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**PART 7** **CFMEU NSW**

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The importance of the case study  
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The plan of approach

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 REPORT

Volume 3

Royal Commission into Trade Union Governance and Corruption
PART 6: CFMEU ACT

CHAPTER 6.1

INTRODUCTION

1. The Commission held hearings in Canberra between 13 and 31 July 2015, and in Sydney between 4 and 6 August 2015, between 1 and 4 September 2015 and on 7 and 8 October 2015. The hearings concerned the ACT Branch of the Construction and General Division of the CFMEU and the Plumbing Division of the CEPU. The Report deals with the CEPU in Chapter 3.2. A total of 70 witnesses gave evidence in public hearings. The hearings concerned the conduct of union officials in the construction industry in the Australian Capital Territory.

2. In Part 6 the ACT Branch of the CFMEU will be referred to simply as the CFMEU.

3. Submissions from counsel assisting, from counsel representing the CFMEU and its officers, from counsel representing the CEPU and its officers (which are considered in Chapter 3.2 of this Report), from CETW and CCW, the Canberra Tradesmen’s Union Club and Woden Tradesmen’s Union Club and from counsel representing John Nikolic,
Samuel De Lorenzo and MPR Scaffolding Pty Ltd have been received and considered.

4. This Part of the Report is structured in the following way:

(a) Chapter 6.2 deals with the conduct of Halafihi Kivalu and with the CFMEU’s responses to allegations about it.

(b) Chapter 6.3 deals with inappropriate pressure to enter into enterprise agreements (EBA).

(c) Chapter 6.4 deals with inappropriate pressure to enter into membership arrangements.

(d) Chapter 6.5 deals with anti-competitive conduct.

(e) Chapter 6.6 deals with Creative Safety Initiatives.

(f) Chapter 6.7 makes some concluding remarks.

5. It is convenient in this introductory chapter to deal with some of the submissions made by the CFMEU. An endeavour has been made to concentrate on the more substantive and meritorious submissions. Submissions outside this category have been examined closely but are not dealt with.

6. The CFMEU made general submissions about the use of hearsay evidence. Submissions of this kind have been dealt with elsewhere, in
Volume 1 of this Report. It is not necessary to deal again with them here.

7. A number of persons in the Canberra Construction industry gave evidence contrary to the interests of the CFMEU and its officials. One common answer to this evidence given by the CFMEU is that it should be rejected or given no weight because the persons in question did not bring proceedings against the CFMEU, or did not make a complaint about the CFMEU or its officials to the relevant authority (for example, Fair Work Building and Construction).¹

8. In some instances, these submissions are factually wrong: the persons in question did complain.² In many instances, the proposition advanced by the CFMEU in submissions was not put to the witnesses in question and so there is no evidentiary basis for the submission. But it is not difficult to imagine why a participant in the industry would not want to take action against the CFMEU. The participant might legitimately fear further disruption to their business as a result of litigation or involvement in it. The smear campaign planned by the CFMEU against witnesses to appear in this Commission, referred to later in this Report, suggests such fears would not be unfounded. There is the further point that, presently, the consequences for contravening many of the provisions of the *Fair Work Act 2009 (Cth)* are, for a union of the size and resources of the CFMEU, minimal. The

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¹ Just some examples appear at Submissions of the CFMEU, 5/11/15, p 3, para 11; p 20, para 18; p 25, para 30.
² The Leemhuis case study is an example. The CFMEU’s submission that there was no complaint is followed by a submission that because a complaint made to the police did not result in a prosecution, it was without substance: see Submissions of the CFMEU, 5/11/15, p 34, paras 56-57.
consequences of litigation against the CFMEU for a small business can be fatal. The balance of financial power, considered as a source of the funds necessary to run complex litigation, greatly favours the CFMEU over small businesses. The CFMEU’s submissions on this topic are unrealistic and unpersuasive.

9. The CFMEU made a general complaint about the manner in which the hearing was conducted.3 The complaint was made for the first time in written submissions on 5 November 2015, well after the hearings had concluded. There was ample opportunity to raise the matter during the hearings themselves. But the CFMEU chose not to.

10. This general complaint was really composed of three related complaints. First, that onerous timeframes were imposed on the CFMEU for the provision of responsive to witness statements. Secondly, that the hearings extended beyond their anticipated timeframe in Canberra. It was expected that the hearings would conclude in three weeks in Canberra in July but that proved impossible. As indicated above, it was necessary to reconvene those hearings in Sydney for 4 days in September and 2 days in October. Thirdly, that the result of the extended hearing was to cause unnecessary damage to the union’s reputation because allegations against the union were allowed to stand unanswered for months.

11. None of these complaints has any substance. None was made during the hearing. The first complaint is, indeed, cancelled out by the second. If there was further material that the CFMEU wished to put

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3 Submissions of the CFMEU, 5/11/15, pp 4 -5, paras 15-23.
on, it had ample time to do so by virtue of the extended time for hearings. It in fact did put on further material during that time.

12. As to the second complaint, no-one aimed to extend the hearings beyond July. That was an inconvenience to the Commission as much as anyone. The CFMEU did not suggest any alternative course. None was apparent. The second complaint is without foundation.

13. If the second complaint is without foundation, then so is the third. There are further answers to the third complaint. The CFMEU does not make plain what unanswered allegations caused it reputational damage, or how. Those allegations were made by witnesses whom the CFMEU had the opportunity to cross-examine. It took up that opportunity. The allegations were not unanswered in that sense. This third complaint also assumes that, ultimately, all of those allegations were without foundation. That is not so. If it is not so, what is the additional reputational damage that could have been caused? The complaint is without substance.
CHAPTER 6.2

HALAFIHI KIVALU

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A – INTRODUCTION

1. Halafihi Kivalu commenced working for the CFMEU in about 2006.\(^1\) He was initially employed by the CFMEU as an organiser. In due course he was promoted to lead organiser. A number of other organisers appear to have reported to him, including Anthony Vitler, Johnny Lomax, Brett Harrison, Cameron Hardy, Zachary Smith and Kenneth ‘Dusty’ Miller.\(^2\) He reported to the assistant secretary, Jason O’Mara. As lead organiser Halafihi Kivalu said that he looked after

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\(^1\) Halafihi Kivalu, 16/7/15, T:220.22-40.

\(^2\) Halafihi Kivalu, 16/7/15, T:221.34-37.
plasterers, traffic control, labour hire and painters.\(^3\) Halafihi Kivalu was widely known as ‘Fihi’. He was a member of the Branch Committee of Management (BCOM).

2. Halafihi Kivalu ceased to be employed as an organiser by the CFMEU in late 2014. However, he remained as a member of the BCOM until the commencement of the Commission’s hearings in Canberra in 2015.\(^4\)

3. The evidence included allegations that, over a period of about two years while employed by the CFMEU, he demanded and received cash and other payments from a variety of employers. In summary, witnesses who gave evidence before the Commission alleged that Halafihi Kivalu received the following payments:

   (a) $135,000 from Elias Taleb in various cash instalments;

   (b) $40,000 in a series of further cash cheques given to him by Medwhat Eleisawy or others from MDS Tiling Pty Ltd;

   (c) $30,000 by cheque made in favour of his wife from John Domitrovic; and

   (d) $5,000 from Jian Yu He.

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\(^3\) Halafihi Kivalu, 16/7/15, T:222.34-36.

\(^4\) Halafihi Kivalu, 16/7/15, T:223.22-41; Dean Hall, first witness statement dated 24/7/15, 8/10/15, para 8.
4. Halafihi Kivalu was charged with offences in connection with some of these payments at the conclusion of his oral evidence. He has pleaded not guilty. The matter is presently before the criminal courts of the ACT.

5. In the above circumstances, counsel assisting submitted that no findings should be made against Halafihi Kivalu and no conclusions should be drawn regarding his conduct. The submissions of counsel assisting about his conduct were confined to setting out the allegations raised in the evidence.

6. Halafihi Kivalu was represented during the hearings. But he did not make any submissions to the Commission. The CFMEU did not dissent from the course taken by counsel assisting.

7. In the above circumstances, it is appropriate to adopt the course taken by counsel assisting and to recite the summary of the evidence in their submissions. Recital of this evidence should not be taken to imply its acceptance. It is for the forum in which Halafihi Kivalu will defend the charges laid against him to determine whether any of the allegations are to be accepted.

8. Counsel assisting’s submissions are set out in sections B – F, below. The final two sections of this Chapter, G and H, deal with discrete topics. One is the payments made to Halafihi Kivalu on the termination of his employment by the CFMEU. The other is the question of how much other CFMEU officials knew of allegations regarding Halafihi Kivalu.
B – ELIAS TALEB

9. Elias Taleb at all relevant times conducted a formwork business in Canberra through a company known as Class 1 Form Pty Ltd (Class 1 Form). In summary, his evidence was that he paid Halafih Kivalu a series of cash payments from about June 2012 through to November 2013.

Payments in respect of the Yarralumla job

10. Elias Taleb’s evidence was that he began to make payments to Halafih Kivalu in the following circumstances.

11. In around 2011, he became aware of a job to complete formwork for a block of 38 residential units at 41 Hampton Circuit, Yarralumla.\(^5\) Elias Taleb’s evidence was to the effect that he was told by Halafih Kivalu that in order to win this job (which he had by this stage committed himself or his company to in a financial sense) it would be necessary to make a payment to Halafih Kivalu. Elias Taleb said in his witness statement:\(^6\)

\(\text{Fihi said words to the effect ‘it will be 50 grand for this job, and if you don’t pay someone else will, and they will get the job’. If I missed out on the job it would have had very bad financial consequences for me. I understood from what he told me that if I paid Fihi $50,000, I was guaranteed the job.}\)

\(^5\) Elias Taleb, witness statement, 13/7/15, para 24.

\(^6\) Elias Taleb, witness statement, 13/7/15, para 34.
12. According to Elias Taleb, he and Halafihi Kivalu reached an arrangement pursuant to which the $50,000 would be paid in five instalments of $10,000, upon completion of five stages of the job.

13. Elias Taleb’s evidence was that on 8 June 2012 he withdrew $32,000 in cash from Class 1 Form’s bank account for that day.7

14. Elias Taleb’s evidence was that on 12 June 2012 when Halafihi Kivalu visited Class 1 Form’s office Elias Taleb handed him an envelope with $10,000 in cash in it.8

15. The oral evidence of Elias Taleb concerning the first payment made of $10,000 made by him included the following:9

Q. … Did you feel like you had a choice other than to give him that money?
A. No.

Q. What would happen if you didn’t give it to him?
A. Basically, if we don’t do memberships, or whatever, they usually go to the site, harass everyone, all workers to site, to the site shed, just giving us a hard time, till the builder put pressure on the contractor to sort it out.

Q. When you say “put worker in the shed”, you mean stop them working and –
A. Stop all employers from working if they’re not financial, if we’re not paying in, or whatever.

7 Elias Taleb, witness statement, 13/7/15, para 42 and see also tab 8.
8 Elias Taleb, witness statement, 13/7/15, para 45.
9 Elias Taleb, 13/7/15, T:15.13-26.
16. Elias Taleb’s evidence was that he paid the second instalment of $10,000 in cash on or about 17 August 2012. This followed a withdrawal of two amounts of cash of $30,000 and $12,000 respectively from Class 1 Form’s bank account shortly prior to that date.\textsuperscript{10}

17. Elias Taleb’s evidence was that on or about 16 November 2012 he paid Halafihi Kivalu the sum of $20,000 in cash, comprising both the third and the fourth payments.\textsuperscript{11}

18. According to Elias Taleb, the final payment of $10,000 was made on or about 28 March 2013.\textsuperscript{12}

19. Thus, according to Elias Taleb’s evidence, in connection with the job at Hampton Circuit, Yarralumla, he paid Halafihi Kivalu in total $50,000 in cash in four instalments.

**Payments in connection with Denham Constructions job**

20. Elias Taleb’s evidence was that he made further payments to Halafihi Kivalu in relation to a retirement village comprising 77 units in Griffith, ACT. The builder on the project was Denham Constructions. According to Elias Taleb he and Halafihi Kivalu agreed that Elias Taleb would again pay $50,000 by instalments in respect of this job.\textsuperscript{13}

\textsuperscript{10} Elias Taleb, witness statement, 13/7/15, paras 49-54.
\textsuperscript{11} Elias Taleb, witness statement, 13/7/15, paras 57-58.
\textsuperscript{12} Elias Taleb, witness statement, 13/7/15, para 66.
\textsuperscript{13} Elias Taleb, witness statement, 13/7/15, para 80.
21. According to Elias Taleb, on 22 March 2013 he made the first payment of $20,000. His evidence was that he then made two further payments for this job, one for $20,000 and the other for $10,000. The final payment of $10,000, on Elias Taleb’s evidence, was made on 21 October 2013.

Gungahlin Job

22. Elias Taleb also gave evidence that he made a further payment of $15,000 in cash to Halafihi Kivalu on or about 19 July 2013 in relation to a job in Gungahlin. The builder was ADCO Building Developments Pty Ltd (ADCO). Elias Taleb’s evidence was that he was working closely on that job with Clive Arona, the owner of Multi-Crete (Aust) Pty Ltd, a concreting company operating in the ACT.

23. According to Elias Taleb, he and Clive Arona met with Halafihi Kivalu at a coffee shop near the ADCO site. Elias Taleb said that he paid Halafihi Kivalu $15,000 in cash in an envelope in the presence of Clive Arona.

Habitat Job

24. Elias Taleb gave evidence that he made another payment to Halafihi Kivalu, in November 2013, of $20,000 in cash, again in an envelope. This time, according to Elias Taleb, the money was handed over at

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14 Elias Taleb, witness statement, 13/7/15, para 87.
15 Elias Taleb, witness statement, 13/7/15, paras 92-94.
16 Elias Taleb, witness statement, 13/7/15, para 102.
17 Elias Taleb, witness statement, 13/7/15, para 130.
18 Elias Taleb, witness statement, 13/7/15, para 138.
Gus’s Café. Elias Taleb said that this time the payment was in respect of the Habitat job. The Habitat job was a development comprising 44 units in Braddon.

**Elias Taleb ceases making payments**

25. Elias Taleb’s evidence was that at around about this time (that is, late 2013) he became fed up with making payments to Halafihi Kivalu and told him that he would not make any more. Elias Taleb’s evidence was that an agreement was reached with Halafihi Kivalu pursuant to which he and Clive Arona would assist Halafihi Kivalu by carrying out building work on a shed and a house on land owned by a relative of Halafihi Kivalu. Elias Taleb’s evidence was to the effect that the arrangement was that Elias Taleb and Clive Arona would do the ‘build, the formwork and the concrete and pumping for free’ and also provide the labour. Ultimately, according to Elias Taleb, this arrangement did not progress beyond the provision of structural drawings by Elias Taleb to Halafihi Kivalu.

26. Elias Taleb’s evidence was that in due course a dispute broke out between him and Halafihi Kivalu concerning whether any more money was owed.

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19 Elias Taleb, witness statement, 13/7/15, para 124.
20 Elias Taleb, 13/7/15, T:22.34.
21 Elias Taleb, witness statement, 13/7/15, para 140.
22 Elias Taleb, witness statement, 13/7/15, para 144.
27. Elias Taleb said that at one point, in about April 2015, he was approached by one of Class 1’s employees, Tuungafasi Manase, and told that a friend of Tuungafasi Manase, namely David Pattison, had been engaged by Halafihi Kivalu to collect money from him. David Pattison is also a relative of Tuungafasi Manase. According to Elias Taleb, Tuungafasi Manase showed Halafihi Kivalu a piece of paper that he said was prepared by him by copying from a file he had seen in David Pattison’s office. According to Elias Taleb, Tuungafasi Manase gave him to understand that that file had been given to David Pattison by Halafihi Kivalu.24

28. Elias Taleb says that he took a photograph of that piece of paper, and a copy of that photograph was in evidence.25 The piece of paper, as depicted in that photograph, records the names or the four jobs referred to above, and an amount of money next to each job, with a total of ‘$170K’. It also records a series of dates with sums of money next to them. At the bottom is recorded ‘$80K Balance’ and ‘Interest on Top $20K’.

29. Elias Taleb identified the handwriting on this document as that of Tuungafasi Manase.26 Tuungafasi Manase gave evidence. He denied that the handwriting depicted on this document was his. Tuungafasi Manase has been charged with perjury and so it is neither appropriate to discuss his evidence nor the question of whose handwriting is in fact on the document. The comments made above concerning Halafihi

24 Elias Taleb, 13/7/15, T:40.13-41.
25 Taleb MFI-1, 13/7/15, p 225.
26 Elias Taleb, 13/7/15, T:39.41.
Kivalu also applied to Tuungafasi Manase.\textsuperscript{27} The document nonetheless is of some significance for other purposes, because it was shown (on Elias Taleb’s phone) to Dean Hall during a meeting with Elias Taleb in June 2015.

\textbf{Evidence of builders}

30. Elias Taleb claimed that he made the above payments to assist Class 1 Form in obtaining work. In fact, Class 1 Form did obtain contracts on each of the jobs in respect of which Elias Taleb said he made payments to Halafihi Kivalu. Representatives from the builders on three of the jobs gave evidence at the Commission. It is appropriate to refer, again in relatively short form, to their evidence.

31. Adam Jeffrey was in charge of the tender process for the Habitat job with Morris Group. He was in need of a third subcontractor for the tender of the formwork on the job. One of his seniors, Alex Shonte, gave him the name of Class 1 Form and told him to give Class 1 Form a call. He said that “[Class 1 Form] was a contractor who was okay by the Union.”\textsuperscript{28} He called Elias Taleb, asked him whether Class 1 Form had an EBA, and invited him to tender for the project.

32. Adam Jeffrey said that the decision to award Class 1 the job was made by him in conjunction with his two bosses. There were two other tenderers. The first, Pacific Formwork, was too expensive. The second, IC Formwork, had a price that was competitive with, and possibly cheaper than, Class 1 Form. Adam Jeffrey’s evidence was

\textsuperscript{27} Paragraphs 5, 7.

\textsuperscript{28} Adam Jeffrey, 14/7/15, T:134.3-20.
that, prior to the decision on the tender, he had been told by Halafihi Kivalu that there were no problems from the CFMEU’s point of view with any of the three contractors who had tendered for the job.\textsuperscript{29} He said that the decision was made to use Class 1 Form because they wanted to grow with a new company who would perhaps show them some loyalty in the future.\textsuperscript{30} Adam Jeffrey gave evidence to the effect that the CFMEU generally would ask who was tendering for a job.\textsuperscript{31} He said that it was common in the construction industry for unions to enquire about the contractors proposed to be used on a job and that sometimes he would chose to tell them and sometimes not.\textsuperscript{32}

Adam Jeffrey said it was possible that he had contact with the CFMEU between the time he told Elias Taleb that his tender was successful and the time of the contract being signed. He was asked whether the CFMEU raised with him the question of whether or not Class 1 Form had an up to date EBA. He said:\textsuperscript{33}

\begin{quote}
The Union, when they have rung, usually say, “There is an issue.” I selectively don’t want to know what that issue is. We have made a decision to award a contractor a job, so I am often told what the issue may be; you know, he’s not up to date with his superannuation payments, he’s not up to date with this, not up to date with that. I may have been told he had an EBA. My usual response to any organiser who has rung me and gone, “We have a problem”, I go, “Well, it’s not my problem, it’s your problem to deal with the contractor.” Now, in the process of communication with any contractor over anything, for example, maybe ringing Elias and saying, “Can you get in here and sign the contract?”, I would say, “Oh, we’ve had a call, apparently you’ve got an issue, it would be great if you can resolve it, but it’s your problem, it’s not my problem.”
\end{quote}

\textsuperscript{29} Adam Jeffrey, 14/7/15, T:136.47-137.6-19.
\textsuperscript{30} Adam Jeffrey, 14/7/15, T:143.6-30.
\textsuperscript{31} Adam Jeffrey, 14/7/15, T:136.28-34.
\textsuperscript{32} Adam Jeffrey, 14/7/15, T:137.33-138.5.
\textsuperscript{33} Adam Jeffrey, 14/7/15, T:144.32-46.
34. Adam Jeffrey’s evidence has some relevance to the question, raised in Chapter 6.3, about the circumstances in which Elias Taleb’s EBA came to be lodged with Fair Work Australia by the CFMEU, according to Elias Taleb at a time soon after he was notified that he had been awarded a contract on the Habitat job. Because of the pending proceedings against Halafihi Kivalu, it has not been possible to deal with that question in this Report.

35. Rodney Peachey’s evidence (formerly of Denham Constructions) was that he would tell Halafihi Kivalu in general terms what companies he was looking at as potential subcontractors. He said that Halafihi Kivalu would suggest subcontractors that he deemed ‘good’. His evidence was that Halafihi Kivalu had deemed Class 1 Form to be a ‘good company’. He also gave evidence to the effect that Denham Constructions’s attitude was that if it kept co-operating with the CFMEU, it would have a better and smoother job. Rodney Peachey said that Class 1 Form won the tender as its terms were the most commercial. According to Rodney Peachey, commercial, in this context, included the price quoted, safety standards, previous experience and corporate governance of the tendering company.

36. Ivan Bulum, the director of B&T Constructions (the builder on the Yarralumla job) also gave evidence. He said that the CFMEU would

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34 Rodney Peachey, 15/7/15, T:201.1-11; Rodney Peachey, witness statement, 15/7/15, paras 7-8.
35 Rodney Peachey, 15/7/15, T:202.6-8.
37 Rodney Peachey, 15/7/15, T:203.35-37.
38 Rodney Peachey, 15/7/15, T:199.7-11.
ask him what contractors he intended to use and he would provide the CFMEU with names of the employees on the site and to which company they belonged to.\textsuperscript{39} Ivan Bulum gave evidence that the CFMEU tried to tell him which contractor to use but he said that he would not take any notice.\textsuperscript{40} He said he was always open with the CFMEU and he would tell them who he was using and who he would engage to complete the work.\textsuperscript{41} Ivan Bulum said that Class 1 Form won the tender because its price was a good, reasonable price.\textsuperscript{42}

\textbf{C – MEDWHAT ELEISAWY}

37. Medwhat Eleisawy has been a tiler by profession since 1991. He trades through a company known as MDS Tiling Pty Ltd (MDS). MDS mainly trades in New South Wales. Medwhat Eleisawy said that it did some work in Canberra in around 2012–2013 when MDS did not have much work in New South Wales.\textsuperscript{43}

38. In around 2013 Medwhat Eleisawy was doing a job in Braddon. His evidence was to the effect that at around this time Halafiihi Kivalu introduced himself and had a meeting with him. He said that at the meeting they talked about ‘how he can help us to get in the market in Canberra, because we don’t know anyone and we start from there’.\textsuperscript{44}

\textsuperscript{39} Ivan Bulum, 14/7/15, T:149.8-13.
\textsuperscript{40} Ivan Bulum, 14/7/15, T:149.25-28.
\textsuperscript{41} Ivan Bulum, 14/7/15, T:150.22-23.
\textsuperscript{42} Ivan Bulum, 14/7/15, T:148.43-46.
\textsuperscript{43} Medwhat Eleisawy, 13/7/15, T:52.44-53.1.
\textsuperscript{44} Medwhat Eleisawy, 13/7/15, T:54.3-8.
39. Medwhat Eleisawy’s evidence was to the effect that Halafihi Kivalu told him that he would need to pay some money in order to win work.\textsuperscript{45} His project manager, Robert Rae, was based in Canberra at that time. Medwhat Eleisawy gave evidence that he met with Halafihi Kivalu who said that to get work and win tenders MDS would have to pay some money and the amount of money would depend on the size of the job.\textsuperscript{46}

40. Ultimately, according to Medwhat Eleisawy, he gave, or caused to be given, four cheques to Halafihi Kivalu in the amount of $10,000 each.\textsuperscript{47} Medwhat Eleisawy gave evidence that he thought he had no choice but to make the payments. He said:\textsuperscript{48}

> Because every single job in Canberra, anyway, especially in Canberra, yes, the builder will not let any trade contractor without approval by Union, that’s the market, so we tried to get some work.

\textbf{D – TONY BASSIL}

41. Antonios Bassil (\textbf{Tony Bassil}) has been the principal of various concreting companies. He gave evidence of paying cash to Halafihi Kivalu.\textsuperscript{49} Tony Bassil says that he made a series of payments over the last few years to Halafihi Kivalu after being asked to make donations in relation to tsunami damage in Tonga.\textsuperscript{50}

\textsuperscript{45} Medwhat Eleisawy, 13/7/15, T:54.29.
\textsuperscript{46} Medwhat Eleisawy, 13/7/15, T:54.14-43.
\textsuperscript{47} Eleisawy MFI-1, 13/7/15.
\textsuperscript{48} Medwhat Eleisawy, 13/7/15, T:61.12-15.
\textsuperscript{49} Antonios Bassil, 13/7/15, T:66.9.
\textsuperscript{50} Antonios Bassil, 13/7/15, T:66.12-15, 68.7-11.
42. According to Tony Bassil, at the time of the payments, Halafihi Kivalu told him that he would recommend Tony Bassil’s company to other builders ‘so we can get you more work’.51 His oral evidence included the following exchange:52

Q. Was it really just payments you were making to him to get work in Canberra, is that really the position?
A. Well, he said, ‘this payment, will help you to get work, yes. We recommend your company to other builders’.
Q. Is this fair, Mr Bassil, that you are making these payments of cash to Fihin in order to get work for your company in Canberra?
A. Probably you can say so.

43. Elias Taleb described in his evidence attending a meeting with Halafihi Kivalu and Tony Bassil at Kingsley’s Steak Restaurant at which, according to Elias Taleb, Tony Bassil handed over $12,000 in cash to Halafihi Kivalu.53 Tony Bassil’s evidence was that he could not recall this particular meeting, in the sense that he simply did not remember one way or the other whether it had taken place.54

44. Tony Bassil’s evidence as to precisely how much he paid Halafihi Kivalu was vague. It was clearly in the thousands of dollars, including one payment of about $5,000, and occurred on more than one occasion.55

51 Antonios Bassil, 13/7/15, T:67.23-26; see also Antonios Bassil, 13/7/15, T:69.41-42.
52 Antonios Bassil, 13/7/15, T:68.13-21.
53 Elias Taleb, witness statement, 13/7/15, para 127.
54 Antonios Bassil, 13/7/15, T:69.13.
55 Antonios Bassil, 13/7/15, T:66.8-29, 68.23-32.
E – PAYMENTS BY JIAN YU ‘JACKIE’ HE

45. Jian Yu He is a licensed gyprocker and plasterer who has been carrying out work in the ACT for about 5 or 6 years. During the last 3 or 4 years he has run his own business.  

46. Jian He’s first language is Mandarin. His English is limited. He gave evidence through an interpreter.  

47. Jian He said that the first job on which he had dealings with Halafihi Kivalu was a job at Narrabundah through B&T Constructions. Jian He described Halafihi Kivalu ringing the site and saying he wanted to have a meeting after which he turned up at the site in Narrabundah. According to Jian He, Halafihi Kivalu asked for a payment of $10,000 and Jian He negotiated the amount down to $5,000.  

48. Jian He’s oral evidence was to the following effect:  

He [Halafihi Kivalu] said without paying it’s possible that I cannot stay in Canberra for work.  

49. Subsequently in his oral evidence the following exchange took place:  

Q. Go back to the $5,000. Why did you pay $5,000 to somebody in cash during this job? What is your explanation for doing that?  

A. Well, this should – Fihi said to me, he said if this money is not paid then he will cause trouble.  

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56 Jian He, 14/7/15, T:76.16-23.  
57 Jian He, 14/7/15, T:78.10-11.  
58 Jian He, 14/7/15, T:78.15-16.  
59 Jian He, 14/7/15, T:83.20-24.
50. Jian He gave evidence that he paid the $5,000 in cash, in two instalments. The first was $2,000. The second was $3,000.60

51. Jian He gave evidence that this was not the first time he had seen cash being handed to Halafihi Kivalu. He described being present at a meeting at a restaurant in Dickson at which the owners of the Sydney based business he was then working with, Steve Huang and Jason Lu handed over cash payments, apparently in amounts to the total of $10,000, to Halafihi Kivalu.61 Neither Steve Huang nor Jason Lu gave evidence.

F – PAYMENTS BY JOHN DOMITROVIC

52. John Domitrovic is a builder developer who has been in the construction industry for approximately 35 years.62 He is a director of a number of building companies. He was also finance manager for a company called All Kiwi Constructions Pty Ltd (All Kiwi Constructions). The company carried out permanent formwork for concreted poured walls.63

53. In about 2011, All Kiwi Constructions was carrying out work as a subcontractor in relation to a development of approximately 80 apartments in Flemington Road Mitchell, ACT.64 At the same time John Domitrovic was carrying out work through a different corporate

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60 Jian He, 14/7/15, T:79.2-80.15.
61 Jian He, 14/7/15, T:80.20-83.41.
62 John Domitrovic, 24/7/15, T:982.1.
63 John Domitrovic, 24/7/15, T:982.19-42.
64 John Domitrovic, 24/7/15, T:983.11-30.
entity on a large building job in Queanbeyan, NSW. The latter was a different type of project in that an entity associated with John Domitrovic had acquired the land and was developing it.

54. According to John Domitrovic, Halafihi Kivalu telephoned him at around this time. They arranged to meet at the site of the Queanbeyan job. John Domitrovic’s evidence was that in this telephone call Halafihi Kivalu said words to the effect that if John Domitrovic wanted to work in the ACT he was going to have to pay some money to Halafihi Kivalu.65

55. The substance of John Domitrovic’s evidence was that he and Halafihi Kivalu subsequently agreed that $30,000 would be paid by instalments, and that amounts to the total of $30,005 were paid by him in four instalments over the period 7 October 2011 to 24 December 2011.66 It is not necessary to go into the detail of that evidence.

56. John Domitrovic in his evidence said that his decision to pay Halafihi Kivalu the sum of $30,000 was a ‘purely business decision for economic reasons’.67 His evidence included the following exchange:68

Q. What do you mean by that? Can you just explain what you mean?

A. Well, at my biggest – I was involved in this, one of the biggest jobs I ever did which was these apartments in Queanbeyan and I thought if I didn’t comply with his wishes, I could have got on the wrong side of him and the Union and they could have had –

65 John Domitrovic, 24/7/15, T:984.28-42.
66 John Domitrovic, 24/7/15, T:985.40-990.18.
67 John Domitrovic, 24/7/15, T:990.21.
68 John Domitrovic, 24/7/15, T:990.23-37.
they could have put a lot of pressure on me on the job in Queanbeyan.

Q. What sort of pressure?

A. Well, you know, they could have come, stopped jobs, stopped the progress and you know, could have stopped pours. You know, you hear these things and this was one of the real reasons I was – I didn’t want to get on the wrong side of the Union.

G – HALAFIHI KIVALU CEASES TO BE EMPLOYED BY THE CFMEU

57. The above deals with the evidence concerning payments received by Halafihi Kivalu. The circumstances in which he ceased to be a CFMEU organiser call for some comment. They were as follows.

58. On 10 November 2014 Halafihi Kivalu by letter resigned from the CFMEU with immediate effect. The letter was stated that he had resigned for ‘personal reasons’. Shortly after his resignation he received termination pay comprising a total sum of $73,737, which yielded after tax a net payment to him of $60,467. The said payment included what was described as a ‘redundancy amount’ of $32,267.52. Halafihi Kivalu said that he did not know how or why he came to receive a redundancy of $32,267.52 in circumstances where he resigned for personal reasons.

69 Kivalu MFI-1, 16/7/15, p 3.
70 Halafihi Kivalu, 16/7/15, T:225.1-9: T:227.11.
71 Halafihi Kivalu, 16/7/15, T:225.17-22.
72 Halafihi Kivalu, 16/7/15, T:226.27 ; see also Kivalu MFI-1, 16/7/15, pp 5-6.
73 Halafihi Kivalu, 16/7/15, T:227.15.
59. Dean Hall accepted that it was not a legitimate redundancy. Contrary to the position suggested by Halafihi Kivalu’s letter, Dean Hall said that Halafihi Kivalu’s role as lead organiser was being made redundant but the real problem was that his performance was waning.

60. Shortly after documents were tendered relating to Halafihi Kivalu’s redundancy, the CFMEU lodged with the Commissioner of Taxation an amended 2015 PAYG payment summary for Halafihi Kivalu and remitted an amount of $11,958. The amount of $11,958 was the amount that the CFMEU was required to withhold and remit to the Commissioner of Taxation on the basis that ‘redundancy amount’ of $32,267.52 paid to Halafihi Kivalu was not in fact a genuine redundancy payment.

61. It would therefore seem that, following the hearings in Canberra, the CFMEU has complied with its taxation obligations in respect of Halafihi Kivalu’s termination payment. There are a number of matters, however, that remain unsatisfactory.

62. First, it is not apparent why a termination payment of any amount (over and above net payments of $6,302 accrued annual leave and $9,897 long service leave) was made to Halafihi Kivalu. He did not have a written contract of employment with the CFMEU ACT. His job had not been made genuinely redundant. Therefore he was not

74 Dean Hall, 8/10/15, T:2252.8.
75 Dean Hall, 8/10/15, T:2250.41-43.
76 Hall MFI-8, 8/10/15.
77 The Commission issued the CFMEU ACT with a Notice to Produce documents covering all documents relating to Halafihi Kivalu’s employment. No contract of employment was produced.
entitled to a redundancy payment under s 119 of the *Fair Work Act* 2009 (Cth).

63. *Secondly*, what now seems to have occurred is, in effect, that the CFMEU has paid the $11,958 tax that Halafihi Kivalu is or will be liable to pay in respect of the 2014–2015 income year on the amount of $32,267.

64. *Thirdly*, Halafihi Kivalu in addition received a net payment of about $12,000 in sick leave in circumstances where there was no legislative requirement to make that payment.

65. In the result, counsel assisting submitted, significant amounts of members’ funds have been expended for no justifiable reason. Counsel assisting submitted that although the CFMEU may have entitlement to recover some of the above amounts from Halafihi Kivalu, the practical likelihood of that may be remote.

66. The CFMEU did not respond to these submissions. They must be accepted.

**H – KNOWLEDGE ON THE PART OF OTHER OFFICIALS AT THE CFMEU**

67. There were no allegations in the evidence before the Commission that other CFMEU officials received payments of the sort alleged to have been received by Halafihi Kivalu.

68. However, there was evidence that CFMEU officials had heard allegations or rumours of Halafihi Kivalu receiving payments. All of
the CFMEU officials who gave evidence were questioned about this topic. Counsel assisting made submissions about this evidence. Those submissions included submissions about the credit of the CFMEU officials. Ultimately, the submissions made by counsel assisting were that the evidence of CFMEU officials could not be accepted, and that it was not possible to make findings about what they had heard about Kivalu or about what they had done. It was submitted that, on any view, one aspect of their conduct was unsatisfactory: either they had disobeyed a direct instruction from Dean Hall or Dean Hall had given untruthful evidence to the Commission about giving that instruction or about the response he received. More is said about that evidence below.

69. The CFMEU criticised counsel assisting’s approach. It asserted that the question of how the Branch or its officers responded to rumours of this kind was outside the Terms of Reference. It said that no findings were sought by counsel assisting. It said that, as a result, the attacks on the credit of the CFMEU officials, and the criticisms of their conduct, were unwarranted.

70. The question of whether Branch officials had heard rumours or allegations of misconduct, and, if so, what they did about them is within the Terms of Reference. In particular the question is within paragraphs (g), (h), (i) and (k). No objection was taken during the questioning by counsel assisting on this topic. Indeed, as will be seen below, CFMEU officials addressed the topic in their witness statements.
71. The other general criticisms made by the CFMEU fall away if these matters are within the Terms of Reference. If it is legitimate to inquire into these matters, it is legitimate to make submissions about them. It is also legitimate to make submissions on questions of credit where credit is relevant. The credit of the CFMEU officials was relevant. The CFMEU’s submission is rejected.

72. Other than the general criticisms referred to above, the CFMEU in its submissions did not attempt to respond to counsel assisting’s submissions on this topic at an evidentiary level, save in the case of Dean Hall. In these circumstances, what follows draws largely on counsel assisting’s submissions.

Johnny Lomax

73. Johnny Lomax had heard allegations about Halafihi Kivalu receiving improper payments from at least 10 April 2015 and in all probability before then.78

74. Counsel assisting submitted that his evidence on this issue was unsatisfactory. The submission begins by noting that Johnny Lomax initially said in oral evidence that he had heard allegations about Halafihi Kivalu about 12 to 18 months ago where he had attended a meeting with Halafihi Kivalu and one of the steel fixers told them that he did not want Halafihi Kivalu to co-ordinate as the organiser for them anymore.79 When asked for more details, Johnny Lomax said, ‘[t]here was general blooming conversation or accusations made, but

78 Lomax MFI-1, 7/10/15, p 4.38-39.
79 Johnny Lomax, 7/10/15, T:2099.17-23.
nothing of substance.’80 The only allegation he could point to with any specificity was that the whole organisation was corrupt.81 He said that he could not recall any conversation with anyone in the construction industry to the effect that Halafihi Kivalu had asked them for money.82

After Johnny Lomax had given this evidence, he was reminded by counsel assisting of a conversation that he had with Zachary Smith on 22 May 2015 about the payments made by Jian He. A recording of the conversation was played. In it, Johnny Lomax reports to Zachary Smith about a conversation he had just had with Bradley Jones, a foreman on a site where Jian He was working.83

JOHNNY LOMAX: No, sweet. Hey, umm, I heard from Brad. Well, I rung him up, actually. He said to talk to Jackie Chan or whatever. Umm, I saw him this afternoon. He’s willing to talk to me. Ah, he reckons umm – ah, he went up to them and said to them ah, you know, “Well, how much do they want this time?” (Laughs).

ZAC SMITH: Fuckin’ hell. Is that what he said?

JOHNNY LOMAX: That’s what he said to Brad, “How much do they want this time?” or something. Well, fuck, obviously in gibberish, he can’t speak very well English, and I said to Brad, “Don’t – don’t worry about that, mate.” He said – he goes, “Oh, no, I fuckin’ told him, mate”, you know, [indistinct] see if we can help him. So obviously he’s been touched before – by the sounds of this, he’s been touched before by the big fellow.
Johnny Lomax accepted that he understood that he had been told by Brad Jones that Halafihi Kivalu had asked for money from Jian He on a previous occasion.  

Counsel assisting submitted that this conversation indicates that Johnny Lomax’s initial response to questions about allegations concerning Halafihi Kivalu was not a frank one. It was submitted that if what he heard from Brad Jones took him completely by surprise, it is unlikely that he would have forgotten about it prior to giving evidence at the Commission. If, on the other hand, Brad Jones was merely repeating what Johnny Lomax had heard before, then it is hard to see how, prior to giving evidence, he could have forgotten being told by anyone at all that Halafihi Kivalu had received improper payments.

Counsel assisting’s submissions continued by noting that Johnny Lomax claimed that he was expressing surprise to Zachary Smith in this conversation. However, his tone is a mixture of amusement and resignation. It is obvious that he had heard similar allegations before. Johnny Lomax, like the other CFMEU officials who gave evidence, was anxious to say that if he heard any accusations of this kind at all, he would advise that person to come into the office or go to the police with any information they had. His evidence was that while he was not sure of the protocol after that point, he thought that his boss would deal with it. However his conversation with Zachary Smith makes a nonsense of such claims. Johnny Lomax and Zachary Smith do not make any reference to ensuring that any of these things are done. Nor

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84 Zachary Smith, 2/9/15, T:1832.47-1833.6; Johnny Lomax, 7/10/15, T:2103.6-13.
85 Johnny Lomax, 7/10/15, T:2105.6-24.
do they refer to reporting the matter to their superiors. An allegation that Halafih Kivalu may have received payments from Jian He appeared to be, for them, more in the nature of an inconvenience or obstacle in their attempt to persuade Jian He that his employees should become CFMEU members.

79. Johnny Lomax claimed that he asked Zachary Smith to come to see Jian He so that Zachary Smith could deal with Jian He’s allegations. His explanation for this was that Zachary Smith was ‘more experienced than me, he’s got a legal experience’. He went on to claim that Zachary Smith dealt with Jian He on this topic. However, it is apparent from what Johnny Lomax and Zachary Smith discussed that the arrangement for Zachary Smith to go out to visit Jian He had been made prior to Zachary Smith’s and Johnny Lomax’s conversation, and that it was only during that conversation that Zachary Smith heard of Jian He’s allegations.

80. Whilst being questioned about his conversation with Zachary Smith on 22 May 2015, Johnny Lomax said that this was the first time that he could recall hearing of an allegation of this nature. Johnny Lomax was then asked whether Adrian Maretta had ever mentioned something to this effect. Johnny Lomax said that he had, but that it was late during the Royal Commission hearings in Canberra.

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89 Johnny Lomax, 7/10/15, T:2107.41-2108.29.
said his advice to Adrian Maretta was to go to the police with the evidence and tell the truth.90

81. After Johnny Lomax gave this evidence, a recording of a telephone call between him and Adrian Maretta was played. The call was 10 April 2015 at 10.32am and thus, contrary to Johnny Lomax’s assertions, prior to 22 May 2015.91 The telephone call concerns Johnny Lomax’s attempts to get one of Adrian Maretta’s employees to become a member of the union. It is dealt with in Chapter 6.4 of this Report.92 At the conclusion of the call Adrian Maretta made a similar allegation in relation to Halafihi Kivalu. In the circumstances it is unnecessary to set that allegation out here.93

82. After a recording of this call was played during his oral evidence, Johnny Lomax claimed to have been ‘deeply shocked’ by this allegation.94 That was a false claim. Its falsity is indicated by several matters. One is Johnny Lomax’s failure to remember it when first asked in oral evidence about whether he had heard such allegations before. Another is his response to Adrian Maretta (‘I’m not interested in that, bro’).95 Another is the fact that he failed to report this to Jason O’Mara because he had ‘completely forgotten about it’.96 Yet another

90 Johnny Lomax, 7/10/15, T:2110.8-9.
91 Lomax MFI-1, 7/10/15.
92 Chapter 6.4, paras 51-55.
94 Johnny Lomax, 7/10/15, T:2114.45-2116.22.
95 Lomax MFI-1, 7/10/15, p 4.41-42.
is the fact that he did not raise the allegation at a meeting convened by Dean Hall on the same afternoon to talk about Milin Builders. 97

83. Counsel assisting submitted that Johnny Lomax’s evidence on this topic was unsatisfactory. From it, two conclusions can be drawn with confidence. The first is that his uncorroborated evidence cannot be relied on (unless given against his own interests). His failure to recall either the allegations of Jian He or the allegations of Adrian Maretta when first questioned on this topic indicate either a poor memory or an unwillingness to be frank. It is only through telephone intercepts that evidence of these allegations has come to light. The second conclusion that it is submitted is to be drawn is that Johnny Lomax had heard other allegations of this kind. That Johnny Lomax neither registered any surprise nor took steps to address the allegations is explicable only by the fact that he did not regard them as unusual.

84. These submissions of counsel assisting are soundly based. They are accepted.

**Zachary Smith**

85. Zachary Smith was present at a meeting with Elias Taleb, Jason O’Mara and Dean Hall on 22 June 2015. Zachary Smith took handwritten notes of the meeting, which he transcribed. 98 It is apparent from that typescript that Elias Taleb alleged to those present that Halafihi Kivalu was purporting to be collecting debts on behalf of the

97 Johnny Lomax, 7/10/15, T:2119.17.

98 Zachary Smith, witness statement dated 30/7/15, 2/9/15, paras 5-7.
CFMEU.99 Elias Taleb showed Dean Hall and Jason O’Mara a photograph of the document that he said in oral evidence was shown to him by Tuungafasi Manase – that is, the document referred to above purporting to set out a reconciliation of amounts paid and owing in respect of the four jobs in relation to which Elias Taleb claims he made payments to Halafihi Kivalu.100

86. Zachary Smith accepted that he understood from what Elias Taleb said at this meeting that he was making an allegation that improper payments had been made by Elias Taleb to Halafihi Kivalu.101

87. Zachary Smith initially said in oral evidence, twice, that he did not remember any other allegations of that nature.102 Some short time later Zachary Smith was asked if he had heard the evidence of Jian He, and when he first heard any suggestion of payments of that kind. He then said ‘now that you raise it’, he recalled a suggestion being made by a site manager, Brad (that is, Brad Jones), on a site where Jian He worked. He said that Brad Jones said words to the effect that ‘[Jian He] had had a previous interaction with Fihi and had given him a sum of money. It wasn’t made clear what that money was for and it wasn’t made clear how much.’103

101 Zachary Smith, 2/9/15, T:1826.16-19.
102 Zachary Smith, 2/9/15, T:1826.21-27.
103 Zachary Smith, 2/9/15, T:1829.35-40.
88. Counsel assisting submitted that Zachary Smith’s failure to recall the incident with Jian He until asked about it detracts from the confidence the Commission can have in his uncorroborated evidence.

89. Zachary Smith claimed that he reported these allegations to Jason O’Mara. In his statement of 17 July 2015, Zachary Smith addressed those parts of Jian He’s oral evidence in which Jian He claimed that he and Johnny Lomax asked him to pay membership fees for 10 employees (a matter discussed further in Chapter 6.4). In this witness statement, Zachary Smith suggested that he understood Jian He to have offered to make a payment to him and Johnny Lomax. Zachary Smith said that he rejected that suggestion. He went on to say:

Later that day I spoke to the Branch Assistant Secretary, Jason O’Mara, and reported that [Jian He] had offered to make payment to me and Johnny directly.

90. In oral evidence, Zachary Smith claimed that, in the same conversation, he also told Jason O’Mara that Jian He had made an allegation about Halafih Kivalu.

91. Counsel assisting submitted that if the above claim is true then it makes Zachary Smith’s initial failure in oral evidence to recall any allegations concerning Halafih Kivalu prior to 22 June 2015 all the more unsatisfactory. The entire statement deals with Jian He and paragraph 17 of the statement deals with a conversation in which (so Zachary Smith claims) allegations of improper conduct were reported

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104 Zachary Smith, 2/9/15, T:1830.4-20.
105 Zachary Smith, witness statement dated 17/7/15, para 17.
106 Zachary Smith, 2/9/15, T:1830.4-20.
to Jason O’Mara. Zachary Smith must (if his claim is true) have reflected on those allegations at the time of preparing the statement and in preparation for giving his oral evidence.

Zachary Smith also claimed to have discussed the allegations with Jian He and Brad Jones and told them that any allegations of this kind should be taken to police.\footnote{Zachary Smith, 2/9/15, T:1829.47-1830.2.} Counsel assisting also submitted that the Commission can have no confidence in this evidence. The more likely position is that Johnny Lomax and Zachary Smith in fact did nothing at all about the allegations after Johnny Lomax had been told of them by Brad Jones.

After giving the above evidence, Zachary Smith was asked whether he knew of any other allegations about Halafihi Kivalu. He said three times that he could not recall any others. When asked whether that was the sort of thing he would remember, he said ‘I would presume so, but as I sit here I can’t remember any other allegations’. He accepted that it was possible that he may have heard other things but could not remember one way or another.\footnote{Zachary Smith, 2/9/15, T:1838.34-1839.8.}

Counsel assisting submitted that it was not possible to be satisfied that Zachary Smith has not heard other allegations, or that he was frank in his evidence on this topic. It was submitted that Zachary Smith has only been employed by the CFMEU since January 2015 of this year; that he was evidently intelligent and capable; and that it is not possible to accept that he was unable to be definitive about the first occasion on
which he heard mention of so significant a matter as an allegation regarding Halafihi Kivalu receiving an improper payment.

95. As in the case of Johnny Lomax, the CFMEU did not respond to these submissions on an evidentiary level. The submissions are accepted.

Jason O’Mara

96. Jason O’Mara was vague when asked about whether he had heard any rumours himself. He said, on his second attempt to answer the question, that his recollection was ‘cloudy’ since the Commission commenced its hearings in July 2015. He recalled that there was ‘the odd discussion here or there around the traps, you know, sort of everyone, I guess, hoping that everything was all right.’

97. Jason O’Mara said that he ‘hadn’t heard much about’ the allegations of payments by Jian He. But he appeared to confirm that he had heard about the allegations from Zachary Smith. Jason O’Mara gave evidence after Zachary Smith had said that he reported the allegations to Jason O’Mara. Jason O’Mara said he told Zachary Smith to invite Jian He to come in and talk to the CFMEU or tell him to report it to the police. To his knowledge, Jian He did not do either. As counsel assisting submitted, there is not a single CFMEU record to confirm Jason O’Mara’s claims.

98. Jason O’Mara said that Elias Taleb never made any allegations that he had made improper payments to Halafihi Kivalu.\footnote{Jason O’Mara, 3/9/15, T:1965.15-46.} This is inconsistent with what Zachary Smith’s typescript indicates occurred at the 22 June 2015 meeting with Elias Taleb and Dean Hall. It is also inconsistent with Zachary Smith’s understanding of that meeting.

99. This was a submission that the CFMEU did address at an evidentiary level, albeit in connection with Dean Hall’s position. The CFMEU’s submission is considered below in that context.

\textbf{Anthony Vitler and Kenneth Miller}

100. There was no telephone intercept or other contemporaneous material on this topic in connection with these witnesses. Counsel assisting submitted that telephone intercept material on other topics indicated the generally unsatisfactory nature of their evidence. Their evidence on the question of allegations made in respect of Halafihi Kivalu can be dealt summarised briefly. In general terms they both said they heard vague rumours about improper conduct on the part of Halafihi Kivalu and claimed that in response they told the person in question to bring evidence forward or go to the police.\footnote{Anthony Vitler, 1/9/15, T:1644-1645, Zachary Smith, 2/9/15, T:1735-1736; Kenneth Miller, 2/9/15, T:1883-1889.}
Dean Hall

101. Dean Hall at all material times was Secretary of the CFMEU. On 24 July 2015, Dean Hall put on a response to Elias Taleb’s statement and to the oral evidence Elias Taleb gave on 13 July 2015:\textsuperscript{114}

7. In his evidence Mr Taleb refers to making payments to Halafihi Kivalu while Kivalu was an organiser of the ACT Branch of the Construction & General Division of the CFMEU. Mr Kivalu also gave evidence that he had received payments from Mr Elias [sic]. I consider this conduct to be deplorable. The union does not condone it.

8. I was not aware of these payments before the evidence was given in the Royal Commission. When I became aware of the evidence of Mr Elias [sic] and it was clear that Mr Kivalu did not deny it I formed the view that Kivalu had engaged in conduct that was gross misbehaviour. While Mr Kivalu no longer held office as an organiser in the Branch he continued to be a member and held office as a member of the branch Committee of Management. I immediately took steps to have Mr Kivalu removed from office and expelled from membership.

10. … I have asked all other officials in the Branch about rumours of that kind and they had not heard them either. Had I heard them I would have acted.

102. Elias Taleb gave oral evidence again on 27 July 2015, when he was examined by senior counsel for the CFMEU. During the course of his evidence on this day, he referred to a meeting with Dean Hall and Jason O’Mara.\textsuperscript{115} This was the meeting of 22 June 2015 that is recorded in Zachary Smith’s typescript.\textsuperscript{116} It is apparent from paragraphs 20–28 of that typescript that Elias Taleb showed those at

\textsuperscript{114} Dean Hall, first witness statement dated 24/7/15, 8/10/15, paras 7-8, 10.
\textsuperscript{115} Elias Taleb, 27/7/15, T:1219.45ff.
\textsuperscript{116} Zachary Smith, witness statement dated 30 July 2015, ZS-2.
the meeting a photograph of the ‘debt reconciliation’ document he claimed was provided to him by Tuungafasi Manase. Elias Taleb had told the meeting that he had been approached by Fihi ‘to collect payments that he allegedly owed’ and made allegations about Halafihi Kivalu debt collecting on behalf of the CFMEU. The typescript records that Elias Taleb said words to the effect that ‘the last EBA he was dealing with Fihi and he didn’t want to deal with him because of this’. The typescript records that Dean Hall twice told Elias Taleb to go to the police.

103. Counsel assisting submitted that it appeared from Zachary Smith’s typescript that Dean Hall’s claim in paragraph 8 of his witness statement dated 24 July 2015 that he knew nothing of the payments prior to the Commission was wrong, and criticised Dean Hall for attempting to defend it.

104. After Elias Taleb gave evidence on 27 July 2015, Dean Hall put on a further statement. In it he admitted that he had a meeting with Elias Taleb at which allegations were raised about Halafihi Kivalu. But he said that the allegations were not that improper payments had been made. He took the same position in oral evidence. When asked whether he read the document on Elias Taleb’s phone, he said ‘Briefly. Oh, not really, I glanced at it’. The substance of Dean Hall’s

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117 Taleb MFI-1, 13/7/15, tab 25, p 225. See paras 27-29.
118 Dean Hall, witness statement dated 30/7/15, 8/10/15.
119 Dean Hall, 8/10/15, T:2232.2.
evidence was that he thought that Elias Taleb was merely alleging that Halafhi Kivalu was debt collecting for other people in the industry.\textsuperscript{120}

105. Counsel assisting submitted that Dean Hall’s evidence cannot be accepted. They submitted that it is at odds with Zachary Smith’s evidence about what occurred at the meeting, at odds with what Zachary Smith’s typescript indicates would have been obvious to an intelligent and capable person such as Dean Hall and also at odds with the fact that Dean Hall at the meeting twice in quick succession told Elias Taleb to contact the police. Counsel assisting submitted that the conclusion to be drawn is that Dean Hall in his oral evidence and in his statement of 30 July 2015 was attempting to justify the position he had taken in his earlier statement, which had been prepared before Elias Taleb had given evidence that he had told the CFMEU about the alleged payments.

106. The CFMEU responded to these submissions by pointing to Elias Taleb’s oral evidence. It submitted that his oral evidence cannot be relied upon to suggest that anyone in the union knew about the payments. It quoted the following passage from Elias Taleb’s examination by its senior counsel:\textsuperscript{121}

\begin{quote}
Q. Do you say – I just want you to be absolutely clear about this: you have never said anything to Dean Hall or Jason O’Mara about the fact that you had paid money to Fiihi?

A. Not in exact words, no. I’ve never – I’ve indicated the things that happened. I’ve never told them I’ve paid money, in that words, I never told them that.
\end{quote}

\textsuperscript{120} Dean Hall, 8/10/15, T:2234.34-2235.44.

\textsuperscript{121} Elias Taleb, 27/7/15, T:1222.39-45.
107. Elias Taleb gave only qualified assent to the proposition put to him by senior counsel for the CFMEU. His evidence at times suggested that he did mention payments, either expressly or implicitly, to the CFMEU.\textsuperscript{122} It is not necessary to form any final view about the overall effect of Elias Taleb’s evidence. It is sufficient to deal solely with Zachary Smith’s typescript. Zachary Smith understood that Elias Taleb was making an allegation that improper payments had been made by Elias Taleb to Halafihi Kivalu.\textsuperscript{123} That understanding is entirely rational in the light of the typescript. Elias Taleb’s complaint was not that Halafihi Kivalu was collecting legitimate debts. He was complaining that the debts were illegitimate. The document on his phone that he showed Dean Hall had the names of various construction projects next to sums of money said to be owed. It stated that $90,000 had already been paid. It is obvious from what was said and this document that Elias Taleb was alleging that Halafihi Kivalu was demanding money in connection with various construction projects, and that some money had already been paid.

108. For these reasons, the CFMEU’s submissions are rejected and those of counsel assisting are accepted.

109. There is one further matter to deal with. Dean Hall in, in paragraph 10 of his witness statement of 24 July 2014, quoted above, gave evidence that, after Elias Taleb first gave oral evidence in Canberra, Dean Hall had asked all the other officials in the Branch whether they had heard rumours or allegations of the kind discussed above, and they had said

\textsuperscript{122} Elias Taleb, 27/7/15, T:1202.20-47, 1206.39-1207.16.

\textsuperscript{123} Zachary Smith, 2/9/15, T:1826.16-19.
‘no’. He gave similar oral evidence. However, all of the organisers had in fact heard such rumours – and some of them concrete allegations - by the time the Commission’s hearings had started. Dean Hall deposed that after Anthony Vitler, Zachary Smith, Kenneth Miller, Jason O’Mara and Johnny Lomax gave evidence at the Commission to the effect that they had heard such rumours, Dean Hall asked them why they did not tell him about it previously, when he had asked them. According to Dean Hall, they responded with words to the effect ‘I don’t know’.

110. Counsel assisting submitted that there is no satisfactory way to explain the above evidence from the CFMEU’s point of view. They submitted that, if not one organiser was prepared to tell Dean Hall that he had heard about rumours concerning Halafihi Kivalu then each flagrantly disobeyed a direct and obviously highly important request from their superior. If, on the other hand, that was not the position then, they submitted, Dean Hall was being untruthful, either because he made no request for information about such rumours, or because a request was made and responded to.

111. As indicated above, the CFMEU characterised the above submission as amounting to a submission that no finding should be made at all. The CFMEU criticised it, and the other attacks on the credit of the CFMEU witnesses, as gratuitous. For the reasons given earlier in this Chapter, that submission is rejected.

124 Dean Hall, 8/10/15, T:2229.1ff.
125 Dean Hall, 8/10/15, T:2245.26-2246.42.
112. There is a question as to whether a finding can or should be made determining which of the two unsatisfactory alternatives posited by counsel assisting should be accepted. None is suggested by counsel assisting. The unsatisfactory nature of the evidence of all of the CFMEU officials makes it impossible to choose between the alternatives.

113. There is, however, one finding which can be made. The CFMEU’s persistent line – and not only in the Australian Capital Territory – is always that any person who suspects corruption should report the matter to the police. That norm or mandate cannot operate properly unless there is within the union some system by which rumours of or suspicions about corruption which officials hear about are brought to the attention of responsible persons who have a duty to inform the police. It is clear that, whatever the true position which may lie behind the foggy and contradictory evidence described above, in the Australian Capital Territory the CFMEU had no system whatever to collect and record rumours and suspicions and then report them in an efficient manner to the police.
CHAPTER 6.3

INAPPROPRIATE PRESSURE TO ENTER INTO ENTERPRISE AGREEMENTS

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**A – INTRODUCTION**

1. The Report of the Cole Royal Commission identified various categories of inappropriate conduct which existed at that time throughout the building and construction industry. One of these was
‘the use by a union of occupational, health and safety (OH&S) issues as an industrial tool, intermingled with legitimate OH&S issues’. Another was ‘the raising of alleged OH&S issues by a union in pursuit of industrial ends’. The present Chapter is concerned with these kinds of conduct.

2. Clive Arona has been in the construction industry for about 18 years. His evidence was that to get work in the commercial sector his concreting company, Multi-Crete Australia Pty Ltd, needed to have an EBA and that if it had an EBA a company was ‘left alone’ by the union. The question of what ‘left alone’ meant was explored in the following passage of evidence:

Q. So it wouldn’t have problems on the site...
A. No.
Q. … Is that what you meant?
A. Yes, correct.
Q. But if you don’t have that arrangement, you would have problems on the site, is that what you mean?
A. Seemed to, yes.
Q. Did you feel like you had a choice?
A. Not really.

1 Royal Commission into the Building and Construction Industry, Final Report (2003), Vol 1, p 10 (7th and 8th bullet points).
2 Clive Arona, 15/7/15, T:159.41-42.
3 Clive Arona, 15/7/15, T:166.18-26.
4 Clive Arona, 15/7/15, T:166.28-47.
5 Clive Arona, 15/7/15, T:167.2-17.
Q. When you go to a head contractor, a builder, do they ask if you’ve got an EBA?

A. Yes.

3. Later in Clive Arona’s oral evidence he was asked whether he would have been able to get work in the Canberra commercial market if he did not have a CFMEU EBA. He answered, ‘I think not’. He said further that without an EBA he did not think he would have been able to operate or get jobs.

4. This issue was explored further in the following passage of evidence:

THE COMMISSIONER Q. Is it that the builder wants a quiet life? No unwelcome visits from Union officials?

A. Could be, yes.

Q. No meetings, no strikes, no general trouble, and if a subcontractor has an EBA, there is more chance the builder won’t be exposed to that sort of harassment?

A. Yes.

5. Numerous other witnesses gave evidence to similar effect: for example, Bernardo Da Silva and John Ryan, who operated scaffolding companies. Still other witnesses said that they felt that

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6 Clive Arona, 15/7/15, T:189.36.
7 Clive Arona, 15/7/15, T:190.1-5.
8 Clive Arona, 15/7/15, T:190.15-22.
9 Bernardo Da Silva, witness statement dated 22/7/15, 30/7/15, para 26; Bernardo Da Silva, 30/7/15, T:1525.6-31, 1532.28-39.
10 John Ryan, witness statement, 29/7/15, para 12.
they had no choice but to enter into CFMEU EBAs: for example, Elias Taleb,11 Pietro Marcantonio,12 Adam McEvilly13 and Ian Watt.14

6. These are all general statements. They are probative at least of the existence of a belief or attitude amongst participants in the industry. The case studies in this Chapter indicate that beliefs of this kind are well-founded. So much was indicated by what Johnny Lomax, in Jason O’Mara’s presence, said to a subcontractor: ‘without the EBA, you won’t be doing any work on commercial sites’.15 Johnny Lomax’s evidence was that this was something he sometimes said to contractors.16

7. The case studies in the present Chapter examine some of ways in which the CFMEU has a significant influence over which companies obtain work in Canberra. They focus on the question of whether the CFMEU exercises or purports to exercise rights of entry under Work Health and Safety legislation for the purpose of applying industrial pressure to participants in the industry.

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12 Pietro Marcantonio, witness statement, 16/7/15, para 7; Pietro Marcantonio, 16/7/15, T:321.22-322.4.
13 Adam McEvilly, witness statement, 29/7/15, para 6.
14 Horace Watt, 30/7/15, T:1582.3-22, 1584.6-8.
15 O’Mara MFI-3A, 8/10/15, p 4.3-4.
16 Johnny Lomax, 7/10/15, T:2209.41-2210.4.
B – STATUTORY CONTEXT

8. It is necessary to refer at the outset to some of the relevant legislative provisions.


10. Primary responsibility for safety on site is vested in the person conducting the business or undertaking (PCBU). It is also vested in the PCBU’s officers. Duties are imposed on any person at a workplace to take reasonable care for his or her own safety, to ensure that his or her acts or omissions do not adversely affect the safety of others, and to comply with any reasonable instruction from the person conducting the business or undertaking.

11. Division 3 of Part 5 of the *Work Health and Safety Act 2011* (ACT) provides for the appointment, on the request of a worker, of health and safety representatives (HSRs). Part of the powers and functions of HSRs include monitoring compliance with the Act, investigating complaints from workers and inquiring into anything that appears to be a health and safety risk.

12. A worker is entitled to cease work if the worker has a reasonable concern that the work could expose him or her to a serious safety risk.

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19 *Work Health and Safety Act 2011* (ACT), s 68.
emanating from an immediate or imminent exposure to a hazard. HSRs are entitled to direct workers to cease work in similar circumstances. If there is a dispute about whether work should cease, the HSR, the PCBU or the worker is entitled to ask WorkSafe to appoint an inspector to attend the workplace to assist in resolving that dispute.

13. HSRs are entitled to issue provisional improvement notices if they reasonably believe a person is contravening a provision of the Work Health and Safety Act 2011 (ACT) or has contravened a provision in circumstances that make it likely that the contravention will continue to be repeated.

14. Part 7 of the Work Health and Safety Act 2011 (ACT) confers rights on entry on the holders of work, health and safety entry permits (WHS permits). WHS permit holders are also required, in order to exercise their rights under this Part, to hold permits under the Fair Work Act 2009 (Cth). WHS permits can only be issued on the application of a union. They can only be issued to a person who is an official or employee of that union. They can only be issued to a person that has completed prescribed training.

15. Section 117 of the Work Health and Safety Act 2011 (ACT) provides:

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20 Work Health and Safety Act 2011 (ACT), s 84.
22 Work Health and Safety Act 2011 (ACT), s 89.
(1): A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of his Act that relates to, or affects, a relevant worker.

(2): The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring.

16. By s 4, ‘relevant worker’ is defined to mean any worker on the site who is or is eligible to be a member of the union whose interests the work, health and safety permit holder represents.

17. Section 118 of the Work Health and Safety Act 2011 (ACT) sets out what a WHS permit holder may do after having entered under s 117. In substance, the permit holder is entitled to inspect matters in relation to the suspected contravention, consult with relevant workers and the PCBU, inspect and make copies of any document directly relevant to the suspected contravention and warn any person if the permit holder reasonably believes a person to be exposed to a serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard.

18. Section 119 of the Work Health and Safety Act 2011 (ACT) requires that a notice be given to the PCBU as soon as reasonably practicable after entering the workplace where the contravention is suspected.

19. Section 126 of the Work Health and Safety Act 2011 (ACT) provides that rights of entry may only be exercised by a WHS permit holder during usual working hours at the workplace.

20. Section 128 of the Work Health and Safety Act 2011 (ACT) requires a WHS permit holder to comply with any reasonable request by the PCBU or person with management or control of the workplace to
comply with any work health and safety requirement or any other legislated requirement.

21. Section 138 of the *Work Health and Safety Act 2011* (ACT) confers an entitlement on persons affected by the exercise or purported exercise of power by a WHS permit holder to apply to the regulator to revoke the WHS permit.

22. Section 141 of the *Work Health and Safety Act 2011* (ACT) provides that any party to a dispute about the exercise or purported exercise of a right of entry by a WHS permit holder may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute.

23. Section 144 of the *Work Health and Safety Act 2011* (ACT) requires that a person must not, without reasonable excuse, refuse or unduly delay entry into a workplace by a WHS permit holder. Section 145 of the *Work Health and Safety Act 2011* (ACT) provides that a person must not intentionally and unreasonably hinder or obstruct a WHS permit holder in entering a workplace or in exercising any rights at a workplace.

24. Section 146 of the *Work Health and Safety Act 2011* (ACT) provides that in exercising rights under Part 7 of the Act, a WHS permit holder must not intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace or otherwise act in an improper manner.
25. Inspectors are appointed by the regulator.\footnote{25}{The national statutory regime makes provision for different regulators in different states and territories and for a national regulator (ComCare). The regulator in the Australian Capital Territory is the director-general (see Dictionary to the \textit{Work Health and Safety Act} 2011 (ACT), p 217).} By s 158 of the \textit{Work Health and Safety Act} 2011 (ACT), an inspector is obliged to disclose all interests that conflict or could conflict with the proper performance of an inspector’s functions and the regulator is required to give an inspector a direction not to deal with a matter if, where there is a potential conflict, the inspector so considers.

26. The functions and powers of inspectors are specified in s 160 of the \textit{Work Health and Safety Act} 2011 (ACT). They include providing information and advice about compliance with the \textit{Work Health and Safety Act} 2011 (ACT), requiring compliance with that Act through the issuing of notices, monitoring compliance with that Act and investigating contraventions of that Act.

27. An inspector may at any time enter a place that is, or that the inspector reasonably suspects is, a workplace.\footnote{26}{\textit{Work Health and Safety Act} 2011 (ACT), s 163.} Upon entry, inspectors have broad powers of inspection and examination and to compel the co-operation of others.\footnote{27}{\textit{Work Health and Safety Act} 2011 (ACT), ss 165, 171-181.} Inspectors have the power to issue improvement and prohibition notices and to enforce compliance with those notices.\footnote{28}{\textit{Work Health and Safety Act} 2011 (ACT), Part 10.} A prohibition notice (which can be issued orally) may be issued, in
substance, in the same circumstances as an HSR may direct a worker to stop work.29

28. Section 188 of the *Work Health and Safety Act 2011* (ACT) provides, relevantly, that a person must not intentionally hinder or obstruct an inspector in exercising his or her compliance powers. By s 190 a person commits an officer if a person engages in conduct and the person intends, by engaging in that conduct, to directly or indirectly assault, threaten or intimidate an inspector. A contravention of s 188 is punishable by a fine of $10,000 and an offence of s 190 is punishable by $50,000 or imprisonment for two years, or both.

29. The CFMEU drew attention in its submissions to provisions of the *Fair Work Act 2009* (Cth).30 Many of these submissions proceed on the assumption that the exercise of rights by a WHS permit holder under the *Work Health and Safety Act 2011* (ACT) is necessarily an exercise of rights under the *Fair Work Act 2009* (Cth). The assumption is at odds with the terms of the provisions of the *Fair Work Act 2009* (Cth) and its correctness was contested by counsel assisting. It is not necessary to deal with the matter because the significant provisions referred to by the CFMEU in the *Fair Work Act 2009* (Cth) are in substance replicated in the *Work Health and Safety Act 2011* (ACT).

30. There were two points that the CFMEU endeavoured to make arising out of these provisions. The first was that some provisions confer rights on affected persons to take action against a WHS permit holder in the event of an improper exercise of power. Section 138 of the

Work Health and Safety Act 2011 (ACT), referred to above, is an example of such a section. The CFMEU’s submission is that the failure to exercise such rights leads to the conclusion that there is no substance in the allegations made in the evidence before the Commission. The difficulties with this submission have been referred to in Chapter 6.1.

31. The second point the CFMEU endeavoured to make was that the exercise of rights under s 117 is subject to significant curtailment. That is a debatable proposition. But however one describes the limitations on those rights, the question in the particular case studies considered is whether those rights have been abused.

32. There is only one precondition to the exercise by a WHS permit holder of a right of entry under s 118. That is satisfaction of s 117. Section 117 contains two limbs. Section 117(1) requires that a WHS permit holder have a particular purpose (namely, that of inquiring into a suspected contravention of the Work Health and Safety Act 2011 (ACT)). Section 117(2) requires that the WHS permit holder reasonably suspect, before entering the workplace, that a contravention of the Work Health and Safety Act 2011 (ACT) has occurred or is occurring.

33. The reference in s 117(2) to a reasonable suspicion that a contravention ‘has occurred’ is without any express temporal limitation. It could not

31 See para 21. The CFMEU relied on s 500 of the Fair Work Act 2009 (Cth), which is in similar terms but is expressed to apply only to the exercise of a right under Part 3-4 of the Fair Work Act 2009 (Cth).

32 See paras 7-8.
be intended, for example, to apply to a contravention that has occurred in the distant past and has long since been rectified. But the words of s 117(2) do not provide any clear guidance as to what, if any, temporal limitations are involved. There is no curtailment of any kind expressed in this part of the legislation.

34. Nor does the *Work Health and Safety Act* 2011 (ACT) limit the number of WHS permit holders who can enter a site at any one time. It may be, however, that where numerous officials from the same union enter a site at the same time for no apparent reason, there could be an inference that they are not exercising rights for the purposes identified in s 117(1) of the *Work Health and Safety Act* 2011 (ACT).

C – SAFETY INSPECTIONS AND THE NATURE OF BUILDING SITES

35. During the course of the hearing a substantial amount of evidence was received concerning particular safety issues on building sites. In most cases there was a contest about that evidence, either because there was a dispute about the existence of the safety issue at all, or because there was a dispute about its significance. Counsel assisting indicated during the course of the hearing that it was not proposed to evaluate the evidence. To take any other course would have extended the hearings considerably and required expert assistance.

36. Counsel assisting proceeded in submissions on the assumption that, in respect of each of the building sites entered by CFMEU official in purported exercise of rights under the *Work Health and Safety Act* 2011 (ACT), a person in the position of the CFMEU officials in question would have been entitled to have a reasonable suspicion that there had been a contravention of the *Work Health and Safety Act* 2011
(ACT) for the purposes of s 117(2). The same assumption is adopted in this Report. This is an assumption which is obviously favourable to the CFMEU.

37. Counsel assisting submitted that the requirement under s 117(2) was relatively easy to satisfy. In part this is because all that is required is a ‘reasonable suspicion’ of a contravention. In part it is because of two matters: the nature of construction work and the nature of the standards in the *Work Health and Safety Act 2011* (ACT) and Regulations. The CFMEU contested this proposition.

38. Making an assessment, in the abstract, of the relative ease or difficulty with which a WHS permit holder might exercise rights under s 117 is of limited utility. It is, however, of utility to refer to some of the evidence relied upon by counsel assisting in support of this submission.

**The nature of construction work**

39. Samuel DeLorenzo is the principal of a commercial building company operating in Canberra. Samuel DeLorenzo has operated in the commercial construction industry in Australia, including in Canberra, for about 40 years.\(^{33}\)

40. Samuel DeLorenzo gave general evidence about safety and risk management on a construction site. He said:\(^{34}\)

> I mean that in safety management we assess risk and we react to risk according to the severity of it. We eliminate the risk if we can and if we


\(^{34}\) Samuel DeLorenzo, 28/7/15, T:1258.21-41.
can’t eliminate it, we manage around it by blocking off, et cetera. So if you look hard enough, you will see something that is a risk, but it may not necessarily be an area that’s being used and there may have been some measure taken to prevent the risk being apparent during the work. It’s about—we accept that there is a risk on the job and that we have to manage it and in the management of risk, we cannot eliminate everything. Unfortunately, with human nature, as people are setting up in the mornings, et cetera, which is perhaps when those photos were taken, the leads may have been on the ground before they were hooked up, I don’t know, but I believe that—and as someone in the construction industry, I can walk around the site, any site, and find a hazard and because—there may be 6,000 or 7,000 issues on a job of a large project, maybe a couple of hundred on a small project, and it’s quite a labour to maintain that. We maintain it to the best of our ability and I think we do a pretty good job.

41. Samuel DeLorenzo explained that construction ‘is a leading edge process where you’re doing things, you’re lifting things, you know, you’re always building up or building out or digging down’. That is, work on a construction site is a dynamic process. The effect of his evidence was that if one takes a snapshot of a site at a particular point in time, one is always going to be able to spot things that could be characterised as hazards. That is because in the ordinary course of managing risks some things will have emerged and just have not been fixed at that moment in time. He described in his evidence his practice of giving instructions to observe safety standards, and then checking on the implementation of his instructions by doing circuits of a building site. He said that sometimes in this process, it is necessary to close one area of the site off in order to manage a safety risk on it. He gave the example of scaffolding not being up to standard and said that the scaffolding would be shut off, a sign put up, and the area

35 Samuel DeLorenzo, 28/7/15, T:1259.40-42.
36 Samuel DeLorenzo, 28/7/15, T:1266.43-1267.9.
barricaded. The result, in such a situation, is that an area of the site has a safety risk, but that risk is managed.

42. Donald McInnes gave a similar example in connection with scaffolding that had a subsidence issue. He was shown a picture of scaffolding with jack studs being back-braced against a slab. It was suggested to him that that represented a significant risk to health and safety. The substance of Donald McInnes’ answer was that the subsidence issue had already been identified and was being addressed at the time that the photograph was taken. He explained:

…this shot has been taken during, if you want to call it, like a rectification process, where we back-propped the scaffold and then it was hand-dug-out and then it was backfilled with gravel and compacted.

