFMEU, that Mr Rossi's company would not get work on the Geelong cement manufacturing plant demolition job?---No, I do not recall saying that.

30 Do you say you didn't say it?---I'm saying I don't recall saying it. In the event that I had any discussion with Don Henderson about the Geelong cement factory, I must therefore put some points around that, because that allegation has been made in Mr Henderson's statement and it is exceedingly mischievous and unfair. What I would say is, to begin with, despite Don's theory that union secretaries click their fingers and the captains of industry are just waiting to allocate contracts based on my say so or phone call, that was not the case at Geelong Cement. The second point is the comment would be illogical, certainly inconsistent, because the Geelong construction agreements are negotiated by Geelong organisers in Geelong. We would have no control over who got that work.

45 Whether it be an idle threat or not, Mr Shorten, is not what I'm asking you about. What I'm asking you about is whether you uttered those words, and I

understand your response to be that you have no recollection of doing so, but you are not in a position to deny that you did?---Hang on a second. I was actually going to make three points. The third point about the discussion about Able is that, for a number of months, I had asked to get an appropriate
5 agreement. The certified agreement signed in 1998 was never designed for major projects and it was certainly not designed for areas outside of our rules. The difficulty which I had had explaining to Able these points in this site gave me no confidence whatsoever that they would be able to do multi-union, which the Geelong demolition site, Geelong Cement site, has turned out to be a
10 multi-union site. So that other context must be made. I do not recall, I do not believe I would have said those words, and the characterisation is certainly out of character for myself.

I want to ask you some questions relating to some evidence you gave this
15 morning in relation to Mr Rossi. Is it your evidence that Mr Rossi, through Able Demolitions, pays the union dues of your members employed by Able?
---Not to my knowledge.

So what you were indicating this morning was that Mr Rossi is himself a
20 member of your union?---Yes.

Do you have any problem with that?---It's unusual. I'm not sure where we cover in our eligibility managing directors of companies. If people want to pay us money to belong to our union, I don't mind.

25 COMMISSIONER: What if they do work on the site?---That was probably one of the reasons why he was a member then. But these whole discussions were a little unusual, in my experience. I do believe that Able weren't out to rip off their blokes, for instance. I don't think they are badly-intentioned. I
30 think Don Henderson, for 99 per cent of the time while he was with the AWU, let his views about the CFMEU get in the way of doing his job. But nonetheless, it is unusual when you negotiate with the managing director of a company who is also the member, who, when I make a proposition about a major agreement, seeks advice from my organiser about what that means. I
35 was sufficiently moved to think that the roles were conflicted, that I did suggest that Able got their own independent advice.

MR TRACEY: I will ask you again, just so that we are clear about this. Do
40 you have any difficulty with Mr Rossi being a member of your union, that you have ever raised with him?---I have to say that I did not realise that he himself was a member until after the event. He never made that known to me. Secondly, if people want to be in the union, I don't mind, but I do think there is a role (indistinct) negotiating for the employees with the employer when the employer is actually in the union. So I think it is a complicated issue, but I'm
45 not necessarily going to rule them out.

Have you ever raised it with him?---I found out after the event.

5 That is some year or more ago. Have you raised it with him in that period?---I found out in preparing for this appearance. I didn't necessarily think it was appropriate that I give him a ring now.

10 Have you ever suggested to him that you'd return his money?---No, because I wasn't aware that I was receiving his money.

Have you ever suggested to him that he was ineligible to be a member of your union?---If I wasn't an aware that he was in our union, I wouldn't have necessarily had a discussion about his status in our union.

15 And you have no reason to think that whichever officials or officers of your union accepted his money and his enrolment form were acting improperly?---I don't know who accepted his money. I will have a guess - I don't know and therefore I don't believe people were acting improperly. But returning to your question about did I ever suggest to him that he was ineligible, to the extent I
20 said we were ineligible to cover the work on that site, I suppose vicariously that would have included him. But to his own personal membership, of which I was unaware until a couple of weeks ago, no, I didn't realise. I think it does help explain some of the conflicting issues which were happening on the site, though.

25 I'll turn to another matter, Mr Shorten. Your union, I take it, has members of companies who are conducting work on sites in circumstances where there are no other unions involved?---Yes.

30 And does your union have a policy on the question of no ticket, no start on such sites?---No, we don't. We obviously encourage people to be in the union, but we don't have a policy of no ticket, no start; and nor would we, for instance, have any publications to that effect, or any documented.

35 And I take it that it flows from that that your shop stewards would not be instructed to make demands in order to produce full unionisation on such sites?---We strongly encourage our shop stewards to recruit and enrol members, no question. But would we advise our delegates to take no prisoners, to demand 100 per cent compliance? No, that's not part of our training of our
40 delegates and nor is it a practice which we talk to our delegates about.

The Commission has heard evidence of a practice that appears to be reasonably widespread, certainly on major building sites, of union shop stewards and other officials being paid by employers in circumstances where they do very little
45 else but union work.

MR BROMBERG: Commissioner, all these matters that my learned friend
has now gone to are matters that will be taken up in the statement that my
learned friend has requested and will be provided to him tomorrow. They are
5 clearly within the subject matters that a statement was asked to deal with.

If my learned friend persists, and I'm in your hands, I don't know that I have a
real problem, but I do indicate that they are matters that have already been
addressed and perhaps a more efficient way of dealing with this is for my
10 learned friend to receive the statement and to see whether he has any follow-up
questions thereafter.

MR TRACEY: We have some time this afternoon, sir; we will have very
limited time on Thursday. I'd prefer to get as many of these issues out of the
15 way as I can, while time is available.

COMMISSIONER: Let's go on, then.

MR BROMBERG: With respect, Commissioner, we were told very clearly
20 about what matters would be dealt with today and we were told by my learned
friend, as late as yesterday, that today would be for dealing with National
Gallery matters and general issues about demarcations. The witness has been a
cooperative witness and, for that purpose, he has been involved in the
preparation of a statement which is not yet finalised.

25 COMMISSIONER: I understand that, but I don't see any disadvantage to the
witness.

MR BROMBERG: There is, because the preparation of that witness statement
30 is not finished. He is in the process of preparing his evidence on those matters
and he ought to be given an opportunity to complete the preparation and the
statement that was called for.

COMMISSIONER: When was he asked to provide a statement?

35 MR BROMBERG: The agreement between us, I understand, is that the
statement be provided tomorrow.

COMMISSIONER: When was the request made for the statement?

40 MR BROMBERG: The request was made some time ago.

COMMISSIONER: Then I think we'll go on, Mr Bromberg.

45 MR TRACEY: The issue I was raising with you, Mr Shorten, was the

evidence that has been given by a number of witnesses to the Commission which suggests that there is a fairly widespread practice whereby union shop stewards are engaged by companies, but would do very little else on site than attend to union matters. Is that a practice of which you are aware?---The policy of the AWU is that we prefer our shop stewards - - -

Mr Shorten, I didn't ask for your policy. Is it a practice of which you are aware?---Within the AWU, no, that is not a practice which would occur. We believe our delegates should be working delegates. Otherwise, it creates a lot of resentment amongst the other workers. It may well be from time to time that there are issues which may, at some periods in the project, make the delegate nearly full-time being a delegate. But our principle is in the AWU, and our practice, of which I am aware, that we don't encourage full-time delegates, we encourage working delegates.

And is there a principle position that underlies that policy?---I think the view would be that, if you have got a delegate sitting in a hut all day, whilst they may have periods of being busy, at other times there may be the perception, fair or unfair, by the rest of the workforce that this person is not putting in. So I have generally found that the theory underlying the AWU position is you turn to, you are prepared to work, and you will generally get more respect from the men around you.

What about the question of the choice of shop delegates, Mr Shorten? Under your union's rules, how are they chosen?---What would be the practice on the construction sites that we represent is that at some point early on in the job there would be an election for the delegate. It's the best way to legitimise the person's role.

And that is what the rules require?---I'd have to go to the rules. I think the rules have got any number of steps, depending on which state of the country you are in. But certainly that would be the principal position and the practice of the Victorian branch of the AWU.

