SUPREME COURT OF NEW SOUTH WALES

ANNUAL CORPORATE LAW CONFERENCE

Directors' Duties, Corporate Culture and Corporate Governance

2018 Conference

Tuesday, 20 November 2018 at 1.30pm

Banco Court, Supreme Court of New South Wales,
Level 13, Queen's Square, Sydney

DR AUSTIN: Ladies and gentlemen, I am Bob Austin and it is my function to call this meeting to order and then get out of the way. Welcome everyone to this the 13th in the series of Supreme Court conferences which started in 2006 and we have our best attendance ever so far, so we appreciate the support. It is my privilege to call upon the Chief Justice to be welcomed to the conference and then we will move immediately to the first session which will be a paper by Professor Harris. Chief Justice, thank you.

THE HON CHIEF JUSTICE TF BATHURST: Thank you and good afternoon. There has probably never been a more exciting time to be a corporate lawyer. That might be because there never before has been an exciting time to be one, but I think the times have changed. If a commercial barrister has a standing hashtag on Twitter, by which I am of course referring to #doc@or, there must be something going on.

Now, in these exciting times this conference is a welcome opportunity I think though to sit back and reflect more deeply, absent the media hype, on the issues surrounding directors' duties, corporate culture and corporate governance.

On that note, it is my great pleasure to welcome you to the 2018 Supreme Court Annual Corporate and Commercial Law Conference. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora Nation and pay my respects to their elders past, present and emerging and my respects to all other indigenous people who may be here today.

I will keep my remarks very brief so as not to encroach on the program which I know we are all looking forward to. Thanks as always are due to the Law Society of New South Wales, the Ross Parson Centre for Commercial, Corporate and Taxation Law at the University of Sydney and the Law Society for their generous sponsorship of this event and they are actually coordinating and ensuring the seamless running of the conference.

I have also, of course, to acknowledge Bob Austin for his tireless efforts over the years in putting this conference together and his never ending patience in dealing with me. He has once again arranged a topical and thought provoking program. It brings together practitioners, academics and the judiciary to discuss their

1 different perspectives on the difficult legal and social
2 issues presently at the forefront of the commercial world.
3
4 Thanks also must go to Professor Barbara McDonald of
5 the Ross Parson Centre who has been involved in
6 organisation this year and also the President of the
7 Law Society, Doug Humphreys.
8
9 These are exciting times but they are also quite
10 turbulent. In fact, "exciting" is probably just a
11 politician's positive spin on turbulence. The revelations
12 from the Hayne Commission have caused I think significant
13 soul-searching, particularly in the financial services
14 industry, and a re-evaluation of the legal framework around
15 corporate governance.
16
17 I think two major themes have emerged. The first
18 relates to whether the traditional view that directors'
19 duties are owed to the company come with a consideration of
20 the primacy of shareholders still holds water or perhaps is
21 going to continue to hold water. Put another way, it can
22 be asked whether the so-called social licence to operate
23 extends to taking action which on its face may be seen to
24 be contrary to the financial interests of shareholders.
25
26 Social licence to operate, as most of you know, isn't
27 new. It used to be called corporate social responsibility
28 before it was forgotten for about I think 15 years or
29 thereabouts, coinciding with the 2007 financial crisis.
30
31 Second is the question of how we regulate. Is it a
32 principles based approach, such as it seems to be favoured
33 by Commissioner Hayne in his Interim Report, or should it
34 be what could be described as prescriptive or more
35 pejoratively, in the words of its distractors, tick-a-box
36 regulation.
37
38 For what it is worth, which is probably not much,
39 I don't think either extreme is appropriate. The broad
40 principles based approach may give rise to too much
41 uncertainty whilst prescriptive regulation can lead at best
42 to mechanical compliance without thought as to the
43 underlying outcomes that are sought and at worst, a
44 strategic compliance designed to avoid the intended
45 outcomes of a regulatory regime.
46
47 Many of us, looking back, may have from time to time

1 advised on what is euphemistically called
2 "strategic compliance", but this year we are privileged to
3 have four distinguished speakers to consider these topical
4 issues bringing their particular perspectives to the table.
5
6 Our first speaker is Associate Professor Jason Harris.
7 Congratulations are in order as he will from 2019 be taking
8 a position as Professor of Corporate Law at the University
9 of Sydney, a very well deserved appointment. He will also
10 as a result have to have much more to do with this
11 conference than previously.
12
13 Professor Harris will be discussing shareholder
14 primacy in these changing times, examining the ongoing
15 debate as to what exactly the best interests of the
16 corporation are. He will also touch on the question of
17 stakeholder interests and the desirability of legislative
18 recognition of these interests, such as, of course,
19 section 172 of the United Kingdom's Companies Act.
20
21 As you would all know, this was answered in the
22 negative by the Corporate and Markets Advisory Committee in
23 2006, was reconsidered again by the Governance Institute in
24 2014 and probably will be rehashed yet again in the
25 aftermath of the Hayne Commission. This paper and session
26 certainly adds a measured and considered perspective to the
27 bourgeoning debate.
28
29 You will then hear from Professor Dimity Kingsford
30 Smith from the University of New South Wales who will be
31 considering the question of whether directors' duties are
32 public duties. That was the question that Edelman J
33 considered in some detail in *ASIC v Cassimatis*, the
34 Storm Financial case. This paper, however, takes the
35 question one step further and asks what it actually means
36 practically to say that directors' duties have a public
37 quality. This is certainly the question that has vexed me
38 both in considering Cassimatis and the academic debate over
39 the years.
40
41 Following afternoon tea we move from the academics to
42 the practitioners, hearing from Shannon Finch who most of
43 you know is a partner at King & Wood Mallesons and a chair
44 of the Law Council's Corporations Committee. Her topic is
45 regulators and the ASX and her paper considers the
46 regulation of corporate culture. These issues have - I am
47 perhaps exaggerating a bit - blown up recently in the

1 reactions to the proposed changes to Principle 3 of the
2 ASX Corporate Government Principles and Recommendations
3 from its current form which requires that a listed entity
4 act ethically and responsibly to requiring that a board -
5 and I quote - "have regard to the views and interests of
6 stakeholders, including employees, customers, suppliers,
7 regulators and the local community." It may be put in
8 fairly short form, have regard to everyone but I shouldn't
9 express views.
10
11 Among other submissions critical of the proposed
12 change, the business law section of the Law Council has
13 firmly stated its opposition. It submitted that the
14 efforts of the board must ultimately be directed towards
15 the financial wellbeing of the shareholders as a general
16 body, that being the fundamental raison d'etre of all
17 listed entities. You can see how it relates back to
18 Associate Professor Harris's paper and as I think that
19 points out, the competing views are underlain by
20 fundamental differences as to the purposes of corporations,
21 whether they are in fact simply devices used by law to
22 support the proper exploitation of private property, or
23 whether they are public entities that not only exist for
24 the financial wellbeing of shareholders but also for the
25 benefit of society. It may be that the two positions can
26 never be reconciled and we simply end up with laws that
27 seek to find a balance between both those views.
28
29 These conceptions of a corporation I think are often
30 influenced directly or indirectly by public opinion,
31 resulting in swings back and forth in regulation reflecting
32 the two underlying ideologies. As I said, you only have to
33 look at 2007 when everyone thought that the most important
34 thing to do was to protect the banks, to the reaction to
35 the banks these days. It shows how public opinion can
36 really affect these issues.
37
38 A more immediate question is whether a body like the
39 ASX Corporate Governance Council is the appropriate body to
40 be setting these sorts of legal norms or whether this is
41 something which should be left to parliament. Of necessity
42 I have to take a neutral position but let me say this, that
43 those supporting the view that it be left to parliament
44 would generally support the proposition that directors
45 should be free to act in what they perceive to be in the
46 best interests of the corporation, subject to such duties
47 imposed by parliament or by the general law.

1
2 The alternative view is that bodies such as the
3 ASX council, which is made up of listed entity
4 representatives as well as shareholder and industry groups,
5 is well placed to set legal norms apart from whatever
6 parliament deems appropriate. Whichever view a person
7 holds is probably underpinned to a large extent on whether
8 they support simply broad principle based regulation or
9 whether it is preferable at the present time to expand on
10 these principles by the imposition of guidelines such as
11 those amendments proposed by the ASX council or,
12 for example, by those found in the Banking Code of Conduct.
13
14 In addition to these issues, Shannon's paper addresses
15 the views expressed in the Interim Report of the
16 Royal Commission about the appropriate role for ASIC and
17 particularly that in all cases ASIC's first question should
18 be "Why not litigate?" It is interesting to reflect
19 I think that in virtually every other sphere of litigation
20 the approach of governments and the courts has been to
21 encourage parties to settle and come to an agreement
22 wherever possible. It is unsurprising in those
23 circumstances that aspects of that approach have infused
24 the work of the corporate regulator.
25
26 In Commissioner Hayne's interim view, however,
27 considering how misconduct can be resolved by agreement
28 cannot be the starting point for a conduct regulator.
29 However, Sharon's paper issues a word of caution as to
30 whether this new approach to enforcement will actually
31 discourage compliance. Once again, it may be we end up
32 somewhere between an overly risk averse approach to
33 enforcement and the extreme of litigating each and every
34 case of non-compliance. I certainly hope that we do.
35
36 In this context it will be interesting to see whether
37 the proposed deferred prosecution scheme for Australia will
38 go ahead. The bill establishing that scheme has been
39 before the Senate for some time now and it would appear
40 that the preventative justice methodologies which underlie
41 such agreements are somewhat at odds with ASIC's new stated
42 approach to enforcement or should I say more accurately,
43 the approach to enforcement it is suggested that ASIC
44 should adopt.
45
46 We are very lucky today because we will have the
47 expert opinion of Kevin McCann who will take us through the

1 implications arising from corporate governance from the
2 Hayne Interim Report. It might be called a right of reply.
3 A number of quite strong views to enforcement and changes
4 to the law, or otherwise, have been expressed by the
5 Commissioner and I certainly look forward to hearing
6 Kevin's views on those and other issues.
7
8 The conference will conclude with a panel comprised of
9 all of the speakers - and I have to disclose in advance my
10 arm has been twisted to join that panel - chaired by Dr Bob
11 Austin and it will be followed by post-conference drinks.
12
13 So without further ado, let me start the proceedings
14 by introducing our speaker for the first session which
15 I have the honour of chairing. As I have already
16 mentioned, Jason has been appointed as a professor of
17 corporate law at the University of Sydney from 2019. He is
18 currently an associate professor at the University of
19 Technology where he has taught in the areas of corporate
20 law, securities law, secured transactions and corporate
21 insolvency. He has been around, so to speak, previously
22 teaching at the University of New South Wales and the ANU,
23 acting as a visiting scholar in Canada and the UK and an
24 adjunct professor in Delaware. Prior to this, he worked as
25 a lawyer for the Australian Government Solicitor. Please
26 join me in welcoming Professor Harris.
27
28 ASSOCIATE PROFESSOR HARRIS: Thank you very much,
29 Chief Justice for that introduction. Thanks also to the
30 conference organisers for asking me to come and speak with
31 you today about a topic that really is a core controversy
32 in our corporate law, the topic of shareholder primacy.
33
34 The title of my paper, which is in your materials, is
35 "Shareholder Primacy in Changing Times", and that title
36 points to the longstanding nature of the debate about the
37 extent to which shareholder primacy should form part of our
38 corporate law. But it also points to the question of
39 whether our changing times - and we have already had
40 reference to that in the Royal Commission - warrant further
41 law reform, and these are themes that I develop in the
42 paper - that is, the question is being asked about whether
43 the conduct of seemingly many small and large companies in
44 Australia has focused too much on generating profits for
45 shareholders and has disregarded community concerns. But
46 my paper is focused on the legal issues, particularly a
47 director's duty to act in good faith in the best interests

1 of the company.
2
3 A particular focus of my paper is the legal status of
4 the English Court of Appeal decision in *Greenhalgh v*
5 *Arderne Cinemas*. This debate about shareholder primacy and
6 what are the interests of the company goes to the heart of
7 what a company is in our system of law and, therefore, how
8 it should be regulated. The Chief Justice has already
9 touched on some of those issues, and the next presenter
10 will also discuss the public and private debate.
11
12 Really, this is posing the question of in whose
13 interests should companies be managed and are companies
14 anything more than simply the aggregation of their
15 shareholders' economic interests? In my view, they are.
16
17 To cut to the conclusion in my paper, in my view, law
18 reform is not needed to deal with these changing times, and
19 that is because our current law, as I attempt to argue in
20 the paper, is sufficiently flexible to allow directors to
21 take into account a wide variety of interests, not just
22 shareholder interests, and that is because the duty, of
23 course, is owed to the company and not to the shareholders.
24
25 So what I have here are a number of attempts to define
26 shareholder primacy. I am not going to read through the
27 quotes, but there is a common theme there, and the theme is
28 that shareholders should be viewed as the ultimate
29 beneficiaries of management decision-making. This is based
30 on the view, to use the language of shareholder primacy's
31 proponents, because shareholders are the ultimate owners of
32 the company. That is one view.
33
34 The first quote there from Professor Berle is that, of
35 course, management powers are only to be exercised for the
36 rateable benefit of all shareholders. That seems like
37 a relatively straightforward statement, but it actually
38 draws out a number of important legal, commercial and
39 practical questions: are shareholder interests the only
40 interests that need to be considered? If other interests
41 are to be considered in addition to shareholders', how are
42 they to be balanced? Must shareholder interests always
43 take precedence? And what about community expectations;
44 what happens if there is a potential conflict between
45 community expectations and shareholder expectations? These
46 are issues that I develop through the paper.
47

1 So, as I said at the start, the debate about
2 shareholder primacy is a longstanding one in our company
3 law and we can go back to the academic debate between
4 Professor Adolf Berle and Professor Merrick Dodd, and this
5 was back during the time of the Great Depression.
6
7 Now, this debate is actually still relevant for us
8 today. The themes that they were discussing at that time
9 in a series of articles published in the Harvard Law Review
10 still resonate with us today and still connect to some of
11 the issues that we are dealing with today.
12
13 Professor Berle, of course, is most famous for his
14 seminal book "The Modern Corporation and Private Property",
15 which he published in 1932 with economist Gardiner Means.
16 In that book they looked at the capital structure of large
17 publicly listed companies in the United States and they
18 found what we know today, which is that a large number of
19 companies have a lot of very small shareholders; they are
20 dispersed shareholder bases.
21
22 Berle and Means were concerned about the challenge
23 that this reality posed for keeping managers accountable:
24 how could directors and their managers be accountable to
25 a dispersed shareholder base? So he wrote in a series of
26 articles during the Great Depression about the need for
27 director powers to be tied directly to shareholder
28 interests, and he went so far, as I put on the last slide,
29 to say that that is the only purpose that they should be
30 exercised for.
31
32 Now, Dodd responded to this by saying that the problem
33 with viewing director powers as linked only to shareholder
34 profit is that, of course, corporations play an important
35 role in our society. They affect many stakeholders. Dodd
36 argued that the role that corporations play in society gave
37 rise to legitimate community expectations and that these
38 should also be taken into account. But both scholars here
39 are really arguing about what is the corporation and how do
40 we keep directors accountable? So on the one hand Berle is
41 concerned about protecting the private property of
42 shareholders who have invested in these companies, and if
43 the shareholder base is too dispersed, then how do we keep
44 managers accountable? Whereas Dodd is really arguing about
45 the public nature of companies and the need to serve that
46 public purpose.
47

1 Now, the public versus private debate I will leave to
2 our next presenter, Professor Kingsford Smith, but suffice
3 it to say, of course, in these changing times these issues
4 are still highly relevant.
5
6 So I will focus for a moment just on the economic
7 perspective, and really what we have here are competing
8 conceptions about what a corporation is, as the
9 Chief Justice mentioned in his introductory remarks.
10 Economic perspectives - and I won't turn this into
11 a corporate law lecture, don't worry - in short, take the
12 view of the corporation as not a real thing. It is a nexus
13 of contractual relationships - that is, it acts as a forum
14 recognised by law to facilitate and assist the relationship
15 between the owners of capital, the shareholders, and the
16 managers of that capital.
17
18 Central to that idea is that of shareholders as the
19 residual risk bearers. Shareholders are the last in the
20 queue to get paid, as it were. As the residual risk
21 bearers they should, in theory, have the appropriate
22 economic incentives to effectively monitor corporate
23 management, to hold directors accountable, again reflecting
24 on Professor Berle's experience in writing that book in
25 1932 and the dangers that having a dispersed shareholder
26 base posed.
27
28 On the other hand, stakeholder perspectives take
29 a different view. They disagree with the view that
30 shareholders are the only residual risk bearers in the
31 corporation. Again they argue, as Professor Dodd did, that
32 there are a variety of stakeholders who have legitimate
33 interest in the corporation's activity.
34
35 Some stakeholder theorists go so far as to criticise
36 economic perspectives on the basis that they are too narrow
37 in their focus, that they look for only things that can be
38 easily measured in economic terms. Whereas the life of
39 corporations and the relationship that corporations have
40 with their stakeholders, of course, is more than simply
41 those economic values and includes things such as mutual
42 trust and confidence, interdependence with stakeholders and
43 the company, vulnerability and the legitimate interests of
44 the community. Stakeholder theory therefore rejects this
45 idea of shareholders as the residual risk bearers, and this
46 is something I am going to come back to. Employees,
47 customers, creditors, shareholders and the community all

1 share the risk of corporate failure.
2
3 So if this debate has been going on for so long, why
4 are we still talking about it today? As was discussed at
5 the start, these are issues that are coming out in the
6 Royal Commission. We are seeing these sorts of headlines,
7 which I have taken from various newspaper reports this
8 year, and they really show that this debate about the
9 public purpose versus the private purpose of corporations
10 is still very relevant, and the question of in whose
11 interests the corporation should be managed is still highly
12 relevant.
13
14 But where does the law fit in? As I said, I am going
15 to focus on the legal issues.
16
17 I do not need to explain to this audience the nature
18 of directors' duties or where they come from. As I said,
19 I am focused on specifically the duty of directors to act
20 in good faith in the best interests of the company. The
21 leading statement that seems to explain that duty is up
22 there on the slide, from *Smith & Fawcett* in the English
23 Court of Appeal. The key point to note from that is that
24 somewhat similar comments had been made in various earlier
25 cases, including by the High Court in *Ure's* case some
26 30 years earlier.
27
28 The main point to take from both of those quotes is
29 that the law allows directors considerable discretion in
30 exercising their management power and it leaves the
31 decision of what are the interests of the company to the
32 directors. It is not for the court to determine what those
33 interests are. This is sometimes explained as being a form
34 of general law business judgment rule, that we allow
35 directors to make what they believe are decisions in the
36 best interests of the company.
37
38 Now, the *Hutton v West Cork Railway* case, of course,
39 noted that there has to be some limit to this. It cannot
40 simply be an honest attempt to benefit the company,
41 otherwise, as the court there said, you could have the
42 honest lunatic running companies.
43
44 That case tried to draw an important line that the
45 decisions that directors were exercising in good faith had
46 to have some connection to the business of the company, and
47 of course gives us the often-cited quote of:

The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

So what do we take from this? How do we define what are the interests of the company? We can go back to the case of *Allen v Gold Reefs*, which is sometimes said to be the origin of this particular phrase, "bona fide for the benefit of the company as a whole", although, as I was researching for this paper, McPherson J, in an article written in the Australian Law Journal about 40 years ago, went back much further than that to trace the origins of that phrase.

That particular phrase, of course, as we know, is no longer the test for assessing the validity of changes to a company's constitution, at least not in Australia since the High Court's *Gambotto* decision. But the meaning of that term, "the company as a whole", was sought to be explained in the Court of Appeal decision in *Greenhalgh v Arderne Cinemas*. I won't read through the entirety of that quote.

Clearly, what the Master of the Rolls is saying there in that quote in *Greenhalgh*'s case is that we cannot just focus on the commercial interests of the company as a separate entity, but it has to mean something more than that, and in his Honour's view means the interests of the shareholders as a whole, or the corporators, as he mentioned.

Now, that particular formulation has been applied by the High Court in a directors' duties case in *Ngurli v McCann*.

In the paper I trace through the lines of authority that have applied the *Greenhalgh* formulation, and there are a number of cases that have applied that. I also go through and map a number of significant appellate cases that recognise that there is a distinction, and there has to be a distinction, between the interests of the company and the interests of shareholders, that they are not the same.

So, for example, there are cases such as *Reid v Baggot*

Well Pastoral Company, *International Swimwear Logistics,* and *Idylic Solutions* here in New South Wales that apply that *Greenhalgh* formulation. There are other cases that make it very clear that, even though they are not applying the *Greenhalgh* case, they are equating the interests of the company with the interests of shareholders, including in Isaac J's decision in the *Ure* case in 1923, Dixon J's reasons in *Peters American Delicacy*, those of King CJ in *Australian Growth Resources* and Kirby P here in New South Wales in *Darvall v North Sydney Brick*. So there is clearly a long line of cases that supports the view that "the interests of the company" means the interests of shareholders.

But for an alternate view, if we look, for example, to the reasons of the plurality in the High Court's decision in *Pilmer v Duke Group*, we see the court discussing that when directors determine what the interests of the company as a whole are, the directors will usually have close regard to how the decision will affect shareholders. They are clearly drawing a distinction between the interests of the company and the interests of shareholders. They are not the same, even if they may well overlap.

Indeed, in just the last 12 months we have seen a first-instance decision in the Victorian Supreme Court in the case of *United Petroleum* that has gone so far as to call into question the continuing relevance of the *Greenhalgh* formulation about the interests of the company as a whole, where the court said:

> *In more recent times, the view has been expressed that the general body of shareholders does not always, and for all purposes, embody "the company as a whole".*

But perhaps the clearest expression of this idea that the interests of the company are separate from the interests of the shareholders as a whole comes from Owen J at first instance in the *Bell* case, and there is a brief quote there where he draws that distinction. They may well overlap, but they are not the same.

There is a longer quote on the next slide which makes the same point but also very strongly states that simply equating the interests of the company to be the interests of shareholders, and vice versa, is, in fact, an error. So

1 Owen J in that case favoured the approach of balancing
2 those various interests.
3
4 Now, of course, that case was about the duty to
5 consider creditor interests when the company nears
6 insolvency, and that is not an issue that I am going to
7 discuss in any detail. It is a well-worn topic.
8
9 So what, then, can we make of the *Greenhalgh* case and
10 its continuing relevance in Australian corporate law? The
11 first point to note, as I have mentioned already, is that
12 *Greenhalgh* was not a case involving directors' duties; it
13 was a case applying the *Allen v Gold Reefs* test about how
14 we assess the validity of resolutions to change the
15 constitution. But it is a case that has been applied by
16 the High Court in directors' duties, and that is *Ngurli v*
17 *McCann*.
18
19 I will also note that the Master of the Rolls in
20 *Greenhalgh* made it quite clear that he was stating
21 a formulation for cases about changing the constitution,
22 because with the relevant quote that I had up earlier on
23 the slide, and also in the paper before you, he makes the
24 clear statement, "at least in a case such as the present";
25 he is limiting it to decisions to change the constitution.
26
27 But there are broader issues at play here. The
28 assimilation in the *Greenhalgh* case of the interests of the
29 company with interests of shareholders is really
30 reminiscent of the earlier quotes that I had on the second
31 slide with the idea that shareholders are the ultimate
32 beneficiaries, and that is because they are seen to be the
33 ultimate owners of the company.
34
35 But shareholders do not have all the hallmarks of
36 owning the company. The company is a separate legal
37 entity. Directors may well be accountable to shareholders,
38 but that is because of the very practical issue that if the
39 directors do not do what the shareholders like, or at least
40 sufficient majority of the shareholders, then they can be
41 voted out.
42
43 Directors do not derive their power from a delegation
44 from the shareholders. The directors are not the agents of
45 the shareholders. The shareholders do not control the
46 directors' exercise of managerial power and, indeed, cases
47 such as *Automatic Self-Cleansing Filter v Cunninghame*

1 recognise that the directors are not bound to follow the
2 wishes of the members.
3
4 So it seems odd that shareholders are seen to be the
5 owners of the company. In fact, even if directors were
6 directly accountable to the actual shareholder interests,
7 they would find that identifying the nature of those
8 interests would be difficult, if not impossible. There are
9 simply too many differences between the interests of
10 shareholders, for example within the same class, where we
11 have shareholders who are investing for the long term
12 versus shareholders investing in the short term;
13 differences between classes, for example holders of
14 preference shares versus holders of ordinary shares or
15 holders of non-voting shares and holders of voting shares;
16 and also inter-temporal problems, differences between the
17 current shareholders and also the future shareholders.
18
19 So the *Greenhalgh* test is limited in its practical
20 capacity to actually help directors.
21
22 Now, the Master of the Rolls was aware of these
23 problems of conflicting interests within the shareholder
24 body, because his Honour actually proposed a solution, and
25 it is in the quote that I have included there on the slide.
26 It is the idea that it is not the actual shareholders that
27 he is talking about, it is some sort of hypothetical
28 shareholder who acts in the medium to long-term interests
29 of the company. But as one noted commentator wrote in the
30 Modern Law Review many years ago, this risks substituting
31 one legal quagmire for another, the idea of the
32 hypothetical shareholder.
33
34 This is not a new issue in company law and this is an
35 issue that has been addressed by the High Court in *Mills v*
36 *Mills*, where Latham CJ recognised that in these
37 circumstances where there are inherent conflicts between
38 shareholder groups, what is it the directors are expected
39 to do; they are expected to act fairly between those
40 competing groups.
41
42 So we end up in the situation where company law allows
43 the directors to make the management decisions, confers
44 a great deal of discretion on them, does not require them
45 to focus on the actual interests of shareholders and
46 creates a hypothetical shareholder who is actually divorced
47 from the actual shareholders and their actual interests.

1 Well, it must be seriously asked, if shareholder primacy
2 bears no resemblance to the actual shareholders and their
3 actual interests, what use is it? If the law is glossing
4 over the actual shareholders in favour of maintaining
5 strong managerial discretion in the board room, it is no
6 wonder that some scholars go so far as to say it is not, in
7 fact, shareholder primacy; it is director primacy.
8
9 It is submitted here that part of the problem is
10 seeing shareholders as the owners of the company, which
11 I mentioned earlier. Clearly, they are not, either as
12 a matter of law or as a matter of practice. Shareholders
13 own shares in the company. The arguments that shareholders
14 are owners of the company in some way really harks back to
15 an older notion of joint-stock companies that were based on
16 partnerships, and the merchants would combine their
17 resources and that would form the basis of the company's
18 joint stock as it went overseas to conduct its trading
19 operations.
20
21 The shares that those shareholders had represented
22 a percentage of that joint stock. But that time is long
23 gone. Shares are themselves personal property now, and
24 shareholders do not own, through their shareholdings, any
25 interest in the company's property. Why? Because the
26 company is, of course, separate.
27
28 Once we recognise that principle, that the company is
29 separate from its shareholders, the shareholder interests
30 are not the same as the company's interests or not
31 necessarily the same - they are certainly not equivalent in
32 all circumstances - it makes it much easier for us to
33 accept the central consequence of the *Salomon* case; and you
34 cannot give a talk on company law without mentioning
35 *Salomon*'s case.
36
37 Of course, the consequence of *Salomon*'s case is that
38 the company is a separate entity. But the further
39 consequence, in some ways the whole point of *Salomon*'s
40 case, is that it should not matter who the shareholders
41 are, because the company is separate from the shareholders.
42
43 Now, the suggestion has been made that directors might
44 not be able to consider non-shareholder interests as
45 a matter of law. I would dispute that, and as the
46 Chief Justice mentioned, that has also been disputed by
47 CAMAC.

There are a number of cases that recognise that directors can and do take into account non-shareholder interests when making decisions. Of course, the statement there from the High Court's decision in *Harlowe's Nominees* makes that very clear, that there are wide interests that can be considered. That formulation is also commonly recognised as a form of general business law - a business judgment rule at general law, that is, that the courts are reluctant to interfere in good faith commercial decision-making.

The statement from the Canadian case in *Teck Corp* that I have included there, and which is also included in the paper, is even more explicit of the need and the reality of directors taking into account a variety of interests when making decisions. That particular statement was approved by the Privy Council in the *Howard Smith v Ampol* case and was also approved by Wilson J in *Whitehouse v Carlton* here in the High Court. So, as a matter of law, directors can take into account wider interests than merely the shareholder interests.

It has been suggested that we might need law reform to deal with these changing times and that if we had, perhaps, some further statutory clarification that directors are permitted to take into account non-shareholder interests when they are acting in the best interests of the company, that would provide for more acceptable corporate conduct.

One way of doing this would be to enact a so-called constituency statute, which has been undertaken in more than 40 states in America. But all those statutes do is give directors the permission, not the imperative, to include non-shareholder interests.

The Chief Justice earlier referred to section 172 of the UK Companies Act. That does provide that directors "shall" consider a variety of interests, some of which are then listed there, but it is important to note that that is a non-exhaustive list. The directors are able to choose which interests they will take into account, and section 172 is not a serious challenge to the shareholder primacy norm, because that is actually a duty to promote the success of the company for the interests of the members as a whole.

1 So to come to the conclusion of my argument, do we
2 need law reform to provide directors with the capacity to
3 take into account broader considerations or are they bound
4 by law to only consider shareholder primacy, the interests
5 of shareholders? In my answer, no, we do not need law
6 reform. The law is sufficiently flexible as it is to allow
7 directors to take into account a broad variety of concerns.
8 And while there may be calls from bodies such as the ASX
9 Corporate Governance Council for listed corporate boards to
10 take into account broader stakeholder interests and to
11 maintain the company's licence, whatever it is that that
12 may mean, I would argue that law reform is not needed. Our
13 existing law is sufficient to deal with these problems.
14
15 Of course, that accords both with legal principle, as
16 I have mentioned earlier, but also with the reality of
17 board room decisions. Boards have to take into account
18 a broad range of interests, as Professor Gower mentioned
19 many years ago.
20
21 So, in short, we need to recognise that there is
22 a limit here to what company law can do. Changing the
23 Corporations Act is very much a blunt instrument, and if we
24 are concerned about directors making decisions that do not
25 accord with so-called community expectations, then we need
26 to be looking more at what motivates, what drives, both
27 individual and corporate behaviour. The law is only one
28 factor in that equation and I would argue it is not even
29 the most important factor. Trying to obtain a commercial
30 benefit for the company and all of its stakeholders is what
31 drives board behaviour.
32
33 So, in conclusion, shareholder primacy, in my view, is
34 not under serious threat by these changing times, because
35 it has only ever been one part of the story.
36
37 And if I can finish with a cartoon from Dilbert, who
38 is always my guiding light on corporate behaviour -
39 actually, that is quite big, you should all be able to read
40 that, but if anyone is unable to read that, essentially,
41 Dilbert goes to his manager and says, "Look, I have found
42 a way to save a million dollars by spending only 10,000."
43 The manager responds, "Well, that 10,000 would come out of
44 my budget, but the benefit would go to somebody else's
45 budget, so I don't think that's feasible." Dilbert
46 replies, "Well I think our shareholders would disagree",
47 and his manager says, "And that's why they are not invited

1 to the meeting." Thank you.
2
3 THE HON CHIEF JUSTICE TF BATHURST: Thank you, Jason. One
4 thing I think you must have regard to in this area is the
5 evolution of the law to take account of changing conditions
6 and circumstances. I think it was Milton Friedman in 1970
7 who said that the only object of a corporation was to make
8 money, and lots of it, for its shareholders. Shareholders
9 might agree. That was shot down fairly quickly thereafter
10 by Sir Anthony Mason in *Walker v Wimborne*, and since then
11 there has been a move that directors, as part of their
12 duties, have to take into account the interests of
13 creditors near insolvency and, I think, take steps,
14 obviously, to comply with existing laws and regulations
15 because the company is a legal entity.
16
17 Now, that may or may not make good Jason's thesis as
18 to whether the blunt instrument of changing the
19 Corporations Law is necessary, but it certainly shows,
20 I think, irrespective of that, the law will evolve to take
21 account of changing circumstances and, indeed, changing
22 social mores.
23
24 With that homily, can I throw it open for questions.
25 Could I ask you, please, to wait for the microphone and
26 identify yourself. Are there any questions?
27
28 MS SHARMA: Good evening, everyone, my name is Apurva.
29 I am a researcher and I have come from RMIT University,
30 Melbourne. I've read a lot and it is an honour to be here
31 and listening to you. I actually think that if you could
32 reflect on the new laws that have come out in the USA
33 recently of benefit corporation legislation being adopted
34 by 33 states already, what would you think about that, a
35 structure like that? I don't pitch that a new corporate
36 form should be enacted here, but indeed changing or taking
37 the three main features of that law reform in that respect.
38 Thank you so much.
39
40 ASSOCIATE PROFESSOR HARRIS: Thank you for question.
41 I will defer perhaps to Professor Gower, even though he
42 wrote this almost 50 years ago. In my personal view,
43 I haven't looked too much into benefit corporations.
44 I think they get a lot of publicity and in particular there
45 are certain companies that promote their status as B corps.
46 There is clearly some money to be made there.
47

The idea that I am arguing for in the paper is that at the end of the day it comes down to the sustainability of the company as a commercial entity and that will require a variety of stakeholders to be taken into account.

If you want to set up some form of commercial activity and say, "Well, we're not here to make a profit, we're here to serve the interests of broad stakeholders", there is already a capacity to do that. You can set up a company limited by guarantee. You can set up a company even if it's limited by shares and include a provision in your constitution saying "This is what we're trying to achieve".

My argument is more that shareholder primacy is an incomplete picture of what happens inside boardrooms. While it provides a seemingly clear object that boards can focus on - is this going to help the shareholders - what the cases show is that really we are arguing about what happens in the longer term. Are the decisions going to promote the longer-term success of the company? If they do then each of the stakeholders should get some benefit out of that. Shareholders, of course, can't receive dividends until the company makes a profit. It is only making a profit if the other stakeholders receive their benefit.

I personally don't see a need for B corps here in Australia. I think we can already achieve that, but as I say I haven't looked into that in great detail. Thank you for your question.

THE HON CHIEF JUSTICE TF BATHURST: We have 14 more minutes.

MATT McGIRR: Thanks, Professor. I am Matt McGirr from the Australian Institute of Company Directors. I just wanted to follow on from something that the Chief Justice said about this, but before I do, I personally agree with your paper. It is not the position of the AICD necessarily but I agree with what you are saying. I am interested in this question. There seem to be a number of competing regulatory demands, if you like, on the boardroom now. So you have this overarching principle which stands, but then you have, take financial services law, a number of obligations imposed on the board now through things like the BEAR management which in some ways runs counter to it, or at least there is a tension point between this overarching obligation and some of the more individual

1 sorts of discrete obligations that are now imposed on
2 boards.
3
4 I guess what I am asking is this - and this is a
5 really important question to this debate going forward -
6 are we at the point where there is now a misalignment
7 between our overarching obligation imposed on directors and
8 what they are actually being asked to do in practice and
9 that is to be stakeholder managers. The reason I think it
10 is important is that there is an element of truth - and
11 I think Kevin McCann might have more to say on this - to
12 the proposition that directors are no longer necessarily in
13 any given instance asking the question "Is this for the
14 benefit of shareholders?", but asking the question "Is this
15 in compliance with the law that I am considering at any
16 given moment in the particular circumstance that I find
17 myself?" We might not have an answer now but it is the
18 difficulty we face. Thanks.
19
20 THE HON CHIEF JUSTICE TF BATHURST: Jason has passed it to
21 me, I'm not quite sure why.
22
23 ASSOCIATE PROFESSOR HARRIS: I always defer to you,
24 Chief Justice.
25
26 THE HON CHIEF JUSTICE TF BATHURST: I don't think there is
27 a misalignment. I am seriously reluctant to express too
28 much of a personal view on it, but there is inevitably a
29 danger that if a board is swamped by regulation they will
30 move from a position where they're able to - again using a
31 colloquialism - steer the company because they're too
32 involved with risk management advisers telling them what
33 the latest piece of regulation can or cannot do. That is
34 not to say that some regulation is not necessary or
35 shouldn't respond to significant matters that arise, but if
36 at all possible it should be relatively simple and not
37 over technical or over prescriptive. That is about the
38 best answer I think I can give you.
39
40 ASSOCIATE PROFESSOR HARRIS: I would like to add a few
41 comments to that. I would actually take a slightly
42 different view, although I am hesitant, which is that
43 I think there is a misalignment. I think what we are
44 seeing is a continual piling on of - it is essentially
45 addressing the squeaky wheel. A problem presents itself:
46 "Well, let's draft a law to try and deal with that
47 problem." Who is the person that we can make accountable?

1 We are being tough on companies and tough on boards and so
2 it is continually piling on.
3
4 What we are not seeing is policy that is sitting back
5 and saying, "Actually, what are we trying to achieve here?"
6 Rather than just dealing with that squeaky wheel problem,
7 let's think carefully about actually how companies operate,
8 how we want them to operate and how we think what role the
9 law should play in that, but that's a hard task. It is
10 much easier to say, "Well, here's a rule that will deal
11 with that problem that was reported in the press", rather
12 than, "Let's actually undertake a holistic review of our
13 corporate legislation", which in many respects is still
14 buried in the 19th century, and actually ask the hard
15 question of what is it that we should be asking directors
16 to do and what can they actually do? I am not sure that
17 just piling on more and more and more regulation is
18 actually getting us anywhere.
19
20 To a similar extent saying, "Well, let's increase the
21 regulation, let's just give ASIC more powers and give ASIC
22 more responsibility", I am not sure that that's the
23 appropriate approach either. If we were to start again
24 would we have the system that we have now? I don't think
25 so.
26
27 THE HON CHIEF JUSTICE TF BATHURST: Anyone else?
28
29 JOHN MORGAN: John Morgan from Allens and UNSW. Jason, it
30 is interesting in the Royal Commission at the moment there
31 has been a lot of commentary upon remuneration and the fact
32 that institutional shareholders and proxy advisers are very
33 influential in relation to how shareholders vote in
34 relation to the approval of remuneration of executives and
35 that remuneration structure seems to have some alignment
36 with the problems that occur, that is, the disregarding of
37 the customer interest or the community interest and the
38 greater regard of the shareholder and profit interest.
39
40 Do you think that that law needs to be revisited so
41 that there needs to be some countervail to having regard
42 properly to the other stakeholder interests and not just
43 the shareholder interests in how remuneration is actually
44 approved and structured?
45
46 ASSOCIATE PROFESSOR HARRIS: Thank you for your question,
47 John. There's an awful lot in that. On one level I would

1 agree that the current - and I am not holding myself out as
2 an executive remuneration expert by any means, but it seems
3 to me that the current law on executive remuneration is too
4 complex. It doesn't make sense to me, just as an ordinary
5 investor, that we have companies that are spending dozens
6 and dozens of pages explaining the detail of remuneration
7 and not as much time actually explaining how they run their
8 business. I think there is a problem with that.
9
10 However, you also mentioned in your question about
11 whether there is a link between so-called shareholder
12 primacy and these particular remuneration structures.
13 I think the problem I have tried to highlight in my paper
14 is that it is not necessarily actually shareholder primacy,
15 it is not actually what the shareholders want necessarily
16 that we are focused on here. It is an idealised notion of
17 supposedly what we think they want, so I am not sure that
18 the way remuneration structures tend to be set up is
19 necessarily the same thing as what shareholders would
20 actually want.
21
22 We assume that they want, for example, ever increasing
23 share prices if you invest in a publicly listed company,
24 but the diversity of shareholders' interests would suggest
25 that maybe there are other things that they would value as
26 well, perhaps to draw back to the earlier question about
27 B corps. So yes, I think there is a problem, but I don't
28 have the confidence of the law to fix it. I am not sure
29 that saying, "Okay. Well, you must not do this now", or,
30 "You must include this further disclosure now", or, "There
31 must be these further hurdles now", I am not sure that
32 that's going to fix it. I would far favour saying this is
33 one area where we need to be looking at big picture
34 wholesale reform, like England did with the Companies Act,
35 take 10, 15 years and go through and try and work out what
36 we think a more appropriate system for company law is and
37 remuneration would certainly be part of that.
38
39 THE HON CHIEF JUSTICE TF BATHURST: Could I just add this.
40 There is a lot of talk about executive remuneration,
41 variable remuneration, bonuses, et cetera, but one of the
42 real difficulties in generalising is that for each company
43 there is a different means, a different structure, a
44 different way of doing so and different reasons to
45 incentivise or pay people in that way. It is a very
46 difficult area to generalise about, I think.
47

1 KAYLEEN MANWARING: Kayleen Manwaring from the UNSW. This
2 is a very pragmatic question, it's quite a simple question
3 and I am sure you have an answer for it. You have argued
4 quite convincingly - I haven't read your paper but I am
5 sure it will back everything up - that the law is
6 sufficiently flexible to extend outside the guardianship of
7 the regulator. The very fact that you have been asked to
8 come here, my question to you is is the law sufficiently
9 clear? The law shouldn't just act on stuff that has
10 already happened. There should be a guide to conduct in
11 some of the law.
12
13 I suppose my question is about two things. What is
14 wrong with regulatory clarity? You are saying we don't
15 need reform, but what's wrong with clearing up the obvious
16 discontent, misunderstandings, or things like that, with
17 the current law?
18
19 ASSOCIATE PROFESSOR HARRIS: Thank you, Kayleen, that is a
20 great question. To a certain extent, essentially, that is
21 where the UK has ended up. One of the narratives around
22 section 172 is does it really change anything? Even if the
23 answer is no, I have read some commentary that suggests
24 that there's still a benefit because it tries to make it
25 even clearer to corporate boards that yes, you can take
26 into account these sorts of things.
27
28 I am not sure that changing the law is the best way to
29 do that, though. We have a variety of regulatory tools and
30 certainly government, through its infrastructure and
31 procurement processes and the like, has a variety of things
32 that it can do to try and make that message clearer. The
33 concern that I have about changing the law, just adding
34 little bits to try and deal with one perceived problem, is
35 that it can create unintended consequences.
36
37 As I argue in the paper, I don't think we need a 172
38 here in Australia. I think the existing law covers it. As
39 you are suggesting and others are suggesting, if we are
40 still not getting the results that we want, I think there's
41 a bigger problem there. I don't see the problem as being
42 section 181.
43
44 THE HON CHIEF JUSTICE TF BATHURST: We have time I think
45 for one more question. Professor Austin?
46
47 DR AUSTIN: Jason, is there any situation you can envisage

1 where the interests of the group of shareholders and the
2 interests of other recognised stakeholder groups, such as
3 consumers, will necessarily conflict and if so what does
4 the law tell us about that? What is the purpose of the
5 directors' conduct?
6
7 ASSOCIATE PROFESSOR HARRIS: That is an excellent question
8 and yes, I absolutely can. We have seen this in a number
9 of product liability examples where companies become aware
10 that their products may well be dangerous and might be
11 harming people, so there's a clear conflict there.
12
13 My first response would be to say - and I also argue
14 this in the paper - that I think we need to recognise
15 company law has a limit, that company law is not about
16 regulating everything that companies do or everyone that
17 companies affect. My first response would be yes, that's a
18 very big problem and that's what consumer law is about,
19 that there should be a legislative response to that. But
20 to bring it back within company law, again, if we think
21 about the interests of the company as being the long-term
22 sustainability of the company, then actually I'd go back to
23 what Professor Dodd was arguing at the start, that if there
24 is a dissonance between how companies are being run and
25 what the community demands, regulation will come and
26 directors have to respond to that.
27
28 Drawing on that, I would suggest that - and as a
29 lead-in to Professor Kingsford Smith's paper - directors
30 need to be thinking about that regulatory risk. If they're
31 doing things that they know are going to harm people then
32 they're going to get regulated in the future and they will
33 need to adjust their conduct.
34
35 DR AUSTIN: Just a slight further proposition. Do you
36 think that it would be right to tell directors who are in
37 that sort of quandary, where there seems to be a conflict
38 between shareholder interests and other stakeholder
39 interests, that their objective is to act in good faith to
40 promote the success of the company for the benefit of
41 shareholders in the longer term?
42
43 ASSOCIATE PROFESSOR HARRIS: Yes.
44
45 DR AUSTIN: In which case, we do have a modified
46 shareholder primacy goal underlying it all.
47

1 ASSOCIATE PROFESSOR HARRIS: Yes, I would agree with that
2 because if we accept that when we say the interests of
3 shareholders, particularly in the long-term, does not have
4 to relate to what the actual shareholders want right now,
5 then really we're talking about the success of the company
6 as an entity, so I would agree with that.
7
8 THE HON CHIEF JUSTICE TF BATHURST: On that note, can
9 I ask you all to thank Jason in the usual way.
10
11 DR AUSTIN: We will reorganise the bench and I would ask
12 Justice Beazley, the President of the Court of Appeal, to
13 move up to chair the session with Professor Dimity
14 Kingsford Smith.
15
16 THE HON JUSTICE M BEAZLEY: It is my pleasure to introduce
17 Dimity Kingsford Smith, Professor of Law at the University
18 of New South Wales. You will already have some of her
19 biographical details in the paper, but I think it is
20 important to focus on what she does rather than the
21 post-nominals.
22
23 Professor Kingsford Smith's scholarship covers a
24 number of specialties, financial services regulation,
25 corporate governance, online investing, but perhaps more
26 importantly and more relevantly for this paper, the theory
27 and practice of regulation and civil society forms of
28 governance in the financial sector and I think Jason was
29 correct when he said the questions which came out of the
30 last paper are a very interesting segue into Dimity's work
31 that she is going to present now.
32
33 Perhaps I should only add in terms of her
34 qualifications and activities that in addition to her
35 position at University of New South Wales, she is a member
36 of ASIC's external advisory panel and she has written many
37 research reports for ASIC, so she has very much a hands-on
38 feel for the types of issues that we are discussing this
39 afternoon. Thank you.
40
41 PROFESSOR KINGSFORD SMITH: Thank you very much, a very
42 generous and kind introduction. I am delighted to be here
43 and I thank the Chief Justice for the invitation to present
44 in this lovely courtroom, to Justice Beazley for agreeing
45 to chair and also to Bob Austin with whom I have a long
46 association in corporate law and whose lectures at the
47 University of Sydney I think sparked my interest in company

law a long time ago now.

Moral revolutions happen. The philosopher Anthony Appiah observes that, "At the end of [a] moral revolution, as at the end of a scientific revolution, things look new. Looking back, even over a single generation, people ask, 'What were they thinking? How did we did *that* for all those years?'"

Rather than a revolution my argument here is that there is a bit of an evolution underway in the way we think about directors' duties. The law now recognises in various ways that interests greater than those of the commercial entity of a company may be considered in advance by boards. This is instead of directors' decisions turning exclusively on private corporate interests, primarily those of the shareholders as Professor Harris has indicated. Indeed, the law has recognised the public content of directors' duties for a long time.

In the community I think there's something more of a revolution going on. In organised society and in some parts of the business world it is expected that directors may and even should take wider interests into account in the management of corporations. This expectation continues as a term of reference and prominent theme of the Royal Commission and it is also obvious in quasi-legal ideas such as the social licence to operate and in the codes of corporate social responsibility.

The moral change can also be observed in a recent statement by Catherine Livingston, the chair of the CBA. She said: "Too often, a focus on profitability disadvantaged some of our customers. We agree that this balance is not acceptable." And she went on to say that the board's strategy is to become "a simpler, better bank that delivers balanced and sustainable outcomes for our customers, community, our people", and the last on her list is the shareholders.

This wider moral revolution is I think feeding a longstanding legal evolution but giving it a real move along. Directors are still required to weigh the interests that relate to the private nature of the corporation, but increasingly they must do so by taking account of wider moral goods and I would argue that these are goods of a public character.

1
2 As legally this area is truly one of evolution, many
3 of the instances I hope to enliven this argument with are
4 well known and my aim is to draw them together in the hope
5 of showing how far towards having a public character
6 directors' duties have already progressed.
7
8 The titular question of this paper has actually done
9 some shape-shifting since I first proposed it and instead
10 of debating the unarguable existence in Australian law of
11 public elements or aspects of directors' duties, here
12 I concentrate on what I hope is a more trenchant question,
13 that is, what does it mean to say that directors' duties
14 have a public quality? And in doing so I concentrate on
15 two core issues which are up on the slide there. What is
16 the nature and effect of the public character in
17 directors' duties, and secondly, to whom do directors owe
18 their duties in this public character?
19
20 I would like to start with thinking about what it
21 means to say that something might be public. There are a
22 variety of responses to the very idea that it is useful to
23 reason about the categories of public and private.
24 Karl Llewellyn and the realists attack the distinction as
25 legally unsophisticated to draw attention to the widespread
26 perception that so-called private institutions were
27 acquiring the coercive power that had previously only been
28 in the hands of government. Christopher Stone - not
29 Julius Stone - writing about corporations is more realistic
30 about the unstable nature of the distinction and sees it as
31 a barometer of how social choices about rules change the
32 autonomy of decision makers over time.
33
34 My argument is that the lines between public and
35 private, always very changeable and back and forth, have
36 created hybrid directors' duties and that it is important
37 to understand the public side as well as we understand the
38 private.
39
40 The distinction between public and private is
41 open-textured, but the general trend in processes and
42 sometimes in substantive standards is for traditionally
43 private bodies, even business corporations, to bear the
44 obligations once associated almost exclusively with
45 governments.
46
47 While public values manifest differently, the overall

1 effect is to diminish an entity's internal decision-making
2 independence and to narrow the space in which an actor can
3 be arbitrary, capricious and prejudiced. Instead of the
4 non-interventionist approach explicit in the internal
5 management rule of companies, directors and boards find
6 themselves required to consider wider interests or
7 community standards than those recognised by traditional
8 private duties.
9
10 Critics of this imperialism of the public sphere, such
11 as Professor Hilmer, say that rather than encouraging
12 performance this imposes conformance, stifling to
13 management decision making and damaging to companies. Like
14 Llewellyn and the realists, those who support a greater
15 influence of public values see those as a way to temper
16 power and to protect the interests of those whom private
17 power affects.
18
19 What might be the signposts of this publicness? The
20 first one I think that is relevant to our argument here is
21 that when government steps into a traditionally private law
22 domain, it often concentrates on increasing accountability
23 and responsibility of decision makers and often does that
24 through improvements or changes to enforcement.
25
26 The empowerment and funding of a regulator to
27 supervise, detect, investigate and take action against
28 deficient decision makers is the kind of thing I have in
29 mind, so a first sign or value of the conception of
30 publicness is a consequent increase in accountability and
31 responsibility of decision makers, in this case directors.
32
33 A second sign of publicness is a greater opportunity
34 for those affected by the resolutions or determinations of
35 decision makers to participate in and have their interests
36 considered in the process of decision making. This may be
37 through greater disclosure to them, it may be through an
38 opportunity to put forward their interest and the
39 consequences for them of the options before the
40 decision maker.
41
42 Publicness may be conceived of, therefore, as taking
43 account of the interests of others affected by a decision
44 and an example of this is the requirement of directors to
45 consider the interests of creditors in board decisions in
46 certain circumstances, although people might suggest that
47 that is a rather tame version of the kind of voice of

1 interested participants that are seen in other
2 circumstances.
3
4 Wider purposes and scope of the benefit to be weighed
5 in the exercise of a power by a decision maker is a third
6 marker of publicness. This is the idea where we encounter
7 the idea of public harm and parallel public duty. If we
8 consider the careless management of companies to be a
9 public harm, then the legislature may impose a public duty
10 to mitigate the occurrence of the harm and it is arguable
11 that purposes of section 180 are directed in that way.
12
13 In this way regulation adopts wider purposes and
14 distributes to a wider group of beneficiaries the goods of
15 publicly mandated processes and standards of conduct. With
16 a public duty the fact that the regulated conduct may harm
17 particular individuals is of secondary, if any, importance
18 and private loss and damage to an individual or entity need
19 not be shown to establish liability. Of course, the same
20 facts which enliven a breach of public duty may also
21 establish a private right of action.
22
23 There are many emblems in the public domain, but a
24 fourth and the last considered here is a more demanding
25 requirement of reasonableness and rationality. One of the
26 changes to section 180, particulary in the CLERP reforms
27 enacted in 1999, was from a subjective standard of
28 directors' conduct to one to be judged objectively, taking
29 account of accepted practice of the kind of company and the
30 responsibilities of the person in question.
31
32 Rationality in director decision making is evidenced
33 in procedural requirements in decision making. These
34 involve appropriate information seeking and other steps to
35 develop a belief in the interests of the company that only
36 a reasonable person in their position could hold about the
37 subject matter of their decision.
38
39 This greater procedural rationality, as Whincop and
40 Keyes argued 20 years ago, draws implicitly from public law
41 norms and concepts and this is in contrast with the
42 relative freedom of action accorded by the principles
43 permitting director autonomy in internal management.
44
45 Now I am going to proceed to what is basically part 3
46 of that schema up there for the rest of my talk and to look
47 at some areas in which I think directors' duties have

1 evolved towards some of these conceptions of publicness.
2
3 In his observations about moral revolutions Appiah
4 also says that arguments against each of the practices that
5 changed were well known and clearly made a good deal before
6 the moral revolution occurred. It wasn't that people were
7 bowled over by new moral arguments. I think it would be
8 clear from the rest of what I have to say that publicness
9 in Australian directors' duties is not recent.
10
11 Let's start with public enforcement.
12 Public enforcement of directors' duties, including the duty
13 of care, began early in Australia and as Langford, Ramsay
14 and Welsh point out, public enforcement of this duty began
15 with the introduction of an offence in 1958 providing for
16 prosecution of a duty which in its original form had
17 entered the statutory law in 1896.
18
19 Justice Nettle observes it was from 1958 that
20 directors' duties were thought of and enforced as part of
21 the public law and not just part of the private
22 obligations.
23
24 Public prosecution of directors' duties, though since
25 1999 not of the duty of care, continues today. The
26 introduction in 1993 of ASIC powers for civil enforcement
27 of directors' duties, including the duty of care, is the
28 most obvious and unique feature of the evolving publicness
29 of Australian directors' duties.
30
31 In the comparable jurisdictions of the US and the UK
32 while directors' duties are prosecuted, there are fewer
33 avenues for public civil enforcement and these are
34 generally privately enforced. Empowerment of ASIC as a
35 plaintiff makes available public resources for civil
36 enforcement and this is particularly salient for the
37 statutory duty of care which is at the heart of company
38 management and absent a prosecution power.
39
40 In the ensuing 25 years, public enforcement of the
41 statutory duty of care has been an important influence on
42 Australian corporate governance.
43
44 There are important sanctions which accompany the
45 change to civil penalties. The public character of civil
46 regulatory enforcement of the statutory duty of care is
47 deepened by the nature of these civil sanctions that ASIC

1 may apply for. All of the directors' duties, including the
2 duty of care, are civil penalties. Civil penalty actions
3 may result in sanctions which are personal and share some
4 of the qualities of criminal sanctions. For example, the
5 making of a declaration of contravention shares aspects of
6 the public denunciation inherent in a finding of guilt in
7 criminal proceedings. It requires specification of the
8 person who contravened the provision and particulars of the
9 conduct constituting the contravention.
10
11 Likewise, a pecuniary penalty order shares aspects of
12 fines as criminal sanctions. While disqualification
13 consequent upon a finding of breach of a civil penalty
14 provision does not involve a custodial sentence, it is
15 considered penal in part. They share a purpose, in effect,
16 of protecting the public from further damage by removing
17 the liable director from the management of companies.
18
19 Further emphasising the public nature of civil penalty
20 enforcement against directors, only ASIC has standing to
21 apply for civil penalty orders consequent upon
22 a declaration of contravention.
23
24 In director disqualification it has been held that the
25 class of persons whom disqualification is to protect is
26 wider than shareholders and, at the very least, includes
27 creditors and potential creditors. Protection for the
28 public also includes consumers and individuals who deal
29 with a company, such as suppliers or employees. It is not
30 to be limited to the commercially unsophisticated nor
31 limited to public companies. The interest of protecting
32 the public should be paramount and outweighs the hardship
33 to the disqualified director. The more serious the
34 contravention, the longer the term of disqualification and
35 the greater the weight to be given to the risk of return to
36 old practices.
37
38 Now I would like to advance to talking about public
39 harms and the purposes of the public interest in protecting
40 individuals and other interests from those harms, and to do
41 so I am going to spend a minute tracing the pre-legislative
42 statements of parliaments in relation to the enactment of
43 earlier versions of section 180 and then very quickly go
44 through the statements of judicial officers and the ASIC
45 enforcement discretion, and then move on to think about the
46 statutory duty and its public features.
47

1 Since its original enactment in 1896, the directors'
2 statutory duty of care has addressed a potentially wide
3 public harm being the misuse of the corporate form. The
4 public purpose of responding to this public harm has
5 sharpened with the introduction of civil penalties and
6 accompanying statements in pre-enactment sources about the
7 wide public interest in better enforcement.
8
9 Both the 1896 and the subsequent 1958 versions of the
10 statutory duty of care were responses to corporate frauds.
11 In both cases, those supporting enactments thought
12 "something must be done to protect the public" and that
13 setting out clearly the principles to govern directors'
14 duties in the provisions would be "a deterrent to
15 misconduct by directors and officers", an inference being
16 that such deterrence would be for the benefit of the
17 public.
18
19 The 1958 text was re-enacted a number of times as
20 Australia tried to create a national system of company
21 registration. In 1992 two recommendations to amend the
22 statutory duty of care by a senate committee were amongst
23 those adopted by the government. One recommendation
24 enacted provided that the statutory duty of care should be
25 objective. The other was the introduction of the civil
26 penalty provisions.
27
28 In adopting the senate's recommendation for the
29 introduction of the civil penalty sanctions, the government
30 said, "the government's view is that the enforcement of
31 duties of directors is important because a breach of these
32 provisions could have adverse consequences for many
33 stakeholders, including shareholders, other directors,
34 creditors, employees and the general community."
35
36 With civil penalties in place, the issue of removing
37 criminal prosecution for breach of the duty of care
38 remained on the legislative agenda, and in 1999 criminal
39 penalties for a contravention of the duty of care were
40 finally removed and, in the same enactment, a business
41 judgment rule was introduced.
42
43 This express tour of the legislative history is to
44 point out the nature of the harms that section 180 is
45 intended to address and the remedial purposes of the
46 various enacting parliaments.
47

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1 That Australian directors' duties serve public
2 purposes which may address public harms has also been
3 observed by the courts, though this has been expressed in
4 differing ways. I am going to be very synoptic here
5 because "time's winged chariot is hurrying near".
6
7 Sometimes the public interest is found in the proper
8 management of companies. At other times, the courts have
9 found that the public interest in directors' compliance
10 with their duties is identified as a delivery of accurate
11 information to the market and the public. In other times,
12 a wider and more variegated version of the public interest
13 in the duties of directors is identified by the courts,
14 saying, "The role of a director is significant as their
15 actions may have a profound effect on the community, and
16 not just shareholders, employees and creditors." At other
17 times, the courts identify a public interest in the proper
18 enforcement of sanctions against errant directors,
19 primarily through the civil penalty provisions.
20
21 The law is also concerned with public protection more
22 widely, including of individuals that deal with companies
23 in a wide way, as many of these descriptions have already
24 captured. In *ASIC v Adler*, Santow J conducted
25 a wide-ranging review of the mix of public interests
26 involved in directors' duties, including those protected by
27 the civil penalty provisions.
28
29 ASIC's enforcement discretion also sets out the nature
30 of the interests it wishes to protect. For ASIC, a leading
31 consideration is the nature of the conduct and extent of
32 the harm or loss caused by the suspected breach and whether
33 it impacts on market integrity and the confidence of
34 investors and financial consumers. To ASIC, the amount of
35 money lost and the impact of that loss on the people
36 affected is very important in deciding what to do about
37 enforcement. Here, the interest is in a safe and orderly
38 market and in mitigating the human impact of large
39 financial losses on a wide range of participants.
40
41 This all contrasts sharply with the singularity of the
42 interest in private enforcement of directors' duties.
43
44 Now I am going to turn to the text of the directors'
45 statutory duty of care and make a few remarks about the
46 differences between it in its public version and its
47 private operation.

1
2 The statutory text of section 180 imposing a duty of
3 care on Australian directors contains elements and concepts
4 different to those in the general law duty. Judicial
5 interpretation of the text of the statutory duty has
6 identified how these elements and concepts differ from
7 those in the general law. The discussion of the public
8 character of directors' duties, and specifically the duty
9 of care, has been elevated since the Federal Court decision
10 in *ASIC v Cassimatis* in 2016. There, it was noted that:
11
12 *Private wrongdoing is relational. It*
13 *involves a breach of duty in relation to*
14 *another person...This principle of private*
15 *law does not apply to public duties.*
16 *A public duty to take care can often and*
17 *does arise without being in relation to*
18 *a person. There are few, if any, places in*
19 *the world where a person who drives at*
20 *200km per hour on a public road does not*
21 *seriously breach a legislated public duty.*
22
23 I am longing to know what sort of car Edelman J has,
24 because 200 kilometres an hour is very fast:
25
26 *If no person is damaged then no private*
27 *duty to a person is breached. But the*
28 *public duty is breached.*
29
30 Consideration of the text of section 180 reveals that the
31 duty of a director of an Australian corporation to exercise
32 their powers and discharge their duties with the degree of
33 care and diligence that a reasonable person would exercise
34 is open and general. The duty is nowhere expressed to be
35 in relation to any beneficiary or owed to any entity. In
36 particular, the text of the section does not expressly
37 state that the duty of care is owed to the company. Nor
38 does the statutory text restrict the powers to be exercised
39 and the duties to be discharged by directors to the private
40 kind derived from a corporate constitution. The text
41 leaves open and general the possibility, indeed, the modern
42 reality, that directors will be required to exercise powers
43 and discharge duties under general and statute law derived
44 otherwise than from the corporation. This, of course,
45 includes powers and duties other than that from the
46 Corporations Act. Many of these general powers and duties
47 will be public in nature and owed to the public or sections

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1 of it, such as employees of or investors in the
2 corporation.
3
4 Also distinctive about the text of section 180, though
5 by omission, is the absence of a requirement to show loss
6 to the corporation to constitute a breach of the public
7 duty when ASIC is the plaintiff. This was observed in
8 *Vrisakis v Australian Securities Commission* about
9 a predecessor to section 180, that unlike in private tort,
10 liability could be found without any damage having been
11 sustained. Rather, it is only necessary to show
12 a foreseeable likelihood of loss from the balance of the
13 risk of harm and potential benefit potentially arising from
14 a director's decision or action. Instead, the public duty
15 is argued to be a norm of conduct which may require
16 consideration of the public interest possibly separate from
17 the interests of the corporation.
18
19 The clearest examples are judgments of liability for
20 failure by directors to carefully and diligently monitor
21 arrangements for corporate compliance with statutory
22 provisions revealed by instances of corporate illegality.
23 The absence of a requirement to show loss in the text of
24 the civil penalty section is both a departure from the
25 private law elements of tort and, more significantly for
26 directors, a signpost suggesting a departure from the
27 relational private law setting where directors owe their
28 duty only to the company.
29
30 I will move on now to ask this blockbuster question,
31 to which I have a really tame response: to whom might the
32 public duty of care be owed?
33
34 If we are to conclude, as I think we must, that
35 section 180 is a public duty, then to whom is that public
36 duty owed? Private law directors' duties are owed to the
37 company and in Australian law, aside from the liberty to
38 consider the interests of creditors, only the shareholders'
39 interests are required to be considered.
40
41 This paper is about legal evolution and slow changes
42 in the legal system effected through the public sphere in
43 response to changes in community standards. There is no
44 need to see or predict a dramatic break from the current
45 legal position that directors' duties are owed to the
46 company both at general law and in relation to statutory
47 duties. There are, however, two theatres of contemporary

1 Australian corporate law from which it is credible to
2 suggest that changes will develop. The first is in changes
3 which may emerge from the increase in parties with standing
4 to sue for breach of statutory duties. The second is in
5 the ratification of statutory directors' duties or, to be
6 more precise, the possibilities that remain for general law
7 ratification of those duties which may alter the standard
8 of care that directors must discharge.
9
10 A public duty is owed to the world at large or, as put
11 in *Cassimatis*, "often does arise without being in relation
12 to a person" in any way nominated. Taking further
13 Edelman J's example of a breach of public duty in driving
14 at 200 kilometres an hour, does that mean that anyone in
15 the world catching a driver in the act can enforce such
16 a public duty? How would it play out if we followed this
17 logic of public duties to the full in relation to
18 section 180? A public duty may have normative but little
19 practical effect unless it is grounded in a right such as
20 standing. Unless it is accompanied by standing rights,
21 a public duty such as section 180 remains a duty of
22 imperfect obligation. Imperfect because, though a positive
23 norm of conduct, there is no legal means to compel it.
24
25 The section 180 duty when enforced by ASIC is
26 partially perfected and, importantly, wider and different
27 public interests are protected as well. When a company
28 applies for compensation for breach of section 180 the duty
29 is further perfected in a fashion and measure similar but
30 not identical to the general law. And the same is the case
31 where shareholders and others named as potential derivative
32 applicants successfully obtain leave to sue on section 180
33 for statutory compensation as derivative plaintiffs.
34
35 If a plaintiff is a person whose interests have been
36 or would be affected by conduct constituting
37 a contravention of the Corporations Act, including
38 section 180, then they may apply for an injunction.
39 Standing under section 1324 is generally given a broad and
40 remedial interpretation consistent with the objects of the
41 legislation in protecting the public in respect of the
42 commercial interests of corporations. Standing to apply
43 for injunctions responding to breaches of directors' duties
44 have been granted to shareholders and to creditors. There
45 are practical obstacles and controversial limits to this
46 remedy, but the cases indicate the court should consider
47 the public interest in curtailing contraventions in

deciding to grant an injunction.

For other potential plaintiffs the section 180 duty remains one of imperfect obligation. One way to vindicate section 180 as a public duty more widely is to assert that it implies a private right of action against a breaching director. Speaking practically, this would likely only occur when someone had suffered a loss or damage, though, legally, no proof of that is required. Speaking theoretically, this could perfect the directors' public duty by conferring on any individual or entity a right of action for breach of statutory duty.

Theoretical is, however, the state in which standing of those in the general public is likely to remain. In a recent review of the state of Australian authorities for implying a private right to sue for the tort of breach of statutory duty owed to the world at large, Foster concludes:

> *It is true to say that in recent years the action for breach of statutory duty has more often been denied than accepted in areas outside workplace safety...more recently the presumption now usually applied is the opposite one, at least where a penalty is prescribed by the statute: that the criminal penalty alone is deemed to be the main means of enforcement of the statutory right, unless there are good reasons...otherwise.*

Generally, the court finds that the implication of what parliament has enacted is that parliament intended to legislate for the protection of a class of persons which includes the claimant. One important piece of evidence tending to show that parliament intended such protection is that the legislation makes further and better provision for protection of an already recognised common law right.

As we have been discussing, standing to sue in common or general law is limited to the company or derivatively to shareholders and has never been available to the general public.

In short, since 1958, standing to enforce directors' duties has increased from solely the company to include the

1 Director of Public Prosecutions and a number of other
2 plaintiffs that we have mentioned. This experience of
3 60 years suggests the practical likelihood of the public
4 duty in section 180 bringing on a deluge of actions is
5 remote. However, it is also the case that over 60 years
6 the combination of statutory public duties and wider
7 standing rights have slowly transformed our understanding
8 of what is required of directors to include the public
9 interest and, in some circumstances, to consider the
10 interests of third parties as creditors. My guess is that
11 opportunities to be heard that this wider standing affords,
12 and the greater accountability and responsibility exacted
13 by public plaintiffs such as ASIC, will continue this slow
14 evolution of the interests to be considered and even the
15 recognition of new beneficiaries of the statutory duty in
16 the decisions of company directors.
17
18 Greater standing to vindicate a public duty is one
19 vector towards recognition of wider interests but says
20 nothing directly about to whom the duty is owed. The 1896
21 version of the statutory duty expressly provided that every
22 director shall be under an obligation to the company to use
23 reasonable care and prudence and did, in fact, replicate
24 the general law in having the duty expressly owed to the
25 company. This conclusion was confirmed by the accompanying
26 grant of standing to the company to seek compensation.
27 None of the subsequent versions of the statutory duty
28 replicated this express statement that the directors' duty
29 was owed to the company. However, all of them, alongside
30 a provision for an offence or civil penalties, include
31 a mechanism for the company to seek compensation. Given
32 this hybridity and that the directors' statutory duty has
33 not been expressed as owing to the company since 1910, can
34 we still say that the duty is owed to the company? I think
35 we must, though I think it is a point of departure and not
36 a destination.
37
38 The cases on ratification of breaches of the statutory
39 directors' duties by the shareholders in general meetings
40 show us how the evolution of the statutory public duty
41 might, over time, change our conception. One reason
42 ratification is provoking about the beneficiary of the
43 statutory duty of care is that it involves a direct
44 engagement between public and private interests. On one
45 hand, the review of pre-legislative materials and judicial
46 decisions shows a surprisingly wide roundup of interests
47 external to the company mentioned as relevant to, if not

1 the beneficiaries of, statutory directors' duties. On the
2 other hand, corporations law is strongly conceptualised as
3 involving private property, contractual rights and liberal
4 autonomy of action by directors in the private sphere.
5
6 The weight of authority on ratification of statutory
7 duty denies directors a release from the consequences of
8 breach of statutory conduct standards. Some decisions
9 indicate the types of interests the statutory duties seek
10 to protect and which cannot be derogated from by a vote of
11 the shareholders in general meeting.
12
13 Ratification of the statutory duty has been denied
14 when it would damage the rights of third parties
15 transacting with a company, in part because the duty
16 involves public rights. Ratifications also consider, and
17 still only as obiter, but in the High Court, whether
18 a resolution of the shareholders can alter - usually
19 diminish - the strictness of the statutory standards of
20 conduct required of directors. This is an even more
21 trenchant question for the distinction between the public
22 and the private law of companies and the question of to
23 whom directors owe their statutory duties. In *Carabelas*,
24 the liquidator on behalf of the company argued that any
25 appropriation of company property by a director would be in
26 breach of the statutory conduct standards of propriety.
27 Two justices of the High Court disagreed, saying:
28
29 *This proposition concerning "appropriation"*
30 *is too broad. It insufficiently allows for*
31 *the significance from case to case of the*
32 *commercial context, and assumes a standard*
33 *of conduct that is inflexible. The*
34 *starting point must be the general duty of*
35 *a director to act in the best interests of*
36 *the company. The best interests of the*
37 *company will depend on various factors*
38 *including solvency.*
39
40 Less emphatically, two other members of the court seem to
41 agree:
42
43 *In a particular case, their [the*
44 *shareholders'] acquiescence in a course of*
45 *conduct might affect the practical content*
46 *of those [directors'] duties. It might,*
47 *for example, be relevant to a question of*

1 *impropriety.*
2
3 Turning back now to the statutory duty of care, the
4 High Court's obiter view is also relevant to whether the
5 general meeting can prospectively alter the content of
6 statutory duties in relation to a transaction, especially
7 one involving parties external to the company. At general
8 law it is argued shareholders of a solvent company have
9 wide freedom to take honest but stupid business risks in
10 authorising or ratifying acts of directors provided the
11 acts are not fraudulent - Professor Harris's amiable
12 lunatic.
13
14 If shareholders can prospectively release directors to
15 act on the company's behalf in such a way, then, as one
16 commentator has put it, there is a risk that standards of
17 company management set by the legislature may be avoided by
18 the back door.
19
20 These matters point up the dance which continues
21 between the private law origins of corporate law and the
22 public interest of the state in standards for companies'
23 proper management. Sometimes, the public duty in
24 section 180 is treated as if it is the private law general
25 duty with additional standing and sanctions. At other
26 times it is described, and sometimes acted on, as a general
27 conduct standard intended to protect substantially wider
28 interests than only those of the company. It seems likely
29 that, incrementally, rules granting wider standing will
30 bring forward new constituencies and new types of claims to
31 be treated with care and diligence in competition with the
32 interests of shareholders. With a greater number of claims
33 it also seems plausible that over time the elements of the
34 public duty will develop interpretatively and diverge from
35 the private law version. Perhaps this development will
36 eventually incorporate other interests alongside the
37 company as the beneficiaries of the statutory directors'
38 duty of care, and it is in this characteristically common
39 law fashion that it is possible to imagine the evolution of
40 legal change to a duty of company directors owed more
41 widely than to their company: in short, a duty with a more
42 public character.
43
44 I think I might leave it there and thank you very
45 much.
46
47 THE HON JUSTICE M BEAZLEY: We have a few minutes for

1 questions. It is a very stimulating paper and in some ways
2 perhaps a little controversial, so your questions and
3 comments I'm sure will be appreciated.
4
5 Perhaps if I could just start off with this question:
6 really underlying your paper, I think, is a vote for the
7 regulatory model, if I can put it in those terms. Is that
8 correct? And if that is so, is the reverse side of the
9 publicness of Corporations Law, as you have put it,
10 a challenge to a stifling of corporate activity?
11
12 PROFESSOR KINGSFORD SMITH: Yes, as you can see, I am
13 sitting carefully on the fence here. There is a lot to be
14 said for Professor Hilmer's view of leaving autonomy and,
15 as Professor Harris has discussed, leaving the decision
16 about what the best interests of the company is to the
17 directors. If they are stewards of the company in the long
18 term, then they will be considering the kinds of interests
19 that the public duty of care has brought up to the surface.
20
21 However, the empirical fact of the matter is that
22 though companies do a lot of good, some of them do harm,
23 and, in fact, it seems from what we see from the Royal
24 Commission that some of our largest and most respected
25 companies do harm as well, and so we have, going back to
26 the Chief Justice's earlier remarks about balance, a need
27 to give directors, who know their company and their
28 company's business best, the room to make determinations
29 about how to promote the success of that company, but at
30 the same time to find some kind of legal mechanism or, as
31 Professor Harris suggests, extra-legal means, to bring the
32 legitimate public interest in a wider group of interests
33 into the board room and to have those interests weighed in
34 a proper way in directors' decision-making.
35
36 I think the change in insight and outlook from that
37 quote that I read from Catherine Livingstone is a very good
38 example of how the to and fro of public and private from
39 time to time brings into account different interests as you
40 deal, as a director, with the circumstances of the company
41 before you.
42
43 I have a great deal of respect, as my work with ASIC
44 would suggest, for the need to regulate. I think we have
45 to deal with the bad byproducts of good activity which most
46 companies provide. So I think there is no clear answer to
47 the question of how much public and how much private, but

1 we need to have both, and one of the things that I think
2 we, having been - most of us - trained in a private and
3 politically liberal mindset about how to think about
4 companies sometimes overlook is the quite developed public
5 aspect that is already in the Australian law of companies
6 and thinking about what the future is for that particular
7 component of thinking about companies.
8
9 THE HON JUSTICE M BEAZLEY: Would anyone like to make
10 a very quick comment on that? Pauline, thank you. We
11 might have to make that the only one.
12
13 MS WRIGHT: Does the trend towards short-term appointments
14 of directors in the interests of refreshment and keeping
15 a board new and fresh have an adverse impact on the ability
16 of the board to consider the long-term public interest of
17 its activities?
18
19 PROFESSOR KINGSFORD SMITH: Losing your institutional
20 memory is I think one of the things that short-term board
21 appointments can bring on, and one of the things about
22 regulatory interaction, of whatever sort, is that it is
23 hoped that companies learn from regulatory interaction and
24 take that back into the organisation - into training, into
25 recruitment, into the kinds of corporate purposes or the
26 way those corporate purposes are realised. If you have
27 short-term turnover, I think one of the things you lose is
28 the impact of those lessons that come from regulatory
29 interaction. And that regulatory interaction does not have
30 to be your own regulatory interaction, it can be watching
31 somebody who is a competitor get an enforceable
32 undertaking, for example, or civil penalty action being
33 taken against members of a board in a competitor company.
34 You can learn a lot, and we know that people do learn
35 a lot, from watching that happening. But too short
36 a period I think - you know, too long a period, of course,
37 people do not bring anything new to the corporation and the
38 corporation's circumstances can change. But I think
39 institutional memory is really important.
40
41 THE HON JUSTICE M BEAZLEY: Thank you. I think with that,
42 then, I would ask you to thank Professor Kingsford Smith in
43 the usual way.
44
45 DR AUSTIN: Ladies and gentlemen, it is now afternoon tea
46 time out in the foyer there. We will resume at 4 o'clock
47 sharp, please.

