



Tabled by Mr Travis O'Brien, Senior
Industrial Officer, CFMEUQ, at
Finance and Administration Committee
hearing, 5 March 2014.



FAIR WORK
COMMISSION

TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009 1049027-1

COMMISSIONER BOOTH

C2013/6426

s.418 - Application for an order that industrial action by employees or employers stop etc.

**Lend Lease Engineering Pty Limited
and
Construction, Forestry, Mining and Energy Union; Australian Building
Construction Employees and Builders' Labourers' Federation (Queensland
Branch) Union of Employees
(C2013/6426)**

Brisbane

12.14PM, WEDNESDAY, 16 OCTOBER 2013

PN1

THE COMMISSIONER: If I could have appearances please.

PN2

MR C. MURDOCH: May it please the commission, my name is Murdoch, initials C.J. I seek the commission's leave to appear on behalf of the applicant, instructed by Minter Ellison lawyers.

PN3

THE COMMISSIONER: Thank you, Mr Murdoch. Mr O'Brien.

PN4

MR T. O'BRIEN: Thank you, Commissioner. My name is O'Brien, O-b-r-i-e-n, initial T. With me is MR A COUSNER, C-o-u-s-n-e-r and together we appear on behalf of the first and second respondent. There are three short procedural matters I need to raise before we commence, Commissioner, if I may? The first is you may have noticed that I

have a suitcase in the hearing room. It's because I have a flight booked this afternoon so at some point this afternoon it may be necessary for me to seek to be excused and for Mr Cousner to take over the carriage of the matter. The second is the respondents would object to any grant of leave for the applicant to be represented in this matter and the third is you will have seen that we've filed written objections to portions of the evidence that has been filed by the applicant.

PN5

THE COMMISSIONER: Yes, thank you, Mr O'Brien. I'll hear from Mr Murdoch on the question of leave. Mr O'Brien, you're simply out of courtesy letting the tribunal know about the first point. That's the only thing you need.

PN6

MR O'BRIEN: That's right. It may be necessary at some stage for me to seek to be excused, Commissioner.

PN7

THE COMMISSIONER: Yes, thank you, thank you. And on the third point was there anything that needed to happen other than you need - - -

PN8

MR O'BRIEN: In terms of the objections to the evidence as filed, Commissioner, we acknowledge that the Act provides that you can inform yourself in any way that you see fit and that the rules of evidence don't strictly apply.

PN9

THE COMMISSIONER: Yes.

PN10

MR O'BRIEN: We would say, though, that given the seriousness of this matter, also given the length of time that the applicant has had to prepare their material – we're talking about events from two days ago – that they should be held to the highest possible standards in terms of the evidence that they seek to lead. We would submit that the objectionable evidence that we've identified in our written submissions should not be admitted into evidence but if you're against me on that point we would say that those portions of the applicant's evidence should be given no weight at all.

PN11

THE COMMISSIONER: Thank you, Mr O'Brien. I just might hear Mr Murdoch on the legal representation point.

PN12

MR MURDOCH: Yes, before I embark upon those submissions, Commissioner, might I imply that it's relevant the submissions that I intend to make, whether you've had a chance to peruse the material that's been filed?

PN13

THE COMMISSIONER: Mr Murdoch, peruse is probably an okay a word, but carefully read, I would not go so far as to say that. But yes, I've perused them.

PN14

MR MURDOCH: Can I then deal with the issue of whether leave should be granted under section 596 of the Act? Working through the factors that are set out in section 596 (2), can I first deal with why my submission enabling legal representation or representation by a lawyer, rather, in this matter would enable the matter to be dealt with more efficiently taking into account the complexity of the matter? You would have seen from the material that this matter comes before the tribunal in relatively unique factual circumstances. It comes before the tribunal in factual circumstances that involve a situation where, as I stand here, on my instructions there is not presently a stoppage of work that's in place at the children's hospital project.

PN15

However, it comes before the tribunal the situation where as is apparent from Mr Guilda's statutory declaration there is an extensive history of stoppages and litigation in respect of this site and it also comes before the tribunal in the circumstances of a stoppage on Monday of this week in which it will no doubt be suggested by those who seek to oppose the orders that that stoppage was as a result of safety concerns and the like and it will no doubt also be suggested by those who seek to oppose the orders that in any event the matter of the stoppage wasn't organised by the relevant unions and in any event on the evidence that's before the tribunal the tribunal should not find that continuing stoppages et cetera at the site are probable or impending. So there's a complicated factual history.

PN16

There's also the fact that the commission is going to need to deal potentially with the question of whether or not there were safety concerns or otherwise on Monday, also the extent to which the matter was being organised, and lastly, the question of whether there is a probability or impending nature of further stoppages. Each of those matters will involve the commission considering not just fact but also law. So in my respectful submission for those reasons alone it's a case in which the matter could well be dealt with more efficiently taking into account the complexity of the matter. And I note that my friend in his brief opening described the matter as serious so the nature of the matter is acknowledged by both parties.

PN17

The second point that I note is that there's this rather extensive and I make that criticism because people are entitled to make objections, but there's a rather extensive list of objections to evidence that have been proffered by the respondents. So they'll of course need to be worked through and you'll need to hear submissions from my client in respect of the various grounds that have been set out, relevance, hearsay, speculation, opinion and the like, further matters that in my submission add to the complexity of the matter and will also enable the matter to be able to be dealt with more efficiently if my client is represented by a lawyer.

PN18

When we get to section 596(2) in my submission following on from the matters set out above or earlier by myself, it would be unfair not to allow my client to be represented by a lawyer in this case. And lastly, in respect of section 596(2)(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter. It's a matter of some small 'n' notoriety that my friend, Mr O'Brien, was, until – and he can of course speak for himself – until recent times a solicitor of the Supreme Court who appears regularly in these sorts of matters. So given that my friend is here appearing for the union parties it would be unfair not to allow my client to be also represented. They're my submissions on the representation point.

PN19

THE COMMISSIONER: Thank you, Mr Murdoch. Mr O'Brien.

PN20

MR O'BRIEN: Thank you, Commissioner. If I can start with section 596(2)(a), there's nothing in the submission from my learned friend that would indicate that a grant of leave to be represented in this matter, not just by lawyers, but also by counsel – it's important that we make that point, Commissioner – there's nothing in the submissions from my learned friend that the grant of leave would allow the matter to be dealt with more efficiently taking into account the complexity of the matter. There's nothing that has been put before you to suggest that failure to grant the leave that's sought would somehow delay the matter or see it proceed inefficiently.

PN21

If we move to subsection 2(b) there is nothing in the submissions from my learned friend that would lead you to conclude that it would be unfair to not allow this particular applicant to be represented. This applicant is clearly able to represent themselves. We are talking about a large, very, very well resourced multinational corporation. In fact the contact person named on the application for the applicant is Mr Jeremy Hanrahan. I'm instructed that Mr Hanrahan is legally trained and is legally qualified. It begs the question why a large multinational corporation whose contact person on the application is legally trained, why they would need to be represented not only by solicitors but also by counsel in the interests of fairness.

PN22

It's certainly true that I have legal training. I am on the roll of solicitors of the Supreme Court of Queensland but I do not currently hold a practising certificate. The reason for that is the nature of the work that I do is significantly different from the work that is required of solicitors and legal practitioners. The fact that I no longer hold a practising certificate is recognition of the fact that the work that I do is very different.

PN23

Now, we move onto subsection 2(c). It would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter. Well, you've largely heard me on this point, Commissioner. We're dealing with a large, well-resourced corporation who has listed the contact person on their own application as a legally trained officer in their employment and on the other side you have a not-for-profit organisation who is being represented by somebody of similar standing to that of Mr Hanrahan.

PN24

It seems to me that it would be very, very difficult for my learned friend to convince you that it would be unfair not to allow Lend Lease Engineering Pty Ltd to not be represented by not only solicitors but also by counsel. So if the applicant has failed to satisfy you on subsections 2(a), (b) and (c) then, Commissioner, no leave to be represented should be granted. Unless I can be of further assistance, those are my submissions on that point.

PN25

THE COMMISSIONER: Thank you to both of you. Mr Murdoch, do you have anything in reply?

PN26

MR MURDOCH: Yes, I do. Just in respect of one point that my friend raised. He appeared to make some sort of or tried to make some sort of dichotomy between my client being represented by counsel or by a solicitor. The Act doesn't provide for such a dichotomy. It refers to permission being granted for a person to be represented by a lawyer so the plain, relevant matter is that my client has sought leave to be represented. It's not a question of whether my client has sought leave to be represented by counsel or by a solicitor.

PN27

THE COMMISSIONER: Thank you for submissions from both parties. I do consider this matter to be a complex one. I also consider that it is complex legally and the matters raised in the material before the tribunal do need to be dealt with quickly and efficiency in these circumstances today, in my view, will be assisted by permission being granted for the applicant to be represented by a lawyer. So Mr Murdoch's application to represent his client is granted. Thank you, Mr Murdoch.

PN28

MR MURDOCH: Commissioner, can I read the material that my client relies on. Now, I read this of course accepting that there some objections. Can I first read the statutory declaration of Brian Gerrard Guildea that was sworn by Mr Guildea yesterday, being 15 October? And can I then read the statutory declaration of Brian Raymond Murphy, which is also sworn 15 October?

PN29

Can I then hand to you – my friend has been given a copy of this already as I understand it – can I hand to you a copy for the file and also a working copy of the applicant's outline of submissions? And also a bundle of the cases that are referred to in the submissions. I'm instructed that Mr Murphy and Mr Guildea are available to be cross-examined and I'm informed by my friend that he requires them for cross-examination but before I call them, I wonder how you would like to deal with the matter of objections?

PN30

THE COMMISSIONER: Look, I've reviewed the objections. Can I suggest that the witness be sworn and then we deal with the objections? Is that an appropriate way to deal with it? I have no particular preference.

PN31

MR O'BRIEN: Commissioner, in the absence of submissions from my learned friend I would submit that it's more appropriate to deal with the objections prior to the witness being sworn.

PN32

THE COMMISSIONER: All right.

PN33

MR MURDOCH: I'm content with that. Perhaps the way it should be approached is that they're my friend's objections, so it would be appropriate in those circumstances for us to deal with Mr Guildea's affidavit first.

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THE COMMISSIONER: All right.

PN35

MR MURDOCH: And Mr O'Brien can address you on the objections and I can respond. Perhaps it might be more efficient if Mr O'Brien addresses you on each tranche of objection and I respond.

PN36

THE COMMISSIONER: All right, okay.

PN37

MR O'BRIEN: Commissioner, perhaps in the interests of - - -

PN38

THE COMMISSIONER: I'll just get the - sorry, Mr O'Brien, it always seems to be in the other order. Thank you. Right, and I've got your objections here.

PN39

MR O'BRIEN: Commissioner, in the interests of expediency instead of dealing with them paragraph by paragraph perhaps the simplest way for me to deal with it would be to simply say that the objections are all clear on their face and they are matters that could be - they could be dealt with by the commission simply by assessing the objections and giving the relevant aspects of the evidence the appropriate weight, bearing in mind the objections that have been raised. I'm content for the affidavits to go into evidence in full. What I would say though is that the objections in my submission should see those parts that have been objected to given no weight when it comes to your deliberations.

PN40

THE COMMISSIONER: Well, Mr Murdoch might - - -

PN41

MR O'BRIEN: And if you're with me on that point, perhaps we could proceed.

PN42

THE COMMISSIONER: Mr Murdoch, yes.

PN43

MR MURDOCH: Well, my friend has just said two different things. He said you should approach them on the basis of giving them a limited amount of weight and then you should give them no weight. Now, with respect, if it's going to be put they should be given no weight the objections should be dealt with now, because that way I know before I call the witness what's in and what's out and I have the opportunity, if appropriate and subject to your leave to lead further evidence in respect of those points. But if it's a question of them being given less than full weight well I'm content with what my friend proposes and submissions to be made about it in due course, subject of course to your convenience.

PN44

MR O'BRIEN: The concerns that my learned friend raises are matters for closing submissions in my view, Commissioner.

PN45

MR MURDOCH: In light of that answer, I'd seek that we deal with the objections now so there is clarity going forward as to what's in and what's out - - -

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THE COMMISSIONER: All right.

PN47

MR MURDOCH: - - - because my friend hasn't responded as to whether he presses his submission that the objections be given limited weight or no weight.

PN48

THE COMMISSIONER: Look, it seems to me some of these are, a significant number, Mr Murdoch of Mr O'Brien's objections, you're going to say fair enough. Some of them perhaps we'll have a debate about but some of them you're really going to have not a lot of problem with, I don't think. So look, let's just go through them as quickly as we can. Mr O'Brien.

PN49

MR O'BRIEN: Commissioner, if we start with the first objection to the evidence of Mr Guildea, paragraphs 7 to 22, they're dealing with events that are more than 12 months old and I would submit that they could not possibly bear any relevance to your

deliberations this afternoon on whether industrial action is happening, threatened, impending or probable. We're dealing with events that are in the distant past and should have no bearing on your deliberations to the questions that are before you this afternoon. Commissioner, would you like me to move on or shall we deal with these one by one?

PN50

THE COMMISSIONER: I think that's a pretty important one and perhaps that is one that will require more than.

PN51

MR MURDOCH: Yes, can I respond to that in a couple of ways? Firstly, the paragraphs from 7 through to 22, in my submission, provide the commission with a context as to relevant stoppages and orders that have been made in the past. They also provide a context in respect of what other litigation is presently on foot between the parties and the timing of that litigation. They also provide and I'm talking now of course about paragraph 22 in respect of other contextual matters that are relevant to the question of the probability or impending nature of industrial action. I should make it clear though, just in respect of paragraph 21 as a result of a decision of the Federal Circuit Court earlier today where Mr Guildea gives his evidence, I'll be having the date of 21 October 2013 deleted and the date of 3 February 2014 inserted.

PN52

In my submission, they're all matters that are relevant to your consideration because they give context to the events of Monday. The extent to which you ultimately consider the relevance is a matter for you but in my submission they're not matters that simply bear no weight and therefore should be struck out in their entirety on the basis of relevance.

PN53

THE COMMISSIONER: And particularly in the light of the decision earlier this week and more generally I do agree that both, that they do provide some context but yes, the weight they are given on the particular proceedings today, I think is a matter for consideration when I'm making my decision. I don't think they are irrelevant.

PN54

MR O'BRIEN: Commissioner, if I may respectfully, I would like to draw a distinction between the substance of paragraphs 7 to 22 and annexure BG-2. In my submission annexure BG-2 deserves separate consideration in that what we have here is a document that has, on the evidence of Mr Guildea, come to his attention on Monday of this week.

PN55

The document, it's unclear as to who the author is. It's unclear as to how the document came into existence. It's unclear as to who has authorised it if anybody, has authorised this document. What this document amounts to essentially is unsourced hearsay. It's a document that has come to Mr Guildea's attention on 14 October. We don't know how it's come to his attention. We don't know how it has come to be that Mr Guildea has got this document in his possession. He refers to the CFMEU logo being on the document.

PN56

I suspect what Mr Guildea is referring to is the top left-hand corner and you will see there the Australian Workers Union logo. You'll also see the union's New South Wales logo. You'll see the Australian Metal Workers' logo. You'll see the ACTU's logo. You'll see what I believe is the MUA's logo. You'll see three logos that I can't identify. It seems to me that this document is of no probative value at all. It amounts to nothing more than unsourced hearsay and that this document, BG-2, should not be admitted into evidence.

PN57

MR MURDOCH: Mr Guildea can be cross-examined as to how it was this document came into his possession and in my submission it's not appropriate to be ruled out at this stage.

PN58

THE COMMISSIONER: I will leave the document in at the moment. It's part of Mr Guildea's material and as I said you can certainly ask Mr Guildea questions about that document along the lines no doubt you raised this afternoon, Mr O'Brien.

PN59

MR O'BRIEN: Thank you, Commissioner. If we turn to paragraph 25 of Mr Guildea's affidavit, I'm content for that paragraph to be admitted into evidence on the proviso that the applicant doesn't seek to rely on it for the truth of the statement if my learned friend is content with that perhaps we can move on.

PN60

MR MURDOCH: Just reading through it again on the basis of that statement. I'm content with that.

PN61

THE COMMISSIONER: Thank you.

PN62

MR O'BRIEN: If we go to paragraph 26, Commissioner, the relevant passage being:

PN63

I understand that Mr Murphy met with the organisers and the delegates from just after 6.30am at which time he was provided with a right of entry notice issued pursuant to 117 of the WHS Act.

PN64

Again, I'm content for that to be admitted into evidence provided that the applicant doesn't seek to rely on that passage for the truth of the matter, merely that that was what was said to Mr Guildea.

PN65

MR MURDOCH: Well, I'm content with that. However, can I just ask through you, is it not conceded by my friend that there was a notice issued pursuant to section 117?