What about the practice of which the Commission has also heard, of some unions nominating to employers persons who they are to engage and who will become shop stewards upon engagement on behalf of the union?---There is no question that the AWU does recommend people to work at sites. This is based on a couple of reasons. One is the nature of the construction industry and many of the jobs is jobs start and then they finish. If you are an active union member, with the best will in the world, you will get a bit of a reputation. The reputation can either, of course, be good or bad. I have been in situations where companies have said, "Will you please give us the name of someone who is good, who can sort of exert a bit of collective discipline, sort of a de facto regimental sergeant major-type role". The second reason why we are

5 keen to see people on jobs is that if people develop a name, sometimes it makes them hard to be employed elsewhere, because they are diligent in their jobs, in terms of standing up for workers. So there is almost a de facto black list from time to time and unfortunately the nature of what I'm saying, a de facto black list, is very hard to prove the existence of. A little bit like some of the other questions you are asking, I know that that is the case and that employers - some of our delegates do find it hard to get work. So we do recommend people. Once they are there - - -

10 COMMISSIONER: Recommend them to the employer?---Yes.

15 What if they say, "No, we won't have him"?---We try and persuade them. But at that point, there is only so much you can do. I would say the AWU's relationship with most companies is such that we generally get there. Most companies we deal with do believe that, on balance, we are capable of keeping our agreements once we have signed them and that generally most companies in construction projects which have the AWU on their site tend to go quite well. I can't comment, of course, for the sites where we have been excluded from, but the ones we are there tend to go quite well. So when the worker gets there, quite often this person may be elected, but you need to have some sort of mandating process. Otherwise, it will cause problems for the delegate and the union organisation down the track on that site, because someone who is artificially imposed, once they make a call which maybe the membership don't agree with, then you'll have a vote anyway.

25 Under the CFMEU rules, as I recall them, it's only the job delegate who can make a nomination to the members meeting in relation to the election of a health and safety officer or health and safety delegate. Is there a similar position with the AWU?---No. Under the occ health and safety legislation, the workers in the work group have got to elect the health and safety rep, and that's certainly what - - -

35 I'm not suggesting otherwise. Their rules provide, as I read them, that the only person who can nominate someone is the CFMEU job delegate?---I don't know if that happens there. You obviously have looked at their rules, I haven't. That is not a practice which we would in any way desire to replicate in our union.

40 MR TRACEY: Does your union have a view about the utility of pattern bargaining in this industry?---We certainly do. It is a little frustrating, I must say - I understood we'd be on National Gallery today. We have got a bit of a detailed statement about pattern bargaining and going through each of the industry sectors that we have. Whilst I have had a number of false starts, if you like, when I was going to make my debut here, the statement which I have got, I feel, will go far more into that issue and I do understand that time marches on and that you guys want to do what you do.

COMMISSIONER: We'll leave that topic until Thursday.

5 MR TRACEY: What about the question of training of site delegates and shop
stewards, do you have an active training program?---We certainly do. Our
union in Victoria has about 20,500, 600 members. We also look after the glass
workers branch out of our offices in Victoria, about 700. We are fortunate
enough to have about 1200 honorary representatives, be they health and safety
or shop steward. Our construction segment is smaller than that, it would be
10 perhaps 20 per cent of our membership, but also within that we have a got lot
of honorary reps. Therefore the very fabric of the union relies on our
delegates. So in the last two or three years - and I'll certainly provide a very
specific number in writing to you - we would have had two and a half thousand
delegates trained in safety or in workplace relations. Another measure we have
15 adopted in terms of our training, and this is across the union, but construction
members are welcome to apply, is we have now sent 60 of them to university,
30 to do human resource management at Swinburne University, 30 to do occ
health and safety at Ballarat University. These are TAFE Level 4s. They are a
bridging course to do a diploma. I am very confident that our training agenda
20 is pretty good, but as far as I'm concerned, we couldn't train enough people. If
we could train them every day - not everyone every day, because nothing
would get built - but if we could train people every day, I think that would be
superb.

25 You have mentioned extra union training. What about training as to the duties
and responsibilities of being a shop steward, for example, do you have internal
union courses that cover those matters?---Sorry, I didn't make that clear. The
2500 do internal union courses and as it is a component both within the safety
rep training and the delegate training that we train them in terms of dispute
30 resolution, the history of the union, all of the appropriate road rules which a
delegate should know. We have a delegates 1 course, which is for people who
have just been elected delegate; a delegates 2 course for people who have done
the delegates 1 course, obviously. So we do go through a lot of the issues
which I would think are appropriate for a delegate to know.

35 To your knowledge, do the union's branch in other states offer similar
training?---Yes, to my general knowledge they do.

40 I take it that your statement will deal with the question of site allowances?---It
does, yes.

I won't ask you about that at the moment. Mr Shorten, you will pardon the
observation, but I think you are the first union official to give evidence to this
commission who hasn't arrived accompanied by a large number of union
45 members, who have simply walked off building sites around this city. Does

that reflect an AWU view of the appropriateness or otherwise of such conduct?---Some of the more unkind - probably some unions could say this because none of my delegates love me - I would say that we don't have a lot of delegates working within the CBD. I did have a discussion with some of the officials and delegates, who said they'd like to come along and demonstrate a form of solidarity with me. I didn't necessarily think that was - if that was the way we were going to handle the Commission - I've got plenty of views and I've got a statement which is full of punch and go, but I didn't necessarily see that I needed a cheer squad either.

5
10

There was a serious basis for the question, and that is this, Mr Shorten: contracts of employment exist between individual workers and their employers and those contracts of employment require attendance at workplaces during certain hours and the performance of duties. And a number of unions, through their officials, have told this commission that they think it is perfectly acceptable, notwithstanding those arrangements, for people who wish to pursue some political or other cause that they deem appropriate to simply abandon their work and go off to rallies or march up the street or things of this kind. Is that a matter on which your union as a policy?---It's not one which we would have a written policy, but the AWU has got a practice and a reputation. I don't think we are a union who would just encourage rallying on a sort of sporadic basis to rally, but I do also believe that one is allowed to conduct political protest. Of course, what is one person's politics could be another person's breach of contract.

15
20
25

COMMISSIONER: There is no doubt you can conduct political protests; the question is whether you do it in the employer's time?---Yes, indeed. I guess there is a - I would say I have two views on it, and I believe this would accurately reflect the AWU's view, certainly in Victoria. One is that, from time to time, there may well be issues of such significance to the whole of the workforce that perhaps you do need to register a political protest, and if that time is during work time, that may be the case. But I also have the view that not every issue is a wildly political issue. For instance, if there were changes to workers compensation laws, we had a discussion at our executive and said well, "We think that this is important," whatever one thinks of the common law, we were keen to see it defended and then reinstated. Those issues, though, are not that common. I'm not going to stand in judgment of other unions, but I think you can take a good thing too far sometimes.

30
35

40 MR TRACEY: If the Commission pleases, I think that is as far as I can usefully go with this witness, absent a statement. I wonder if he might be released.

COMMISSIONER: Yes.

45

MR BROMBERG: I can re-examine on the matters, if that is convenient.

COMMISSIONER: Yes, certainly.

5 MR BORENSTEIN: Before he does, might I draw the Commission's attention
to a factual matter that I think Mr Tracey got wrong. He put a question, at
transcript page 2430, at line 26, to Mr Shorten about the import of the
injunction against the CFMEU at the National Gallery site and suggested to
Mr Shorten that the injunction prevented any CFMEU officials from attending
10 the site. Factually, that is not correct, Commissioner.

COMMISSIONER: What was the scope of the injunction?

15 MR BORENSTEIN: The injunction was varied on 24 August to include an
expressed permission for persons who had the appropriate permit under the
Workplace Relations Act to enter on to the site in accordance with the
provisions of that act. So I think that perhaps that should be noted.