1
2 **SHORT ADJOURNMENT**
3
4 DR AUSTIN: Ladies and gentlemen, can I call the meeting
5 to order again. I will ask Mr Justice Gleeson of the Court
6 of Appeal and of the Corporations List to chair this
7 session with Shannon Finch.
8
9 THE HON JUSTICE F GLEESON: Thank you, Bob. Welcome back
10 to our third session of today's conference. I trust you
11 enjoyed the opportunity to speak with your colleagues.
12
13 Our speaker this afternoon, Shannon Finch, will be
14 directing us on two related and highly topical issues
15 which the Chief Justice mentioned earlier this afternoon.
16 One concerns proposals to regulate corporate culture and
17 the particular focus of Shannon's presentation will be
18 draft proposed Principle 3 of the ASX Corporate Governance
19 Principles. The other is the other obviously highly
20 topical issue, particularly arising out of the
21 Banking Royal Commission Interim Recommendations, what type
22 of enforcement strategies adopted by regulators might
23 impact governance and culture.
24
25 Shannon's background and experience is detailed in the
26 brochure in your conference booklet. She is a senior
27 partner in the mergers and acquisition teams of King & Wood
28 Mallesons and she is the national chair of the corporations
29 committee of the business law section of the Law Council of
30 Australia. She has a wealth of practical experience on the
31 topic and I expect you will find her presentation
32 informative, balanced and insightful. Welcome Shannon.
33
34 MS FINCH: As some of you who know me well may know, I am
35 a passionate fan of Bell Shakespeare and as I was gathering
36 my thoughts for this paper I had attended the opening night
37 of 'Julius Caesar'. It may have shaped my views. Today
38 perhaps I fear I come to bury Caesar, not to praise him,
39 but it does seem to me that there is some balance to be
40 brought to current discussions about our key corporate
41 regulators and their proper roles, including their role in
42 relation to matters of corporate governance.
43
44 It must be an interesting time to be a regulator.
45 They have been under intense review and scrutiny over the
46 past fives years, whether directly or indirectly, and in
47 saying that it's not to suggest that this scrutiny or

1 reflection only commenced with the 2013 Senate inquiry into
2 the performance of the Australian Securities and
3 Investments Commission. Simply, that it must seem to have
4 been unrelenting in one form or another since that time,
5 but it has been a valuable and timely period of reflection.
6
7 The Senate's inquiry into ASIC's performance was
8 undertaken in close proximity to the financial system
9 inquiry which in turn reflected on the earlier work of the
10 Wallis inquiry and the Campbell inquiry and was followed by
11 the ASIC Enforcement Review and a contemporaneous House of
12 Representatives review into the four major banks. Then
13 most recently of course the Royal Commission and its
14 Interim Report combined with the release of APRA's report
15 into CBA, its prudential inquiry final report.
16
17 In the midst of all of this activity important reforms
18 have been proposed and are in the course of being
19 implemented, reforms to introduce design and distribution
20 obligations and product intervention powers for ASIC, the
21 introduction of the Banking Executive Accountability
22 Regime, tellingly known as the BEAR reforms, substantial
23 reforms to corporate penalties and sanctions following the
24 ASIC Enforcement Review, and of course revisions to the
25 corporate governance principles and recommendations of the
26 ASX Corporate Governance Council proposed for its fourth
27 edition.
28
29 Out of those various inquiries, reviews and reports
30 emerged some consistent and not terribly surprising themes.
31 Firstly, that for law to be effective it must be seen to be
32 enforced, that enforcement is not simply about consequences
33 for the entity or person who has contravened the law, but
34 an important deterrent and motivator of corporate conduct
35 and that enforcement will not be an effective deterrent if
36 the sanctions are not meaningful. These are not new
37 observations but their examination has raised questions as
38 to whether our various regulators have been doing enough of
39 the right kind of things in the right way.
40
41 Further themes have emerged that have really
42 captivated the legal community this year, that where
43 sanctions have not been meaningful and where regulators may
44 have been too comfortable with or close to the entities
45 that they regulate, compliance with the law or lack thereof
46 may be treated as a cost of doing business; sometimes,
47 controversially, the relevance or otherwise from a

1 regulatory or governance perspective of the social licence
2 and values or culture of regulated entities; and finally,
3 the roles of core corporate regulators that appear to be
4 shifting and changing, including an expanded role for APRA,
5 suites of new powers and increased sanctions at the
6 fingertips of ASIC, but a looming threat perhaps to the
7 scope of ASIC's remit.
8
9 These themes have offered too generous a supply of
10 material, so for today's purposes I propose to explore only
11 a couple of aspects in particular.
12
13 Firstly, regulating culture. To reflect on the
14 proposal to incorporate social licence and cultural issues
15 in the draft governance principles in light of the
16 APRA report and the Royal Commission's Interim Report and
17 the effectiveness of different regulatory strategies for
18 engaging on culture, and secondly, to consider the comments
19 in the Interim Report on enforcement strategies by
20 regulators and the way that this may impact governance and
21 compliance.
22
23 To turn first to the social licence and the regulation
24 of culture, in 2016 the then Chairman of ASIC waxed lyrical
25 on a few occasions on the importance of corporate culture
26 and companies' awareness of their need for a social licence
27 to operate to maintain the trust and confidence of the
28 community over and above their legal licence.
29 Greg Medcraft was careful, however, to emphasise that ASIC
30 was examining culture to identify early warning signs of
31 misconduct, not seeking to regulate culture.
32
33 There was an echo of this concept of the social
34 licence in the articulated focus of the Royal Commission,
35 being not only on conduct that had breached the law but
36 also on conduct that had fallen below community
37 expectations and standards. It was initially unclear
38 whether this suggested that the Royal Commission would seek
39 to hold financial institutions to community standards that
40 went beyond the black letter law.
41
42 Against this backdrop and amidst the media frenzy that
43 surrounds each day's commentary of case studies being
44 examined by the Royal Commission, there were two
45 fascinating developments: the release of the APRA report
46 on 1 May and the release of the consultation draft of the
47 revised corporate governance principles by the

1 ASX Corporate Governance Council on 2 May. Each of these
2 connected cultural factors with governance and
3 accountability.
4
5 The APRA report highlighted concerns with culture in a
6 number of respects. A certain complacency and
7 overconfidence buoyed by financial success, a reactive
8 attitude to risks, particularly non-financial risks, and a
9 slow and legalistic and at times dismissive culture in
10 dealings with regulators, insularity, a failure to listen
11 to external voices and community expectations of fair
12 treatment and a degree of collegiality and trust in the
13 good intent of peers that impeded accountability and
14 healthy challenge within the organisation.
15
16 The APRA report made a range of recommendations to
17 strengthen governance, accountability and culture which
18 included cultivation of a DNA deep culture of asking
19 "Should we?" rather than "Can we?" in its dealings with
20 customers. The APRA report did, in effect, touch on social
21 licence issues, but it connected them strongly with
22 traditional governance obligations and compliance with law.
23
24 At the risk of leaping ahead to my next theme,
25 I believe the APRA report is an interesting demonstration
26 of how a regulator can have a profound effect on the
27 conduct of those who believe themselves to be good or at
28 the very least well intentioned actors without resorting to
29 prosecution. This report did not purport to be a set of
30 guidelines for all companies, yet it contained simple
31 messages that appear to have resonated strongly with
32 boards. It has been discussed and debated in boardrooms
33 within and far beyond the financial sector, often with
34 boards asking "What can we learn from this?"
35
36 Part of the value of the report, in my opinion, is
37 that it examines cultural factors as they connect with
38 governance and compliance issues in the specific context of
39 a large and complex business and it acknowledges both
40 strengths and weaknesses. As a result, it provides
41 flashpoints of recognition for other entities.
42
43 The release of the consultation draft of the corporate
44 governance principles at around the same time provided an
45 interesting contrast to the APRA report. It too was a
46 thoughtful document that sought to engage with the links
47 between culture and governance. It too was released

1 against a backdrop of stories from the Royal Commission
2 that were highlighting cultural governance and compliance
3 concerns.
4
5 Amongst a range of other changes, the draft proposed
6 that Principle 3, currently to act responsibly and
7 ethically, be substantially revised as follows:
8
9 *to instill and continually reinforce a*
10 *culture across the organisation of acting*
11 *lawfully, ethically and in a socially*
12 *responsible manner.*
13
14 This principle was then voiced in a number of
15 recommendations. Listed entities must report the extent to
16 which they have chosen to follow recommendations on an
17 "if not, why not" basis. As members of the ASX Corporate
18 Governance Council are at pains to point out, it is not a
19 binding code other than in a few respects for larger listed
20 entities.
21
22 The additions to the recommendations included that the
23 entities should articulate and disclose its core values and
24 there's also a suggestion, which entities need not strictly
25 respond to, that this could be included in its code of
26 conduct and that this should include a requirement not to
27 act in an unethically or socially irresponsible manner.
28
29 Further, that there should be reporting to the board
30 on material breaches of the code of conduct, presumably
31 including core values, by directors or senior executives,
32 and any other material breaches of the code that called
33 into question the culture of the organisation. Then
34 followed on that whistleblowing regimes should encourage
35 reporting of concerns that the entity is not acting
36 lawfully, ethically or in a socially responsible manner and
37 that the board should be informed of material concerns
38 raised under whistleblowing policies that called into
39 question the culture of the organisation.
40
41 Many submissions acknowledge the importance of values
42 and the culture of organisations. However, this
43 formulation of Principle 3 and its recommendations
44 encountered significant resistance from the industry and
45 the legal community and objections included comments to the
46 effect that it went beyond the obligations of the black
47 letter law to act in the best interests of the company and

1 comply with the law, that it could expand the scope for
2 potential liability for companies and their directors, and
3 that the recommendations, while not binding per se, operate
4 as a soft code that has the potential to creep into
5 hard law.
6
7 The concepts of values, culture and more particularly
8 acting in a socially responsible manner were nebulous and
9 problematic and that finally it represents an attempt to
10 regulate culture, which is not the proper role of
11 regulators.
12
13 The final fourth edition is expected to be released in
14 the near future and there has been speculation that some
15 aspects of these recommendations may be reconsidered in
16 light of the heat of the debate.
17
18 I have found the vehemence of some of the reactions to
19 the proposed Principle 3 and its recommendations curious
20 when contrasted to the reaction to the APRA report. It
21 struck me that the APRA report could be said, without any
22 great stretch of the imagination, to be seeking to
23 influence and engage on matters of culture and values more
24 directly, effectively regulating culture.
25
26 APRA provided a simple but effective answer as to why
27 a prudential regulator commissioned the report in the first
28 place and why these matters fall within its remit. Culture
29 governance and accountability go to risk and that is
30 fundamental to stability. Nonetheless, the commissioning
31 and publication of a report of this kind was a new approach
32 for APRA.
33
34 Perhaps the difference in the reactions to these two
35 documents lies in part in the way that people respond to
36 and derive significance from them, in particular, the way
37 they respond to specific narratives and storytelling. The
38 governance principles necessarily are expressed at a
39 general level and it is acknowledged that governance
40 practices can be adapted to different organisations in
41 light of their scale and complexity.
42
43 However, while they are not a code they do purport to
44 articulate a contemporary view of appropriate corporate
45 government standards and reflect the reasonable
46 expectations of investors and that suggests they have the
47 potential to influence interpretation of directors' duties

1 and could expand those duties. That may also go some way
2 to explaining the reaction.
3
4 The APRA report is obviously a very different kind of
5 document. It grounds the specific cultural issues that it
6 identified in compliance, oversight and accountability
7 outcomes and matters that have had a demonstrated relevance
8 to the existing law and to shareholder value. It
9 acknowledges strengths but it explains how weaknesses have
10 arisen from those strengths and in that way it is vivid and
11 it is relatable.
12
13 There may be some scientific backing to the difference
14 in the reaction. The APRA report has both a sense of
15 immediacy and salience. It was produced swiftly, it is
16 contemporary to events and its observations are compelling.
17 When I was reflecting on this it struck a chord with an
18 early piece of work by behavioural scientists
19 Professors Cass Sunstein, Christine Jolls and
20 Richard Thaler. Richard Thaler, as you might recall, won
21 the Nobel Prize for Economics last year for his work in the
22 field.
23
24 They have examined the way that laws influence the
25 behaviour of individuals and in particular the way that an
26 individual's behaviour will be likely not to conform to
27 economically rational behaviour. I am about to
28 dramatically oversimplify, so for anyone who is a devotee
29 of this subject you're about to be annoyed.
30
31 Part of the gist of their thesis relates to the
32 availability heuristic which they say seems to shape
33 regulation. That is, troubling conduct that is both
34 salient - so it is vivid, it is noticeable - and recent
35 influences perceptions of the probability that it is going
36 to happen again, and therefore the importance of addressing
37 it. It is more likely as a result to provoke both a
38 community reaction and a regulatory reaction, but it also
39 means that this heuristic can be used by regulators to
40 influence people's behaviour.
41
42 Could that help to explain why the APRA report has had
43 such an influence beyond the entity that it related to?
44 Perhaps there is a powerful lesson here as to how culture
45 can in fact be shaped.
46
47 The later work of Professors Thaler and Sunstein is in

1 their acclaimed and very accessible, I might add, work
2 "Nudge", and it highlights some of the successes of public
3 disclosure and transparency by regulators in motivating
4 improved behaviour on the part of regulated entities even
5 if consumers themselves do not always read it. And that
6 was sort of an "Aha!" moment for me because we have all
7 seen the comments from regulators that disclosure
8 regulation is failing us, it's not working, but perhaps
9 Sunstein and Thaler have pointed to a role where disclosure
10 may still have an important influence.
11
12 Both the APRA report and the draft governance
13 principles could be said to have pre-empted matters that
14 were within the remit of the Royal Commission. After all,
15 the Royal Commission had specifically inquired into conduct
16 that fell below community expectations. To my mind the
17 Interim Report grounds matters of social licence and
18 cultural concerns again firmly within compliance with the
19 law, often in a failure to meet a standard of honestly,
20 efficiently and fairly that is required of legally licensed
21 entities and failures in oversight.
22
23 The Commission's observations regarding the role of
24 regulators do not suggest to me that it believes that
25 regulators need more powers to regulate culture. Rather,
26 it asserts that they should have responded more firmly to
27 breach reports and should have made more use of traditional
28 forms of enforcement.
29
30 The Interim Report may as a result have quieted some
31 initial concerns that the Royal Commission will call for
32 the law on directors' duties to be dramatically rewritten
33 and we will wait to see what emerges from the ASX Corporate
34 Governance Council in their fourth edition of governance
35 principles. However, in the meantime we should not forget
36 the powerful *nudge* that came from the APRA report and the
37 impact that it has had. Regulating culture by any other
38 name.
39
40 Which brings me around to my second theme which is
41 examining the role of the regulators and some of the
42 critique by the Royal Commission in its Interim Report and
43 the impact that this could have on the way that regulators
44 interact with regulated entities and vice versa.
45
46 The Interim Report seeks submissions as to whether
47 ASIC and APRA, in particular, need greater powers and

1 whether their enforcement strategies are effective.
2 However, the Commission's interim views with respect to
3 ASIC in particular do tend to leap off the page. The
4 Interim Report suggested ASIC has responded to misconduct
5 in the banking sector by focussing on infringement notices
6 made on a no-admissions basis and negotiated enforceable
7 undertakings which set relatively low financial payments.
8
9 It also suggests that ASIC does have a track record of
10 successful prosecutions but notes that on closer scrutiny
11 these reveal an apparent emphasis on prosecutions in the
12 small business compliance and deterrence team, in many
13 cases prosecuting strict liability offences, and it also
14 suggests that ASIC has a risk averse approach to
15 litigation. Those observations no doubt all have some
16 validity to them.
17
18 The Royal Commission does recognise that ASIC will be
19 delivered an additional suite of powers and that
20 Corporations Act contraventions will carry significantly
21 increased sanctions, a broader ability to seek civil
22 penalties and infringement notices under the
23 Enforcement Review bill and further powers under the
24 Product Design and Intervention reforms.
25
26 However, it remains highly critical of ASIC's attitude
27 to enforcement and appears to advocate for more of a
28 "litigate first, negotiate later" approach. The temptation
29 to say they were recommending a little less conversation, a
30 little more action was quite powerful, although it may be
31 some form of heresy to introduce Elvis when I started with
32 Shakespeare.
33
34 It gives the example - presumably intended as a
35 favourable comparison - of the ACCC conducting unsuccessful
36 litigation in order to demonstrate that regulatory reform
37 was needed, but how does all that stack up against theories
38 of effective regulation?
39
40 The Interim Report makes reference to the enforcement
41 pyramid from the work done on responsive regulation by
42 Professors John Braithwaite and Ian Ayres and that pyramid
43 is often presented, particularly in a corporate law
44 context, in a relatively simple form drawn from their 1992
45 work, with regulatory responses starting at the base of the
46 pyramid with persuasion, and perhaps education, escalating
47 to warning letters, then to civil penalties, then to

1 criminal penalties, then to licence suspension and
2 ultimately, licence revocation.
3
4 They indicate that the vast majority of enforcement
5 activity should be concentrated in the lower three levels
6 of the pyramid, so that's down with persuasion, education,
7 perhaps warning letters as a form of deterrence and then
8 perhaps progressing to civil penalties.
9
10 More recent versions of the enforcement pyramid show
11 the now familiar tiers of regulatory responses with some
12 variations, noting that some tiers are suited to different
13 categories of actors. Activities around education and
14 persuasion are helpful, for instance, where people may be
15 compliant and you wish to engage and stimulate responses or
16 changes in direction, they're helpful where people may be
17 confused and they remain helpful even when people are
18 perhaps careless, so perhaps well intentioned but dropping
19 the ball occasionally.
20
21 On later versions of the pyramid this still remains
22 within the remit of education, persuasion and then drifting
23 towards subtle acts of deterrence. As conduct becomes a
24 little more reckless then sanctions should increase. So
25 for people who are inclined to gamble, to take chances with
26 compliance, at that point you move towards increased
27 sanctions, stricter forms of enforcement and you reserve
28 the full force of the law and prosecutions for truly
29 criminal behaviour. The idea is that you start at the
30 lower levels of the pyramid, signalling an intention to
31 move up if there is not compliance, but you only move up if
32 compliance is not procured.
33
34 There have also been more recent versions of the
35 pyramid that refer also to complementary pyramids of
36 support, so while you have escalating forms of sanctions,
37 you also have escalating forms of recognition and benefit
38 coming to those people who demonstrate compliance. At the
39 upper reaches you may in fact have champions of compliance
40 where you recognise and reward good behaviour. Braithwaite
41 now indicates that it is the combination of the two that is
42 more effective.
43
44 The Interim Report accurately observes that the
45 Braithwaite thesis is that enforcement strategies should
46 start at the lower level of the pyramid and escalate from
47 there, but it rapidly goes on to observe that ASIC should

be more inclined to pursue litigation and negotiate with regulated entities in the context of that litigation. It cautions that a regulator speaking softly will rarely be effective unless the regulator carries a big stick.

It suggests that persuasion cannot be the starting point for a conduct regulator, that ASIC must always ask why would it not be in the public interest to bring proceedings to penalise the breach? Hasn't that turned Braithwaite's pyramid on its head or at least sideways?

Surely the course that ASIC has pursued is consistent with the Braithwaite model even though it may be criticised for setting financial payments at too low a level. Is there not a valid case to be made that court enforced undertakings with outcomes made publicly known are not capable of being highly effective regulatory tools if they are set at levels that are perceived to properly reflect the severity of the contravention?

It is also interesting that examples of the Braithwaite pyramids of enforcement and support drawn from other industries include in their pyramid a stage between education and persuasion and sanctions to deter an additional layer, which is shaming for inaction.
We typically refer to the famous quote from the former Supreme Court Justice Louis Brandeis - I should say US Supreme Court, given my location - that "Sunlight is the best disinfectant". We traditionally refer to that in the context of disclosure regulation, but perhaps it is also apt in this context. The impact of the APRA report on not only its subject but also on other companies across the market, is a case in point.

That brings me back to behavioural science. In addition to the availability heuristic, which is the effect of vivid recent examples on the assessment of significance of a risk and the need to respond, Professors Sunstein, Jolls and Thaler identified other behavioural biases and heuristics. One was that perceptions of fairness powerfully influence the way that people respond, but they are impacted by self-interest and in particular people tend to be concerned for others and they are inclined to be cooperative in the interests of fairness sometimes, to the astonishment of economists, against their own material self-interest.

1 Conversely, they may act spitefully even against their
2 own self interest where there is perceived unfairness. In
3 addition, over-optimism affects both perceptions of
4 relativities of conduct and individual responses to
5 regulation. People tend to be overly-optimistic about
6 their own standards of behaviour relative to others. In
7 effect, they tend to believe that they are good actors.
8 They believe that their own risk of a negative outcome is
9 lower than other people's.
10
11 Hindsight bias has a striking effect on the assessment
12 of past conduct, namely, that the outcomes of actions that
13 would have been fundamentally uncertain or unpredictable at
14 the time look far more predictable after the outcomes are
15 known. Finally, hyperbolic discounting is the tendency of
16 people - other than economists and perhaps lawyers - to
17 discount costs or consequences that occur over time at an
18 inconsistent rate. As a result, this means impatience for
19 near term rewards tends to be very high, aversion to
20 immediate sanctions tends to be very high. However, this
21 sharply declines the further out those rewards or sanctions
22 may apply.
23
24 For some time many regulators across the world,
25 including ASIC, have acknowledged the importance of
26 behavioural science to understanding how consumers and
27 investors make decisions and also to understanding how to
28 procure better compliance by companies.
29
30 In Nudge, the later work by Professors Thaler and
31 Sunstein, there are observations in that context which
32 relate, amongst other things, to conduct in the financial
33 sector. Their work continues to be influential in
34 regulatory design, particularly where there is a need to
35 change people's minds or their behaviour or both.
36
37 Behavioural science tends to suggest that increasing
38 the size of the big stick that regulators carry does not
39 always have a corresponding influence on behaviour. For
40 instance, people who are genuinely well intentioned, albeit
41 perhaps not effective, will tend to see themselves as good
42 actors so they can't imagine that the stick would actually
43 be applied to them. People who are not well intentioned
44 may either be delusional about their compliance or overly
45 optimistic that they will be able to avoid detection.
46
47 Moving straight to litigation more often by itself may

1 not necessarily be effective to persuade the mainstream
2 business community that their conduct or their attitudes
3 need to change. They may think that other people's conduct
4 and attitudes need to change, but they think their own is
5 actually okay, for the most part.
6
7 In addition, while increasing applicable penalties is
8 very important so that there is an appropriate sanction
9 available in the worst of circumstances, if those penalties
10 can only be obtained through traditional litigation, then
11 the delay in securing an outcome may cause the regulated
12 community to discount the effect of it as a deterrent and
13 reduce the impact of it on the community as a vivid and
14 proximate response. It does not take advantage of the
15 availability heuristic.
16
17 Now, if Braithwaite's model is valid, then responsive
18 regulation can justify dialogue with the regulated
19 community and seeking to secure their cooperation before
20 escalating to more severe sanctions. If examples of
21 regulatory responses are heavily weighted towards
22 litigation and formal sanctions, then will that, in fact,
23 deter cooperation that is valuable for enforcement
24 outcomes?
25
26 If there is not perceived proportionality in
27 regulatory responses and applicable sanctions, both for
28 wilful and serious misconduct but also for lower-order
29 regulatory compliance failures, then that can impact on
30 perceived fairness which behavioural science suggests will
31 impact on willingness to cooperate in those lower-order
32 cases?
33
34 In addition, if laws are so torturous, or so broad and
35 uncertain, that perfect compliance is virtually impossible
36 or seems meaningless, does that not also have an impact on
37 perceived fairness?
38
39 Understandably, ASIC has responded to the anticipated
40 and received criticism. It has announced a greater
41 emphasis on civil and criminal litigation, it has appointed
42 an experienced senior counsel as its deputy chairman, it
43 proposes to put supervisors into major banks and use public
44 denunciation of the banks to drive change, and it has
45 secured increased funding for these purposes.
46
47 However, I would urge that these responses be tempered

1 and applied with proportionality and an appreciation of the
2 way that human behaviour can be shaped. Our goal is not
3 simply to see more prosecutions; it is to drive change in
4 human behaviour.
5
6 ASIC has also demonstrated many strengths as
7 a regulator. For instance, it has been effective in
8 improving standards and conduct in the securities markets;
9 it has followed a process of well-publicised scrutiny and
10 information gathering, followed by publication of reports
11 and detailed guidance that shines a light on problematic
12 conduct, with a warning of enforcement following
13 publication of the report, and this has guided and shaped
14 changes in behaviours and market practices in a way that
15 has been effective. It has engaged in well-promoted public
16 education programs and, anecdotally, these appear to be
17 accessible and helpful.
18
19 There is something to be said for recognising our
20 regulator's strengths. While regulators must face candid
21 scrutiny to build trust and confidence in our regulatory
22 frameworks, it must also be balanced scrutiny. Regulators
23 are required to make judgment calls and exercise
24 discretions. They play a significant role in permitting
25 flexibility that supports innovation and the reduction of
26 red tape.
27
28 Regulators must also be conscious that they are funded
29 by public money and that regulatory intervention imposes
30 costs on companies that can impact, ultimately, those
31 companies' shareholders. They have to choose their
32 battles, try out some strategies, take some risks, and we
33 should want them to do that. Sometimes those choices will
34 not work out as they had hoped. Those actions all get
35 judged with hindsight and regulators can fall victim to
36 hindsight bias as much as anyone else.
37
38 In my view, it is important for trust and confidence
39 in and effectiveness of our regulatory systems and our
40 regulators that they both act fairly and are treated
41 fairly.
42
43 Now, it is worth bearing in mind that the Royal
44 Commission is an inquiry into misconduct and, as part of
45 that, it is examining where there may have been failings in
46 the regulatory systems or on the part of regulators that
47 have contributed. It has not been tasked with providing

1 affirmation or support for the good work that companies or
2 regulators do. We should not be expecting it to be
3 a pyramid of support.
4
5 It has not been asked to examine the strategies that
6 regulators employ that have, in fact, improved corporate
7 conduct or improved the standard of communication to
8 consumers and investors or increased public access to
9 educative information. Its job is to highlight the
10 failings. That does not mean that those engaging in the
11 debate over "what next" should lose sight of the ultimate
12 goal of improving outcomes.
13
14 We should not overemphasise regulatory strategies or
15 regulatory structures that deter the regulated community
16 from coming forward and seeking help and receiving
17 education and support. We want boards to supervise
18 actively and constructively. We want executives to
19 escalate concerns as they identify them for the abundance
20 of caution and not look for reasons why they do not have
21 to. We want them to exercise judgment and to be recognised
22 for identifying and dealing with problems well and to
23 expect that they will be treated fairly when they do so.
24
25 There is no question that maximum Corporations Act
26 penalties needed to be increased to be meaningful.
27 However, there should not be a presumption that the maximum
28 penalty should always be pursued, nor that complex cases
29 that turn on technicalities are necessarily the right cases
30 to pursue.
31
32 While the deterrence effect of the law suffers if
33 enforcement of serious breaches is not seen to be pursued,
34 there is also harm done if proceedings are pursued and
35 penalties are imposed where the conduct is not perceived to
36 be sufficiently culpable. If regulators take highly
37 technical or pedantic interpretations of ambiguous laws, if
38 they refuse to give guidance or if they engage in ambush
39 litigation, there is as much risk that the law will be
40 disregarded if it is seen to be unfair or impossible to
41 comply with or if regulators take unreasonable positions as
42 if it is not seen to be enforced in instances of serious
43 breach.
44
45 None of this is to attempt to shift responsibility for
46 the conduct highlighted to date in the Royal Commission or
47 to suggest what the response should be. Far from it.

1 Rather, it is to acknowledge that regulatory discretion,
2 engagement and judgment is important and that sanctions are
3 not the only solution. Sometimes, the nudge may achieve
4 more than the stick. Thank you.
5
6 THE HON JUSTICE F GLEESON: If I may say so, firstly, that
7 was a very enlightening presentation and a rather
8 sophisticated analysis of the escalating forms of sanction
9 and enforcement action and contrasts strongly with
10 a possibly simplistic mantra of "litigate first, negotiate
11 later" which we, as litigators, are very comfortable with.
12 We have a very short time for any questions.
13
14 DR AUSTIN: Thank you, chair. Shannon, you concentrate,
15 understandably, on the position of ASIC and its potential
16 changes in its enforcement approach. Do you think, in
17 relation to APRA, there is a fundamental inconsistency
18 between the prudential function and what the Interim Report
19 is saying about enforcement?
20
21 MS FINCH: I may interpret the question slightly
22 differently than you intended it, Bob, but I am troubled
23 that if APRA were to also follow the kind of guide that has
24 been given to ASIC in the Interim Report, that it would
25 impair its prudential function. Part of the value in
26 APRA's approach to date has been its willingness to engage
27 and educate those entities that are prudentially regulated,
28 and I think we have seen it be very effective over the
29 years. It is potentially at odds with their traditional
30 role that they become a regulator of conduct, but they
31 might also say that in many ways they always have been,
32 that conduct has always been relevant to stability and that
33 they have engaged privately and quietly on conduct for some
34 time.
35
36 Whether I like the idea that APRA is seen to seek
37 penalties, to pursue litigation - I tend to think it will
38 be counterproductive. But I also believe that they will
39 exercise judgment as to the circumstances when it is
40 appropriate for them to do so.
41
42 THE HON JUSTICE F GLEESON: Thank you. I think that
43 concludes that session. Thank you very much, Shannon.
44
45 I will ask you to join me in thanking Shannon again.
46 It was very informative.
47

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1 DR AUSTIN: We now move straight on to the final
2 presentation by Kevin McCann.
3
4 THE HON JUSTICE A BLACK: I am delighted to welcome the
5 last speaker for the sessions today. He has an absolutely
6 distinguished curriculum vitae, starting life in the role
7 of a commercial partner at Allens Arthur Robinson as it
8 then was, moving through to be the former chairman of
9 several public companies and still holding a range of
10 corporate and public roles. It is a pleasure to welcome
11 Kevin McCann to speak today. He will be addressing matters
12 that have already plainly been touched in the course of
13 this afternoon arising from the present Royal Commission,
14 both in terms of the content of its inquiries and the wider
15 lessons to be drawn from it and its implications for
16 regulation of banking and other financial services.
17
18 MR McCANN: Thank you very much. Could I begin by
19 thanking the Chief Justice for providing the facilities for
20 this conference, which does cover important areas of
21 corporate law, so thank you very much to the Chief Justice.
22 Also to Justice Black, who over many years had an uncanny
23 ability to advise me when to settle a case and when to
24 litigate. Actually, his rate was 100 per cent. So
25 thank you, judge. And, finally Bob Austin, who put all of
26 this together and, as a result, I have had sleepless nights
27 for the last month.
28
29 Let me begin by making some disclosures. In my CV
30 I have disclosed that I am a former chairman of a bank, so
31 I come with all of that baggage.
32
33 The second thing you will note is that the Interim
34 Report is not an accessible document. It is 345 pages long
35 and it has obviously been prepared under a time pressure,
36 and so the result is that the conclusions of the
37 Commissioner in parts are inconsistent, so it requires
38 quite some concentration to figure out what he regards as
39 the chief basis for misconduct.
40
41 I see, by the way, that Bob has given me 50 minutes -
42 unlike the rest of the speakers, so thank you, Bob - which
43 means I can go back to some background, because we were
44 assuming a lot of understanding in the audience about
45 a very complex field.
46
47 The first thing to note is that in my speech I will

1 look at the breakdown in culture and governance of the four
2 major banks - CBA, WBC, ANZ, NAB - and AMP, which led to
3 misconduct and the alleged illegal behaviour revealed in
4 the report.
5
6 As Shannon has mentioned, the APRA Prudential Inquiry
7 into the CBA is absolutely essential reading and it needs
8 to accompany any comments made on the inquiry.
9
10 I was also lucky to find some speech notes, which fell
11 off a truck, by Professor Graeme Samuel, who was a member
12 of the CBA panel. Graeme's comments are not as nuanced but
13 much more racy than those of Dr Laker.
14
15 Well, why have we got a royal commission? We have a
16 royal commission because of a number of issues which
17 occurred to Australia's largest company, namely, the CBA,
18 and that involved the following: mis-selling of
19 residential mortgages and margin loans in the *Storm* case,
20 2008; fees for no service in financial advice - that was
21 shared by all of the major banks and the AMP; an outdated
22 definition of "heart attack" sold by one of its
23 subsidiaries; anti-money laundering breaches, which
24 involved record fines; and the mis-selling of credit card
25 insurance. So there was a long litany of matters which led
26 to a lot of political pressure and media pressure and,
27 after resistance by Prime Minister Turnbull, he succumbed
28 and set up the Royal Commission.
29
30 Now, the terms of reference were touched on by
31 Shannon, but let me give you a bit more detail. The
32 inquiry was into misconduct, and "misconduct" was broadly
33 defined. It firstly included breaches of the law; it
34 included conduct which fell below community standards; it
35 dealt with conduct that involved breaches of trust or
36 unconscionable conduct; conduct that was misleading,
37 deceptive or both.
38
39 In having regard to changes in the law, the
40 Commissioner had to have regard to the economy generally
41 for access to and the cost for financial services for
42 consumers, for competition in the financial sector and for
43 financial system stability. So it was not just limited to
44 breaches of the law, as you see; quite a wide area.
45
46 His methodology has been to look at case studies, on
47 the basis that case studies that were indicative of general

1 trends of misconduct were the best way to proceed. Because
2 of the fact that the AMP and the big four banks have paid
3 hundreds of millions of dollars in remediation, frankly, it
4 has become an inquiry into the big four banks and the AMP.
5
6 In terms of where the Commissioner focused his
7 attention, in this paper I an going to look at financial
8 advice and consumer lending. There was a whole lot of
9 other areas, like indigenous lending, rural lending and
10 small SMEs, but I won't be considering that today.
11
12 Okay, financial advice. We have the benefit, through
13 the Royal Commission, of a paper by Professor Hanrahan on
14 the framework for financial advice. That is 101 pages.
15 She described the framework as a patchwork of legislation
16 and the general law. And, by the way, the 101 pages only
17 deal with financial advice, not with responsible lending.
18
19 The legislation is the Corporations Law, chapter 7;
20 the Australian Securities and Investments Commission Act
21 and the APRA legislation.
22
23 The focus of the Commission was on the provision of
24 financial advice given to retail customers, and the law
25 there requires services to be provided efficiently,
26 honestly and fairly, and the FOFA - Future of Financial
27 Advice - reforms were requiring some additional changes,
28 that the providers of the advice had to act in the best
29 interests of the client, and conflicted remuneration was
30 banned. That was remuneration which you might expect could
31 influence the recommendation of a financial product.
32
33 The core change, to act in the client's best
34 interests, required a series of steps in order to qualify
35 for that, and you also had record-keeping of the advice
36 given by the adviser to the client.
37
38 Consumer lending was the other area where the Royal
39 Commission directed its attention. The Royal Commission
40 was interested in whether or not lenders had complied with
41 the National Consumer Credit Protection Act. It is framed
42 in a rather convoluted way, but, basically, to put it into
43 a positive, the lender has to determine whether a contract
44 is not unsuitable for the consumer, and that required
45 making inquiries about the consumer's financial position.
46
47 Well, that is the background to the examination we

1 have had in the Royal Commission. Let me now go through
2 some of the key findings of misconduct.
3
4 In the case of financial advice there were some really
5 shocking revelations. The most egregious, I think, was the
6 fee for no service. The fee for no service really arose
7 because there were certain kinds of commissions which were
8 prohibited, so the companies concerned came up with the
9 idea that the people who lost the commission would now
10 provide financial advice, but they did not actually have to
11 provide any financial advice at all, and usually they did
12 not. So what you got was a situation where people signed
13 up for advice, they were debited in their accounts and were
14 unaware they were being debited - if they had read their
15 accounts they might have picked it up, but most of them did
16 not - no advice was ever provided and the companies who
17 licensed the advisers were well aware of that.
18
19 I recommend to you, if you want to study some really
20 bad cases, the study on the AMP in volume 2 which reveals
21 that senior executives of that company were aware that fees
22 were being charged when no advice was going to be provided
23 to clients.
24
25 Secondly, the case studies demonstrated that the
26 licensees who licensed the advisers had no framework in
27 place to ever determine whether or not the advice was being
28 given. There was no monitoring, there was no checking,
29 there was no data which they gathered to see what advice
30 was being given.
31
32 Other misconduct was bad advice - that is, advice that
33 was completely negligent and incompetent. There was
34 improper conduct by advisers, which was dishonest and
35 deceptive behaviour. Then there were inadequate systems to
36 service clients. For instance, the AMP, when it became
37 aware that someone was dead or was no longer giving advice,
38 had no mechanism for turning off the deductions and there
39 was no interest on the part of the executives of AMP in
40 actually doing a manual workaround; they just continued to
41 take the money without giving the advice, where the clients
42 were not getting any advice.
43
44 In the case of the AMP, the Commissioner found that
45 executives of the AMP knew of charging for no service but
46 did not reveal that to ASIC and they also gave false and
47 misleading information to ASIC about the misconduct of

1 which they were aware.
2
3 By the way, this is not in any way reflecting on the
4 position of the independent opinion that was provided by
5 a well-known law firm and where the allegation was made the
6 chairman had played a role that was inappropriate. There
7 is no finding against the chairman in the Interim Report,
8 but we are talking about situations here where senior
9 executives knew there had been breaches and, in the view of
10 the Commission, lied to ASIC.
11
12 Now, in the case of home lending, there were a number
13 of areas of misconduct which the Commission identified.
14 Some 43 per cent of retail home loans come from mortgage
15 brokers. I know from my own experience that mortgage
16 brokers have provided a very positive role in some areas.
17 They enabled disruptors to come in and compete against
18 banks who had a branch system which the newly competing
19 groups did not have. So 43 per cent of all mortgage loans
20 with consumers are negotiated through intermediaries,
21 mortgage brokers.
22
23 The Commission found that there was a confusion of
24 roles and it was not clear who the mortgage broker
25 represents: is he or she representing the interests of the
26 borrower or the interests of the lender; what duties did
27 the mortgage broker have to the borrower; the fact that
28 there was no disclosure of commissions received and there
29 was evidence that the brokers were persuading people to
30 borrow more money than they needed; and also that the
31 brokers' loans were more risky than other loans.
32
33 So the result was, he found, that the encouragement of
34 the lenders was not to pursue the interests of the
35 consumer; that compliance was relegated to a cost of doing
36 business and profit trumped over the law.
37
38 I suppose the other rather extraordinary case of
39 misconduct, which was mentioned yesterday by the managing
40 director of the CBA, was credit card insurance. People
41 were being signed up with the knowledge of the bank that
42 they were ineligible for the insurance from day 1. In
43 other words, there were people who were unemployed, and if
44 you were unemployed you could not claim under the policy.
45 Now, the amount of money was not large, it seems to have
46 been between 10 and 15 million dollars, but that is an
47 extraordinary thing to happen.

Well, the Commissioner had a very clear view in his executive summary as to why this misconduct occurred. He said:

> *[It is] greed - the pursuit of short-term profit at the expense of basic standards of honesty.*

So let us now turn to what Bob set as my task today, and that is: what are the lessons learnt from the Royal Commission and, I would say, the APRA report. I have nine or ten, but probably those of you in the audience can find some more.

I mentioned that the Commissioner's rationale for misconduct fluctuates throughout the document: sometimes it is greed, sometimes it is remuneration, sometimes it is short-term profit. But at the end of his document he lists four reasons: conflict of interest and duty - and his concern there is staff and intermediaries who are pursuing profit and ignoring their responsibility under FOFA, the Corporations Law and the National Consumer Protection law; remuneration - this view that toxic remuneration leads to misconduct; culture and governance, which I will come back to; and regulatory response, which Shannon has referred to - his view is that the regulators were lax.

Now, interestingly enough, in the CBA report there is only passing reference to corporate governance. It is not dealt with. But it is interesting to see the progress of examination of the CBA CEO, and I think we are heading down to a commentary on corporate governance in the final report.

Although the Interim Report does not deal with corporate governance, I think it does invite us to consider whether there were reasons other than the reasons advanced by the Commissioner for the misconduct.

Okay. Lesson number 1. The misconduct which was identified is systematic and companies refused to acknowledge it. He is rightly critical of the financial institutions who invariably responded to misconduct by claiming they were the isolated actions of rogue staff or bad apples; it was never systemic, according to the chief executives.

One of the reasons of course that they didn't join the dots was that they didn't have the data, it appears, to even figure out how many instances of misconduct occurred. It does seem incredible in hindsight that an organisation like the CBA with a litany - every year they dropped another case of misconduct and yet, it was always due to some isolated and not interconnected event. Indeed, as late as May 2018 the Chairman of the AMP, at its AGM, addressed misconduct in the following terms:

A small number of individuals in our advice business made the decision not to follow policy, and inappropriately charged fees to customers when no service was provided.

The Commissioner's response is that rhetoric of this kind is common and responses of this kind are revelations of wrongdoing and are generally accompanied by apologies and an assurance that the public trust will be restored.

The CBA Report tells that public trust in the banks has been damaged by the misconduct issues that have been recorded. The Deloittes Survey on trust released in October validates the comments in the CBA Report. It reveals that the people surveyed had a low opinion of the ethical behaviour of banks and their conduct towards customers.

I think the time has really come for the senior leadership of banks to acknowledge that the misconduct was systemic and not due to individual bad apples, and secondly, acknowledge that they failed to introduce the new cultural norms required to comply with legislation for regulating responsible lending and financial advice. They must now recognise that they should approach viewing their customers through the lens of commercial morality.

Third, they failed to prevent, protect and punish misconduct because they failed to identify the material conduct risks which they faced. Finally, they should acknowledge that they are committed to a comprehensive remediation of their corporate governance where it is required.

The CBA has no option because it has been forced to sign an EU with APRA and that takes up Shannon's point that

1 APRA can move and that is a much better way of dealing with
2 what happened at the CBA than going to court. I would
3 imagine that APRA, which has called for self-examination by
4 major institutions, will be signing up the remaining three
5 banks as they have all been found to have misconduct and
6 I would have thought the AMP would also be in that category
7 as well.
8
9 The next lesson is let's have a look at why was there
10 such a massive misconduct by the four banks and if you
11 think about it, they are four of the largest companies in
12 Australia. The CBA is the largest listed company in
13 Australia by 20 per cent. It is ahead of BHP by
14 $20 billion. All the other four banks are in the top 10,
15 as is Macquarie, so the banks are very important.
16
17 The CBA Report spells out very clearly the role of the
18 board. The board is responsible for setting the risk
19 appetite of the institution, they are responsible for
20 setting the risk management framework, they delegate
21 implementation of the risk management to the management and
22 they have the job of over-sighting the management.
23
24 What happened at the CBA, according to the CBA Report,
25 is they didn't get the information they needed from
26 management to form a view about whether or not the risk
27 management in that organisation was satisfactory. The
28 reports were high level, they had a limited detailed
29 profile of the organisation and very importantly, they
30 failed to identify new and emerging risks.
31
32 I think one of the really interesting things for
33 another day is the behavioural psychology around boards.
34 If you are sitting in front of a CEO who has three law
35 degrees, is a Rhodes Scholar, he excelled at Oxford, did
36 another degree at NYU and then worked at McKinseys and his
37 executive committee sitting around that table were
38 absolutely outstanding people, he was voted CEO of the Year
39 year after year, and it is the largest and most profitable
40 company in Australia, it is a very brave director who
41 challenges that individual and if you're a woman director,
42 watch out, it's even tougher. That is something that
43 someone needs to explore.
44
45 The result is there was no challenge to management.
46 Management gave assurances that all was well. It seems to
47 me reasonable to assume that CBA directors didn't know what

1 was coming down the track with FOFA and NCCP, and the
2 policy behind the financial services legislation, which the
3 Commissioner goes over again and again and again, is that
4 the interests of customers should be favoured over that of
5 the enterprise and the mindset of the provider should be,
6 "Should we do this or should we not do this?"
7
8 When you think about the famous case involving Storm,
9 that involved the mortgaging of pensioners' homes. The
10 money was then given to a financier who then re-leveraged
11 it through a margin loan. 10 years later I can't imagine
12 anyone in this room would think that that is something that
13 a financial institution should do and yet, 10 years ago
14 no-one gave it a second thought. It was legal, "We'll do
15 it."
16
17 My own experience - Macquarie has confessed that we
18 had an enforceable undertaking and we were fortunate that
19 we got an early one and we were not informed by management
20 that FOFA would have such an impact on the culture of
21 managing the business and in particular, we weren't told
22 the policy behind the legislation requiring provision of
23 advice in the best interests of the client. We didn't
24 understand the changes in processes and documentation which
25 were required. There was a reliance upon manuals and not
26 actually explaining to people what was in the manuals.
27
28 I have set out in the paper a cultural roadmap and
29 what the roadmap indicates is that strong leadership is
30 needed. You need leaders who understand why the reform is
31 occurring and are committed to drive change. They need to
32 then identify to staff what changes are needed and how they
33 are going to implement them. That means new behaviours and
34 the success of the change program is when people understand
35 the change that is needed, the policies behind them and why
36 they are going to be implemented.
37
38 We realised at Macquarie that the risk committee
39 wasn't good enough, so we set up a governance and
40 compliance committee chaired by a very good lawyer and she
41 reviewed issues, development of corporate governance and
42 the corporate governance framework and particularly, new
43 standards arising from legislative change. I believe that
44 if that changed roadmap had been available to the boards of
45 other banks, a lot of the grief that has been caused and
46 identified would not have occurred.
47

1 Now, I should say my explanation is an explanation,
2 I am not seeking to justify the fact we got it wrong, but
3 you can understand why that occurred.
4
5 Let's turn to remuneration, lesson number 3. The
6 Commissioner seems to regard remuneration by banks as the
7 root of all evil. He makes the statement:
8
9 *Every piece of conduct identified that has*
10 *been contrary to law is a case where the*
11 *existing Government structures and*
12 *practices did not prevent the conduct*
13 *occurring. The culture and conduct of the*
14 *banks was driven by, and was reflected in*
15 *their remuneration practices and policies.*
16
17 Previous speakers have talked about this and I won't
18 canvass what they have said, but I will point out that the
19 CBA and Sedgwick reports proceed on the assumption that
20 remuneration which has variable incentives in it can result
21 in appropriate legislative outcomes, it doesn't always lead
22 to misconduct, or won't lead to misconduct, and so does
23 APRA where in fact they regulate variable remuneration.
24
25 It is an interesting read because the Commissioner
26 seems to be trying to reform or change the way we
27 remunerate in Australia, in that he thinks that perhaps the
28 best way to go, including senior executives, is a flat
29 salary and that he has got some support from the academic
30 world that suggests that people don't want incentives.
31 I have been a director for 40 years and the empirical
32 evidence I get is to the contrary. People are motivated by
33 incentives, and promotion, which has been suggested as the
34 solution, I don't think will work.
35
36 Some of the proposals are quite interesting. He
37 thinks that there should be no individual profit, entity
38 profit should go into a pool and that everyone shares
39 equally. Also, he doesn't like malus clauses because that
40 would lead to concealment. Global bank regulators regard
41 malus and clawback as essential tools of consequence
42 management of misconduct. He also suggests that we need
43 regulation banning certain kinds of remuneration and
44 I suspect he has variable remuneration in his sights.
45
46 I think prescriptive legislation here is not the way
47 to go. Boards have to be allowed to set remuneration. As

we heard earlier, there are different circumstances for companies and so you need flexibility and probably APRA is the best entity to do that, but I do have a concern that they don't have the resources to go right down through the corporation.

Lesson number 4, changes to the law. When you read Pamela Hanrahan's paper you realise how complex the law is and I agree completely with Commissioner Hayne that we need to simplify it so we don't lose sight of the principles that lie behind it. Amongst the panelists today there seemed to be an optimism that we should get law reform in this area. I am more pessimistic about the present situation in Canberra. I don't see that happening before the next election.

Lesson number 5, regulators. We have had a very good presentation on that but if I am on the board of a bank, this is what's coming. The new Deputy Chairman Daniel Crennan QC has foreshadowed a tougher line with banks. He said:

> *I am taking more matters to court and there will be less recourse to enforceable undertakings.*

And:

> *They'll be lucky in future if they get an EU.*

The disappointment for me here is dismissal of the merits of enforceable undertakings. In my experience they have been extremely effective in enabling a company to undertake a cultural change roadmap to embrace the principles of FOFA and get on promptly with remediation.

It is not correct to say that remuneration has been deliberately dragged out. Entities deal first with clients' complaints, next they review the files of advisers at risk and finally, they review files of other clients as required by ASIC. It is dealing with tens of thousands of files and that takes time.

Two other comments - Graeme Samuel, the former ACCC Chair, points out that court processes are important but that they suffer from random complexity in the legal

1 process and his challenge to the Chief Justice is as
2 follows: he wants the Federal Court and the state courts
3 to collaborate; he wants specialised groups of judges with
4 expertise in the complexities of corporate securities and
5 financial services law - and I know your court has that
6 experience - and he also says that he likes enforceable
7 undertakings.
8
9 I thought I would give you some light relief here and
10 go back to "It was a bad week for ASIC in the courts" and
11 the first thing I would like to read is a statement from
12 Beach J who was required to hear a case involving Westpac
13 which was in dispute with ASIC about the correct fine.
14 ASIC was seeking a fine of $55 million and the bank said
15 $3.3 million. In a delightful opinion - he was looking at
16 penalty - and I thought this was wonderful, Beach J said:
17
18 *First, my task does not involve the luxury*
19 *of applying any asymmetric rectitudinous*
20 *philosophy for the penalty phase, the task*
21 *is to set a penalty appropriate to the*
22 *facts so far. Second, the solution to this*
23 *legal problem of identifying the maximum*
24 *penalty applicable to Westpac's offending*
25 *has not been assisted by ASIC's approach*
26 *before me, which had all the irreconcilable*
27 *atonality of a Schoenberg composition when*
28 *compared with the cases pleaded and*
29 *substantiated at trial.*
30
31 As I say, not a good week. The other case involved
32 Justice Gleeson's relative who came as an amicus curiae
33 before Perram J and that was an agreed settlement between
34 Westpac and ASIC, but the judge, not unreasonably, said he
35 couldn't work out what the offence was, so he took counsel
36 and counsel said perhaps there was no offence but if there
37 was offence, it should be three times the number agreed.
38 The result was that the judge said he would not make the
39 orders. I suppose there are two learnings there for ASIC
40 and also for Westpac. In future you've got to figure out
41 what you've done wrong if you want a judge to endorse it.
42
43 Lesson 6 was litigation. If you engage in misconduct
44 you will expect class actions. There are five against the
45 AMP, one against CBA and one against another bank, so
46 they're certainly going to happen if you are not careful.
47

1 The next is what are the implications for the
2 non-financial sector and I think there was the following
3 there. Both the report of the Commission and also the
4 report from APRA - and James Shipton, Chairman of ASIC, has
5 urged every listed company to read the report - show,
6 firstly, the need for oversight of non-financial risk; be
7 aware of material legislative change; be aware that ACCC
8 and ASIC are coming after you; that when misconduct, actual
9 or perceived, has occurred, stakeholders' trust in
10 companies evaporates, and I think companies that have mass
11 consumer markets, like energy retailers and
12 telecommunications, are at risk; and finally, cultural
13 change needs to be driven internally by the board and
14 management and not outsourced to consultants because that
15 means that the employees see that management is serious.
16
17 Directors. I think I am sort of running out of time
18 to get beyond some very high-level comments here.
19 Jennifer Hill has given a really good address on the
20 liability of directors, potentially, for failing to prevent
21 misconduct and she argues that that may be actionable under
22 section 180.
23
24 I know that there are some defences, such as reliance,
25 but I would have thought that we are going to have a
26 toughened-up regulator and if the Commissioner says "You
27 must go to court", they might try that on, but I think the
28 better regulator is probably APRA which has got really
29 quite ample powers to deal with that.
30
31 Let me just wrap up by finishing on this point, the
32 consequences of failure to provide governance and good risk
33 management. In a sense, the first paper and the quote from
34 Gower said it all, that once you alienate consumers,
35 government, media, regulators, you've got trouble, and that
36 is what has happened to the banks. We have wholesale
37 criticism of their misconduct and we know that community
38 trust has been badly eroded.
39
40 Secondly, the banks and the directors and shareholders
41 and I suspect the community have paid an enormous price for
42 the misconduct that has been revealed. In the case of the
43 AMP the Chairman and the CEO went. In the case of the CBA
44 the most admired CEO in the country went and a new chairman
45 was appointed. In both cases you had an impression of a
46 closed course: in other words, the directors went.
47

1 There are class actions in train. The cost of
2 remediation to date is $4 billion and they are facing
3 penalties now. APRA can impose $210 million maximum per
4 offence and there is legislation in the house federally for
5 another $210 million imposed by ASIC. Regulatory
6 litigation by ASIC and APRA will distract board management.
7 It is facing disruption in payment systems and it has
8 strategic issues to address.
9
10 They have responded to their misconduct in their
11 financial advisory business by selling out and in many
12 cases the sales are going to be at a book loss. Finally,
13 the CBA has an enforceable undertaking with APRA in
14 relation to the CBA Report and I expect, as I say, all the
15 other banks and the AMP will follow.
16
17 The conclusion, the lesson here, is that the banks'
18 boards have no option, they have to get their act together,
19 they have to engage in effective risk management, effective
20 oversight of their management, and if I could quote from
21 the APRA Report, "In the future the voice of the customer
22 and risk must join in the anthem of financial success."
23
24 THE HON JUSTICE A BLACK: We have of course been very
25 fortunate in Kevin McCann's paper. He has engaged in a
26 very ambitious and I must say very successful exercise in
27 answering the very hard task Professor Austin had set him
28 of trying to identify lessons to be learned, indeed, in
29 anticipation of the Commissioner having expressed a final
30 view of the lessons to be learned. We do have some time
31 now, we probably have about five or seven minutes for
32 questions, I am sure there are many, so let me open the
33 room to questions.
34
35 Yes, Professor Dimity Kingsford Smith.
36
37 PROFESSOR KINGSFORD SMITH: Yesterday, Mr Comyn was being
38 asked a lot of questions at the Royal Commission about the
39 root cause of the systemic non-compliance. One of the
40 leading factors that he put his finger on was lack of
41 capability and that capability seemed to be a capability in
42 the legal and compliance team for the kinds of reasons we
43 can imagine and have been enumerated.
44
45 I was interested that you raised, if I understood
46 correctly, a similar kind of difficulty in your early
47 enforceable undertaking at Macquarie. My question is

1 whether you think it was a technical incapability or
2 whether you thought it was, in a sense, an attitudinal
3 incapability of a narrative of profit in the institutions
4 that overcame the understanding that the ballpark had
5 changed with FOFA and other amendments, for example,
6 conflicted remuneration and so on, and that those things
7 just didn't add up to people operationalising what needed
8 to be done.
9
10 That is a very penetrating question, and I pondered
11 this for a while because I was a lawyer on the board at the
12 time, but this really was not my field. I spent most of my
13 life practising about 30 sections of the Corporations Law,
14 at the end of my career. At the beginning of my career
15 I did everything.
16
17 So the question is should I, being on the risk
18 committee, have inquired about FOFA and should I have done
19 my own work, or was I entitled to expect that the
20 management would come forward and explain this to me.
21
22 Now, when the report finally came in it became
23 apparent that, yes, people had not realised the impact it
24 was having, and the Commissioner talked about a nonchalance
25 about compliance. There is no question that we got,
26 I think, Deloittes or EY to write a manual and the
27 executives were given the manual. Well, that absolutely
28 missed the point of the change that was required from this
29 legislation.
30
31 I don't think I am answering your question, I am
32 sorry, Dimity.
33
34 So we decided the only way to fix this was to set up
35 a separate subcommittee under a former Mallesons partner
36 and she really got into it and we began to understand what
37 the legislation intended, and we were determined never to
38 be caught again if we got changes to legislation. So it
39 was the committee then, perhaps, providing proper oversight
40 because it was properly informed.
41
42 THE HON JUSTICE A BLACK: There is a question in the
43 second-back row.
44
45 MR EDWARDS: Thank you. Tim Edwards, I am a solicitor.
46 I am making some anecdotal observations and maybe asking
47 a question, I am not sure yet.

Could I come at it from being on the board of the St James Ethics Centre for 20-odd years, which was set up in 1989 at the conclusion of WA Inc, and so on, with the aim to engage boards and senior managers into having a discussion about ethical behaviour in the corporate sector, and I am sure you are aware of all of that.

Over those years reviews were undertaken of public companies, law firms and other entities, all with the idea of looking at culture and behavioural change, and there was inevitably some engagement, and a lot of engagement, by those companies that used the services, but bit by bit the behaviours slipped.

The behaviours that Shannon has talked about and which you have alluded to, of the board accepting responsibility for corporate behaviour and ethics and the like suffer from the human condition: while they are under the pump, everybody wants to behave and change cultures, and then, as time goes on, that imperative lessens. I wonder if that is going to be the case going forward now.

MR McCANN: No, I think we have come to a real watershed. There is a very good decision by Beach J, I forget the name of it now, where he talks about having to look at the FOFA and the NCCP rules through the lens of corporate morality.

When I started off in the law we were black-letter: if it was not prohibited, you could do it. Now, if you go to Korea, we discovered at Macquarie, it is rather different. The Americans assumed that if it was not prohibited you could do it. But the Koreans said, "No, no, no, maybe you can do it; maybe you cannot." But there was this sense of morality: is it something we should do or is it something we should not do, or is it something we ought to do?

So I think in business now we are going to be having to ask ourselves the question: "It may not be prohibited by the law, but is it something we should do?" And certainly in this new legislation where we have relationships between business and consumers, more and more the courts will be deciding whether we have behaved appropriately or not, and probably there will be judge-made law rather than these incredibly complicated prescriptive rules where, as a result, as the Commissioner said, we have

1 all gone to the box-ticking exercise.
2
3 So, no, I think it is going to change. I know why it
4 will change, because if you are facing penalties of
5 $210 million, directors will not get away with situations
6 much longer from shareholders where you are paying those
7 sorts of penalties. If you think about it, the CBA paid
8 a penalty of $700 million. Now, the consequences were
9 dramatic: the CEO is gone and Catherine Livingstone has
10 cleaned out the board. So there have been consequences.
11 This is, again, the biggest company in Australia, one of
12 the most profitable companies in Australia, and the CEO has
13 gone and the board has gone.
14
15 THE HON JUSTICE A BLACK: I note the time. There may be
16 time for one last question. I see Professor Austin
17 agreeing, so one last question, if there are any questions
18 remaining. In the second row there.
19
20 QUESTION FROM THE FLOOR: This might be very simplistic,
21 but when are individuals going to be accountable? Whilst
22 the company is paying a $210 million fine, are individuals
23 ever going to be accountable? Do we not need to find the
24 individuals and penalise them in a very real way to change
25 the culture?
26
27 MR McCANN: Let me answer your question in two parts.
28 There is no question that in the case of the competition
29 law - I used to be on the board of a concrete company.
30 Concrete companies made lots of profits because they
31 colluded. The then Commissioner decided to sue not only
32 the company but the chief executive, and that had
33 a remarkable effect on outcomes.
34
35 At the moment, these breaches do not involve - well,
36 I stand to be corrected, actually, by the experts in front
37 of me as to whether there are criminal penalties for
38 individuals in these cases or whether it is banning and
39 things of that sort, but I think that probably the view is
40 taken at the moment that if you have these huge penalties
41 against companies, the boards and executives will do
42 something about ensuring misconduct does not occur. You
43 will prevent it, you will detect it and you will punish it.
44
45 THE HON JUSTICE A BLACK: Well, we should thank
46 Kevin McCann for his paper.
47

1 DR AUSTIN: This is the last session, which is
2 a discussion session. I think a substantial part of it
3 ought to be to continue with the themes enunciated by
4 Mr McCann, because they really bring into focus everything
5 else that we have done, but we have a few agenda items to
6 discuss and I am happy to say that the Chief Justice is
7 going to join us upstairs and he might have one or two
8 things to say.
9
10 I will start with Kevin McCann's paper. We have heard
11 his prognostications of what will follow from at least what
12 the Royal Commission has done so far and, looking into the
13 future, what it may do. It seems to me that the overall
14 conclusion is that the important thing from Mr McCann's
15 point of view is that boards of directors should take the
16 Royal Commission's findings very seriously and respond in a
17 number of ways - respond in terms of making sure that they
18 are properly informed about the law and making sure that
19 remuneration structures are justifiable - and he has not
20 recommended that there be a major legislative change in
21 consequence upon everything that has happened.
22
23 I notice that Kevin is nodding and agreeing, but
24 I wonder whether others might have comments to say about
25 what can and ought to follow once the Royal Commission has
26 made its final report. Would anyone like to kick off on
27 that?
28
29 PROFESSOR KINGSFORD SMITH: Well, do you mean legal
30 changes or structural changes to corporate governance?
31
32 DR AUSTIN: Everything.
33
34 PROFESSOR KINGSFORD SMITH: Everything? One of the things
35 I think which could be done, which would require
36 a legislative change, is that at the moment we have "twin
37 peaks" regulators and they have overlapping remits. It may
38 be helpful to revise their powers both to plug the gaps in
39 the prudential side and in the conduct side - and I am sure
40 that that will already be in train. What we heard
41 yesterday morning all about the general themes of the
42 responses to the interim report suggest there will be some
43 of that coming along.
44
45 But it is, I think, important to better coordinate the
46 prudential and conduct regulators, and one of the things
47 which could be done is to give them both powers in

1 overlapping areas, where those overlaps are unavoidable,
2 and to encourage them to coordinate in the exercise of
3 those powers.
4
5 DR AUSTIN: Are you talking about APRA and ASIC?
6
7 PROFESSOR KINGSFORD SMITH: Yes.
8
9 DR AUSTIN: Are you including the ACCC?
10
11 PROFESSOR KINGSFORD SMITH: I have not, but I guess there
12 is no reason why you might not.
13
14 In South Africa they have taken the "twin peaks" model
15 on recently and it is kind of "Twin Peaks Mark II". They
16 have gone ahead with something like this suggestion. I am
17 sure we would look at what they have done and do it with
18 "Twin Peaks Mark III", perhaps. But I think that is one
19 thing that would require legislative change that could
20 improve the overall projection of regulatory coverage.
21
22 DR AUSTIN: Would it be right to describe that as
23 streamlining the interface between the regulators?
24
25 PROFESSOR KINGSFORD SMITH: Yes.
26
27 DR AUSTIN: And you say that should be a primary outcome?
28
29 PROFESSOR KINGSFORD SMITH: I think it would be a very
30 helpful outcome.
31
32 Turning to the Commissioner's very interesting
33 suggestions that you could have a number of principles
34 which would hit the high notes of the purposes of financial
35 services --
36
37 DR AUSTIN: Where would they be?
38
39 PROFESSOR KINGSFORD SMITH: Well, that is the question
40 I was coming to. It is not easy to use principles-based
41 regulation. There are a lot of paradoxes in it. It is
42 not, however, impossible. Principles like that could be
43 indicated as interpretive principles for the law you
44 already have; they could be installed in the legislation as
45 a principle referable to certain lower rules, lower-status
46 rules of more particularity, and what we know about
47 rule-making suggests that mixing principles with more

1 particularised rules works quite well.
2
3 The problem is, of course, between the scylla of
4 uncertainty and the charybdis of particularity and
5 complexity, and I know that the Law Council's submission
6 and certainly the submission of the Centre for Law, Markets
7 and Regulation has been that in relation to suggestions
8 like this one, which are highly legal in their content, we
9 need to have a few expert minds put to work to make sure
10 that these recommendations or suggestions in principle, if
11 they do become the Commissioner's recommendations, are
12 operationalised and legislated for in a way that makes them
13 legally work well. There is a bit too much of what some of
14 us, when we talk about this, call "junk law" around; law
15 that is proposed and seems to be something that everybody
16 needs or even some of us want, but that does not work very
17 well once it has got through the legislative sausage-making
18 machine.
19
20 So having some expert legal firepower in putting into
21 operation the Commissioner's recommendations I think would
22 be really important.
23
24 I have one other suggestion about change, but I might
25 leave it until later since I have used up a bit of time
26 already.
27
28 DR AUSTIN: I might interject here, for the benefit of the
29 audience, some information about the Law Council's
30 submission on the Interim Report. They said that the law
31 should be simplified with a key focus on the principles
32 already embodied in the law such as acting honestly,
33 efficiently and fairly and not misleading, and acting in
34 the best interests of the customer. That, of course,
35 invokes what the Interim Report said. They suggested that
36 the radical simplification which changes compliance
37 obligations should be avoided due to substantial cost which
38 would be borne by businesses and ultimately consumers in
39 adapting their compliance regimes. They cautioned against
40 extending the best interests duty beyond the circumstances
41 where the relationship with the intermediary is of
42 a fiduciary character. Rather, they said, it should be
43 made clear to consumers that they are not in an advisory
44 relationship with their financial adviser, rather the
45 opposite, they are being sold to by the intermediary. They
46 recommended that the reforms should include simplifying
47 information consumers receive from their financial adviser.