PN66

MR O'BRIEN: It is conceded, Commissioner and in fact more than conceded. It will be relied upon.

PN67

MR MURDOCH: Well, on the basis of that I'm content to take the approach in respect of the words that my friend took you to as he suggests.

PN68

MR O'BRIEN: Commissioner, we move onto paragraph 27, the relevant passage being:

PN69

It quickly became clear to me that the organisers intended to disrupt the project because they were adamant that an evacuation drill needed to be conducted immediately and were raising issues with the site evacuation procedures.

PN70

This is nothing more than speculation, Commissioner, and in my submission, it's not proper for this to be admitted into evidence.

PN71

MR MURDOCH: I'm content to seek to amend that sentence to read:

PN72

The organisers were adamant that an evacuation drill needed to be done immediately and were raising issues with the site evacuation procedures.

PN73

MR O'BRIEN: No difficulty, Commissioner.

PN74

THE COMMISSIONER: The organisers were adamant - --

PN75

MR MURDOCH: So that will delete - - -

PN76

THE COMMISSIONER: Yes.

PN77

MR MURDOCH: - - delete the words "It quickly became clear to me that" and the words, "intended to disrupt the project because they."

PN78

MR O'BRIEN: Commissioner, are you ready for me to move on?

PN79

THE COMMISSIONER: Yes, I am.

PN80

MR O'BRIEN: We then come to the second objection regarding paragraph 27. The relevant passage reads:

PN81

It was my belief that the safety issues being raised by the organisers was with the intention to disrupt the project.

PN82

Again, it's pure speculation, Commissioner and the entire sentence should not be admitted into evidence.

PN83

MR MURDOCH: In my submission that sentence can remain solely though as Mr Guildea's belief and it has the weight attributed to it that you attribute to it accordingly.

PN84

MR O'BRIEN: I don't have difficulty with that, Commissioner.

PN85

THE COMMISSIONER: Thank you, move on.

PN86

MR O'BRIEN: We then move onto paragraph 35. The objection is to the words:

PN87

I am aware that the CFMEU members did not go back to work when they returned to site but remained in the crib sheds onsite.

PN88

Again, it seems that this is hearsay evidence. There's nothing in the material that discloses how Mr Guildea became aware of this. It seems to me that this is evidence that is not capable of being admitted and if it was admitted that no weight could be given to it.

PN89

MR MURDOCH: Excuse me a moment. I don't press the first sentence of paragraph 35.

PN90

THE COMMISSIONER: And the last sentence, Mr Murdoch?

PN91

MR MURDOCH: I don't press the last sentence.

PN92

MR O'BRIEN: Commissioner, just so I'm clear here, is my learned friend not pressing the first sentence as well.

PN93

THE COMMISSIONER: Both sentences.

PN94

MR O'BRIEN: Both first sentence and last sentence from paragraph e35 are not being pressed?

PN95

MR MURDOCH: That is so.

PN96

MR O'BRIEN: Thank you for that. Paragraph 36, again, it's clear on its face that paragraph 36 is not only hearsay, it's unsourced hearsay. Mr Guilda has asked an unnamed manager of the site to conduct a review and this unnamed manager then appears to provide information to Mr Guilda. Again, it's unsourced hearsay and it should not be admitted into evidence. If it is admitted into evidence it should be given no weight.

PN97

MR MURDOCH: Excuse me while I take some instructions, Commissioner. Commissioner, in my submission the appropriate way to deal with this matter is for when Mr Guilda gives his evidence for me to ask him who it was that he asked to conduct a review. Mr Guilda holds a senior position on the site. If my friend wants to cross-examine him in respect of the numbers well he can do so but the alternative to what is being suggested is that there need to be detailed evidence taken in respect of each and every one of the employees and Mr Guilda, given his role on the site, is well-capable of giving the evidence.

PN98

MR O'BRIEN: Mr Guilda may well have a senior role on the site, Commissioner. What he does not have is first-hand knowledge of the facts that are seeking to be led in evidence here.

PN99

THE COMMISSIONER: I'm going to leave the material in. I am mindful of the nature of these proceedings and that it's important to get as accurate evidence as possible but it has to be taken into account that it's done quite quickly. I certainly think to the extent that you can cross-examine and further information about who provided this evidence should be the subject of cross-examination and I'm sure, Mr Obrien, you may then make some submissions about that as a result if your conclusions are that it doesn't add up, I guess, to a satisfactory conclusion.

PN100

MR O'BRIEN: Thank you, Commissioner.

PN101

MR MURDOCH: I don't press paragraph 37.

PN102

MR O'BRIEN: Ready for me to move on, Commissioner? We come to paragraph 44. The passage that's objected to is the concluding phrase:

PN103

and I considered it was unlawful industrial action.

PN104

I think in colloquial terms this amounts to swearing the issue, Commissioner. The applicant is seeking to lead evidence of the opinion of Mr Guildea who is not qualified to give an opinion as to whether or not this was unlawful industrial action and the phrase should not be admitted into evidence.

PN105

MR MURDOCH: That may well have been one of the ones that you were referring to earlier by your fair enough comments, Commissioner. I don't press those parts of it.

PN106

MR O'BRIEN: Commissioner, we come to paragraph 57. The relevant passage here is:

PN107

John had advised Mr Myles that entry to site was being refused in line with my instructions which I issued yesterday evening.

PN108

Again, Mr Guildea has no first-hand knowledge of the purported exchange between Mr Pelaschi and Mr Myles and cannot properly give evidence about such an exchange.

PN109

MR MURDOCH: I'm content for that to remain but simply for it to remain on the basis of Mr Guildea stating what he was told.

PN110

THE COMMISSIONER: Yes, if that's what you say.

PN111

MR O'BRIEN: Commissioner, that's not the evidence. The evidence reads:

PN112

John had advised Mr Myles.

PN113

Perhaps my learned friend might like to consider an amendment to the evidence?

PN114

MR MURDOCH: Can I suggest it be amended to read:

PN115

John told me that he had advised Mr Myles.

PN116

MR O'BRIEN: I have no difficulty with that, Commissioner. Commissioner, we then move onto paragraph 66. Again, what we have here is not only hearsay evidence but it's unsourced hearsay evidence. An unnamed person called Mr Guildea on his evidence to advise him that he has seen certain things. Mr Guildea can't give a first-hand account of any of this. It's hearsay but more than that, it's unsourced hearsay.

PN117

MR MURDOCH: I'm content, Commissioner, to ask Mr Guildea who it was who told him that and for that evidence to remain in on the basis that that was what that person told Mr Guildea.

PN118

THE COMMISSIONER: Are you content with that?

PN119

MR O'BRIEN: Commissioner. This brings us to paragraph 70. The passage that's objected to is:

PN120

I have been advised by Brian Murphy that the organisers said words to the effect, "We'll be back tomorrow."

PN121

Again, it's hearsay evidence, Commissioner, and we would say it should not be admitted into evidence. If it is admitted into evidence it's not capable of being relied on in any way by the applicant.

PN122

MR MURDOCH: I'm content for it to stay on the basis that that was what Mr Guildea was told by Mr Murphy and I'll take some instructions upon whether I seek leave to seek to lead evidence about to that effect from Mr Murphy.

PN123

MR O'BRIEN: I'm content with that, Commissioner. I think that disposes of the objections to the evidence of Mr Guildea.

PN124

MR MURDOCH: On that basis, I call Mr Guildea now.

PN125

MR O'BRIEN: Commissioner, while there are only three objections to the evidence of Mr Murphy perhaps we should - - -

PN126

THE COMMISSIONER: I'm in your hands, Mr O'Brien.

PN127

MR O'BRIEN: If we start at paragraph 3, the objection is to the concluding phrase:

PN128

commenced a stoppage at the QCH.

PN129

Again, I think it's what's colloquially known as swearing the issue. It's opinion evidence in that it was a stoppage that occurred at the QCH. There are implications to the use of the word "stoppage" that should not be going into evidence, Commissioner.

PN130

MR MURDOCH: I don't think it's swearing the issue.

PN131

THE COMMISSIONER: No.

PN132

MR MURDOCH: It's a factual statement.

PN133

THE COMMISSIONER: Quite so.

PN134

MR O'BRIEN: With respect, Commissioner, there's a difference between performing productive work and not performing productive work. Not performing productive work is not necessarily by definition a stoppage. There are a number of reasons why an employee may cease to perform productive work. They are entitled to be paid in some of those circumstances and that does not make it a stoppage. In my submission the clear implication from the use of the word "stoppage" is that an employee is not entitled to be paid. "Ceasing to perform productive work" would be an expression that I would have no objections to rather than the use of the word "stoppage" in this particular passage of the evidence.

PN135

MR MURDOCH: The witness has given evidence that the work has commenced to stop. That's a factual matter. Mr O'Brien can cross-examine him as to what he means by it but that's a statement of fact.

PN136

THE COMMISSIONER: It's not a word that's actually referred to in section 418, Mr O'Brien.

PN137

MR O'BRIEN: No, I don't think there's a definition of it in any of the relevant legislative instruments, Commissioner.

PN138

THE COMMISSIONER: No, no, no.

PN139

MR O'BRIEN: My objection really is based, I suppose, on the colloquial meaning of the word rather than a technical legal meaning and I don't want to see an incorrect imputation given to the evidence of this witness based on what is perhaps a less than accurate use of language.

PN140

THE COMMISSIONER: I'll allow it in for the time being and I expect that you may have something to say about it, Mr O'Brien, in due course both in cross-examination, perhaps in final submissions. Can we go on?

PN141

MR O'BRIEN: Certainly. We come to paragraph 17 of the evidence of Mr Murphy. The passage that's objected to reads:

PN142

but which I did not consider to be genuine safety concerns.

PN143

The witness is seeking to give evidence about the genuineness of the concerns held by others. It's nothing more than his opinion, nothing more than speculation and on that basis we object to that particular passage.

PN144

MR MURDOCH: Well, he can give evidence as to whether he considers the safety concerns to be genuine ones. That's his view of it. He's not giving any evidence there as to somebody else's view. It's his view of it.

PN145

THE COMMISSIONER: Yes.

PN146

MR O'BRIEN: The evidence is capable, Commissioner, of being read that he did not consider that the concerns were genuine. In its entirety the paragraph reads:

PN147

The organisers then raised other issues they said had been reported to them by workers onsite but which I did not consider to be genuine safety concerns.

PN148

It's capable of being read such that the witness is giving evidence that he did not think the concerns were genuinely held and it is that reading that we object to.

PN149

THE COMMISSIONER: I think this is a grey area because it is one of the issues that need to be decided in genuine safety concerns, meaning if they're immediate, do trigger certain requirements in these types of orders but I do also think a person's opinion is one that can be validly disagreed about. I mean it happens every day on that side of the bar table. So I am prepared to accept that is an opinion and to give it weight that it is an opinion and it doesn't persuade me that it is the opinion of the author of the affidavit. Mr Obrien have you got anything more to say on that point?

PN150

MR O'BRIEN: No, Commissioner. We'll move onto paragraph 47. Again, the objection to this paragraph in its entirety is that it is opinion evidence and the witness is not in a position to swear to the fact that "there was nothing to prevent work from safely occurring onsite throughout that day." That may well be an opinion that he holds, given your previous comments, but he can't swear to the fact that there was nothing that prevented work from being performed safely.

PN151

MR MURDOCH: Well, I'm prepared to seek your leave to amend that to read, "In my opinion" - - -

PN152

THE COMMISSIONER: Yes, I'd be satisfied with that. Mr Murdoch.

PN153

MR MURDOCH: Yes, thank you, Commissioner. I call Brian Gerrard Guildea.

<BRIAN GERRARD GUILDEA, SWORN [1.00PM]

<EXAMINATION-IN-CHIEF BY MR MURDOCH [1.01PM]

PN154

MR MURDOCH: Could you give your full name to the commission, please?
---Brian Gerrard Guildea.

PN155

And have you provided a statutory declaration that was given by you on 15 October 2013 for use in this proceeding?---Yes.

PN156

Do you have a copy of it there in front of you?---Yes.

PN157

Can I ask you please to turn to paragraph 21 and ask you to note that in paragraph 21 on the last line you referred to 21 October 2013? Can I ask, whether you since giving this statutory declaration been informed that that matter that you refer to in paragraph 21 will now begin or is now scheduled to begin on 3 February 2014 and not 21 October 2013?---That's correct. I was advised a few hours prior to this hearing.

PN158

So on that basis would you like to amend paragraph 21 to read, "was scheduled to begin on Monday 21 October 2013 and is now scheduled to begin on 3 February 2014"?---I have no objection on it.

PN159

Can I ask you then, please, to go to paragraph 27 and can you note that in paragraph 27 in the third line the words "It quickly became clear to me that" as well as the words "intended to disrupt the project because they" have now been deleted?---Yes.

PN160

Can you then please go to paragraph 35 and note that the first and last sentences in paragraph 35 have been deleted?---Yes.

PN161

In paragraph 36 you've referred there to one of the managers onsite. Are you about to inform the commission who it was that you asked?---It was Mr Lachlan Tipler who is the senior area manager in charge of the fit-out of the hospital.

PN162

Can I ask you then to note that paragraph 37 has been deleted?---Yes.

**** BRIAN GERRARD GUILDEA XN MR MURDOCH

PN163

And in paragraph 44 on the last line the words "after" but not including "me" have been deleted?---Yes.

PN164

Then in paragraph 57 can I ask you to note that in the second line after the word "John" the words "told me that he" are to be inserted? Are you content with that?---Yes.

PN165

Then in paragraph 66 you refer in the first lines taking a telephone call from another manager. Can you tell the commission who the other manager was?---It's Mr Mark Taylor. He is the project manager in charge of the project adjacent to the QCH site.

PN166

With those amendments taken into account are the contents of this statutory declaration true and correct to the best of your knowledge and belief?---Yes.

PN167

That's the evidence-in-chief of Mr Guildea.

PN168

THE COMMISSIONER: We'll mark that document A1.

EXHIBIT #A1 STATUTORY DECLARATION OF BRIAN GUILDEA

PN169

MR MURDOCH: Thank you, Commissioner.

PN170

MR O'BRIEN: Thank you, Commissioner.

<CROSS-EXAMINATION BY MR O'BRIEN [1.05PM]

PN171

MR O'BRIEN: Mr Guildea, how long have you worked in the construction industry?---25 plus years.

PN172

And have you always worked in your current role as a project manager?---No.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN173

What other roles have you had over your 25 years?---From on-the-tools, leading hands, foreman, site manager, project manager, senior manager.

PN174

Can you take me through the training that you've undertaken over your 25 years in the construction industry?---Onsite training.

PN175

All onsite training?---Yes.

PN176

Have you received any formal training in work, health and safety?---Yes.

PN177

What training is that?---Well, various courses that organisations I've worked with, with departments, Workplace Health and Safety Departments, various experts.

PN178

In terms of this particular project you would be the number one authority for the applicant, would you not?---In regards to safety?

PN179

In regards to managing the project?---In regards to the overall management of the project the site operations, I'd say yes.

PN180

I see. Do you have a specialised work, health and safety person on the project?
---We have a number of personnel, safety coordinators overseen by a safety manager.

PN181

So you have a safety manager employed just on this project, do you?---Correct.

PN182

And who is that safety manager?---Brian Murphy.

PN183

Brian Murphy. So do you consider yourself to be an expert in workplace health and safety?---No.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN184

You don't. You give evidence that there are some 1,100 employees working on the project. Out of those how many are construction workers that are employed by Lend Lease?---None of those numbers.

PN185

Lend Lease does not employ a single construction worker on this project, is that right?---Actually we have one labourer on the project. All the other personnel are of a supervisory nature or administrative.

PN186

So would you agree with me then that every single construction worker, bar this one labourer, is employed by somebody other than Lend Lease?---Yes.

PN187

Thank you. You give evidence that there are currently night works undertaken on the project. Can you explain to me what that means, please?---Night works, due to the location of the project it fronts major arterial roads, particularly Stanley and Vulture Street. The nature of those works means we have to shut lanes, close lanes down to carry out those works. Council will not permit those closures till out of hours.

PN188

I see, so is this a regular thing?---It has been for a number of months, yes.

PN189

So the subcontractors that are engaging in the nightshift works, can you explain to me what fatigue management plans they have in place for those workers?---Well, we have been through them. They definitely do have them. We've had a number of discussions in regards to that, particularly the civil contractor, Shamrock Civil. There were detailed conversations with the CFMEU in regards to that matter because they sought approval in line with their EBA to work out of hours and that plan was critiqued prior to that approval being given.

PN190

Are you familiar with the term "person conducting a business or undertaking"?
---I've heard it before, yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN191

Would you agree with me that Lend Lease is the person conducting a business or undertaking insofar as the Queensland Children's Hospital project is concerned?
---Yes.