20 COMMISSIONER: I note that. Thank you, Mr Borenstein.

<CROSS-EXAMINATION BY MR BROMBERG

Perhaps for the sake of convenience, because I will go to it shortly, we could bring up Mr Henderson's statement, which begins at 071.0576.0787.0074.

5 Mr Shorten, you were asked, and to some extent you dealt with, the relationship between Mr Don Henderson and the CFMEU. What do you know about Mr Don Henderson's former role within the CFMEU or its predecessors?---I believe that Don Henderson used to be the secretary of the Building Workers Industrial Union. I also believe that, in or about 1985, he

10 fell out with the national office of the Building Workers Industrial Union over, I think, an issue about a debate about a national award or redundancy standards or Victorian standards. I think Mr Henderson and the leadership of the national office up to that stage were what you would call were the political left within the labour movement, and I think that was a pretty nasty disagreement.

15 Beyond that, I believe that post-the BLF deregistration, I think there was some pretty fractured factional relationships within the building unions which now make up the CFMEU. I'm not an expert, but a lot of people have observed the activities of the AWU from the outside and seen fit to comment, so I feel I have some general knowledge. I understand that Mr Henderson fell out with

20 his committee of management. They then removed him. He then got reinstated. Anyway, I think it was pretty tough and I think at all times Mr Henderson was out to promote the interests of the members. But I do get the impression that sometimes unions go through cycles where they are a bit like a snake pit, and I think that was a period for that organisation. After 1990,

25 I think he went and found some work. He joined us in 97.

Before you go there, have you ever had any discussions with Mr Henderson where he has expressed to you his like or dislike or hatred or his feelings about the current CFMEU leadership?---Yes, I believe he has a very, very strong

30 dislike. I also believe it's probably reciprocated, but it is clearly one of those things where there is some history and there is a lot of very, very heartfelt views about the parties between each other.

Were you also aware that Mr Henderson was employed by Able after he left the CFMEU?---Yes, I am aware that he worked with Able after he left the

35 CFMEU, and I believe that he is quite grateful to Able. I do have a view about Don, that he can be a very loyal friend, and I do believe he appreciates working with Able and he is very supportive of them and that's fine as well. It's not a crime to be a union rep and like an employer.

40

What degree of loyalty or friendship did you regard Mr Henderson to have with Mr Rossi?---I can't say that initially I was terribly aware of it. I believed that it was Don who had brought Able to the AWU and that he was - I have learned that he was intimately involved in setting up the first or the

45 1998 agreement.

COMMISSIONER: He says so in his agreement?---Yes. And I know that subsequent, as we went on in this issue, I do think that Don was quite committed to Able and I understand that Able had had some difficulty getting work in the city. I don't know if that was true or not, but certainly the National Gallery was a chance for both Don and Able - - -

I think I understand your position in relation to that aspect.

MR BROMBERG: Just finally on that, if I may, Commissioner, do you have a view as to whether Mr Henderson's views and his relationship with Able resulted in his approach in relation to the National Gallery matter being somewhat coloured or influenced?---I believe that when Able got the contract, I do believe Don said, "We'll cover that work and we'll look after you and protect you from the CFMEU". Whilst that's fine for an organiser to say it, I think there were a couple of points during the Able business when I don't think we were conducting ourselves appropriately in terms of - there is some reference to a site agreement which was worked out between Don and the company. Organisers do not have the power to work out site agreements and sign off on them. That appropriately goes through a union certification process. That, I think, was an example of just working it through as mates.

Did you have any involvement in a negotiation of the Able AWU 1998 enterprise bargaining agreement?---No, I had no involvement in that.

The agreement, if I might tell you, is dated 25 August 1998. At that time, were you secretary?---I'd become secretary of the Victorian branch of the AWU, yes.

The evidence already before the Commission is that that agreement was negotiated for the AWU by Don Henderson. Were you ever alerted to those negotiations between Mr Henderson and Able, and did you become aware of the making of that agreement at the time that it was made?---Once I became secretary of the union, as is appropriate, I did ask - or I certainly did ensure that all agreements covering work in Victoria, I had some interest in. This Able agreement is a very unusual agreement in the way the process was formed. It was signed off by our national office. That's fine for an agreement covering all of Australia, but I think it would be one of the few examples, since I have been state secretary, where, at the very least, the state secretaries aren't notified there is a negotiation in place and their views ascertained. So this process was a little unusual. I accept I'd only been secretary for 40 days and perhaps Don didn't feel the need to consult me as the state secretary, but logically there is a chain of command and I am surprised that that wasn't followed through.

You said in your evidence that in about March of 2000, you had a cursory conversation with Don Henderson and perhaps Mr Rossi about the National

Gallery work and I think you said in your evidence that at that time you hadn't really focused on the coverage issue and matters of that sort. Is that right?

5 ---Yes, I hadn't focused on the issue of coverage. I had the vague feeling that when Don was sort of relaying that the AWU had a beachhead and were going to do something at National Gallery, I had this vaguest inkling, and I'm trying to think of a suitable metaphor. It was a bit like a Miami Cuban announcing that we'd just landed on a pebble in Cuba and we were making inroads back. I didn't focus on it, but I just thought this was a little bit of an adventure, because I hadn't heard of us doing any work like this for some period, or us doing any work.

10 In late March, you were married and you went away on a honeymoon. How long were you away for?---I think it was five weeks. But in case my wife reads the transcript, I'm not absolute absolutely rock clear on how long it was.

15 Your evidence was, I think, that in or about mid-June, there was a meeting between yourself, Mr Henderson and Mr Rossi and, for the purpose of that meeting, you made some preparations?---We were going to have a meeting to talk about National Gallery. I just acquainted myself and I wasn't entirely familiar with our demolition rules coverage, so I just acquainted myself with the rules.

20 Can I show you a copy of your rules. Do you have a copy of your eligibility rule there?---Yes.

25 Would the Commission be assisted with a copy?

COMMISSIONER: Thank you.

30 MR BROMBERG: I don't have a copy for my learned friend.

Would you turn to rule 5. You see rule 5 is subheaded Section 1, Part A?
---Yes.

35 COMMISSIONER: What is the point of all this, Mr Bromberg?

MR BROMBERG: The witness said he went to his eligibility rule, had a look, and came to a view about eligibility.

40 COMMISSIONER: I understand the position he took, he thought that the coverage was, at best, doubtful; at worst, non-existent.

MR BROMBERG: If that is not an issue, we won't go to it.

45 I think you said you also looked at the 98 agreement between Able and the

AWU?---Yes.

5 Were you clear about whether or not the National Gallery job came inside or outside the scope of that agreement?---I certainly had the view that the existing agreement did not contain within its scope the possibility of covering operations at the National Gallery.

10 Is it usual or unusual for certified agreements to have scope clauses of this sort?---No, it's quite usual.

15 Is it usual or unusual, for instance, for a union to have a number of certified agreements with the same employer but each certified agreement covering a different area of industry or a different workplace?---No, it is quite common to have multiple certified agreements covering different sorts of the company's operations.

20 You have also given evidence that you came to a view about the appropriateness of the 1998 certified agreement and your evidence was that it was inappropriate to cover CBD demolition work, in terms of its terms and conditions?---Yes, in terms of its terms and conditions, I didn't think it was appropriate either.

25 Would you have a look at this document, please. I have a copy for you, Commissioner, and for my learned friend as well, and one for the witness. Did you have someone in your office prepare a comparison between the terms and conditions specified in the Able 98 certified agreement and the terms and conditions applicable for demolition work in the Melbourne CBD?---Yes, I did have a discussion, and I had someone have a look at it, I forget who, but have a look at the agreement then and also again subsequently.

30 Does this document that you are looking at at the moment reflect the comparison that you asked be done?---Yes.

35 MR BELL: Can that be published, please, Commissioner.

COMMISSIONER: Yes.

40 MR BROMBERG: Does this document assist you in being able to recollect why it was that you thought the AWU Able 1998 agreement was not appropriate for standard demolition work?---Yes, it does.

45 COMMISSIONER: When did you have this document prepared?---This document that you have in front of you I prepared in the last couple of weeks to refresh my memory, but I know that I had someone look at the agreement at the time and explain to me various features of the agreement. I also think that Don

understood that the agreement at the time needed to be upgraded.