43. Donald McInnes gave further evidence along similar lines in relation to bricks and other material on a walkway. The substance of his evidence is that the bricklayers had just finished and that one was always going to have rubbish on a site and that it needed to be collected in an area, loaded into a bin and taken away.

44. As counsel assisting submitted, s 117(2) refers to a reasonable suspicion that a breach of the Act ‘has occurred’. Thus, it encompasses situations of the sort described by Donald McInnes and Samuel DeLorenzo: namely, where a safety issue has been identified by the builder and is in the process of being addressed.

37 Samuel DeLorenzo, 28/7/15, T:1260.3-31.
38 Donald McInnes, 1/9/15, T:1620.33-1622.19.
39 Donald McInnes, 1/9/15, T:1621.8-12.
40 Donald McInnes, 1/9/15, T:1632.4-45.
The nature of safety standards

45. Counsel assisting also made submissions about the nature of safety standards. Particular examples were given of safety standards that are in general terms, or which admit of various constructions, or both, and which as a result might give rise without much difficulty to a reasonable suspicion under s 117(2). The submissions were made by reference to the evidence of particular safety breaches alleged. They were not the subject of any specific response by the CFMEU. What follows draws largely on counsel assisting’s submissions, which are accepted.

46. The primary duty imposed by the *Work Health and Safety Act 2011* (ACT) is the duty of the PCBU under s 19(1) to ‘ensure, so far as is reasonably practicable, the health and safety of’ the workers on site. That is as general an expression of a duty as could be formulated. Section s 19(3) is only slightly more particular in providing that, without limiting s 19(1), the PCBU has a duty to ensure, so far as reasonably practicable, such matters as ‘the provision of a work environment without risks to health and safety’, ‘the provision and maintenance of safe plant and structures’, and ‘the provision and maintenance of safe systems of work’. These standards are general for a very good reason. They must be capable of applying to the almost infinite variety of work that can be done on construction sites.

47. Section 276 of the *Work Health and Safety Act 2011* (ACT) empowers the Governor General to make regulations in relation to any matter relating to work health and safety. The regulations have been promulgated (*Work Health and Safety Regulations 2011* (Cth))
(Regulations)). They provide what might be termed particular examples of the application of the general standards in s 19.

48. The application of the safety standards in the Regulations, or some of them, can be demonstrated by reference to the CFMEU visit to the Milin Builders Pty Ltd (Milin) site on Moore Street on 21 April 2015. That visit and the preparations for it are the subject of further consideration in the next section. It is sufficient to note here that a concrete pour was taking place on that day. The site was located near a T-intersection which required concrete trucks to enter the site from across a road with a reasonable amount of traffic. On the site, a concrete boom was in place in preparation for the commencement of the pour.

49. Some time after the visit, Garry Hamilton of the CFMEU prepared a site report identifying suspected breaches of the Act. The first suspected breach identified is a breach of r 215(4) of the Regulations, when read in light of the General Guide for Workplace Traffic Management and the WorkSafe Code of Practice How to Manage Work Health and Safety Risks. Regulation 215(4) applies to the operation of powered mobile plant at a workplace. It requires the person conducting the business or undertaking to ‘ensure that the plant does not collide with pedestrians or other powered mobile plant’. The two publications referred to by Garry Hamilton provide general

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41 Dennis Milin, witness statement, 22/7/15, Annexure F, pp 100-108.
42 Dennis Milin, witness statement, 22/7/15, Annexure F, p 104.
43 The regulation is made pursuant to s 276 of the Work Health and Safety Act 2011 (Cth), which empowers the Governor General to make regulations in relation to any matter relating to work health and safety.
guidance on traffic management but (understandably) do not prescribe standards any more particular than those identified in s 19 of the *Work Health and Safety Act* 2011 (ACT) and regulation 215(4). Garry Hamilton’s report does not identify any parts of these publications as directly applicable.

50. The particular concern identified in this part of Garry Hamilton’s report was the collision of the concrete truck with pedestrians. There was some dispute on the evidence as to whether one or two traffic controllers were in attendance on the day in question. For example, Garry Hamilton’s report in paragraph three says that there was only one, but in the next paragraph identifies two.\(^{44}\) But whether there was one, two or indeed three such controllers, it is not difficult to arrive at a reasonable suspicion that a contravention of the Act had occurred or was occurring. Though reasonable, that suspicion might have been wrong. It appears that WorkSafe regarded the site’s traffic management as adequate. However, the nature of the standards that might be contravened and the dynamic and inherently dangerous nature of what was involved in a concrete truck entering a building site from across a busy road makes it very difficult to say that a suspicion of this kind would be unreasonable.

51. The ease with which a reasonable suspicion might arise in these circumstances was illustrated by Johnny Lomax’s evidence that ‘we knew there would be a problem with traffic control because it is in a high-density populated and trafficked area’.\(^{45}\) The exchanges between

\(^{44}\) There was a dispute on the evidence as to whether one or two traffic controllers were in attendance.

\(^{45}\) Johnny Lomax, 7/10/15, T:2145.32-34.
senior counsel for the CFMEU and Micah Beaumont about whether and under what circumstances an additional spotter was required to assist a reversing concrete truck are a further example of a traffic management matter about which reasonable minds can differ.46

The next breach identified by Garry Hamilton in his report was Anthony Vitler’s belief that there was no delineation between plant and workers on site.47 The particular issue was whether there was sufficient delineation between the concrete trucks entering the site and the scaffolding. The view of Milin was that sufficient delineation was provided by a concrete slab.48 The CFMEU view was that this was insufficient, and additional concrete barriers were necessary. WorkSafe supported the CFMEU view, although there was some debate about whether WorkSafe asked Milin to put barriers in the same place that the CFMEU said they should be placed and also about whether water-filled barriers were sufficient.49

Garry Hamilton’s report suggests that the absence of a concrete barrier was a breach of the duty of the person conducting the business or undertaking under regulation 203 of the Regulations. That regulation imposes on the PCBU or undertaking a duty to ‘manage risks to health and safety associated with plant, in accordance with part 3.1’. Part 3.1 of the Regulations does not impose any more specific obligation. It is not hard to see how reasonable minds may differ about the application of this standard and in particular about whether in particular

47 Dennis Milin, witness statement, 22/7/15, Annexure F, pp 100-101.
48 See for example Micah Beaumont, 22/7/15, T:724.27-725.43.
circumstances any delineation is required and/or what sort of delineation is required.

54. Garry Hamilton’s report refers to the Australia Code of Practice *Managing Risks Of Plant In The Workplace*, page 12 under the heading ‘Isolation’. Under that heading the following appears:

**Isolation**- Separate the hazardous plant from people either by distance or physical barrier. For example:

- Constructing a booth from which the plant can be operated remotely, and
- Using concrete barriers to separate mobile plant from workers.

55. This code of practice is an approved code under s 274 of the *Work Health and Safety Act 2011* (ACT). The code is admissible in proceedings for an offence under that Act. Section 275(3) of the *Work Health and Safety Act 2011* (ACT) provides that a court may have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and may rely on the code in determining what is reasonably practicable in the circumstances into which the code relates. The particular part of the code relied upon by Garry Hamilton, quoted above, provides two examples of how the requirement in r 215 might be satisfied. One is the use of concrete barriers to separate mobile plant from workers. But this part of the code does not exhaust the possibilities for compliance with r 215. It also indicates that ‘distance’ or other types of barrier may be sufficient.

56. The issue that arose on 21 April 2015 in respect to delineation is an illustration of how reasonable minds can differ as to the application of the above standards. Micah Beaumont believed that there was
sufficient delineation between plant and scaffold because of the existence of a concrete slab. Whether or not Micah Beaumont’s view was right or wrong, it was not unreasonable. The view expressed in Garry Hamilton’s report was different, but it too was not unreasonable. WorkSafe appeared to agree with it. The same difference of opinion could have arisen even had there been concrete barriers in place on the day. The code does not and could not specify precisely the dimensions of the barriers it refers to or what amount of delineation is required.

One further example of what occurred on 21 April 2015 usefully reinforces the above points. There was some debate in the evidence about whether any work at all underneath a concrete boom is permissible. This also is the subject of Garry Hamilton’s report. The report submitted that work under a concrete boom is likely to be a contravention of r 203 of the Work Health and Safety Act 2011 (ACT) and that an exclusion zone is necessary. WorkSafe, at least so far as the visit on 21 April 2015 was concerned, seems not to have agreed. Joseph Bartlett, a WorkSafe inspector who gave evidence about a different site, said that he did not believe there was any requirement of this nature. But whether or not an exclusion zone is required by r 203 under particular circumstances is also something about reasonable minds can differ. It is very difficult to say that the view expressed in Garry Hamilton’s report, whether one regards it as right or wrong, was an unreasonable view.

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50 See for example the exchange between senior counsel for the CFMEU and a Worksafe inspector: Joseph Bartlett, 21/7/15, T:534.22-47.

The above matters are illustrations of why it may be very easy for a WHS permit holder to identify a safety issue sufficient to give rise to a reasonable suspicion for the purposes of s 117(2) of the Work Health and Safety Act 2011 (ACT).

Counsel assisting submitted that entry onto a site pursuant to s 117 of the Work Health and Safety Act 2011 (ACT) can have numerous adverse consequences for a builder and its contractors. As a general proposition this is no more than common sense. However it appeared to be contested by the CFMEU in submissions, who described it as speculation and utter nonsense. The CFMEU’s submission is disingenuous. Delay and disruption on building sites costs money. Delay and disruption during critical work can cost a lot of money. Abuse of rights of entry under s 117 can lead to delay and disruption. The was actual evidence of the cost of such incidents in the A&P Leemhuis case study, referred to below.

Further, the CFMEU’s own conduct is evidence that abuse of rights under s 117 has adverse consequences. The purpose of the abuse is to make those on the site suffer adverse consequences. The Milin case study, for example, indicates that the CFMEU targeted a site purportedly to exercise rights under s 117 but in truth to apply industrial pressure to a builder who refused to have a CFMEU EBA. The inference to draw is that it did so for the very purpose of causing delay, disruption and the financial consequences that flow from it.

It is convenient to turn to the particular case studies.

D – MILIN BUILDERS

62. Milin is a construction company operating in Canberra. Dennis Milin is its managing director. Milin is a building head contractor and undertakes the construction of multi-unit residential developments for various developers throughout Canberra and the surrounding region. Milin had about 25 employees. About half of them were construction workers and machinery operators. The balance were office staff, a construction manager, a project manager, site managers and foremen.53

63. From time to time in the past Milin has had site specific EBAs with the CFMEU: that is, EBAs in relation to particular projects rather than a blanket EBA covering all of Milin’s operations.54 On 13 October 2014, Milin signed a non-CFMEU EBA that applied across all its sites. It was approved by the Fair Work Commission on 28 November 2014.55

64. The Commission received evidence concerning the dealings between Dennis Milin and the CFMEU in connection with three projects. The first was the IQ Apartments Project in Braddon. Counsel assisting did not submit that any adverse findings should be made against the CFMEU in connection with this first project, but rather submitted that it was an example of the CFMEU’s stance that every builder in Canberra had to have an EBA, and that it was relevant by way of background to the other two projects that concerned Milin. It is convenient to proceed on the same basis.

53 Dennis Milin, witness statement, 22/7/15, paras 1, 4; Dennis Milin, 22/7/15, T:678.1-8.
54 Dennis Milin, 22/7/15, T:679.12-29.
65. The IQ Apartments Project in Braddon started in January 2012. Prime Space Property Investment Ltd (the principal) engaged Milin to design the IQ Apartments Project in Braddon and also agreed to enter into a contract for the construction and completion of the Project subject to an agreement on price and to approval of finance. Subsequently, Prime Space Property Investment Ltd could not achieve sufficient presales to satisfy its lenders. As a result it decided to bring in a joint venture partner. The joint venture partner was the Tradies Group.

66. Milin was not engaged as the builder by the joint venture. Dennis Milin did not claim that this was in breach of any contract or other legal entitlement. Both he and Dean Hall gave evidence about the circumstances in which the decision was made not to engage Milin. There was some dispute about whether Dean Hall represented the Tradies Group in his negotiations with Dennis Milin. Dennis Milin thought he did. Dean Hall’s position was that he did not. It is not necessary to determine this issue.

67. Dennis Milin said that in March or April of 2012 he had a meeting with Dean Hall and Jason O’Mara to discuss the construction of the IQ Apartments project. There was not a great deal of dispute between Dennis Milin and Dean Hall about what was said at this meeting. They both agreed, in substance, that Dean Hall indicated that he wanted Milin, if it was to be the builder, to have a CFMEU EBA and to use

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56 Dennis Milin, witness statement, 22/7/15, paras 5-6.
contractors with CFMEU EBAs or who paid CFMEU EBA rates.\footnote{Dennis Milin, witness statement, 22/7/15, para 8; Dean Hall, second witness statement dated 24/7/15, 8/10/15, paras 3-4.} According to Dennis Milin, either Dean Hall or Jason O’Mara also said ‘we want contractors who have their employees as union members because every four years we have a vote we need those votes to hold our positions, and that is more important than the construction price. If you engage contractors without EBAs and union memberships that will upset our relationships and risk losing votes’\footnote{Dennis Milin, witness statement, 22/7/15, para 10.}. Dean Hall denied this.\footnote{Dean Hall, second witness statement dated 24/7/15, 8/10/15, para 7.} There is no contemporaneous or objective evidence either way. Nothing turns on the resolution of this contest. Therefore it is not necessary to resolve it.

Dean Hall accepted that the Tradies Group expressed a preference to PrimeSpace that Milin not be awarded the job.\footnote{Dean Hall, second witness statement dated 24/7/15, 8/10/15, para 12.} As indicated above, Milin, in fact, did not get the job.

Dennis Milin gave evidence about a conversation he had with Dean Hall after the decision not to use Milin had been made. According to Dennis Milin, Dean Hall gave as one of the reasons not to use Milin that he wanted to deal with a builder who had experience of dealing with a death on a building site. Dean Hall strenuously denied this. The conversation is only of any significance because the CFMEU submitted that it indicates that Dennis Milin was not a witness of credit. The submission appears to assume that Dean Hall’s evidence is accepted. That is its first difficulty. Dean Hall’s evidence was often
improbable. It seemed to proceed from an emotion of reckless idealism. Dean Hall gave the impression of strongly believing in his own rectitude and capacity. He was very touchy about any challenge to either aspect of what he perceived about himself in these respects. Perhaps for these reasons in many ways Dean Hall was an unsatisfactory witness. Examples of this include his evidence in relation to Halafihi Kivalu\(^{61}\) and the CFMEU smear campaign.\(^{62}\) The submission also proceeds on the basis that it is inherently unlikely that Dean Hall would have said something of this kind. But it is not obviously unlikely that a representative of the Tradies Group (which Dennis Milin understood Dean Hall to be representing) would want to deal with a builder who had that experience. Dennis Milin did not suggest that Dean Hall said something to the effect that he wanted persons to die on building sites, or that he wanted to use a builder likely to cause deaths.

70. The foregoing is sufficient to demonstrate that the Dennis Milin’s evidence on this point does not demonstrate that he was not a credible witness. It is not necessary to make any finding as to whether, in fact, Dean Hall said the words attributed to him.

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\(^{61}\) Chapter 6.2, paras 101-113.

\(^{62}\) See paras 315-322.
Trilogy Apartments Project

71. The next project was the Trilogy Apartments Project. This was a building development in Woden ranging from seven to twelve stories comprising of 320 apartments. Its budget was roughly $75 million.63

72. Milin and the CFMEU attempted to negotiate an EBA in 2013. The negotiations broke down in March or February 2014. In August 2014 Dean Hall telephoned Dennis Milin to discuss the Trilogy Project. They gave different accounts of their conversation.

73. Dennis Milin made a note of the conversation about 48 hours after it took place.64 The note proceeds as follows:

Record of Conversation – Summary of Hall’s conversation points to Dennis Milin

10-12min talk on the phone with Dean Hall on 26 Aug 2014

1. Hall: I hear you are going to start building in Woden with Amalgamated…

2. In due course - but the DA isn’t even approved yet… so we may or may not…

3. Hall: You understand - that you’ll never be allowed to build without an EBA in place …

4. Why?

5. Hall: I’d be the laughing stock of the Union movement in Canberra if we didn’t have one in place - its [sic] 3-12 storey towers..its [sic] just not going to happen.”

6. Mmme…

63 Dennis Milin, 22/7/15, T:684.20-27.

64 Milin MFI-1, 22/7/15.
7. If you don’t sign up, you will find you can’t get access to a cement pour, there will be trades you can’t access - you won’t be able to build. Yer get that don’t you……

8. Really…

9. Hall: Yep and there will be all sorts of authorities and officials visiting to check you over and close you down…

10. So are you threatening us?

11. Hall: Of course not - we don’t do that, we don’t threaten anyone…

12. Mmme really?

13. Hall: The thing I’m [sic] really worries me about is that any negative (media?) publicity about Woden, you know - ‘site picketed’, ‘site shut-down’, ‘bad unsafe builder etc.’ - well that’s bad for the development of Woden… you know we have our own interests in Woden too - we don’t want any negative publicity in Woden…”

14. We don’t know what we are doing yet.

15. Hall: don’t play games with me…

16. Hall: I’ll say it again - you’ll never build there - … we won’t allow you or Amalgamated - so looks like Amalgamated’ll have to get themselves another builder…

17. You’ll need to take that up with Amalgamated…

18. Hall: We will.

74. Dennis Milin said the note was typed 40 to 48 hours after the conversation by his colleague on the basis of what Dennis Milin told him.65 The notes conform to Dennis Milin’s general description of

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65 Dennis Milin, 22/7/15, T:682.7-16.
what Dean Hall said.66 He confirmed the accuracy of the note in oral evidence.67

75. The CFMEU criticised the note as unreliable. First, it said that the note was hearsay and not admissible in judicial proceedings and as such had no or no significant probative force in a Commission of inquiry. The non-sequitur involved in the proposition that hearsay evidence has no probative force in this Commission has been discussed in Volume 1. The CFMEU’s criticism has further difficulties. It seems to reflect a view that the law of evidence, to the virtues of which the CFMEU often appealed, had become frozen in the form it took when Baron Parke started at the bar. It is desirable instead to remember what the modern law of evidence is. So far as the note was not relied upon to establish the truth of its contents, it would not have been excluded by operation of the hearsay rule in judicial proceedings. Further, it would have been admissible evidence of the truth of its contents in any event in re-examination under s 108 and s 60 of the Evidence Act 1995 (Cth) and its equivalents in three States and three Territories. It may also have been admissible in chief as evidence of the truth of its contents under the ‘business records’ exception in s 69. That would depend upon whether it was prepared in connection with contemplated proceedings. There is nothing on the face of the document which suggests that it was. And it was admissible as evidence of the truth of its contents pursuant to s 64(3). Further, in conventional litigation, the record would be viewed as recording numerous admissions against

66 Dennis Milin, 22/7/15, T:680.39-681.5.
interest by Dean Hall – an ancient exception to the rule against hearsay now recognised in s 81 of that Act.

76. The CFMEU criticised the reliability of the note on various other grounds. None was persuasive. It said that the date and provenance of the document are uncertain. That is not true. Both those matters were established by Dennis Milin’s evidence. The CFMEU (inconsistently) also said the note was unreliable on the basis that it was not exactly contemporaneous with the conversation, but rather created a couple of days after it. There is no basis for thinking that Dennis Milin’s memory of the substance of the conversation had deteriorated significantly in the course of the two days between the conversation and the preparation of the note. The CFMEU said that the note was ‘oddly replete with strange words’ such as ‘Yer’ and ‘Mmmm’. But the meaning of those words was not difficult to understand. The CFMEU said the note was ‘self-serving’ and made in circumstances where Dennis Milin was antagonistic to Dean Hall. The CFMEU does not identify why the note was ‘self-serving’ – and it goes on to criticise Dennis Milin, inconsistently with this submission, for failing to make any complaint about the matters recorded in the note. There is no basis to think that the accuracy of the note was compromised by any antagonism Dennis Milin might have felt against Dean Hall. He was entitled to feel aggrieved at what Dean Hall said to him. That does not mean he did not cause what Dean Hall said to be recorded truthfully and accurately.

The CFMEU’s criticisms of the note are rejected. It is necessary to consider Dean Hall’s evidence about the conversation. In both his witness statement and oral evidence he denied that the matters set out in paragraphs 3 to 18 of Dennis Milin’s notes were said.\footnote{Dean Hall, second witness statement dated 24/7/15, 8/10/15, para 18; Dean Hall, 8/10/15, T:2287.5-2292.6.} That was a piece of heroic testimonial audacity. Dean Hall made no note of the conversation. His evidence was that he and Dennis Milin had a long conversation in which Dean Hall sought to obtain details about the project. He said that Dennis Milin was ‘cagey’ and avoided saying where the project was up to, when it would start and how big it was. According to Dean Hall, he asked Dennis Milin at the conclusion of the conversation for an undertaking that when Milin obtained a development approval, Dennis Milin would sit down and discuss an EBA. He said Dennis Milin gave that undertaking.

Counsel assisting submitted that Dennis Milin’s note should be preferred to the above evidence. That submission is accepted. As earlier indicated, Dean Hall’s evidence on other issues was unsatisfactory. In relation to this particular conversation, it is unlikely that a busy person’s recollection of a single telephone conversation almost a year earlier, unaided by any document or means of refreshing memory, would be more accurate than a near contemporaneous note of that conversation.

Counsel assisting submitted that, in making the statements recorded in the note, Dean Hall’s conduct may have fallen below the standards expected of an official in his position and may also be conduct in contravention of ss 343 and 348 of the \textit{Fair Work Act 2009} (Cth). The
latter submissions were put on the basis that the threats may amount to threats to take action against Milin with the intent to coerce it to agree to a CFMEU EBA (or to coerce Dennis Milin to do so on its behalf). It was submitted that the entry into an EBA by Milin would be the exercise of a workplace right by Dennis Milin and Milin within the meaning of s 341(1)(b) by operation of s 341(2)(e) and would also be engaging in industrial activity within the meaning of ss 347(b)(iv) and s 347(e). The CFMEU criticised the reference to s 347(e). Even assuming that that criticism has force, s 347(b)(iv) remains applicable.

80. The CFMEU complained that counsel assisting’s submissions on this point resulted in a denial of procedural fairness to Dean Hall. It was said that no reference was made to these sections in counsel assisting’s opening and that procedural fairness required that it be put to Dean Hall that he had the requisite intention under s 343 and s 348. However the conversation as set out in Dennis Milin’s note was put to Dean Hall in detail in oral evidence. It was put to Dean Hall that what the note records him as saying reflected his position at the time. The CFMEU has had the opportunity to make submissions on this topic. There has been no denial of procedural fairness.

81. Dennis Milin’s note also contains a record of a conversation that Dennis Milin said Greg Lemin recounted to him. Greg Lemin is a representative of an organisation referred to as Amalgamated, who were the development managers on the Trilogy Apartments

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70 A reference was also made to s 347(e).
71 Dean Hall, 8/10/15, T:2288.20-24, 2289.24-27, 2290.8-16, 2291.26-35.
development Project in Woden. The record in Dennis Milin’s note is as follows:

**Record of Hall/Amalgamated Phone conversation**

Hall/CFMEU then called Greg Lemin at Amalgamated and told them of their position on using Milin as a builder. No EBA – no building allowed. Hall advised Amalgamated that going with Milin as a builder would be a risk (i.e. unacceptable risk) for Amalgamated. Amalgamated should think about it.

82. Greg Lemin was not called to give evidence. In those circumstances, counsel assisting made no submission that a finding should be made against Dean Hall based on this part of the file note. That perhaps over-generous stance in relation to evidence demonstrating a consistency of position on Dean Hall’s part means that no such finding will, in the particular circumstances, be made.

**The Moore Street Project**

83. In 2015, Milin was the builder on a site on Moore Street, Turner. The CFMEU have made a number of visits to that site. The question that this case study explored was: why did these officials make these visits? The ostensible purpose of the visits was to investigate safety issues. But counsel assisting submitted that recordings of intercepted telephone conversations suggested that this was a mere device to apply pressure to Milin.

84. In overview, counsel assisting submitted that on Friday 10 April 2015 Dean Hall discovered that Milin was operating on the Moore Street site and was furious that no action had been taken against it. He called an urgent meeting of organisers that afternoon to express his displeasure. The Secretary’s mood was not improved by the unauthorised absence
of two organisers. He directed the organisers to ‘sort out’ Milin. There followed a site visit by three officials on Monday 13 April. In the week that followed the CFMEU discovered that a concrete pour was to occur on 21 April 2015. There was a further meeting of organisers on Monday, 20 April 2015. On the morning of 21 April 2015, four CFMEU officials entered the site, purportedly for safety reasons, but, it is said, in truth with a view to disrupting the concrete pour. In fact, the concrete pour proceeded on that day. Counsel assisting’s submission was that the CFMEU was using safety as a means of applying industrial pressure to Milin.

85. The CFMEU characterised matters differently. In overview, its position was that the visits were legitimate exercises of rights under s 117 of the Work Health and Safety Act 2011 (ACT). The meeting of 10 April 2015 was no more than Dean Hall giving organisers a ‘tune up’ about substandard site mapping. The visits on 13 April 2015 and 21 April 2015 exposed legitimate safety issues that required attention. The visits had nothing to do with trying to force Milin to get a CFMEU EBA or punishing it for not having one.

86. To resolve these competing positions it is necessary to examine the evidence.

10 April 2015

87. On the afternoon of Friday, 10 April 2015, Dean Hall called an urgent meeting at the CFMEU’s offices. The meeting was unusual in that organisers’ meetings occurred every Tuesday. Johnny Lomax and another organiser, Cameron Hardy, had gone home for the day. They were told to come back to work by Zachary Smith and by Dean Hall.
Johnny Lomax returned to work and attended the meeting, but Cameron Hardy did not. Shortly after the meeting, Johnny Lomax called Cameron Hardy and told him what had happened at the meeting.

A recording of that conversation was played during Johnny Lomax’s oral evidence. In recounting what had occurred at the meeting, Johnny Lomax said that Dean Hall was ‘fuckin’ dirty’. Johnny Lomax went on to say:

And you know why? … ‘cause there’s a fuckin job in town that’s fuckin - that he’s - he’s affected by. The Milin brothers have got a job in town, all right...In the city and, ah, no-one’s done nothing about it, you know, they haven’t got an EBA, how come they’re building there. He [Dean Hall] reckons Milin’s going around fucking bagging us saying, fuck, he doesn’t need an EBA he can build when he wants and - so he’s - he’s fuckin’, “Who the fuck’s job is it? Why aren’t youse there doing something about it?”

Johnny Lomax and Cameron Hardy proceeded to discuss the fact that Dean Hall had been critical of them for leaving early that day. Dean Hall or Jason O’Mara appeared to have raised something in connection with that topic at the meeting. Johnny Lomax told Cameron Hardy:

He [it is not clear whether this is a reference to Dean Hall or Jason O’Mara] says “I’ll take it back to fuckin’ 5 o’clock if you want, but I don’t want to leave youse in a bad state but fuckin Milin Brothers” they’re red-hot about Milin Brothers. He said “I’m going to leave that to you, yeah that goes straight to you. “You blokes are smartarses, go and get that shit sorted out. This can’t fuckin’ happen.”

72 Lomax MFI-5, 7/10/15.
73 Lomax MFI-5, 7/10/15, p 3.27.
74 Lomax MFI-5, 7/10/15, p 3.31-47.
75 Lomax MFI-5, 7/10/15, p 5.43-6.2.
90. Johnny Lomax then told Cameron Hardy ‘we’re going to sort out Milin Brothers next week’.  

91. Counsel assisting was critical of the evidence given by CFMEU officials about this meeting. It was submitted that the meeting was unusual, that it had happened fairly recently before the Commission hearings, and that it concerned a builder and a site that were the subject of extensive evidence at the Commission. The recording of the conversation between Johnny Lomax and Cameron Hardy was played after everyone except Dean Hall had been asked about the meeting. Notwithstanding these matters, none of the organisers who attended the meeting claimed to have any recollection of Dean Hall referring to Milin and being annoyed that it was building on a site without an EBA. That, it was said, cast significant doubt on either their preparedness to be frank in giving their evidence or the quality of their powers of memory generally or both.

92. Kenneth Miller said he did not remember a meeting of organisers on this day. So also did Anthony Vitler. Anthony Vitler denied that Dean Hall had complained to him and the other organisers that Milin was doing this job in town without an EBA. However, according to what Johnny Lomax told Cameron Hardy, the Moore Street job was Anthony Vitler’s responsibility and Dean Hall was particularly annoyed with Anthony Vitler, seemingly because he had ‘mapped’ the site by identifying contractors working there but not the builder.

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76 Lomax MFI-5, 7/10/15, p 6.6-7.
79 Anthony Vitler, 1/9/15, T:1681.29-45.
Johnny Lomax at one point suggested that prior to the meeting Jason O’Mara and/or Dean Hall met with Anthony Vitler about this.80

93. Jason O’Mara did claim a general recollection of the meeting. He endeavoured to suggest that it was merely a meeting where Dean Hall gave some of the organisers a ‘dressing down’ or ‘tune up’ about making regular site visits.81 Jason O’Mara denied that the point of the meeting was to plan a visit to the Milin site the following Monday.82 Jason O’Mara’s description of the meeting is at odds with what Johnny Lomax told Cameron Hardy. Johnny Lomax’s conversation with Cameron Hardy indicates that Anthony Vitler may have received a ‘tune up’, seemingly for not having identified Milin as the builder on the site (despite having identified the contractors who were working there). But this was not, as Jason O’Mara sought to depict it, a general tune up about making regular site visits. The Lomax/Hardy conversation indicates that the point of the meeting was to notify organisers that Milin was to be targeted.

94. It may be that Jason O’Mara gave this evidence because he knew that on 10 April 2015 he had sent a text message to Anthony Vitler saying ‘I suggest you visit [the Moore Street site]’. Jason O’Mara claimed that he sent the text because, although Anthony Vitler had been to the site two weeks earlier, and although Anthony Vitler knew that Milin was there, ‘[o]n a job of this size we like people to be visiting at least

weekly’. If that was the CFMEU practice, then it is not clear why it was necessary for Jason O’Mara to make this suggestion.

Johnny Lomax, prior to the above recording being played, described the meeting broadly along the lines of Jason O’Mara (who gave evidence before Johnny Lomax). Johnny Lomax suggested that the purpose of the meeting was to give organisers a bit of a touch up regarding their site mapping. He said that he could not recall if there was a discussion about the fact that Milin did not have an EBA. He would not accept that Dean Hall was furious with Milin. He would not accept that the meeting was about Milin and the fact that it was operating without an EBA, and that that was why Dean Hall was angry.

After the above recording was played, Johnny Lomax accepted that Milin ‘did come up’ during the meeting. He appeared to accept that one outcome of the meeting was a visit to Milin Brothers in the following week, but denied that the purpose of the meeting was to direct organisers to target Milin because it did not have a CFMEU EBA.

The CFMEU submitted that the purpose of this meeting was for Dean Hall to give organisers a ‘tune up’ for poor site mapping. It said that Johnny Lomax’s statement that ‘we’re going to sort out Milin Brothers next week’ was a reference to a plan to engage in site mapping. It

84 Johnny Lomax, 7/10/15, T:2142.1-6.
85 Johnny Lomax, 7/10/15, T:2152.27-2153.28.
86 Johnny Lomax, 7/10/15, T:2156.7-2160.41.
pointed to evidence from a Milin employee, Micah Beaumont, that Anthony Vitler and Johnny Lomax had visited the site and made inquiries about what subcontractors had been engaged.

98. However the language used by Johnny Lomax in his conversation with Cameron Hardy is not the language of site mapping. And Johnny Lomax and Anthony Vitler had already mapped the site prior to 10 April. That is what Micah Beaumont referred to in the evidence quoted in the CFMEU’s submissions. That is what Johnny Lomax referred to in his conversation with Cameron Hardy on 10 April when he said that he knew about the job a month prior and that he was lucky he ‘got Tony to come with me’, and where he recounted that he said to Anthony Vitler ‘you’re lucky I took you down there, bro, to do that. You’re lucky I wrote these fuckin’ names down’.

99. The evidence indicates that the problem was not that the site had not been mapped by 10 April: it was that Dean Hall was not aware that the builder was Milin and that, having become aware, he wanted to target the site. That was the purpose of the meeting. It was not a general ‘tune up’.

Visit of 13 April 2015

100. On the morning of Monday, 13 April 2015, Anthony Vitler, Kenneth Miller and Garry Hamilton went out to the Milin site on Moore Street. Counsel assisting’s submission was that they did so because they had been told by Dean Hall on the Friday before to ‘sort out Milin’, and

87 Submissions of the CFMEU, 5/11/15, ch 3, para 34.
that this was an abuse of the provisions of the *Work Health and Safety Act* 2011 (ACT).

101. The substance of Garry Hamilton’s evidence was that he could not recall why he went to the site on this day.89 Anthony Vitler said he went to the site ‘[b]ecause that job was in my area and I probably go around and see that job once a week, see how it’s travelling safety wise’.90 Kenneth Miller said that he went out there because:91

I just thought it was a normal safety inspection on a job. I think the concerns were about site mapping, making sure that our sites were properly mapped, and that was just another site to me, same as any other.

102. These accounts cannot be accepted in light of the evidence of what occurred at the meeting on 10 April 2015. Garry Hamilton, on 22 April 2015, sent a report to Worksafe regarding this visit. The report begins by stating ‘Union received complaints regarding the following…’.92 Gary Hamilton could not recall who made such a report, or how, and said that he kept no records of it. He said that there was a report of some kind.93 But the only relevant complaint was Dean Hall’s on 10 April 2015. That was not a complaint about safety but about Milin not having a CFMEU EBA.

103. The CFMEU pointed to the fact that safety issues were in fact found on 13 April, and that there was no suggestion in the evidence that anything was communicated to Milin employees on 13 April. This is

89 Garry Hamilton, 2/9/15, T:1795.43-1797.44.
89 Garry Hamilton, 2/9/15, T:1795.43-1797.44.
90 Anthony Vitler, 1/9/15, T:1676.4-19.
92 Hamilton MFI-1, 2/9/15, p 2.
said to indicate that there was no ulterior purpose in the visit. This ignores the evidence about the meeting of 10 April 2015. Further, the fact that safety issues were found only indicates that CFMEU officials, having already decided to go to the site, were able to find issues that could support a reasonable suspicion of a breach of the *Work Health and Safety Act 2011* (ACT). It does not follow from this that investigating safety issues was the purpose of the visit.

*Events following the 13 April 2015 site visit*

104. Recordings of two telephone conversations were played during which Johnny Lomax told concreters that the CFMEU was planning to visit all sites on which concrete pours were taking place. On 16 April 2015 Johnny Lomax said in a conversation with Clive Arona:94

> Very shortly, I’m talking within the next – the next couple of days … There’s going to be a full for all the concreters, wherever they’re pouring. We’re going – all of us are going to the sites where all of them are … we’re going to all of them, bro, not any particular one, every one – –

105. Johnny Lomax told Anthony Costanzo substantially the same thing on the same day.95

106. The planned visits appear to have concerned the CFMEU’s suspicions that some concreters were using subcontractors. Johnny Lomax said in oral evidence that the visits in fact never occurred and that the visit to Milin on 21 April 2015 was of a different nature from these visits.96 As counsel assisting accepted, that may well be so: however, it is plain

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94 Lomax MFI-10, 7/10/15, p 3.4-26.
95 Lomax MFI-11, 7/10/15.
96 Johnny Lomax, 7/10/15, T:2197.6-11.
from what Johnny Lomax told Anthony Costanzo and Clive Arona on 16 April 2015 that the CFMEU in the week prior to 21 April 2015 was taking steps to ascertain when a concrete pour was going to occur on the Milin site.

107. Counsel assisting also made submissions about the credibility of Johnny Lomax and Jason O’Mara in connection with this evidence.

108. Prior to these recording being played, Johnny Lomax said that he thought he found out that there was going to be a concrete pour on the Moore Street Site on 21 April 2015, the morning of the visit to that site. After the recording of the conversation with Clive Arona was played, Johnny Lomax agreed that the CFMEU knew the date of the pour in advance. This suggests either that Johnny Lomax’s memory of what occurred in April 2015 is unreliable or that in giving evidence he was withholding a true recollection. On either view, his credit is adversely affected.

109. Johnny Lomax indicated that he had been told about the plan to visit sites with concrete pours by Jason O’Mara. Jason O’Mara in his oral evidence was asked whether there was a plan to visit every concrete pour taking place in the week on the 13th. His answer was ‘I don’t believe so’. This also has an adverse impact on Jason O’Mara’s credit. It is inconceivable that he did not know, in April 2015, of the plan. His oral evidence indicates either that his memory of what

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97 Johnny Lomax, 7/10/15, T:2138.32-2139.7.
98 Johnny Lomax, 7/10/15, T:2192.31-35.
occurred in April 2015 is poor or that he was withholding a true recollection. Again, on either scenario, his credit is adversely affected.

20 April 2015

110. On the afternoon of 20 April 2015, Dean Hall called another urgent meeting of organisers at the CFMEU offices. A recording of a telephone conversation between Zachary Smith and Johnny Lomax at 2.47pm on this day was played during Johnny Lomax’s evidence.101 Zachary Smith told Johnny Lomax that Dean Hall wanted everyone back in the office in five minutes and asked him and Kenneth Miller to leave the building site they had just entered.

111. There was no direct evidence of what transpired at this meeting. No CFMEU official asked about it said he recalled it.102

112. Counsel assisting submitted that the appropriate inference to draw is that the purpose of this meeting was to plan a visit to the Milin site the next day. They submitted that the timing of the meeting was significant: it was a Monday and, since organisers’ meetings occurred on Tuesday afternoons (and in fact occurred on Tuesday 21 April 2015), Dean Hall must have required the attendance of organisers to deal with a matter that required attention on the Tuesday morning.

113. The CFMEU submitted that this is mere speculation. However, there was no contrary evidence. The inference is open. The question is

101 Lomax MFI-4, 7/10/15.
whether it should be drawn. The visit to the Milin site the next day took place early in the morning. It is very likely that there was a meeting of some kind amongst CFMEU officials on 20 April to discuss it. Was it the meeting Zachary Smith called Johnny Lomax about? No other meeting is suggested. No other explanation is suggested for this meeting. In all the circumstances, it is right to draw the inference.

Visit of 21 April 2015

114. On the morning of 21 April 2015, as Milin was in the process of setting up to commence a concrete pour, Anthony Vitler, Zachary Smith and Johnny Lomax arrived at the Moore Street site. They entered it in purported exercise of their rights under s 117 of the Work Health and Safety Act 2011 (ACT). Garry Hamilton joined them a short time later. Two notices were given under s 118 of the Work Health and Safety Act 2011 (ACT).

115. The Commission received extensive evidence about what occurred after the CFMEU officials entered the site. In summary, the first notice issued under s 118 identified four suspected breaches: delineation between plant and scaffold, traffic management plan in place and adhered to, formwork altered after sign off and scaffolding blocked. The second notice identified four further suspected breaches: workers not correctly inducted, cannot locate safety management plan, no electrician on site, no adequate first aid facility.

103 Micah Beaumont, witness statement, 22/7/15, Annexure A.
104 Micah Beaumont, witness statement, 22/7/15, Annexure B.
116. Micah Beaumont called the police shortly after the arrival of the CFMEU officials. Worksafe was also called, by Anthony Vitler shortly after he entered the site, and also by a Milin representative. Four Worksafe inspectors arrived at the site. Milin representatives wanted the police and Worksafe inspectors to ask CFMEU officials to leave the site. The CFMEU officials asserted that they had a right to remain. Eventually the police and the CFMEU officials left at about 9:30am and Worksafe inspectors left at about 9:45am.

117. The inspectors subsequently prepared a Worksafe visit report. The report said that not all workers had been correctly inducted, but that they were then correctly inducted. The report said that the Gungahlin Concrete ‘Work Health and Safety [Plan]’ was incomplete, said that there was insufficient delineation between plant and scaffold at vehicle entry points, and referred to storage of timber and steel on the form deck. Worksafe subsequently issued an Improvement Notice requiring that Gungahlin Concrete provide a complete copy of the Work Health and Safety Plan. A site visit report was prepared by Garry Hamilton some time later.

118. Micah Beaumont’s notes for that day record ‘CFMEU on site. 4 blokes came and tried to stop the pour’. The concrete pour ultimately proceeded after the CFMEU, the police and Worksafe had

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105 Beaumont MFI-2, 22/7/15.
106 Anthony Vitler, witness statement dated 20/7/15, 1/9/15, para 11.
107 Dennis Milin, witness statement, 22/7/15, Annexure C, p 95.
108 Dennis Milin, witness statement, 22/7/15, Annexure D, p 97.
109 Dennis Milin, witness statement, 22/7/15, Annexure F, p 100.
departed the site. The breach identified in the improvement notice was fixed by the next day.\textsuperscript{111}

119. The CFMEU submitted that this site visit was no more than what the above events suggest: a visit for the important purpose of identifying safety issues. Counsel assisting submitted that the evidence indicated that the true purpose of the visit was to send a message to Milin that it could not operate in Canberra without a CFMEU EBA. One difficulty with the CFMEU’s submission is that it does not explain the meetings of 10 April and 20 April. Another difficulty is that the CFMEU’s submission does not explain the CFMEU’s efforts to ascertain the times of concrete pours. Another difficulty is that the identification of safety issues does not explain why the CFMEU officials were there at the site in such numbers in the first place. They themselves gave no convincing explanation.

120. There was further evidence that supports counsel assisting’s submission and undermines the CFMEU’s position. The first piece of evidence was a recording of a conversation between Anthony Vitler and Jason O’Mara at 7.18am on 21 April 2015:\textsuperscript{112}

\begin{verbatim}
AV: How you going, mate?
JM: Mate, what’s happening?
AV: I just letting you know we’re down at Brooklyn and they’re attempting to set up a pump, so we – we’re all down here, gonna have a bit of a fuckin’ crack.
JM: No worries man.
\end{verbatim}

\textsuperscript{111} Micah Beaumont, 22/7/15, T:719.19-29.

\textsuperscript{112} O’Mara MFI-1, 3/9/15.
121. The CFMEU submitted that the reference to ‘having a fuckin’ crack’ was merely an off the cuff comment and it was speculation to say that this indicated anything untoward about the visit. However this grossly understates the force of Anthony Vitler’s language and ignores the excitement in his voice.

122. Next, there was a recording of a telephone conversation on 23 April 2015 at 9.01am between Johnny Lomax telephoned Arthur Karvounis. During the course of the conversation Arthur Karvounis asked Johnny Lomax for ‘a small favour’. In substance, Arthur Karvounis was concerned about the visit to the Moore Street site on 21 April 2015. He said that steel-fixers on the site were being blamed for calling the union on that day. Arthur Karvounis wanted to know whether steel-fixers in fact had called the union on that day. Johnny Lomax’s response was as follows:

…no company rung with any problems… we knew that they had a few problems ourselves and we were just waiting for them to start their pour so we could identify their problems.

123. Prior to this recording being played, Johnny Lomax twice denied that he was just waiting for the concrete pour to start so he could go on-site and identify some safety problems. That is a further example of how profoundly unsatisfactory his evidence was.

124. Johnny Lomax went on to say: ‘No, sorry, no one rung us bud. You know, it’s something else, Arthur, that’s what I’m trying to tell you

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113 Lomax MFI-3, 7/10/15.
114 Lomax MFI-3, 7/10/15, p 3.41-44.
because we’ve got… we’ve got some other problems, mate, with them’.Johnny Lomax also said: ‘Between you and me, we will go back there again, Arthur… nothing to do with anyone from any subcontractor, nothing… It’s us and Milin… you keep that to us though, okay?’

125. Counsel assisting submitted that it follows from what Johnny Lomax said to Arthur Karvounis that the CFMEU was ‘just waiting for them to start their pour so we could identify their problems’. That is a further powerful indication that the visit on 21 April 2015 was planned with a view to interrupting the concrete pour. The CFMEU submitted that this submission of counsel assisting is a naïve submission, and that Johnny Lomax was being careful not to disclose the true identity of the persons who had complained about safety. However Johnny Lomax accepted in oral evidence that neither he nor to his knowledge anyone else had had someone call and make a complaint of this nature.

126. There is also the evidence of one of Milin’s employees on site that day, Tony Davey. He said that at one point during the visit Kenneth Miller turned to him and said ‘You need to tell Dennis [Milin] to call Dean [Hall]’. Kenneth Miller said that he could not recall that being said but did not deny that it was said. The inference to be drawn is that Kenneth Miller said this because the reason the CFMEU officials were

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116 Lomax MFI-3, 7/10/15, p 4.27-43.
118 Johnny Lomax, 7/10/15, T:2144.16-33.
119 Tony Davey, witness statement, 22/7/15, para 12.
on the site was that Milin did not have a CFMEU EBA and Dean Hall was furious about it.

127. In addition, counsel assisting pointed to the presence of four CFMEU officials on site that day. It was submitted that no witness could give any credible explanation for why so many CFMEU officials attended the site that day. In relation to a visit to the Crace site, Garry Hamilton said:121

Look, we tend to – you tend to – we will go with a few. It depends on whether we think they are going to be hostile or not. I mean, there is [sic] occasions when builders are very hostile towards us and we need a few more there, or the size of the site might have a bearing on it. It just depends on the circumstances at the time.

128. Jason O’Mara gave similar evidence.122 However, Garry Hamilton’s evidence was that the management on the site were amicable on the previous visit to the Moore Street Site of 13 April 2015.123 Why then were so many officials needed?

129. It is also necessary to have regard to the evidence given by the CFMEU officials themselves about the purpose of the visit. None gave any convincing explanation for why they went to the site on that day. It is convenient to refer to one example: Jason O’Mara’s evidence in response to the playing of the recording of his conversation with Anthony Vitler on the morning of 21 April 2015.124 Jason O’Mara was asked whether his understanding was that Anthony Vitler was telling

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123 Garry Hamilton, 2/9/15, T:1793.9-11, 1795.24-36.
124 See paras 120-121.
him that he and the other officials were about to execute the plan that had been hatched over the previous days. Jason O’Mara’s answer was:125

He was telling me they were down at Brooklyn and his language is a bit funny, but I take that to mean that they were going down to check on the safety of the project, which they did.

130. This evidence was discreditable: Anthony Vitler’s language was not ‘a bit funny’ and was not related to safety.

131. Jason O’Mara was asked numerous times whether he thought the CFMEU officials were just down to the site to have a look and see whether there were safety issues. He never gave a direct answer to this question.126 In his third response, Jason O’Mara said:127

I could possibly have talked to him about going down there. I could possibly have talked to him. I said I – I told you before I couldn’t recollect whether I had or not, I could possibly have, but I don’t know whether I did or not.

132. Jason O’Mara evaded the question because he knew that a truthful answer would not assist him. The same is true of his other evasions of the question.

Conclusions regarding the Moore Street site visits

133. Section 117(1) of Work Health and Safety Act 2011 (ACT) only permits union officials to enter sites if they have a particular purpose in

mind: the purpose of inquiring into a suspected contravention of Work Health and Safety Act 2011 (ACT).

134. It follows from the above analysis of the evidence that none of the officials who visited the Milin Moore Street site on either 13 April 2015 or 21 April 2015 had such a purpose. The purpose that the union officials had was (as Johnny Lomax said of the 13 April 2015 visit) to ‘sort out’ Milin or (as Anthony Vitler said to Jason O’Mara prior to the 21 April 2015 visit) to ‘have a bit of a fuckin crack’ at Milin. These were shorthand expressions for intimidating Milin and sending a message that the CFMEU would not tolerate a builder without a CFMEU EBA in the civil construction industry in Canberra. That was the message Dean Hall gave to organisers to send at the meeting of 10 April 2015. That is the message they sent. That is the message which Dean Hall had earlier given to Dennis Milin in their conversation regarding the Trilogy Project on 26 August 2014.

135. The conduct of the officials involved in these visits fell short of the standards expected of union officials. It may have been an abuse of s 117 of the Work Health and Safety Act 2011 (ACT). Further, union resources were deployed to deal, in effect, with a personal grievance of Dean Hall’s. In so far as union resources are deployed to deal with safety issues in the ACT, they should be deployed for the sole purpose of dealing with safety. And they should be deployed without discrimination between members who are employed by EBA companies and members who are not.

136. It is a familiar experience in litigation and other formal procedures for fact finding that witnesses purporting to give evidence about conversations have a considerable freedom to tell positive lies or to
feign lack of memory if there is no contemporary documentary record or mechanical recording of those conversations. The eventual tender of either type of record induces depression about human nature, because it shows the mendacity of human beings or the fallibility of human powers of observation, recollection and expression. This case study is a vivid illustration of that experience. What is particularly disturbing about the case study is the refusal of CFMEU officials to admit the truth even when it is revealed by tape recordings. Were it not for the fact that the Commission had access to intercepted telephone conversations, it would have been very difficult to challenge the claims of CFMEU officials that the visit was just a routine safety visit. In the ordinary course, proof that a WHS permit holder lacks the requisite intention for the purposes of s 117(1) would be next to impossible. This is a further reason why the CFMEU’s reliance on the absence of complaints by participants in the industry is unwarranted. This case study suggests that a concrete pour on a busy site provides fertile ground for hostile officials to apply industrial pressure through the abuse of provisions of the Work Health and Safety Act 2011 (ACT). They enter for one purpose which has nothing to do with the statute. The fact that a bona fide entrant might be able to rely on the statutory ‘reasonable suspicion’ does not alter the fact that the hostile officials are not motivated by any such suspicion.

**E – A & P LEEMHUIS BUILDERS PTY LTD CASE STUDY**

137. Evidence was received about another CMFEU visit during a concrete pour on a construction site. This visit took place on 12 December 2010 at a building site in Beaconsfield Street Fyshwick. The builder was A & P Leemhuis Builders Pty Ltd (**A & P Leemhuis**). A & P
Leemhuis carries out a range of work from interior fit outs worth about $250,000 to jobs worth up to nearly $30 million. Darrell Leemhuis is a director of A & P Leemhuis.

138. A number of CFMEU officials, perhaps as many as six, arrived on the site on 12 December 2010. Some of those officials blocked a concrete truck that was attempting to back into the site for the purposes of pouring concrete. The pour had to be cancelled. It cost A & P Leemhuis in the vicinity of $10,000. The police and WorkSafe were called. Some safety matters were discussed, but no improvement notices were issued.

139. The CFMEU characterised this as a routine safety visit. It criticised A&P Leemhuis employees for disrupting it. Counsel assisting submitted that the purpose of the visit was to intimidate a non-union builder. To assess those competing contentions it is necessary to set out the evidence of what transpired during the visit.

140. Between 9am and 10am on 12 December 2012 Darrell Leemhuis received a call from his brother Russell Leemhuis, the site foreman on the Beaconsfield Street site, advising him that the CFMEU were on site.\textsuperscript{128} On his way to the Beaconsfield Street site Darrell Leemhuis telephoned both the police and WorkSafe and asked them to attend.\textsuperscript{129}

141. When he arrived at the Beaconsfield Street Fyshwick site Darrell Leemhuis observed that a truck which was endeavouring to implement a concrete pour was unable to back up because two union officials had

\textsuperscript{128} Darrell Leemhuis, witness statement, 16/7/15, para 6.
\textsuperscript{129} Darrell Leemhuis, 16/7/15, T:253.34-37.
gone and stood right up behind it. This was depicted in a photograph.\textsuperscript{130}

142. At some point after his arrival Darrell Leemhuis attempted to introduce himself to the union officials and there was some discussion. One of his employees took a video of what was occurring. At the commencement of that conversation Darrell Leemhuis introduced himself. Halafihi Kivalu refused to shake his hand and said ‘you are not Darrell Leemhuis’. Darrell Leemhuis asked, on a number of occasions, that Halafihi Kivalu identify the safety issue that the CFMEU were concerned about. After failing to respond, Halafihi Kivalu eventually said ‘fall protection’.\textsuperscript{131}

143. At some point during the course of the morning Darrell Leemhuis made a second call to the police.\textsuperscript{132} The transcript of that call reveals Darrell Leemhuis telling the person identified as Hugh from Australian Capital Territory Police:

Mate, we’re still in there – they won’t leave our site and they’ve just threatened – threatened myself and my father.

144. In his oral evidence the following exchange took place concerning the statement by Darrell Leemhuis to the Australian Capital Territory Police that he and his father had been threatened:\textsuperscript{133}

Q. What had they been doing that caused you to say that?

\textsuperscript{130} Darrell Leemhuis, witness statement, 16/7/15, Annexure DPL-1.
\textsuperscript{131} Darrell Leemhuis MFI-1, 16/7/15, p 7.14; Darrell Leemhuis, 16/7/15, T:256.10-22.
\textsuperscript{132} Darrell Leemhuis MFI-3, 16/7/15.
\textsuperscript{133} Darrell Leemhuis, 16/7/15, T:260.9-14.
A. Their actions were intimidating. They were asking us to step up and basically we took that to mean to have to have a fist fight with them, which nobody was prepared to do on our site. They weren’t following any instructions and we couldn’t get them to do anything.

145. The transcript of the triple 0 call made by Darrell Leemhuis on 12 December 2012 includes the following words spoken by Darrell Leemhuis:134

Can we have a car to help us out because these guys are – are threatening, you know, to – they’re wanting us to step up and have a fight. We’re not here to fight them. We just want to have a discussion and we don’t want them to - -

146. Darrell Leemhuis went on to say:135

Yeah, so we’ve got these guys shouting at us on site and threatening us.

147. After giving the person identified as Hugh details concerning the site and other contact information Darrell Leemhuis goes on to say:136

We just need this situation to calm down a little bit. These people are being more than unreasonable.

148. Darrell Leemhuis was asked in oral evidence to how he felt when the union officials were inviting him to ‘step up’. Darrell Leemhuis gave the following evidence:137

Q. How were you feeling at this point?

A. You know, your knees are knocking together; the guys obviously aren’t small they’d bring to site; intimidated, belittled.

134 Darrell Leemhuis MFI-3, 16/7/15, p 2.4-8.
135 Darrell Leemhuis MFI-3, 16/7/15, p 2.22-23.
136 Darrell Leemhuis MFI-3, 16/7/15, p 3.15-17.
137 Darrell Leemhuis, 16/7/15, T:260.25-27.
In regard to the size of the ‘guys’, Halafihi Kivalu is a large, strong, heavy man. Jason O’Mara is also of solid build. Johnny Lomax, whose name is a household one in Canberra because of his rugby league career in the Raider’s forward pack, was a large man then and is much larger now. Detective Sergeant Battye spoke of ‘Union members of quite significant size outnumbering police’.\textsuperscript{138}

149. The situation did not resolve itself. At some point after the triple 0 call, members of the Australian Capital Territory Police arrived. Greg Mason, an officer from WorkSafe also arrived. The police presence had no impact on the officials. Johnny Lomax told Detective Sergeant Battye: ‘You can’t do anything, we’re entitled to be here.’\textsuperscript{139} Both propositions were highly questionable. Johnny Lomax behaved aggressively towards the officer, who considered that Johnny Lomax was trying to intimidate him.\textsuperscript{140} It was suggested to Detective Sergeant Battye in cross-examination that it was he who was doing the intimidating. He rejected that.\textsuperscript{141} Despite Detective Sergeant’s Battye’s inquiries of Jason O’Mara, no specific safety issue was ever identified.\textsuperscript{142} In various respects Johnny Lomax took issue with Detective Sergeant’s Battye’s evidence. Senior counsel for Johnny Lomax cross-examined Detective Sergeant’s Battye thoroughly and at length on these differences. The officer’s account is to be preferred.

\textsuperscript{138} Mark Battye, 28/7/15, T:1284.23-24.
\textsuperscript{139} Mark Battye, 28/7/15, T:1269.23.
\textsuperscript{140} Mark Battye, 28/7/15, T:1270.37-38.
\textsuperscript{141} Mark Battye, 28/7/15, T:1284.19-33.
\textsuperscript{142} Mark Battye, 28/7/15, T:1272.22-34.
150. Darrell Leemhuis took Greg Mason over to the slab to show him where the pour was to occur. Greg Mason inspected the area and said there was no safety issue with it. Neither the CFMEU nor any of its officers who gave evidence asserted there was any safety issues with it.

151. Darrell Leemhuis then told the officials blocking the truck that there was no issue and asked them to move. The officials said words to the effect ‘we don’t care, we are not moving’.

152. As a result of the refusal of the officials to move, the concrete was ultimately found to be unusual and the truck had to be sent away. Darrell Leemhuis estimated that the disruption cost his company between $10,000 and $15,000. The concrete had to be dumped. New concrete had to be purchased. Labour costs had to be paid for.

153. Still the officials refused to leave the site. Darrell Leemhuis offered to take a union official and Greg Mason, the WorkSafe representative, on a site safety walk. A safety walk then took place. Greg Mason advised on minor points but did not identify any issues that required him to issue an improvement notice.

154. Darrell Leemhuis did not receive any notice of improvement from WorkSafe, nor any correspondence or follow-up after the Beaconsfield Street Fyshwick site inspection.

143 Darrell Leemhuis, witness statement, 16/7/15, paras 17 - 18.
144 Darrell Leemhuis, 16/7/15, T:265.6-12.
145 Darrell Leemhuis, witness statement, 16/7/15, para 26.
146 Darrell Leemhuis, 16/7/15, T:287.22-35.
Assessment of conduct of CFMEU Officials

155. There was no dispute that the CFMEU officials stopped the concrete truck. That was depicted in photographs. The CFMEU tried to defend the visit, but it did not address the rather fundamental proposition that its officials, even in the bona fide exercise of rights under s 117, had no entitlement to block the concrete truck. If the concrete truck had not been blocked, the pour could have continued. On any view, the conduct of the CFMEU officials in stopping the pour may have been an abuse of the provisions of the *Work Health and Safety Act 2011* (ACT).

156. The CFMEU did seek to defend the conduct of its officials in other respects. It focused on Darrell Leemhuis’ evidence that he was intimidated. The CFMEU’s submissions commenced with the proposition that no action or proceedings have been commenced by A&P Leemhuis about the incident. The difficulty with propositions of this kind has been considered above. Not entirely consistently with the above submission, the CFMEU says that Halafihi Kivalu’s conduct could not have been as serious as Darrell Leemhuis suggested because, although Darrell Leemhuis reported it to the police, no criminal proceedings have been commenced. However, investigating abuse of the provisions of the *Work Health and Safety Act 2011* (ACT) is not a police function.

157. Next, it is said that the video recordings were made by an apprentice because he found the incidents comical. That is irrelevant to what is depicted in the videos. It is also irrelevant because the conduct was not directed at the apprentice. It was directed at Darrell Leemhuis.
The CFMEU then attacked the quality of Darrell Leemhuis’s recollection. It referred to his own evidence that he was unsure of the exact sequence of events. But the exact sequence of events was not important. That Darrell Leemhuis did not have a memory of that exact sequence does not make unreliable his memory of intimidatory conduct, at whatever point it occurred in the sequence of events.

Next, the CFMEU says that there were genuine safety issues that needed to be addressed on the site. As observed above, the video footage shows Halafihi Kivalu initially failed to identify any safety issue. Then it showed him referring to ‘fall protection’. That was the explanation given by Halafihi Kivalu in his witness statement. Darrell Leemhuis in his evidence said that the only issue identified to him by Halafihi Kivalu was ‘fall protection’. The contrary was not suggested to him. Darrell Leemhuis said this possibly related to an official perhaps seeing a worker on the roof but being unable to see as well the fall protection that he was actually using. An issue of this kind would not explain the presence of so many CFMEU officials on site, the nature of their behaviour or the stopping of a concrete pour.

Jason O’Mara discussed this site visit in his witness statement. But he did not identify any safety issues on the site. In oral evidence he said the visit was to address ‘appalling’ issues in connection with the use of a scissor lift to access the roof. The notes of the WorkSafe inspector tendered by counsel assisting as a result of Jason O’Mara’s

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147 Halafihi Kivalu, witness statement dated 14/7/15, 28/7/15, para 8.
148 Darrell Leemhuis, 16/7/15, T:256.32-257.44.
149 Jason O’Mara, witness statement dated 14/7/15, 3/9/15.
150 Jason O’Mara, 3/9/15, T:2035.4-17, 2036.2-21.
evidence begin with a reference to ‘EWP – Access’. That would appear to be an abbreviation for elevated work platform. These notes do not indicate the existence of the ‘appalling’ issues identified by Jason O’Mara. Nor do they suggest any connection between them and the concrete pour.

**A follow up meeting with Halafihi Kivalu**

161. Counsel assisting submitted that the purpose of the visit was laid bare by a meeting a few months later between Halafihi Kivalu and Darrell Leemhuis at the Plum Café in Fyshwick.\(^\text{151}\)

162. The evidence of Darrell Leemhuis was that at the start of this meeting in the Plum Café, Halafihi Kivalu apologised for the union’s actions on the Beaconsfield site. He went on to say that if A & P Leemhuis employees were union members and if A & P Leemhuis had a union EBA and used union nominated subcontractors these sorts of ‘incidents’ would not occur.\(^\text{152}\)

163. The CFMEU submitted that it would be unfair and inappropriate to make a finding on the basis of this evidence in circumstances where the conversation had not been put to Halafihi Kivalu. It is neither unfair nor inappropriate. Halafihi Kivalu put on a witness statement addressing this topic. He accepted that the purpose of the meeting was to discuss an EBA. He denied the proposition that he said ‘if we have a better Union relationship those sorts of incidents wouldn’t occur’. The question is not whether procedural fairness has been afforded

\(^{151}\) Darrell Leemhuis, witness statement, 16/7/15, para 31.

\(^{152}\) Darrell Leemhuis, witness statement, 16/7/15, para 31.
because an issue was not raised with Halafihi Kivalu. The question is rather whether to accept the denial which Halafihi Kivalu proffered on the issue which he raised himself. That denial should not be accepted. Darrell Leemhuis was an impressive witness. It is inherently likely that he would have a better memory of this conversation than Halafihi Kivalu.

164. Counsel assisting’s submission is accepted. Halafihi Kivalu’s follow up meeting with Darrell Leemhuis at the Plum café made explicit what was in any event implicit in the CFMEU site visit. It was an attempt to put pressure on A&P Leemhuis to agree to a CFMEU EBA. This was another example of the same type of conduct as that which occurred on the Milin Builders Moore Street site.

F – CASE STUDY – CLAW CONSTRUCTIONS

165. Claw Constructions provided formwork and related services primarily in the ACT. The principal of Claw Constructions is Troy Armstrong, Claw Constructions did not have an enterprise agreement with the CFMEU. It had had a troubled relationship with the CFMEU since 2012. There was evidence of visits by CFMEU officials to three sites on which Claw Constructions was working.

The Arthur Circle site

166. The first site was in Arthur Circle, Forrest, ACT. The head contractor on the site was Delorco Pty Ltd (Delorco). Claw Constructions was
subcontracted to Delorco to provide formwork and steel fixing. The project was the building of four ‘top of the line’ townhouses.\textsuperscript{153}

167. A CFMEU official made contact with Troy Armstrong through the site foreman on the Arthur Circuit site. A meeting was arranged between Troy Armstrong and Anthony Vitler at McDonalds, Fyshwick, ACT. Troy Armstrong and Anthony Vitler had different accounts of this meeting.

168. Troy Armstrong’s evidence in his statement of the conversation which then ensued was in the following terms:\textsuperscript{154}

Vitler: If you come to the party and sign the EBA with us we can guarantee you work.

Armstrong: How can you guarantee me work?

Vitler: We make sure IC and Pacific take the big jobs in town and we will make sure the little jobs go to you.

Armstrong: I find that hard to believe as I constantly tend to jobs against IC and Pacific. Some I win and some they win.

Vitler: This is the way the industry is going and the other formwork companies in town are signing EBAs and we will take control of the jobs. We will soon be telling you which ones you can and can’t go on.

169. In oral evidence, Troy Armstrong said that he had a clear memory of Anthony Vitler saying the words in the last part of the quote above.\textsuperscript{155}

\textsuperscript{153} Troy Armstrong, witness statement, 20/7/15, para 4.
\textsuperscript{154} Troy Armstrong, witness statement, 20/7/15, para 9.
\textsuperscript{155} Troy Armstrong, 20/7/15, T:401.41-45.
170. Troy Armstrong explained to Anthony Vitler that he had a difficulty with the quantum of the amount required to pay a labourer pursuant to the CFMEU EBA. He said that he would end up paying labourers approximately $90,000 a year, in circumstances in which both he and his two brothers were all earning less than that amount.

171. Troy Armstrong’s evidence was that his meeting with Anthony Vitler then included a conversation in words to the following edifying effect:156

Vitler: That is the going rate and you need to get in line with them.

Armstrong: We are still a small company buying a lot of gear and are not really showing a profit unlike IC and Pacific, which are second generation businesses. I cannot compete with them. Don’t you care about small businesses?

Vitler: I don’t give a fuck about small businesses. Go back and work for Pacific. If you can’t beat them join them.

172. Following further discussion the meeting concluded with Troy Armstrong telling Anthony Vitler that he would think about it. According to Troy Armstrong, Anthony Vitler responded:157

You need to think about it in the next hour or two and come to an agreement with us or we will kick you off your sites.

173. Troy Armstrong adhered to his evidence in cross-examination by senior counsel for the CFMEU.158

156 Troy Armstrong, witness statement, 20/7/15, para 12.
157 Troy Armstrong, witness statement, 20/7/15, para 18.
158 Troy Armstrong, 20/7/15, T:413.1-41, 417.8-26, 418.31-40.
Anthony Vitler denied making a statement that he could guarantee Claw work. He accepted that he said it was common for IC and Pacific to get the big jobs. He denied saying that he did not ‘give a fuck about small businesses’ or suggesting to Troy Armstrong that he go back and work for Pacific. He denied saying that Troy Armstrong had to abide by CFMEU policy if he wanted to get onto CFMEU sites or threatening to kick him off sites.  

As set out below, shortly after this meeting, CFMEU officials attended another of the sites on which Claw Constructions was working. Apart, perhaps, from the fact of that visit and what transpired during it, there was no contemporaneous evidence of the content of the above conversation.

Counsel assisting submitted that Anthony Vitler’s account should be rejected having regard to what was said to be his unsatisfactory evidence on other topics. The CFMEU submitted that Troy Armstrong was not a credible witness. It pointed to what it said were inconsistencies in his oral evidence. The inconsistencies were not apparent. The CFMEU accused Troy Armstrong of engaging in sham contracting and underpaying his workers, thus, it is said, calling into question his general credibility and illustrating an antipathy to workers. But the evidence referred to by the CFMEU did not

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159 Anthony Vitler, witness statement dated 15/7/15, 1/9/15, paras 7-15.
160 Submissions of the CFMEU, 5/11/15, p38, para 71. There is no inconsistency between this and what appears in paragraph 9 of Troy Armstrong’s witness statement. It simply means that on Troy Armstrong’s evidence, Anthony Vitler said both what appears in paragraph 9 and what is referred to in the CFMEU’s submissions.
161 Submissions of the CFMEU, 5/11/15, p38 [73]; Troy Armstrong, 20/7/15, T:415.47-416.11.
establish sham contracting. In fact it suggested genuine contracting. The substance of Troy Armstrong’s evidence is accepted. His account of Anthony Vitler’s mode of speech and tone rang true.

**Erindale site**

177. The Erindale Site was a site that Claw Constructions was working on at this time on the corner of Ashley Drive and Lansell Circuit, Wanniassa in the ACT (Erindale Site). Claw Constructions were subcontractors to Delorco who worked under the principal contractor, Dellow.\(^{162}\) The foreman for Delorco was Aaron Golledge.

178. Aaron Golledge’s evidence was that at around 8.00am on Monday 21 May 2012, he was working as the foreman and site manager at the Erindale site. Two officials from the CFMEU, Anthony Vitler and Halafihi Kivalu, entered the site.\(^{163}\)

179. Aaron Golledge made a record of the visit in his Delorco site diary. The relevant entry was in the following terms:\(^{164}\)

> 2 x CFMEU Union members arrived on site at 8.00am. Did not ask permission or give 24 hrs notice to come on site. There [sic] reason was about employing Contractors who are not signed up to there [sic] EBA, I took them into site office. Anthony Vitler, Halafihi Kivalu. Discussed formworkers, steelfixers, ect [sic].

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\(^{162}\) Dellow is a business owned by Tony DeLorenzo, brother of Sam DeLorenzo of Delorco: see Troy Armstrong, witness statement, 20/7/15, para 8.

\(^{163}\) Aaron Golledge, witness statement, 20/7/15, para 6.

\(^{164}\) Aaron Golledge, witness statement, 20/7/15, Annexure A.
180. As appears from the above diary entry, a meeting took place in the site office. Aaron Golledge’s account of the meeting in his witness statement was in the following terms:165

Vitler/Kivalu: Which contractors are you using for your concreting, formwork and steel fabrication work?
Golledge: We are using Claw Constructions.
Vitler/Kivalu: Claw Construction is not signed up to our EBA. They are not paying their employees correctly and are not doing the right thing. If you continue to use them, we will come back tomorrow and shut down your site.

181. Aaron Golledge in oral evidence said that he could not recall whether it was Anthony Vitler or Halafihi Kivalu who said those words.166

182. Counsel assisting submitted that Aaron Golledge’s account of the conversation in his witness statement should be accepted, notwithstanding the absence of any express reference in his diary to a threat to shut down the site. The CFMEU said that for this very reason his account in oral evidence should be rejected. The resolution of those competing submissions requires some further consideration of the evidence.

183. Aaron Golledge said that he did not write down everything that happened in his diary word for word.167 He said a number of times in his oral evidence that, notwithstanding the absence of these words in

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165 Aaron Golledge, witness statement, 20/7/15, para 7.
166 Aaron Golledge, 20/7/15, T:494.43.
his diary, something to the effect of what appeared in his statement was in fact said.\textsuperscript{168}

184. Counsel assisting submitted that the content of what CFMEU officials conveyed to Aaron Golledge is apparent from what Aaron Golledge did as a consequence of the conversation. He telephoned his boss, Samuel DeLorenzo. Both Samuel DeLorenzo and Aaron Golledge gave evidence that Aaron Golledge told Samuel DeLorenzo that the union wanted Claw to stop working.\textsuperscript{169} The CFMEU asserted their evidence is fundamentally inconsistent. But it did not say why. The only significant difference appears to be that Aaron Golledge says the conversation occurred on 21 May and Samuel De Lorenzo says it occurred ‘on or about 23 May’. The difference is material in that if the conversation occurred on 21 May, it supports an inference that a threat was made by CFMEU officials on that day.

185. Ultimately, it is not necessary resolve this difference. It is plain from what occurred later on 21 May, and again on 23 May, that a threat was made by the CFMEU on both these days to prevent Claw from working on the site.

186. Later on 21 May, at 4:00pm, Halafihi Kivalu telephoned Aaron Golledge. Aaron Golledge made a record of that call in his site diary as follows:\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{168} Aaron Golledge, 20/7/15, T:494.31-495.5.
\item \textsuperscript{169} Aaron Golledge, witness statement, 20/7/15, para 9; cf. Samuel DeLorenzo, witness statement, 28/7/15, para 13.
\item \textsuperscript{170} Aaron Golledge, witness statement, 20/7/15, Annexure ‘A’.
\end{itemize}
Halafihi from CFMEU called again at 4.00 and said he will stop Claw from working on this site, couldn’t give a [sic] answer on why.

187. On 23 May 2012 Aaron Golledge’s site diary records that on the same day he had a telephone conversation with Elias Taleb. The note in Aaron Golledge’s site diary is as follows:  

Spoke with Elias from Class 1 Form, he informed me that his price will be to [sic] high.

188. Aaron Golledge said he was not clear on how he got Elias Taleb’s name. He did not know Elias Taleb before this time. He said that it was very likely that someone from the CFMEU gave him Elias Taleb’s name and number.

189. Aaron Golledge’s site diary then records the following occurring at 2.37pm on 23 May 2012:

Halafihi from CFMEU called at 2.37pm. Asked what was going on at Wanniassa, I told him we were installing dincell, Halafihi said he will stop job. I told him to call Sam. Called Michael Baldwin to get advice.

190. Samuel De Lorenzo recounted a conversation with ‘Halafihi’ on the same day as he recounted a conversation with Aaron Golledge about the union stopping the job (that is, on or about 23 May).

191. Samuel DeLorenzo (either on 21 May or 23 May) rang Mike Baldwin from the Master Builders’ Association to tell him that the CFMEU had been out to the Erindale Site wanting to stop the job and asked him to

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171 Aaron Golledge, witness statement, 20/7/15, Annexure ‘B’.
172 Aaron Golledge, 20/7/15, T:490.17-19.
173 Aaron Golledge, 20/7/15, T:490.31-33.
174 Aaron Golledge, witness statement, 20/7/15, Annexure B.
come out to give Aaron Golledge some assistance in managing the
right of entry process in the event that the CFMEU returned. 175 Mike
Baldwin in fact went out to the site the day after this request in
anticipation that the CFMEU would return. 176

192. Aaron Golledge and Troy Armstrong both gave evidence that Aaron
Golledge reported threats made by CFMEU officials to stop Claw from
working to Troy Armstrong. 177

193. The CFMEU had two responses to the evidence of the threats recorded
in Aaron Golledge’s diary after the morning of 21 May. The first was
to assert that Aaron Golledge was an unreliable witness because of his
evidence about the threat on the morning of 21 May. This is a strange
submission. It is difficult to understand how Aaron Golledge’s
evidence about matters not referred to in his diary can make what
appears in his diary unreliable.

194. The CFMEU’s second response was to say it would be unsafe to make
any finding on this matter because the threats were not put to Halafihi
Kivalu. It is correct that this topic was not canvassed with Halafihi
Kivalu in oral evidence. However Halafihi Kivalu responded to the
evidence of Aaron Golledge and Samuel De Lorenzo in a witness
statement. 178 He denied participating in the conversation described by
Aaron Golledge on the morning of 21 May 2012. His response to the

175 Samuel DeLorenzo, witness statement, 28/7/15, para 19.
176 Samuel DeLorenzo, witness statement, 28/7/15, paras 19, 20; Aaron Golledge, witness
statement, 20/7/15, paras 14, 16.
177 Aaron Golledge, 20/7/15, T:491.16-41; Troy Armstrong, witness statement, 20/7/15,
para 20.
178 Halafihi Kivalu, witness statement dated 15/7/15, Claw Constructions, 28/7/15.
other conversations attributed to him by Aaron Golledge and Samuel De Lorenzo was to say that he did not recall them but did not believe he would have made the statements in question. Since Halafihi Kivalu has addressed the issue of his own volition in writing, there is no impediment flowing from the absence of oral evidence to dealing with the matter here. The question is thus whether to prefer Halafihi Kivalu’s denials to the evidence of Aaron Golledge. The evidence of what appears in Aaron Golledge’s diary is by far the more reliable. There is no conceivable reason why he would have fabricated it. It is accepted.