1 They noted that many of the issues raised in the Interim
2 Report demand a careful and considered responsible reform
3 at a fundamental policy level that capitalises on the
4 experience since the introduction of the financial services
5 and consumer credit regimes. In other words, it should be
6 expert-inputted, I think. Accordingly, they recommend that
7 the way to proceed in law reform is referral to the
8 Australian Law Reform Commission.
9
10 Can I just add a personal view of my own. I think
11 that there is a need to consider further law reform,
12 particularly in the chapter 7 area, and I am surprised that
13 Professor Kingsford Smith has said that the statement of
14 principles in the legislation, supported by regulations, is
15 successful. I would say not always, and I would say a good
16 example of too much detail in the legislation, superimposed
17 by a whole lot of regulations that you have to check up on
18 whenever you want to give any advice, is not a successful
19 way forward. You may not disagree with that, by the way.
20
21 The other thing that I have a concern about is that we
22 have to make sure that the demand for law reform is not
23 transformed into an excuse for what went wrong. We cannot
24 blame the law for the misconduct that the Commission has
25 uncovered. It has to be accepted that blame has to be
26 attributed to those responsible for it.
27
28 Any comments?
29
30 PROFESSOR KINGSFORD SMITH: Could I just clarify, I did
31 not necessarily mean that you impose principles on the
32 rules in chapter 7 that we currently have, but if you are
33 going to use principles of the sort that the Commissioner
34 suggests, then I think that you are going to have to have
35 some kind of level of particularity that goes with them in
36 order to make the legislation workable and to meet the
37 demand of the industry that they know what their
38 obligations are.
39
40 DR AUSTIN: Does anyone else want to have some
41 observations on the prospects of law reform as an outcome?
42
43 THE HON CHIEF JUSTICE TF BATHURST: It is obviously a
44 potential outcome, indeed, law change I think is almost a
45 near certain outcome and I use the word "change"
46 deliberately, but speaking from almost an outsider's point
47 of view, I would have thought the best approach would be to

1 consider the deficiencies that have emerged as a result of
2 the Commission's report, the APRA Report, then work from
3 there as to whether legislative reform, whether by way of
4 principles based legislation or perhaps dealing with
5 specific problems which came, should be implemented.
6
7 There are simple things like increasing penalties,
8 that Kevin talked about, there may be an extension of
9 criminal liability in respect of certain areas, but it is
10 very difficult to talk about it in the abstract. One needs
11 to have a long, cold look at it and see, if there are
12 deficiencies in the law, the best way to remedy it. I do
13 agree with you, just try and keep it simple because not
14 only lawyers have to work with it, boards, risk management
15 people and the like also have to work with it.
16
17 DR AUSTIN: Another powerful part of Kevin's paper and
18 also Shannon's relates to the way in which we can learn a
19 lot out of the CBA Report and the prospect that we may have
20 future developments both contained in the final report of
21 the Royal Commission and perhaps in other ways. I wonder
22 whether the panel has a view on our prospects of getting
23 another CBA Report, perhaps in a different context, or
24 whether the circumstances that led to APRA generating that
25 report were quite unique and not likely to be repeated. Do
26 you want to comment on that, Kevin?
27
28 MR McCANN: Look, I think - how can I put it - the
29 Royal Commission was necessary because even an insider like
30 me didn't realise the extent of the misconduct that
31 occurred and so if I didn't know the community was entitled
32 to know what was happening, but I'm not sure that the
33 Royal Commissioner - with the greatest of respect - is the
34 best person to prescribe the remedies. He has some very
35 unusual views on remuneration. Chief Justice, I would
36 hate to see him in your Court of Criminal Appeal because
37 your gaols would be full of bankers and ASIC managers,
38 I think.
39
40 I think Dr Laker has come out with a very, very
41 minimalist explanation of what went wrong and what should
42 be done to remedy it. His comments on remuneration were
43 comments in chapter, I forget which chapter it is but the
44 one where he talks about how you remediate is really well
45 written. My worry is you're going to get some conflicting
46 views coming out of the Royal Commission. I think APRA has
47 already done it in that space, so maybe the

1 Royal Commission could look at areas not covered by APRA.
2
3 DR AUSTIN: Where do you think APRA should be taken as a
4 regulator? It now has the BEAR legislation to deal with.
5 It's likely I guess that BEAR will be expanded in some ways
6 and the question arises whether similar legislation should
7 be extended to other parts of APRA's responsibility.
8
9 MR McCANN: It is interesting because when I began life on
10 the Bank Board they were a very principled regulator. They
11 didn't get into a lot of detail. By the time I left the
12 board they were really into everything. Now they've got
13 the BEAR legislation. They have been chastised by the
14 Royal Commission so they will probably be signing up the
15 other big three banks and the AMP to enforceable
16 undertakings. They are a very small agency, they don't
17 have a lot of resources and that's going to put quite a lot
18 of stress on them if they have to regulate oversight that
19 is used.
20
21 My point about remuneration is at the moment they're
22 only limited to a handful of people. If they're having to
23 go down into a bank that has 45,000 employees, even if they
24 stop at 10,000 that's a huge task to audit whether or not
25 that has been complied with; so the answer is I don't know.
26
27 The other thing I would say, Bob, is there is a
28 turf war going on because ACCC has brought that case
29 against underwriters and I'm not being rude, but I
30 understand the question is whether or not a share is a
31 good. When I taught personal property I thought it was a
32 chose in action, but apparently the definition as such is
33 capable of being interpreted as a good. So you've now got
34 Mr Sims coming into the financial markets in a matter
35 that's a conduct matter, not a competition matter.
36
37 DR AUSTIN: I don't want to get bogged down in the
38 definition of goods and shares, but Shannon, would you like
39 to add something to the observations about the ACCC?
40 I know you're interested.
41
42 MS FINCH: Bob knows that I have some strong views on the
43 subject. The cartel case that the ACCC is pursuing came as
44 such a complete shock to the market.
45
46 DR AUSTIN: It produces a great overlap of regulatory
47 involvements.

MS FINCH: It does, and I think it can be contrasted with the way that ASIC has engaged in trying to drive behaviour within the same community that is affected by the cartel case, where ASIC's approach will be to review behaviour, identify it if they think that there are problems there, and once that has become known then proceed to enforce. The law is not supposed to take people by surprise.

DR AUSTIN: It sounds to me like a view is emerging on the panel that we desperately need a clear focus on regulatory cooperation. Would that be fair?

MS FINCH: I certainly think there's nothing to be gained by regulators arm-wrestling over territory. That's not in the interests of trust and confidence in our regulatory systems.

DR AUSTIN: I want to circle back to the first two papers, in conclusion, and refer again to Kevin's reference to Professor Jennifer Hill who has cited *ASIC v Adler* and Santow J's comments there to argue that directors can be made liable under the duty of care and diligence provisions for omissions if they don't ensure that a company has appropriate compliance systems and acts in accordance with its authorised practices. She describes this as a responsibility of directors to ensure that companies are not engaging in organisational hypocrisy.

I think that could provide a foundation for expanding the scope of the statutory duty of care provision in section 180 to address some at least of the issues that are floating around concerning corporate culture, or the lack of it, which are currently being reinforced in other ways by the possibly fictional social licence to operate. We might find that there are duty of care cases that relate to the kinds of deficiencies in corporate culture that has been a concern in CBA reported by APRA and in other ways.

The question that is perhaps most interesting arising out of Professor Kingsford Smith's paper is the extent to which her analysis about the public focus of section 180 might be extended to other statutory duties, including the best interest duty in section 181. It seems possible to argue that if you characterised those statutory provisions as part of the public law then the next question that will arise is the extent to which that characterisation affects

1 the content of the duties and may take us to the
2 conclusion, notwithstanding Professor Harris's paper and
3 the debate that we had about that, that because the best
4 interest duty is part of the public law, it is directed
5 towards the interests of the community and the interests of
6 the community must eventually be taken to trump the
7 interests of shareholders. Would anyone like to comment
8 about that?
9
10 PROFESSOR KINGSFORD SMITH: Going straight to the heart of
11 your question, which is, I suspect, really asking me about
12 181 rather than 180, since that overlaps more with what
13 Professor Harris had to say, 181 is a duty which is
14 expressed as being open to the world in the same way that
15 section 180 is, and although it is more directed in its
16 language to the best interests of the company, it is a duty
17 to act in the best interests of the company and to act
18 honestly, but it does not expressly say that the duty is
19 owed to the company. It is also the duty which has been
20 most referred to in terms of interests which are not
21 traditional interests that have been surveyed in the
22 general law of companies. So, for example, it is the duty
23 sometimes in which environmental interests are raised or
24 interests of the community in some sort of more general
25 way.
26
27 Somebody came to talk to me at the break about the
28 fact that there were environmental law actions going on in
29 the superannuation investment area which may go in this
30 direction. Of course, they might also be covered by the
31 section 180 duty of care.
32
33 So I think the kind of things that you are suggesting
34 are certainly plausible. Where they will go is anyone's
35 guess, I think.
36
37 DR AUSTIN: It seems like an increasingly open question.
38 I think we should give the penultimate last word to this
39 man, who might have something to say about the discussion
40 we have just had, and then perhaps the Chief Justice might
41 like to make some concluding remarks and close the
42 conference.
43
44 ASSOCIATE PROFESSOR HARRIS: Thanks, Bob. Certainly
45 Professor Kingsford Smith's analysis about the indicators
46 of publicness of duties applies equally in section 181. We
47 have the potential for criminal penalties, we have public

1 enforcement through a public regulator. But my comment to
2 it would be why do we need to only focus on the first part
3 of that section - that is, 181(1)(a)? What does it mean to
4 say that directors have to act for a proper purpose? How
5 do we frame those proper purposes, and could we reach
6 a stage where ensuring that your company does its best to
7 comply with the law is seen as being a proper purpose, and
8 failing to ensure that your company complies with the law
9 could be seen as acting for an improper purpose? These are
10 some issues that have come up in US corporate law,
11 particularly around the Caremark duty and duty of good
12 faith, setting up compliance programs and monitoring those
13 compliance programs. I do not think we have reached the
14 stage in US law, nor in Australian law, where the failure
15 to have a fully 100 per cent effective compliance program
16 means that you have breached your duties. There might be
17 a duty to ensure there is some compliance program and to
18 monitor it, but we are not at the stage where you must
19 ensure that no breaches occur.
20
21 THE HON CHIEF JUSTICE TF BATHURST: There are a lot of
22 matters there on which I cannot comment except to say that
23 no doubt these issues will be ventilated through the courts
24 in the years to come.
25
26 What has been described as "stepping-stone liability"
27 is very much a matter of controversy, and I think that is,
28 when one is dealing with directors' duties, inevitably
29 linked up to this private/public concept.
30
31 To go further, I can see the potential for litigation
32 saying directors did not fulfil their duties of ensuring an
33 adequate risk management system in circumstances where it
34 could be shown that the lack of that risk management system
35 was detrimental to the company. These are all matters that
36 have been put into extreme focus, and Bob, with his usual
37 ability, has forced the panel in the last few minutes to
38 focus on them, and I am glad I generally kept quiet.
39
40 Can I simply say this: I think this conference has
41 been fascinating. The issues are of considerable public
42 importance, not only for lawyers but to the community
43 generally and to the future health of our economy.
44
45 Can I thank the panellists for the enormous amount of
46 work they put into their papers, the erudition with which
47 they were delivered, and of course thank Bob for all the

work he did, and Barbara McDonald and the Ross Parsons Centre. I hope to see you all again here next year and I declare the conference closed.

AT 6PM THE CONFERENCE WAS ADJOURNED ACCORDINGLY

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$20 [1] - 67:14
$210 [4] - 73:3, 73:5, 76:5, 76:22
$55 [1] - 71:14
$700 [1] - 76:8

'

'Julius [1] - 44:37
'What [1] - 27:7

1

1 [3] - 46:46, 64:42, 65:41
1.30pm [1] - 1:24
10 [5] - 23:35, 64:46, 67:14, 68:11, 68:13
10,000 [3] - 18:42, 18:43, 82:24
100 [2] - 60:24, 85:15
101 [2] - 62:14, 62:16
12 [1] - 13:25
13 [1] - 1:28
1324 [1] - 37:39
13th [1] - 2:3
14 [1] - 20:31
15 [3] - 3:28, 23:35, 64:46
172 [5] - 4:19, 17:37, 17:43, 24:22, 24:37
180 [25] - 30:11, 30:26, 32:43, 33:44, 35:2, 35:30, 36:4, 36:9, 36:35, 37:18, 37:21, 37:25, 37:28, 37:32, 37:38, 38:3, 38:5, 39:4, 41:24, 72:22, 83:32, 83:42, 84:12, 84:15, 84:31
181 [5] - 24:42, 83:44, 84:12, 84:13, 84:46
181(1)(a [1] - 85:3
1896 [4] - 31:17, 33:1, 33:9, 39:20
1910 [1] - 39:33
1923 [1] - 13:7
1932 [2] - 9:15, 10:25
1958 [5] - 31:15, 31:19, 33:9, 33:19, 38:46
1970 [1] - 19:6
1989 [1] - 75:4
1992 [2] - 33:21, 52:44
1993 [1] - 31:26
1999 [3] - 30:27, 31:25, 33:38
19th [1] - 22:14

2

2 [2] - 47:1, 63:20
20 [3] - 1:24, 30:40, 67:13
20-odd [1] - 75:3
200 [2] - 35:24, 37:14
2006 [2] - 2:4, 4:23
2007 [2] - 3:29, 5:33
2008 [1] - 61:20
200km [1] - 35:20
2013 [1] - 45:1
2014 [1] - 4:24
2016 [2] - 35:10, 46:24
2018 [4] - 1:19, 1:24, 2:26, 66:9
2019 [2] - 4:7, 7:17
25 [1] - 31:40

3

3 [7] - 5:1, 30:45, 44:18, 48:6, 48:43, 49:19, 69:5
3.3 [1] - 71:15
30 [2] - 11:26, 74:13
33 [1] - 19:34
345 [1] - 60:34

4

4 [3] - 43:46, 70:7, 73:2
40 [3] - 12:13, 17:33, 69:31
43 [2] - 64:14, 64:19
45,000 [1] - 82:23

5

5 [1] - 70:17
50 [2] - 19:42, 60:41

6

6 [1] - 71:43
60 [2] - 39:3, 39:5
6PM [1] - 86:5

7

7 [3] - 62:19, 80:12, 80:32

A

A [5] - 60:4, 73:24, 74:42, 76:15, 76:45
a [661] - 2:9, 2:12, 2:13, 2:15, 2:16, 2:19, 2:45, 3:10, 3:14, 3:19, 3:31, 3:35, 3:43, 3:45, 4:8, 4:9, 4:10, 4:26, 4:36, 4:43, 4:47, 5:3, 5:4, 5:15, 5:27, 5:29, 5:38, 5:42, 6:6, 6:7, 6:28, 6:29, 7:2, 7:3, 7:8, 7:16, 7:23, 7:25, 7:31, 7:46, 8:3, 8:7, 8:21, 8:25, 8:27, 8:37, 8:38, 8:44, 9:2, 9:9, 9:18, 9:19, 9:25, 10:6, 10:8, 10:11, 10:12, 10:13, 10:25, 10:29, 10:32, 11:33, 12:11, 12:19, 12:21, 12:29, 12:31, 12:35, 12:40, 12:41, 12:42, 12:43, 13:11, 13:19, 13:21, 13:26, 13:30, 13:35, 13:39, 13:40, 13:44, 14:7, 14:12, 14:13, 14:15, 14:21, 14:24, 14:36, 14:43, 15:24, 15:34, 15:44, 15:46, 16:12, 16:22, 16:34, 16:38, 16:45, 17:2, 17:8, 17:16, 17:20, 17:31, 17:39, 17:41, 17:43, 17:44, 17:46, 18:7, 18:18, 18:22, 18:23, 18:29, 18:37, 18:42, 19:7, 19:11, 19:15, 19:29, 19:30, 19:34, 19:35, 19:44, 20:3, 20:7, 20:9, 20:10, 20:11, 20:16, 20:23, 20:26, 20:40, 20:43, 20:46, 21:4, 21:6, 21:27, 21:28, 21:29, 21:30, 21:40, 21:41, 21:43, 21:44, 21:45, 21:46, 22:9, 22:10, 22:12, 22:20, 22:31, 23:8, 23:11, 23:23, 23:27, 23:36, 23:40, 23:43, 23:45, 24:2, 24:10, 24:19, 24:20, 24:24, 24:29, 24:31, 24:37, 24:41, 25:8, 25:11, 25:15, 25:17, 25:19, 25:24, 25:28, 25:35, 25:37, 25:45, 26:23, 26:30, 26:35, 26:37, 26:41, 26:45, 27:1, 27:4, 27:5, 27:6, 27:10, 27:11, 27:14, 27:19, 27:21, 27:26, 27:31, 27:33, 27:36, 27:41, 27:42, 27:46, 28:5, 28:12, 28:14, 28:21, 28:31, 29:14, 29:15, 29:21, 29:26, 29:29, 29:30, 29:33, 29:43, 29:47, 30:5, 30:8, 30:9, 30:14, 30:16, 30:20, 30:21, 30:23, 30:24, 30:27, 30:35, 30:36, 31:5, 31:16, 31:34, 31:38, 32:5, 32:6, 32:11, 32:13, 32:14, 32:15, 32:22, 32:29, 32:41, 33:2, 33:14, 33:19, 33:20, 33:22, 33:31, 33:39, 33:40, 34:10, 34:12, 34:14, 34:15, 34:17, 34:23, 34:25, 34:30, 34:37, 34:39, 34:45, 35:2, 35:13, 35:16, 35:18, 35:19, 35:20, 35:21, 35:27, 35:31, 35:33, 35:40, 36:5, 36:6, 36:9, 36:12, 36:14, 36:15, 36:23, 36:24, 36:26, 36:31, 36:35, 36:44, 37:10, 37:12, 37:13, 37:15, 37:16, 37:18, 37:19, 37:21, 37:22, 37:27, 37:29, 37:35, 37:37, 37:39, 38:5, 38:6, 38:8, 38:11, 38:15, 38:17, 38:27, 38:35, 39:1, 39:4, 39:18, 39:30, 39:31, 39:35, 39:36, 39:43, 39:46, 40:7, 40:10, 40:15, 40:18, 40:25, 40:32, 40:35, 40:43, 40:44, 40:47, 41:6, 41:8, 41:15, 41:16, 41:26, 41:32, 41:40, 41:41, 41:47, 42:1, 42:2, 42:6, 42:10, 42:13, 42:22, 42:26, 42:32, 42:34, 42:37, 42:40, 42:43, 43:2, 43:10, 43:15, 43:31, 43:33, 43:34, 43:35, 43:36, 44:26, 44:30, 44:35, 44:44, 45:5, 45:11, 45:46, 45:47, 46:6, 46:9, 46:11, 46:25, 46:26, 47:5, 47:6, 47:7, 47:8, 47:10, 47:12, 47:16, 47:18, 47:26, 47:29, 47:39, 47:40, 47:45, 48:1, 48:5, 48:9, 48:11, 48:14, 48:18, 48:19, 48:24, 48:26, 48:36, 49:4, 49:8, 49:26, 49:27, 49:31, 49:38, 49:43, 49:44, 50:4, 50:7, 50:14, 50:17, 50:28, 50:37, 50:38, 50:44, 51:9, 51:19, 51:30, 52:6, 52:9, 52:14, 52:21, 52:27, 52:29, 52:34, 52:43, 52:44, 53:7, 53:23, 54:3, 54:4, 54:7, 54:14, 54:15, 54:23, 54:33, 54:38, 55:8, 55:11, 55:18, 55:34, 55:39, 56:12, 56:13, 56:40, 57:7, 57:9, 57:11, 57:12, 57:14, 57:24, 58:3, 58:27, 59:7, 59:10, 59:12, 59:17, 59:30, 60:7, 60:9, 60:10, 60:23, 60:26, 60:30, 60:35, 60:44, 60:45, 61:11, 61:15, 61:16, 61:25, 61:26, 61:31, 61:44, 62:8, 62:13, 62:15, 62:31, 62:34, 62:42, 62:43, 63:12, 63:40, 64:5, 64:6, 64:12, 64:16, 64:18, 64:23, 64:35, 65:2, 65:33, 66:6, 66:12, 66:26, 66:42, 67:1, 67:9, 67:10, 67:26, 67:28, 67:34, 67:35, 67:40, 67:41, 68:10, 68:11, 68:13, 68:14, 68:25, 68:28, 68:39, 68:40, 68:45, 69:10, 69:28, 69:31, 69:38, 70:3, 70:17, 70:18, 70:20, 70:34, 70:35, 71:10, 71:11, 71:12, 71:14, 71:15, 71:21, 71:27, 71:31, 71:41, 72:19, 72:25, 72:33, 72:44, 72:45, 73:12, 73:25, 73:29, 73:38, 73:41, 73:46, 74:1, 74:2, 74:3, 74:10, 74:11, 74:24, 74:26, 74:35, 74:42, 74:45,

74:47, 75:6, 75:12, 75:24, 75:25, 75:47, 76:8, 76:22, 76:24, 76:29, 76:33, 77:2, 77:5, 77:16, 77:20, 77:36, 78:27, 78:29, 78:33, 78:41, 78:45, 79:9, 79:12, 79:13, 79:25, 79:31, 79:42, 80:2, 80:3, 80:10, 80:11, 80:15, 80:17, 80:18, 80:21, 80:43, 80:44, 81:1, 81:11, 81:18, 81:22, 81:23, 81:40, 82:3, 82:10, 82:11, 82:16, 82:17, 82:22, 82:23, 82:24, 82:27, 82:30, 82:31, 82:33, 82:34, 82:35, 82:44, 82:46, 83:10, 83:11, 83:24, 83:26, 83:30, 83:38, 84:13, 84:16, 85:1, 85:4, 85:6, 85:7, 85:15, 85:17, 85:21, 85:27
ability [4] - 43:15, 52:21, 60:23, 85:37
able [5] - 16:44, 17:41, 18:39, 21:30, 55:45
about [115] - 3:28, 6:16, 7:31, 7:36, 7:42, 8:5, 8:43, 9:1, 9:22, 9:26, 9:39, 9:41, 9:44, 10:8, 11:4, 11:8, 12:13, 13:29, 14:4, 14:13, 14:21, 15:27, 18:24, 19:34, 20:18, 20:37, 21:37, 22:7, 23:10, 23:26, 23:40, 23:46, 24:13, 24:33, 25:4, 25:15, 25:18, 25:21, 25:30, 26:5, 27:12, 28:20, 28:23, 28:29, 28:30, 28:31, 30:36, 31:3, 32:38, 32:45, 33:6, 34:36, 34:45, 36:4, 36:8, 36:41, 39:20, 39:42, 42:16, 42:26, 42:29, 43:3, 43:6, 43:7, 43:21, 44:40, 45:32, 50:27, 50:29, 55:5, 55:44, 59:19, 60:44, 62:45, 63:47, 64:8, 67:11, 67:26, 68:8, 69:17, 70:13, 71:13, 73:31, 73:38, 74:13, 74:18, 74:24, 74:25, 75:6, 75:16, 75:26, 76:7, 76:42, 77:18, 77:24, 77:41, 78:5, 78:46, 79:14, 79:24, 79:29, 80:21, 81:8, 81:10, 81:44, 82:21, 82:39, 83:42, 84:3, 84:8, 84:11, 84:27, 84:39, 84:45
above [1] - 46:28
absence [2] - 36:5, 36:23
absent [2] - 2:21, 31:38
absolutely [5] - 25:8, 60:5, 61:7, 67:38, 74:27
abstract [1] - 81:10
abundance [1] - 58:19
academic [3] - 4:38, 9:3, 69:29
academics [2] - 2:47, 4:41
ACCC [7] - 52:35, 70:46, 72:7, 78:9, 82:28, 82:39, 82:43
accept [2] - 16:33, 26:2
acceptable [2] - 17:29, 27:35
accepted [3] - 30:29, 38:23, 80:25
accepting [1] - 75:17
access [2] - 58:8, 61:41
accessible [3] - 51:1, 57:17, 60:34
acclaimed [1] - 51:1
accompanied [2] - 37:20, 66:19
accompany [2] - 31:44, 61:8
accompanying [2] - 33:6, 39:25
accord [1] - 18:25
accordance [1] - 83:25
accorded [1] - 30:42
according [2] - 65:46, 67:24
ACCORDINGLY [1] - 86:5
accordingly [1] - 80:6
accords [1] - 18:15
account [21] - 8:21, 9:38, 17:3, 17:16, 17:21, 17:27, 17:42, 18:3, 18:7, 18:10, 18:17, 19:5, 19:12, 19:21, 20:4, 24:26, 27:24, 27:45, 29:43, 30:29, 42:39
Accountability [1] - 45:21
accountability [8] - 29:22, 29:30, 39:12, 47:3, 47:13, 47:17, 49:29, 50:6
accountable [10] - 9:23, 9:24, 9:40, 9:44, 10:23, 14:37, 15:6, 21:47, 76:21, 76:23
accounts [2] - 63:13, 63:15
accurate [1] - 34:10
accurately [2] - 6:42, 53:44
achieve [3] - 20:27, 22:5, 59:3
achieve" [1] - 20:12
acknowledge [7] - 2:42, 48:41, 59:1, 65:43, 66:31, 66:33, 66:42
acknowledged [2] - 49:39, 55:25
acknowledges [2] - 47:39, 50:9
acknowledging [1] - 2:27
acquiescence [1] - 40:44
acquiring [1] - 28:27
acquisition [1] - 44:27
across [3] - 48:10, 54:32, 55:24
act [21] - 5:4, 5:45, 7:47, 11:19, 15:39, 24:9, 25:39, 37:15, 40:35, 41:15, 48:6, 48:27, 48:47, 55:1, 57:40, 62:28, 62:33, 73:18, 84:17, 85:4
Act [10] - 4:19, 17:38, 18:23, 23:34, 35:46, 37:37, 52:20, 58:25, 62:20, 62:41
acted [1] - 41:26
acting [8] - 7:23, 17:28, 48:10, 48:35, 49:8, 79:32, 79:33, 85:9
action [13] - 3:23, 29:27, 30:21, 30:42, 36:14, 38:6, 38:12, 38:22, 40:4, 43:32, 52:30, 59:9, 82:32
actionable [1] - 72:21
actions [9] - 32:2, 34:15, 39:4, 55:12, 57:34, 65:45, 71:44, 73:1, 84:28
actively [1] - 58:18
activities [3] - 26:34, 43:17, 53:13
activity [6] - 10:33, 20:6, 42:10, 42:45, 45:17, 53:5
actor [1] - 29:2
actors [4] - 47:28, 53:13, 55:7, 55:42
acts [6] - 10:13, 15:28, 41:10, 41:11, 53:23, 83:25
actual [10] - 15:6, 15:26, 15:45, 15:47, 16:2, 16:3, 16:4, 26:4, 72:8
actually [32] - 2:39, 4:35, 6:30, 8:37, 9:7, 15:20, 15:24, 15:46, 17:44, 18:39, 19:31, 21:8, 21:41, 22:7, 22:12, 22:14, 22:16, 22:18, 22:43, 23:7, 23:14, 23:15, 23:20, 25:22, 28:8, 55:42, 56:5, 60:24, 63:10, 63:40, 68:26, 76:36
Actually [1] - 22:5
adapted [1] - 49:40
adapting [1] - 79:39
add [7] - 21:40, 23:39, 26:33, 51:1, 74:7, 80:10, 82:39
adding [1] - 24:33
addition [7] - 6:14, 8:41, 26:34, 54:36, 55:3, 56:7, 56:34
additional [4] - 41:25, 52:19, 54:25, 62:27
additions [1] - 48:22
address [5] - 33:45, 34:2, 72:19, 73:8, 83:32
addressed [3] - 15:35, 33:2, 66:10
addresses [1] - 6:14
addressing [3] - 21:45, 50:36, 60:11
adds [1] - 4:26
adequate [1] - 85:33
ADJOURNED [1] - 86:5
ADJOURNMENT [1] - 44:2
adjunct [1] - 7:24
adjust [1] - 25:33
Adler [2] - 34:24, 83:21
admired [1] - 72:44
admissions [1] - 52:6
ado [1] - 7:13
Adolf [1] - 9:4
adopt [1] - 6:44
adopted [3] - 19:33, 33:23, 44:22
adopting [1] - 33:28
adopts [1] - 30:13
advance [3] - 7:9, 27:14, 32:38
advanced [1] - 65:38
advantage [1] - 56:14
adverse [2] - 33:32, 43:15
advice [25] - 61:20, 62:8, 62:12, 62:14, 62:17, 62:24, 62:28, 62:35, 63:4, 63:10, 63:11, 63:13, 63:16, 63:22, 63:27, 63:29, 63:32, 63:37, 63:41, 63:42, 66:12, 66:35, 68:23, 80:18
Advice [1] - 62:27
advise [1] - 60:23
advised [1] - 4:1
adviser [3] - 62:36, 79:44, 79:47
advisers [6] - 21:32, 22:32, 63:17, 63:26, 63:34, 70:40
advisory [3] - 26:36, 73:11, 79:43
Advisory [1] - 4:22
advocate [1] - 52:27
affect [5] - 5:36, 9:35, 13:20, 25:17, 40:45
affected [5] - 29:34, 29:43, 34:36, 37:36, 83:4
affects [3] - 29:17, 55:3, 83:47
affirmation [1] - 58:1
affords [1] - 39:11
Africa [1] - 78:14
after [5] - 51:14, 55:14, 61:27, 67:39, 72:8
aftermath [1] - 4:25
afternoon [7] - 2:12, 4:41, 26:39, 43:45, 44:13, 44:15, 60:13
again [20] - 2:45, 4:23, 4:24, 6:31, 10:23, 10:31, 21:30, 22:23, 25:20, 44:5, 50:36, 51:18, 59:45, 68:3, 74:38, 76:11, 83:20, 86:2
against [19] - 29:27,

31:4, 32:20, 34:18, 38:6, 43:33, 46:42, 48:1, 52:37, 54:45, 55:1, 64:7, 64:17, 71:44, 71:45, 76:41, 79:39, 82:29
agency [1] - 82:16
agenda [2] - 33:38, 77:5
agents [1] - 14:44
aggregation [1] - 8:14
AGM [1] - 66:9
ago [7] - 12:13, 15:30, 18:19, 19:42, 27:1, 30:40, 68:13
agree [10] - 19:9, 20:37, 20:39, 23:1, 26:1, 26:6, 27:34, 40:41, 70:9, 81:13
agreed [2] - 71:33, 71:37
agreeing [3] - 26:44, 76:17, 77:23
agreement [2] - 6:21, 6:27
agreements [1] - 6:41
Aha [1] - 51:6
ahead [4] - 6:38, 47:24, 67:13, 78:16
AICD [1] - 20:38
aim [2] - 28:4, 75:5
albeit [1] - 55:40
ale [2] - 12:3, 12:4
alienate [1] - 72:34
alignment [1] - 22:35
all [47] - 2:31, 2:34, 4:21, 5:16, 6:17, 7:9, 8:36, 10:47, 13:34, 14:35, 16:32, 17:33, 18:30, 18:39, 21:36, 25:46, 26:9, 27:8, 32:1, 34:41, 39:29, 45:17, 47:30, 51:6, 51:14, 52:15, 52:37, 57:34, 60:25, 60:31, 61:21, 63:11, 64:19, 67:5, 67:14, 67:46, 69:7, 71:26, 72:34, 73:14, 75:7, 75:10, 76:1, 77:41, 85:35, 85:47, 86:2
allegation [1] - 64:5
alleged [1] - 61:3
Allen [2] - 12:9, 14:13
Allens [2] - 22:29, 60:7
allow [3] - 8:20, 11:34, 18:6
allowed [1] - 69:47
allows [3] - 11:29, 15:42, 40:30
alluded [1] - 75:17
almost [4] - 19:42, 28:44, 80:44, 80:46
alone [1] - 38:28
along [2] - 27:43, 77:43
alongside [2] - 39:29, 41:36
already [19] - 7:15, 7:39, 8:8, 14:11, 19:34, 20:9, 20:27, 24:10, 26:18, 28:6, 34:23, 38:39, 43:5, 60:12, 77:40, 78:44, 79:26, 79:32, 81:47
also [75] - 2:42, 3:4, 3:6, 3:9, 4:9, 4:16, 5:24, 7:29, 7:38, 8:10, 9:38, 12:40, 13:45, 14:19, 14:23, 15:16, 15:17, 16:46, 17:7, 17:14, 17:19, 18:16, 23:10, 25:13, 26:45, 27:27, 27:31, 30:20, 31:4, 32:28, 34:2, 34:21, 34:29, 36:4, 39:5, 40:16, 41:4, 41:33, 46:36, 48:24, 50:1, 50:38, 52:9, 52:13, 53:34, 53:35, 53:37, 54:21, 54:30, 54:32, 55:27, 56:28, 56:36, 57:6, 57:22, 57:28, 58:34, 59:23, 59:31, 59:38, 60:22, 61:10, 62:35, 63:46, 64:30, 67:6, 69:39, 69:42, 71:6, 71:40, 72:3, 81:15, 81:18, 84:19, 84:30
alter [3] - 37:7, 40:18, 41:5
alternate [1] - 13:15
alternative [1] - 6:2
although [6] - 12:11, 21:42, 29:46, 52:30, 65:36, 84:15
always [15] - 2:35, 8:42, 13:34, 18:38, 21:23, 28:35, 51:5, 54:7, 55:39, 58:28, 59:31, 59:32, 66:7, 69:21, 80:15
am [54] - 2:1, 2:16, 4:46, 8:26, 10:46, 11:14, 11:19, 14:6, 19:29, 20:1, 20:34, 20:39, 21:4, 21:15, 21:27, 21:42, 22:16, 22:22, 23:1, 23:17, 23:28, 23:31, 24:3, 24:4, 24:28, 26:42, 30:45, 32:41, 34:4, 34:44, 35:23, 42:12, 44:34, 50:27, 59:22, 60:4, 60:30, 69:2, 70:13, 70:18, 70:23, 72:17, 73:32, 74:31, 74:45, 74:46, 74:47, 75:7, 77:6, 77:39, 78:16, 80:12, 85:38
ambiguous [1] - 58:37
ambitious [1] - 73:26
ambush [1] - 58:38
amend [1] - 33:21
amendments [2] - 6:11, 74:5
America [1] - 17:33
American [1] - 13:8
Americans [1] - 75:32
amiable [1] - 41:11
amicus [1] - 71:32
amidst [1] - 46:42
among [1] - 5:11
amongst [4] - 33:22, 48:5, 55:32, 70:11
amount [3] - 34:34, 64:45, 85:45
AMP [15] - 61:2, 61:21, 62:2, 62:4, 63:20, 63:36, 63:39, 63:44, 63:45, 66:9, 67:6, 71:45, 72:43, 73:15, 82:15
ample [1] - 72:29
Ampol [1] - 17:18
an [103] - 2:14, 6:21, 6:32, 7:18, 7:23, 9:34, 11:40, 11:44, 12:12, 13:15, 13:47, 14:6, 15:34, 16:15, 19:30, 20:14, 21:10, 21:17, 22:47, 23:2, 23:4, 23:16, 24:3, 25:7, 26:6, 27:11, 29:1, 29:2, 29:37, 29:44, 30:18, 31:15, 31:41, 33:15, 35:24, 35:31, 37:14, 37:38, 38:1, 38:39, 39:22, 39:30, 40:20, 43:15, 43:31, 44:44, 45:34, 45:35, 46:4, 46:33, 47:25, 47:44, 48:16, 48:27, 49:9, 50:17, 50:25, 50:43, 51:6, 51:10, 52:11, 52:19, 53:30, 54:24, 55:17, 56:8, 56:11, 56:36, 56:42, 57:1, 57:44, 60:5, 60:22, 60:34, 61:21, 62:4, 62:7, 64:46, 66:5, 66:20, 66:47, 68:18, 68:19, 68:20, 69:1, 69:25, 70:12, 70:29, 71:32, 71:33, 72:41, 72:45, 73:13, 74:2, 79:43, 80:23, 80:41, 80:46, 81:8, 81:29, 84:37, 85:9, 85:32
analysis [3] - 59:8, 83:42, 84:45
and [922] - 1:17, 2:1, 2:2, 2:5, 2:7, 2:11, 2:20, 2:22, 2:26, 2:29, 2:30, 2:37, 2:39, 2:44, 2:45, 2:47, 3:1, 3:6, 3:14, 3:43, 4:17, 4:22, 4:24, 4:25, 4:26, 4:35, 4:38, 4:43, 4:45, 5:2, 5:4, 5:5, 5:7, 5:18, 5:26, 5:31, 6:4, 6:16, 6:20, 6:21, 6:33, 6:39, 7:3, 7:5, 7:6, 7:9, 7:11, 7:20, 7:22, 7:23, 7:30, 7:35, 7:39, 7:41, 7:43, 7:45, 8:5, 8:7, 8:9, 8:10, 8:13, 8:18, 8:22, 8:23, 8:27, 8:38, 8:43, 8:45, 9:3, 9:4, 9:10, 9:14, 9:17, 9:22, 9:24, 9:28, 9:37, 9:39, 9:42, 9:45, 10:7, 10:10, 10:14, 10:15, 10:25, 10:39, 10:41, 10:42, 10:43, 10:45, 10:47, 11:8, 11:10, 11:30, 11:46, 12:3, 12:4, 12:30, 12:39, 12:41, 12:42, 12:44, 13:2, 13:9, 13:22, 13:34, 13:40, 13:47, 14:6, 14:9, 14:16, 14:23, 14:32, 14:46, 15:15, 15:16, 15:17, 15:24, 15:34, 15:45, 15:47, 16:2, 16:16, 16:17, 16:23, 16:33, 16:45, 17:3, 17:14, 17:15, 17:18, 17:25, 17:42, 18:8, 18:10, 18:23, 18:27, 18:28, 18:30, 18:37, 18:41, 18:47, 19:6, 19:8, 19:10, 19:13, 19:14, 19:21, 19:25, 19:29, 19:30, 19:31, 19:44, 20:3, 20:7, 20:11, 20:47, 21:4, 21:7, 21:8, 21:10, 21:36, 21:46, 22:1, 22:5, 22:8, 22:14, 22:16, 22:17, 22:21, 22:29, 22:31, 22:32, 22:34, 22:37, 22:38, 22:42, 22:44, 23:1, 23:6, 23:7, 23:12, 23:35, 23:36, 23:44, 24:3, 24:29, 24:30, 24:31, 24:32, 24:34, 24:39, 25:1, 25:3, 25:8, 25:10, 25:13, 25:18, 25:24, 25:25, 25:28, 25:32, 25:38, 26:11, 26:26, 26:27, 26:28, 26:34, 26:36, 26:42, 26:43, 26:45, 26:46, 27:22, 27:24, 27:26, 27:27, 27:28, 27:35, 27:37, 27:38, 27:46, 28:4, 28:9, 28:14, 28:16, 28:17, 28:23, 28:24, 28:30, 28:34, 28:35, 28:36, 28:40, 28:41, 29:2, 29:3, 29:5, 29:13, 29:14, 29:16, 29:23, 29:26, 29:27, 29:30, 29:35, 29:38, 29:44, 30:4, 30:7, 30:10, 30:13, 30:15, 30:18, 30:24, 30:25, 30:29, 30:34, 30:39, 30:41, 30:46, 31:5, 31:13, 31:14, 31:20, 31:21, 31:28, 31:31, 31:33, 31:36, 31:38, 32:3, 32:8, 32:26, 32:27, 32:28, 32:32, 32:34, 32:39, 32:40, 32:43, 32:44, 32:45, 32:46, 33:5, 33:9, 33:12, 33:15, 33:34, 33:38, 33:40, 33:45, 34:11, 34:12, 34:15, 34:16, 34:31, 34:32, 34:33, 34:34, 34:35, 34:37, 34:38, 34:45, 34:46, 35:3, 35:6, 35:8, 35:16, 35:32, 35:33, 35:34, 35:39, 35:41, 35:43, 35:45, 35:46, 35:47, 36:13, 36:20, 36:25, 36:37, 36:41, 36:46, 37:26, 37:29, 37:30, 37:31, 37:39, 37:44, 37:45, 38:38, 38:43, 39:1,

39:6, 39:9, 39:12, 39:14, 39:23, 39:32, 39:35, 39:44, 39:45, 40:3, 40:10, 40:16, 40:22, 40:32, 41:21, 41:25, 41:26, 41:30, 41:31, 41:34, 41:38, 41:44, 42:1, 42:2, 42:8, 42:14, 42:23, 42:24, 42:25, 42:27, 42:33, 42:36, 42:38, 42:47, 43:1, 43:2, 43:6, 43:14, 43:15, 43:21, 43:23, 43:29, 43:34, 43:37, 43:45, 44:4, 44:6, 44:14, 44:16, 44:23, 44:25, 44:27, 44:28, 44:31, 44:32, 44:35, 44:41, 44:45, 44:46, 45:2, 45:5, 45:10, 45:11, 45:13, 45:18, 45:19, 45:20, 45:23, 45:24, 45:25, 45:29, 45:30, 45:34, 45:35, 45:43, 46:2, 46:4, 46:5, 46:14, 46:16, 46:18, 46:20, 46:23, 46:26, 46:27, 46:28, 46:37, 46:42, 46:46, 47:2, 47:6, 47:8, 47:9, 47:11, 47:12, 47:13, 47:17, 47:22, 47:32, 47:33, 47:38, 47:39, 47:40, 47:47, 48:2, 48:6, 48:9, 48:11, 48:23, 48:26, 48:32, 48:36, 48:42, 48:43, 48:44, 48:45, 48:47, 49:2, 49:7, 49:8, 49:9, 49:14, 49:19, 49:23, 49:28, 49:29, 49:31, 49:36, 49:37, 49:39, 49:41, 49:45, 49:46, 50:1, 50:6, 50:7, 50:8, 50:10, 50:15, 50:16, 50:19, 50:25, 50:34, 50:36, 50:38, 50:47, 51:1, 51:2, 51:3, 51:5, 51:9, 51:12, 51:17, 51:20, 51:21, 51:27, 51:33, 51:36, 51:41, 51:42, 51:44, 51:47, 52:6, 52:12, 52:13, 52:19, 52:22, 52:23, 52:24, 52:27, 52:42, 52:46, 53:1, 53:7, 53:13, 53:15, 53:17, 53:22, 53:27, 53:28, 53:37, 53:40, 53:46, 54:1, 54:22, 54:24, 54:38, 54:39, 54:42, 54:43, 55:4, 55:16, 55:26, 55:27, 55:30, 56:4, 56:12, 56:13, 56:19, 56:22, 56:27, 56:28, 56:34, 56:40, 56:41, 56:43, 56:44, 57:1, 57:8, 57:9, 57:11, 57:13, 57:14, 57:16, 57:17, 57:21, 57:23, 57:25, 57:29, 57:32, 57:35, 57:38, 57:39, 57:40, 57:44, 58:8, 58:16, 58:17, 58:18, 58:20, 58:21, 58:22, 58:34, 59:2, 59:7, 59:9, 59:15, 59:18, 59:27, 59:28, 59:32, 59:33, 60:9, 60:10, 60:14, 60:15, 60:16, 60:23, 60:25, 60:26, 60:35, 60:36, 61:1, 61:2, 61:3, 61:7, 61:18, 61:19, 61:21, 61:24, 61:26, 61:28, 61:32, 61:41, 61:42, 62:2, 62:4, 62:8, 62:9, 62:16, 62:20, 62:21, 62:24, 62:26, 62:29, 62:35, 62:44, 63:11, 63:13, 63:16, 63:33, 63:34, 63:38, 63:46, 64:5, 64:9, 64:17, 64:24, 64:28, 64:30, 64:36, 64:43, 64:46, 65:11, 65:12, 65:20, 65:21, 65:22, 65:23, 65:25, 65:26, 65:32, 65:42, 66:7, 66:8, 66:14, 66:18, 66:19, 66:20, 66:27, 66:32, 66:35, 66:39, 66:47, 67:1, 67:5, 67:10, 67:21, 67:29, 67:30, 67:36, 67:39, 67:41, 68:1, 68:3, 68:5, 68:13, 68:18, 68:19, 68:21, 68:24, 68:25, 68:28, 68:31, 68:32, 68:33, 68:35, 68:39, 68:40, 68:41, 68:42, 68:45, 69:11, 69:13, 69:14, 69:15, 69:17, 69:19, 69:22, 69:29, 69:31, 69:33, 69:38, 69:41, 69:43, 70:2, 70:9, 70:23, 70:27, 70:36, 70:41, 70:43, 71:1, 71:2, 71:4, 71:5, 71:6, 71:9, 71:10, 71:14, 71:16, 71:28, 71:33, 71:34, 71:36, 71:40, 71:45, 72:2, 72:3, 72:4, 72:8, 72:10, 72:11, 72:12, 72:13, 72:14, 72:21, 72:26, 72:32, 72:33, 72:35, 72:37, 72:40, 72:41, 72:43, 72:44, 73:2, 73:4, 73:6, 73:7, 73:11, 73:14, 73:15, 73:20, 73:22, 73:26, 73:41, 73:42, 73:43, 74:5, 74:6, 74:10, 74:18, 74:20, 74:24, 74:26, 74:36, 74:37, 74:46, 75:4, 75:5, 75:7, 75:10, 75:11, 75:12, 75:16, 75:18, 75:20, 75:27, 75:41, 75:43, 75:45, 76:9, 76:12, 76:13, 76:24, 76:32, 76:38, 76:41, 76:43, 77:6, 77:7, 77:12, 77:16, 77:18, 77:19, 77:23, 77:25, 77:37, 77:39, 77:46, 78:2, 78:5, 78:15, 78:17, 78:27, 78:46, 79:4, 79:5, 79:6, 79:7, 79:12, 79:15, 79:33, 79:38, 80:2, 80:5, 80:12, 80:15, 80:36, 80:45, 81:11, 81:13, 81:15, 81:17, 81:19, 81:21, 81:25, 81:31, 81:37, 81:41, 82:6, 82:15, 82:17, 82:29, 82:38, 83:2, 83:7, 83:16, 83:20, 83:21, 83:23, 83:25, 83:38, 84:1, 84:2, 84:5, 84:15, 84:17, 84:40, 84:41, 85:5, 85:7, 85:11, 85:12, 85:17, 85:27, 85:36, 85:38, 85:43, 85:47, 86:1, 86:2

anecdotal [1] - 74:46
anecdotally [1] - 57:16
announced [1] - 56:40
annoyed [1] - 50:29
Annual [1] - 2:26
ANNUAL [1] - 1:11
another [11] - 3:21, 15:31, 35:14, 45:4, 66:7, 67:33, 67:36, 71:45, 73:5, 81:17, 81:23
answer [9] - 18:5, 21:17, 21:38, 24:3, 24:23, 42:46, 49:26, 76:27, 82:25
answered [1] - 4:21
answering [2] - 73:27, 74:31
anthem [1] - 73:22
Anthony [2] - 19:10, 27:4
anti [1] - 61:23
anti-money [1] - 61:23
anticipated [1] - 56:39
anticipation [1] - 73:29
ANU [1] - 7:22
any [27] - 14:7, 16:24, 19:26, 21:13, 21:15, 23:2, 24:47, 30:17, 35:18, 35:35, 36:10, 37:12, 38:11, 40:24, 48:32, 49:21, 51:37, 59:12, 61:8, 63:11, 63:42, 64:3, 71:19, 76:17, 80:18, 80:28
anyone [10] - 18:40, 22:27, 37:14, 43:9, 50:28, 57:36, 68:12, 77:26, 80:40, 84:7
anyone's [1] - 84:34
anything [3] - 8:14, 24:22, 43:37
anywhere [1] - 22:18
ANZ [1] - 61:2
apart [1] - 6:5
apologies [1] - 66:19
apparent [2] - 52:11, 74:23
apparently [1] - 82:32
Appeal [6] - 8:4, 11:23, 12:22, 26:12, 44:6, 81:36
appear [4] - 6:39, 46:3, 47:31, 57:16
appears [2] - 52:27, 66:3
appellate [1] - 12:41
appetite [1] - 67:19
Appiah [2] - 27:4, 31:3
apples [2] - 65:46, 66:32
applicable [3] - 56:7, 56:27, 71:24
applicants [1] - 37:32
applied [7] - 12:34, 12:39, 12:40, 14:15, 38:26, 55:43, 57:1
applies [2] - 37:28, 84:46
apply [7] - 13:2, 32:1, 32:21, 35:15, 37:38, 37:42, 55:22
applying [3] - 13:4, 14:13, 71:19
appointed [3] - 7:16, 56:41, 72:45
appointment [1] - 4:9
appointments [2] - 43:13, 43:21
appreciate [1] - 2:6
appreciated [1] - 42:3
appreciation [1] - 57:1
approach [20] - 3:32, 3:40, 6:20, 6:23, 6:30, 6:32, 6:42, 6:43, 14:1, 22:23, 29:4, 49:31, 52:14, 52:28, 59:16, 59:26, 66:36, 71:25, 80:47, 83:5
appropriate [14] - 3:39, 5:39, 6:6, 6:16, 10:21, 22:23, 23:36, 30:34, 49:44, 56:8, 59:40, 69:21, 71:21, 83:25
appropriately [1] - 75:45
appropriation [2] - 40:25, 40:29
approval [1] - 22:34
approved [3] - 17:17, 17:19, 22:44
APRA [43] - 46:4, 46:16, 46:45, 47:5, 47:16, 47:20, 47:25, 47:45, 49:20, 49:21, 49:26, 49:32, 50:4, 50:14, 50:42, 51:12, 51:36, 51:47, 54:31, 59:17, 59:23, 59:36, 61:6, 62:21, 65:12, 66:47, 67:1, 67:3, 69:23, 70:2, 72:4, 72:28, 73:3, 73:6, 73:13, 73:21, 78:5, 81:2, 81:24, 81:46, 82:1, 82:3, 83:38
APRA's [3] - 45:14, 59:26, 82:7
apt [1] - 54:31
Apurva [1] - 19:28
arbitrary [1] - 29:3
Arderne [2] - 8:5, 12:23
are [246] - 2:34, 2:35, 2:39, 3:9, 3:19, 3:43, 4:2, 4:7, 4:16, 4:31, 5:19, 5:21, 5:23,

5:29, 6:41, 6:46, 7:41, 8:6, 8:13, 8:15, 8:25, 8:31, 8:35, 8:39, 8:41, 8:46, 9:11, 9:19, 9:39, 10:4, 10:7, 10:19, 10:30, 10:32, 10:36, 11:4, 11:5, 11:6, 11:31, 11:33, 11:35, 12:2, 12:3, 12:4, 12:8, 12:39, 12:44, 12:47, 13:3, 13:4, 13:5, 13:19, 13:21, 13:22, 13:38, 13:42, 14:27, 14:31, 14:32, 14:44, 15:1, 15:4, 15:8, 15:11, 15:37, 15:38, 15:39, 16:11, 16:14, 16:23, 16:30, 16:31, 16:41, 17:2, 17:6, 17:9, 17:26, 17:28, 17:39, 17:41, 18:3, 18:24, 18:47, 19:26, 19:45, 20:18, 20:19, 20:39, 21:1, 21:6, 21:8, 21:12, 21:43, 22:1, 22:4, 22:5, 22:32, 23:5, 23:16, 23:25, 24:14, 24:39, 25:24, 25:31, 25:36, 26:30, 26:38, 27:43, 27:46, 28:3, 28:15, 28:21, 30:1, 30:11, 30:23, 31:32, 31:33, 31:44, 32:2, 32:3, 35:18, 36:19, 36:34, 36:36, 36:39, 36:45, 36:47, 37:27, 37:45, 38:30, 41:11, 42:17, 43:26, 45:18, 45:36, 48:18, 49:38, 49:43, 50:16, 52:1, 53:12, 53:14, 53:17, 53:25, 54:16, 54:18, 54:42, 54:43, 55:7, 55:14, 55:31, 55:40, 55:43, 56:21, 56:34, 57:23, 57:28, 57:40, 58:29, 58:34, 58:35, 59:2, 59:11, 59:27, 60:37, 61:12, 64:8, 64:20, 65:11, 65:21, 65:32, 66:18, 66:19, 66:42, 67:11, 67:14, 67:15, 67:19, 67:34, 68:31, 68:32, 68:33, 68:36, 69:32, 69:36, 70:1, 70:46, 71:39, 71:44, 71:46, 72:1, 72:8, 72:12, 72:24, 72:25, 73:1, 73:2, 73:12, 73:32, 75:7, 75:19, 75:39, 76:4, 76:6, 76:17, 76:21, 76:22, 76:37, 77:18, 77:19, 78:1, 78:5, 78:9, 78:41, 79:8, 79:11, 79:43, 79:45, 80:32, 80:34, 80:38, 81:7, 81:11, 82:16, 83:6, 83:27, 83:32, 83:34, 83:36, 84:20, 84:23, 84:33, 84:34, 85:9, 85:18, 85:21, 85:35, 85:41

area [9] - 19:4, 23:33, 23:46, 28:2, 61:44, 62:38, 70:13, 80:12, 84:29
areas [10] - 7:19, 30:47, 38:24, 60:20, 62:9, 64:13, 64:16, 78:1, 81:9, 82:1
arguable [1] - 30:10
argue [9] - 8:19, 10:31, 18:12, 18:28, 24:37, 25:13, 27:46, 83:22, 83:45
argued [6] - 9:36, 24:3, 30:40, 36:15, 40:24, 41:8
argues [1] - 72:21
arguing [5] - 9:39, 9:44, 20:1, 20:18, 25:23
argument [6] - 18:1, 20:14, 27:10, 28:3, 28:34, 29:20
arguments [3] - 16:13, 31:4, 31:7
arise [4] - 21:35, 35:17, 37:11, 83:47
arisen [1] - 50:10
arises [1] - 82:6
arising [6] - 7:1, 36:13, 44:20, 60:13, 68:43, 83:40
arm [2] - 7:10, 83:15
arm-wrestling [1] - 83:15
arose [1] - 63:6
around [11] - 3:14, 7:21, 24:21, 47:44, 51:40, 53:13, 67:33, 67:37, 79:14, 83:33, 85:11
arranged [1] - 2:45
arrangements [1] - 36:21
Arthur [1] - 60:7
article [1] - 12:12
articles [2] - 9:9, 9:26
articulate [2] - 48:23, 49:44
articulated [1] - 46:34
as [224] - 2:33, 2:35, 3:26, 3:32, 3:34, 3:42, 4:7, 4:8, 4:10, 4:15, 4:18, 4:21, 5:15, 5:18, 5:20, 5:32, 6:2, 6:4, 6:10, 6:29, 7:15, 7:16, 7:23, 7:24, 8:19, 8:28, 9:1, 9:28, 9:33, 10:8, 10:12, 10:13, 10:18, 10:20, 10:31, 10:35, 10:41, 10:45, 11:4, 11:14, 11:18, 11:33, 11:41, 12:4, 12:11, 12:17, 12:21, 12:28, 12:31, 12:47, 13:19, 13:27, 13:30, 13:35, 13:39, 14:11, 14:24, 14:47, 15:29, 16:6, 16:10, 16:11, 16:12, 16:18, 16:30, 16:44, 16:45, 17:8, 17:20, 17:46, 18:6, 18:8, 18:15, 18:18, 19:11, 19:17, 19:45, 20:3, 20:27, 23:1, 23:4, 23:7, 23:19, 23:25, 24:37, 24:38, 24:41, 25:2, 25:21, 25:28, 26:6, 27:5, 27:17, 27:26, 27:28, 28:2, 28:24, 28:30, 28:37, 29:11, 29:15, 29:42, 30:39, 31:13, 31:20, 31:34, 32:12, 32:29, 33:19, 34:10, 34:14, 34:23, 36:1, 36:34, 37:10, 37:19, 37:21, 37:27, 37:31, 37:33, 38:5, 38:41, 39:10, 39:13, 39:33, 39:47, 40:2, 40:17, 41:15, 41:24, 41:26, 41:37, 42:9, 42:12, 42:15, 42:25, 42:30, 42:39, 42:40, 42:43, 44:34, 44:35, 45:22, 45:37, 45:46, 47:37, 47:40, 48:7, 48:17, 49:4, 49:26, 50:20, 50:37, 50:44, 51:30, 51:46, 52:34, 53:7, 53:23, 55:18, 55:41, 56:12, 56:13, 56:42, 57:6, 57:34, 57:36, 57:44, 58:19, 58:39, 58:41, 59:11, 59:39, 60:7, 60:26, 60:38, 61:6, 61:12, 61:44, 62:15, 65:3, 65:10, 66:8, 66:9, 67:5, 67:7, 67:15, 69:6, 69:33, 69:41, 69:47, 70:41, 71:1, 71:31, 71:32, 72:24, 73:14, 75:20, 75:47, 76:37, 78:22, 78:43, 78:44, 79:32, 80:41, 81:1, 81:3, 82:3, 82:32, 82:33, 82:43, 83:26, 83:46, 84:14, 85:7, 85:9, 85:26
ASIC [56] - 4:33, 6:16, 6:43, 22:21, 26:37, 31:26, 31:34, 31:47, 32:20, 32:44, 34:24, 34:30, 34:34, 35:10, 36:7, 37:25, 39:13, 42:43, 45:11, 45:20, 45:24, 46:6, 46:24, 46:29, 51:47, 52:3, 52:4, 52:9, 52:14, 52:18, 53:47, 54:7, 54:12, 55:25, 56:39, 57:6, 59:15, 59:24, 63:46, 63:47, 64:10, 70:42, 71:10, 71:13, 71:14, 71:34, 71:39, 72:4, 72:8, 73:5, 73:6, 78:5, 81:37, 83:3, 83:21
ASIC's [9] - 6:17, 6:41, 26:36, 34:29, 45:7, 46:7, 52:26, 71:25, 83:5
aside [1] - 36:37
ask [11] - 19:25, 22:14, 26:9, 26:11, 27:7, 36:30, 43:42, 44:5, 54:7, 59:45, 75:40
asked [7] - 3:22, 7:42, 16:1, 21:8, 24:7, 58:5, 73:38
asking [9] - 7:30, 21:4, 21:13, 21:14, 22:15, 47:18, 47:34, 74:46, 84:11
asks [1] - 4:35
aspect [1] - 43:5
aspects [6] - 6:23, 28:11, 32:5, 32:11, 46:11, 49:15
assert [1] - 38:5
asserts [1] - 51:26
assess [1] - 14:14
assessing [1] - 12:18
assessment [2] - 54:37, 55:11
assimilation [1] - 14:28
assist [1] - 10:14
assisted [1] - 71:25
associate [1] - 7:18
Associate [2] - 4:6, 5:18
ASSOCIATE [10] - 7:28, 19:40, 21:23, 21:40, 22:46, 24:19, 25:7, 25:43, 26:1, 84:44
associated [1] - 28:44
association [1] - 26:46
assume [2] - 23:22, 67:47
assumed [1] - 75:32
assumes [1] - 40:32
assuming [1] - 60:44
assumption [1] - 69:19
assurance [1] - 66:20
assurances [1] - 67:46
astonishment [1] - 54:45
ASX [11] - 4:45, 5:2, 5:39, 6:3, 6:11, 18:8, 44:18, 45:26, 47:1, 48:17, 51:33
asymmetric [1] - 71:19
AT [1] - 86:5
At [1] - 27:4
at [112] - 1:24, 2:37, 3:2, 3:41, 3:43, 4:8, 4:43, 5:33, 6:9, 6:41, 7:17, 7:18, 7:22, 9:1, 9:8, 9:16, 11:4, 12:19, 13:39, 14:24, 14:27, 14:39, 17:9, 18:26, 20:1, 20:46, 21:6, 21:15, 21:36, 22:30, 23:33, 25:23, 26:17, 26:35, 26:46, 27:5, 30:47, 31:37, 32:26, 34:8, 34:16, 35:19, 36:46, 37:10, 37:14, 38:18, 38:26, 41:7, 41:25, 42:29, 43:46, 46:5, 47:9, 47:24, 47:27, 47:44, 48:18, 49:38, 52:45, 53:26, 53:29, 53:38, 53:46, 54:10, 54:14, 54:18, 55:13, 55:17, 59:29, 60:7, 61:1, 61:46, 62:7, 63:11,

65:7, 65:19, 66:9, 67:2, 67:9, 67:24, 67:35, 67:36, 68:38, 70:41, 71:15, 71:29, 72:12, 73:12, 73:38, 73:47, 74:11, 74:14, 75:2, 75:4, 75:11, 75:26, 75:31, 76:35, 76:40, 77:11, 77:36, 78:17, 80:3, 81:11, 82:1, 82:21, 82:24, 83:32, 84:27, 85:18
atonality [1] - 71:27
attack [2] - 28:24, 61:22
attempt [4] - 8:19, 11:40, 49:9, 58:45
attempts [1] - 8:25
attendance [1] - 2:5
attended [1] - 44:36
attention [3] - 28:25, 62:7, 62:39
attitude [2] - 47:8, 52:26
attitudes [2] - 56:2, 56:4
attitudinal [1] - 74:2
attributed [1] - 80:26
audience [4] - 11:17, 60:44, 65:13, 79:29
audit [1] - 82:24
AUSTIN [25] - 2:1, 24:47, 25:35, 25:45, 26:11, 43:45, 44:4, 59:14, 60:1, 77:1, 77:32, 78:5, 78:9, 78:22, 78:27, 78:37, 79:28, 80:40, 81:17, 82:3, 82:37, 82:46, 83:10, 83:19, 84:37
Austin [8] - 2:1, 2:42, 7:11, 24:45, 26:45, 60:25, 73:27, 76:16
Australia [14] - 6:37, 7:44, 12:19, 20:27, 24:38, 31:13, 33:20, 44:30, 67:12, 67:13, 67:40, 69:27, 76:11, 76:12
Australia's [1] - 61:17
Australian [21] - 7:25, 12:13, 13:9, 14:10, 20:35, 28:10, 31:9, 31:29, 31:42, 34:1, 35:3, 35:31, 36:8, 36:37, 37:1, 38:16, 43:5, 45:2, 62:20, 80:8, 85:14
authorised [1] - 83:26
authorising [1] - 41:10
authorities [1] - 38:16
authority [2] - 12:38, 40:6
Automatic [1] - 14:47
autonomy [4] - 28:32, 30:43, 40:4, 42:14
availability [3] - 50:32, 54:36, 56:15
available [4] - 31:35, 38:43, 56:9, 68:44
avenues [1] - 31:33
averse [2] - 6:32, 52:14
aversion [1] - 55:19
avoid [2] - 3:44, 55:45
avoided [2] - 41:17, 79:37
aware [9] - 15:22, 25:9, 63:17, 63:21, 63:37, 64:1, 72:7, 75:7
awareness [1] - 46:26
away [1] - 76:5
awful [1] - 22:47
Ayres [1] - 52:42

B

B [3] - 19:45, 20:26, 23:27
back [28] - 2:20, 3:47, 5:17, 5:31, 9:3, 9:5, 10:46, 12:8, 12:14, 16:14, 22:4, 23:26, 24:5, 25:20, 25:22, 27:6, 28:35, 41:3, 41:18, 42:25, 43:24, 44:9, 54:35, 60:43, 65:25, 71:10, 74:43, 83:19
backdrop [2] - 46:42, 48:1
background [3] - 44:25, 60:43, 62:47
backing [1] - 50:13
bad [6] - 42:45, 63:20, 63:32, 65:46, 66:32, 71:10
badly [1] - 72:38
baggage [1] - 60:31
Baggot [1] - 12:47
balance [5] - 5:27, 27:35, 36:12, 42:26, 44:39
balanced [4] - 8:42, 27:37, 44:32, 57:22
balancing [1] - 14:1
ball [1] - 53:19
ballpark [1] - 74:4
Banco [1] - 1:27
bank [8] - 27:36, 60:30, 64:41, 69:40, 70:18, 71:14, 71:45, 82:23
Bank [1] - 82:10
bankers [1] - 81:37
banking [2] - 52:5, 60:16
Banking [3] - 6:12, 44:21, 45:21
banks [25] - 5:34, 5:35, 45:12, 56:43, 56:44, 61:2, 61:21, 62:2, 62:4, 64:18, 66:22, 66:27, 66:31, 67:5, 67:10, 67:14, 67:15, 68:45, 69:6, 69:14, 70:21, 72:36, 72:40, 73:15, 82:15
banks' [1] - 73:17
banned [1] - 62:30
banning [2] - 69:43, 76:38
Barbara [2] - 3:4, 86:1
barometer [1] - 28:31
barrister [1] - 2:15
base [4] - 9:25, 9:43, 10:26, 52:45
based [7] - 3:32, 3:40, 6:8, 8:29, 16:15, 78:40, 81:4
bases [1] - 9:20
basic [1] - 65:7
basically [2] - 30:45, 62:42
basis [6] - 10:36, 16:17, 48:17, 52:6, 60:39, 61:47
BATHURST [11] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 80:43, 85:21
battles [1] - 57:32
be [296] - 2:7, 2:8, 2:13, 2:14, 2:17, 2:31, 3:22, 3:23, 3:24, 3:27, 3:32, 3:34, 4:7, 4:13, 4:24, 4:30, 5:7, 5:14, 5:25, 5:26, 5:40, 5:41, 5:43, 5:45, 6:18, 6:27, 6:28, 6:31, 6:36, 7:2, 7:11, 8:8, 8:13, 8:28, 8:35, 8:40, 8:41, 8:42, 9:24, 9:27, 9:29, 9:38, 10:37, 11:11, 11:39, 11:40, 12:2, 12:3, 12:9, 12:21, 12:43, 13:46, 14:32, 14:37, 14:40, 15:4, 15:8, 16:1, 16:44, 17:7, 17:31, 18:8, 18:26, 18:39, 19:30, 19:36, 19:46, 20:4, 20:40, 21:9, 21:36, 22:15, 22:40, 22:41, 23:18, 23:31, 23:33, 23:37, 24:10, 25:10, 25:13, 25:17, 25:19, 25:30, 25:36, 25:37, 26:42, 27:14, 27:31, 28:21, 29:3, 29:19, 29:36, 29:37, 29:42, 30:4, 30:8, 30:19, 30:28, 31:7, 32:30, 32:32, 32:35, 33:12, 33:14, 33:16, 33:24, 34:4, 35:34, 35:38, 35:39, 35:42, 35:47, 36:10, 36:15, 36:32, 36:39, 37:5, 37:36, 38:29, 39:11, 39:14, 39:22, 40:10, 40:25, 40:34, 40:47, 41:17, 41:31, 42:3, 42:13, 42:18, 43:30, 44:13, 44:17, 44:39, 44:44, 45:31, 45:35, 45:46, 46:3, 47:27, 47:29, 48:7, 48:25, 48:29, 48:37, 49:13, 49:15, 49:21, 49:22, 49:40, 50:13, 50:26, 50:29, 50:39, 50:45, 51:13, 51:32, 52:18, 52:30, 53:5, 53:14, 53:16, 54:1, 54:3, 54:6, 54:8, 54:13, 54:15, 54:43, 55:5, 55:19, 55:20, 55:33, 55:43, 55:44, 55:45, 56:1, 56:10, 56:47, 57:2, 57:16, 57:19, 57:22, 57:28, 58:2, 58:21, 58:23, 58:26, 58:27, 58:28, 58:33, 58:36, 58:39, 58:40, 58:42, 58:47, 59:28, 59:38, 60:8, 60:11, 60:15, 62:10, 62:25, 63:22, 66:20, 67:4, 67:6, 68:4, 68:5, 68:36, 69:26, 69:37, 69:47, 70:12, 70:24, 70:29, 71:37, 72:6, 72:7, 72:13, 72:21, 73:12, 73:28, 73:30, 73:41, 74:8, 74:38, 75:22, 75:39, 75:40, 75:44, 75:45, 76:15, 76:20, 76:21, 76:23, 76:29, 76:36, 77:3, 77:20, 77:35, 77:38, 77:40, 77:42, 77:47, 78:22, 78:27, 78:29, 78:37, 78:42, 78:44, 79:15, 79:22, 79:31, 79:37, 79:38, 79:42, 80:5, 80:25, 80:47, 81:5, 81:8, 81:25, 81:37, 81:42, 82:3, 82:5, 82:7, 82:14, 83:2, 83:5, 83:12, 83:14, 83:22, 83:43, 84:6, 84:30, 85:2, 85:9, 85:16, 85:23, 85:34
Beach [3] - 71:12, 71:16, 75:25
bear [1] - 28:43
BEAR [5] - 20:45, 45:22, 82:4, 82:5, 82:13
bearers [4] - 10:19, 10:21, 10:30, 10:45
bearing [1] - 57:43
bears [1] - 16:2
Beazley [2] - 26:12, 26:44
BEAZLEY [4] - 26:16, 41:47, 43:9, 43:41
became [2] - 63:36, 74:22
because [43] - 2:13, 6:46, 8:19, 8:22, 8:31, 14:22, 14:32, 14:38, 15:24, 16:25, 16:41, 17:44, 18:34, 19:15, 21:31, 24:24, 26:2, 33:31, 34:5, 35:24, 37:22, 40:15, 51:6, 60:43, 61:16, 62:1, 63:7, 66:40, 66:46, 69:25, 69:39, 72:14, 74:11, 74:40, 76:4, 76:30, 77:4, 81:13, 81:29, 81:36, 82:9, 82:28, 84:3
become [6] - 25:9, 27:36, 59:30, 62:4, 79:11, 83:7
becomes [1] - 53:23
been [89] - 2:12, 2:14, 3:5, 6:20, 6:38, 7:4, 7:10, 7:16, 7:21, 11:3, 11:24, 12:34, 13:32, 14:15, 15:35, 16:43, 16:46, 17:24,

