SUBMISSIONS OF COUNSEL ASSISTING IN RELATION TO APPLICATIONS FOR DISQUALIFICATION

A INTRODUCTION

1. These submissions are made in relation to the applications made on behalf of:

   (a) the ACTU, CEPU, HSU, TWU, Unions NSW and the MUA;

   (b) the AWU; and

   (c) the CFMEU and 34 named individuals;

   that the Commissioner recuse himself from further sitting as Royal Commissioner on the ground of apprehended bias.

2. As is appropriate these applications have been made to the Commissioner in the first instance.[1]

3. The role of Counsel Assisting is to assist the Commissioner carry out his duties and functions in accordance with the Letters Patent. Conformably with the ACTU's submissions,[2] in the context of the present applications for disqualification the role of Counsel Assisting is not to adopt a position on the outcome of the applications, however it includes (a) identifying the correct legal principles and (b) identifying relevant evidentiary material.

4. The following submissions are divided into three parts. Part B outlines some general matters of background. Part C contains the relevant legal principles in considering an application for bias or apprehended bias. Part D identifies the relevant evidentiary material.

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[1] *Ferguson v Cole* (2002) 121 FCR 402.

[2] Submissions of the ACTU, [114].

B BACKGROUND

5. The Royal Commission into Trade Union Governance and Corruption was established by Letters Patent issued by the Governor-General on 13 March 2014. Subsequently, equivalent Letters Patent were issued by the Governor (or Administrator) of each State.

6. To date, 441 witnesses have given evidence in public and private hearings which began in April 2014. Public hearings have been "live-streamed" via the Commission's website. 149 public and private hearing days have been conducted. As at 18 August 2015, 1703 Notices to Produce have been issued since March 2014. Four issues papers were released in 2014 and a Discussion Paper on Options for Law Reform released in May 2015. A 1817 page Interim Report was handed to the Governor-General on 15 December 2015 and was subsequently made public.

C DISQUALIFICATION FOR BIAS: THE LEGAL PRINCIPLES

7. Insofar as the exercise of a Royal Commissioner's powers are capable of adversely affecting a person's rights or interests as an individual,[3] a Royal Commissioner must, in exercising those powers, act in accordance with the rules of natural justice.[4]

8. One of the rules of natural justice is the rule against bias. The rule prevents a decision-maker who is subject to the rules of natural justice in relation to the exercise of particular powers from exercising those powers if the decision-maker is biased or appears to be biased. An allegation that a decision-maker is biased is an allegation of actual bias; an allegation that a person appears to be biased is an allegation of apprehended bias.

9. Where an application based on an allegation of actual bias or apprehended bias is made, the ordinary course is for the application to be made, in the first instance, to the decision-maker alleged to be biased.[5] Where an allegation of bias or apprehended bias against a Royal Commissioner is rejected by the Royal Commissioner, the person

[3] See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

[4] *Ferguson v Cole* (2002) 121 FCR 402 at 416 [34] per Branson J and the cases cited there.

[5] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 361 [74] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

making the allegation may then seek a writ of prohibition from a court such as the High Court of Australia or the Federal Court of Australia. A person who alleges bias against a Royal Commissioner may also seek a writ of prohibition from a court without making a prior application to the Commissioner for disqualification, but this course has the significant risk that the court will refuse any relief because the application is premature.[6]

Actual bias: the principles

10. To establish an allegation of actual bias by prejudgment in relation to a judge it is necessary to establish that the decision-maker is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or argument may be presented.[7] Actual bias through prejudgment requires an assessment of the actual state of mind of the decision-maker.[8]

11. A finding of actual bias is a grave matter.[9] An allegation of actual bias must be distinctly made and clearly proved; such a finding should not be made lightly; cogent evidence is required.[10]

Apprehended bias: the principles

12. The test to be applied when determining whether a judge is disqualified for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide.[11] An allegation of apprehended bias must be "firmly

[6] See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013) at pp 782–783 [12.60] and the cases cited there.

[7] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]); *Ferguson v Cole* (2002) 121 FCR 402 at 417 [40] per Branson J.

[8] *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437–438 [33] per Gummow ACJ, Hayne, Crennan and Bell JJ.

[9] *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 127 per Burchett J; *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 at [68] per Gleeson JA (Emmett JA and Tobias AJA agreeing).

[10] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 at [97] per McColl JA (Giles and Tobias JJA agreeing) and the authorities cited there.