**Flemington Road site: purpose of visit**

195. There was a further incident involving Claw Construction and the CFMEU on a site at 171 Flemington Road, Mitchell, ACT (Flemington Road Site). The head contractor on site was Zoran Stojanovic trading as Claxton Constructions.\(^{179}\) Claxton Constructions sub-contracted Claw Construction to do the formwork and steel-fixing on the site.\(^{180}\) The site foreman and supervisor for Claxton was Robert Rossi.\(^{181}\)

196. On 25 February 2013 a significant interruption to work on the Flemington Road site took place. Multi-Crete Australia Pty Ltd had been contracted by Claxton to do a concrete pour on that day.\(^{182}\) At about 6.45am a number of officials from the CFMEU attended the site.

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\(^{179}\) Zoran Stojanovic, witness statement, 20/7/15, para 2.
\(^{180}\) Zoran Stojanovic, witness statement, 20/7/15, para 7.
\(^{181}\) Zoran Stojanovic, witness statement, 20/7/15, para 9.
\(^{182}\) Robert Rossi, witness statement, 20/7/15, para 11.
They appear to have been Dean Hall, Halafihi Kivalu, and Anthony Vitler and, at some point, Brett Harrison and Gary Hamilton.

197. What was the intention of the CFMEU officials that attended the site that day? In contrast to the position for the visit to Milin Builders at Moore Street, there were no recordings of intercepted telephone conversations available that would shed any light on the question of their intention in attending the site on that day.

198. Anthony Vitler prepared the CFMEU site inspection report for the visit. In oral evidence he said he and three or four other CFMEU officials went out there because Johnny Lomax had driven past that site on the way to work and noticed ‘fall protection issues in regards to the handrail’. Dean Hall’s evidence was that he had noticed, some days or weeks prior to the day of the concrete pour, that there was no perimeter protection on the top deck. However, he said that he did not address the issue because no-one was working of the top deck and sometimes perimeter protection is installed at a later point. He could not remember with any precision why he went out to the site on the day of the concrete pour. But he said he had reports, perhaps from an organiser or from someone on the site, that they were just about to start a concrete pour. Halafihi Kivalu in his witness statement did not

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185 Dean Hall, 8/10/15, T:2302.12-44.
186 Dean Hall, 8/10/15, T:2303.41-2304.13.
deal with this question. Nor was it dealt with in the evidence of Johnny Lomax or Gary Hamilton.

199. There is some evidence to suggest that the visit was not prompted by a concern for safety. One piece of evidence is the number of CFMEU officials who arrived at the site. Another is the conduct of Halafihi Kivalu. At some point shortly after the officials arrived on the site Halafihi Kivalu went across to the formwork, and started shaking the handrails very hard saying, ‘This isn’t safe’. Robert Rossi called back to Halafihi Kivalu ‘it’s not a swing’.

200. This is hardly the way a bona fide safety inspection is conducted by a person endeavouring to conform to the professional standards of a trade union official. Nor was it authorised by s 118 of the Work Health and Safety Act 2011 (ACT).

201. A further piece of evidence is the conduct of the CFMEU the next day, when three or four CFMEU officials returned to the Flemington Road site. The only one identified by name in the evidence was Halafihi Kivalu. A meeting then took place in the site office. Robert Rossi made a note of the meeting in his site diary in the following terms:

Had meeting with union in office they want us to work with them e.g.: get rid of Claw Constructions or we going to make life hell for us. If we don’t work in together.

187 Halafihi Kivalu, witness statement dated 15/7/15, Claw Constructions, 28/7/15, para 7.
188 Robert Rossi, witness statement, 20/7/15, paras 15-16; Zoran Stojanovic, witness statement, 20/7/15, para 12.
189 Zoran Stojanovic, 20/7/15, T:475.27-34.
190 Robert Rossi, witness statement, 20/7/15, Annexure RSR-2.
202. In his oral evidence Robert Rossi confirmed that the reference to ‘us’ 
was to Claxton.\(^{191}\) He said the only memory that his note brought back 
was a discussion in which CFMEU representatives also asked Claxton 
to use trades nominated by the CFMEU.\(^{192}\) Zoran Stojanovic was 
present at the meeting. He gave an account of it in his oral evidence 
that included both the substance of the file note and the substance of 
what Robert Rossi recalled in oral evidence.\(^{193}\)

203. Counsel assisting submitted that this follow up visit is telling. It lays 
bare the purpose of the visit on the previous day. That purpose, they 
submitted, was to denigrate a non-union contractor and pressure a 
builder to use CFMEU approved contractors. That is a purpose foreign 
to s 117 of the \textit{Work Health and Safety Act} 2011 (ACT). Like the 
Milin and Leemhuis Brothers case study, this case study is an example 
of what may be an abuse of the statutory powers of WHS permit 
holders.

204. Anthony Vitler and Dean Hall both denied that the purpose of the visit 
was to interrupt a concrete pour or to pressure the builder to stop using 
Claw and said the visit was for safety reasons.\(^{194}\) The CFMEU 
submitted that this evidence should be accepted, that there were very 
serious safety issues on the site, and that there is no basis for inferring 
that the purpose of the visit was anything other than to deal with these 
issues.

\(^{191}\) Robert Rossi, 20/7/15, T:444.7-14.
\(^{192}\) Robert Rossi, 20/7/15, T:455.17-455.44.
\(^{193}\) Zoran Stojanovic, 20/7/2015, T:475.8-476.4
\(^{194}\) Anthony Vitler, 1/9/15, T:1668.47-1674.33; Dean Hall, 8/10/15, T:2310.15-18.
205. The submission that serious safety issues were identified after the CFMEU officials attended the site does not address the question of why they decided to visit the site in the first place. No convincing explanation emerges from the evidence of why the CFMEU decided to attend the site on that day, and in those numbers. Conduct during and after the visit by at least one CFMEU official is at odds with a genuine concern about safety.

206. It is, however, correct to say that legitimate safety issues were identified on the site. There was some evidence about the nature and scope of the safety issues. Joseph Bartlett (a WorkSafe inspector) and Robert Rossi were taken through the improvement and prohibition notices that were issued. Anthony Vitler’s site report was in evidence. Zoran Stojanovic said that there was only one safety issue identified in connection with the concrete pour and that was access and egress. This, he said, was identified by Joseph Bartlett and not the CFMEU.¹⁹⁵

207. It is convenient at this point to refer in more detail to what occurred on the site. It included an altercation between Dean Hall and Joseph Bartlett.

**Flemington Road site: Dean Hall and Joseph Bartlett**

208. At 7.45am on 25 February 2013, Joseph Bartlett, an inspector at WorkSafe ACT, arrived at the site.¹⁹⁶

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¹⁹⁵ Zoran Stojanovic, 20/7/15, T:480.43-481.24.
¹⁹⁶ Joseph Bartlett, 21/7/15, T:513.33.
209. Joseph Bartlett gave evidence that the CFMEU officials told him they had concerns over safety on the site and wanted him to stop the concrete pour. The following safety issues were raised at that time:

(a) insufficient access and egress onto the pourdeck;

(b) unsafe handrails on the edge of the slab;

(c) inadequate propping at the southern end of the site; and

(d) inadequate workers’ compensation insurance held by Claw Construction, the subcontractor hired to do the formwork on the site.

210. Joseph Bartlett was at that time inexperienced both in construction and as an inspector at WorkSafe. He had been at WorkSafe only about nine or ten months prior to his visit to the Flemington Road site. He had no previous history in the construction industry.197

211. Joseph Bartlett had never dealt with CFMEU officials before in relation to shutting down a site. He said he ‘felt the pressure of the situation’.198 He rang his senior manager at WorkSafe ACT, Stewart Ellis asking for advice. Stewart Ellis told him that WorkSafe would need to be certain if it decided to prohibit work on the site.199

197 Joseph Bartlett, 21/7/15, T:512.46-513.2.
198 Joseph Bartlett, witness statement, 21/7/15, para 12.
199 Joseph Bartlett, witness statement, 21/7/15, para 12.
212. Joseph Bartlett then set about satisfying himself as to whether or not the concrete pour could continue. After investigations he arrived at the following position:200

In my view, there were minor safety issues which on their own were not enough to stop the pour. I therefore informed Mr Stojanovic that I was satisfied for the concrete pour to continue.

213. He was feeling pressured by the CFMEU officials to stop the pour, as he put it, ‘regardless of the safety documentation’. In order to seek clarification, Joseph Bartlett again called Stewart Ellis and was again told that he needed ‘a good reason to stop the pour’.201

214. Joseph Bartlett then had a discussion with Dean Hall. Joseph Bartlett’s oral evidence concerning the discussion was in the following terms:202

Q. You say you had a conversation with Mr Hall. Just tell me what happened then?

A. I told him that I wouldn’t be stopping the pour because I’d seen the documentation and he said to me, ‘if you don’t fucking stop this pour and someone dies, you’ll go to gaol’.

Q. Where was he standing when he said that to you?

A. Less than arm’s length from me. He was very close to me.

Q. Was he doing anything with his hands?

A. Yes, he was pointing at me and gesturing, jabbing sort of, but didn’t make contact.

Q. When you said those words, I note for the transcript that you raised your index finger and made pointing gestures; is that what he did?

200 Joseph Bartlett, witness statement, 21/7/15, para 17.
201 Joseph Bartlett, witness statement, 21/7/15, para 18.
202 Joseph Bartlett, 21/7/15, T:515.24-516.20.
A. Yes.

Q. Where was his index finger, how far from you?
A. Very close.

Q. Close to what part of your body?
A. Head, chest, sort of area.

Q. Was he raising his voice?
A. Yes.

Q. How did you feel?
A. It was intimidated and stressed by the whole situation.

Q. Where were the other CFMEU officials at this point?
A. They were in the general area, not shoulder to shoulder with me by any means but they were sort of within five metres.

Q. Who else was standing around, do you remember?
A. From the CFMEU?

Q. No, just generally.
A. Zoran and Bob from Claxton Constructions were also nearby.

215. Joseph Bartlett’s evidence is that Dean Hall’s comment ‘shook me up’. \(^{203}\) Joseph Bartlett went on to say: \(^{204}\)

I found the situation intimidating because there were four or five angry CFMEU officials standing around me, some of whom are very large men, pressuring me to shut the site down.

216. Immediately after the incident, Joseph Bartlett did not tell anyone that he had been intimidated by Dean Hall. The notes that he made of his site visit do not record Dean Hall telling him that if he did not stop the

\(^{203}\) Joseph Bartlett, witness statement, 21/7/15, para 21.

\(^{204}\) Joseph Bartlett, witness statement, 21/7/15, para 22.
pour and someone died then he would go to gaol.\textsuperscript{205} However, Joseph Bartlett gave convincing explanations for this in his oral evidence. When asked why he did not write to the CFMEU to complain, he said that he was not usually one to complain or kick up a fuss and that he did not really want to go back over what had happened.\textsuperscript{206} When asked why he did not think to complain to anybody, he said that he did not want to think about it anymore at all and just wanted to resolve the issues at hand and be done with it.\textsuperscript{207} When it was put to him that there was no reference in his notes to Dean Hall saying anything about going to gaol, Joseph Bartlett said ‘No. I’m not proud of it’.\textsuperscript{208} The appropriate inference to draw is that Joseph Bartlett, understandably, was ashamed and humiliated by what Dean Hall had done and wanted to put the incident behind him. For reasons of that kind, he did not complain to anybody about what Dean Hall had said or describe it in any detail in his site notes.

\textsuperscript{217} During this altercation, the engineer, Pierre Dragh, arrived at the site.\textsuperscript{209} Pierre Dragh told Joseph Bartlett that it would be possible to put a ‘cold joint’ in the slab which would allow work to commence later without affecting the structural integrity of the slab.\textsuperscript{210}

\textsuperscript{205} Joseph Bartlett, witness statement, 21/7/15, JDB -1.

\textsuperscript{206} Joseph Bartlett, 21/7/15, T:556.18-23.

\textsuperscript{207} Joseph Bartlett, 21/7/15, T:556.38-42.

\textsuperscript{208} Joseph Bartlett, 21/7/15, T:558.16-21.

\textsuperscript{209} Joseph Bartlett, witness statement, 21/7/15, para 25.

\textsuperscript{210} Joseph Bartlett, witness statement, 21/7/15, para 25; see also Joseph Bartlett, 21/7/15, T:516.23-27.
218. Upon being given this option Joseph Bartlett changed his mind and decided to stop the pour.\textsuperscript{211} He directed that the ‘cold joint’ be installed.\textsuperscript{212} In his oral evidence Joseph Bartlett readily conceded that he had changed his position by reason of the conduct of Dean Hall:\textsuperscript{213}

Q. In effect, you changed your position, did you?
A. I did.

Q. And but for the person yelling in your face and pointing at you, would you have stopped the concrete pour?
A. No.

Q. What would you have done?
A. I would have allowed the pour to continue. Obviously there was some issues that could have been addressed and we identified those and issued improvement notices for those after we’d ceased the pour, but at that time had I not been yelled at, then I would have allowed the pour to continue.

219. In his witness statement Joseph Bartlett described the position as follows:\textsuperscript{214}

I believe that had I not been subject to the behaviour of Dean Hall and the other CFMEU officials, I probably would not have issued any prohibition notices which resulted in shutting down the concrete pour, as I do not think there was any imminent safety risk at the time. However, at the time, I had had limited dealings with the CFMEU and construction sites in general and succumbed to the pressure.

220. Following the pour being stopped, Joseph Bartlett issued a verbal prohibition notice. The concreters began packing up. At about that time Chris Flanagan, a more experienced inspector from WorkSafe,

\textsuperscript{211} Joseph Bartlett, witness statement, 21/7/15, para 26.
\textsuperscript{212} Joseph Bartlett, witness statement, 21/7/15, para 27.
\textsuperscript{213} Joseph Bartlett, 21/7/15, T:516.42-517.8.
\textsuperscript{214} Joseph Bartlett, witness statement, 21/7/15, para 39.
arrived at the site. He and Joseph Bartlett walked around the site with Robert Rossi and identified a number of what Joseph Bartlett described as ‘minor issues to be addressed’.

221. Joseph Bartlett issued six improvement notices and two prohibition notices the same day. Many of these were directed to obtaining further documentation which was in due course supplied. Joseph Bartlett was taken through these notices in his oral evidence.

222. The evidence of Joseph Bartlett as to his altercation with Dean Hall is supported by that of Robert Rossi. In his statement Robert Rossi gave the following evidence:

I then saw Dean Hall walk up to the Work Cover official and go off the Richter scale and start pointing in his face. Dean Hall was saying, words to the effect of, ‘if anyone gets hurt, it’s your fault, you’ll be going to jail’.

223. Robert Rossi gave similar oral evidence:

Q. And then what happened?
A. That’s when Dean Hall approached him and started going off the Richter Scale – it just got – he started poking him saying, ‘if something happens on this job and someone gets hurt, you’ll be going to gaol’. It was odd, but he was a bit more aggressive than that.

Q. How far away from the Work Cover fellow was Dean Hall?
A. Oh, he was right in front of him.

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215 Joseph Bartlett, witness statement, 21/7/15, para 30.
216 Joseph Bartlett, 21/7/15, T:546.33-554.37.
217 Robert Rossi, witness statement, 20/7/15, para 19.
Q.  Where were you?
A.  I was to the side.

Q.  You were sort of jabbing with your forefinger.  Is that what he was doing?
A.  Yes.  He was pointing at him, like that (indicating).

Q.  Was he raising his voice?
A.  Yes.  He was going off.  In my words, just going off, cranky, you’re…(makes noise).

Q.  What did the WorkCover fellow say?
A.  He didn’t say much at all.  He was just shaking.

Q.  He was what?
A.  Shaking.

Q.  He was shaking.  How could you tell?
A.  You could just see he was put back, he was just - -

Q.  You’re raising your hands and leaning back in the chair.  Is that –
A.  Yeah.  Well, I know – if it’s me, I’m a different sort of person.  If someone does that to me I react.  He didn’t react.  He went backwards and just sort of - -

Q.  Right.
A.  You, know I’m a different sort of person.  If someone points fingers at me, I point them back, but - -

Robert Rossi kept a diary note for 25 February 2013. The diary note is in the following terms:\textsuperscript{219}

\begin{quote}
Started concrete pour.  Then union came on site.  I called WorkCover after we closed site down.  Put cold joint in.
\end{quote}

\textsuperscript{219} Robert Rossi, witness statement, 20/7/15, attachment RSR-1.
Union stop job then WorkSafe said go ahead then union threatened WorkSafe by saying if something goes wrong they will suffer consequences. So job shut down.

225. There is no reference to gaol in the note. However Robert Rossi maintained in oral evidence that he heard Dean Hall say to Joseph Bartlett ‘if something goes wrong, it will be your fault and you’ll be the one going to gaol’. He said that there was more said at the time but that: ‘I can just remember those words going through my head. That’s the only thing that I remember’. Robert Rossi said about the notes he made: ‘I just make them very short, very quick, just what happens in the day’.

226. It was suggested to Robert Rossi in oral examination that if someone had said ‘you will go to gaol’ he would have made a notation in those terms rather than simply ‘they will suffer consequences’. Robert Rossi was adamant that the former words were said. And Robert Rossi’s note in his diary is a very brief summary of events. The note captures in a very few words the gist of a series of complex events that took place on Monday 25 February 2012. To suggest that Robert Rossi’s diary note should have recorded a verbatim account of what was said to the WorkSafe inspector is placing an unreasonably high burden upon him. He gave his evidence in cogent and direct way. He did not appear to be suffering from any memory defect.

220 Robert Rossi, 20/7/15, T:448.29-44, 450.45; Robert Rossi, 20/7/15, witness statement, 20/7/15, para 19.
221 Robert Rossi, 20/7/15, T:451.3-5.
222 Robert Rossi, 20/7/15, T:441.20-21.
227. When it was put to Joseph Bartlett that what Dean Hall said was not words to the effect of ‘you’ll go to gaol’ but instead ‘you’ll suffer the consequences’, Joseph Bartlett responded:224

No, that’s not true. Those words stuck in my head. You don’t hear someone say that to you and forget it. Those are the words he used.

228. The evidence of Robert Rossi and Joseph Bartlett as to what was said by Dean Hall is corroborated by Zoran Stojanovic. Zoran Stojanovic said, in oral evidence, that he was standing next to Joseph Bartlett when Dean Hall pointed his finger and said ‘If you don’t fucking close the job now and something happens, you’re going to gaol’.225 His description of the incident in his statement was to substantially the same effect.226

229. Anthony Vitler said he did not witness this incident.227

230. Dean Hall in his witness statement denied saying ‘if anyone gets hurt, it’s your fault, you’ll be going to jail’. He gave the following account of the exchange with Joseph Bartlett:228

[Joseph Bartlett] told me that he was not very experienced. I then explained to him that it was a very dangerous situation and that the site needed to be closed. I told him that he needed to make a call and get some instructions from his boss.

224 Joseph Bartlett, 21/7/15, T:544.34-41.
225 Zoran Stojanovic, 20/7/15, T:477.41-46.
226 Zoran Stojanovic, witness statement, 20/7/15, para 15.
227 Anthony Vitler, 1/9/15, T:1675.27-32.
228 Dean Hall, witness statement dated 15/7/15, 8/10/15, paras 32-33.
231. Dean Hall did not in his witness statement deny yelling at the inspector or aggressively pointing his finger at him. In oral evidence he described the encounter as ‘heated’, but said he did not know if he was yelling at Joseph Bartlett.\(^{229}\) Dean Hall said that the proposition that Joseph Bartlett would end up going to gaol was a ridiculous one.\(^{230}\) It was at least in part on this basis that he denied saying something to Joseph Bartlett to this effect.\(^{231}\)

232. Dean Hall claimed that he was not trying to intimidate Joseph Bartlett but rather trying to take the pressure off him by telling him to call his boss. This is an inherently unlikely explanation for conduct that on any view involved shouting in an aggressive manner. Further, Joseph Bartlett’s evidence was that he had called his boss twice before his altercation with Dean Hall.\(^{232}\) He said that he rang WorkSafe three times that day. He did not recall whether Dean Hall told him to ring WorkSafe but accepted that that was possible.\(^{233}\)

233. The evidentiary position is thus as follows. There is no doubt that there was a heated altercation. There are competing accounts about just how heated the altercation was. There is no doubt that Dean Hall wanted Joseph Bartlett to stop the concrete pour. The accounts given in oral evidence by Joseph Bartlett, Robert Rossi and Zoran Stojanovic were all to the effect that Dean Hall was pointing his finger

\(^{229}\) Dean Hall, 8/10/15, T:2307.28-43.

\(^{230}\) Dean Hall, 8/10/15, T:2309.21.

\(^{231}\) Dean Hall, 8/10/15, T:2309.23-.24, 2308.8-23.

\(^{232}\) Joseph Bartlett, witness statement, 21/7/15, paras 12, 18, 19; Joseph Bartlett, 21/7/15, T:515.1-29, 542.39-543.4.

\(^{233}\) Joseph Bartlett, 21/7/15, T:546.17-31.
aggressively at Joseph Bartlett, shouting at him, and told him that if he
did not stop the pour he would go to gaol. The contemporaneous notes
prepared by Robert Rossi and Joseph Bartlett did not record a threat in
these terms. Dean Hall denies saying these words.

234. The question is whether, having regard to the seriousness of the
conduct, there should be a finding that Dean Hall may have
contravened s 190 of the *Work Health and Safety Act 2011* (ACT).

235. A number of reasons were advanced by counsel assisting for rejecting
Dean Hall’s evidence and accepting the evidence of the others. One of
these reasons was that, having regard to the fact that Joseph Bartlett
was new to the job and that this was his first meeting with Dean Hall,
he would be likely to remember what was said.234 It was also
submitted that Joseph Bartlett did not present in the witness box as a
person prone to exaggeration and readily made concessions about his
own inexperience and about the safety issues on the site that day.
Counsel assisting submitted that his explanations for not including
details about the incident in his file note were convincing.

236. The CFMEU described Joseph Bartlett’s explanation for there being no
reference to the incident in his notes as self-serving and unconvincing.
It submitted that the fact that he made no complaint to anyone indicates
that the incident did not occur as he described in oral evidence. The
CFMEU also point to the fact that Robert Rossi’s file note makes no
reference to gaol.

234 Joseph Bartlett, 21/7/15, T:526.40-44.
237. It is right to accept the submissions of counsel assisting. A rejection of Dean Hall’s evidence on this point is supported, in addition, by the unsatisfactory nature of his evidence on other points (such as the CFMEU smear campaign and rumours regarding Halafihi Kivalu).

238. The CFMEU also took issue with the approach of counsel assisting in not dealing in detail with the safety issues on the site. It submitted that to assess Dean Hall’s conduct it was necessary to examine those issues. The submission did not explain why. Let it be assumed that Dean Hall wanted the concrete pour to stop because he was concerned about serious safety issues. That would not affect the operation of s 190. The question for the purposes of s 190 is whether, by his conduct, he was intimidating Joseph Bartlett. Intimidation for the purpose of addressing serious safety issues is nonetheless intimidation. The point of s 190 (amongst other sections in the Act) is to prevent interference with the performance by WorkSafe inspectors of their duties and functions under the Act.

239. As set out earlier in this Chapter, s 190 of the Work Health and Safety Act 2011 (ACT) makes it an offence to engage in conduct with the intention to threaten or intimidate an inspector. The maximum penalty is $50,000 or 2 years imprisonment or both.

240. The CFMEU submitted that, even if Dean Hall made the statement that the other witnesses allege he made, there was no contravention of s 190. The submission is that by telling Joseph Bartlett that if he did not stop the pour, he would go to gaol, Dean Hall was not intimidating him because intimidation requires a threat coupled with a demand. The CFMEU contends that there could be no threat because a threat requires a ‘communicated intention to inflict some kind of harm on a
person or the property of another. The CFMEU submitted that telling someone that they ‘could’ go to gaol is not a threat in the relevant sense.

241. Counsel assisting submitted that the above argument ignores the words of s 190. That section provides that:

A person commits an offence if–

(a) the person engages in conduct; and

(b) the person intends, by engaging in that conduct, to directly or indirectly assault, threaten or intimidate another person; and

(c) the other person is an inspector or a person assisting an inspector.

242. Section 190 is directed at conduct accompanied by a particular intention. The relevant intention for present purposes is the intention is to intimidate. Counsel assisting point to the observations of Simpson J about the word ‘intimidate’ in a different statutory context:

It is, first, an ordinary English word, readily understood, with no technical or complex or concealed meaning. The Oxford English Dictionary, 2nd ed and the Macquarie Dictionary are in agreement that “intimidate” means to render timid, to inspire with fear, to overawe, to cow, or to force to or deter from some action by threats or violence or by inducing fear.

243. The question is whether Dean Hall, in engaging in the conduct that he did with Joseph Bartlett, had an intention to ‘intimidate’ Joseph Bartlett in this ordinary sense. His claim that he was attempting to take the pressure off Joseph Bartlett is rejected for reasons already given. Dean Hall was a very experienced, tough and senior trade union official. He was shouting very angry insults. On his own evidence

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236 Meller v Low (2000) 48 NSWLR 517 at [9].
Dean Hall admitted that he knew that Joseph Bartlett was not very experienced. Hence he was likely to be rendered timid, or inspired with fear, or overawed, or cowed. Dean Hall knew that. He was in truth attempting and therefore intending to intimidate Joseph Bartlett, in the ordinary sense of that word.

244. In these circumstances, Dean Hall may have contravened s 190 of the *Work Health and Safety Act 2011* (ACT).

245. Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Director-General, Chief Minister, Treasury and Economic Development Directorate for consideration of whether Dean Hall should be prosecuted for a possible contravention of s 190 of the *Work Health and Safety Act 2011* (ACT).

246. Even if it is thought that Dean Hall’s conduct was outside s 190, it is open to a lesser and narrower complaint. It fell well below the professional standards of a trade union official. It was a loutish, bullying performance.

**G – CAPITAL HYDRAULICS**

247. The CFMEU has been attempting to persuade the Lo Res to sign an EBA this year. Kenneth Miller and Jason O’Mara have been conducting those negotiations. Kenneth Miller’s evidence was that
there will not come a point when he gives up trying to persuade Joe Lo Re to sign the agreement.237

248. On 15 April 2015, during a conversation with Jason O’Mara of the CFMEU about a possible EBA with Joe Lo Re’s earthworks company, Joe Lo Re recounted that Jason O’Mara had said to him words to the effect that signing the EBA was ‘[e]ntirely up to you, but you have to understand we have a job to do.’238 Joe Lo Re took this to mean that the CFMEU would continue to apply pressure, and shut his sites down, unless Capital Earthworks signed an EBA.

249. On the same day, almost contemporaneously with this conversation, Johnny Lomax and Kenneth Miller attended a site on which Capital Earthworks was engaged at Aranda. They went straight from that site to another site on which Capital Earthworks was engaged.

250. Counsel assisting submitted that there was a connection between Jason O’Mara’s phone call and the site visits.

251. Kenneth Miller said that he could not recall how he came to be driving past the site on 15 April 2015. He said he did not think he attended the Aranda site to send a message to Joe Lo Re.239 Kenneth Miller, who was for the most part a garrulous, speech-making kind of witness, could offer no particular reason why he and Johnny Lomax were together on this day. He said he was there ‘to work with him’. He said: ‘We work together. No particular reason’. He said that it was

237 Kenneth Miller, 3/9/15, T:1922.14-44.
238 Joe Lo Re, witness statement, 23/7/15, paras 51-52.
‘Nothing special, to my knowledge. Maybe we worked together’. 240 Kenneth Miller appeared to accept that the site visit was not a random one, and that he and Johnny Lomax went there for the purpose of having a look at the site. 241 But why that site at that time?

252. Jason O’Mara vacillated in his account of the circumstances surrounding the site visit on 15 April 2015. Counsel assisting submitted that he was careful to ensure that he did not steadfastly commit to any proposition lest evidence be presented that showed the true position. That is a stand adopted which many witnesses before the Commission adopted, from Brian Parker down. Jason O’Mara said he ‘could have’ organised Johnny Lomax and Kenneth Miller to attend the Aranda site on 15 April 2015. 242 He said it was possible that he rang Joe Lo Re at a moment when he knew that Johnny Lomax and Kenneth Miller were either on their way to or had already arrived at the Aranda site. 243

253. Counsel assisting submitted that that is the inference that should be drawn. They submitted that this was a co-ordinated effort to place pressure on Joe Lo Re to sign a CFMEU EBA. It was typical of the methods implemented by the CFMEU. It was submitted that the message conveyed to Joe Lo Re was substantially the same message as that conveyed to Milin, to A&P and to Claw.

The submissions which the CFMEU made about this material did not respond to the nub of the submissions of counsel assisting: that there was a co-ordination between site visits purportedly for safety reasons and a telephone call from Jason O’Mara about an EBA. The CFMEU denied that there was anything sinister about Jason O’Mara saying to Jo Lo Re ‘But you have to understand, we have a job to do’. The import of those words rather depends on the context: if the context was a co-ordinated visit purportedly only for safety reasons, then the words have a more sinister implication than they otherwise might bear.

The CFMEU then submitted that Johnny Lomax and Kenneth Miller identified safety issues at the site. That, also, is not to the point. The nature of the safety issues identified does not assist in dispelling the inference that arises from the coincidence of Jason O’Mara’s telephone call and his own evidence about it. The safety issues were as follows: on the first site, one of the machines operated by Joe Lo Re on the site did not have flashing lights. It had a possible oil leak. According to Kenneth Miller this was a sufficient basis to go on to any other Capital Hydraulics site ‘because the pattern was there’. Upon entering the second site, Kenneth Miller identified, after inspecting all of the machines on the site, that one machine had no operator’s manual and that its motion beeper was not working. The machine was fixed.

The submissions of counsel assisting are accepted. This was another example of the use of safety issues to apply industrial pressure.

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245 Kenneth Miller, witness statement dated 22/7/15, 2/9/15, paras 6-7.
246 Kenneth Miller, 3/9/15, T:1927.4-1928.32.
H – OTHER EXAMPLES

257. There were in evidence intercepted telephone conversations that indicated that this approach was widespread. Some are discussed in Chapter 6.5 (Anti-Competitive Conduct): for example, a series of conversations and text messages dealing with attempts to make a bricklayer without a CFMEU EBA charge higher prices, and a conversation between Kenneth Miller and Jason O’Mara regarding a crane operator seeking to enter the Canberra market.

258. It is convenient in this Chapter to refer to one other example. It concerns a conversation between Jason O’Mara and a representative of a builder commencing its first project in Canberra.

259. Jason O’Mara accepted that the CFMEU had a list of ‘preferred contractors’ that was given, on occasions, to builders. When asked if it contained only contractors with pattern EBAs he said:248

No, I think there’s possibly a couple who don’t. It contains a list of people that we believe are up to date in payments, that aren’t behind on their superannuation and long service and items like that.

260. This answer could only mean that the ‘couple’ of contractors who do not have pattern EBAs but nonetheless have CFMEU EBAs. Otherwise, it would not be possible for the CFMEU to check that the companies were up to date in the respects to which Jason O’Mara referred.

261. In oral evidence, Jason O’Mara said on a number of occasions that he told his organisers, and that it was his view, that it was not the CFMEU’s position to be promoting one company over another. His description of his approach was encapsulated by the following evidence:

…I never – and I explained to my organisers it’s not our job to promote one company over another. If there are companies who we believe are good and do a good job, I’m happy for you to pass their names on to people, but, other than that, that’s the builder’s job to worry about that.

262. He went on to say:

My instructions to organisers are that, ‘It is not your job for a particular company to be winning work over others, but if you have an opportunity to promote a company who we believe does the right thing, pays their workers to their agreements, has good safety practices, has a good record of completing jobs on time, it wouldn’t be inappropriate to say these companies are okay.

263. There is nothing wrong with an approach of this kind. But there is evidence that this is not the CFMEU approach. It was not the approach taken, for example, by Halafihi Kivalu in relation to Claw Constructions and Claxton.

264. Nor was it the approach adopted by Jason O’Mara in a telephone conversation with Sean Gibbeson. At this time, Sean Gibbeson was the representative of a builder. The builder was new in town and was just starting a job with a company referred to as Richard Crookes in the commercial sector in Canberra. A recording of that conversation was played during Jason O’Mara’s oral evidence.

249 Jason O’Mara, 4/9/15, T:2049.36-41.
251 O’Mara MFI-2, 3/9/15.
265. It is apparent from the conversation that this was the first time that Jason O’Mara and Sean Gibbeson had spoken. Sean Gibbeson’s company had been doing work in Sydney and already an EBA with the NSW CFMEU. He had spoken to Dean Hall and explained this to him and agreed that no new EBA was necessary for Canberra.

266. Jason O’Mara introduced the purpose of his call by saying.\(^{252}\)

JASON O’MARA: But we’ve just got to make sure that while we’re doing that we don’t, you know have any – have any mishaps with shit contractors early in the piece either, you know what I mean?

SEAN GIBBESON: Yep. Yeah, yeah, I understand, yep.

JASON O’MARA: Which I- I did get a little bit of intel that there might be a couple of unsavoury ones on the early works that might be talking to youse.

SEAN GIBBESON: Right, yeah.

JASON O’MARA: Yeah, yeah. So it’d be good to be able to catch up and try and make sure we don’t – like, you know, obviously a big job, you blokes live in town. Crookes, you know, have been here a little while.

SEAN GIBBESON: Yeah.

JASON O’MARA: There’s a real potential that we’re going to have a – you know, there could be some misunderstandings of them guys, because they have been treating us with a bit of disrespect and we haven’t shown them the attention we need to. So it’d be good to get off on the right foot.

267. There followed some further discussion about details of the project, and the possibility of a meeting. At this point Jason O’Mara said:\(^{253}\) ‘Can you just do us a favour and put on hold any major decisions until we have had a chat?’

\(^{252}\) O’Mara MFI-2, 3/9/15, p 3.25-4.2.

\(^{253}\) O’Mara MFI-2, 3/9/15, p 5.21-23.
There was then a slight pause in the conversation and Sean Gibbeson answered ‘yeah, ok. Yeah’.

The conversation continued in the following way:

JASON O’MARA:  You know what I mean - -
SEAN GIBBESON:  I - I have to talk to the boys.
JASON O’MARA:  -- because it’d be - -
SEAN GIBBESON:  I don’t know where we’re at with subbies or - -
JASON O’MARA:  Yeah. Can you just check, because it’d be really shit to have a big, you know shithouse contract that is your first contract when you get down to town and, you know, like yeah.
SEAN GIBBESON:  I know – I know they’ve let an early works civil package. I don’t know who to.
JASON O’MARA:  Yeah, look, I am hearing that might be Cord Civil, which is – we like them, we don’t mind them, but, there are a couple of other --
SEAN GIBBESON:  Who ever it was, I know – I know at the time, to be honest, between you and I, they said that, you know, you guys were happy with them, so - -
JASON O’MARA:  Yeah
SEAN GIBBESON:  We were running with another guy or something and then - -

... Guideline, they’re – yeah.

And once we – yeah.

Yeah, but, yeah, you know what I mean, like civil’s – once you get to the structure trades, you’ve really got to go way out to find someone that’s no good, but in civil (indistinct – simultaneous speakers)

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SEAN GIBBESON: Yeah, but we haven’t even appointed – to give you an idea, we haven’t even appointed the architect yet, mate, so - -

JASON O’MARA: Haven’t you?

SEAN GIBBESON: We’re nowhere near letting like formworkers or anyone like that. That’s miles away, miles away.

JASON O’MARA: No, no. Yeah, as I said, that’s all - that’s all sweet. It’s just that the early earth packages are making a bit of a big deal to us at the moment, because, you know, there are a heap of good contractors and there are only two or three bad ones and - -

SEAN GIBBESON: Yeah.

JASON O’MARA: - - yeah. It makes a big difference to the way the job starts, that’s all.

270. Guideline was a company which did not have a CFMEU EBA. Cord Civil was a company that did.255

271. Counsel assisting was submitted that what Jason O’Mara was conveying was that there were only some contractors that the CFMEU would approve for use on the project, and that in the event that the wrong contractors were used, there would be adverse consequences for the builder. It was submitted that Jason O’Mara’s reference to avoiding ‘bloody mishaps with shit contractors’ and to the ‘real potential that... there could be some misunderstandings... because they have been treating us with a bit of disrespect and we haven’t shown them the attention we need to’ were thinly veiled threats that the CFMEU would cause difficulties unless they had a good relationship with the builder. What was involved in such a good relationship, it was submitted, was made plain by Jason O’Mara’s request to ‘hold any

major decisions until we have had a chat’: that is, a relationship in which major decisions require CFMEU approval.

272. Jason O’Mara would not accept this interpretation of the conversation in his oral evidence. His position was that he was merely ‘ringing up to have a meet and greet with a new company in town’. The CFMEU submitted that in the absence of Sean Gibbeson being called, counsel assisting’s submissions were mere speculation.

273. Sean Gibbeson’s presence in the witness box could not have altered the content of the recorded conversation. The conversation demonstrated that Jason O’Mara’s description in oral evidence of the CFMEU’s position is inconsistent with CFMEU practice. It cannot be said, and it was not submitted, that the conversation indicates wrongdoing on the part of Jason O’Mara. However it undermines the CFMEU’s repeated claims that it has no influence, or no significant influence, on building sites in Canberra. Those claims are part of its more general position that it would not use untoward means to seek to compel anyone to have a CFMEU EBA, or to punish those who do not have a CFMEU EBA. That general position, too, is undermined by the conversation.

I – LODGEMENT OF MPR EBA

274. The Commission heard evidence regarding the lodgement at the Fair Work Australia of two EBAs. One of those EBAs concerned Class 1 Formwork. It could be suggested that its preparation and lodgement were connected with the allegations against Halafihi Kivalu in relation

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to which he has now been charged. In these circumstances, counsel assisting did not deal with that issue. Neither will this Report.

275. There was also evidence of about the preparation and lodgement of an EBA on behalf of MPR Scaffolding in 2010. There is also a difficulty in drawing conclusions about this evidence. There are proceedings on foot between the CFMEU and MPR Scaffolding in which the validity of this EBA is challenged. The challenge to validity concerns the circumstances in which it was prepared and lodged.

276. In these circumstances, counsel assisting submitted that no conclusions about the validity of the EBA should be drawn. The CFMEU accepted that approach. There was no dissent from it in submissions filed on behalf of MPR. In these circumstances this Report will adopt that approach. What follows sets out the evidence on this issue, taken largely from the submissions of counsel assisting.

277. On 20 August 2010 Fair Work Australia approved a collective agreement between the CFMEU and MPR Scaffolding Pty Ltd (MPR).258 The circumstances in which that agreement came to be approved are as follows.

278. Petar Josifoski is the director and sole owner of MPR. Prior to 2010 he worked in Sydney for another company. In about 2010 he moved to Canberra and started MPR. In mid-2010 he decided he wanted to move into the commercial sector of the scaffolding industry. At that time he was tendering for work on a commercial site on Flemington

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258 Petar Josifoski, witness statement dated 27/5/15, 29/7/15, PJ-1, tab 1.
279. As a result, Petar Josifoski called the CFMEU and spoke to Anthony Vitler. On 22 July 2010, he met Halafihi Kivalu to discuss the EBA. On 5 August 2010, there was a further meeting at the CFMEU’s offices. Present were Anthony Vitler, Halafihi Kivalu, Petar Josifoski and his wife Rosa Josifoski. Petar Josifoski’s recollections of that meeting are as follows. He arrived at about 9am having commenced work at 7am. He drove over from that job to the CFMEU in Dickson. Petar Josifoski arrived separately from his wife Rosa. The meeting took about 40 minutes to an hour. During the meeting the terms of the proposed EBA were discussed. At the conclusion either Halafihi Kivalu or Anthony Vitler said to Petar Josifoski that he needed to sign the EBA. Petar Josifoski said that he recalled being given a ‘few pieces of paper to sign’, and that he signed them.

280. One of those pieces of paper was the last page of the 2010 EBA itself. In addition, Petar Josifoski’s signature appears on a statutory declaration headed Form F17 Employers Declaration in support of the EBA (F17 Declaration), which was lodged with Fair Work

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260 Petar Josifoski, witness statement dated 27/7/15, 29/7/15, para 7.
261 Petar Josifoski, 29/7/15, T:1341.4-46.
263 Petar Josifoski, 29/7/15, T:1342.4-6.
264 Petar Josifoski, 29/7/15, T:1347.32-43.
265 Petar Josifoski, witness statement dated 27/5/15, 29/7/15, PJ-1, tab 1, p 22.
Australia.  The date inserted on that page is 5 August 2010, however the handwriting is not that of Petar Josifoski. It is that of the person who purported to witness his signature, Natasha Roache.

Natasha Roache was not at the meeting at the CFMEU’s offices. Natasha Roache affixed her signature to the F17 Declaration at the offices of the Commonwealth Bank in Dickson. Natasha Roache said that the stamp that she affixed to the document never left the premises of the bank. However Petar Josifoski said that he did not attend that branch of the Commonwealth Bank on that day or any other day. Immediately after signing the EBA at the CFMEU’s offices, he went outside with his wife and returned to work at the Empire job. His diary for that day indicates that he had a job at ‘Lemo North’ at 7.30am, and then a job at 9.00am for ‘Empire’. Rosa Josifoski confirmed in her evidence that she and her husband arrived and left the meeting in separate cars. Petar Josifoski said that he did not remember seeing a Commonwealth Bank stamp on the F17 Declaration when he signed it.

266 Petar Josifoski, witness statement dated 27/7/15, 29/7/15, tab 20.
267 Petar Josifoski, witness statement dated 27/7/15, 29/7/15, tab 20.
268 Natasha Roache, 30/7/15, T:1478.21-47.
270 Petar Josifoski, witness statement dated 27/7/15, 29/7/15, para 10; Petar Josifoski, 29/7/15, T:1353.26-44.
271 Josifoski MFI-2, 29/7/15.
272 Rosa Josifoski, witness statement, 29/7/15, paras 4-13.
The substance of Natasha Roache’s evidence about how she came to affix her signature to the document was as follows. She commenced at the Commonwealth Bank as a teller in 2009. This was the first time that she had been a bank officer. In the middle of 2010, Natasha Roache was promoted to the position of customer service specialist. At the time she witnessed the statutory declaration she had been in that position for a couple of months. She had not witnessed statutory declarations whilst she was a teller. Natasha Roache said that she did not have a specific memory of witnessing the signature on the relevant page of the F17 Declaration. However, she said that she ‘would have’ observed the person signing the document on 5 August 2010 when she witnessed it. She was asked on what basis she said and her response was follows:

Because it’s a stat dec, if I was putting my signature to it, I would have wanted the person to sign in front of me, otherwise I wouldn’t have signed it.

Similarly, Natasha Roache said that she ‘would have’ asked the person for a driver’s licence or some other form of identification.

It is clear from her evidence that Natasha Roache has no actual recollection of what occurred on 5 August 2010. She was not withholding any genuine recollection from the Commission. There is no doubt that Natasha Roache signed the F17 Declaration on 5 August 2010. There is a question as to whether, when she did so, she

274 Natasha Roache, 30/7/15, T:1478.12ff.
275 Natasha Roache, 30/7/15, T:1479.10-12.
276 Natasha Roache, 30/7/15, T:1479.18-21.
277 Natasha Roache, 30/7/15, T:1479.30-34.
witnessed Petar Josifoski signing the document. Natasha Roache said that she ‘would have witnessed the document in someone’s presence and upon seeing relevant identification was ‘procedure’.” However, there were no written procedures for statutory declarations at that time.

284. As at 5 August 2010, Natasha Roache did not have the necessary qualifications to witness a statutory declaration. Section 8 of the Statutory Declarations Act 1959 (Cth) required at that time (and presently) that a statutory declaration must be made in the prescribed form and before a prescribed person. Schedule 2 to regulation 4 of the Statutory Declarations Regulations 1993 (Cth) prescribes the persons before whom a statutory declaration may be made. At the relevant time, a bank officer with five or more continuous years of service was one of those prescribed persons (see item 204). As at 5 August 2010, Natasha Roache had less than two years’ experience. The F17 Declaration itself contained a space into which was supposed to be inserted ‘full name, qualification and address of person before whom the declaration was made in printed letters’. Natasha Roache did not fill out this part of the F17 Declaration at the time that she signed purportedly as witness. Natasha Roache said that she did not know when she witnessed the document that she did not have the necessary qualifications. She accepted that she was not really very familiar with what was required and what was not required for the purposes of witnessing a statutory declaration. She accepted that she did not really have any established practice in respect of witnessing statutory

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278 Natasha Roache, 30/7/15, T:1479.34.
279 Natasha Roache, 30/7/15, T:1479.40-45.
280 Natasha Roache, 30/7/15, T:1482.30-42.
declarations at that time.\textsuperscript{281} She also accepted that she had not had any training to witnessing statutory declarations.\textsuperscript{282} Natasha Roache did not accept that the likely position was that she signed the document at a time when Petar Josifoski’s signature was already on it. Nor did she accept that that was a possible scenario.\textsuperscript{283}

285. In the above circumstances counsel assisting submitted that the appropriate finding to make, is that Natasha Roache, as a result of her lack of training, experience, and knowledge of what the proper procedures were at the time, signed the F17 Declaration at a time when Petar Josifoski was not present. Natasha Roache was represented at the hearings in Canberra. She made no submissions. Counsel assisting’s submissions are soundly based. They are accepted. Acceptance of them does not entail any criticism of Natasha Roache personally.

286. The next issue is: how did it come to be that the F17 Declaration was put before Natasha Roache? Halafihi Kivalu did not give evidence on this issue. Anthony Vitler agreed that he was at the meeting of 5 August at the CFMEU’s offices in Dickson. However, he was not sure if he stayed for the whole duration of the meeting. Anthony Vitler said he had no idea how the employer’s declaration came to be filled out, that he did not read it at any time, and that he had no idea how the declaration got taken to the Commonwealth Bank.\textsuperscript{284}

\textsuperscript{281} Natasha Roache, 30/7/15, T:1483.15-26.
\textsuperscript{282} Natasha Roache, 30/7/15, T:1479.23-41.
\textsuperscript{283} Natasha Roache, 30/7/15, T:1484.38-1485.17.
\textsuperscript{284} Anthony Vitler, 1/9/15, T:1716.34-1717.10.
287. The effect of Petar Josifoski’s evidence was that most of the details in the F17 Declaration were incorrect. In particular, he said that none of the essential requirements for approval refer to in part two of the document, had taken place. That is, no notice of representational rights was given (cf paragraph 2.1 of the declaration). Nor, according to Petar Josifoski was any vote taken by his employees to improve the EBA (cf paragraphs 2.2, 2.7 of the declaration) and nor were employees notified of any meetings at which a vote was to take place (cf paragraph 2.5 of the declaration).²⁸⁵ This was the first time that Petar Josifoski had ever signed an EBA. He had never been responsible for organising a vote for an EBA. He had never himself voted for an EBA.²⁸⁶

288. According to the F17 Declaration, the vote by employees took place on 4 August 2010 (see paragraph 2.2). Petar Josifoski’s diary for that day records that MPR had five employees working on the Lemo and Empire sites.²⁸⁷ One of those employees as identified as ‘Vince’. That would appear to be a reference to Vince Spatolisano. Vince Spatolisano provided a witness statement to the Commission. He said that he worked for MPR from mid-June 2010 to March 2011. During his employment with MPR, Vince Spatolisano did not know that an EBA was discussed or signed. He said that he did not attend any vote for any EBA on 4 August 2010 and that he was unaware of any vote that occurred on that day. He said that during his time of employment at MPR he was not told about and did not attend any meetings about any EBA and that he never saw any flyers about EBA meetings. He

²⁸⁵ Petar Josifoski, witness statement dated 27/7/15, 29/7/15, paras 11-16.
²⁸⁶ Peter Josifoski, 29/7/15, T:1343.40-1344.2.
²⁸⁷ Josifoski MFI-2, 29/7/15.
said, in substance, that none of the matters recorded in the statutory declaration ever took place.\footnote{Vince Spatolisano, witness statement, 30/7/15, paras 4-14; Vincenzo Spatolisano, 30/7/15, T:1501.46-1502.16.}

289. The answers in the F17 Declaration were inserted in typescript by someone in the CFMEU’s offices. Garry Hamilton said that he did not believe that he had anything to do with the 2010 MPR EBA.\footnote{Garry Hamilton, 2/9/15, T:1786.21-24.} He said that, as a matter of process the details in paragraph 2.2 of the F17 Declaration probably would have come from the organiser responsible.\footnote{Garry Hamilton, 2/9/15, T:1789.19-28.} However, he also said that it could have been Shayne Hall, that there could have been a variety of sources and that he really did not know.\footnote{Garry Hamilton, 2/9/15, T:1789.31-43.} Shayne Hall prepared a witness statement that was received into evidence.\footnote{At the time of the Commission’s hearings, Shayne Hall had recently given birth and was on maternity leave. She was not required to give oral evidence.} She could not recall how the F17 Declaration came to be completed but said that her usual practice was to comply with the requests of the CFMEU organisers.\footnote{Shayne Hall, witness statement, 7/10/15, paras 5-8.}

290. Jason O’Mara was at this time, and subsequently in charge of the EBA department at the CFMEU.\footnote{Jason O’Mara, 3/9/15, T:1983.46-41.} Pursuant to a notice to produce, the CFMEU produced documents in connection with the approval of the 2010 EBA.\footnote{Notice to Produce 1458, para 1b.} Included in those documents was a document headed...
‘CFMEU EBA Data Form’. The EBA data form began with the heading ‘this form MUST be completed’. The form contains a number of boxes including a box headed ‘date employees received EBA’, ‘date employees received representational rights notice’, ‘first vote date’, ‘final vote date’, ‘total number of employees who cast valid vote’. Although the form identifies MPR, its address and contact details, none of the boxes seeking details in relation to a vote on an EBA has been completed.

291. The CFMEU also produced forms completed in connection with other EBAs. One was a form headed ‘EBA task check’. This document contains a series of questions including questions about the holding of meetings and the signing of EBAs. There is no completed form of this nature for MPR.

292. Jason O’Mara in oral evidence suggested that the EBA Data Form (headed ‘this form MUST be completed’) was merely optional. Counsel assisting submitted that this evidence was unconvincing and represented an attempt to underplay the significance of these forms. But, even if the completion of this form was not mandatory, it is quite evident that someone had chosen to use this form in the case of MPR. Why then was the EBA lodged when the form was incomplete?

293. At some point prior to the meeting of 5 August 2010, Rosa Josifoski was provided with a draft F17 statutory declaration (Draft F17).

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296 Vitler MFI-1, 1/9/15.
297 Vitler MFI-1, 1/9/15, p 4.
299 Rosa Josifoski, witness statement, 29/7/15, paras 14, 15, RJ-1.
The document produced to the Commission by the CFMEU has ‘draft’ written on the front, although the handwriting is not Rosa Josifoski’s. The Draft F17 contains some answers to questions inserted in typescript, evidently by someone at the CFMEU, and some answers inserted by Rosa Josifoski in her handwriting.

294. The answers inserted in typescript by the CFMEU include an ‘x’ in the ‘yes’ box to question 2.1 (whether a notice of representational rights complying with s 174 was given to each employee in accordance with s 173). They also include ‘N/A’ in answer to question 2.3 (a question applicable if the date on which the employees vote to approve the EBA is more than 14 days before the application for approval is lodged). They include what might be described as CFMEU pro forma responses to questions 2.4, 2.5 and 2.6 (which seek details about steps taken to give employees access to the agreement, notice of the time and place for voting and explanations given to the employees of the effect of the agreement). These answers assume that a valid vote of employees had taken place. Nonetheless, there is no answer inserted to question 2.2 (which seeks details of the dates on which notices under s 173 were given and on which voting took place).

295. The details inserted by Rosa Josifoski in handwriting included an answer to question 2.7. That paragraph begins ‘please provide the following details of the vote on the agreement’. There is then a box with three lines asking for the number of employees who will be covered by the agreement, who voted on the agreement, and who voted to approve the agreement. Rosa Josifoski wrote the number ‘3’ for all three boxes. Rosa Josifoski said that she put those numbers in because they were the full-time employees at MPR at the time. She said that
she would assume that she read the opening words of the question but that she was not quite sure as to why she completed it. Rosa Josifoski said that the three full-time employees were Dusko Doneski, John Swallow and Cvetko Stojkoski. She said that there were Vince Spatolisano was a part-time employee and that there was another one or two other casual employees. Vince Spatolisano regarded himself as a full-time employee.

Rosa Josifoski was examined by senior counsel for the CFMEU to the effect that at the time she completed the Draft F17, she must have understood that question 2.7 was premised on the fact that there had been a vote. The substance of Rosa Josifoski’s response was that she was not quite sure why she completed the document in that way but she may have been assuming that there would have been a vote.

Counsel assisting submitted that it should be accepted that Rosa Josifoski did not, at the time completed the Draft F17, believe that in fact there had been a vote on the agreement. They gave the following five reasons. First, it is hard to know how she could have come by that knowledge. Petar Josifoski’s and Vince Spatolisano’s evidence was that there was no vote. Secondly, had Rosa Josifoski known that there had been a vote on the agreement, then it is likely that she would have completed the answer to question 2.2. However, she left that part of the form blank. Thirdly, although the opening words of question 2.7 refer to a vote, the box focuses on the ‘number of employees’. It is not
implausible that Rosa Josifoski assumed that at some point there would be or had been a vote and simply inserted what she thought to be the number of full-time employees that the company had. Fourthly, it is evident that Rosa Josifoski did not understand some of the details of the documents. In answer to question 4.1, she said that the company had one part time and two casual employees. However, it was apparent from her oral evidence that the three employees that she identified in question 2.7 were what she understood to be the full-time employees of the company. To properly complete the form, she ought to have included not merely those three full-time employees but both the casual and part-time employees. Fifthly, Rosa Josifoski was inexperienced in matters of this kind. She had no background in construction. In August 2010 she was looking after a two year old child. She was working three days a week. MPR was only registered as a company on 15 June 2010.

298. The CFMEU did not address these submissions. In circumstances where it is not submitted that any ultimate finding should be made, and where there are extant proceedings in which the issue may arise, it is not necessary to determine the matter.

299. However, it is necessary to observe that, on any view, the Draft F17 could not have provided any proper basis for someone at the CFMEU’s offices to think that statutory requirements had been followed in relation to the approval of the EBA. That it was not in fact used for that purpose is apparent from a number of matters. First, no CFMEU

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304 Rosa Josifoski, 29/7/15, T:1401.1-37.
305 Rosa Josifoski, 29/7/15, T:1387.5-22, 1388.16-23.
witness claimed that it was. *Secondly,* the answers to questions inserted by the CFMEU in typescript in that document proceed on the basis that a valid vote had taken place prior to it being provided to Rosa Josifoski (that is, the answers to questions 2.1, 2.3, 2.4, 2.5, 2.6). *Thirdly,* Rosa Josifoski did not complete the answer to question 2.2 (which asks for details of dates of notices of representational rights and votes).

300. There is, also, the following curiosity about the relationship between the Draft F17 and the F17 Declaration lodged with Fair Work Australia. Beneath Natasha Roache’s signature on the F17 Declaration is a box containing handwritten contact details for MPR Scaffolding. The handwriting is that of Rosa Josifoski. On the Draft F17, the last page of that draft (at least as produced to the Commission) has Petar Josifoski’s contact details in typescript. This is highly curious because the process that seems to have occurred is that the Draft F17 was provided to Rosa Josifoski, she inserted some handwriting on it and someone at the CFMEU’s offices typed up that handwriting. But, in relation to the last page of the two documents, the reverse process appears to have occurred. That is, Rosa Josifoski was provided with a page that had typescript in a box, and did not change it, but somehow a box with her handwriting is contained in the Form F17 lodged with Fair Work Australia.

301. One might be able to dismiss the above matter as a mere curiosity if it were not for the evidence, reviewed above, about how Petar Josifoski’s signature on this page of the document came to be witnessed. Other

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306 Rosa Josifoski, witness statement, 29/7/15, para 17.
than to say that she did not complete the handwritten details on the last page of the F17 Declaration after Petar Josifoski had signed it, Rosa Josifoski was unable to recall the circumstances in which she inserted the details on this page or explain this aspect of the evidence.\footnote{Rosa Josifoski, witness statement, 29/7/15, paras 15-17; Rosa Josifoski, 29/7/15, T:1394.1-30.} Nor was any other witness.

302. Counsel assisting submitted that one possible explanation is as follows. Rosa Josifoski completed a document like the Draft F17 but with a last page that in fact became the last page of the Form F17 lodged with Fair Work. That document was brought to the meeting of 5 August 2010 and signed by Petar Josifoski. Following that meeting, what became the Form F17 lodged with the Fair Work Commission was compiled by the insertion of a variety of details in typescript electronically together with the last page of the document completed by Rosa Josifoski and signed by Petar Josifoski at the meeting.

303. Was that possibility what in fact occurred? The events occurred more than five years ago. All of the witnesses who were asked about the process of compiling the above documents have no relevant recollections. Halafihi Kivalu did not give evidence on this issue. In these circumstances, counsel assisting submitted that the appropriate conclusion is that the evidence does not establish what document was actually signed by Petar Josifoski when he affixed his signature to what appears as the last page of the F17 Declaration lodged with Fair Work Australia. No submissions were made by other parties. The better approach is to make no finding.
304. Jason O’Mara gave a Form F18 statutory declaration in connection with the 2010 EBA. Jason O’Mara declared in answer to question 6 that in so far as the matters contained in Petar Josifoski’s declaration are within his knowledge, he agreed with the answers that Petar Josifoski gave.

305. Jason O’Mara said that it was his normal practice to sign statutory declarations of this kind after they had been prepared for him. The substance of Jason O’Mara’s evidence was that he signed this declaration on the basis that he assumed that it had been prepared by Garry Hamilton or under Garry Hamilton’s direction and that the person preparing it had in effect got it right. The effect of his evidence was that his general practice was that the questions in Form 18s were completed by his industrial department and that he would sign those forms them after reading them, looking through the EBA itself and the Form F17 declaration completed by the employer.

306. Jason O’Mara did not in any witness statement contest Petar Josifoski’s claims that the EBA was not voted on or approved by his employees. Nonetheless, in oral evidence, Jason O’Mara suggested that the EBA had been approved properly. Jason O’Mara’s position was that Petar Josifoski was claiming that it had not been approved properly merely because the CFMEU had recently brought proceedings

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308 Josifoski MFI-5, 29/7/15.
against him for not paying in accordance with that agreement.\textsuperscript{313} Jason O’Mara said in oral evidence:\textsuperscript{314}

It seems a little strange to me that – you know, it seems like they are grasping at straws to me because if they just paid to their agreement there would be no problems, but we held them to task because we found underpayments, or alleged underpayments, and amazingly their memories got so good that they knew that five years ago they didn’t have a meeting or something. He had plenty of time, you know he signed a document saying he had the meeting. I don’t know where he is going with that.

307. Counsel assisting submitted that the objective evidence does not support Jason O’Mara’s position. They submitted that Jason O’Mara must know that the CFMEU’s own records provide no support for the proposition that the EBA was ever properly approved. Petar Josifoski’s position has never been that he did not sign the EBA: he accepts he signed it. He said however that he had only really recently been made aware of the requirement for a 21 day period of consultation as well as two meetings and a vote by the employees prior to an EBA being signed.\textsuperscript{315} He had not himself ever signed an EBA before, or organised a vote for an EBA before or actually voted for an EBA.\textsuperscript{316} He said that the first time he can recall seeing the signed statutory declaration was when it was sent to him by his lawyer prior to his giving evidence at the Commission.\textsuperscript{317} In these circumstances, it was submitted by counsel assisting that it is not at all surprising that it was only after being served by the CFMEU with proceedings that Petar Josifoski has sought to challenge the making of the EBA.

\textsuperscript{315} Petar Josifoski, witness statement dated 27/7/15, 29/7/15, para 11.
\textsuperscript{316} Petar Josifoski, 29/7/15, T:1343.41-1344.7.
\textsuperscript{317} Petar Josifoski, witness statement dated 27/7/15, 29/7/15, para 7.
308. Counsel assisting submitted that the proposition, apparently advanced by Jason O’Mara, that the statutory requirements in relation to notices of representational rights and the holding of meetings must have been followed because Petar Josifoski’s F17 Declaration said so was also without substance. That F17 Declaration was prepared by the CFMEU. It was prepared on the basis that a vote had taken place. Either Petar Josifoski signed the F17 lodged without reading it or he signed some other, incomplete document. Jason O’Mara was unable to explain how the document was prepared. Counsel assisting submitted that in these circumstances Jason O’Mara cannot now attempt to shift all responsibility for the correctness of that document to Petar Josifoski, who is not a lawyer or an industrial official but rather a scaffolder who attended CFMEU meetings between jobs on the 5th of August, who signed what was put in front of him and who paid the CFMEU $800 for the preparation and lodgement of the EBA.

Conclusions

309. Counsel assisting submitted that the above matters indicate that the CFMEU’s processes for the preparation and lodgement of EBAs – such as they are - are defective. The practice adopted is for Jason O’Mara to make the Form 18 declaration in reliance on the work done by the industrial relations department of the CFMEU. The result of that, in the present case, is that Jason O’Mara makes a declaration about matters of which he has no direct knowledge. Whether such matters are properly regarded as being ‘within’ Jason O’Mara’s knowledge by reason of some doctrine akin to corporate knowledge need not be canvassed here. The point is that this process removes an
essential safeguard to ensuring that Fair Work obtains complete and accurate information about the EBA it is being asked to approve.

310. Jason O’Mara said in oral evidence: 318

I think the process of having someone sign off on it who doesn’t have the meetings, and that, is a bit silly, so we at one stage started getting the organiser in charge of the agreement to sign off on that, but the Commission knocked us back, the Fair Work Commission, and said that it had to be a senior official of the Branch signing that, because I felt it more prudent that the person signing the declaration would be the person who had had the meetings and had all the interaction, but we were overruled by the Commission with that and I had to start – I had to keep signing them.

311. This evidence may be doubted. Jason O’Mara made the Form 18 declaration in respect of the 2013 Class 1 EBA (with which, for the reasons described above, these submissions does not deal) in his capacity as ‘Organiser of the [CFMEU]’. 319 Question 1 of that Form states ‘I am an Elected Official of the [CFMEU]’. There is nothing in that document to identify Jason O’Mara as assistant secretary of the CFMEU. In contrast, he made the Form 18 declaration in respect of the 2010 MPR EBA in his capacity as ‘Assistant Secretary of [the CFMEU]’. 320

312. Form 18 as presently prescribed requires merely a declaration that the maker is an ‘officer of the union’. The prescribed form is made under rule 24(3) of the rules of the Fair Work Commission Rules 2013 (Cth). That sub-rule requires that each employee organisation that is a

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319 Taleb MFI-3, 13/7/15.
320 Josifoski MFI-5, 29/7/15.
bargaining representative and wants to advise the Commission about whether the organisation supports the approval of the agreement or agrees with one or more statements in the statutory declaration made by an employer is to ‘lodge a statutory declaration by an officer or authorised employee of the organisation’.

313. The CFMEU did not respond to these submissions.

314. As indicated at the outset of this section, there is an issue as to whether the EBA lodged ever bound MPR. That is an issue presently before the Fair Work Commission. For that reason it is not appropriate to make any finding about it.

**J – SMEAR CAMPAIGN**

315. It is convenient to deal in this Chapter with a relatively discrete issue. On 7 July 2015, the CFMEU ACT had its regular Tuesday meeting of organisers. The minutes were prepared by Garry Hamilton. The first heading on the second page of these minutes is titled, “Media Release”. The sub-heading reads, “Smear Campaign for next 3-4 weeks”. Under that sub-heading it lists the names ‘Built’, ‘Claw’, ‘Advance Plumbing’, ‘MPR Scaffold’, ‘Gungahlin’, ‘Capital Hydraulics’, ‘Leamus [sic]’. The next bullet point refers to a press release, statement of claim and the name of a journalist in connection with MPR.

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321 Dean Hall, 8/10/15, T:2262.20; Hall MFI-1, 8/10/15, pp 89-91.

322 Hall MFI-1, 8/10/15, p 90. Built was the builder the subject of some of the matters raised in John Nikolic’s statement in the Master Builders eCB.
316. The seven names identified corresponded to the 6 of the 7 case studies that had been served on the CFMEU electronically on 2 July 2015 by being uploaded in separately named electronic court books. The seventh case study was Capital Hydraulics, which primarily concerned the CEPU. The reference to ‘Built’ was to the builder on the site that was the subject of some of the material uploaded in the Master Builders eCB. The material in relation to that site (the Kim Hall Dance Company) ultimately was not canvassed in evidence because it became apparent that it was the subject of pending proceedings.

317. Counsel assisting submitted that the obvious inference to draw from these references in the organisers’ minutes was that there was a plan to launch a smear campaign against the contractors who were due to give evidence at the Commission commencing the following week. It submitted that by 7 July 2015 the CFMEU legal representatives (as they were entitled to do) had conveyed this information to someone at the CFMEU. The CFMEU officials then decided to take steps publicly to publicly denigrate those companies or their representatives. The minutes of the same day go on to refer to legal representatives coming in the next day to take statements, and to other matters in connection with the upcoming Commission hearings. This, submitted counsel assisting, is the context in which the ‘smear campaign’ was to be launched.

318. Dean Hall denied that this was the correct way to interpret the minutes. He said that the CFMEU was expecting those cases to be used against

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it to smear the reputation of the CFMEU.  

321. The CFMEU in submissions said that the evidence of Dean Hall should be accepted. The CFMEU annexed to its submissions copies of media releases from the MBA. The first is dated 7 July 2015. It does not refer to any of the companies named in the organisers’ minutes. It does not name any case study. It does not support Dean Hall’s explanation in oral evidence for what appeared in the organisers’ minutes. The next release in time is dated 13 July 2015. This, and the other releases, post-date the organisers’ meeting. They cannot support Dean’s Hall’s explanation either. Some MBA press releases were tendered during Dean Hall’s oral examination. These did not support his explanation either, and were not relied upon by the CFMEU in submissions.

322. Counsel assisting also submitted that, if Dean Hall’s explanation were correct, then he must at least have known at this time that representatives of these companies were going to give evidence at the Commission. But Dean Hall also suggested in his oral evidence that he did not know who would be giving evidence at the Commission until the Friday before the hearings commenced (that is, 10 July 2015). If this is so, it is not possible to see how it was that the CFMEU thought

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324 Dean Hall, 8/10/15, T:2263.21-23.
325 Dean Hall, 8/10/15, T:2265.43-2266.7.
326 Submissions of the CFMEU, 6/11/15, pp 50-52.
327 Hall MFI-4, 8/10/15.
328 Dean Hall, 8/10/15, T:2268.27-44.
it was going to be ‘smeared’ by these companies at the Commission. The CFMEU did not address this submission.

321. There is no evidence as to whether or not the smear campaign was implemented, save in relation to MPR. After commencing proceedings against MPR the CFMEU provided a copy of the filed application to a journalist at the Canberra Times. The application was provided on 7 or 8 July 2015, prior to its being served on MPR or the Josifoskis. An article concerning those proceedings was published on the weekend before the Josifoskis gave oral evidence.

322. The planned ‘smear campaign’ was another example of inappropriate conduct. It is not in the interests of members that CFMEU resources be deployed to advance a smear campaign against persons summoned to give evidence at a Royal Commission, or the corporate entities through which those persons operated.

329 Petar Josifoski, 29/7/15, T:1356.3-4; Hall MFI-5–MFI-6, 8/10/15.

330 Hall MFI-1, 8/10/15, p 92; Hall MFI-6, 8/10/15.
## CHAPTER 6.4

### MEMBERSHIP ISSUES

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A – INTRODUCTION

1. This Chapter deals with instances of CFMEU officials applying pressure to employers to ensure that their employees were CFMEU members.

2. Some of the general difficulties with employers paying union fees on behalf of employees are canvassed in Chapter 10.9. It deals with the encouragement of the conduct by the AWU. These payments undermine freedom of association. They weaken the bargaining position of unions in their dealings with employers.

3. The existing statutory regime to some extent deals with these payments by prohibiting officials from advising, encouraging or inciting employers to induce employees to become union members. It does so through the following provisions of the *Fair Work Act 2009* (Cth):

   (a) Section 350(1) provides that an employer must not induce an employee to take, or propose to take, membership action. Section 350(2) contains a similar provision in respect of an independent contractor. These sections are civil remedy provisions.

   (b) Section 350(3) provides:

   A person takes *membership action* if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association.
(c) One effect of s 362 is that a person who advises, encourages or incites another to take action which would contravene s 350 is deemed himself or herself to contravene s 350.

(d) An official who is involved in an actual contravention of s 350 by an employer within the meaning of s 550(2) is taken by s 550(1) to have contravened that section.

4. Section 348 is also capable of application in this context. It provides:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

That too is a civil remedy provision.

5. The circumstances in which a person ‘engages in industrial activity’ include, relevantly, where a person pays a fee (however described) to an industrial association.\(^1\) Section 348 thus prohibits a union official from threatening to take action against an employer with the intent to coerce the employer to make a payment in respect of membership fees to the union.

6. Counsel assisting submitted that CFMEU organisers are under pressure to increase membership numbers. They relied on a requirement recorded in minutes of an organisers’ meeting of 6 May 2015. Those minutes indicate that a target was set to attract or retain 120 members per organiser from that time until September 2015, and that organisers

\(^1\) *Fair Work Act 2009* (Cth), s 347(b)(vi).
were required to identify ten ‘targets’ each week. Jason O’Mara gave
evidence that each organiser had a target of 125 new members per year
or ten per month with retention of existing members.

7. The CFMEU did not take issue with the proposition that membership
targets were set, and that membership was important. It was the first
item on the agenda for each organisers’ meeting. Weekly membership
reports were produced, describing the recruiting efforts of each
organiser. Each organiser had to report to Dean Hall on how they
were performing.

8. The CFMEU took issue with the proposition that the effect of these
targets was to place pressure on organiser to achieve them. However
that is an available inference from the conduct of the officials
described below. It was also apparent, as counsel assisting submitted,
from Johnny Lomax’s statement that a target of 120 members in six
months was ‘unrealistic’.

9. There is nothing inherently wrong with a desire to increase union
membership numbers. Legitimate increases are a good thing for a
union. But increases resulting from payments by employers are not a
good thing. That is so whether they are made in the absence of
pressure from the union, as occurred in the AWU case studies, or as a
result of union pressure, as occurred in some of the examples referred

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2 Hall MFI-1, 8/10/15, p 46.
3 Jason O’Mara, 4/9/15, T:2061.35-2062.3.
4 Hall MFI-1, 8/10/15, p 73.
5 Dean Hall, 8/10/15, T:2261.21-36.
6 Johnny Lomax, 7/10/15, T:2201.21-27.
to below. The approach of the CFMEU and AWU may be contrasted with the approach described by David Broadley in oral evidence: 7

[I]t’s like a football club. If you want to be a member of a football club, you pay your way. To me, it’s if you want to be in a union you be in a union, but you pay to be in that union and you be proud to be in that union …

Commissioner, I can’t talk for other unions, but all I can say is this is the way we operate. If an employer came up and said “Look, I want to pay my guys’ union fees”, whether it be 10 guys or some companies have 200 guys, I don’t think you’d really want me to tell you want I’d say to him”.

10. This approach recognises the importance of voluntary union membership. It is consistent with the objects and provisions of the Fair Work Act 2009 (Cth).

B – PARTICULAR CONDUCT

HD Projects: Halafihi Kivalu

11. One example of conduct of this kind was the conduct of Halafihi Kivalu in connection with HD Projects. Halafihi Kivalu did not give evidence about these payments: this issue emerged after he left the witness box and had been charged in connection with the evidence regarding his receipt of allegedly corrupt payments. It is undesirable in that circumstance to make findings about his conduct. However, it is desirable to refer to the evidence and the submissions of counsel assisting about it. Notwithstanding that it was conduct engaged in by Halafihi Kivalu during his time as a CFMEU organiser, the CFMEU did not respond to counsel assisting’s submissions about it. Halafihi Kivalu, as has been stated, did not make any submissions. What

7 David Broadley, 23/7/15, T:945.19-46.
follows sets out counsel assisting’s submissions regarding the evidence on this topic.

12. Clyde Daish is a shareholder and director of HD Projects Pty Ltd (HD). HD specialises in the supply and installation of wall systems, mainly for multi-storey apartments. In 2009 – 2010 HD was interested in winning work in the ACT. One of the first jobs HD obtained was the Ambassador Apartments in Deakin.

13. Clyde Daish described in his witness statement how in about early 2010, within about a week of HD commencing work at the Deakin site, the CFMEU caused disruption on site. The description included HD’s workers being put in the sheds.

14. Clyde Daish said in his witness statement that after he heard this he had a telephone conversation with Halafihi Kivalu to the following effect:

   Kivalu: If you are working in Canberra you need to pay to the Canberra union.

   Daish: Our employees are already covered by a CFMEU EBA and we are paying our employees in accordance with it.

   Kivalu: I don’t care. We’ll let you go on the EBA, but you’ll need to pay for memberships.

   Daish: My NSW employees are already members in NSW and I don’t think my Canberra workers are interested.

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8 Clyde Daish, 17/7/15, T:374.17-23.
9 Clyde Daish, 17/7/15, T:374.37-44.
10 Clyde Daish, witness statement, 17/7/15, para 10.
11 Clyde Daish, witness statement, 17/7/15, para 11.
Kivalu: You need to pay anyway. I’ll just make up 12 names. You need to pay for 12 employee memberships.

Daish: OK, but you must send me an invoice.

15. In his oral examination Clyde Daish was asked why he agreed to Halafihi Kivalu’s proposal. Clyde Daish responded as follows:\textsuperscript{12}

A. Well, we were at a standstill really. There’s a lot of pressure on us to perform on projects. We are contractually obligated to achieve a certain amount of work each day.

Q. On the Ambassador job?

A. Yes, and this seemed like a fairly easy way to sort of move forward and get through it.

16. On 12 February 2010 HD received a facsimile from Halafihi Kivalu in the following terms:\textsuperscript{13}

Please find attachment [sic] an invoice of twelve membership agreed on. Thank you and hope to catch up soon.

17. At the top of the page of the above facsimile is included a date stamp and ‘P.001/002’. The printing was caused by HD’s fax machine when the fax was printed out.\textsuperscript{14} On its face this suggests that the facsimile received by HD on 12 February 2010 was a two page facsimile.