17:32, 18:35, 19:11, 22:31, 24:7, 28:27, 31:41, 32:24, 34:2, 34:3, 35:9, 36:10, 37:35, 37:44, 38:23, 38:41, 38:43, 39:33, 40:13, 43:2, 44:45, 45:4, 45:5, 45:18, 45:38, 45:43, 45:44, 47:32, 49:14, 53:34, 55:13, 57:7, 57:15, 57:45, 57:47, 58:5, 59:24, 59:26, 59:31, 59:32, 60:12, 60:35, 61:46, 64:9, 64:46, 66:23, 66:46, 67:5, 68:44, 68:45, 69:10, 69:31, 69:33, 70:34, 70:38, 71:25, 72:38, 72:42, 73:24, 73:43, 76:10, 79:7, 82:13, 82:25, 83:38, 84:19, 84:21, 85:26, 85:36, 85:41
before [12] - 2:14, 3:28, 6:39, 14:23, 20:37, 29:39, 31:5, 42:41, 56:19, 70:14, 71:26, 71:33
began [4] - 31:13, 31:14, 74:36, 82:9
begin [3] - 2:27, 60:18, 60:29
beginning [1] - 74:14
behalf [2] - 40:24, 41:15
behave [1] - 75:20
behaved [1] - 75:44
behaviour [22] - 18:27, 18:31, 18:38, 50:25, 50:26, 50:27, 50:40, 51:4, 53:29, 53:40, 55:6, 55:35, 55:39, 57:2, 57:4, 61:3, 63:35, 66:27, 75:6, 75:18, 83:3, 83:5
behavioural [8] - 50:18, 54:35, 54:39, 55:26, 55:37, 56:30, 67:33, 75:11
behaviours [4] - 57:14, 68:33, 75:14, 75:16
behind [4] - 68:2, 68:22, 68:35, 70:11
being [32] - 5:16, 7:42, 11:33, 19:33, 21:8, 22:1, 24:41, 25:21, 25:24, 33:3, 33:15, 35:17, 37:11, 43:32, 45:18, 46:35, 46:43, 54:17, 63:14, 63:22, 63:27, 63:30, 64:41, 73:37, 74:17, 75:2, 79:45, 82:29, 82:33, 83:34, 84:14, 85:7
belief [1] - 30:35
believe [7] - 11:35, 47:25, 47:27, 55:7, 55:8, 59:38, 68:43
believes [1] - 51:24
Bell [2] - 13:40, 44:35
below [3] - 46:36, 51:16, 61:34
bench [1] - 26:11
beneficiaries [6] - 8:29, 14:32, 30:14, 39:15, 40:1, 41:37
beneficiary [2] - 35:35, 39:42
benefit [20] - 5:25, 8:36, 11:40, 12:5, 12:11, 18:30, 18:44, 19:33, 19:43, 20:21, 20:24, 21:14, 24:24, 25:40, 30:4, 33:16, 36:13, 53:37, 62:12, 79:28
Berle [5] - 8:34, 9:4, 9:13, 9:22, 9:40
Berle's [1] - 10:24
best [32] - 2:5, 3:41, 4:15, 5:46, 7:47, 11:20, 11:36, 17:28, 21:38, 24:28, 40:35, 40:36, 42:16, 42:28, 48:47, 54:29, 62:1, 62:28, 62:33, 68:23, 69:28, 70:3, 79:34, 79:40, 80:47, 81:12, 81:34, 83:44, 84:3, 84:16, 84:17, 85:6
better [7] - 27:36, 33:7, 38:38, 55:28, 67:1, 72:28, 77:45
between [31] - 5:27, 6:32, 8:44, 9:3, 10:15, 12:43, 13:21, 15:9, 15:13, 15:16, 15:37, 15:39, 20:46, 21:7, 23:11, 25:24, 25:38, 28:34, 28:40, 34:46, 39:44, 40:21, 41:21, 47:47, 54:23, 59:18, 64:46, 71:33, 75:43, 78:23, 79:3
beyond [6] - 46:40, 47:33, 48:46, 50:43, 72:18, 79:40
BHP [1] - 67:13
bias [2] - 55:11, 57:36
biases [1] - 54:39
big [8] - 18:39, 23:33, 25:18, 54:4, 55:38, 62:2, 62:4, 82:15
bigger [1] - 24:41
biggest [1] - 76:11
bill [2] - 6:38, 52:23
billion [2] - 67:14, 73:2
binding [2] - 48:19, 49:3
biographical [1] - 26:19
bit [7] - 4:47, 27:11, 61:31, 75:13, 79:13, 79:25
bits [1] - 24:34
BLACK [5] - 60:4, 73:24, 74:42, 76:15, 76:45
black [3] - 46:40, 48:46, 75:29
Black [1] - 60:22
black-letter [1] - 75:29
blame [2] - 80:24, 80:25
blockbuster [1] - 36:30
blown [1] - 4:47
blunt [2] - 18:23, 19:18
board [27] - 5:4, 5:14, 16:5, 18:17, 18:31, 20:44, 21:29, 29:45, 42:33, 43:15, 43:16, 43:20, 43:33, 48:29, 48:37, 67:18, 70:18, 72:13, 73:6, 74:11, 75:2, 75:17, 76:10, 76:13, 76:29, 82:12
Board [1] - 82:10
board's [1] - 27:36
boardroom [1] - 20:41
boardrooms [2] - 20:15, 47:32
boards [19] - 18:9, 18:17, 20:16, 21:2, 22:1, 24:25, 27:14, 29:5, 47:32, 47:34, 58:17, 67:33, 68:44, 69:47, 73:18, 75:5, 76:41, 77:15, 81:14
Bob [15] - 2:1, 2:42, 7:10, 26:45, 44:9, 59:22, 60:25, 60:41, 60:42, 65:10, 82:27, 82:42, 84:44, 85:36, 85:47
bodies [3] - 6:2, 18:8, 28:43
body [5] - 5:16, 5:38, 5:39, 13:33, 15:24
bogged [1] - 82:37
bona [1] - 12:10
bonuses [1] - 23:41
book [4] - 9:14, 9:16, 10:24, 73:12
booklet [1] - 44:26
borne [1] - 79:38
borrow [1] - 64:30
borrower [2] - 64:26, 64:27
both [27] - 4:38, 5:27, 9:38, 11:28, 18:15, 18:26, 33:9, 33:11, 36:24, 36:46, 43:1, 47:39, 50:14, 50:33, 50:37, 51:12, 55:3, 55:35, 56:27, 57:40, 60:14, 61:37, 72:3, 72:45, 77:38, 77:47, 81:20
bound [2] - 15:1, 18:3
bourgeoning [1] - 4:27
bowled [1] - 31:7
box [2] - 3:35, 76:1
box-ticking [1] - 76:1
Braithwaite [5] - 52:42, 53:40, 53:45, 54:13, 54:22
Braithwaite's [2] - 54:10, 56:17
branch [1] - 64:18
Brandeis [1] - 54:27
brave [1] - 67:40
breach [19] - 30:20, 32:13, 33:31, 33:37, 34:32, 35:13, 35:21, 36:6, 37:4, 37:13, 37:28, 38:12, 38:17, 38:22, 40:8, 40:26, 51:27, 54:9, 58:43
breached [4] - 35:27, 35:28, 46:35, 85:16
breaches [12] - 37:43, 39:38, 48:30, 48:32, 58:33, 61:23, 61:33, 61:35, 61:44, 64:9, 76:35, 85:19
breaching [1] - 38:6
break [2] - 36:44, 84:27
breakdown [1] - 61:1
Brick [1] - 13:10
brief [2] - 2:33, 13:40
bring [7] - 25:20, 41:30, 42:31, 43:21, 43:37, 54:8, 77:4
bringing [2] - 4:4, 39:4
brings [4] - 2:46, 42:39, 51:40, 54:35
broad [8] - 3:39, 6:8, 18:7, 18:18, 20:8, 37:39, 40:30, 56:34
broader [4] - 14:27, 18:3, 18:10, 52:21
broadly [1] - 61:32
brochure [1] - 44:26
broker [2] - 64:24, 64:27
brokers [4] - 64:15, 64:16, 64:21, 64:29
brokers' [1] - 64:31
brought [3] - 42:19, 44:40, 82:28
budget [2] - 18:44, 18:45
build [1] - 57:21
buoyed [1] - 47:7
buried [1] - 22:14
bury [1] - 44:38
business [22] - 5:12, 11:34, 11:46, 17:8, 23:8, 27:23, 28:43, 33:40, 41:9, 42:28, 44:29, 45:46, 47:39, 52:12, 56:2, 64:36, 66:13, 68:21, 73:11, 75:39, 75:43
businesses [1] - 79:38
but [139] - 2:14, 3:9, 4:2, 5:8, 5:24, 5:42, 7:38, 7:45, 8:27, 8:37, 9:38, 10:2, 11:14, 12:3, 12:20, 12:29, 13:15, 13:37, 13:42, 13:45, 14:15, 14:27, 14:35, 14:38, 15:29, 16:22, 16:38, 17:33, 17:40, 18:16, 18:40, 18:44, 19:19, 19:36, 20:27, 20:37, 20:39, 20:42, 21:14, 21:17, 21:28, 21:35, 22:9, 23:2, 23:24, 23:27, 23:41, 24:4, 24:15, 25:19, 26:19, 26:25, 27:42, 27:44, 28:41, 30:23, 35:27, 37:18, 37:29, 37:46, 39:19, 40:17, 41:9, 42:29, 42:47, 43:35, 43:38, 44:39, 45:5, 45:33, 45:37, 46:6, 46:35, 47:21, 49:26, 50:9, 50:38, 51:8,

52:10, 52:37, 53:18, 53:31, 53:47, 54:30, 54:32, 54:41, 56:4, 56:28, 59:22, 59:30, 59:38, 61:12, 61:31, 62:10, 62:42, 63:10, 63:15, 63:45, 64:8, 64:46, 65:13, 65:19, 65:31, 69:2, 69:18, 70:3, 70:18, 70:47, 71:34, 71:36, 72:25, 72:27, 74:12, 75:13, 75:33, 75:34, 75:41, 76:21, 76:32, 76:39, 77:5, 77:23, 77:45, 78:11, 78:18, 79:16, 79:24, 80:32, 80:46, 81:9, 81:32, 81:43, 82:29, 82:32, 82:38, 84:18, 85:1, 85:18, 85:42

by [149] - 2:9, 2:16, 2:27, 3:33, 4:22, 4:23, 5:19, 5:21, 5:30, 5:47, 6:10, 6:11, 6:12, 6:27, 7:4, 7:10, 7:11, 7:14, 9:32, 10:14, 11:25, 12:34, 14:15, 15:35, 16:46, 17:18, 17:19, 18:4, 18:34, 18:42, 19:10, 19:34, 20:10, 20:11, 21:29, 23:2, 27:14, 27:32, 27:45, 29:7, 29:34, 29:43, 30:5, 30:42, 31:7, 31:47, 32:16, 33:15, 33:22, 33:23, 34:3, 34:13, 34:26, 34:32, 35:39, 36:5, 36:20, 36:22, 37:20, 37:25, 37:36, 38:11, 38:27, 39:13, 39:25, 39:39, 40:4, 40:10, 40:25, 41:17, 44:22, 45:10, 46:19, 46:44, 46:47, 47:7, 48:31, 50:18, 50:39, 51:3, 51:37, 51:42, 52:5, 52:41, 54:42, 55:28, 55:30, 55:47, 57:10, 57:29, 60:2, 60:18, 60:29, 60:41, 61:11, 61:21, 61:22, 61:27, 61:30, 62:13, 62:16, 62:36, 63:34, 64:3, 64:4, 64:39, 65:39, 65:44, 66:19, 66:23, 67:3, 67:10, 67:13, 68:19, 68:40, 69:6, 69:14, 69:32, 70:42, 71:25, 72:13, 72:31, 73:5, 73:6, 73:11, 75:12, 75:13, 75:25, 75:41, 76:36, 77:3, 79:38, 79:45, 80:14, 80:17, 80:19, 81:3, 82:1, 82:11, 82:13, 83:4, 83:8, 83:15, 83:35, 83:38, 84:30

byproducts [1] - 42:45

C

Caesar [1] - 44:38

Caesar' [1] - 44:37

cakes [2] - 12:3, 12:4

call [6] - 2:2, 2:6, 13:28, 44:4, 51:31, 79:14

called [11] - 3:22, 3:27, 4:1, 7:2, 17:31, 18:25, 23:11, 28:26, 48:32, 48:38, 67:3

calls [2] - 18:8, 57:23

CAMAC [1] - 16:47

came [8] - 26:29, 51:36, 63:8, 71:32, 74:22, 81:5, 82:43, 84:27

Campbell [1] - 45:10

Can [1] - 47:19

can [74] - 3:21, 3:41, 5:17, 5:25, 5:35, 6:27, 9:3, 10:37, 12:8, 14:9, 14:40, 17:3, 17:7, 17:20, 18:22, 18:37, 19:24, 20:9, 20:10, 20:16, 20:27, 21:33, 21:38, 21:47, 22:16, 24:25, 24:32, 24:35, 24:47, 25:8, 26:8, 27:31, 29:2, 35:16, 37:15, 39:33, 40:18, 41:5, 41:14, 42:7, 42:12, 43:21, 43:30, 43:34, 43:38, 44:4, 47:26, 47:34, 49:40, 50:39, 50:45, 56:10, 56:18, 56:29, 57:2, 57:30, 57:35, 60:43, 65:13, 67:1, 69:3, 69:20, 73:3, 73:43, 75:34, 77:25, 80:10, 81:18, 81:28, 83:2, 83:22, 85:31, 85:40, 85:45

can't [3] - 20:22, 55:42, 68:11

Canada [1] - 7:23

Canadian [1] - 17:13

Canberra [1] - 70:14

candid [1] - 57:20

cannot [10] - 6:28, 11:39, 12:27, 16:34, 21:33, 40:10, 54:6, 75:34, 80:23, 85:22

canvass [1] - 69:18

capability [3] - 73:41

capable [2] - 54:17, 82:33

capacity [3] - 15:20, 18:2, 20:9

capital [3] - 9:16, 10:15, 10:16

capitalises [1] - 80:3

capricious [1] - 29:3

captivated [1] - 45:42

captured [1] - 34:24

car [1] - 35:23

Carabelas [1] - 40:23

card [2] - 61:24, 64:40

care [31] - 31:13, 31:25, 31:27, 31:37, 31:41, 31:46, 32:2, 33:2, 33:10, 33:22, 33:24, 33:37, 33:39, 34:45, 35:3, 35:9, 35:16, 35:33, 35:37, 36:32, 37:8, 39:23, 39:43, 41:3, 41:31, 41:38, 42:19, 83:23, 83:31, 83:36, 84:31

career [2] - 74:14

careful [3] - 46:29, 71:46, 80:2

carefully [3] - 22:7, 36:20, 42:13

careless [2] - 30:8, 53:18

Caremark [1] - 85:11

Carlton [1] - 17:19

carries [1] - 54:4

carry [2] - 52:20, 55:38

cartel [2] - 82:43, 83:4

cartoon [1] - 18:37

case [57] - 4:34, 6:34, 11:25, 11:38, 11:44, 12:9, 12:27, 12:35, 13:5, 13:7, 13:27, 13:40, 14:1, 14:4, 14:9, 14:12, 14:13, 14:15, 14:24, 14:28, 16:33, 16:35, 16:37, 16:40, 17:13, 17:18, 25:45, 29:31, 37:30, 39:5, 40:31, 40:43, 46:43, 54:15, 54:33, 60:23, 61:19, 61:46, 61:47, 63:4, 63:25, 63:44, 64:12, 64:38, 66:7, 68:8, 69:10, 71:12, 71:31, 72:42, 72:43, 75:22, 76:28, 82:28, 82:43, 83:5

cases [24] - 6:17, 11:25, 12:40, 12:41, 12:47, 13:3, 13:11, 14:21, 14:46, 17:2, 20:18, 33:11, 37:46, 39:38, 52:13, 56:32, 58:28, 58:29, 63:20, 71:28, 72:45, 73:12, 76:38, 83:36

Cass [1] - 50:19

Cassimatis [4] - 4:33, 4:38, 35:10, 37:11

catching [1] - 37:15

categories [2] - 28:23, 53:13

category [1] - 67:6

Catherine [3] - 27:32, 42:37, 76:9

caught [1] - 74:38

cause [2] - 56:11, 73:39

caused [3] - 3:12, 34:32, 68:45

caution [2] - 6:29, 58:20

cautioned [1] - 79:39

cautions [1] - 54:3

CBA [28] - 27:32, 45:15, 61:2, 61:7, 61:12, 61:17, 64:40, 65:29, 65:32, 66:6, 66:22, 66:25, 66:46, 67:2, 67:12, 67:17, 67:24, 67:47, 69:19, 71:45, 72:43, 73:13, 73:14, 76:7, 81:19, 81:23, 83:38

cent [5] - 60:24, 64:14, 64:19, 67:13, 85:15

central [2] - 10:18, 16:33

Centre [5] - 2:36, 3:5, 75:3, 79:6, 86:2

century [1] - 22:14

CEO [7] - 65:32, 67:34, 67:38, 72:43, 72:44, 76:9, 76:12

certain [9] - 19:45, 24:20, 29:46, 47:6, 63:7, 69:43, 78:45, 80:45, 81:9

certainly [14] - 4:26, 4:37, 6:34, 7:5, 16:31, 19:19, 23:37, 24:30, 71:46, 75:42, 79:6, 83:14, 84:34, 84:44

cetera [1] - 23:41

chair [7] - 4:43, 26:13, 26:45, 27:32, 44:6, 44:28, 59:14

Chair [1] - 70:46

chaired [2] - 7:10, 68:40

chairing [1] - 7:15

Chairman [5] - 46:24, 66:9, 70:19, 72:4, 72:43

chairman [6] - 56:42, 60:8, 60:30, 64:6, 64:7, 72:44

challenge [6] - 9:22, 17:43, 42:10, 47:14, 67:45, 71:1

challenges [1] - 67:41

champions [1] - 53:39

chances [1] - 53:25

change [37] - 5:12, 14:14, 14:25, 24:22, 27:31, 28:31, 31:45, 39:41, 41:40, 42:36, 43:38, 55:35, 56:3, 56:4, 56:44, 57:3, 62:33, 68:31, 68:34, 68:35, 68:43, 69:26, 70:35, 72:7, 72:13, 74:28, 75:11, 75:20, 76:3, 76:4, 76:24, 77:20, 77:36, 78:19, 79:24, 80:44, 80:45

changeable [1] - 28:35

changed [4] - 2:15, 31:5, 68:44, 74:5

changes [22] - 5:1, 7:3, 12:18, 29:24, 30:26, 36:41, 36:43, 37:2, 48:5, 53:16, 57:14, 59:16, 61:39, 62:27, 68:24, 68:32, 70:7, 74:38, 77:30, 79:36

Changing [1] - 7:35

changing [16] - 4:14, 7:39, 8:18, 10:3, 14:21, 17:25, 18:22, 18:34, 19:5, 19:18, 19:21, 19:36, 24:28, 24:33, 46:4

chapter [5] - 62:19, 80:12, 80:32, 81:43

character [8] - 27:47, 28:5, 28:16, 28:18, 31:45, 35:8, 41:42, 79:42

characterisation [1] - 83:47
characterised [1] - 83:45
characteristically [1] - 41:38
charged [2] - 63:22, 66:14
charging [1] - 63:45
chariot [1] - 34:5
charybdis [1] - 79:4
chastised [1] - 82:13
check [1] - 80:17
checking [1] - 63:28
Chief [18] - 2:7, 2:9, 7:29, 8:8, 10:9, 16:46, 17:37, 20:36, 21:24, 26:43, 42:26, 44:15, 60:19, 60:21, 71:1, 77:6, 81:35, 84:40
chief [3] - 60:39, 65:46, 76:32
CHIEF [11] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 80:43, 85:21
choices [2] - 28:31, 57:33
choose [2] - 17:41, 57:31
chord [1] - 50:17
chose [1] - 82:32
chosen [1] - 48:16
Christine [1] - 50:19
Christopher [1] - 28:28
Cinemas [2] - 8:5, 12:23
circle [1] - 83:19
circumstance [1] - 21:16
circumstances [16] - 6:23, 15:37, 16:32, 19:6, 19:21, 29:46, 30:2, 39:9, 42:40, 43:38, 56:9, 59:39, 70:1, 79:40, 81:24, 85:33
cited [2] - 11:47, 83:21
civil [25] - 26:27, 31:26, 31:33, 31:35, 31:45, 31:47, 32:2, 32:13, 32:19, 32:21, 33:5, 33:25, 33:29, 33:36, 34:19, 34:27, 36:24, 39:30, 43:32, 52:21, 52:47, 53:8, 56:41
CJ [2] - 13:8, 15:36
claim [1] - 64:44
claimant [1] - 38:36
claiming [1] - 65:45
claims [2] - 41:30, 41:32
clarification [1] - 17:26
clarify [1] - 80:30
clarity [1] - 24:14
class [5] - 15:10, 32:25, 38:35, 71:44, 73:1
classes [1] - 15:13
clauses [1] - 69:39
clawback [1] - 69:41
cleaned [1] - 76:10
Cleansing [1] - 14:47
clear [13] - 13:4, 14:20, 14:24, 17:6, 20:16, 24:9, 25:11, 31:8, 42:46, 64:24, 65:2, 79:43, 83:11
clearer [2] - 24:25, 24:32
clearest [2] - 13:37, 36:19
clearing [1] - 24:15
clearly [8] - 12:26, 13:10, 13:21, 16:11, 19:46, 31:5, 33:13, 67:17
CLERP [1] - 30:26
client [3] - 62:29, 62:36, 68:23
client's [1] - 62:33
clients [4] - 63:23, 63:36, 63:41, 70:41
clients' [1] - 70:40
close [4] - 13:19, 45:8, 45:44, 84:41
closed [2] - 72:46, 86:3
closer [1] - 52:10
Code [1] - 6:12
code [6] - 48:19, 48:25, 48:30, 48:32, 49:4, 49:43
codes [1] - 27:29
coercive [1] - 28:27
coinciding [1] - 3:29
cold [1] - 81:11
collaborate [1] - 71:3
colleagues [1] - 44:11
collegiality [1] - 47:12
colloquialism [1] - 21:31
colluded [1] - 76:31
combination [2] - 39:6, 53:41
combine [1] - 16:16
combined [1] - 45:14
come [24] - 3:19, 6:21, 7:30, 10:46, 11:18, 18:1, 18:43, 19:29, 19:32, 24:8, 25:25, 43:28, 44:38, 60:31, 64:14, 64:17, 65:25, 66:30, 74:20, 75:2, 75:24, 81:40, 85:10, 85:24
comes [2] - 13:39, 20:2
comfortable [2] - 45:44, 59:11
coming [10] - 11:5, 53:38, 58:16, 68:1, 70:19, 72:8, 77:43, 78:40, 81:46, 82:34
commenced [1] - 45:1
comment [5] - 43:10, 81:26, 84:7, 85:1, 85:22
commentary [4] - 22:31, 24:23, 46:43, 65:33
commentator [2] - 15:29, 41:16
comments [16] - 11:24, 21:41, 42:3, 46:18, 48:45, 51:7, 61:8, 61:12, 66:25, 70:45, 72:18, 77:24, 80:28, 81:42, 81:43, 83:22
Commercial [2] - 2:26, 2:36
commercial [13] - 2:15, 3:2, 8:38, 12:28, 17:10, 18:29, 20:3, 20:6, 27:13, 37:42, 40:32, 60:7, 66:37
commercially [1] - 32:30
commission [3] - 61:15, 61:16, 63:9
Commission [46] - 3:12, 4:25, 6:16, 7:40, 11:6, 22:30, 27:27, 36:8, 42:24, 44:21, 45:3, 45:13, 46:34, 46:38, 46:44, 48:1, 51:14, 51:15, 51:31, 51:42, 52:18, 57:44, 58:46, 60:13, 61:28, 62:13, 62:20, 62:23, 62:39, 63:1, 64:10, 64:13, 64:23, 65:12, 72:3, 73:38, 77:12, 77:25, 80:8, 80:24, 81:21, 81:29, 81:46, 82:1, 82:14
Commission's [5] - 46:16, 51:23, 52:2, 77:16, 81:2
commissioned [1] - 49:27
Commissioner [20] - 3:33, 6:26, 7:5, 60:37, 61:40, 62:6, 63:44, 65:2, 65:39, 68:3, 69:6, 69:25, 70:9, 72:26, 73:29, 74:24, 75:47, 76:31, 80:33, 81:33
Commissioner's [5] - 65:16, 66:17, 78:32, 79:11, 79:21
commissioning [1] - 49:30
commissions [2] - 63:7, 64:28
committed [2] - 66:42, 68:31
Committee [2] - 4:22, 4:44
committee [7] - 33:22, 44:29, 67:37, 68:38, 68:40, 74:18, 74:39
common [5] - 8:27, 38:39, 38:41, 41:38, 66:18
commonly [1] - 17:7
communication [1] - 58:7
community [38] - 5:7, 7:45, 8:43, 8:45, 9:37, 10:44, 10:47, 18:25, 22:37, 25:25, 27:21, 27:38, 29:7, 33:34, 34:15, 36:43, 45:42, 46:28, 46:36, 46:39, 47:11, 48:45, 50:38, 51:16, 56:2, 56:12, 56:13, 56:19, 58:15, 61:34, 72:37, 72:41, 81:31, 83:4, 84:5, 84:6, 84:24, 85:42
companies [53] - 7:43, 8:13, 9:17, 9:19, 9:42, 9:45, 11:42, 16:15, 19:45, 22:1, 22:7, 23:5, 25:9, 25:16, 25:17, 25:24, 29:5, 29:13, 30:8, 32:17, 32:31, 34:8, 34:22, 40:22, 42:22, 42:25, 42:46, 43:4, 43:5, 43:7, 43:23, 47:30, 49:2, 54:32, 55:28, 57:30, 58:1, 60:9, 63:8, 63:16, 65:42, 67:11, 70:2, 72:10, 75:10, 75:13, 76:12, 76:30, 76:41, 83:27, 84:22
Companies [3] - 4:19, 17:38, 23:34
companies' [3] - 41:22, 46:26, 57:31
company [124] - 3:19, 8:1, 8:6, 8:7, 8:23, 8:32, 9:2, 10:43, 11:20, 11:31, 11:36, 11:40, 11:46, 12:5, 12:8, 12:11, 12:21, 12:28, 12:43, 13:6, 13:12, 13:18, 13:22, 13:29, 13:35, 13:38, 13:46, 14:5, 14:29, 14:33, 14:36, 15:5, 15:29, 15:34, 15:42, 16:10, 16:13, 16:14, 16:26, 16:28, 16:34, 16:38, 16:41, 17:28, 17:45, 18:22, 18:30, 19:15, 20:3, 20:9, 20:10, 20:20, 20:23, 21:31, 23:23, 23:36, 23:42, 25:15, 25:20, 25:21, 25:22, 25:40, 26:5, 26:47, 27:14, 30:29, 30:35, 31:37, 32:29, 33:20, 35:37, 36:28, 36:37, 36:46, 37:27, 38:42, 38:47, 39:16, 39:22, 39:25, 39:26, 39:29, 39:31, 39:33, 39:34, 39:47, 40:15, 40:24, 40:25, 40:36, 40:37, 41:7, 41:8, 41:17, 41:28, 41:37, 41:40, 41:41, 42:16, 42:17, 42:27, 42:29, 42:40, 43:33, 48:47, 61:17, 63:21, 67:12, 67:40, 70:34, 72:5, 76:11, 76:22, 76:29, 76:32, 83:24, 84:16, 84:17, 84:19, 85:6, 85:8, 85:35
Company [2] - 13:1, 20:35
company's [7] - 12:19, 16:17, 16:25, 16:30, 18:11, 41:15, 42:28
comparable [1] -

31:31
compared [1] - 71:28
comparison [1] - 52:35
compel [1] - 37:23
compelling [1] - 50:16
compensation [4] - 37:28, 37:33, 39:26, 39:31
compete [1] - 64:17
competing [5] - 5:19, 10:7, 15:40, 20:40, 64:18
competition [4] - 41:31, 61:42, 76:28, 82:35
competitor [2] - 43:31, 43:33
complacency [1] - 47:6
complaints [1] - 70:40
complementary [1] - 53:35
complete [1] - 82:44
completely [2] - 63:33, 70:9
complex [5] - 23:4, 47:39, 58:28, 60:45, 70:8
complexities [1] - 71:4
complexity [3] - 49:41, 70:47, 79:5
compliance [37] - 3:42, 3:44, 4:2, 6:31, 6:34, 21:15, 34:9, 36:21, 45:45, 46:21, 47:22, 47:38, 48:2, 50:6, 51:18, 52:12, 53:26, 53:31, 53:32, 53:38, 53:39, 55:28, 55:44, 56:29, 56:35, 64:35, 68:40, 73:39, 73:42, 74:25, 79:36, 79:39, 83:25, 85:12, 85:13, 85:15, 85:17
compliant [1] - 53:15
complicated [1] - 75:46
complied [2] - 62:40, 82:25
complies [1] - 85:8
comply [5] - 19:14, 49:1, 58:41, 66:34, 85:7
component [1] - 43:7
composition [1] - 71:27
comprehensive [1] - 66:42
comprised [1] - 7:8
Comyn [1] - 73:37
concealment [1] - 69:40
conceived [1] - 29:42
concentrate [3] - 28:12, 28:14, 59:14
concentrated [1] - 53:5
concentrates [1] - 29:22
concentration [1] - 60:38
concept [2] - 46:33, 85:29
conception [2] - 29:29, 39:41
conceptions [3] - 5:29, 10:8, 31:1
concepts [4] - 30:41, 35:3, 35:6, 49:7
conceptualised [1] - 40:2
concern [5] - 24:33, 65:21, 70:3, 80:21, 83:38
concerned [6] - 9:22, 9:41, 18:24, 34:21, 54:43, 63:8
concerning [2] - 40:29, 83:33
concerns [10] - 7:45, 18:7, 44:16, 47:5, 48:3, 48:35, 48:37, 51:18, 51:31, 58:19
conclude [2] - 7:8, 36:34
concludes [2] - 38:19, 59:43
concluding [1] - 84:41
conclusion [9] - 8:17, 18:1, 18:33, 39:25, 73:17, 75:4, 77:14, 83:20, 84:2
conclusions [1] - 60:36
concrete [2] - 76:29, 76:30
condition [1] - 75:19
conditions [1] - 19:5
Conduct [1] - 6:12
conduct [57] - 6:28, 7:43, 16:18, 17:29, 24:10, 25:5, 25:33, 30:15, 30:16, 30:28, 32:9, 34:31, 36:15, 37:23, 37:36, 40:8, 40:20, 40:26, 40:33, 40:45, 41:27, 45:34, 46:35, 46:36, 47:27, 48:26, 48:30, 50:33, 51:15, 53:23, 54:7, 55:4, 55:12, 55:32, 56:2, 56:3, 57:8, 57:12, 58:7, 58:35, 58:46, 59:30, 59:32, 59:33, 61:34, 61:35, 61:36, 63:34, 66:27, 66:41, 69:9, 69:12, 69:13, 77:39, 77:46, 82:35
conducted [1] - 34:24
conducting [1] - 52:35
CONFERENCE [2] - 1:11, 86:5
conference [14] - 2:7, 2:19, 2:40, 2:44, 4:11, 7:8, 7:11, 7:30, 44:10, 44:26, 60:20, 84:42, 85:40, 86:3
Conference [2] - 1:19, 2:27
conferences [1] - 2:4
conferring [1] - 38:11
confers [1] - 15:43
confessed [1] - 68:17
confidence [7] - 10:42, 23:28, 34:33, 46:27, 57:21, 57:38, 83:16
confirmed [1] - 39:25
conflict [5] - 8:44, 25:3, 25:11, 25:37, 65:20
conflicted [2] - 62:29, 74:6
conflicting [2] - 15:23, 81:45
conflicts [1] - 15:37
conform [1] - 50:26
conformance [1] - 29:12
confused [1] - 53:17
confusion [1] - 64:23
congratulations [1] - 4:7
connect [2] - 9:10, 47:37
connected [2] - 47:2, 47:21
connection [1] - 11:46
conscious [1] - 57:28
consequence [5] - 16:33, 16:37, 16:39, 69:41, 77:21
consequences [9] - 24:35, 29:39, 33:32, 40:7, 45:32, 55:17, 72:32, 76:8, 76:10
consequent [3] - 29:30, 32:13, 32:21
consider [17] - 4:3, 14:5, 16:44, 17:39, 18:4, 29:6, 29:45, 30:8, 36:38, 37:46, 39:9, 40:16, 43:16, 46:18, 65:37, 80:11, 81:1
considerable [2] - 11:29, 85:41
consideration [4] - 3:19, 34:31, 35:30, 36:16
considerations [1] - 18:3
considered [12] - 4:26, 4:33, 8:40, 8:41, 17:7, 27:14, 29:36, 30:24, 32:15, 36:39, 39:14, 80:2
considering [6] - 4:31, 4:38, 6:27, 21:15, 42:18, 62:10
considers [1] - 4:45
consistent [3] - 37:40, 45:30, 54:12
constituencies [1] - 41:30
constituency [1] - 17:32
constitute [1] - 36:6
constituting [2] - 32:9, 37:36
constitution [6] - 12:19, 14:15, 14:21, 14:25, 20:12, 35:40
constructively [1] - 58:18
consultants [1] - 72:14
consultation [2] - 46:46, 47:43
Consumer [2] - 62:41, 65:23
consumer [7] - 25:18, 62:8, 62:38, 62:44, 64:35, 72:11, 80:5
consumer's [1] - 62:45
consumers [13] - 25:3, 32:28, 34:34, 51:5, 55:26, 58:8, 61:42, 64:20, 72:34, 75:43, 79:38, 79:43, 79:47
contained [2] - 47:30, 81:20
contains [1] - 35:3
contemporaneous [1] - 45:11
contemporary [3] - 36:47, 49:44, 50:16
content [6] - 27:18, 40:45, 41:5, 60:14, 79:8, 84:1
context [9] - 6:36, 40:32, 47:38, 52:44, 54:2, 54:30, 54:31, 55:31, 81:23
continual [1] - 21:44
continually [2] - 22:2, 48:9
continue [3] - 3:21, 39:13, 77:3
continued [1] - 63:40
continues [4] - 27:25, 31:25, 41:20, 55:33
continuing [2] - 13:28, 14:10
contract [1] - 62:43
contractual [2] - 10:13, 40:3
contrary [3] - 3:24, 69:10, 69:32
contrast [2] - 30:41, 47:45
contrasted [2] - 49:20, 83:2
contrasts [2] - 34:41, 59:9
contravened [2] - 32:8, 45:33
contravention [7] - 32:5, 32:9, 32:22, 32:34, 33:39, 37:37, 54:19
contraventions [2] - 37:47, 52:20
contributed [1] - 57:47
control [1] - 14:45
controversial [2] - 37:45, 42:2
controversially [1] - 45:47
controversy [2] - 7:31, 85:27
conversation [1] - 52:29
conversely [1] - 55:1
convincingly [1] - 24:4
convoluted [1] - 62:42
cooperate [1] - 56:31
cooperation [3] - 56:19, 56:23, 83:12
cooperative [1] - 54:44
coordinate [2] - 77:45, 78:2

coordinating [1] - 2:39
core [6] - 7:31, 28:15, 46:3, 48:23, 48:31, 62:33
Cork [1] - 11:38
Corp [1] - 17:13
CORPORATE [1] - 1:11
corporate [68] - 2:13, 2:22, 2:23, 3:15, 3:27, 4:46, 6:24, 7:1, 7:17, 7:19, 7:20, 7:32, 7:38, 10:11, 10:22, 11:1, 14:10, 17:29, 18:9, 18:27, 18:38, 19:35, 22:13, 24:25, 26:25, 26:46, 27:16, 27:29, 31:42, 33:3, 33:10, 35:40, 36:21, 36:22, 37:1, 41:21, 42:10, 43:25, 43:26, 44:16, 44:40, 44:42, 45:23, 45:25, 45:34, 46:3, 46:25, 46:47, 47:43, 49:44, 52:43, 58:6, 60:10, 60:21, 65:30, 65:33, 65:37, 66:43, 68:41, 68:42, 71:4, 75:6, 75:18, 75:27, 77:30, 83:33, 83:37, 85:10
Corporate [14] - 1:16, 1:17, 2:26, 2:37, 4:8, 4:22, 5:2, 5:39, 18:9, 44:18, 45:26, 47:1, 48:17, 51:33
corporation [18] - 4:16, 5:29, 5:46, 9:39, 10:8, 10:12, 10:31, 11:11, 19:7, 19:33, 27:44, 35:31, 35:44, 36:2, 36:6, 36:17, 43:37, 70:5
Corporation [1] - 9:14
corporation's [2] - 10:33, 43:38
Corporations [12] - 4:44, 18:23, 19:19, 35:46, 37:37, 42:9, 44:6, 52:20, 58:25, 62:19, 65:23, 74:13
corporations [13] - 5:20, 9:34, 9:36, 10:39, 11:9, 19:43, 27:25, 28:29, 28:43, 37:42, 40:2, 44:28
corporators [1] - 12:31
corps [3] - 19:45, 20:26, 23:27
correct [4] - 26:29, 42:8, 70:38, 71:13
corrected [1] - 76:36
correctly [1] - 73:46
corresponding [1] - 55:39
cost [5] - 45:46, 61:41, 64:35, 73:1, 79:37
costs [2] - 55:17, 57:30
Could [1] - 75:2
could [36] - 3:34, 9:24, 11:41, 19:25, 19:31, 23:39, 30:36, 33:32, 36:10, 38:10, 42:5, 48:25, 49:1, 49:21, 50:1, 50:42, 51:13, 51:43, 60:18, 62:30, 64:44, 73:20, 75:30, 75:33, 77:35, 77:47, 78:19, 78:33, 78:42, 78:44, 80:30, 82:1, 83:30, 85:5, 85:9, 85:34
couldn't [1] - 71:35
council [2] - 6:3, 6:11
Council [9] - 5:12, 5:39, 17:18, 18:9, 44:29, 45:26, 47:1, 48:18, 51:34
Council's [3] - 4:44, 79:5, 79:29
counsel [3] - 56:42, 71:35, 71:36
counter [1] - 20:45
counterproductive [1] - 59:38
countervail [1] - 22:41
country [1] - 72:44
couple [1] - 46:11
course [34] - 2:16, 2:42, 4:18, 8:23, 8:35, 9:13, 9:34, 10:3, 10:40, 11:38, 11:47, 12:17, 14:4, 16:26, 16:37, 17:4, 18:15, 20:22, 30:19, 35:44, 40:44, 43:36, 45:13, 45:18, 45:24, 54:12, 60:12, 66:2, 72:46, 73:24, 79:3, 79:34, 84:30, 85:47
court [13] - 11:32, 11:41, 13:17, 13:30, 37:46, 38:33, 40:40, 54:15, 67:2, 70:23, 70:46, 71:5, 72:27
COURT [1] - 1:8
Court [22] - 1:27, 2:4, 2:26, 8:4, 11:23, 11:25, 12:22, 12:35, 13:26, 14:16, 15:35, 17:20, 26:12, 35:9, 40:17, 40:27, 44:5, 54:27, 54:28, 71:2, 81:36
Court's [4] - 12:20, 13:16, 17:5, 41:4
courtroom [1] - 26:44
courts [10] - 6:20, 17:9, 34:3, 34:8, 34:13, 34:17, 71:2, 71:10, 75:44, 85:23
cover [1] - 60:20
coverage [1] - 78:20
covered [2] - 82:1, 84:30
covers [2] - 24:38, 26:23
create [2] - 24:35, 33:20
created [1] - 28:36
creates [1] - 15:46
credible [1] - 37:1
credit [3] - 61:24, 64:40, 80:5
Credit [1] - 62:41
creditor [1] - 14:5
creditors [10] - 10:47, 19:13, 29:45, 32:27, 33:34, 34:16, 36:38, 37:44, 39:10
creep [1] - 49:4
Crennan [1] - 70:20
criminal [12] - 32:4, 32:7, 32:12, 33:37, 33:38, 38:28, 53:1, 53:29, 56:41, 76:37, 81:9, 84:47
Criminal [1] - 81:36
crisis [1] - 3:29
critical [3] - 5:11, 52:26, 65:43
criticise [1] - 10:35
criticised [1] - 54:13
criticism [2] - 56:40, 72:37
critics [1] - 29:10
critique [1] - 51:42
culpable [1] - 58:36
cultivation [1] - 47:18
cultural [10] - 46:14, 47:2, 47:37, 48:2, 50:5, 51:18, 66:34, 68:28, 70:35, 72:12
culture [36] - 2:22, 4:46, 44:16, 44:23, 46:2, 46:13, 46:18, 46:24, 46:25, 46:30, 46:31, 47:5, 47:9, 47:17, 47:18, 47:47, 48:10, 48:33, 48:39, 48:42, 49:7, 49:10, 49:23, 49:24, 49:28, 50:44, 51:25, 51:37, 61:1, 65:25, 68:20, 69:13, 75:11, 76:25, 83:33, 83:37
Culture [1] - 1:16
cultures [1] - 75:20
Cunninghame [1] - 14:47
curiae [1] - 71:32
curious [1] - 49:19
current [8] - 5:3, 8:19, 15:17, 23:1, 23:3, 24:17, 36:44, 44:40
currently [4] - 7:18, 48:6, 80:32, 83:34
curriculum [1] - 60:6
curtailing [1] - 37:47
custodial [1] - 32:14
customer [3] - 22:37, 73:21, 79:34
customers [10] - 5:6, 10:47, 27:34, 27:38, 47:20, 62:24, 66:15, 66:28, 66:37, 68:4
cut [1] - 8:17
CV [1] - 60:29

D

d'etre [1] - 5:16
damage [5] - 30:18, 32:16, 36:10, 38:8, 40:14
damaged [2] - 35:26, 66:23
damaging [1] - 29:13
dance [1] - 41:20
danger [1] - 21:29
dangerous [1] - 25:10
dangers [1] - 10:25
Daniel [1] - 70:20
Darvall [1] - 13:10
data [2] - 63:29, 66:3
date [3] - 58:46, 59:26, 73:2
day [3] - 20:2, 64:42, 67:33
day's [1] - 46:43
days [1] - 5:35
dead [1] - 63:37
deal [18] - 8:18, 15:44, 17:25, 18:13, 21:46, 22:10, 24:34, 31:5, 32:28, 34:22, 42:40, 42:43, 42:45, 62:17, 65:36, 70:39, 72:29, 82:4
dealing [8] - 2:45, 9:11, 22:6, 58:22, 67:1, 70:42, 81:4, 85:28
dealings [2] - 47:10, 47:19
dealt [2] - 61:35, 65:31
debate [16] - 4:15, 4:27, 4:38, 7:36, 8:5, 8:10, 9:1, 9:3, 9:7, 10:1, 11:3, 11:8, 21:5, 49:16, 58:11, 84:3
debated [1] - 47:32
debating [1] - 28:10
debited [2] - 63:13, 63:14
deceptive [2] - 61:37, 63:35
decided [2] - 74:34, 76:31
deciding [3] - 34:36, 38:1, 75:44
decision [31] - 8:4, 8:29, 11:31, 12:20, 12:22, 13:7, 13:16, 13:20, 13:26, 17:5, 17:11, 28:32, 29:1, 29:13, 29:23, 29:28, 29:31, 29:35, 29:36, 29:40, 29:43, 30:5, 30:32, 30:33, 30:37, 35:9, 36:14, 42:15, 42:34, 66:13, 75:25
decision-making [4] - 8:29, 17:11, 29:1, 42:34
decisions [15] - 11:35, 11:45, 14:25, 15:43, 17:4, 17:17, 18:17, 18:24, 20:19, 27:15, 29:45, 39:16, 39:46, 40:8, 55:27
declaration [2] - 32:5, 32:22
declare [1] - 86:3
declines [1] - 55:21
deductions [1] - 63:38
deemed [1] - 38:28
deems [1] - 6:6
deep [1] - 47:18
deepened [1] - 31:47
deeply [1] - 2:21
defences [1] - 72:24
defer [2] - 19:41, 21:23
deferred [1] - 6:37

deficiencies [3] - 81:1, 81:12, 83:37
deficient [1] - 29:28
define [2] - 8:25, 12:7
defined [1] - 61:33
definition [3] - 61:22, 82:32, 82:38
degree [3] - 35:32, 47:12, 67:36
degrees [1] - 67:35
Delaware [1] - 7:24
delay [1] - 56:11
delegate [1] - 67:20
delegation [1] - 14:43
deliberately [2] - 70:39, 80:46
Delicacy [1] - 13:8
delighted [2] - 26:42, 60:4
delightful [1] - 71:15
delivered [2] - 52:19, 85:47
delivers [1] - 27:37
delivery [1] - 34:10
Deloittes [2] - 66:24, 74:26
deluge [1] - 39:4
delusional [1] - 55:44
demand [3] - 80:2, 80:22, 80:37
demanding [1] - 30:24
demands [2] - 20:41, 25:25
demonstrate [2] - 52:36, 53:38
demonstrated [3] - 50:7, 57:6, 63:25
demonstration [1] - 47:25
denied [2] - 38:23, 40:13
denies [1] - 40:7
denunciation [2] - 32:6, 56:44
departure [3] - 36:24, 36:26, 39:35
depend [1] - 40:37
Depression [2] - 9:5, 9:26
Deputy [1] - 70:19
deputy [1] - 56:42
derivative [2] - 37:31, 37:33
derivatively [1] - 38:42
derive [2] - 14:43, 49:36
derived [2] - 35:40, 35:43
derogated [1] - 40:10
describe [1] - 78:22
described [4] - 3:34, 41:26, 62:15, 85:26
describes [1] - 83:26
descriptions [1] - 34:23
deserved [1] - 4:9
Design [1] - 52:24
design [2] - 45:19, 55:34
designed [1] - 3:44
desirability [1] - 4:17
desperately [1] - 83:11
destination [1] - 39:36
detail [7] - 4:33, 14:7, 20:28, 23:6, 61:31, 80:16, 82:11
detailed [3] - 44:25, 57:11, 67:28
details [1] - 26:19
detect [2] - 29:27, 76:43
detection [1] - 55:45
deter [3] - 54:24, 56:23, 58:15
determinations [2] - 29:34, 42:28
determine [4] - 11:32, 13:18, 62:43, 63:27
determined [1] - 74:37
deterrence [5] - 33:16, 52:12, 53:7, 53:23, 58:32
deterrent [4] - 33:14, 45:34, 45:35, 56:12
detrimental [1] - 85:35
develop [5] - 7:41, 8:46, 30:35, 37:2, 41:34
developed [1] - 43:4
development [2] - 41:35, 68:41
developments [2] - 46:45, 81:20
devices [1] - 5:21
devotee [1] - 50:28
dialogue [1] - 56:18
did [19] - 10:31, 23:34, 27:7, 27:8, 39:23, 47:20, 47:29, 63:10, 63:11, 63:15, 63:46, 64:19, 64:26, 67:35, 69:12, 74:15, 80:30, 85:32, 86:1
didn't [9] - 66:2, 66:3, 67:25, 67:47, 68:23, 74:7, 81:30, 81:31, 82:11
differ [1] - 35:6
difference [2] - 49:34, 50:13
differences [5] - 5:20, 15:9, 15:13, 15:16, 34:46
different [17] - 3:1, 10:29, 21:42, 23:43, 23:44, 35:4, 37:26, 42:39, 46:17, 49:40, 50:4, 53:12, 70:1, 75:32, 81:23
differently [2] - 28:47, 59:22
differing [1] - 34:4
difficult [4] - 3:1, 15:8, 23:46, 81:10
difficulties [1] - 23:42
difficulty [2] - 21:18, 73:46
Dilbert [3] - 18:37, 18:41, 18:45
diligence [3] - 35:33, 41:31, 83:23
diligently [1] - 36:20
diminish [2] - 29:1, 40:19
Dimity [5] - 4:29, 26:13, 26:17, 73:35, 74:32
Dimity's [1] - 26:30
direct [1] - 39:43
directed [5] - 5:14, 30:11, 62:39, 84:4, 84:15
directing [1] - 44:14
direction [2] - 53:16, 84:30
directly [6] - 5:30, 9:27, 15:6, 39:20, 44:46, 49:24
director [19] - 9:27, 9:33, 16:7, 30:32, 30:43, 32:17, 32:24, 32:33, 34:14, 35:31, 38:7, 39:22, 40:25, 40:35, 42:40, 64:40, 67:40, 67:41, 69:31
Director [1] - 39:1
director's [2] - 7:47, 36:14
Directors [1] - 20:35
directors [83] - 5:44, 8:20, 9:24, 9:40, 10:23, 11:19, 11:29, 11:32, 11:35, 11:45, 13:18, 13:19, 14:37, 14:39, 14:43, 14:44, 15:1, 15:5, 15:20, 15:38, 15:43, 16:43, 17:3, 17:16, 17:20, 17:26, 17:34, 17:38, 17:41, 18:2, 18:7, 18:24, 19:11, 21:7, 21:12, 22:15, 25:26, 25:29, 25:36, 27:23, 27:43, 28:17, 29:5, 29:31, 29:44, 32:20, 33:15, 33:31, 33:33, 34:13, 34:18, 35:3, 35:39, 35:42, 36:20, 36:26, 36:27, 37:8, 39:8, 39:16, 40:4, 40:7, 40:20, 40:23, 41:10, 41:14, 41:40, 42:17, 42:27, 43:14, 48:31, 49:2, 67:47, 72:17, 72:20, 72:40, 72:46, 76:5, 77:15, 83:22, 83:27, 85:4, 85:32
directors' [52] - 2:22, 3:18, 4:31, 4:36, 11:18, 12:35, 14:12, 14:16, 14:46, 25:5, 27:12, 27:15, 27:18, 28:6, 28:11, 28:13, 28:17, 28:36, 30:28, 30:47, 31:9, 31:12, 31:20, 31:24, 31:27, 31:29, 31:32, 32:1, 33:1, 33:13, 34:1, 34:9, 34:26, 34:42, 34:44, 35:8, 36:36, 36:45, 37:5, 37:43, 38:10, 38:46, 39:28, 39:32, 39:39, 40:1, 40:46, 41:37, 42:34, 49:47, 51:32, 85:28
Directors' [1] - 1:16
disadvantaged [1] - 27:34
disagree [3] - 10:29, 18:46, 80:19
disagreed [1] - 40:27
disappointment [1] - 70:32
discharge [3] - 35:32, 35:43, 37:8
discharged [1] - 35:39
disclose [2] - 7:9, 48:23
disclosed [1] - 60:30
disclosure [7] - 23:30, 29:37, 51:3, 51:7, 51:9, 54:30, 64:28
disclosures [1] - 60:29
discontent [1] - 24:16
discount [2] - 55:17, 56:12
discounting [1] - 55:15
discourage [1] - 6:31
discovered [1] - 75:31
discrete [1] - 21:1
discretion [6] - 11:29, 15:44, 16:5, 32:45, 34:29, 59:1
discretions [1] - 57:24
discuss [4] - 2:47, 8:10, 14:7, 77:6
discussed [3] - 11:4, 42:15, 47:32
discussing [5] - 4:13, 9:8, 13:17, 26:38, 38:41
discussion [4] - 35:7, 75:6, 77:2, 84:39
discussions [1] - 44:40
dishonest [1] - 63:34
disinfectant" [1] - 54:29
dismissal [1] - 70:32
dismissive [1] - 47:9
dispersed [4] - 9:20, 9:25, 9:43, 10:25
dispute [2] - 16:45, 71:13
disputed [1] - 16:46
disqualification [4] - 32:12, 32:24, 32:25, 32:34
disqualified [1] - 32:33
disregarded [2] - 7:45, 58:40
disregarding [1] - 22:36
disruption [1] - 73:7
disruptors [1] - 64:17
dissonance [1] - 25:24
distinction [8] - 12:42, 12:43, 13:21, 13:41, 28:24, 28:30, 28:40, 40:21
distinctive [1] - 36:4
distinguished [2] - 4:3, 60:6
distract [1] - 73:6
distractors [1] - 3:35
distributes [1] - 30:14
distribution [1] - 45:19
diverge [1] - 41:34
diversity [1] - 23:24
dividends [1] - 20:22
divorced [1] - 15:46
Dixon [1] - 13:7

DNA [1] - 47:18
do [81] - 4:10, 5:34, 6:34, 9:39, 9:43, 11:17, 12:7, 14:35, 14:39, 14:43, 14:45, 15:39, 16:24, 17:3, 17:33, 18:1, 18:5, 18:22, 18:24, 20:9, 20:20, 20:37, 21:8, 21:33, 22:16, 22:40, 23:29, 24:29, 24:32, 25:16, 25:35, 25:45, 27:45, 28:17, 32:40, 34:36, 42:22, 42:25, 43:34, 43:37, 49:43, 51:5, 51:24, 52:3, 57:33, 58:2, 58:20, 58:23, 59:16, 59:40, 68:6, 68:13, 68:14, 70:3, 73:30, 75:30, 75:33, 75:34, 75:35, 75:36, 75:37, 75:41, 76:23, 76:35, 76:41, 77:13, 77:29, 78:17, 79:11, 81:12, 81:25, 82:3, 85:2, 85:5, 85:13
doc@or [1] - 2:17
document [5] - 47:46, 50:5, 60:34, 65:17, 65:19
documentation [1] - 68:24
documents [1] - 49:35
Dodd [6] - 9:4, 9:32, 9:35, 9:44, 10:31, 25:23
does [42] - 11:14, 12:2, 13:34, 15:44, 17:38, 24:22, 25:3, 26:3, 26:20, 28:13, 29:23, 32:14, 35:15, 35:17, 35:20, 35:36, 35:38, 37:11, 37:14, 43:13, 43:29, 44:39, 52:9, 52:18, 52:37, 55:38, 56:14, 56:36, 58:10, 60:20, 65:36, 65:37, 66:5, 69:22, 71:18, 76:42, 79:16, 80:40, 83:2, 84:18, 85:3, 85:6
doesn't [3] - 23:4, 69:21, 69:39
doing [8] - 17:31, 23:44, 25:31, 28:14, 45:38, 45:46, 63:40, 64:35
dollars [3] - 18:42, 62:3, 64:46
domain [2] - 29:22, 30:23
don't [21] - 3:39, 10:11, 18:45, 19:35, 20:26, 21:26, 22:24, 23:27, 24:14, 24:37, 24:41, 69:30, 69:34, 70:4, 70:10, 70:14, 74:31, 82:16, 82:25, 82:37, 83:24
done [14] - 28:8, 33:12, 52:41, 58:34, 71:41, 74:8, 74:18, 77:5, 77:12, 77:35, 77:47, 78:17, 81:42, 81:47
door [1] - 41:18
dots [1] - 66:3
doubt [2] - 52:15, 85:23
Doug [1] - 3:7
down [8] - 19:9, 20:2, 53:6, 65:32, 68:1, 70:4, 82:23, 82:37
dozens [2] - 23:5, 23:6
Dr [3] - 7:10, 61:13, 81:40
DR [25] - 2:1, 24:47, 25:35, 25:45, 26:11, 43:45, 44:4, 59:14, 60:1, 77:1, 77:32, 78:5, 78:9, 78:22, 78:27, 78:37, 79:28, 80:40, 81:17, 82:3, 82:37, 82:46, 83:10, 83:19, 84:37
draft [7] - 21:46, 44:18, 46:15, 46:46, 47:43, 48:5, 51:12
dragged [1] - 70:39
dramatic [2] - 36:44, 76:9
dramatically [2] - 50:28, 51:32
draw [4] - 11:44, 23:26, 28:4, 28:25
drawing [2] - 13:21, 25:28
drawn [3] - 52:44, 54:22, 60:15
draws [3] - 8:38, 13:41, 30:40
drifting [1] - 53:22
drinks [1] - 7:11
drive [4] - 56:44, 57:3, 68:31, 83:3
driven [2] - 69:14, 72:13
driver [1] - 37:15
drives [3] - 18:26, 18:31, 35:19
driving [1] - 37:13
dropped [1] - 66:6
dropping [1] - 53:18
due [4] - 2:35, 66:7, 66:32, 79:37
Duke [1] - 13:17
during [2] - 9:5, 9:26
duties [69] - 2:22, 3:19, 4:31, 4:32, 4:36, 5:46, 11:18, 12:35, 14:12, 14:16, 19:12, 27:12, 27:19, 28:6, 28:11, 28:13, 28:17, 28:18, 28:36, 29:8, 30:47, 31:9, 31:12, 31:20, 31:24, 31:27, 31:29, 31:32, 32:1, 33:14, 33:31, 34:1, 34:10, 34:13, 34:26, 34:42, 35:8, 35:15, 35:32, 35:39, 35:43, 35:45, 35:46, 36:36, 36:45, 36:47, 37:4, 37:5, 37:7, 37:17, 37:43, 38:47, 39:6, 39:39, 40:1, 40:9, 40:23, 40:46, 41:6, 49:47, 50:1, 51:32, 64:26, 83:43, 84:1, 84:46, 85:16, 85:28, 85:32
Duties [1] - 1:16
duty [99] - 7:47, 8:22, 11:19, 11:21, 14:4, 17:44, 30:7, 30:9, 30:16, 30:20, 31:12, 31:14, 31:16, 31:25, 31:27, 31:37, 31:41, 31:46, 32:2, 32:46, 33:2, 33:10, 33:22, 33:24, 33:37, 33:39, 34:45, 35:2, 35:4, 35:5, 35:8, 35:13, 35:16, 35:21, 35:27, 35:28, 35:31, 35:34, 35:37, 36:7, 36:14, 36:28, 36:32, 36:35, 36:36, 37:10, 37:13, 37:16, 37:18, 37:21, 37:25, 37:28, 38:3, 38:5, 38:11, 38:12, 38:18, 38:22, 39:4, 39:15, 39:18, 39:20, 39:21, 39:24, 39:27, 39:28, 39:32, 39:34, 39:40, 39:43, 40:7, 40:13, 40:15, 40:34, 41:3, 41:23, 41:25, 41:34, 41:38, 41:40, 41:41, 42:19, 65:20, 79:40, 83:23, 83:31, 83:36, 83:44, 84:4, 84:13, 84:16, 84:18, 84:19, 84:22, 84:31, 85:11, 85:17

E

each [6] - 6:33, 20:21, 23:42, 31:4, 46:43, 47:1
earlier [13] - 11:24, 11:26, 14:22, 14:30, 16:11, 17:37, 18:16, 23:26, 32:43, 42:26, 44:15, 45:9, 70:1
early [5] - 31:13, 46:30, 50:18, 68:19, 73:46
easier [2] - 16:32, 22:10
easily [1] - 10:38
easy [1] - 78:40
echo [1] - 46:33
economic [7] - 8:15, 10:6, 10:10, 10:22, 10:36, 10:38, 10:41
economically [1] - 50:27
Economics [1] - 50:21
economist [1] - 9:15
economists [2] - 54:45, 55:16
economy [2] - 61:40, 85:43
Edelman [3] - 4:32, 35:23, 37:13
edition [3] - 45:27, 49:13, 51:34
educate [1] - 59:27
education [7] - 52:46, 53:6, 53:13, 53:22, 54:24, 57:16, 58:17
educative [1] - 58:9
EDWARDS [1] - 74:45
Edwards [1] - 74:45
effect [14] - 28:16, 29:1, 32:15, 34:15, 37:19, 47:20, 47:26, 48:46, 54:36, 55:7, 55:11, 56:12, 58:32, 76:33
effected [1] - 36:42
effective [17] - 45:31, 45:35, 49:26, 52:1, 52:38, 53:42, 54:4, 54:17, 55:41, 56:1, 57:7, 57:15, 59:28, 70:34, 73:19, 85:15
effectively [2] - 10:22, 49:24
effectiveness [2] - 46:17, 57:39
efficiently [3] - 51:20, 62:25, 79:33
efforts [2] - 2:43, 5:14
egregious [1] - 63:5
either [4] - 3:39, 16:11, 22:23, 55:44
elders [1] - 2:30
election [1] - 70:15
element [1] - 21:10
elements [5] - 28:11, 35:3, 35:6, 36:25, 41:33
elevated [1] - 35:9
else [4] - 22:27, 57:36, 77:5, 80:40
else's [1] - 18:44
Elvis [1] - 52:31
emblems [1] - 30:23
embodied [1] - 79:32
embody [1] - 13:35
embrace [1] - 70:35
emerge [1] - 37:3
emerged [4] - 3:17, 45:30, 45:41, 81:1
emerges [1] - 51:33
emerging [3] - 2:30, 67:30, 83:10
emphasis [2] - 52:11, 56:41
emphasise [1] - 46:29
emphasising [1] - 32:19
emphatically [1] - 40:40
empirical [2] - 42:21, 69:31
employ [1] - 58:6
employees [8] - 5:6, 10:46, 32:29, 33:34, 34:16, 36:1, 72:15, 82:23
empowerment [2] - 29:26, 31:34
empted [1] - 51:13
enabled [1] - 64:17
enabling [1] - 70:34
enact [1] - 17:31
enacted [5] - 19:36, 30:27, 33:19, 33:24, 38:34
enacting [1] - 33:46
enactment [4] - 32:42, 33:1, 33:6, 33:40
enactments [1] - 33:11

encounter [1] - 30:6
encountered [1] - 48:44
encourage [3] - 6:21, 48:34, 78:2
encouragement [1] - 64:33
encouraging [1] - 29:11
encroach [1] - 2:34
end [8] - 5:26, 6:31, 15:42, 20:2, 27:4, 27:5, 65:19, 74:14
ended [1] - 24:21
ending [1] - 2:44
endorse [1] - 71:41
energy [1] - 72:11
enforce [3] - 37:15, 38:46, 83:7
enforceable [9] - 43:31, 52:6, 68:18, 70:24, 70:33, 71:6, 73:13, 73:47, 82:15
enforced [6] - 31:20, 31:34, 37:25, 45:32, 54:15, 58:42
enforcement [43] - 6:30, 6:33, 6:42, 6:43, 7:3, 29:24, 31:11, 31:12, 31:14, 31:26, 31:33, 31:36, 31:40, 31:46, 32:20, 32:45, 33:7, 33:30, 34:18, 34:29, 34:37, 34:42, 38:29, 44:22, 45:32, 45:35, 46:19, 51:28, 52:1, 52:27, 52:40, 53:4, 53:10, 53:27, 53:45, 54:22, 56:23, 57:12, 58:33, 59:9, 59:16, 59:19, 85:1
Enforcement [3] - 45:11, 45:24, 52:23
engage [8] - 47:46, 49:23, 53:15, 58:38, 59:26, 71:43, 73:19, 75:5
engaged [4] - 57:15, 59:33, 73:25, 83:3
engagement [4] - 39:44, 59:2, 75:12
engaging [3] - 46:18, 58:10, 83:28
England [1] - 23:34
English [2] - 8:4, 11:22
enjoyed [1] - 44:11
enlightening [1] - 59:7
enliven [2] - 28:3, 30:20
enormous [2] - 72:41, 85:45
enough [3] - 45:38, 65:29, 68:39
ensuing [1] - 31:40
ensure [5] - 83:24, 83:27, 85:8, 85:17, 85:19
ensuring [4] - 2:39, 76:42, 85:6, 85:32
entered [1] - 31:17
enterprise [1] - 68:5
entirety [1] - 12:23
entities [16] - 5:17, 5:23, 45:44, 46:2, 47:41, 48:15, 48:20, 48:23, 48:24, 51:4, 51:21, 51:44, 54:2, 59:27, 70:39, 75:10
entitled [2] - 74:19, 81:31
entity [17] - 5:3, 6:3, 12:29, 14:37, 16:38, 19:15, 20:3, 26:6, 27:14, 30:18, 35:35, 38:11, 45:33, 48:35, 50:43, 69:37, 70:3
entity's [1] - 29:1
enumerated [1] - 73:43
enunciated [1] - 77:3
environmental [2] - 84:23, 84:28
envisage [1] - 24:47
Eora [1] - 2:29
equally [2] - 69:39, 84:46
equating [2] - 13:5, 13:46
equation [1] - 18:28
equivalent [1] - 16:31
eroded [1] - 72:38
errant [1] - 34:18
error [1] - 13:47
erudition [1] - 85:46
escalate [2] - 53:46, 58:19
escalating [5] - 52:46, 53:36, 53:37, 56:20, 59:8
especially [1] - 41:6
essential [2] - 61:7, 69:41
essentially [3] - 18:40, 21:44, 24:20
establish [2] - 30:19, 30:21
establishing [1] - 6:38
et [1] - 23:41
ethical [2] - 66:27, 75:6
ethically [4] - 5:4, 48:7, 48:11, 48:36
Ethics [1] - 75:3
ethics [1] - 75:18
EU [2] - 66:47, 70:30
euphemistically [1] - 4:1
evaluation [1] - 3:14
evaporates [1] - 72:10
even [23] - 13:4, 13:23, 15:5, 17:15, 18:28, 19:41, 20:10, 24:22, 24:25, 27:6, 27:24, 28:43, 39:14, 40:20, 51:4, 53:17, 54:13, 55:1, 66:4, 67:42, 79:16, 81:29, 82:23
evening [1] - 19:28
event [2] - 2:39, 66:8
events [1] - 50:16
eventually [2] - 41:36, 84:6
ever [6] - 2:5, 18:35, 23:22, 63:16, 63:27, 76:23
every [6] - 6:19, 6:33, 39:21, 66:6, 69:9, 72:5
everybody [2] - 75:20, 79:15
everyone [6] - 2:3, 5:8, 5:33, 19:28, 25:16, 69:38
Everything [1] - 77:34
everything [7] - 24:5, 25:16, 74:15, 77:4, 77:21, 77:32, 82:12
evidence [3] - 38:36, 64:29, 69:32
evidenced [1] - 30:32
evil [1] - 69:7
evolution [8] - 19:5, 27:11, 27:42, 28:2, 36:41, 39:14, 39:40, 41:39
evolve [1] - 19:20
evolved [1] - 31:1
evolving [1] - 31:28
exacted [1] - 39:12
exactly [1] - 4:15
exaggerating [1] - 4:47
examination [4] - 45:37, 62:47, 65:32, 67:3
examine [1] - 58:5
examined [2] - 46:44, 50:24
examines [1] - 47:37
examining [4] - 4:14, 46:30, 51:41, 57:45
example [16] - 6:12, 12:47, 13:15, 15:10, 15:13, 23:22, 29:44, 32:4, 37:13, 40:47, 42:38, 43:32, 52:34, 74:5, 80:16, 84:22
examples [5] - 25:9, 36:19, 54:21, 54:37, 56:20
excelled [1] - 67:35
excellent [1] - 25:7
except [2] - 12:4, 85:22
exciting [5] - 2:12, 2:14, 2:19, 3:9, 3:10
exclusively [2] - 27:15, 28:44
excuse [1] - 80:23
executive [6] - 23:2, 23:3, 23:40, 65:3, 67:37, 76:32
Executive [1] - 45:21
executives [11] - 22:34, 48:31, 58:18, 63:21, 63:39, 63:45, 64:9, 65:47, 69:28, 74:27, 76:41
exercise [11] - 14:46, 30:5, 35:31, 35:33, 35:42, 57:23, 58:21, 59:39, 73:26, 76:1, 78:2
exercised [3] - 8:35, 9:30, 35:38
exercising [2] - 11:30, 11:45
exhaustive [1] - 17:41
exist [1] - 5:23
existence [1] - 28:10
existing [5] - 18:13, 19:14, 24:38, 50:8, 69:11
expand [3] - 6:9, 49:1, 50:1
expanded [2] - 46:4, 82:5
expanding [1] - 83:30
expect [6] - 44:31, 58:23, 62:30, 71:44, 73:14, 74:19
expectation [1] - 27:25
expectations [9] - 8:43, 8:45, 9:37, 18:25, 46:37, 47:11, 49:46, 51:16
expected [4] - 15:38, 15:39, 27:23, 49:13
expecting [1] - 58:2
expense [1] - 65:7
experience [9] - 10:24, 39:2, 44:25, 44:30, 64:15, 68:17, 70:33, 71:6, 80:4
experienced [1] - 56:42
expert [5] - 6:47, 23:2, 79:9, 79:20, 80:6
expert-inputted [1] - 80:6
expertise [1] - 71:4
experts [1] - 76:36
explain [4] - 11:17, 11:21, 50:42, 74:20
explained [2] - 11:33, 12:22
explaining [4] - 23:6, 23:7, 50:2, 68:26
explains [1] - 50:9
explanation [3] - 69:1, 81:41
explicit [2] - 17:15, 29:4
exploitation [1] - 5:22
explore [2] - 46:10, 67:43
express [4] - 5:9, 21:27, 33:43, 39:28
expressed [9] - 6:15, 7:4, 13:33, 34:3, 35:34, 39:33, 49:38, 73:29, 84:14
expression [1] - 13:37
expressly [4] - 35:36, 39:21, 39:24, 84:18
extend [1] - 24:6
extended [2] - 82:7, 83:43
extending [1] - 79:40
extends [1] - 3:23
extension [1] - 81:8
extent [9] - 6:7, 7:37, 22:20, 24:20, 34:31, 48:15, 81:30, 83:41, 83:47
external [4] - 26:36, 39:47, 41:7, 47:11
extra [1] - 42:31
extra-legal [1] - 42:31
extraordinary [2] - 64:38, 64:47
extreme [3] - 3:39, 6:33, 85:36
extremely [1] - 70:34
EY [1] - 74:26

F

F [3] - 44:9, 59:6, 59:42
face [3] - 3:23, 21:18, 57:20
faced [1] - 66:41
facilitate [1] - 10:14
facilities [1] - 60:19
facing [3] - 73:2, 73:7, 76:4
fact [20] - 3:10, 5:21, 13:47, 15:5, 16:7, 22:31, 24:7, 30:16, 39:23, 42:21, 42:23, 50:45, 53:39, 56:22, 58:6, 62:2, 64:27, 69:2, 69:23, 84:28
factor [2] - 18:28, 18:29
factors [4] - 40:37, 47:2, 47:37, 73:40
facts [2] - 30:20, 71:22
failed [4] - 66:33, 66:39, 66:40, 67:30
failing [3] - 51:8, 72:20, 85:8
failings [2] - 57:45, 58:10
failure [6] - 11:1, 36:20, 47:10, 51:19, 72:32, 85:14
failures [2] - 51:21, 56:29
fair [2] - 47:11, 83:12
fairly [9] - 5:8, 15:39, 19:9, 51:20, 57:40, 57:41, 58:23, 62:26, 79:33
fairness [4] - 54:40, 54:44, 56:30, 56:37
faith [6] - 7:47, 11:20, 11:45, 17:10, 25:39, 85:12
fall [2] - 49:28, 57:35
fallen [1] - 46:36
false [1] - 63:46
familiar [1] - 53:11
famous [3] - 9:13, 54:26, 68:8
fan [1] - 44:35
far [12] - 2:5, 9:28, 10:35, 13:27, 16:6, 23:32, 28:5, 47:33, 55:14, 58:47, 71:22, 77:12
fascinating [2] - 46:45, 85:41
fashion [2] - 37:29, 41:39
fast [1] - 35:24
favour [2] - 16:4, 23:32
favourable [1] - 52:35
favoured [3] - 3:32, 14:1, 68:4
Fawcett [1] - 11:22
fear [1] - 44:38
feasible [1] - 18:45
feature [1] - 31:28
features [2] - 19:37, 32:46
Federal [2] - 35:9, 71:2
federally [1] - 73:4
fee [2] - 63:6
feeding [1] - 27:41
feel [1] - 26:38
fees [3] - 61:20, 63:21, 66:14
fell [3] - 51:16, 61:10, 61:34
fence [1] - 42:13
few [9] - 21:40, 34:45, 35:18, 41:47, 46:25, 48:19, 77:5, 79:9, 85:37
fewer [1] - 31:32
fictional [1] - 83:35
fide [1] - 12:10
fiduciary [1] - 79:42
field [3] - 50:22, 60:45, 74:12
figure [3] - 60:38, 66:4, 71:40
files [3] - 70:40, 70:41, 70:43
Filter [1] - 14:47
final [7] - 45:15, 49:13, 60:1, 65:33, 73:29, 77:26, 81:20
finally [10] - 33:40, 46:2, 49:9, 55:15, 60:25, 66:41, 70:41, 72:12, 73:12, 74:22
financial [47] - 3:13, 3:24, 3:29, 5:15, 5:24, 20:43, 26:24, 26:28, 34:34, 34:39, 45:8, 46:39, 47:7, 47:8, 47:33, 52:7, 54:14, 55:32, 60:16, 61:20, 61:41, 61:42, 61:43, 62:7, 62:12, 62:14, 62:17, 62:24, 62:31, 62:45, 63:4, 63:10, 63:11, 65:43, 66:35, 68:2, 68:13, 71:5, 72:2, 72:6, 73:11, 73:22, 78:34, 79:44, 79:47, 80:4, 82:34
Financial [2] - 4:34, 62:26
financier [1] - 68:10
FINCH [5] - 44:34, 59:21, 82:42, 83:2, 83:14
Finch [3] - 4:42, 44:7, 44:13
find [10] - 5:27, 15:7, 21:16, 29:5, 42:30, 44:31, 61:10, 65:13, 76:23, 83:36
finding [3] - 32:6, 32:13, 64:7
findings [2] - 63:2, 77:16
finds [1] - 38:33
fine [3] - 71:13, 71:14, 76:22
fines [2] - 32:12, 61:24
finger [1] - 73:40
fingertips [1] - 46:6
finish [1] - 18:37
finishing [1] - 72:31
firepower [1] - 79:20
firm [1] - 64:5
firmly [3] - 5:13, 51:18, 51:26
firms [1] - 75:10
first [26] - 2:8, 3:17, 4:6, 6:17, 7:14, 8:34, 13:26, 13:39, 14:11, 25:13, 25:17, 28:9, 29:20, 29:29, 37:2, 46:23, 49:27, 52:28, 59:10, 60:47, 70:39, 71:11, 71:18, 72:33, 83:19, 85:2
first-instance [1] - 13:26
firstly [5] - 45:31, 46:13, 59:6, 61:33, 72:6
fit [1] - 11:14
five [2] - 71:44, 73:31
fives [1] - 44:46
fix [3] - 23:28, 23:32, 74:34
flashpoints [1] - 47:41
flat [1] - 69:28
flexibility [2] - 57:25, 70:2
flexible [3] - 8:20, 18:6, 24:6
floating [1] - 83:33
FLOOR [1] - 76:20
fluctuates [1] - 65:17
focus [19] - 8:3, 10:6, 10:37, 11:15, 12:28, 15:45, 20:17, 26:20, 27:33, 44:17, 46:34, 62:23, 77:4, 79:31, 83:11, 83:42, 85:2, 85:36, 85:38
focused [5] - 7:44, 7:46, 11:19, 23:16, 62:6
focussing [1] - 52:5
FOFA [8] - 62:26, 65:22, 68:1, 68:20, 70:35, 74:5, 74:18, 75:26
follow [8] - 15:1, 20:36, 48:16, 59:23, 66:13, 73:15, 77:11, 77:25
followed [6] - 7:11, 37:16, 45:10, 48:34, 57:9, 57:10
following [6] - 4:41, 45:23, 57:12, 61:18, 66:10, 72:2
follows [2] - 48:7, 71:2
for [232] - 2:36, 2:38, 2:42, 3:28, 3:38, 5:23, 5:24, 6:12, 6:16, 6:28, 6:37, 6:39, 7:14, 7:25, 7:29, 7:30, 7:44, 8:35, 9:7, 9:13, 9:23, 9:26, 9:30, 10:6, 10:37, 11:3, 11:32, 12:5, 12:10, 12:12, 12:18, 12:47, 13:15, 13:34, 14:21, 15:10, 15:11, 15:13, 15:31, 16:32, 17:29, 17:45, 18:9, 18:30, 19:8, 19:24, 19:25, 19:40, 20:1, 20:26, 20:29, 21:13, 22:46, 23:22, 23:36, 23:42, 24:3, 24:45, 25:40, 26:26, 26:37, 26:38, 26:43, 26:44, 27:8, 27:19, 27:37, 28:42, 29:34, 29:39, 30:46, 31:15, 31:26, 31:33, 31:35, 31:36, 32:1, 32:4, 32:21, 32:27, 33:16, 33:28, 33:32, 33:37, 33:39, 34:30, 36:19, 36:21, 36:25, 37:4, 37:6, 37:28, 37:33, 37:38, 37:43, 38:3, 38:12, 38:16, 38:17, 38:22, 38:35, 38:38, 39:30, 39:31, 40:21, 40:30, 40:47, 41:22, 41:47, 42:6, 42:14, 42:44, 43:6, 43:32, 44:36, 45:20, 45:26, 45:31, 45:33, 46:4, 46:10, 46:17, 46:26, 47:30, 47:41, 48:19, 49:1, 49:2, 49:32, 50:21, 50:28, 51:6, 51:31, 52:27, 53:14, 53:25, 53:28, 54:7, 54:14, 54:25, 54:43, 55:18, 55:24, 55:39, 56:5, 56:23, 56:27, 56:28, 56:45, 57:7, 57:19, 57:38, 58:1, 58:19, 58:20, 58:22, 58:45, 59:12, 59:33, 59:40, 60:5, 60:15, 60:19, 60:27, 60:39, 61:20, 61:41, 61:42, 62:14, 62:35, 62:44, 63:6, 63:13, 63:36, 63:38, 63:45, 64:42, 65:16, 65:39, 66:30, 66:34, 67:3, 67:18, 67:19, 67:32, 69:31, 70:1, 70:32, 71:10, 71:20, 71:39, 71:40, 72:1, 72:6, 72:20, 72:41, 73:4, 73:31, 73:42, 74:5, 74:11, 75:3, 75:18, 76:16, 76:37, 76:46, 78:43, 79:6, 79:12, 79:28, 80:22, 80:23, 80:24, 80:26, 83:24, 83:30, 84:22, 84:47, 85:4, 85:9, 85:31, 85:42, 85:45, 85:47
force [1] - 53:28
forced [2] - 66:46, 85:37
forefront [1] - 3:2
foreseeable [1] - 36:12
foreshadowed [1] - 70:20
forget [3] - 51:35, 75:25, 81:43
forgotten [1] - 3:28
form [15] - 5:3, 5:8, 7:37, 11:33, 16:17, 17:8, 19:36, 20:6, 31:16, 33:3, 45:4, 52:31, 52:44, 53:7, 67:26
formal [1] - 56:22
former [5] - 54:26,