[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] 344 per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437 [31] per Gummow ACJ,

established".[12] A judge should not disqualify himself or herself on the ground of bias or reasonable apprehension of bias unless "substantial grounds" are established.[13]

13. The same test for apprehended bias has also been applied to non-judicial decision-makers as part of the wider principles of natural justice.[14] However, outside the context of judicial decision-makers the application of the test must necessarily recognise and accommodate the differences between court proceedings and other kinds of decision-making.[15] In essence, although the test for apprehended bias is the same, in assessing the standard or level of impartiality which may reasonably be expected of a non-judicial decision-maker the fair-minded observer will have regard to the nature and context of the decision-maker's role and the differences between that role and that of a judicial officer.[16]

14. There are a number of significant differences between a Royal Commission and a judicial proceeding. The findings of a Royal Commission have no effect on legal rights and obligations. The report which is produced is in the nature of advice to the Executive, which may or may not be published, and may or may not be acted upon. A Royal Commission is not bound by the rules of evidence, or by procedural rules applied in courts. A Royal Commission has an inquisitorial role which a judge does not have. From these matters it follows that a Royal Commissioner is permitted to take "a more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions" than applies in court proceedings.[17] The Full Court of the Supreme Court of Tasmania summarised the position as follows:[18]

> "The fair-minded person would not be quick to suspect bias if the Commissioner intervened in the cross-examination of certain witnesses in a robust way and on occasions to an extent in

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Hayne, Crennan and Bell JJ; *Isbester v Knox City Council* (2015) 89 ALJR 609 at 612 [12], 613 [20] per Kiefel, Bell, Keane and Nettle JJ.

[12] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 533–554 per curiam; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262 per Barwick CJ, Gibbs, Stephen and Mason JJ.

[13] *Beinstein v Beinstein* (2003) 195 ALR 225 at [36] per curiam (HCA).

[14] *Isbester v Knox City Council* (2015) 89 ALJR 609 at 614 [22]–[23] per Kiefel, Bell, Keane and Nettle JJ.

[15] *Isbester v Knox City Council* (2015) 89 ALJR 609 at 614 [22] per Kiefel, Bell, Keane and Nettle JJ.

[16] *Isbester v Knox City Council* (2015) 89 ALJR 609 at 614–615 [20]–[27] per Kiefel, Bell, Keane and Nettle JJ.

[17] *Keating v Morris* [2005] QSC 243 at [46] per Moynihan J. See also *R v Carter; Ex parte Gray* (1991) 14 Tas R 247 (FC) at 260–263 [29]–[34] per curiam; *Carruthers v Connolly* [1998] 1 Qd R 339 at 358 per Thomas J.

[18] *R v Carter; Ex parte Gray* (1991) 14 Tas R 247 (FC) at 263 [34] per curiam

> excess of that expected of a judicial officer. Similarly, the fair minded observer would not be quick to suspect bias upon learning that the Commissioner was, in general terms, directing counsel assisting to pursue certain lines of inquiry nor even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses. The Commissioner's duty to inquire as well as to report and recommend is a factor which the fair minded bystander will have to the forefront of his or her mind when considering whether the Commissioner's conduct, relied upon by the Prosecutors reasonably gives rise to an apprehension of bias."

The fair-minded observer

15. The fair-minded observer is a legal construct which seeks to ensure that the test for apprehended bias is applied objectively. The fair-minded observer does not make snap judgments.[19] He or she is taken to be reasonable.[20] He or she is neither complacent nor unduly sensitive or suspicious.[21]

16. Knowledge of all of the circumstances of the case must be attributed to the fair-minded observer.[22] In other words, the fair-minded observer is an informed one. The fair-minded observer is not credited with knowledge of the individual capacities or characteristics of the decision maker.[23] However, where the decision-maker is a judicial officer the fair-minded observer will have regard to the fact that a judicial officer's training, tradition and oath or affirmation equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial.[24] "[J]udges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence".[25] As was noted by Lord Rodger is *Helow v Home Secretary*:[26]

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[19] *Johnson v Johnson* (2000) 201 CLR 488 at 494 [14] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

[20] *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

[21] *Johnson v Johnson* (2000) 201 CLR 488 at 509 [53] per Kirby J; *Helow v Home Secretary* [2008] 1 WLR 2416 (HL(Sc)) at 2418 [2] per Lord Hope, 2421 [14] per Lord Rodger, 2427 [39] per Lord Mance.

[22] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293–294 per curiam; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 355 per Mason J, 359 per Wilson J, 368 per Brennan J, 371–372 per Dawson J; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87–88 per Mason CJ and Brennan J, 95 per Deane J.

[23] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 299 per curiam.

[24] *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527 per McHugh JA, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584–585 per Toohey J.

[25] *British American Tobacco Services Ltd v Laurie* (2011) 242 CLR 283 at 331–332 [140] per Heydon, Kiefel and Bell JJ.

> "Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience."