18. The facsimile sent on 12 February 2010 included a tax invoice from the CFMEU purporting to be for twelve members in ‘arrears’ with a

\textsuperscript{12} Clyde Daish, 17/7/15, T:377.21-28.

\textsuperscript{13} Clyde Daish, witness statement, 17/7/15, CRD-1, p 1.

\textsuperscript{14} Clyde Daish, 17/7/15, T:378.15-18.
total amount owing (inclusive of GST) of $3,674.20.\textsuperscript{15} The tax invoice sent on 12 February 2010 includes the words:

Company payment

CFMEU membership contributions as per attached list.

19. The facsimile machine printing at the top of the page of the tax invoice reads: ‘P.002/002’. This suggests that it was the second page of the two page fax sent on that day. Clyde Daish conducted a search of HD’s records. He was unable to find a membership list attached to the invoice received on 12 February 2010.\textsuperscript{16} The above circumstances all suggest that there was no list attached to the invoice.

20. That there was no attached list is also supported by the results of Dean Hall’s inquiries into how the payment of the invoice was allocated. The invoice was paid by HD on 16 February 2010.\textsuperscript{17} Dean Hall caused the CFMEU’s membership records to be checked to ascertain how this payment was allocated. Those records indicate that:

(a) On 11 February 2010, all 12 persons became recorded as members on the CFMEU membership roll.\textsuperscript{18}

(b) The payment from HD was allocated, on 16 February 2010, as between those 12 persons. The sum of $326.60 was

\textsuperscript{15} Clyde Daish, witness statement, 17/7/15, CRD-1, p 2.

\textsuperscript{16} Clyde Daish, 17/7/15, T:379.8-9.

\textsuperscript{17} Clyde Daish, witness statement, 17/7/15, para 15.

\textsuperscript{18} Hall MFI-2, 8/10/15, p 5.
allocated to 11 of the 12 persons and the sum of $81.60 was allocated to Erwin Rebolledo.\textsuperscript{19}

\textbf{(c)} At this time, annual membership fees ranged from $432 per year to $500 per year. It was possible to pay fees on a fortnightly, monthly, or sixth monthly basis.\textsuperscript{20} The amount allocated to each of the 12 persons does not correspond to any of the amounts that would be paid on any of these bases. Dean Hall in oral evidence was unable to explain why this was so.\textsuperscript{21}

\textbf{(d)} Membership application forms were filled out by each of those 12 persons, but at different points in time. For example, Mormon Tusa’s membership application was dated 13 August 2010. Falamani Mafi’s form was executed on 26 November 2009.\textsuperscript{22} Nonetheless, it would seem both individuals became members of the CFMEU at the same point in time, on 11 February 2010. Dean Hall was unable to explain why this was so.\textsuperscript{23}

\textbf{(e)} Two of the membership application forms identified HD Projects as the employer of the individual. Clyde Daish’s

\textsuperscript{19} Daish MFI-2, 1/9/15.
\textsuperscript{20} Hall MFI-2, 8/10/15, p 2.
\textsuperscript{21} Dean Hall, 8/10/15, T:2316.4-18.
\textsuperscript{22} Hall MFI-2, 8/10/15, pp 1-4.
\textsuperscript{23} Dean Hall, 8/10/15, T:2316.43-2317.12.
evidence is that none of the 12 persons was in fact an employee of HD Projects.24

(f) A number of those application forms were filled out by employees of Sunrise Recruitments. Clyde Daish’s evidence was that at the time he made the payment, HD Projects was using Sunrise to provide labour hire on some of its jobs in Canberra. He said he there was some connection between Halafihi Kivalu and Sunrise but that he could not remember what it was.25 HD Projects has records relating to only two of the membership application forms of Sunrise Recruitments employees (Chris Aviga and Mormon Tusa).26

21. Counsel assisting submitted that none of the 12 persons had an entitlement to be recorded on the membership roll. The submission was not contradicted and should be accepted. Rule 30(i)(f) of the CFMEU rules requires that a new member ‘shall pay on application for membership all moneys required to be paid by a new member’.27 None of the 12 persons did that. Rule 30(i)(b) has the effect that an applicant for membership shall be admitted as a member if the Divisional Branch Management Committee is satisfied with the bona-fides and qualifications of the applicant. There was no basis, in the circumstances outlined above, for the Management Committee to be so satisfied.

24 Clyde Daish, witness statement, 1/9/15, para 3.
25 Clyde Daish, witness statement, 1/9/15, paras 4-5.
26 Clyde Daish, witness statement, 1/9/15, paras 7-9.
27 Registered Rules of the Construction, Forestry, Mining and Energy Union, Construction and General Division and Construction and General Divisional Branches [R2013/483] Rule 30(i)(f); note: the Entrance Fee is defined in Rule 31.
22. Counsel assisting submitted that Clyde Daish, in making the payment on behalf of HD, did not contravene s 350 of the *Fair Work Act* 2009 (Cth) because he did not induce any employee to become a member of the CFMEU: his employees were already members. That submission is accepted. It must follow that Halafihi Kivalu did not contravene s 350 by operation of s 362 because he was not encouraging Clyde Daish to offer inducements to anyone to become a member.

23. However, it does not follow that Halafihi Kivalu did not contravene s 348 of the *Fair Work Act* 2009 (Cth). Clyde Daish’s evidence gives rise to an inference that Halafihi Kivalu was threatening him with an intention to coerce him into engaging in industrial activity. However, having regard to the fact that Halafihi Kivalu did not have an opportunity to deal with this matter in his evidence, it is not appropriate to make any finding.

**HD Projects: Jason O’Mara and Anthony Vitler**

24. Clyde Daish gave further evidence of pressure imposed on him by the CFMEU to ensure his workers were signed up as members. In 2012 HD had won a contract to work on the Manhattan Project, in the civil construction sector in Canberra. He was told by a representative of the builder that Jason O’Mara and Anthony Vitler wanted to speak to him. Clyde Daish met with Jason O’Mara and Anthony Vitler at the CFMEU’s offices on 23 February 2012.28

25. There was a contest about what was said at this meeting, but there was also some agreement. There is no contemporaneous evidence. It was

28 Clyde Daish, witness statement, 17/7/15, paras 17-18.
accepted by all that Clyde Daish was told that if HD joined up its employees as members, the CFMEU would promote in the Canberra market. Clyde Daish affirmed, but Anthony Vitler and Jason O’Mara denied, that Clyde Daish was also told that if HD did not join up its employees as members, then, as a result of the CFMEU’s political connections and interests in various projects, HD would struggle to win work in the Canberra market.29

26. Counsel assisting submitted that it was likely that Clyde Daish was told that HD would struggle to win work in the Canberra market unless it signed up its employees as members. This was no more than the corollary of what Jason O’Mara and Anthony Vitler accepted they said. Propositions of this kind, the evidence suggests, were conveyed on a routine basis by the CFMEU. The CFMEU did not in terms submit that Jason O’Mara’s and Anthony Vitler’s account should be preferred. But its submissions repeat their denials of Clyde Daish’s account.30 Clyde Daish’s evidence is preferred on this issue.

27. Clyde Daish’s employees in fact did become members as a result of this conversation. Clyde Daish said that he made the decision to seek to have them join the CFMEU so that the CFMEU would put a good word in for HD on Canberra construction projects.31 However, in contrast to what occurred in 2010, these employees signed membership

31 Clyde Daish, witness statement, 17/7/15, para 20.
application forms. They paid their own membership fees by payroll deduction.\textsuperscript{32}

28. Counsel assisting submitted that the evidence did not establish that Jason O’Mara and Anthony Vitler may have contravened s 348 or s 350. This was because, although they were attempting to induce Clyde Daish to take steps to ensure that his workers became members, the evidence did not establish that they were advising or encouraging Clyde Daish to induce his employees to become members. For example, the evidence did not suggest that they advised Clyde Daish to pay his employees’ membership fees. Unsurprisingly, there was no dissent from that proposition by the CFMEU.

29. Counsel assisting also submitted that the conduct of Jason O’Mara and Anthony Vitler was, although not a contravention of the \textit{Fair Work Act} 2009 (Cth), inappropriate and contrary to the policy and objects of that Act. This was put on the basis that union membership is fundamentally a matter to be discussed and determined as between employee and union. The CFMEU disputed this submission and described it as a gratuitous attack without any basis. However, counsel assisting’s submission is soundly based. Union membership is fundamentally a matter as between union and worker. To enlist the assistance of the employer in this way, by offering the promise of union assistance in the workplace, undermines freedom of association. Jason O’Mara and Anthony Vitler did not tell Clyde Daish that HD should pay for the memberships, but they were indifferent to how the

\textsuperscript{32} Clyde Daish, witness statement, 17/7/15, para 20.
membership should be paid for. What was important was not voluntary association but membership numbers.

**Tony Bassil**

30. Tony Bassil is a concreter who has been working in the construction industry for about 40 years, in New South Wales, Queensland and the ACT. He had an experience with Halafihi Kivalu regarding membership that was similar to the one described by Clyde Daish. Tony Bassil’s evidence about workers being signed up as members was in the following terms. He indicated that a number of his workers were already members of the CFMEU NSW. He then had a conversation with Halafihi Kivalu in which he was told that if his employees were working in the ACT they had to be a member with the ACT Branch. As a consequence, Tony Bassil arranged for the workers in question to sign application forms, and he paid their membership dues.\(^{33}\)

31. Halafihi Kivalu had an opportunity to respond to this evidence and did not deny engaging in this conduct. He made no submissions in response to counsel assisting’s submissions.

32. Counsel assisting submitted that in telling Tony Bassil that his employees, even though they were members of the CFMEU NSW, had to be signed up as ACT members, Halafihi Kivalu must have known that their employer would have to pay their membership fees. That

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\(^{33}\) Antonios Bassil, 13/7/15, T:65.28-36.
submission is accepted. The CFMEU rules did not and do not allow for a person to be a member of more than one Divisional Branch.\footnote{Registered Rules of the Construction, Forestry, Mining and Energy Union [R2015/1], Rule 7(viii); Registered Rules of the Construction, Forestry, Mining and Energy Union, Construction and General Division, [R2015/1], Rule 4(i).}

33. Counsel assisting submitted that the evidence did not establish that Halafihi Kivalu may have contravened a provision of the \emph{Fair Work Act 2009} (Cth). He was not encouraging Tony Bassil to induce his employees to become CFMEU members: they already were. In contrast to Clyde Daish’s situation, Tony Bassil’s evidence is not sufficient to establish that Halafihi Kivalu threatened to take action against Tony Bassil with the intent to coerce Tony Bassil to make the membership payment. That is because Tony Bassil, a man with 40 years’ experience in the construction industry, readily acquiesced in Halafihi Kivalu’s request. Counsel assisting submitted, correctly and without dissent from the CFMEU, that this was a sad reflection on the industry.

34. The result of the Halafihi Kivalu’s request and Tony Bassil’s payment was that from 26 September 2012 to 26 August 2014, two payments by cheque of $1,590, a cash payment of $1,585 and a further cash payment of $2,744 were paid by companies associated with Tony Bassil and allocated as membership fees.\footnote{Dean Hall, witness statement dated 24/7/15, 8/10/15, paras 13-14.} Dean Hall was unable in oral evidence to explain the basis on which these payments were allocated as between members.\footnote{Dean Hall, 8/10/15, T:2319.12-2321.28.}
35. Counsel assisting submitted that the conduct of Halafihi Kivalu described in the preceding paragraph was inappropriate. The CFMEU did not address this submission.\textsuperscript{37} The submission is accepted: Halafihi Kivalu was simply asking for money on behalf of the CFMEU without any proper basis. It fell below the applicable professional standards for trade union officials.

\textbf{Anthony Costanzo}

36. A number of intercepted telephone conversations revealed further instances of pressure placed on employers to ensure their workers were signed up as CFMEU members.

37. Two recorded conversations were played involving Anthony Costanzo. Both occurred on 22 May 2015. In the first, Johnny Lomax, in the presence of Jason O’Mara, telephoned Anthony Costanzo.\textsuperscript{38} Anthony Costanzo worked for CPS Concreting, a concreting company. Johnny Lomax began the conversation by telling Anthony Costanzo that they needed to talk about ‘membership and stuff like that’ because ‘[m]y bosses are very upset and I can’t control that. You know, they’re requesting a meeting straight away with yourselves’. Anthony Costanzo suggested that the meeting await the return of his father, who was away at that time. Shortly thereafter the following exchange took place:\textsuperscript{39}

\textsuperscript{38} O’Mara MFI-3A, 8/10/15.
\textsuperscript{39} O’Mara MFI-3A, 8/10/15, pp 3.23-4.4.
Lomax: I think – I think, mate, they – they’ll do some action, mate, unless we get this meeting sorted out straight away.

Costanzo: What’s that, sorry?

Lomax: We’ll be delivering some action. Unless we get this meeting sorted out straight away, mate, you’re –

Costanzo: What do you mean moving some action?

Lomax: Well, I don’t know what sort of action we’re going to take, mate, but one – one would be – one would be my suggestion of ripping up your EBA.

Costanzo: Rip it up?

Lomax: Yeah.

Costanzo: Does that mean we can pay our workers what we want after?

Lomax: Fuck no.

Costanzo: Yeah.

Lomax: Well, you – yeah, but you won’t be doing fucking any – without the EBA, you won’t be doing any work on commercial sites.

38. The conversation continued. It became apparent that Johnny Lomax’s dissatisfaction stemmed from the fact that a number of CPS workers had not become union members. There was also a discussion about Johnny Lomax’s and Anthony Costanzo’s unsuccessful efforts to persuade them to become members. Reference was also made to the possibility that the company might pay membership fees on behalf of those workers. Anthony Costanzo said that, because CPS was not his company, he was not in a position to pay for memberships and that, in any event, the company was not yet making a profit.40 Johnny

40 O’Mara MFI-3A, 8/10/15, pp 4.29-33, 5.31-43.
Lomax’s response was: ‘my problem is, mate … I’ll have to call you ‘a non-union company and you’re are [sic] are getting most of the work’. Anthony Costanzo indicated that he would be happy to meet and work with the Union when his father was back. Johnny Lomax said:

Mate, you’re just about to get a couple – a couple of more contracts and stuff like that and we’ll – mate, well, sort of like, well, we’re … pushing a non-preferred contractor at this stage because, you know, because of the situation where I’m – regarding what I’m talking about, membership.

39. The above conversation terminated, apparently as a result of Anthony Costanzo’s mobile telephone losing reception. Johnny Lomax called back Anthony Costanzo a few minutes later. It is not apparent whether he did so in Jason O’Mara’s presence. In the resumed conversation Johnny Lomax accepted that there was no point in having a meeting until Anthony Costanzo’s father returned. He continued to emphasise the need for employees of CPS to be union members. At one point Johnny Lomax said to Anthony Costanzo:

[You don’t want to ring GEOCON up and tell them not to give you that job, mate. You know what I – you know what I’m saying … you know, that’s what they want to do. They said “No, well, we’ll put a fucking union contractor on that.”

40. Anthony Costanzo’s response was (again) that he was ‘willing to work with you guys’.

41. Counsel assisting submitted that Johnny Lomax was endeavouring to convey to Anthony Costanzo that if CPS did not increase the number

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41 O’Mara MFI-3A, 8/10/15, pp 6.43-7.4.
42 O’Mara MFI-3A, 8/10/15, p 7.36-41.
43 Lomax MFI-12, 7/10/15, p 1.41-2.2.
of its workers who were CFMEU members, the CFMEU would not promote it and, conversely, that if membership numbers were increased, the CFMEU would promote CPS. In the resumed conversation, it was submitted, this threat was reiterated, but by reference to a particular job that CPS was, evidently, hoping to obtain.

42. A recording of these conversations were played during Johnny Lomax’s evidence and he was questioned about them. He gave a number of explanations for what he said. These included:

(a) He suggested in some of his answers that what he was really interested in was ensuring that Anthony Costanzo’s workers were being paid in accordance with their entitlements.44

(b) In relation to the threat to ‘rip up’ CPS’ EBA, with the result that CPS would not be doing any commercial work, Johnny Lomax’s position appeared to be that ripping up an EBA was, in effect, impossible and that Anthony Costanzo knew as much and was ‘happy’.45

(c) He claimed, in substance, that his statement that CPS would not be doing any work on commercial sites in Canberra was really meant to convey that builders with EBAs would not be able to use CPS because of provisions in those EBAs.46

44 Johnny Lomax, 7/10/15, T:2206.46-2207.18.
45 Johnny Lomax, 7/10/15, T:2207.29-2208.20.
46 Johnny Lomax, 7/10/15, T:2208.35-2209.4.
(d) Similarly to (c), above, Johnny Lomax tried to explain his statement at the end of the second conversation regarding Geocon by saying, in substance, that he meant that he would tell Geocon that CPS was not complying with its obligations under its CFMEU EBA.47

(e) Johnny Lomax denied that he was attempting to intimidate Anthony Costanzo in the above conversations. The denial was based on his claim that Anthony Costanzo was ‘a big gentleman’.48

43. Counsel assisting made a number of criticisms of these explanations, most notably that they are inconsistent with what was actually said by Johnny Lomax. The CFMEU did not adopt Johnny Lomax’s explanations in its submissions. None of the above explanations is at all persuasive. They reflect poorly on Johnny Lomax’s reliability as a witness.

44. The first of the above conversations was played to Jason O’Mara when he gave evidence. Prior to this conversation being played, Jason O’Mara denied that he had ever heard one of his organisers say to an employer that if they did not sign up all their employees as members, they would not be doing any work on commercial sites in Canberra.49 He was asked whether he regarded conduct of that kind as appropriate. It was necessary to ask that question four times before he gave a responsive answer. Ultimately, he agreed that it would be

47 Johnny Lomax, 7/10/15, T:2212.2-2213.8.
49 Jason O’Mara, 4/9/15, T:2050.6-10.
inappropriate, and that it would not be behaviour that he would condone.\textsuperscript{50} He said that if he found out about it, he would take immediate action and ‘say that is not how we’ve been instructed to work’.\textsuperscript{51} Counsel assisting contended that Jason O’Mara’s presence during the first conversation with Anthony Costanzo indicates that, contrary to the above evidence, Jason O’Mara regarded it as perfectly appropriate to make threats of this kind.

45. A further submission was made by counsel assisting as to Jason O’Mara’s credit. After the conversation was played, Jason O’Mara was asked, by reference to Johnny Lomax’s statement ‘we’ll be delivering some action’, what other action might be taken, Jason O’Mara said: ‘I think he suggests, you know, that we’d probably go and ask the boys if they wanted an EBA or not’.\textsuperscript{52} Counsel assisting submitted that this was a discreditable answer because CPS, as the conversation itself makes plain, already had an EBA.

46. Counsel assisting submitted that in both conversations Johnny Lomax conveyed to Anthony Costanzo one simple message: that the CPS workers needed to become CFMEU members or CPS would not be doing commercial work in Canberra. It must follow, if that was what Johnny Lomax conveyed, that he was both attempting to intimidate Anthony Costanzo and advising, encouraging or inciting Anthony Costanzo (or CPS) to either pay money to the CFMEU for membership or take steps to induce its employees or sub-contractors to become members. As such, if this is what Johnny Lomax conveyed, then his

\textsuperscript{50} Jason O’Mara, 4/9/15, T:2050.15-2051.14.

\textsuperscript{51} Jason O’Mara, 4/9/15, T:2051.16-19.

\textsuperscript{52} Jason O’Mara, 4/9/15, T:2055.7-10.
To this submission, and to the other submissions referred to above, the CFMEU proffered what was in essence one answer. It was that the evidence did not establish what, in fact, Johnny Lomax conveyed to Anthony Costanzo in these conversations. The CFMEU contended that it was not possible to draw any of the above conclusions because Anthony Costanzo was not called. It was said that it was apparent from the conversation that Anthony Costanzo had an obvious level of familiarity with Johnny Lomax and that it was equally likely that Anthony Costanzo had no problems working with the union because it was good for his workers and he had a co-operative relationship with the Branch’s organisers and officials.

However, as counsel assisting observed, neither s 348 nor s 362 require any proof of the state of mind of the person to whom the proscribed conduct is directed. Calling Anthony Costanzo could not have changed the evidentiary position in relation to Johnny Lomax’s state of mind. And what if Anthony Costanzo did have a good relationship with the CFMEU? That would mean that Johnny Lomax was prepared to make these kinds of demands on persons with whom he had a good relationship. It would suggest that part of having a good relationship is a willingness to accede to such demands. Calling Anthony Costanzo to establish this would not have assisted the CFMEU or Johnny Lomax.

Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been

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53 Submissions of the CFMEU, 5/11/15, ch 4, paras 30-35.
referred to the Director of the Fair Work Building Industry Inspectorate for consideration of whether proceedings should be instituted against Johnny Lomax for possible contraventions of s 348 and s 350 of the *Fair Work Act 2009* (Cth).

49. Counsel assisting submitted that Jason O’Mara may have aided and abetted Johnny Lomax’s contraventions of s 348 and s 350 within the meaning of s 550 of the *Fair Work Act 2009* (Cth). This was put on the basis that Jason O’Mara was present for the entirety of the first conversation. His presence was announced to Anthony Costanzo. Johnny Lomax also, at the beginning of the conversation, told Anthony Costanzo that ‘his bosses’ were not happy about the membership situation.

50. Apart from its submission regarding the failure to call Anthony Costanzo, the CFMEU made no submission in response. For the above reasons, that submission is rejected. Counsel assisting’s submission is accepted. Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Director of the Fair Work Building Industry Inspectorate for consideration of whether proceedings should be instituted against Jason O’Mara for possible contraventions of s 348 and s 350, read with s 550, of the *Fair Work Act 2009* (Cth).

**Adrian Maretta**

51. Adrian Maretta operates a cleaning company in Canberra. His company has a CFMEU EBA. Reference was made in Chapter 6.2 to a conversation that he had on 10 April 2015 with Johnny Lomax in April
of this year regarding an allegation that he was asked for money by Halafihi Kivalu. The context in which Adrian Maretta told Johnny Lomax about that was a conversation regarding Peter Taylor. Peter Taylor was working for Adrian Maretta at this time as an independent contractor. He was not a member of the CFMEU.

52. A recording of this conversation was played during Johnny Lomax’s oral evidence. It is apparent from it that Adrian Maretta and Johnny Lomax had already had discussions about whether Peter Taylor should be paid under the EBA that Adrian Maretta’s company had with the CFMEU. It is also apparent that Johnny Lomax was not concerned about that. At one point in the conversation Johnny Lomax said:

Hey, look, the biggest thing was to clear it up and just make him a member, man. Just tell him to fuckin’ sign up.

Later in the conversation Johnny Lomax suggested to Adrian Maretta that he might pay for Peter Taylor’s membership. At the conclusion of the conversation Johnny Lomax said ‘the biggest thing that’ll stop anyone jumping up and down on them is obviously that signature’.

53. A week later, on 17 April 2015, Adrian Maretta and Johnny Lomax had a further conversation. A recording of that conversation, too, was played during Johnny Lomax’s oral evidence. The conversation begins with Adrian Maretta telling Johnny Lomax that he offered to

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54 Chapter 6.2, paras 81-84.
55 Lomax MFI-1, 7/10/15.
56 Lomax MFI-1, 7/10/15, p 3.24-26.
57 Lomax MFI-1, 7/10/15, p 4.2-3.
58 Lomax MFI-1, 7/10/15, p 5.32-34.
59 Lomax MFI-2, 7/10/15.
pay Peter Taylor’s membership but that Peter Taylor was adamant that he did not want to be a member of the union. Johnny Lomax’s immediate response was ‘move him off the job, Adrian I’m sorry to say…if my bosses got wind of that, mate, they’d kick up a stink with you a little bit, bro’.\(^6\) Johnny Lomax went on to say ‘if he’s going to be a cunt then he’ll get the cunt treatment back to him a little bit, you know what I mean’\(^6\) 

54. Later in the conversation Adrian Maretta told Johnny Lomax that Peter Taylor was only doing a few days a week casual and that Adrian Maretta was not going to be taking on some work that Johnny Lomax had anticipated he would be taking on. Johnny Lomax then said:\(^6\)

   Well, I might, Adrian, think of another way that, you know, this misrepresentation can be – can be sorted, do you what I mean? I don’t know, you might – you might make a little donation for half a table or something, I don’t know.

55. The conversation suggests that the reference to ‘half a table’ was something in the nature of places at a table at a breakfast for one of the CFMEU’s charitable trusts. Johnny Lomax said that such a donation ‘might smooth things over with’ his superiors and prevent him, ie Johnny Lomax, from ‘fuckin being reprimanded about letting blokes get away with it’.\(^6\)

56. Counsel assisting submitted that Johnny Lomax regarded Adrian Maretta as under an obligation to make the above payment: it was not

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\(^6\) Lomax MFI-2, 7/10/15, p 2.17-36.

\(^6\) Lomax MFI-2, 7/10/15, pp 3.20-22.

\(^6\) Lomax MFI-2, 7/10/15, p 4.47-5.4.

\(^6\) Lomax MFI-2, 7/10/15, p 5.28-34.
in truth a ‘donation’ but a payment in lieu of membership. The submission was put on the basis that, although at one point Johnny Lomax said ‘there’s no – no – no force, bro … we’ll leave it at that’, he later said:64

When it comes to a little later, bud, but I’ve heard you – I’ve heard you say that you will donate, so we’ll – I’ll keep you to that, all right?

57. Counsel assisting submitted that Johnny Lomax’s behaviour may have contravened section 346 of the *Fair Work Act 2009* (Cth). Counsel assisting said that if Adrian Maretta had complied with Johnny Lomax’s demands, he would have contravened s 346: removing Peter Taylor from his work site would be taking adverse action against him within the meaning of s 342 and that such action would have been taken because Peter Taylor was not a member of the CFMEU. Thus, it was submitted, Johnny Lomax by advising, encouraging or inciting Adrian Maretta to do that within the meaning of s 362 may have contravened s 346.

58. Counsel assisting also submitted that Johnny Lomax’s ‘request’ for a donation may have involved a contravention of s 348 of the *Fair Work Act 2009* (Cth). As stated above, the payment was in truth a payment in lieu of Peter Taylor’s membership. Johnny Lomax said that he would ‘keep’ Adrian Maretta to making the payment. The payment was to ‘smooth things over’. Johnny Lomax’s request for the payment, and his statement that he would ‘keep’ Adrian Maretta to his promise to make it, carried with them threats to take action against Adrian Maretta if the payment was not made. The threats were made with an intention to coerce Adrian Maretta to make the payment. Johnny

64 Lomax MFI-2, 7/10/15, p 6.34-36.
Lomax thereby may have contravened s 348 of the *Fair Work Act 2009* (Cth).

59. In large part, the CFMEU’s submissions in response mirrored its submissions in relation to the conversations between Johnny Lomax and Anthony Costanzo. First, it said that no findings can be made in light of the failure to call Adrian Maretta. That submission is rejected for the reasons already given.

60. In addition, the CFMEU contended that the conversation showed that Johnny Lomax and Adrian Maretta had a friendly relationship, and that there is no hint of any threat or coercion. The CFMEU relied on Adrian Maretta referring, at the end of the conversation, to Johnny Lomax as ‘a fucking champion’, and to his addressing Johnny Lomax as ‘mate’ and ‘bud’. One answer to this submission is that, if Adrian Maretta was in fact happy by the end of the conversation it was because, unlike Halifihi Kivalu, Johnny Lomax had not ‘hit him up’ for $5000. However it is sufficient to say that Adrian Maretta’s happiness or otherwise is of no moment. If correct, the CFMEU’s submission would only demonstrate that Johnny Lomax was prepared to intimidate his friends. Johnny Lomax accepted in oral evidence that, when he told Adrian Maretta that if Peter Taylor was not going to become a member he had to be moved off the job, that is what he believed and intended.65

61. In addition, the CFMEU embraced Johnny Lomax’s claims in oral evidence that the conversation really concerned a situation in which

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65 Johnny Lomax, 7/10/15, T:2122.47-2123.16.
Peter Taylor had been rude to a CFMEU delegate, and that this was the reason he would be moved off the job, Johnny Lomax’s bosses would kick up a stink, that Peter Taylor would get ‘the cunt treatment’ and that a donation was necessary to sort out the ‘misrepresentation’ and that otherwise Johnny Lomax would be ‘reprimanded’. This submission just ignored what was said in the conversation: nothing at all was said about Peter Taylor being rude, or about this being a reason for any of the demands made during the conversation. Much of the conversation was at odds with this argument: for example, a donation of half a table is no way to remedy rudeness of this kind. The submission is rejected.

For the above reasons, Johnny Lomax may have contravened s 346 and s 348 of the *Fair Work Act 2009* (Cth). Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Director of the Fair Work Building Industry Inspectorate for consideration of whether proceedings should be instituted against Johnny Lomax for possible contraventions of s 346 and s 348 of the *Fair Work Act 2009* (Cth).

**MPR Scaffolding**

The question of membership payments arose also in relation to MPR. Petar Josifoski said that around the time he signed the EBA in 2010, Anthony Vitler spoke to him about getting his staff to become CFMEU members. According to Petar Josifoski, he asked his staff whether they wanted to join the union and they said that they did not. He then

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went back to Anthony Vitler and told him that they did not want to be members. Petar Josifoski said that Anthony Vitler’s response was to say ‘well, to have an EBA you need to have members join and if they are not happy about the payment or whatever you know, you could pay for their memberships’.  

64. Anthony Vitler’s version of the conversation was slightly different. He said that he merely explained to Petar Josifoski that one option was for MPR to pay the union fees and then deduct that amount over time from employees’ wages. He said that he mentioned also the option of payment by direct debit. In oral evidence, Anthony Vitler ultimately accepted that his account in his statement was his description of his usual practice and that he did not actually recall what was said.

65. Petar Josifoski said that four employees agreed to join the union on the basis that MPR pay their membership fees up front and be reimbursed out of their weekly wages. This is supported by payroll advices provided by Petar Josifoski to the Commission.

66. Counsel assisting submitted that Petar Josifoski’s evidence as to what was said in this conversation should be preferred to Anthony Vitler’s. They rely on what they submitted was Anthony Vitler’s general unreliability and on his concession that he did not actually recall what was said. Counsel assisting submitted that if Petar Josifoski’s evidence

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67 Petar Josifoski, 29/7/15, T:1314.29-41, 1369.30-1370.27.
69 Anthony Vitler, 1/9/15, T:1687.29-1688.12.
70 Petar Josifoski, witness statement dated 27/5/15, 29/7/15, para 10.
71 Petar Josifoski, witness statement dated 27/5/15, 29/7/15, para 10, tab 3.
is accepted then Anthony Vitler may have contravened s 350 by operation of s 362: he encouraged or advised Petar Josifoski to pay his employees’ membership fees and thereby induce them to become CFMEU members.

67. The CFMEU submitted, first, that the arrangement put in place by MPR corresponds with Anthony Vitler’s evidence as to what he told Petar Josifoski. This is not a reason for accepting Anthony Vitler’s evidence. Petar Josifoski did not say that he set up the arrangement in this way because that it what Anthony Vitler suggested. Secondly, the CFMEU submitted that this arrangement did not contravene s 350: the facilitation of payment of union fees by payroll deduction does not amount to an inducement to pay membership fees. The arrangement itself may not have contravened s 350. But that would only mean that Petar Josifoski did not contravene that section. If, however, Petar Josifoski’s evidence is accepted, then Anthony Vitler was encouraging or advising him to pay his employee’s membership fees.

68. Petar Josifoski’s evidence is preferred on this point to Anthony Vitler’s. If MPR’s employees were content to become members of the CFMEU, there would have been no need for Anthony Vitler to suggest that MPR pay their membership fees and then seek reimbursement from them. That suggests Anthony Vitler’s version of the conversation is inherently unlikely. In addition, his evidence, on many other issues, was unsatisfactory. Petar Josifoski presented well as a witness. His evidence on this point is accepted. Hence Anthony Vitler may have contravened s 350 by operation of s 362. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Director of
the Fair Work Building Industry Inspectorate for consideration of whether proceedings should be instituted against Anthony Vitler for possible contravention of s 350, read with s 362, of the *Fair Work Act* 2009 (Cth).

**Jian He**

69. The question of union membership arose also with Jian He. Jian He said that about a month prior to his giving evidence, Johnny Lomax approached him and asked him to join his employees as members of the union. Jian He said that he paid membership fees for six people at $380 per person. He said that the six persons had signed membership application forms.

70. Jian He said that Johnny Lomax approached him and said words to the effect that if he did not join up ten members then ‘the boss’ will not be happy. Zachary Smith was with Johnny Lomax at the time. Jian He said that he responded that he could only find six members and Johnny Lomax said that ‘you need to find another four’. Jian He in fact only paid for six people.

71. Jian He said, at the time of first giving oral evidence on 14 July 2015, that he had not yet talked to these persons about whether he would get this money back from them. By the time of giving evidence on 27 July 2015, Jian He had told all of the people for whom he paid fees that

72 Jian He, 14/7/15, T:83.43-84.30.
73 Jian He, 14/7/15, T:84.32-41.
74 Jian He, 14/7/15, T:84.43-85.47.
those fees had been paid. He said that he had asked them to repay the fees but that they were refusing.75

72. Both Zachary Smith and Johnny Lomax accepted that there was a conversation with Jian He about membership. They denied that Johnny Lomax told Jian He that he needed to find ten members. Rather they said that Johnny Lomax indicated that he wanted all of Jian He’s employees to be members.76 Johnny Lomax said, however, that he told Jian He ‘that I wanted all of his employees to be in the union and that I would be working for all of his employees and if only six were in the union my boss would not be happy with me’ and that Jian He responded ‘I’ll try and get you 10’.

73. Counsel assisting submitted that the evidence does not establish that Johnny Lomax was encouraging or advising Jian He to induce his employees to become members contrary to s 350, or that Jian He in fact did induce them to become members. The submission, in effect, is that the evidence does not establish an encouragement to induce as distinct from mere encouragement to ask them. The CFMEU agreed.

74. Counsel assisting submitted that, nonetheless, Johnny Lomax’s conduct fell short of the standards expected of a union official in his position. This was put on the basis that Johnny Lomax simply told an employer that his workers had to be union members and gave him a pile of membership forms, without making any effort to introduce himself to those prospective members or to explain to them what was involved in

75 Jian He, 27/7/15, T:1127.46-1128.24.

becoming or being a member. The submission went on to state that this was in circumstances where Johnny Lomax said he had a ‘very strong communication problem’ with Jian He because of his limited English. A week later, Johnny Lomax accepted from a foreman on one of Jian He’s job sites six membership forms and a cheque from Jian He. The submission was made that persons would become members of a union in such circumstances is contrary to the objects and policy of the Fair Work Act 2009 (Cth).

75. The CFMEU’s response pointed to evidence that Jian He spoke to his workers in Chinese, and submitted that it was likely that their English language skills were at least as limited as Jian He’s. This response is not to the point. There is no suggestion that Johnny Lomax knew this. He did not give Jian He any instructions about what to convey to the workers, or indeed to talk to the workers at all. Johnny Lomax just wanted the workers to become paid up members. The CFMEU’s submission is rejected. Johnny Lomax’s conduct fell short of the standards expected of a union official in his position.

**CFMEU membership administration**

76. Counsel assisting submitted that the above evidence showed that one could have no confidence in the integrity of the CFMEU’s register of members. One matter was the addition to the membership roll of persons not entitled to be members – for example, the 12 persons added as members as a result of the payments made by Clyde Daish at the request of Halafihi Kivalu.

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77 Johnny Lomax, witness statement dated 17/7/15, 7/10/15, para 9.
77. The other matter pointed to by counsel assisting was the fact that at every CFMEU BCOM meeting a resolution in the following form is passed:78

COM notes that the Secretary and Assistant Secretary have decided to waive dues owing in respect to a number of members. The details of the relevant waivers are contained in a list available at this meeting. In accordance with Rule 32(i) COM provides final ratification of the decision of the Secretary and Assistant Secretary in respect of each and every member referred to in the list in order to maximise participation in union affairs.

78. The apparent purpose of these resolutions is to permit persons to become or remain members in circumstances where they have not paid the membership fees due under the CFMEU Rules. Dean Hall said the purpose was to increase union participation, and that ‘it was about waiving fees for people who might have neglected not to inform [the CFMEU that] they were going overseas and they ran up a bill or something’.79

79. A notice to produce required production of the lists of members in respect of whom fees were waived at meetings around the time Clyde Daish and Tony Bassil made the payments referred to above. Nothing was produced.80 Dean Hall said it looked as though there never were any lists.81 He described this as a ‘definite flaw’ and ‘not best

78 Hall MFI-2, 8/10/15, p 15; Dean Hall, 8/10/15, T:2323.5-8.
79 Dean Hall, 8/10/15, T:2323.27-38.
80 Hall MFI-2, 8/10/15, pp 7, 12.
81 Dean Hall, 8/10/15, T:2323.10-11.
practice’. He said that the Branch, in conjunction with the national office, was looking into rectifying the situation.82

80. The CFMEU submitted that this was no more than untidy bookkeeping. It was more than that. The purpose of the resolution was to increase membership numbers. There is no way one can have any confidence about the extent to which membership numbers were affected, or whether the resolution resulted in illegitimate inflation of membership numbers. The other evidence canvassed in this Chapter indicates that membership numbers were inflated in other situations. The end result is that there can be no confidence that the CFMEU’s membership register is a true reflection of the persons presently entitled to be members of the ACT Branch.

C – CONCLUSIONS

81. Counsel assisting made essentially two submissions in conclusion. First, it was said that the above conduct was not isolated, but rather part of a culture that derived in part from pressure imposed on organisers to increase membership numbers. The existence of that culture was said to be demonstrated, amongst other matters, by Jason O’Mara’s acquiescence to Johnny Lomax’s threats to Anthony Costanzo. Counsel assisting submitted that such a culture is contrary to the policy and objects of the Fair Work Act 2009 (Cth), and, in some of the particular cases identified, may have involved contraventions of that Act.

82 Dean Hall, 8/10/15, T:2323.13-2324.10.
Counsel assisting pointed to an additional difficulty with conduct of this kind. They submitted that organisers are acting in a position where there is a potential for their self-interest (that is, their interest in complying with pressure exerted by their superiors to increase membership numbers) to conflict with their duties to members. They gave the example of the situation of Johnny Lomax in the case of Anthony Costanzo. Some CPS employees were CFMEU members at the time Johnny Lomax made the threats described above to Anthony Costanzo. Johnny Lomax had a duty to act in the interests of those members. However, counsel assisting submitted, the evidence suggests that in order to further his own interests (by achieving the membership targets set for him) Johnny Lomax was prepared to say to Anthony Costanzo that he would rip up the CPS EBA and stop it from working in the commercial construction industry. Such a consequence for CPS would, obviously, be detrimental to its employees, including those who were CFMEU members. In substance, counsel assisting submitted, conduct of this kind amounts to focusing on acquiring new members at the expense of servicing existing members.

The CFMEU made no direct response to these submissions. They are in substance correct.
# CHAPTER 6.5

## ANTI-COMPETITIVE CONDUCT

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A – INTRODUCTION

1. At the conclusion of the hearings in Canberra, the Australian Competition and Consumer Commission (ACCC) announced that it had commenced making inquiries into cartel conduct in the building industry in the ACT. A joint agency agreement has been entered into between the ACCC and the Trade Union Royal Commission Taskforce.

2. Counsel assisting submitted that the evidence before the Commission reveals an industry with a number of features that operate to reduce competition substantially. Those features included: CFMEU pattern EBAs, an expectation on the part of CFMEU EBA contractors that the CFMEU will stop contractors without a CFMEU EBA from working in the commercial construction industry and a willingness on the part of CFMEU officials to satisfy that expectation.

3. There was evidence, also, of cartel conduct and of attempts by CFMEU officials to induce it. It is with that conduct that this Chapter is principally concerned. One simple example in the evidence concerned
a bricklayer, referred to in the evidence as Charlie. Charlie was charging a builder $4 per block. This was less than bricklayers with CFMEU EBAs, who were charging at least $6 per block. A ‘compliant’ EBA bricklayer found out that Charlie was working on a particular site and told Johnny Lomax. He asked Johnny Lomax, in effect, to stop Charlie from working. Johnny Lomax promptly located Charlie and went to see him. In substance, he told Charlie that he could not charge $4 per block and that he needed to get an EBA and price properly if he wanted to do any work in Canberra. Johnny Lomax enlisted the help of another EBA bricklayer to help Charlie price for the next job. Johnny Lomax reported back to the original complainant bricklayer who indicated that he would be content if Charlie complied with Johnny Lomax’s requests.

4. Counsel assisting submitted that, in light of the ongoing ACCC investigation, and the possibility that further or other factual material might emerge, no findings should be made about whether there may have been contraventions of provisions of the *Competition and Consumer Act 2010* (Cth). The CFMEU’s submission is that there should be a finding acknowledging that there is no evidence to suggest any involvement by CFMEU officials in cartel conduct. For reasons explained further below, counsel assisting’s submission is accepted and the CFMEU’s submission is rejected.

**B – TYPES OF ANTI-COMPETITIVE CONDUCT**

5. It is appropriate to begin by identifying the centrally relevant legislative provisions. That identification is drawn largely from counsel assisting’s submissions.
Cartel conduct

6. By s 44ZZRF of the *Competition and Consumer Act 2010 (Cth)* a corporation commits an offence if it makes a contract or arrangement or arrives at an understanding and the contract, arrangement or understanding contains a ‘cartel provision’. Section 44ZZRJ of that Act imposes civil liability under the same circumstances. A contravention of s 44ZZRF requires proof of intent and must be established beyond reasonable doubt. A contravention of s 44ZZRJ does not require proof of intent and must be established on the balance of probabilities.

7. The effect of section 44ZZRD of the Act, relevantly for present purposes, is that the following conditions must be satisfied for a provision of a contract, arrangement or understanding to be a ‘cartel provision’:

(a) the provision must have the purpose, or have or be likely to have the effect, of fixing, controlling or maintaining the price for goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or

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1 These prohibitions are imposed only on a ‘corporation’, however the *Competition Policy Reform Act 1996 (ACT)* enacts the ‘schedule version’ of Part IV of the *Competition and Consumer Act 2010 (Cth)*, which contains equivalent prohibitions on ‘persons’; *Competition Policy Reform Act 1996 (ACT)*, Part 2, s 4(1)(a)-(b).
understanding (s 44ZZRD(1)(a)(i) and s 44ZZRD(2)(a) and 2(c) of the Act);² and

(b) at least two parties to the contract, arrangement or understanding are or are likely to be in competition with each other in relation to the supply of those goods and services (s 44ZZRD(4)(a) and 4(c) of the Act).

8. So far as ‘purpose’ is concerned, the question is whether the proscribed purpose was a substantial one, not the sole one.³ The question is whether the provision has that purpose. Ultimately, that refers to the subjective purpose of the parties.⁴

9. As to ‘fixing, controlling or maintaining’, ‘controlling’ is most relevant in the present context. Generally, ‘maintaining’ assumes there has been a ‘fixing’ beforehand;⁵ ‘controlling’ means ‘to exercise restraint or direction over’. An arrangement has the effect of ‘controlling price’ if it restrains a freedom that would otherwise exist as to a price to be charged.⁶ Specificity as to price is not a necessary element of the

² Or the provision must have the effect of providing for the fixing, controlling or maintaining the price for goods or services etc: see Competition and Consumer Act 2010 (Cth) s 44ZZRD(2)(b). This alternative may be put to one side for present purposes.
³ Competition and Consumer Act 2010 (Cth), s 4F.
⁴ News Ltd v South Sydney District Rugby League Football Club Ltd (2003) 215 CLR 563 at [18], [31]-[43], [59]-[66] and [212]-[216].
⁵ Re Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd and 2 Day-FM Limited (1982) 44 ALR 557 at 567.
The notion of ‘controlling’ price.\(^7\) The imposition of a ceiling and a floor on tender prices was sufficient to amount to controlling in *ACCC v TF Woollam & Son Pty Ltd*.\(^8\)

10. For there to be a contravention of s 44ZZRF, it is necessary to show that there is a ‘contract, arrangement or understanding’. An ‘arrangement’ or ‘understanding’ requires something more than a mere expectation. The following observations of Lindgren J in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*\(^9\) (emphasis in original) were endorsed by the Full Court in *Rural Press Ltd v Australian Competition and Consumer Commission*:\(^10\)

The cases require that at least one party “assume an obligation” or give an “assurance” or “undertaking” that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that party. In the present case, for example, each individual who attended the Meeting may have expected that as a matter of fact the others would return to their respective offices by car, or, to express the matter differently, each may have been expected by the others to act in that way. Each may even have “aroused” that expectation by things he said at the meeting. But these factual expectations do not found an “understanding: in the sense in which the word is used in ss 45 and 45A. The conjunction of the word “understanding” with the words “agreement” and “arrangement” and the nature of the provisions show that something more is required.

11. The Full Court of the Federal Court in *Australian Industry Group v Fair Work Australia*\(^11\) held that an EBA was not a ‘contract,

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\(^7\) *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 at 506.

\(^8\) (2011) 196 FCR 212 at [84].

\(^9\) (1999) 92 FCR 375 at [141].

\(^10\) (2002) 118 FCR 236 at [79].

arrangement or understanding’. More is said about that decision below.

12. The terms of an enterprise agreement might be thought to be excluded from consideration in assessing cartel conduct by operation of s 51(2)(a) of the Competition and Consumer Act 2010 (Cth). That provides that in determining whether a contravention of a provision of Part IV of the Act has been committed (other than, relevantly, a contravention of s 45E of the Act), regard shall not be had to:

   any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees.

13. However, following the decision of the Full Court of the Federal Court in Australian Industry Group v Fair Work Australia, there is a difficulty in applying this exclusion to EBAs. If they are not contracts or arrangements or understandings, then neither they, nor any of their terms, nor acts done in relation to them are excluded by s 51(2)(a) from consideration in assessing Part IV conduct.

14. The submissions of counsel assisting proceeded on the basis that the mere agreement by contractors in a particular section of the construction industry to enter into EBAs on the same terms would not contravene the cartel provisions of Part IV of the Competition and Consumer Act 2010 (Cth). That basis is a highly dangerous one.

Analysis proceeding on that basis has to be undertaken with care. However, it is appropriate to take the same course in this Report.

‘Services’

15. The definition of ‘services’ in s 4 of the Competition and Consumer Act 2010 (Cth) imposes another limitation that is important for present purposes. That definition excludes, relevantly, ‘rights or benefits being … the performance of work under a contract of service’. Thus, an understanding or arrangement that fixes, controls or maintains the price that a company pays its employees is not an understanding or arrangement with respect to ‘services’ for the purposes of the above provisions.

Accessorial liability: section 79 of the Competition and Consumer Act 2010 (Cth)

16. Section 79(1) of the Competition and Consumer Act 2010 (Cth) makes provision for the imposition of accessorial liability in relation to cartel provisions (ss 4ZZRF and 44ZZRG of the Act). Most relevantly for present purposes, s 79(1)(b) has the effect that a person who attempts to induce another to contravene a cartel provision is taken to have contravened that provision.

17. It is apparent from the terms of s 79(1)(b) itself that a person may attempt to ‘induce’ such a contravention by promises, threats, or otherwise. As the Full Court of the Federal Court stated in Trade Practices Commission v Parkfield Operations Pty Ltd,\(^\text{13}\) an attempt to

\(^{13}\) (1985) 7 FCR 534 at 539-40.
persuade someone to contravene a provision of Part IV can amount to attempt to induce within the meaning of section 76(1)(d) of the *Competition and Consumer Act 2010* (Cth). Further, ‘mere persuasion, with no promise or threat, may well be an attempt to induce’.\(^\text{14}\)

**CFMEU’s approach**

18. At this point it is convenient to refer to some of the submissions made by the CFMEU regarding the above provisions.\(^\text{15}\)

19. *First*, the CFMEU submitted that the effect of *Australian Industry Group v Fair Work Australia*\(^\text{16}\) was that neither an enterprise agreement nor the process of negotiation leading up to it could amount to a contract, arrangement or understanding within the meaning of the *Competition and Consumer Act 2010* (Cth). But that case is not authority for the proposition that cartel conduct is excluded from the operation of the Act merely because it occurs during the negotiation of an EBA. To the extent the CFMEU’s submission expresses a contrary view, it takes too broad a view of that decision and seeks to apply it well beyond its facts. However, as the above analysis has indicated, the effect of s 51(2)(a) is that conduct connected with the negotiation of an EBA might not be cartel conduct.

\(^{14}\) *Heating Centre Pty Limited v Trade Practices Commission* (1986) 9 FCR 153 at 164 per Wilcox J. See also *Australian Competition and Consumer Commission v Flight Centre Ltd* (2013) 307 ALR 209 at [154]-[155] per Logan J (reversed on appeal but not on this point: see *Flight Centre Ltd v Australian Consumer Commission* [2015] FCAFC 104 at [99], [107] and [183]).


\(^{16}\) (2012) 205 FCR 339.
20. *Secondly*, the CFMEU submitted that it was ‘trite’ to observe that accessorial liability presupposes principal liability. That observation is true of some types of accessorial liability but untrue of others. It is untrue of the type of accessorial liability created by s 79(1)(b) of the *Competition and Consumer Act 2010* (Cth): the offence of attempting to induce cartel conduct does not require proof that cartel conduct has in fact occurred.

21. *Thirdly*, the CFMEU pointed out that s 44ZZRD(6) had the effect that a provision of a contract, arrangement or understanding is not taken to have the purpose of fixing, controlling or maintaining a price merely because it recommends or provides for the recommending of, a price. That is so. But, it does not follow, as the CFMEU appeared to submit, that a union official who recommends that others agree to charge a price or a minimum price is not attempting to induce cartel conduct. That union official is not recommending that others come to an arrangement that recommends, or provides for the recommending of, a price.

22. Apart from these legal submissions, the substance of the CFMEU’s submissions was that there was no evidence of cartel conduct and no evidence of actual prices charged.\(^{17}\) This submission was premised on the view that, if correct, it followed that CFMEU officials did not attempt to induce cartel conduct. As stated above, that premise is wrong. Further, the submission itself is wrong. The telephone intercepts dealing with Charlie the bricklayer, referred to at the commencement of this Chapter and discussed in more detail below,

\(^{17}\) Submissions of the CFMEU, 6/11/15, p 67-70, paras 14-22.
were evidence of both matters. There was much other evidence of cartel conduct, referred to below. But so also was there evidence that pointed against the existence of cartel conduct. And, as counsel assisting’s submissions pointed out, there was potentially relevant evidence that was not before the Commission.

23. Although the CFMEU agreed with counsel assisting’s submissions that no findings should be made, it said the Commission should go further. It submitted that there should be an acknowledgement that there was no credible evidence of any attempt by CFMEU offices to engage in cartel conduct.\textsuperscript{18} As indicated above, that submission proceeds on an incorrect view both of the law and of the evidence. The appropriate approach, having regard to the matters identified by counsel assisting, is to make no findings.

24. The remainder of this Chapter sets out, drawing largely on counsel assisting’s submissions, the relevant evidence on this topic. Most attention was given to the scaffolding industry. It is convenient to consider that first and then deal with the other industries, about which there was less evidence.

**C – SCAFFOLDERS**

25. The CFMEU engages in pattern bargaining in each of the major trades in the construction industry. One such trade is scaffolding. Negotiations for a new EBA for scaffolders commenced in late 2012. There were five or six such meetings, the last of which appears to have

\textsuperscript{18} Submissions of the CFMEU, 6/11/15, p 65, para 4; p 70, para 22.
taken place in the first half of 2013. It would seem that all of the scaffolders in the commercial sector were invited to these meetings and that all, or most, attended at least some of the meetings.\textsuperscript{19}

26. The evidence of Petar Josifoski (MPR) in his statement was that at one of these meetings Anthony Vitler and/or Jason O’Mara said words to the following effect:\textsuperscript{20}

\begin{quote}
We are trying to get you more money on the jobs by getting all the companies to agree on a minimum price for jobs.
\end{quote}

27. Petar Josifoski said that in response to this he stood up and said words to the effect of ‘this is price fixing. I can’t be listening to this. I could go to jail just for talking about it’.\textsuperscript{21} According to Petar Josifoski either Anthony Vitler or Jason O’Mara responded with words to the effect of ‘well we’ve done it to the formwork sector in Canberra and it’s working there’.\textsuperscript{22} In oral evidence Petar Josifoski said that the meeting at which these things were said was a meeting in February.\textsuperscript{23} Petar Josifoski rejected the proposition that the only conversation at the meeting about minimum price was about the minimum amount of

\textsuperscript{19} See Donald Thompson, witness statement, 30/7/15, para 5; Scott Jeffery, witness statement, 29/7/15, para 9; Adam McEvilly, witness statement, 29/7/15, paras 9-10; John Ryan, witness statement, 29/7/15, paras 15-16; Bernardo Da Silva, witness statement dated 22/7/15, 30/7/15, paras 8-9.


\textsuperscript{21} Petar Josifoski, witness statement dated 27/5/15, 29/7/15, para 14; Petar Josifoski, 29/7/15, T:1318.39-45.

\textsuperscript{22} Petar Josifoski, witness statement dated 27/5/15, 29/7/15, para 14.

\textsuperscript{23} Petar Josifoski, 29/7/15, T:1371.37-40.
money that people would need to charge in order to cover their obligations under the EBA.\textsuperscript{24}

28. Other scaffolders who attended these meetings also gave evidence. Scott Jeffery was the sole director of Straight Up Scaffolding (ACT) Pty Ltd. He attended three or four EBA meetings.\textsuperscript{25} In his witness statement, Scott Jeffery said that he could recall either Anthony Vitler or Jason O’Mara asking everyone what the contractors thought would be the minimum they would need to charge for their labour per square metre in order to cover the cost of the EBA. Scott Jeffery said that he believed that some people at the meeting, he could not remember who, suggested $15-$16 per square metre as the minimum price they would have to charge per square metre.\textsuperscript{26}

29. In oral evidence, Scott Jeffery said that the $15 or $16 figure was a ‘ballpark’ figure. He said ‘I mean, prices vary on different jobs and it depends on if you’ve got good blokes, bad blokes, or whatever but, yes, there was some sort of discussion on 15 or 16 bucks, but that was just more like ballpark figures on roughly what everyone was thinking about.’\textsuperscript{27}

30. Adam McEvilly, one of the directors of Higher Up Pty Ltd, an ACT scaffolding company, also gave evidence. Adam McEvilly in his witness statement said that he attended a meeting regarding the EBA in

\textsuperscript{24} Petar Josifoski, 29/7/15, T:1372.32-1374.14.
\textsuperscript{25} Scott Jeffery, witness statement, 29/7/15, paras 3, 8.
\textsuperscript{26} Scott Jeffery, witness statement, 29/7/15, para 18.
\textsuperscript{27} Scott Jeffery, 29/7/15, T:1415.1-6, T:1419.8-16.
early 2013. He said that at this meeting there were some general complaints regarding the wage rates and other costs in the proposed EBA. Adam McEvilly said that in response to such complaints either Jason O’Mara or Anthony Vitler said words to the effect of ‘if everyone puts their prices up, you will be able to service the EBA’. Adam McEvilly said that the response to the group to this suggestion was not positive. He said that Jason O’Mara and Anthony Vitler also spoke generally about the scaffolders charging a minimum price for jobs, and that Jason O’Mara suggested that all scaffolding companies could put forward money into a kitty and if a company started undercutting, that company would not get their money back. Adam McEvilly in both his witness statement and in oral evidence said that nothing came of Jason O’Mara’s suggestion to pay money into a kitty.

31. In oral evidence, Adam McEvilly agreed that either Jason O’Mara or Anthony Vitler said words to the effect of ‘we are trying to get you more money on the jobs by getting all the companies to agree on a minimum price for jobs’. Adam McEvilly also agreed that Jason O’Mara asked, ‘what price per metre do you need to comply with the EBA?’ and that in answer one of the scaffolders responded $15 or

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28 Adam McEvilly, witness statement, 29/7/15, para 16.
29 Adam McEvilly, witness statement, 29/7/15, para 18; Adam McEvilly, 29/7/15, T:1444.3-31.
30 Adam McEvilly, witness statement, 29/7/15, para 18; Adam McEvilly, 29/7/15, T:1444.26-36.
31 Adam McEvilly, 29/7/15, T:1432.47-1433.5.
$16. Adam McEvilly adhered to this evidence in questioning by counsel for the CFMEU.  

32. John Ryan, the managing director of To The Top Scaffolding Pty Ltd, also gave evidence. He attended two of the EBA meetings for scaffolders. In his witness statement, John Ryan said that he complained at one of these meetings that the companies without a CFMEU EBA could quote on jobs for significantly lower rates and were winning work and he said other people had made similar complaints. John Ryan said that in response either Jason O’Mara or Anthony Vitler said that the way to get around that problem was that all of the scaffolding companies should give their tender information to the CFMEU and that a minimum per square metre rate would be decided on and that if the CFMEU found out that a scaffolding company was quoting for jobs under that rate they would be ‘hammered and run out of town’.  

33. John Ryan said that Jason O’Mara or Anthony Vitler also proposed that all of the scaffolders should put forward around $10,000 pursuant to an arrangement similar to that described by Adam McEvilly. John Ryan said that nothing came of either suggestion. John Ryan said however that there was a discussion about what the minimum rate would be. He could not recall the specific amount but said that it was

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32 Adam McEvilly, 29/7/15, T:1433.7-36.
33 Adam McEvilly, 29/7/15, T:1442.47-1443.32.
34 John Ryan, witness statement, 29/7/15, para 25.
35 John Ryan, witness statement, 29/7/15, para 26.
36 John Ryan, witness statement, 29/7/15, para 27; Adam McEvilly, 29/7/15, T:1444.3-36.
37 John Ryan, witness statement, 29/7/15, para 28; John Ryan, 29/7/15, T:1452.20-1453.7.
around $20 per metre of scaffolding. John Ryan said he recalled similar discussions at both of the meetings he attended.

34. In oral evidence John Ryan said that the figure that was thrown around at the meeting could possibly have been $15 or $16. John Ryan said that he recalled either Jason O’Mara or Anthony Vitler saying ‘we are trying to get you more money on the jobs by getting all companies to agree on a minimum price for jobs’. John Ryan adhered to this evidence in questioning by Counsel for the CFMEU.

35. Bernardo Da Silva said that he attended three or four of the EBA meetings for scaffolders. Bernardo Da Silva at that time was a director and shareholder of Rovera Scaffolding Pty Ltd. At that time Rovera Scaffolding Pty Ltd was a scaffolding company that provided primarily hire and transport services for scaffolding. In contrast to the other scaffolding companies, it provided most of its labour through subcontractors.

36. Bernardo Da Silva said that there was much general discussion at the meetings about how the scaffolding labour companies would not be able to sustain the wage rates in the proposed EBA. He said that in response, Anthony Vitler and Jason O’Mara defended the proposed wages and indicated that the scaffolders should just raise their labour

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38 John Ryan, witness statement, 29/7/15, para 29.
39 John Ryan, witness statement, 29/7/15, para 30.
40 John Ryan, 29/7/15, T:1453.44-46.
41 John Ryan, 29/7/15, T:1454.6-9.
42 John Ryan, 29/7/15, T:1467.22-23; T:1468.15-17.
43 Bernado Da Silva, witness statement dated 22/7/15, 30/7/15, para 23.
Bernardo Da Silva said that at these meetings some scaffolders voiced concerns that they would be disadvantaged as against competitors or those who did not have a CFMEU EBA. He said he recalled either Anthony Vitler or Jason O’Mara saying to the meeting that the labour companies should agree a standard labour rate it did not drop below and that the union would ‘make it hard’ for non-union contractors. Bernardo Da Silva said that at one meeting when Jason O’Mara asked the meeting in words to the effect, ‘what should the labour rate be?’; a few rates were thrown around by people in the room such as ‘not lower than $15 or $16 per square metre’. Bernardo Da Silva said he responded with words to the effect of ‘this is a waste of time - you guys can talk about rates but how do you get people to stick to it?’; that someone said in response to that ‘you just have to stick to the rate’ and that Bernardo Da Silva in the end responded ‘someone is going to break. You can’t control rates’.

Bernardo Da Silva said that Jason O’Mara then said words to the effect of ‘if you are quoting less than $15 or $16 per square metre then you are an idiot’. At this point Bernardo Da Silva left the room because he, as a director of a company that was a significant purchaser of sub-

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44 Bernado Da Silva, witness statement dated 22/7/15, 30/7/15, para 17.
45 Bernado Da Silva, witness statement dated 22/7/15, 30/7/15, para 18.
46 Bernado Da Silva, witness statement dated 22/7/15, 30/7/15, paras 19-20.
47 Bernado Da Silva, witness statement dated 22/7/15, 30/7/15, para 21.
contractor labour, did not want to be part of the conversation. In oral evidence, Bernardo Da Silva said that he was pretty sure that at one point in one of these meetings, Petar Josifoski said words to the effect of ‘this is price fixing’. Bernardo Da Silva also recalled a discussion regarding a proposal to put some sum of money into a kitty. Bernardo Da Silva said that he did not believe that, ultimately, any understanding or agreement about what price should be charged arose from these discussions. He said this was because:

[A]t the end of the day, like a lot of people were saying, “How do you police it? How do you do this; how do you do that?”

Donald Thompson, a director of Trojan Scaffolding Pty Ltd and Trojan Scaffolding ACT Pty Ltd, also gave evidence. He attended two or three EBA meetings for scaffolders in early to mid-2013. Donald Thompson’s recollection was that the main point of the discussions was the wage rates in the EBAs. He said that one scaffolder (he could not recall who) said that the wage rates were too high and that they would need to start charging $14 to $15 per square metre to pay them. Donald Thompson’s recollection was that most of the scaffolders agreed with that, and that either Jason O’Mara or Anthony Vitler also agreed and said that they would have to lift their prices. Donald Thompson also said that he recalled a discussion about scaffolders not charging below a certain price. He could not recall who

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48 Bernardo Da Silva, witness statement dated 22/7/15, 30/7/15, paras 22-23.
49 Bernardo Da Silva, 30/7/15, T:1520.10-28.
50 Bernardo Da Silva, 30/7/15, T:1523.36-1524.39.
51 Bernardo Da Silva, 30/7/15, T:1551.20-33.
52 Donald Thompson, witness statement, 30/7/15, para 7.
53 Donald Thompson, witness statement, 30/7/15, paras 8-9.
brought the issue up but he recalled Jason O’Mara agreeing with it. He could not recall what price was discussed.\

Donald Thompson also recalled that at one stage someone suggested that the scaffolders put a sum of money into a kitty to be held as security. He could not recall who made the suggestion. The general response was that this was impossible and did not happen. In oral evidence, Donald Thompson recalled Jason O’Mara, when someone mentioned a figure of $15 or $16 per square metre, saying ‘if you’re quoting less than that you’re an idiot because you wouldn’t be able to comply with the EBA’. He agreed that Jason O’Mara never said anything to the effect that the scaffolders ‘must’ charge the same price. It was put to him that Jason O’Mara did not encourage the scaffolders to agree together to charge only one price. Donald Thompson’s answer was ‘not one price, but to have a benchmark not to go – don’t go below a price’. Donald Thompson accepted that there was no agreement between all of the scaffolders that nobody would charge below a certain price.

Anthony Vitler said that he had no recollection of anyone at these meetings referring to agreeing on a minimum price for jobs or price-fixing. In his statement he said he recalled Petar Josifoski walking out of some of these meetings but he said that that was because a number

54 Donald Thompson, witness statement, 30/7/15, paras 11-12.
55 Donald Thompson, witness statement, 30/7/15, paras 13-14.
56 Donald Thompson, 30/7/15, T:1561.36-1562.3.
57 Donald Thompson, 30/7/15, T:1562.39-1563.2.
of other contractors complained that MPR was undercutting them.\(^5\) In oral evidence, Anthony Vitler said that there was discussion about a minimum figure, namely the amount that they would have to charge so that they could pay their entitlements under the agreement. Anthony Vitler said that that minimum figure varied between $16 and $20. He could not recall who mentioned those figures.\(^6\) Anthony Vitler also said in oral evidence that on one occasion Petar Josifoski ‘flipped his lid and walked out’ and said that Petar Josifoski believed that there was a mention of price-fixing and said that he would have nothing to do with it.\(^7\) Anthony Vitler said that Petar Josifoski made that comment because of the mention of the minimum figure of $16 and that Petar Josifoski interpreted that differently from everyone else in the room.\(^8\)

42. Anthony Vitler did not recall Jason O’Mara or himself saying words to the effect ‘we’re trying to get you more money on the jobs by getting all the companies to agree on a minimum price for jobs.’\(^9\) Nor did he remember Jason O’Mara or him saying ‘well we’ve done it to the formwork sector in Canberra and it’s working there.’\(^10\) Anthony Vitler said that he was present during the formworkers’ EBA meetings at this time.\(^11\)

\(^{58}\) Anthony Vitler, witness statement dated 13/7/15, 1/9/15, para 5.

\(^{59}\) Anthony Vitler, 1/9/15, T:1689.24-1690.33.

\(^{60}\) Anthony Vitler, 1/9/15, T:1691.17-23.

\(^{61}\) Anthony Vitler, 1/9/15, T:1691.25-29.

\(^{62}\) Anthony Vitler, 1/9/15, T:1692.17-27.

\(^{63}\) Anthony Vitler, 1/9/15, T:1693.33-35.

\(^{64}\) Anthony Vitler, 1/9/15, T:1693.40-1694.43.
43. Anthony Vitler said that there were other occasions where Petar Josifoski walked out of scaffolders’ meetings, and that these were because of what Anthony Vitler described as ‘the other sub-contractors having a shot at him for pricing too low’. Anthony Vitler said that he regarded it as important to get everyone signed up to the EBA so that they wouldn’t be able to undercut any of the others. Anthony Vitler said that when Petar Josifoski walked out, the other contractors ‘just assumed if he’s left that he’s been going too cheap’. Anthony Vitler then sought to clarify this by saying that the assumption was that Petar Josifoski was probably not paying to his agreement.

44. Anthony Vitler accepted that someone at the meeting asked a question to the effect of ‘what are you [the CFMEU] going to do about it if someone undercuts?’. He said that it was possibly Bernardo Da Silva. Anthony Vitler said that the suggestion put forward in answer to this concern was that the CFMEU would check through the audit clause that people were paying the correct wages to the agreement. That was the only suggestion that Anthony Vitler recalled being put forward on this issue. He denied that there was any discussion at these meetings to the effect that if the CFMEU found out that a scaffolder was quoting for jobs at a price lower than what was contemplated as what was being the minimum, pressure would be put on the scaffolder.

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65 Anthony Vitler, 1/9/15, T:1695.21-29.
66 Anthony Vitler, 1/9/15, T:1695.44-1696.3.
68 Anthony Vitler, 1/9/15, T:1696.31-1697.7.
69 Anthony Vitler, 1/9/15, T:1697.34-40.
70 Anthony Vitler, 1/9/15, T:1697.34-1698.25.
to cease that practice. He denied that there was any discussion to the effect that the audit clause would be a way that the CFMEU could ensure that everyone was kept on a level playing field.  

45. As regards the meeting with Petar Josifoski in February 2015, Anthony Vitler accepted that a figure of $16 per square metre was mentioned, but said it was only a ‘ballpark minimum figure that they have to charge to a builder to cover their agreement’.  

46. Jason O’Mara denied that either he or Anthony Vitler said at these meetings anything to the effect that the CFMEU was trying to get more money on jobs by getting all the companies to agree on a minimum price for jobs. Jason O’Mara said that what was discussed at the meeting was wage increases and that he recalled complaints from the floor about other contractors quoting prices that meant that the EBA could not be complied with. According to Jason O’Mara, because effectively all ACT scaffolding companies were represented, he said words to the effect ‘what price per metre do you need to comply with the EBA?’, somebody replied ‘$15 or $16’ and then Jason O’Mara replied ‘well, if you are quoting less than that you are an idiot because you couldn’t comply with the current EBA’. Jason O’Mara said that Petar Josifoski said something impossible to understand and then walked out of the meeting. Jason O’Mara did not recall what he said but had no recollection of him referring to price-fixing or going to

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71 Anthony Vitler, 1/9/15, T:1700.7-30.
72 Anthony Vitler, witness statement dated 13/7/15, 1/9/15, para 8.
73 Jason O’Mara, witness statement dated 13/7/15, 3/9/15, para 32.
gaol.\textsuperscript{75} In oral evidence, Jason O’Mara said that the discussion about a per metre rate lasted for only about 30 seconds but there were extensive discussions about wage rates and conditions for workers.\textsuperscript{76} Jason O’Mara said that he could not recall whether Bernardo Da Silva referred to the matters that Bernardo Da Silva said in his witness statement he had referred to.\textsuperscript{77} Jason O’Mara’s ultimate position in evidence was to accept that he was suggesting to the scaffolders that they needed to increase their charge out rate to accommodate their obligations under the new EBA that he wanted them to sign.\textsuperscript{78}

47. Jason O’Mara recalled some discussion about a proposal to pay money into a kitty. However, he said that this was not a serious proposal or given serious consideration.\textsuperscript{79} In oral evidence, Jason O’Mara characterised this proposal as being raised in the context about people not complying with their agreements.\textsuperscript{80} As Adam McEvilly said in evidence referred to below, the two issues are sides of the same coin. A scaffolder not paying in accordance with an EBA would be in a position to charge builders less than a scaffolder who was complying with obligations under an EBA.

\textsuperscript{75} Jason O’Mara, witness statement dated 13/7/15, 3/9/15, para 34.
\textsuperscript{76} Jason O’Mara, 3/9/15, T:2009.8-27.
\textsuperscript{78} Jason O’Mara, 3/9/15, T:2015.4-11.
Further meetings in 2015

48. Petar Josifoski did not sign an EBA in 2013. However, he continued negotiating it with the Union. He said that on 12 February 2015, he had a meeting at the O’Connor shops with Anthony Vitler and Zachary Smith. Ned Aleksic was also present. According to Petar Josifoski, during conversation, he spoke to Zachary Smith about the price needed to sustain the new EBA. Petar Josifoski said that Zachary Smith said to him words to the following effect ‘after speaking to other scaffolding companies they determined that $16 per square metre was the dollar amount that all the other companies agreed would be enough to cover the EBA’. Ned Aleksic also heard Zachary Smith say that.

49. A number of the scaffolders who did sign EBAs in 2013 found that they were losing tenders as a result of being undercut either by companies who did not have EBAs or by companies who they suspected were not paying in accordance with EBAs. Scott Jeffery said that in early 2015 he had made such a complaint to Zachary Smith. He said that following this the CFMEU called one or two meetings with the scaffolders at which concerns of this nature were raised. Scott Jeffery said that at these meetings Zachary Smith said that he would try to chase up the scaffolders who were winning these jobs and get them on board to meet the EBA requirements and that the CFMEU was trying to get them to pay the EBA rates.

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82 Ned Aleksic, 29/7/15, T:1407.18-23.
83 Scott Jeffery, witness statement, 29/7/15, paras 21-23.
50. Adam McEvilly also attended one of these meetings in 2015. He said that the meetings were organised as a result of scaffolders winning jobs on tenders at ‘ridiculously low prices’. Adam McEvilly said that Zachary Smith conveyed to him that the point of the meeting was to get all scaffolders on the same page with regards to price. He said that at the meeting he attended there was a concern expressed that the 2013 EBA did not suit the market and that Zachary Smith conveyed to the group that the solution from the CFMEU’s perspective was that all of the scaffolding companies needed to bring their prices up.\(^{84}\) He recalled that Anthony Vitler saying that the same result had been achieved amongst the steel fixer companies and their prices were rising.\(^{85}\) Zachary Smith in his witness statement denied that he said that the scaffolders needed to bring their prices up, or that he heard Anthony Vitler say that.\(^{86}\)

51. It was suggested to Adam McEvilly by counsel for the CFMEU that Zachary Smith was more interested in getting scaffolders on the same page in complying with the EBA. Adam McEvilly’s response in essence is encapsulated by the following answers that he gave:\(^{87}\)

Yes, but it served two purposes. If everyone was complying to the EBA the pricing is going to be pretty similar, isn’t it.

\[\ldots\]

\(^{84}\) Adam McEvilly, witness statement, 29/7/15, para 28; Adam McEvilly, 29/7/15, T:1439.26-1441.8.

\(^{85}\) Adam McEvilly, witness statement, 29/7/15, para 31.


\(^{87}\) Adam McEvilly, 29/7/15, T:1446.33-35; T:1447.42-44.
...but if we keep, you know, paying to this EBA we’re all going to end up broke, so it’s got to do with pricing and the EBA; it’s all connected.

52. Adam McEvilly adhered to the evidence in his statement that Zachary Smith conveyed at this meeting that the scaffolding companies needed to bring their prices up.88

53. Donald Thompson said that in recent years he had made complaints about underquoting to the CFMEU.89 Donald Thompson’s concern appears largely to have been companies that did not have EBAs.90 Donald Thompson said that the CFMEU’s response to these complaints was always to the effect of ‘yeah we are on to it’ and ‘we will go around and have a yarn to them’.91

54. Horace Ian Watt (Ian Watt) gave evidence that he had expressed concerns to the CFMEU at these meetings about MPR winning jobs by quoting lower rates.92 Ian Watt said that one of the complaints concerned the job that MPR had won with Mayfair Homes. He said that he had priced two jobs for Mayfair Homes and had been told that MPR had got them because their labour was a lot less than Ian Watt’s.93 Ian Watt’s evidence was that he believed that MPR could not have been paying in accordance with its EBA, or at least with the rates in the industry EBA. He said that he did not make a complaint about the matter to the Union but rather just mentioned it, although just about

88 Adam McEvilly, 29/7/15, T:1448.5-12; Adam McEvilly, 29/7/15, T:1449.36-38.
89 Donald Thompson, witness statement, 30/7/15, paras 18-21.
90 Donald Thompson, 30/7/15, T:1556.1-15.
91 Donald Thompson, witness statement, 30/7/15, para 20.
92 Horace Watt, 30/7/15, T:1569.17-1570.6.
93 Horace Watt, 30/7/15, T:1570.25-34.
every other scaffolding company complained about it.94 Ian Watt accepted that the other scaffolders wanted to make sure that MPR paid in accordance with the EBA to stop them quoting lower prices.95

55. Ian Watt also gave evidence about a meeting with Zachary Smith over coffee this year. The meeting was to discuss a proposed audit. Ian Watt said that he told Zachary Smith that Prestige, his company, was struggling a bit financially and Zachary Smith offered to give him more time before the audit.96 Ian Watt said that Zachary Smith also mentioned that MPR had not been paying its employees correctly and that the CFMEU was chasing it for payments owed to them.