60:8, 60:30, 70:45, 74:35
forms [6] - 26:27, 51:28, 53:27, 53:36, 53:37, 59:8
formulation [7] - 12:34, 12:39, 13:3, 13:29, 14:21, 17:7, 48:43
forth [2] - 5:31, 28:35
fortunate [2] - 68:18, 73:25
forum [1] - 10:13
forward [9] - 2:35, 7:5, 21:5, 29:38, 41:30, 58:16, 74:20, 75:22, 80:19
Foster [1] - 38:18
found [11] - 6:12, 9:18, 18:41, 34:7, 34:9, 36:10, 49:18, 63:44, 64:23, 64:33, 67:5
foundation [1] - 83:30
four [9] - 4:3, 45:12, 61:1, 62:2, 62:4, 65:20, 67:10, 67:11, 67:14
fourth [4] - 30:24, 45:26, 49:13, 51:34
foyer [1] - 43:46
frame [1] - 85:5
framed [1] - 62:41
framework [6] - 3:14, 62:14, 62:15, 63:26, 67:20, 68:42
frameworks [1] - 57:22
frankly [1] - 62:3
frauds [1] - 33:10
fraudulent [1] - 41:11
free [1] - 5:45
freedom [2] - 30:42, 41:9
frenzy [1] - 46:42
fresh [1] - 43:15
Friedman [1] - 19:6
fro [1] - 42:38
FROM [1] - 76:20
from [108] - 3:12, 3:47, 4:7, 4:29, 4:30, 4:41, 4:42, 5:3, 6:5, 7:1, 7:17, 8:34, 11:7, 11:18, 11:22, 11:23, 11:28, 12:7, 13:38, 13:39, 14:43, 14:44, 15:47, 16:29, 16:41, 17:5, 17:13, 18:8, 18:37, 19:29, 20:34, 20:36, 21:30, 22:29, 24:1, 30:27, 30:40, 31:8, 31:19, 32:16, 32:17, 32:40, 35:6, 35:40, 35:44, 35:45, 36:12, 36:13, 36:16, 36:24, 36:26, 36:37, 36:44, 37:1, 37:3, 38:47, 40:7, 40:10, 40:31, 41:34, 42:23, 42:36, 42:37, 42:38, 43:23, 43:28, 43:35, 45:47, 47:34, 48:1, 48:44, 49:36, 50:10, 51:7, 51:33, 51:36, 52:41, 52:44, 53:46, 54:22, 54:26, 58:16, 58:47, 60:13, 60:15, 64:14, 64:15, 64:42, 65:11, 67:25, 68:43, 69:29, 70:47, 71:11, 72:4, 72:33, 73:20, 74:28, 75:2, 75:18, 76:6, 77:11, 77:14, 79:47, 80:46, 81:2
front [2] - 67:34, 76:36
fulfil [1] - 85:32
full [3] - 37:17, 53:28, 81:37
fully [1] - 85:15
function [3] - 2:2, 59:18, 59:25
fundamental [5] - 5:16, 5:20, 49:30, 59:17, 80:3
fundamentally [1] - 55:13
funded [1] - 57:28
funding [2] - 29:26, 56:45
further [20] - 4:35, 7:13, 7:40, 12:14, 16:38, 17:26, 23:30, 23:31, 25:35, 32:16, 32:19, 37:12, 37:29, 38:38, 45:41, 48:29, 52:23, 55:21, 80:11, 85:31
future [10] - 15:17, 25:32, 43:6, 49:14, 70:29, 71:40, 73:21, 77:13, 81:20, 85:43
Future [1] - 62:26

G

Gadigal [1] - 2:29
gained [1] - 83:14
gamble [1] - 53:25
Gambotto [1] - 12:20
gaols [1] - 81:37
gaps [1] - 77:38
Gardiner [1] - 9:15
gathered [1] - 63:29
gathering [2] - 44:35, 57:10
gave [4] - 9:36, 63:46, 67:46, 68:14
general [34] - 5:15, 5:47, 11:34, 13:33, 17:8, 17:9, 28:41, 33:34, 35:4, 35:7, 35:34, 35:41, 35:43, 35:46, 36:46, 37:6, 37:30, 38:15, 38:42, 38:43, 39:24, 39:39, 40:11, 40:34, 41:5, 41:7, 41:24, 41:26, 49:39, 61:47, 62:16, 77:41, 84:22, 84:24
generalise [1] - 23:46
generalising [1] - 23:42
generally [8] - 5:44, 31:34, 37:39, 38:33, 61:40, 66:19, 85:38, 85:43
generating [2] - 7:44, 81:24
generation [1] - 27:7
generous [3] - 2:38, 26:42, 46:9
gentlemen [3] - 2:1, 43:45, 44:4
genuinely [1] - 55:40
get [18] - 2:2, 10:20, 19:44, 20:21, 25:32, 43:31, 57:34, 67:25, 69:32, 70:12, 70:29, 70:36, 72:18, 73:18, 76:5, 81:45, 82:11, 82:37
getting [4] - 22:18, 24:40, 63:42, 81:22
gist [1] - 50:31
give [13] - 3:40, 16:34, 17:34, 21:38, 22:21, 42:27, 58:38, 61:31, 71:9, 77:47, 80:18, 84:38
given [15] - 21:13, 21:16, 32:35, 37:39, 39:31, 54:28, 59:24, 60:41, 62:24, 62:36, 63:28, 63:30, 68:10, 72:19, 74:27
gives [2] - 11:47, 52:34
giving [3] - 27:42, 63:37, 63:41
glad [1] - 85:38
Gleeson [1] - 44:5
GLEESON [3] - 44:9, 59:6, 59:42
Gleeson's [1] - 71:32
global [1] - 69:40
glossing [1] - 16:3
go [26] - 3:4, 6:38, 9:3, 10:35, 12:8, 12:40, 16:6, 18:44, 23:35, 25:22, 32:43, 49:29, 50:1, 60:43, 63:1, 69:28, 69:38, 69:47, 70:4, 71:10, 72:27, 75:30, 82:23, 84:29, 84:34, 85:31
goal [3] - 25:46, 57:2, 58:12
goes [6] - 8:6, 18:41, 53:47, 68:3, 75:21, 80:35
going [43] - 2:17, 3:21, 8:26, 10:46, 11:3, 11:14, 14:6, 20:17, 20:19, 21:5, 23:32, 25:31, 25:32, 26:31, 27:22, 30:45, 32:41, 34:4, 34:44, 42:25, 50:35, 62:7, 63:22, 67:2, 68:33, 68:36, 71:46, 72:25, 73:12, 75:22, 75:39, 76:3, 76:21, 76:23, 77:7, 80:33, 80:34, 81:45, 82:17, 82:28, 84:10, 84:28
Gold [2] - 12:9, 14:13
gone [7] - 13:27, 16:23, 76:1, 76:9, 76:13, 78:16
good [30] - 2:11, 7:47, 11:20, 11:45, 17:10, 19:17, 19:28, 25:39, 31:5, 38:30, 42:22, 42:37, 42:45, 47:13, 47:27, 53:40, 55:7, 55:41, 58:1, 68:39, 68:40, 70:17, 71:31, 72:19, 72:32, 75:25, 80:15, 82:31, 82:33, 85:11
goods [4] - 27:46, 30:14, 82:38
got [14] - 61:15, 63:12, 68:19, 69:2, 69:29, 71:40, 72:28, 72:35, 74:25, 74:36, 74:38, 79:17, 82:12, 82:33
govern [1] - 33:13
Governance [9] - 1:17, 4:23, 5:39, 18:9, 44:18, 45:26, 47:1, 48:18, 51:34
governance [36] - 2:23, 3:15, 7:1, 26:25, 26:28, 31:42, 44:23, 44:42, 45:25, 46:1, 46:15, 46:20, 46:47, 47:2, 47:17, 47:22, 47:38, 47:44, 47:47, 48:2, 49:29, 49:38, 49:39, 51:12, 51:34, 61:1, 65:25, 65:30, 65:33, 65:37, 66:43, 68:39, 68:41, 68:42, 72:32, 77:30
Government [3] - 5:2, 7:25, 69:11
government [7] - 24:30, 28:28, 29:21, 33:23, 33:29, 49:45, 72:35
government's [1] - 33:30
governments [2] - 6:20, 28:45
Gower [3] - 18:18, 19:41, 72:34
Graeme [2] - 61:11, 70:45
Graeme's [1] - 61:12
grant [2] - 38:1, 39:26
granted [1] - 37:44
granting [1] - 41:29
great [7] - 2:25, 15:44, 20:28, 24:20, 42:43, 49:22, 82:46
Great [2] - 9:5, 9:26
greater [12] - 22:38, 27:13, 29:14, 29:33, 29:37, 30:39, 32:35, 39:12, 39:18, 41:32, 51:47, 56:40
greatest [1] - 81:33
greed [2] - 65:6, 65:18
Greenhalgh [11] - 8:4, 12:22, 12:39, 13:3, 13:5, 13:29, 14:9, 14:12, 14:20, 14:28, 15:19
Greenhalgh's [1] - 12:27
Greg [1] - 46:29
grief [1] - 68:45
grounded [1] - 37:19
grounds [2] - 50:5, 51:17
Group [1] - 13:17
group [3] - 25:1, 30:14, 42:32

groups [6] - 6:4, 15:38, 15:40, 25:2, 64:19, 71:3
Growth [1] - 13:9
guarantee [1] - 20:10
guardianship [1] - 24:6
guess [5] - 21:4, 39:10, 78:11, 82:5, 84:35
guidance [2] - 57:11, 58:38
guide [2] - 24:10, 59:23
guided [1] - 57:13
guidelines [2] - 6:10, 47:30
guiding [1] - 18:38
guilt [1] - 32:6

H

had [46] - 7:39, 11:24, 11:45, 14:22, 14:30, 16:21, 17:25, 28:27, 31:16, 38:8, 44:36, 46:35, 46:36, 50:7, 50:42, 51:15, 51:37, 57:34, 60:22, 60:26, 61:40, 62:28, 62:35, 62:40, 63:1, 63:14, 63:26, 63:38, 64:6, 64:9, 64:18, 65:2, 66:26, 67:28, 68:18, 68:44, 70:17, 71:26, 72:45, 73:27, 74:4, 74:23, 76:32, 84:3, 84:13, 84:40
hallmarks [1] - 14:35
hand [4] - 9:40, 10:28, 39:45, 40:2
handful [1] - 82:22
hands [2] - 26:37, 28:28
hands-on [1] - 26:37
Hanrahan [1] - 62:13
Hanrahan's [1] - 70:8
happen [4] - 27:3, 50:36, 64:47, 71:46
happened [5] - 24:10, 67:2, 67:24, 72:36, 77:21
happening [3] - 43:35, 70:14, 81:32
happens [3] - 8:44, 20:15, 20:19
happy [1] - 77:6
hard [4] - 22:9, 22:14, 49:5, 73:27
hardship [1] - 32:32
harks [1] - 16:14
Harlowe's [1] - 17:5
harm [12] - 25:31, 30:7, 30:9, 30:10, 30:16, 33:3, 33:4, 34:32, 36:13, 42:22, 42:25, 58:34
harming [1] - 25:11
harms [4] - 32:39, 32:40, 33:44, 34:2
HARRIS [10] - 7:28, 19:40, 21:23, 21:40, 22:46, 24:19, 25:7, 25:43, 26:1, 84:44
Harris [8] - 2:9, 4:6, 4:13, 7:26, 27:17, 42:15, 42:31, 84:13
Harris's [3] - 5:18, 41:11, 84:2
Harvard [1] - 9:9
has [156] - 2:12, 2:14, 2:16, 2:45, 3:5, 4:37, 5:12, 6:20, 6:38, 7:10, 7:16, 7:19, 7:21, 7:44, 7:45, 8:8, 11:3, 11:39, 12:29, 12:34, 12:42, 13:27, 13:32, 14:15, 15:35, 16:43, 16:46, 17:24, 17:32, 18:35, 19:11, 21:20, 22:31, 24:9, 24:21, 24:31, 25:15, 26:36, 26:37, 27:17, 27:18, 28:8, 31:41, 32:20, 32:24, 33:2, 33:4, 34:2, 34:3, 35:5, 35:9, 35:23, 38:22, 38:34, 38:43, 38:47, 39:32, 40:13, 41:16, 42:15, 42:19, 44:30, 45:5, 45:33, 45:37, 47:32, 49:4, 49:14, 50:14, 50:42, 51:37, 52:4, 52:14, 54:12, 55:11, 56:39, 56:40, 56:41, 56:44, 57:6, 57:7, 57:9, 57:13, 57:15, 57:47, 58:5, 59:23, 59:26, 59:32, 60:5, 60:35, 60:41, 61:6, 61:46, 62:4, 62:43, 65:26, 66:23, 66:30, 66:46, 67:3, 67:34, 68:17, 68:45, 69:9, 69:20, 69:29, 69:33, 69:44, 70:20, 70:38, 71:5, 71:25, 72:4, 72:9, 72:19, 72:28, 72:36, 72:38, 72:42, 73:7, 73:13, 73:25, 75:16, 76:9, 76:12, 76:13, 77:12, 77:19, 77:21, 77:25, 79:7, 79:17, 80:13, 80:24, 80:25, 81:22, 81:34, 81:40, 81:46, 82:4, 82:23, 82:25, 82:28, 83:3, 83:7, 83:21, 83:24, 83:37, 84:19, 85:26, 85:37, 85:40
hashtag [1] - 2:16
hasn't [1] - 54:9
hate [1] - 81:36
have [247] - 2:5, 2:15, 2:42, 3:12, 3:17, 3:47, 4:3, 4:10, 4:36, 4:46, 5:5, 5:8, 5:32, 5:42, 6:23, 6:46, 7:4, 7:9, 7:15, 7:39, 8:25, 9:19, 9:42, 10:7, 10:21, 10:32, 10:39, 11:7, 11:41, 11:46, 12:39, 12:40, 13:19, 13:25, 14:11, 14:35, 15:11, 15:25, 17:14, 18:16, 18:17, 18:41, 19:4, 19:12, 19:29, 19:32, 20:31, 20:42, 20:43, 21:11, 21:17, 22:24, 22:35, 23:5, 23:13, 23:28, 24:3, 24:7, 24:23, 24:29, 24:33, 24:44, 25:8, 25:26, 25:45, 26:3, 26:18, 26:45, 28:6, 28:14, 28:35, 29:28, 29:35, 30:47, 31:8, 33:32, 34:8, 34:15, 34:23, 36:31, 37:18, 37:35, 37:44, 38:41, 39:2, 39:7, 41:8, 41:47, 42:9, 42:25, 42:33, 42:43, 42:44, 43:1, 43:11, 43:15, 43:26, 43:29, 44:37, 44:45, 45:3, 45:18, 45:38, 45:41, 45:43, 45:44, 46:9, 47:26, 47:31, 48:16, 49:18, 49:46, 50:7, 50:9, 50:24, 51:6, 51:9, 51:10, 51:13, 51:26, 51:27, 51:30, 51:43, 52:9, 52:15, 53:34, 53:36, 53:37, 53:39, 55:13, 55:25, 55:39, 56:36, 57:31, 57:45, 57:47, 58:6, 58:20, 59:12, 59:28, 59:31, 59:33, 60:12, 60:26, 60:30, 61:15, 61:40, 62:2, 62:12, 63:1, 63:10, 63:15, 64:16, 64:19, 64:27, 64:45, 65:12, 66:3, 66:23, 67:5, 67:6, 67:9, 67:22, 68:20, 68:28, 68:46, 69:17, 69:18, 69:31, 69:47, 70:3, 70:4, 70:17, 70:33, 72:10, 72:25, 72:36, 72:41, 73:10, 73:18, 73:19, 73:24, 73:30, 73:31, 73:43, 74:18, 75:17, 75:24, 75:42, 75:44, 75:47, 76:10, 76:40, 77:5, 77:7, 77:10, 77:24, 77:36, 77:37, 78:11, 78:14, 78:16, 78:17, 78:33, 78:44, 79:9, 79:24, 79:25, 80:17, 80:21, 80:22, 80:32, 80:34, 80:40, 80:47, 81:1, 81:11, 81:14, 81:15, 81:19, 82:13, 82:17, 82:18, 82:42, 84:21, 84:39, 84:40, 84:47, 85:4, 85:10, 85:13, 85:15, 85:16, 85:36
haven't [3] - 19:43, 20:28, 24:4
having [14] - 10:25, 22:41, 28:5, 36:10, 39:24, 43:2, 61:39, 73:29, 74:24, 75:5, 75:26, 75:39, 79:20, 82:22
Hayne [5] - 3:12, 3:33, 4:25, 7:2, 70:9
Hayne's [1] - 6:26
he [54] - 2:45, 4:7, 4:9, 4:16, 7:17, 7:19, 7:21, 7:24, 9:15, 9:25, 9:28, 12:31, 13:41, 14:20, 14:23, 14:25, 15:27, 19:41, 26:29, 60:5, 60:11, 60:38, 61:27, 64:25, 64:33, 65:3, 65:19, 65:43, 67:35, 67:38, 69:7, 69:27, 69:29, 69:36, 69:39, 69:42, 69:44, 70:21, 71:2, 71:3, 71:6, 71:15, 71:34, 71:35, 71:38, 73:25, 73:40, 75:26, 77:7, 77:19, 81:34, 81:44, 86:1
head [1] - 54:10
heading [1] - 65:32
headlines [1] - 11:6
health [1] - 85:43
healthy [1] - 47:14
hear [2] - 4:29, 71:12
heard [4] - 39:11, 70:1, 77:10, 77:40
hearing [2] - 4:42, 7:5
heart [4] - 8:6, 31:37, 61:22, 84:10
heat [1] - 49:16
heavily [1] - 56:21
held [1] - 32:24
help [4] - 15:20, 20:17, 50:42, 58:16
helpful [6] - 53:14, 53:16, 53:17, 57:17, 77:38, 78:30
her [8] - 4:44, 4:45, 26:18, 26:33, 26:34, 27:38, 44:31, 83:42
here [36] - 2:31, 8:25, 9:38, 10:7, 13:2, 13:9, 14:27, 16:9, 17:19, 18:22, 19:30, 19:36, 20:7, 20:26, 22:5, 23:16, 24:8, 24:38, 26:42, 27:10, 28:11, 29:20, 30:24, 34:4, 34:37, 42:13, 50:44, 64:8, 69:46, 70:32, 71:9, 72:18, 73:17, 79:28, 86:2
here's [1] - 22:10
heresy [1] - 52:31
hesitant [1] - 21:42
heuristic [4] - 50:32, 50:39, 54:36, 56:15
heuristics [1] - 54:40
High [11] - 11:25, 12:20, 12:35, 13:16, 14:16, 15:35, 17:5, 17:20, 40:17, 40:27, 41:4
high [5] - 55:19, 55:20, 67:28, 72:18, 78:34
high-level [1] - 72:18
highlight [2] - 23:13, 58:9
highlighted [2] - 47:5, 58:46
highlighting [1] - 48:2
highlights [1] - 51:2
highly [8] - 10:4, 11:11, 44:14, 44:19, 52:26, 54:17, 58:36, 79:8
Hill [2] - 72:19, 83:21

Hilmer [1] - 29:11
Hilmer's [1] - 42:14
him [3] - 44:38, 73:27, 81:36
hindsight [4] - 55:11, 57:35, 57:36, 66:5
his [26] - 2:43, 2:44, 3:33, 9:13, 10:9, 12:30, 15:24, 18:41, 18:47, 31:3, 50:21, 60:24, 61:46, 62:6, 65:2, 65:19, 65:20, 65:27, 67:36, 69:44, 71:1, 73:40, 76:46, 77:11, 81:42, 85:36
history [1] - 33:43
hit [1] - 78:34
hold [4] - 3:21, 10:23, 30:36, 46:39
holders [4] - 15:13, 15:14, 15:15
holding [2] - 23:1, 60:9
holds [2] - 3:20, 6:7
holistic [1] - 22:12
home [2] - 64:12, 64:14
homes [1] - 68:9
homily [1] - 19:24
HON [23] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 26:16, 41:47, 43:9, 43:41, 44:9, 59:6, 59:42, 60:4, 73:24, 74:42, 76:15, 76:45, 80:43, 85:21
honest [3] - 11:40, 11:42, 41:9
honestly [4] - 51:19, 62:26, 79:32, 84:18
honesty [1] - 65:8
Honour [1] - 15:24
honour [2] - 7:15, 19:30
Honour's [1] - 12:30
hope [5] - 6:34, 28:3, 28:4, 28:12, 86:2
hoped [2] - 43:23, 57:34
hour [3] - 35:20, 35:24, 37:14
House [1] - 45:11
house [1] - 73:4
how [42] - 3:31, 5:17, 5:35, 6:27, 8:7, 8:41, 9:24, 9:39, 9:43, 12:7, 13:20, 14:13, 22:7, 22:8, 22:33, 22:43, 23:7, 25:24, 27:7, 28:5, 28:31, 35:6, 37:16, 39:40, 42:29, 42:38, 42:47, 43:3, 47:26, 50:9, 50:44, 52:37, 55:26, 55:27, 66:4, 68:32, 70:8, 81:28, 81:44, 85:4
Howard [1] - 17:18
however [19] - 4:34, 6:26, 6:29, 23:10, 36:47, 38:14, 39:5, 39:29, 42:21, 46:29, 48:42, 49:43, 51:35, 52:2, 52:26, 55:20, 56:47, 58:27, 78:42
huge [2] - 76:40, 82:24
human [4] - 34:38, 57:2, 57:4, 75:19
Humphreys [1] - 3:7
hundreds [1] - 62:3
hurdles [1] - 23:31
hurrying [1] - 34:5
Hutton [1] - 11:38
hybrid [1] - 28:36
hybridity [1] - 39:32
hype [1] - 2:21
hyperbolic [1] - 55:15
hypocrisy [1] - 83:28
hypothetical [3] - 15:27, 15:32, 15:46

I

i [18] - 2:33, 6:34, 19:41, 20:27, 20:34, 20:39, 21:27, 21:43, 22:16, 23:28, 24:28, 26:42, 49:18, 50:27, 67:32, 69:31, 70:13, 70:23
I [366] - 2:1, 2:15, 2:16, 2:20, 2:27, 2:34, 2:42, 3:12, 3:17, 3:28, 3:39, 4:46, 5:5, 5:8, 5:18, 5:29, 5:32, 5:42, 6:19, 6:42, 7:5, 7:9, 7:15, 7:41, 8:19, 8:25, 8:26, 8:46, 9:1, 9:28, 10:1, 10:6, 10:10, 10:46, 11:7, 11:14, 11:17, 11:18, 11:19, 12:11, 12:23, 12:38, 12:40, 14:6, 14:11, 14:19, 14:22, 14:30, 15:25, 16:11, 16:45, 17:14, 18:12, 18:16, 18:28, 18:37, 18:41, 18:45, 18:46, 19:4, 19:6, 19:13, 19:20, 19:24, 19:25, 19:29, 19:31, 19:35, 19:43, 19:44, 20:1, 20:26, 20:28, 20:35, 20:37, 20:39, 21:4, 21:9, 21:11, 21:15, 21:16, 21:23, 21:26, 21:38, 21:40, 21:41, 21:42, 21:43, 22:22, 22:24, 22:47, 23:1, 23:8, 23:13, 23:17, 23:27, 23:31, 23:32, 23:39, 23:46, 24:3, 24:4, 24:13, 24:23, 24:33, 24:37, 24:38, 24:40, 24:41, 24:44, 25:8, 25:13, 25:14, 25:28, 26:1, 26:6, 26:9, 26:11, 26:19, 26:28, 26:33, 26:43, 26:45, 26:47, 27:21, 27:41, 27:46, 28:3, 28:9, 28:12, 28:14, 28:20, 29:20, 29:28, 30:45, 30:47, 31:7, 31:8, 32:38, 32:41, 34:4, 34:44, 35:23, 36:30, 36:31, 36:34, 39:34, 39:35, 41:44, 42:5, 42:6, 42:7, 42:12, 42:36, 42:37, 42:43, 42:44, 42:46, 43:1, 43:20, 43:27, 43:36, 43:38, 43:41, 43:42, 44:4, 44:5, 44:10, 44:31, 44:34, 44:35, 44:36, 44:38, 46:10, 47:25, 50:17, 51:1, 52:31, 54:27, 56:47, 59:6, 59:21, 59:22, 59:28, 59:36, 59:37, 59:38, 59:42, 59:45, 60:4, 60:18, 60:26, 60:30, 60:31, 60:41, 60:43, 60:47, 61:10, 62:7, 62:10, 63:5, 63:19, 64:15, 64:38, 65:12, 65:16, 65:25, 65:32, 65:37, 66:30, 67:2, 67:6, 68:11, 68:28, 68:43, 69:1, 69:2, 69:17, 69:18, 69:32, 69:34, 69:44, 69:46, 70:3, 70:9, 70:14, 70:18, 71:5, 71:9, 71:11, 71:16, 71:31, 71:39, 72:2, 72:10, 72:17, 72:24, 72:25, 72:27, 72:41, 73:14, 73:20, 73:26, 73:32, 73:45, 74:10, 74:11, 74:12, 74:15, 74:17, 74:18, 74:19, 74:26, 74:31, 74:45, 74:46, 74:47, 75:2, 75:7, 75:21, 75:24, 75:25, 75:29, 75:39, 76:3, 76:15, 76:16, 76:29, 76:36, 76:39, 77:2, 77:6, 77:10, 77:23, 77:24, 77:35, 77:39, 77:45, 78:11, 78:16, 78:18, 78:29, 78:40, 79:5, 79:21, 79:24, 79:25, 79:28, 80:6, 80:10, 80:12, 80:15, 80:21, 80:30, 80:34, 80:44, 80:45, 80:47, 81:12, 81:21, 81:28, 81:31, 81:35, 81:38, 81:40, 81:43, 81:46, 82:5, 82:9, 82:11, 82:25, 82:27, 82:29, 82:31, 82:37, 82:40, 82:42, 83:2, 83:14, 83:19, 83:30, 84:11, 84:33, 84:35, 84:38, 85:13, 85:22, 85:27, 85:31, 85:38, 85:40, 85:45, 86:2, 86:3
I'd [1] - 25:22
I'm [4] - 21:21, 42:3, 81:32, 82:29
I've [1] - 19:30
Ian [1] - 52:42
idea [14] - 10:18, 10:45, 13:37, 14:31, 15:26, 15:31, 20:1, 28:22, 30:6, 30:7, 53:29, 59:36, 63:9, 75:10
idealised [1] - 23:16
ideas [1] - 27:28
identical [1] - 37:30
identified [9] - 34:10, 34:13, 35:6, 50:6, 54:39, 64:13, 65:42, 68:46, 69:9
identify [9] - 19:26, 34:17, 46:30, 58:19, 66:40, 67:30, 68:32, 73:28, 83:6
identifying [3] - 15:7, 58:22, 71:23
ideologies [1] - 5:32
Idylic [1] - 13:2
if [104] - 2:15, 8:40, 8:44, 9:42, 11:3, 13:15, 13:23, 14:38, 15:5, 15:8, 16:1, 16:3, 17:25, 18:23, 18:37, 18:40, 19:31, 20:6, 20:10, 20:20, 20:24, 20:41, 21:29, 21:35, 22:23, 23:23, 24:22, 24:39, 25:3, 25:20, 25:23, 25:30, 26:2, 30:7, 30:17, 35:18, 35:26, 36:34, 37:16, 37:35, 39:47, 41:14, 41:24, 42:5, 42:7, 42:8, 42:17, 43:26, 45:35, 48:17, 51:5, 53:31, 54:17, 56:9, 56:17, 56:20, 56:26, 56:34, 58:32, 58:34, 58:36, 58:37, 58:38, 58:40, 58:41, 58:42, 59:6, 59:23, 63:14, 63:19, 64:43, 67:10, 67:34, 67:41, 68:44, 70:18, 70:29, 71:36, 71:41, 71:43, 71:46, 72:26, 73:20, 73:45, 74:38, 75:21, 75:30, 75:32, 76:4, 76:7, 76:17, 76:40, 79:10, 80:32, 81:11, 81:31, 82:18, 82:22, 82:23, 83:6, 83:24, 83:45
ignoring [1] - 65:22
Il" [1] - 78:15
Ill [1] - 78:18
illegal [1] - 61:3
illegality [1] - 36:22
imagination [1] - 49:22
imagine [5] - 41:39, 55:42, 67:3, 68:11, 73:43
immediacy [1] - 50:15
immediate [2] - 5:38, 55:20
immediately [1] - 2:8
impact [16] - 34:35, 34:38, 43:15, 43:28, 44:23, 46:20, 51:37, 51:43, 54:31, 56:13, 56:29, 56:31, 56:36, 57:30, 68:20, 74:23
impacted [1] - 54:42
impacts [1] - 34:33
impair [1] - 59:25
impatience [1] - 55:18
impeded [1] - 47:13
imperative [2] - 17:34, 75:21

imperfect [3] - 37:22, 38:4
imperialism [1] - 29:10
implement [1] - 68:33
implementation [1] - 67:21
implemented [3] - 45:19, 68:36, 81:5
implication [1] - 38:33
implications [3] - 7:1, 60:15, 72:1
implicitly [1] - 30:40
implies [1] - 38:6
implying [1] - 38:17
importance [6] - 30:17, 46:25, 48:41, 50:36, 55:25, 85:42
important [28] - 5:33, 8:38, 9:34, 11:44, 17:40, 18:29, 21:5, 21:10, 26:20, 28:36, 31:41, 31:44, 33:31, 34:36, 38:36, 43:39, 45:17, 45:34, 51:10, 56:8, 57:38, 59:2, 60:20, 67:15, 70:46, 77:14, 77:45, 79:22
importantly [3] - 26:26, 37:26, 67:29
impose [3] - 30:9, 73:3, 80:31
imposed [6] - 5:47, 20:44, 21:1, 21:7, 58:35, 73:5
imposes [2] - 29:12, 57:29
imposing [1] - 35:2
imposition [1] - 6:10
impossible [4] - 15:8, 56:35, 58:40, 78:42
impression [1] - 72:45
improper [2] - 63:34, 85:9
impropriety [1] - 41:1
improve [1] - 78:20
improved [3] - 51:4, 58:6, 58:7
improvements [1] - 29:24
improving [2] - 57:8, 58:12
in [664] - 2:3, 2:4, 2:19, 2:43, 2:44, 3:5, 3:10, 3:13, 3:33, 3:35, 4:7, 4:14, 4:21, 4:22, 4:23, 4:24, 4:33, 4:38, 4:47, 5:7, 5:21, 5:31, 5:45, 6:12, 6:14, 6:15, 6:17, 6:19, 6:22, 6:26, 6:36, 7:9, 7:19, 7:23, 7:24, 7:26, 7:32, 7:34, 7:35, 7:40, 7:41, 7:43, 7:47, 8:4, 8:7, 8:12, 8:15, 8:17, 8:19, 8:41, 9:2, 9:9, 9:15, 9:16, 9:17, 9:25, 9:35, 9:36, 9:42, 10:3, 10:9, 10:11, 10:19, 10:21, 10:24, 10:30, 10:33, 10:37, 10:38, 11:5, 11:10, 11:14, 11:20, 11:22, 11:24, 11:25, 11:29, 11:35, 11:45, 12:12, 12:13, 12:19, 12:22, 12:27, 12:30, 12:35, 12:38, 13:2, 13:6, 13:7, 13:8, 13:9, 13:10, 13:16, 13:17, 13:25, 13:26, 13:32, 13:40, 13:47, 14:1, 14:7, 14:10, 14:16, 14:19, 14:23, 14:24, 14:28, 15:5, 15:12, 15:19, 15:25, 15:28, 15:29, 15:34, 15:35, 15:36, 15:42, 16:4, 16:5, 16:6, 16:13, 16:14, 16:25, 16:31, 16:39, 17:5, 17:10, 17:13, 17:14, 17:18, 17:19, 17:20, 17:28, 17:32, 17:33, 18:5, 18:21, 18:28, 18:33, 19:4, 19:6, 19:10, 19:32, 19:37, 19:42, 19:44, 20:1, 20:11, 20:19, 20:26, 20:28, 20:39, 20:45, 21:8, 21:12, 21:15, 21:16, 22:9, 22:11, 22:13, 22:14, 22:30, 22:33, 22:43, 22:47, 23:10, 23:13, 23:23, 23:42, 23:45, 24:10, 24:37, 24:38, 25:8, 25:14, 25:29, 25:32, 25:36, 25:39, 25:41, 25:45, 26:3, 26:9, 26:19, 26:28, 26:33, 26:34, 26:44, 26:46, 26:47, 27:11, 27:12, 27:14, 27:21, 27:22, 27:24, 27:27, 27:28, 27:31, 28:4, 28:10, 28:14, 28:16, 28:18, 28:28, 28:41, 28:42, 29:2, 29:4, 29:28, 29:30, 29:31, 29:35, 29:36, 29:45, 30:1, 30:5, 30:11, 30:13, 30:23, 30:26, 30:27, 30:30, 30:32, 30:33, 30:35, 30:36, 30:41, 30:43, 30:47, 31:3, 31:9, 31:13, 31:15, 31:16, 31:17, 31:26, 31:31, 32:3, 32:6, 32:15, 32:24, 32:39, 32:42, 33:1, 33:6, 33:7, 33:11, 33:14, 33:21, 33:28, 33:36, 33:38, 33:40, 34:3, 34:7, 34:9, 34:11, 34:13, 34:17, 34:23, 34:24, 34:26, 34:36, 34:37, 34:38, 34:42, 34:46, 35:4, 35:7, 35:10, 35:13, 35:17, 35:18, 35:35, 35:47, 36:1, 36:7, 36:9, 36:23, 36:37, 36:42, 36:43, 36:46, 37:2, 37:3, 37:4, 37:11, 37:12, 37:13, 37:14, 37:15, 37:17, 37:19, 37:29, 37:41, 37:47, 38:14, 38:15, 38:21, 38:23, 38:41, 38:46, 39:4, 39:9, 39:15, 39:23, 39:24, 39:39, 40:4, 40:11, 40:15, 40:17, 40:23, 40:25, 40:35, 40:43, 40:44, 41:6, 41:9, 41:15, 41:22, 41:23, 41:31, 41:38, 41:41, 42:1, 42:7, 42:17, 42:23, 42:32, 42:33, 42:34, 42:36, 43:2, 43:5, 43:14, 43:33, 43:42, 43:46, 44:25, 44:26, 44:27, 44:41, 44:46, 45:4, 45:8, 45:9, 45:17, 45:18, 45:39, 46:11, 46:15, 46:19, 46:24, 46:34, 47:5, 47:9, 47:12, 47:19, 47:20, 47:32, 47:36, 47:38, 48:11, 48:14, 48:19, 48:25, 48:27, 48:36, 48:47, 49:8, 49:13, 49:15, 49:27, 49:34, 49:35, 49:36, 49:40, 50:6, 50:10, 50:14, 50:21, 50:25, 50:45, 50:47, 51:3, 51:19, 51:21, 51:34, 51:35, 51:42, 51:47, 52:3, 52:5, 52:11, 52:12, 52:36, 52:43, 52:44, 53:5, 53:16, 53:39, 54:2, 54:8, 54:23, 54:29, 54:31, 54:33, 54:35, 54:42, 54:44, 55:2, 55:6, 55:31, 55:32, 55:33, 56:7, 56:9, 56:11, 56:22, 56:26, 56:31, 56:34, 57:3, 57:7, 57:8, 57:14, 57:15, 57:21, 57:24, 57:38, 57:39, 57:43, 57:45, 58:6, 58:10, 58:38, 58:42, 58:46, 59:16, 59:24, 59:25, 59:31, 59:45, 60:6, 60:12, 60:14, 60:29, 60:37, 60:44, 60:47, 61:1, 61:3, 61:19, 61:20, 61:39, 61:42, 62:3, 62:6, 62:7, 62:28, 62:33, 62:34, 62:40, 62:42, 63:1, 63:4, 63:13, 63:20, 63:26, 63:39, 63:44, 64:3, 64:7, 64:9, 64:12, 64:16, 64:17, 64:42, 65:2, 65:13, 65:29, 65:33, 66:5, 66:10, 66:12, 66:22, 66:25, 67:6, 67:11, 67:12, 67:14, 67:27, 67:34, 67:40, 68:12, 68:21, 68:23, 68:24, 68:26, 68:28, 69:14, 69:20, 69:21, 69:23, 69:27, 69:44, 70:12, 70:14, 70:29, 70:33, 70:34, 70:47, 71:4, 71:10, 71:13, 71:15, 71:40, 71:43, 72:9, 72:33, 72:42, 72:43, 72:44, 72:45, 72:46, 73:1, 73:4, 73:7, 73:10, 73:11, 73:13, 73:19, 73:22, 73:25, 73:26, 73:28, 73:41, 73:46, 74:2, 74:3, 74:22, 74:42, 75:4, 75:6, 75:29, 75:39, 75:42, 76:11, 76:12, 76:18, 76:24, 76:27, 76:28, 76:36, 76:38, 77:16, 77:17, 77:20, 77:38, 77:39, 77:40, 77:47, 78:2, 78:14, 78:41, 78:44, 79:7, 79:8, 79:10, 79:12, 79:20, 79:32, 79:33, 79:38, 79:43, 80:1, 80:5, 80:7, 80:12, 80:14, 80:16, 80:32, 80:35, 81:9, 81:10, 81:12, 81:18, 81:20, 81:21, 81:23, 81:36, 81:43, 81:47, 82:5, 82:32, 82:34, 82:37, 83:3, 83:15, 83:16, 83:20, 83:25, 83:28, 83:31, 83:34, 83:37, 83:38, 83:44, 84:14, 84:15, 84:17, 84:20, 84:21, 84:23, 84:24, 84:28, 84:29, 84:46, 85:10, 85:14, 85:24, 85:33, 85:37
In [3] - 31:40, 55:30, 73:21
inaction [1] - 54:25
inadequate [1] - 63:35
inappropriate [1] - 64:6
inappropriately [1] - 66:14
Inc [1] - 75:4
incapability [2] - 74:1, 74:3
incentives [4] - 10:22, 69:20, 69:30, 69:33
incentivise [1] - 23:45
inclined [3] - 53:25, 54:1, 54:43
include [9] - 17:35, 20:11, 23:30, 38:47, 39:8, 39:30, 48:26, 54:23, 79:46
included [9] - 15:25, 17:14, 47:18, 48:22, 48:25, 48:45, 61:33, 61:34
includes [5] - 10:41, 32:26, 32:28, 35:45, 38:36
including [18] - 5:6, 11:25, 13:6, 31:12, 31:27, 32:1, 33:33, 34:22, 34:26, 37:37, 40:38, 44:41, 46:4, 48:31, 55:25, 69:28, 78:9, 83:43
incompetent [1] - 63:33
incomplete [1] - 20:15
inconsistency [1] - 59:17
inconsistent [2] - 55:18, 60:37
incorporate [2] - 41:36, 46:14
increase [4] - 22:20,

29:30, 37:3, 53:24
increased [7] - 38:47, 46:5, 52:21, 53:26, 56:45, 58:8, 58:26
increasing [5] - 23:22, 29:22, 55:37, 56:7, 81:7
increasingly [2] - 27:45, 84:37
incredible [1] - 66:5
incredibly [1] - 75:46
incrementally [1] - 41:29
indeed [9] - 13:25, 14:46, 19:21, 19:36, 27:17, 35:41, 66:8, 73:28, 80:44
independence [1] - 29:2
independent [1] - 64:4
indicate [3] - 37:46, 40:9, 53:4
indicated [2] - 27:17, 78:43
indicates [2] - 53:41, 68:29
indicative [1] - 61:47
indicators [1] - 84:45
indigenous [2] - 2:31, 62:9
indirectly [2] - 5:30, 44:46
individual [8] - 18:27, 20:47, 30:18, 38:11, 55:4, 66:32, 67:41, 69:37
individual's [1] - 50:26
individuals [10] - 30:17, 32:28, 32:40, 34:22, 50:25, 66:12, 76:21, 76:22, 76:24, 76:38
industries [1] - 54:23
industry [4] - 3:14, 6:4, 48:44, 80:37
ineligible [1] - 64:42
inevitably [3] - 21:28, 75:12, 85:28
inference [1] - 33:15
inflexible [1] - 40:33
influence [11] - 29:15, 31:41, 49:23, 49:47, 50:24, 50:40, 50:43, 51:10, 54:41, 55:39, 62:31
influenced [1] - 5:30
influences [1] - 50:35
influential [2] - 22:33, 55:33
information [8] - 30:34, 34:11, 57:10, 58:9, 63:47, 67:25, 79:29, 79:47
informative [2] - 44:32, 59:46
informed [4] - 48:37, 68:19, 74:40, 77:18
infrastructure [1] - 24:30
infringement [2] - 52:5, 52:22
infused [1] - 6:23
inherent [2] - 15:37, 32:6
initial [1] - 51:31
initially [1] - 46:37
injunction [2] - 37:38, 38:1
injunctions [1] - 37:43
innovation [1] - 57:25
inputted [1] - 80:6
inquired [2] - 51:15, 74:18
inquiries [3] - 45:29, 60:14, 62:45
Inquiry [1] - 61:6
inquiry [10] - 45:1, 45:7, 45:9, 45:10, 45:15, 57:44, 61:8, 61:32, 62:4
inside [1] - 20:15
insider [1] - 81:29
insight [1] - 42:36
insightful [1] - 44:32
insolvency [3] - 7:21, 14:6, 19:13
installed [1] - 78:44
instance [7] - 13:26, 13:40, 21:13, 53:14, 55:40, 57:7, 63:36
instances [4] - 28:3, 36:22, 58:42, 66:4
instead [4] - 27:15, 28:9, 29:3, 36:14
instill [1] - 48:9
Institute [2] - 4:23, 20:35
institution [2] - 67:19, 68:13
institutional [3] - 22:32, 43:19, 43:39
institutions [5] - 28:26, 46:39, 65:44, 67:4, 74:3
instrument [2] - 18:23, 19:18
insufficiently [1] - 40:30
insularity [1] - 47:10
insurance [3] - 61:25, 64:40, 64:42
integrity [1] - 34:33
intended [8] - 3:44, 33:45, 38:34, 38:37, 41:27, 52:34, 59:22, 74:37
intense [1] - 44:45
intent [1] - 47:13
intention [1] - 53:30
intentioned [4] - 47:28, 53:18, 55:40, 55:43
inter [1] - 15:16
inter-temporal [1] - 15:16
interact [1] - 51:44
interaction [5] - 43:22, 43:23, 43:29, 43:30
interconnected [1] - 66:8
interdependence [1] - 10:42
interest [30] - 10:33, 16:25, 22:37, 22:38, 26:47, 29:38, 32:31, 32:39, 33:7, 34:7, 34:9, 34:12, 34:17, 34:37, 34:42, 36:16, 37:47, 39:9, 41:22, 42:32, 43:16, 54:8, 54:42, 54:46, 55:2, 63:39, 65:20, 83:44, 84:4
interested [5] - 20:39, 30:1, 62:40, 73:45, 82:40
interesting [15] - 6:18, 6:36, 22:30, 26:30, 44:44, 47:25, 47:45, 54:21, 65:31, 67:32, 69:25, 69:36, 78:32, 82:9, 83:40
interestingly [1] - 65:29
interests [137] - 3:24, 4:15, 4:17, 4:18, 5:5, 5:46, 7:47, 8:6, 8:13, 8:15, 8:21, 8:22, 8:39, 8:40, 8:42, 9:28, 10:43, 11:11, 11:20, 11:31, 11:33, 11:36, 12:8, 12:28, 12:30, 12:43, 12:44, 13:5, 13:6, 13:12, 13:18, 13:21, 13:22, 13:29, 13:38, 13:46, 14:2, 14:5, 14:28, 14:29, 15:6, 15:8, 15:9, 15:23, 15:28, 15:45, 15:47, 16:3, 16:29, 16:30, 16:44, 17:4, 17:6, 17:16, 17:21, 17:22, 17:27, 17:28, 17:35, 17:39, 17:42, 17:45, 18:4, 18:10, 18:18, 19:12, 20:8, 22:42, 22:43, 23:24, 25:1, 25:2, 25:21, 25:38, 25:39, 26:2, 27:13, 27:16, 27:24, 27:43, 29:6, 29:16, 29:35, 29:43, 29:45, 30:35, 32:40, 34:25, 34:30, 36:17, 36:38, 36:39, 37:27, 37:35, 37:42, 39:10, 39:14, 39:19, 39:44, 39:46, 40:9, 40:35, 40:36, 41:28, 41:32, 41:36, 42:16, 42:18, 42:32, 42:33, 42:39, 43:14, 48:47, 54:44, 62:29, 62:34, 64:25, 64:26, 64:34, 68:4, 68:23, 79:34, 79:40, 83:16, 84:5, 84:7, 84:16, 84:17, 84:20, 84:21, 84:23, 84:24
interface [1] - 78:23
interfere [1] - 17:10
interim [3] - 6:26, 52:2, 77:42
Interim [22] - 3:33, 6:15, 7:2, 44:21, 45:14, 46:16, 46:19, 51:17, 51:30, 51:42, 51:46, 52:4, 52:40, 53:44, 59:18, 59:24, 60:33, 64:7, 65:36, 79:30, 79:35, 80:1
interject [1] - 79:28
intermediaries [2] - 64:20, 65:21
intermediary [2] - 79:41, 79:45
internal [3] - 29:1, 29:4, 30:43
internally [1] - 72:13
International [1] - 13:1
interpret [1] - 59:21
interpretation [3] - 35:5, 37:40, 49:47
interpretations [1] - 58:37
interpretatively [1] - 41:34
interpreted [1] - 82:33
interpretive [1] - 78:43
Intervention [1] - 52:24
intervention [2] - 45:20, 57:29
interventionist [1] - 29:4
into [54] - 8:21, 9:38, 10:10, 13:28, 17:3, 17:16, 17:21, 17:27, 17:42, 18:3, 18:7, 18:10, 18:17, 19:12, 19:43, 20:4, 20:28, 24:26, 26:30, 27:24, 29:21, 42:33, 42:39, 43:24, 43:25, 45:1, 45:7, 45:12, 45:15, 48:33, 48:38, 49:4, 51:15, 56:43, 57:44, 61:7, 61:32, 62:4, 62:42, 69:38, 74:36, 75:5, 77:4, 77:12, 79:20, 80:23, 82:11, 82:12, 82:23, 82:34, 85:36, 85:46
introduce [4] - 26:16, 45:19, 52:31, 66:33
introduced [1] - 33:41
introducing [1] - 7:14
introduction [9] - 7:29, 26:42, 31:15, 31:26, 33:5, 33:25, 33:29, 45:21, 80:4
introductory [1] - 10:9
invariably [1] - 65:44
invest [1] - 23:23
invested [1] - 9:42
investigate [1] - 29:27
investing [3] - 15:11, 15:12, 26:25
investment [1] - 84:29
Investments [2] - 45:3, 62:20
investor [1] - 23:5
investors [5] - 34:34, 36:1, 49:46, 55:27, 58:8
invitation [1] - 26:43
invite [1] - 65:37
invited [1] - 18:47
invokes [1] - 79:35
involve [4] - 30:34, 32:14, 71:18, 76:35
involved [8] - 3:5, 21:32, 34:26, 61:18, 61:24, 61:35, 68:9, 71:31
involvements [1] - 82:47
involves [3] - 35:13, 39:43, 40:16

involving [5] - 14:12, 40:3, 41:7, 68:8, 71:12
irreconcilable [1] - 71:26
irrespective [1] - 19:20
irresponsible [1] - 48:27
Is [2] - 21:13, 21:14
is [599] - 2:2, 2:6, 2:19, 2:25, 3:10, 3:20, 3:31, 3:38, 3:39, 4:1, 4:6, 4:37, 4:43, 4:44, 5:38, 5:39, 5:40, 6:2, 6:3, 6:5, 6:7, 6:9, 6:18, 6:22, 6:43, 7:17, 7:31, 7:34, 7:42, 7:46, 8:3, 8:7, 8:12, 8:18, 8:19, 8:20, 8:22, 8:23, 8:27, 8:29, 8:32, 8:34, 8:44, 9:2, 9:7, 9:13, 9:18, 9:29, 9:34, 9:39, 9:40, 9:43, 9:44, 10:8, 10:12, 10:13, 10:18, 10:40, 10:46, 11:10, 11:11, 11:21, 11:23, 11:28, 11:32, 11:33, 12:9, 12:17, 12:26, 12:27, 12:42, 13:10, 13:40, 13:44, 13:47, 14:6, 14:7, 14:11, 14:15, 14:16, 14:25, 14:29, 14:32, 14:36, 14:38, 15:19, 15:25, 15:26, 15:27, 15:34, 15:38, 15:46, 16:3, 16:5, 16:6, 16:7, 16:9, 16:22, 16:26, 16:28, 16:37, 16:38, 16:40, 16:41, 17:7, 17:9, 17:14, 17:15, 17:33, 17:40, 17:43, 17:44, 18:6, 18:11, 18:12, 18:13, 18:21, 18:23, 18:27, 18:28, 18:30, 18:33, 18:38, 18:39, 18:40, 19:4, 19:15, 19:19, 19:28, 19:30, 19:46, 20:1, 20:8, 20:12, 20:14, 20:17, 20:18, 20:23, 20:38, 20:46, 21:4, 21:6, 21:9, 21:10, 21:17, 21:26, 21:28, 21:29, 21:33, 21:34, 21:37, 21:42, 21:43, 21:44, 21:47, 22:2, 22:4, 22:9, 22:13, 22:15, 22:17, 22:30, 22:36, 22:43, 23:3, 23:8, 23:11, 23:14, 23:15, 23:16, 23:18, 23:27, 23:32, 23:36, 23:40, 23:42, 23:43, 23:45, 24:2, 24:5, 24:8, 24:13, 24:19, 24:20, 24:22, 24:23, 24:28, 24:34, 24:47, 25:4, 25:7, 25:15, 25:18, 25:24, 25:39, 26:16, 26:19, 26:31, 26:35, 27:10, 27:11, 27:15, 27:23, 27:27, 27:35, 27:36, 27:39, 27:41, 28:2, 28:4, 28:12, 28:13, 28:15, 28:22, 28:29, 28:34, 28:36, 28:40, 28:42, 29:1, 29:20, 29:28, 29:30, 29:33, 29:44, 29:47, 30:5, 30:6, 30:10, 30:17, 30:24, 30:32, 30:41, 30:45, 31:9, 31:27, 31:36, 31:37, 31:46, 32:14, 32:25, 32:29, 33:30, 33:31, 33:43, 33:44, 34:5, 34:7, 34:10, 34:13, 34:14, 34:21, 34:31, 34:36, 34:37, 35:12, 35:24, 35:26, 35:27, 35:28, 35:34, 35:37, 36:5, 36:7, 36:11, 36:15, 36:24, 36:35, 36:41, 36:43, 37:1, 37:2, 37:4, 37:10, 37:19, 37:20, 37:23, 37:25, 37:29, 37:30, 37:35, 37:39, 38:5, 38:9, 38:14, 38:15, 38:21, 38:26, 38:27, 38:28, 38:34, 38:37, 38:42, 39:4, 39:5, 39:8, 39:10, 39:18, 39:20, 39:34, 39:35, 39:42, 39:43, 40:2, 40:20, 40:30, 40:33, 41:4, 41:8, 41:16, 41:24, 41:26, 41:38, 41:39, 42:1, 42:6, 42:7, 42:8, 42:13, 42:16, 42:21, 42:37, 42:46, 43:4, 43:5, 43:6, 43:20, 43:22, 43:27, 43:31, 43:39, 43:45, 44:19, 44:25, 44:26, 44:28, 44:39, 45:32, 47:25, 47:36, 48:18, 48:35, 49:10, 49:13, 49:29, 49:39, 50:4, 50:10, 50:11, 50:15, 50:28, 50:33, 50:34, 50:35, 50:37, 50:44, 50:47, 51:8, 51:20, 51:40, 52:43, 53:29, 53:31, 53:32, 53:41, 53:45, 54:12, 54:14, 54:21, 54:25, 54:28, 54:30, 54:33, 54:36, 55:2, 55:8, 55:15, 55:34, 56:4, 56:7, 56:8, 56:17, 56:23, 56:26, 56:35, 57:2, 57:3, 57:19, 57:38, 57:43, 57:44, 57:45, 58:9, 58:25, 58:33, 58:34, 58:35, 58:39, 58:40, 58:42, 58:45, 59:1, 59:2, 59:17, 59:19, 59:29, 59:36, 59:39, 60:10, 60:33, 60:34, 60:36, 60:47, 61:7, 62:14, 62:19, 62:41, 62:44, 62:47, 63:32, 64:3, 64:7, 64:25, 64:46, 65:6, 65:11, 65:18, 65:21, 65:27, 65:29, 65:30, 65:31, 65:42, 65:43, 66:17, 66:18, 66:43, 67:1, 67:9, 67:12, 67:13, 67:15, 67:18, 67:25, 67:33, 67:35, 67:39, 67:40, 67:42, 67:45, 68:3, 68:12, 68:29, 68:30, 68:34, 68:35, 69:1, 69:10, 69:25, 69:28, 69:32, 69:46, 70:2, 70:8, 70:19, 70:32, 70:38, 70:42, 71:1, 71:11, 71:21, 72:1, 72:15, 72:28, 72:36, 73:2, 73:4, 73:7, 73:17, 73:47, 74:10, 74:17, 74:25, 74:42, 75:21, 75:25, 75:31, 75:35, 75:36, 75:41, 76:3, 76:9, 76:11, 76:22, 76:28, 76:38, 76:39, 77:1, 77:6, 77:14, 77:15, 77:23, 77:36, 77:45, 77:47, 78:12, 78:15, 78:18, 78:39, 78:40, 78:41, 79:3, 79:13, 79:15, 79:41, 80:7, 80:11, 80:14, 80:18, 80:21, 80:22, 80:43, 80:44, 81:9, 81:33, 81:43, 81:44, 81:45, 82:9, 82:19, 82:21, 82:25, 82:27, 82:30, 82:32, 82:43, 83:4, 83:8, 83:10, 83:40, 83:41, 83:47, 84:4, 84:11, 84:13, 84:15, 84:16, 84:18, 84:19, 84:22, 84:34, 85:3, 85:7, 85:17, 85:27, 85:28
Isaac [1] - 13:7
isn't [1] - 3:26
isolated [2] - 65:45, 66:8
issue [6] - 14:6, 14:38, 15:34, 15:35, 33:36, 44:20
issues [32] - 2:21, 3:2, 4:4, 4:46, 5:36, 6:14, 6:29, 7:6, 7:46, 8:9, 8:46, 9:11, 10:3, 11:5, 11:15, 14:27, 26:38, 28:15, 44:14, 46:14, 47:21, 47:38, 50:5, 61:16, 66:23, 68:41, 73:8, 80:1, 83:32, 85:10, 85:23, 85:41
It [5] - 7:2, 65:6, 68:14, 71:10, 75:40
it [376] - 2:1, 2:6, 2:25, 2:46, 3:21, 3:27, 3:28, 3:31, 3:32, 3:33, 3:38, 4:35, 5:7, 5:13, 5:17, 5:25, 5:35, 5:43, 6:9, 6:18, 6:22, 6:31, 6:36, 6:39, 6:43, 7:11, 7:38, 8:8, 8:37, 10:3, 10:12, 10:13, 10:20, 11:4, 11:30, 11:32, 11:39, 12:29, 13:4, 14:7, 14:12, 14:15, 14:20, 14:25, 15:4, 15:25, 15:26, 15:27, 15:38, 16:1, 16:3, 16:5, 16:6, 16:7, 16:9, 16:18, 16:32, 16:40, 17:24, 17:40, 18:6, 18:11, 18:28, 18:35, 19:6, 19:8, 19:19, 19:24, 19:30, 20:2, 20:16, 20:23, 20:38, 20:45, 21:9, 21:17, 21:20, 21:28, 21:36, 21:44, 22:2, 22:9, 22:15, 22:29, 23:2, 23:4, 23:14, 23:15, 23:16, 23:28, 23:32, 23:45, 24:3, 24:5, 24:22, 24:24, 24:32, 24:35, 24:38, 25:20, 25:36, 25:46, 26:16, 26:19, 27:23, 27:27, 27:42, 28:9, 28:13, 28:20, 28:22, 28:30, 28:36, 29:22, 29:37, 30:10, 31:6, 31:7, 31:19, 32:7, 32:14, 32:24, 32:29, 34:30, 34:33, 34:46, 35:10, 35:12, 36:1, 36:11, 37:1, 37:16, 37:19, 37:20, 37:23, 38:6, 38:21, 39:5, 39:35, 39:43, 40:14, 40:30, 40:46, 41:8, 41:16, 41:24, 41:26, 41:28, 41:33, 41:38, 41:39, 41:44, 42:1, 42:7, 42:9, 42:23, 43:22, 43:30, 43:45, 44:37, 44:39, 44:44, 45:3, 45:5, 45:31, 46:37, 47:21, 47:30, 47:32, 47:37, 47:39, 47:40, 47:45, 47:47, 48:18, 48:46, 49:1, 49:9, 49:20, 49:39, 50:5, 50:8, 50:9, 50:10, 50:11, 50:15, 50:17, 50:34, 50:35, 50:37, 50:38, 50:43, 51:2, 51:5, 51:24, 51:26, 51:37, 52:9, 52:13, 52:26, 52:30, 52:34, 53:41, 53:47, 54:2, 54:6, 54:8, 54:13, 54:21, 54:30, 56:12, 56:13, 56:14, 56:40, 56:41, 56:42, 56:44, 57:3, 57:7, 57:9, 57:15, 57:22, 57:38, 57:43, 57:45, 57:47, 58:2, 58:5, 58:40, 58:42, 58:47, 59:1, 59:22, 59:24, 59:28, 59:29, 59:37, 59:39, 59:46, 60:7, 60:10, 60:15, 60:34, 60:35, 60:37, 61:7, 61:33, 61:34, 61:43, 62:3, 62:41, 62:42, 63:15, 63:36, 64:24, 64:45, 65:18, 65:30, 65:31, 65:37, 65:43, 65:46, 66:3, 66:5, 66:7, 66:25, 66:43, 66:46, 67:11, 67:13,

67:39, 67:40, 67:46, 68:11, 68:14, 68:15, 69:2, 69:20, 69:21, 69:25, 70:10, 70:11, 70:38, 70:42, 71:37, 71:41, 72:34, 73:7, 74:1, 74:2, 74:22, 74:23, 74:36, 74:38, 74:40, 75:2, 75:26, 75:30, 75:31, 75:32, 75:33, 75:34, 75:35, 75:36, 75:41, 76:3, 76:7, 76:38, 76:43, 77:2, 77:13, 77:37, 77:45, 78:15, 78:17, 78:22, 78:29, 78:40, 78:41, 79:17, 79:25, 79:42, 80:5, 80:25, 80:26, 80:43, 81:9, 81:10, 81:11, 81:12, 81:13, 81:14, 81:15, 81:28, 81:42, 81:43, 81:47, 82:4, 82:9, 82:31, 82:46, 83:2, 83:6, 83:10, 83:34, 83:44, 84:4, 84:15, 84:16, 84:18, 84:19, 84:22, 84:37, 85:2, 85:3, 85:18, 85:33
it's [6] - 20:11, 24:2, 44:47, 51:8, 67:42, 82:5
items [1] - 77:5
its [45] - 3:23, 3:35, 5:3, 5:13, 14:10, 15:19, 16:18, 16:29, 18:30, 19:8, 24:30, 31:16, 32:46, 33:1, 34:46, 43:17, 45:13, 45:15, 45:26, 47:19, 48:23, 48:25, 48:43, 49:19, 49:28, 50:16, 51:42, 54:10, 54:32, 56:42, 58:9, 59:15, 59:16, 59:25, 59:26, 60:14, 60:15, 61:22, 62:39, 66:9, 77:26, 83:26, 84:15, 85:6
itself [2] - 21:45, 55:47

J

J [11] - 4:32, 12:12, 13:39, 14:1, 17:19, 34:24, 35:23, 71:12, 71:16, 71:33, 75:25
J's [4] - 13:7, 37:13, 83:22
James [2] - 72:4, 75:3
Jason [8] - 4:6, 7:16, 19:3, 21:20, 22:29, 24:47, 26:9, 26:28
Jason's [1] - 19:17
Jennifer [2] - 72:19, 83:21
job [2] - 58:9, 67:22
JOHN [1] - 22:29
John [3] - 22:29, 22:47, 52:42
join [6] - 7:10, 7:26, 59:45, 66:2, 73:22, 77:7
joint [3] - 16:15, 16:18, 16:22
joint-stock [1] - 16:15
Jolls [2] - 50:19, 54:39
Journal [1] - 12:13
judge [5] - 60:25, 71:34, 71:38, 71:41, 75:45
judge-made [1] - 75:45
judged [2] - 30:28, 57:35
judges [1] - 71:3
judgment [7] - 11:34, 17:9, 33:41, 57:23, 58:21, 59:2, 59:39
judgments [1] - 36:19
judicial [3] - 32:44, 35:4, 39:45
judiciary [1] - 2:47
Julius [1] - 28:29
junk [1] - 79:14
jurisdictions [1] - 31:31
just [26] - 3:10, 8:21, 10:6, 12:27, 13:25, 20:35, 22:6, 22:17, 22:21, 22:42, 23:4, 23:39, 24:9, 24:33, 25:35, 31:21, 34:16, 42:5, 61:43, 63:40, 72:31, 74:7, 80:10, 80:30, 81:13, 84:40
justice [1] - 6:40
Justice [24] - 2:7, 2:9, 7:29, 8:8, 10:9, 16:46, 17:37, 20:36, 21:24, 26:12, 26:43, 26:44, 31:19, 44:5, 44:15, 54:27, 60:19, 60:21, 60:22, 71:1, 71:32, 77:6, 81:35, 84:40
JUSTICE [23] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 26:16, 41:47, 43:9, 43:41, 44:9, 59:6, 59:42, 60:4, 73:24, 74:42, 76:15, 76:45, 80:43, 85:21
Justice's [1] - 42:26
justices [1] - 40:27
justifiable [1] - 77:19
justify [2] - 56:18, 69:2

K

Karl [1] - 28:24
KAYLEEN [1] - 24:1
Kayleen [2] - 24:1, 24:19
keep [4] - 2:33, 9:40, 9:43, 81:13
keeping [3] - 9:23, 43:14, 62:35
kept [1] - 85:38
Kevin [10] - 6:47, 21:11, 60:2, 60:11, 73:25, 76:46, 77:10, 77:23, 81:8, 81:26
Kevin's [3] - 7:6, 81:17, 83:20
key [4] - 11:23, 44:40, 63:2, 79:31
Keyes [1] - 30:40
kick [1] - 77:26
kilometres [2] - 35:24, 37:14
kind [16] - 26:42, 29:28, 29:47, 30:29, 35:40, 42:30, 45:39, 49:31, 50:4, 59:23, 66:18, 73:46, 78:15, 80:35, 84:33
kinds [6] - 42:18, 43:25, 63:7, 69:43, 73:42, 83:37
King [3] - 4:43, 13:8, 44:27
Kingdom's [1] - 4:19
Kingsford [11] - 4:29, 10:2, 25:29, 26:14, 26:17, 26:23, 43:42, 73:35, 80:13, 83:41, 84:45
KINGSFORD [13] - 26:41, 42:12, 43:19, 73:37, 77:29, 77:34, 78:7, 78:11, 78:25, 78:29, 78:39, 80:30, 84:10
Kirby [1] - 13:9
knew [2] - 63:45, 64:9
know [26] - 2:34, 3:26, 4:21, 4:43, 9:18, 12:17, 25:31, 35:23, 42:27, 43:34, 43:36, 44:34, 64:15, 67:47, 71:5, 72:24, 72:37, 76:3, 78:46, 79:5, 80:37, 81:31, 81:32, 82:25, 82:40
knowledge [1] - 64:41
known [7] - 28:4, 31:5, 45:22, 54:16, 55:15, 64:5, 83:7
knows [1] - 82:42
Korea [1] - 75:31
Koreans [1] - 75:33

L

lack [4] - 45:45, 73:40, 83:33, 85:34
ladies [3] - 2:1, 43:45, 44:4
laker [1] - 81:40
Laker [1] - 61:13
land [1] - 2:28
Langford [1] - 31:13
language [2] - 8:30, 84:16
large [9] - 6:7, 7:43, 9:16, 9:18, 34:38, 37:10, 38:18, 47:39, 64:45
larger [1] - 48:19
largest [5] - 42:24, 61:17, 67:11, 67:12, 67:39
last [14] - 9:28, 10:19, 13:25, 26:30, 27:38, 30:24, 50:21, 60:5, 60:27, 76:16, 76:17, 77:1, 84:38, 85:37
late [1] - 66:9
later [7] - 50:47, 52:28, 53:21, 55:30, 59:11, 68:11, 79:25
latest [1] - 21:33
Latham [1] - 15:36
laundering [1] - 61:23
LAW [1] - 1:11
law [157] - 5:12, 5:21, 5:47, 7:4, 7:17, 7:20, 7:32, 7:38, 7:41, 8:7, 8:17, 8:19, 9:3, 10:11, 10:14, 11:14, 11:29, 11:34, 12:2, 14:10, 15:34, 15:42, 16:3, 16:12, 16:34, 16:45, 17:8, 17:9, 17:20, 17:24, 18:2, 18:4, 18:5, 18:6, 18:12, 18:13, 18:22, 18:27, 19:5, 19:20, 19:37, 20:43, 21:15, 21:46, 22:9, 22:40, 23:3, 23:28, 23:36, 24:5, 24:8, 24:9, 24:11, 24:17, 24:28, 24:33, 24:38, 25:4, 25:15, 25:18, 25:20, 26:46, 27:1, 27:12, 27:18, 28:10, 29:21, 30:40, 31:17, 31:21, 34:21, 35:4, 35:7, 35:15, 35:43, 36:25, 36:27, 36:36, 36:37, 36:46, 37:1, 37:6, 37:30, 38:39, 38:42, 39:24, 40:2, 40:22, 41:8, 41:21, 41:24, 41:35, 41:39, 43:5, 44:29, 45:31, 45:33, 45:45, 46:35, 46:40, 47:22, 48:47, 49:1, 49:5, 50:8, 51:19, 51:32, 52:43, 53:28, 58:32, 58:39, 60:21, 61:33, 61:39, 61:44, 62:16, 62:24, 64:5, 64:36, 65:23, 67:34, 69:10, 70:7, 70:8, 70:12, 71:5, 75:10, 75:29, 75:41, 75:46, 76:29, 77:18, 78:43, 79:14, 79:30, 79:32, 80:7, 80:11, 80:22, 80:24, 80:41, 80:44, 81:12, 83:8, 83:46, 84:4, 84:22, 84:28, 85:7, 85:8, 85:10, 85:14
Law [22] - 2:27, 2:35, 2:37, 2:38, 3:7, 4:8, 4:44, 5:12, 9:9, 12:13, 15:30, 19:19, 26:17, 42:9, 44:29, 62:19, 65:23, 74:13, 79:5, 79:6, 79:29, 80:8
lawfully [2] - 48:11, 48:36
laws [6] - 5:26, 19:14, 19:32, 50:24, 56:34, 58:37
lawyer [4] - 2:13, 7:25, 68:40, 74:11
lawyers [3] - 55:16, 81:14, 85:42
lax [1] - 65:27
layer [1] - 54:25
lead [5] - 3:41, 25:29,