PN192

Is it your understanding that the person conducting a business or undertaking has a primary duty of care for the health and safety of all workers regardless of who they are employed by that are engaged on a particular project? Would you agree with that?---Yes.

PN193

Can you explain to me how the relationship works between Lend Lease and the 1,099 construction workers engaged in this project that you do not directly employ? Are you able to direct them day by day minute by minute as to what work they're performing?---We coordinate the works with their respective managers. We don't give direct direction to the employees.

PN194

So how does that work in practice? Would I be right in saying that you would go to the manager to say, the gyprocking subcontractor and say, "By the end of the month we want this amount of gyprock to be installed?" Is that the sort of direction you're talking about?---Yes.

PN195

But it wouldn't go to "We want these gyprockers to be working from 6 till 6 every day"? That would be a matter for the gyprocker subcontractor, wouldn't it?---As to how it would occur, correct.

PN196

Yes, yes, so your level of direction and control over the subcontractors would go no further than, "By this particular date we want you to be at this particular point"?---In regards to our expectations, yes.

PN197

Thank you for that. You don't get involved in how it is the subcontractor gets to that point, do you?---Depending on some matters, if there's a complexity to them we may have to but as a norm no.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN198

Thank you. When is the project expected to be completed?---The project completion date is for the early part of 2014.

PN199

Is that the structural part of the project? Is that the commissioning part of the project?---That is the main hospital building.

PN200

That would be structural part of the project?---No, the fit-out and the commissioning.

PN201

You're expected to have the fit-out and the commissioning completed by early 2014, is that right?---That is correct.

PN202

Do you still have structural works being performed on the project, Mr Guildea?
---From a concrete point of view, no. Structurally, the building is there. The envelope of the building is complete. There is some minor structural steelwork going up but not necessary for the structure.

PN203

It's not going to be finished by early next year, is it, Mr Guildea?---No.

PN204

In reality when do you think it will be ready to be handed over?---In my opinion?

PN205

Yes?---Hopefully in the first quarter of '14.

PN206

Your evidence is you believe this project will be ready for handover in the first quarter of 2014. Is that right?---Well, it's subject to a number of variables. When we say "handover" the project is broken into a number of separable portions.

PN207

I see?---So there are external civil works, external landscape works. That is subject to commissioning a very complicated building as well.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN208

Let's go back to the gyrockers? When do you think the gyrockers will be finished their part of the project?---That would range between the next two weeks and the early part of next year because of the nature of the fit-out from levels 1 to 12.

PN209

Are there two gyrocking packages on this project?---That is correct.

PN210

And you expect both of those packages to be completed at latest by early next year, would you?---Early next year, yes.

PN211

Is the project behind schedule, Mr Guildea?---Yes.

PN212

How far behind schedule is it?---45, 50 days.

PN213

Not 12 months? It's 40 to 55 days behind schedule is it, that's all?---Well, that's minus delay contingencies.

PN214

I see. Mr Guildea, I put it to you that the gyroackers are 12 to 14 months behind in their scheduled works at the moment. What do you say to that?---Well, I'm struggling to see how it's relevant to my statements.

PN215

Well, I'll deal with that in a moment, Mr Guildea. What do you say to my proposition that the gyroackers are 12 to 14 months behind their scheduled works on your project, what do you say to that?

PN216

MR MURDOCH: I object on the basis that that's not a relevant question in this matter.

PN217

MR O'BRIEN: Commissioner, it is a relevant question. Mr Guildea has given evidence about his attitude towards a safety issue. If the project is significantly behind schedule it may well be that changes his attitude to delays to ensure safety and I think I'm entitled to put the question.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN218

THE COMMISSIONER: Mr O'Brien, I'm really struggling to see the connection between your line of questioning around this particular issue and the safety issues.

PN219

MR O'BRIEN: Commissioner, I haven't turned to the safety issues yet. I'm merely dealing with the scheduling of the project but perhaps I can move on.

PN220

THE COMMISSIONER: I'd appreciate you moving on to the safety issue sooner rather than later.

PN221

MR O'BRIEN: I have two more questions to ask about the scheduling, Commissioner. They are of a different line though.

PN222

THE COMMISSIONER: Mr O'Brien, I think I've given you a fair bit of leeway on those issues and I really would appreciate you moving to the safety issues now.

PN223

MR O'BRIEN: Certainly. Mr Guildea, you give evidence that on 6 August the then Fair Work Australia issued orders that industrial action stop regarding your project. Were orders issued over the respondents in this matter on that occasion?

---Well, my understanding is I thought that was struck from my affidavit, the start.

PN224

No, Mr Guildea, I don't think it was?---No.

PN225

But do you recollect whether or not the then Fair Work Australia found that any industrial action was being organised as at 6 August?---Well, as per item 8 the number of applications were made during that period.

PN226

I see. You don't recall?---Well, it's well over a year so - - -

PN227

That's a very fair point, Mr Guildea?---- -I do not clearly recall, no.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN228

No, it's a very fair point. Can I take you to annexure BG-2 in your statement? What's that document there, Mr Guildea?---A flyer, information handout sheet.

PN229

How did it come to be in your possession?---I was given a copy of this through an employee who works on the project, John Pelaschi.

PN230

Yes. So Mr Pelaschi came up to you on Monday and gave you this flyer, did he?
---Well, it was on a website of some description. He had sent me that and I had it printed out.

PN231

I see. So he emailed you a link to a website?---Correct.

PN232

And you then printed out this from that website. Is that correct?---Correct.

PN233

I see. Who administers the website, Mr Guildea?---I didn't check that.

PN234

You don't know?---No.

PN235

Was there any reference to the CFMEU or the BLF on the website?---I didn't do the printing.

PN236

You saw the website though?---I didn't print it out. I saw the link.

PN237

You saw the link?---That was it and asked for it to be printed.

PN238

And you asked for that link to be printed?---That's it.

PN239

Can you take me to anywhere in this document where it refers to the CFMEU or the BLF, please?---Well, other than what you had highlighted earlier on in the top corner of the paperwork, page 1, where you have highlighted the CFMEU and a number of other organisations.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN240

I see. So the only connection you can draw between this flyer and the CFMEU or the BLF is that logo in the top corner. Is that right?---Other than an opinion.

PN241

So based on that evidence you would also say that this flyer had the exact same connection to the Australian Workers Union - - -?---Yes.

PN242

- - - as it does to the Construction, Forestry, Mining and Energy Union, wouldn't you?---Any of the ones mentioned in that or noted on that.

PN243

What's your understanding of the Bob Carnegie issue, if I can call it that? What's your understanding of that issue? What's this flyer all about?---The matter has obviously been before the courts and the courts have made a ruling on it.

PN244

What's the matter, Mr Guildea?---In regards to contempt charges.

PN245

I see, so what are these contempt charges? Who brought the contempt charges against whom?---Abigroup brought contempt charges against Bob Carnegie.

PN246

And Abigroup who was your then employer - - -?---Correct.

PN247

- - - brought contempt charges against Bob Carnegie. And what was the outcome of that?
---Well, I think it's noted in here that charges were dropped for whatever reasons. Court orders had been unclear. Was acquitted on the grounds, this is what's noted in the flyer.

PN248

I see. So Bob Carnegie has been acquitted of the contempt charges. Is that your understanding?---Yes.

PN249

It sort of puts the Bob Carnegie issue to bed, doesn't it, Mr Guildea?---I would have thought so.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN250

Thanks for that. Can I take you to paragraph 39 of your statement, please? You give evidence that at approximately 10am on 14 October you advised the organisers that you considered the workers' refusal to return to work to be unlawful industrial action. Mr Guildea, in your 25 years' experience in the construction industry have you come across any circumstances where a refusal to perform work is not industrial action, be it lawful or otherwise?---Yes.

PN251

What are those circumstances?---Training would be a good one.

PN252

Yes?---By agreement with the employer. That would be two.

PN253

Anything else?---Nothing springs to mind.

PN254

Just a moment, excuse me for a moment, Commissioner. Mr Guildea, are you familiar with the Work Health and Safety Act 2011? This is the Queensland legislation that governs work, health and safety on your project. Are you familiar with that Act?---I'm aware of the Act, yes.

PN255

Commissioner, may the witness be shown this? It's an extract from that Act. For the benefit of my learned friend it's sections 116, 117, 118 and 119 of the relevant Act. Can I take you to section 117 of the Act, Mr Guildea? Do you agree with me that prior to Messrs Myles, Vink and Ramsey entering your project on Monday, 14 October that they provided a right of entry notice pursuant to 117 of the Work Health and Safety Act? Do you agree with that?---I became aware of it after,
yes - - -

PN256

I see, I see?---- - -which is in my statement.

PN257

Can I take you to section 118(1)(b) of the Act, please?---Yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN258

Have you read that passage, Mr Guildea?---“Consult with the relevant workers,” yes.

PN259

So in full would you agree with me that it provides

PN260

While at the workplace under this Division the Work Health and Safety entry permit holder may do all or any of the following in relation to the suspected contravention of this Act: consult with the relevant workers in relation to the suspected contravention.

PN261

Do you agree with me that the Work Health and Safety Act provides that workers may consult with their Work Health and Safety entry permit holder who is there pursuant to section 117 of the Work Health and Safety Act? Would you agree with that?---Yes.

PN262

It wouldn't be industrial action, would it?---No.

PN263

They'd be exercising a lawful power to consult about a suspected contravention, wouldn't they?---Correct.

PN264

You agree with me that Messrs Ramsey, Vink and Myles were there pursuant to 117 of the Work Health and Safety Act on 14 October? You agree with that, do you?---They came in under 117, yes.

PN265

Thanks for that. Mr Guildea, are you familiar with industrial instruments under which your subcontractors engaged their employees?---Not all of them. There are a couple of base documents that I'm fairly familiar with.

PN266

Is there any one subcontractor in particular where you're more familiar with their document?---Well, more so the CFMEU document.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN267

I see, so I've already referred to the gyrockers. Perhaps we might start with the Gyrockers Enterprise Agreement? Commissioner, may the witness be shown this document? What is that document, witness?---It's a collective agreement between one of the gyrock companies and the CFMEU.

PN268

The gyrock company, North West?---Correct.

PN269

Is North West the same NWCI referred to at paragraph 36(c) of your affidavit? Is it the same company?---It would be, yes.

PN270

It is. Can I take you to clause 8.1 of that agreement, please?---Yes.

PN271

What does the last passage of clause 8.1 say, Mr Guilda?---They're "not required to work in circumstances where the employee or a relevant – abbreviated – "permit holder reasonably believes that safety law is being or will be contravened."

PN272

Would you agree with me that the agreement between employees of North West and their employer, the agreement is that where a Work Health and Safety entry permit holder believes there's a contravention of the Work Health and Safety Act that they're not required to perform work? Would you agree with that under the terms of that enterprise agreement?---Under those terms, yes.

PN273

Would you agree with me that where there's agreement between an employer and an employee that no work be performed that that's not industrial action? Would you agree with that?---Between those two parties, yes.

PN274

You would agree with me that it's not industrial action?---If there's agreement between the employer and the employee, yes.

PN275

Yes, all right, thank you for that. Just a moment, Commissioner. May the witness be shown this? It's an extract from the Work Health and Safety Act and for the benefit of my friend it's sections 82 to 89 of the Work Health and Safety Act. Can I take you section 85, Mr Guilda? Can you read section 85(1) for me, please?---

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN276

health and safety representative may direct a worker who is in a workgroup represented by the representative to cease work if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety emanating from an immediate or imminent exposure to a hazard.

PN277

Do you agree with me that that provides if a health and safety representative directs that work cease that the worker is entitled to cease that work and it would not be industrial action? Do you agree with that?---Under the terms of item 1.

PN278

Under the terms of this Act, do you agree with that?---Yes.

PN279

Can I take you back to paragraph 39 of your affidavit? At 10am on 14 October you've met with the organisers who are also – when I say “the organisers” for the sake of clarity I'm talking about Messrs Ramsey, Myles and Vink, not organisers from the other industrial associations. You've met with the organisers, you acknowledge that the organisers were there pursuant to section 117 of the Work Health and Safety Act, you've already had discussions about a request to do an evacuation drill and you say that you consider the workers' refusal to return to work to be unlawful industrial action. Given that the enterprise agreement provides that workers can refuse to do the work, given section 85 provides that the health and safety representatives who you had been talking to can direct people not to work - - -

PN280

MR MURDOCH: I object to that. Perhaps the witness can go outside?

PN281

THE COMMISSIONER: You want Mr Guildea to?

PN282

MR MURDOCH: Yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN283

THE COMMISSIONER: Mr Guildea, would you like to step outside while we have a discussion about that point?---Sure.

PN284

Thank you.

<THE WITNESS WITHDREW [1.32PM]

PN285

MR MURDOCH: I didn't notice, were you provided with a copy of section 85?

PN286

THE COMMISSIONER: No, I wasn't and in fact I would appreciate – I am familiar with it but I would appreciate it, Mr O'Brien.

PN287

MR O'BRIEN: I do have a copy here, sorry, Commissioner, my apologies.

PN288

THE COMMISSIONER: Thank you.

PN289

MR MURDOCH: This questioning of the witness in respect of the effect of section 85 is quite unfair in my submission because all the witness' questions have been in respect of section 85(1) but you'll note, Commissioner, that the direction that section 85(1) refers to can't be given unless the matters in section 85(2) have been complied with. There's been no suggestion to this witness that to his knowledge 85(2) has been complied with and for that reason it's not appropriate for him to be questioned as to whether or not if a direction was given under 85(1) it may have had a particular effect.

PN290

MR O'BRIEN: Commissioner, I don't need to question this witness about section 85(2) because my learned friend has already led evidence that those matters have been satisfied. It's in the material already filed.

PN291

THE COMMISSIONER: Mr O'Brien, I have another concern. It's that I'm finding the line of questioning – I mean I understand cross-examination doesn't need to be word-for-word – but my concern is section both 85 – the wording in this section and similarly in the 100 section, there are those cautionary words around reasonableness and imminent concern and like words that caution and if you like qualify the very strict requirements of these provisions. And I am concerned that the witness needs to – that when you put this series of provisions to the witness that those qualifying words are also put to the witness when he's answering those questions. So I do think that point needs to be raised. But on the question of the second point – perhaps that's just a concern that I have – but on the second point, I'm not sure I understand quite what you're answer is, Mr O'Brien. So you're saying that the second issue that the direction has been dealt with. Can you point me particularly to where that point that Mr Murdoch says has not been dealt with is dealt with in the material because I'm just unsure.

PN292

MR O'BRIEN: Yes, if I can take you to paragraph 29 of Mr Guildea's affidavit - - -

PN293

THE COMMISSIONER: Thank you, all right.

PN294

MR O'BRIEN: - - it provides, "I arranged for the site's HSRs" – which I believe to be health and safety representatives –

PN295

to attend on level 12 to meet and discuss the request by the organisers for drill to be conducted. I asked Lachlan Tipler, senior area manager, employed by Abigroup to chair the meeting. I then left the meeting with the organisers and went back to my office.

PN296

It seems to me that that's satisfying the requirements of 185(2)(b) [sic] consulting about the matter with the person conducting the business or undertaking for whom the workers are carrying out work. Mr Guildea has given evidence that he organised for the senior area manager to chair a meeting between Abigroup, Lend Lease and the HSRs. That's consulting, in my submission. Further that it would also satisfy section 85(2)(b) attempting to resolve the matter as an issue under division 5. This is all occurring at 7.15 in the morning and we're talking about 10 o'clock. It seems to me that there has been an attempt to resolve the issue. There has been consultation and this isn't in my evidence. This is in the evidence of the applicant.

PN297

Again, though, Commissioner, this is in my submission a matter for cross-examination. It's a matter for closing submissions. The question of whether or not the requirements of section 85 have been met is not a matter for Mr Guildea, it's not a matter for me, it's not a matter for my learned friend. It's only a matter for the Commissioner. I won't be seeking to rely on any assertions given by Mr Guildea that section 85 has been complied with in my closing submissions. It's not a matter for Mr Guildea to say that.

PN298

MR MURDOCH: Well, in light of that last answer, my friend should move on and not keep asking Mr Guildea about section 85.

PN299

MR O'BRIEN: My questions go to the veracity of Mr Guildea's claim at section 39 that he determined the refusal to work to be unlawful industrial action. My questions are going to Mr Guildea's awareness of what, I would say, are key provisions in the Work Health and Safety Act, provisions I would say he should be aware of and plainly he's not. And it goes to the veracity and the weight that can be given to his assertion that it was unlawful industrial action that occurred two days ago.

PN300

MR MURDOCH: My friend can't have it both ways. If he's going to criticise Mr Guildea in respect of Mr Guildea not being aware of the operation of section 85 he can't do that unless he puts to him in a careful way the relevant provisions of section 85 and also ascertains whether Mr Guildea is aware of whether the facts that are required for section 85 to be engaged apply. He's not doing any of that.