56. Ian Watt denied raising with Zachary Smith any safety concerns he had with the residential sector, or any concerns regarding Mayfair Homes sites.97 He did recall telling Zachary Smith at some point that MPR were hard to beat because their prices were lower.98

57. Zachary Smith, in contrast, recalled Ian Watt saying that he lost two Mayfair jobs to MPR but said that in addition Ian Watt at this meeting was expressing concerns about safety.99 Shortly after the meeting (Zachary Smith said about a fortnight later), Zachary Smith and Anthony Vitler went out to a job that MPR was doing with Mayfair Homes. Zachary Smith claimed the visit was prompted by safety

94 Horace Watt, 30/7/15, T:1570.42-1571.7.
95 Horace Watt, 30/7/15, T:1571.16-35.
96 Horace Watt, witness statement, 30/7/15, para 10.
97 Horace Watt, 30/7/15, T:1586.21-24.
98 Horace Watt, witness statement, 30/7/15, paras 12-13.
concerns that Ian Watt and other sub-contractors had made about the standard of scaffolding in Coombs.\textsuperscript{100} Zachary Smith claimed that it was just a coincidence that Ian Watt had been complaining about MPR undercutting on price.\textsuperscript{101}

58. Counsel assisting submitted that Ian Watt’s evidence should be accepted, but that, even if it be the case that the CFMEU received complaints from contractors about MPR’s safety, these complaints could not have been motivated by some kind of altruistic concern for safety. They could only have been part and parcel of their desire to stop MPR from undercutting on price. And, it was submitted, Zachary Smith and Anthony Vitler in responding to any safety concerns must have known that. It was submitted that the point was to get the CFMEU to put pressure on MPR because MPR was not a compliant contractor and Zachary Smith and Anthony Vitler decided that raising safety concerns was the best way to apply that pressure.

59. The CFMEU did not respond to these submissions. In part, they raise questions similar to those that arise in connection with, for example, the CFMEU’s visits to the Milin Moore Street site. It is not necessary to make any specific findings. On any view, this evidence illustrates the connection between what might be described as anti-competitive conduct and the potential for abuse of rights of entry. It is a further indication that participants in the industry with CFMEU EBAs cannot compete with those that do not have CFMEU EBAs, and that they

\textsuperscript{100} Zachary Smith, witness statement dated 28/8/15, 2/9/15, paras 15-16; Zachary Smith, 2/9/15, T:1849.44-1850.30.

\textsuperscript{101} Zachary Smith, 2/9/15, T:1851.42-1853.26.
expect co-operation from the CFMEU in stamping out that competition.

D – CONCRETERS

60. In late 2013 the CFMEU held four meetings with the major commercial concreters in Canberra to discuss signing another EBA. Clive Arona from Multi-Crete Concreting attended these meetings.

61. Clive Arona said that Canberra concreters (at least in the commercial sector) charge a rate per cubic metre for pouring (or placing) concrete and a rate per square metre for finishing concrete. The effect of his evidence was that, although he could not be 100% sure, there was some discussion at these meetings about charging $16.50 per cubic metre for pouring and $6.50 for finishing.102

62. When asked whether these were the rates that he in fact charged, he said:103

We’d break our – we’d have different lots. We have our pumps as well. So our pumps would sometimes go into the equation, we’d go on a cubic metre rate. It was all depending on the job. But yes, typically, probably, yes.

63. Later he gave the following evidence:104

Q. You mentioned figures of $16.50 per cubic metre of concrete poured and $6.50 per square metre for finishing it.

102 Clive Arona, 15/7/15, T:164.35-39, 177.36-178.14, 188.46-189.9.
103 Clive Arona, 15/7/15, T:165.28-33.
104 Clive Arona, 15/7/15, T:177.36-178.14.
A. Correct.

Q. I just want to get this clear: those rates are common to all concreters, are they, in the ACT?
A. Yes.

Q. The precise figure, the $16.50 and the $6.50, was agreed, was it, at the various meetings?
A. I’m not sure. I can’t recall. It was – I don’t know- remember if it was brought up in the meeting our however it was brought up at all exactly. It could have been, yes. I’m not 100 per cent – I can’t exactly put my finger on where it was.

Q. But the concreters didn’t arrive at these prices just as a result of their own independent decisions. Everyone knew that everyone else would be charging $16.50?
A. Yes.

Q. And that is because, in effect, of an agreement?
A. I can’t recall. I’m not 100 per cent sure. Yes, there was an agreement, but I’m not sure. Yes, there was an agreement, but I’m not sure how it was brought up and how the numbers actually come on the table.

64. Clive Arona was saying that there was an agreement to charge those rates, but that he was not sure of the circumstances in which it was reached. Clive Arona’s evidence continued:105

Q. What would happen if your company decided to try and get more business by cutting the price, say, to $14.50?
A. Well, it would be more affordability, I guess. How could you do it? It would have cost, with the EBA, I guess…

Q. Cost the EBA, is that what you said?

105 Clive Arona, 15/7/15, T:178.15-179.10.
A. If you’re paying the rates, you could, yes. It would be up to the person, I guess. Cut the profit, I guess.

Q. Obviously, if you cut the prices, in one sense, you’re running the risk of losing profit?

A. Yes.

Q. On the other hand, you’re gaining the chance of getting more work.

A. Yes.

Q. But how would it cause the EBA to be lost?

A. EBA to what?

Q. To be lost. I think you said about three answers ago…

A. I wasn’t sure. You know, I guess, the men – what it cost us in men an hour, it would be pretty hard to lower your figure, I guess, so to speak.

Q. If you did engage in price cutting, would you expect any reaction from the Union?

A. Oh, if they probably knew about it, I guess they would, I think. I’m not sure.

Q. Would they try and protest with you, or get you to change your decision, would they?

A. I’m not sure. I don’t know.

Q. The other concreters, they would criticise you presumably, would they?

A. I’d say so, yes.

Q. For breaking the agreement?

A. Yes, if that was their thing, yeah, but --
There was further evidence to similar effect given by Clive Arona in answer to questions from counsel for the CFMEU.\(^{106}\) At the conclusion of that questioning, Clive Arona agreed with the proposition that at no stage did any CFMEU representative ever urge any of the companies to charge a particular set price for work that they were going to be charging for.\(^{107}\)

Pietro Marcantonio and Richard Lewis from Gungahlin Concrete Services Pty Ltd attended two of these meetings.\(^{108}\) Pietro Marcantonio said that the rates to be charged to builders by concreters was a topic that came up at one of these meetings. He could remember the figures of $16.50 per cubic metre and $6.50 per square metre being discussed but he could not remember who actually spoke about them.\(^{109}\)

Pietro Marcantonio was quite adamant in giving his oral evidence that he did not need anyone telling him what rates he should be charging on jobs.\(^{110}\) Pietro Marcantonio also said that he did not need advice from the CFMEU to run his own business and accepted the proposition that he did not get any such advice. It is not entirely clear whether he also accepted whether he did not get any advice from the CFMEU about what rates he should charge, however his position, plainly, was that he

\(^{106}\) Clive Arona, 27/7/15, T:1164.40-1166.33.

\(^{107}\) Clive Arona, 27/7/15, T:1166.35-42.

\(^{108}\) Pietro Marcantonio, witness statement, 16/7/15, para 19; Richard Lewis, witness statement, 16/7/15, para 7.

\(^{109}\) Pietro Marcantonio, 16/7/15, T:325.11-31.

\(^{110}\) Pietro Marcantonio, 16/7/15, T:324.32-34, 335.6-24.
neither wanted nor needed such advice. Richard Lewis denied that there was any discussion at the meetings he attended about setting a minimum rate. He did, however, agree that at some point in one of these meetings Pietro Marcantonio complained that the charge out rates to head contractors were too low to support the proposed increases under the new EBA.

68. Jason O’Mara’s account of the EBA meetings with concreters was similar to his account of the EBA meetings with scaffolders. He said in his witness statement ‘it is not unusual in EBA discussions for the employers to talk about the costs associated with increases in wages and conditions. This topic came up in the concreting EBA negotiations’. Jason O’Mara said that there were discussions at EBA meetings with concreters about what the minimum charge would need to be to meet the proposed EBA, although there were no discussions about actual charges. He denied that the CFMEU urged the companies to set a price for pouring or finishing concrete or that there was any price maintenance agreement.

69. There was no evidence from representatives of the other concreting companies who attended these meetings. There appear to have been at least five other such concreting companies. Nor was there any

112 Richard Lewis, 16/7/15, T:364.20-21.
113 Richard Lewis, 16/7/15, T:364.3-18.
117 Pietro Marcantonio, witness statement, 15/7/15, para 19.
detailed evidence regarding prices actually quoted by concreters in tenders or charged on particular jobs.

E – OTHER TRADES

70. There was no detailed evidence regarding other trades. However, intercepted telephone conversations revealed evidence of potential anti-competitive conduct in the bricklaying industry and in the crane industry.

Bricklayers

71. Reference was made at the outset of this Chapter to the evidence concerning Charlie the bricklayer. What follows, drawing largely from the submissions of counsel assisting, sets out that evidence in more detail.

72. On 8 April 2015 Johnny Lomax exchanged a series of text messages with Mark Walker, a bricklayer.\footnote{Lomax MFI-6, 7/10/15.} The substance of the text messages is that Mark Walker was concerned that there was a ‘grub of a bricklayer’ working without an EBA on a job in Gungahlin. Johnny Lomax agreed to go out and see him. In one of the text messages Mark Walker said ‘Geo Con should only be using Eba compliant brickies on their big sites shouldn’t they (Charlie bricklaying) hammer him’. Johnny Lomax responded ‘yeah what job’.
On the morning of 9 April 2015 Johnny Lomax telephoned the bricklayer referred to by Mark Walker as ‘Charlie’. A recording of that conversation was played during Johnny Lomax’s oral evidence. Johnny Lomax introduced himself to Charlie and said that he needed to catch up with him to ‘have a little bit of a talk about Geocon’. Johnny Lomax said to Charlie:

[M]aybe we need to sew things up if you want to keep doing work with Geocon, Charlie, that’s it…I know you do a little bit of work with Geocon. I don’t know if you’re going to keep doing work with Geocon, but we can just talk about how you – what’s happening anyway.

A meeting was arranged at 1 o’clock that day.

The next morning, Johnny Lomax telephoned another person in the bricklaying industry in Canberra, identified as George. Before a recording of this conversation was played during his evidence, Johnny Lomax was asked whether Charlie told him how much he was charging Geocon. Johnny Lomax said:

No. We never really got to how much he was charging Geocon or anything like that. I just asked him about his mechanism. I was asking him maybe we could meet with his boys and have a talk to his boys.

Johnny Lomax denied that he made some inquiries about what might be an appropriate amount to charge on a job like that. What he said to George was inconsistent with this denial. Early in the conversation, Johnny Lomax asked George how much he charged to lay blocks. George said $6 to cover labour only.

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119 Lomax MFI-7, 7/10/15.
120 Johnny Lomax, 7/10/15, T:2172.29-33.
proceeded to tell George that Charlie was charging $4 per block on the Geocon job.123 Johnny Lomax said to George:124

… I just went in there to have a talk to him about, ya know, fuckin’ cunt goin’ under price, he’s got to price properly, um, so I’m gonna give him rates, gonna give him an EBA to look at and have a talk to him about that if he wants to – ‘cause he seems to think he’s going to do more Geocon – Geocon work.

77. Johnny Lomax went on to recount to George further details about what he said to Charlie:125

I said “The most important thing is that you can’t be goin’ around pricing. I need to give you rates, I need to get you an EBA if you want to do commercials”.

78. George suggested that Charlie ‘does it for nothing’. Johnny Lomax responded: ‘Well, he [Charlie] can’t do it for nothin’ now, he’s going to have to price it properly’.126 Johnny Lomax said that he told Charlie ‘We’ve already got a system in place and can’t have you fuckin’ disrupting it’.127

79. Johnny Lomax indicated early in the conversation with George that he had suggested to Charlie that he contact George to ask about how EBAs operated. Later in the conversation, George said: ‘…if he asks

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121 Johnny Lomax, 7/10/15, T:2172.19-22.
122 Lomax MFI-8, 7/10/15.
123 Lomax MFI-8, 7/10/15, p 5.29.
124 Lomax MFI-8, 7/10/15, p 5.44-6.2.
125 Lomax MFI-8, 7/10/15, p 7.19-22.
126 Lomax MFI-8, 7/10/15, p 8.29-30.
127 Lomax MFI-8, 7/10/15, p 8.4-5.
me and I’ll tell him what rates to do it … I’ll just tell him how to … I’ll help him price it’.\textsuperscript{128} Johnny Lomax responded.\textsuperscript{129}

Yeah, all right. Well he probably will need some help, man, ‘cause I – I – at the end of the day I just don’t want another one sneaking around we have to chase him everywhere. All it – all it does is just give him at least something that he’s got to comply to.

80. Johnny Lomax suggested in oral evidence that George’s assistance was required to help Charlie to understand what prices needed to be charged to cover the rates in the EBA. But he accepted that George was probably going to tell Charlie what his minimum price would have to be.\textsuperscript{130}

81. Johnny Lomax went on to say to George:\textsuperscript{131}

...I’ve gotta tell him [Charlie] he can’t go in there and – fuckin’ when Geocon ring him up to come and sharpen the pencil, the fuckin’ pencil’s blunt, the pencil’s not gonna sharpen, there’s nothing left in the pencil.

82. Counsel assisting submitted that Johnny Lomax was referring to what he anticipated would be a request by Geocon in forthcoming negotiations to do a job for a cheaper price and suggesting that Charlie had to be told that if such a request was made he had to refuse it and not quote less than an agreed minimum rate. Johnny Lomax in

\textsuperscript{128} Lomax MFI-8, 7/10/15, p 9.2-9.
\textsuperscript{129} Lomax, MFI-8, 7/10/15, p 9.11-16.
\textsuperscript{130} Johnny Lomax, 7/10/15, T:2183.12-27.
\textsuperscript{131} Lomax, MFI-8, 7/10/15, p 9.20-24.
substance accepted this, although he said that the minimum rate was what was necessary for Charlie to pay his workers under an EBA.\textsuperscript{132}

Johnny Lomax reported back to Mark Walker on 13 April 2015, in a telephone conversation that was played during his oral evidence.\textsuperscript{133} Johnny Lomax told Mark Walker that he was ‘giving him [Charlie] an EBA’ and ‘he can’t do any more work for them unless he is going to do an EBA, man, so I don’t know if that is going to work for you or’. Mark Walker responded: ‘oh it doesn’t worry me. I couldn’t give a fuck who gets the work, Johnny, as long as they don’t fuck me’. Later in the conversation Johnny Lomax indicated that Charlie had told him that he was being paid $4 a block on the job. Mark Walker responded ‘yeah, what a fuckwit’. Johnny Lomax went on to reiterate that Charlie ‘won’t be doing any commercial work and will be going to Geocon and telling him he doesn’t do any more work’ unless he had an EBA. Mark Walker’s response was, ‘yeah, good. That’s all I want out of this’.

This series of telephone and text messages was the subject of considerable emphasis in the submissions of counsel assisting. It was submitted, amongst other matters, that they indicated the following. First, a bricklayer with an EBA was being undercut by a bricklayer without an EBA. Secondly, the EBA bricklayer complained to the CFMEU and asked it to stop the undercutting. Thirdly, the CFMEU approached the non-EBA bricklayer and told him (a) that he had to have an EBA and (b) that he had to price his jobs in line with EBA

\textsuperscript{132} Johnny Lomax, 7/10/15, T:2184.1-21.

\textsuperscript{133} Lomax MFI-9, 7/10/15.
bricklayers or else he would not be able to do any commercial work. Fourthly, the CFMEU reported back to the EBA bricklayer informing him what had transpired. Fifthly, the EBA bricklayer was content with that result.

85. The CFMEU response claimed that none of Mark, George or Charlie was called. It was submitted that in the absence of their being called the inferences that counsel assisting submitted to draw from the intercepted material were unwarranted and tentative in the extreme.\(^{134}\) The CFMEU’s submission does not attempt to identify any parts of the intercepted conversations that are unreliable in the absence of calling these other persons. What these persons said to Johnny Lomax and what he said to them is apparent from the recordings (and the text messages) themselves. They are ‘original evidence’. They are ‘operative words’. But if the recordings of the intercepted conversations are not unreliable, why cannot inferences be drawn from them? The CFMEU’s submissions do not explain. It is unnecessary to make any finding. No particular finding was sought by counsel assisting. The matter is the subject of an ongoing investigation.

**Crane operators**

86. The Commission heard a telephone recording between Kenneth Miller and Jason O’Mara in which Kenneth Miller reported his thus far unsuccessful efforts to persuade a crane operator, Dave Taylor, to sign up to an industry EBA.\(^{135}\) Dave Taylor had formerly worked for a

\(^{134}\) Submissions of the CFMEU, 6/11/15, p 48, para 105.

\(^{135}\) Miller MFI-1, 2/9/15.
crane company in Canberra but recently had started up his own business.

87. In this conversation, Kenneth Miller told Dave Taylor that other crane operators had an EBA and ‘We’d expect you to be on the level field’.136 Dave Taylor responded:137

   No, I quote less than that, I quote less than the others, to get the work. I can’t afford to pay these rates.

88. Kenneth Miller told Jason O’Mara that his response was ‘Mate, that’s not the right way to talk’ and indicated that that was all he was willing to say to Jason O’Mara on the phone.138

89. Counsel assisting submitted that this telephone intercept indicated that the message that Kenneth Miller, with the apparent approval of Jason O’Mara, conveyed to the new entrant into the crane industry was: competing with EBA contractors by quoting lower prices was not acceptable.

90. The CFMEU, first, described reliance on this evidence as mere speculation in the absence of Dave Taylor. Secondly, it submitted there was no evidence even as to Mr Taylor’s first name or as to whether he was in fact a crane operator operating in the ACT. The second submission overlooked Kenneth Miller’s repeated references to Mr Taylor as ‘Dave Taylor’ and ‘Dave’ and to his description of him

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136 Miller MFI-1, 2/9/15, p 2.45-46.
137 Miller MFI-1, 2/9/15, p 3.3-5.
138 Miller MFI-1, 2/9/15, p 3.9-11.
as ‘the person that operates Concept Cranes’, one of the two crane operators in Canberra that Kenneth Miller said did not have CFMEU EBAs.\(^{139}\)

91. As to the first submission, Kenneth Miller did not suggest that he was giving Jason O’Mara an inaccurate account of what had passed between him and Dave Taylor. It is not easy to see why it was necessary to call Dave Taylor to confirm the substance of Kenneth Miller’s report. The telephone recording was relied upon by counsel assisting not for the purpose of seeking particular findings regarding anti-competitive conduct but as evidence of a more general approach of the CFMEU. Nonetheless, for the reasons already given, it is neither necessary nor desirable to make any particular findings.

**General evidence**

92. Darrell Leemhuis, a builder, gave some general evidence about his experience when describing a meeting with Halafihi Kivalu in December 2012. The meeting followed the CFMEU’s disruption of a concrete pour on a Leemhuis brothers’ site described in Chapter 6.3.\(^{140}\) In his oral examination on 16 July 2015, Darrell Leemhuis was asked to specify what exactly Halafihi Kivalu had said at the meeting in the Plum Café. Darrell Leemhuis gave the following evidence:\(^{141}\)

\(^{139}\) Kenneth Miller, 2/9/15, T:1891.8-27.

\(^{140}\) Chapter 6.3, paras 137-164.

\(^{141}\) Darrell Leemhuis, 16/7/15, T:265.31-36.
He – during the conversation it was brought up that we had become a contractor that had popped up on to their radar because we was now starting to do jobs that they looked after and that they thought we should have an EBA, so there’s EBAs and use everybody that had EBAs, Union EBAs, so we could create a level playing field.

93. Darrell Leemhuis gave evidence that he understood the reference to a ‘level playing field’ by having an EBA as follows:

I guess they want to make sure everybody is paid the same and everybody is charging the same.

94. When asked to explain this, Darrell Leemhuis said:

The Union EBA, they give all the contractors the same EBA and all the contractors discuss what rates they’re going to charge me, so it’s almost like you get your – if you go to a guy with a Union EBA, you’ll get all of the same rates because they’ve all been set, give or take.

95. Darrell Leemhuis explained that by ‘rates’ he meant the rates that he as a builder paid the contractors to do the work. Darrell Leemhuis in the above evidence said that the rates had all been set ‘give or take’. He went on to say: ‘I guess they need to set a rate to cover the costs of everything’. When asked about his practical experience of receiving tenders from contractors, Darrell Leemhuis gave the following evidence:

Q: Have you observed any similarity in the tenders that come in, say, for concreting companies with the – ones which have EBAs and the ones which don’t?

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142 Darrell Leemhuis, 16/7/15, T:265.44-45.
143 Darrell Leemhuis, 16/7/15, T:268.7-15.
144 Darrell Leemhuis, 16/7/15, T:268.26-27.
145 Darrell Leemhuis, 16/7/15, T:270.9-25.
A: They are a lot more expensive than the guys who don’t have an EBA, but similarities in their quote, not to that extent, no, you can’t – no.

Q: You can’t pin down a precise figure?

A: No, I couldn’t pin it down and I wouldn’t be able to, no.

Q: Are you able to in respect of any other trades?

A: There’s not an actual trade where you can pin down because they’re not going to send their tender submission in and say, ‘We’re part of an EBA and we have agreed to a rate, so this is what you need to charge’, they’re not going to put that in their submission’.

96. There is no detailed evidence about tenders or contracts which might permit conclusions to be drawn about what in fact contractors in particular trades are tendering or charging.

F – A WARNING

97. The items of evidence described above, and the CFMEU’s submission that there is no evidence to suggest any involvement by CFMEU officials in cartel conduct, prompt the following warning. To assemble competitors in a room, to stimulate a discussion about prices and costs, and to engage in a process of advising the competitors to charge a particular price is a very hazardous activity. It is also very hazardous to advocate, encourage or insist that the competitors enter into identical agreements with a union. These are fundamentally anti-competitive practices. That is so if for some deficiency in proof, or some quirk in applying quite technical legislation, or the possible application of s 51(2)(a), there is no contravention of the Act in particular instances. Even if the conduct itself is not unlawful, it is conduct which establishes a perfect background for unlawful conduct. Individual traders ought to be left to negotiate as they wish with unions. They
should not reach agreements among themselves. At least, if they do, they should understand the perils in terms of loss of property and loss of liberty which face them.
## CHAPTER 6.6

CREATIVE SAFETY INITIATIVES AND CONSTRUCTION CHARITABLE WORKS

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A – INTRODUCTION

1. This Chapter is concerned principally with two relevant entities associated with the Construction, Forestry, Mining and Energy Union, Construction and General Division – ACT Branch. The registered union is referred to as the CFMEU. The ACT Branch is referred to as the CFMEU ACT.¹ Those relevant entities are:

¹ In contrast to some States, in the ACT there is no separate Mining and Energy Divisional Branch of the CFMEU. Nor is there a separate Forestry Divisional Branch of the CFMEU in the ACT. Accordingly, the CFMEU, Construction and General Division, ACT Divisional
(a) Construction Employment Training & Welfare Limited (CETW). CETW is the trustee of the Creative Safety Initiatives (CSI) Trust; and

(b) Construction Charitable Works Limited (CCW), a registered charity.

2. The Chapter addresses four main topics. They are:

(a) governance failures by the board of CETW;

(b) the diversion of CCW’s funds for non-charitable purposes and possible breaches of fiduciary and statutory duties owed to CCW by Jason Jennings, Dean Hall and Jason O’Mara. In addition to being current or former directors or senior officers of CCW, these persons are also respectively the President, Secretary and Assistant Secretary of the CFMEU ACT;

(c) systemic breaches of fiduciary duty by officers of the CFMEU ACT when negotiating enterprise agreements on behalf of union members; and

(d) possible third line forcing or exclusive dealing by the CFMEU ACT in consequence of including certain clauses in its pattern enterprise agreement in relation to CETW and CCW.

Branch is synonymous with the CFMEU, ACT Branch: Dean Hall, 4/8/15, T:11.16-30. The operating reports filed with the Fair Work Commission state the name of the branch as the ‘Construction and General Division – ACT Branch’.
3. The CFMEU submitted that counsel assisting made ‘valiant efforts to inflate’ various payments and engaged in a ‘speculative accounting exercise’.2 This assertion was unparticularised and unsupported. It may therefore be put aside. Apart from it, there was no challenge by the CFMEU to any of the factual matters set out in counsel assisting’s submissions. Neither CETW nor CCW challenged any factual matter presented in counsel assisting’s submissions. The result is that the Chapter largely adopts counsel assisting’s submissions concerning the facts.

B – SUMMARY OF FINDINGS

4. In summary, for the reasons that follow:

(a) There have been significant failures of governance by the directors of CETW and CCW, principally Dean Hall.3

(b) CCW’s funds have been diverted for non-charitable purposes for the benefit of the CFMEU ACT. By causing or allowing the diversion to occur, Jason Jennings, Dean Hall and Jason O’Mara may have breached their directors’ duties to CCW. This issue has been referred to the Australian Charities and Not-for-Profits Commission so that it can give consideration to revoking CCW’s registration as a charity.4

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2 Submissions of the CFMEU, 29/10/15, p 97, para 14.
3 See paras 51-59.
4 See paras 60-97.
(c) The CFMEU ACT includes various clauses in its pattern enterprise agreement that provide a disguised financial benefit to the union. The inclusion of those clauses has created an environment in which there are inherent conflicts of interest between union officials and the workers they represent and a substantial systemic risk of breaches of fiduciary duty.5

(d) Owing to uncertainty in the law, no finding is made concerning whether or not the CFMEU ACT may have engaged in third line forcing or exclusive dealing contrary to the competition laws.6

(e) The Report and the materials obtained by the Commission have been referred to the Australian Federal Police and the ACT Gaming and Racing Commission to investigate the commission of possible criminal offences against the *Criminal Code* (ACT) and s 65 of the *Taxation Administration Act* 1999 (ACT) in relation to matters concerning the *Gaming Machine Act* 2004 (ACT).7

C – BASIC OVERVIEW OF CFMEU ACT ENTITIES

5. As noted below,8 CCW took a preliminary point about the Terms of Reference. In order to consider that point, it is necessary first to have a

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5 See paras 98-124.
6 See paras 126-151.
7 See paras 152-164.
8 Paragraph 25.
basic understanding of the various entities. The structure is remarkably complex.

6. Diagram 1 set out below shows the structures and relationships between CETW, CCW and various other entities associated with the CFMEU ACT. Dean Hall gave evidence that, apart from Construction Industry Training and Employment Association (CITEA), each of the entities on that diagram were separate entities established ‘to benefit the members [of the CFMEU] and their families in the communities they live in’ and that their ‘end goal’ was for ‘the end stakeholder, which is our members of the CFMEU’. A brief summary of the operation of various of the entities is set out below.

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CETW

7. CETW is the trustee of the CSI Trust. The CSI Trust is a trust trading under the name ‘Creative Safety Initiatives’ (CSI). CETW as trustee of the CSI Trust is a registered training organisation. Its principal activity is operating the CSI business. That business provides training for a fee to persons involved in or associated with the construction industry in the ACT.

8. CETW was registered on 29 July 2010 as a public company limited by guarantee. The initial members and directors were Dean Hall, Jason O’Mara and Jason Jennings. At the time of CETW’s registration, and subsequently, those persons were respectively the Secretary, Assistant Secretary and President of the CFMEU ACT.

9. Prior to CETW’s incorporation, the CSI business was operated by another company, Creative Safety Initiatives Pty Ltd. That company was formed in May 2006. Stephen Brennan was a director and the company secretary and accountant of Creative Safety Initiatives Pty Ltd. During 2010 he proposed that a new business structure be established and that the CSI business be structured as a trust rather than a company. This was implemented during 2010 and 2011 with the CSI business being ‘transferred’ to CETW. Employees previously employed by CITEA were transferred to CETW. During 2012,

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11 Stephen Brennan is also the CFO of the Canberra Tradesman’s Union Club and Woden Tradesman’s Union Club.
12 Dean Hall, 4/8/15, T:34.13-35.23.
13 CSI MFI-3, 4/8/15, Vol 1, p 139.
Creative Safety Initiatives Pty Ltd changed its name to 119 585 821 Pty Ltd. The company no longer trades.

10. The current directors of CETW are Dean Hall, Stephen Brennan and Robert Docker. Among other roles, Stephen Brennan and Robert Docker are respectively the CFO and CEO of the Canberra Tradesman’s Union Club and Woden Tradesman’s Union Club.\textsuperscript{14} Jason Jennings is the CEO of CETW.

11. Pursuant to the trust deed establishing the CSI Trust:

(a) Each calendar year, CETW may either (i) pay the income of the trust in that year to one or more ‘Beneficiaries’ or (ii) accumulate the income, which accumulation will be an accretion to the trust fund. In default, the ‘Income Default Beneficiary’ is entitled to the income for the year.\textsuperscript{15} The ‘Income Default Beneficiary’ is the President or Secretary of the CFMEU ACT for and on behalf of and for the benefit of the CFMEU ACT.\textsuperscript{16}

(b) ‘Beneficiaries’ is defined to mean each ‘Designated Beneficiary’ (and certain other entities in which a Designated Beneficiary has an interest), any charity which CETW nominates and any entity to which deductible gifts may be

\textsuperscript{14} Dean Hall, 4/8/15, T:22.34-23.24.
\textsuperscript{15} CSI MFI-3, 4/8/15, Vol 1, pp 57-58, cll 8-10.
paid in accordance with Division 30 of the *Income Tax Assessment Act* 1997 (Cth).\(^{17}\)

(e) The ‘Designated Beneficiaries’ are the President or Secretary of the CFMEU ACT for and on behalf of and for the benefit of the CFMEU ACT, any person which CETW determines as having similar purposes activities and membership criteria as the CFMEU ACT, and any other person or entity appointed by CETW.\(^{18}\) Dean Hall did not think CETW had ever appointed any other person as a ‘Designated Beneficiary’.\(^{19}\)

(d) CETW may at any time determine to pay any part of the trust capital to or for the benefit of a Beneficiary. If the capital has not been distributed before the Vesting Date, CETW must distribute the trust fund to one or more of the Beneficiaries, in default of which the ‘Capital Default Beneficiary’ will be entitled to the capital.\(^{20}\) The ‘Capital Default Beneficiary’ is the President or Secretary of the CFMEU ACT for and on behalf of and for the benefit of the CFMEU ACT.\(^{21}\)

12. The effect of these provisions is that apart from the possibility of trust income or capital being distributed to a charity or gift deductible recipient, the CSI Trust operates solely for the benefit of the CFMEU

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\(^{17}\) CSI MFI-3, 4/8/15, Vol 1, pp 50-51, cl 1.2.
\(^{18}\) CSI MFI-3, 4/8/15, Vol 1, p 52, cl 1.9.
\(^{19}\) Dean Hall, 4/8/15, T:38.22-37.
\(^{20}\) CSI MFI-3, 4/8/15, Vol 1, p 59, cl 11.
\(^{21}\) CSI MFI-3, 4/8/15, Vol 1, p 51, cl 1.3.
ACT. That possibility appears to be no more than theoretical. In both the 2013 and 2014 calendar years the entire profit of the CSI Trust was in fact distributed to the CFMEU ACT.

13. The CFMEU ACT also directs CETW. Pursuant to CETW's constitution, members of CETW must be elected officials of the CFMEU ACT or of the committee of management of the CFMEU ACT. The directors of CETW must be members of CETW. Thus, both the members and directors of CETW must be elected officials of the CFMEU ACT or of the committee of management of the CFMEU ACT. The directors of CETW are appointed from the members of CETW by the Secretary of the CFMEU ACT and hold office for one year. After that they must retire. But they are eligible for re-appointment. The office of a director becomes vacant if a director ceases to be a member of CETW. Casual vacancies on the board of directors are filled by the Secretary of the CFMEU ACT.

14. The consequence is that for all practical purposes CETW as trustee of the CSI Trust is controlled by and operated solely for the benefit of the CFMEU ACT. Any and all profits generated by the CSI Trust flow directly to the CFMEU ACT.

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22 The CSI Trust operates on an accounting period ending on 31 December each year.
23 CSI MFI-14, 5/8/15, pp 1, 47.
24 CSI MFI-3, 4/8/15, Vol 1, p 34, cl 16.
25 CSI MFI-3, 4/8/15, Vol 1, p 39, cl 44.
27 CSI MFI-3, 4/8/15, Vol 1, p 40, cl 51(h).
28 CSI MFI-3, 4/8/15, Vol 1, p 40, cl 52.
CCW

15. CCW was registered on 7 February 2008 as a public company limited by guarantee. CCW is a charity registered under the Australian Charities and Not-for-profits Commission Act 2012 (Cth). Its principal activities are:

(a) paying money to CETW in the form of a ‘management fee’;

(b) paying money to CETW in the form of a ‘gap payment’ for apprentice training conducted by CETW; and

(c) facilitating the provision of welfare services to construction industry participants.

16. The only member of CCW is the Canberra Tradesmen’s Union Club Community Fund Ltd (CTUCCF). Under CCW’s constitution, CTUCCF may appoint directors to CCW as it thinks fit.29 Meetings of the board of directors must be convened at least once every three months.30 The current directors of CCW are Dean Hall, Martin Carrick and Scott Abraham. Martin Carrick is a solicitor with Slater & Gordon. Scott Abraham is an accountant.31 Jason Jennings is the CEO.

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CTUCCF

17. CTUCCF was registered on 20 April 2006 as a public company limited by guarantee. Its current directors are Dean Hall, Jason O’Mara, Jason Jennings, Rod Driver and Trevor Scott. Each of those men is an office bearer of the CFMEU ACT. The CTUCCF has two members. One is the Canberra Tradesmen’s Union Club Limited (CTUC). The other is the Woden Tradesmen’s Union Club Limited (WTUC). The sole purpose and object of the CTUCCF is to ‘operate for the public benefit by providing charitable benefits to persons who reside within a 50 kilometre radius of the Club House’. The ‘Club House’ is the premises of the CTUC and WTUC.

The Tradies Group

18. Together, CTUC and WTUC operate under the name ‘The Tradies Group’. Both CTUC and WTUC are public companies limited by guarantee. A member of the CFMEU is automatically a member of the two clubs. Each club operates a licensed community club in the ACT for the benefit of its members. Each club holds a gaming machine licence under the Gaming Machine Act 2004 (ACT). That Act requires a club to contribute 8% of its net gaming machine revenue to the

32 CSI MFI-7, 5/8/15.
35 A lower percentage for a particular club may be specified by the Minister in limited circumstances, but that has not occurred for either the CTUC or the WTUC.
Clubs which do not meet the 8\% required community contributions must pay tax, at a rate of 100\%, on the shortfall.\(^{37}\)

19. The current directors of the CTUC are Dean Hall, Jason O’Mara, Jason Jennings, Mark Dymock, Trevor Scott and Rod Driver.\(^ {38}\) Each of those persons is an office bearer of the CFMEU ACT.\(^ {39}\) In order to be an ordinary member of the CTUC, a person must be a financial member of the CFMEU ACT.\(^ {40}\) A person may only be a director of the CTUC if he or she is a financial member of the CFMEU ACT.\(^ {41}\)

20. The current directors of the WTUC are Dean Hall, Jason O’Mara, Jason Jennings, Anthony Vittler, Cameron Hardy and Clyde Stewart. Apart from Clyde Stewart, each of those persons is an office bearer of the CFMEU ACT.\(^ {42}\) As with the CTUC, in order for a person to be an ordinary member of the WTUC that person must be a financial member of the CFMEU ACT and a person may only be a director of the WTUC if he or she is a financial member of the CFMEU ACT.\(^ {43}\)

\(^{36}\) *Gaming Machine Act* 2004 (ACT), s 169; Dean Hall, 4/8/15, T:90.15-24.

\(^{37}\) *Gaming Machine Act* 2004 (ACT), s 172.


\(^{39}\) CSI MFI-7, 5/8/15.

\(^{40}\) CSI MFI-8, 5/8/15, tab 1, p 10, cl 5.4.

\(^{41}\) CSI MFI-8, 5/8/15, tab 1, pp 13-14, cl 8.1.

\(^{42}\) CSI MFI-7, 5/8/15.

\(^{43}\) CSI MFI-8, 5/8/15, tab 2, pp 11, 15, cl ll 5.4, 8.
JLT Discretionary Trusts

21. Two other entities shown on Diagram 1 are the JLT (CSI) Discretionary Trust and the JLT (CSI Member Benefits) Discretionary Trust. The trustee of both trusts is JLT Group Services Pty Ltd (JGS), a wholly-owned subsidiary of Jardine Lloyd Thompson Pty Ltd (JLT). JLT operates a large insurance broking business.

22. The JLT (CSI) Discretionary Trust was established by a trust deed dated 1 June 2012 after fairly lengthy negotiations between the CFMEU ACT and JLT and JGS. Under the trust deed, CETW is described as the Promoter. The trust is also known as the JDT arrangement. The basic aspects are as follows:

(a) The JDT arrangement is an unregistered managed investment scheme. It is not insurance and is not subject to regulation by APRA. The terms of the scheme are set out in the trust deed in combination with Scheme Rules and product disclosure statement (PDS).

(b) Persons may become ‘Members’ of the trust in accordance with the Scheme Rules by completing an ‘Acceptance Form’ and paying the required membership contributions to JLT, as Broker. JLT then pays the contributions to JGS, as Trustee. According to the PDS, the JDT arrangement ‘was established

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to help manage the Members’ risk of accident and sickness, which occur outside of working hours and for which Statutory Worker’s Compensation benefits are not payable.\textsuperscript{46}

(c) The JDT arrangement has two parts: the Scheme Cover and the Insurance Cover. The Scheme Cover provides cover, at the trustee’s absolute discretion, from the trust fund to meet claims by Members. This part of the arrangement is entirely discretionary. The Insurance Cover involves a group insurance policy which is purchased by the trustee for the benefit of the Members and their declared employees. The Insurance Cover provides cover, in accordance with the terms and conditions of the policy, in respect of sickness and accident claims by persons insured that are in excess of the lesser of $100,000 and the ‘Scheme Cover Aggregate Limit’. The ‘Scheme Cover Aggregate Limit’ is an annual limit that varies from year to year (for 2015/16 it is $525,500).\textsuperscript{47} It erodes for each claim which is paid by the trustee. Under the group insurance policy, there are three levels of cover – bronze, silver and gold – with gold providing the highest level of cover.

23. The amount of the membership contributions required to be paid by an employer varies depending on whether the employer selects bronze, silver or gold cover for its employees. Part of the membership contribution is a ‘Promoter’s fee’ which is paid by JGS to CETW as

\textsuperscript{46} CSI MFI-3, 4/8/15, Vol 2, p 580.

\textsuperscript{47} CSI MFI-15, 6/8/15, tab 7, Appendix A.
trustee of the CSI Trust. This fee is described as ‘an administrative fee paid for the distribution, contribution collection and other related services provided by the Promoter’.\textsuperscript{48} Both the cost of the different levels of cover and the amount of the Promoter’s fee varies from year to year. However, the Promoter’s fee is in the order of 10–15% of the weekly contributions paid by employers. The table below sets out the weekly contributions required to be paid by an employer per employee from 2012 to 2015 along with the amount of the Promoter’s fee, which is the same dollar amount for each level of cover:\textsuperscript{49}

<table>
<thead>
<tr>
<th>Period</th>
<th>Bronze (incl GST)</th>
<th>Silver (incl GST)</th>
<th>Gold (incl GST)</th>
<th>Promoter’s fee (ex GST)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/2013</td>
<td>$15.00</td>
<td>$18.00</td>
<td>$22.50</td>
<td>$2.00</td>
</tr>
<tr>
<td>2013/2014</td>
<td>$16.00</td>
<td>$19.00</td>
<td>$23.50</td>
<td>$2.00</td>
</tr>
<tr>
<td>2014/2015</td>
<td>$17.00 ($18.04 with WC Top-Up)</td>
<td>$20.00 ($21.32 with WC Top-Up)</td>
<td>$24.50</td>
<td>$2.45</td>
</tr>
</tbody>
</table>

24. The JLT (CSI Member Benefits) Discretionary Trust was established by a trust deed dated 18 March 2014 between JGS and CETW as trustee for the CSI Trust. The purpose of the arrangement is to provide financial members of the CFMEU ACT with a range of benefits including travel insurance and emergency transport cover. The structure of the CSI Member Benefits JDT arrangement is similar to the CSI JDT arrangements save in two respects. One is that the ‘Members’ are financial members of the CFMEU ACT. The other is

\textsuperscript{48} CSI MFI-3, 4/8/15, Vol 2, p 589 (Acceptance Form).

that the membership contributions are paid by the CFMEU ACT on behalf of its members. On at least two occasions, it appears that the CFMEU ACT funded the payment of membership contributions from payments made to the CFMEU ACT by CETW.50

D – A PRELIMINARY POINT: CCW AND THE TERMS OF REFERENCE

25. During the hearing on 4 August 2015, counsel for CCW contended that CCW was not a ‘relevant entity’ within the meaning of the Terms of Reference.51 The term ‘relevant entities’ is defined in paragraph (a) of the Terms of Reference as ‘separate entities established by employee associations or their officers’. CCW accepted that it was a ‘separate entity’. But it submitted that it was not established by an employee association or its officers.52 Its position was that it was established by CTUCCF, which is neither an employee association nor an officer of an employee association.53

26. CCW pressed this objection in written submissions.54 It argued, in effect, that only the entity (here CTUCCF) that made the instrument which brought CCW into being could be said to have ‘established’ CCW. It also submitted that the Terms of Reference ought to be read strictly, because ‘[t]hey delineate the field of operation of the extraordinary invasive powers of the Royal Commission.’

50 CSI MFI-14, 5/8/15, tab 14, pp 123, 129, 130, 132, 133, 134, 137, 140, 142.
54 Submissions of CETW and CCW, 29/10/15, paras 1-3.
At the outset it must be said that the powers of the Royal Commission, though real, are much less ample than many people seem to think. They are not extraordinarily invasive.

Counsel assisting made submissions rejecting the CCW objection to the following effect. They are correct. CCW cited no authority for the proposition that the terms of reference of a Royal Commission must be strictly construed. It is doubtful that any such general principle exists. Section 1A of the *Royal Commissions Act* 1902 (Cth) confers on the Governor-General the power to issue, by Letters Patent, such commissions as the Governor-General thinks fit requiring and authorising inquiry and report into:

> any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

These words granting power are of the greatest amplitude. They negate the view that a strict interpretation must always be placed on the terms of reference of a Royal Commission. In addition, by reason of s 46 of the *Acts Interpretation Act* 1901 (Cth), the provisions of that Act apply to the interpretation of Letters Patent issued pursuant to s 1A of the *Royal Commissions Act* 1902 (Cth). The result is that the correct approach is that advanced by counsel assisting: the Terms of Reference should be given their natural and ordinary meaning, informed by consideration of the context and purpose to be ascertained form reading the Terms of Reference as a whole (and any relevant extrinsic materials). Further, in the present case, the breadth of the matters specified in the Terms of Reference and paragraph (k) (‘any
matters reasonably incidental to a matter mentioned in paragraphs (a) to (ia)’ tend against any principle of strict construction.

29. Even if there were some principle of ‘strict construction’, CCW’s submissions lack merit. As counsel assisting submitted in reply, CCW’s construction elevates form over substance in a way that would stultify the apparent purpose of the Commission’s inquiries. On CCW’s construction if three union officials established company A and the same three officials then caused company A to establish company B, then although company A could be a relevant entity, company B could not be. The consequence is that the governance of company B would be outside the Terms of Reference, even though the only human actors involved in the establishment of company B were the three union officials.

30. Further, CCW’s construction of paragraph (a) depends on the assumption that there can be only one person who ‘establishes’ an entity. That assumption is wrong. In the ordinary usage of language, an entity can be said to be established by a person if that person plays an important or significant role in bringing that entity into being. There may be a number of persons who can be said to have established an entity. Contrary to CCW’s submissions the issue calls for a factual inquiry, not a purely formal one.

31. As set out above, CCW was registered as a public company limited by guarantee on 7 February 2008. Its initial directors were Sarah

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55 Submissions of Counsel Assisting, 11/11/15, para 6(b).
56 See para 15.
Schoonwater, Dean Hall and Julie Evans.\textsuperscript{57} The consent of directors and proposed directors of a public company is necessary before they can be appointed validly: \textit{Corporations Act} 2001 (Cth), ss 120, 201D. As at 7 February 2008, Sarah Schoonwater and Dean Hall were respectively the Secretary and Assistant Secretary of the CFMEU.\textsuperscript{58} Sarah Schoonwater and Dean Hall were the only two directors of CTUCCF who executed the constitution of CCW on behalf of CTUCCF.\textsuperscript{59} As recorded above,\textsuperscript{60} Dean Hall’s evidence was that CCW and CTUCCF were separate entities established to ‘benefit the members [of the CFMEU] and their families in the communities they live in’ and that their ‘end goal’ was for ‘the end stakeholder, which is our members of the CFMEU’. Hence at the very least CCW can be said to have been established by two officers of the CFMEU ACT, being Sarah Schoonwater and Dean Hall, if not the union itself.

32. Accordingly, CCW’s submissions are rejected. CCW is a ‘relevant entity’ within the Terms of Reference.

\textbf{E – FUNDS FLOW IN RELATION TO CETW AND CCW}

33. This section, which is based on and accepts counsel assisting’s submissions, summarises the flow of funds in relation to CETW and CCW. A convenient illustration of the funds flow for the 2013 and 2014 calendar years can be seen below in Diagrams 2 and 3 respectively. Unless otherwise stated, all amounts are exclusive of GST.

\textsuperscript{57} CSI MFI-3, 4/8/15, Vol 1, pp 253-254.
\textsuperscript{58} CSI MFI-7, 5/8/15.
\textsuperscript{59} CSI MFI-3, 4/8/15, Vol 1, p 298.
\textsuperscript{60} Paragraph 6.
Diagram 2 (CSI MFI - 5)
Flow of payments made in relation to EBAs with the CFMEU ACT 2013

Employers with CFMEU enterprise bargaining agreements (EBA)

Other CSI Clients

Total payments for training CY13 $481,803

Income protection insurance premiums CY13 between $16 and $20 per employee

EBA contributions CY13 $16,995

Woden Tradesmen’s Union Club Ltd
Donations CY13 $218,750

Canberra Tradesmen’s Union Club Ltd
Donations CY13 $218,750

JLT (CSI) Discretionary Trust
Trustee: JLT Group Services Pty Ltd (Non-bank) Promoter: CFU Ltd

Training relation CY13 $85,525

Promoters fees (also Trust fees) CY13 $50,782

Management fees CY13 $214,829

Payments for training and other CY13 $249,126

JLT (CSI) Discretionary Trust

Construction Charitable Works Limited (CCW)

Donation CY13 $718,350

ACT Building & Construction Ind TFA

Application for training relate

Training relation paid to CSI CY13 $481,801

Creative Safety Initiatives Trust (CSI)
(Trustee: Construction Employment Training and Welfare Ltd)

Income $1,239,131
Expenses $1,348,493
Profit $579,691

Trust Distribution CY13 $718,350
Trust Distribution CY13 $579,691

Construction Forestry Mining and Energy Union - Construction and General Division, ACT (CFMEU ACT)

Donation CY13 $718,350

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Diagram 3 (CSI MFI - 6)

Flow of payments made in relation to EBA’s with the CFMEU ACT 2014

Employers with CFMEU enterprise bargaining agreements (EBA)

- Other CSI Clients
  - Total payments for training CY14 $734,423
- ACT Building & Construction Ind TFA
  - Application for training rebate
  - Training rebates paid to CSI CY14 $452,555
- JLT (CSI) Discretionary Trust
  - Trustee: JLT Group Services Pty Ltd (landline)
  - Promoter: CEFW Ltd
  - Promoter’s fees (aka Trust fees) CY14 $308,794
  - Training rebates CY14 $29,521
  - EBA Contributions CY14 $26,817
- Woden Tradesmen’s Union Club Ltd
  - Donations CY14 $157,500
- Canberra Tradesmen’s Union Club Ltd
  - Donations CY14 $157,500
- Construction Charitable Works Limited (CCW)
  - Surplus distribution CY14 $120,066
  - Management fees CY14 $234,020
  - Payments for training and other CY14 $209,721
- CREATIVE SAFETY INITIATIVES TRUST (CSI)
  - (Trustees: Construction Employment Training and Welfare Ltd)
  - Income $1,855,330
  - Expenses $3,062,990
  - Profit $790,660
  - Trust Distribution CY14 $790,660
- Construction Forestry Mining and Energy Union - Construction and General Division, ACT (CFMEU ACT)
  - Donation CY14 $555,817

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CETW as trustee for the CSI Trust

34. CETW as trustee for the CSI Trust has five main sources of income.

35. The first is course fees paid by clients for training services provided by CETW to or for those clients. In 2013, this amount was $485,803.\(^{61}\) In 2014, the amount was $794,431.\(^{62}\)

36. Parts of these course fees are paid by employers who have negotiated enterprise agreements with the CFMEU ACT. The CFMEU ACT’s current ‘pattern’\(^{63}\) enterprise agreement contains a clause which is commonly in the following terms:\(^{64}\)

X.1 In order to increase the efficiency and productivity of the Company, a significant commitment to structured training and skill development is required. Accordingly the parties commit themselves to:

(i) maintaining a [sic] regular training and entry level training;

(ii) providing Employees with the opportunity to acquire additional skills through appropriate structured training based on nationally endorsed (i.e. Construction & Property Services Industry Skills Council) competency standards and curriculum;

(iii) actively encouraging Employees to seek funding through the Building and Construction Industry Training Board Funds; and

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\(^{61}\) CSI MFI-14, 5/8/15, tab 1, p 3.

\(^{62}\) CSI MFI-14, 5/8/15, tab 7, p 47.

\(^{63}\) Dean Hall, 5/8/15, T:184.24, 186.15-25.

(iv) actively encouraging Employees to seek formal recognition of their skills (i.e. recognition of prior learning).

X.2 It is agreed that a training program will be developed and delivered by the Approved Training Authority.

X.3 The Company undertakes to utilise the training conducted by the Approved Training Authority which is consistent with the following:

(i) the Company’s business requirements, relevant to the work of the Employees and consistent with the skills development of each employee.

(ii) Training may be taken either on or off the job with all reasonable steps being taken to conduct training in normal working hours.

(iii) If an approved training activity is undertaken during ordinary working hours, the Employee/s concerned shall not suffer any loss of pay.

(iv) Training costs of courses approved by the Company will be met by the Company. Where possible, application will be made to the Building and Construction Industry Training Fund Board.

(v) The Company will not be asked to meet the costs of training undertaken by Employees which was not approved by the Company.

(vi) Leave of absence granted pursuant to this clause shall count as service for all purposes of the Agreement.

X.4 It is agreed that all new Employee’s [sic] to the industry that work on Company projects will be required to complete the entry level industry recognised induction course, commonly known as the ‘White Card’ and it is agreed that the Company will utilise the Approved Training Authority for this purpose.

‘Approved Training Authority’ is defined in the standard definitions clause to mean CETW as trustee of the CSI Trust.
37. The last paragraph of the clause actually requires the company to provide ‘White Card’ training through CETW. The first and second paragraphs are somewhat vague. However, the third paragraph of the clause does require an employer when providing training, consistent with its business requirements, to ‘utilise’ the training provided by CETW. In this context, it is reasonably clear that the effect of this part of the clause is to require employers with a pattern CFMEU ACT enterprise agreement to use CETW exclusively to provide relevant training to employees.

38. Dean Hall gave oral evidence that he had been advised by CETW’s accountant that in general only 6% of the course fees paid to CETW by clients were paid by employers with a CFMEU ACT enterprise agreement. CETW relied on a note explaining how that figure had been obtained. It had been prepared apparently under the direction of CETW’s accountant, Stephen Brennan. However, as illustrated in the table below, the 6% figure was not accurate because it calculated the course fees paid by clients with a CFMEU ACT enterprise agreement as a percentage not of total course revenue, but of some other, much larger, amount.

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65 Dean Hall, 4/8/15, T:53.40-54.37.
<table>
<thead>
<tr>
<th></th>
<th>2013</th>
<th>2014</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CETW analysis (as per CSI MFI-13)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total $ value of EBA customers</td>
<td>A 104,045</td>
<td>101,111</td>
<td>205,156</td>
</tr>
<tr>
<td>Total $ value</td>
<td>B 1,618,54767</td>
<td>2,026,52068</td>
<td>3,645,067</td>
</tr>
<tr>
<td>% of $ value of EBA customers</td>
<td>A/B 6%</td>
<td>5%</td>
<td>6%</td>
</tr>
<tr>
<td><strong>Correct analysis</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total $ value of EBA customers</td>
<td>A 104,045</td>
<td>101,111</td>
<td>205,156</td>
</tr>
<tr>
<td>Total $ value of total course revenue</td>
<td>C 485,80369</td>
<td>794,43170</td>
<td>1,280,235</td>
</tr>
<tr>
<td>% of $ value of EBA customers</td>
<td>A/C 21%</td>
<td>13%</td>
<td>16%</td>
</tr>
</tbody>
</table>

39. In 2013 and 2014, in the order of one-sixth to one-fifth of CETW’s course fees were paid by customers with a CFMEU ACT enterprise agreement. Having regard to the fact that those customers also generated training rebates for CETW71 it is clear that customers with an enterprise agreement generate a significant amount of revenue for CETW, and consequently the CFMEU ACT.

40. The second source of CETW’s funds is training rebates paid to CETW by the ACT Building & Construction Industry Training Fund Authority (TFA). The TFA was established under the Building and Construction Levy Training Authority Act 1999 (ACT). Building and construction work in the ACT covered by that Act is subject to a 0.2% levy which is

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67 This amount *exceeds* the total income recorded in the CSI Trust’s accounts for 2013 of $1,519,151: CSI MFI-3, 4/8/15, Vol 1, p 87. In any event, the recorded income includes substantial amounts from other sources including payments from CCW, training rebates paid by the TFA and Promoter’s fees.

68 This amount *exceeds* the total income recorded in the CSI Trust’s accounts for 2014 of $1,853,330: CSI MFI-3, 4/8/15, Vol 1, p 100. In any event, the recorded income includes substantial amounts from other sources including payments from CCW, training rebates paid by the TFA and Promoter’s fees.

69 CSI MFI-14, 5/8/15, tab 1, p 3.

70 CSI MFI-14, 5/8/15, tab 1, p 47.

71 See para 40.
paid to the TFA. The TFA uses part of those levies to provide a rebate for the costs of training to eligible applicants. Those applicants include employees, employers and registered training organisations.

41. CETW applies to the TFA for funding to undertake training, which is paid by the TFA to CETW upon proof that the training has been completed for a particular client. Whether the amount paid by the TFA is retained by CETW or passed on to the client depends on whether the client has paid the full retail cost of the training or only the ‘gap’ between the retail cost and the amount paid by the TFA.72 In 2013, CETW received $461,48173 in training rebates from the TFA, the majority of which was retained by CETW. The following year, CETW received $452,59574 in training rebates. Again, the vast majority was retained by CETW.

42. The third source of CETW’s funds is ‘gap payments’ made by CCW to CETW to contribute to the cost of training apprentices. As part of its activities, CETW staff carry out some training of apprentices at the Canberra Institute of Technology.75 In relation to that training, CCW pays CETW the ‘gap’ between the usual retail price of the training course offered by CETW and the rebate paid to CETW by the TFA.76

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72 Dean Hall gave evidence that the training rebates were paid directly by the TFA to workers, who then paid the money to CETW: Dean Hall, 4/8/15, T:53.32-37. However, Jason Jennings’s evidence was that the payments were received from the TFA by CETW: Jason Jennings, 5/8/15, 215.33-216.6. Jason Jennings’s evidence is supported by CETW’s financial records.

73 CSI MFI-14, 5/8/15, tab 1, p 3.

74 CSI MFI-14, 5/8/15, tab 7, p 47.

75 Jason Jennings, 6/8/15, T:325.3-33.

76 See Dean Hall, 4/8/15, T:87.12-88.28.
In 2013, the gap payments in relation to apprentice training were $138,874.\textsuperscript{77} In 2014, they were $163,484.\textsuperscript{78} CCW also pays additional amounts to CETW for other unspecified training.

43. The fourth main source of CETW’s income is a management fee paid to CETW by CCW. CCW has no employees of its own. Instead it utilises CETW’s staff for which it pays a fee. The annual fee from October 2012 onwards has been $214,829.\textsuperscript{79} Issues concerning the amount of that management fee are considered below.\textsuperscript{80}

44. The final source of CETW’s income is in the form of Promoter’s fees paid by JGS as the trustee of the JLT (CSI) Discretionary Trust. In 2013 and 2014, the fee was $90,781\textsuperscript{81} and $108,794 respectively.\textsuperscript{82}

45. The majority of CETW’s expenses concern employee related costs such as wages, superannuation, provision for annual and long service leave, travel costs and fringe benefits expenses. In 2013, these costs totalled $701,278 (approximately 61% of total expenditure). In 2014, these costs totalled $722,215 (approximately 65% of total expenditure).

46. As discussed above,\textsuperscript{83} profit of the CSI Trust is distributed solely to the CFMEU ACT. In 2013, the total profit distributed to the CFMEU

\textsuperscript{77} CSI MFI-14, 5/8/15, tab 1, p 3.
\textsuperscript{78} CSI MFI-14, 5/8/15, tab 7, p 48.
\textsuperscript{79} CSI MFI-10, 5/8/15.
\textsuperscript{80} See paras 60-97.
\textsuperscript{81} CSI MFI-14, 5/8/15, tab 1, p 3.
\textsuperscript{82} CSI MFI-14, 5/8/15, tab 7, p 48.
ACT was just over $390,000. The following year, the profit distributed was just over $790,000.

CCW

47. Like CETW, CCW has a number of sources of revenue. Its principal source of funds is donations paid by the CTUC and WTUC. In 2013, each club made a donation of $218,750. Together these donations represented just over two-thirds of CCW’s entire revenue.84 In 2014, each club made a donation of $137,500 which together represented just under 50% of CCW’s revenue.85 Reports lodged by the CTUC and the WTUC for the 2013–2015 financial years with the ACT Gaming and Racing Commission declared that the donations paid to CCW were ‘charitable and social welfare contributions’ for the purposes of ‘drug and alcohol training’ or the provision of such training.86

48. Other than donations from the clubs, CCW’s main regular sources of funds are as follows:

(a) CCW holds an annual charity breakfast which in 2013 and 2014 generated in the order of $100,000 in donations in each year.

83 Paragraph 12.
84 CSI MFI-14, 5/8/15, tab 5, p 43.
85 CSI MFI-14, 5/8/15, tab 11, p 105.
CCW receives a relatively modest amount – around $30,000 to $40,000 per year – from vending machines on building sites.

CCW also receives funds pursuant to a clause contained in the CFMEU ACT pattern enterprise agreement (the CCW Clause). The standard clause provides as follows:\(^{87}\)

Employees agree to donate $1.00 per week from the Companies ACIRT contributions as detailed in Clause [x] to Construction Charitable Works ABN 65 129 595 651 a construction charity set up to provide welfare services which is determined to improve the lives of building workers and their families during a time of need.

The Employee authorises that Company to donate $1.00 per week from their ACIRT Contributions as detailed in Clause [x] to Construction Charitable Works.

In 2013 and 2014 respectively, the payments from employers to CCW totalled almost $37,000 and $27,000 respectively.\(^{88}\)

In addition to these regular sources, in early 2014 CCW received a surplus distribution of $126,066 from the JLT (CSI) Discretionary Trust.\(^{89}\)

Apart from the payments to CETW outlined above, CCW makes relatively few other payments, other than for office expenses and motor vehicle costs. In 2013, approximately 83% of CCW’s expenses

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\(^{88}\) CSI MFI-14, 5/8/15, tab 5, p 44 and tab 11, p 105.

\(^{89}\) CSI MFI-14, 5/8/15, tab 11, p 105.
involved payments to CETW. In 2014, the figure was 81%. CCW pays a relatively modest amount for the provision of counselling services (approximately $10,000 per annum). CCW also pays an amount to reserve emergency accommodation.

F – TOPICS OF CONCERN

CETW: governance failures

51. The evidence disclosed some obvious governance failures in respect of CETW.

52. Neither Stephen Brennan nor Robert Docker was validly appointed as a director of CETW under CETW’s constitution. Only elected officials of the CFMEU ACT may be appointed as directors of CETW. Neither Stephen Brennan nor Robert Docker was an elected official of the CFMEU ACT when they were purportedly appointed as directors on 3 March 2014. Accordingly, they were never validly appointed directors of CETW.

53. As will be seen, there are reasons to conclude that the officials of the CFMEU ACT wanted CETW to be considered publicly as separate from the union. However, Dean Hall denied that the replacement of Jason O’Mara and Jason Jennings, both elected CFMEU ACT officials,

90 CSI MFI-14, 5/8/15, tab 5, p 43 ($463,955 in payments to CETW out of total expenses of $558,900 which figure included $17,472 in depreciation).

91 CSFI MFI-14, 5/8/15, tab 11, p 105 ($466,270 in payments to CETW out of total expenses of $572,358 which figure included $34,188 in motor vehicle depreciation).

92 See para 13.

93 See para 120(d)-(e).
by Stephen Brennan and Robert Docker had anything to do with the announcement of the Royal Commission, or that the appointment was made urgently. 94 Dean Hall said that the decision to appoint Stephen Brennan and Robert Docker had actually been made approximately 12 months earlier – presumably around early 2013 – but through tardiness on his part and that of the company secretary (Stephen Brennan) the decision had not been enacted. 95 Dean Hall did not refer to CETW’s constitution when the appointment was made. 96 Whatever the motivations for replacing the directors, Dean Hall’s failure to comply with the clear provisions of CETW’s constitution was a significant governance failure.

54. In addition, the meetings of the board of directors of CETW from January 2011 to February 2015 were irregular. The minutes of board meetings in that period record the minutes as those of:

- Creative Safety Initiatives Pty Ltd
- Construction Employment Training & Welfare Ltd
- Creative Safety Initiatives Trust
- All Trading as Creative Safety Initiatives (emphasis in original)

55. The title of the minutes suggests that Creative Safety Initiatives Pty Ltd and CETW held simultaneous board meetings. However, Dean Hall

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95 Dean Hall, 4/8/15, T:22.27-36, 33.21-27.
96 Dean Hall, 4/8/15, T:33.33-35.
denied that and said that the ‘actual company’ was CETW, that the minutes were ‘misleading’ and should say ‘Construction Employment Training and Welfare’. However, Dean Hall’s evidence is contradicted by the fact that the minutes record numerous occasions when Robert Docker, Rod Driver and Trevor Scott moved or seconded motions at times when those individuals were not directors of CETW. Whilst guests may be permitted to attend directors’ meetings, only directors are entitled to propose and vote on resolutions of the meeting. The effect on the validity of the meeting will depend on the particular circumstances of the meeting. Those circumstances are not generally apparent from the minutes. But at least the meetings after March 2014 were invalid for want of a proper quorum. At the same time, it could not be said that the minutes are simply those of Creative Safety Initiatives Pty Ltd since the bulk of the minutes are devoted to matters concerning CETW.

56. The irresistible inference is that from January 2011 to February 2015 CETW held joint board meetings with Creative Safety Initiatives Pty Ltd with the directors of each company acting as ‘de facto’ directors of the other. Needless to say this is another substantial governance failure. Basic principle requires a company to be controlled by its properly appointed directors and not outsiders.

98 Dean Hall, 4/8/15, T:80.8-19.
57. In its submissions, CETW acknowledged these deficiencies in governance and acknowledged that they require rectification.\textsuperscript{101} However, CETW disputed the significance attributed to the deficiencies by counsel assisting.\textsuperscript{102}

58. Counsel assisting submitted that the significance of the governance failures identified was that they highlighted the lack of proper accountability and transparency in a very substantial part of the CFMEU ACT’s operations.\textsuperscript{103} The CFMEU ACT’s financial statements for the 2013 and 2014 years record that the continuing operation of the branch is dependent ‘upon the financial support by the Canberra Tradesmen’s Union Club’.\textsuperscript{104} In 2013 and 2014, the financial support from CTUC totalled $718,320 and $555,817 respectively.\textsuperscript{105} In 2013 and 2014, the CFMEU ACT received $390,052 and $790,840 respectively from CETW.\textsuperscript{106} From those figures, counsel assisting submitted that it was apparent that at least in 2014, if not 2013 as well, the continuing operation of the CFMEU ACT was dependent upon the revenue received from CETW. Yet members of the union did not have visibility into CETW’s operations. And the directors of CETW were not accountable to the members of the union for its operations, even though it is a critical part of the union’s operations.

59. Counsel assisting’s submissions on this point must be accepted.

\textsuperscript{101} Submissions of CETW and CCW, 29/10/15, paras 4-5.
\textsuperscript{102} Submissions of CETW and CCW, 29/10/15, para 6.
\textsuperscript{103} Submissions of Counsel Assisting, 20/10/15, para 51.
\textsuperscript{104} CSI MFI-3, 4/8/15, Vol 4, pp 1637, 1671.
\textsuperscript{105} CSI MFI-3, 4/8/15, Vol 4, pp 1637, 1671.
\textsuperscript{106} CSI MFI-14, 5/8/15, tab 1, p 1; tab 7, p 47.
CCW: diversion of funds for non-charitable purposes and breaches of officers’ duties

60. Counsel assisting also identified less serious breaches of corporate governance requirements by CCW. These breaches were accepted by CCW in its submissions.\textsuperscript{107} In particular, CCW’s constitution requires board meetings to be convened at least once every three months.\textsuperscript{108} This requirement has a fairly obvious purpose. It ensures that the activities of the charity are subject to regular supervision by the board of directors. During the period from November 2010 to October 2012, the requirement was met. However, after October 2012 meetings of the board of CCW became increasingly less frequent. Board meetings were held six to eight months apart. Thus CCW board meetings were held on 24 October 2012, 29 May 2013, 18 November 2013, 24 July 2014 and 25 February 2015. CCW’s constitution also requires signed minutes of board meetings.\textsuperscript{109} However, the copies of the minutes for the meetings held on 24 October 2012 and 29 May 2013 produced to the Commission were not signed.\textsuperscript{110}

61. The much more serious issues relating to CCW concern the ‘management fee’ paid by CCW to CETW. As noted above,\textsuperscript{111} CCW does not employ any staff. Instead, CETW’s employees perform work on behalf of CCW. CCW pays CETW a ‘management fee’ for the CCW-related work performed by those staff.

\textsuperscript{107} Submissions of CETW and CCW, 29/10/15, para 7.
\textsuperscript{108} CSI MFI-3, 4/8/15, Vol 1, p 289 (cl 24.1(a)).
\textsuperscript{109} CSI MFI-3, 4/8/15, Vol 1, p 293 (cl 32.2).
\textsuperscript{110} CSI MFI-3, 4/8/15, Vol 1, pp 417, 427.
\textsuperscript{111} Paragraph 43.
62. Counsel assisting submitted that the ‘management fee’ was substantially inflated in the order of $100,000–$150,000 per annum, that as a result CCW had diverted money for non-charitable purposes and was no longer operating as a charity, and that in determining the amount of the ‘management fee’ each of Jason Jennings, Dean Hall and Jason O’Mara may have breached their general law and statutory duties to CCW.\(^{112}\) CCW made no submissions on this topic. However, the written submissions on behalf of the CFMEU and the three officials contested counsel assisting’s conclusions principally on the ground that, factually, the ‘management fee’ was within an objectively reasonable range.\(^{113}\)

63. In assessing those submissions, there are two critical factual questions. What is the ‘management fee’ paid for? How is the amount of the fee calculated?

64. Dean Hall, who is the chair of both CETW and CCW,\(^ {114}\) gave evidence that CETW earned the fee from CCW for ‘management of the program and services into the construction industry and administration.’\(^ {115}\) He later expanded on the non-administrative component of the fee by explaining that CETW employed two officers, Richard ‘Dick’ Garrety and Duncan Bennett-Burleigh, who were both training officers in the CSI business and also ‘field officers’ for CCW who assisted with the

\(^{112}\) Submissions of Counsel Assisting, 20/10/15, paras 69-75.

\(^{113}\) Submissions of the CFMEU, 29/10/15, pp 95-96, paras 3-11.

\(^{114}\) Dean Hall, 5/8/15, T:202.42-203.7.

\(^{115}\) Dean Hall, 4/8/15, T:44.41-46. See also T:120.14-16.
welfare of participants in the construction industry.  Dean Hall could not give an indication of the proportion of time Dick Garrety and Duncan Bennett-Burleigh spent in their welfare role for CCW but said that Jason Jennings would be able to assist on that topic.  Dean Hall’s evidence was that he was not involved in the day-to-day operation of the companies, although he estimated that Jason Jennings spent approximately 50% of his time performing CCW related tasks.  Dean Hall said that he was satisfied that the management fee was fair and reasonable, although he could not provide any reason why he thought it was.

65. Jason O’Mara was a director of CCW between 23 March 2010 and 28 June 2013.  He was a director of CETW between 29 July 2010 and 3 March 2014.  He said that whilst he was a director of CCW he did not think that the management fee was inflated.  He did not make any direct inquiries as to what was done in order to earn the fee.  At one point in his evidence he said that having regard to the importance of the work done by CCW he ‘couldn’t see that any management fee would be too much for the work that [CCW] did’.  He explained that this did not mean that he would have thought any management fee was appropriate, that the setting of the fee ‘was an operational decision made inside the company’ and said that ‘there was nothing that was

116 Dean Hall, 4/8/15, T:46.31-48.16.
117 Dean Hall, 4/8/15, T:48.18-23.
118 Dean Hall, 4/8/15, T:45.1-16.
119 Dean Hall, 4/8/15, T:119.32-120.16.
120 Jason O’Mara, 6/8/15, T:343.34-42.
121 Jason O’Mara, 6/8/15, T:344.4-6.
brought to my attention that would have me believe that they were not fair figures’.122

66. The initial evidence of Jason Jennings was that the fee for the 2013 and 2014 calendar years, which was $214,829 (excluding GST) in each year,123 was based on an ‘informal formula’ being 1/3 of the total wages bill of CETW’s staff but the amount could change from year to year.124 The budgeted management fee for 2015 was $236,000,125 which is almost exactly the GST inclusive amount of the fee paid in 2013 and 2014, being $236,311.90.

67. The evidence of Jason Jennings about the calculation of the management fee was contradicted by an email dated 4 October 2012 at 9.06am from Glenn Carlos, the then CFO of the CFMEU ACT, CETW and CCW, to Jason Jennings. In that email Glenn Carlos wrote:126

JJ

As we discussed, now that the full CSI team is in place and providing services to CCW we need to adjust the management fee payable to CCW to CSI.

…

You indicated that in terms of expected effort that the fee should be based on 5 staff spending approximately 50% of their time on CCW related matters (Dick, Jess, John, Glenn and Jason).

122 Jason O’Mara, 6/8/15, T:344.8-14.
123 See CSI MFI-5, 4/8/15 and CSI MFI-6, 4/8/15 and notes.
125 CSI MFI-3, 4/8/15, Vol 1, p 463.
126 CSI MFI-10, 5/8/15, p 2.
Based on the October 2012 approved wage rates the total annualised wages bill including ACIRT for these five staff is $429,658.75.

The future rate will therefore be set at $214,829 pa, or $17,902 per month. With your agreement I will apply this rate of payment from October 2012.

Jason Jennings gave Glenn Carlos the ‘go ahead’ in an email at 10.30am the same day.

68. The five staff identified in Glenn Carlos’s email were Dick Garrety, Jess Dean, John Dunmore, Glenn Carlos and Jason Jennings. The following evidence was given about the CCW-related activities of those persons:

(a) Jason Jennings said that about three-fifths of his time was involved in a more training related role, with the remainder related to CCW ‘fieldwork’. Jason Jennings referred to the welfare related work conducted on behalf of CCW as ‘intake work’ which could be conducted either at the CCW office or in the ‘field’ on work sites by himself or other ‘field officers’. The ‘intake work’ would involve staff providing welfare assistance to individuals who sought CCW’s assistance or were referred to CCW. Depending on the particular circumstances of a client, the staff might help refer a client who had sought assistance to a counsellor, to a drug and alcohol rehabilitation program or to OzHelp which was

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another organisation providing counselling and other forms of welfare support for construction workers.

(b) Richard Garrety was employed by CETW as a ‘Training and Welfare Officer’.\textsuperscript{130} He, along with Duncan Bennett-Burleigh and Jess Dean, transferred employment from CITEA to CETW in around July 2011.\textsuperscript{131} Jason Jennings estimated that Dick Garrety would have spent approximately two-thirds of his time in CSI training related activities and one-third of his time in CCW welfare related activities as a field officer.\textsuperscript{132} However, although Dick Garrety’s position description, which was signed by Jason Jennings, contained considerable detail about Dick Garrety’s training and assessment responsibilities, it contained no description of his welfare role. The same was true in respect of Duncan Bennett-Burleigh who was also a ‘Training and Welfare Officer’ who had a very similar position description to Dick Garrety’s.\textsuperscript{133}

(c) Jess Dean commenced employment with CETW in administration in around July 2011 having transferred employment from CITEA.\textsuperscript{134} Jason Jennings estimated that at the end of 2011, Jess Dean was spending two-thirds if not a little more of her time in CSI training related activities and by

\textsuperscript{130} CSI MFI-12, 5/8/15; Jason Jennings, 5/8/15, T:210.15-16.
\textsuperscript{131} Jason Jennings, 5/8/15, T:210.7-23.
\textsuperscript{132} Jason Jennings, 5/8/15, T:210.40-211.5, 212.33-213.12, 218.27-34.
\textsuperscript{133} CSI MFI-11, 5/8/15.
\textsuperscript{134} Jason Jennings, 5/8/15, T:210.12-23.
2012 was ‘100 per cent doing CSI work’. The following day, Jason Jennings tried to qualify his earlier evidence by saying that when he affirmed that Jess Dean was ‘100 per cent doing CSI work’ in 2012 in fact he meant ‘CSI/CCW work’. In fact, as a result of increased training CETW hired another administration officer, Diane Vanderdong, in early 2012 to assist with the office work. Initially, Diane Vanderdong only performed training related work. But Jason Jennings said that at some later point in time she started to perform some intake work for CCW, although it was not her main role.

(d) John Dunmore commenced employment as a training and welfare officer at some point in 2012, although he ceased employment on 19 December 2012. Jason Jennings estimated that approximately two-thirds of John Dunmore’s time was spent in relation to CSI training related activities. John Dunmore’s position was filled by Leon Arnold, working part time 3 days a week. He was brought on to deliver short courses in the CSI business.