69:21, 69:22, 69:40
lead-in [1] - 25:29
leaders [1] - 68:30
leadership [2] - 66:31, 68:29
leading [3] - 11:21, 34:30, 73:40
leads [1] - 65:24
leap [1] - 52:3
leaping [1] - 47:24
learn [5] - 43:23, 43:34, 47:34, 81:18
learned [2] - 73:28, 73:30
learnings [1] - 71:39
learnt [1] - 65:11
least [10] - 12:19, 14:24, 14:39, 20:46, 32:26, 38:26, 47:28, 54:10, 77:11, 83:32
leave [4] - 10:1, 37:32, 41:44, 79:25
leaves [2] - 11:30, 35:41
leaving [2] - 42:14, 42:15
lecture [1] - 10:11
lectures [1] - 26:46
led [3] - 61:2, 61:25, 81:24
left [3] - 5:41, 5:43, 82:11
legal [31] - 3:1, 3:14, 5:40, 6:5, 7:46, 8:3, 8:38, 11:15, 14:36, 15:31, 18:15, 19:15, 27:27, 27:42, 36:41, 36:42, 36:45, 37:23, 41:40, 42:30, 42:31, 45:42, 46:28, 48:45, 68:14, 70:47, 71:23, 73:42, 77:29, 79:8, 79:20
legalistic [1] - 47:9
legally [5] - 28:2, 28:25, 38:9, 51:20, 79:13
legislate [1] - 38:35
legislated [2] - 35:21, 79:12
legislation [24] - 19:33, 22:13, 37:41, 38:38, 62:15, 62:19, 62:21, 66:34, 68:2, 68:22, 69:46, 73:4, 74:29, 74:37, 74:38, 75:42, 78:44, 80:14, 80:16, 80:36, 81:4, 82:4, 82:6, 82:13
legislative [14] - 4:17, 25:19, 32:41, 33:38, 33:43, 39:45, 68:43, 69:21, 72:7, 77:20, 77:36, 78:19, 79:17, 81:3
legislature [2] - 30:9, 41:17
legitimate [4] - 9:37, 10:32, 10:43, 42:32
lender [2] - 62:43, 64:26
lenders [2] - 62:40, 64:34
lending [7] - 62:8, 62:9, 62:17, 62:38, 64:12, 66:35
lens [2] - 66:37, 75:27
less [3] - 40:40, 52:29, 70:24
lessens [1] - 75:21
lesson [8] - 50:44, 65:41, 67:9, 69:5, 70:7, 70:17, 71:43, 73:17
lessons [5] - 43:28, 60:15, 65:11, 73:28, 73:30
let [9] - 5:42, 7:13, 60:29, 61:31, 63:1, 65:10, 72:31, 73:32, 76:27
let's [7] - 21:46, 22:7, 22:20, 22:21, 31:11, 67:9, 69:5
Let's [1] - 22:12
letter [3] - 46:40, 48:47, 75:29
letters [2] - 52:47, 53:7
Level [1] - 1:28
level [8] - 22:47, 49:39, 53:46, 54:14, 67:28, 72:18, 80:3, 80:35
levels [3] - 53:5, 53:30, 54:18
leveraged [1] - 68:10
liability [9] - 25:9, 30:19, 36:10, 36:19, 49:2, 52:13, 72:20, 81:9, 85:26
liable [2] - 32:17, 83:23
liberal [2] - 40:3, 43:3
liberty [1] - 36:37
licence [15] - 3:22, 3:26, 18:11, 27:28, 46:1, 46:14, 46:23, 46:26, 46:28, 46:34, 47:21, 51:17, 53:1, 53:2, 83:35
licensed [3] - 51:20, 63:17, 63:26
licensees [1] - 63:26
lie [1] - 70:11
lied [1] - 64:10
lies [1] - 49:35
life [4] - 10:38, 60:6, 74:13, 82:9
light [6] - 18:38, 46:15, 49:16, 49:41, 57:11, 71:9
like [34] - 2:27, 5:38, 8:36, 14:39, 19:35, 20:41, 20:44, 21:40, 23:34, 24:16, 24:31, 28:20, 29:13, 32:38, 43:9, 59:36, 62:9, 66:6, 69:39, 71:11, 72:11, 75:18, 77:26, 78:16, 78:42, 79:8, 81:7, 81:15, 81:29, 82:38, 83:10, 84:7, 84:37, 84:41
likelihood [2] - 36:12, 39:3
likely [7] - 38:7, 38:15, 41:28, 50:26, 50:37, 81:25, 82:5
likes [1] - 71:6
likewise [1] - 32:11
limit [3] - 11:39, 18:22, 25:15
limited [9] - 15:19, 20:10, 20:11, 32:30, 32:31, 38:42, 61:43, 67:28, 82:22
limiting [1] - 14:25
limits [1] - 37:45
line [3] - 11:44, 13:11, 70:20
lines [2] - 12:38, 28:34
link [1] - 23:11
linked [2] - 9:33, 85:29
links [1] - 47:46
liquidator [1] - 40:24
List [1] - 44:6
list [2] - 17:41, 27:38
listed [11] - 5:3, 5:17, 6:3, 9:17, 17:40, 18:9, 23:23, 48:15, 48:19, 67:12, 72:5
listen [1] - 47:10
listening [1] - 19:31
lists [1] - 65:19
litany [2] - 61:25, 66:6
litigate [4] - 6:18, 52:28, 59:10, 60:24
litigating [1] - 6:33
litigation [14] - 6:19, 52:15, 52:36, 54:1, 54:2, 55:47, 56:10, 56:22, 56:41, 58:39, 59:37, 71:43, 73:6, 85:31
litigators [1] - 59:11
little [6] - 24:34, 37:18, 42:2, 52:29, 52:30, 53:24
Livingston [1] - 27:32
Livingstone [2] - 42:37, 76:9
Llewellyn [2] - 28:24, 29:14
loan [1] - 68:11
loans [5] - 61:19, 64:14, 64:19, 64:31
local [1] - 5:7
location [1] - 54:28
logic [1] - 37:17
Logistics [1] - 13:1
long [16] - 11:3, 13:11, 15:11, 15:28, 16:22, 25:21, 26:3, 26:45, 27:1, 27:19, 42:17, 43:16, 43:36, 60:34, 61:25, 81:11
long-term [4] - 15:28, 25:21, 26:3, 43:16
longer [9] - 12:18, 13:44, 20:19, 20:20, 21:12, 25:41, 32:34, 63:37, 76:6
longer-term [1] - 20:20
longing [1] - 35:23
longstanding [3] - 7:36, 9:2, 27:42
look [18] - 5:33, 7:5, 10:37, 13:15, 18:41, 27:6, 30:46, 55:14, 58:20, 61:1, 61:46, 62:7, 67:9, 75:26, 78:17, 81:11, 81:28, 82:1
looked [3] - 9:16, 19:43, 20:28
looking [8] - 2:34, 3:47, 18:26, 23:33, 27:6, 71:15, 75:11, 77:12
looming [1] - 46:6
lose [3] - 43:27, 58:11, 70:10
losing [1] - 43:19
loss [8] - 30:18, 34:32, 34:35, 36:5, 36:12, 36:23, 38:8, 73:12
losses [1] - 34:39
lost [2] - 34:35, 63:9
lot [23] - 9:19, 19:30, 19:44, 22:31, 22:47, 23:40, 42:13, 42:22, 43:34, 43:35, 60:44, 61:26, 62:8, 68:45, 73:38, 75:12, 78:41, 80:17, 81:19, 82:11, 82:17, 85:21
lots [2] - 19:8, 76:30
Louis [1] - 54:27
lovely [1] - 26:44
low [3] - 52:7, 54:14, 66:26
lower [8] - 53:5, 53:30, 53:46, 55:9, 56:28, 56:31, 78:45
lower-order [2] - 56:28, 56:31
lower-status [1] - 78:45
lucky [3] - 6:46, 61:10, 70:29
lunatic [2] - 11:42, 41:12
luxury [1] - 71:18
lyrical [1] - 46:24

M

M [4] - 26:16, 41:47, 43:9, 43:41
machine [1] - 79:18
Macquarie [5] - 67:15, 68:17, 68:38, 73:47, 75:31
made [19] - 6:3, 11:24, 14:20, 16:43, 19:46, 31:5, 47:16, 51:27, 52:6, 54:15, 54:16, 61:8, 64:5, 66:13, 75:45, 76:30, 77:26, 79:43, 83:23
main [3] - 11:28, 19:37, 38:29
mainstream [1] - 56:1
maintain [2] - 18:11, 46:27
maintaining [1] - 16:4
major [7] - 3:17, 45:12, 56:43, 61:2, 61:21, 67:4, 77:20
majority [2] - 14:40, 53:4
make [22] - 11:35, 13:4, 14:9, 15:43, 19:7, 19:17, 20:7, 21:47, 23:4, 24:24, 24:32, 34:45, 42:28, 43:9, 43:11, 55:27,

57:23, 71:38, 79:9, 80:22, 80:36, 84:41
maker [2] - 29:40, 30:5
makers [5] - 28:32, 29:23, 29:28, 29:31, 29:35
makes [10] - 13:44, 14:23, 16:32, 17:6, 20:23, 31:35, 38:38, 52:40, 69:7, 79:12
making [20] - 8:29, 17:4, 17:11, 17:17, 18:24, 20:23, 29:1, 29:13, 29:36, 30:32, 30:33, 32:5, 42:34, 60:29, 62:45, 74:46, 77:17, 77:18, 78:47, 79:17
Mallesons [3] - 4:43, 44:28, 74:35
malus [2] - 69:39, 69:41
man [1] - 84:39
managed [2] - 8:13, 11:11
management [37] - 8:29, 8:35, 10:23, 11:30, 15:43, 20:45, 21:32, 27:25, 29:5, 29:13, 30:8, 30:43, 31:38, 32:17, 34:8, 41:17, 41:23, 67:20, 67:21, 67:22, 67:26, 67:27, 67:45, 67:46, 68:19, 69:42, 72:14, 72:15, 72:33, 73:6, 73:19, 73:20, 74:20, 81:14, 85:33, 85:34
manager [3] - 18:41, 18:43, 18:47
managerial [2] - 14:46, 16:5
managers [7] - 9:23, 9:24, 9:44, 10:16, 21:9, 75:5, 81:37
managing [2] - 64:39, 68:21
mandated [1] - 30:15
manifest [1] - 28:47
manner [4] - 48:12, 48:27, 48:36, 49:8
mantra [1] - 59:10
manual [3] - 63:40, 74:26, 74:27
manuals [2] - 68:25, 68:26
MANWARING [1] - 24:1
Manwaring [1] - 24:1
many [23] - 3:47, 7:43, 9:35, 15:9, 15:30, 18:19, 22:13, 26:36, 28:2, 30:23, 33:32, 34:23, 35:46, 48:41, 52:12, 55:24, 57:6, 59:31, 60:22, 66:4, 73:11, 73:32, 80:1
map [1] - 12:41
margin [2] - 61:19, 68:11
Mark [2] - 78:15, 78:18
marker [1] - 30:6
market [6] - 34:11, 34:33, 34:38, 54:33, 57:14, 82:44
Markets [2] - 4:22, 79:6
markets [3] - 57:8, 72:11, 82:34
Mason [1] - 19:10
mass [1] - 72:10
massive [1] - 67:10
Master [3] - 12:26, 14:19, 15:22
material [7] - 46:10, 48:30, 48:32, 48:37, 54:45, 66:40, 72:7
materials [2] - 7:34, 39:45
MATT [1] - 20:34
Matt [1] - 20:34
matter [11] - 16:12, 16:40, 16:45, 17:20, 30:37, 42:21, 82:34, 82:35, 85:27
matters [13] - 21:35, 41:20, 44:42, 49:23, 49:28, 50:7, 51:13, 51:17, 60:11, 61:25, 70:23, 85:22, 85:35
maximum [4] - 58:25, 58:27, 71:23, 73:3
May [3] - 46:46, 47:1, 66:9
may [68] - 2:31, 3:23, 3:40, 3:47, 5:7, 5:25, 6:31, 13:23, 13:41, 14:37, 18:8, 18:12, 19:17, 25:10, 27:14, 27:24, 29:36, 29:37, 29:42, 30:9, 30:16, 30:20, 32:1, 32:3, 34:2, 34:15, 36:15, 37:3, 37:7, 37:18, 37:38, 41:17, 44:34, 44:37, 45:43, 45:46, 46:20, 49:15, 50:1, 50:13, 51:10, 51:30, 52:30, 53:14, 53:16, 53:39, 54:13, 55:1, 55:22, 55:44, 55:47, 56:3, 56:11, 57:45, 59:3, 59:6, 59:21, 72:21, 75:40, 76:15, 77:13, 77:37, 80:19, 81:8, 81:19, 84:1, 84:29
maybe [5] - 23:25, 74:46, 75:34, 81:47
McCann [13] - 6:47, 12:36, 14:17, 21:11, 60:2, 60:11, 60:18, 75:24, 76:27, 76:46, 77:4, 81:28, 82:9
McCann's [3] - 73:25, 77:10, 77:14
McDonald [2] - 3:4, 86:1
McGirr [2] - 20:34
McKinseys [1] - 67:36
McPherson [1] - 12:12
me [35] - 2:45, 4:37, 5:42, 7:13, 7:26, 7:30, 21:21, 23:3, 23:4, 44:34, 44:39, 49:21, 51:6, 51:24, 51:40, 54:35, 59:45, 60:23, 60:29, 60:41, 61:31, 63:1, 67:47, 70:32, 71:26, 72:31, 73:32, 74:20, 76:27, 76:37, 77:13, 81:30, 83:10, 84:11, 84:27
mean [8] - 12:29, 18:12, 28:13, 37:14, 58:10, 77:29, 80:31, 85:3
meaning [1] - 12:20
meaningful [3] - 45:36, 45:43, 58:26
meaningless [1] - 56:36
means [15] - 4:35, 12:30, 13:12, 23:2, 23:43, 28:21, 37:23, 38:29, 42:31, 50:39, 55:18, 60:43, 68:33, 72:15, 85:16
Means [2] - 9:15, 9:22
meantime [1] - 51:35
measure [1] - 37:29
measured [2] - 4:26, 10:38
mechanical [1] - 3:42
mechanism [3] - 39:31, 42:30, 63:38
Medcraft [1] - 46:29
media [4] - 2:21, 46:42, 61:26, 72:35
medium [1] - 15:28
meet [3] - 2:28, 51:19, 80:36
meeting [5] - 2:2, 19:1, 40:11, 41:5, 44:4
meetings [1] - 39:39
Melbourne [1] - 19:30
member [2] - 26:35, 61:11
members [5] - 15:2, 17:45, 40:40, 43:33, 48:17
memory [2] - 43:20, 43:39
mentioned [15] - 7:16, 10:9, 12:32, 14:11, 16:11, 16:46, 18:16, 18:18, 23:10, 39:2, 39:47, 44:15, 61:6, 64:39, 65:16
mentioning [1] - 16:34
merchants [1] - 16:16
merely [1] - 17:21
mergers [1] - 44:27
merits [1] - 70:32
Merrick [1] - 9:4
message [1] - 24:32
messages [1] - 47:31
methodologies [1] - 6:40
methodology [1] - 61:46
microphone [1] - 19:25
midst [1] - 45:17
might [36] - 2:13, 7:2, 16:43, 17:24, 19:9, 21:11, 21:17, 25:10, 28:21, 29:19, 29:46, 36:31, 39:41, 40:45, 40:46, 41:44, 43:11, 44:22, 50:20, 51:1, 59:31, 62:30, 63:15, 72:27, 76:20, 77:7, 77:24, 78:12, 79:24, 79:28, 83:36, 83:43, 84:30, 84:39, 84:40, 85:16
million [9] - 18:42, 64:46, 71:14, 71:15, 73:3, 73:5, 76:5, 76:8, 76:22
millions [1] - 62:3
Mills [2] - 15:35, 15:36
Milton [1] - 19:6
mind [3] - 29:29, 51:16, 57:43
minds [2] - 55:35, 79:9
mindset [2] - 43:3, 68:5
minimalist [1] - 81:41
Minister [1] - 61:27
minute [1] - 32:41
minutes [5] - 20:32, 41:47, 60:41, 73:31, 85:37
mis [2] - 61:18, 61:24
mis-selling [2] - 61:18, 61:24
misalignment [3] - 21:6, 21:27, 21:43
misconduct [42] - 6:27, 33:15, 46:31, 52:4, 56:28, 57:44, 60:39, 61:3, 61:32, 62:1, 63:2, 63:32, 63:47, 64:13, 64:39, 65:3, 65:17, 65:25, 65:39, 65:41, 65:44, 66:4, 66:7, 66:10, 66:23, 66:31, 66:40, 67:5, 67:10, 69:22, 69:42, 71:43, 72:8, 72:21, 72:37, 72:42, 73:10, 76:42, 80:24, 81:30
misleading [3] - 61:36, 63:47, 79:33
missed [1] - 74:28
misunderstandings [1] - 24:16
misuse [1] - 33:3
mitigate [1] - 30:10
mitigating [1] - 34:38
mix [1] - 34:25
mixing [1] - 78:47
model [4] - 42:7, 54:13, 56:17, 78:14
Modern [2] - 9:14, 15:30
modern [1] - 35:41
modified [1] - 25:45
moment [8] - 10:6, 21:16, 22:30, 51:6, 76:35, 76:40, 77:36, 82:21
money [9] - 19:8, 19:46, 34:35, 57:29, 61:23, 63:41, 64:30, 64:45, 68:10
monitor [3] - 10:22, 36:20, 85:18
monitoring [2] - 63:28, 85:12
month [1] - 60:27
months [1] - 13:25
moral [8] - 27:3, 27:4, 27:31, 27:41, 27:46, 31:3, 31:6, 31:7

morality [3] - 66:37, 75:27, 75:35
more [73] - 2:12, 2:21, 3:34, 4:10, 5:38, 6:42, 8:14, 10:40, 12:29, 13:32, 17:15, 17:29, 17:32, 18:26, 20:14, 20:31, 20:47, 21:11, 22:17, 22:21, 22:22, 23:36, 24:45, 26:25, 26:26, 27:21, 28:12, 28:29, 30:24, 32:33, 34:12, 34:21, 36:25, 37:6, 38:5, 38:23, 40:20, 41:40, 41:41, 49:7, 49:23, 50:37, 51:25, 51:26, 51:27, 52:27, 52:30, 53:10, 53:24, 53:34, 53:42, 54:1, 55:14, 55:47, 56:20, 57:3, 59:4, 61:13, 61:31, 64:30, 64:31, 65:14, 70:13, 70:23, 75:43, 78:46, 78:47, 84:12, 84:15, 84:24
mores [1] - 19:22
MORGAN [1] - 22:29
Morgan [1] - 22:29
morning [1] - 77:41
mortgage [6] - 64:14, 64:15, 64:19, 64:21, 64:24, 64:27
mortgages [1] - 61:19
mortgaging [1] - 68:9
most [19] - 3:26, 4:42, 5:33, 9:13, 18:29, 31:28, 42:24, 42:45, 43:2, 45:13, 56:5, 63:5, 63:15, 67:39, 72:44, 74:12, 76:12, 83:40, 84:20
motivated [1] - 69:32
motivates [1] - 18:26
motivating [1] - 51:3
motivator [1] - 45:34
move [13] - 2:8, 4:41, 19:11, 21:30, 26:13, 27:42, 32:45, 36:30, 53:26, 53:31, 60:1, 67:1
moving [2] - 55:47, 60:8
Mr [5] - 44:5, 73:37, 77:4, 77:14, 82:34
MR [6] - 60:18, 74:45, 75:24, 76:27, 81:28, 82:9
MS [7] - 19:28, 43:13, 44:34, 59:21, 82:42, 83:2, 83:14
much [29] - 3:38, 3:40, 4:10, 7:28, 7:44, 12:14, 16:32, 18:23, 19:38, 19:43, 21:28, 22:10, 23:7, 26:37, 26:41, 41:45, 42:47, 57:36, 58:39, 59:43, 60:18, 60:21, 61:13, 67:1, 76:6, 79:13, 80:16, 85:27
must [29] - 2:17, 3:4, 5:14, 8:42, 16:1, 19:4, 23:29, 23:30, 23:31, 27:45, 33:12, 36:34, 37:8, 39:35, 40:34, 44:44, 45:3, 45:31, 48:15, 54:7, 57:20, 57:22, 57:28, 66:36, 72:27, 73:22, 73:26, 84:6, 85:18
mutual [1] - 10:41
my [60] - 2:2, 2:6, 2:25, 2:29, 2:30, 2:33, 7:9, 7:34, 7:46, 8:3, 8:15, 8:17, 18:1, 18:5, 18:33, 18:38, 18:44, 19:28, 19:42, 20:14, 23:13, 24:8, 24:13, 25:13, 25:17, 26:16, 26:47, 27:10, 28:4, 28:34, 30:46, 39:10, 42:43, 44:36, 44:37, 47:24, 47:36, 51:16, 51:40, 54:28, 57:38, 60:29, 60:47, 64:15, 65:10, 68:17, 69:1, 70:33, 71:18, 73:47, 74:12, 74:14, 74:19, 80:10, 81:45, 82:21, 85:1
myself [2] - 21:17, 23:1

N

NAB [1] - 61:2
name [3] - 19:28, 51:38, 75:25
named [1] - 37:31
namely [2] - 55:12, 61:17
narrative [1] - 74:3
narratives [2] - 24:21, 49:37
narrow [2] - 10:36, 29:2
Nation [1] - 2:29
National [2] - 62:41, 65:23
national [2] - 33:20, 44:28
nature [13] - 7:36, 9:45, 11:17, 15:7, 27:44, 28:16, 28:30, 31:47, 32:19, 33:44, 34:29, 34:31, 35:47
NCCP [2] - 68:1, 75:27
near [4] - 19:13, 49:14, 55:19, 80:45
near" [1] - 34:5
nears [1] - 14:5
nebulous [1] - 49:8
necessarily [11] - 16:31, 20:38, 21:12, 23:14, 23:15, 23:19, 25:3, 49:38, 56:1, 58:29, 80:31
necessary [4] - 19:19, 21:34, 36:11, 81:29
necessity [1] - 5:41
need [41] - 8:40, 9:26, 9:45, 11:17, 17:15, 17:24, 18:2, 18:5, 18:21, 18:25, 20:26, 23:33, 24:15, 24:37, 25:14, 25:30, 25:33, 30:18, 36:44, 42:26, 42:44, 43:1, 46:26, 48:24, 51:25, 51:47, 54:38, 55:34, 56:3, 56:4, 68:30, 68:31, 69:42, 70:2, 70:9, 72:6, 76:23, 79:9, 80:11, 83:11, 85:2
needed [10] - 8:18, 18:12, 52:37, 58:26, 64:30, 67:25, 68:30, 68:32, 68:35, 74:7
needs [7] - 22:40, 22:41, 61:7, 67:43, 72:13, 79:16, 81:10
negative [2] - 4:22, 55:8
negligent [1] - 63:33
negotiate [3] - 52:28, 54:1, 59:10
negotiated [2] - 52:6, 64:20
Nettle [1] - 31:19
neutral [1] - 5:42
never [7] - 2:12, 2:14, 2:44, 5:26, 38:43, 65:46, 74:37
new [23] - 3:27, 6:30, 6:41, 15:34, 19:32, 19:35, 27:6, 31:7, 39:15, 41:30, 43:15, 43:37, 45:36, 46:5, 49:31, 66:33, 67:30, 68:33, 68:42, 70:19, 72:44, 75:42
NEW [1] - 1:8
New [8] - 1:27, 2:36, 4:30, 7:22, 13:2, 13:9, 26:18, 26:35
newly [1] - 64:18
newspaper [1] - 11:7
next [11] - 8:9, 10:2, 13:44, 47:24, 58:11, 67:9, 70:15, 70:40, 72:1, 83:46, 86:2
nexus [1] - 10:12
Ngurli [2] - 12:35, 14:16
night [1] - 44:36
nights [1] - 60:26
nine [1] - 65:12
no [49] - 12:3, 12:17, 16:2, 16:5, 18:5, 21:12, 24:23, 35:26, 36:43, 37:23, 38:9, 42:46, 52:6, 52:15, 58:25, 61:20, 63:6, 63:16, 63:22, 63:26, 63:28, 63:29, 63:37, 63:38, 63:39, 63:45, 64:7, 64:28, 66:15, 66:46, 67:45, 68:14, 69:37, 71:36, 73:18, 74:25, 75:24, 75:33, 75:34, 76:3, 76:28, 78:12, 85:19, 85:23
no-admissions [1] - 52:6
no-one [1] - 68:14
Nobel [1] - 50:21
nodding [1] - 77:23
nominals [1] - 26:21
nominated [1] - 37:12
Nominees [1] - 17:5
non [12] - 6:34, 15:15, 16:44, 17:3, 17:27, 17:35, 17:41, 29:4, 47:8, 72:2, 72:6, 73:39
non-compliance [2] - 6:34, 73:39
non-exhaustive [1] - 17:41
non-financial [3] - 47:8, 72:2, 72:6
non-interventionist [1] - 29:4
non-shareholder [4] - 16:44, 17:3, 17:27, 17:35
non-voting [1] - 15:15
nonchalance [1] - 74:24
none [2] - 39:27, 58:45
nonetheless [1] - 49:30
nor [4] - 32:30, 35:37, 58:28, 85:14
norm [3] - 17:44, 36:15, 37:23
normative [1] - 37:18
norms [4] - 5:40, 6:5, 30:41, 66:34
North [1] - 13:10
not [223] - 2:33, 3:38, 5:23, 6:18, 8:18, 8:21, 8:23, 8:26, 10:12, 11:17, 11:32, 12:2, 12:19, 12:44, 13:4, 13:23, 13:34, 13:42, 14:6, 14:12, 14:35, 14:39, 14:43, 14:44, 14:45, 15:1, 15:8, 15:26, 15:34, 15:44, 16:6, 16:11, 16:24, 16:30, 16:31, 16:40, 16:44, 17:34, 17:43, 18:5, 18:12, 18:24, 18:28, 18:34, 18:47, 19:17, 20:7, 20:38, 21:17, 21:21, 21:34, 21:36, 22:4, 22:16, 22:22, 22:42, 23:1, 23:7, 23:14, 23:15, 23:17, 23:28, 23:29, 23:31, 24:28, 24:40, 25:15, 26:3, 27:35, 28:28, 30:19, 31:9, 31:21, 31:25, 32:14, 32:29, 34:16, 35:15, 35:20, 35:36, 37:30, 39:33, 39:35, 39:47, 41:11, 43:29, 43:37, 44:38, 44:47, 45:30, 45:32, 45:35, 45:36, 45:43, 46:31, 46:35, 47:29, 48:17, 48:18, 48:24, 48:26, 48:35, 49:3, 49:10, 49:43, 50:26, 51:5, 51:8, 51:24, 51:35, 53:31, 53:32, 54:8, 54:15, 54:16, 54:31, 55:38, 55:41, 55:43, 56:1, 56:14, 56:26, 56:36, 57:2, 57:34, 57:47, 58:2, 58:5, 58:10, 58:14, 58:20, 58:27, 58:33, 58:35, 58:42, 59:3, 60:34, 61:12, 61:43, 62:17, 62:40, 62:44, 63:10,

63:12, 63:16, 63:27, 63:42, 63:46, 64:3, 64:19, 64:24, 64:34, 64:44, 64:45, 65:30, 65:36, 66:8, 66:13, 66:32, 67:26, 68:6, 68:19, 68:25, 68:46, 69:2, 69:12, 69:46, 70:38, 71:18, 71:25, 71:31, 71:34, 71:38, 71:46, 72:14, 74:12, 74:23, 74:47, 75:30, 75:32, 75:36, 75:40, 75:45, 76:5, 76:23, 76:31, 76:35, 76:42, 77:19, 78:11, 78:12, 78:40, 78:42, 79:16, 79:33, 79:43, 80:15, 80:18, 80:19, 80:22, 80:31, 81:13, 81:25, 81:32, 82:1, 82:24, 82:29, 82:30, 82:35, 83:8, 83:15, 83:28, 84:18, 84:20, 85:13, 85:18, 85:32, 85:42

note [9] - 2:25, 11:23, 14:11, 14:19, 17:40, 26:8, 60:33, 60:47, 76:15

noted [4] - 11:39, 15:29, 35:10, 80:1

notes [3] - 52:10, 61:10, 78:34

nothing [2] - 39:20, 83:14

notice [1] - 77:23

noticeable [1] - 50:34

notices [2] - 52:5, 52:22

noting [1] - 53:12

notion [2] - 16:15, 23:16

notwithstanding [1] - 84:2

November [1] - 1:24

now [57] - 2:19, 6:39, 9:7, 9:32, 10:1, 11:38, 12:34, 14:4, 15:22, 16:23, 16:43, 19:17, 20:41, 20:44, 21:1, 21:6, 21:17, 22:24, 23:29, 23:30, 23:31, 26:4, 26:31, 27:1, 27:12, 30:45, 32:38, 34:44, 36:30, 38:25, 41:3, 43:45, 53:11, 53:41, 56:17, 57:43, 60:1, 61:30, 63:1, 63:9, 64:12, 64:45, 65:10, 65:29, 66:36, 69:1, 73:3, 73:31, 74:22, 75:22, 75:26, 75:30, 75:39, 76:8, 82:4, 82:12, 82:33

nowhere [1] - 35:34

nuanced [1] - 61:12

nudge [2] - 51:36, 59:3

Nudge [2] - 51:2, 55:30

number [26] - 7:3, 8:25, 8:38, 9:18, 12:40, 12:41, 17:2, 20:40, 20:43, 25:8, 26:24, 33:19, 39:1, 41:32, 47:6, 48:14, 61:16, 64:12, 65:41, 66:12, 69:5, 70:7, 70:17, 71:37, 77:17, 78:33

NYU [1] - 67:36

O

o'clock [1] - 43:46

obiter [2] - 40:17, 41:4

object [2] - 19:7, 20:16

objections [1] - 48:45

objective [2] - 25:39, 33:25

objectively [1] - 30:28

objects [1] - 37:40

obligation [5] - 20:47, 21:7, 37:22, 38:4, 39:22

obligations [9] - 20:44, 21:1, 28:44, 31:22, 45:20, 47:22, 48:46, 79:37, 80:38

observations [9] - 31:3, 45:37, 50:16, 51:23, 52:15, 55:31, 74:46, 80:41, 82:39

observe [1] - 53:47

observed [3] - 27:31, 34:3, 36:7

observes [3] - 27:4, 31:19, 53:44

obstacles [1] - 37:45

obtain [2] - 18:29, 37:32

obtained [1] - 56:10

obvious [3] - 24:15, 27:27, 31:28

obviously [5] - 19:14, 44:19, 50:4, 60:35, 80:43

occasionally [1] - 53:19

occasions [1] - 46:25

occur [5] - 22:36, 38:8, 55:17, 76:42, 85:19

occurred [8] - 31:6, 61:17, 65:3, 66:4, 68:46, 69:3, 72:9, 81:31

occurrence [1] - 30:10

occurring [2] - 68:31, 69:13

October [1] - 66:25

odd [1] - 15:4

odds [2] - 6:41, 59:29

OF [1] - 1:8

of [1210] - 1:27, 2:3, 2:4, 2:16, 2:28, 2:29, 2:35, 2:37, 2:38, 2:40, 2:42, 3:2, 3:4, 3:6, 3:14, 3:19, 3:20, 3:24, 3:26, 3:31, 3:35, 3:45, 3:47, 4:8, 4:9, 4:15, 4:16, 4:17, 4:18, 4:19, 4:25, 4:30, 4:31, 4:42, 4:44, 4:46, 5:1, 5:5, 5:11, 5:12, 5:14, 5:15, 5:16, 5:20, 5:22, 5:24, 5:25, 5:29, 5:40, 5:41, 5:46, 6:3, 6:10, 6:12, 6:15, 6:19, 6:20, 6:23, 6:24, 6:29, 6:33, 6:34, 6:47, 7:2, 7:3, 7:8, 7:9, 7:15, 7:16, 7:17, 7:18, 7:19, 7:22, 7:32, 7:34, 7:36, 7:37, 7:38, 7:43, 8:1, 8:3, 8:4, 8:6, 8:7, 8:9, 8:12, 8:14, 8:21, 8:22, 8:25, 8:29, 8:30, 8:31, 8:34, 8:36, 8:38, 9:5, 9:9, 9:10, 9:13, 9:16, 9:18, 9:19, 9:25, 9:34, 9:41, 9:45, 10:3, 10:12, 10:13, 10:15, 10:16, 10:18, 10:32, 10:38, 10:40, 10:43, 10:45, 11:1, 11:6, 11:9, 11:10, 11:18, 11:19, 11:20, 11:23, 11:28, 11:31, 11:34, 11:36, 11:38, 11:46, 11:47, 12:5, 12:8, 12:9, 12:10, 12:11, 12:14, 12:17, 12:18, 12:20, 12:22, 12:23, 12:26, 12:28, 12:30, 12:38, 12:40, 12:41, 12:43, 12:44, 13:5, 13:6, 13:8, 13:11, 13:12, 13:16, 13:18, 13:21, 13:22, 13:27, 13:28, 13:29, 13:33, 13:37, 13:38, 13:46, 13:47, 14:1, 14:4, 14:9, 14:14, 14:19, 14:28, 14:29, 14:30, 14:33, 14:35, 14:38, 14:40, 14:44, 14:46, 15:2, 15:5, 15:7, 15:9, 15:13, 15:14, 15:15, 15:22, 15:23, 15:27, 15:29, 15:31, 15:44, 15:45, 16:4, 16:9, 16:10, 16:12, 16:14, 16:15, 16:17, 16:22, 16:26, 16:33, 16:37, 16:39, 16:45, 17:2, 17:4, 17:8, 17:15, 17:16, 17:20, 17:28, 17:31, 17:37, 17:39, 17:45, 18:1, 18:5, 18:7, 18:15, 18:16, 18:18, 18:30, 18:35, 18:43, 19:5, 19:7, 19:8, 19:11, 19:12, 19:18, 19:20, 19:21, 19:33, 19:37, 19:44, 20:2, 20:4, 20:6, 20:8, 20:15, 20:20, 20:21, 20:22, 20:35, 20:38, 20:40, 20:43, 20:47, 21:1, 21:10, 21:14, 21:28, 21:33, 21:44, 22:12, 22:15, 22:31, 22:34, 22:36, 22:38, 23:6, 23:16, 23:24, 23:28, 23:37, 23:40, 23:41, 23:44, 24:6, 24:11, 24:21, 24:26, 24:29, 24:31, 25:1, 25:2, 25:4, 25:9, 25:21, 25:22, 25:37, 25:40, 26:2, 26:5, 26:12, 26:17, 26:18, 26:24, 26:27, 26:29, 26:33, 26:35, 26:36, 26:38, 26:47, 27:4, 27:5, 27:11, 27:13, 27:14, 27:15, 27:16, 27:18, 27:21, 27:23, 27:25, 27:26, 27:29, 27:32, 27:34, 27:44, 27:45, 27:46, 28:2, 28:3, 28:5, 28:8, 28:10, 28:11, 28:16, 28:22, 28:23, 28:28, 28:30, 28:31, 28:32, 29:3, 29:5, 29:10, 29:15, 29:16, 29:19, 29:23, 29:26, 29:28, 29:29, 29:31, 29:33, 29:34, 29:36, 29:39, 29:42, 29:43, 29:44, 29:45, 29:47, 30:4, 30:5, 30:6, 30:7, 30:8, 30:10, 30:11, 30:14, 30:15, 30:17, 30:19, 30:20, 30:21, 30:25, 30:27, 30:29, 30:30, 30:35, 30:37, 30:42, 30:46, 31:1, 31:4, 31:8, 31:12, 31:13, 31:14, 31:15, 31:16, 31:20, 31:21, 31:24, 31:25, 31:26, 31:27, 31:28, 31:29, 31:31, 31:34, 31:37, 31:40, 31:41, 31:45, 31:46, 31:47, 32:1, 32:2, 32:4, 32:5, 32:6, 32:7, 32:8, 32:11, 32:13, 32:16, 32:17, 32:19, 32:22, 32:25, 32:31, 32:34, 32:35, 32:39, 32:42, 32:43, 32:44, 33:2, 33:3, 33:4, 33:5, 33:9, 33:10, 33:16, 33:19, 33:20, 33:22, 33:24, 33:25, 33:29, 33:30, 33:31, 33:36, 33:37, 33:39, 33:43, 33:44, 33:45, 34:8, 34:10, 34:12, 34:13, 34:14, 34:18, 34:22, 34:23, 34:25, 34:30, 34:31, 34:33, 34:34, 34:35, 34:38, 34:39, 34:41, 34:42, 34:44, 34:45, 35:2, 35:5, 35:7, 35:8, 35:9, 35:13, 35:14, 35:23, 35:30, 35:31, 35:32, 35:36, 35:37, 35:44, 35:46, 36:1, 36:4, 36:5, 36:6, 36:12, 36:13, 36:15, 36:16, 36:17, 36:19, 36:22, 36:23, 36:25, 36:32, 36:38, 36:47, 37:4, 37:5, 37:7, 37:8, 37:13, 37:17, 37:21, 37:23, 37:28, 37:37, 37:40, 37:41, 37:42, 37:43, 38:4, 38:6,

38:9, 38:11, 38:12, 38:15, 38:16, 38:17, 38:22, 38:29, 38:33, 38:35, 38:36, 38:39, 39:1, 39:2, 39:3, 39:4, 39:6, 39:8, 39:10, 39:14, 39:15, 39:16, 39:19, 39:21, 39:26, 39:27, 39:29, 39:35, 39:38, 39:40, 39:42, 39:43, 39:45, 39:46, 40:1, 40:4, 40:6, 40:7, 40:8, 40:9, 40:10, 40:13, 40:14, 40:18, 40:19, 40:20, 40:22, 40:24, 40:25, 40:26, 40:27, 40:31, 40:33, 40:34, 40:35, 40:36, 40:40, 40:44, 40:46, 40:47, 41:3, 41:5, 41:8, 41:10, 41:16, 41:21, 41:22, 41:28, 41:30, 41:32, 41:33, 41:37, 41:38, 41:39, 41:40, 42:8, 42:9, 42:10, 42:14, 42:16, 42:17, 42:18, 42:19, 42:21, 42:22, 42:24, 42:29, 42:30, 42:32, 42:38, 42:40, 42:43, 42:45, 42:47, 43:1, 43:2, 43:5, 43:7, 43:14, 43:16, 43:20, 43:21, 43:22, 43:25, 43:27, 43:28, 43:33, 43:36, 44:5, 44:6, 44:10, 44:17, 44:18, 44:20, 44:22, 44:27, 44:28, 44:29, 44:30, 44:34, 44:35, 44:37, 44:42, 45:2, 45:5, 45:9, 45:11, 45:13, 45:14, 45:17, 45:18, 45:21, 45:24, 45:25, 45:29, 45:34, 45:38, 45:39, 45:46, 46:1, 46:2, 46:3, 46:5, 46:6, 46:7, 46:9, 46:11, 46:15, 46:17, 46:24, 46:25, 46:26, 46:27, 46:30, 46:33, 46:34, 46:43, 46:45, 46:46, 47:1, 47:6, 47:11, 47:12, 47:13, 47:16, 47:18, 47:24, 47:26, 47:27, 47:29, 47:36, 47:38, 47:41, 47:43, 48:1, 48:5, 48:10, 48:14, 48:17, 48:25, 48:30, 48:32, 48:33, 48:35, 48:37, 48:39, 48:41, 48:42, 48:43, 48:46, 48:47, 49:7, 49:10, 49:15, 49:16, 49:18, 49:22, 49:23, 49:31, 49:41, 49:44, 49:46, 49:47, 50:4, 50:14, 50:18, 50:25, 50:29, 50:31, 50:35, 50:36, 50:47, 51:2, 51:4, 51:6, 51:14, 51:17, 51:19, 51:20, 51:23, 51:27, 51:28, 51:34, 51:41, 52:9, 52:19, 52:26, 52:27, 52:31, 52:35, 52:38, 52:45, 53:4, 53:6, 53:7, 53:10, 53:11, 53:13, 53:21, 53:22, 53:23, 53:27, 53:28, 53:30, 53:34, 53:35, 53:36, 53:37, 53:39, 53:41, 53:46, 54:2, 54:17, 54:19, 54:21, 54:22, 54:30, 54:31, 54:37, 54:38, 54:40, 54:44, 54:45, 55:3, 55:4, 55:6, 55:8, 55:12, 55:15, 55:25, 55:38, 56:9, 56:12, 56:13, 56:14, 56:20, 56:44, 57:1, 57:9, 57:10, 57:12, 57:13, 57:25, 57:39, 57:44, 57:46, 58:3, 58:7, 58:11, 58:12, 58:20, 58:32, 58:33, 58:37, 58:42, 58:45, 59:8, 59:10, 59:15, 59:23, 59:25, 59:30, 60:7, 60:8, 60:9, 60:12, 60:14, 60:16, 60:20, 60:25, 60:30, 60:31, 60:36, 60:42, 60:44, 61:1, 61:12, 61:13, 61:16, 61:18, 61:21, 61:22, 61:24, 61:25, 61:26, 61:30, 61:33, 61:35, 61:44, 61:47, 62:1, 62:2, 62:3, 62:6, 62:8, 62:13, 62:15, 62:23, 62:26, 62:28, 62:29, 62:31, 62:34, 62:35, 63:2, 63:4, 63:7, 63:15, 63:17, 63:21, 63:39, 63:44, 63:45, 63:47, 64:4, 64:9, 64:12, 64:13, 64:14, 64:19, 64:23, 64:25, 64:26, 64:28, 64:33, 64:34, 64:35, 64:38, 64:40, 64:41, 64:45, 65:6, 65:7, 65:13, 65:19, 65:20, 65:31, 65:32, 65:43, 65:45, 66:2, 66:4, 66:7, 66:9, 66:12, 66:17, 66:18, 66:19, 66:26, 66:27, 66:31, 66:37, 66:43, 67:1, 67:11, 67:13, 67:17, 67:19, 67:21, 67:22, 67:29, 67:32, 67:34, 67:38, 68:4, 68:5, 68:9, 68:20, 68:22, 68:23, 68:34, 68:41, 68:44, 68:45, 69:7, 69:9, 69:13, 69:36, 69:41, 69:42, 69:43, 70:10, 70:18, 70:32, 70:33, 70:35, 70:40, 70:41, 70:42, 71:3, 71:4, 71:14, 71:19, 71:23, 71:27, 72:3, 72:4, 72:6, 72:7, 72:17, 72:20, 72:32, 72:37, 72:42, 72:43, 72:45, 73:1, 73:20, 73:21, 73:22, 73:24, 73:28, 73:29, 73:30, 73:38, 73:39, 73:40, 73:42, 73:46, 74:3, 74:12, 74:13, 74:14, 74:28, 75:2, 75:4, 75:7, 75:9, 75:11, 75:12, 75:17, 75:26, 75:27, 75:35, 76:4, 76:7, 76:8, 76:11, 76:28, 76:29, 76:30, 76:37, 76:39, 77:2, 77:11, 77:15, 77:17, 77:34, 77:41, 77:43, 77:46, 78:2, 78:15, 78:20, 78:33, 78:34, 78:41, 78:46, 79:3, 79:4, 79:6, 79:13, 79:16, 79:25, 79:28, 79:34, 79:41, 80:1, 80:4, 80:10, 80:13, 80:16, 80:17, 80:33, 80:35, 80:37, 80:41, 80:47, 81:1, 81:3, 81:8, 81:9, 81:17, 81:19, 81:20, 81:22, 81:30, 81:33, 81:36, 81:37, 81:41, 81:46, 82:7, 82:11, 82:17, 82:18, 82:22, 82:33, 82:38, 82:46, 83:16, 83:23, 83:27, 83:31, 83:32, 83:34, 83:36, 83:37, 83:41, 83:42, 83:46, 84:1, 84:4, 84:5, 84:7, 84:10, 84:16, 84:17, 84:20, 84:22, 84:24, 84:30, 84:31, 84:33, 84:46, 85:3, 85:11, 85:21, 85:27, 85:32, 85:34, 85:41, 85:43, 85:45, 85:47

off [6] - 42:5, 52:3, 61:11, 63:38, 75:29, 77:26

offence [6] - 31:15, 39:30, 71:35, 71:36, 71:37, 73:4

offences [1] - 52:13

offending [1] - 71:24

offered [1] - 46:9

officers [2] - 32:44, 33:15

often [12] - 5:29, 11:47, 27:33, 29:22, 29:23, 35:16, 37:11, 38:23, 47:33, 51:19, 52:43, 55:47

often-cited [1] - 11:47

okay [3] - 56:5, 62:12, 65:41

Okay [1] - 23:29

old [1] - 32:36

older [1] - 16:15

omission [1] - 36:5

omissions [1] - 83:24

on [190] - 2:16, 2:17, 2:21, 2:25, 2:28, 2:34, 3:1, 3:11, 3:23, 4:1, 4:16, 6:7, 6:9, 7:6, 7:44, 7:46, 8:9, 8:30, 9:28, 9:40, 10:6, 10:24, 10:28, 10:36, 11:3, 11:15, 11:19, 11:22, 12:28, 13:44, 14:22, 14:30, 15:25, 15:44, 15:45, 16:15, 16:34, 18:38, 19:32, 20:17, 20:36, 20:41, 20:44, 21:1, 21:7, 21:11, 21:28, 21:44, 22:1, 22:2, 22:17, 22:47, 23:3, 23:16, 24:9, 25:28, 26:8, 26:20, 26:37, 27:16, 27:22, 27:33, 27:35, 27:38, 28:12, 28:14, 28:15, 29:22, 31:41, 32:45, 33:38, 34:15, 34:33, 34:35, 34:39, 35:3, 35:20, 36:30, 37:32, 38:11, 39:4, 39:38, 39:44, 40:1, 40:6, 40:24, 40:37, 41:15, 41:26, 42:13, 43:10, 43:15, 43:21, 44:14, 44:30, 45:9, 46:13, 46:18, 46:19, 46:25, 46:35, 46:36, 46:46, 47:1, 47:20, 47:26, 48:16, 48:30, 48:34, 49:23, 50:17, 51:4, 51:32, 51:43, 52:5, 52:6, 52:10, 52:11, 52:41, 53:21, 53:47, 54:10, 54:31, 54:32, 54:37, 55:11, 55:39, 56:13, 56:29, 56:31, 56:36, 56:41, 57:11, 57:30, 57:46, 58:29, 59:15, 59:33, 60:1, 61:8, 61:30, 61:46, 62:13, 62:23, 63:20, 63:39, 64:3, 65:33, 66:24, 68:20, 69:19, 70:18, 70:36, 72:19, 72:27, 72:31, 73:40, 74:6, 74:11, 74:17, 75:2, 75:4, 75:21, 76:29, 76:33, 77:26, 78:15, 79:30, 79:31, 80:3, 80:17, 80:31, 80:41, 81:22, 81:26, 81:35, 81:42, 82:9, 82:18, 82:28, 82:42, 83:10, 83:11, 84:28, 85:2, 85:22, 85:38

once [8] - 2:45, 6:31, 16:28, 28:44, 72:34, 77:25, 79:17, 83:7

one [58] - 2:14, 4:35, 8:32, 9:2, 9:40, 15:29, 15:31, 17:31, 18:27, 18:35, 19:3, 22:47, 23:33, 23:41, 24:21, 24:34, 24:45, 28:2, 29:20, 30:25, 30:28, 33:23, 38:4, 38:26, 39:18, 39:41, 39:44, 41:7, 41:15, 43:1, 43:11, 43:20, 43:21, 43:27, 44:16, 45:4, 54:40, 61:22, 66:2, 67:32, 68:14, 68:19, 71:45, 73:39, 76:11, 76:16, 76:17, 77:7, 77:34, 77:46, 78:18, 79:8, 79:24, 81:10, 81:44, 85:28

One [1] - 38:36

ongoing [1] - 4:14

online [1] - 26:25

only [40] - 5:23, 5:32, 8:35, 8:39, 9:29, 9:33, 10:30, 10:37, 18:4, 18:27, 18:35, 18:42, 19:7, 20:23, 26:33, 28:27, 30:35, 32:20, 36:11, 36:28, 36:38, 38:7, 40:17, 41:28, 43:11, 45:1, 46:10, 46:35, 53:31, 54:32, 56:10, 59:3, 62:16, 65:30, 74:34, 76:31, 81:14, 82:22, 85:2, 85:42
open [7] - 19:24, 28:41, 35:34, 35:41, 73:32, 84:14, 84:37
open-textured [1] - 28:41
opening [1] - 44:36
operate [8] - 3:22, 3:26, 22:7, 22:8, 27:28, 46:27, 49:3, 83:35
operation [2] - 34:47, 79:21
operationalised [1] - 79:12
operationalising [1] - 74:7
operations [1] - 16:19
opinion [7] - 5:30, 5:35, 6:47, 47:36, 64:4, 66:26, 71:15
opportunities [1] - 39:11
opportunity [4] - 2:20, 29:33, 29:38, 44:11
opposite [2] - 38:26, 79:45
opposition [1] - 5:13
optimism [2] - 55:3, 70:12
optimistic [2] - 55:5, 55:45
option [2] - 66:46, 73:18
options [1] - 29:39
or [123] - 3:20, 3:28, 3:33, 3:34, 5:22, 5:30, 5:40, 5:47, 6:8, 6:11, 6:42, 7:4, 11:18, 12:31, 14:39, 15:14, 16:12, 16:30, 18:3, 19:17, 19:36, 20:46, 21:33, 21:34, 21:37, 22:37, 23:29, 23:30, 23:45, 24:16, 25:16, 28:11, 29:6, 29:24, 29:29, 29:34, 30:18, 32:29, 34:32, 35:35, 35:47, 36:1, 36:14, 36:44, 37:5, 37:10, 37:36, 38:8, 38:11, 38:42, 39:30, 41:10, 42:30, 43:25, 43:32, 44:46, 44:47, 45:4, 45:33, 45:44, 45:45, 45:47, 46:1, 46:2, 47:27, 48:27, 48:31, 48:36, 53:15, 54:10, 55:13, 55:17, 55:21, 55:35, 55:44, 56:2, 56:34, 56:36, 57:46, 58:1, 58:7, 58:8, 58:14, 58:37, 58:38, 58:40, 58:41, 58:46, 61:35, 61:37, 62:40, 63:27, 63:37, 64:25, 64:26, 65:13, 65:45, 67:26, 68:6, 69:22, 69:26, 72:9, 73:31, 74:1, 74:19, 74:26, 75:35, 75:36, 75:45, 76:38, 77:7, 77:30, 79:10, 79:16, 81:4, 81:23, 82:24, 82:30, 83:33, 84:23
order [9] - 2:2, 4:7, 32:11, 44:5, 52:36, 56:28, 56:31, 62:34, 80:36
orderly [1] - 34:37
orders [2] - 32:21, 71:39
ordinary [2] - 15:14, 23:4
organisation [9] - 3:6, 43:24, 47:14, 48:10, 48:33, 48:39, 66:5, 67:27, 67:29
organisational [1] - 83:28
organisations [2] - 48:42, 49:40
organised [1] - 27:22
organisers [1] - 7:30
origin [1] - 12:10
original [2] - 31:16, 33:1
origins [2] - 12:14, 41:21
other [68] - 2:31, 5:11, 6:19, 7:6, 8:40, 10:28, 13:3, 20:24, 22:42, 23:25, 25:2, 25:38, 30:1, 30:34, 32:40, 33:25, 33:33, 34:8, 34:11, 34:16, 35:45, 38:3, 39:1, 40:2, 40:40, 41:25, 41:36, 44:19, 47:41, 48:5, 48:19, 48:32, 51:37, 54:23, 54:32, 54:39, 55:9, 55:16, 55:32, 56:3, 60:16, 62:9, 62:38, 63:32, 64:31, 64:38, 64:43, 65:38, 67:14, 68:45, 70:41, 70:45, 71:31, 72:46, 73:15, 74:5, 75:10, 79:24, 80:5, 80:21, 81:21, 82:7, 82:15, 82:27, 83:34, 83:38, 83:43
others [6] - 24:39, 29:43, 37:31, 54:43, 55:6, 77:24
otherwise [4] - 7:4, 11:41, 35:44, 45:47
ought [3] - 75:36, 77:3, 77:25
our [35] - 2:5, 4:6, 7:14, 7:32, 7:37, 7:39, 8:7, 8:19, 9:2, 9:35, 10:2, 18:12, 18:46, 21:7, 22:12, 27:34, 27:37, 27:38, 29:20, 39:7, 39:41, 42:24, 44:10, 44:13, 44:40, 45:38, 57:2, 57:19, 57:21, 57:39, 66:12, 81:22, 83:16, 85:43
ourselves [1] - 75:40
out [40] - 2:3, 5:19, 8:38, 11:5, 14:41, 18:43, 19:32, 20:21, 23:1, 23:35, 26:29, 31:14, 33:13, 33:44, 34:29, 37:16, 43:46, 44:20, 45:29, 48:18, 55:21, 57:32, 57:34, 60:38, 66:4, 67:17, 67:42, 68:28, 69:18, 70:39, 70:46, 71:35, 71:40, 72:17, 73:11, 76:10, 81:19, 81:40, 81:46, 83:41
outcome [7] - 55:8, 56:11, 78:27, 78:30, 80:41, 80:44, 80:45
outcomes [11] - 3:43, 3:45, 27:37, 50:7, 54:16, 55:12, 55:14, 56:24, 58:12, 69:21, 76:33
outdated [1] - 61:21
outlook [1] - 42:36
outside [2] - 24:6, 38:24
outsider's [1] - 80:46
outsourced [1] - 72:14
outstanding [1] - 67:38
outweighs [1] - 32:32
over [24] - 2:43, 4:38, 16:4, 21:37, 27:6, 28:32, 31:7, 39:5, 39:41, 41:33, 44:45, 46:28, 55:3, 55:17, 58:11, 59:28, 60:22, 64:36, 67:22, 68:3, 68:4, 75:9, 83:15
over-optimism [1] - 55:3
over-sighting [1] - 67:22
overall [3] - 28:47, 77:13, 78:20
overarching [3] - 20:42, 20:47, 21:7
overcame [1] - 74:4
overconfidence [1] - 47:7
overemphasise [1] - 58:14
overlap [3] - 13:23, 13:41, 82:46
overlapping [2] - 77:37, 78:1
overlaps [2] - 78:1, 84:12
overlook [1] - 43:4
overly [3] - 6:32, 55:5, 55:44
overly-optimistic [1] - 55:5
overseas [1] - 16:18
oversight [6] - 50:6, 51:21, 72:6, 73:20, 74:39, 82:18
oversimplify [1] - 50:28
owe [3] - 28:17, 36:27, 40:23
owed [17] - 3:19, 8:23, 35:35, 35:37, 35:47, 36:32, 36:36, 36:45, 37:10, 38:18, 39:20, 39:24, 39:29, 39:34, 41:40, 84:19
Owen [2] - 13:39, 14:1
owing [1] - 39:33
own [12] - 16:13, 16:24, 43:30, 54:45, 55:2, 55:6, 55:8, 56:4, 64:15, 68:17, 74:19, 80:10
owners [7] - 2:28, 8:31, 10:15, 14:33, 15:5, 16:10, 16:14
owning [1] - 14:36
Oxford [1] - 67:35

P

P [1] - 13:9
page [1] - 52:3
pages [4] - 23:6, 60:34, 62:14, 62:16
paid [4] - 10:20, 62:2, 72:41, 76:7
pains [1] - 48:18
Pamela [1] - 70:8
panel [7] - 7:8, 7:10, 26:36, 61:12, 81:22, 83:11, 85:37
panelists [1] - 70:11
panellists [1] - 85:45
paper [44] - 2:9, 4:25, 4:34, 4:45, 5:18, 6:14, 6:29, 7:34, 7:42, 7:46, 8:3, 8:17, 8:20, 8:46, 12:12, 12:38, 14:23, 17:15, 20:1, 20:38, 23:13, 24:4, 24:37, 25:14, 25:29, 26:19, 26:26, 26:30, 28:8, 36:41, 42:1, 42:6, 44:36, 62:7, 62:13, 68:28, 70:8, 72:33, 73:25, 76:46, 77:10, 81:17, 83:41, 84:2
papers [2] - 83:19, 85:46
paradoxes [1] - 78:41
parallel [1] - 30:7
paramount [1] - 32:32
parliament [7] - 5:41, 5:43, 5:47, 6:6, 38:34, 38:37
parliaments [2] - 32:42, 33:46
Parson [2] - 2:36, 3:5
Parsons [1] - 86:1
part [24] - 7:37, 16:9, 18:35, 19:11, 23:37, 30:45, 31:20, 31:21, 32:15, 40:15, 47:36, 49:35, 50:31, 51:4, 56:5, 57:44, 57:46, 59:25, 63:39, 77:2, 81:17, 83:46, 84:4, 85:2
partially [1] - 37:26
participants [2] - 30:1,

34:39
participate [1] - 29:35
particular [21] - 4:4, 8:3, 12:10, 12:17, 12:34, 17:17, 19:44, 21:16, 23:12, 30:17, 35:36, 40:43, 43:6, 44:17, 46:11, 49:36, 50:25, 51:47, 52:3, 54:42, 68:21
particularised [1] - 79:1
particularity [3] - 78:46, 79:4, 80:35
particularly [13] - 3:13, 6:17, 7:46, 26:3, 31:36, 44:20, 47:8, 49:7, 52:43, 55:34, 68:42, 80:12, 85:11
particulars [1] - 32:8
particulary [1] - 30:26
parties [5] - 6:21, 37:3, 39:10, 40:14, 41:7
partner [4] - 4:43, 44:27, 60:7, 74:35
partnerships [1] - 16:16
parts [4] - 27:23, 60:37, 76:27, 82:7
passed [1] - 21:20
passing [1] - 65:30
passionate [1] - 44:35
past [3] - 2:30, 44:46, 55:12
Pastoral [1] - 13:1
patchwork [1] - 62:15
patience [1] - 2:44
Pauline [1] - 43:10
pay [2] - 2:29, 23:45
paying [2] - 76:6, 76:22
payment [1] - 73:7
payments [2] - 52:7, 54:14
peaks [2] - 77:37, 78:14
Peaks [2] - 78:15, 78:18
pecuniary [1] - 32:11
pedantic [1] - 58:37
peers [1] - 47:13
pejoratively [1] - 3:35
penal [1] - 32:15
penalise [2] - 54:9, 76:24
penalties [23] - 31:45, 32:2, 33:5, 33:36, 33:39, 39:30, 45:23, 52:22, 52:47, 53:1, 53:8, 56:7, 56:9, 58:26, 58:35, 59:37, 73:3, 76:4, 76:7, 76:37, 76:40, 81:7, 84:47
penalty [19] - 32:2, 32:11, 32:13, 32:19, 32:21, 33:26, 33:29, 34:19, 34:27, 36:24, 38:27, 38:28, 43:32, 58:28, 71:16, 71:20, 71:21, 71:24, 76:8
penetrating [1] - 74:10
pensioners' [1] - 68:9
penultimate [1] - 84:38
people [40] - 2:29, 2:31, 23:45, 25:11, 25:31, 27:7, 27:38, 29:46, 31:6, 34:35, 43:34, 43:37, 49:35, 53:14, 53:16, 53:17, 53:25, 53:38, 54:41, 54:42, 55:5, 55:16, 55:40, 55:43, 63:9, 63:12, 64:29, 64:40, 64:43, 66:26, 67:38, 68:26, 68:34, 69:30, 69:32, 74:7, 74:23, 81:15, 82:22, 83:8
people's [4] - 50:40, 55:9, 55:35, 56:3
per [8] - 35:20, 49:3, 60:24, 64:14, 64:19, 67:13, 73:3, 85:15
perceive [1] - 5:45
perceived [8] - 24:34, 54:18, 55:2, 56:26, 56:30, 56:37, 58:35, 72:9
percentage [1] - 16:22
perception [1] - 28:26
perceptions [3] - 50:35, 54:40, 55:3
perfect [2] - 38:10, 56:35
perfected [2] - 37:26, 37:29
performance [3] - 29:12, 45:2, 45:7
perhaps [33] - 3:20, 4:47, 13:37, 17:25, 19:41, 23:26, 26:25, 26:33, 41:35, 42:2, 42:5, 44:38, 46:6, 49:34, 50:44, 51:8, 52:46, 53:7, 53:8, 53:18, 54:30, 55:16, 55:41, 69:27, 71:36, 74:39, 78:18, 81:4, 81:21, 81:23, 83:40, 84:40
period [3] - 43:36, 45:5
permission [1] - 17:34
permitted [1] - 17:27
permitting [2] - 30:43, 57:24
Perram [1] - 71:33
person [14] - 6:6, 21:47, 30:30, 30:36, 32:8, 35:18, 35:19, 35:26, 35:27, 35:33, 37:12, 37:35, 45:33, 81:34
person...This [1] - 35:14
personal [6] - 16:23, 19:42, 21:28, 32:3, 80:10, 82:31
personally [2] - 20:26, 20:37
persons [2] - 32:25, 38:35
perspective [3] - 4:26, 10:7, 46:1
perspectives [5] - 3:1, 4:4, 10:10, 10:28, 10:36
persuade [1] - 56:1
persuading [1] - 64:29
persuasion [6] - 52:46, 53:6, 53:14, 53:22, 54:6, 54:24
pessimistic [1] - 70:13
Peters [1] - 13:8
Petroleum [1] - 13:27
phase [1] - 71:20
philosopher [1] - 27:3
philosophy [1] - 71:20
phrase [3] - 12:10, 12:15, 12:17
picked [1] - 63:15
picture [2] - 20:15, 23:33
piece [4] - 21:33, 38:36, 50:18, 69:9
piling [3] - 21:44, 22:2, 22:17
Pilmer [1] - 13:17
pitch [1] - 19:35
place [3] - 33:36, 49:28, 63:27
placed [1] - 6:5
places [1] - 35:18
plainly [1] - 60:12
plaintiff [3] - 31:35, 36:7, 37:35
plaintiffs [4] - 37:33, 38:3, 39:2, 39:13
plausible [2] - 41:33, 84:34
play [6] - 9:34, 9:36, 14:27, 22:9, 37:16, 57:24
played [1] - 64:6
pleaded [1] - 71:28
please [3] - 7:25, 19:25, 43:47
pleasure [3] - 2:25, 26:16, 60:10
plug [1] - 77:38
plurality [1] - 13:16
point [24] - 6:28, 11:23, 11:28, 13:45, 14:11, 16:39, 20:46, 21:6, 31:14, 33:44, 39:35, 40:34, 41:20, 48:18, 53:26, 54:7, 54:33, 66:47, 69:18, 72:31, 74:28, 77:15, 80:46, 82:21
pointed [1] - 51:9
points [4] - 5:19, 7:36, 7:38, 70:46
policies [3] - 48:38, 68:35, 69:15
policy [6] - 22:4, 64:44, 66:14, 68:2, 68:22, 80:3
political [1] - 61:26
politically [1] - 43:3
politician's [1] - 3:11
pondered [1] - 74:10
pool [1] - 69:38
posed [2] - 9:23, 10:26
posing [1] - 8:12
position [10] - 4:8, 5:42, 20:38, 21:30, 26:35, 30:36, 36:45, 59:15, 62:45, 64:4
positions [2] - 5:25, 58:41
positive [4] - 3:11, 37:22, 62:43, 64:16
possibilities [1] - 37:6
possibility [1] - 35:41
possible [4] - 6:22, 21:36, 41:39, 83:44
possibly [3] - 36:16, 59:10, 83:35
post [2] - 7:11, 26:21
post-conference [1] - 7:11
post-nominals [1] - 26:21
potential [12] - 8:44, 32:27, 36:13, 37:31, 38:3, 49:2, 49:4, 49:47, 59:15, 80:44, 84:47, 85:31
potentially [4] - 33:2, 36:13, 59:29, 72:20
power [8] - 11:30, 14:43, 14:46, 28:27, 29:16, 29:17, 30:5, 31:38
powerful [4] - 50:44, 51:36, 52:30, 81:17
powerfully [1] - 54:41
powers [20] - 8:35, 9:27, 9:33, 22:21, 31:26, 35:32, 35:38, 35:42, 35:45, 35:46, 45:20, 46:5, 51:25, 51:47, 52:19, 52:23, 72:29, 77:38, 77:47, 78:3
practical [8] - 8:39, 14:38, 15:19, 37:19, 37:45, 39:3, 40:45, 44:30
practically [2] - 4:36, 38:7
practice [4] - 16:12, 21:8, 26:27, 30:29
practices [7] - 31:4, 32:36, 49:40, 57:14, 69:12, 69:15, 83:26
practising [1] - 74:13
practitioners [2] - 2:47, 4:42
pragmatic [1] - 24:2
praise [1] - 44:38
pre [4] - 32:41, 33:6, 39:45, 51:13
pre-empted [1] - 51:13
pre-enactment [1] - 33:6
pre-legislative [2] - 32:41, 39:45
precedence [1] - 8:43
precise [1] - 37:6
predecessor [1] - 36:9
predict [1] - 36:44
predictable [1] - 55:14
preferable [1] - 6:9
preference [1] - 15:14
prejudiced [1] - 29:3
prepared [1] - 60:35
prescribe [1] - 81:34
prescribed [1] - 38:27
prescriptive [5] - 3:34, 3:41, 21:37, 69:46, 75:46
present [7] - 2:30, 6:9,

14:24, 26:31, 26:43, 60:13, 70:13
presentation [5] - 44:17, 44:31, 59:7, 60:2, 70:18
presented [1] - 52:43
presenter [2] - 8:9, 10:2
presently [1] - 3:2
presents [1] - 21:45
President [2] - 3:6, 26:12
press [1] - 22:11
pressure [3] - 60:35, 61:26
presumably [2] - 48:30, 52:34
presumption [2] - 38:25, 58:27
prevent [4] - 66:39, 69:12, 72:20, 76:43
preventative [1] - 6:40
previous [1] - 69:17
previously [3] - 4:11, 7:21, 28:27
price [1] - 72:41
prices [1] - 23:23
primacy [17] - 3:20, 4:14, 7:32, 7:37, 8:5, 8:26, 9:2, 16:1, 16:7, 17:44, 18:4, 18:33, 20:14, 23:12, 23:14, 25:46
Primacy [1] - 7:35
primacy's [1] - 8:30
primarily [2] - 27:16, 34:19
primary [1] - 78:27
Prime [1] - 61:27
Principle [5] - 5:1, 44:18, 48:6, 48:43, 49:19
principle [8] - 6:8, 16:28, 18:15, 20:42, 35:14, 48:14, 78:45, 79:10
principled [1] - 82:10
principles [24] - 3:32, 3:40, 6:10, 30:42, 33:13, 45:25, 46:15, 46:47, 47:44, 49:38, 51:13, 51:35, 70:10, 70:35, 78:33, 78:40, 78:42, 78:43, 78:47, 79:31, 80:14, 80:31, 80:33, 81:4
Principles [2] - 5:2, 44:19
principles-based [1] - 78:40
prior [1] - 7:24
Private [1] - 9:14
private [41] - 5:22, 8:10, 9:41, 10:1, 11:9, 27:16, 27:44, 28:23, 28:26, 28:35, 28:38, 28:40, 28:43, 29:8, 29:16, 29:21, 30:18, 30:21, 31:21, 34:42, 34:47, 35:12, 35:14, 35:26, 35:39, 36:9, 36:25, 36:27, 36:36, 38:6, 38:17, 39:44, 40:3, 40:4, 40:22, 41:21, 41:24, 41:35, 42:38, 42:47, 43:2
private/public [1] - 85:29
privately [2] - 31:34, 59:33
privilege [1] - 2:6
privileged [1] - 4:2
Privy [1] - 17:18
Prize [1] - 50:21
probability [1] - 50:35
probably [12] - 2:12, 3:10, 3:38, 4:24, 6:7, 65:13, 70:2, 72:28, 73:31, 75:45, 76:39, 82:14
problem [15] - 9:32, 16:9, 21:45, 21:47, 22:6, 22:11, 23:8, 23:13, 23:27, 24:34, 24:41, 25:18, 71:23, 79:3
problematic [2] - 49:9, 57:11
problems [7] - 15:16, 15:23, 18:13, 22:36, 58:22, 81:5, 83:6
procedural [2] - 30:33, 30:39
proceed [5] - 30:45, 62:1, 69:19, 80:7, 83:7
proceedings [4] - 7:13, 32:7, 54:9, 58:34
process [3] - 29:36, 57:9, 71:1
processes [5] - 24:31, 28:41, 30:15, 68:24, 70:46
procure [1] - 55:28
procured [1] - 53:32
procurement [1] - 24:31
produced [1] - 50:15
produces [1] - 82:46
product [3] - 25:9, 45:20, 62:31
Product [1] - 52:24
products [1] - 25:10
professor [4] - 7:16, 7:18, 7:24, 24:45
PROFESSOR [23] - 7:28, 19:40, 21:23, 21:40, 22:46, 24:19, 25:7, 25:43, 26:1, 26:41, 42:12, 43:19, 73:37, 77:29, 77:34, 78:7, 78:11, 78:25, 78:29, 78:39, 80:30, 84:10, 84:44
Professor [41] - 2:9, 3:4, 4:6, 4:8, 4:13, 4:29, 5:18, 7:26, 8:34, 9:4, 9:13, 10:2, 10:24, 10:31, 18:18, 19:41, 20:34, 25:23, 25:29, 26:13, 26:17, 26:23, 27:17, 29:11, 41:11, 42:14, 42:15, 42:31, 43:42, 61:11, 62:13, 73:27, 73:35, 76:16, 80:13, 83:21, 83:41, 84:2, 84:13, 84:45
Professors [5] - 50:19, 50:47, 52:42, 54:38, 55:30
profile [1] - 67:29
profit [12] - 9:34, 20:7, 20:23, 20:24, 22:38, 64:36, 65:7, 65:19, 65:22, 69:37, 69:38, 74:3
profitability [1] - 27:33
profitable [2] - 67:39, 76:12
profits [2] - 7:44, 76:30
profound [2] - 34:15, 47:26
prognostications [1] - 77:11
program [5] - 2:34, 2:46, 68:34, 85:15, 85:17
programs [3] - 57:16, 85:12, 85:13
progress [1] - 65:31
progressed [1] - 28:6
progressing [1] - 53:8
prohibited [4] - 63:8, 75:30, 75:33, 75:40
projection [1] - 78:20
prominent [1] - 27:26
promote [5] - 17:44, 19:45, 20:20, 25:40, 42:29
promoted [1] - 57:15
promotion [1] - 69:33
promptly [1] - 70:36
proof [1] - 38:9
proper [11] - 5:22, 34:7, 34:17, 41:23, 42:34, 44:41, 49:10, 74:39, 85:4, 85:5, 85:7
properly [4] - 22:42, 54:18, 74:40, 77:18
Property [1] - 9:14
property [7] - 5:22, 9:41, 16:23, 16:25, 40:3, 40:25, 82:31
proponents [1] - 8:31
proportionality [2] - 56:26, 57:1
proposal [1] - 46:14
proposals [2] - 44:16, 69:36
propose [1] - 46:10
proposed [12] - 5:1, 5:11, 6:11, 6:37, 15:24, 28:9, 44:18, 45:18, 45:26, 48:5, 49:19, 79:15
proposes [1] - 56:43
proposition [4] - 5:44, 21:12, 25:35, 40:29
propriety [1] - 40:26
prosecuted [1] - 31:32
prosecuting [1] - 52:13
prosecution [6] - 6:37, 31:16, 31:24, 31:38, 33:37, 47:29
Prosecutions [1] - 39:1
prosecutions [4] - 52:10, 52:11, 53:28, 57:3
prospect [1] - 81:19
prospectively [2] - 41:5, 41:14
prospects [2] - 80:41, 81:22
protect [8] - 5:34, 29:16, 32:25, 33:12, 34:30, 40:10, 41:27, 66:39
protected [2] - 34:26, 37:27
protecting [5] - 9:41, 32:16, 32:31, 32:39, 37:41
protection [5] - 32:27, 34:21, 38:35, 38:37, 38:39
Protection [2] - 62:41, 65:23
provide [8] - 17:29, 17:38, 18:2, 42:46, 63:10, 63:11, 72:32, 83:30
provided [11] - 33:24, 39:21, 41:10, 47:44, 49:26, 62:25, 63:16, 63:22, 64:4, 64:16, 66:15
provider [1] - 68:5
providers [1] - 62:28
provides [2] - 20:16, 47:40
providing [4] - 31:15, 57:47, 60:19, 74:39
provision [8] - 20:11, 32:8, 32:14, 38:38, 39:30, 62:23, 68:22, 83:31
provisions [8] - 33:14, 33:26, 33:32, 34:19, 34:27, 36:22, 83:23, 83:45
provoke [1] - 50:37
provoking [2] - 2:46, 39:42
proximate [1] - 56:14
proximity [1] - 45:8
proxy [1] - 22:32
prudence [1] - 39:23
Prudential [1] - 61:6
prudential [6] - 45:15, 49:27, 59:18, 59:25, 77:39, 77:46
prudentially [1] - 59:27
psychology [1] - 67:33
public [131] - 4:32, 4:36, 5:23, 5:30, 5:35, 8:10, 9:45, 9:46, 10:1, 11:9, 27:18, 27:47, 28:5, 28:11, 28:14, 28:16, 28:18, 28:21, 28:23, 28:34, 28:37, 28:40, 28:47, 29:10, 29:15, 30:7, 30:9, 30:16, 30:20, 30:23, 30:40, 31:11, 31:12, 31:14, 31:21, 31:24, 31:33, 31:35, 31:40, 31:45, 32:6, 32:16, 32:19, 32:28, 32:31, 32:32, 32:38, 32:39, 32:46,