PN301

MR O'BRIEN: Commissioner, I hope Mr Guildea is aware of the contents of his own sworn evidence.

PN302

THE COMMISSIONER: Look, where are we going to take this because Mr O'Brien you seem to be now saying that you're using this particular section for the purposes of establishing in your final submissions whether this witness has an understanding of what is unlawful industrial action. Is that my understanding? Or is it his lack of understanding of work health and safety legislation? Which is the purpose?

PN303

MR O'BRIEN: What we'll be saying in our closing submissions, Commissioner, is that there are three reasons why there was no industrial action that occurred on Monday at all and I'm attempting to take this witness through those three arguments and I'll be asking him to reconsider the advice that he gave the organisers at 10 o'clock on 14 October on the basis of that.

PN304

THE COMMISSIONER: Look, my view is I will let you continue. As I said I would like you to be, as I said, very careful of the points that I've made. I think Mr Murdoch has raised an issue that I think you do need to be mindful of but I will let you continue down the path you're going but I would ask for consideration of those points.

PN305

MR O'BRIEN: Commissioner, Mr Murdoch is entitled to re-examine the witness.

PN306

THE COMMISSIONER: Absolutely.

PN307

MR O'BRIEN: My job is not here to be balanced and fair with all due respect.

PN308

MR MURDOCH: Well, that's quite wrong. Cross-examination is a significant power that's given to any party in litigation and because of its significance and because a witness is compelled ordinarily to answer questions the questions that are answered have to be fair. So Mr O'Brien is required to be fair in his cross-examination.

PN309

MR O'BRIEN: That doesn't extend to doing Mr Murdoch's job for him and saving him the need to re-examine witnesses though, Commissioner. I'm entitled to put my case to this witness and have him respond.

PN310

THE COMMISSIONER: We'll call Mr Guildea back in, thank you.

<BRIAN GERRARD GILDEA, ON FORMER OATH [1.41PM]

PN311

MR O'BRIEN: Mr Guildea, prior to the break in evidence, I was taking you through some provisions of the Work Health and Safety Act. Were you familiar with those provisions before this afternoon?---For HSRs, yes.

PN312

Were you familiar with the provisions regarding work health and safety entry permit holders?---Yes.

**** BRIAN GERRARD GILDEA XXN MR O'BRIEN

PN313

You were familiar with both of those provisions, were you?---Yes.

PN314

Why then would you advise organisers at 10 o'clock on 14 October that workers' refusal to return to work was unlawful industrial action if you were aware at that time that workers were entitled to consult with work health and safety entry permit holders or health and safety representatives were entitled to direct that work not be performed? Why would you make a declaration that it was industrial action at that time, Mr Guildea? ---Well, no one had informed me as of that time and I also had several hundred workers who had returned to work and for the record, I make those opinions to organisers and others so that it cannot be stated that I never challenged what was going on at the time.

PN315

So you say those things to protect your interests down the track if required, is that right? ---Whether it's to protect my interest, I make it very clear what my opinion is.

PN316

I see. There was an evacuation drill conducted on the morning of the 14th, wasn't there? ---That's correct.

PN317

Would you agree with me that there were workers on your project that didn't hear the evacuation siren?---That is correct.

PN318

Is that a problem?---It wasn't a problem.

PN319

It's not a problem that workers don't hear the sirens? That's not a problem for you?---It wasn't a problem during the evacuation.

PN320

Your evidence, Mr Guildea, was that there were workers on the project who didn't hear the sirens?---That's correct.

PN321

Is that a difficulty for you? Does that worry you?---Yes, it does.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN322

It's not a safe evacuation drill if there are workers working who don't hear the sirens, is it?---We have people wearing earmuffs, we have people using angle grinders, we have people working in sound rated booths, we have fire wardens who go through the floors and go room by room to ensure that no one is missed out. It is impossible to expect sirens to cover 100,000 square metres of a hospital.

PN323

Would you agree with me that it is reasonable to expect that where there are areas that you have so readily identified that sirens can't be heard that steps would be taken to remedy that? Would you agree with me that's a reasonable request?
---Those steps were already in place.

PN324

What were those steps, Mr Guildea?---Exactly what I just explained. We have dedicated wardens per floor that go through and verify that there was no one left on the floor. There was also other measures whereby there is a check sheet where the subcontractors account for their own staff which is collected at pre-start times so that it's well-known where they are at the time.

PN325

You've been advised since the conclusion of that drill on 14 October that there were workers who didn't leave the site, haven't you?---I was advised of a crane driver who never leaves the site and when we had multiple cranes we never brought the drivers down in a mock evacuation. I was advised by Mr Vink that he had video and photographic evidence that there were people still on the project. He refused to show that to me. I challenged the HSRs, I challenged the records of everything that was given to us at the evacuation muster points that there was no one left on the project.

PN326

I see?---So I've been given two points of view.

PN327

Have you agreed to undertake any remedial action regarding evacuations in future?---Every time we do an evacuation drill and we've done several on this project over several years that we take the lessons learnt and we amend our procedures accordingly. In this case the project has moved on since our last one in June of this year and additional sirens are being installed.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN
PN328

Yes?---We are also going to incorporate the use of handheld gas operated horns as well.

PN329

When did you take the decision to implement the gas handheld horns?

---Yesterday, day before.

PN330

So that was a learning – to use your words – that was a learning coming out of the drill conducted on Monday, is that right?---Correct.

PN331

So but for that drill on Monday you would not know that you needed those handheld horns, would you?---The evacuation of the building on Monday in context was the best one yet. The criticism made towards my operations onsite was that the last one was a debacle. This procedure, the button was switched on and the building was evacuated in approximately 10 minutes as per my affidavit. There was no criticism at all put back to us from HSRs from anything when we sat down with the HSRs and the organisers later that day.

PN332

Mr Guildea, my question to you was but for the evacuation drill - - -?---Yes.

PN333

- - - on Monday, 14 October, you would not have learnt that you needed the handheld horns, would you? You didn't know that until that drill on Monday, did you?

PN334

That's not a criticism, Mr Guildea. It's just a simple question?---It is an additional measure that I agreed to introduce. I'm more than comfortable with the procedures we have in place. It is no major issue for us to provide additional measures on the project.

PN335

Would you agree with me that one of the key elements of an evacuation drill is the debrief, is getting the relevant people together to talk about the evacuation drill to see if there was anything that could have been done better? Would you agree with me that's an important part?---Yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN
PN336

I see. Would you agree with me that having an adequate evacuation procedure in place, that that's a very important part of maintaining a safe system of work on your project? Would you agree with that?---The project has an adequate evacuation procedure in place.

PN337

Do you agree with me, Mr Guildea, that it is important to have an adequate evacuation procedure in place - - -?---Yes.

PN338

- - - in order to maintain a safe system of work?---Yes.

PN339

It's a safety issue, isn't it?---Yes.

PN340

Do you agree with that?---Yes.

PN341

Would you agree with me that if there was a project – let's not use your project, we're talking hypotheticals here, let's use the gasworks project just down the road from the commission here – would you agree with me that if on that project they had an inadequate evacuation plan that they are then failing to provide a safe system of work and that is a safety issue? Would you agree with me on that?---It would be an area of concern, yes.

PN342

Yes?---Depending on the nature of the building as well or where the project is at. There are a number of variables.

PN343

Is it your evidence, Mr Guildea, that it may well be that some construction projects don't need evacuation plans? Is that your evidence?---No.

PN344

Every construction project needs an evacuation plan, doesn't it?---I'm not sure on where your question is leading.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN345

Well, Mr Guildea, perhaps if you focus on my questions themselves?---Yes.

PN346

Do you agree with me that every construction project in order to be a safe site needs an evacuation plan?---Yes.

PN347

Do you agree with that?---Yes.

PN348

Do you agree with me that if a construction site does not have an evacuation plan then that is a safety issue? Do you agree with that?---Yes.

PN349

Thank you for that. Now, Mr Guildea, we come to 15 October. Your evidence is that you advised Messrs Mark O'Brien and Mr Myles, "You are not allowed to come onsite." And this was after that issue of entry notice pursuant to section 117. Why did you say that to them?---I did not see a notice at the time of talking to them there.

PN350

I see?---A notice was provided some 45 minutes to 60 minutes later which was handed into the security office downstairs. It wasn't handed to me.

PN351

Mr Guildea, can I take you to paragraph 64 of your statement, please?---Yes.

PN352

It reads, "I then took a telephone call from Mark O'Brien." This is Mark O'Brien, CFMEU organiser, is it?---Yes.

PN353

Mark O'Brien, work health and safety entry permit holder, that's that Mark O'Brien, is it?---Yes.

PN354

"I then took a telephone call from Mark O'Brien regarding the right of entry notice from that morning"?---So you've already seen the notice at this point, haven't you, Mr Guildea? This is the morning of 15 October?---At that time, yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN355

Mark was saying words to the effect that he had concerns about the cutting rooms. I responded to Mark by saying that those issues were already being addressed. I also said, "You are not allowed to come onsite."

PN356

Do you stand by your earlier evidence that when you said, "You're not allowed to come onsite" you didn't know about the right of entry notice? Do you stand by that evidence?---Yes.

PN357

Well, which is right, Mr Guildea? The evidence you've just given or the evidence in your affidavit, which one is it?---Well, both are correct.

PN358

Are they? So you did know and you didn't know? They're both correct, are they?---No. When we met on the street there were about four or five managers on Raymond Terrace. We met both Mr Myles and Mr O'Brien. They had a conversation. I said, "You're not allowed onsite." They left. They left site or they weren't onsite. They walked away. Some 45 minutes later I was advised that they've dropped a notice in down at the security room. No one rung me. I went downstairs, collected the notice and it was when I was there that I took the call.

PN359

I'm very confused, Mr Guildea. You say no one rang you. Let me take you back to paragraph 64?---Yes.

PN360

"I then took a telephone call" - - -?---Yes, when I was down there.

PN361

- - - "from Mark O'Brien regarding the right of entry notice"?---Yes.

PN362

So at that point you knew there was a right of entry notice in from Mark O'Brien and you knew it was about concerns about the cutting rooms?---That was about 45 minutes later to an hour later.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN363

Mr Guildea, at this point in time you've spoken to Mark O'Brien on the phone - - -?---And I - - -

PN364

- - - about the right of entry notice - - -?---And I had the notice, yes.

PN365

- - - about the concerns about the cutting room?---Yes.

PN366

And you said, "You are not allowed to come onsite"?---That's correct.

PN367

Why?---Because as I've put in my affidavit I've told the organisers that I am sceptical as to the reasons why they come onto the project.

PN368

Can you take me to the provision in the Work Health and Safety Act that deals with the project manager's scepticism, please, Mr Guildea?---It doesn't exist.

PN369

No, it doesn't, does it?---It doesn't exist.

PN370

Now these concerns that Mr O'Brien had that you were sceptical about, about the cutting room - - -?---Yes.

PN371

- - - workers were working in dust from the cutting of the gyprock, weren't they?
---This is, just to put this into context, some 45 minutes earlier when I met Mr O'Brien this matter was not raised. It was not a matter of urgency some 45 minutes later and I put it to - - -

PN372

Mr Guildea- - -?---I put it to Mr O'Brien that, "You went away and you come up with something that you felt was warranted for a 117 and that I'd already, as raised on the Monday, had people going through checking those concerns."

PN373

Mr Guildea, none of that is in your evidence. You've had two days to put this evidence together and this is the first we're hearing of it. It's very convenient, isn't it?

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN374

Would you agree with me that workers working in an area with poor ventilation when they are cutting - - -?---No, there was no poor ventilation.

PN375

Let me finish the question, Mr Guildea. This will go much simpler if you just answer the questions. Do you agree with me - - -

PN376

MR MURDOCH: Well, I object. I object to this. This is another example of a proposition being put that's not founded on facts. If my friend wants to ask a question based upon poor ventilation he needs to establish with this witness first if the witness has accepted the proposition.

PN377

MR O'BRIEN: No, I don't, Commissioner. I'm asking a hypothetical question and the reason for that will become clear. I'm not alleging there were areas on this project where there was poor ventilation. I'm asking this witness a hypothetical question.

PN378

THE COMMISSIONER: All right, hypothetical question, go ahead.

PN379

MR O'BRIEN: Mr Guildea, would you agree with me if – the key word here being, Mr Guildea, "if" – a worker was working in an area with poor ventilation where they were using power tools to cut gyprock such that there was a lot of dust in the air would you agree with me that that would present a health and safety concern?---Yes.

PN380

Do you agree with me that on the right of entry notice provided by Mr Mark O'Brien and Mr Nick Myles, that the details of the suspected contravention to which this notice relates provides "cutting rooms, ventilation/lighting, ventilation" amongst other things? Do you agree with that?---Yes, I've read the notice.

PN381

So would you agree with me that those concerns, the suspected contraventions, that if in fact they were occurring that that would be a serious health and safety matter? Do you agree with that?---If they were occurring, yes.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

PN382

Thank you for that. Have you taken any remedial actions regarding the cutting room since 14 October?---There were some findings when we visited those areas with Mr Myles and Mr O'Brien. The directions given to the two gyprock companies and it's the cutting of a CFC, not gyprock, was to improve the exhaust extraction system on the saw and the bagging and handling of dust.

PN383

So Mr Guildea, the short answer to my question, have you taken any remedial action, is yes, isn't it?---Well, I was there when they gave the commitment what they would do, yes.

PN384

I see, I see?---If you're asking me I can only say based on what they told me.

PN385

I took you through earlier this afternoon provisions of the NWCI agreement that provide where a work health and safety entry permit holder has reasonable concerns about a contravention of the Work Health and Safety Act that no worker is required for work. Do you recall that?---Yes.

PN386

Do you recall that you also gave evidence that a lot of the agreements of the subcontractors engaged on your site are CFMEU agreements?---Yes.

PN387

Would you agree with me that all CFMEU agreements have that same provision in them?---I can't say for sure.

PN388

Mr Guildea, let's go through them. Can I take you to paragraph 36 of your declaration, please?---Yes.

PN389

Commissioner, may the witness be shown this document, please? What is that document, witness?---Collective agreement between the CFMEU and Superior Walls and Ceilings.

**** BRIAN GERRARD GILDEA XXN MR O'BRIEN

PN390

Is that the subcontractor referred to at paragraph 36(a) of your declaration?
---Correct.

PN391

Can you read the last passage of clause 8.1 out for me, please?---

PN392

Employees not required to work in circumstances where the employee or the relevant workplace health and safety EPH reasonably believes the safety law is being or will be contravened.

PN393

Thank you. Can I have that back, please? Commissioner, may the witness be shown this document, please? What document is that, witness?---Collective agreement, CFMEU and Faux Finishes, same floors.

PN394

Is this the Faux Finishes referred to at 36(b) of your declaration?---Yes.

PN395

Can you read the last passage of clause 8.1 out for me, please?---

PN396

Employees are not required to work in circumstances where the employee or a relevant AREO reasonably believes the safety law is being or will be contravened.

PN397

Can you go to the definitions in that agreement, please, Mr Guildea, and find the definition of AREO?

PN398

Commissioner, rather than asking the witness to find that definition perhaps I could ask my learned friend whether he's prepared to accept that AREO is merely the old name for

workplace health and safety entry permit holder and we can save going through this process.

PN399

MR MURDOCH: I accept.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN
PN400

THE COMMISSIONER: Thank you.

PN401

MR O'BRIEN: Thank you, witness. Can I have that back, please? Thank you. Sorry, Commissioner, I might have to ask the witness to look at this document on an i-Pad, which I don't want to tender because my friend, Mr Cousner, will be upset. If you scroll up, Mr Guildea, you'll be able to see what that document is. Can I ask you to read it out, please?---CFMEU collective agreement between Tasklake.

PN402

And again, can I ask you to read the last passage from clause 8.1, please?---

PN403

Employees are not required to work in circumstances where the employee or relevant WH&S EPH reasonably believes the safety law is being or will be contravened.

PN404

Mr Guildea, you accept that the subcontractors engaged on your site who have agreements with the CFMEU would all contain that particular provision?---It's on that, yes.

PN405

THE COMMISSIONER: Mr O'Brien, would you just read me out the particular words from that clause you referred to? I didn't get them down.

PN406

MR O'BRIEN: Certainly.

PN407

THE COMMISSIONER: It's in the subcontractors' clause.

PN408

MR O'BRIEN: Would it be of assistance, Commissioner, if I hand up one copy of the - -

PN409

THE COMMISSIONER: That's in each one. It may well be.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN
PN410

MR O'BRIEN: I'm happy to read it out for you or I can provide you with - - -

PN411

THE COMMISSIONER: I only got about half of it down, that's all. Thank you. So it's -
--

PN412

MR O'BRIEN: Mr Guildea, Mr Mark O'Brien, he has a work health and safety entry permit?---I would expect so. I haven't sighted it of late.

PN413

I see. You have asked him to see his permits before?---Previously, yes.