135 Jason Jennings, 5/8/15, T:211.7-12, 216.18-33.
136 Jason Jennings, 6/8/15, T:305.41307.3.
that Leon Arnold would ‘probably not’ have spent 50% of his
time on field officer welfare work. But he later changed his
answer to say he did not know.\textsuperscript{143} Leon Arnold resigned in
November 2013 at which point there were only two training
and welfare officers, Dick Garrety and Duncan Bennett-
Burleigh.

\textbf{69.} The evidence summarised in the previous paragraph is largely based on
the oral testimony of Jason Jennings. As counsel assisting submitted,
even if that evidence were accepted at its highest, it is apparent that not
one, let alone all, of the five staff members identified in the Glenn

\begin{flushright}
\begin{itemize}
\item 143 Jason Jennings, 5/8/15, T:217.10-218.11.
\item 144 Jason Jennings, 5/8/15, T:214.7-13; CSI MFI-3, 4/8/15, Vol 1, p 410.
\item 146 Jason Jennings, 5/8/15, T:218.43-47.
\item 147 Jason Jennings, 5/8/15, T:214.44-215.16, 224.36-225.2.
\end{itemize}
\end{flushright}
Carlos email were spending 50% of their time on CCW related activity in 2013 and 2014. Rather, on the figures of Jason Jennings, the five employees were spending approximately one-third of their time on CCW related tasks. If that proportion were accepted, the management fee in 2013 and 2014 should have been $143,219, more than $70,000 less than the $214,829 actually paid. At a minimum the ‘management fee’ was inflated by around $70,000. The CFMEU made no challenge to this reasoning.

70. However, counsel assisting went on to argue that it should be in fact concluded that Jason Jennings substantially exaggerated the estimates which he gave of the time spent by CETW employees on CCW related activities and that the ‘management fee’ paid in those years was inflated by at least $100,000 and in fact closer to $160,000.\textsuperscript{148}

71. Counsel assisting’s analysis in support of that submission proceeded on the following basis.

72. In relation to the intake/welfare work performed, during the course of the hearing CCW provided copies of ‘intake forms’ completed in relation to clients that had contact with CCW in 2013 and 2014 in relation to welfare issues.\textsuperscript{149} There were 52 such forms. Those intake forms recorded a total during those two years of:

(a) 73 face-to-face contacts between clients and CETW staff; and

\textsuperscript{148} Submissions of Counsel Assisting, 20/10/15, para 60.

\textsuperscript{149} CSI MFI-32, 7/9/15.
(b) 178 calls, attempted calls, texts or emails between clients and CETW staff.

73. For the purposes of determining the amount of time spent in relation to welfare-work, counsel assisting then assumed that:

(a) each face-to-face contact would, on average, involve 4 hours of work by a CETW staff member; and

(b) each call, attempted call, text or email would, on average, involve 1 hour of work by a CETW staff member.

74. It was not contested that these assumptions were very favourable to CCW. It is unlikely that a face-to-face contact would, on average, have involved half a day. It is even more unlikely that calls, attempted calls, texts and emails would, on average, have involved 1 hour of work by a CETW staff member.

75. Based on these very favourable assumptions, the intake forms reflected an average of 470 hours of work by CETW staff members on CCW intake/welfare work over a two-year period i.e. an average of 235 hours of work per year. Assuming a 7 hour working day, counsel assisting submitted, correctly, that this was equivalent to just under 34 full time working days per year or approximately 0.15 full time equivalent (FTE) staff annually (assuming 229 working days in a year).

76. Next, counsel assisting addressed the evidence given by Jason Jennings that a proportion of the contacts with clients were not recorded on
‘intake forms’, nor were there any records of any kind recording CCW’s contacts with these clients.\textsuperscript{150} He initially estimated that between 20–30\% of clients would \textit{not} have an intake form, but the following day, estimated that only 20–40\% of clients \textit{would have} an intake form.\textsuperscript{151}

77. Counsel assisting submitted that this volte-face was unsatisfactory and reflected poorly on Jason Jennings’ credit. That submission, which was not challenged, must be accepted. Jason Jennings could not offer any explanation for the change in his evidence. As counsel assisting submitted, the most likely explanation is that Jason Jennings realised, after it was put to him that the records were consistent with an average intake of only one person per fortnight,\textsuperscript{152} that it was necessary to exaggerate the number of persons who had ‘fallen off the filing system’ if his evidence that the ‘management’ fee was reasonable was to be accepted. His demeanour in giving evidence was generally poor. The idea that a charity providing assistance to persons apparently in distress would not keep any record of its dealings with 60–80\% of its clients is inherently implausible. For these reasons, Jason Jennings’ earlier estimate that between 20–30\% of CCW’s clients were not recorded on intake forms is preferred.

78. Counsel assisting then used Jason Jennings’s initial estimate to reach a conclusion that on average in 2013 and 2014 between 0.18–0.22 FTE staff of CETW were engaged annually in CCW intake and field work.


\textsuperscript{151} Jason Jennings, 5/8/15, T:223.24-26; 6/8/15, T:314.32-34.

\textsuperscript{152} Jason Jennings, 6/8/15, T:313.45-314.5.
That work was principally carried out by Jason Jennings and two training and welfare officers. Based on the annual 2012–2013 payroll, the average gross wages and entitlements (including superannuation and ACIRT contributions) paid to Jason Jennings and the two full time training and welfare officers, Dick Garrety and Duncan Bennett-Burleigh, was approximately $108,000.\footnote{CSI MFI-21, 7/9/15.} Based on the number of FTE staff identified above, counsel assisting submitted that approximately $20,000–$25,000 of CETW’s annual wages bill could reasonably be attributed to CCW intake/welfare work.

79. Counsel assisting also analysed the position on the assumption that Jason Jennings’ higher figures concerning the proportion of clients without intake forms or a record of any kind was to be accepted. On the basis of those figures, counsel assisting submitted that it would still only result in between 0.37–0.75 FTE staff of CETW being engaged annually in CCW intake/welfare work. This is equivalent to between $40,000-$81,000 of CETW’s annual wages bill being attributed to CCW intake/welfare work.

80. No submission was made challenging any part of the above reasoning. It is true that it rests on the basis of certain assumptions about the average length of time spent in relation to tasks depicted on the intake forms. However, as indicated above, those assumptions are very favourable to CCW, and it is no doubt for this reason that no challenge was made to them. For reasons already given, a conclusion that 60–80% of the welfare work done by CCW was not recorded by it cannot be accepted. Even allowing a substantial profit margin to CETW, an
objectively reasonable range for the cost to CETW of the CCW-related welfare work could not be outside the $20,000–$50,000 range.

81. The next part of counsel assisting’s analysis sought to estimate the cost of the financial and administrative work performed by CETW staff for CCW. Counsel assisting submitted that in terms of financial and administrative work, Jason Jennings’s evidence that Glenn Carlos spent 30% of his time in relation to CCW’s finances was also unbelievable. CCW employs no staff. In comparison with both the CFMEU ACT and CETW, for which Glenn Carlos was also responsible, its finances are simple. CCW’s only activity other than the payment of money – which would involve a limited amount of administrative work – is in organising an annual charity breakfast. Even accepting that Glenn Carlos spent 30% of his time on CCW-related tasks, counsel assisting submitted that the combined administrative and financial work for CCW could not reasonably be said to require more than 0.5 FTE staff of CETW annually. Based on the annual 2012–2013 payroll, the average gross wages and entitlements (including superannuation) paid to Glenn Carlos and Jess Dean, the full-time administrative assistant, was just under $65,000.154 Fifty percent of that wages bill is $32,500.

82. The CFMEU submitted that counsel assisting did not examine or attempt to value the labour cost associated with the administrative work involved in collecting money under the CCW clause and in organising and convening the annual charity breakfast.155 Apparently

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154 CSI MFI-21, 7/9/15.
155 Submissions of the CFMEU, 29/10/15, p 96, paras 7-9.
relying on Dean Hall’s evidence, the CFMEU submitted that the evidence was that the collection of money under the CCW clause was burdensome and difficult.

83. As counsel assisting pointed out in reply, any reliance on Dean Hall’s evidence about the difficulties involved in collecting money faces significant hurdles given his other evidence that he was not involved in the day-to-day operations of the CETW and CCW. Further, it was not correct to say that counsel assisting did not take account of the administrative work involved generally or in relation to the charity breakfast specifically. As set out above, the analysis allowed 0.2 FTE staff annually for the administrative work involved i.e. one staff member spending 1 day per week every working week of the year in relation to administrative matters.

84. Further, even if one were to accept that a greater amount could reasonably be paid for such administrative work, it does not affect the conclusions drawn by counsel assisting. On any view, no more than 0.7 FTE staff annually could reasonably be allocated to the minimal administrative work involved – particularly having regard to the evidence summarised above – with the result that the total wages bills on administrative and financial work could not reasonably be greater than 1 FTE staff annually (i.e. around $65,000).

156 Dean Hall, 4/8/15, T:138.16-32, 143.44-144.19.
157 Submissions of the CFMEU, 29/10/15, p 96, para 8.
158 See para 64.
159 See para 68.
In other words, an objectively reasonable range for the administrative work was somewhere between $32,500 and $65,000. Taken with the range identified above, a reasonable range for the annual management fee in 2013 and 2014 was somewhere between $52,500 and $115,000. That is, on the basis of the whole of the evidence the ‘management fee’ of $214,829 paid in 2013 and 2014 by CCW was inflated somewhere between $100,000 and $160,000.

Counsel assisting submitted that it should be inferred that the purpose of the payment of the inflated ‘management fee’ was to generate revenue for CETW as trustee of the CSI Trust, the profit of which trust would thereafter flow to the CFMEU ACT. This finding was opposed by counsel for the CFMEU on the grounds that (a) the fee was within an objectively reasonable range, (b) there was no document suggestive of any such purpose and (c) the allegation was a serious one.

The first ground has been rejected above. The second ground is specious. It would not be expected that there would be a document attesting to that purpose. The third ground was presumably intended to draw in aid the statements in Briginshaw v Briginshaw.

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160 Paragraph 80.
161 Submissions of Counsel Assisting, 20/10/15, para 69.
162 Submissions of the CFMEU, 29/10/15, p 96, para 11.
163 (1938) 60 CLR 336.
88. In the present case, the inference that the purpose of the payment of the inflated ‘management fee’ was to generate revenue for the CFMEU ACT is supported by a number of matters:

(a) The effect of the inflated management fee was in fact to pass money to CETW, which in turn passed its profits through to the CFMEU ACT.

(b) The fee was inflated to a very substantial extent. That suggests a deliberate purpose to pass through profit.

(c) The fee remained the same in 2013 and 2014 and the same fee was budgeted for 2015, notwithstanding considerable changes in staff over those years and a considerable increase in the CSI business over that period. Again, that suggests a deliberate purpose.

(d) Other than a discussion and a single email with Glenn Carlos, Jason Jennings did nothing to attempt to assess what amount a reasonable management fee would be.

(e) CCW and CETW did not hire a consultant to provide an independent valuation, or adopt any other process to assess what amount the fee should be.

(f) Neither Dean Hall nor Jason O’Mara made any inquiries about the calculation of the fee, notwithstanding that it was a very substantial part of CCW’s expenditure: in both 2013 and
2014 the ‘management fee’ accounted for approximately 38% of CCW’s expenditure.

89. Taken together, those matters amply justify the finding of purpose sought by counsel assisting.

90. Two legal consequences follow from these findings.

91. *First,* it means that monies paid to CCW ostensibly for charitable purposes have been used, not for charitable purposes, but to generate profit for CETW, which profit has in turn flowed directly to the CFMEU ACT. The payment of money by CCW to generate profit for the CFMEU ACT has the consequence that CCW has applied its funds otherwise than for charitable purposes and for the purpose of distributing profit. Accordingly, having regard to its actual activities, CCW is not a ‘charity’ within the meaning of s 5 of the Charities Act 2013 (Cth) since its purposes are not solely charitable (or purposes incidental to charitable purposes). Nor is it a ‘not-for-profit entity’ within the meaning of the Australian Charities and Not-for-Profits Commission Act 2012 (Cth). In addition, the application of money for the purpose of generating profits means that CCW has not satisfied the requirements imposed on registered charities by Governance Standard 1 contained in r 45.5(2) of the Australian Charities and Not-for-Profits Commission Regulation 2013 (Cth). Ceasing to be a charity and failure to comply with the governance standards imposed by that
regulation are grounds for revocation of registration as a registered charity.\textsuperscript{164}

92. Pursuant to s 6P of the \textit{Royal Commissions} Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Australian Charities and Not-for-Profits Commission in order that consideration may be given to whether CCW’s registration as a registered charity should be revoked.

93. \textit{Secondly}, Jason Jennings, Dean Hall and Jason O’Mara may have breached duties which they owe to CCW as officers of the company pursuant to the general law and ss 180 and 181 of the \textit{Corporations Act}.

94. At general law, directors and senior officers of a corporation, such as the Chief Executive Officer, are fiduciaries. They are under a fiduciary duty to the corporation to avoid a conflict between their duty to the corporation and other duties those officers may have to other persons. Section 180(1) of the \textit{Corporations Act} requires directors and other officers of a corporation to exercise reasonable care and diligence in the exercise of their powers and discharge of their duties. Section 181(1) requires directors and other officers of a corporation to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

\textsuperscript{164} See \textit{Australian Charities and Not-for-Profits Commission Act} 2012 (Cth), ss 35-10(1)(a), (c)(ii).
At all relevant times, Jason Jennings has been CEO of both CCW and CETW and Dean Hall has been a director and chair of CCW and CETW. Jason O’Mara was a director of both CCW and CETW between 29 July 2010 and 28 June 2013. In determining the amount of the ‘management fee’ payable by CCW to CETW each of Jason Jennings, Dean Hall and Jason O’Mara were in a position where their duties conflicted. Each had a duty to act in the best interests of CCW – in whose interest it was to pay a low management fee. At the same time each had a duty to act in the best interests of CETW – in whose interest it was to charge a high management fee. They were each in a classic position of conflict.\(^{165}\) It was necessary for those individuals to take steps to ameliorate that conflict, such as by appointing an independent valuer to determine the management fee payable.

The CFMEU appeared to submit that there was no breach of duty because ‘the scale of the task and cost associated’ with setting a proper fee ‘is wholly out of proportion to the alleged inflation of the fee’.\(^{166}\) That submission must be rejected. The inflation in question was in the order of $100,000 to $160,000 per annum. As noted above, in 2013 and 2014 the ‘management fee’ accounted for more than one-third of CCW’s annual expenditure.\(^{167}\) The proper setting of the fee was thus an important part of the officers’ roles. Further, there is no evidence that a proper setting of the fee would have been prohibitively expensive.

\(^{165}\) See *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471 per Lord Cranworth LC.

\(^{166}\) Submissions of the CFMEU, 29/10/15, p 95, para 5; see also p 96, para 7.

\(^{167}\) Paragraph 88(f).
97. Each of Jason Jennings, Dean Hall and Jason O’Mara may also have breached their duties to exercise reasonable care and diligence and to act in the best interests of CCW. In circumstances where Jason Jennings, as CEO responsible for accepting the fee on behalf of CCW, took no steps to assess what fee should be payable by CCW his negligence is straightforward. He cannot avail himself of the statutory business judgment defence in s 180(2) as that defence requires officers to inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate. Given the size of the fee payable – both in absolute and relative terms – no reasonable person in Jason Jennings’s position could conclude that it was sufficient to take no steps to ascertain whether the fee was appropriate. In addition, Jason Jennings’s conduct was not in the best interests of CCW, nor could it rationally be thought to be so. As the result of the inflated management fee, CCW has diverted money away from the furtherance of its charitable objects with the consequence that there is a real risk that CCW may lose its status as a registered charity thereby undermining its attempts to generate revenue and receive donations.\(^{168}\) Similar reasoning applies in respect of Dean Hall and Jason O’Mara.

**CFMEU ACT: systemic breaches of fiduciary duty**

98. Another aspect of the inquiry concerned potential breaches of fiduciary duty by CFMEU ACT officials arising out of the negotiation of the CFMEU ACT’s pattern enterprise agreement.

\(^{168}\) As CCW is a wholly-owned subsidiary of CTUCCF, the officers of CCW were permitted to act in the best interests of CTUCCF: *Corporations Act 2001* (Cth), s 187. However, CTUCCF’s purpose is limited to providing charitable benefits, so it is not possible to see how the diversion of money from charitable purposes could be in the best interests of CTUCCF.
The pattern enterprise agreement contains a number of clauses that have the effect of providing a pecuniary benefit to the union. Two of those clauses – the Training Clause and the CCW Clause – have already been considered. The Training Clause generates revenue for CETW as trustee of the CSI Trust. That revenue is distributed to the CFMEU ACT. The CCW Clause generates funds for CCW which, in part, are transferred via a number of payments to CETW as trustee of the CSI Trust and the profits are then distributed to the CFMEU ACT.

In addition to those clauses, there is a standard clause in the CFMEU ACT enterprise agreement requiring employers to effect income protection insurance for their employees (the Income Protection Insurance Clause). Over time there have been a number of variants of the clause. One common form of the clause, found in agreements entered into during 2013, is as follows:

The Company shall affect [sic] an agreed Income Protection insurance policy for Employees covered by this Agreement. The terms, conditions and benefits provided by the agreed insurance policy must be equal or better than that provided by BUILT-PLUS.

... The cost of BUILT-PLUS will be $18 per Employee during the nominal term of this Agreement.

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169 See paras 36, 48(c).
101. BUILT-PLUS is the marketing name of the ‘insurance’ product offered by JLT through the JDT arrangement outlined above.\textsuperscript{172} For a relatively short period in 2011, BUILT-PLUS was operated as an ordinary insurance policy, but from 2012 onwards was offered through the JDT arrangement.\textsuperscript{173} The version of the Income Protection Insurance Clause set out in the previous paragraph requires an agreed insurance policy with ‘terms, conditions and benefits’ which are ‘equal or better than that provided by BUILT-PLUS’. Jason O’Mara’s evidence was that in practice ‘a lot’ of employers signed up to BUILT-PLUS, although ‘not a high majority of them’.\textsuperscript{174}

102. Later forms of the clause mandated that an employer in fact use BUILT-PLUS. Some agreements in 2014 contain the following form of clause:\textsuperscript{175}

\begin{quote}
The Company shall affect [sic] an agreed Income Protection insurance policy for Employees covered by this Agreement. The terms, conditions and benefits provided by the agreed insurance policy will be provided by BUILT-PLUS.

\ldots

The cost of BUILT-PLUS policy will not exceed $20 per week per Employee during the nominal term of the Agreement.
\end{quote}

103. Even more recent versions of the Income Protection Insurance Clause refer specifically to JLT:\textsuperscript{176}

\textsuperscript{172} See paras 22-23.
\textsuperscript{174} Jason O’Mara, 6/8/15, T:344.35-44.
\textsuperscript{175} CSI MFI-3, 4/8/15, Vol 4, p 1404.
At a cost of no more than $20 per week, per Employee … the Company will pay for the income protection insurance offered by Jardine Lloyd Thompson Pty Limited under its Built-Plus policy, to those Employees who are able to be insured under the terms and conditions of that policy.

... The cost of the Built-Plus policy will not exceed $20 per week per Employee during the nominal term of this Agreement.

104. As with the Training Clause and the CCW Clause, one effect of the Income Protection Insurance Clause is to provide a pecuniary benefit to the CFMEU ACT. The benefit is derived in two ways. First, as explained above, CETW is paid a Promoter’s fee, which is approximately 10–15% of the amounts paid by employers. In 2013 and 2014, the fee was $90,781 and $108,794 respectively. Secondly, under the trust deed, JGS has a discretion to distribute any surplus in the fund for a year, after discussion with CETW as the Promoter, ‘for expenditure on issues which are relevant to Members and/or Member’s businesses or which advance the purposes of the Fund generally’. In 2014, after consultation with CETW, JGS distributed the surplus of $126,066 for the 2013/2014 fund year to CCW. Minutes of a meeting held on 2 April 2014 between officers of JGS and CETW indicate that it was proposed that 80% of the fund surplus for the 2014/2015 year be distributed to CETW.177

105. Counsel assisting submitted that the existence of these pecuniary benefits gives rise to a position of conflict for those CFMEU ACT officials negotiating enterprise bargaining agreements. It creates a

potential breach of fiduciary duty by those officials. That submission was premised on the basis that union officials negotiating enterprise agreements owe a fiduciary duty to the union member employees that will be covered by a proposed agreement.

106. The CFMEU accepted that CFMEU officials acting for the union in the capacity of default bargaining representatives under the *Fair Work Act* 2009 (Cth) (*FW Act*) act on behalf of, and represent the interests of, union members. However, the CFMEU submitted that there are strong arguments that the provisions of the FW Act preclude a finding that union officials hold a fiduciary duty in bargaining. Somewhat strangely, none of those arguments were ever stated. It was also asserted that before any conclusion that a fiduciary duty existed could be reached, the whole of Part 2.4 of the FW Act had to be taken into account. However, again, the submissions failed to identify any particular provision which was said to be inconsistent with the existence of a fiduciary duty.

107. More detailed arguments concerning the existence of fiduciary duties in enterprise bargaining are considered in Chapter 10.2 of this Report. For the reasons more fully set out there, union officials engaged in enterprise bargaining should be considered as fiduciaries vis-à-vis the union employee members proposed to be covered by an enterprise agreement on whose behalf, and in whose interest, those officials act. In essence, they exhibit what Mason J described in *Hospital Products*

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178 Submissions of the CFMEU, 29/10/15, p 97, para 15.
179 Submissions of the CFMEU, 29/10/15, p 97, para 17.
180 Submissions of the CFMEU, 29/10/15, p 97, paras 16-17.
LTD v UNITED STATES SURGICAL CORPORATION\textsuperscript{181} as the ‘critical feature’ of a fiduciary. That feature was that:

the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of the other person in a legal or practical sense.

108. His Honour went on to state that:

The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions ‘for’, ‘on behalf of’ and ‘in the interests of’ signify that the fiduciary acts in a ‘representative’ character in the exercise of his responsibility…

109. As fiduciaries, union officials negotiating enterprise agreements have a duty, without fully informed consent, to avoid a position where there is a conflict, or a sensible, real or substantial possibility of conflict, between their interest and duty or between their duties.\textsuperscript{182} The reference to a sensible, real or substantial possibility of conflict makes clear that a fiduciary must not only avoid a situation where there is in fact a divergence between duty and interest, or between duties, but also where there is a sensible, real or substantial possibility of such divergence. As noted, fully informed consent is a defence to a claim of breach of fiduciary duty. It is a matter for the fiduciary to establish. Whether it can be established will depend on all the circumstances of


\textsuperscript{182} See, eg, Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384 at 408-409; Breen v Williams (1996) 186 CLR 71 at 113; Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165 at [74], [77]-[79]; Clay v Clay (2001) 202 CLR 410 at 436; Howard v FCT (2014) 253 CLR 83 at [33], [56], [59], [61].
the case. In general terms, the fiduciary must make full disclosure to
the person to whom the duty is owed of all relevant facts known to the
fiduciary and that person must consent to the proposed conduct.

110. The CFMEU ACT’s enterprise agreements were and are primarily
‘negotiated’ by Jason O’Mara, the Assistant Secretary, and the
CFMEU ACT organisers. Counsel assisting submitted that whilst
negotiating enterprise agreements, those officials had a duty to the
union to ensure, and an interest in ensuring, that the CFMEU ACT was
as profitable as possible. At the same time, each had a duty during
bargaining for an enterprise agreement to act in the interests of the
union member employees who would be covered by the proposed
agreement. In circumstances where the Training Clause, CCW Clause
and Income Protection Insurance Clause each provide a substantial
pecuniary benefit to the CFMEU ACT – in the order of hundreds of
thousands of dollars per year reflecting a not insignificant part of the
CFMEU ACT’s entire revenue – counsel assisting submitted that the
inclusion of those clauses in proposed enterprise agreements placed the
officials in a position where there was a real possibility of conflict
between their duties to the union and their duties to the particular union
members proposed to be covered by the agreement.

111. Counsel assisting sought to demonstrate the substantiality of the
conflicts by identifying that there were a range of other providers of
training and insurance services and a range of other charities in the
ACT. There are a number of other registered training organisations in

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183 See, eg, Hasler v Singtel Optus Pty Ltd (2014) 87 NSWLR 609 at [3], [133], [135].
the ACT providing training services in the construction industry. Similarly, there are other charitable organisations in the ACT offering similar services to CCW e.g. OzHelp Foundation. There are also numerous other providers of income protection insurance. For example, the Cbus Income Continuance Portfolio offers a traditional insurance product providing accident and sickness cover (with or without Workers Compensation Top Up) with similar (although not identical) benefits to that offered under the Bronze and Silver BUILT-PLUS policies. The Cbus product has the advantage that there is no element of discretion in whether an employee will be covered. In addition, the commercial premiums (i.e. the premiums which an employee would pay) for the Cbus product are also less expensive than the premiums paid on the employees’ behalf under the Bronze and Silver BUILT-PLUS policies.185

112. The CFMEU attacked counsel assisting’s conclusion on the basis that there was ‘nothing in the evidence to suggest that the CSI, CCW and BUILT PLUS schemes are not the best outcomes for the employees’.186 The CFMEU also submitted that in assessing the possibility of conflict it was necessary to recognise that the members of

185 Based on current premium rates, Cbus offers an accident and sickness policy with WCTU with a waiting period of 28 days at 100% benefit level (up to a maximum of $700 per week), at a cost of $783.50 per annum: CSI MFI-15, 6/8/15, tab 12. This is cheaper than the comparable Bronze Built-Plus product which is $938.09 per annum. Cbus offers a similar policy but with a maximum benefit of $1,000 per week at a cost of $1,079.21 per annum: CSI MFI-15, 6/8/15, tab 12. This is cheaper, albeit marginally, than the comparable Silver Built-Plus Product which is $1,108.64 per annum. Cbus does not offer a policy which is comparable to the Gold Built-Plus product.

186 Submissions of the CFMEU, 29/10/15, p 99, para 25.
the union gain a benefit from any income the union derives from the schemes.  

113. These submissions must be rejected for a number of reasons.

114. The first, and fatal, flaw is that the CFMEU’s submissions assume that for there to be a breach of fiduciary duty it must be shown that the person who is owed the fiduciary duty (the principal) is worse off. The law has been clear on this subject for at least 200 years. As James LJ famously observed,\(^\text{188}\) the law does not permit any:

\[
\text{evidence, or suggestion or argument as to whether the principal did or did not suffer injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.}
\]

115. The second flaw is that there are strong grounds for concluding that at least in relation to the CCW Clause and the Income Protection Insurance Clause, employees were worse off.

116. In respect of the CCW Clause, considerable amounts of CCW’s funds were diverted away from charitable purposes. It is true that the profits were sent to the union. But it is certainly not open for a fiduciary to say to his or her principal: ‘True it is, you didn’t get what you wanted,

\(^{187}\) Submissions of the CFMEU, 29/10/15, p 99, para 25.

\(^{188}\) Parker v McKenna (1874) LR 10 Ch App 96 at 124-125. See also Ex parte James (1803) 8 Ves 337 at 348-349 per Lord Eldon LC; 32 ER 385 at 389; Hamilton v Wright (1842) 9 Cl & Fin 111 at 123 per Lord Brougham (the other Lords agreeing); Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461 at 471-472 per Lord Cranworth LC; Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384 at 399 per Isaacs J, 408-409 per Dixon J (Rich J agreeing).
but I have judged that it was better for you to give the money to me and in due course I will provide you with a benefit (which incidentally you already pay dues for)\textsuperscript{1}.

117. In respect of the Income Protection Insurance Clause, the evidence summarised above showed that CETW received an effective commission of between 10–15\%.\textsuperscript{189} There are a number of ways in which that commission could be used to the benefit of employees. For example, additional insurance benefits could be provided under the JLT arrangement. Or employees covered by the enterprise agreement could receive further other benefits.

118. The third flaw is an underlying assumption that the union alone knows what is best for its members.

119. For the reasons given above, by including the three clauses under consideration in proposed enterprise agreements the CFMEU ACT officials negotiating those agreements would have breached their fiduciary duties unless they first obtained the fully informed consent of the union employee members.

120. The existence of fully informed consent in the present circumstances would depend on whether union officials disclosed the details of the financial relationships between CETW, CCW, JGS and the CFMEU ACT. The evidence on that topic was summarised by counsel assisting as follows:

\textsuperscript{189} Paragraph 23.
(a) Jason O’Mara, who was most senior officer of the CFMEU ACT with responsibility for the negotiation of enterprise agreements, gave evidence that he did not see any ‘conflict of interest’ arising from the Training Clause\textsuperscript{190} or the CCW Clause.\textsuperscript{191} Dean Hall did not see any conflict of interest arising from any of the three clauses under examination.\textsuperscript{192} Jason Jennings did not think there was a conflict of interest arising out of the Training Clause.\textsuperscript{193}

(b) In relation to the disclosures made during negotiations concerning the financial benefits flowing from the CSI Trust to the CFMEU ACT, Jason O’Mara gave the following evidence:\textsuperscript{194}

Q. Do you explain to people that there is a financial benefit flowing through from CSI to the CFMEU?

A. We don’t directly explain the company set-up and how it goes, but Canberra is a small place, everyone knows the CFMEU, everyone knows the training organisation, everyone knows – it’s not a secret in the industry.

Q. That there is a financial benefit flowing through from CSI to CFMEU?

A. No, it’s not.

Q. It’s not a secret?

A. No, I don’t think so, no.

\textsuperscript{190} Jason O’Mara, 6/8/15, T:339.34-341.30.
\textsuperscript{191} Jason O’Mara, 6/8/15, T:343.1-5.
\textsuperscript{192} Dean Hall, 5/8/15, T:188.8-31, 189.40-190.9.
\textsuperscript{193} Jason Jennings, 5/8/15, T:264.44-265.20.
\textsuperscript{194} Jason O’Mara, 6/8/15, T:341.32-47.
Q. It’s well known, is it?
A. I would suggest so, yes.

(c) Dean Hall’s evidence was similar in some respects. He thought that people in the industry would know that there was a financial relationship between CETW and the CFMEU ACT. Dean Hall also believed that the financial relationship between the two entities was made clear during the negotiations for enterprise agreements. But he accepted that he did not know if that occurred.

(d) However, the evidence of a number of employer witnesses was to the effect that although employers in Canberra may be aware of a generic relationship between CETW and CFMEU ACT they are not generally aware of the details or the quantum of the financial benefits provided by CETW to the CFMEU ACT, nor of the financial connection between CETW and CCW, nor the financial connection between CETW and JLT.

(e) Further, a number of pieces of evidence suggest that the CFMEU ACT is keen to hide, or at least not to disclose, its financial connection with CETW. There is a small CFMEU

195 Dean Hall, 4/8/15, T:28.30-29.2.
196 Dean Hall, 4/8/15, T:28.30-30.32.
197 Adam McEvilly, 29/7/15, T:1435.10-23; John Ryan, 29/7/15, T:1455.17-1456.20, 1457.30-1458.34; Bernardo da Silva, 30/7/15, T:1527.13-1528.30, 1534.35-46; Donald Thompson, 30/7/15, T:1556.24-1558.9; Horace Watt, 30/7/15, T:1567.44-1568.2, 1584.27-1585.220.
logo on the CSI website which sits alongside the logos of a number of other organisations. But there is no indication on the CSI website that the organisation is in fact operated for the benefit of the CFMEU. The 2009–2011 strategic plan for CITEA, CISC and CSI records that ‘CFMEU connection is seen as a negative by some’. In relation to the JDT arrangements, there are several instances where references to the CFMEU have been deliberately replaced by references to the CETW as trustee for the CSI Trust. Articles in the CFMEU magazine state ‘Both CSI and CCW are initiatives for the Tradies Group of Clubs and are supported by the ACT Branch of the CFMEU’. But they do not provide any indication that the CFMEU benefits from CSI and CCW.

121. No submission was made challenging that summary of the evidence. Rather, the CFMEU submitted that because Subdivision A of Division 4 of Part 2.4 of the FW Act – in particular s 180 – requires employees to be fully informed of the terms that have been negotiated by union officials, therefore one could expect that there was fully informed consent.

122. Counsel assisting contended that that submission is nonsensical. First, the obligation under s 180 to explain the terms of the agreement, and its effect, falls on employers, not union officials. Employers can only

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201 Submissions of the CFMEU, 29/10/15, p 98, paras 18-19.
disclose what they know, and the evidence summarised above is that employers do not know the details of the financial arrangements between the union, CETW and CCW.\textsuperscript{202} \textit{Secondly}, fully informed consent is a question of fact. It is not a question only of what \textit{should} occur. The submission entirely confuses what should occur with what does occur. \textit{Thirdly}, a fiduciary cannot discharge the obligation of fully informed consent by saying that someone else, over whom the fiduciary has no control, does or should do something. These three reasons of counsel assisting are correct.

123. In summary, there is no evidence of the disclosure, whether routinely or at all, of the details of the financial relationships between the various entities and the CFMEU ACT that would be necessary to establish fully informed consent. As counsel assisting correctly submitted, in fact the inference from the present evidence is that generally it does not occur.

124. Overall, the CFMEU ACT’s pattern enterprise agreement in combination with the union’s failure of disclosure has created a substantial and systemic risk of breaches of fiduciary duty by union officials. It cannot be said whether on any particular occasion an organiser negotiating for a pattern enterprise agreement has or has not breached his or her fiduciary duty. Rather what can be said is that there is a strong likelihood of breaches of duty by many officials.

\textsuperscript{202} Paragraph 120.
CFMEU ACT: third line forcing or other exclusive dealing

125. Counsel assisting also analysed whether the CFMEU ACT, by requiring the inclusion of the Training Clause and the more recent version of the Income Protection Insurance Clause in its enterprise agreements, had engaged in third line forcing or other exclusive dealing in contravention of provisions found in the *Competition and Consumer Act 2010* (Cth).

Third line forcing or other exclusive dealing: the law

126. Counsel assisting’s summary of the relevant law was unchallenged. It is set out below.

127. Section 47(1) of the *Competition and Consumer Act* prohibits a corporation, in trade or commerce, from engaging in the practice of ‘exclusive dealing’. The remainder of s 47 is directed to defining what constitutes ‘exclusive dealing’.

128. ‘Corporation’ is defined in s 4(1) of that Act as follows:

*corporation* means a body corporate that:

(a) is a foreign corporation;

(b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;

(c) is incorporated in a Territory; or

(d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).
129. The CFMEU is an organisation registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth). Accordingly it is a body corporate. It may be that having regard to its overall activities the CFMEU is properly described as a ‘trading corporation’. If so, it is a ‘corporation’ within the meaning of the *Competition and Consumer Act* and is hence subject to the operation of s 47 of that Act.

130. However, for present purposes the question is immaterial. Section 5 of the *Competition Policy Reform Act* 1996 (ACT) enacts the ‘Competition Code’ – which includes Schedule 1 of the *Competition and Consumer Act* – as a law of the ACT which applies in relation to persons (not just corporations) having a connection with the territory (see s 8). Schedule 1 of the *Competition and Consumer Act* contains a version of s 47 of the *Competition and Consumer Act* which is relevantly identical except that it replaces the word ‘corporation’ for ‘person’. The result is that irrespective of whether the CFMEU is a ‘corporation’ or not within the meaning of s 4 of the *Competition and Consumer Act*, it is subject to the prohibition contained in s 47.

131. It is convenient to refer to the more general version of s 47 found in the *Competition Code*. It relevantly provides:

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47  Exclusive dealing

(1) Subject to this section, a person shall not, in trade or commerce, engage in the practice of exclusive dealing.
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(2) A person (the *first person*) engages in the practice of exclusive dealing if the first person:

(a) supplies, or offers to supply, goods or services; …

on the condition that the person (the *second person*) to whom the first person supplies, or offers or proposes to supply, the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate:

(d) will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; …

…

(6) A person (the *first person*) also engages in the practice of exclusive dealing if the first person:

(a) supplies, or offers to supply, goods or services; …

on the condition that the person (the *second person*) to whom the first person supplies or offers or proposes to supply the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.

…

(10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a person engaging in conduct of a kind referred to in subsection (2) … unless:

(a) the engaging by the person in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(b) the engaging by the person in that conduct, and the engaging by the person, or by a body corporate related to the person, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.

…
In this section:

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances; …

132. ‘Services’ is defined broadly in s 4(1) of the Competition and Consumer Act, which section applies also to the Competition Code, to include any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred in trade or commerce but excludes rights or benefits being the supply of goods or the performance of work under a contract of service.

133. Subsections (2) and (6) each contemplate the existence of three parties: a first person, who supplies or offers to supply goods or services to a second person, and a third person. In general terms:

(a) Subsection (2) applies when the first person supplies services to the second person on the condition that the second person will not acquire goods or services from a competitor of the first person or from a competitor of a body corporate related to the first person. For there to be a contravention the conduct of the first person must have the purpose, effect or likely effect of substantially lessening competition.

(b) Subsection (6) applies when the first person supplies services to the second person on the condition that the second person
will acquire goods or services from a third person who is not a body corporate related to the first person.

134. As can be seen the operation of these provisions depends, in part, on whether a body corporate is related to the first person. Subsection 4A(5) of the *Competition and Consumer Act*, which also forms part of the *Competition Code*, provides:

(5) Where a body corporate:

(a) is the holding company of another body corporate; 
(b) is a subsidiary of another body corporate; or 
(c) is a subsidiary of the holding company of another body corporate;

that first mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

135. The earlier subsections of s 4A amplify this deeming provision:

(1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:

(a) that other body corporate:

   (i) controls the composition of the board of directors of the first mentioned body corporate; 

   (ii) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first mentioned body corporate; …

(2) For the purposes of subsection (1), the composition of a body corporate’s board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the
exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:

(a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or

(b) a person’s appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.

…

(4) A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.

136. In considering the application of s 47 in the industrial context, it is also necessary to have regard to s 51(2). That subsection relevantly provides:

(2) In determining whether a contravention of a provision of this Part [which includes s 47]… has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees …
Third line forcing or other exclusive dealing: application of the law

137. Clauses 4 and 5 of the CFMEU ACT standard pattern agreement provide that the enterprise agreement is binding on and applies to the CFMEU as the ‘Union’. Clause 7 provides that:

During the life of this agreement, the Company, Employee(s) and the Union will not make any demand and/or pursue any extra claim regarding any term or condition of employment.

Pursuant to clause 7, the CFMEU provides the employer company with a valuable benefit falling within the definition of ‘services’. In return for those services, the terms of the Training Clause in the pattern enterprise agreement require employers both (a) to acquire White Card training services for new employees from CETW and also (b) to abstain from acquiring training services for employees from any other training provider i.e. from any of CETW’s competitors. The more recent versions of the Income Protection Insurance Clause (which appear to have been used in a number of pattern CFMEU ACT enterprise agreements from 2014 onwards) also require employers to acquire insurance services from JLT.

138. The overall effect of the agreement is that the CFMEU (the first person) supplies or agrees to supply services to the employer company (the second person) on the condition that the employer company:

(a) acquire White Card training from CETW;

\[132\] Paragraph 132.
(b) not acquire other training services from any of CETW’s competitors; and

c) acquire insurance services from JLT.

139. Counsel assisting submitted that, subject to issues concerning the application of the exclusion in s 51(2), which are discussed below:205

(a) requiring an employer to acquire White Card training services from CETW will constitute a contravention of s 47(6), provided CETW is not a related body corporate of the CFMEU;

(b) requiring an employer to acquire insurance services from JLT will constitute a contravention of s 47(6), provided JLT is not a related body corporate of the CFMEU; and

c) requiring an employer not to acquire other training services from CETW’s competitors will constitute a contravention of s 47(2), provided CETW is a related body corporate of the CFMEU and the purpose, effect or likely effect of the CFMEU’s conduct is to lessen competition substantially.

140. Plainly, JLT is not a related body corporate of the CFMEU.

141. Is CETW a related body corporate of the CFMEU? Counsel assisting submitted that applying the definitions set out above, CETW and the

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205 See paragraph 145.
CFMEU will be related bodies corporate if CETW is a ‘subsidiary’ of the CFMEU, taking into account the extended statutory sense.\textsuperscript{206} Under CETW’s constitution, the Secretary of the Construction, Forestry, Mining and Energy Union, ACT Branch has the power to appoint directors of CETW. However, the CFMEU itself has no power to appoint directors. Thus, prima facie CETW and the CFMEU are not related bodies corporate, and subject to the possible operation of s 51(2), the Training Clause contravenes s 47(6) of the \textit{Competition Code}.

However, counsel assisting identified an alternative point of view. That view was that the CFMEU does have the power to appoint directors because, under the rules of the union,\textsuperscript{207} the Secretary of the ACT Branch is subject to the direction and control of the Divisional Branch and ultimately the National Executive of the CFMEU, and hence CETW and the CFMEU are related bodies corporate. If this view were accepted, the Training Clause would contravene s 47(2) only if the purpose, effect or likely effect of the CFMEU’s conduct is to lessen competition substantially. In the context of s 47, ‘substantially’ has been held to mean real or of substance as opposed to insignificant or minimal.\textsuperscript{208} ‘Purpose’ means the actual subjective purpose of the person in question,\textsuperscript{209} which will often be inferred from

\textsuperscript{206} See paragraph 135.
\textsuperscript{207} Construction and General Division Rules, r 46(a); National Rules, rr 15(iv), 26.
\textsuperscript{209} \textit{Universal Music Australia Pty Ltd v ACCC} (2003) 131 FCR 529.
the circumstances and the likely effect of the conduct. The issue ultimately turns on an assessment of the facts.

143. It is not necessary to determine which of the two views identified by counsel assisting is correct in the present case. That is because the evidence in the present case is that CETW is one of the main registered training organisations in the ACT. The inclusion of the Training Clause can be seen to have the effect of creating a monopoly within the market for training services to be provided to construction companies with a CFMEU ACT enterprise agreement. It is strongly arguable that that is a substantial market in and of itself and, given the CFMEU ACT’s attempts to expand its reach, it is a growing market within the broader market for training services to construction companies within the ACT. Accordingly, irrespective of market definition, there is a reasonable argument that the CFMEU ACT’s conduct has the proscribed purpose, effect or likely effect.

144. In that event, subject to the operation of s 51(2)(a), the conduct of the CFMEU ACT in including the Training Clause and the more recent versions of the Income Protection Insurance Clause may be in contravention of s 47 of the Competition Code.

145. Counsel assisting identified two views concerning the operation of s 51(2)(a).

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211 See para 136.
One view was that the exception has only a very limited operation in respect of enterprise agreements. The Full Court of the Federal Court has held that an enterprise agreement is not a contract, arrangement or understanding within the meaning of the *Competition and Consumer Act*.\(^\text{212}\) If this decision was applied to s 51(2)(a) it would arguably give the provision little operation in respect of enterprise agreements.

An alternative view is that s 51(2)(a) also prevents regard being had, in determining whether there is a contravention of s 47, to ‘any act done in relation to … the remuneration, conditions of employment, hours of work or working conditions of employees’. The inclusion of certain conditions in an enterprise agreement could be argued to be an ‘act done’ irrespective of whether the enterprise agreement is a contract, arrangement or understanding as those words are understood in the Act. On this view s 51(2)(a) would apply if the inclusion of the Training Clause and the Income Protection Insurance Clause could be said to be in relation to the ‘remuneration [or] conditions of employment’ of employees. It has been held that there must be a direct relationship between the act done and the remuneration or conditions of employment.\(^\text{213}\) However, a significant weakness in this argument is that in relation to a prior version of s 51(2)(a), a majority of the Full Court of the Federal Court held that the phrase ‘any act done’ had a limited meaning and did not include a complex act such as entering into a contract.\(^\text{214}\) In fact, it was as a result of this decision that

\(^{212}\) *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339 at [72].

\(^{213}\) *Ausfield Pty Ltd v Leyland Motor Corp of Australia Ltd* (1977) 30 FLR 477.

\(^{214}\) *Ausfield Pty Ltd v Leyland Motor Corp of Australia Ltd* (1977) 30 FLR 477 at 481-482.
s 51(2)(a) was amended to make specific reference to the entry into a contract, arrangement or understanding.

148. On this alternative view there may be a distinction between the Training Clause and the Income Protection Insurance Clause. The Training Clause requires training services that relate to an employee’s work tasks to be acquired from a particular training provider. Arguably, that requirement is one which relates to the employee’s conditions of employment.

149. However, the Income Protection Insurance Clause requires the employer to obtain insurance coverage for employees for accident and sickness risks occurring outside work. It is difficult to see how such a requirement could be said to relate to an employee’s ‘conditions of employment’. However, it may be that such a requirement could be said to relate to an employee’s ‘remuneration’. Although ‘remuneration’ can have a broad meaning to include any benefit, whether financial or otherwise, provided by an employer to an employee, it is apparent in this context that remuneration has a more limited meaning. Otherwise any term of an employment contract which conferred a right on an employee could be described as relating to ‘remuneration’. On the one hand, the payments made by the employer provide the employee with the benefit of an insurance policy which could be regarded as part of the employee’s remuneration. On the other hand, the benefit provided is unlike other forms of remuneration such as salary, wages, allowances, bonuses, superannuation payments, or property such as shares or options which may be given as part of an employment package and can be turned to pecuniary account: the only benefit derived by the employee is when
and if the employee satisfies the conditions for a payment under the JDT arrangement.

150. Counsel assisting submitted that the better view is that the exception in s 51(2)(a) does not apply in the present case. But they conceded that the issue is uncertain. Given the admitted uncertainty surrounding s 51(2)(a) it is not proposed to make any finding one way or the other about whether the CFMEU, or its officers, may have engaged in third line forcing or other forms of exclusive dealing.

151. The broader policy questions that the case study, and others, raise about the interaction between industrial law and the *Competition and Consumer Act 2010* (Cth) are addressed in Volume 5 of this Report. The CFMEU submitted these broader policy matters were outside the Terms of Reference. But the truth is that they clearly fall within paragraph (j) of the Terms of Reference.

G – A FINAL ISSUE

152. Finally, there is an issue that arose incidentally in the course of inquiries and should be mentioned briefly.

153. As recorded above,\(^\text{215}\) for the 2013–2015 financial years both the CTUC and WTUC made declarations to the ACT Gaming and Racing Commission that the monies paid to CCW by those entities in 2013 to 2015 were ‘community contributions’ for the purposes of the *Gaming Machine Act 2004* (ACT) being donations for the purpose of ‘drug and

\(^{215}\) Paragraph 153.
alcohol training’ or the provision of such training. Section 164 of the *Gaming Machine Act* and Part 9 of the *Gaming Machine Regulation 2004* (ACT) specify the requirements which must be met for a contribution to be a community contribution. Contributions to a trade union are not counted as community contributions. \(^{216}\)

154. The table below summarises the community contributions declared in respect of CCW by both clubs for the 2013–2015 financial years. \(^{217}\)

<table>
<thead>
<tr>
<th>Period</th>
<th>Donations for drug and alcohol training/provision of drug and alcohol training</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CTUC</td>
</tr>
<tr>
<td>1/7/12–31/12/12</td>
<td>$43,749.99</td>
</tr>
<tr>
<td>1/1/13–30/6/13</td>
<td>$131,250.00</td>
</tr>
<tr>
<td>1/7/13–31/12/13</td>
<td>$87,499.98</td>
</tr>
<tr>
<td>1/1/14–30/6/14</td>
<td>$62,500.02</td>
</tr>
<tr>
<td>1/7/14–31/12/14</td>
<td>$75,000.00</td>
</tr>
<tr>
<td>1/1/15–30/6/15</td>
<td>$150,000.00</td>
</tr>
</tbody>
</table>

155. However, CCW’s financial records reveal that nothing like those amounts was spent by CCW on drug and alcohol training or the provision of drug and alcohol training in 2013 and 2014. Indeed, based on CCW’s expenditure in 2013 some or all of $437,500 donated by CTUC and WTUC must have flowed to CETW in the form of the inflated ‘management fee’ which then flowed to the CFMEU ACT.

\(^{216}\) *Gaming Machine Act*, s 164(3).

\(^{217}\) CSI MFI-33, 7/9/15.
156. This raises a number of obvious possibilities. One possibility is that CTUC and WTUC were misled by CCW - that CTUC and WTUC donated the money for a particular purpose but CCW misused the donations. However, this possibility would seem unlikely for the following reasons. There is a substantial overlap of directors between CTUC, WTUC and CCW. The CEO of CCW (Jason Jennings) is and has been a director of both clubs. Stephen Brennan is the company secretary of all three companies, the CFO of the two clubs and the accountant for CCW.

157. Another obvious possibility is that the declarations provided by the CTUC and the WTUC to the ACT Gaming and Racing Commission were false or misleading and that the money donated by the clubs to CCW was not provided for drug and alcohol training, but for CCW to transfer the money donated to CETW. Approximately 80% of the money paid from CCW in 2013 and 2014 was paid to CETW. This would ultimately be distributed to the CFMEU ACT under the terms of the CSI Trust. In other words, there is a substantial possibility that the payments made by CTUC and WTUC were not genuine contributions to a charitable organisation but disguised contributions to the CFMEU ACT. These contributions cannot be ‘community contributions’ under the Gaming Machine Act.

158. If that were the position there would be a number of possible consequences. It may be that one or both of the CTUC and the WTUC had a community contributions shortfall in one or more financial years. In that case the clubs would have been liable to pay community contributions shortfall tax under s 172 of the Gaming Machine Act. For example, if all of the contributions to CCW were excluded from
the reports lodged by the CTUC and the WTUC for the 2015 financial year, both clubs would have had a community contributions shortfall, for which tax and possible penalties would be payable. It may also be that the circumstances involve the commission of one or more criminal offences including offences against:

(a) ss 332, 333 or 335 of the *Criminal Code (ACT)* (obtaining financial advantage by deception, general dishonesty, obtaining financial advantage from the Territory);

(b) ss 337, 338 or 339 of the *Criminal Code (ACT)* (making false or misleading statements, giving false or misleading information, producing false or misleading documents); or

(c) s 65 of the *Taxation Administration Act 1999 (ACT)* (avoidance of tax).

159. Evidence has been received from three senior directors of the CTUC and the WTUC. But there has been no general inquiry into the affairs of the two clubs. Nor were the two clubs, or relevant persons such as Stephen Brennan, represented during the public hearings concerning CETW and CCW. In those circumstances, no conclusions are drawn about the matters canvassed in the previous three paragraphs.

160. However, submissions were invited from the CTUC and the WTUC and Stephen Brennan about why, pursuant to s 6P of the *Royal Commissions Act 1902* (Cth), the materials obtained by the Commission in its inquiries should not be provided to:
(a) the Australian Federal Police; and/or

(b) the ACT Gaming and Racing Commission to conduct an investigation under Part 4 of the *Gaming and Racing Control Act 1999* (ACT).

161. The CTUC and WTUC made two sets of submissions on the topic. The first set invited the referral if the Commission, having considered the circumstances, believed it was appropriate for the referral to be made.218 The second set argued that the CTUC and WTUC were not ‘relevant entities’ or ‘employee associations’ within the Terms of Reference.219 The implication of the second set was that the referral should not be made.

162. There are reasons to think that the CTUC and WTUC are ‘relevant entities’ having regard to the evidence before the Commission concerning the purposes of those clubs and the circumstances of their establishment.220 However, it is not necessary to determine the point. Section 6P(1) relevantly provides:

> Where, in the course of inquiring into a matter, a Commission obtains information that relates, or that may relate, to a contravention of a law, or evidence of a contravention of a law, of the Commonwealth, of a State or of a Territory, the Commission may, if in the opinion of the Commission it is appropriate so to do, communicate the information or furnish the evidence, as the case may be, to:

218 Submissions of the Canberra Tradesmen’s Union Club Limited and Woden Tradesmen’s Union Club, 27/10/15.

219 Supplementary submissions of the Canberra Tradesmen’s Union Club Limited and Woden Tradesmen’s Union Club, 29/10/15.

220 See particularly the evidence summarised in paras 6, 19 and 20 above.
... 

(d) the Commissioner of the Australian Federal Police or of the Police Force of a State or of the Northern Territory; or

(e) the authority or person responsible for the administration or enforcement of that law.

163. Section 6P thus provides an express conferral of authority in the present case: in the course of the Commission’s inquiries in relation to CETW, CCW and the CFMEU ACT, the Commission has obtained material which may relate to the contravention of a number of ACT criminal provisions by other persons. In those circumstances, a referral was appropriate.

164. Finally, pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Government of the Australian Capital Territory for consideration of whether express amendments should be made to the Gaming Machine Act 2004 (ACT) so that ‘community contributions’ cannot be made by a registered club to an entity related to that club.
CHAPTER 6.7

FURTHER CONCLUSIONS REGARDING CFMEU CONDUCT

1. The evidence canvassed in Chapter 6.3 indicates that CFMEU officials take the view that it is compulsory to have a CFMEU EBA in order to do construction work in the ACT. The need for a CFMEU EBA is not merely a reflection of a ‘commercial reality’ that exists independently of the CFMEU. It is a reality created by the CFMEU. In particular, the case studies examined in Chapter 6.3 indicate that officials may be prepared to abuse rights of entry conferred by s 117 of the Work Health and Safety Act 2011 (ACT) for the purposes of bringing about that reality.

2. At least two matters of significance appear to drive the CFMEU view that all participants in the ACT construction industry must have CFMEU EBAs.

3. The first is that the CFMEU derives significant financial benefits from its pattern EBAs and as a result has an interest in ensuring that all participants in the commercial construction industry are signed up to them. The evidence on this question is the subject of the separate CSI and CCW case study in Chapter 6.6. As that evidence demonstrates, those financial benefits give rise to significant conflicts of interest.
A second matter that appears to drive the CFMEU view that all participants in the construction industry must have CFMEU EBAs concerns pattern bargaining. This is not unrelated to the matter described in the above paragraph. Pattern bargaining is a most efficient way for the CFMEU to generate the financial benefits described above. Another aspect of CFMEU pattern bargaining, however, is that it results in participants in particular sectors of the commercial construction industry paying significantly higher wages under CFMEU EBAs than participants who do not have CFMEU EBAs. The evidence suggests that CFMEU EBA contractors simply cannot compete with contractors who do not pay CFMEU EBA rates. As a result, what Johnny Lomax described as ‘the system’ only works if all or substantially all contractors are parties to identical CFMEU EBAs. Consequentially, participants with CFMEU EBAs expect the CFMEU to take steps to bring other participants under that pattern EBA. And the CFMEU is prepared to comply. The evidence in Chapter 6.3 provides illustrations of what can occur when contractors are not prepared to sign up to CFMEU EBAs.

Chapter 6.4 in one sense stands apart from the other Chapters in this Part because it concerns pressure placed on CFMEU officials to achieve membership targets, and pressure in turn placed by those officials on participants in the industry to ensure that workers are CFMEU members. However, in another sense, it provides further examples of participants in the industry complying with demands or inappropriate requests made by officials of a union that they perceive, correctly, wields significant influence in the construction industry.

1 Lomax MFI-8, 7/10/15, p 8; Johnny Lomax, 7/10/15, T:2180.1-29.
Chapter 6.5 examines some of the aspects of ‘the system’ from the perspective of the cartel provisions in the *Competition and Consumer Act* 2010 (Cth). However, as stated in that Chapter, and as is apparent from the summary above, the evidence gives rise to more widespread concerns about anti-competitive conduct in the ACT construction industry. The evidence concerning Johnny Lomax’s dealings with Charlie the bricklayer and Kenneth Miller’s dealings with a crane operator are stark illustrations of what actually happens when someone attempts to participate as a new entrant in that industry.

It might be said that the above analysis leaves out one important point: that the result of the CFMEU’s influence is to increase the wages and other employment benefits paid to employees in the construction industry. Do increased wage levels in CFMEU EBAs actually result in a net benefit to those workers? If so, over what period? Is any net benefit worth what may be significantly adverse effects on competition? These are all debatable questions. Further, Chapter 6.6 indicates that it cannot be assumed, from the mere fact that the CFMEU is encouraging participants to sign up to EBAs, that those EBAs are necessarily more beneficial to the workers in question. The financial benefits to the CFMEU from such EBAs make self-interest a significant motivation.

To resolve debates of the kind identified in the previous paragraph would to some degree involve going outside the Terms of Reference. However, a number of matters that arose in the evidence may be noted. *First*, Johnny Lomax’s conversations with Clive Arona and Anthony
Costanzo\textsuperscript{2} suggest that the use by EBA contractors of subcontractors who are paid less than EBA rates is prevalent, at least amongst concreters. Second\textsuperscript{ly}, unless increased wage levels translate into increased prices charged to builders, EBA contractors are unlikely to be profitable. Thus Anthony Costanzo told Johnny Lomax that his company was not profitable.\textsuperscript{3} And the widespread use of subcontractors may reflect what concreters regard as economic necessity. If EBA contractors are not profitable then they will not be able to afford the increased wages under CFMEU EBA. Third\textsuperscript{ly} and related\textsuperscript{ly}, for contractors with CFMEU EBAs to remain profitable, it is necessary to prevent competition from other contractors without CFMEU EBAs. As previously stated, the ‘system’ is an all or nothing proposition. The evidence suggests that there are still some participants in the industry in Canberra who are willing to attempt to operate outside of that system.

The ACCC is better placed than this Commission to evaluate the extent to which conduct of the kind referred to in Chapter 6.5 is permissible under the existing statutory regime in the *Competition and Consumer Act 2010* (Cth) and, if so, whether that regime requires change. That may require further consideration of the scope of operation of the exception in s 51(2)(a). Such consideration, self-evidently, needs to take into account interests across all industries and in all States and Territories. It also, it is submitted, needs to take into account the extent to which the CFMEU itself, and what Johnny Lomax described as the ‘system’ it propounds in the ACT commercial construction

\textsuperscript{2} Lomax MFI-10, 7/10/15, pp 3, 5; Lomax MFI-11, 7/10/15, p 3.

\textsuperscript{3} Lomax MFI-12, 7/10/15, p 4.
industry, are afforded protection from competition, and whether that is a desirable outcome.
# PART 7: CFMEU NSW

## CHAPTER 7.1

### CBUS

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A – INTRODUCTION

The importance of the case study

1. This is another case study about the Construction, Forestry, Mining and Energy Union (CFMEU). It concerns the New South Wales Branch (CFMEU NSW). It concerns dealings between the CFMEU and a group of institutions known as ‘Cbus’. Cbus is the name of a
superannuation trust fund. On 29 July 2013 a senior Cbus executive travelled from Melbourne to the CFMEU NSW offices at Lidcombe in Sydney. She did so with the knowledge and participation of a more senior executive. Her purpose was to deliver what are known as the ‘Zanatta spreadsheets’. The ultimate recipient was to be the State Secretary of the CFMEU NSW, Construction and General Division. The Zanatta spreadsheets contained confidential personal information about the employees of two companies. That information comprised their telephone numbers, their personal email addresses and their residential addresses. The superannuation assets of the employees were held by the trustee of the Cbus superannuation trust fund. An official of the CFMEU then used the information to contact some of the employees with a view to making them disgruntled with their employers. He did this at the State Secretary’s instigation. This was part of a campaign by the CFMEU against the employers.

2. Some might ask: ‘So what?’

3. The answer is that this release of confidential personal information to an outside party, the CFMEU, was wrong. The release was wrong in many ways. The release was a breach of trust by the trustee. The release contravened the Cbus trust deed, cl 6.4. The release was the result of officers of the trustee having procured a breach of trust. The breach was a breach of contractual duties owed to the employees of the two companies. The release was a breach of the *Privacy Act 1988* (Cth) s 16A. The release was a breach of various contractual duties created by their contracts of employment under which the executives were engaged. The release is a matter that the Cbus interests have expressed great concern about.
4. There are several other respects in which the episode is important. The executives conducted themselves as they did at the behest of the CFMEU. This was a completely inappropriate use of power by the CFMEU. The episode is also important because of the reaction of the Cbus interests and the CFMEU as the details about what had happened trickled out. On 1 August 2013 the solicitors for the two companies began to complain about leaked personal information to both the CFMEU and Cbus. On 11 May 2014 and on succeeding days articles in the Fairfax press described revelations by the official of the CFMEU who had contacted the employees about his role in what had happened. The responses of Cbus and the CFMEU have involved wilful blindness. They have involved massive mendacity to the point of perjury. Those traits were revealed both before the Commission began and in the course of its inquiries and hearings. Cbus has made almost grovelling acknowledgments that the executives were at fault. But these acknowledgments took a long time to emerge – until November 2014. The acknowledgment by the CFMEU that its officials were at fault has taken even longer – until September 2015.  

5. How did these various breaches of duty come to take place? Why did the executives do what they did? What role did the CFMEU play in their conduct? What knowledge did other persons have of this conduct? Why did the two executives commit perjury? Why have the two executives been peremptorily dismissed? Why has no-one else within Cbus been dismissed? Why has no-one still within the CFMEU been the subject of sanctions?

1 Submissions of the CFMEU, 18/9/15, para 4.
Superannuation payment arrears information

6. The CFMEU and Cbus have constantly alleged that the two employer companies were in arrears in paying employee superannuation entitlements to Cbus. In discussing that topic, it is necessary to remember that the field ‘superannuation payment arrears information’ can be divided into several categories. One category might be ‘aggregated’ information: the total amount each company owed over a period or in particular months. A second category might contain the same information, but divided into amounts owed in respect of individual employees. A third category might contain the same information as the second category but also information identifying the names of the employees, their Cbus membership number and their dates of birth. A fourth category is the information, or some of it, in earlier categories together with details enabling outsiders to get into personal contact with the employees – personal email addresses, home addresses and telephone numbers. The information in the Zanatta spreadsheets fell into the fourth category. There is some controversy as to how far information in the second or third category, for example, might fall within cl 6.4 of the trust deed, but there can be none about the fourth.

The plan of approach

7. This case study is factually complex. The evidence has come out only in stages. The first stage took place in the public hearings of July 2014 in Melbourne. A great deal of the evidence given by the executives on that occasion, on 7 July, has turned out to be perjured. The second
stage was in the public hearings held in October 2014 in Sydney. The perjury began to be exposed. One of the executives was speedily dismissed by the CEO. The other soon shared her fate. A third stage consisted of private hearings in Sydney on 10 and 12 December 2014. The executives began to reveal further material for the first time. The final stage was the public hearings of June 2015 in Sydney. In those hearings the evidence tendered at the private hearings was tendered in public. Much other evidence was given as well. The clarity of the evidence has been affected by the jerky fashion in which it came out. But its clarity is further affected by the probable perjury of several witnesses. It is also affected by the different stages at which different witnesses admitted to their perjury or evidence emerged suggesting it.

8. It may therefore clarify the position to state here in an integrated way what findings were made in the Interim Report and what findings are to be made in this Report. It would be possible to deal with the arguments only about the additional findings to be made in this Report on the assumption that the reader was closely familiar with the background revealed in the Interim Report. But that assumption would be unrealistic. The findings made in this Report correspond substantially with those urged by counsel assisting. Where criticisms of counsel assisting have been made by persons affected, those criticisms have been examined at appropriate places. It must be remembered that no submissions from the two executives have been received in 2015, though their positions have been expounded during their numerous appearances in the witness box. The findings rest in some measure on circumstantial evidence. It is therefore desirable to set out the circumstances largely in chronological order.
B – THE BACKGROUND AND THE KEY EVENTS

The business and structure of Cbus

9. The superannuation trust fund named Cbus was not some contemptible little thing. It was large. It was promoted by massive advertising campaigns to which very few Australian residents have not been exposed. At the relevant time the fund contained $26b in member assets. At different stages even larger claims have been made. Thus on 11 September 2015 Cbus described itself as a $31b fund.\(^2\) In the final Cbus set of written submissions dated 4 December 2015, the figure rose to $32b.\(^3\) The trustee of the fund was United Super Pty Ltd (United Super). The administrator of the member and employer records of the fund was Superpartners Pty Ltd (Superpartners). Although strictly speaking it was United Super who ran the trust business with the aid of Superpartners, the whole enterprise was commonly called ‘Cbus’. That usage will generally be employed here. The Chief Executive Officer of United Super was David Atkin. One well respected senior executive, who reported to him, was Maria Butera. Another executive who was well respected but less senior was Lisa Zanatta. She reported to Cath Noye, who reported to Maria Butera.\(^4\)

\(^2\) Submissions of United Super Pty Ltd, 11/9/15, para 75. Hereafter these submissions and other sets of Cbus submissions are called ‘Submissions of David Atkin’.

\(^3\) Submissions of David Atkin, 4/12/15, para 49.

10. The CFMEU exercised considerable influence over United Super. The Board of United Super was, apart from one independent director, evenly divided between union representatives and employer representatives. At the relevant time there were three CFMEU officials on the Cbus Board: Rita Mallia (President of the NSW Branch of the CFMEU NSW Construction and General Division), Frank O’Grady (National Divisional Assistant Secretary of the CFMEU General and Construction Division) and David Noonan (National Secretary of the CFMEU). Some employees of United Super once worked for the CFMEU or came from a CFMEU background.5

11. There are two key geographical facts. First, the Cbus offices were in central Melbourne. The office of the New South Wales State Secretary of the CFMEU’s NSW Construction and General Division, Brian Parker, was at Lidcombe, a suburb of Sydney. Secondly, David Atkin, Maria Butera and Lisa Zanatta all worked on the same floor at the Cbus premises in an open plan office quite near each other.

The CFMEU controversy with Lis-Con

12. For some time the CFMEU has been in controversy with two companies in the construction industry. They are Lis-Con Concrete Constructions Pty Ltd and Lis-Con Services Pty Ltd (Lis-Con). The principal relevant executive in those companies is Eoin O’Neill. Cbus was the default superannuation fund for Lis-Con from about 2003 to 2013. There seem to have been several causes for the controversy. The most relevant one is a dispute between the CFMEU and Lis-Con

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about whether Lis-Con had been in arrears illegally in paying the employee superannuation contributions which was obliged to pay to United Super. For present purposes it does not matter whether the Lis-Con companies had been in arrears illegally. Of course, if they had been, that is deplorable. Companies which, in breach of the law, cling onto money which should have been paid to a superannuation trustee in order to provide themselves with some working capital are in effect misappropriating the money. The risk is that if the company suddenly crashes, the superannuation position of the employees is radically worsened. A CFMEU objection to the practice of paying in arrears illegally is understandable, and even to be encouraged, at least so far as CFMEU members are affected. The real issue is what tactics the CFMEU have employed in trying to overcome the illegal arrears problem, if it existed. If those tactics have been unlawful, or have resulted in others behaving unlawfully, the tactics would not be justified merely because the Lis-Con companies themselves were at fault, if they were, by paying in arrears illegally.6

18 June 2013: the first Gaske leak

13. Steve Gaske was a Cbus employee. He was also Honorary President of the Queensland Branch of the Construction and General Division of the CFMEU. In that respect he illustrated a propensity in many people connected with Cbus to wear two hats. On 18 June 2014 he requested and obtained certain information relating to the arrears of Lis-Con from Superpartners. The information was contained partly in two emails from Ann-Marie Hughes of Superpartners setting out the total

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amounts Lis-Con owed in unpaid superannuation contributions for particular months. And it was also contained in a schedule identifying the names of the Lis-Con employees, their Cbus membership number, their date of birth and the superannuation contributions. But no personal contact details in the nature of email or home addresses or telephone numbers were disclosed. On the same day, 18 June 2013, Steve Gaske sent the emails on to a CFMEU organiser in Queensland. The handing over of this information to Steve Gaske became known as ‘the Gaske leak’. It was the first of two Gaske leaks.

18-25 June 2013: referring Lis-Con to lawyers for action

14. On the same day, 18 June 2013, a further key event happened. The debt collection agent for Cbus was Industry Funds Credit Control (IFCC). The solicitors for IFCC sent a letter to Lis-Con concerning the arrears position. On 20 June 2013 Eoin O’Neill responded by telephone, saying he had already paid the superannuation entitlements for February 2013 and would pay for March 2013 by 27 June 2013. IFCC agreed that Lis-Con could have until that date to make that payment.

15. On 25 June 2013 Steve Gaske contacted Ann-Marie Hughes of Superpartners and requested that Lis-Con’s files be ‘referred to legal’. By this he meant ‘referred to lawyers for action. This was the CFMEU’s idea. Ann-Marie Hughes complied with that request and

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asked Andrew Grabski of IFCC to arrange for the Lis-Con files to be forwarded ‘to Legal’.  

25-27 June 2013: the CFMEU decision to go to war with Lis-Con

On 25-27 June 2013 a Divisional Executive Meeting of executives for the Construction and General Division of the CFMEU took place. Among those attending were Brian Parker, David Noonan, Michael Ravbar (Secretary of the Queensland Branch of the Construction and General Division) and Brian Fitzpatrick (an organiser from the New South Wales Branch of the Construction and General Division). The minutes record a discussion about complaints received by the CFMEU of breaches by Lis-Con in relation to awards and statutory entitlements. The Branches were requested to provide information to the National Office about these things. But in substance it was agreed that the CFMEU would ‘go to war’ with Lis-Con, as Brian Fitzpatrick described it.

Brian Parker’s plan

Brian Parker knew that United Super held the personal contact details of Lis-Con employees. He decided to obtain those details. He wanted CFMEU staff to contact the employees and encourage them to harass

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Lis-Con for not having paid employee superannuation entitlements on time.\textsuperscript{11}

18. After the 25-27 June 2013 meeting, Brian Parker told Brian Fitzpatrick that he wanted to ‘get contact details for Lis-Con employees off Cbus and then contact the employees and encourage them to stir up trouble with Lis-Con over unpaid entitlements’. By ‘contact details’ he meant personal information capable of being used to communicate with the employees.\textsuperscript{12}

19. Before examining how Brian Parker’s plan was implemented, it is necessary to set out some intervening events.

**27-28 June 2013: the CFMEU directs Cbus to start proceedings against Lis-Con**

20. On 27 June 2013 Lisa Zanatta had a meeting with IFCC. She said that because of ongoing issues the CFMEU was having with Lis-Con, she had been requested to ask for advice of ‘all payment terms on any future arrears’. Later that day she called IFCC and requested an email setting out the current arrears position, the estimated debt and the implications of issuing proceedings or holding off. Andrew Grabski replied that day. He advised Lisa Zanatta that Eoin O’Neill had called him. He said that Lis-Con would not commit to monthly superannuation payments but that the payments for April 2013 and May 2013 would be paid by 27 June 2013. Andrew Grabski supplied

\textsuperscript{11} Interim Report, Vol 2, ch 8.3, para 4(c).

\textsuperscript{12} Interim Report, Vol 2, ch 8.3, paras 52-54.
arrears information which was ‘aggregated’ in the sense that it stated the total amounts paid by each company for particular months. It was not broken down by reference to individual employees.\textsuperscript{13}

On the next day, 28 June 2013, a curious but thought-provoking event took place. Lisa Zanatta sent the ‘email that went around the world’. Its journey began when Lisa Zanatta forwarded Andrew Grabski’s email to Jade Ingham, Assistant Secretary of the Queensland Branch of the Construction and General Division of the CFMEU. Her covering email asked him to ‘read update below regarding Lis Con’. She asked him to call her. Her email had been sent in response to a request from Jade Ingham for an update of the arrears status of Lis-Con. Jade Ingham sent the material to Michael Ravbar. Michael Ravbar rang David Atkin and said he wanted further information about the extent of the arrears. David Atkin said he later gave this during a trip to Brisbane in the form of aggregate arrears information. Michael Ravbar then sent the ‘email that went around the world’ on to David Noonan. David Noonan sent it to David Atkin. David Atkin sent it to Maria Butera. He asked her to touch base with him about it.\textsuperscript{14} At 11.29am on 28 June 2013 the ‘email that went around the world’ was then sent by Maria Butera to Kath Noye. Maria Butera asked her to ‘follow up’.\textsuperscript{15} At 11.33am Lisa Zanatta sent an email to IFCC advising that the CFMEU in Queensland had ‘requested’ that Cbus ‘go ahead with legal proceedings ASAP’. In a telephone call a few moments later, Kath Noye said to IFCC that ‘the union wanted files referred to legal asap’. Proceedings were then commenced on 19 July 2013 in the District

\textsuperscript{13} Interim Report, Vol 2, ch 8.3, paras 32-37.
\textsuperscript{14} Interim Report, Vol 2, ch 8.3, paras 38-41.
\textsuperscript{15} Interim Report, Vol 2, ch 8.3, para 45.
Court of New South Wales. So the Cbus interests did what ordinary legal persons do when aggrieved – they resorted to due process of law. As will be seen below, that was one day after a telephone call from Brian Parker to David Atkin, which negated due process of law.

22. These events reveal that Cbus, in deciding to commence legal proceedings against Lis-Con, was acting at the direction of the CFMEU.

23. It is probable that the CFMEU’s decision to direct Cbus to start proceedings against Lis-Con was one aspect of its war with Lis-Con. But it is now necessary to concentrate on another – the implementation of Brian Parker’s plan.

**Brian Parker’s first step: approaching Bob McWhinney on 8 July 2014**

24. The first step taken pursuant to Brian Parker’s plan failed. But what happened is very significant in several respects. On 8 July 2013 Brian Fitzpatrick contacted Bob McWhinney. Bob McWhinney was another man with two hats. He was an employee of Cbus. But he was also a financial member of the CFMEU. Brian Fitzpatrick asked him what information he could provide to the CFMEU about Lis-Con. Bob McWhinney asked Anthony Walls of Superpartners to run a ‘query’ through the database in order to obtain particular information. An

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17 Interim Report, Vol 2, ch 8.3, para 47.
email of 9 July 2013 from Anthony Walls makes clear,\textsuperscript{19} as Bob McWhinney accepted,\textsuperscript{20} that the information he had asked Anthony Walls to obtain concerned the names and addresses of Lis-Con employees. \textit{But, critically, it did not concern arrears information.} At 12.54pm Anthony Walls sent an email to the team which was to run the query. It stated\textsuperscript{21}:

Hi guys,

Bob McWhinney (Cbus Coordinator) has requested that a query be done for 2 employer accounts. […]

Bob requires a list of:
- All members registered with both employers (\textit{current and past})
- Member Number
- Member Name
- Dates of Birth
- \textit{Address}

(bold emphasis in original; italicised emphasis supplied)

\textbf{The events of 9 July 2013}

25. Some extremely significant events took place on 9 July 2013. Bob McWhinney spoke to Lisa Zanatta for over five minutes at 11.38am.\textsuperscript{22} Bob McWhinney informed Lisa Zanatta about his request. But she told him that he was not permitted to ask for this information.\textsuperscript{23} That evidence of Bob McWhinney was confirmed by Lisa Zanatta’s

\textsuperscript{19} Cbus Hearings MFI-1, 11/6/15, Vol 1, tab 11, pp 49-50.
\textsuperscript{20} Cbus Hearings MFI-1, 11/6/15, Vol 1, tab 11, p 49; Robert McWhinney, 12/6/15, T:198.23-36.
\textsuperscript{21} Cbus Hearings MFI-1, 11/6/15, Vol 1, p 49.
\textsuperscript{22} Parker MFI-1, 15/6/15, p 8.
\textsuperscript{23} Robert McWhinney, 12/6/15, T:299.34-37, 201.8-10.
evidence that she had told Bob McWhinney that he could not pursue
the request. According to her, she told Bob McWhinney that if Brian
Parker wanted that level of information he should ‘try his luck’ with
the CEO (i.e. David Atkin).24 Bob McWhinney could not recall this
additional comment, but said it was possible that this had been said.25
At 12.44pm, Bob McWhinney contacted Anthony Walls by email and
amended the terms of his request, now requiring only \textit{arrears}
information: ‘[…] I will only need a list of the last completed payment
headers for the two accounts […]’

26. By 1.06pm Anthony Walls had communicated Bob McWhinney’s
amended request to the team.26

27. The uncontroverted evidence of events on 9 July 2013, then, was that,
when Lisa Zanatta discovered that Bob McWhinney wished to obtain
personal member information in the form of addresses, she
successfully acted to prevent him getting it. She did so because to
release it would have contravened Cbus policy. It is, therefore, most
unlikely that she would have acted in a contrary manner some days
later, between 18 and 29 July 2013, unless she had received specific
authorisation to do it from the top level in Cbus.