33:3, 33:4, 33:7, 33:12, 33:17, 34:1, 34:2, 34:7, 34:9, 34:11, 34:12, 34:17, 34:21, 34:25, 34:46, 35:7, 35:15, 35:16, 35:20, 35:21, 35:28, 35:47, 36:6, 36:14, 36:16, 36:32, 36:35, 36:42, 37:10, 37:13, 37:16, 37:17, 37:18, 37:21, 37:27, 37:41, 37:47, 38:5, 38:10, 38:15, 38:44, 39:3, 39:6, 39:8, 39:13, 39:18, 39:40, 39:44, 40:16, 40:21, 41:22, 41:23, 41:34, 41:42, 42:19, 42:32, 42:38, 42:47, 43:4, 43:16, 51:2, 54:8, 56:43, 57:15, 57:29, 58:8, 60:9, 60:10, 66:20, 66:22, 75:9, 83:42, 83:46, 84:4, 84:47, 85:1, 85:41
Public [1] - 39:1
publication [3] - 49:31, 57:10, 57:13
publicised [1] - 57:9
publicity [1] - 19:44
publicly [4] - 9:17, 23:23, 30:15, 54:16
publicness [10] - 29:19, 29:30, 29:33, 29:42, 30:6, 31:1, 31:8, 31:28, 42:9, 84:46
published [2] - 9:9, 9:15
pump [1] - 75:19
punish [2] - 66:39, 76:43
purport [2] - 47:29, 49:43
purpose [10] - 9:29, 9:46, 11:9, 25:4, 32:15, 33:4, 85:4, 85:7, 85:9
purposes [14] - 5:20, 13:35, 30:4, 30:11, 30:13, 32:39, 33:45, 34:2, 43:25, 43:26, 46:10, 56:45, 78:34, 85:5
pursue [4] - 54:1, 58:30, 59:37, 64:34
pursued [4] - 54:12, 58:28, 58:33, 58:34
pursuing [2] - 65:21, 82:43
pursuit [1] - 65:6
put [17] - 3:21, 5:7, 9:28, 29:38, 37:10, 41:16, 42:7, 42:9, 56:43, 60:25, 62:42, 73:40, 79:9, 81:28, 82:17, 85:36, 85:46
putting [2] - 2:43, 79:20
pyramid [12] - 52:41, 52:42, 52:46, 53:6, 53:10, 53:21, 53:30, 53:35, 53:46, 54:10, 54:23, 58:3
pyramids [2] - 53:35, 54:22

Q

QC [1] - 70:20
quagmire [1] - 15:31
qualifications [1] - 26:34
qualify [1] - 62:34
qualities [1] - 32:4
quality [2] - 4:37, 28:14
quandary [1] - 25:37
quasi [1] - 27:27
quasi-legal [1] - 27:27
Queen's [1] - 1:28
QUESTION [1] - 76:20
question [62] - 3:31, 4:16, 4:31, 4:32, 4:35, 4:37, 5:38, 6:17, 7:38, 7:42, 8:12, 11:10, 13:28, 19:40, 20:29, 20:40, 21:5, 21:13, 21:14, 22:15, 22:46, 23:10, 23:26, 24:2, 24:8, 24:13, 24:20, 24:45, 25:7, 28:8, 28:12, 30:30, 36:30, 40:21, 40:22, 40:47, 42:5, 42:47, 48:33, 48:39, 58:25, 59:21, 73:47, 74:10, 74:17, 74:25, 74:31, 74:42, 74:47, 75:40, 76:16, 76:17, 76:27, 76:28, 78:39, 82:6, 82:30, 83:40, 83:46, 84:11, 84:37
questions [12] - 8:39, 19:24, 19:26, 26:29, 42:1, 42:2, 45:37, 59:12, 73:32, 73:33, 73:38, 76:17
queue [1] - 10:20
quick [1] - 43:10
quickly [2] - 19:9, 32:43
quiet [1] - 85:38
quieted [1] - 51:30
quietly [1] - 59:33
quite [16] - 3:9, 7:3, 14:20, 18:39, 21:21, 24:2, 24:4, 43:4, 52:30, 60:38, 61:44, 69:36, 72:29, 79:1, 81:25, 82:17
quote [13] - 5:5, 8:34, 11:47, 12:24, 12:27, 13:40, 13:44, 14:22, 15:25, 42:37, 54:26, 72:33, 73:20
quotes [3] - 8:27, 11:28, 14:30

R

racy [1] - 61:13
radical [1] - 79:36
Railway [1] - 11:38
raised [5] - 45:37, 48:38, 73:45, 80:1, 84:23
raison [1] - 5:16
Ramsay [1] - 31:13
random [1] - 70:47
range [5] - 18:18, 34:39, 47:16, 48:5, 60:9
ranging [1] - 34:25
rapidly [1] - 53:47
rarely [1] - 54:3
rate [2] - 55:18, 60:24
rateable [1] - 8:36
rather [18] - 22:6, 22:11, 26:20, 27:10, 29:11, 29:47, 36:11, 47:19, 51:25, 59:1, 59:7, 62:42, 64:38, 75:31, 75:46, 79:42, 79:44, 84:12
ratification [6] - 37:5, 37:7, 39:38, 39:42, 40:6, 40:13
ratifications [1] - 40:16
ratifying [1] - 41:10
rational [1] - 50:27
rationale [1] - 65:16
rationality [3] - 30:25, 30:32, 30:39
re [3] - 3:14, 33:19, 68:10
re-enacted [1] - 33:19
re-evaluation [1] - 3:14
re-leveraged [1] - 68:10
reach [1] - 85:5
reached [1] - 85:13
reaches [1] - 53:39
reaction [6] - 5:34, 49:20, 50:2, 50:14, 50:38
reactions [3] - 5:1, 49:18, 49:34
reactive [1] - 47:7
read [14] - 8:26, 12:23, 18:39, 18:40, 19:30, 24:4, 24:23, 42:37, 51:5, 63:14, 69:25, 70:7, 71:11, 72:5
reading [1] - 61:7
real [5] - 10:12, 23:42, 27:42, 75:24, 76:24
realise [2] - 70:8, 81:30
realised [3] - 43:26, 68:38, 74:23
realistic [1] - 28:29
realists [2] - 28:24, 29:14
reality [4] - 9:23, 17:15, 18:16, 35:42
really [31] - 5:36, 7:31, 8:12, 9:39, 9:44, 10:7, 11:8, 14:29, 16:14, 20:18, 21:5, 24:22, 26:5, 36:31, 42:6, 43:39, 45:41, 63:4, 63:6, 63:19, 66:30, 67:32, 72:19, 72:28, 74:12, 74:36, 77:4, 79:22, 81:44, 82:12, 84:11
reason [4] - 21:9, 28:23, 39:41, 78:12
reasonable [5] - 30:36, 35:33, 39:23, 49:45, 67:47
reasonableness [1] - 30:25
reasons [9] - 13:8, 13:16, 23:44, 58:20, 65:20, 65:38, 66:2, 73:42
reasons...otherwise [1] - 38:31
recall [1] - 50:20
receive [3] - 20:22, 20:24, 79:47
received [2] - 56:40, 64:28
receiving [1] - 58:16
recent [9] - 13:32, 27:31, 31:9, 38:16, 38:21, 50:34, 53:10, 53:34, 54:37
recently [5] - 4:47, 19:33, 38:25, 45:13, 78:15
reckless [1] - 53:24
recognise [9] - 12:42, 15:1, 16:28, 17:2, 18:21, 25:14, 52:18, 53:40, 66:36
recognised [8] - 10:14, 15:36, 17:8, 25:2, 27:18, 29:7, 38:39, 58:21
recognises [1] - 27:12
recognising [1] - 57:19
recognition [5] - 4:18, 39:15, 39:19, 47:41, 53:37
recommend [2] - 63:19, 80:6
recommendation [3] - 33:23, 33:28, 62:31
Recommendations [2] - 5:2, 44:21
recommendations [13] - 33:21, 45:25, 47:16, 48:15, 48:16, 48:22, 48:43, 49:3, 49:15, 49:19, 79:10, 79:11, 79:21
recommended [2] - 77:20, 79:46
recommending [1] - 52:29
reconciled [1] - 5:26
reconsidered [2] - 4:23, 49:15
record [3] - 52:9, 61:24, 62:35
record-keeping [1] - 62:35
recorded [1] - 66:24
recourse [1] - 70:24
recruitment [1] - 43:25
rectitudinous [1] - 71:19
red [1] - 57:26
reduce [1] - 56:13
reduction [1] - 57:25
Reefs [2] - 12:9, 14:13
refer [4] - 53:35, 54:26, 54:29, 83:20
referable [1] - 78:45
reference [6] - 7:40,

27:26, 52:40, 61:30, 65:30, 83:20
referral [1] - 80:7
referred [3] - 17:37, 65:26, 84:20
referring [1] - 2:17
reflect [6] - 2:20, 6:18, 19:32, 46:13, 49:45, 54:18
reflected [2] - 45:9, 69:14
reflecting [4] - 5:31, 10:23, 50:17, 64:3
reflection [2] - 45:1, 45:5
reform [19] - 7:41, 8:18, 17:24, 18:2, 18:6, 18:12, 19:37, 23:34, 24:15, 52:36, 68:30, 69:26, 70:12, 80:2, 80:7, 80:11, 80:22, 80:41, 81:3
Reform [1] - 80:8
reforms [8] - 30:26, 45:17, 45:19, 45:22, 45:23, 52:24, 62:27, 79:46
refreshment [1] - 43:14
refuse [1] - 58:38
refused [1] - 65:42
regard [10] - 5:5, 5:8, 13:20, 19:4, 22:38, 22:41, 61:39, 61:40, 69:6, 69:40
regarding [1] - 51:23
regards [1] - 60:38
regime [1] - 3:45
Regime [1] - 45:22
regimes [3] - 48:34, 79:39, 80:5
registration [1] - 33:21
regulate [9] - 3:31, 42:44, 44:16, 45:45, 46:31, 49:10, 51:25, 69:23, 82:18
regulated [11] - 8:8, 25:32, 30:16, 46:2, 51:4, 51:44, 54:2, 56:11, 56:18, 58:15, 59:27
regulating [5] - 25:16, 46:13, 49:24, 51:37, 66:35
Regulation [1] - 79:7
regulation [25] - 3:36, 3:41, 4:46, 5:31, 6:8, 21:29, 21:33, 21:34, 22:17, 22:21, 25:25, 26:24, 26:27, 30:13, 46:23, 50:33, 51:8, 52:38, 52:41, 54:30, 55:5, 56:18, 60:16, 69:43, 78:41
regulations [3] - 19:14, 80:14, 80:17
regulator [17] - 6:24, 6:28, 24:7, 29:26, 44:44, 47:26, 49:27, 54:3, 54:4, 54:7, 57:7, 59:30, 72:26, 72:28, 82:4, 82:10, 85:1
regulator's [1] - 57:20
regulators [37] - 4:45, 5:7, 44:22, 44:41, 45:38, 45:43, 46:3, 46:20, 47:10, 49:11, 50:39, 51:3, 51:7, 51:24, 51:25, 51:41, 51:43, 55:24, 55:38, 57:20, 57:22, 57:28, 57:35, 57:40, 57:46, 58:2, 58:6, 58:36, 58:41, 65:27, 69:40, 70:17, 72:35, 77:37, 77:46, 78:23, 83:15
regulatory [36] - 3:45, 20:41, 24:14, 24:29, 25:30, 31:46, 42:7, 43:22, 43:23, 43:28, 43:29, 43:30, 46:1, 46:17, 50:38, 52:36, 52:45, 53:11, 54:17, 55:34, 56:21, 56:27, 56:29, 57:21, 57:29, 57:39, 57:46, 58:14, 58:15, 59:1, 65:26, 73:5, 78:20, 82:46, 83:11, 83:16
rehashed [1] - 4:24
Reid [1] - 12:47
reinforce [1] - 48:9
reinforced [1] - 83:34
rejects [1] - 10:44
relatable [1] - 50:11
relate [4] - 26:4, 27:44, 55:32, 83:36
related [2] - 44:14, 50:43
relates [4] - 3:18, 5:17, 50:31, 81:18
relation [14] - 22:33, 22:34, 32:42, 35:13, 35:17, 35:35, 36:46, 37:11, 37:17, 41:6, 44:42, 59:17, 73:14, 79:7
relational [2] - 35:12, 36:27
relationship [4] - 10:14, 10:39, 79:41, 79:44
relationships [2] - 10:13, 75:43
relative [3] - 30:42, 55:6, 71:32
relatively [4] - 8:37, 21:36, 52:7, 52:44
relativities [1] - 55:4
release [6] - 40:7, 41:14, 45:14, 46:45, 46:46, 47:43
released [3] - 47:47, 49:13, 66:24
relegated [1] - 64:35
relevance [4] - 13:28, 14:10, 45:47, 50:7
relevant [10] - 9:7, 10:4, 11:10, 11:12, 14:22, 29:20, 39:47, 40:47, 41:4, 59:32
relevantly [1] - 26:26
reliance [2] - 68:25, 72:24
relief [1] - 71:9
reluctant [2] - 17:10, 21:27
remain [3] - 37:6, 38:15, 53:17
remained [1] - 33:38
remaining [2] - 67:4, 76:18
remains [4] - 37:21, 38:4, 52:26, 53:21
remarkable [1] - 76:33
remarks [5] - 2:33, 10:9, 34:45, 42:26, 84:41
remedial [2] - 33:45, 37:40
remediate [1] - 81:44
remediation [4] - 62:3, 66:43, 70:36, 73:2
remedies [1] - 81:34
remedy [3] - 37:46, 81:12, 81:42
reminiscent [1] - 14:30
remit [4] - 46:7, 49:28, 51:14, 53:22
remits [1] - 77:37
remote [1] - 39:5
removed [1] - 33:40
removing [2] - 32:16, 33:36
remunerate [1] - 69:27
remuneration [31] - 22:31, 22:34, 22:35, 22:43, 23:2, 23:3, 23:6, 23:12, 23:18, 23:37, 23:40, 23:41, 62:29, 62:30, 65:18, 65:24, 69:5, 69:6, 69:15, 69:20, 69:23, 69:43, 69:44, 69:47, 70:38, 74:6, 77:19, 81:35, 81:42, 82:21
reorganise [1] - 26:11
repeated [1] - 81:25
replicate [1] - 39:23
replicated [1] - 39:28
replies [1] - 18:46
reply [1] - 7:2
Report [30] - 3:33, 6:15, 7:2, 45:14, 46:16, 46:19, 51:17, 51:30, 51:42, 51:46, 52:4, 52:40, 53:44, 59:18, 59:24, 60:34, 64:7, 65:36, 66:22, 66:25, 67:17, 67:24, 73:14, 73:21, 79:30, 79:35, 80:2, 81:2, 81:19, 81:23
report [36] - 45:14, 45:15, 46:16, 46:45, 47:5, 47:16, 47:20, 47:25, 47:29, 47:36, 47:45, 48:15, 49:20, 49:21, 49:27, 49:31, 50:4, 50:14, 50:42, 51:12, 51:36, 54:31, 57:13, 61:4, 65:12, 65:29, 65:34, 72:3, 72:4, 72:5, 74:22, 77:26, 77:42, 81:2, 81:20, 81:25
reported [2] - 22:11, 83:38
reporting [2] - 48:29, 48:35
reports [7] - 11:7, 26:37, 45:29, 51:27, 57:10, 67:28, 69:19
Representatives [1] - 45:12
representatives [1] - 6:4
represented [1] - 16:21
representing [1] - 64:25
represents [2] - 49:9, 64:25
require [5] - 15:44, 20:3, 36:15, 77:35, 78:19
required [18] - 12:4, 27:43, 29:6, 35:42, 36:39, 38:9, 39:8, 40:20, 51:20, 57:23, 62:34, 62:44, 66:34, 66:44, 68:25, 70:42, 71:12, 74:28
requirement [5] - 29:44, 30:25, 36:5, 36:23, 48:26
requirements [1] - 30:33
requires [4] - 5:3, 32:7, 60:37, 62:25
requiring [3] - 5:4, 62:27, 68:22
research [1] - 26:37
researcher [1] - 19:29
researching [1] - 12:12
resemblance [1] - 16:2
reserve [1] - 53:27
residential [1] - 61:19
residual [4] - 10:19, 10:20, 10:30, 10:45
resistance [2] - 48:44, 61:27
resolution [1] - 40:18
resolutions [2] - 14:14, 29:34
resolved [1] - 6:27
resonate [1] - 9:10
resonated [1] - 47:31
resorting [1] - 47:28
Resources [1] - 13:9
resources [4] - 16:17, 31:35, 70:4, 82:17
respect [6] - 19:37, 37:41, 42:43, 52:2, 81:9, 81:33
respected [1] - 42:24
respects [5] - 2:29, 2:30, 22:13, 47:6, 48:19
respond [9] - 21:35, 25:26, 48:25, 49:35, 49:37, 54:38, 54:41, 77:16, 77:17
responded [6] - 9:32, 51:26, 52:4, 56:39, 65:44, 73:10
responding [2] - 33:4, 37:43
responds [1] - 18:43
response [9] - 25:13, 25:17, 25:19, 36:31, 36:43, 56:14, 58:47, 65:26, 66:17
responses [11] - 28:22, 33:10, 52:45,

53:11, 53:15, 55:4, 56:21, 56:27, 56:47, 66:18, 77:42
responsibilities [1] - 30:30
responsibility [11] - 3:27, 22:22, 27:29, 29:23, 29:31, 39:12, 58:45, 65:22, 75:17, 82:7, 83:27
responsible [9] - 48:12, 48:36, 49:8, 62:17, 66:35, 67:18, 67:19, 80:2, 80:26
responsibly [2] - 5:4, 48:6
responsive [2] - 52:41, 56:17
rest [3] - 30:46, 31:8, 60:42
restored [1] - 66:20
restrict [1] - 35:38
result [14] - 4:10, 32:3, 47:40, 50:37, 51:30, 55:18, 60:26, 60:36, 64:33, 67:45, 69:20, 71:38, 75:47, 81:1
resulting [1] - 5:31
results [1] - 24:40
resume [1] - 43:46
retail [2] - 62:24, 64:14
retailers [1] - 72:11
return [1] - 32:35
reveal [2] - 52:11, 63:46
revealed [3] - 36:22, 61:3, 72:42
reveals [3] - 35:30, 63:20, 66:26
revelations [3] - 3:11, 63:5, 66:18
reverse [1] - 42:8
review [9] - 22:12, 34:25, 38:16, 39:45, 44:45, 45:12, 70:40, 70:41, 83:5
Review [5] - 9:9, 15:30, 45:11, 45:24, 52:23
reviewed [1] - 68:41
reviews [2] - 45:29, 75:9
revise [1] - 77:38
revised [2] - 46:47, 48:7
revisions [1] - 45:24
revisited [1] - 22:40
revocation [1] - 53:2
revolution [6] - 27:5, 27:10, 27:22, 27:41, 31:6
revolutions [2] - 27:3, 31:3
reward [1] - 53:40
rewards [2] - 55:19, 55:21
rewritten [1] - 51:32
rhetoric [1] - 66:17
Rhodes [1] - 67:35
Richard [2] - 50:20
right [15] - 7:2, 25:36, 26:4, 30:21, 37:19, 38:6, 38:11, 38:17, 38:30, 38:39, 45:39, 58:29, 70:4, 78:22
rightly [1] - 65:43
rights [5] - 37:20, 39:7, 40:3, 40:14, 40:16
rise [2] - 3:40, 9:37
risk [32] - 6:32, 10:19, 10:20, 10:30, 10:45, 11:1, 21:32, 25:30, 32:35, 36:13, 41:16, 47:24, 49:29, 52:14, 54:38, 55:8, 58:39, 67:18, 67:20, 67:21, 67:26, 68:38, 70:41, 72:6, 72:12, 72:32, 73:19, 73:22, 74:17, 81:14, 85:33, 85:34
risks [7] - 15:30, 41:9, 47:8, 57:32, 66:41, 67:30
risky [1] - 64:31
RMIT [1] - 19:29
road [1] - 35:20
roadmap [4] - 68:28, 68:29, 68:44, 70:35
Robinson [1] - 60:7
rogue [1] - 65:45
role [17] - 6:16, 9:35, 9:36, 22:8, 34:14, 44:41, 46:4, 49:10, 51:9, 51:23, 51:41, 57:24, 59:30, 60:6, 64:6, 64:16, 67:17
roles [4] - 44:41, 46:3, 60:10, 64:24
Rolls [3] - 12:26, 14:19, 15:22
room [6] - 16:5, 18:17, 42:28, 42:33, 68:12, 73:33
root [2] - 69:7, 73:39
Ross [3] - 2:36, 3:5, 86:1
roundup [1] - 39:46
row [2] - 74:43, 76:18
royal [2] - 61:15, 61:16
Royal [37] - 6:16, 7:40, 11:6, 22:30, 27:27, 42:23, 44:21, 45:13, 46:16, 46:34, 46:38, 46:44, 48:1, 51:14, 51:15, 51:31, 51:42, 52:18, 57:43, 58:46, 60:13, 61:28, 62:13, 62:38, 62:39, 63:1, 65:11, 73:38, 77:12, 77:16, 77:25, 81:21, 81:29, 81:33, 81:46, 82:1, 82:14
rude [1] - 82:29
rule [6] - 11:34, 17:9, 22:10, 29:5, 33:41, 78:47
rule-making [1] - 78:47
rules [8] - 28:31, 41:29, 75:27, 75:47, 78:45, 78:46, 79:1, 80:32
run [2] - 23:7, 25:24
running [3] - 2:40, 11:42, 72:17
runs [1] - 20:45
rural [1] - 62:9

S

safe [1] - 34:37
safety...more [1] - 38:24
said [31] - 5:32, 9:1, 11:14, 11:18, 11:41, 12:9, 13:30, 19:7, 20:37, 26:29, 27:33, 33:30, 42:14, 49:21, 51:13, 57:19, 65:4, 69:18, 70:21, 71:14, 71:16, 71:34, 71:36, 71:38, 72:34, 75:33, 75:47, 79:30, 79:35, 79:42, 80:13
salary [1] - 69:29
sales [1] - 73:12
salience [1] - 50:15
salient [2] - 31:36, 50:34
Salomon [1] - 16:33
Salomon's [3] - 16:35, 16:37, 16:39
same [15] - 12:45, 13:23, 13:42, 13:45, 15:10, 16:30, 16:31, 23:19, 30:19, 33:40, 37:30, 42:30, 47:44, 83:4, 84:14
Samuel [2] - 61:11, 70:45
sanction [2] - 56:8, 59:8
sanctions [23] - 31:44, 31:47, 32:3, 32:4, 32:12, 33:29, 34:18, 41:25, 45:23, 45:36, 45:43, 46:5, 52:21, 53:24, 53:27, 53:36, 54:24, 55:20, 55:21, 56:20, 56:22, 56:27, 59:2
Santow [2] - 34:24, 83:22
satisfactory [1] - 67:27
sausage [1] - 79:17
sausage-making [1] - 79:17
save [1] - 18:42
say [45] - 4:36, 5:42, 6:42, 9:29, 10:3, 12:2, 16:6, 20:7, 20:28, 21:11, 21:34, 22:10, 25:13, 26:2, 27:35, 28:13, 28:21, 29:11, 31:8, 38:21, 39:34, 50:32, 52:29, 54:27, 59:6, 59:31, 65:12, 69:1, 70:38, 71:31, 73:14, 73:26, 77:6, 77:8, 77:24, 78:27, 80:15, 82:27, 84:13, 84:18, 84:39, 85:4, 85:22, 85:40
saying [14] - 9:32, 12:26, 20:12, 20:39, 22:5, 22:20, 23:29, 23:32, 24:14, 34:14, 40:27, 44:47, 59:19, 85:32
says [6] - 18:41, 18:47, 31:4, 39:19, 71:6, 72:26
scale [1] - 49:41
schema [1] - 30:46
scheme [2] - 6:37, 6:38
Schoenberg [1] - 71:27
scholar [1] - 7:23
Scholar [1] - 67:35
scholars [2] - 9:38, 16:6
scholarship [1] - 26:23
science [4] - 54:35, 55:26, 55:37, 56:30
scientific [2] - 27:5, 50:13
scientists [1] - 50:18
scope [4] - 30:4, 46:7, 49:1, 83:31
scrutiny [6] - 44:45, 44:47, 52:10, 57:9, 57:21, 57:22
scylla [1] - 79:3
se [1] - 49:3
seamless [1] - 2:40
searching [1] - 3:13
second [10] - 3:31, 14:30, 29:33, 37:4, 51:40, 60:33, 68:14, 71:22, 74:43, 76:18
second-back [1] - 74:43
secondary [1] - 30:17
secondly [5] - 28:17, 46:18, 63:25, 66:33, 72:40
section [37] - 4:19, 5:12, 17:37, 17:43, 24:22, 24:42, 30:11, 30:26, 32:43, 33:44, 35:2, 35:30, 35:36, 36:4, 36:9, 36:24, 36:35, 37:18, 37:21, 37:25, 37:28, 37:32, 37:38, 37:39, 38:3, 38:5, 39:4, 41:24, 44:29, 72:22, 83:32, 83:42, 83:44, 84:15, 84:31, 84:46, 85:3
sections [2] - 35:47, 74:13
sector [7] - 26:28, 47:33, 52:5, 55:33, 61:42, 72:2, 75:7
secure [1] - 56:19
secured [2] - 7:20, 56:45
securing [1] - 56:11
Securities [3] - 36:8, 45:2, 62:20
securities [3] - 7:20, 57:8, 71:4
Sedgwick [1] - 69:19
see [23] - 5:17, 6:36, 13:17, 20:26, 24:41, 29:15, 36:44, 42:12, 42:23, 51:33, 55:41, 57:3, 60:41, 61:44, 63:29, 65:31, 70:14, 72:15, 76:16, 81:11, 81:36, 85:31, 86:2
seeing [4] - 11:6, 16:10, 21:44, 22:4
seek [7] - 5:27, 39:26,

39:31, 40:9, 46:38, 52:21, 59:36
seeking [7] - 30:34, 46:31, 49:22, 56:19, 58:16, 69:2, 71:14
seeks [1] - 51:46
seem [5] - 20:40, 40:40, 44:39, 45:3, 66:5
seemed [2] - 70:12, 73:41
seemingly [2] - 7:43, 20:16
seems [20] - 3:32, 8:36, 11:21, 15:4, 22:35, 23:2, 25:37, 41:28, 41:33, 42:23, 50:32, 56:36, 64:45, 67:46, 69:6, 69:26, 77:13, 79:15, 83:44, 84:37
seen [15] - 3:23, 13:25, 14:32, 15:4, 25:8, 30:1, 45:31, 51:7, 58:33, 58:40, 58:42, 59:28, 59:36, 85:7, 85:9
sees [1] - 28:30
segue [1] - 26:30
Self [1] - 14:47
self [4] - 54:42, 54:46, 55:2, 67:3
Self-Cleansing [1] - 14:47
self-examination [1] - 67:3
self-interest [2] - 54:42, 54:46
selling [3] - 61:18, 61:24, 73:11
seminal [1] - 9:14
Senate [2] - 6:39, 45:1
senate [1] - 33:22
senate's [1] - 33:28
Senate's [1] - 45:7
senior [8] - 44:26, 48:31, 56:42, 63:21, 64:8, 66:30, 69:28, 75:5
sense [5] - 23:4, 50:14, 72:33, 74:2, 75:35
sentence [1] - 32:14
separate [9] - 12:29, 13:38, 14:36, 16:26, 16:29, 16:38, 16:41, 36:16, 74:35
series [4] - 2:4, 9:9, 9:25, 62:34
serious [7] - 17:43, 18:34, 32:33, 56:28, 58:33, 58:42, 72:15
seriously [4] - 16:1, 21:27, 35:21, 77:16
serve [3] - 9:45, 20:8, 34:1
service [6] - 61:20, 63:6, 63:36, 63:45, 66:15
services [11] - 3:13, 20:43, 26:24, 60:16, 61:41, 62:25, 68:2, 71:5, 75:13, 78:35, 80:4
session [9] - 2:8, 4:25, 7:14, 26:13, 44:7, 44:10, 59:43, 77:1, 77:2
sessions [1] - 60:5
set [18] - 6:5, 20:6, 20:9, 20:10, 23:18, 41:17, 47:29, 52:7, 54:18, 61:28, 65:10, 68:28, 68:39, 69:47, 71:21, 73:27, 74:34, 75:3
sets [1] - 34:29
setting [7] - 5:40, 33:13, 36:27, 54:14, 67:18, 67:20, 85:12
settle [2] - 6:21, 60:23
settlement [1] - 71:33
seven [1] - 73:31
several [1] - 60:9
severe [1] - 56:20
severity [1] - 54:19
Shakespeare [2] - 44:35, 52:32
shall [2] - 17:39, 39:22
shaming [1] - 54:25
Shannon [12] - 4:42, 44:7, 44:13, 44:32, 59:14, 59:43, 59:45, 61:6, 61:31, 65:26, 75:16, 82:38
Shannon's [5] - 6:14, 44:17, 44:25, 66:47, 81:18
shape [2] - 28:9, 50:32
shape-shifting [1] - 28:9
shaped [4] - 44:37, 50:45, 57:2, 57:13
share [5] - 11:1, 23:23, 32:3, 32:15, 82:30
shared [1] - 61:21
shareholder [43] - 4:13, 6:4, 7:32, 7:37, 8:5, 8:22, 8:26, 8:30, 8:39, 8:42, 8:45, 9:2, 9:20, 9:25, 9:27, 9:33, 9:43, 10:25, 15:6, 15:23, 15:28, 15:32, 15:38, 15:46, 16:1, 16:7, 16:29, 16:44, 17:3, 17:22, 17:27, 17:35, 17:43, 18:4, 18:33, 20:14, 22:38, 22:43, 23:11, 23:14, 25:38, 25:46, 50:8
Shareholder [1] - 7:35
shareholders [87] - 3:20, 3:24, 5:15, 5:24, 7:45, 8:23, 8:28, 8:31, 8:36, 9:19, 9:42, 10:15, 10:18, 10:19, 10:30, 10:45, 10:47, 12:31, 12:44, 13:6, 13:13, 13:20, 13:22, 13:34, 13:39, 13:47, 14:29, 14:31, 14:35, 14:37, 14:39, 14:40, 14:44, 14:45, 15:4, 15:10, 15:11, 15:12, 15:17, 15:26, 15:45, 15:47, 16:2, 16:4, 16:10, 16:12, 16:13, 16:21, 16:24, 16:29, 16:40, 16:41, 18:5, 18:46, 19:8, 20:17, 20:22, 21:14, 22:32, 22:33, 23:15, 23:19, 25:1, 25:41, 26:3, 26:4, 27:17, 27:39, 32:26, 33:33, 34:16, 37:31, 37:44, 38:43, 39:39, 40:11, 40:18, 41:8, 41:14, 41:32, 57:31, 72:40, 76:6, 84:7
shareholders' [5] - 8:15, 8:41, 23:24, 36:38, 40:44
shareholdings [1] - 16:24
shares [12] - 15:14, 15:15, 16:13, 16:21, 16:23, 20:11, 32:5, 32:11, 69:38, 82:38
SHARMA [1] - 19:28
Sharon's [1] - 6:29
sharp [1] - 43:47
sharpened [1] - 33:5
sharply [2] - 34:41, 55:21
she [16] - 26:20, 26:31, 26:35, 26:36, 26:37, 27:33, 27:35, 44:26, 44:28, 44:30, 62:15, 64:25, 68:40, 72:21, 74:36, 83:26
shift [1] - 58:45
shifting [2] - 28:9, 46:4
shines [1] - 57:11
Shipton [1] - 72:4
shock [1] - 82:44
shocking [1] - 63:5
short [13] - 5:8, 10:11, 15:12, 18:21, 38:46, 41:41, 43:13, 43:20, 43:27, 43:35, 59:12, 65:6, 65:19
SHORT [1] - 44:2
short-term [5] - 43:13, 43:20, 43:27, 65:6, 65:19
shot [1] - 19:9
should [77] - 3:33, 5:41, 5:45, 6:17, 6:42, 6:44, 7:37, 8:8, 8:13, 8:28, 9:29, 9:38, 10:21, 11:11, 16:40, 18:39, 19:36, 20:21, 21:36, 22:9, 22:15, 24:10, 25:19, 26:33, 27:24, 32:32, 33:24, 37:46, 48:23, 48:26, 48:29, 48:34, 48:37, 51:26, 51:27, 51:35, 53:5, 53:24, 53:45, 53:47, 54:27, 57:33, 58:2, 58:11, 58:14, 58:27, 58:28, 58:47, 66:36, 66:41, 68:4, 68:5, 68:6, 68:13, 69:1, 69:37, 69:38, 70:12, 71:37, 74:17, 74:18, 75:35, 75:36, 75:41, 76:45, 77:15, 78:27, 79:31, 79:37, 79:42, 79:46, 80:5, 81:5, 81:41, 82:3, 82:6, 84:38
Should [2] - 47:19, 68:6
shouldn't [3] - 5:8, 21:35, 24:9
show [9] - 11:8, 20:18, 36:5, 36:11, 36:23, 38:37, 39:40, 53:10, 72:5
showing [1] - 28:5
shown [2] - 30:19, 85:34
shows [3] - 5:35, 19:19, 39:46
side [4] - 28:37, 42:8, 77:39
sideways [1] - 54:10
sight [2] - 58:11, 70:10
sighting [1] - 67:22
sights [1] - 69:44
sign [3] - 29:29, 29:33, 66:47
signalling [1] - 53:30
signed [2] - 63:12, 64:41
significance [3] - 40:31, 49:36, 54:37
significant [6] - 3:12, 12:41, 21:35, 34:14, 48:44, 57:24
significantly [2] - 36:25, 52:20
signing [2] - 67:4, 82:14
signpost [1] - 36:26
signposts [1] - 29:19
signs [1] - 46:30
similar [5] - 11:24, 22:20, 37:29, 73:46, 82:6
simple [7] - 21:36, 24:2, 47:30, 49:26, 52:44, 81:7, 81:13
simpler [1] - 27:36
simplification [1] - 79:36
simplified [1] - 79:31
simplify [1] - 70:10
simplifying [1] - 79:46
simplistic [2] - 59:10, 76:20
simply [12] - 5:21, 5:26, 6:8, 8:14, 10:40, 11:40, 13:45, 15:9, 45:3, 45:32, 57:3, 85:40
Sims [1] - 82:34
since [12] - 12:19, 19:10, 28:9, 31:24, 33:1, 35:9, 38:46, 39:33, 45:4, 79:25, 80:4, 84:12
single [1] - 27:6
singularity [1] - 34:41
Sir [1] - 19:10
sit [1] - 2:20
sitting [4] - 22:4, 42:13, 67:34, 67:37
situation [4] - 15:42, 24:47, 63:12, 70:14
situations [2] - 64:8, 76:5
size [1] - 55:38
sleepless [1] - 60:26

slide [7] - 9:28, 11:22, 13:44, 14:23, 14:31, 15:25, 28:15
slight [1] - 25:35
slightly [2] - 21:41, 59:21
slipped [1] - 75:14
slow [3] - 36:41, 39:13, 47:9
slowly [1] - 39:7
small [6] - 7:43, 9:19, 52:12, 62:10, 66:12, 82:16
SMEs [1] - 62:10
SMITH [13] - 26:41, 42:12, 43:19, 73:37, 77:29, 77:34, 78:7, 78:11, 78:25, 78:29, 78:39, 80:30, 84:10
Smith [9] - 4:30, 10:2, 11:22, 17:18, 26:14, 26:17, 43:42, 73:35, 80:13
Smith's [4] - 25:29, 26:23, 83:41, 84:45
so [108] - 2:5, 2:33, 3:22, 7:13, 7:21, 8:25, 9:1, 9:25, 9:28, 9:40, 10:6, 10:35, 11:3, 12:7, 12:47, 13:10, 13:27, 13:47, 14:9, 15:4, 15:19, 15:42, 16:6, 17:20, 17:31, 18:1, 18:21, 18:25, 18:33, 18:45, 19:38, 20:41, 22:1, 22:25, 22:40, 23:11, 23:17, 23:27, 23:44, 25:3, 25:11, 26:6, 26:37, 27:45, 28:14, 28:26, 29:29, 32:41, 42:2, 42:8, 42:25, 42:46, 46:10, 50:28, 50:34, 53:6, 53:18, 53:24, 53:36, 55:42, 56:8, 56:34, 58:23, 59:6, 59:40, 60:21, 60:24, 60:30, 60:36, 60:37, 60:42, 61:25, 61:43, 63:8, 63:12, 64:19, 64:33, 65:10, 67:15, 68:39, 69:22, 70:2, 70:10, 71:22, 71:35, 71:45, 73:32, 74:6, 74:17, 74:34, 74:38, 75:4, 75:39, 76:3, 76:10, 76:17, 77:12, 79:20, 81:31, 81:47, 82:14, 82:25, 82:33, 84:22, 84:33
so-called [5] - 3:22, 17:31, 18:25, 23:11, 28:26
social [16] - 3:1, 3:22, 3:26, 3:27, 19:22, 27:28, 27:29, 28:31, 46:1, 46:14, 46:23, 46:26, 46:33, 47:20, 51:17, 83:35
socially [4] - 48:11, 48:27, 48:36, 49:8
society [5] - 5:25, 9:35, 9:36, 26:27, 27:22
Society [3] - 2:35, 2:38, 3:7
soft [1] - 49:4
softly [1] - 54:3
sold [2] - 61:22, 79:45
solely [1] - 38:47
Solicitor [1] - 7:25
solicitor [1] - 74:45
solution [4] - 15:24, 59:3, 69:34, 71:22
Solutions [1] - 13:2
solvency [1] - 40:38
solvent [1] - 41:8
some [91] - 4:33, 6:39, 8:9, 9:10, 10:35, 11:25, 11:39, 11:46, 15:27, 16:6, 16:14, 16:39, 17:26, 17:39, 19:46, 20:6, 20:21, 20:45, 20:47, 21:34, 22:35, 22:41, 24:11, 24:23, 26:18, 27:22, 27:34, 28:9, 30:47, 31:1, 32:3, 39:9, 40:8, 42:1, 42:22, 42:24, 42:30, 44:34, 44:39, 45:30, 49:14, 49:18, 50:1, 50:13, 51:2, 51:30, 51:41, 52:15, 52:31, 53:11, 53:12, 55:24, 57:32, 59:33, 60:29, 60:38, 60:43, 61:10, 62:27, 63:2, 63:4, 63:19, 64:14, 64:16, 65:14, 66:8, 69:29, 69:36, 71:9, 72:18, 72:24, 73:30, 74:46, 75:12, 77:42, 79:13, 79:16, 79:20, 79:29, 80:35, 80:40, 81:34, 81:45, 82:5, 82:42, 83:32, 84:24, 84:41, 85:10, 85:17
somebody [3] - 18:44, 43:31, 84:27
someone [3] - 38:8, 63:37, 67:43
something [20] - 2:17, 5:41, 10:46, 12:29, 20:36, 27:21, 28:21, 33:12, 57:19, 67:42, 68:12, 75:35, 75:36, 75:41, 76:42, 78:16, 79:15, 82:39, 84:39
sometimes [15] - 11:33, 12:9, 28:42, 34:7, 41:23, 41:26, 43:4, 45:46, 54:44, 57:33, 59:3, 65:17, 65:18, 84:23
somewhat [2] - 6:41, 11:24
somewhere [1] - 6:32
sophisticated [1] - 59:8
sorry [1] - 74:32
sort [9] - 15:27, 25:37, 35:23, 43:22, 51:6, 72:17, 76:39, 80:33, 84:24
sorts [5] - 5:40, 11:6, 21:1, 24:26, 76:7
sought [3] - 3:43, 12:21, 47:46
soul [1] - 3:13
soul-searching [1] - 3:13
sounds [1] - 83:10
sources [1] - 33:6
SOUTH [1] - 1:8
South [9] - 1:27, 2:36, 4:30, 7:22, 13:2, 13:9, 26:18, 26:35, 78:14
space [2] - 29:2, 81:47
sparked [1] - 26:47
speak [4] - 7:21, 7:30, 44:11, 60:11
speaker [4] - 4:6, 7:14, 44:13, 60:5
speakers [4] - 4:3, 7:9, 60:42, 69:17
speaking [4] - 38:7, 38:9, 54:3, 80:46
specialised [1] - 71:3
specialties [1] - 26:24
specific [4] - 47:38, 49:37, 50:5, 81:5
specifically [3] - 11:19, 35:8, 51:15
specification [1] - 32:7
speculation [1] - 49:14
speech [2] - 60:47, 61:10
spells [1] - 67:17
spend [1] - 32:41
spending [2] - 18:42, 23:5
spent [1] - 74:12
sphere [4] - 6:19, 29:10, 36:42, 40:4
spin [1] - 3:11
spitefully [1] - 55:1
sponsorship [1] - 2:38
Square [1] - 1:28
squeaky [2] - 21:45, 22:6
St [1] - 75:3
stability [3] - 49:30, 59:32, 61:43
stack [1] - 52:37
staff [3] - 65:21, 65:45, 68:32
stage [4] - 54:23, 85:6, 85:14, 85:18
stakeholder [9] - 4:17, 10:28, 10:35, 10:44, 18:10, 21:9, 22:42, 25:2, 25:38
stakeholders [11] - 5:6, 9:35, 10:32, 10:40, 10:42, 18:30, 20:4, 20:8, 20:21, 20:24, 33:33
stakeholders' [1] - 72:9
stand [1] - 76:36
standard [6] - 30:27, 37:7, 40:32, 41:27, 51:19, 58:7
standards [17] - 28:42, 29:7, 30:15, 36:43, 40:8, 40:19, 40:26, 41:16, 41:22, 46:37, 46:39, 49:45, 55:6, 57:8, 61:34, 65:7, 68:43
standing [16] - 2:16, 32:20, 37:3, 37:20, 37:39, 37:42, 38:14, 38:41, 38:46, 39:7, 39:11, 39:18, 39:26, 41:25, 41:29
stands [1] - 20:42
start [11] - 7:13, 9:1, 11:5, 22:23, 25:23, 28:20, 31:11, 42:5, 53:29, 53:46, 77:10
started [3] - 2:4, 52:31, 75:29
starting [5] - 6:28, 40:34, 52:45, 54:6, 60:6
state [5] - 35:37, 38:14, 38:16, 41:22, 71:2
stated [2] - 5:13, 6:41
statement [11] - 8:37, 11:21, 14:24, 17:4, 17:13, 17:17, 27:32, 39:28, 69:7, 71:11, 80:13
statements [3] - 32:42, 32:44, 33:6
States [1] - 9:17
states [3] - 13:45, 17:33, 19:34
stating [1] - 14:20
status [3] - 8:3, 19:45, 78:45
statute [3] - 17:32, 35:43, 38:27
statutes [1] - 17:33
statutory [45] - 17:26, 31:17, 31:37, 31:41, 31:46, 32:46, 33:2, 33:10, 33:22, 33:24, 34:45, 35:2, 35:5, 35:38, 36:21, 36:46, 37:4, 37:5, 37:33, 38:12, 38:18, 38:22, 38:30, 39:6, 39:15, 39:21, 39:27, 39:32, 39:38, 39:40, 39:43, 40:1, 40:6, 40:8, 40:9, 40:13, 40:19, 40:23, 40:26, 41:3, 41:6, 41:37, 83:31, 83:43, 83:45
steer [1] - 21:31
step [1] - 4:35
stepping [1] - 85:26
stepping-stone [1] - 85:26
steps [4] - 19:13, 29:21, 30:34, 62:34
stewards [1] - 42:17
stick [4] - 54:4, 55:38, 55:42, 59:4
stifling [2] - 29:12, 42:10
still [17] - 3:20, 9:7, 9:10, 10:4, 11:4, 11:10, 11:11, 22:13, 24:24, 24:40, 27:43, 39:34, 40:17, 51:10, 53:21, 60:9
stimulate [1] - 53:15
stimulating [1] - 42:1
stock [3] - 16:15, 16:18, 16:22
stone [1] - 85:26

Stone [2] - 28:28, 28:29
stop [1] - 82:24
stories [1] - 48:1
Storm [3] - 4:34, 61:19, 68:8
story [1] - 18:35
storytelling [1] - 49:37
straight [3] - 55:47, 60:1, 84:10
straightforward [1] - 8:37
strategic [3] - 3:44, 4:2, 73:8
strategies [8] - 44:22, 46:17, 46:19, 52:1, 53:45, 57:32, 58:5, 58:14
strategy [1] - 27:36
streamlining [1] - 78:23
strengthen [1] - 47:17
strengths [5] - 47:40, 50:9, 50:10, 57:6, 57:20
stress [1] - 82:18
stretch [1] - 49:22
strict [1] - 52:13
stricter [1] - 53:27
strictly [1] - 48:24
strictness [1] - 40:19
striking [1] - 55:11
strong [4] - 7:3, 16:5, 68:29, 82:42
strongly [5] - 13:45, 40:2, 47:21, 47:31, 59:9
struck [2] - 49:21, 50:17
structural [1] - 77:30
structure [4] - 9:16, 19:35, 22:35, 23:43
structured [1] - 22:44
structures [5] - 23:12, 23:18, 58:15, 69:11, 77:19
studies [4] - 46:43, 61:46, 61:47, 63:25
study [2] - 63:19, 63:20
stuff [1] - 24:9
stupid [1] - 41:9
subcommittee [1] - 74:35
subject [5] - 5:46, 30:37, 50:29, 54:32, 82:43
subjective [1] - 30:27
submission [3] - 79:5, 79:6, 79:30
submissions [3] - 5:11, 48:41, 51:46
submitted [2] - 5:13, 16:9
subsequent [2] - 33:9, 39:27
subsidiaries [1] - 61:23
substantial [3] - 45:22, 77:2, 79:37
substantially [2] - 41:27, 48:7
substantiated [1] - 71:29
substantive [1] - 28:42
substituting [1] - 15:30
subtle [1] - 53:23
success [8] - 17:45, 20:20, 25:40, 26:5, 42:29, 47:7, 68:34, 73:22
successes [1] - 51:2
successful [4] - 52:10, 73:26, 80:15, 80:18
successfully [1] - 37:32
succumbed [1] - 61:27
such [31] - 3:32, 4:18, 5:46, 6:2, 6:10, 6:41, 10:41, 12:4, 12:47, 14:24, 14:47, 18:8, 25:2, 27:28, 29:10, 32:29, 33:16, 36:1, 37:15, 37:19, 37:21, 38:37, 39:13, 41:15, 50:43, 67:10, 68:20, 72:24, 79:32, 82:32, 82:44
sue [5] - 37:4, 37:32, 38:17, 38:41, 76:31
suffer [2] - 70:47, 75:18
suffered [1] - 38:8
suffers [1] - 58:32
suffice [1] - 10:2
sufficient [2] - 14:40, 18:13
sufficiently [5] - 8:20, 18:6, 24:6, 24:8, 58:36
suggest [10] - 23:24, 25:28, 29:46, 37:2, 42:44, 44:47, 51:24, 55:37, 58:47, 77:42
suggested [6] - 6:43, 17:24, 46:38, 52:4, 69:33, 79:35
suggesting [4] - 24:39, 36:26, 84:33
suggestion [4] - 16:43, 48:24, 78:16, 79:24
suggestions [3] - 78:33, 79:7, 79:10
suggests [12] - 24:23, 39:3, 42:31, 49:46, 52:9, 52:14, 54:6, 56:30, 69:30, 69:42, 78:47, 80:34
suite [1] - 52:19
suited [1] - 53:12
suites [1] - 46:5
summary [1] - 65:3
Sunlight [1] - 54:28
Sunstein [5] - 50:19, 50:47, 51:9, 54:38, 55:31
superannuation [1] - 84:29
superimposed [1] - 80:16
supervise [2] - 29:27, 58:17
supervisors [1] - 56:43
suppliers [2] - 5:6, 32:29
supply [1] - 46:9
support [11] - 2:6, 5:22, 5:44, 6:8, 29:14, 53:36, 54:22, 58:1, 58:3, 58:17, 69:29
supported [1] - 80:14
supporting [2] - 5:43, 33:11
supports [2] - 13:11, 57:25
suppose [3] - 24:13, 64:38, 71:39
supposed [1] - 83:8
supposedly [1] - 23:17
SUPREME [1] - 1:8
Supreme [6] - 1:27, 2:4, 2:26, 13:26, 54:27, 54:28
sure [20] - 21:21, 22:16, 22:22, 23:17, 23:28, 23:31, 24:3, 24:5, 24:28, 42:3, 73:32, 74:47, 75:7, 77:17, 77:18, 77:39, 78:17, 79:9, 80:22, 81:32
surely [1] - 54:12
surface [1] - 42:19
surprise [1] - 83:8
surprised [1] - 80:12
surprising [1] - 45:30
surprisingly [1] - 39:46
surrounding [1] - 2:22
surrounds [1] - 46:43
Survey [1] - 66:24
surveyed [2] - 66:26, 84:21
suspect [3] - 69:44, 72:41, 84:11
suspected [1] - 34:32
suspension [1] - 53:1
sustainability [2] - 20:2, 25:22
sustainable [1] - 27:37
sustained [1] - 36:11
swamped [1] - 21:29
swiftly [1] - 50:15
Swimwear [1] - 13:1
swings [1] - 5:31
Sydney [6] - 1:28, 2:37, 4:9, 7:17, 13:10, 26:47
synoptic [1] - 34:4
system [10] - 8:7, 22:24, 23:36, 33:20, 36:42, 45:8, 61:43, 64:18, 85:33, 85:34
systematic [1] - 65:42
systemic [3] - 65:46, 66:32, 73:39
systems [6] - 57:39, 57:46, 63:35, 73:7, 83:17, 83:25

T

table [2] - 4:4, 67:37
take [38] - 5:42, 6:47, 8:21, 8:43, 10:11, 10:28, 11:28, 12:7, 17:3, 17:21, 17:27, 17:42, 18:3, 18:7, 18:10, 18:17, 19:5, 19:12, 19:13, 19:20, 20:43, 21:41, 23:35, 24:25, 27:24, 29:27, 35:16, 41:9, 43:24, 53:25, 56:14, 57:32, 58:36, 58:41, 63:41, 77:15, 83:8, 84:1
taken [8] - 9:38, 11:7, 20:4, 43:33, 76:40, 78:14, 82:3, 84:6
takes [3] - 4:34, 66:47, 70:43
taking [9] - 3:23, 4:7, 17:16, 19:36, 27:45, 29:42, 30:28, 37:12, 70:23
talk [6] - 16:34, 23:40, 30:46, 79:14, 81:10, 84:27
talked [4] - 69:17, 74:24, 75:16, 81:8
talking [6] - 11:4, 15:27, 26:5, 32:38, 64:8, 78:5
talks [2] - 75:26, 81:44
tame [2] - 29:47, 36:31
tape [1] - 57:26
task [6] - 22:9, 65:10, 71:18, 71:20, 73:27, 82:24
tasked [1] - 57:47
taught [2] - 7:19, 82:31
Taxation [1] - 2:37
tea [2] - 4:41, 43:45
teaching [1] - 7:22
team [2] - 52:12, 73:42
teams [1] - 44:27
technical [3] - 21:37, 58:37, 74:1
technicalities [1] - 58:29
Technology [1] - 7:19
Teck [1] - 17:13
telecommunications [1] - 72:12
tell [2] - 25:4, 25:36
telling [1] - 21:32
tellingly [1] - 45:22
tells [1] - 66:22
temper [1] - 29:15
tempered [1] - 56:47
temporal [1] - 15:16
temptation [1] - 52:28
ten [1] - 65:13
tend [7] - 23:18, 52:3, 54:42, 55:5, 55:7, 55:41, 59:37
tendency [1] - 55:15
tending [1] - 38:37
tends [3] - 55:19, 55:20, 55:37
tens [1] - 70:42
tension [1] - 20:46
term [19] - 12:21, 15:11, 15:12, 15:28, 20:19, 20:20, 25:21, 25:41, 26:3, 27:26, 32:34, 42:18, 43:13, 43:16, 43:20, 43:27, 55:19, 65:6, 65:19

terms [9] - 10:38, 26:33, 42:7, 60:14, 61:30, 62:6, 66:10, 77:17, 84:20
terribly [1] - 45:30
territory [1] - 83:15
test [3] - 12:18, 14:13, 15:19
text [10] - 33:19, 34:44, 35:2, 35:5, 35:30, 35:36, 35:38, 35:40, 36:4, 36:23
textured [1] - 28:41
TF [11] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 80:43, 85:21
Thaler [6] - 50:20, 50:47, 51:9, 54:39, 55:30
than [33] - 4:11, 8:14, 10:40, 12:14, 12:29, 17:21, 17:33, 22:6, 22:12, 26:20, 27:10, 27:13, 29:7, 29:11, 32:26, 35:44, 35:45, 38:23, 41:28, 41:41, 47:19, 48:19, 55:9, 55:16, 59:4, 59:22, 61:13, 64:30, 64:31, 65:38, 67:2, 75:46, 84:12
thank [31] - 2:9, 2:11, 7:28, 19:1, 19:3, 19:38, 19:40, 20:29, 22:46, 24:19, 26:9, 26:39, 26:41, 26:43, 41:44, 43:10, 43:41, 43:42, 44:9, 59:4, 59:14, 59:42, 59:43, 60:18, 60:21, 60:25, 60:42, 74:45, 76:45, 85:45, 85:47
thanking [2] - 59:45, 60:19
thanks [6] - 2:35, 3:4, 7:29, 20:34, 21:18, 84:44
That [1] - 74:10
that [826] - 2:13, 2:25, 3:18, 3:43, 4:32, 4:36, 4:37, 5:3, 5:4, 5:13, 5:16, 5:18, 5:23, 5:25, 5:26, 5:33, 5:42, 5:43, 5:44, 6:2, 6:17, 6:19, 6:23, 6:34, 6:38, 6:40, 6:43, 7:10, 7:29, 7:31, 7:35, 7:40, 7:41, 7:42, 8:19, 8:22, 8:28, 8:32, 8:34, 8:36, 8:40, 8:46, 9:8, 9:11, 9:16, 9:18, 9:23, 9:29, 9:32, 9:34, 9:36, 9:37, 9:45, 10:13, 10:16, 10:18, 10:24, 10:25, 10:29, 10:31, 10:36, 10:37, 10:39, 11:5, 11:8, 11:21, 11:23, 11:29, 11:34, 11:39, 11:44, 11:45, 12:2, 12:14, 12:15, 12:17, 12:21, 12:23, 12:27, 12:30, 12:34, 12:39, 12:40, 12:42, 12:44, 13:2, 13:3, 13:4, 13:11, 13:17, 13:27, 13:33, 13:37, 13:41, 13:45, 14:1, 14:4, 14:6, 14:11, 14:15, 14:16, 14:19, 14:20, 14:22, 14:30, 14:31, 14:32, 14:38, 15:1, 15:4, 15:7, 15:25, 15:26, 15:35, 15:36, 16:6, 16:9, 16:13, 16:15, 16:17, 16:21, 16:22, 16:28, 16:37, 16:40, 16:43, 16:45, 16:46, 17:2, 17:6, 17:7, 17:9, 17:13, 17:17, 17:24, 17:25, 17:26, 17:29, 17:38, 17:40, 17:44, 18:11, 18:12, 18:15, 18:21, 18:24, 18:28, 18:39, 18:40, 18:43, 19:7, 19:9, 19:11, 19:17, 19:20, 19:24, 19:31, 19:32, 19:34, 19:35, 19:37, 19:45, 20:1, 20:3, 20:9, 20:14, 20:16, 20:18, 20:22, 20:27, 20:28, 20:36, 21:1, 21:9, 21:10, 21:12, 21:15, 21:16, 21:29, 21:33, 21:34, 21:35, 21:37, 21:41, 21:42, 21:46, 21:47, 22:4, 22:6, 22:9, 22:10, 22:11, 22:15, 22:16, 22:22, 22:24, 22:32, 22:35, 22:36, 22:40, 22:41, 22:47, 23:1, 23:3, 23:5, 23:8, 23:14, 23:16, 23:17, 23:22, 23:25, 23:29, 23:31, 23:37, 23:42, 23:45, 24:5, 24:7, 24:9, 24:16, 24:19, 24:20, 24:23, 24:24, 24:25, 24:28, 24:29, 24:32, 24:33, 24:35, 24:40, 25:4, 25:7, 25:10, 25:14, 25:15, 25:16, 25:19, 25:23, 25:26, 25:28, 25:30, 25:31, 25:36, 25:37, 25:39, 26:1, 26:2, 26:6, 26:8, 26:31, 26:34, 26:38, 27:4, 27:8, 27:10, 27:13, 27:23, 27:34, 27:35, 27:37, 27:44, 27:46, 28:13, 28:21, 28:22, 28:26, 28:27, 28:34, 28:36, 29:11, 29:20, 29:21, 29:23, 29:46, 29:47, 30:1, 30:11, 30:16, 30:35, 30:46, 31:4, 31:6, 31:8, 31:19, 31:47, 32:24, 33:12, 33:16, 33:24, 33:30, 33:44, 34:1, 34:9, 34:22, 34:35, 35:10, 35:30, 35:33, 35:37, 35:42, 35:45, 36:9, 36:34, 36:35, 36:45, 37:2, 37:6, 37:8, 37:14, 38:5, 38:9, 38:21, 38:28, 38:33, 38:34, 38:37, 38:38, 39:2, 39:5, 39:10, 39:11, 39:21, 39:28, 39:32, 39:34, 39:43, 40:24, 40:33, 41:16, 41:29, 41:33, 41:39, 42:7, 42:8, 42:19, 42:21, 42:24, 42:29, 42:36, 42:37, 43:1, 43:5, 43:6, 43:10, 43:11, 43:20, 43:22, 43:23, 43:24, 43:28, 43:29, 43:34, 43:35, 43:41, 44:39, 44:47, 45:3, 45:4, 45:31, 45:32, 45:35, 45:41, 45:42, 45:45, 46:3, 46:20, 46:29, 46:35, 46:36, 46:38, 46:39, 46:42, 47:13, 47:31, 47:37, 47:46, 48:2, 48:6, 48:22, 48:25, 48:26, 48:29, 48:32, 48:34, 48:35, 48:37, 48:38, 48:46, 49:1, 49:3, 49:4, 49:9, 49:14, 49:21, 49:29, 49:35, 49:39, 49:46, 50:1, 50:5, 50:7, 50:10, 50:24, 50:25, 50:33, 50:35, 50:39, 50:42, 50:43, 51:5, 51:7, 51:13, 51:16, 51:20, 51:24, 51:26, 51:31, 51:36, 51:37, 51:43, 52:9, 52:10, 52:14, 52:18, 52:19, 52:36, 52:37, 52:42, 53:4, 53:12, 53:26, 53:29, 53:35, 53:41, 53:44, 53:45, 53:47, 54:2, 54:3, 54:6, 54:7, 54:9, 54:12, 54:15, 54:18, 54:21, 54:28, 54:29, 54:35, 54:40, 54:41, 55:7, 55:8, 55:12, 55:17, 55:31, 55:37, 55:38, 55:42, 55:45, 56:2, 56:3, 56:8, 56:22, 56:23, 56:29, 56:35, 56:36, 56:47, 57:2, 57:11, 57:14, 57:25, 57:28, 57:29, 57:30, 57:33, 57:40, 57:43, 57:45, 57:46, 58:1, 58:5, 58:6, 58:10, 58:15, 58:23, 58:25, 58:27, 58:28, 58:29, 58:39, 59:1, 59:2, 59:6, 59:23, 59:24, 59:27, 59:30, 59:31, 59:32, 59:36, 59:38, 59:42, 59:43, 60:12, 60:30, 60:31, 60:33, 60:36, 60:41, 60:47, 61:18, 61:20, 61:35, 61:36, 61:47, 62:2, 62:10, 62:14, 62:28, 62:30, 62:35, 62:44, 62:47, 63:9, 63:17, 63:21, 63:25, 63:32, 63:37, 63:44, 63:46, 64:4, 64:6, 64:15, 64:23, 64:27, 64:29, 64:30, 64:33, 64:35, 64:41, 64:46, 65:11, 65:16, 65:24, 65:27, 66:2, 66:3, 66:5, 66:17, 66:20, 66:22, 66:23, 66:26, 66:31, 66:33, 66:36, 66:42, 66:47, 67:1, 67:3, 67:6, 67:27, 67:37, 67:41, 67:42, 67:46, 67:47, 68:3, 68:4, 68:9, 68:12, 68:17, 68:18, 68:20, 68:29, 68:33, 68:35, 68:38, 68:43, 68:44, 68:45, 69:3, 69:9, 69:18, 69:19, 69:27, 69:29, 69:30, 69:37, 69:38, 69:39, 69:42, 70:3, 70:9, 70:11, 70:12, 70:14, 70:18, 70:38, 70:43, 70:46, 70:47, 71:5, 71:6, 71:33, 71:38, 72:7, 72:8, 72:10, 72:14, 72:15, 72:21, 72:24, 72:25, 72:27, 72:29, 72:34, 72:35, 72:37, 72:42, 73:17, 73:40, 73:41, 73:45, 74:4, 74:6, 74:19, 74:23, 74:25, 74:27, 74:28, 75:7, 75:13, 75:16, 75:21, 75:32, 76:28, 76:32, 76:39, 76:40, 77:5, 77:6, 77:13, 77:14, 77:15, 77:17, 77:18, 77:20, 77:21, 77:23, 77:27, 77:36, 77:40, 77:43, 78:18, 78:19, 78:22, 78:27, 78:33, 78:39, 78:42, 78:47, 79:5, 79:7, 79:10, 79:12, 79:15, 79:16, 79:30, 79:34, 79:35, 79:43, 79:46, 80:1, 80:3, 80:6, 80:11, 80:12, 80:13, 80:17, 80:19, 80:21, 80:22, 80:24, 80:25, 80:31, 80:32, 80:33, 80:34, 80:35, 80:37, 81:1, 81:8, 81:19, 81:24, 81:26, 81:30, 81:32, 81:47, 82:5, 82:18, 82:23, 82:25, 82:28, 82:42, 82:43, 83:3, 83:4, 83:6, 83:7, 83:11, 83:12, 83:22, 83:24, 83:27, 83:30, 83:32, 83:36, 83:37, 83:40, 83:45, 83:46, 83:47, 84:3, 84:8, 84:12, 84:14, 84:18, 84:21, 84:28, 84:33, 85:3, 85:4, 85:6, 85:8, 85:10, 85:16, 85:19, 85:22, 85:27, 85:34, 85:35
that's [12] - 18:45, 18:47, 22:9, 22:22, 23:32, 25:17, 25:18, 53:6, 82:17, 82:24, 82:35, 83:15
The [2] - 9:14, 34:14
the [2098] - 2:3, 2:6,

2:7, 2:8, 2:15, 2:21, 2:26, 2:27, 2:28, 2:29, 2:34, 2:35, 2:36, 2:37, 2:38, 2:39, 2:40, 2:43, 2:47, 3:1, 3:2, 3:5, 3:6, 3:11, 3:12, 3:13, 3:14, 3:17, 3:18, 3:19, 3:20, 3:22, 3:24, 3:29, 3:31, 3:35, 3:39, 3:42, 3:44, 4:4, 4:8, 4:14, 4:15, 4:16, 4:17, 4:19, 4:21, 4:22, 4:23, 4:24, 4:25, 4:26, 4:30, 4:31, 4:32, 4:33, 4:34, 4:37, 4:38, 4:39, 4:41, 4:42, 4:44, 4:45, 4:47, 5:1, 5:5, 5:7, 5:11, 5:12, 5:13, 5:14, 5:15, 5:16, 5:19, 5:20, 5:22, 5:24, 5:25, 5:32, 5:33, 5:34, 5:35, 5:38, 5:39, 5:43, 5:44, 5:45, 5:46, 5:47, 6:2, 6:9, 6:10, 6:11, 6:12, 6:15, 6:16, 6:20, 6:24, 6:28, 6:33, 6:37, 6:38, 6:39, 6:40, 6:43, 6:46, 6:47, 7:1, 7:4, 7:8, 7:9, 7:13, 7:14, 7:15, 7:17, 7:18, 7:19, 7:22, 7:23, 7:25, 7:29, 7:32, 7:34, 7:36, 7:38, 7:40, 7:41, 7:42, 7:43, 7:46, 7:47, 8:1, 8:3, 8:4, 8:6, 8:8, 8:9, 8:10, 8:12, 8:14, 8:17, 8:20, 8:22, 8:23, 8:26, 8:27, 8:28, 8:30, 8:31, 8:32, 8:34, 8:35, 8:39, 8:46, 9:1, 9:3, 9:5, 9:8, 9:9, 9:11, 9:16, 9:17, 9:22, 9:26, 9:28, 9:29, 9:32, 9:36, 9:39, 9:40, 9:41, 9:43, 9:45, 10:1, 10:6, 10:8, 10:11, 10:12, 10:14, 10:15, 10:18, 10:19, 10:20, 10:21, 10:25, 10:28, 10:29, 10:30, 10:33, 10:36, 10:38, 10:39, 10:43, 10:44, 10:45, 10:47, 11:1, 11:5, 11:8, 11:9, 11:10, 11:11, 11:14, 11:15, 11:17, 11:19, 11:20, 11:22, 11:23, 11:25, 11:28, 11:29, 11:30, 11:31, 11:32, 11:35, 11:36, 11:38, 11:40, 11:41, 11:44, 11:46, 11:47, 12:2, 12:5, 12:8, 12:10, 12:11, 12:13, 12:14, 12:18, 12:20, 12:21, 12:22, 12:23, 12:26, 12:28, 12:30, 12:31, 12:35, 12:38, 12:39, 12:43, 12:44, 13:5, 13:6, 13:7, 13:11, 13:12, 13:16, 13:17, 13:18, 13:19, 13:20, 13:21, 13:22, 13:23, 13:25, 13:26, 13:27, 13:28, 13:29, 13:30, 13:32, 13:33, 13:35, 13:37, 13:38, 13:39, 13:40, 13:42, 13:44, 13:45, 13:46, 14:1, 14:4, 14:5, 14:9, 14:10, 14:13, 14:14, 14:16, 14:19, 14:21, 14:22, 14:23, 14:24, 14:25, 14:27, 14:28, 14:30, 14:31, 14:32, 14:33, 14:35, 14:36, 14:38, 14:39, 14:40, 14:44, 14:45, 15:1, 15:2, 15:4, 15:5, 15:6, 15:7, 15:9, 15:10, 15:11, 15:12, 15:16, 15:17, 15:19, 15:22, 15:23, 15:25, 15:26, 15:28, 15:29, 15:31, 15:35, 15:38, 15:42, 15:43, 15:45, 15:47, 16:2, 16:3, 16:4, 16:5, 16:9, 16:10, 16:13, 16:14, 16:16, 16:17, 16:21, 16:25, 16:28, 16:29, 16:30, 16:31, 16:33, 16:37, 16:38, 16:39, 16:40, 16:41, 16:43, 16:45, 17:4, 17:5, 17:9, 17:13, 17:14, 17:15, 17:18, 17:20, 17:21, 17:28, 17:34, 17:37, 17:38, 17:41, 17:43, 17:45, 18:1, 18:2, 18:4, 18:6, 18:8, 18:11, 18:16, 18:22, 18:27, 18:29, 18:30, 18:35, 18:43, 18:44, 19:1, 19:4, 19:5, 19:7, 19:12, 19:15, 19:18, 19:20, 19:25, 19:32, 19:37, 20:1, 20:2, 20:3, 20:8, 20:17, 20:18, 20:19, 20:20, 20:21, 20:23, 20:24, 20:35, 20:36, 20:38, 20:41, 20:44, 20:45, 20:47, 21:6, 21:9, 21:12, 21:13, 21:14, 21:15, 21:16, 21:17, 21:31, 21:33, 21:37, 21:45, 21:47, 22:8, 22:11, 22:14, 22:20, 22:22, 22:24, 22:30, 22:31, 22:34, 22:36, 22:37, 22:38, 22:42, 22:43, 23:1, 23:3, 23:6, 23:13, 23:15, 23:18, 23:19, 23:24, 23:26, 23:28, 23:34, 23:41, 24:1, 24:5, 24:6, 24:7, 24:8, 24:9, 24:11, 24:15, 24:17, 24:21, 24:22, 24:28, 24:31, 24:32, 24:33, 24:37, 24:38, 24:40, 24:41, 25:1, 25:4, 25:14, 25:21, 25:22, 25:23, 25:25, 25:32, 25:40, 25:41, 26:2, 26:3, 26:4, 26:5, 26:9, 26:11, 26:12, 26:13, 26:17, 26:19, 26:20, 26:26, 26:28, 26:29, 26:38, 26:43, 26:46, 27:3, 27:4, 27:5, 27:11, 27:12, 27:13, 27:16, 27:18, 27:21, 27:23, 27:25, 27:26, 27:28, 27:31, 27:32, 27:36, 27:38, 27:39, 27:43, 27:44, 28:3, 28:4, 28:8, 28:10, 28:15, 28:16, 28:22, 28:23, 28:24, 28:25, 28:27, 28:28, 28:30, 28:31, 28:34, 28:37, 28:40, 28:41, 28:43, 28:47, 29:2, 29:3, 29:4, 29:10, 29:14, 29:16, 29:19, 29:26, 29:28, 29:29, 29:34, 29:36, 29:38, 29:39, 29:43, 29:44, 29:45, 29:47, 30:4, 30:5, 30:6, 30:7, 30:8, 30:9, 30:10, 30:14, 30:16, 30:19, 30:23, 30:24, 30:25, 30:26, 30:29, 30:30, 30:35, 30:36, 30:41, 30:42, 30:46, 31:4, 31:6, 31:8, 31:12, 31:15, 31:17, 31:21, 31:25, 31:27, 31:28, 31:31, 31:36, 31:37, 31:40, 31:44, 31:45, 31:46, 31:47, 32:1, 32:4, 32:6, 32:7, 32:8, 32:9, 32:16, 32:17, 32:19, 32:24, 32:26, 32:27, 32:30, 32:31, 32:32, 32:33, 32:34, 32:35, 32:39, 32:41, 32:42, 32:44, 32:45, 33:1, 33:3, 33:5, 33:6, 33:9, 33:12, 33:13, 33:14, 33:16, 33:19, 33:21, 33:23, 33:24, 33:25, 33:28, 33:29, 33:30, 33:34, 33:36, 33:37, 33:38, 33:39, 33:40, 33:43, 33:44, 33:45, 34:3, 34:7, 34:8, 34:9, 34:11, 34:12, 34:13, 34:15, 34:17, 34:19, 34:21, 34:25, 34:27, 34:29, 34:30, 34:31, 34:32, 34:33, 34:34, 34:35, 34:37, 34:38, 34:41, 34:44, 34:45, 35:2, 35:4, 35:5, 35:7, 35:8, 35:9, 35:19, 35:27, 35:30, 35:32, 35:34, 35:36, 35:37, 35:38, 35:39, 35:40, 35:41, 35:44, 35:45, 35:47, 36:1, 36:4, 36:5, 36:6, 36:7, 36:12, 36:14, 36:16, 36:17, 36:19, 36:23, 36:24, 36:26, 36:28, 36:31, 36:36, 36:37, 36:38, 36:42, 36:44, 36:45, 37:2, 37:3, 37:4, 37:5, 37:6, 37:7, 37:10, 37:15, 37:17, 37:25, 37:28, 37:30, 37:37, 37:40, 37:41, 37:46, 37:47, 38:3, 38:10, 38:14, 38:15, 38:16, 38:17, 38:18, 38:21, 38:25, 38:26, 38:27, 38:28, 38:29, 38:33, 38:35, 38:36, 38:38, 38:42, 38:43, 38:47, 39:3, 39:5, 39:6, 39:8, 39:9, 39:12, 39:14, 39:15, 39:16, 39:20, 39:21, 39:22, 39:24, 39:25, 39:26, 39:27, 39:28, 39:29, 39:31, 39:32, 39:33, 39:34, 39:38, 39:39, 39:40, 39:42, 39:45, 39:47, 40:1, 40:4, 40:6, 40:7, 40:9, 40:11, 40:13, 40:14, 40:15, 40:17, 40:18, 40:19, 40:21, 40:22, 40:24, 40:26, 40:27, 40:31, 40:33, 40:34, 40:35, 40:36, 40:40, 40:43, 40:45, 41:3, 41:4, 41:5, 41:7, 41:10, 41:15, 41:17, 41:18, 41:20, 41:21, 41:22, 41:23, 41:24, 41:28, 41:31, 41:33, 41:35, 41:36, 41:37, 41:39, 42:6, 42:8, 42:13, 42:15, 42:16, 42:17, 42:18, 42:19, 42:21, 42:23, 42:26, 42:28, 42:29, 42:30, 42:31, 42:33, 42:36, 42:38, 42:40, 42:44, 42:45, 42:47, 43:1, 43:4, 43:5, 43:6, 43:11, 43:13, 43:14, 43:15, 43:16, 43:20, 43:21, 43:24, 43:25, 43:27, 43:28, 43:37, 43:43, 43:46, 44:4, 44:5, 44:6, 44:11, 44:15, 44:17, 44:18, 44:19, 44:20, 44:25, 44:27, 44:28, 44:29, 44:30, 44:36, 44:45, 45:1, 45:2, 45:7, 45:8, 45:9, 45:10, 45:11, 45:12, 45:13, 45:14, 45:17, 45:18, 45:20, 45:21, 45:22, 45:23, 45:24, 45:25, 45:33, 45:36, 45:39, 45:42, 45:44, 45:45, 45:47, 46:1, 46:3, 46:5, 46:6, 46:13, 46:15, 46:16, 46:17, 46:18, 46:19, 46:20, 46:23, 46:24, 46:25, 46:27, 46:33, 46:34, 46:35, 46:38, 46:40, 46:42, 46:44, 46:45, 46:46, 46:47, 47:5, 47:12, 47:14, 47:16, 47:20, 47:24,