5 I don't understand how you can upgrade an agreement, unless you can say the previous agreement doesn't apply?---Thanks for correcting my use of the language. When I mean upgrade, I mean we want a new agreement. I think in the case of the company, they believed that creating a new all-up hourly rate would be sufficient.

10 MR BROMBERG: Can I take you through this comparative table.

COMMISSIONER: I have read it and I think I understand it.

15 MR BROMBERG: It does require some explanation, Commissioner, with respect.

You see on the left-hand column, that is referable to the conditions in the 98 certified agreement. Is that right?---Yes, it is.

20 What does "DW 1 lowest" mean?---I think that was the lowest classification of employee under the Able 98 agreement.

What does "DW 400 per cent" mean?---That was the highest one, as I recall, the highest classification.

25 Is 100 per cent a reference to what is known as the trades rate?---Yes, it is. I'll, if you like, just check that.

30 In terms of wages, is the comparison to be drawn between the standard demolition arrangement and the 98 agreement this: for a DW 1, for the lowest classification, the wages are 969.92 as compared to 688.55?---Yes, I understand that to be the case.

35 The 688.55, does that include or not include any disability allowance?---No, it doesn't.

Is the example that is then given in relation to the DW 4, you see there is a 756.22 rate shown?---Yes.

40 The example then goes on to refer to the \$4 disability allowance. To your understanding, does that mean that in terms of wages, the comparison for a DW 4 is 1036.11 as compared to 908.22?---Yes.

45 It is clear, on that basis, isn't it, that the 98 agreement was superior in terms of wage rates?---I believe that the basket of money that you would take home under one, as compared to the 98 agreement, was superior.

COMMISSIONER: Mr Bromberg, I really do understand this.

MR BROMBERG: If the Commission pleases.

5

MR BORENSTEIN: Before Mr Bromberg goes on, might we have an explanation of what is referred to in the column standard demolition. Does that refer to some particular agreement or is it a term of art?---This is what the AWU viewed was the going market rate in the city. It was a term of art for the art gallery.

10

MR BROMBERG: Can I then take you to paragraph 6 of Mr Henderson's statement, if that could be brought back on the screen, 071.0576.0787.0075. You see at paragraph 6 there is reference by Mr Henderson to him speaking with Sam Wood and Terry Muscat and national officials of the AWU about the National Gallery work?---Yes, I do.

15

Do you see also, in paragraph 7, he says, "During the negotiation period, I rang Bill Scales, secretary of the Victorian Department of Premier and Cabinet"? ---Yes, I do.

20

And said various things to him. Were you aware that Mr Henderson was speaking to national officials of your union and also to government officials, such as Mr Scales, and I think he mentions Mr Fary?---When I read this statement, this is the first time I learned that I have got an organiser out on a frolic ringing the secretaries of departments and Geoff Fary. I'm obviously running a show where organisers are out there again subverting the chain of command, running their own individual representations to the secretaries of departments. That is absolutely not the policy. I was not aware of that at the time and I guess it doesn't matter now, but when it comes to going to the national office, I didn't know if he had spoken to Sam or Terry, but I suppose that I wasn't surprised because I'm not sure that Don was entirely comfortable in dealing with me, for whatever reason. He was always very straight and loyal to me, but maybe he went to the national office because they had negotiated the agreements. I don't really have a view about that. We don't stop people in our union talking to other people in our union. But certainly speaking to the departments, well, that's - I don't know if he knew them privately or socially, but other than that context, that is unusual.

25

30

35

40

Just bear with me for a moment. If you have a look at paragraph 6, there is mention of a handshake agreement between Paul Rossi, Sam Wood, the then national assistant secretary, and Able. Were you aware of that at all?---I don't know if I was aware of a handshake agreement, but when Able had done some work at Longford, they certainly didn't try to claim to put up this all-up rate special, which was their solution at National Gallery, ultimately. I understand

45

they paid under the terms and conditions that were the going rates during the Longford reconstruction.

5 Mr Tracey put to you that there had been an agreement done about rates that was being applied by Able in relation to its workers at the National Gallery site when they went on site. Were you told by Henderson or anybody else or were you otherwise aware of any such agreement?---To be fair to Don, initially I think there was discussion after I had explained I think we needed to have an agreement covering the National Gallery as the only viable way forward. He
10 said they'd work on the site allowances or come up with some arrangement. But, no, any private arrangement reached between Mr Henderson and representatives of Able didn't carry any status as agreements within our organisation.

15 What had you specifically instructed Mr Henderson to do in relation to an agreement with Able?---I had said we need - and this was June and before - said we need to make sure that we have an agreement which is market standard for the labour market and demolition in the CBD area.

20 Do you have any recollection of anything at all very much happening in July in relation to the National Gallery matter?---I have to say - no, it didn't register as a big time.

25 It was suggested to you there was a meeting in July?---Yes. As I think I indicated to Mr Tracey, I don't recall having a meeting, but I suppose it's not out of the question either in early July, but I certainly don't recall it. I do recall having a meeting at the outset where I recommended that they go and get their own advice, and I do recall having a session on 8 August. I can't recall if I had a meeting in between.

30 Would you have a look at paragraph 11 of Mr Henderson's statement. You see towards the bottom, there is this reference, "Shorten then gave me instructions to go and get Rossi to sign the agreement." Then Henderson says, "He says I can't force him to sign it, I won't force him to sign it, it's illegal, I'm not going
35 to commit illegal acts for you or anyone else." Do you have any recollection of that conversation?---I can't recall the particular conversation. I do believe that Don was feeling some pressure of dealing in between my requests, Able's position, and the whole sort of box and dice. I certainly believe Don would be capable of that sort of remark, but what I don't accept is that I would say to
40 someone, "You must go out and perform an illegal act".

45 Would you have made a suggestion of that sort at all?---I could certainly have said to Don, "I want to get an enterprise agreement, a proper enterprise agreement, not a scrap of paper or a handshake," and I have certainly got no doubt that by August I had formed the view that the only way I could try and

extricate everyone's interests was by having a mirror agreement or the CFMEU and AWU agreement, which would try and resolve matters.

5 I understand your evidence about what happened on 8 or 9 August and the instruction you gave Mr Winter and Mr Henderson to go and speak to the Able workers. I just want to draw your attention to what seems to be an earlier time frame at the bottom of paragraph 11 and it is suggested, the last sentence, that you told Mr Henderson that you wanted him to have a meeting with the Able workers and tell them that they had to join the CFMEU. Did you make any
10 such suggestion?---I never made that suggestion, and certainly I was very keen in June and early July and really only evolved the position by August. I was keen that we get an agreement up and that Able get the contract - sorry, they must have already had the contract - but that Able were able to do the work.

15 Turning to the meeting of 8 August or thereabouts, between you, Henderson and Rossi, did you suggest in any way to Mr Rossi during that meeting that you had met with the CFMEU and other unions and that it had been decided at a meeting that a particular course of action be engaged in?---I certainly had a meeting with the CFMEU, but the CFMEU don't have the power to make
20 decisions for the AWU.

COMMISSIONER: That's not the question?---Sorry, I haven't answered it properly, then.

25 MR BROMBERG: Did you, at the meeting - - -?---No.

- - - say or suggest that there had been an agreement done between the CFMEU and the AWU and other unions for Able to sign a CFMEU pattern agreement, for Able to encourage its workers to join the CFMEU, and that Able should
30 allow the CFMEU organisers on to the site?---Yes, I beg your pardon. Yes, I met with the CFMEU and then subsequently I would have had a meeting with Paul Rossi. I would have indicated to Paul words to the effect that I believe that he should sign an agreement with the CFMEU. I certainly would have said that his workforce should consider CFMEU membership. But what I don't
35 believe I would have said is there is a decision made by a group of unions and that this was the position. I do make the point, however, that this was fundamentally the lost roll of the dice, as far as I could see, for the AWU to try and preserve a position whereby Able and the AWU and the CFMEU were all viewed as at least not having been totally beaten or totally victorious, some
40 face for everyone.