12 July 2013: Brian Fitzpatrick reports failure to Brian Parker

28. Bob McWhinney sent the information he got pursuant to his amended request to Brian Fitzpatrick on 12 July 2013. It did contain the name, Cbus number, date of birth and superannuation payment information in respect of particular Lis-Con employees for each Lis-Con company. But it was radically different from the Zanatta spreadsheets in not containing home addresses, telephone numbers and personal email addresses. It was nonetheless probably in breach of cl 6.4 of the Cbus trust deed – which is a badge of the strictness of cl 6.4.27 But it gave arrears information – not aggregated into a total, but identifying what was owed in relation to each individual employee.28 Hence, it may be said, looking forward, that Brian Parker had no reason to be ringing David Atkin, as he did on 18 July 2013, to ask for information about the Lis-Con arrears position. He already knew it in detail.

29. On 12 July 2013, after receiving Bob McWhinney’s email attaching information about the Lis-Con employees, Brian Fitzpatrick noted that the information did not include what Brian Parker viewed as a means of contacting the Lis-Con employees. He reported back to Brian Parker. Brian Parker said he would talk to Bob McWhinney.29 In the next few days there were numerous telephone calls between Bob McWhinney, Brian Fitzpatrick and Brian Parker. In particular, Brian Parker called Bob McWhinney and spoke to him for 22 minutes on 16

29 Brian Fitzpatrick, witness statement, 15/7/14, para 105.
July 2013 – no doubt about Brian Fitzpatrick’s failure to obtain the addresses of Cbus members employed by Lis-Con.\(^\text{30}\)

**Brian Parker’s second step: approaching David Atkin on 18 July 2013**

30. The second step of Brian Parker’s plan began six days after 12 July, on 18 July 2013. It must be remembered that on 18 July 2013, each of Brian Parker, Maria Butera and Lisa Zanatta knew very well what Lis-Con’s arrears position was. Brian Parker knew it because Bob McWhinney’s email of 12 July 2013 to Brian Fitzpatrick had been passed on by Brian Fitzpatrick to Brian Parker. Maria Butera and Lisa Zanatta knew it because they had participated in email traffic and other communications between senior CFMEU officials and senior Cbus executives in late June – particularly the ‘email that went around the world’. A further source of Lisa Zanatta’s knowledge was her involvement in the starting of proceedings against Cbus because of the arrears position. On 18 July there were three communications between Brian Parker and David Atkin: two telephone calls and a text message. Brian Parker rang David Atkin at 8.35am.\(^\text{31}\) That call lasted one minute. At 9.40am David Atkin sent a text message to Brian Parker. At 10.00am Brian Parker rang David Atkin again. That call lasted three minutes and 30 seconds. Brian Parker requested David Atkin’s assistance in obtaining information enabling him to contact Lis-Con employees as the CFMEU was running a campaign against Lis-Con. David Atkin told Brian Parker he would arrange for someone from Cbus to provide the information. Later that day David Atkin told

\(^{30}\) Parker MFI-1, 15/6/2015, p 7.  
Maria Butera about the conversation. According to her, he said Brian Parker had asked for the personal member details of Lis-Con employees for the purposes of a union campaign, and asked him to arrange for Brian Parker to be given the information he wanted. In turn, Maria Butera spoke to Lisa Zanatta about what David Atkin had said to Maria Butera. Lisa Zanatta told Maria Butera of the incident which happened only nine days earlier, on 9 July, when she told Bob McWhinney that if Brian Parker wanted personal information he would need to raise it with David Atkin. Lisa Zanatta then spoke to Brian Parker on 18 July. She told him it was not normal practice to hand out the information he was asking for. However, he asked her to get information which would enable the CFMEU to contact Lis-Con employees.

18-22 July 2013: Lisa Zanatta procures the Zanatta spreadsheets

31. On the same day, 18 July, Lisa Zanatta asked Anthony Walls of Superpartners to run an ‘enquiry’ for the accounts for Lis-Con for the past 12 months. For the reasons given in the previous paragraph, the ‘enquiry’ cannot have been motivated by a desire to find out the arrears position. Lisa Zanatta already knew that. On 22 July Anthony Walls responded to Lisa Zanatta’s request by sending her an email which attached two large spreadsheets containing the names, residential addresses, email addresses, telephone numbers and mobile numbers of

32 Paras 64-100.
a large number of Lis-Con employees. A form of these spreadsheets was modified by removing some of its columns. But the columns relating to the personal details just mentioned of Lis-Con employees were not removed. The modified spreadsheets were delivered to Brian Parker’s office at Lidcombe on 29 July. The spreadsheets in that modified form are known as the ‘Zanatta spreadsheets’.

32. When Anthony Walls sent his email of 22 July 2013 to Lisa Zanatta, he copied Bob McWhinney into it. This surprised Lisa Zanatta. In her request of Anthony Walls to run an ‘enquiry’ she had been careful not to include any other person as an addressee. She did not want anyone else to know about it. Upon receiving the 22 July email and realising that it had also been copied to other people, Lisa Zanatta sent an email to Bob McWhinney stating: ‘Bob please don’t pass this on at this stage. Thank you.’ Bob McWhinney replied: ‘Okay’. Lisa Zanatta also sent an email to Anthony Walls which rebuked him. It said: ‘Thank you Anthony this request was private. I would have appreciated if it was okey [sic] before ccing others.’ (emphasis added) These communications reveal that Lisa Zanatta had intended that her request to Anthony Walls be kept secret. She understood that it was wrong for her to be seeking and obtaining documents containing personal contact details for the purpose of supplying it to Brian Parker to assist the CFMEU in its war with Lis-Con. Anthony Walls replied to Lisa Zanatta’s reprimand in an email stating: ‘I’m so sorry about that. I thought Cc’ing Bob would be ok given that he asked me for the same query 2 weeks ago but changed his mind. My apologies I’ll remember it for next time’. Lisa Zanatta replied: ‘No problem at all. I

understand exactly why you did it. I have sorted it.’ Lisa Zanatta’s reference to having ‘sorted it’ was a reference to the fact that she had requested and obtained Bob McWhinney’s assurance not to pass it on at that stage.36

**24 July 2013: Maria Butera and Lisa Zanatta decide on a meeting to concert plans for delivery**

33. On 24 July Lisa Zanatta sent an email to Maria Butera. It stated that she had the data requested by Brian Parker. It stated that she had rebuked Anthony Walls for passing it on to others without consent. It stated that she attached the documents which Anthony Walls sent on 22 July. And it indicated that she would catch up with Maria Butera the next day if she were available.37 Maria Butera sent an email back requesting that they discuss the matter the following day, and Lisa Zanatta agreed.38

34. It is clear from these communications that both executives knew that the spreadsheets obtained from Anthony Walls contained the data Brian Parker had requested. But how were the spreadsheets to be delivered to him? If that question were to be discussed via email or in casual office conversation on an open plan floor there was a risk of imperilling secrecy. There is a lot of circumstantial and documentary evidence which points to the conclusion that Maria Butera and Lisa Zanatta were acutely conscious of various matters. One was that the

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personal contact details of the Lis-Con employees comprised highly sensitive information. Another was that they would be handing it over to Brian Parker in breach of Cbus policy. Another was that for those reasons they had to preserve the utmost secrecy about their dealings with it.\textsuperscript{39}

\textbf{25 July 2013: Maria Butera and Lisa Zanatta meet}

35. On the next day, 25 July, Maria Butera and Lisa Zanatta met as arranged. They discussed how to convey the highly sensitive information to Brian Parker. They agreed that Lisa Zanatta should get the information to Brian Parker, not by emailing it or using a conventional courier service or posting it, but by herself acting as a courier and secretly taking it, under cover of some seemingly legitimate but actually non-existent reason for a trip to Sydney, to his Sydney office.\textsuperscript{40} This was a very expensive course. It involved the actual travel costs and the opportunity costs of the time Lisa Zanatta was throwing away. The expense reveals how great a premium was being placed on secrecy. There can be no suggestion that the purpose of the 25 July meeting was to discuss, not sensitive information, but arrears information. Both executives believed that Lis-Con was up to four months in arrears. So did Brian Parker. Lisa Zanatta did not need any guidance or approval from Maria Butera to give Brian Parker arrears information. She needed guidance or approval in relation to the communication of sensitive information.

\textsuperscript{39} Interim Report, Vol 2, ch 8.3, paras 72-86.

\textsuperscript{40} Interim Report, Vol 2, ch 8.3, para 87.
26 July 2013: Maria Butera and Lisa Zanatta make their final plans

36. On Friday 26 July 2013 the pace of events picked up. Lisa Zanatta was not in the Cbus office in Melbourne. She was travelling to and from Geelong. At 2.30pm she telephoned Brian Parker. They spoke for four and a half minutes. An arrangement was made for Lisa Zanatta to drop the Zanatta spreadsheets off with Brian Parker’s personal assistant in the CFMEU NSW Branch office at Lidcombe in Sydney on 29 July 2013. He himself was not going to be in the office that day.41

37. On 26 July at 2.37pm Lisa Zanatta sent an iMessage to Maria Butera’s mobile phone. It stated that she had made an arrangement to drop off the information to Brian Parker’s personal assistant, and that he was expecting a call from Maria Butera.42 She also rang Jackie Heintz, Project Officer at Cbus, to ensure that flights were booked for Monday.43

38. On 26 July 2013 at 2.40pm Maria Butera telephoned Brian Parker. She warned him of the need for secrecy and care in using the Zanatta spreadsheets.44

39. On 26 July at 2.43 pm an iMessage was sent by Maria Butera to Lisa Zanatta. It stated that she had spoken to Brian Parker and he had agreed to use the information very carefully.45

40. Within 20 minutes of Lisa Zanatta’s call to Jackie Heintz at 2.37pm, the latter had booked return flights from Melbourne to Sydney on Monday 29 July 2013.46

41. At 3.57pm on 26 July 2013 an express courier service was booked by Cbus for the purpose of delivering a package from the Cbus office to Lisa Zanatta’s home address. The package was collected at 4.40pm. It was delivered at 5.20pm. It contained the Zanatta spreadsheets.47 Meanwhile, at 4.54pm, Lisa Zanatta spoke to Maria Butera concerning a request from Queensland for an official named Clarke to attend a meeting. He was due in Melbourne for specialist training the following week. Maria Butera requested that Lisa Zanatta provide David Atkin with the details so that he was familiar with the issues in the event of a call to him from the Queensland branch. At 4.57pm she spoke to David Atkin on that subject. During this conversation she confirmed that Brian Parker’s request was ‘sorted’.48

42. At 5.47pm on 26 July 2013 Lisa Zanatta sent an iMessage to Brian Parker. It read: ‘Hey Comrade just confirming that Jenny or is it Jennifer operates out of the Lidcombe office. Is that correct? In unity lisa cbus’. At 6.10pm Brian Parker responded: ‘Jennifer comrade thank you’. The name of Brian Parker’s personal assistant was

46 Interim Report, Vol 2, ch 8.3, para 97.
Jennifer Glass. The two iMessages were referring to her.49 On this uplifting note of fraternity the day ended.

**Brian Parker updates Brian Fitzpatrick**

43. Brian Fitzpatrick gave evidence, denied by Brian Parker, to the effect that on or possibly a little after 26 July 2013, he had an important conversation with Brian Parker. Brian Parker said that he had ‘arranged for a couple of women at Cbus down in Melbourne to secretly give him private information about Lis-Con’s employees’. Brian Parker said: ‘We are getting what we want. I’ve spoken to her and she has agreed to give it to us on the quiet’. That may be a reference to Lisa Zanatta’s conversation with Brian Parker on 18 July 2013 at 2.06pm for seven minutes. Or it may be a reference to her conversation with him at 2.30pm on 26 July 2013 for four and a half minutes. Or it may be a reference to Maria Butera’s two minute call to Brian Parker at 2.40pm on 26 July 2013. Or it may be a reference to a combination of them. Brian Parker mentioned the first name of a woman in Cbus – Liza or Lisa. This is plainly Lisa Zanatta. Brian Parker said that one of the Cbus women involved was one of the bosses and that she had not told her own boss what she was doing because it was illegal. Brian Parker also said: ‘We have gotta be very careful we don’t tell anyone about this. If this comes out I’m dead, the girls are dead and they’ll be sacked and I’ll be sacked’. The iMessages of 26 July 2013 corroborate various parts of this evidence of Brian Fitzpatrick. This corroboration is significant. It is significant because neither the Commission staff nor Brian Fitzpatrick knew anything

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about those iMessages when he gave his evidence in July 2014. They only came to light in late October 2014.50

29 July 2013: Lisa Zanatta flies to and from Sydney

44. On Monday 29 July 2013 Lisa Zanatta flew from Melbourne to Sydney. She arrived at about 10.55am. She had with her the Zanatta spreadsheets. She travelled by taxi from Sydney Airport to the CFMEU’s office at Lidcombe. The taxi arrived at 11.33am. She delivered the Zanatta spreadsheets. She requested that they be provided to Brian Parker.51

45. At 11.35am on 29 July Lisa Zanatta’s taxi left to take her back to the airport.52

46. At 11.46am on 29 July Maria Butera sent Lisa Zanatta an iMessage: ‘Everything ok? M’. Lisa Zanatta immediately responded: ‘Yes thank you – done delivered’. Thus Maria Butera knew that Lisa Zanatta was in Sydney delivering the Zanatta spreadsheets to Brian Parker’s personal assistant.53

47. Lisa Zanatta reached home late in the afternoon of 29 July 2015. She telephoned Brian Parker, who had not been in his Lidcombe office that day. They spoke for three and a half minutes. She told him she had

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53 Interim Report, Vol 2, ch 8.3, paras 118-120.
dropped off the Zanatta spreadsheets to Jennifer Glass earlier that day.54

The aftermath of Lisa Zanatta’s trip to Sydney

48. On 30 July 2013 Brian Parker called Lisa Zanatta. They spoke for three minutes. Brian Parker had returned to his Lidcombe office the previous evening. He told Lisa Zanatta that he had received the Zanatta spreadsheets.55

49. On 30 July 2013 Brian Parker provided Brian Fitzpatrick with the Zanatta spreadsheets. Brian Parker told Brian Fitzpatrick that he had received the lists from the Cbus headquarters in Melbourne. He told Brian Fitzpatrick to ‘follow up on it’. That is, Brian Fitzpatrick was to use the contact details in the documents provided to contact employees of Lis-Con and carry out the plan to attack Lis-Con.56 On 30 July 2013 Brian Fitzpatrick made a number of telephone calls to employees of Lis-Con. The numbers he rang appeared on the Zanatta spreadsheets. They do not appear on any other documents which were provided by Cbus to the CFMEU. In those calls Brian Fitzpatrick told the employees that Lis-Con was in arrears in paying their entitlements. He said words to the effect: ‘I asked them were they aware that their entitlements are well behind in both their super and redundancy provisions, are they aware of that and if they’re not they should be because if the company goes down, they’ll be without the money and

55 Interim Report, Vol 2, ch 8.3, para 123.
the company’s got a history of folding and they should check and take it up with their employer’. The purpose of the calls was to get the employees to contact Eoin O’Neill about outstanding superannuation payments. That was the tactic which had been agreed between himself and Brian Parker in order to achieve the ‘best and quickest response’.

50. On 30 July 2013 at 4.42pm Lisa Zanatta and Brian Parker spoke again on the telephone for one minute. Immediately after that they spoke again at 4.43pm for four minutes. Brian Parker told her that the plan they had discussed had been put into action, and the Zanatta spreadsheets had been very useful.

The second Gaske leak

51. On 30 July 2013 Steve Gaske sought and obtained further information from Ann-Marie Hughes of Superpartners in relation to Lis-Con arrears. Ann-Marie Hughes provided Steve Gaske with an email dated 30 July listing the employees of Lis-Con Services by name and identifying amounts owed to them. The information did not include any of the personal contact details of the Lis-Con services employees. But the disclosure of financial information was probably in breach of cl 6.4 of the Cbus trust deed. On receipt of the email, Steve Gaske sent it to Gareth Baines, the Construction Manager at Civil, Mining and Construction Pty Ltd. He said in the email: ‘I think we have covered

57 Brian Fitzpatrick, 15/7/14, T:46.3-9.
off on information you requested. If there is anything else don’t hesitate to call. Cheers’.60

52. On 1 August 2013 Cleary Hoare, the solicitors for Lis-Con, wrote to David Noonan of the CFMEU. They raised concerns that Steve Gaske had obtained confidential information in respect of Lis-Con and forwarded it externally to Cbus. Cleary Hoare noted that a number of Lis-Con’s employees had been contacted from telephone numbers that originated in Bowen Hills. Bowen Hills is the Brisbane suburb in which the Queensland Divisional Branch has its office. Cleary Hoare noted that those employees had reported that they had been threatened by CFMEU officials.61

53. On the same day Cleary Hoare also sent similar correspondence to David Atkin at Cbus. The letter to David Atkin attached a copy of Steve Gaske’s email of 30 July 2013 to Gareth Baines. Several days later Cleary Hoare also wrote to Steve Bracks, the Chairman of Cbus.62

54. When David Atkin received the Cleary Hoare letter on 1 August 2013, he forwarded it to Maria Butera. He said: ‘This has just come through this afternoon. Could we discuss how best to respond’. Maria Butera then forwarded the email to Lisa Zanatta at 5.17pm. She said: ‘In-confidence. I need to speak to you about this. M’. At 5.23pm Maria

61 Interim Report, Vol 2, ch 8.3, para 133.
Butera rang Lisa Zanatta. They had a five minute telephone conversation. They discussed the Cleary Hoare complaint.\(^63\)

55. On 2 August 2013 various telephone calls took place. At 7.29 am Lisa Zanatta rang Brian Parker. The call lasted seven minutes and thirty seconds. At 12.00 pm Maria Butera rang Lisa Zanatta. The call took four minutes. At 3.21 pm Brian Parker rang Lisa Zanatta. The call took six minutes. At 3.57 pm Maria Butera rang Lisa Zanatta. The call took five minutes.

56. The following inference may be drawn. Maria Butera and Lisa Zanatta had been or continued to be afraid that they were going to be caught out. They were afraid that the Lis-Con complaint had really arisen because of the use that had been made of the Zanatta spreadsheets delivered by her on 29 July 2013. Since the complaint from Lis-Con, however, had directed attention to Steve Gaske, they wanted him to remain the target of attention.\(^64\)

57. On 2 August 2013, in response to the complaint from Lis-Con, David Atkin asked Angela Thurstans, the Cbus Executive Manager of Governance and Risk, to undertake an investigation into the matter. Maria Butera and Lisa Zanatta were called on to assist in that process. Following this brief investigation, Holding Redlich, the solicitors for Cbus, were instructed to send a letter to Cleary Hoare on 7 August 2013. It said that Cbus accepted that it was inappropriate for Steve Gaske to have acted as he did. But it also said that Cbus was quite satisfied that this incident was an isolated occurrence. That letter was

\(^{63}\) Interim Report, Vol 2, ch 8.3, paras 135-137.

\(^{64}\) Interim Report, Vol 2, ch 8.3, paras 138-139.
sent following a conference with Holding Redlich attended by David Atkin, Maria Butera, Lisa Zanatta and Angela Thurstans.  

58. The complaint about the leakage of Lis-Con employees’ information to the CFMEU so soon after their own leakage on 29 July 2013 had given Maria Butera and Lisa Zanatta a fright. They were anxious to ensure that there would be no further complaints from Lis-Con that might result in yet another investigation, and a revelation of their own misconduct. On 8 August 2013 at 8.41am Lisa Zanatta rang Brian Parker in a one minute thirty second call. At 11.52am Maria Butera rang Lisa Zanatta in a thirty second call. At 11.53am Maria Butera sent Lisa Zanatta an iMessage saying: ‘Lisa – did BP call you back? M’. At 11.53am Lisa Zanatta sent an iMessage to Maria Butera as follows: ‘No ill call him now’. At 11.54am Brian Parker rang Lisa Zanatta in a one minute call. At 11.55am Brian Parker rang Lisa Zanatta in a four minute call. At 11.59am Lisa Zanatta sent an iMessage to Maria Butera stating: ‘Everything is still safe in his hands only’. By that Lisa Zanatta recorded the proposition that Brian Parker had told Lisa Zanatta that everything was still safe in his hands because only he still had the Zanatta spreadsheets and there would be no more activity that could result in their exposure.  

59. These numerous communications between Lisa Zanatta and Brian Parker on 2 and 8 August 2013 tend to corroborate Brian Fitzpatrick’s evidence.

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David Atkin capitulates to David Noonan in relation to Steve Gaske

60. On 9 August 2013 David Atkin gave in to David Noonan over whether Steve Gaske should keep his position as Honorary President of the CFMEU in Queensland at the same time as being a Cbus organiser. In iMessage exchanges between Maria Butera and Lisa Zanatta, Maria Butera was critical of David Atkin and described him as having ‘caved’. Lisa Zanatta was also extremely critical. This evidence demonstrates that neither Lisa Zanatta nor Maria Butera was predisposed to cleave unthinkingly to the CFMEU position. They would not have acted as they did without authorisation from within Cbus. It may be inferred that David Atkin was prepared to meet the desires of the CFMEU and then order his own executives to comply with those desires.

The 11 May 2014 Sydney Morning Herald article and the 20 May 2014 meetings

61. On 11 May 2014 an article was published in the Sydney Morning Herald entitled ‘Super Fund in Union Leak Claim’. The article alleged that the private financial details and the home addresses of hundreds of non-union workers employed by Lis-Con were disclosed by a Cbus employee to a whistle blower and to Brian Parker without authorisation.67 Other articles followed. Plainly public inquiries into the Lis-Con link were imminent.

On 20 May 2014 Brian Parker spoke to each of Maria Butera, Lisa Zanatta and David Atkin. His intention was to impress on them what he would say, if asked, about the circumstances surrounding the leak of 29 July 2013, and encouraging them to adopt the same position. Brian Parker told Maria Butera that his story was going to be that he got the contact information on the Zanatta spreadsheets from Brian Fitzpatrick, that he did not ask for it, and that he did not get it from David Atkin or anyone else. Maria Butera felt threatened by his manner, size and reputation. Brian Parker told Lisa Zanatta that, if asked, he would say he got the contact information from Brian Fitzpatrick, and, if she were asked, she was to deny that she gave Brian Parker the contact information. Brian Parker told David Atkin that in their 18 July 2013 conversation David Atkin had said there were constraints on what information he could give by way of assisting the CFMEU to pursue outstanding arrears from Lis-Con, but that he, David Atkin, would follow it up to see how Cbus could help. Brian Parker also told David Atkin that he had not received any Cbus list of members employed by Lis-Con, but that Brian Fitzpatrick had obtained the list from Cbus.

The positions of persons affected

Apart from the findings set out above in relation to 18 July 2013 and 20 May 2014, those findings broadly correspond with what counsel assisting submitted in 2014 and with what was accepted in the Interim Report. The findings for 18 July 2013 and 20 May 2014 are controverted by Cbus, David Atkin, Brian Parker and to some extent the CFMEU. They are supported by Brian Fitzpatrick and the Lis-Con
parties. The events of those two days must now be more closely examined.

C – THE PARKER/ATKIN CONVERSATION OF 18 JULY 2013

64. In a telephone conversation at 10.00am on 18 July 2013, Brian Parker requested David Atkin’s assistance to obtain information enabling him to contact Lis-Con employees, as the CFMEU was running a campaign against Lis-Con. David Atkin told Brian Parker he would arrange for someone in Cbus to provide the information requested. Later that day, David Atkin told Maria Butera what Brian Parker had said and asked her to arrange for him to be given the information he wanted.

65. The evidence establishes these facts, at least on the balance of probabilities, taking into account the seriousness of the matter. Perhaps the evidence satisfies an even higher standard of proof. But that need not be decided.

66. At the outset it is desirable to notice a curiosity about the conversation. On any view Brian Parker wanted to get some kind of information to assist the CFMEU. But why was Brian Parker seeking information instead of giving it? It is the duty of a trustee to get in the trust property. That is a fundamental and primary duty. If Lis-Con was in arrears, it was the duty of Cbus – ie United Super – to pursue Lis-Con, whether by persuasion, threats of litigation or actual litigation, in order to ensure that the property which should have been in the hands of the trustee United Super got into those hands. David Atkin’s response to Brian Parker should have been: ‘If there is a problem with arrears, we,

68 Briginshaw v Briginshaw (1938) 60 CLR 336.
as trustee, will pursue it and solve it.’ To promise information to Brian Parker was to reject the path of legality and walk down the path of illegal self-help. Courtesy is a fine thing, and so is cooperation with those David Atkin had to deal with. But his conduct shows him as being over-ready to delegate to another the trustee’s duties instead of ensuring that he procured the trustee of which he was the CEO to carry out its primary duties itself.

67. Counsel assisting put the following submissions in support of the suggested findings about the 18 July 2013 Parker/Atkin conversation and about what Brian Parker said on 20 May 2014 to Maria Butera, Lisa Zanatta and David Atkin.

68. Brian Parker had made attempts to obtain the personal contact details of Lis-Con employees through Brian Fitzpatrick’s communications with Bob McWhinney on 8 July 2013. Bob McWhinney had endeavoured to obtain at least the employees’ residential addresses. Because of Lisa Zanatta’s intervention, those attempts had failed, and all that the CFMEU got was arrears information, not personal contact details. Arrears information was something that could be got by dealings between CFMEU officials and Cbus employees at levels well below that of State Secretary to CEO.

69. These circumstances make it inherently probable that during their telephone conversation of 18 July 2013 Brian Parker asked David Atkin for what he wanted and had not been able to obtain - that is, the personal contact details of Lis-Con employees.
70. David Atkin and Brian Parker each gave evidence that their conversation of 18 July 2013 was of an altogether more general kind. That evidence is not plausible, in view of the events leading up to 18 July.

71. Although David Atkin’s evidence as to the content of this conversation changed somewhat over time, each version was based on the proposition that all Brian Parker had asked for was general information in relation to the extent of the Lis-Con arrears, and all David Atkin offered to do was to refer it to someone in Cbus to see what could be done to assist.69 Brian Parker’s evidence was to the same ultimate effect.70

72. The problems with this evidence include the following:

(a) Brian Parker already knew that Lis-Con was in arrears, and by how much.71 His sources of knowledge included the information recently provided by Bob McWhinney.

(b) There existed a routine, uncontroversial and well known method by which arrears information could be obtained by the CFMEU from Cbus. This involved a CFMEU organiser ringing someone at Cbus, and Cbus then making a call to a dedicated team within Superpartners.72

71 Brian Parker, 15/6/15, T:398.41-399.3, 399.21-23, 399.36-37.
72 Anthony Walls, 12/6/15, T:226.5-227.6.
There was, therefore, no reason why the most senior person within the NSW Branch of the CFMEU’s Construction and General Division would need to ring the most senior executive officer of Cbus in order to obtain arrears information for Lis-Con.

Neither David Atkin nor Brian Parker was able to provide a sensible explanation of what assistance Cbus could provide the CFMEU about the extent of Lis-Con’s superannuation arrears beyond the provision of information that could be (and had been) obtained through the usual channels following interaction between relatively junior staff from both organisations.

The absence of a sensible explanation was highlighted through David Atkin’s vagueness about precisely what it was that Brian Parker was actually asking for. For instance, on 23 October 2014 he said that Brian Parker was seeking assistance in terms of ‘further background around the company’s arrears history’. He said that was the full extent of the conversation. However, on 10 June 2015 David Atkin said that what Brian Parker wanted was ‘assistance to identify the extent of the arrears problem’. On the same day David Atkin also said that he expressly warned Brian Parker that there were ‘clearly going to be restrictions on’ the assistance that could be provided. On

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73 David Atkin, 23/10/14, T:868.26-33.
74 David Atkin, 23/10/14, T:869.18-24.
75 David Atkin, 10/6/15, T:51.29-33.
3 October 2014 he had said: ‘there would be limitations in what we could provide’.77

75. Brian Parker had a strong desire to obtain quite particular information about Lis-Con employees. Time had passed between 18 July 2013 and the various days on which David Atkin gave evidence. Making allowances for the effects of that on his memory, whichever of David Atkin’s versions of the conversation is taken, it is unlikely that Brian Parker would have spoken to David Atkin in such an imprecise way, giving David Atkin no real idea about what he was supposed to do next in response to the request.

76. Further, if the information required really was only information as to the extent of the arrears, David Atkin would have had no need to tell Brian Parker that there would be restrictions or limitations on what could be provided. To speak of restrictions or limitations implies that the information was much more confidential than information only about arrears. David Atkin gave an implausible explanation for this unsatisfactory aspect of his evidence. He said that at the time of the conversation with Brian Parker he lacked the expertise to know what information could be provided, and therefore felt the need to qualify his response to Brian Parker.78 However, on David Atkin’s evidence, what Brian Parker requested was at most routine information as to the extent of the arrears, not personal information. It is not possible to accept David Atkin’s evidence that he lacked the expertise to know that information merely recording the extent of an employer’s arrears

77 David Atkin, 3/10/14, T:783.26-27.
(if that is what was being sought by Brian Parker) was regularly provided by Cbus to the CFMEU without the need for any controversy or restrictions or limitations, and without the elaborately clandestine measures eventually used to supply the Zanatta spreadsheets to the CFMEU.

77. David Atkin testified that the conversation between Brian Parker and David Atkin led to a discussion about restrictions and limitations. Either that is true or it is not true. If it is true, it is most likely that the conversation was one in which Brian Parker was asking for personal member information (contrary to the evidence of David Atkin and Brian Parker). If it is not true, this reflects badly on David Atkin’s credit. In either case, the credibility of David Atkin’s evidence suffers.

78. Brian Parker’s inability to provide a rational explanation for his allegedly vague request of David Atkin for unspecified ‘information’ was also unimpressive. It demonstrates the improbability of there having been a conversation of that kind. This was exposed during the course of his examination, and again in the course of cross-examination by counsel for Brian Fitzpatrick.79

79. A good example of this is the following passage of evidence given by Brian Parker after he had been reminded that his evidence was that, as at 18 July 2013, he already knew from Brian Fitzpatrick that Lis-Con was four months in arrears.80

79 Brian Parker 15/6/15, T:339.35-340.11, 401.36-43.
80 Brian Parker, 15/6/15, T:398.17-400.10, 400.20-401.43.
Q. In that case what further information did you need? You have been told they were in arrears, so, in other words, what did you need to ask David Atkin about?

A. More information.

Q. Right, but you told us today that you didn't know that Brian Fitzpatrick had information already. Back on 3 October you told us that Brian Fitzpatrick had informed you of that?

A. Oh, okay. Well, he had information prior to that, but what information he had I can't - I don't know exactly what information. That's where I might have got confused in my response.

Q. What's confusing, sir? Today you tell us, "I wasn't aware", categorically not aware of information coming from Brian Fitzpatrick from McWhinney: that's today. 3 October last year --

A. I may have misjudged the question, so --

Q. Misjudged what question?

A. I just - I had information - Brian Fitzpatrick did have information. I know that about Lis-Con because he told me, or he'd actually told me. He mightn't have had the information. He might - he just told me that they were four months in arrears, so whether it was information, whether he rang up and found that they were four months in arrears, but he had the information, I'm not sure, but he told me that.

Q. But if Brian Fitzpatrick already had the information you needed, why would you be ringing up David Atkin?

A. He told me that they were four months in arrears; Brian Fitzpatrick told me that.

Q. Brian Fitzpatrick told you that he had that information?

A. Yes, that's right.

Q. Right. He had the information, so --

A. He could have rung up about the information.

Q. If he already had the information that you needed, why were you ringing David Atkin?
A. My understanding is there's a difference between having the information which is available in front of you to read out, or being told the information.

Q. How did you know? Did you ask Brian Fitzpatrick, "Do you have the information that I can read out"?

A. No, he told me that he - that's what he had, information. He told me that he had information they were four months in arrears. That was the information - that's what he told me.

Q. But you didn't know whether it was in documentary form or not?

A. No, not that I can recall, no.

Q. So you thought, "I won't bother asking Brian Fitzpatrick whether he's already got all the documentation. I'll ring the CEO and pursue it further"; is that right?

A. Well, I rang the CEO, that's correct.

Q. Why would you do that and bother him if Brian Fitzpatrick may have had it in his hot hands already?

A. I don't know that. He told me that he had information that the company was four months in arrears; that's my answer.

Q. Yes. How is that documented?

A. That was my answer.

Q. Did you ask Brian, "How was that documented?"

A. No, I didn't, no.

Q. Why not?

A. Because I didn't.

Q. Instead of doing that, instead of doing that, you rang the CEO of Cbus and said, "We want information."

A. That's correct.

Q. Without any parameters put on it whatsoever. That's ridiculous --

A. Well, to my - to my --
Q. With all due respect --

... 

Q. You asked an open-ended question of the CEO of Cbus that you wanted information?

A. That's correct.

Q. That's it, that's all you told him?

A. That's correct, from what I can recall, yes.

Q. What on earth does that mean? How on earth would David Atkin understand what you were talking about?

A. He knows what I was talking about. I asked him for information for Lis-Con.

Q. That's it. And he would know automatically precisely what you wanted; is that right?

A. You'd have to ask David Atkin that question.

Q. Precisely, Brian Parker.

A. You'd have to ask David Atkin that question.

Q. That's right. Why on earth did you think he was going to provide what you wanted unless you specified what you wanted?

A. Because I never have - over the years and years that I've been an official, I'd never specify anything about detail about what I require.

Q. You never give details?

A. Not to my knowledge.

Q. You never request details of anyone, ever?

A. No, I didn't say that.

Q. What did you say then?

A. I said that information that I've required previously from Cbus over many years has been the same information you get all the time when you ask for information.
Q. It never changes?
A. No.
Q. Ever?
A. No.
Q. You can't be more specific about certain things in certain situations, it's always the same?
A. I said no.
Q. You already knew, didn't you, that Brian Fitzpatrick had information; he told you that?
A. He told me he had information, that's right; he told me that, that's correct.
Q. That's right, he had information?
A. He told me that he had information.
Q. If he's working with you on the same wavelength, he's got everything you need already, he's got the information he's got it. So why would you be ringing up the CEO to say, "I want information" if Brian Fitzpatrick has said, "I've got information", because "information" means everything you need?
A. Because I did. I asked him for information, that's it.

80. This damaging exchange illuminated the implausibility of Brian Parker's evidence. Incidentally, in its mixture of circular answers and non-responsive answers, this passage is typical of Brian Parker's testimonial style.
Explanation for the uncharacteristic behaviour of Lisa Zanatta and Maria Butera

81. Lisa Zanatta and Maria Butera were long serving and valued senior employees of Cbus. Neither Cbus nor David Atkin suggested that either woman had a history of aberrant behaviour. They did not suggest that either woman habitually failed to take her roles and responsibilities seriously, either with regard to the protection of private member information or otherwise. Indeed, through their counsel, they positively put to Maria Butera that she was an experienced and accountable leader, known within Cbus for her values and integrity.  

82. Why would Maria Butera and Lisa Zanatta have been prepared to act as they did? There is no reason, except that they had obtained authorisation from the CEO, David Atkin.

83. Two particular aspects of the evidence reinforce this general proposition.

84. The first concerns the action taken by Lisa Zanatta on 9 July 2013 discussed above.  

85. The second matter which tends to support this point is the reaction of Lisa Zanatta and Maria Butera when they discovered, on 9 August 2013, that David Atkin had given in to David Noonan over whether Steve Gaske should keep his position as honorary president of the

81 Maria Butera, 11/6/15, T:158.2-17.
82 Paras 24-29.
CFMEU in Queensland in circumstances where he was also a Cbus organiser. In iMessage exchanges between these two women at the time, Maria Butera was critical of David Atkin, describing him as having ‘caved’. Lisa Zanatta was also extremely critical. Again, this evidence suggests that neither Lisa Zanatta nor Maria Butera were predisposed to bow to the whim of the CFMEU. It suggests that they would not have acted as they did without authorisation from above.

86. Maria Butera’s evidence was that David Atkin approached her on 18 July 2013, the day of Brian Parker’s telephone call. He told her he had spoken with Brian Parker, who had asked him for the personal member details of Lis-Con employees for the purposes of a union campaign. She understood the term ‘personal member details’ to be information over and above what Cbus would normally make available. According to Maria Butera, David Atkin then said ‘obviously we want to help the union where we can’, and she responded by telling him that she would get Lisa Zanatta to provide the information quickly. Her evidence was that David Atkin’s request was unusual, but she acted on it because it had come from the CEO.

87. Maria Butera also gave evidence that she told Lisa Zanatta about what David Atkin had said. At that point Lisa Zanatta told Maria Butera about her earlier conversation with Bob McWhinney, and how she had told Bob McWhinney that if Brian Parker wanted that sort of information, he would need to raise it with David Atkin.

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83 Zanatta Bundle, 12/6/15, tab 3.15, p 188.
84 Butera MFI-1, 11/6/15, tab 1, pp 4.5-5.36.
It is unfortunately important to approach Maria Butera’s evidence with care. She has lied many times. Some credit must be given to her for admitting her wrongdoing – the wrongdoing involved in her deliberately false statements, but also the wrongdoing involved in participating in the wrongful disclosure of the information. But the fact remains that her credibility has been badly damaged by her appearances in the witness box in 2014. For this reason, it might well be unsafe to make a finding against David Atkin solely on the basis of Maria Butera’s evidence.

However, for reasons which have already been explained, a finding that Brian Parker did ask David Atkin to assist the CFMEU by providing personal member information of Lis-Con employees is available without reference to Maria Butera’s evidence. Those same reasons make it more likely than not that David Atkin did speak with Maria Butera in the way she described in her evidence.

David Atkin denied that a conversation with Maria Butera occurred in the terms she described. However, his denial was based on the antecedent proposition that he had not had a conversation with Brian Parker in the terms she spoke of in her evidence describing her conversation with David Atkin. For reasons that have already been explained, that antecedent proposition is improbable. Once it is accepted that more likely than not Brian Parker and David Atkin did discuss the provision by Cbus of member contact information, it follows that it is likely that David Atkin said as much to Maria Butera.

In assessing Maria Butera’s evidence it is relevant to also consider the evidence of Lisa Zanatta as to the conversation they had following
Maria Butera’s discussion with David Atkin on 18 July 2013. It is important to approach Lisa Zanatta’s evidence with as much care as should be used with Maria Butera’s. She, too, has lied many times. Maria Butera’s version of events was described above. Lisa Zanatta’s version is different. In a letter from her solicitor conveying her instructions dated 9 December 2014, the following appears:86

‘Miss Butera informed [Lisa Zanatta] that Mr Atkin had received a call from Mr Parker who had requested member data/information regarding all of Lis-con’s employees. The purpose of this data was to assist Mr Parker and his branch in pursuing members’ unpaid superannuation entitlements.

In her private hearing on 12 December 2014 Lisa Zanatta’s recollection of the conversation was that Maria Butera had told her that Brian Parker had spoken with David Atkin and had requested ‘member data and information’, and that at the time she understood that to be normal information about arrears and members.87 According to Lisa Zanatta, her recollection was that she only appreciated that the information Brian Parker was seeking was the personal information of members when she spoke with Brian Parker later on 18 July 2013.88 Yet in a public hearing on 12 June 2015, while being questioned about the solicitor’s letter, she said ‘member data’ was her expression. The questioning continued:89

Q. What do you mean by “member data”?
A. Member information, personal member information.
Q. What did the personal information include?

86 Zanatta Bundle, 12/6/15, tab 2, p 45[3].
87 Zanatta Bundle, 12/6/15, tab 1, p 7.30.
88 Zanatta Bundle, 12/6/15, tab 1, p 8.15.
89 Lisa Zanatta, 12/6/15, T:328.18-32.
A. That could include a whole range of information.

Q. Did Ms Butera, in her conversation with you on the morning of 18 July 2013, say to you that what Mr Parker was after was personal member information?

A. I don’t recall exactly whether it was personal member information. It was definitely member information, but they both mean the same thing from what I – from the work that I was doing.

92. Can Lisa Zanatta’s description of what she was told by Maria Butera support an argument that David Atkin did not tell Maria Butera that Brian Parker had asked for personal member information of a kind that would not usually be disclosed? And on the strength of that argument should it further be accepted that Brian Parker did not ask David Atkin for such information?

93. The argument postulated is not persuasive.

94. To begin with, Lisa Zanatta stated in her evidence that when she spoke to Brian Parker on 18 July 2013 and told him that it was not normal practice to hand out the personal member information he was asking for, Brian Parker told her that he had already discussed it with David Atkin and been told by David Atkin that Cbus would see what it could do. Lisa Zanatta’s evidence, taken as a whole, tends to accord with what Maria Butera stated was said between Brian Parker and David Atkin on 18 July 2013.

95. It is to be remembered that member contact information was the very information that Brian Parker was looking for as at 18 July 2013. The very information he later obtained and used was what he always intended to get. That being so, it is inherently probable that Brian
Parker had asked David Atkin for that information, and that David Atkin had told Maria Butera about that fact.

96. In considering the evidence of Maria Butera as to her conversation with Lisa Zanatta, it is also relevant to observe that Lisa Zanatta had only recently dealt with Bob McWhinney in relation to the same company, Lis-Con. This makes it likely that Lisa Zanatta would have mentioned this to Maria Butera when they discussed the request from David Atkin in relation to Lis-Con during their conversation, as Maria Butera (but not Lisa Zanatta) says they did.

97. Considerations of this kind tend to support a finding that Maria Butera’s account of her conversation with Lisa Zanatta should be accepted.

98. Why does the evidence of Maria Butera differ from that of Lisa Zanatta? One possibility is that this is the result of natural differences in recollection arising from the passage of time. A second possibility is that it results from the fact that the two of them came to this conversation (and their recollections of it) from different perspectives. It was Maria Butera, not Lisa Zanatta, who actually had the conversation with David Atkin. It was at this point where her involvement with events was at its height. Lisa Zanatta, on the other hand, had not spoken with David Atkin and was receiving summary information from Maria Butera in a relatively short conversation and was moving forward quickly, dealing with Brian Parker only shortly thereafter. Her encounter with Brian Parker later that same day was more extensive. It represented her first substantial discussion with
anyone about the matter. It is, therefore, perhaps not particularly surprising that her recollection focuses more on that point in time.

99. A third possible explanation for the difference in accounts is that Lisa Zanatta decided to make admissions where they were compelled by the objective evidence, but not to make admissions beyond that point. Another example of this may be Lisa Zanatta’s testimony that she gave the material to Brian Parker because the CFMEU NSW was very concerned about Lis-Con’s arrears and their viability as companies.90 Lisa Zanatta’s account in relation to this issue does not sit well with the clandestine nature of her trip to Sydney, and could be an attempt to minimise the extent of her evidence against Brian Parker. However, it is not necessary to determine that issue.

100. It is not necessary to decide whether any of these three possibilities posed by counsel assisting are probabilities. It is enough to find that on balance, and taking into account all the circumstances, it is most likely that Maria Butera did tell Lisa Zanatta about Brian Parker’s request for member contact information and they spoke about Lisa Zanatta’s experience with Bob McWhinney.

Submissions of Brian Parker on the 18 July 2013 conversation

101. Counsel for Brian Parker began their submissions on the 18 July 2013 conversation with a preliminary point of intellectual method. They submitted that counsel assisting had committed an error of approach. They submitted that counsel assisting began with ‘the interim findings

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of 2014’ and then interpreted the new evidence tendered in 2015 in the light of the ‘interim findings’. The error was to treat the latter as incontrovertibly established facts. They submitted that that erroneous approach should be rejected and replaced by the correct approach, which was put thus. If the question is whether the direct evidence of Brian Parker and David Atkin should be rejected because of contrary circumstantial evidence, the circumstances must be considered as a whole – the 2015 evidence as well as the 2014 evidence that led to the ‘interim findings’. The submission proceeded:91

It would invert the proper reasoning process to treat interim findings, based on less than all of the available evidence, as established facts and then interpret other parts of the evidence in the light of those supposed facts – that is to say, using the supposed “established facts” to favour one reading of the further evidence over another. The proper course would be, rather, to accept as a starting point that the interim findings might need to be revised if consideration of all the evidence requires it.

102. This submission has superficial plausibility. But it has no utility. In part it is fallacious. In part it is immaterial. In part it is superfluous.

103. First, the 2014 findings were made in an Interim Report. It was contemplated that many other case studies would be dealt with in a final report – this Report. At the time the 2014 findings were seen as appropriate. It is true that if new evidence cast doubt on them, it would be right to examine them afresh. But it discounts them to a degree by calling them ‘interim’. They are not like the findings of a judge made in an application for an interlocutory injunction in comparison to those made on an application for a final injunction.

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91 Submissions of Brian Parker, 11/9/15, para 17. See generally paras 13-18.
Secondly, Brian Parker’s submissions do not demonstrate why the 2014 findings were incorrect in any way. The position is to the contrary. The new evidence tendered in 2015 did not undercut the 2014 findings. It tended to support them. David Atkin’s 2015 evidence created further difficulties for him. So did Brian Parker’s.

To take an example to be considered in detail later, the evidence of Maria Butera and Lisa Zanatta about their meetings with Brian Parker on 20 May 2014 showed Brian Parker behaving in a shifty way. It suggested that he was trying to manufacture evidence, and that he was doing so because he was aware that if he and the executives gave honest evidence to the best of their ability it would damage his cause.

And the evidence of Maria Butera and Lisa Zanatta, in revealing their earlier lies, suggests the correctness of Brian Fitzpatrick’s evidence about the role of Brian Parker. In short, the premise on which the submission of counsel for Brian Parker is based has not been made good.

However, the evidence that led to the 2014 findings has been taken into account along with later evidence. Whether or not the error against which counsel for Brian Parker warns underlies the submissions of counsel assisting, an attempt has been made to avoid it in this Report.

Counsel for Brian Parker submitted that a fundamental fault in counsel assisting’s submissions related to the phrase Maria Butera employed in describing her meeting with David Atkin on 18 July – ‘personal member details’. The submission was that counsel assisting had failed to distinguish between ‘personal member details’ of Lis-Con employees and ‘contact details’, described as ‘personal member details extending to telephone numbers and email addresses’. Counsel for
Brian Parker also submitted that witnesses drew the distinction even though counsel assisting did not.

107. This submission is unconvincing. It depends on a distinction between residential addresses, on the one hand, and telephone numbers and email addresses, on the other. On that distinction, ‘personal member details’ include ‘residential addresses’, but not telephone numbers and email addresses. And on that distinction ‘contact details’ do not include residential addresses. In principle this is a distinction without utility or rationality. Once one knows a person’s name and address, it is very easy to find out that person’s landline telephone number, if the person has one.

108. The distinction relied on by counsel for Brian Parker was not one drawn by Maria Butera. She said ‘personal member details’ were items which were ‘[o]ver and above what we would normally make available for the purposes of arrears … [Y]ou are talking about things like dates of birth; you are talking about things like, perhaps, email addresses, things that you would not normally share’.\(^92\) Counsel for Brian Parker submitted: ‘So, from the outset, she was equivocal about whether it included email addresses and she did not mention telephone numbers.’\(^93\) That submission is wrongheaded if the ‘personal member details’/‘contact details’ distinction is correct. That is because it would go without saying that telephone numbers are personal member details, not contact details. And the submission is over-pedantic: both email addresses and telephone numbers are items over and above what would

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\(^{92}\) Butera MFI-1, 11/6/15, tab 1, p 4.24-29.  
\(^{93}\) Submissions of Brian Parker, 11/9/15, para 23.
normally be made available for the purpose of inquiries about arrears. It is unsound to criticise Maria Butera for not giving every example of what falls within the category of that which is over and above what would normally be made available for the purpose of arrears.

109. The submissions of counsel for Brian Parker about Maria Butera’s evidence of what David Atkin said to her about the conversation she had with Brian Parker are incomplete and misleading. The questioning proceeded as follows:  

A. [David Atkin] walked over to my desk and the only time that, to be fair, David Atkin would do that is actually to have something actioned. You know, it’s not to have a general chat, that’s just now how he operates. So he walked over to my desk and told me that he had had a conversation with Brian Parker, who was the state secretary of the CFMEU New South Wales, and that Brian Parker had asked him for personal member details of Lis-Con employees for the purposes of a union campaign. They were chasing union superannuation arrears.

...  

Q. When he said “personal member details”, what did you understand that to mean?

A. Over and above what we would normally make available for the purposes of arrears. I mean, once you start talking about personal member details, you are talking about things like dates of birth; you are talking about things like, perhaps, email addresses, things that you would not normally share.

Q. So you understood that at the time?

A. I did.

Q. Is that an expression that’s used in Cbus, personal member details, having that sense?

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A. It’s used in the sense that that’s not what you give out.

Q. All right. So you understood immediately this was something of an unusual request.

A. I did.

Q. Did he say anything else to you?

A. Yes, he did. He said, “Obviously, we want to help the union where we can.”

Q. And what did you say?

A. I said, “Well, look, this sounds urgent. Obviously Brian Parker has called you and I will expedite it in the best way I know possible and that is to go to Lisa Zanatta”, who was the senior adviser member services, and somebody who is adept at actually dealing with arrears situations on a day-to-day basis.

Q. Have you ever had a request like that before?

A. Never.

Q. To your understanding, was handing over personal member details within Cbus’s privacy policy?

A. Absolutely not.

Q. You regarded this as unusual, is that fair?

A. I did regard it as unusual.

Q. Did you say anything like that to Mr Atkin?

A. I didn’t. I didn’t. I mean, if I could turn back time now, obviously, I would deal with this completely differently, but it had come from the CEO, so I actioned his request. You know, something like that, typically would need to go to our executive manager of governance and risk if a situation like that occurred, because it’s in breach of the privacy policy of the fund.
Q. To hand over those details.
A. Personal details.

Q. Who was that person that you have just made reference to?
A. Angela Thurstans.

Q. Did that occur on this occasion?
A. It didn’t occur.

Q. Why did you say that you would go to Lisa Zanatta in particular?
A. Because she – she’s someone who has been dealing with arrears and recovery of arrears for a very long time at Cbus, and it sounded urgent to me, and I knew she would be able to expedite it in terms of what needed to be done, and I did explain that to Mr Atkin.

Q. What happened then, after you had finished your conversation with Mr Atkin?
A. I spoke to Lisa.

Q. And where is Lisa in the configuration?
A. She would be on the same side of the building, obviously, that I’m at, but some six or so desks away from me.

Q. So, what, you walked over to her desk, did you?
A. I did.

Q. What happened then?
A. I spoke to her.

Q. What did you say?
A. I explained to her that I had had a conversation with David Atkin and it was in relation to a request by Brian Parker, and explained to her what that request was, which was for the personal member data for Lis-Con employees, and it was for the purposes of chasing arrears as it had been explained to me.

Q. Did she ask or make any comment about the fact that personal member details were being asked for?
A. The only thing she told me – and I don’t know exactly when this had occurred – she said to me that – she didn’t seem that surprised, because she had previously had a conversation with Bob McWhinney, who is one of our coordinators or field officers, you would call them, in New South Wales, and he had been telephoned by Brian Parker and the same request had been made of him. Bob McWhinney – now, this is Lisa telling me this – Bob McWhinney recounted this to Lisa and Lisa said to him, “Well, that’s not appropriate, and if that’s what Brian Parker wants, he needs to go and seek that from the CEO”, or words to that effect.

Q. Did she say anything to you about how she would get the information?

A. She said that she would run a query through Superpartners.

Q. And what did you understand that to mean?

A. That she would, you know, speak to whoever it is, the member services advisers that they normally would talk to, and ask for the information.

110. On the argument of counsel for Brian Parker, it would have been perfectly all right for residential addresses to be handed over. Yet to do so would have been outside Cbus’s privacy policy. They would have been things ‘that you would not normally share’. To do so would have been quite ‘unusual’. The Cbus ‘Compliance Guidelines – Content’ state that among what ‘we CANNOT provide to Union Officials’ is ‘Members Address’.95

111. Further, it is important to note the concluding part of the answer about ‘personal information’ which counsel for Brian Parker criticised as being equivocal. Maria Butera said that personal member data was ‘not personal information that we … were in the business of handing

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95 Cbus Hearings MFI-1, 11/6/15, tab 135, p 1202.
Upon reflection, she saw it as an ‘inappropriate request’. All these characterisations of Maria Butera’s catch both residential addresses and telephone numbers/email addresses. Indeed, Lisa Zanatta told Maria Butera that she had seen the request to Bob McWhinney on 8 July 2013 for ‘personal member data’ as ‘not appropriate’.

Both Brian Parker and David Atkin seized on Maria Butera’s evidence that ‘[t]o a degree at least [she] made an assumption about what it was that Mr Atkin actually wanted.’ This part of her evidence must be read with the rest of her evidence. She may have been in doubt about some of the detail of what David Atkin wanted. She was in no doubt about the substance of it: he wanted material over and above what Cbus would normally provide. In common parlance, a listener is often said to ‘assume’ what a speaker means by taking the words used by the speaker in the context in which the speaker is speaking and attributing a particular meaning to the speaker. Depending on the circumstances, the speaker can be bound by the meaning thus arrived at. That is what Maria Butera meant by ‘assumed’.

David Atkin submitted that it is incredible that she should undertake an illegal act merely on an assumption that David Atkin wanted her to do

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96 Maria Butera, 11/6/15, T:156.43-45.
98 Butera MFI-1, 11/6/15, tab 1, p 6.44.
99 Submissions of Brian Parker, 11/9/15, para 25.
100 Submissions of David Atkin, 11/9/15, para 47.
101 Maria Butera, 11/6/15, T:173.11-16.
so without confirming or questioning the request with David Atkin or her peers.\textsuperscript{102} David Atkin did not seem to be a person who was entirely amenable to having instructions debated or questioned. And speaking to her peers would endanger the need to preserve secrecy which the unusualness of the request seemed to entail.

114. Counsel for Brian Parker relied on various parts of Maria Butera’s cross-examination which were apparently said to reveal an account which ‘shifted significantly’.\textsuperscript{103} Brian Parker’s submissions do not demonstrate that conclusion. To some degree they exaggerate particular aspects of the evidence. Maria Butera generally adhered to her position. Thus she said she understood ‘personal member details’ to have a particular meaning ‘by implication’. That meaning was: ‘Over and above what we would normally provide; maybe addresses, for example, telephone numbers, for example, but I wasn’t sure.’\textsuperscript{104}

115. And there is a fundamental difficulty in the assumptions underlying the cross-examination of Maria Butera. Senior counsel for David Atkin kept putting to her ‘that all that Mr Atkin said to you was that Brian Parker had asked him for assistance in relation to arrears, information concerning the arrears of Lis-Con employees, and Mr Atkin said to you that he wanted to be able to help the Union where they could and that was it.’\textsuperscript{105} The trouble with that assumption, as Maria Butera pointed out, is that it raises the question why Brian Parker would ‘ring the CEO for general arrears information … [w]hen there is … a longstanding

\textsuperscript{102} Submissions of David Atkin, 11/9/15, paras 48-49.
\textsuperscript{103} Submissions of Brian Parker, 11/9/15, para 24.
\textsuperscript{104} Maria Butera, 11/6/15, T:161.27-31.
\textsuperscript{105} Maria Butera, 11/6/15, T:163.36-41.
process that has been in place that has been used'. 106 It raises other questions. If that assumption is correct, the information supplied to Brian Parker in the Zanatta spreadsheets went way beyond what he had asked for. Why did he not return the material, pointing out that it went beyond his request? Why did he accept the need for secrecy in his dealings with Maria Butera and Lisa Zanatta on 26, 29 and 30 July 2013? If all he wanted was arrears information, why did he ring up in view of the fact that Bob McWhinney had already provided Brian Fitzpatrick with arrears information? The assumption is entirely inconsistent with all the circumstantial evidence in point.

116. Counsel for Brian Parker submitted that even if Maria Butera’s evidence was ‘taken on its own terms’, i.e. at its highest, it proved only that he asked her to get ‘personal member details’, not telephone numbers or email addresses. 107 It has been pointed out above that that is a false distinction. Knowledge of addresses enables the searchers to find out at least landline telephone numbers.

117. Counsel for Brian Parker then submitted that Maria Butera’s evidence should not be accepted at its highest, or at all, because she was not reliable or truthful, and her evidence did not sit well with the totality of the oral evidence. It did, however, sit well with all the circumstantial evidence. As to the oral evidence, there are good reasons for rejecting the evidence of Brian Parker and David Atkin. The factual controversy in question carries heavy consequences for David Atkin (a man of good reputation) and to some extent Brian Parker (a man of much less

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107 Submissions of Brian Parker, 11/9/15, para 26.
good reputation) if resolved one way, but does not carry heavy consequences for Maria Butera and Lisa Zanatta (former executives whose careers have been ruined and who are facing criminal sanctions) if decided the other way.

118. No doubt no witness in this case study is outstanding for reliability and truthfulness, except for Brian Fitzpatrick. But counsel assisting may have gone too far in conceding that one could not make an adverse finding based on Maria Butera’s evidence alone. It is one thing to take care with her evidence. It is another to treat it as a nullity unless corroborated.

119. Damaged though her credit may be, she said many true things – particularly after the remorse and contrition she displayed at her confidential hearing on 10 December 2014, which was later tendered at a public hearing.

120. Counsel for Brian Parker relied on Lisa Zanatta’s evidence that her provision to the CFMEU of the Zanatta spreadsheets including contact details (telephone numbers and email addresses) was a blunder on her part, and not the result of any request for those details. Yet counsel for Brian Parker also submitted that on 18 July 2013 Lisa Zanatta and Anthony Walls discussed the data needed: ‘member name, [member] number, D.O.B., address and amounts paid’ (emphasis added) – but not telephone numbers and email addresses. And counsel for Brian Parker relied on evidence from Lisa Zanatta that Brian Parker

\[108\] Submissions of Brian Parker, 11/9/15, para 30.

\[109\] Submissions of Brian Parker, 11/9/15, para 31.
requested addresses, not telephone numbers and email addresses.\textsuperscript{110} Yet knowledge of the addresses gives access to the landline telephone numbers. The argument of counsel for Brian Parker does not explain why Lisa Zanatta, after becoming upset when she learned that Anthony Walls on 22 July sent spreadsheets containing the email addresses and telephone numbers of Lis-Con employees to Bob McWhinney, did not appreciate the supposed blunder then and ensure that what Anthony Walls had supplied was not redacted more completely.

\textbf{121.} Brian Parker submitted that the reasoning of counsel assisting was open to criticism. He submitted that it was wrong to say that private member information was the very information he had been looking for as at 18 July 2013. This was said to be wrong in involving the error of treating the findings in the Interim Report as unquestionably correct. But it does not do this. What the reasoning relies on is the fact that the information Brian Fitzpatrick had obtained on 12 July 2013 was unsatisfactory because it did not include what Brian Parker viewed as a means of contacting the Lis-Con employees.\textsuperscript{111} Brian Fitzpatrick (and Brian Parker) had wanted personal contact information, not arrears information. What they got was arrears information only (because Lisa Zanatta had forbidden Bob McWhinney to seek the other information from Anthony Walls). What point was there in asking yet again for arrears information on 18 July 2013 when what was wanted was personal contact information? That reasoning relies on evidence in part received in 2015, not 2014.

\textsuperscript{110} Submissions of Brian Parker, 11/9/15, para 32.

\textsuperscript{111} See paras 24-29.
122. Brian Parker then submitted that counsel assisting overlooked Maria Butera’s evidence that she made an assumption about the information David Atkin wanted her to obtain, and needed to go to Lisa Zanatta for her to ask Brian Parker what information he wanted. That ignores the totality of Maria Butera’s evidence to the effect that she believed the desired information was something not usually made available.

123. Brian Parker then submitted that Lisa Zanatta’s account of her conversation with Maria Butera should be preferred to Maria Butera’s account. He submitted that Lisa Zanatta had abandoned her lies earlier and more fully than Maria Butera. He submitted that even now Maria Butera was not being candid: the example given was her claimed failure to recall a café meeting on 20 May 2014 before the conversations between Brian Parker on the one hand and Maria Butera, Lisa Zanatta and David Atkin on the other. These distinctions are unconvincing. Both Maria Butera and Lisa Zanatta have suffered a lot. Both have recanted. It may be that both are even now not being fully truthful or frank on different points. Counsel assisting argued that Maria Butera’s evidence of her conversation with Lisa Zanatta was to be preferred because it fitted in better with the conversation between Brian Parker and David Atkin. There is no good reason to reject that argument.

124. In Brian Parker’s arguments for preferring Lisa Zanatta over Maria Butera, he referred to Lisa Zanatta’s evidence that in her conversation with Brian Parker on 18 July 2013, he requested ‘member information’

112 Submissions of Brian Parker, 11/9/15, paras 33-34. See paras 86-91.
113 See paras 217-219.
including ‘addresses’, but not telephone numbers or email addresses. By citing this evidence purportedly to his own advantage, Brian Parker thus appears to accept that he did ask Lisa Zanatta for addresses. If so, he probably asked David Atkin for information of the same kind – a normally forbidden kind which was in breach of all Cbus standards.

125. Then Brian Parker relied on evidence that when Anthony Walls included the contact details of Cbus members in the spreadsheets which eventually went to the CFMEU as the Zanatta spreadsheets, he did not do so by reason of any request. However, this does not invalidate any of counsel assisting’s arguments.

126. In general Brian Parker’s submissions about the 18 July 2013 Parker/Atkin telephone conversation concentrate too much on pedantic analysis of testimony about the precise nuances of brief conversations a year or two earlier and not at all on the underlying circumstances. Brian Parker already had Lis-Con arrears information. He wanted the more sensitive information about contact details. He had already failed to get it via Brian Fitzpatrick’s request of Bob McWhinney, thanks to Lisa Zanatta’s direction to Bob McWhinney to obey normal protocols. There was nothing else for Brian Parker to talk about with David Atkin except getting the contact details. Why would Maria Butera and Lisa Zanatta imperil their entire careers by supplying the contact details information unless they had been told to by the CEO?

114 Submissions of Brian Parker, 11/9/15, para 35.
Submissions of David Atkin on the 18 July 2013 conversation: irrelevant points

127. So much for Brian Parker’s submissions about the 18 July 2013 Parker/Atkin phone call. What were David Atkin’s? There was some overlap, but it was far from complete.

128. It is necessary at the outset to clear up several misleading aspects to David Atkin’s submissions. If the categories about to be illustrated were exemplified only by single or passing instances, they might be overlooked. Their repetition is mysterious and perhaps sinister.

129. The first category concerns the adoption by counsel for David Atkin of the words of Graeme Samuel AC and Robert Van Woerkom in their Independent Privacy Governance Review of Cbus (Samuel Review). They said that the actions of Maria Butera and Lisa Zanatta ‘were isolated actions of the employees … not sanctioned by … the CEO [and] undertaken under a cloak of secrecy in an attempt to avoid detection.’ A little later counsel for David Atkin repeated this point: ‘KPMG and the Samuel Review did not uncover any involvement by Mr Atkin in any of their independent investigations and reports.’

115 The submissions of David Atkin were put by the team of lawyers which acted for Cbus as well. It is convenient to call them ‘Submissions of David Atkin’ for short. The Lis-Con submissions alleged a conflict of interest between David Atkin and Cbus, and in effect said that just as the Cbus team of lawyers had ceased to act for Maria Butera and Lisa Zanatta, so a further separation of representation should have taken place. The Lis-Con submissions submitted that the Commission had not had the benefit of a consideration by Cbus of its own position free from the need also to justify the conduct of its officers: Lis-Con submissions, 19/9/15, para 1. That may be true, but it is immaterial for present purposes.


117 Submissions of David Atkin, 11/9/15, para 7(c).
Later still it is said that the Samuel Review made ‘an express finding that Mr Atkin had not sanctioned their actions’.\textsuperscript{118} The assertion is stated for the fourth time towards the end: repeating the material quoted earlier in this paragraph.\textsuperscript{119} And it is repeated twice in the final submissions of David Atkin dated 4 December 2015.\textsuperscript{120} Among the points which should be made about these unsatisfactory submissions are the following.

130. The first point is that the words quoted from the Samuel Review are preceded by these words: ‘It appears from the KPMG forensic examination and Part 8.3 of the Interim Report of the Royal Commission that the actions referred to’. In other words, Graeme Samuel and Robert Van Woerkom are not at this point offering a conclusion based on their own entirely independent work. That point is confirmed by the authors’ statement at the end of the relevant paragraph to the effect that it was not possible for them ‘to form a definitive view on this’. The authors did a great deal of work, but it does not appear to have included independent first-hand work on the role of David Atkin.

131. The second point is that the Interim Report did \textit{not} reach any conclusion of the kind suggested. On the contrary, it repeatedly made it plain that David Atkin’s position remained open for investigation.\textsuperscript{121}

\textsuperscript{118} Submissions of David Atkin, 11/9/15, para 27(c).
\textsuperscript{119} Submissions of David Atkin, 11/9/15, para 41(b).
\textsuperscript{120} Submissions of David Atkin, 4/12/15, paras 41, 45(a).
\textsuperscript{121} Interim Report, Vol 2, ch 8.3, paras 202, 203, 244.
132. The third point is that in any event the Interim Report was written before the revelations of Maria Butera about what David Atkin said about the conversation he had with Brian Parker on 18 July 2013 and before the revelations of Maria Butera, Lisa Zanatta and David Atkin about their conversations with Brian Parker on 20 May 2014. In another place, David Atkin’s submissions seem to assume that the private hearings of Maria Butera and Lisa Zanatta on 10 and 12 December 2014 were taken into account in the Interim Report. This impliedly asserts a breach of the rules of natural justice. However, the assumption ignores practical reality. The Interim Report was delivered to the Governor-General on 15 December 2014. The circumstances in which large numbers of copies of a 1,817 page Interim Report are printed do not permit changes to be made in the light of evidence given respectively two clear business days and no clear business days before delivery.

133. It is accordingly misleading to suggest, if this was intended, that the Samuel Review in some way is to be taken into account as an independent piece of evidence either suggesting or compelling the conclusion advocated by counsel for David Atkin.

134. A second misleading submission was put no fewer than nine times. On the first occasion it was put thus: ‘The Commission’s key whistle blower with respect to the CFMEU, Mr Fitzpatrick, has given evidence, accepted as reliable by the Commission in its Interim Report, that Ms Butera and Ms Zanatta were deliberately concealing their

122 Submissions of David Atkin, 11/9/15, para 30(c) n 35.
123 Submissions of David Atkin, 11/9/15, para 7(a).
actions from Mr Atkin.’ (It may be noted that this reported Brian Parker’s desire for secrecy but also reported more indirectly that one of the ‘women at Cbus down in Melbourne’ was trying to preserve secrecy.)

135. Then the submissions said: ‘Mr Fitzpatrick’s evidence supports the Parker Disclosure being undertaken covertly by Ms Butera and Ms Zanatta, with a particular purpose of preventing Mr Atkin from finding out. Mr Fitzpatrick’s evidence on this matter has been accepted by the Commission ....’

136. Later this was said: ‘Mr Fitzpatrick’s evidence, accepted by the Commission, that Mr Atkin had not authorised the conduct and that Ms Butera and Ms Zanatta were intentionally concealing their actions from the CEO.’

137. Further, the submission was put eight days later in David Atkin’s submissions responding to the Lis-Con submissions. It was there put twice. First, there was a reference to ‘Mr Fitzpatrick’s evidence that Mr Atkin … was not aware of what was going on.’ Secondly, there was a reference to ‘Mr Fitzpatrick’s evidence that the “boss” didn’t know’. Finally, it was relied on at least four times in David Atkin’s final set of submissions dated 4 December 2015.

124 Submissions of David Atkin, 11/9/15, para 27(a).
125 Submissions of David Atkin, 11/9/15, para 41(a).
126 Submissions of David Atkin, 18/9/15, para 15.
127 Submissions of David Atkin, 18/9/15, para 15(a).
128 Submissions of David Atkin, 4/12/15, para 6 (text and n 4), 11(b), 15.
138. These submissions are quite untrue. The Interim Report accepted that Brian Fitzpatrick gave truthful evidence that Brian Parker had said certain things to him.\textsuperscript{129} It did not accept that what Brian Parker said to Brian Fitzpatrick was true. The proposition that David Atkin was ignorant of what was happening depends on at least double hearsay: the Cbus executives, or one of them, may have told Brian Parker, who told Brian Fitzpatrick, who gave the evidence. There are many instances in the Interim Report where Brian Parker’s evidence was rejected on credibility grounds.

139. These submissions of David Atkin that the credit of Brian Parker was accepted as distinct from that of Brian Fitzpatrick are extraordinarily ambitious. They assume a very gullible audience.

140. A third misleading aspect in David Atkin’s submissions is the contention that somehow David Atkin should be believed because Cbus has achieved a high rate of return over long periods which is superior to that of competitors, because its products rank in the top 25% of superannuation funds, because it seeks to serve the best interests of its ‘members’ (ie the beneficiaries of the trust), because it operates in an environment highly regulated by equity, by statute and by the Australian Prudential Regulation Authority, because its successes have been achieved in a difficult industry environment involving many failed companies and many employees who are young, transient and uninterested in superannuation, because Lis-Con was often badly in arrears (or so it says) and because it needs to be involved with unions in maintaining the compliance of employers with

\textsuperscript{129} Interim Report, Vol 2, ch 8.3, paras 106-108.
superannuation obligations. It is said that in these circumstances it would be ‘unnecessary’ and ‘inappropriate’ to make findings against David Atkin. This seems to pose the wrong question. The question is simply: ‘Is it justified and correct or unjustified and incorrect to make findings against David Atkin on the evidence? Is there reasoning available from the evidence rightly understood to make adverse findings against David Atkin, or findings in his favour, or no findings at all?

A similar formulation appears at the end of David Atkin’s written submissions: ‘In the face of the evidence as a whole, it would be improper to attack the CEO of a $31 billion, high performing, APRA-supervised superannuation fund, or make the findings sought by counsel assisting.’ The Commission is not involved in making discretionary judgments with a view to abstention from making findings merely because of David Atkin’s senior position or merely because of the success of Cbus. Whether it is improper or not or unnecessary or not or inappropriate or not does not depend on the rank of the person under consideration or the success that that person had in running an organisation or the amount of trust money that person is responsible for. It depends only on the merits or demerits of the factual reasoning.

Similarly, the submissions of David Atkin say that ‘the objective facts do not justify traducing Mr Atkin’s reputation’. This suggests that a

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130 Submissions of David Atkin, 11/9/15, paras 4, 10-11, 17-21.
132 Submissions of David Atkin, 11/9/15, para 75.
133 Submissions of David Atkin, 11/9/15, para 44.
certain level of evidence might justify findings which traduce a man of
not very good reputation, like Brian Parker, but not findings which
traduce a man of great reputation, like David Atkin, who works for a
highly successful company.

143. David Atkin submitted that if the difficulties created by Maria Butera
and Lisa Zanatta were caused by a problem of governance, the problem
had now been fixed.\textsuperscript{134} Perhaps it has been. But whether it has or has
not been fixed cannot affect a decision about what actually happened
between June 2013 and May 2014.

144. A fourth misleading submission is that in some way counsel assisting
behaved unfairly. This has been a recurring theme in the case of
submissions by interested persons in other case studies. Usually the
intensity with which the point was made was in direct proportion to the
lack of merit in the other arguments of the particular interested person.
David Atkin accused counsel assisting of developing a ‘new theory’.
They were also accused of failing to make witnesses available to be
questioned on the ‘new theory’. The names of Brian Fitzpatrick and
Angela Thurstans figure prominently in the submissions.\textsuperscript{135} The ‘new
theory’ was the idea that Brian Parker would have called David Atkin
seeking something other than arrears information, for arrears
information could have been obtained routinely through dealings
between less senior levels of the organisations.

145. There are two basic problems with this submission.

\textsuperscript{134} Submissions of David Atkin, 11/9/15, paras 8, 54-73, 76-79.
\textsuperscript{135} See, for example, Submissions of David Atkin, 11/9/15, paras 27(a), 30(c), 35(a).
One basic problem is that the theory is not a new theory. It was in play last year, from the earliest stages.

The other basic problem is that had a request been made of counsel assisting to recall Brian Fitzpatrick, or to call Angela Thurstans to supplement the evidence given in her private hearing which was tendered in public, there is no reason to doubt that it would have been complied with.

In fairness to David Atkin, it is proposed to put on one side the various arguments just summarised. It is better to concentrate on more substantive arguments.

Submissions of David Atkin on the 18 July 2013 conversation: substantive points

The substantive submissions of David Atkin necessarily repeat those of Brian Parker to some degree. The treatment of those submissions will not be repeated.

David Atkin essentially relied on the concurrence between him and Brian Parker in denying that anything beyond arrears information was discussed on 18 July. He also relied on the fact that contemporary documents such as the iMessages did not implicate him in the actual delivery of the Zanatta spreadsheets. The only testimony adverse to him, and that only indirectly, is that of Maria Butera.