PN414

And you accept that you've asked him to see that permit previously and at that time he held the permit?---The current, yes.

PN415

The same for Mr Myles?---Yes.

PN416

Mr Vink?---No.

PN417

You haven't seen Mr Vink's entry permit?---No.

PN418

Mr Guildea, would you agree with me that Mr Vink and Mr Ramsey both hold an entry permit for the purposes of the Work Health and Safety Act?---Well, I would believe so, yes, particularly Mr Ramsey.

PN419

What's Mr Ramsey's position?---Workplace health and safety coordinator - - -

PN420

I see?---- - is my understanding.

PN421

So is it your understanding that within the CFMEU he is somewhat of an expert on matters of work health and safety?---That is what appears in the website.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN
PN422

Does Mr Ramsey often visit your project?---No.

PN423

So it would be a rare thing for Mr Ramsey to visit your project?---Correct.

PN424

Commissioner, I'm just going to ask the witness to confirm that Messrs Vink, Ramsey, Myles and O'Brien all appear on the register of work health and safety entry permit holders on the website. I just need a moment to retrieve that list from the i-Pad. Commissioner, can I ask that this i-Pad be given to the witness? Witness, you'll see at the top of the screen there there's a web address. What's the web address?---
Qirc.qld.gov.au.

PN425

Qld.gov.au? And what's the heading of the document?---Workplace Health and Safety Register.

PN426

Can you see Mr Vink's name? I suspect it will be somewhere down the bottom?
---Yes.

PN427

So Mr Scott Vink from the CFMEU is there?---Yes.

PN428

Mr Ramsey, Andrew Ramsey, CFMEU, is he there as well?---Yes.

PN429

Mr Mark O'Brien, CFMEU, is he there?---Yes.

PN430

Mr Myles, Nick Myles, BLF, is he there?---Yes.

PN431

So do you accept, Mr Guilda, that those four gentlemen are all holders of workplace health and safety entry permits?---Yes.

PN432

Thank you. Thank you, Commissioner, I have no further questions.

**** BRIAN GERRARD GUILDEA XXN MR O'BRIEN

<RE-EXAMINATION BY MR MURDOCH [2.09PM]

PN433

MR MURDOCH: Mr Guilda, do you still have before you a copy of any of the agreements that were shown to you?---No.

PN434

You were taken in respects of agreements to a clause 8.1. Can you just tell me which one you've just been handed?---This is the agreement between North West which is referred to as NWCI and the CFMEU.

PN435

Just take up that agreement and go to clause 8.1, if you would, please? I take it just in your earlier evidence that North West is one of the subcontractors that was performing work at the site or it was performing work at the site on 14 October?
---That's correct.

PN436

Can I ask you whether in respect of North West you were informed at any stage on 14 October 2013 or whether you've been informed at any stage since then by anybody from North West that there was any agreement between North West and its employees for the employees to cease work?---For that day?

PN437

Yes?---No, I was not aware of that, no.

PN438

And similarly, in respect of the other subcontractors that you've listed in paragraph 36, have you been provided any information by any of those subcontractors to the effect that they agreed with their respective employees for their employees to not perform work on the 14th?---I'm not aware of any as of this moment.

PN439

Have any of those subcontractors referred to in section 36 provided you with the information to the effect that clause 8.1 or its equivalent under any relevant agreement was invoked on 14 October?---I'm not aware of any.

**** BRIAN GERRARD GUILDEA RXN MR MURDOCH

PN440

Yes, I've got no further questions for Mr Guilda. Might he be excused?

PN441

THE COMMISSIONER: Thank you. Mr Guilda, I've just got a question for you about that flyer. You said that the Bob Carnegie defence campaign flyer – you it came off a website It's unusual in that it doesn't have a – you know, sometimes when it comes off a website it's topped and tailed with where it's come from. There's nothing on it. That's just how it came off the printer, is that the details? Was there a top sheet or something

that went with it that you are aware of?---Not that I'm aware of. I had it printed for me, Commissioner.

PN442

All right, thank you.

PN443

MR MURDOCH: I've got a question arising out of that.

PN444

THE COMMISSIONER: Thank you.

PN445

MR MURDOCH: I've got a question arising out of your question.

PN446

THE COMMISSIONER: Thank you, Mr Murdoch.

PN447

MR MURDOCH: Mr Guilda, can you go to the BG-2, please?---Yes.

PN448

If you have a look at the first page under the heading, "Bob Carnegie Defence Campaign" there is a website that's printed there and then what appears to be a Facebook reference of some description then an email address that's listed. Are you able to say whether the website address that's set out there is the website address that was the link that you were provided with?---Not with any surety, no.

PN449

No further questions.

**** BRIAN GERRARD GUILDEA RXN MR MURDOCH

PN450

THE COMMISSIONER: Thank you. You're more modern than me, Mr Murdoch. Thank you. Mr O'Brien, do you have any questions arising out of that?

PN451

MR O'BRIEN: Nothing arising.

PN452

THE COMMISSIONER: Thank you. I'm proposing we might have a brief break but I'm mindful that perhaps, Mr O'Brien, I don't want to – you know if you've got to go, what would suit you best?

PN453

MR O'BRIEN: I was just inquiring as to whether my learned friend had finished his re-examination.

PN454

THE COMMISSIONER: Yes, he has.

PN455

MR O'BRIEN: If that's the case then I have no difficulty with the break. I'm not quite that pressed for time. I need to be leaving perhaps at 3.30 and I expect cross-examination of the next witness will be really quite brief.

PN456

THE COMMISSIONER: Well, I was proposing just perhaps say 15 minutes or something like that. Is that enough time?

PN457

MR MURDOCH: I'm content with that.

PN458

THE COMMISSIONER: All right, thank you, Mr Guildea.

<THE WITNESS WITHDREW [2.15PM]

PN459

THE COMMISSIONER: So 15 minutes, if you need any longer if you can just let Angie know. But I'm proposing to perhaps come back in – or maybe 20 minutes – and then we'll continue at that point. Thank you.

<SHORT ADJOURNMENT [2.15PM]

<RESUMED [2.48PM]

PN460

MR MURDOCH: I call Brian Raymond Murphy. I'm having him brought in now, Commissioner.

<BRIAN RAYMOND MURPHY, SWORN [2.49PM]

<EXAMINATION-IN-CHIEF BY MR MURDOCH [2.50PM]

PN461

MR MURDOCH: Could you give your full name to the commission, please?
---Brian Raymond Murphy.

PN462

And what's your present occupation, Mr Murphy?---I'm the safety manager at the QCH project.

PN463

Have you provided a statutory declaration for use in this proceeding?---Yes.

PN464

Was that a statutory declaration declared by you on 15 October 2013?---Yes.

PN465

Do you have a copy with you in the witness box?---Yes.

PN466

Can I ask you please to turn to paragraph 47?---Yes.

PN467

And ask you to note that prior to the beginning of that sentence, the words "In my opinion," are to be added. Are you content with that?---Yes.

PN468

Can I ask you then also to put your stat dec to one side and turn your mind to yesterday and can I ask you whether you had any discussions yesterday with any union organisers?---Yes, I did, yes.

PN469

Can you say with whom it was that you had discussions?---Nick Myles and Mark O'Brien.

**** BRIAN RAYMOND MURPHY XN MR MURDOCH

PN470

At some point during the course of yesterday did those gentlemen enter the QCH site?---Yes, they did, yes.

PN471

I assume that at some point those gentlemen left the site?---Yes, they did, yes.

PN472

Were you with them as they left?---Yes, I escorted them out, yes.

PN473

Did they make any comments to you as they left?---Yes, they just said, "We'll see you tomorrow."

PN474

That's the evidence-in-chief of Mr Murphy. Thank you, Commissioner.

PN475

THE COMMISSIONER: Thank you, that statutory declaration will be A2.

EXHIBIT #A2 STATUTORY DECLARATION OF BRIAN MURPHY

PN476

MR MURDOCH: Thank you.

PN477

MR O'BRIEN: Thank you, Commissioner.

<CROSS-EXAMINATION BY MR O'BRIEN [2.52PM]

PN478

MR O'BRIEN: Mr Murphy, is it correct to say that you are the most senior safety officer on the Queensland Children's Hospital project?---Yes, it is, yes.

PN479

So if there's a safety matter you're the top man?---Yes, I am.

PN480

What training have you undertaken?---I have certifications. I have an advanced diploma in OH&S. I've had 13 years as a state manager at a previous employment and obviously the safety manager on the QCH project for the last probably nearly two years.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN481

So how long have you worked in the construction industry?---Probably all up, probably close to – nearly 18 years or something.

PN482

Eighteen years and you're the number one safety officer on the project?---That's it.

PN483

All right, can I take you to paragraph 33 of your statement, please?---Yes.

PN484

You state that:

PN485

Mr Guildea indicated that the workers only had the right not to return to work if there was an immediate or imminent risk to health and safety and that was not the case.

PN486

?---Yes.

PN487

Was Mr Guildea right when he said that workers only had the right not to return to work if there was an immediate or imminent risk to health and safety?---Yes.

PN488

There's no other reason, no other way that a worker can lawfully refuse to do work?---If they feel that it is unsafe and there is imminent and immediate risk to the health and safety of them, yes, they can.

PN489

So as the number one safety bloke on this job - - -?---Yes.

PN490

- - - the safety expert, you're not aware of anything else, any piece of legislation?
---No.

PN491

Nothing?---No, no.

PN492

I see. Mr Murphy, are you familiar with the Work Health and Safety Act?---Yes, I am.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN493

How familiar? You'd have to be pretty familiar, wouldn't you, doing your job?
---I am pretty familiar, yes, yes.

PN494

What would you rate yourself out of 10?---Mate, I'm not into bragging, mate, so we won't get into that.

PN495

I'll take that as a nine?---Yes, we won't go into bragging.

PN496

Can I take that as a nine?

PN497

Can I ask you to take a look at this document, Mr Murphy?---Yes.

PN498

What's that document?---This is a section out of the Act, yes.

PN499

Which Act is that?---Workplace Health and Safety Act, yes.

PN500

Can you go to section 85 for me, please?---Yes.

PN501

Can you take a moment to read section 85?---Yes.

PN502

Once you've read that, Mr Murphy, can you tell me whether you'd like to revise your answer given previously?---Once again it says here "immediate or imminent risk" so at the end of the day for them to cease work, they can cease work if there is imminent or immediate risk.

PN503

Mr Murphy, what happens if their health and safety representative directs that work stopped? What is that worker entitled to do in that instance?---They are, if there is imminent or immediate risk.

PN504

Mr Murphy, my question to you is if a health and safety representative directs a worker to stop are they entitled to stop work?---If there is imminent or immediate risk.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN505

I see. Thanks for that. Can the witness be shown this document, please? What's that document, witness?---Another section, yes.

PN506

Work Health and Safety Act?---Yes.

PN507

Are you familiar with section 117?---Yes.

PN508

What does that provide?---That's you're starting to have the right to enter under a contravention.

PN509

Who is "they", Mr Murphy?---The permit holders, so in other words, the unions, they can enter under what they suspect is being contravention of the Act, yes.

PN510

Can I ask you to turn to section 118, please?---Yes.

PN511

Specifically section 118(1)(b)?---Yes.

PN512

What does that provide?---It says they can consult with relevant workers in relation to suspected contraventions.

PN513

Could that happen on paid time?---Yes, it can.

PN514

Again, do you want to revise your answer that you agree with Mr Guildea that workers only have the right to not return to work if there's an immediate or imminent risk to health and safety? Do you want a chance now to revise that?
---No, not at all, no.

PN515

So workers don't have a right to go and consult with an entry permit holder about a suspected contravention?---No, yes, they do.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN516

They do?---But once again when it comes down to ceasing work, they cease work if there is imminent or immediate risk.

PN517

Yes, but they would cease work to go and consult with their entry permit holder, wouldn't they, Mr Murphy?---It depends.

PN518

Would they consult with them without ceasing work?---Could do.

PN519

Is that right?---Well, the guys would then walk around. It happens all the time.

PN520

Well, that would be inspecting work practices, wouldn't it? That's different from consulting, isn't it?---I don't know, to me.

PN521

So you'd be happy as the health and safety expert on this job - - -?---Yes.

PN522

- - - you'd be happy for workers doing high risk construction work, whilst they were consulting with an entry permit holder, whilst they're having a conversation about something you'd be happy for them to do that whilst they're performing high risk work,

would you?---No, well, obviously they're not going to perform the work while they're sitting there talking to them.

PN523

They would stop work, would they?---Okay, yes.

PN524

So you were wrong earlier when you said - - -?---No, no.

PN525

Were you wrong then?---No.

PN526

So you're wrong now?---No.

PN527

I see, thank you. You'd be familiar with the health and safety provisions in the collective agreements - - -?---No.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN528

- - - the workers on your project are working under?---No.

PN529

You're the health and safety expert on this job?---Yes.

PN530

You have access to those documents, wouldn't you?---No, I don't - I don't work on EBA. It's nothing to do with me.

PN531

The workers that you are responsible for they work under collective agreements, don't they?---Well, hang on, we'll get who we're responsible for, we'll get that to the point.

PN532

Well, let's talk about the gyroprockers. You're responsible for the health and safety of the gyroprockers on your job, aren't you?---No, I'm not.

PN533

Don't care about that?---Mate, I'm not responsible for all. I'm the safety manager on the project so I'm not responsible for everybody that's on that project so - - -

PN534

You're not?---No.

PN535

I see. So what's your understanding of the obligation of a PCBU? You know what a PCBU is?---I certainly do, yes.

PN536

You're an expert on the Act?---Yes, yes.

PN537

What is it?---Well, at the end of the day the - - -

PN538

What does the PCBU stand for, Mr Murphy?---A person conducting a business or undertaking.

PN539

And who is that on the children's hospital?---Well, we have for every subcontractor that's on there at the moment and also Abigroup so - - -

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN540

Abigroup, and who do you work for?---I work for Abigroup.

PN541

You're the most senior safety person for Abigroup?---Yes.

PN542

Who is the principal contractor?---Abigroup or Lend Lease.

PN543

I see?---Yes.

PN544

So do you agree with me that you then have a responsibility for the health and safety of any worker that comes onto the project given you're the senior safety officer for the PCBU?---Everyone has a responsibility and an obligation, yes, but my responsibility - - -

PN545

So earlier when you said you - - -?---No, no, no, I'm not responsible for every single person on that jobsite.

PN546

Not solely responsible, Mr Murphy?---No, no.

PN547

But do you have a responsibility?---Of course everybody has a responsibility and an obligation.

PN548

Everybody does?---Yes.

PN549

So in your capacity as the safety expert for Abigroup on this project - - -?---Yes.

PN550

- - - did you ever think it might be important to have a look at the health and safety provisions in the collective agreements that apply to workers that you have a responsibility for?---No, because I have an Act and the regs and a management system that we comply with.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN551

So you've never turned your mind to the agreements?---Nothing to do with me.

PN552

Nothing to do with you?---I have an Act and the regs which is the law-abiding document that we adhere to.

PN553

So if you gave a direction to workers that was contrary to an enterprise agreement - - -?---The enterprise agreement is not with me. That's between that company and the union.

PN554

Yes, Mr Murphy, I'm coming to that. This will go better if I finish my question before you answer?---Yes, okay.

PN555

Now, Mr Murphy, if you gave a direction to an employee of say, North West, the gyprocker - - -?---Yes.

PN556

- - - and that direction was contrary to their enterprise agreement, you could leave North West and Abigroup in a difficult legal position, couldn't you?---I object.

PN557

MR MURDOCH: I object to this. This is nothing but speculation. These questions are not relevant to the issues that are before you.

PN558

MR O'BRIEN: I withdraw the question, Commissioner. Now, Mr Murphy, what are the powers of a health and safety representative on a construction site?---Well, the main function for them is obviously to communicate with their work group, issues that get raised from their work groups involved with safety. They then discuss that with their PCBU and with their management. So yes, that's mostly it.

PN559

That's it?---In a nutshell, yes.

PN560

They're the 4000 functions of a health and safety representative?---I know there are a lot more powers than that. I'd have to go back through the Act to read out every single one of them but that's basically what the health and safety rep is there to consult with the work group on OH&S matters and mediate it back in between with the PCBU.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN561

So it's an important role, isn't it?---Of course, one hundred percent.

PN562

So the project on which you're the safety expert, you'd have a safety - - -?---I'm a safety manager so - - -

PN563

You'd have a safety committee?---Certainly do.

PN564

Is that made up of health and safety representatives?---Certainly is.

PN565

They're elected by their work groups, are they?---Certainly are.

PN566

They've been given the requisite training under the Act, have they?---The ones that have gone through that have wanted the training have had the training, so yes.

PN567

Are you aware of health and safety representatives on the safety committee - - -?
---Yes.

PN568

- - - who have received the requisite training?---Yes.