I want to take you to a number of statements that were made by Counsel Assisting in opening, in the opening given in relation to the National Gallery case study. I will read you the statement and ask you to comment on it. This
45 was said, "The third issue that arises is whether the CFMEU and/or any of its

officers or any other union, including the AWU, has committed a contravention of section 298 P3 of the Workplace Relations Act by seeking to advise, encourage or incite Able to take action which would, if taken, contravene section 298K".

5

COMMISSIONER: That will depend on what facts I find, won't it?

MR BROMBERG: It will, but I want to ask the witness about whether or not he, or anybody that he is aware of within the AWU, engaged in action of the kind alleged.

10

COMMISSIONER: I don't think you can put the whole section to him. You'll have to put the facts to him, won't you?

15 MR BROMBERG: All right.

Did you, Mr Shorten, or, to your knowledge, anybody else within the AWU, advise, encourage or incite Able to take action that would injure the workers of Able?---Absolutely not.

20

It was also put in opening, Mr Shorten, that you told Mr Henderson, and I quote what counsel says, "I will see that Rossi never works in our area again." Did you ever make such a statement?---That line, when it was quoted in the opening - I'm a union secretary, so therefore by definition you can't get offended by the things that people say about you, because if you did, you might well go crazy. But I found that implication, that I'm acting in the form of some Hoffa-like Hollywood mogul, that you'll never eat lunch in this town again, to be a totally ridiculous and absurd proposition. Able has worked here again. Their people still pay membership dues to the AWU. At no stage did I ever want Able not to be able to get work done. And whilst I understand that this commission has got - it's interviewed people and gone through issues and all of that, I don't believe that that reference is at all appropriate.

25

30

Have you, at any time since the National Gallery matter, done anything at all - - -

35

COMMISSIONER: You have to understand, Mr Shorten, that there is evidence before me that you did say that.

40 MR BROMBERG: There wasn't, Commissioner, with respect.

COMMISSIONER: Was there not?

MR BROMBERG: There is nothing of that sort in Mr Henderson's material, nothing of that sort at all.

45

COMMISSIONER: I thought there was.

5 MR BROMBERG: Well, there isn't. There was a comment about Geelong
Cement. Where Counsel Assisting referenced that statement is, at the moment,
beyond us.

10 Mr Shorten - - -?---I have to say that the comment that I said that they won't
have a contract, I want them out of the contract, I agree if statements are given,
I suppose that's fair property to utilise. But a statement which said that
someone heard on the other side of a door a conversation of one side, without
going to all the sentences, not even knowing who is being spoken to, and then
to find out an explanation might have been that I was engaging in some sort of
15 stooging trick to egotistically push the organiser to an outcome, and then the
reference in the opening and the way in the transcript the special quote, which
wasn't what I actually said or even been put to me, I understand there are a lot
of really complicated significant fundamental issues in front of this
Commission, but I just thought that was salacious.

20 Have you done anything at all, Mr Shorten, since the National Gallery matter
that would have prevented or precluded Able or Mr Rossi getting any contract
anywhere?---No.

25 Another allegation that was made in the opening, that I want to deal with you
about, Mr Shorten, is it was said that the AWU - and this is in relation to the
1998 certified agreement and the National Gallery matter - it was said that this
commission ought to investigate whether the AWU breached clause 3.3 of the
1998 agreement with Able and thereby section 178 of the Workplace Relations
Act, by failing to use its best endeavours to ensure no stoppage of work or
30 other forms of industrial action were taken in respect of any demarcation
dispute. Are you aware of clause 3.3, the dispute resolution clause?---I have
read it, yes.

35 Can you tell the Commission what your response is to the suggestion that
clause 3.3 of the 1998 agreement might have been breached?---First of all, the
scope of the agreement meant that it didn't apply here. The second issue is that
I finally formed the view about eligibility, so once again it didn't apply here.
The third point is even if this agreement did apply, which I understand no-one
particularly thinks did, I wasn't actually in dispute with Able. At no stage was
40 I in dispute with Able. They had a view, I had a view, but I never was going to
say that I'm in a fundamental dispute about demarcation with Able. But also I
think what that point misses is that Able and Don mightn't have been happy
with the way I wanted to handle the issue, but I wasn't interested in not trying
to at least resolve the expectations that had been pumped up in Able and I was
45 not interested to try and actually create a relationship where all of the parties

felt that there was something left on the table for them. So I actually think that, regardless of the clause which didn't apply, I did actually put some effort in to try and fix the matters.

5 In the evidence of Mr Roennfeldt, there was a suggestion by him that he feared that the AWU would withdraw or abandon its members in relation to the National Gallery site. Do you have a response to that suggestion?---I'm not about to hand any medals out to the Office of Major Projects. At no stage did they ever contact us to ascertain our views. The implication that this fellow,
10 who I might have met once in passing, said that the AWU, as early as May, was going to abandon the workers is a slur, it is not correct, it doesn't reflect the issues that were at stake. So I would absolutely reject what he said and, as I say, there seemed to be any number of people in the public sector worrying about the issue, but I am going to send them my telephone number.

15 Just staying with Mr Roennfeldt, his evidence was that he had had some experience with industrial matters. He also gave evidence that, although he had a concern about the applicability of the 98 agreement to the National Gallery work, he wasn't sure about it and he was seeking advice about it.

20 Mr Shorten, from your experience, if a person experienced in industrial relations matters picked up the 98 agreement, would they or would they not be able to form a view, a fairly immediate view, as to whether or not the 98 agreement applied to the National Gallery site?---Yes, I believe so.

25 And what would that view be?---That there are - the scope of that agreement goes to, and if I might just quote, "Heavy industrial and civil demolition and associated works." I don't believe that the National Gallery has been viewed as an industrial or civil demolition site. Someone experienced in industrial relations in the building industry might have also looked at the issue of what
30 was the parent award. I love the AWU awards, but they would probably have some awareness that demolition in the city was not often done by the AWU. So you might have gone and checked why that was and what awards would cover demolition work of buildings. But having said that, everyone is wise in hindsight. So it is not automatically clear and I also, to be fair, believe that
35 some of the demarcations and coverage issues are labyrinthine.

There was a suggestion in Mr Roennfeldt's evidence, if not an express statement, that he didn't believe that, in relation to government projects, a contractor could get on without an EBA. Do you have a view about that?---I
40 can't speak for OMP because, as I say, they don't ring us a lot. But I know that in Department of Natural Resources and Environment, for instance, or the Alpine Resorts Commission, or indeed some of the water boards, statutory bodies, these are areas outside of Melbourne. Obviously by nature, they are departmental responsibilities. You do get small contractors and there is plenty
45 of work being done in the bush or building tracks or toilets in national parks or

5 projects which I'm not sure the department has asked to see their certified agreements. I wouldn't mind having more regulated standards, however, in some of those departments because one of the beauties of certified agreements is at least - it's not exactly AS 9001 quality assurance, but at least it means that the employer has thought about a range of the issues which they are probably going to need to comprehend doing the sort of heavy work which both ourselves and other building unions cover.

10 Mr Roennfeldt also, in his evidence, dealt with occupational health and safety and at page 2127, he said this, "Many, many projects get delayed on many, many occasions on the grounds of occupational health and safety. While anybody can applaud the use of the incorporation of proper occupational health and safety issues, there is no question it is also an extraneous issue that is often introduced by those unions in terms of their industrial bargaining." Mr Shorten, 15 in your experience and in relation to the activities of the AWU, is that statement correct or incorrect?---Once again, I don't know how this Roennfeldt fellow knows so much about us. The view of the AWU is very clear on health and safety.

20 COMMISSIONER: No, we are not talking about the view. I want to know the practice?---I beg your pardon. The practice of the AWU is that health and safety disputes shouldn't be used as a mask for other industrial issues.