17. In the same case, Lord Hope summarised the key attributes of the fair-minded observer as follows:[27]

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she had seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. … Her approach must not be confused with that of the person who has brought the complaint. … The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. …
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> Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she had read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

18. Where there is a dispute about a fact, knowledge of which is to be attributed to the fair minded observer, the authorities appear to indicate that the decision-maker should:

(a) resolve the factual dispute where there is no plausible or substantial evidence which would support an assertion made in relation to the fact – this is because in such a case the fair-minded observer would dismiss the possibility; and

(b) otherwise, proceed on the basis that the fair-minded observer will have regard to the dispute in applying the test for apprehended bias.[28]

Prejudgment not predisposition

19. "The rule against bias prohibits prejudgment not predispositions".[29] As Gleeson CJ and Gummow J explained in *Minister for Immigration and Multicultural Affairs v Jia Legeng*:[30]

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[26] [2008] 1 WLR 2416 at 2422 [23] per Lord Rodger (Lords Hope and Cullen agreeing).

[27] [2008] 1 WLR 2416 at 2418 [2]–[3] (HL(Sc)).

[28] See *Gas & Fuel Corporation Superannuation Fund* (1994) 52 FCR 48 (FC) at 65–67 per Gummow and Heerey JJ; *Comcare v John Holland Rail Pty Ltd* (2011) 119 ALD 556 at 576–578 [42]–[48] per Bromberg J; *CUR24 v Director of Public Prosecutions* (2012) 83 NSWLR 385 at 391–392 [18]–[22] per Basten JA, 396–397 [41]–[44] per Meagher JA; *Rouvinetis v Knoll* [2013] NSWCA 24 at [25]–[26] per Basten JA (Barrett and Ward JJA agreeing); *DPP (Cth) v Fattal* [2013] VSCA 276 at [142]–[148] per curiam.

> "Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publically expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion … Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."

20. The same point has been made both in the House of Lords and the Supreme Court of Canada. In *R v S (RD)*, L'Heureux-Dubè and McLachlin JJ stated the following:[31]

> "It has been observed that the duty to be impartial 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.'"

21. It is the fact that the test for apprehended bias is concerned with prejudgment not predisposition that allows teetotallers to try licensing applications provided they are not implacably opposed to all applications,[32] and the Chairman of the Independent Liquor and Gaming Authority to hear applications to grant poker machines notwithstanding his public statements that he "hate[d] gambling", "despise[d] poker machines" and was a "dedicated non-gambler" who had "never gambled with money at all".[33] Thus the mere fact that a decision-maker is a member of an association does not mean that the decision-maker should be taken to endorse every view or opinion expounded by that association.[34] As a unanimous High Court stated in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*[35] a "fair and unprejudiced mind" is "not necessarily a mind which has not given thought to the subject matter or one

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[29] M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013), p 641 [9.190].

[30] (2001) 205 CLR 507 at 531–532 [71]–[72] (Hayne J agreeing). See also *Carruthers v Connolly* [1998] 1 Qd R 339 at 356 per Thomas J.

[31] [1997] 3 SCR 484 at 533–534 [119], quoted with approval in *Helow v Home Secretary* [2008] 1 WLR 2416 (HL(Sc)) at 2435 [57] per Lord Mance (Lords Hope, Rodger, Cullen agreeing). See generally M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013), pp 641–642 [9.190]–[9.200].

[32] See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook, 2013), p 642 [9.200] and the cases cited there. See also *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, 2013), pp 560–561 [10-054].

[33] *O'Hara v Independent Liquor & Gaming Authority* [2014] NSWSC 880.

[34] *Helow v Home Secretary* [2008] 1 WLR 2416 (HL(Sc)).

[35] (1969) 122 CLR 546 at 554 per curiam.

which, having thought about it, has not formed any views on inclination of mind upon or with respect to it."

Two-step test

22. It is established that the application of the apprehended bias test requires two steps:

> "First, it requires the identification of what it is said might lead a [decision-maker] to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding a case on its merits. The bare assertion that a [decision-maker] has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."[36]

23. In *Webb v The Queen*,[37] Deane J identified four main, albeit overlapping, categories of case where an appearance of bias may arise. Those categories involve an apprehension of bias arising by reason of:

(a) interest, that is the existence of some direct or indirect interest in the proceeding;

(b) conduct, whether in the course of or outside the proceeding;

(c) association; or

(d) extraneous information, that is where the decision-maker has knowledge of some prejudicial but inadmissible fact or circumstance.

Although this is not necessarily an exhaustive categorisation, it provides a useful reference point.[38]

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[36] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 207 at 564 [184]–[185] per Hayne J; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 445 [63] per Gummow ACJ, Hayne, Crennan and Bell JJ; *Isbester v Knox City Council* (2015) 89 ALJR 609 at 613–614 [21] per Kiefel, Bell, Keane and Nettle JJ, see also at 619 [59] per Gageler J.