PN569

On Monday morning there were discussions around evacuation procedures?
---Yes, there were.

PN570

Was a meeting convened of the safety committee?---No, this was the first part was in the morning, between the union officials and myself and a couple other of Abigroup representatives or other safety coordinators that work under me.

PN571

Did the safety committee get involved in that?---No.

PN572

The safety committee wasn't involved at all on Monday morning?---No.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN
PN573

Not at all?---No, not when that meeting took part. So then - - -

PN574

My question to you, Mr Murphy, is - - -?---Yes.

PN575

- - - was the safety committee involved at any time in discussions around an evacuation drill on Monday morning?---Yes, there was, yes, all selected HSRs that turned up that are a part of the committee.

PN576

Did that safety committee determine that an evacuation drill needed to be conducted?---
They requested one, yes.

PN577

How many exits are there on the project?---What have we got? One, two, three, four, five, five.

PN578

Are you familiar with the term "cattle gates" in the construction industry?---No.

PN579

"Cattle grids," "prison gates," are you familiar with any of those terms?---People may, yes, I've heard those sort of things, yes.

PN580

What do they describe?---I don't know what they're talking about there.

PN581

Can you describe the access gates of your project for me?---Yes, we have double sliding gates that open up. We have one, two turnstiles on the site or three turnstiles onsite and the rest are all double sliding gates or chain wire fence gates.

PN582

So when you're talking about sliding gates, you're talking about vehicle access?
---No, I'm talking about double sliding gates.

PN583

Are workers required to swipe an access card?---When they come into site, yes, they are and when they leave.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN584

Is that at all five entry points?---No, that's only at the turnstile gates.

PN585

Has a direction been issued that all workers are to access through the turnstile gates?---
Yes, they are.

PN586

Is it possible for a worker to jump over the turnstile gates or are they solid?---No, they can't jump over it unless you jump over the actual container part unit of it, yes.

PN587

So when you're talking about turnstile gates, you're talking about a gate that's some 6.5, 7 foot high?---It's probably, yes, 6 foot high, something like that, 7 foot, yes.

PN588

So if those gates were locked there would be no way for a worker to get in or out of that site, would there?---No, not unless someone has opened the gate and let them in or you can gain access if two people go through with a swipe card through the gate, you can get two people to go through the gate.

PN589

Has it ever been put to you at any time that there were concerns by workers about what would happen in an emergency evacuation - - -?---Yes.

PN590

- - - in trying to get a large number of workers through these turnstile gates in a hurry?---
Yes.

PN591

Has that never been raised before?---Yes, it has been raised, yes.

PN592

When was that first raised with you?---Probably when they first got put in.

PN593

So would it be right to say that ever since you put these turnstile gates in workers have raised concerns about what happens in the event of an evacuation?

---Workers haven't raised them. It's been raised by the workers' representatives, being the unions, yes.

**** BRIAN RAYMOND MURPHY XXN MR O'BRIEN

PN594

Has it been raised by health and safety representatives?---Through the unions, yes.

PN595

Has it been raised at the safety committee level?---Yes, it was, yes, it has.

PN596

So it's safe to say that there's been talk about what would happen in an evacuation for quite some time?---Certainly.

PN597

Do you agree with that?---Yes.

PN598

I have no further questions, Commissioner.

<RE-EXAMINATION BY MR MURDOCH [3.07PM]

PN599

MR MURDOCH: You were asked some questions about evacuation and turnstiles?---Yes.

PN600

What was the issue or the issues that were raised by people in that respect?---It was about obviously having to swipe to get out which we said you don't swipe to get out. They go into free spin so that you can actually walk out. We've also communicated back through the workforce, which has agreed, that you get out any of the safest points that are possible. So we have numerous gates, well, the double-sided gates which are probably, I don't know, 5, 10 metres long or whatever they are and people will leave through those gates. So if you're at a turnstile and it's the safest place, it's in free spin, you just walk out as you'd normally walk out through a single gate or you back your way out through the gates.

PN601

When was this issue raised about the turnstile?---Well, we had issues from the moment that they put one in.

PN602

You've said that that issue was raised and the response was that they'd be in free spin or something to that effect?---Sorry, what was that?

**** BRIAN RAYMOND MURPHY RXN MR MURDOCH

PN603

Your response was that they'd be in free spin?---Yes, yes.

PN604

When was that response provided to the workforce?---Immediately, as soon as the issues get raised.

PN605

And are you able to say about when it was that the issue got raised?---Honestly, I can't remember, yes.

PN606

Are you able to say how close or otherwise to 14 October 2013 it was, that the issue was raised?---Yes, yes, I wouldn't know exactly, yes. I'd have to go back through all the records for everything.

PN607

Do you know if it was raised this year or last year?---Well, it would have been last year as well as this year, yes, last year.

PN608

And when you say this year, how early this year?---We had them raised earlier in the piece. It was raised all the time, yes.

PN609

Are you able to say when the issue of the gates going into free spin was last communicated by Abigroup to the workforce?---Yes, well, whenever the issue was raised. There hasn't really been – when they go into free spin and we open the gates up there hasn't ever been any issues with it. The last, every evacuation we've done there hasn't been an issue. The last evacuation that we did in June, I think it was, they raised an issue through a bottleneck because everybody left to go out through one stairwell, which when they didn't follow the procedures they were told by the other fire wardens to enter through the other areas to go out. So that was through a stairwell and there hasn't been any other issues as far as I know that's been raised through the turnstiles going into free spin.

PN610

Okay?---Most of the people will always enter out through the gates.

**** BRIAN RAYMOND MURPHY RXN MR MURDOCH
PN611

You were also asked some questions about various provisions of the Work Health and Safety Act?---Yes.

PN612

You were given a copy of section 85. Do you still have that with you?---Yes.

PN613

Can I ask you to turn your attention to section 85(5)? And you'll see there it says:

PN614

The health and safety representative must inform the person conducting the business - - -

PN615

?---Yes.

PN616

- - - or undertaking of any direction given by the health and safety representative to workers under this section.

PN617

?---Yes.

PN618

Were you made aware on 14 October 2013 of any such direction being given?
---When was that?

PN619

Monday?---Monday, no, not at all.

PN620

I've got no further re-examination. Might Mr Murphy be excused?

PN621

THE COMMISSIONER: Thank you, Mr Murphy, thank you.

<THE WITNESS WITHDREW [3.11PM]

PN622

THE COMMISSIONER: That concludes - - -

PN623

MR MURDOCH: That's the evidence for the applicant, Commissioner.

PN624

THE COMMISSIONER: Thank you. Mr O'Brien, I assume you are not putting any evidence in this matter?

PN625

MR O'BRIEN: That's quite correct, Commissioner.

PN626

THE COMMISSIONER: I guess it's submissions then.

PN627

MR MURDOCH: Yes. Commissioner, I gave you earlier a copy of the applicant's outline of submissions. Have you had a chance to peruse that document?

PN628

THE COMMISSIONER: I have.

PN629

MR MURDOCH: I also gave you a copy of a bundle of cases that - - -

PN630

THE COMMISSIONER: I have not had a chance to look at those.

PN631

MR MURDOCH: - - - have been referred to and I don't, of course, expect that you will have had a chance to peruse all of them. Of course, however, many of them will be familiar to you, I suspect. Can I take the written submissions as read? And I didn't intend to rehearse them in full but rather take you to what in my submission is some of the more significant aspects of this matter.

PN632

Can I say at the outset that in my submission this is a matter in which the commission need to consider the historical context as well as the context in terms of the litigation that's on foot as referred to in Mr Guildea's affidavit together with the events of 14 October and in particular, not so much what occurred on 14 October but more the circumstance in which it occurred and what was said about it at various times during the course of the day by the organisers concerned.

PN633

You will have noted in the course of the cross-examination of my client's witnesses that to my recall there's been no challenge made to any of the evidence that's been given by Mr Murphy or Mr Guildea in respect of any of the statements that they attribute to any of the organisers. Of course the organisers themselves and delegates et cetera have not

given evidence before you. So you're entitled to, and I'd urge you to accept anything that's been said by Mr Guilda and Mr Murphy in respect of what was said to them by the relevant delegates and organisers who attended to the site on 14 October 2013.

PN634

Can I take you to Mr Guilda's stat dec and just take you to what in my submission are some of the more relevant parts of that document? You'll notice that paragraphs 1 through to 22 provide a historical context and you'll note, in particular, that paragraph 16 refers to orders that were made by Richards SDP on 5 September 2012 and that's attached among the other orders that are at BG-1. If I could just ask you to go to BG-1 and go to the order of Richards SDP of that date?

PN635

You'll note in it that his Honour made inter alia orders against employees. You'll see at 4.1, "The employees must not engage in any industrial action." Then you'll see not surprisingly at 4.4, "For the purposes of this order industrial action does not include relevantly 4.4.2, "action by employees that's authorised or agreed" and then 4.4.3, "action by employee if the action was based on a reasonable concern by the employee about imminent risk to his or her health or safety" et cetera. Can you then turn please to the next page, clause 6, Term and Date of Effect and you'll - - -

PN636

THE COMMISSIONER: Can I just stop you there? This is BG-1?

PN637

MR MURDOCH: Yes.

PN638

THE COMMISSIONER: I know Richards SDP has done a number of orders. Is it BG-2? No, that's the - - -

PN639

MR MURDOCH: The order that I'm taking you to is probably, can I clumsily say, it's in about the middle of the bundle.

PN640

THE COMMISSIONER: Yes, pardon me. That's a later order, a September 12 order?

PN641

MR MURDOCH: Yes, 5 September 2012.

PN642

THE COMMISSIONER: Yes, yes, pardon me, I've got it now, yes.

PN643

MR MURDOCH: I beg your pardon, I - - -

PN644

THE COMMISSIONER: Yes, I'm with you, Mr Murdoch.

PN645

MR MURDOCH: Yes, part of the challenge in reading this exhibit is that there's a range of orders made a tribunal and also a court. So 5 September 2012 - - -

PN646

THE COMMISSIONER: Yes.

PN647

MR MURDOCH: - - -the more relevant parts of it are clause 4.1, "The employees must not engage in any industrial action," 4.4.2 and 4.4.3 that provides relevant exemptions in respect of what's defined as industrial action. Then clause 6, you'll note, clause 6.3:

PN648

This order applies to the employees who are members or are eligible to be members of the CFMEU for the duration of the QCH project.

PN649

THE COMMISSIONER: Yes.

PN650

MR MURDOCH: So that's relevant for a number of reasons. It explains why the orders that are being sought from you today are in the limited terms that they are and it also highlights, in my respectful situation, a matter that's starkly missing from any evidence that's been put before you by the union. There's been much said in cross-examination about reasonable concerns and the like but there's not a scintilla of evidence before you that indicates that any particular employee held a reasonable concern. Can I then - - -

PN651

THE COMMISSIONER: Can I just stop you there - - -

PN652

MR MURDOCH: Yes.

PN653

THE COMMISSIONER: - - -because that was obviously a matter I was going to raise with you - - -

PN654

MR MURDOCH: Yes.

PN655

THE COMMISSIONER: - - -the fact that Richards SDP had made this order against the CFMEU for the duration of the QCH project.

PN656

MR MURDOCH: No, I need to clarify. It was not against the union for duration.

PN657

THE COMMISSIONER: All right, if you could clarify it, I would appreciate it, because applies to employees who are members. Yes, please clarify.

PN658

MR MURDOCH: Yes, the best way to clarify it is to take you through 6.1, 6.2, 6.3.

PN659

THE COMMISSIONER: Right.

PN660

MR MURDOCH: 6.1 deals with the extent to which the order applied to the unions, CFMEU, CEPU and you'll note that it ceased to have effect at 12pm on 5 March 2013.

PN661

THE COMMISSIONER: Yes.

PN662

MR MURDOCH: So the order finished as at 5 March 2013 in respect of the two unions named there. Then in respect of employees who are members of the CEPU, clause 6.2 applies. The order ceased to have effect in respect of such persons on 5 March 2013 but in respect of employees who are members or eligible to be members of the CFMEU Richards SDP's order remains in place.

PN663

THE COMMISSIONER: Yes.

PN664

MR MURDOCH: That's the point that I was seeking to make.

PN665

THE COMMISSIONER: Thank you.

PN666

MR MURDOCH: And that explains why the orders that are sought from you in this application are in the relatively limited form to orders that you might otherwise see in an application of this nature.

PN667

THE COMMISSIONER: Yes, I understand that.

PN668

MR MURDOCH: And the second point of taking you to that is to demonstrate that given that there is already an order in place in respect of the employees with the exclusions that it contained and given that it's clear from my friend's cross-examination of Mr Guildea and Mr Murphy that the question of imminent risk et cetera is a feature of the case that the union wishes to run in this matter before you today, you will have noted the stark absence of any evidence from any employee in respect of any concern held by them as to there being an imminent risk et cetera on 14 October 2013.

PN669

Can I then take you back, please, to the stat dec itself and paragraph 21, Mr Guildea gave evidence there about a related court proceeding. That's matter BRG/714 2012. That was as Mr Guildea gave evidence, that was scheduled to commence on 21 October 2013 and that was scheduled to commence as at that date when the events that have led us here occurred, that being 14 October 2013. As Mr Guildea said the change of the date to 3 February was something that occurred more recently. So as at 14 October there was a hearing to commence relating to the earlier matters next Monday.

PN670

Then of course we get to document BG-2, being the leaflet that Mr Guildea attached to his affidavit. He's been cross-examined in respect of that and he's told you where he got it from or how he came to receive that document. The document speaks for itself in my submission. When one reads through it it's clear that it's in relation to a matter involving a Mr Carnegie. It's clear that it's in relation to action taken by Lend Lease. As the document describes, Lend Lease is said to be suing him and two unions for the total of money that's set out there in damages et cetera.

PN671

Then it's also clear, in my submission, from this document that the document invites people to do certain things and that could be seen from page 2 of BG-2. There's a box there which sets out a chronology in relation to Mr Carnegie over the years and then underneath that there's the question or the statement, "What you can do" and you'll note amongst the various items there, there's item number 3, "organise a picket, protest or other action at a Lend Lease site in your area." As Mr Guildea points out the document that's BG-2, up in the top left-hand corner, it's got a statement, "Hands off Bob Carnegie" and underneath it there are various logos of various organisations and as is clear one of the logos that's there is the logo that relates to the respondents in this matter.

PN672

You're entitled in my respective submission to form a view in respect of the question of probability or the question of there being industrial action impending from all of the circumstances of the case and one of the circumstances of this case is that the unions who are the respondents to this matter have put on no evidence in respect of their involvement or more important their lack of involvement in respect of – or their lack of endorsement in respect of this document that's been put on by Mr Guildea. It would

have been a very easy thing to do. It would have been a one-line affidavit. That hasn't been provided to you. What's been provided to you is no response in respect of this document by way of evidence from either of the relevant unions.

PN673

Before I move to deal with the remainder of the evidence, can I just ask you to turn to one of the cases that is in the bundle? And it's the case of Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd.

PN674

THE COMMISSIONER: I know you're on a roll, Mr Murdoch, but just returning to this document, I mean it is the only, if you like, tangible evidence of the material of perhaps ongoing potential reason for industrial activity. The Internet does have a lot of material on it that's rubbish. Everyone knows that and how do I know this is of more importance than that, I suppose, is what I'm saying to you?

PN675

MR MURDOCH: Well, how you know that it's of more importance than that is, in my submission, founded on a number of points. Firstly – and I'm not presuming to know what your definition of "rubbish on the Internet" is.

PN676

THE COMMISSIONER: Well, there's a lot of material on the Internet.

PN677

MR MURDOCH: There's a broad range of material on the Internet and it ranges from material that a casual observer can look at and know immediately, "That's nonsense. I can't possibly take any account of that."

PN678

THE COMMISSIONER: Yes.

PN679

MR MURDOCH: And we all can think of examples of that. This is not in that category.

PN680

THE COMMISSIONER: No, and I think I agree with that.

PN681

MR MURDOCH: It's not in that category.

PN682

THE COMMISSIONER: No.

PN683

MR MURDOCH: It's a document, that whoever wrote it, has put it together in a careful way.

PN684

THE COMMISSIONER: It's sensible.

PN685

MR MURDOCH: It's a structured document and a considerable amount of – it would appear that a considerable amount of thought has gone into it.

PN686

THE COMMISSIONER: But it's a big leap, isn't it, to say then that that, it's the basis on which someone will make a decision to take industrial action.

PN687

MR MURDOCH: And I don't invite you to make any decision based on this document alone.

PN688

THE COMMISSIONER: No.

PN689

MR MURDOCH: It's a document that has to be considered in respect of a number of matters in the case and one of those matters is that you've had no response by way of evidence from the relevant unions in respect of this document. It's one thing to say to Mr Guildea, "You don't know where this came from" or you know, "You don't know who put this together." But it would have been very, very easy, very easy for it to be disavowed. It hasn't been. That's a factor, in my submission, that you can take into account. Again, it's not the sole factor; it is a factor.