25 Everyone agrees with that, but in fact are they?---Within the AWU, yes, I believe so. I do, though, have to say that - - -

30 MR BROMBERG: I'm not sure if you heard the question. The question was: are health and safety disputes used within the AWU as a mask for industrial issues?---No. That was the point I was trying to make, they are not. I do want to make a point, though, I think there is a false intellectual delineation or Chinese wall between occupational health and safety and industrial. Health and safety disputes, by their nature, are industrial, taking the broadest meaning of the word "industrial," pertaining to the workplace, and from time to time safety matters may have to be pursued by using industrial means. But using 35 health and safety matters for other industrial agendas, that is not the AWU practice.

40 You gave some evidence about the power of the Commission to deal with demarcation disputes and I think your evidence was that the Commission, at one time, had a greater power than it has now and I think your evidence was that there was a limitation in the capacity of the Industrial Relations Commission to prevent disputes, demarcation disputes, rather than simply cure them. Would you turn to section 118A of the Workplace Relations Act. Do you have a copy there?---Yes, I do.

45

I think you actually referred to a section, I think you said 118(1)(b). Would you look at section 118A(1)(b)?---Yes.

Is that the section you had in mind?---It is, actually.

5

The Commissioner can read that, of course, for himself, but is your understanding that that section limits the Commission's power to make orders, demarcation orders, to circumstances where the Commission is satisfied that there is conduct or threatened conduct which is preventing or restricting the performance of work or is harming the business of an employer?---Yes, that is. I think that the clause or the section would be much strengthened by giving a greater discretion to the Commission to step in in advance of the actual dispute. The ability to draw some lines around issues and coverage, I think, would be very handy, and the Commission is quite timely in the method it could do that.

15

Is it your understanding that, prior to the changes made to the act in December of 1996, the Commission could make exclusive representation orders in relation to union representation without the existence of a demarcation dispute at all?---Yes, that is my understanding, and I think that would be a good step forward, for the reasons I think I outlined before, in terms of competitive unionism sounds all right on paper, but I think, for reasons that have been outlined, and perhaps will be further discussed by this Commission, there are other ways to regulate, if you like, monopoly coverage by unions other than simply having overlapping coverage, and this is a good one.

25

Do you have any understanding of what might be the legal consequences of a union trying to represent workers at a workplace where those workers are outside the constitutional coverage of the union?---Yes, I do. Frequently - quite often the AWU is approached by workers either in other unions or perhaps in sections of the economy which aren't covered by awards or we can't cover under our rules. If we chose to take protected industrial action, if we are not eligible to cover them, then we can't take protected industrial action, and to do so would actually expose the union to legal remedy by the outraged party. So practically, you are buying a real fiscal problem if you seek to enrol outside your coverage and then seek to bargain in terms of taking protected industrial action.

35

Can you make an enforceable certified agreement, in your understanding, Mr Shorten, in circumstances where the union does not have eligibility for anyone at the workplace?---No, you can't. You need at least one person whom you are eligible to cover in order to make a certified agreement. I think it's section 170LJ.

40

I have no further questions.

45

MR BORENSTEIN: Might I ask whether the chart Mr Bromberg used earlier in evidence has actually been marked as an exhibit, because we don't have a copy.

5 MR BROMBERG: Yes, can I tender that.

EXHIBIT #122 - CHART

10 COMMISSIONER: When I get Mr Shorten's statement, I'll make that 122A.

MR BELL: I was going to ask for clarification to be sought of the figures in the left column.

15 COMMISSIONER: That can be sorted out between the solicitors, I imagine.

MR BORENSTEIN: Commissioner, may I also raise another matter. We have received yesterday a notice that adverse evidence to our clients, that is certain persons in the Victorian branch of the CFMEU, will be led tomorrow. The list of proposed witnesses for tomorrow contain only one person, Mr Coates, whose statement is on the court book. It seems not to be of the kind that is mentioned in the letter.

25 I'm wondering whether we might have some indication as to what sort of evidence or from whom it is to be called tomorrow, so we can get instructions overnight. There has been a problem about getting witness statements before the day of the witness being in the hearing room.

COMMISSIONER: Mr Tracey.

30 MR TRACEY: I can assist our friend, but perhaps before I do, can I just ask Mr Shorten a couple of quick questions before he leaves the box, so he is not detained while I'm doing it.

35 COMMISSIONER: Yes.

<RE-EXAMINATION BY MR TRACEY

Mr Shorten, do you still have exhibit 122 in front of you?---Sorry, which was exhibit 122? The agreement, yes.

5

There are two columns. There is what you attribute to the Able agreement as at September 2000?---Yes.

Do you see that?---Yes.

10

And then in the right-hand column, you have got standard demolition?---Yes.

Can you tell the Commission whether, if it looked, it could find an agreement that the AWU was a party to that was in force in Melbourne in September 2000 that contained each and every one of the terms that are listed in that right-hand column?---No, because we have not done building demolition and these are the market rates that the CFMEU have established, and I didn't see that the AWU should be out there lowering standards, and I think that is one of the dilemmas of this whole - for the AWU, at least - in terms of this whole Able saga.

15
20

The second matter that you raised that I want to ask you about is the question of the coverage of your union. You indicated, in the course of your evidence, that there had been occasions in the past where your union's coverage had extended to the performance of demolition work in the central business district in Melbourne. Is that right?.

25

MR BROMBERG: I'm not sure that that was in the evidence.

MR TRACEY: The witness can disabuse me, if he wants to. I have asked him is it right.

30

MR BROMBERG: He can ask whether that is the case.

COMMISSIONER: I will allow the question?---We are all straining to speak. In my opinion, we haven't done demolition in the CBD, that I am aware of, for a long, long time.

35

MR TRACEY: May we infer from that that it has occurred in the past?---I can only speak about what I know about, and perhaps if we use the term of my life, 34 years, I'm just not aware that we have been doing it.

40

Is there anything in your rules that would say anything about whether construction work in the CBD is to be regarded as within your coverage capacity that - well, let me pause there. Do your rules delineate coverage by

45

reference to where the work is performed?---Yes and no. Yes, our rules do delineate coverage about where the work can be performed, but the CBD is not a bar to us.

5 Indeed. So the fact that the National Gallery site in Victoria was within the CBD area was not a relevant factor in determining whether your union had coverage of that work or not?---I don't believe it was the critical issue. I believe the critical issue was both the scope of the agreement and the eligibility within our rules.

10

And your rules do provide coverage of civil construction work involving entertainment venues, do they not?---Yes, they do; but not the demolition of buildings housing goods.

15 COMMISSIONER: "Housing goods"?---If I might draw the Commission's attention to the section in our rules.

MR BROMBERG: I'm not sure if I ended up giving you a copy.

20

COMMISSIONER: You did. I have got that here.

MR BROMBERG: If I could direct you to - your page might be numbered 11 of 118.

25

COMMISSIONER: Yes, thank you. What is the relevant clause, then?---I'm talking about - it is page 11 of 118 pages, it is marked subsection 4. Then we go down to (c) and we see, "Construction, repair, maintenance or" - - -

30 Demolition?---Demolition, yes, and I think, if I recall Mr Tracey's question, he was saying, "Well, you have got (v), sports and/or entertainment complexes," and I think the inference in the question is is the National Gallery an entertainment complex.

35 That is a very nice point?---No question. The problem is if you then go down to - and that was, I guess - - -

We need some equity lawyers to sort that one out.

40 MR BROMBERG: It doesn't finish there, Commissioner. The witness is going on.

COMMISSIONER: Go on?---If we go down to - underneath (vi), it says, "Shall be eligible for membership of the union," but it goes down to the next
45 paragraph and it says, "Subject to other paragraphs of this rule. Nothing in

paragraph 4(c) shall render eligible to join the union, pursuant to this part, any building tradesmen," so there goes my DW 4 classification, but also, "except in the areas specified by 4B," and that is the Rockhampton line - anything north of that, we can do - "any builders labourer". That is wrapping up a lot of the functions. So I think it is arguable whether or not it is an entertainment complex. Traditionally, even if - I understand there has been a debate about the contiguous line of the gallery to the concert hall. I do have the view that we can't demolish buildings - structures for which are the purposes of housing persons, goods or workshop equipment. I believe that, practically, when we were doing some work on the Southern Stand at the MCG, goodness knows when - I guess when they were building it - even then, the AWU never sought to claim the buildings which were housing the people. It is these sort of minutiae issues which have fuelled it.