47:25, 47:26, 47:28, 47:33, 47:36, 47:38, 47:43, 47:44, 47:45, 47:46, 48:1, 48:5, 48:10, 48:15, 48:17, 48:22, 48:29, 48:30, 48:32, 48:33, 48:35, 48:37, 48:39, 48:41, 48:42, 48:44, 48:45, 48:46, 48:47, 49:1, 49:3, 49:4, 49:7, 49:10, 49:13, 49:14, 49:16, 49:18, 49:19, 49:20, 49:21, 49:22, 49:27, 49:30, 49:34, 49:35, 49:36, 49:37, 49:45, 49:46, 50:2, 50:4, 50:5, 50:8, 50:13, 50:14, 50:21, 50:24, 50:25, 50:31, 50:35, 50:36, 50:42, 50:43, 50:47, 51:2, 51:4, 51:7, 51:12, 51:14, 51:15, 51:16, 51:18, 51:23, 51:30, 51:31, 51:32, 51:33, 51:35, 51:36, 51:41, 51:42, 51:43, 51:46, 52:2, 52:3, 52:5, 52:11, 52:18, 52:22, 52:23, 52:28, 52:34, 52:35, 52:40, 52:41, 52:45, 53:4, 53:5, 53:6, 53:10, 53:11, 53:19, 53:21, 53:22, 53:28, 53:29, 53:30, 53:34, 53:38, 53:41, 53:44, 53:46, 54:2, 54:4, 54:6, 54:8, 54:9, 54:12, 54:13, 54:19, 54:21, 54:26, 54:28, 54:29, 54:31, 54:32, 54:36, 54:37, 54:38, 54:41, 54:44, 55:11, 55:12, 55:14, 55:15, 55:21, 55:24, 55:25, 55:30, 55:32, 55:38, 55:42, 56:1, 56:5, 56:9, 56:11, 56:12, 56:13, 56:14, 56:18, 56:39, 56:44, 57:1, 57:8, 57:13, 57:25, 57:43, 57:46, 58:1, 58:5, 58:7, 58:9, 58:10, 58:11, 58:15, 58:19, 58:27, 58:29, 58:32, 58:35, 58:39, 58:46, 58:47, 59:3, 59:4, 59:8, 59:15, 59:18, 59:21, 59:23, 59:24, 59:25, 59:28, 59:36, 59:39, 60:1, 60:4, 60:5, 60:6, 60:8, 60:12, 60:13, 60:14, 60:19, 60:21, 60:27, 60:33, 60:36, 60:39, 60:41, 60:42, 60:44, 60:47, 61:1, 61:3, 61:4, 61:6, 61:7, 61:8, 61:12, 61:17, 61:18, 61:19, 61:21, 61:24, 61:28, 61:30, 61:31, 61:33, 61:39, 61:40, 61:41, 61:42, 61:44, 61:47, 62:1, 62:2, 62:4, 62:6, 62:12, 62:13, 62:14, 62:15, 62:16, 62:19, 62:20, 62:21, 62:23, 62:24, 62:26, 62:28, 62:29, 62:31, 62:33, 62:35, 62:36, 62:38, 62:39, 62:41, 62:43, 62:44, 62:45, 62:47, 63:1, 63:2, 63:4, 63:5, 63:6, 63:8, 63:9, 63:16, 63:17, 63:20, 63:25, 63:26, 63:27, 63:36, 63:38, 63:39, 63:41, 63:44, 63:45, 63:47, 64:3, 64:4, 64:5, 64:7, 64:9, 64:10, 64:12, 64:13, 64:18, 64:23, 64:24, 64:25, 64:26, 64:27, 64:29, 64:30, 64:33, 64:34, 64:36, 64:38, 64:39, 64:40, 64:41, 64:42, 64:44, 64:45, 65:2, 65:6, 65:7, 65:11, 65:12, 65:13, 65:16, 65:17, 65:19, 65:22, 65:23, 65:27, 65:29, 65:31, 65:32, 65:33, 65:36, 65:38, 65:39, 65:41, 65:43, 65:45, 65:46, 66:2, 66:3, 66:6, 66:9, 66:10, 66:13, 66:17, 66:20, 66:22, 66:23, 66:24, 66:25, 66:26, 66:30, 66:31, 66:33, 66:37, 66:40, 66:46, 67:2, 67:4, 67:6, 67:9, 67:10, 67:11, 67:12, 67:14, 67:15, 67:17, 67:18, 67:19, 67:20, 67:21, 67:22, 67:24, 67:25, 67:26, 67:27, 67:29, 67:32, 67:33, 67:38, 67:39, 67:45, 68:1, 68:2, 68:4, 68:5, 68:8, 68:9, 68:20, 68:21, 68:22, 68:23, 68:24, 68:26, 68:28, 68:29, 68:30, 68:34, 68:35, 68:38, 68:42, 68:44, 68:45, 69:2, 69:5, 69:6, 69:7, 69:10, 69:12, 69:13, 69:18, 69:19, 69:25, 69:26, 69:27, 69:29, 69:31, 69:32, 69:33, 69:36, 69:46, 70:3, 70:4, 70:7, 70:8, 70:10, 70:11, 70:13, 70:15, 70:18, 70:19, 70:32, 70:35, 70:40, 70:45, 70:47, 71:1, 71:2, 71:4, 71:10, 71:11, 71:13, 71:14, 71:18, 71:20, 71:21, 71:22, 71:23, 71:26, 71:28, 71:31, 71:34, 71:35, 71:37, 71:38, 71:44, 72:1, 72:2, 72:3, 72:5, 72:6, 72:13, 72:15, 72:19, 72:26, 72:27, 72:31, 72:33, 72:36, 72:40, 72:41, 72:42, 72:43, 72:44, 72:46, 73:1, 73:4, 73:12, 73:13, 73:14, 73:15, 73:17, 73:21, 73:22, 73:27, 73:29, 73:30, 73:32, 73:38, 73:39, 73:42, 74:3, 74:4, 74:11, 74:13, 74:14, 74:17, 74:19, 74:22, 74:23, 74:24, 74:26, 74:27, 74:28, 74:34, 74:37, 74:39, 74:42, 75:2, 75:4, 75:6, 75:10, 75:13, 75:16, 75:17, 75:18, 75:19, 75:22, 75:25, 75:26, 75:27, 75:29, 75:32, 75:33, 75:40, 75:41, 75:44, 75:47, 76:1, 76:7, 76:8, 76:9, 76:10, 76:11, 76:12, 76:13, 76:15, 76:18, 76:22, 76:23, 76:25, 76:28, 76:29, 76:31, 76:32, 76:35, 76:36, 76:39, 76:40, 76:41, 77:1, 77:3, 77:6, 77:12, 77:13, 77:14, 77:15, 77:18, 77:25, 77:34, 77:36, 77:38, 77:39, 77:41, 77:42, 77:45, 77:46, 78:2, 78:9, 78:14, 78:20, 78:23, 78:32, 78:34, 78:39, 78:43, 78:44, 79:3, 79:4, 79:5, 79:6, 79:11, 79:17, 79:21, 79:28, 79:29, 79:30, 79:31, 79:32, 79:34, 79:35, 79:36, 79:40, 79:41, 79:44, 79:45, 79:46, 80:1, 80:3, 80:4, 80:7, 80:12, 80:13, 80:14, 80:16, 80:19, 80:21, 80:22, 80:24, 80:31, 80:33, 80:36, 80:37, 80:41, 80:45, 80:47, 81:1, 81:2, 81:10, 81:12, 81:15, 81:18, 81:19, 81:20, 81:21, 81:22, 81:24, 81:28, 81:30, 81:31, 81:32, 81:33, 81:34, 81:43, 81:46, 81:47, 82:4, 82:6, 82:10, 82:11, 82:13, 82:14, 82:15, 82:21, 82:25, 82:27, 82:30, 82:32, 82:34, 82:37, 82:39, 82:42, 82:43, 82:44, 83:3, 83:4, 83:8, 83:10, 83:16, 83:19, 83:23, 83:31, 83:32, 83:33, 83:35, 83:37, 83:40, 83:41, 83:42, 83:43, 83:46, 83:47, 84:1, 84:3, 84:4, 84:5, 84:6, 84:10, 84:14, 84:16, 84:17, 84:18, 84:19, 84:21, 84:22, 84:24, 84:27, 84:29, 84:30, 84:33, 84:38, 84:39, 84:40, 84:41, 84:45, 84:47, 85:2, 85:7, 85:8, 85:11, 85:13, 85:14, 85:18, 85:23, 85:24, 85:31, 85:34, 85:35, 85:37, 85:41, 85:42, 85:43, 85:45, 85:46, 85:47, 86:1, 86:3

THE [25] - 2:11, 19:3, 20:31, 21:20, 21:26, 22:27, 23:39, 24:44, 26:8, 26:16, 41:47, 43:9, 43:41, 44:9, 59:6, 59:42, 60:4, 73:24, 74:42, 76:15, 76:20, 76:45, 80:43, 85:21, 86:5

theatres [1] - 36:47

their [82] - 2:30, 2:38, 2:47, 4:4, 8:14, 9:24, 10:37, 10:40, 11:30, 14:43, 15:47, 16:2, 16:16, 16:24, 19:11, 19:45, 20:24, 23:7, 25:10, 25:33, 25:39, 28:18, 29:35, 29:38, 30:36, 30:37, 34:10, 34:14, 35:32, 36:27, 40:23, 40:43, 41:41, 42:27, 44:41, 45:37, 46:26, 46:28, 49:2, 49:41, 50:31, 51:1, 51:34, 52:1, 52:44, 54:23, 54:45, 55:1, 55:6, 55:8, 55:33, 55:35, 55:44, 56:2, 56:4, 56:19, 57:31, 59:29, 63:13, 63:14, 65:22, 66:27, 66:36, 66:43, 69:15, 72:37, 73:10, 73:18, 73:20, 77:38, 79:8, 79:39, 79:44, 79:47, 80:37, 85:32, 85:46

them [27] - 15:44, 21:32, 22:8, 28:4, 29:37, 29:39, 39:29, 42:22, 47:21, 49:36, 52:16, 55:43, 57:33, 58:19, 58:21, 59:40, 63:15, 68:33, 68:35, 76:24, 77:47, 78:2, 79:12, 80:35, 82:18, 85:38

theme [5] - 8:27, 27:26, 47:24, 51:40

themes [8] - 3:17, 7:41, 9:8, 45:30, 45:41, 46:9, 77:3, 77:41

themselves [5] - 16:23, 29:6, 47:27, 51:5, 55:41

then [51] - 2:2, 2:7, 4:29, 9:43, 14:9, 14:40, 17:40, 18:25, 19:10, 20:21, 20:42, 25:22, 25:31, 26:5, 30:9, 32:43, 32:45, 35:26, 36:35, 37:38, 41:15, 42:18, 43:42, 45:12, 46:24, 48:14, 48:33, 52:47, 53:1, 53:7, 53:22, 53:24, 56:10, 56:17, 56:22, 56:29, 60:8, 63:35, 67:36, 68:10, 68:32, 74:39, 75:20, 76:31,

80:34, 81:2, 83:7, 83:46, 84:40
theoretical [1] - 38:14
theoretically [1] - 38:10
theories [1] - 52:37
theorists [1] - 10:35
theory [3] - 10:21, 10:44, 26:26
there [174] - 2:12, 2:13, 2:17, 8:27, 8:34, 8:44, 10:32, 11:22, 11:39, 11:41, 12:2, 12:3, 12:26, 12:39, 12:42, 12:47, 13:3, 13:10, 13:40, 13:44, 14:27, 15:8, 15:25, 15:37, 17:2, 17:5, 17:6, 17:14, 17:40, 18:8, 18:21, 19:11, 19:26, 19:44, 19:46, 20:8, 20:40, 20:46, 21:6, 21:10, 21:26, 21:28, 21:43, 22:30, 22:41, 23:8, 23:11, 23:25, 23:27, 23:43, 24:10, 24:41, 24:47, 25:11, 25:19, 25:23, 25:37, 27:11, 28:15, 28:21, 30:23, 30:46, 31:32, 31:44, 35:10, 35:18, 36:43, 36:47, 37:23, 37:44, 38:30, 41:16, 41:44, 42:13, 42:46, 43:46, 44:39, 46:33, 46:44, 48:29, 49:14, 50:13, 50:44, 53:31, 53:34, 53:47, 54:15, 55:2, 55:31, 55:34, 56:8, 56:26, 57:19, 57:45, 58:25, 58:27, 58:34, 58:39, 59:17, 61:25, 62:8, 62:25, 63:4, 63:7, 63:28, 63:29, 63:33, 63:35, 63:38, 64:6, 64:9, 64:12, 64:23, 64:28, 64:43, 65:21, 65:29, 65:38, 67:9, 67:45, 68:25, 69:37, 70:1, 70:11, 70:23, 71:36, 71:39, 71:44, 72:2, 72:3, 72:24, 73:1, 73:4, 73:32, 74:25, 74:42, 75:11, 75:25, 75:34, 75:45, 76:10, 76:15, 76:17, 76:18, 76:28, 76:37, 77:20, 77:42, 78:11, 78:41, 79:13, 80:11, 81:3, 81:7, 81:8, 81:11, 82:27, 83:6, 83:22, 83:36, 84:28, 85:16, 85:17, 85:21, 85:22
There [2] - 23:30, 23:40
there's [7] - 22:47, 24:24, 24:40, 25:11, 27:21, 48:24, 83:14
thereabouts [1] - 3:29
thereafter [1] - 19:9
therefore [4] - 8:7, 10:44, 29:42, 50:36
thereof [1] - 45:45
these [57] - 2:19, 3:9, 4:3, 4:14, 4:18, 4:46, 5:29, 5:35, 5:36, 5:40, 6:10, 6:14, 7:41, 8:18, 8:45, 9:37, 9:42, 10:3, 11:5, 11:6, 15:22, 15:36, 17:25, 18:13, 18:34, 23:12, 23:31, 24:26, 27:46, 30:33, 31:1, 31:33, 31:47, 33:31, 34:23, 35:6, 35:46, 41:20, 45:36, 46:9, 47:1, 49:15, 49:28, 49:34, 52:11, 56:45, 56:47, 57:16, 75:46, 76:35, 76:38, 76:40, 79:10, 85:9, 85:23, 85:35
thesis [3] - 19:17, 50:31, 53:45
they [184] - 2:39, 3:9, 5:21, 5:23, 5:45, 6:8, 8:15, 8:42, 9:8, 9:16, 9:17, 9:19, 9:29, 9:35, 10:21, 10:29, 10:31, 10:36, 10:37, 11:8, 11:18, 11:35, 12:44, 13:4, 13:5, 13:20, 13:22, 13:23, 13:41, 13:42, 14:32, 14:40, 15:7, 15:39, 16:11, 16:31, 17:28, 17:42, 18:3, 18:47, 19:44, 20:20, 21:8, 21:29, 22:16, 23:7, 23:17, 23:22, 23:25, 25:31, 25:32, 27:7, 27:45, 32:15, 37:38, 42:17, 42:18, 44:45, 45:45, 47:37, 48:16, 49:37, 49:43, 49:46, 50:24, 50:32, 51:26, 52:29, 53:4, 53:17, 54:17, 54:41, 54:43, 55:1, 55:7, 55:8, 55:42, 55:45, 56:3, 56:4, 57:24, 57:28, 57:31, 57:34, 57:40, 58:19, 58:20, 58:23, 58:38, 59:30, 59:31, 59:33, 59:38, 63:10, 63:11, 63:13, 63:14, 63:15, 63:29, 63:40, 63:46, 64:1, 64:17, 64:30, 64:42, 65:45, 66:2, 66:3, 66:6, 66:33, 66:35, 66:36, 66:39, 66:40, 66:41, 66:42, 67:5, 67:11, 67:19, 67:20, 67:22, 67:25, 67:28, 67:29, 68:31, 68:32, 68:36, 69:18, 69:23, 70:4, 70:29, 70:33, 70:40, 70:41, 70:47, 72:27, 73:2, 73:10, 73:18, 73:19, 75:19, 76:30, 77:4, 77:17, 77:37, 78:14, 78:15, 78:17, 78:37, 78:44, 79:11, 79:30, 79:35, 79:39, 79:42, 79:43, 79:45, 80:1, 80:6, 80:37, 82:10, 82:12, 82:13, 82:14, 82:16, 82:18, 82:23, 83:6, 83:24, 84:30, 84:34, 85:46, 85:47
They'll [1] - 70:29
they're [8] - 21:30, 21:31, 25:30, 25:32, 53:16, 71:46, 82:21, 82:22
they've [1] - 82:12
thing [13] - 5:34, 10:12, 19:4, 23:19, 29:28, 60:33, 60:47, 64:47, 71:11, 77:14, 78:19, 80:21, 82:27
things [24] - 10:37, 10:41, 20:44, 23:25, 24:13, 24:16, 24:26, 24:31, 25:31, 27:6, 43:1, 43:20, 43:21, 43:27, 45:39, 55:32, 67:32, 74:6, 76:39, 77:8, 77:34, 77:46, 81:7, 84:33
think [120] - 2:15, 2:20, 3:12, 3:17, 3:28, 3:39, 5:18, 5:29, 6:19, 18:45, 18:46, 19:4, 19:6, 19:13, 19:20, 19:31, 19:34, 19:44, 20:27, 21:9, 21:11, 21:26, 21:38, 21:43, 22:7, 22:8, 22:24, 22:40, 23:8, 23:13, 23:17, 23:27, 23:36, 23:46, 24:37, 24:38, 24:40, 24:44, 25:14, 25:20, 25:36, 26:19, 26:28, 26:47, 27:11, 27:21, 27:41, 29:20, 30:47, 31:7, 32:45, 36:34, 39:34, 39:35, 41:44, 42:6, 42:36, 42:44, 42:46, 43:1, 43:3, 43:20, 43:27, 43:36, 43:38, 43:41, 56:3, 56:4, 59:16, 59:28, 59:37, 59:42, 63:5, 65:32, 65:37, 66:30, 67:11, 67:32, 68:8, 68:12, 69:34, 69:46, 72:2, 72:10, 72:17, 72:27, 74:1, 74:26, 74:31, 75:24, 75:39, 76:3, 76:7, 76:39, 77:2, 77:35, 77:45, 78:18, 78:29, 79:21, 80:6, 80:10, 80:34, 80:44, 81:28, 81:38, 81:40, 81:46, 82:3, 83:2, 83:6, 83:14, 83:30, 84:33, 84:35, 84:38, 85:13, 85:27, 85:40
thinking [5] - 25:30, 27:7, 28:20, 43:6, 43:7
thinks [2] - 69:27, 69:37
third [5] - 30:5, 39:10, 40:14, 44:10, 66:39
This [1] - 20:12
this [172] - 2:2, 2:3, 2:19, 2:38, 2:43, 3:6, 4:2, 4:10, 4:21, 4:25, 4:34, 4:37, 5:40, 5:42, 6:30, 6:36, 7:24, 8:5, 8:12, 8:29, 9:4, 9:7, 9:23, 9:32, 10:10, 10:44, 10:45, 11:3, 11:7, 11:8, 11:17, 11:33, 11:39, 12:7, 12:10, 12:12, 13:37, 15:30, 15:34, 17:31, 19:4, 19:42, 20:17, 20:37, 20:40, 20:42, 20:46, 21:4, 21:5, 21:11, 21:13, 21:14, 23:29, 23:30, 23:32, 23:39, 24:1, 25:8, 25:14, 26:26, 26:38, 26:44, 27:15, 27:25, 27:34, 27:41, 28:2, 28:3, 28:8, 28:18, 29:10, 29:12, 29:19, 29:31, 29:36, 29:44, 30:6, 30:13, 30:39, 30:41, 31:14, 31:36, 33:4, 33:43, 34:3, 34:41, 35:44, 36:7, 36:30, 36:41, 37:16, 37:45, 38:7, 38:10, 39:2, 39:11, 39:13, 39:25, 39:28, 39:32, 40:20, 40:29, 41:35, 41:38, 42:5, 44:6, 44:13, 44:15, 44:36, 44:47, 45:17, 45:42, 46:20, 46:33, 46:38, 46:42, 47:29, 47:34, 48:14, 48:25, 48:26, 48:42, 49:31, 50:17, 50:29, 50:39, 51:43, 53:21, 54:31, 55:18, 55:20, 57:13, 58:45, 60:13, 60:20, 60:26, 62:7, 64:3, 65:3, 65:24, 66:17, 66:18, 68:6, 68:12, 69:17, 70:13, 70:19, 71:16, 71:22, 72:31, 74:11, 74:12, 74:20, 74:28, 74:34, 75:35, 75:42, 76:11, 76:20, 77:1, 78:16, 79:8, 79:14, 83:26, 84:29, 84:38, 85:29, 85:40
those [64] - 5:27, 5:43, 6:11, 6:12, 6:22, 7:6, 8:9, 10:41, 11:28, 11:32, 13:8, 14:2, 15:7, 15:39, 16:21, 17:33, 27:8, 27:13, 27:16, 29:7, 29:14, 29:15, 29:16, 29:34, 32:40, 33:11, 33:23, 34:26, 35:4, 35:7, 37:7, 38:15, 40:46, 41:28, 42:7, 42:33, 43:26, 43:28, 45:29, 47:27, 50:1, 50:10, 52:15, 53:38, 55:21, 56:9, 56:31, 57:30, 57:33, 57:34, 58:10, 59:27, 61:13, 65:13, 74:6, 75:9, 75:13, 76:6, 78:1, 78:3, 80:26, 83:45, 85:5, 85:12
though [12] - 2:20,

13:4, 19:41, 24:29, 31:24, 34:3, 36:4, 37:22, 38:8, 39:35, 42:22, 54:13
thought [13] - 2:46, 3:42, 5:33, 31:20, 33:11, 67:6, 68:14, 71:9, 71:16, 72:25, 74:2, 80:47, 82:31
thoughtful [1] - 47:46
thoughts [1] - 44:36
thousands [1] - 70:42
threat [2] - 18:34, 46:6
three [6] - 19:37, 53:5, 67:4, 67:34, 71:37, 82:15
through [28] - 6:47, 8:26, 8:46, 12:23, 12:38, 12:41, 16:24, 20:44, 23:35, 24:30, 29:24, 29:37, 32:44, 34:19, 36:42, 56:10, 60:8, 62:12, 63:1, 64:20, 66:37, 68:11, 70:4, 75:27, 79:17, 85:1, 85:23
throughout [1] - 65:17
throw [1] - 19:24
tick [1] - 3:35
tick-a-box [1] - 3:35
ticking [1] - 76:1
tied [1] - 9:27
tiers [2] - 53:11, 53:12
Tim [1] - 74:45
time [39] - 2:13, 2:14, 3:47, 6:9, 6:39, 9:5, 9:8, 16:22, 23:7, 24:44, 27:1, 27:19, 28:32, 39:41, 41:33, 42:30, 42:39, 43:46, 44:44, 45:4, 47:44, 55:14, 55:17, 55:24, 59:12, 59:34, 60:35, 66:30, 70:43, 72:17, 73:30, 74:12, 75:21, 76:15, 76:16, 79:25, 82:11
time's [1] - 34:5
timely [1] - 45:5
Times [1] - 7:35
times [17] - 2:15, 2:19, 3:9, 4:14, 7:39, 8:18, 10:3, 13:32, 17:25, 18:34, 33:19, 34:8, 34:11, 34:17, 41:26, 47:9, 71:37
tireless [1] - 2:43
title [2] - 7:34, 7:35
titular [1] - 28:8
to [1052] - 2:2, 2:3, 2:6, 2:7, 2:8, 2:13, 2:14, 2:17, 2:20, 2:25, 2:26, 2:27, 2:29, 2:30, 2:33, 2:35, 2:42, 2:47, 3:4, 3:18, 3:19, 3:21, 3:22, 3:23, 3:24, 3:26, 3:27, 3:32, 3:40, 3:42, 3:44, 3:47, 4:2, 4:3, 4:4, 4:10, 4:15, 4:26, 4:36, 4:41, 5:1, 5:4, 5:5, 5:8, 5:17, 5:20, 5:21, 5:27, 5:32, 5:34, 5:39, 5:41, 5:42, 5:43, 5:45, 5:46, 6:5, 6:7, 6:9, 6:14, 6:18, 6:20, 6:21, 6:29, 6:30, 6:32, 6:36, 6:42, 6:43, 7:3, 7:4, 7:5, 7:9, 7:10, 7:21, 7:24, 7:29, 7:30, 7:36, 7:37, 7:38, 7:40, 7:47, 8:6, 8:17, 8:18, 8:19, 8:20, 8:23, 8:25, 8:26, 8:30, 8:35, 8:40, 8:41, 8:42, 9:3, 9:10, 9:24, 9:27, 9:29, 9:32, 9:33, 9:37, 9:45, 10:1, 10:3, 10:14, 10:18, 10:20, 10:22, 10:23, 10:35, 10:46, 11:15, 11:17, 11:19, 11:21, 11:23, 11:28, 11:31, 11:32, 11:35, 11:39, 11:40, 11:44, 11:46, 12:2, 12:3, 12:8, 12:9, 12:14, 12:18, 12:21, 12:29, 12:43, 13:15, 13:20, 13:27, 13:46, 14:4, 14:6, 14:11, 14:14, 14:25, 14:32, 14:37, 15:1, 15:4, 15:6, 15:20, 15:28, 15:39, 15:43, 15:45, 16:2, 16:6, 16:14, 16:18, 16:32, 16:44, 17:10, 17:24, 17:27, 17:31, 17:34, 17:37, 17:40, 17:41, 17:43, 17:44, 18:1, 18:2, 18:4, 18:6, 18:7, 18:9, 18:10, 18:13, 18:17, 18:21, 18:22, 18:26, 18:29, 18:39, 18:40, 18:41, 18:42, 18:44, 19:1, 19:4, 19:5, 19:7, 19:12, 19:14, 19:18, 19:20, 19:25, 19:30, 19:31, 19:41, 19:46, 20:2, 20:4, 20:6, 20:7, 20:8, 20:9, 20:12, 20:17, 20:19, 20:36, 20:40, 20:45, 21:5, 21:8, 21:9, 21:11, 21:20, 21:23, 21:27, 21:30, 21:34, 21:35, 21:40, 21:41, 21:46, 22:5, 22:8, 22:10, 22:16, 22:20, 22:23, 22:33, 22:34, 22:35, 22:40, 22:41, 22:42, 23:3, 23:4, 23:13, 23:18, 23:26, 23:28, 23:32, 23:33, 23:44, 23:46, 24:6, 24:7, 24:8, 24:10, 24:20, 24:24, 24:25, 24:28, 24:32, 24:34, 25:13, 25:14, 25:19, 25:20, 25:22, 25:26, 25:29, 25:30, 25:31, 25:32, 25:33, 25:36, 25:37, 25:39, 26:4, 26:9, 26:12, 26:13, 26:16, 26:20, 26:31, 26:34, 26:42, 26:43, 26:44, 26:45, 27:28, 27:35, 27:36, 27:43, 27:44, 28:3, 28:4, 28:13, 28:17, 28:20, 28:21, 28:22, 28:25, 28:37, 28:43, 29:1, 29:2, 29:6, 29:12, 29:13, 29:15, 29:16, 29:20, 29:24, 29:26, 29:35, 29:37, 29:38, 29:44, 30:4, 30:8, 30:10, 30:14, 30:18, 30:19, 30:26, 30:28, 30:34, 30:45, 30:46, 31:8, 31:45, 32:20, 32:25, 32:30, 32:31, 32:33, 32:35, 32:38, 32:40, 32:41, 32:42, 32:45, 33:4, 33:10, 33:12, 33:13, 33:14, 33:20, 33:21, 33:43, 33:45, 34:4, 34:11, 34:30, 34:34, 34:36, 34:44, 35:4, 35:13, 35:15, 35:16, 35:17, 35:23, 35:27, 35:31, 35:34, 35:35, 35:37, 35:38, 35:39, 35:42, 35:47, 36:5, 36:6, 36:9, 36:11, 36:15, 36:20, 36:23, 36:28, 36:30, 36:31, 36:34, 36:35, 36:36, 36:37, 36:39, 36:43, 36:44, 36:45, 36:46, 37:1, 37:4, 37:5, 37:10, 37:12, 37:17, 37:23, 37:30, 37:32, 37:42, 37:43, 37:44, 37:45, 38:1, 38:4, 38:5, 38:15, 38:17, 38:18, 38:21, 38:29, 38:34, 38:37, 38:41, 38:42, 38:43, 38:46, 38:47, 39:8, 39:9, 39:11, 39:14, 39:18, 39:20, 39:22, 39:24, 39:26, 39:29, 39:31, 39:33, 39:34, 39:47, 40:10, 40:22, 40:31, 40:35, 40:40, 40:47, 41:3, 41:4, 41:6, 41:7, 41:9, 41:14, 41:27, 41:30, 41:39, 41:40, 41:41, 42:10, 42:13, 42:16, 42:19, 42:25, 42:27, 42:28, 42:29, 42:30, 42:31, 42:33, 42:38, 42:39, 42:44, 42:45, 42:46, 43:1, 43:3, 43:9, 43:11, 43:16, 43:30, 43:37, 43:42, 44:5, 44:6, 44:10, 44:11, 44:16, 44:38, 44:39, 44:40, 44:42, 44:44, 44:47, 45:3, 45:8, 45:19, 45:23, 45:24, 45:31, 45:38, 45:44, 46:3, 46:6, 46:10, 46:13, 46:14, 46:18, 46:23, 46:27, 46:29, 46:30, 46:31, 46:39, 47:8, 47:10, 47:11, 47:16, 47:24, 47:27, 47:28, 47:29, 47:31, 47:45, 47:46, 48:6, 48:9, 48:15, 48:16, 48:18, 48:22, 48:25, 48:26, 48:29, 48:45, 48:47, 49:4, 49:9, 49:13, 49:18, 49:20, 49:22, 49:26, 49:29, 49:30, 49:34, 49:35, 49:37, 49:40, 49:43, 49:47, 50:2, 50:8, 50:13, 50:16, 50:26, 50:27, 50:29, 50:31, 50:32, 50:36, 50:37, 50:39, 50:42, 50:43, 50:44, 51:9, 51:13, 51:16, 51:19, 51:24, 51:25, 51:26, 51:32, 51:33, 51:40, 51:46, 52:2, 52:3, 52:4, 52:14, 52:16, 52:21, 52:27, 52:29, 52:31, 52:36, 52:40, 52:47, 53:1, 53:8, 53:12, 53:15, 53:25, 53:30, 53:35, 53:38, 53:47, 54:1, 54:8, 54:9, 54:15, 54:18, 54:24, 54:26, 54:29, 54:35, 54:36, 54:38, 54:43, 54:44, 55:4, 55:5, 55:6, 55:7, 55:16, 55:19, 55:20, 55:26, 55:27, 55:32, 55:33, 55:34, 55:37, 55:41, 55:43, 55:45, 55:47, 56:1, 56:3, 56:4, 56:12, 56:19, 56:20, 56:31, 56:39, 56:43, 56:44, 57:3, 57:16, 57:19, 57:21, 57:23, 57:31, 57:33, 57:35, 58:2, 58:5, 58:7, 58:8, 58:9, 58:17, 58:18, 58:21, 58:22, 58:26, 58:30, 58:33, 58:35, 58:38, 58:40, 58:42, 58:45, 58:46, 58:47, 59:1, 59:17, 59:23, 59:24, 59:26, 59:32, 59:36, 59:37, 59:39, 59:40, 59:45, 60:1, 60:4, 60:8, 60:10, 60:11, 60:15, 60:21, 60:22, 60:23, 60:38, 60:43, 60:47, 61:2, 61:8, 61:10, 61:17, 61:26, 61:39, 61:40, 61:41, 61:43, 61:46, 62:1, 62:7, 62:24, 62:25, 62:28, 62:33, 62:34, 62:36, 62:42, 62:43, 62:47, 63:10, 63:19, 63:22, 63:23, 63:27, 63:29, 63:35, 63:40, 63:46, 63:47, 64:10, 64:17, 64:27, 64:29, 64:34, 64:35, 64:45, 64:47, 65:3, 65:10, 65:24, 65:26, 65:27, 65:30, 65:31, 65:33, 65:37, 65:42, 65:44, 65:46, 66:3, 66:7, 66:13, 66:14, 66:31, 66:32, 66:33, 66:34, 66:39, 66:40, 66:42, 66:46, 67:2, 67:5, 67:21, 67:24, 67:26, 67:30, 67:43, 67:45, 67:46,

67:47, 68:10, 68:26, 68:31, 68:32, 68:33, 68:36, 68:44, 69:2, 69:5, 69:6, 69:10, 69:22, 69:26, 69:28, 69:32, 69:40, 69:47, 70:3, 70:4, 70:7, 70:10, 70:12, 70:23, 70:24, 70:34, 70:35, 70:38, 71:1, 71:3, 71:10, 71:11, 71:12, 71:21, 71:22, 71:24, 71:40, 71:41, 71:46, 72:5, 72:13, 72:14, 72:18, 72:20, 72:25, 72:27, 72:29, 72:32, 72:36, 73:2, 73:8, 73:10, 73:12, 73:14, 73:18, 73:19, 73:28, 73:30, 73:33, 73:41, 74:7, 74:8, 74:19, 74:20, 74:26, 74:34, 74:36, 74:37, 74:38, 75:5, 75:17, 75:20, 75:22, 75:24, 75:26, 75:31, 75:37, 75:39, 75:40, 76:1, 76:3, 76:21, 76:23, 76:24, 76:29, 76:31, 76:36, 76:37, 77:3, 77:5, 77:6, 77:7, 77:8, 77:13, 77:24, 77:25, 77:26, 77:30, 77:38, 77:42, 77:45, 77:47, 78:2, 78:22, 78:32, 78:40, 78:45, 79:7, 79:9, 79:15, 79:37, 79:43, 79:45, 80:7, 80:11, 80:17, 80:18, 80:22, 80:25, 80:26, 80:33, 80:34, 80:36, 80:40, 80:47, 81:3, 81:10, 81:11, 81:12, 81:14, 81:15, 81:18, 81:24, 81:25, 81:26, 81:32, 81:34, 81:36, 81:42, 81:45, 82:4, 82:7, 82:15, 82:17, 82:18, 82:22, 82:24, 82:37, 82:39, 82:44, 83:3, 83:5, 83:7, 83:8, 83:10, 83:14, 83:19, 83:20, 83:22, 83:27, 83:32, 83:35, 83:36, 83:41, 83:43, 83:44, 83:47, 84:1, 84:6, 84:7, 84:10, 84:13, 84:14, 84:16, 84:17, 84:19, 84:20, 84:27, 84:38, 84:39, 84:41, 85:1, 85:2, 85:3, 85:4, 85:6, 85:8, 85:15, 85:17, 85:22, 85:24, 85:29, 85:31, 85:35, 85:37, 85:42, 85:43, 86:2

today [15] - 2:31, 6:46, 7:31, 9:8, 9:10, 9:11, 9:18, 11:4, 31:25, 44:37, 60:5, 60:11, 62:10, 65:10, 70:11
today's [2] - 44:10, 46:10
together [5] - 2:44, 2:46, 28:4, 60:26, 73:18
told [1] - 68:21
too [20] - 3:40, 7:44, 9:43, 10:36, 15:9, 19:43, 21:27, 21:31, 23:3, 27:33, 40:30, 43:35, 43:36, 45:44, 46:9, 47:45, 47:47, 54:14, 79:13, 80:16
took [1] - 71:35
tools [3] - 24:29, 54:17, 69:41
top [1] - 67:14
topic [5] - 4:44, 7:31, 7:32, 14:7, 44:31
topical [4] - 2:45, 4:3, 44:14, 44:20
tort [3] - 36:9, 36:25, 38:17
torturous [1] - 56:34
touch [2] - 4:16, 47:20
touched [3] - 8:9, 60:12, 61:30
tough [2] - 22:1
toughened [1] - 72:26
toughened-up [1] - 72:26
tougher [2] - 67:42, 70:20
tour [1] - 33:43
towards [10] - 5:14, 28:5, 31:1, 39:19, 43:13, 53:23, 53:26, 56:21, 66:27, 84:5
toxic [1] - 65:24
trace [2] - 12:14, 12:38
tracing [1] - 32:41
track [2] - 52:9, 68:1
trading [1] - 16:18
traditional [8] - 2:28, 3:18, 29:7, 47:22, 51:27, 56:10, 59:29, 84:21
traditionally [3] - 28:42, 29:21, 54:29
train [2] - 73:1, 77:40
trained [1] - 43:2
training [1] - 43:24
transacting [1] - 40:15
transaction [1] - 41:6
transactions [1] - 7:20
transformed [2] - 39:7, 80:23
transparency [1] - 51:3
treated [5] - 41:24, 41:31, 45:46, 57:40, 58:23
treatment [1] - 47:12
trenchant [2] - 28:12, 40:21
trend [2] - 28:41, 43:13
trends [1] - 62:1
trial [1] - 71:29
tried [3] - 11:44, 23:13, 33:20
tries [1] - 24:24
trouble [1] - 72:35
troubled [1] - 59:22
troubling [1] - 50:33
truck [1] - 61:11
true [1] - 38:21
truly [2] - 28:2, 53:28
trump [1] - 84:6
trumped [1] - 64:36
trust [13] - 10:42, 44:10, 46:27, 47:12, 57:21, 57:38, 61:35, 66:20, 66:22, 66:24, 72:9, 72:38, 83:16
truth [1] - 21:10
try [7] - 21:46, 23:35, 24:32, 24:34, 57:32, 72:27, 81:13
trying [6] - 18:29, 20:12, 22:5, 69:26, 73:28, 83:3
Tuesday [1] - 1:24
turbulence [1] - 3:11
turbulent [1] - 3:10
turf [1] - 82:28
turn [7] - 10:10, 34:44, 45:9, 46:23, 58:29, 65:10, 69:5
Turnbull [1] - 61:27
turned [1] - 54:9
turning [4] - 27:15, 41:3, 63:38, 78:32
turnover [1] - 43:27
twin [2] - 77:36, 78:14
Twin [2] - 78:15, 78:18
twisted [1] - 7:10
Twitter [1] - 2:16
two [18] - 3:17, 5:25, 5:32, 24:13, 28:15, 33:21, 36:47, 40:27, 40:40, 44:14, 46:44, 49:34, 53:41, 70:45, 71:39, 76:27, 77:7, 83:19
type [1] - 44:21
types [3] - 26:38, 40:9, 41:30
typically [1] - 54:26

U

UK [4] - 7:23, 17:38, 24:21, 31:31
ultimate [5] - 8:28, 8:31, 14:31, 14:33, 58:11
ultimately [4] - 5:14, 53:2, 57:30, 79:38
unable [1] - 18:40
unarguable [1] - 28:10
unavoidable [1] - 78:1
unaware [1] - 63:14
uncanny [1] - 60:22
uncertain [2] - 55:13, 56:35
uncertainty [2] - 3:41, 79:4
unclear [1] - 46:37
unconscionable [1] - 61:36
uncovered [1] - 80:25
under [15] - 18:34, 35:43, 37:39, 39:22, 44:45, 48:38, 52:22, 52:23, 60:35, 64:44, 65:22, 72:21, 74:35, 75:19, 83:23
underlain [1] - 5:19
underlie [1] - 6:40
underlying [4] - 3:43, 5:32, 25:46, 42:6
underpinned [1] - 6:7
understand [8] - 28:37, 68:24, 68:30, 68:34, 69:3, 74:36, 82:30
understandably [2] - 56:39, 59:15
understanding [5] - 39:7, 55:26, 55:27, 60:44, 74:4
understood [1] - 73:45
undertake [2] - 22:12, 70:34
undertaken [3] - 17:32, 45:8, 75:9
undertaking [4] - 43:32, 68:18, 73:13, 73:47
undertakings [6] - 52:7, 54:16, 70:25, 70:33, 71:7, 82:16
underway [1] - 27:11
underwriters [1] - 82:29
unemployed [2] - 64:43, 64:44
unethically [1] - 48:27
unfair [1] - 58:40
unfairness [1] - 55:2
unintended [1] - 24:35
unique [2] - 31:28, 81:25
United [3] - 4:19, 9:17, 13:27
University [10] - 2:37, 4:8, 4:30, 7:17, 7:18, 7:22, 19:29, 26:17, 26:35, 26:47
unless [4] - 37:19, 37:20, 38:30, 54:4
unlike [2] - 36:9, 60:42
unpredictable [1] - 55:13
unreasonable [1] - 58:41
unreasonably [1] - 71:34
unrelenting [1] - 45:4
unsophisticated [2] - 28:25, 32:30
unstable [1] - 28:30
unsuccessful [1] - 52:35
unsuitable [1] - 62:44
unsurprising [1] - 6:22
UNSW [2] - 22:29, 24:1
until [2] - 20:23, 79:25
unusual [1] - 81:35
up [41] - 4:47, 5:26, 6:3, 6:31, 11:21, 14:22, 15:42, 20:6, 20:9, 20:10, 23:18, 24:5, 24:15, 24:21, 26:13, 28:15, 30:46, 41:20, 42:19, 52:37, 53:31, 61:28, 63:8, 63:13, 63:15, 64:41, 66:47, 67:4, 68:39, 72:26, 72:31, 74:7, 74:34, 75:3, 79:25, 80:17, 82:14, 85:10, 85:12, 85:29
upon [6] - 2:6, 22:31,

32:13, 32:21, 68:25, 77:21
upper [1] - 53:39
upstairs [1] - 77:7
Ure [1] - 13:7
Ure's [1] - 11:25
urge [1] - 56:47
urged [1] - 72:5
US [4] - 31:31, 54:28, 85:10, 85:14
us [18] - 3:47, 6:47, 9:7, 9:10, 11:47, 16:32, 22:18, 25:4, 39:40, 43:2, 44:14, 51:8, 65:10, 65:37, 77:7, 79:14, 79:16, 84:1
USA [1] - 19:32
use [8] - 8:30, 16:3, 39:22, 51:27, 56:43, 78:40, 80:33, 80:45
used [7] - 3:27, 5:21, 50:39, 75:13, 76:29, 79:25, 82:19
useful [1] - 28:22
using [1] - 21:30
usual [3] - 26:9, 43:43, 85:36
usually [4] - 13:19, 38:25, 40:18, 63:11

V

v [20] - 4:33, 8:4, 11:38, 12:9, 12:22, 12:35, 12:47, 13:10, 13:17, 14:13, 14:16, 14:47, 15:35, 17:18, 17:19, 19:10, 34:24, 35:10, 36:8, 83:21
valid [2] - 54:15, 56:17
validates [1] - 66:25
validity [3] - 12:18, 14:14, 52:16
valuable [2] - 45:5, 56:23
value [5] - 23:25, 29:29, 47:36, 50:8, 59:25
values [9] - 10:41, 28:47, 29:15, 46:2, 48:23, 48:31, 48:41, 49:7, 49:23
variable [4] - 23:41, 69:20, 69:23, 69:44
variations [1] - 53:12
variegated [1] - 34:12
variety [9] - 8:21, 10:32, 17:16, 17:39, 18:7, 20:4, 24:29, 24:31, 28:22
various [8] - 11:7, 11:24, 14:2, 27:12, 33:46, 40:37, 45:29, 45:38
vast [1] - 53:4
vector [1] - 39:19
vehemence [1] - 49:18
ventilated [1] - 85:23
versa [2] - 13:47, 51:44
version [5] - 29:47, 34:12, 34:46, 39:21, 41:35
versions [6] - 32:43, 33:9, 39:27, 53:10, 53:21, 53:34
versus [4] - 10:1, 11:9, 15:12, 15:14
very [74] - 2:33, 4:9, 6:46, 7:28, 9:19, 11:10, 13:4, 13:45, 14:38, 17:6, 18:23, 22:32, 23:45, 24:2, 24:7, 25:18, 26:30, 26:37, 26:41, 28:22, 28:35, 32:26, 32:43, 34:4, 34:36, 35:24, 41:44, 42:1, 42:37, 43:10, 47:28, 50:4, 51:1, 55:19, 55:20, 56:8, 59:7, 59:11, 59:12, 59:28, 59:43, 59:46, 60:18, 60:21, 60:45, 64:16, 65:2, 67:15, 67:17, 67:29, 67:40, 68:40, 70:17, 72:18, 73:24, 73:26, 73:27, 74:10, 75:25, 76:20, 76:24, 77:16, 78:29, 78:32, 79:16, 81:10, 81:34, 81:40, 82:10, 82:16, 85:27
vexed [1] - 4:37
vice [2] - 13:47, 51:44
victim [1] - 57:35
Victorian [1] - 13:26
view [37] - 3:18, 5:43, 6:2, 6:6, 6:26, 8:15, 8:17, 8:30, 8:32, 10:12, 10:29, 12:30, 13:11, 13:15, 13:32, 18:33, 19:42, 21:28, 21:42, 33:30, 41:4, 42:14, 49:44, 57:38, 64:9, 65:2, 65:24, 65:27, 67:26, 73:30, 76:39, 77:15, 80:10, 80:47, 81:22, 83:10
viewed [1] - 8:28
viewing [2] - 9:33, 66:36
views [12] - 5:5, 5:9, 5:19, 5:27, 6:15, 7:3, 7:6, 44:37, 52:2, 81:35, 81:46, 82:42
vindicate [2] - 38:4, 39:18
virtually [2] - 6:19, 56:35
visiting [1] - 7:23
vitae [1] - 60:6
vivid [4] - 50:10, 50:34, 54:37, 56:13
voice [2] - 29:47, 73:21
voiced [1] - 48:14
voices [1] - 47:11
volume [1] - 63:20
vote [3] - 22:33, 40:10, 42:6
voted [2] - 14:41, 67:38
voting [2] - 15:15
Vrisakis [1] - 36:8
vulnerability [1] - 10:43

W

WA [1] - 75:4
wait [2] - 19:25, 51:33
WALES [1] - 1:8
Wales [8] - 1:27, 2:36, 4:30, 7:22, 13:2, 13:10, 26:18, 26:35
Walker [1] - 19:10
Wallis [1] - 45:10
want [21] - 20:6, 22:8, 23:15, 23:17, 23:20, 23:22, 24:40, 26:4, 57:33, 58:17, 58:18, 58:21, 63:19, 69:30, 71:41, 79:16, 80:18, 80:40, 81:26, 82:37, 83:19
wanted [1] - 20:36
wants [3] - 71:2, 71:3, 75:20
war [1] - 82:28
warning [4] - 46:30, 52:47, 53:7, 57:12
warrant [1] - 7:40
WAS [1] - 86:5
was [151] - 3:28, 4:21, 4:23, 4:32, 5:34, 9:5, 11:4, 12:11, 12:21, 14:4, 14:12, 14:13, 14:20, 15:22, 17:17, 17:19, 19:6, 19:7, 19:9, 22:11, 25:23, 26:28, 30:27, 31:19, 33:19, 33:25, 33:41, 35:10, 36:7, 39:25, 39:29, 44:35, 45:7, 45:10, 46:29, 46:30, 46:33, 46:37, 47:45, 47:47, 48:14, 49:31, 50:15, 50:17, 51:6, 52:30, 52:37, 54:40, 59:7, 59:46, 60:8, 60:24, 61:10, 61:11, 61:20, 61:25, 61:32, 61:36, 61:43, 62:8, 62:23, 62:29, 62:30, 62:38, 62:40, 63:5, 63:12, 63:16, 63:22, 63:27, 63:28, 63:29, 63:30, 63:32, 63:33, 63:34, 63:37, 63:39, 64:4, 64:5, 64:6, 64:23, 64:24, 64:28, 64:29, 64:33, 64:34, 64:35, 64:39, 64:40, 64:45, 65:41, 65:46, 66:3, 66:7, 66:15, 66:31, 67:9, 67:27, 67:38, 67:45, 67:46, 68:1, 68:10, 68:14, 68:25, 68:26, 69:14, 71:10, 71:12, 71:13, 71:14, 71:15, 71:16, 71:33, 71:35, 71:36, 71:37, 71:38, 71:43, 72:2, 72:45, 73:37, 73:40, 73:45, 74:1, 74:2, 74:11, 74:12, 74:19, 74:24, 74:28, 74:34, 74:39, 74:40, 75:3, 75:11, 75:30, 75:32, 75:34, 78:40, 81:29, 81:31, 81:32, 82:31, 85:35
wasn't [2] - 31:6, 68:39
watch [1] - 67:42
watching [2] - 43:30, 43:35
water [2] - 3:20, 3:21
watershed [1] - 75:24
waxed [1] - 46:24
way [55] - 2:3, 3:21, 16:14, 17:31, 18:42, 23:18, 23:44, 23:45, 24:28, 26:9, 27:11, 29:15, 30:11, 30:13, 34:23, 37:12, 38:4, 41:15, 42:34, 43:26, 43:43, 45:39, 46:20, 49:35, 49:36, 50:1, 50:10, 50:24, 50:25, 51:43, 54:41, 57:2, 57:14, 60:41, 62:1, 62:16, 62:42, 64:3, 67:1, 69:26, 69:28, 69:46, 74:34, 76:24, 79:12, 80:7, 80:19, 81:3, 81:12, 81:18, 83:3, 84:14, 84:25
ways [11] - 16:39, 20:45, 27:13, 34:4, 42:1, 59:31, 77:17, 81:21, 82:5, 83:34, 83:38
WBC [1] - 61:2
we [196] - 2:5, 2:8, 2:28, 2:34, 3:31, 4:2, 4:41, 5:26, 6:31, 6:34, 6:46, 7:39, 9:3, 9:11, 9:18, 9:40, 9:43, 10:7, 11:4, 11:6, 11:34, 12:7, 12:8, 12:17, 12:27, 13:15, 13:17, 13:25, 14:9, 14:14, 15:10, 15:42, 16:28, 17:24, 17:25, 18:1, 18:5, 18:21, 18:23, 18:25, 20:18, 20:27, 20:31, 21:6, 21:17, 21:18, 21:43, 21:47, 22:1, 22:4, 22:5, 22:8, 22:15, 22:23, 22:24, 23:5, 23:16, 23:17, 23:22, 23:33, 23:36, 24:14, 24:29, 24:37, 24:39, 24:40, 24:44, 25:8, 25:14, 25:20, 25:45, 26:2, 26:11, 26:38, 27:8, 27:11, 27:34, 28:37, 30:6, 30:7, 36:34, 37:16, 38:41, 39:2, 39:34, 39:35, 41:47, 42:23, 42:25, 42:44, 43:1, 43:2, 43:10, 43:34, 43:46, 47:19, 47:34, 51:6, 51:33, 51:35, 54:26, 54:29, 57:32, 58:2, 58:14, 58:17, 58:18, 58:21, 59:11, 59:12, 59:28, 60:1, 60:43, 61:15, 62:12, 62:47, 64:8, 65:32, 68:6, 68:17, 68:18, 68:19, 68:21, 68:23, 68:38, 68:39, 69:2, 69:26, 69:42, 70:1, 70:9, 70:10, 70:12,

70:17, 72:25, 72:36, 72:37, 73:24, 73:30, 73:31, 73:42, 74:25, 74:34, 74:36, 74:37, 74:38, 75:24, 75:29, 75:31, 75:35, 75:36, 75:39, 75:41, 75:42, 75:44, 75:47, 76:23, 76:45, 77:5, 77:10, 77:36, 77:40, 78:17, 78:46, 79:8, 79:14, 80:21, 80:23, 80:32, 81:18, 81:19, 83:11, 83:35, 84:3, 84:38, 84:40, 84:46, 84:47, 85:2, 85:5, 85:13, 85:18
We'll [1] - 68:14
we're [4] - 20:7, 20:12, 26:5
weaknesses [2] - 47:40, 50:9
wealth [1] - 44:30
week [2] - 71:10, 71:31
weigh [1] - 27:43
weighed [2] - 30:4, 42:33
weight [2] - 32:35, 40:6
weighted [1] - 56:21
welcome [7] - 2:3, 2:20, 2:25, 44:9, 44:32, 60:4, 60:10
welcomed [1] - 2:7
welcoming [1] - 7:26
Well [4] - 13:1, 20:7, 22:10, 22:20
well [43] - 4:9, 6:4, 6:5, 13:23, 13:41, 14:7, 14:37, 16:1, 18:43, 18:46, 21:46, 23:26, 23:29, 25:10, 28:4, 28:37, 31:5, 37:27, 42:25, 44:34, 47:28, 53:18, 55:40, 55:43, 57:9, 57:15, 58:22, 61:15, 62:47, 63:17, 64:5, 65:2, 67:7, 67:46, 74:27, 76:35, 76:45, 77:29, 78:39, 79:1, 79:13, 79:17, 81:44
well-known [1] - 64:5
well-promoted [1] - 57:15
well-publicised [1] - 57:9
well-worn [1] - 14:7
wellbeing [2] - 5:15, 5:24
Welsh [1] - 31:14
went [11] - 9:28, 12:14, 16:18, 27:35, 46:40, 48:46, 72:43, 72:44, 72:46, 80:23, 81:41
were [65] - 9:8, 9:22, 10:20, 11:45, 15:5, 16:15, 22:23, 27:7, 28:26, 31:5, 31:6, 31:20, 33:10, 33:22, 33:39, 46:44, 48:2, 49:8, 51:14, 52:29, 59:23, 60:43, 61:30, 61:47, 62:1, 62:27, 63:4, 63:7, 63:13, 63:14, 63:17, 63:21, 63:22, 63:35, 63:42, 64:1, 64:12, 64:29, 64:31, 64:41, 64:42, 64:43, 64:44, 65:27, 65:38, 65:45, 67:28, 67:37, 68:18, 68:19, 68:25, 74:27, 74:37, 75:9, 75:29, 76:8, 81:25, 81:42, 82:10, 82:12, 84:28, 85:47
weren't [1] - 68:21
West [1] - 11:38
Westpac [3] - 71:12, 71:34, 71:40
Westpac's [1] - 71:24
what [112] - 3:34, 3:38, 4:1, 4:15, 4:35, 5:45, 8:6, 8:7, 8:25, 8:43, 8:44, 9:18, 9:39, 10:7, 10:8, 11:31, 11:32, 11:35, 12:7, 12:26, 13:18, 14:9, 14:39, 15:38, 16:3, 18:22, 18:26, 18:30, 19:34, 20:12, 20:15, 20:17, 20:18, 20:39, 21:4, 21:8, 21:32, 21:43, 22:4, 22:5, 22:8, 22:15, 22:16, 23:15, 23:17, 23:19, 23:35, 24:13, 25:3, 25:4, 25:18, 25:23, 25:25, 26:4, 26:20, 28:12, 28:13, 28:15, 28:20, 29:19, 30:45, 31:8, 34:36, 35:23, 38:34, 39:8, 42:16, 42:23, 43:6, 44:21, 51:33, 58:11, 58:47, 59:18, 60:38, 63:12, 63:29, 64:26, 65:10, 65:11, 67:2, 67:24, 67:47, 68:26, 68:29, 68:32, 69:18, 71:35, 71:41, 72:1, 72:36, 74:7, 74:36, 77:11, 77:13, 77:25, 77:40, 78:17, 78:46, 79:13, 79:35, 80:23, 80:37, 81:32, 81:41, 84:12, 85:3, 85:26
What [1] - 47:34
what's [2] - 24:15, 70:19
whatever [3] - 6:5, 18:11, 43:22
wheel [2] - 21:45, 22:6
when [37] - 5:33, 13:18, 14:5, 17:4, 17:16, 17:28, 26:2, 26:29, 29:21, 36:7, 37:25, 37:27, 38:8, 40:14, 49:20, 50:17, 52:31, 53:17, 58:23, 59:39, 60:23, 63:22, 63:36, 66:15, 68:8, 68:34, 70:7, 71:27, 72:8, 74:22, 75:29, 76:21, 79:14, 82:9, 82:31, 85:28
whenever [1] - 80:18
where [55] - 7:19, 11:14, 11:18, 13:30, 13:41, 15:10, 15:36, 15:37, 15:42, 21:6, 21:30, 23:33, 24:21, 25:1, 25:9, 25:37, 30:6, 35:19, 36:27, 37:31, 38:26, 45:42, 45:43, 51:9, 53:14, 53:16, 53:40, 55:2, 55:34, 57:45, 58:35, 62:6, 62:38, 63:12, 63:41, 64:5, 64:8, 66:43, 69:10, 69:23, 75:26, 75:42, 75:47, 76:6, 78:1, 78:37, 79:41, 81:44, 82:3, 83:5, 84:34, 85:6, 85:14, 85:18, 85:33
whereas [2] - 9:44, 10:38
wherever [1] - 6:22
whether [42] - 3:18, 3:22, 4:31, 5:21, 5:23, 5:38, 5:40, 6:7, 6:9, 6:30, 6:36, 7:39, 7:42, 19:18, 23:11, 34:32, 40:17, 41:4, 44:46, 45:38, 46:38, 51:46, 52:1, 59:36, 62:40, 62:43, 63:27, 65:38, 67:26, 74:1, 74:2, 75:44, 76:37, 76:38, 77:24, 81:3, 81:22, 81:24, 82:6, 82:24, 82:30
which [117] - 2:4, 2:8, 2:16, 2:28, 2:34, 3:23, 3:38, 5:3, 5:41, 6:3, 6:40, 7:14, 7:34, 7:37, 9:15, 9:18, 11:7, 12:9, 13:44, 16:10, 17:14, 17:32, 17:39, 17:42, 20:42, 20:45, 21:42, 22:13, 25:45, 26:29, 28:15, 29:2, 30:20, 30:47, 31:16, 31:37, 31:44, 32:3, 34:2, 36:15, 36:31, 37:1, 37:3, 37:7, 38:14, 38:35, 40:10, 41:20, 42:45, 44:15, 45:9, 47:17, 48:16, 48:24, 49:10, 50:32, 51:40, 52:7, 54:25, 54:36, 55:31, 56:30, 59:11, 60:20, 60:42, 61:2, 61:10, 61:16, 61:23, 61:25, 61:34, 62:30, 63:7, 63:20, 63:29, 63:34, 64:1, 64:13, 64:18, 64:39, 65:25, 65:26, 65:41, 66:41, 67:3, 68:2, 68:24, 69:20, 69:33, 71:13, 71:26, 72:28, 75:3, 75:16, 77:1, 77:35, 77:47, 78:34, 79:8, 79:36, 79:37, 81:5, 81:18, 81:43, 83:34, 83:42, 83:47, 84:11, 84:13, 84:19, 84:20, 84:23, 84:29, 85:22, 85:46
whichever [1] - 6:6
while [13] - 18:8, 20:16, 28:47, 31:32, 32:12, 49:3, 49:43, 53:36, 56:7, 57:20, 58:32, 74:11, 75:19
whilst [1] - 3:41
Whilst [1] - 76:21
Whincop [1] - 30:39
whistleblowing [2] - 48:34, 48:38
Whitehouse [1] - 17:19
who [48] - 2:31, 3:5, 4:30, 4:42, 6:47, 9:42, 10:32, 15:11, 15:28, 15:46, 16:40, 18:37, 19:7, 21:47, 25:36, 29:14, 32:8, 32:28, 35:19, 42:27, 43:31, 44:34, 45:33, 47:27, 50:28, 53:25, 53:38, 55:40, 55:43, 60:22, 60:25, 61:11, 63:9, 63:16, 63:26, 64:18, 64:24, 64:43, 65:21, 65:44, 67:34, 67:40, 68:10, 68:30, 71:12, 71:32, 83:21, 84:39
whole [10] - 12:11, 12:21, 12:31, 13:19, 13:30, 13:39, 16:39, 17:46, 62:8, 80:17
whole" [1] - 13:35
wholesale [2] - 23:34, 72:36
whom [8] - 26:45, 28:17, 29:16, 32:25, 36:31, 36:35, 39:20, 40:23
whose [4] - 8:12, 11:10, 26:46, 37:35
Why [1] - 6:18
why [19] - 11:3, 16:25, 18:47, 21:21, 48:17, 49:26, 49:28, 50:42, 54:8, 58:20, 61:15, 65:3, 67:9, 68:30, 68:35, 69:3, 76:3, 78:12, 85:2
wide [10] - 8:21, 17:6, 33:2, 33:7, 34:23, 34:25, 34:39, 39:46, 41:9, 61:44
wide-ranging [1] - 34:25
widely [3] - 34:22, 38:5, 41:41
wider [18] - 17:21, 27:24, 27:41, 27:45, 29:6, 30:4, 30:13, 30:14, 32:26, 34:12, 37:26, 39:6, 39:11, 39:19, 41:27, 41:29, 42:32, 60:14
widespread [1] - 28:25
wilful [1] - 56:28
will [98] - 2:8, 2:33, 4:7, 4:9, 4:13, 4:16, 4:24, 4:29, 4:30, 6:30, 6:36, 6:37, 6:46, 6:47, 7:8, 7:11, 8:10, 10:1, 10:6, 13:19, 13:20, 14:19, 17:42, 19:20, 19:41,

20:3, 21:29, 22:10, 24:5, 25:3, 25:25, 25:32, 26:11, 26:18, 35:42, 35:47, 36:30, 37:2, 39:13, 40:37, 41:29, 41:34, 41:35, 42:3, 42:18, 43:46, 44:5, 44:13, 44:17, 44:31, 45:35, 50:26, 51:31, 51:33, 52:18, 52:20, 54:3, 55:41, 55:45, 56:22, 56:30, 57:33, 58:23, 58:39, 59:37, 59:38, 59:45, 60:11, 60:33, 60:47, 65:25, 66:20, 67:4, 69:18, 69:34, 70:24, 71:44, 73:6, 73:15, 75:44, 75:45, 76:4, 76:5, 76:41, 76:43, 77:10, 77:11, 77:40, 77:42, 82:5, 82:14, 83:5, 83:46, 84:34, 85:23
willingness [2] - 56:31, 59:26
Wilson [1] - 17:19
Wimborne [1] - 19:10
winged [1] - 34:5
wish [1] - 53:15
wishes [2] - 15:2, 34:30
with [171] - 2:45, 3:19, 3:29, 4:10, 5:26, 6:41, 7:8, 7:30, 8:18, 9:10, 9:11, 9:15, 9:33, 10:29, 10:40, 10:42, 13:6, 14:22, 14:29, 14:31, 17:25, 18:2, 18:13, 18:15, 18:16, 18:25, 18:37, 19:14, 19:24, 20:37, 20:39, 21:15, 21:32, 21:46, 22:6, 22:11, 22:36, 23:8, 23:34, 24:14, 24:15, 24:16, 24:34, 26:1, 26:6, 26:13, 26:45, 28:3, 28:20, 28:44, 30:15, 30:41, 31:11, 31:15, 32:29, 33:5, 33:36, 34:10, 34:21, 34:22, 34:41, 35:32, 36:21, 37:3, 37:40, 40:15, 41:25, 41:31, 41:32, 41:41, 42:5, 42:40, 42:43, 42:45, 43:41, 44:7, 44:11, 45:1, 45:14, 45:44, 45:45, 47:2, 47:5, 47:10, 47:19, 47:21, 47:22, 47:31, 47:33, 47:37, 47:46, 49:1, 50:17, 51:18, 51:44, 52:2, 52:31, 52:45, 52:46, 53:6, 53:11, 53:25, 54:1, 54:13, 54:16, 56:18, 57:1, 57:12, 57:35, 57:47, 58:22, 58:41, 59:9, 59:11, 59:29, 60:31, 61:35, 62:17, 62:40, 63:8, 64:20, 64:41, 65:31, 65:36, 66:6, 66:34, 66:47, 67:1, 68:1, 70:9, 70:20, 70:36, 70:39, 70:42, 71:3, 71:13, 71:28, 72:29, 73:13, 74:5, 75:4, 75:10, 76:5, 77:3, 77:10, 78:16, 78:17, 78:47, 79:31, 79:41, 79:44, 80:19, 80:35, 81:4, 81:13, 81:14, 81:15, 81:33, 81:40, 82:4, 82:25, 83:2, 83:25, 84:12, 85:7, 85:8, 85:28, 85:36, 85:46
within [10] - 15:10, 15:23, 25:20, 47:14, 47:33, 49:28, 51:14, 51:18, 53:22, 83:4
without [9] - 3:42, 7:13, 16:34, 35:17, 36:10, 37:11, 47:28, 49:21, 63:41
woman [1] - 67:41
won [1] - 50:20
won't [5] - 10:10, 12:23, 62:10, 69:17, 69:22
wonder [4] - 16:6, 75:21, 77:24, 81:21
wonderful [1] - 71:16
Wood [2] - 4:43, 44:27
word [3] - 6:29, 80:45, 84:38
words [4] - 3:35, 64:43, 72:46, 80:5
work [26] - 6:24, 23:35, 26:30, 42:43, 45:9, 50:18, 50:21, 50:47, 51:1, 52:41, 52:45, 55:30, 55:33, 57:34, 58:1, 69:34, 71:35, 74:19, 79:9, 79:13, 79:16, 81:2, 81:14, 81:15, 85:46, 86:1
workable [1] - 80:36
workaround [1] - 63:40
worked [2] - 7:24, 67:36
working [1] - 51:8
workplace [1] - 38:24
works [1] - 79:1
world [9] - 3:2, 27:23, 35:19, 37:10, 37:15, 38:18, 55:24, 69:30, 84:14
worn [1] - 14:7
worry [2] - 10:11, 81:45
worst [2] - 3:43, 56:9
worth [2] - 3:38, 57:43
would [89] - 2:27, 4:21, 5:44, 6:39, 15:7, 15:8, 16:16, 16:17, 16:45, 17:29, 17:31, 18:12, 18:28, 18:43, 18:44, 18:46, 19:34, 21:40, 21:41, 22:24, 22:47, 23:19, 23:24, 23:25, 23:32, 23:37, 25:13, 25:17, 25:28, 25:36, 26:1, 26:6, 26:11, 27:46, 28:20, 31:7, 32:38, 33:14, 33:16, 35:33, 37:16, 37:36, 38:7, 40:14, 40:25, 42:44, 43:9, 43:42, 46:38, 54:8, 55:13, 55:42, 56:47, 59:24, 63:9, 65:12, 67:2, 67:6, 68:12, 68:20, 68:46, 69:40, 71:9, 71:11, 71:38, 72:25, 74:20, 77:26, 77:35, 78:17, 78:19, 78:22, 78:29, 78:34, 78:37, 79:21, 79:38, 80:15, 80:47, 81:35, 81:37, 82:27, 82:38, 83:12, 84:7, 85:2
wrap [1] - 72:31
wrestling [1] - 83:15
WRIGHT [1] - 43:13
write [1] - 74:26
writing [2] - 10:24, 28:29
written [3] - 12:13, 26:36, 81:45
wrong [6] - 24:14, 24:15, 69:2, 71:41, 80:23, 81:41
wrongdoing [2] - 35:12, 66:19
wrote [3] - 9:25, 15:29, 19:42

Y

Year [1] - 67:38
year [9] - 3:6, 4:2, 11:8, 45:42, 50:21, 66:6, 67:39, 86:2
years [24] - 2:43, 3:28, 4:39, 11:26, 12:13, 15:30, 18:19, 19:42, 23:35, 27:8, 30:40, 31:40, 38:21, 39:3, 39:5, 44:46, 59:29, 60:22, 68:11, 68:13, 69:31, 75:3, 75:9, 85:24
yes [11] - 23:27, 24:25, 25:8, 25:17, 25:43, 26:1, 42:12, 73:35, 74:23, 78:7, 78:25
yesterday [2] - 64:39, 77:41
Yesterday [1] - 73:37
yet [5] - 4:24, 47:30, 66:7, 68:13, 74:47
You [2] - 23:30, 72:26
you [159] - 2:9, 2:11, 2:25, 3:26, 4:21, 4:29, 4:43, 5:17, 5:32, 7:28, 7:31, 11:41, 14:23, 16:33, 18:39, 19:1, 19:3, 19:4, 19:25, 19:31, 19:34, 19:38, 19:40, 20:6, 20:9, 20:10, 20:29, 20:39, 20:41, 20:42, 20:43, 21:23, 21:38, 22:40, 22:46, 23:10, 23:23, 23:29, 24:3, 24:7, 24:8, 24:14, 24:19, 24:25, 24:39, 24:47, 25:35, 26:9, 26:18, 26:39, 26:41, 41:44, 42:9, 42:12, 42:39, 42:41, 43:10, 43:26, 43:27, 43:34, 43:36, 43:41, 43:42, 44:9, 44:10, 44:31, 44:34, 50:20, 53:15, 53:26, 53:27, 53:29, 53:31, 53:36, 53:37, 53:39, 53:40, 59:4, 59:14, 59:16, 59:22, 59:42, 59:43, 59:45, 60:18, 60:21, 60:25, 60:33, 60:42, 61:31, 61:44, 62:30, 62:35, 63:12, 63:19, 64:44, 65:13, 67:10, 67:34, 68:8, 68:30, 69:3, 70:2, 70:7, 70:8, 71:9, 71:41, 71:43, 71:44, 71:46, 72:8, 72:34, 72:45, 73:45, 74:1, 74:2, 74:45, 75:7, 75:17, 75:30, 75:33, 75:34, 76:4, 76:6, 76:7, 76:40, 76:42, 76:43, 77:29, 78:5, 78:9, 78:12, 78:27, 78:33, 78:43, 80:17, 80:18, 80:19, 80:31, 80:32, 80:34, 81:13, 81:26, 81:44, 82:3, 82:38, 83:45, 84:33, 85:16, 85:18, 86:2
you're [4] - 50:29, 67:41, 81:45, 82:40
you've [4] - 71:40, 71:41, 72:35, 82:33
your [23] - 7:34, 20:11, 20:29, 20:38, 22:46, 23:10, 24:4, 42:2, 42:6, 43:19, 43:30, 44:11, 44:26, 71:5, 73:46, 74:31, 76:27, 81:36, 81:37, 84:11, 85:6, 85:8, 85:16
yourself [1] - 19:26