PN690

Now, what you've just raised with me is relevant to the case I was going to take you to. And when I say relevant, relevant in the sense of what you need to be satisfied of in order to make an order under section 418. The MUA case that I'd like to take you to is the decision of Hatcher VP, Booth DP, Commissioner Ball of 11 October 2013 and what's relevant is the material set out under the heading, "Proper Approach in an Appeal Against a Section 418 Order," paragraphs 5 through to 12.

PN691

This was an appeal of course and in considering the approach to take on appeal, it was important for the bench in this matter to consider what was actually being decided or what was the nature, what was the question, what was the issue that was being decided below. You'll note that the MUA made a submission in paragraph 5 which I'll just pause and have a read being that the full bench

PN692

must be concerned with whether the right conclusion is the existence or otherwise of a jurisdictional fact was reached, not simply with whether the challenged finding was reasonably open.

PN693

And then that was rejected by the full bench and their reasons for that can be seen in particular from paragraph 6 and paragraph 7. You'll note in particular in paragraph 7 that the matter of importance is the commission members' perception of the matter specified in the subsection. Then if I could also ask you to note paragraph 11 and particularly the statement that:

PN694

The jurisdictional fact requirement in 418(1) is founded upon the commission members' perception about the specified matters and involves to a significant degree and evaluative assessment with a degree of subjectivity

PN695

et cetera. So in essence, what is required, with respect, of the commission in a case such as this is clearly considering the provisions of section 418 but to step back and look at all of the evidence and to evaluate with a degree of subjectivity as opposed to you'd need to find as a matter of fact the relevant matters that are set out therein.

PN696

Now, can I then turn to take you to some of the relevant aspects of Mr Guildea's statutory declaration that relate to the events of the 14th? What is apparent from the document is that the 14th was as Mr Guildea says in paragraph 23 a normal working day. All the subcontractors required their employees to carry out normal work on the project. That was the expectation on 14 October 2013. The question then becomes well, given that expectation what happens next? What happened next is answered in the paragraphs that follow in that there was an entry by various officials of the relevant unions and there was a right of entry notice provided, which is BJ-3 [sic].

PN697

Can I ask you to turn to BG-3? This is a particularly relevant document because it sets out what was the expressed purpose of the notice of entry on 14 October 2013 and you'll note that the expressed purpose was one under section 118 of the Act. Do you have that section there?

PN698

THE COMMISSIONER: I do.

PN699

MR MURDOCH: And you'll note that as Mr O'Brien pointed out in the course of his cross-examination of Mr Guildea, I think, there are a number of things that one can do or seek to do under section 118(1). But you'll note that the focus and the expressed focus of the entry notice was to inspect – see there “inspect records” et cetera, “inspection of material, cutting rooms” et cetera – and then there are references there to various other things. But to the extent that this document provides some assistance in respect of what

the right that was sought to be exercised on 14 October 2013 are concerned, the document in the hand, one assumes, of those who prepared it directs attention to the task of inspection, not the task of discussion, not the task of consultation; the task of inspection. So that's what the entry was for according to that document: to inspect records et cetera.

PN700

Then of course what happened was that there was a meeting then held – this commencing from paragraph 27 and in the course of that meeting we move from inspection, which was what was referred to in the notice, to on Mr Guilda's evidence the organisers being adamant that an evacuation drill needed to be conducted immediately and there arose issues with the site evacuation procedures. As Mr Guilda says the issues raised weren't specific et cetera.

PN701

What then transpired was that my client ultimately followed a meeting that my client suggested with the HSRs, agreed to conduct an evacuation drill and that occurred. So we've evolved from entry to inspect to a meeting in which evacuation drill was requested to an evacuation drill happening as per the request. The evacuation drill happens at half past 8. This is at paragraph 31. Then as Mr Guilda develops in paragraph 31 it took some 10 minutes to evacuate the entire site, approximately 100,000 square metres, approximately 1,100 workers. He then goes onto say that wardens performed their tasks et cetera in paragraph 32. So we get to paragraph 33 and:

PN702

Approximately 9.10am I received notice that all workers had been accounted for. The all clear for workers to return was given.

PN703

So at 9.10 the all clear is given for workers to return to work. As Mr Guilda says they then should have returned to work immediately as per one infers the normal expectation. But the problem of course then is what happens next? The workers didn't go back. As he said in paragraph 34 something entirely different happened. What happened was that Mr Myles, the organiser, told Mr Guilda that he wanted his members together and make sure they had no other issues. So by the time we get to paragraph 34 there's no reliance upon a section 117 notice is being made and in my submission, nor could it given the matters expressed in the notice.

PN704

The expressed concern in the meeting, that being the site evacuation drill, that had happened and the drill had happened in good time. And 9.10, supposed to go back to work, and Mr Myles then says he wants to get the members together and make sure they had no other issues. So any suggestion that the workers subsequently stopping work was because the workers had some imminent concern as to their health and safety, on the evidence before you must be rejected because it was a normal work day, the only reason the evacuation was held was because my client agreed to it and the only reason on the evidence that the workers didn't go back to work after the evacuation was because Mr Myles wanted to get them together to see if they had any other issues.

PN705

He didn't say on the evidence, "Well, look, there are all these other issues of concern. I want to go and talk to them to see if they have any more issues." As the evidence demonstrates Mr Myles took them off to the ship-in, which is about 200 metres away from the site. There was a meeting there for about 30 minutes. Then the members eventually started heading back to site at about 9.40.

PN706

Then as the evidence demonstrates they didn't go back to work thereafter whilst, as the evidence demonstrates, some 700 other workers did go back, which is again something in my submission that, in light of the absence of any worker here before you saying they had any particular concern, the fact that the CFMEU members didn't go back but some 700 other workers did go back, is a further factor that sounds against there being any concerns in respect of safety that would be of such a nature that would render the action other than industrial action for the purposes of the Act.

PN707

While I'm on that point a further matter that demonstrates that any suggestion that the workers held or that there were, rather, legitimate safety issues can be put readily to one side by going to section 85 of the Work Health and Safety Act 2011. You'll recall that Mr O'Brien cross-examined both Mr Guildea and Mr Murphy in respect of section 85. The true relevance of section 85 is not whether or not Mr Guildea or Mr Murphy were able to recite with precision its terms but true relevance of section 85 is that notwithstanding its terms, it wasn't relied upon.

PN708

There's no evidence before you of any HSR giving any direction on Monday under section 85(1) and there's evidence before you from Mr Murphy that there was no provision of information by a HSR under section 85(5). So yet a further indication that there were no safety concerns held by workers to the requisite standard, nor were there safety concerns held by HSR to the requisite standard.

PN709

Another relevant point in respect of the lack of any particular safety concerns is that when one tracks Mr Guildea's chronology through the meeting at the ship-in, as he says, went for about 30 minutes and the CFMEU members eventually started heading back to the site. And as Mr Guildea – this is in paragraph 35:

PN710

Approximately 400 employees were gathered in the crib sheds from approximately 9.45am.

PN711

You'll then note in paragraph 38 that Mr Guildea then telephoned Mr Myles and requested the organisers to meet with him on level 5 of Mater Mothers' Building. There's no suggestion that following this meeting at the ship-in and following the workers shedding down that anybody from the union side of things contacted

Mr Guildea and said, "Hey, look, Brian, I've just met with these employees. They've raised all these serious concerns. That's why they're in the sheds." Mr Guildea had to call them. He had to call Mr Myles and request the organiser to come and meet with him and they did that and then as you can see from paragraphs 39 through to 42, there were some discussions in respect of the drill.

PN712

There were some documents requested under section 118 so it looks like the organisers eventually got back to doing what they said in their notice they were going to do when they came in that morning. But there's no evidence at all given by Mr Guildea in respect of, at any time, there being any concern raised by the organisers in the relevant meeting in respect of safety concerns on behalf of these 400 workers that would constitute a serious risk to their safety. So there's no evidence on it and no evidence of Mr Guildea being told about it.

PN713

Then ultimately, following my client providing the organiser with the relevant documents and then inspecting them for quite some time, we get to the end of the day when the workers have gone home. So clearly, on the evidence before you it was a case where there was industrial action taken for the purposes of section 418. On the evidence before you there's nothing to demonstrate that safety concerns held by the workers were of such a nature to withdraw the action from the definition of industrial action and clear evidence before you that the people who were encouraging and guiding at all material times the actual stoppage of works were the organisers. It's Mr Myles who took them off the site.

PN714

So that's what happened on the 14th and in my respectful submission, when one looks at what happened on the 14th in terms of there being this rolling process whereby the organisers come and they get entry on a certain basis, they then abandon the basis of entry and raise the issue of evacuation, that's dealt with, then the organisers take the workers away to see if there are any other issues. When one looks at that progression of events one can't, in my submission, help but infer that this was a strategy to, in blunt terms, take the site out for the day for no justifiable reason in respect of the CFMEU members.

PN715

And one then turns to the next question: why would that occur? And at that point the circle closes because the answer is the hearing coming up on the 21st and also the fact that there's the invocation for people to take action in support of Mr Carnegie, who is a person who has, if one accepts what's in the flyer, a person who is connected to the hearing. So we've got this conduct on the 14th that's, in my respectful submission, unjustifiable and that has to be looked at in the context of other matters that are on foot contemporaneously between the unions and my client.

PN716

When one looks at it in that circumstance, in my submission, one comes to the conclusion on all of the material that there was industrial action organised by the union and that the commission couldn't be satisfied in light of what was clearly the matter that

was sought to be achieved on the 14th, that being taking the site out, when one looks at what was clearly the target and when one looks at the timing the commission can be satisfied this is a case in which further action is not possible but probable given that the hearing that was to start next Monday hasn't gone away. It's simply been adjourned until February. So what I submit was a motivating fact for the targeting of the site on Monday hasn't gone. It's simply been put back. Excuse me a moment.

PN717

I'm reminded of a further fact that only causes the legitimacy of the matters raised on Monday to be questioned, that being that as Mr Guildea has said and he hasn't been challenged on this to my recall in cross-examination that even the issues that were raised in respect of the evacuation matter have not been raised by anybody during the safety committee meeting just the previous week. So it's not even a situation where on the evidence before you there's been some underlying concern bubbling along about an evacuation drill. It's raised fresh by the organisers after they obtain entry on Monday. That's paragraph 27 of Mr Guildea's material.

PN718

Otherwise I rely upon the written submissions and you'll note that through the written submissions where I've referred to cases or where cases have been referred to, I've given you the – I think on almost every occasion – a reference not just to the case but to the relevant paragraph that makes good the point that's referred to in the submissions.

PN719

THE COMMISSIONER: Thank you, Mr Murdoch. Mr O'Brien.

PN720

MR O'BRIEN: Thank you, Commissioner. Commissioner, I'll be asking that you take an almost entirely different view of the events over the last few days and the significant events that my friend says close the circle, I'll be asking you to take a completely different view of. What we have here is a lawful exercise of a right of entry by union officials on 14 October. My friend makes much of the history of this particular site and there's no doubt that there has been some tension on this particular site.

PN721

But let's look at the history. It's been over 12 months since there was an outbreak of industrial tension on this project, 12 months. My friend would ask that you draw adverse inferences about what was a protracted dispute but that dispute finished more than 12 months ago and there has been no industrial disharmony since then. So when my friend asks you to look at the history, I agree. I agree with that. But what I would say is let's look at recent history.

PN722

Let's look at the last 12 months. My friend would say that you can draw an adverse inference in that industrial action is somehow more likely or is threatened or is impending or is more probable because of the history but 12 months of industrial harmony, I say the exact opposite. I say there's been 12 months of harmony on this

project and there's no reason, no reason in the evidence that the applicant has put before you to suggest that that's likely to change.

PN723

On 14 October Workplace Health and Safety entry permit holders attended this project. They're entitled to do that, Commissioner. That's quite legal. They're allowed to do that. They went there to investigate suspected contraventions of the Work Health and Safety Act, one of which was the failure to have an adequate evacuation procedure. The various notices referred to it in different ways. They might simply say "evacuation." The evidence of the applicant is that the health and safety representatives agreed that they wanted an evacuation to be run and so an evacuation was run. The evidence from Mr Guildea was, and I'll use his words, they took some "learnings" out of that.

PN724

Let me put that in my words. They realised that they had got some things wrong. They've made some changes. They've implemented air horns and they've issued instructions to people to avoid bottlenecks. My learned friend says that the issue of the evacuations must be a concoction because it wasn't raised at a safety committee meeting a month ago. It's a recent invention. That's not the evidence of the health and safety expert, self-declared, on the project. He says it's been raised consistently since they put the turnstiles in. They're his words. It started to be raised as soon as the turnstiles went in and it's been raised consistently ever since. This is not a new issue. This is an issue that has been in place ever since the applicant changed the way workers get in and out of this job. This is a longstanding concern. This is not a recent invention.

PN725

So on 14 October entry permit holders exercised their right to enter the premises to, amongst other things, consult with workers. They're entitled to do that provided they have reasonable suspicion about a contravention of the Act. Let's talk about that for a moment. The self-declared health and safety expert says that workers have been raising concerns about the evacuation procedure for quite some time. The project manager says they've taken some "learnings" out of the evacuation drill they ran on Monday. It seems to me that they're fairly reasonable concerns that have been raised and it's quite legitimate entry to the workplace pursuant to 117 on Monday, the 14th.

PN726

If you're with me on that point, Commissioner, then the powers under section 118 apply, one of which is the power to consult workers. Now, we heard from Mr Murphy after a few false starts, we heard from Mr Murphy that that involved stopping work, that if workers are going to be consulted that that will involve them stopping work. My friend makes much of Mr Guildea's evidence that Mr Myles said he was going to go and talk to his members to see if they had any other issues after the evacuation. That sounds a lot like consultation to me, Commissioner.

PN727

Mr Guildea also said in his evidence that doing a debrief after an evacuation drill is important. His word, "important." It seems to me that if the permit holders are there on Monday regarding reasonable suspicions about problems with the evacuation procedure,

they're quite entitled to go and talk to their members about other issues. They're quite entitled to do that on paid time.

PN728

Mr Myles came back with concerns regarding manual handling and stretcher procedures. These are all part of an evacuation. They all relate to the one issue. So my learned friend would have you draw an adverse inference from Mr Myles' seeking to go and consult with his members as he's lawfully entitled to do and he would have you draw an adverse inference because he's come back with different issues. Well, they're not different issues, Commissioner. They're the same issue. They're part of the evacuation procedure. Regardless of that, even if you're against me on that point, the Act provides that:

PN729

An entry permit holder must give notice as soon as practicable -

PN730

- as soon as practicable. Workers are quite entitled to raise whatever concerns they have regarding health and safety with Mr Myles whilst he's doing the debrief after the evacuation drill and Mr Myles then is empowered with all of the rights he has under section 118. He doesn't lose those rights because he didn't specify that issue on his 117 entry permit when he first entered the site, just as my learned friend would ask you to draw an adverse inference because on the 117 entry notice they refer to inspecting records.

PN731

Well, they don't lose powers because they don't specify that on the entry permit. They can't. They have a legislative right to consult with workers. They don't need to, as my learned friend suggests, they don't need to say to Mr Guilda or Mr Murphy, "We are now consulting pursuant to section 118(1)(b) of the Work Health and Safety Act." They don't need to declare that. They have that right. Whether they know it or not, they have that right. Whether Mr Guilda or Mr Murphy know it or not, they still have that right.

PN732

What we have is a lawful exercise of legislative powers pertaining to health and safety. This is a longstanding concern on the evidence of Mr Murphy regarding evacuation procedures. We have a request from health and safety representatives, the safety committee, that an evacuation drill be conducted. It was. To use Mr Guilda's words, there were some "learnings" that came out of that. Again, to quote from the evidence from Mr Guilda there was the very important debrief conducted after that. That's all lawful. That is not industrial action. We haven't hit any industrial action yet to this point, Commissioner.

PN733

My learned friend would have you draw an adverse inference because the meeting between Mr Myles and workers occurred 200 metres away from the site. No such inference can be drawn. No such inference can be drawn. The workers are entitled to meet wherever they think is the most reasonable place to meet. If the most reasonable place to meet is in the park 200 metres away from the entrance to the site, so be it. That

doesn't change their legislative rights. They don't lose the legislative protection because they met in a park.

PN734

If I can turn to the written submissions that my learned friend has handed up, I have some short points in response. At paragraph 11 my friend is mistaken when he says that the cessation of work was not agreed to or authorised by either Lend Lease or any of the subcontractor employers of the workers. There are three things I would say about that, Commissioner. You've heard me speak about the rights of workers under section 118(1)(b) of the Work Health and Safety Act to consult regarding a suspected contravention. So they're authorised under section 118(1)(b). They don't need the agreement of their employers to do that.