15 COMMISSIONER: It makes you suggest you should have one union for the building and construction industry, that is what it makes you suggest?---The only dilemma with that is if they picked a different union, then we are a bit toey. So before we divide up the cake, just give us civil and mechanical and we are off and running.

20 MR TRACEY: It is a debatable point, isn't it?---Certainly, when I looked at the rules on or around 20 June - I guess hope springs eternal, but, practically, we have got the issue of the scope of the agreement, we have got what is the new agreement going to be and I wouldn't necessarily want to brief senior counsel to run our line on that.

You do recall speaking to Mr Fary about it back in May, or thereabouts, of 2000?---I recall Mr Fary ringing me and talking about the existing agreement.

30 Let me tell you what Mr Fary's recollection of that conversation was. It appears at the transcript at page 2352 and Dr Renwick asked Mr Fary did you, Mr Shorten, express any view as to whether you thought the AWU had coverage of the work, and that was the work at the National Gallery, and Mr Fary's answer was, "My recollection is that he did and that he stated that the appropriate instrument for that was a certified agreement which the AWU had with Able Demolitions, an agreement which, I recall he indicated, he felt was about to be renewed." Does that accord with your recollection?---I wouldn't actually mind seeing the transcript from which you are quoting.

40 MR BROMBERG: The whole lot ought to be read to him, in fairness?---Also, my screen has hit a gremlin.

MR TRACEY: We can arrange for it to be called up. It starts at line 16?---I think, taking the context of - now if you can ask me the question, because I was about to explain to you what he meant, but I guess you - - -

I just wanted to ask you whether his recollection of the conversation was coincidental with yours?---No, not entirely. I do believe that I would have spoken to him that Able is a company who the AW has dealt with. I think it is
5 interesting he said that he recalled me saying that I felt it was about to be renewed, which I think does endorse the view, which I was saying, that we really needed to get a new agreement. I don't believe that we did discuss the issue of rules and coverage. I think all I would have said is that previously we have had an agreement.

10

We might leave it there, Mr Shorten, for today. Sir, may Mr Shorten be released, with a view to his returning on Thursday morning at 10 o'clock?

15

COMMISSIONER: Make it 9.30?---No worries.

<THE WITNESS WITHDREW

[4.00 pm]

MR TRACEY: Commissioner, before you adjourn today, you will recall that last week I foreshadowed that, provided the evidence allowed it, that the last two weeks of the Melbourne sittings, namely, 28 February and 1 March, was to be set aside for the purpose - - -

5

COMMISSIONER: That is two days.

MR TRACEY: Two days.

10 COMMISSIONER: You said two weeks.

MR TRACEY: I beg your pardon. It is late in the day. Two days be set aside for any cross-examination which you might be disposed to allow in relation to evidence that has been called in the Melbourne sittings in December and this month, and I foreshadowed that letters would go out this week, advising interested parties of that. It occurs to us that there needs to be a somewhat more formal direction, so that the parties will know where they stand and what we would propose, sir, would be directions by you that any party interested in cross-examining anyone who has given evidence during the Melbourne sittings give notice, by Friday at 5 o'clock, of that wish and also provide any statements designed to establish the existence of a dispute as to a particular matter, and that once those applications are to hand, they will be considered by you and ruled on them early next week, so that any witnesses who do need to be recalled can have reasonable notice, so that they can attend with minimum inconvenience on Thursday and Friday of next week.

15

20

25

COMMISSIONER: Yes.

MR BELL: I rise to oppose that course, of which no notice has been given, and I do protest at the speed with which that request has been made of you. We saw the statements of the witnesses whom we are supposed to consider cross-examining this morning. We have been unable to access through the court book, other than one statement. I have tried myself, for several days, to access statements. As of 6.30 last night, I was not able to access any, but my junior was able to access one last night. I saw no statements until this morning, when I met with him. As at the time that I left my chambers this morning, I was unable to access any statements, I personally, none.

30

35

COMMISSIONER: Is the system not working?

40

MR BELL: I don't know whether it is not working generally or whether it is not working with respect to my access, but I am able to access the court book, I am able to go through the normal password pathways - - -

45 COMMISSIONER: It is no good telling the technicalities to me.

MR BELL: I'm just explaining the position as it impacts on the parties.

5 COMMISSIONER: So far, as I understand it, the direction that is being asked is only in relation to material I have heard in these sittings, that is in relation, basically, to the National Gallery, not in relation to the overview evidence.

10 MR BELL: No. We are not troubled in relation to that, but what we are troubled about is the prospect that we'll have to proof all of our witnesses, with respect to statements that arrived this morning, in order to obtain instructions, on the basis of which we might have to present statements providing contrary evidence the basis of a cross-examination, which statements, on the proposed orders, would need to be filed with you by Friday and today is Tuesday, we have got many witnesses with which to deal and some of whom are busy
15 people who have public responsibilities of significance, that means that our access to them is not as great as would otherwise be the case.

20 COMMISSIONER: The whole purpose of this exercise is to try and determine what truly is in dispute. I'm not going to allow cross-examination on matters which I regard as peripheral.

25 MR BELL: There is no dispute about that and I have indicated to you, sir, more than once, that we will work within the four corners of the approach that you have indicated. But for it to be workable and effective, there needs to be adequate time given to the parties to be able to comply with it and three working days is preemptory to say the least. We believe that we could comply with a direction that we provide any contrary statements by Monday. That gives us an extra two working days, being the weekend, but by Friday, we believe we will not be able to comply with the order.

30 COMMISSIONER: I'm prepared to make it 9 o'clock on Monday morning. I don't regard that as an unreasonable time, I must say. We have heard - - -

35 MR BELL: Could it be 10?

40 COMMISSIONER: 10 o'clock. We have heard, as I understand it, in relation to the National Gallery, from Mr Weston, Mr Roennfeldt, Mr Scales, Mr Paynter, Mr Moran, Mr Edwards, Mr Hatfield, Henderson, Mr Fary, Mr Campese, Mr Saddington, Mr Charylo, Mr Rossi, Mr Vizard and Mr Shorten; I think that is 15 odd. If the system isn't working, then someone should do something about making sure that it is.

45 MR TRACEY: I'm told there have been technical difficulties today and they are being worked on.

COMMISSIONER: I imagine you would have copies of their statements (indistinct) to those people.

5 MR BELL: We have one. We have not been able to access two of the witnesses.

COMMISSIONER: If you need photocopies, then speak to Mr Tracey and I'm sure we'll overcome that problem.

10 MR BELL: There is an issue with the annexures. We have had no access to the annexures to date, so we'll need to work that matter through.

15 Can I also mention, in relation to Mr Rossi, that his evidence was to be taken on Friday and I think there is a supplementary statement, although I'm reminded it's been indicated that that won't concern us, but the evidence by way of elaboration of his first statement might, and I just ask the Commission to note that that also will impact on our preparation time, but we'll try to deal with that matter.

20 MR TRACEY: I'm told that as we have been speaking, at least, all the witness statements to which our friend has referred are now available and accessible on the court book.

25 COMMISSIONER: I see. Mr Bromberg, did you want to say something?

MR BROMBERG: Only a matter of clarification in relation to the practice note. As I understand the practice note, leave to cross-examine may be given where there is a dispute between evidence called by a witness led by Counsel Assisting and evidence that comes in a statement subsequently received. I don't think it is the intention of the Commission - and this is what I want to clarify - there is a lot of evidence that has been given orally that is conflicting with other evidence that has either been given in statement form or orally by other witnesses that Counsel Assisting have given. For instance, Mr Shorten has given evidence which disputes matters in Mr Henderson's statement.

35 Are we to assume - and please tell us if we are not right - that we are entitled to cross-examine on those matters of dispute, despite the fact that they haven't come in a statement from Mr Shorten but have come out of his evidence given orally?