[37] (1994) 181 CLR 41 at 74.

Exception to rule against bias: waiver

24. With the possible exception of criminal proceedings, it is well established that a person may waive his or her right to complain about the constitution of a court of tribunal on the ground of bias or apprehended bias.[39] For there to be a waiver, the person objecting must have been aware of the circumstances giving rise to a right to object.[40] In addition, there must be a manifested intention by the aggrieved party not to pursue the objection.

25. This intention may be express (such as through an express disclaimer by the aggrieved party of an intention to raise the point) or implied (such as through acquiescence i.e. inaction with knowledge).

26. In assessing whether there is an implied waiver through acquiescence there is no specific time period which must elapse before a party will be taken to have waived objection. For example, a delay of a day in a three day hearing during which the barrister for the client obtains the transcript and confers with his client has been held not to involve a waiver.[41] On the other hand, a delay of several months was held to constitute a waiver in *Smits v Roach*.[42] The question is one of fact and degree. Relevant considerations will include the length of any delay, whether complaint is made after a decision has been made and whether the aggrieved party is represented by experienced counsel.

Exception to rule against bias: necessity

27. In addition to the principles concerning waiver, there is a further exception to the rule against bias. That exception is the principle of necessity. The principle is that a

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[38] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348–349 [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[39] *Vakauta v Kelly* (1989) 167 CLR 568 at 577–579 per Dawson J and the cases cited there; *Smits v Roach* (2006) 227 CLR 423 at 439 [43] per Gleeson CJ, Heydon and Crennan JJ (Gummow and Hayne JJ agreeing); *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 449 [76] per Gummow ACJ, Hayne, Crennan and Bell JJ.

[40] See the authorities cited in the previous footnote.

[41] *John Fairfax Publications Pty Ltd v Kriss* [2007] NSWCA 79 at [26]–[27] per curiam.

[42] (2006) 227 CLR 423.

decision-maker who is biased may nevertheless continue to occupy his or her decision-making role if there is no alternative to the decision-maker against whom bias is alleged.[43] The doctrine does not require that it is impossible by any means to secure the hearing of the proceeding, but there must be a substantial degree of impracticality.[44]

28. Accordingly, whether the doctrine of necessity will apply depends on a close consideration of the facts.[45] Relevant considerations include whether it is in fact possible to appoint another decision-maker, the length of the existing inquiry and the expected further duration, the resources expended in the inquiry, whether matters of credit are in issue, the degree, nature and gravity of bias or apprehended bias involved and the decision-maker's qualifications and experience.[46]

D EVIDENTIARY MATERIAL

29. The evidentiary material relied on by the applicants for the purposes of the applications appears to be as follows:

(a) ACTU MFI-1: Letter from Gordon Legal to the Commissioner dated 17 August 2015;

(b) ACTU MFI-2: Bundle of documents produced;

(c) ACTU MFI-3: Authorities from the CEPU, HUS and CFMEU;

(d) ACTU MFI-4: ACTU Media Release dated 13 August 2015; and

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[43] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 72 at 88–89 per Mason CJ and Brennan J, Deane J at 96; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 359 [64]–[65] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See also *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 412 per Kirby P, 429–430 per Samuels JA (Gleeson CJ agreeing), 443–445 per Mahoney JA.

[44] See *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 443–445 per Mahoney JA; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 359 [64]–[65] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[45] See, eg, the different conclusions reached in *Clarke v Habersberger* (unreported, Victorian Supreme Court, 10 June 1994, Coldroy J) (necessity applied to lengthy single investigator inquiry over number of years with in excess of 200 sitting days of considerable number of credit issues) and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 359 (necessity applied to lengthy trial where credit in issue and a principal witness had died) compared with *Carruthers v Connolly* [1998] 1 Qd R 339 at 389–390 (necessity not applied).

[46] In addition to the authorities cited in the previous footnote, see M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, Lawbook Co, 2013), pp 673–734 [9.390] and the authorities cited there.

(e) ACTU MFI-5: Letter from the ACTU to the Prime Minister dated 14 August 2015;

(f) the transcript of remarks made by the Commissioner on 17 August 2015 providing context in relation to the documents in MFI-2;[47] and

(g) the bundle of documents entitled "Exhibit Bundle" lodged by the CFMEU with its submissions.

30. In addition, the Commissioner may also properly take notice and have regard to documents in connection with the conduct of the Commission which are publicly available such as those on the Commission's website (eg transcript of hearings, submissions of Counsel Assisting, issues papers, the Interim Report, the Discussion Paper, press releases).

Dated: 21 August 2015

[47] 17/8/2015, T11.4–14.25.