PN735

You've also heard evidence that the health and safety committee was involved in these discussions and meetings and that that consists at very least in part, at least in part if not entirely of properly elected, properly trained health and safety representatives. And section 85 of the Work Health and Safety Act empowers health and safety representatives to direct that work cease.

PN736

Where we have health and safety representatives on the evidence of the applicant requesting that an evacuation proceed to take place and if I can also take you to the evidence of Mr Murphy at paragraph 35? He says Mr Vink said to him, "When the committee is happy everyone will go back to work." The clear implication there is it's the committee, it's the health and safety representatives that need to be satisfied before workers return to work. It is the health and safety representatives that have directed that work stop. And section 85 of the Work Health and Safety Act provides that that is authorised. That is lawful.

PN737

Again, my learned friend would have you draw an adverse inference because at no time did anybody say, "We've been directed by health and safety representatives so pursuant to section 85 of the Work Health and Safety Act this is an industrial action." They'd have you draw an adverse inference because that didn't happen. Well, it doesn't have to happen. It doesn't have to happen, Commissioner. Workers don't lose their protection because they don't go and make that declaration.

PN738

But there's a third reason why paragraph 11 in my learned friend's submission is wrong. We've seen evidence that the employees engaged on this project are employed under enterprise agreements that provide where a workplace health and safety entry permit holder has reasonable concerns about health and safety, they are not required to work. This is an enterprise agreement between these workers and their employers. You will be aware, no doubt, Commissioner, that section 19(2) of the Fair Work Act provides that if there's a performance of labour in any different way or a cessation of labour it's not industrial action if it's agreed by the employer.

PN739

Well, here we have Workplace Health and Safety entry permit holders expressing reasonable concerns about evacuation procedures, amongst other things. The employer has signed these enterprise agreements and agreed that their workers don't have to work. It can't be industrial action. The evidence of the applicant is Workplace Health and Safety entry permit holder, they're on the site, they have expressed concerns. We've heard about that. It's their evidence. Clause 8.1 of these enterprise agreements means it cannot be industrial action because it's agreed to by the employer. So my learned friend is wrong for three reasons when he says the cessation of work was not agreed to or authorised. He's wrong on three counts.

PN740

Now paragraph 12, the MUA v Patricks decision, I agree with my friend's reliance on this particular paragraph that is cited at paragraph 12. There is discretion based on the finding as to whether industrial action is occurring. I couldn't agree more. I couldn't agree with that proposition more. For the reasons that I've gone through I would say that there could not be a finding that there was any industrial action that occurred on Monday, 14 October. I will come back to that in my closing remarks to my submissions.

PN741

Paragraph 16, my learned friend says it is not for union organisers to form a view that there is an imminent risk - under the Work Health and Safety Act only a worker or a HSR has the power to stop work. Well, it seems that the self-designated health and safety representative on this project isn't the only person that's familiar with section 118 of the Work Health and Safety Act. Workers have the right to go and consult with a union organiser if they're a Work Health and Safety entry permit holder during work hours. You're entitled to do that.

PN742

Paragraph 20, it was acknowledged by Mr Murphy that there were concerns about the evacuation procedures. It's wrong to say at paragraph 20(c) that a drill was conducted and occurred without incident on 14 October. Mr Guildea says there were "learnings." If it had occurred without incident Mr Guildea wouldn't have learnt a thing, but he "took learnings" out of it. So I think it's open to conclude that there were some difficulties with it, Commissioner.

PN743

At paragraph 24, what I would ask that you take from my learned friend's submissions at paragraph 24 is the evidence of the applicant about the involvement of the safety committee and the health and safety representatives. You've heard me on what I say the rights of the health and safety representatives are and the role that they play. You've heard me on that and I would ask you to consider that when you are assessing the submissions of my learned friend at paragraph 24.

PN744

Paragraph 25, it seems to me that one of the difficulties that my learned friend has in seeking the orders that are before you is before an order can be made against either of the two industrial associations named there must be sufficient evidence to give you the appearance that industrial action is being organised. It's contemporaneous. You've heard me on why I say there was no industrial action on Monday. But even if you're against

me on the operations of section 118 or against me on the operations of section 85 or against me on the operations of clause 8.1 – and Commissioner, you only need to be with me on one of those three things – but if you're against me on all three, that happened on Monday. There is no contemporaneous organising of industrial activity.

PN745

My learned friend has had ample opportunity to put evidence about anything that happened today and he hasn't done so. He hasn't done so. There's no evidence about any contemporaneous activity. There's evidence about Tuesday, 15 October but even the applicant acknowledges it wasn't industrial action. At paragraph 27 my learned friend submits

PN746

The basis for the stoppage was at the instigation of the union officials and they prolonged it for the entire shift by way of the raising of fresh issues each time the applicant provided an explanation of its position as to an earlier issue.

PN747

Well, that's not the evidence. That submission is not supported by the evidence at all. And you've heard me on why I say that's the case so I won't go over that again.

PN748

Again at paragraph 29, I completely agree with my friend's application of the Crown Constructions decision. The industrial climate must be taken into account, the industrial climate of peace and harmony. I daresay there would be a few employers in the construction industry that would love to have that industrial history, Commissioner. They would love to have the industrial history of 12 months of peace and harmony and I completely agree with my learned friend's submission that you must take that into account when you're making your determination this afternoon.

PN749

Paragraph 31, my friend has corrected the record on that. There is no imminent trial coming up to this matter. This is one of the two matters that my learned friend says closes the circle, the imminent trial coming up in the Federal Circuit Court proceedings. Well, there is no imminent trial so the circle is broken already. I'll come back, at length, on the second aspect to this closing of the circle that my learned friend relies on which is the famous leaflet annexed to Mr Guildea's statement as BG-2.

PN750

Paragraph 34, again, I say I ask you to take into account the history of this project, 12 months of peace and harmony. Paragraph 35, now, my friend would have you rely on evidence of past behaviour to determine whether or not industrial action is threatened, impending or probable, but in doing so he asks you to consider annexure BG-2. Now, Commissioner, you quite rightly asked my learned friend what you should make of that. Well, here's what I say you should make of that. It's a document that was procured from the Internet. Already I would say it's of little, if any, probative value. It's not attributable to anybody, not a soul. So it is unauthorised, unsourced document from the Internet.

PN751

The only connection to the CFMEU as acknowledged by Mr Guildea is what's in my mind a 5 millimetre by 7 millimetre CFMEU logo in the top corner. My learned friend would have you believe that is sufficient for you to find that industrial action is threatened, impending or probable because the document that expresses a strong view about the applicant's actions over 12 months ago has a 5 millimetre by 7 millimetre logo. If that's true then you shouldn't be asked to make an order just against the CFMEU. The AWU logo is there too. Let's make an order against them. If that logo is enough and you can make an order under your own volition under 419 of the Act, make one against the AWU. Make one against the ACTU, their logo is there as well. Make one against Unions New South Wales, their logo is there, Commissioner.

PN752

This is the nonsense that you're being asked to accept. Somehow this logo closes the circle. It closes the circle and it changes what was a legitimate exercise of work health and safety powers on Monday into some nefarious scheme about what is no longer impending litigation, 5 millimetre by 7 millimetre logo. Well, if you accept that argument then I would submit the Act requires that you must make an order against the AWU, that you must make an order against the ACTU and you must make an order against Unions New South Wales. That's the effect of the legislation if you accept my friend's argument on this document closing the circle.

PN753

My friend has gone to some trouble to point out that the respondent hasn't called any evidence here today and that's true, we haven't. But no adverse inference can be drawn against the respondent because we don't call evidence and I rely on the *Jones v Dunkel* decision for that. If you're against me on that, Commissioner, then I would say you should draw an adverse inference against the applicant because they've led no evidence about any activity today. So if you accept my friend's submissions on your ability to draw inferences from a lack of evidence the only inference you can draw is that today is a day of peace and harmony. Yet you're being asked to find that industrial action is somehow threatened, impending or probable.

PN754

Now, I'll briefly turn to the legislative provisions, Commissioner. As we're all familiar with, the Act requires that you must make an order if it appears that industrial action is happening. Well, it can't appear that industrial action is happening. I think that's conceded by the applicant. You've heard me on industrial action being threatened, impending or probable. What we have here is an exercise of legitimate legislative powers regarding health and safety and it's not industrial action at all. That's what occurred on Monday.

PN755

That cannot give the appearance that industrial action is threatened, impending or probable. It's a legitimate exercise of powers under the Work Health and Safety Act. They're important. Some would say that safety is not worth a three pence, Commissioner. We say it's a legitimate exercise of legislative powers on Monday. That's a very separate question from whether or not the Act empowers you to make an order against the two respondent unions. Before you can make an order against the two

respondent unions there must be appearance that industrial action is being organised. There was no evidence of that activity today.

PN756

There's evidence that Workplace Health and Safety entry permit holders attended the site on Tuesday, the 15th but it's conceded that there was no industrial action. It's conceded there was no stoppage. If organisers were there, I would submit, Commissioner, that not only are they entitled to be there where there are concerns about work health and safety, they should be there. That's their job. That's their job. If members have concerns about work health and safety, as Mr Murphy has said – he's had this raised with him over a long period of time – they should be there.

PN757

We also heard from Mr Guildea that the issue on Tuesday was about ventilation and dust in the cutting room. He agreed with me that if – and I stress the word again – if there were problems with the ventilation in a cutting room that that would be a work health and safety issue and again, Mr Guildea has issued directions to make changes there. It seems to me that there were concerns and they've now been fixed because the organisers exercised their legislative power under the Work Health and Safety Act to investigate their reasonable suspicions of a contravention. It's not industrial action and I think that's accepted.

PN758

What that leaves us with is the question of whether or not industrial action is being organised. Again, I make the point. The legislation is clear: "is being organised." It's contemporaneous. We've got an exercise of legitimate Work Health and Safety power on Monday, the 14th. We've got an exercise of legitimate Work Health and Safety power on the morning of Tuesday, the 15th. Even the applicant accepts there was no industrial action on Tuesday, the 15th. There's no evidence about today. It's now 20 past 4 and there is no evidence about any activity today. It cannot possibly be that the evidence that's been led by the applicant gives the appearance that industrial action is being organised.

PN759

The high watermark in their evidentiary case on that point, Commissioner, is BG-2 and you've heard me on that. You've heard me on the Internet leaflet, the Internet flyer. Now, Commissioner, if you're against me on the operations of section 118(1)(b) of the Work Health and Safety Act and you're against me on the operations of section 85 of the Work Health and Safety Act and you're against me on the operations of clause 8.1 of the enterprise agreements – if you're against me on all three of those points and I'd ask you to be with me on all three – but if you're against me on all three of those points and you do believe that there was industrial action that occurred on Monday, that still doesn't overcome the jurisdictional hurdle as we sit here on Wednesday of whether industrial action is threatened, impending or probable.

PN760

There was no industrial action on Tuesday according to the applicants. There's no evidence of industrial action today despite having ample opportunity to produce such evidence. It cannot possibly be that that evidence gives the appearance of industrial

action being threatened, impending or probable. The high watermark in the submissions of the applicant revolve around the Internet flyer and that is not sufficient. That is not sufficient, Commissioner. On that point can I hand up the decision of *Briginshaw v Briginshaw*?

PN761

THE COMMISSIONER: Mr O'Brien, you've already given us, yes.

PN762

MR O'BRIEN: You've already got a copy. I'm sorry, I beg your pardon. Can I take you to page 443? It's the decision of Latham CJ. The Chief Justice provides that

PN763

a mere suggestion in the evidence is not enough. The evidence needs to rise to the level of a necessary conclusion.

PN764

Well, the applicant doesn't get there in this instance, Commissioner, in my submission. And can I take you to page 361 in the decision of Dixon J. Justice Dixon provides:

PN765

The truth is that when the law requires the proof of any fact the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

PN766

Well, that's what you're being asked to do here by the applicant, Commissioner. You're being asked to decide that because 12 months ago there was a dispute there's going to be another one despite the fact we've had 12 months of harmony. The *Briginshaw v Briginshaw* decision would provide that the evidence before you does not get even to the very low bar of creating an appearance.

PN767

Can I also ask you to turn to the decision of Logan J in the *Blomfields v Bechtel Construction Australia Pty Ltd* decision, particularly at paragraph 8? I rely on this particular paragraph, Commissioner, in terms of my submissions regarding the role of the health and safety representatives on Monday, the 14th, but also the entry permit holders on Monday, the 14th. Justice Logan provides at paragraph 8:

PN768

What is important to recall about terms such as "reasonable concern" or "reasonable grounds" is that it is not enough to find an absence of such a concern or ground that the court might not on the same material share that concern or regard that ground as present. Rather more than that is necessary. There must be an absence of any reasonable basis for the concern or ground, something which is fanciful, illogical, irrational or lacking a reasonable foundation.

PN769

Well, here, Commissioner, the concerns that have been raised by the entry permit holders and the HSRs have led to "learnings." They cannot be illogical. Finally, Commissioner, can I refer you to the transcript and decision on transcript in the Lang O'Rourke Australia Construction Pty Ltd v CEPU and CFMEU decision from PN774 onwards and you'll see there that Commissioner Simpson considers the operation of section 118 and its interaction with section 418 of the Fair Work Act. And I would ask that you endorse the decision of Commissioner Simpson and dismiss the application that's before you today.

PN770

I do have one final submission, Commissioner. If you're against me on the operation of section 85, if you're against me on the operation of section 118, if you're against me on the operation of clause 8.1, if you're against me on the weight that should be given to the Internet flyer, if you're against me on the question of contemporaneous organising of industrial activity – if you're against me on all of those points and you are minded to make an order this afternoon – the duration of the order should be no more than two weeks in my submission.

PN771

We've had 12 months of industrial harmony. We've had a genuine health and safety concern and there has been what could only be described as a misunderstanding by the applicant as to the legislative powers of entry permit holders and health and safety representatives regarding that health and safety concern. To seek an order until the completion of the job is a little bit cute in my submission, Commissioner. If an order is to be made it should be of a very short duration.

PN772

THE COMMISSIONER: Thank you, Mr O'Brien.

PN773

MR O'BRIEN: Unless I can be of further assistance, those are my submissions.

PN774

THE COMMISSIONER: Thank you, Mr O'Brien.

PN775

MR MURDOCH: I've just got a couple of short matters in reply in respect of legal issues. Much of my learned friend's argument is based upon a mistaken notion that the facts before the commission support various provisions of the Workplace Health and Safety Act being applicable and various provisions of relevant industrial agreements are applicable. In respect of section 118(1)(b) of the Work Health and Safety Act 2011, that's the section that deals with consultation there is no evidence before the commission of any consultation occurring in relation to the suspected contravention.

PN776

And you'll note that despite my learned friend's cross-examination of Mr Guildea and Mr Murphy and despite his repeated references to the Work Health and Safety Act in the course of his submissions at no point has he actually articulated what the suspected contravention is or was that the organisers that are employed by the organisation that he represents are said to have been exercising rights in respect of.

PN777

Similarly, in respect of section 85 and the powers of HSR, of course section 85 provides for what it provides but again on the evidence there's no evidence to suggest that it was invoked. Then similarly, in respect of the agreement, which is the third, 8.1 of the agreement which is the third matter that my learned friend relied upon, again, there is no evidence before the commission to support a reliance upon clause 8.1 in respect of any subcontractor.

PN778

So the whole argument that my learned friend relies upon to demonstrate that there was no industrial action is based upon my learned friend repeating what's in legislation but not being able to point to evidence to support that any of the legislative provisions that he relies upon so heavily are actually engaged. They're my submissions.

PN779

THE COMMISSIONER: Thank you. I'm considering handing down my decision tomorrow morning. Mr O'Brien, I understand you're wanting to go. Would you like to leave now? Would that be of assistance to you?

PN780

MR O'BRIEN: It would be of great assistance, Commissioner, if with your leave if I could excuse myself?

PN781

THE COMMISSIONER: Yes, yes, all right. As I said, I intend to hand my decision down tomorrow morning and it will be an oral decision. I'm not exactly sure what time but if there's a particular time that suits the parties you might let my chambers know, probably mid-morning sometime. It can be on the phone or come down to the tribunal, whichever suits.

PN782

MR O'BRIEN: Commissioner, I'll be in far north Queensland but I will be available mid-morning to take a decision over the phone.

PN783

THE COMMISSIONER: All right, well, if you could give Angie your details I will hook you up by phone and Mr Cousner as well.

PN784

MR O'BRIEN: Certainly.

PN785

THE COMMISSIONER: Thank you.

PN786

MR MURDOCH: I'm in the Federal Court tomorrow so I might have one of my instructors attend tomorrow.

PN787

THE COMMISSIONER: Yes, yes, thank you.

PN788

MR MURDOCH: Thank you, yes.

PN789

THE COMMISSIONER: Thank you, parties.

<ADJOURNED INDEFINITELY [4.30PM]

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