40 COMMISSIONER: If there is a matter which is in the statement by witness A and Mr Shorten has given contrary evidence in the transcript, then what I would expect would be a note from you saying, "In witness statement A, paragraph 27, and the column next to it, see Mr Shorten, transcript 2461," or
45 whatever, and just one sentence or a few words about what the dispute is.

MR BROMBERG: I anticipated that would be appropriate. I just wanted to confirm it.

5 COMMISSIONER: I can indicate that, in Brisbane, when we implemented that system, it worked very efficiently and well and fairly, I thought.

MR BROMBERG: Secondly, in terms of the cross-examination, beyond the National Gallery witnesses, there were other Melbourne witnesses; for
10 instance, there were witnesses from the MBAV.

COMMISSIONER: They are what I have called overview witnesses.

MR BROMBERG: Yes. Is cross-examination, or what is intended for
15 cross-examination by my learned friends raising the matter, is it intended to include cross-examination of those witnesses or is cross-examination at the moment to be confined to National Gallery matters?

COMMISSIONER: If there is time, I would like it to include the overview
20 witnesses as well. There is one problem with that, as I understand it, that one overview witness has not yet been called. Is that right, Mr Tracey?

MR TRACEY: The difficulty is, firstly, we don't have Mr Shorten's statement
25 which deals with overview matters and there has been another witness who we proposed to call in that regard who has yet to be served and has therefore not got a firm date for attendance.

MR BELL: I am awaiting instructions on overview matters, Commissioner.

30 COMMISSIONER: Then I think I shall give a direction that, by 10 am on Monday next, any person who has been granted either general leave to appear or leave to appear in relation to the sittings in Melbourne and who wishes to cross-examine should, in accordance with practice note No.2, provide to the solicitor for the Commission any statements in opposition which indicate an
35 area where there is a factual dispute or; alternatively, if that factual dispute is said to arise from evidence given, which is on the transcript, a reference to the paragraph in the witness's statement which is said to be contested and a reference to the competing evidence in the transcript.

40 If that can be done by 10 am, I will try and rule on that hopefully by Tuesday morning, so that arrangements can be made for any witnesses in respect of whom I think cross-examination should be permitted to be available on Thursday and Friday of next week. That should apply primarily to the material in relation to the National Gallery. Secondly, I'd make the same order in
45 relation to what I have called overview witnesses, but recognising that it may

be that time will not permit cross-examination of the overview witnesses.

MR BELL: Commissioner, with my client, it is more fundamental than that. I'm not sure whether that leaves the State of Victoria in the position of having
5 to cross-examine the MBA, for example, or consider that in relation to its very large statement. I'm not in possession of instructions in relation to those matters, and many of them concern quite important matters of structure of industry, policy matters and so on, and it had been my apprehension that you would come back to those matters later in the sessions of the Commission, and
10 certainly my client is acting on that basis.

COMMISSIONER: What do you say, Mr Tracey?

MR TRACEY: I think it would be of benefit to the Commission to have the
15 considered view of the Victorian Government on those issues and, for that purpose, I think it may be useful if the Victorian Government was relieved of the obligation that would otherwise be imposed by a direction.

COMMISSIONER: Mr Bromberg, Mr Shorten indicated that he had in mind
20 to prepare on behalf of the national organisation, of which he is the secretary, I thought it might be described as a broader statement. Do you know if you have, or will have, any instructions on behalf of that national organisation to seek authority to appear?

MR BROMBERG: Yes, I anticipate that I will. But in terms of preparing a
25 broader statement, I also anticipate that we'll need some significant time, especially, Commissioner, given that I have other obligations in this place for other clients next week. The other problem with the overview evidence, I should say while I'm on my feet, is that whilst overview witnesses have not
30 been finished - for instance, Mr Mighell is coming back next week - it is very difficult for us to know what is in dispute or at least the totality of the dispute, and in respect of the overview witness that my friend mentioned, who hasn't yet been served, that's an even more difficult situation.

COMMISSIONER: Then I shall restrict the orders to the National Gallery
35 site.

MR TRACEY: Sir, before you adjourn, could I respond briefly to
40 Mr Borenstein's earlier query. The position is that we propose tomorrow to deal with a number of witnesses on the topic of the Anzac Day dispute and, in particular, witnesses who will deal with what was done on various sites in respect of obtaining payment for time not worked on the Monday following Anzac Day in 1999. I will arrange for Mr Borenstein to be told the substance of that evidence as quickly as possible after the hearing adjourns.

45

MR BELL: Commissioner, can I seek clarification in relation to an important matter of procedure. Could I ask at the stage when it is identified by Counsel Assisting that a submission by way of adverse comment or by way of
5 contravention or non-compliance with law might be made in respect of a party, be that party an institution, such as the State of Victoria, or an individual, such as its officers, will there be an opportunity to lead evidence again in respect of that express allegation, or is it expected that any such submission will be made upon the basis of evidence that has been given in the current sessions, which evidence will be closed?

10

COMMISSIONER: It's the latter, but obviously if there is a matter of substance which a party thinks needs to be readdressed, if you like, then I would entertain applications.

15 MR BELL: Yes. Could I place something on the record in this regard. I am concerned at the fact that certain matters to which reference was made in opening were not put to witnesses whom I represent, and I refer to Ms Tozer in particular, but Mr Weston comes into this category. I want to acknowledge that my learned friend has asked me to re-present Ms Tozer so that certain
20 matters can be put in fairness, and that appropriate request will be complied with. However, the concerns go more widely than Ms Tozer because, generally speaking, it is our contention that a number of matters were never put to relevant witnesses.

25 COMMISSIONER: Won't this be a matter for submissions?

MR BELL: It could be a matter for submissions.

30 COMMISSIONER: It doesn't go towards the appropriateness of my making any finding of fact, if you like, which might be considered adverse to a person if a matter hasn't been put to them. I don't carry in my mind the totality of this evidence, properly analysed.

35 MR BELL: No. Yes, it would, and it would be a submission ordinarily made that a matter wasn't put. But it is incumbent on me, I think, at an early stage, when I realise that a matter hasn't been put, to put it on the record. I don't desire to weary the Commission with this submission this afternoon, but I will produce shortly a memorandum setting out matters which I believe not to have been put. Generally speaking, I do not consider that Ms Tozer, Mr Weston and
40 Mr Roennfeldt would have gone home on the evening of their completion of their evidence thinking that everything that might be put against them with regard to the alleged impropriety of a particular course or with respect to allegations of non-compliance with law were in fact put to them.

45 That was not the way the evidence was conducted. Rather, the evidence was

conducted as a factual gathering exercise, and I want to place on the record our belief that that did not enable them properly to respond to allegations that we apprehend might hereafter be made.

5 COMMISSIONER: That is obviously noted. I must say I thought all witnesses had been given a fair chance to say whatever they wanted to say about most things in issue. If there are gaps in that, so be it.

MR BELL: They have, but the point I make, Commissioner - and it's an
10 important point as regards fairness to the individuals in particular; institutions can worry about themselves. But as regards individuals, it is my submission that, for example, if there is an intention to say that a person did not comply with law or breached law or behaved with impropriety in respect of a particular
15 course of action, that they be given the opportunity to answer that allegation expressly, and that is not the way that this case has been conducted.

COMMISSIONER: Not a case; an administrative inquiry.

MR BELL: With respect, I accept that; but an inquiry, the consequences of
20 which may be an adverse finding on this hypothesis as regards their conduct and therefore their reputation. Therefore, matters that form part of a chain of reasoning or the ultimate conclusion itself ought to be put to witnesses expressly, in our submission.

25 COMMISSIONER: I must say I haven't considered whether that is either desirable or necessary yet. I'm waiting to hear what people have to say to me.

MR BELL: Yes. If the Commission pleases.

30 COMMISSIONER: I'll adjourn until 10 am tomorrow.

**MATTER ADJOURNED AT 4.20 PM UNTIL
WEDNESDAY, 20 FEBRUARY 2002**