David Atkin submitted that counsel assisting’s submissions should be rejected because ‘[i]mplicating Mr Atkin relies on the most recent
uncorroborated evidence of Ms Butera, a perjurer with every incentive to try to minimise her role in the disclosure, as well as seek to implicate Mr Atkin.\textsuperscript{136} It is good that in forensic arguments a spade should be called a spade. But if that is done, the consideration of those arguments must employ similarly robust language. It is true that Maria Butera is to some extent a perjurer. But she is a perjurer who changed her mind. It is necessary to bear in mind that if one question is whether Maria Butera has added to her past perjuries, another question is whether David Atkin is a perjurer who has not yet changed his mind. It is not correct to call Maria Butera’s evidence ‘uncorroborated’. Many circumstances support it. Is it right that she has every incentive to try to minimise her role, as well as to seek to implicate David Atkin? Her incentives are not as intense as those of David Atkin. He has everything to lose: he is running a large organisation and is paid very well. She has little to lose: she has been dismissed by him from a well-paid job, may well be unemployable at that level of business, and has foreshadowed to a magistrate that she intends to plead guilty to perjury charges and is thus facing criminal sanctions. The same, mutatis mutandis, is true of Lisa Zanatta.

152. Another difficulty in the submissions for David Atkin is that save in one dangerous respect they rely entirely on acceptance of his evidence. They seek to trivialise any contrary point of view as a ‘new theory’\textsuperscript{137} or as ‘conjecture’.\textsuperscript{138} The dangerous element lies in contending that David Atkin is corroborated by Brian Parker. The problem is that unfortunately Brian Parker has had an appalling testimonial

\textsuperscript{136} Submissions of David Atkin, 11/9/15, para 7(d).
\textsuperscript{137} Submissions of David Atkin, 11/9/15, para 27(a)
\textsuperscript{138} Submissions of David Atkin, 11/9/15, para 27.
performance in several different case studies in the Commission. To invoke his assistance is to risk taint. For example, in two case studies he gave completely contradictory evidence about the circumstances in which the CFMEU’s legal team ceased to act for him on 4 November 2014. 139 Another example is Brian Parker’s evidence regarding the nature of his relationship with George Alex. The evidence was guarded and at times implausible. For example, when asked whether he had met George Alex at the Balkan Restaurant in July 2011, he stated twice that he did not recall meeting him there. 140 When presented with evidence of communications between the two men on the relevant date, Brian Parker suggested that he ‘may have met [George Alex] outside or in the area or, you know, I may have – it may have been in there, but I can’t recall it’. 141 When Brian Parker was then shown a text message sent to George Alex which stated simply ‘At the Balkan now mate’, Brian Parker agreed that he had probably not stood outside with George Alex, as he had previously proposed. 142 The evidence as a whole strongly indicates that Brian Parker met George Alex at the Balkan Restaurant on Oxford Street in Sydney on 15 July 2011, and the evolution of his oral evidence suggests that he was reluctant to admit this. Another example concerns Brian Parker’s evidence regarding his niece. When first asked whether he had introduced George Alex to his niece, Brian Parker did not answer directly. Instead he queried which of his many nieces was being

139 Brian Parker, 15/6/15, T:389.38-390.6; Brian Parker, 18/6/15, T:425.39-428.10; Brian Parker, 19/6/15, T:582.13-39, 583.3-584.32, 586.7-591.33.

140 Brian Parker, 18/6/15, T:483.32-37.

141 Brian Parker, 18/6/15, T:484.30-32.

142 Brian Parker, 18/6/15, T:485.18.
referred to.\textsuperscript{143} Given that he might have answered ‘No’ if he had not introduced any of his nieces to George Alex, this clarification would only be necessary if Brian Parker had introduced more than one of his nieces to George Alex, or if he was seeking not to answer the question directly for some other reason. Only after he was played a telephone intercept which confirmed that Brian Parker took his niece to meet George Alex did Brian Parker agree that he had done so, at which point he no longer required clarification of which niece was being referred to.\textsuperscript{144} This again demonstrates Brian Parker’s reluctance to reveal the full nature of his interactions with George Alex when giving evidence until absolutely necessary. Further, David Atkin’s submissions do not face up to the problems created by the background circumstances. Why would Brian Parker not ask for contact details, given that he wanted them and that his most recent attempt to get them had been refused? Why would Maria Butera and Lisa Zanatta engage in what would otherwise be the behaviour of rogue employees in the absence of authority from David Atkin? To reason inductively from circumstantial evidence of this kind is not to make mere ‘conjectures’ or simply peddle ‘new theories’.

\textbf{153.} Incidentally, the accusation that counsel assisting was engaging in conjecture is a surprising one. David Atkin’s submissions complain a great deal about the absence from the witness box in 2015 in public hearings of Brian Fitzpatrick and Angela Thurstans.\textsuperscript{145} For an argument is put that Brian Parker may have rung David Atkin ‘and placed a general request for information at the behest of Ms Butera or

\textsuperscript{143} Brian Parker, 18/6/15, T:487.8-16.1
\textsuperscript{144} Brian Parker, 18/6/15, T:487.28-33.
\textsuperscript{145} Submissions of David Atkin, 11/9/15, para 35(a).
Ms Zanatta, as a form of insurance against future negative repercussions.146 This treats the primary conspiracy as being between Brian Parker, Maria Butera and Lisa Zanatta, and has David Atkin as its entirely innocent victim. That idea was never put to Brian Parker, Maria Butera or Lisa Zanatta by counsel for David Atkin. It really is a ‘conjecture’ or ‘theory’ and nothing more.

154. David Atkin submitted that the clandestine activities of Maria Butera and Lisa Zanatta before, on and after 29 July 2013, which included lying to Cbus and its lawyers as well as the Commission, indicated that he was not involved. This does not follow. The clandestine conduct in the lying was designed to keep the matter secret within Cbus – secret from anyone who did not already know of the impending leak. Even if David Atkin knew in general terms what the two executives were doing, it was vital for them to keep it secret from other Cbus employees, for a leak of personal contact details was totally against the general law and the Cbus rules. It was important to prevent tongues wagging amongst the Cbus staff. The attempts of Maria Butera and Lisa Zanatta to preserve secrecy shows how serious their conduct was – so serious that it was the sort of thing that only the CEO could authorise. The clandestine conduct of Maria Butera and Lisa Zannata is neutral on the issue of whether David Atkin did or did not already know of the leak. Further, when Lisa Zanatta first admitted her perjury she said she was trying to protect David Atkin.147

146 Submissions of David Atkin, 11/9/15, para 34(c).
147 Lisa Zanatta, 3/10/14, T:750.31-46, 751.1-5.
155. David Atkin’s submission is that the disclosures in the Zanatta spreadsheets were made with the particular purpose of preventing David Atkin from finding out. But why would they do this without David Atkin’s approval? Why would each risk her own career? If they were responding to what Brian Parker said to Lisa Zanatta on 18 July 2013, why would they be so reckless when they knew that Brian Parker had been in touch with David Atkin on that day and would be likely to suspect them of any leak? And why would Lisa Zanatta, who on 9 July had been scrupulous to preserve confidentiality in relation to Brian Fitzpatrick’s request to Bob McWhinney on 8 July, suddenly abandon that prudential approach?

156. The submissions of David Atkin drew a distinction between ‘personal member details’ and what was called ‘extraordinary information’, by which was meant the information in the Zanatta spreadsheets. The submission was that David Atkin cannot be implicated in the misconduct of Maria Butera and Lisa Zanatta unless (a) Brian Parker in the phone call used ‘personal member details’ to mean ‘extraordinary information’; (b) David Atkin so understood him; (c) David Atkin in speaking to Maria Butera meant that the extraordinary information should be handed over; and (d) Maria Butera understood David Atkin to mean this. David Atkin’s submission is that ‘personal member details’, as set out in the policy and procedure manuals of Cbus, is an expression with no special meaning, but includes information that can be supplied in accordance with privacy laws. The submissions of David Atkin cannot resist claiming that there is some sinister

148 Submissions of David Atkin, 11/9/15, para 27(a).
149 Submissions of David Atkin, 11/9/15, para 28.
150 Submissions of David Atkin, 11/9/15, para 29.
significance in the failure of counsel assisting to question Angela Thurstans, Bob McWhinney, Anthony Walls or Nabil Mubarak about what ‘private member details’ meant to them.\textsuperscript{151}

157. The submission is far from convincing. For one thing the submission depends on the proposition that Brian Parker told David Atkin that he wanted ‘personal member details’. David Atkin’s evidence does not support this.\textsuperscript{152} Brian Parker’s evidence does not support it.\textsuperscript{153} Brian Parker’s submissions deny it.\textsuperscript{154} So do David Atkin’s.\textsuperscript{155} Brian Parker’s persona was that of bluffness, directness, getting to the point, preferring substance to form. The expression ‘personal member details’ sounds too technical for him to have used. The expression was, however, used in Maria Butera’s account of what David Atkin told her Brian Parker had asked for.\textsuperscript{156} What David Atkin understood from Brian Parker or what Maria Butera understood from David Atkin’s account of what Brian Parker had said may well not correspond with Brian Parker’s precise words. But he is likely to have used words indicating that he wanted a means of contacting Lis-Con employees. There was no other point in the conversation. David Atkin’s submission, incidentally, that ‘personal member details’ can be supplied in accordance with privacy laws is questionable. Whatever details the expression refers to, they would seem to fall within clause

\textsuperscript{151} Submissions of David Atkin, 11/9/15, para 32(e).
\textsuperscript{152} David Atkin, 3/10/14, T:772.18-24; 783.24-27; 784.4-6; David Atkin, 23/10/14, T:868-869, 894-896; David Atkin 10/6/15, T:51-52, 61-62; David Atkin, 11/6/15, T:95.5.23, 113.42-47.
\textsuperscript{153} Brian Parker, 3/10/14, T:638-40-639.21; Brian Parker, 15/6/15, T:351.40-352.37.
\textsuperscript{154} Submissions of Brian Parker, 11/9/15, para 29.
\textsuperscript{155} Submissions of David Atkin, 11/9/15, para 32.
\textsuperscript{156} Maria Butera, 11/6/15, T:155.5-11.
6.4 of the Cbus trust deed. Further, the Cbus internal guidelines appear to forbid the supply of ‘personal member details’ as well. Whatever can be provided to union officials, the ‘Compliance Guidelines – Content’ state that Cbus ‘CANNOT provide to Union officials’ various items including a member’s date of birth and address.\textsuperscript{157}

158. If the expression ‘personal member details’, or a synonym, was used, it would seem to correspond with ‘personal information’ – that is, information which permits an individual to be identified by means like name, date of birth and address. That corresponds with the ‘Compliance Guidelines – Content’. It also corresponds with Maria Butera’s understanding of the meaning of what David Atkin had been asked for: ‘over and above what we would normally make available for the purposes of arrears … things like dates of birth; you’re talking about things like perhaps, email addresses, things that you don’t normally share.’ Normally people do not share their residential addresses, telephone numbers, email addresses or other means of being contacted unless they want to be contacted.

159. In any event, David Atkin’s submission, even if correct, is beside the point. The probabilities are all one way that Brian Parker used words to the effect that he wanted personal contact information. That is because he wanted to put Brian Fitzpatrick in a position to contact Lis-Con employees so as to anger them against their employer, and Brian Parker had failed in his earlier attempt to get it. Even on David Atkin’s versions of the 18 July 2013 telephone conversation, he seems to have accepted that the information was not merely routine and publicly

\textsuperscript{157} Cbus Hearings MFI-1, 11/6/15, tab 135, p 1186.
available, because of his references to limitations and restrictions. When David Atkin spoke to Maria Butera, she gained the impression that David Atkin (and Brian Parker) were talking about information which is ‘not what you give out’ ordinarily.\footnote{Butera MFI-1, 11/6/15, p 4.34-37.} The secrecy with which Maria Butera and Lisa Zanatta thereafter behaved support the view that both thought the information being sent to Brian Parker was of a kind not ordinarily to be released.

160. The submissions of David Atkin relied on his voluntary and speedy disclosure to the Commission of the iMessages discovered by KPMG in its investigation as a badge of innocence. ‘It would have been against Mr Atkin’s interests to volunteer this information if he had also been involved in the Parker Disclosure’.\footnote{Submissions of David Atkin, 11/9/15, para 41(e).} But the risk of the material being revealed to the Commission by either KPMG or Angela Thurstans was too great for David Atkin to run. In any event, the iMessages did not directly implicate him. His disclosure of the iMessages is thus neutral on the question of his innocence. But those iMessages do negate any idea that all Brian Parker had requested on 18 July 2013 was routine arrears information. The iMessages show his acceptance of the need for secrecy and his cooperation with measures to attain it. His conversation with Brian Fitzpatrick on or about 26 July 2013 also reveals his acute consciousness of the need for secrecy. This obsession with secrecy shows that he wanted secret information, not routine arrears information.
The submissions of David Atkin attempted to explain away the background circumstances which create such difficulties for his position. One of these difficulties is reflected in the question: ‘If Brian Parker’s request was a purely routine one seeking only arrears information, would the top CFMEU official need to go to the CEO of Cbus about a routine matter of arrears?’ To this David Atkin’s submissions gave three answers.

One answer was that David Atkin often received ‘innocuous, general requests’. This point was not particularly powerful, since the evidence about David Atkin’s practice came from Angela Thurstans, not David Atkin. And the point is irrelevant to the present context: whatever may be the case for ‘innocuous, general requests’, information which might have limitations or restrictions on it did not sound innocuous or general.

Another answer given by David Atkin was that routine though Brian Parker’s request was, it was not his practice to brush off ‘a key constituent’ like Brian Parker. But again, a request the answer to which involves restrictions and limitations is not routine.

A third answer raised by David Atkin was that as a matter of common experience, ‘senior people will often call their counterpart senior person, even though the request could have been directed lower down

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160 Submissions of David Atkin, 11/9/15, para 35(a).
the corporate hierarchy.’ Much, of course, can be done with the teachings of ‘common experience’. Often it turns out not to be all that common. But one not unusual aspect of common experience is that inquiries often work their way up. If a senior person – even the most senior person, like Brian Parker – does not get satisfaction at lower levels of an enterprise, the inquiry will be pursued up the chain until the impasse is broken. That is what Brian Parker did. His emissary Brian Fitzpatrick failed with Bob McWhinney; he therefore decided to deal, as they used to say in Queensland, with the ‘top level’.

165. David Atkin relied heavily on the evidence of Brian Fitzpatrick, referred to earlier, about what Brian Parker told him on or about 26 July 2013. The significance of the evidence is that buried in what Brian Fitzpatrick reported is, perhaps, the proposition ‘David Atkin knows nothing about what is going on’. But the argument does involve believing that Brian Parker was telling the truth to Brian Fitzpatrick. Contrary to many of David Atkin’s submissions, the Interim Report accepted the credibility of Brian Fitzpatrick, not the credibility of Brian Parker. From the point of view of reliability, it must be remembered that accepting Brian Parker’s evidence is to accept hearsay or perhaps something even less than hearsay.

166. In fact, the submission raises numerous problems which in a court would be treated as going to admissibility but in this inquiry go to reliability.

163 Submissions of David Atkin, 11/9/15, para 35(c).
164 Submissions of David Atkin, 11/9/15, para 30(a), 30(b).
167. An initial problem is this. Assuming Brian Parker spoke to Brian Fitzpatrick in the way Brian Fitzpatrick told the hearing, what did Brian Parker mean? In particular, when Brian Parker said ‘the bosses don’t know of it’, what did he mean? Did he mean David Atkin? David Atkin was a boss, not the bosses. Brian Parker said that ‘one of the Cbus women involved was one of the bosses’. Did he mean that the bosses were simply an innominate group of executives of whom, say, Maria Butera was one? Or by ‘bosses’ did Brian Parker mean the ultimate bosses of Cbus, namely the directors of United Super? David Atkin’s submissions answered the last question ‘No’, and that is probably correct, but the other questions stand.

168. Behind this doubt about meaning lies a further hearsay problem. All the possibilities just referred to leave open another element of hearsay. It is highly unlikely that Brian Parker would have had personal knowledge of David Atkin’s ignorance if it existed. Where did Brian Parker’s proposition that David Atkin was ignorant come from? Brian Parker may have got it from someone within Cbus, or he may have surmised it for himself, or he may have made it up. If Brian Parker got it from someone within Cbus, what Brian Fitzpatrick said depends on (say) Maria Butera telling Brian Parker that some persons within Cbus (David Atkin? A group of executives? The directors?) were ignorant of the facts, and Brian Parker relaying that proposition to Brian Fitzpatrick, who relayed it to the public hearing. But if Brian Parker surmised it for himself, there is not even a link of any kind with someone having personal knowledge.

169. Why should what Brian Parker said to Brian Fitzpatrick be believed? Virtually nothing he has said on any other significant controversial
question in the Commission’s hearings has proved worthy of belief. In
the Interim Report it was found that he issued a series of contrived and
misleading statements to the public and to members of the CFMEU in
relation to the death threat made by Darren Greenfield against Brian
Fitzpatrick on 27 March 2014.\textsuperscript{165} The Interim Report found that he
made denials of his feelings of violence towards Jose Maria Barrios,
which were recorded in telephone calls to Rob Kera and to Brian
Parker’s daughter, but that these denials were false to his knowledge.\textsuperscript{166}
Brian Parker was criticised for giving deliberately false evidence in
relation to the Cbus leak.\textsuperscript{167} Those matters concerned last year’s
evidence. This year Brian Parker’s evidence was not seen to advantage
in relation to the case study about payments to organisers\textsuperscript{168} and in the
case study about donations and EBAs.\textsuperscript{169}

170. If Brian Parker finds it desirable to lie in solemn and formal hearings
while under affirmation, what restraint is he likely to experience in
speaking to an organiser in the field about a contested current problem?

171. Brian Parker was a shrewd, cunning and wily man. He had risen in the
hard world of the CFMEU, in which he had many critics. There are
reasons why he may have lied to Brian Fitzpatrick about the ignorance
of the bosses.

\textsuperscript{165} Interim Report, Vol 2, ch 8.4, paras 187-194.
\textsuperscript{166} Interim Report, Vol 2, ch 8.5.
\textsuperscript{167} Interim Report, Vol 2, ch 8.3, paras 189-203.
\textsuperscript{168} Chapter 7.2.
\textsuperscript{169} Chapter 7.3.
172. There is a real possibility that he gave an untrue account of the relevant events in order to emphasise to Brian Fitzpatrick the need for the information to be kept secret.

173. There is also a realistic possibility that Brian Parker spoke as he did to Brian Fitzpatrick because he wanted to protect David Atkin. The presence of a CEO of Cbus who was prepared to take his calls and cooperate with his desires had value. Protecting that man’s position was a prudential step.

174. A further real possibility is that Brian Parker may have been boasting to Brian Fitzpatrick. He was insinuating that he had solved the problem by dealing with the ‘women’, unknown to David Atkin, with an indirect, clever, clandestine, cloak and dagger technique, in contrast to a simple request from powerful union boss to powerful corporation boss. Dealing directly with the corporation boss is something which may not have been appealed to a tough old-style CFMEU official like Brian Fitzpatrick. Brian Parker may have simply decided to tell Brian Fitzpatrick the minimum amount of facts in order to preserve his room to manoeuvre freely in future.

175. Yet a further possibility is that Brian Parker was finding Brian Fitzpatrick – elderly, irascible and discontented – a difficult colleague to handle. The relevant conversation between Brian Parker and Brian Fitzpatrick was on or just after 26 July 2013. For months Brian Parker had been trying to sort out the aftermath of what on any view was a dramatic and disturbing phone call from Darren Greenfield to Brian
Parker on 27 March 2013. As narrated in the Interim Report,\textsuperscript{170} for some time Brian Fitzpatrick and Darren Greenfield had been in disputation over how arrears in payment of workers’ entitlements by George Alex companies should be pursued. Two investigations into the 27 March 2013 incident had taken place – the McDonald Report tabled at the COM on 7 May 2013 and the Mallia report tabled at COM on 31 May 2013.\textsuperscript{171} On 1 July 2013 disputes took place within the union on whether Brian Fitzpatrick should be made to leave. These troubles culminated in Brian Fitzpatrick’s resignation on 27 September 2013.\textsuperscript{172} The conversation of Brian Parker with Brian Fitzpatrick on or about 26 July 2013, then, took place at a time when Brian Fitzpatrick was becoming a source of worry, trouble and irritation to Brian Parker. He may have had his own reasons for not telling his unruly colleague the full truth.

\textbf{176.} Various possibilities just touched on could not be usefully explored with Brian Parker, because he flatly denied the conversation reported to the hearing by Brian Fitzpatrick. At one level that is a further difficulty in David Atkin’s reliance on it. He invites total acceptance of Brian Parker as a witness to the 18 July 2013 conversation but total rejection of his denial of the 26 July 2013 conversation.

\textbf{177.} Counsel assisting is seeking rejection of David Atkin’s evidence about the 18 July 2013 telephone call from Brian Parker. David Atkin pressed his version in the course of his four days in the witness box over an eight month period (3 and 23 October 2014 and 10-11 June

\begin{footnotesize}
\textsuperscript{170} Chapter 8.4, paras 12-45.
\textsuperscript{171} Interim Report, Vol 2, ch 8.4, paras 133-155.
\textsuperscript{172} Interim Report, Vol 2, ch 8.4, paras 156-184.
\end{footnotesize}
2015). His counsel’s cross-examination of other witnesses proceeded on the assumption that his position was correct. He pressed his position again in written submissions. To reject that position would be potentially damaging to him. Counsel assisting is making a serious allegation. Grave consequences may flow from a rejection of David Atkin’s position. It is therefore important to pause carefully and at length before rejecting it. It is important to ensure that rejection is supported by sufficiently strong evidence. Brian Fitzpatrick’s evidence of what Brian Parker said to him, however, even taken with David Atkin’s denials, Brian Parker’s corroboration of those denials, and the credibility problems of Maria Butera, do not outweigh the force of the circumstances pointing against David Atkin’s position.

178. For those reasons the submissions of counsel assisting about the events of 18 July 2013, modified as indicated, are accepted.

D – THE EVENTS OF 20 MAY 2014

General

179. The evidence concerning the conversations between Brian Parker and Maria Butera, Lisa Zanatta and David Atkin on 20 May 2014 tends to support a finding that David Atkin knew that his 18 July 2013 conversation with Brian Parker had been more detailed than he described in his evidence.

180. For the reasons set out below a finding is made that on the balance of probabilities Brian Parker spoke to each of Maria Butera, Lisa Zanatta
and David Atkin on 20 May 2014 with a view to impressing on them what he would say, if asked, about the circumstances surrounding the leak, and encouraging them to adopt the same position.

The background to the 20 May 2014 conversations

181. The background to the 20 May 2014 conversations is important. On 29 April 2014 the Royal Commission issued Notices to Produce to United Super and Superpartners. The notices caught, *inter alia*, documents relating to the release of the names, addresses, superannuation entitlements and personal information of Lis-Con employees to the Construction and General Division of the CFMEU NSW, including documents relating to the release of this information to Brian Parker.

182. On 7 May 2014 the CFMEU answered three questions from Fairfax media directed to Brian Parker as follows:173

1) Why did he seek and accept the leaked details of hundreds of construction workers from CBUS in mid-2013?

Mr Parker did not seek or accept any leaked documents or information from CBUS in mid-2013.

2) What was the purpose of receiving the leaked material when it is a massive breach of privacy and potentially illegal?

See above.

3) Why did the NSW CFMEU have some of its officials call workers on the numbers gleaned from the leaked material and pretend to be from Cbus?

Mr Parker had no knowledge that this occurred or if it occurred. If any such calls were made, they were not authorised by the CFMEU.

183. The answers to these questions were of course quite false.

184. On 11 May 2014, the *Sydney Morning Herald* published an article written by Nick McKenzie and Richard Baker in relation to an alleged leak of private information by Cbus to Brian Parker. Similar articles written by those authors were published on 12 and 13 May 2014 in *The Age*, the *Australian Financial Review* and again in the *Sydney Morning Herald*.

185. The 11 May 2014 article in the *Sydney Morning Herald* said in part:174

> The private financial details and home addresses of hundreds of non-union workers were allegedly leaked by one of the nation’s biggest super funds to building union boss Brian Parker as part of an industrial campaign. …

> A Fairfax media investigation has obtained a leaked database with the private details of more than 400 CBUS superannuation fund members – most of whom are not union members – which was allegedly given to the NSW Construction Forestry Mining and Energy Union Branch Secretary without the knowledge of the workers involved.

> A signed statutory declaration, provided by a union whistle blower who assisted Mr Parker after he allegedly obtained the leaked information, states it was used to help formulate an industrial campaign against a company that had been fighting the CFMEU in legal cases in several states.

> ‘State Secretary Brian Parker told me that he had a contact in CBUS who could discreetly … leak him the information he asked for,’ the statutory declaration says. ‘A short time after this, he came to my office and gave me a printed copy of the information he said was supplied to him. He said to me to keep this document secret and not tell anybody else.’

> It has been confirmed the database was used by the NSW CFMEU to call the private phone numbers of South Australian, Queensland NSW employees of construction company Lis-Con.

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The NSW CFMEU branch allegedly received the information from CBUS after senior union leaders met in Sydney last year to discuss ways to attack Lis-Con. Relations between the company and the union became extremely hostile when the company’s management launched defamation writs against the CFMEU in Queensland and South Australia.

The union whistle blower said: ‘They were a company the union wanted to squash. The leaked information was intended to put enough pressure on them so the word would get out that they were not a company contractors should use.’

Mr Parker has issued a statement denying any knowledge of the allegedly leaked database or how it arrived at the CFMEU.

186. The statement attributed to Brian Parker is false.

187. The *Sydney Morning Herald* article of 13 May 2014 said: ‘Mr Parker declined to comment further, citing ongoing investigations, but he flagged he would deal with the matter at the royal commission into union corruption.’

188. On 15 May 2014 further Notices to Produce were issued by the Royal Commission to United Super.

189. It was plain that the Commission would be examining the Cbus leak in public hearings. Brian Parker admitted as much.

190. The evidence of what happened on 20 May 2014 is as follows.

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*Cbus MFI-1, 11/6/15, p 822.*
Maria Butera’s evidence

191. According to Maria Butera, she and Brian Parker were present at a briefing held at the Cbus offices for all the union building industry Secretaries. A transcript of her evidence records the following:\textsuperscript{176}

Q. Did you have any discussion with him at that meeting or before or after?

A. Well, Lisa [Zanatta] and I were actually welcoming the participants into the board room. He actually was one of the last ones to turn up. I saw him. I went over and greeted him, as I had done with the other participants, and he wanted a word and he said to me.

Q. Well, did you stay where you were or did you go to some other place?

A. We just moved. We just moved. Yes.

Q. Was anyone else standing nearby?

A. No. It wouldn’t have been - I mean, it just wouldn’t have been noticeable to anybody, really.

Q. You just went over to a space?

A. Basically, yes, because the board room is a fairly big place.

Q. Than what happened, what did he say to you?

A. He said to me that –

Q. Try to put this as best as you can into the exact words.

A. I have really tried. I’ve really tried to do this as accurately as I can.

Q. All right. So what did he say?

\textsuperscript{176} Butera MFI-1, 11/6/15, p 25.43-27.16.
A. So just bear with me. He stated me down, basically.

Q. What does that mean?

A. Well, he was – he was glaring at me. I mean, this was not a friendly word that he was having with me. He said, “In relation to the data, in relation to the Lis-Con data, you need to understand my story is that I got that from Fitzpatrick and I did not get that – I did not ask for it or I did not get that from David Atkin or anyone else, and that had better be your story and anybody else’s story.”

Q. All right. What did you understand him – when he said “your story”, what did you understand that to mean?

A. Well, if I was ever asked, he never asked for Lis-Con data. He never asked for any personal data. He wasn’t involved at all.

Q. Asked by whom – if you were asked by whom?

A. Anyone. At that stage, there had been the Fairfax Media article, so it was fairly clear what was going to happen.

Q. Well, what do you mean by that?

A. Well, in terms of an inquiry.

Q. How did you feel when he said that? Sorry, before I get to that, what did you say to him?

A. I didn’t say anything. I didn’t – I’ve – I didn’t say anything. I mean, he’s a pretty big, imposing bloke. I mean, I – I didn’t speak in the meeting. I could hardly speak.

Q. So how did you feel after he said that?

A. Intimidated. I mean, it sounds pathetic, but scared. I mean, this guy – I mean, you know, I knew about this guy’s connections, and the building industry – it works on bongo drums. That’s how it works, you know, the word gets out about who knows who and who people are associated with and – scary.

192. Brian Parker denied that. 177

177 Brian Parker, 15/6/15, T:371.44-47, 376.44-46.
Lisa Zanatta’s evidence

193. On the same day Lisa Zanatta said she met Brian Parker on the same occasion. Her evidence was:178

Q. And then on 20 May Brian Parker came to an insurance briefing, and you say that you and he spoke briefly. Where did you have that conversation?

A. Sort of in between the lift wells and the front, the reception area. Maria and I were responsible for greeting our guests or participants to the meeting, so we were sort of - -

Q. And was it just the two of you, you and Brian Parker, or was there anyone else?

A. Oh, there were others – on in Parker – with Parker?

Q. In your note you say you and he spoke briefly. “He confirmed he could no longer find the data?”

A. No, I think I was speaking to him.

Q. Just him?

A. Just him, yes. There was people from insurance, there was people sort of hovering around, meeting and greeting.

Q. He just volunteered he couldn’t find the data; is that what you are saying?

A. No, I asked him again, you know, I just kept rechecking and rechecking.

Q. All right. So what did you ask him?

A. Well, by this time, you know, there was that article. There might have even been another; is that right? After that date there was quite a bit of stuff going on. And that’s when he said, “I have rechecked my safe and it’s not there. I don’t have it.” I said, “Well, what’s become of it?” He said, “I don’t know.”

Q. What did you say?

178 Zanatta Bundle, 12/6/15, tab 1, pp 32.30-33.24, 33.44-34.39.
A. In a polite way, I said, “Oh, you’re kidding me, aren’t you?” But I said more than that. I said, “Now who would have it?” Private members’ information.

Q. What did he say?

A. He said, “I don’t know. I can’t find it.” And I said, “Well, did you give it to Fitzpatrick?” He said, “No”.

Q. Did you talk about what would happen if any questions were asked?

A. Yes, we did.

Q. Now, really try and remember exactly what you said to him and he said to you. Just try and do it from your memory, without worrying too much what’s in - -

A. Yes, really, how it came about, you know, we only spoke very briefly, but I said – he asked if he’s asked where he got the data, “Don’t worry about it, mate, if anyone asks about where the data came from, I got it off Fitzpatrick”, or something along those lines.

Q. What did you say?

A. “Oh God, it’s going to be awful. I’m going to be in real big trouble”, and blah, blah, blah. There was a lot of people around, so I just – it just turned to disaster, really. So I – we agreed, basically, that that would be the story that we - -

Q. So did you tell him that that was what you would say if asked as well?

A. That he got it from Fitzpatrick?

Q. Yes.

A. Well, that – if I was asked where Parker got the information – is that what you are asking me?

Q. Yes, if you were asked any questions about how the information came from Cbus to - -

A. That I didn’t know. That it didn’t come from me.

Q. Is that what you said to him – that’s what you would say?
A. (Witness nods).

Q. So the arrangement was that he was going to say that he got it from Fitzpatrick?

A. And I would deny that I gave him the data.

Q. And you would just say you didn’t know how it came from Cbus to the CFMEU; is that right?

A. That’s right.

194. Brian Parker denied that. 179

David Atkin’s evidence

195. On the same day Brian Parker and David Atkin met. Brian Parker told David Atkin that in their conversation of 18 July 2013 he had requested assistance from Cbus in relation to the outstanding superannuation arrears of Lis-Con. He also said that it was not he, but Brian Fitzpatrick, who had procured Cbus lists of Lis-Con employees. Brian Parker did not dispute David Atkin’s evidence to this effect.

Consciousness of guilt

196. The conduct in litigation ‘of a party to it, if it is such as to lead to the reasonable inference that he disbelieves in his own case, may be proved and used as evidence against him’. 180 Brian Parker’s conduct of 20 May 2014 reveals a ‘consciousness of guilt’. Relevant examples

179 Brian Parker, 15/6/15, T:376.27-42.
180 R v Watt (1905) 20 Cox CC 852 at 853 per Phillimore J.
of that type of conduct include attempting to suborn witnesses,\textsuperscript{181} subornation of false statements to police officers,\textsuperscript{182} and attempting to ensure that those who have observed evidence keep quiet about it.\textsuperscript{183}

The proceedings of a Royal Commission are not litigious proceedings. Brian Parker is not a ‘party’. But the powerful ideas underlying ‘consciousness of guilt’ reasoning can apply also to persons affected by a Royal Commission, like Brian Parker.

197. Judging a contest of credibility between three such unsatisfactory witnesses as Brian Parker, Maria Butera and Lisa Zanatta is an onerous task. But it can be done.

**Consideration**

198. While both Maria Butera and Lisa Zanatta lied many times, when they were confronted with evidence demonstrating their lies, they made certain admissions. In Lisa Zanatta’s case this happened after only a few minutes’ pause in proceedings. In due course she volunteered further evidence. In the case of Maria Butera, her admissions were slower in coming. But they did come, along with what appeared to be expressions of genuine remorse, and with the provision of further evidence on a voluntary basis.

\textsuperscript{181} Moriarty v London, Chatham and Dover Railway Co (1870) LR 5 QB 314; R v Watt (1905) 20 Cox CC 852; R v Liddey (2002) 81 SASR 22 at [243]-[244]; R v Farquharson (2009) 26 VR 410 at [174]; R v Wildy (2011) 111 SASR 189.

\textsuperscript{182} Cooper v R (2012) 293 ALR 17 at [87].

\textsuperscript{183} Cooper v R (2012) 293 ALR 17 at [87].
199. Neither Lisa Zanatta nor Maria Butera was offered any form of inducement to make their admissions or give further evidence. Each may hope that their belated co-operation may assist them in relation to sentencing after any perjury conviction. If so, that hope may also be seen as a factor which motivated them to admit the falsity of their evidence and volunteer further evidence. It does not follow that the further evidence so volunteered was itself fabricated with a view to producing a version of events that would assist them. It was not suggested to either witness that they had done so.

200. Subject to the possible qualification expressed above in relation to Lisa Zanatta, in relation to making admissions only so far as other evidence compelled this, the admissions made by Lisa Zanatta and Maria Butera were not only against their interest, but were largely in accordance with the objective evidence.

201. In particular, their admissions are consistent with the terms of the iMessages which passed between them in July and August 2013. Findings have already been made about the iMessages and what they and other evidence demonstrate. One of those findings was that after Maria Butera spoke to Brian Parker on the telephone on 26 July 2013, as plans were being made for Lisa Zanatta to secretly fly to Sydney to deliver personal member information to Brian Parker’s office, she reported to Lisa Zanatta that Brian Parker ‘understands completely and is committed to using info very carefully’. Another finding was that in August 2013, when complaints came from Lis-Con

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184 See para 99.
186 Butera MFI-3, 28/10/14, p 2, item 27; Butera MFI-1, 11/6/15, tab 2.13, p 164, item 27.
about the leakage of employees’ personal information and Lisa Zanatta and Maria Butera became worried that the information they had secretly delivered to Brian Parker’s office had been leaked, Lisa Zanatta spoke on the telephone with Brian Parker and then reported to Maria Butera that ‘Everything is still safe in his hands only’.187

202. These contemporaneous records of the communications between Lisa Zanatta and Maria Butera, in the context in which they occurred, demonstrate Brian Parker’s direct involvement in a clandestine operation to deliver highly sensitive information to him. It was information so sensitive that he gave a commitment to use it ‘very carefully’ and an assurance that it was ‘still safe’ and ‘in his hands only’. They demonstrate that the communications could not have been in respect of uncontroversial aggregated arrears information of the kind routinely passing between Cbus and the CFMEU, as Brian Parker claimed. They demonstrate that the supply of this sensitive information and its safe keeping became, almost immediately, a point of controversy and worry for those involved in the leak. That meant that it is likely that Brian Parker would have a good recollection of the essence of what transpired. That conclusion is reinforced by the clandestine nature of the event itself, and the fact that the event occurred only a little over 12 months before Brian Parker first gave evidence, and had been the source of ongoing attention and publicity.

203. In circumstances which are difficult to unravel because they have led to questionable claims of legal professional privilege, Brian Parker was obliged to find representation independent of the CFMEU within eight

187 Butera MFI-3, 28/10/14, p 3, item 40; Butera MFI-1, 11/6/15, tab 2.13, p 165, item 40.
days of the revelation of the iMessages. (They were tendered on 28 October 2014. His solicitors ceased to act on 4 November 2014.) It was asserted that there was a ‘conflict of interest’ between him and the CFMEU. Thereafter the CFMEU itself did not endeavour to make any but the briefest of submissions in respect of this case study. No sensible explanation for this so-called ‘conflict’ or the treatment by the CFMEU of Brian Parker has ever been provided, even though the CFMEU was given the opportunity to do so.\textsuperscript{188} Brian Parker was not able to give a clear and consistent answer to the question: ‘Who decided that the CFMEU’s lawyers should cease to act for you?’\textsuperscript{189} It may reasonably be inferred that the CFMEU appreciated the obvious – namely that the iMessages demonstrated beyond reasonable doubt Brian Parker’s central role in the improper leakage of information. It became aware of the iMessages in late October 2014. Thereafter it endeavoured to disassociate itself from Brian Parker and the issue generally.

204. In the face of this iMessage material, Lisa Zanatta and Maria Butera made certain voluntary admissions. Their conduct stands in stark contrast to the conduct of Brian Parker. Even when confronted with the evidence which demonstrated his pivotal role in the affair, and even after learning of the admissions of Maria Butera and Lisa Zanatta,

\textsuperscript{188} Brian Parker, 19/6/15, T:593.37-42.

\textsuperscript{189} Brian Parker, 15/6/15, T:389.38-47; Brian Parker, 18/6/15, T:425.39-428.8; Brian Parker, 19/6/15, T:582.13-39; 586.5-591.2.
Brian Parker tried to maintain an account which stands at odds with the objective evidence.190

205. Did he do so out of a sense of pride, in that he did not want to admit that Brian Fitzpatrick, his former marginalised subordinate, had ‘outed’ him in his interview with the *Sydney Morning Herald*? Or did he do so out of a desire to ‘protect’ the CFMEU – which was misconceived in the sense that his lies were extremely harmful to both him and the union he represents? Whatever the reason, he continued to give an account which did not accord with the objective evidence available to it. This conduct marks him out as a particularly unreliable witness.

206. For these reasons, in a contest between the word of Maria Butera or Lisa Zanatta, on the one hand, and Brian Parker on the other, the former should be preferred on pure credit grounds, other things being equal.

207. In any event, other things are not equal. Beyond pure credit grounds, it seems unlikely that Maria Butera and Lisa Zanatta would have been prepared to lie as they did on 7 July 2014 if they had not first heard directly from Brian Parker on 20 May 2014 that he was prepared to do likewise. If the position was otherwise, they would have been taking a risk. They would be telling lies without knowing whether Brian Parker would later adopt their lies, or instead tell the truth (and in doing so expose their perjury).

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190 As to the evidence he gave in this regard, see Interim Report, Vol 2, ch 8.3, pp 1187-1191. Evidence to the same effect was given again on 15 June 2015 – see Brian Parker, 15/6/15, T:359.19 and following.
The fact Brian Parker is likely to have spoken with and influenced them is further supported by the fact that Brian Parker did the same to David Atkin. The conversation that Brian Parker had with David Atkin on 20 May 2014 was recorded in a note made by the latter.\footnote{Atkin MFI-9, 11/6/15.} That conversation was less blunt than those he had with Maria Butera and Lisa Zanatta – perhaps not surprisingly given David Atkin’s more senior position. However, as explained below, it had the same ultimate purpose and effect.

David Atkin’s note of the conversation made it clear that Brian Parker was going out of his way to tell David Atkin what he would say his recollection of events was. It can be inferred that Brian Parker’s purpose was to ensure that David Atkin understood what Brian Parker’s position was. The note contained the following passages:

He [Brian Parker] made reference to the Fairfax story re alleged [sic] leaks to the CFMEU and mentioned that we had an initial discussion in July 2013 where he raised concerns about outstanding super arrears of a company Liscon, and sought assistance from Cbus. I acknowledged that we had had a conversation. Brian went on to say that I had said that there were constraints on what information the Fund could provide but that I would follow up to see how we could help. I agreed that that was my recollection of the conversation, and then went on to say that he had no further discussions with Cbus about Liscon after this initial conversation. He was also strong in saying that had not received any of Cbus lists of members at Liscon. His belief was that Brian Fitzpatrick was the CFMEU official that had procured [sic] this list from Cbus.

The note is revealing in many respects.

To begin with, it reported statements from Brian Parker which were false to his knowledge. Contrary to what he was saying to David Atkin, Brian Parker did have further discussions with Cbus about Lis-
Con after 18 July 2013. The iMessages reveal that. On 29 July 2013 his office had received Cbus spreadsheets of Lis-Con members – the Zanatta spreadsheets. He, and not Brian Fitzpatrick, had procured the list.

212. The note demonstrates that the current of the conversation flowed very strongly in one direction. It can be inferred that Brian Parker was telling David Atkin what he would say had happened in 2013, and suggesting to David Atkin that neither of them need be implicated. After all, they knew they had only spoken to each other over the phone on 18 July 2013, and they knew there was no record of that communication. Each had a strong self-interest in distancing himself from any responsibility. David Atkin was being invited to adopt Brian Parker’s gentle reconstruction of a relatively short and unrecorded conversation and henceforth regard it as the truth. He seems to have accepted the invitation.

213. There is a further telling aspect of the conversation. The leak was highly controversial. And it had become public. Although David Atkin said in his evidence he was anxious to investigate it,192 when Brian Parker told him that he thought Brian Fitzpatrick had procured the list, David Atkin did not then ask Brian Parker anything about it.193 He did not ask him why he had that belief. He did not ask him for any information that might assist. He did not question Brian Parker as to how it could be that Brian Fitzpatrick, the very person who had gone public with the story, would have done so if he was the culprit. David

192 David Atkin, 10/6/15, T:50.30-38.
Atkin did not even invite Brian Parker to assist him with an investigation. The conversation simply ended. David Atkin did not then go away and ask for future investigations to be focussed around the various ways and means by which information could have been disseminated to Brian Fitzpatrick.

214. If David Atkin was ignorant of the true position and thirsty for knowledge, this revealed a surprising lack of response to potentially important new information. His lack of response suggested he knew what had really occurred in July 2013, but was prepared to follow Brian Parker’s lead about what they had discussed.194

**Brian Parker’s submissions about the 20 May 2014 conversations**

215. Brian Parker submitted that there is no evidence to support the accounts of Maria Butera and Lisa Zanatta about what Brian Parker said to them on 20 May 2014.195 That is not so. Maria Butera’s account is supported by the fact that something very similar happened to Lisa Zanatta at almost the same time. It is also supported by the fact that Brian Parker was aware that the Commission would conduct public hearings on the Cbus leak. On 20 May, about six weeks before the Commission in fact began those hearings, Brian Parker endeavoured to acquaint the two women with what his story would be and what theirs should be. He did essentially the same thing with David Atkin. This is not ‘similar fact evidence’ and it need not comply with the criteria necessary to receive similar fact evidence. It is

194 This supports the point made in para 211 above.
195 Submissions of Brian Parker, 11/9/15, para 41.
evidence of what happened to three people on one occasion. As lawyers used to say, the three incidents were part of the *res gestae*.\textsuperscript{196} Brian Parker was using the opportunity to kill three birds with one stone at one place and at one time. And the accounts of the two women are supported by Brian Parker’s behaviour in July 2013. He revealed then a consciousness that his receipt of the leaked information was shady conduct which needed to be kept secret. His behaviour on 20 May 2014 was consistent with and a continuation of that state of mind.

\textbf{216.} Brian Parker submitted that evidence not dealt with by counsel assisting indicated the improbability of the conversations. The evidence in question concerned a meeting in a café which was a three-five minute drive from the Cbus offices. Those present were Maria Butera, Lisa Zanatta, Brian Parker and Danny Gardiner. Maria Butera could not remember the meeting, though Lisa Zanatta could. Brian Parker submitted that the café meeting:\textsuperscript{197}

casts substantial doubt over the reliability of Ms Butera’s and Ms Zanatta’s accounts of that morning. It is highly unlikely that Mr Parker would have taken each of them aside [at the Cbus offices], where “[t]here were lots of people around”, when he had already seen each of them earlier at the café and discussed the material in the Fairfax press about the leak from Cbus to the CFMEU. Equally, it is highly unlikely that Ms Butera would have willingly attended the café meeting as she did if, as she said in her evidence, she had previously “done a lot of [her] own homework about Brian Parker and … was scared”.\textsuperscript{198}

\textsuperscript{196} \textit{See O’Leary v R} (1946) 73 CLR 566.

\textsuperscript{197} Submissions of Brian Parker, 11/9/15, para 52.

\textsuperscript{198} Maria Butera, 11/6/15, T:178.10-12.
217. Counsel assisting submitted in reply.\footnote{Submissions Counsel Assisting, 2/10/15, para 7.}

As to the café meeting which preceded the discussion that Mr Parker had with each of Ms Butera and Ms Zanatta on 20 May 2014, it is correct that the submissions in chief of Counsel Assisting did not address it. That is because the meeting is an irrelevance. The fact that the individuals met at a coffee shop earlier that day, in the presence of another party who was not implicated in the Cbus leak (Danny Gardiner), does not bear on the probability of there having later been more private conversations of the kind Ms Butera and Ms Zanatta described in their evidence. The fact Ms Butera may not remember she may have met Ms Zanatta, Mr Gardner and Mr Parker for a coffee does not provide a sufficient basis for rejecting her evidence as to her discussion with Mr Parker later that day. There was nothing to indicate that the earlier discussion over a coffee, as opposed to the later confrontational and private one, was a memorable occasion.

218. Those submissions are correct. To them may be added the consideration that a man of Brian Parker’s shrewdness and acute instinct for self-preservation would not have been likely to have foreshadowed his own perjury and tried to suborn perjury from the two executives in the presence of a witness, Danny Gardiner, who had committed no wrongdoing in relation to the Cbus leak.

219. Brian Parker also submitted that the evidence of Maria Butera and Lisa Zanatta about their conversations with him ‘does not sit well with the evidence of Mr Atkin’.\footnote{Submissions of Brian Parker, 11/9/15, para 53.} The submission did not explain why that should be so. In fact David Atkin’s evidence tends to confirm theirs.

220. Brian Parker submitted in relation to the meeting with David Atkin on 20 May 2014 that he did not endeavour to influence David Atkin.
Brian Parker’s submissions deny, but do not convincingly refute, counsel assisting’s submissions about David Atkin’s note.

David Atkin’s submissions about the 20 May 2014 conversations

221. David Atkin, too, joined issue with counsel assisting’s submissions about his meeting with Brian Parker. He submitted that he would not have made or kept the file note if it had recorded a fabrication because it would have been against his interest to do so. He explained his lack of response by pointing to various measures he took to investigate the Cbus leak and by saying it was inherently improbable that his silence arose from the fact that he knew what had really occurred and was prepared to follow Brian Parker’s lead. Again, on balance the submissions of counsel assisting are to be preferred. The file note is more damaging to Brian Parker than to David Atkin, but it is strange that what Brian Parker said about Brian Fitzpatrick, coming just after the colourful allegations made in the *Sydney Morning Herald* article, did not elicit some immediate response. And the various investigative steps David Atkin had taken and was to take are not really probative of his innocence. They are steps which a reasonably competent CEO would have had to undertake, innocent or not. If he had not taken them, it would have looked worse for him.

E – THE FINAL SUBMISSIONS OF DAVID ATKIN

222. On 23 November 2015, the Commission wrote to the Cbus parties inviting them to comment on the appropriateness or otherwise of

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201 Submissions of David Atkin, 11/9/15, paras 52-53.
concluding that David Atkin may have breached ss 182 and 183 of the Corporations Act 2001 (Cth), either directly, or on the ground of knowing involvement in breaches of these sections by Maria Butera or Lisa Zanatta.

223. On 4 December 2015, Cbus and David Atkin contended that that conclusion should not be reached. The submissions were, probably necessarily, long and repetitive. They were also very able. In deference to them they will be dealt with below in a little detail, which is itself repetitive.

224. David Atkin’s submissions first referred to a number of ‘factual fault lines’ which they identified in counsel assisting’s so-called ‘case theory’.

225. The first was a reminder about the application of the Briginshaw v Briginshaw202 standard of proof. That requires no special consideration. Underlying both the whole of the Interim Report and the Report itself was an endeavour to bear that standard in mind whenever it was relevant to do so. David Atkin’s submissions quoted the High Court’s statement that there is a ‘conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct’.203 The application of that observation does depend on the circumstances. Citizens do not ordinarily rob banks, and that proposition would operate with considerable force in the case of David Atkin. But that law-abiding tendency may be less marked when the CEO of a business running a large superannuation fund heavily

202 (1938) 60 CLR 336.
203 Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170 at 171.
dependent on the goodwill of trade union officials to ensure a flow of contributions is rung up by a forceful and very senior CFMEU official with what the official views as a pressing request.

226. Secondly, David Atkin criticised counsel assisting’s ‘case theory’ concerning him as having been built up from a ‘submission’ that during the phone call with him on 18 July 2013, ‘Mr Parker would have asked for what he wanted’. It was then contended by David Atkin that this ‘submission’ was then treated as a ‘fact’ establishing precisely what Brian Parker asked David Atkin to provide, for the purposes of drawing inferences with respect to later events. However, it is wrong to characterise counsel assisting’s argument in that way. It is not a mere ‘submission’. As discussed below, the material available in relation to David Atkin comprises a combination of powerful circumstantial facts from which inferences flow. It is significantly different from a mere ‘submission’.

227. David Atkin also argued that counsel assisting failed to address how it could be ‘open’ to draw the suggested inferences in the face of Brian Fitzpatrick’s evidence that Brian Parker had arranged to get the information on the quiet and without the ‘boss’ (who is said by David Atkin to be himself) of ‘one of the bosses’ who was involved (who is said by David Atkin to be Maria Butera) finding out. David Atkin pointed to the submissions of counsel assisting in reply. David Atkin’s submissions viewed them as posing a choice between accepting that Brian Fitzpatrick’s evidence may provide some support for David Atkin’s position because his account of the conversation reflects the

204 Submissions of David Atkin, 4/12/15, para 6.
reality, or accepting that Brian Parker did not tell the truth. This latter postulation was said to cause ‘problems’ for the remainder of counsel assisting’s ‘case theory’, ‘because elsewhere reliance is placed on a conflicting presumption that Mr Parker must have been upfront, direct and truthful in the conversation he had with Mr Atkin and the separate, subsequent conversation Mr Parker had with Ms Zanatta’.  

228. In fact, there is no such problem. The nature of Brian Fitzpatrick’s relationship with Brian Parker at that particular time – shortly before Brian Fitzpatrick left the union – might readily account for him being untruthful to Brian Fitzpatrick.

229. David Atkin’s third ‘factual fault line’ was an argument that counsel assisting’s submissions rely heavily on witness testimony of ‘patently unreliable witnesses, even though doing so often relies upon reconciling who is the more credible of the two, or invites the Commission to accept the evidence of an admitted perjurer over that of Mr Atkin (as well as, implicitly, over the evidence of Ms Thurstans)’. It was also contended that ‘the documentary evidence is rarely relied upon, even though it is further said an “ounce of intrinsic merit or demerit in the evidence … the value of the comparison of evidence with known facts, is worth pounds of demeanour”’.  

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205 Submissions of David Atkin, 4/12/15, para 6.  
206 See para 149.  
207 Submissions of Cbus, 4/12/15, para 7.  
208 Submissions of Cbus, 4/12/15, para 8.
230. This submission ignores the powerful circumstantial evidence provided by documents relied upon by counsel assisting. The initial request of Bob McWhinney which was later withdrawn appears in a document. So does the later request of Lisa Zanatta which revives the earlier McWhinney request which she was responsible for overriding. These documents provide potent support for the account of Maria Butera. Further, just a portion of further important supportive documentary material is found in the evidence of telephone call charge records showing, for example, contact at relevant times between Brian Fitzpatrick and Bob McWhinney, Bob McWhinney and Lisa Zanatta, and Brian Parker and Bob McWhinney (a twenty-two minute telephone call at a time consistent with Brian Parker learning that the earlier attempt to acquire addresses of Cbus members had been thwarted).

231. Fourthly, it is said that it is important to bear in mind that at no stage have either Maria Butera or Lisa Zanatta contended that David Atkin authorised their covert operation. Attention is drawn to Lisa Zanatta’s apology to David Atkin about the ‘awful position that [she has] placed [David Atkin] and Cbus in and [she] would like the opportunity to explain further.’ It may be true that David Atkin did not know or specifically authorise the clandestine method the revelation of which was at the very least embarrassing for Cbus. But that is to not say he did not trigger the events in question. Lisa Zanatta’s evidence is neutral as to that. It is also said by Cbus that ‘[t]he highest Ms Butera’s evidence as to David Atkin’s authorisation goes is that she

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209 See para 24.
210 See para 31.
211 Submissions of David Atkin, 4/12/15, para 9.
“did what I was asked or what I thought I had been asked to do”’. 212 This submission is not accurate. Maria Butera’s evidence goes much higher than that. 213 This unconvincingly downplays her evidence in a manner which fails to grapple with its force.

232. David Atkin’s submissions then turned to the Parker/Atkin phone call of 18 July 2013 at 10am. It is now stated that the factual finding sought by counsel assisting is an ‘inference’ (no longer a ‘submission’) later relied upon as an ‘established circumstance’. 214

233. David Atkin contended that his evidence should be accepted that during the call, Brian Parker requested Cbus’s ‘assistance with Lis-Con, which the union believed to be in arrears’. Among the matters referred to are the following. It was not surprising that David Atkin would not connect Brian Parker’s request with an email chain forwarded weeks earlier which discussed legal enforcement attempts with respect to Lis-Con arrears. David Atkin’s account is consistent with the evidence of Angela Thurstans who stated that David Atkin regularly received requests which were passed on to subordinates. Counsel assisting’s contention that the mention of restrictions and limitations indicated that it is most likely that Brian Parker was asking for personal member information does not sit well with David Atkin’s explanation that he is a ‘naturally cautious person’. In any event, disbelief in David Atkin’s evidence on this matter does not amount to positive evidence of the opposite of what is disbelieved, even more so

212 Submissions of David Atkin, 4/12/15, para 9.
213 See paras 86-100, 109-119.
214 Submissions of David Atkin, 4/12/15, para 10.
when such serious findings adverse to reputation are requested. All of these arguments against counsel assisting have been discussed and rejected above. But it can be observed here that there is no suggestion that counsel assisting was basing a case merely upon the rejection of David Atkin’s account. To the contrary, there is a combination of direct and circumstantial evidence which underpins counsel assisting’s submissions.

234. Another argument put forward by David Atkin was that there is no suggestion anywhere that Brian Parker would have known that David Atkin ‘was a person who could, with confidence, be asked for information that it would have been improper for Mr Atkin to authorise to be disclosed’. But merely to make a request posed no risk for Brian Parker. The worst that could happen would be that David Atkin would say ‘No’. If he said ‘No’ it is extremely unlikely that David Atkin would then, for example, report Brian Parker to the Privacy Commissioner merely for asking. At best, David Atkin would find a way to assist Brian Parker without anyone ever being revealed as the cause of the privacy breach.

235. It was further contended that counsel assisting’s ‘theory’ cannot be reconciled with Lisa Zanatta’s evidence that neither she nor Maria Butera knew ‘what Mr Parker wanted’. This too has been discussed already. One point worth reiterating is that it was Maria Butera who had the direct conversation with David Atkin. Her evidence has been set out above. The effect of that was clear. She knew he wanted

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216 Submissions of David Atkin, 4/12/15, para 15.
217 Submissions of David Atkin, 4/12/15, para 17.
something he should not have. That is supported by the circumstantial evidence.

236. David Atkin argued that ‘both Mr Atkin’s and Ms Butera’s evidence is that Mr Atkin did not ask Ms Butera to provide Mr Parker with phone numbers or addresses, or otherwise ask her to break the rules of the fund.’

Parts, but not all, of Maria Butera’s evidence are then set out. What is not set out is the part in which she states that the request was ‘absolutely not’ within Cbus’s privacy policy, and that ‘something like that, typically, would need to go to our executive manager of governance and risk if a situation like that occurred, because it’s in breach of the privacy policy of the fund’.

237. David Atkin then asked: even if Maria Butera’s evidence is accepted, given that even she did not know what Brian Parker meant by ‘personal member details’, how could it be said that David Atkin knew that what Brian Parker was asking for was improper? How could it be said that he ‘intended to action an improper request’? David Atkin’s submissions called in aid Maria Butera’s evidence that whilst she considered the task unusual, it did not strike her at the time as inappropriate, nor did she state to David Atkin that the task was unusual or otherwise seek to clarify her task; nor did David Atkin tell her to keep the task secret; nor did he even suggest she could not discuss it with her peers (such as Angela Thurstans). However,

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218 Submissions of David Atkin, 4/12/15, para 19.
220 Submissions of David Atkin, 4/12/15, paras 20-22.
again, there is no reference to a full account of Maria Butera’s evidence in context. It included the following important passage:

Q. You regarded this as unusual, is that fair?
A. I did regard it as unusual.
Q. Did you say anything like that to Mr Atkin?
A. I didn’t. I didn’t. I mean, if I could turn back time now, obviously, I would deal with this completely different, but it had come from the CEO, so I actioned his request. […] (emphasis added)

238. David Atkin then contended that ‘there is no foundation for a conclusion that David Atkin asked that she undertake a task which would involve the provision of an improper level of information to Brian Parker. As Maria Butera sums it up, she “did what I was asked or what I thought I had been asked to do”’. This last submission is simply not correct. There is ample foundation for that conclusion. Further, that Maria Butera and Lisa Zanatta were still undecided as to precisely what they would give Brian Parker a week later, as submitted by David Atkin, is neutral as to the issue of the propriety of the request.

239. David Atkin’s submissions then turned to ss 182 and 183 of the Corporations Act. They accepted that the test of impropriety in s 182 is objective, although the objective test does not disregard the facts and circumstances as known to a defendant.

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222 Submissions of Cbus, 4/12/15, para 26.
240. As to s 182, it was contended by Cbus that the evidence is insufficient to justify a finding that David Atkin did an act which he knew or ought to have known he had no authority to do.\textsuperscript{224} That is a rolled-up submission which can be denied in a rolled-up way. As to the criticism that counsel assisting did not suggest that David Atkin knew he was acting in breach of the privacy law,\textsuperscript{225} Cbus privacy policy or the Cbus trust deed, given David Atkin’s account of his conversation which denied the facts underpinning these possible outcomes, there was clearly no utility in such propositions being put.

241. David Atkin argued that the requisite purpose could not be inferred, i.e. that he intended to breach the various privacy documents which permitted disclosure of personal information in limited circumstances, to do so to cause an advantage for Brian Parker. David Atkin contended that providing information ‘for a campaign to recover superannuation arrears for its members’ is consistent with the purpose of the fund, and its obligations to be prompt and diligent in obtaining any portion of the trust estate that is outstanding.\textsuperscript{226} However, this submission failed to acknowledge that legal proceedings were already on foot,\textsuperscript{227} and that such information had been brought to David Atkin’s attention. In these circumstances, it could not be said that providing the information was consistent with the purpose of the fund.

242. David Atkin argued that for a contravention of ss 182 and 183 to be made out, there must be actual, not constructive, knowledge of the

\textsuperscript{224} Submissions of David Atkin, 4/12/15, para 32.
\textsuperscript{225} Submissions of David Atkin, 4/12/15, para 33.
\textsuperscript{226} Submissions of David Atkin, 4/12/15, paras 34-35.
\textsuperscript{227} See paras 20-21.
essential matters that make up the contravention.\footnote{228}{Submissions of David Atkin, 4/12/15, para 36.} That may be accepted.

\footnote{229}{Submissions of Cbus, 4/12/15, para 40.}

243. It was contended\footnote{229}{Submissions of Cbus, 4/12/15, para 40.} that unless David Atkin knew of the matters that make up the contravention in the level of detail including that Lisa Zanatta had acquired from Superpartners a spreadsheet containing Lis-Con members’ names, addresses, telephone numbers, and email addresses, that a contravention would not be made out. David Atkin also called in aid the supposed clearing of David Atkin by the Samuel Review and KPMG’s investigations.\footnote{230}{Submissions of David Atkin, 4/12/15, paras 41, 45(a).} David Atkin’s submissions also repeated the argument that neither Maria Butera nor Lisa Zanatta gave evidence that David Atkin knew about or participated in any way in their covert operation\footnote{231}{Submissions of David Atkin, 4/12/15, para 42.} The evidence that Lisa Zanatta told David Atkin that Brian Parker’s request had been ‘sorted’ is dismissed in David Atkin’s submissions on the ground that Lisa Zanatta ‘may have meant to convey something other than the truth of what had occurred’, but that, in any event, Lisa Zanatta’s evidence should not be accepted because ‘[i]t is contrary to the evidence of Mr Atkin’, she did not tell Maria Butera by iMessage that she had told David Atkin it had been sorted, and that she did not know it had been ‘sorted’ because the documents had not yet been delivered to her home. However, none of these points carry weight.\footnote{232}{Submissions of David Atkin, 4/12/15, paras 46-48.}
244. First, even if the precise mechanism of the detail and conveyance of material to Brian Parker was not known to David Atkin, it would be sufficient to make out a possible contravention of s 182 that David Atkin had authorised the giving of the material by a suitable means and that he understood his request was being acted upon. Secondly, the reliance upon the Samuel Review and the KPMG investigation is misplaced.\textsuperscript{233} Thirdly, Lisa Zanatta agreed that she did not report back to Maria Butera about the ‘sorted’ conversation with David Atkin. Nor did she ‘detail the details of [her] conversation with David Atkin’. When it was put to her that if she had said such a thing to David Atkin she would have told Maria Butera, she replied ‘Not necessarily’.\textsuperscript{234} As to the contention that the material had not yet been delivered by the time of the ‘sorted’ conversation, that submission does not acknowledge that the extraction and arrangement for delivery was well underway by that time, consistent with the situation being ‘sorted’. The fact is that Lisa Zanatta stuck to her account of the ‘sorted’ conversation doggedly and credibly.

245. Finally, David Atkin addressed the inference\textsuperscript{235} which he conceded ‘might conceivably be said to support a finding that Mr Atkin may have breached sections 182 and 183: that is, the finding sought by counsel assisting that Ms Butera and Ms Zanatta must have received high level, extraordinary authorisation to do what they did.’ It is argued that ‘[t]his is no more than speculation, based on the bewildering behaviour of Ms Butera and Ms Zanatta’. It is said to overlook the immediate instruction of David Atkin voluntarily to alert

\textsuperscript{233} See paras 129-133.

\textsuperscript{234} Zanatta Bundle, 12/6/15, tab 1, transcript of private hearing, 12/12/14, T:292.5-13

\textsuperscript{235} Submissions of Cbus, 4/12/15, para 49.
the Commission following the discovery of the iMessages, and that neither of the two said they were authorised to act as they were when their actions were discovered.

246. However, this is much more than ‘speculation’. After all, if something is ‘based on the bewildering behaviour’ of the two executives, it cannot be just speculation. The submission fails to acknowledge the strength of the circumstantial evidence starting with the McWhinney request which was overridden by Lisa Zanatta and then ‘inexplicably’ revived, the intervening event being the Parker/Atkin phone call of 18 July 2013. The evidence when viewed as a whole amounts to far more than speculation. The behaviour is not ‘bewildering’ in the full context of the case. Rather, it is explained by the events as contended for by counsel assisting. If there were any reasonable alternative explanation of the circumstances, perhaps a finding could not be made adversely to David Atkin. But no other reasonable alternative explanation has any evidentiary support.

247. In all the circumstances, David Atkin may have contravened s 182 of the Corporations Act 2001 (Cth).

F – LIS-CON’S QUEENSLAND LOCKOUT

248. There was a very short chapter bearing this title in the Interim Report. The Interim Report held over the question whether, apart from the Cbus leak, an allegation that the CFMEU had engaged in an industrial campaign against Lis-Con with a view to having it removed from sites in Queensland was well-founded. It was held over in order to see whether any further material came to light in the course of the
Commission’s further investigation of the Cbus leak. No further material on the industrial campaign has come to light, though much other material did. Accordingly, it must be concluded that it is not appropriate either to uphold or to dismiss the allegation. The correct verdict on the allegation, while it is supported to some degree, is not proven.

G – CONCLUSIONS AND RECOMMENDATIONS

Breaches of privacy

249. A number of findings have already been made in the Interim Report relating to breaches by Cbus of the Privacy Act 1988 (Cth), the trust deed, its privacy policy and the terms of its contracts with the Lis-Con members. They are not repeated here.

Perjury

250. Issues concerning the giving of false evidence by Lisa Zanatta and Maria Butera and possible contraventions of s 6H of the Royal Commissions Act 1902 (Cth) are now in the hands of the Commonwealth Director of Public Prosecutions and the Victorian court system. They are not the subject of further consideration.

251. However, as at this point, no charges have been laid against Brian Parker in relation to whether he may have contravened s 6H. For the

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reasons given above and in the Interim Report, Brian Parker may have committed criminal acts in contravention of this section.

252. Brian Parker complained that counsel assisting in their submission to this effect did not identify any evidence which he may have given which was in possible contravention of s 6H. He also submitted that to make any finding that he had contravened s 6H or may have contravened s 6H, it would have been necessary for him to be heard on how various integers of the section might or might not apply.

253. This submission is unmeritorious. Various paragraphs of the Interim Report state that Brian Parker had given knowingly false evidence and identify it.\(^\text{238}\) Brian Parker has had many months to refute those allegations. He has not done so. And the whole of his evidence about the 18 July 2013 conversation, both last year and this year, so far as it was material and positive, was false to his knowledge. So was his evidence totally denying his meetings with Maria Butera and Lisa Zanatta on 20 May 2014.

254. It is not proposed to find that Brian Parker has committed perjury. It is proposed to find only that he may have done so, and to recommend that the matter be referred to the Commonwealth Director of Public Prosecutions to consider whether any prosecution should be instituted. Brian Parker’s submissions confuse what would have to be done if the prosecuting authorities decided to proceed with charges under s 6H with what is sufficient to trigger a consideration by them into possibility of a prosecution.

Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Commonwealth Director of Public Prosecutions for consideration of whether Brian Parker should be prosecuted for possible contraventions of s 6H of that Act.

What about David Atkin? The reasoning above indicates that some of his evidence about the 18 July 2013 conversation with Brian Parker was false, and must have been false to his knowledge. However, unlike Lisa Zanatta and Maria Butera, he has not admitted perjury. There is a lack of objective contemporary material directly and explicitly contradicting him, in contrast to the iMessages in relation to Brian Parker. In these circumstances it is not proposed to recommend that the Commonwealth Director of Public Prosecutions examine whether he should be prosecuted for perjury. That official is, of course, at liberty to investigate the matter of his own volition.

Breaches of the Corporations Act: Maria Butera, Lisa Zanatta and David Atkin

Section 182 of the Corporations Act 2001 (Cth) provides that an employee of a corporation must not improperly use his or her position to gain an advantage for someone else or cause detriment to the corporation. Section 183 of the same Act further provides that a person who obtains information because he or she is an employee of a corporation must not improperly use that information to gain an advantage for someone else or cause detriment to the corporation.
David Atkin, Lisa Zanatta and Maria Butera were employees of United Super at the relevant time. They used their position improperly to obtain the information on Lis-Con’s employees from Superpartners in order to pass that information on to the CFMEU in breach of the Privacy Act 1988 (Cth) and the company’s contracts with members. In doing so they used their position to gain an advantage for Brian Parker and the CFMEU in their dealings with Lis-Con.

Hence Maria Butera and Lisa Zanatta may have breached ss 182(1) and 183(1) of the Corporations Act 2001 (Cth). There may be a difficulty in establishing that Maria Butera breached s 183(1) since she may argue that she never obtained information. However, that difficulty can be examined by the Australian Securities and Investments Commission. In any event, contrary to s 183(2) she may have been involved in the possible contravention of s 183(1) of the Corporations Act 2001 (Cth) by Lisa Zanatta.

Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Australian Securities and Investments Commission for consideration of whether proceedings should be instituted against Lisa Zanatta for possible contravention of ss 182 and 183 of the Corporations Act 2001 (Cth).

Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Australian Securities and Investments Commission for consideration of whether proceedings should be instituted against
Maria Butera for possible contravention of ss 182 and 183 of the
Corporations Act 2001 (Cth).

262. For reasons given above, David Atkin may have breached s 182(1) of
the Corporations Act 2001 (Cth). He is in the same position as Maria
Butera in that he may be outside s 183 since he did not obtain
information. But he may have breached s 183(2).

263. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every
other enabling power, this Report and all relevant materials have been
referred to the Australian Securities and Investments Commission for
consideration of whether proceedings should be instituted against
David Atkin for possible contravention of ss 182 or 183 of the
Corporations Act 2001 (Cth).

Breaches of the Corporations Act: Brian Parker

264. As just foreshadowed, under sub-section (2) of each of ss 182 and 183
of the Corporations Act 2001 (Cth), a person who is involved in a
contravention of one of those sections also contravenes the section.

265. Section 79 of the same Act provides that a person is involved in a
contravention if he or she has:

(a) aided, abetted, counselled or procured the contravention;

(b) induced, whether by threats or promises or otherwise, the
contravention;
(c) been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) conspired with others to effect the contravention.

266. Brian Parker may have been involved in the possible contravention by others of ss 182(1) and 183(1) of the Corporations Act 2001 (Cth) by seeking the information from David Atkin and receiving it from Lisa Zanatta and Maria Butera.

267. For Brian Parker to have been ‘involved’ within the meaning of s 79 of the Corporations Act 2001 (Cth), he must have had actual knowledge of the essential events which constituted the contravention. That knowledge may be inferred from the fact of exposure to the obvious.\textsuperscript{239}

268. The evidence suggests that Brian Parker knew that he was asking Cbus employees to use their position as such to provide him with the personal contact details of Cbus members for the purpose of assisting him and the CFMEU, and that in doing so he was asking them to act improperly. That may be inferred from the secretive nature of his request and the response to it. It may also be inferred from the fact that he said to Brian Fitzpatrick that ‘If this comes out Im dead, the girls are dead and theyll be sacked and Ill be sacked’.\textsuperscript{240}

269. Brian Parker may therefore have been involved in the possible breaches of ss 182(1) and 183(1) of the Corporations Act 2001 (Cth)

\textsuperscript{239} ASIC v Adler (2002) 168 FLR 253 (NSWSC) at [209], following by analogy Yorke v Lucas (1985) 158 CLR 661 at 668-70.

\textsuperscript{240} Brian Fitzpatrick, witness statement, 15/7/14, para 107.
by Lisa Zanatta and Maria Butera in such a way that he did, himself, contravene those same sections.

270. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and any other relevant materials have been referred to the Australian Securities and Investments Commission for consideration of whether proceedings should be instituted against Brian Parker for possible contravention of ss 182 and 183 of the Corporations Act 2001 (Cth).

**Breach of professional standards**

271. It is necessary to turn to the Rules for the Construction and General Division of the CFMEU (the Rules). Clause 51(b) of the Rules provides that any officer of a divisional Branch may be removed from office by a two thirds majority of the divisional Branch management committee where the officer has been charged and found guilty of ‘gross misbehaviour or gross neglect of duty’.

272. This rule confirms something that is not controversial, namely that whatever be the precise nature and extent of the professional standards expected of officers of the CFMEU, at the very least officers are expected not to commit acts of gross misbehaviour.

273. By each of:

(a) obtaining the personal information from Cbus in an improper way;
(b) causing that information to be used in order to contact and harass Lis-Con employees;

e (c) inducing Cbus to breach the Privacy Act 1988 (Cth), its trust deed, its privacy policy and its contracts with members;

(d) breaching the Corporations Act 2001 (Cth) and encouraging Cbus employees to do likewise;

e (e) giving false evidence to this Commission; and

(f) encouraging others to give false evidence to this Commission,

Brian Parker may have engaged in ‘gross misbehaviour’ within the meaning of that expression in the Rules. He accepted that if he had acted as alleged, he would have been guilty of gross misbehaviour.\(^{241}\)

274. Brian Parker may not be a fit and proper person to hold office within a registered organisation.

**Cultural problems within Cbus**

275. Counsel assisting put the following submissions.

276. Within Cbus, two-thirds of its organisers come from a CFMEU background,\(^{242}\) thus creating substantial risks that Cbus will have a

\(^{241}\) Brian Parker, 3/10/14, T:642.38-643.7.

\(^{242}\) David Atkin, 10/6/15, T:13.12.
large portion of its workforce whose loyalties may be more aligned to
the CFMEU than Cbus itself.

277. The evidence also establishes that the CFMEU is able to exert
influence over Cbus of a more general kind.

278. In 2012 and 2013 the CFMEU was involved in a bitter feud with a
building company called Grocon, and to use David Atkin’s language,
the union became ‘unhappy’ that Cbus had provided a building
contract to Grocon. David Atkin said ‘subsequent to that, the Victorian
building unions then undertook a public tender’ for a default
superannuation fund in EBAs and required Cbus to go through a
competitive tender process.\(^{243}\) It was the only time such a process had
occurred in the whole of David Atkin’s eight year tenure at Cbus.\(^{244}\)
According to David Atkin, if Cbus lost its default provider status with
the CFMEU something like 15% to 20% of Cbus’ revenues would be
lost.\(^{245}\) Fortunately for Cbus, the CFMEU subsequently decided to
retain Cbus as the default fund.

279. In a CFMEU publication of August 2013, the union explained its
behaviour towards Cbus. It claimed that ‘unions are the heart of the
fund’. It said that it ‘became concerned that Cbus had lost touch with
this reality’. It said that it believed ‘it was necessary to put Cbus under
the microscope’.\(^{246}\) In conjunction with retaining Cbus as the default
fund, the CFMEU required the establishment of a committee called the

\(^{244}\) David Atkin, 10/6/15, T:19.27.
\(^{245}\) David Atkin, 10/6/15, T:18.45-19.2.
‘Building Industry Group Consultative Forum’, and the recruitment by Cbus of a retired CFMEU official as ‘liaison officer’. The new committee’s role would extend to having an influence in matters such as which building companies would win work from Cbus, and on what terms. 247

280. David Atkin disclaimed any belief that the CFMEU’s displeasure about the Cbus-Grocon contract had any relationship with the union’s decision to put the default superannuation fund opportunity out to tender (‘no…it was a reflection of the strategic landscape that we operated in’). 248 But it is difficult to accept that he could not have held a healthy suspicion that there was some relationship between the two. His apparent lack of suspicion is very unhealthy from the perspective of Cbus. It indicates that the culture within Cbus is such that, even at the most senior of levels, staff are not willing or able to acknowledge (let alone address) the difficult and complex issues and conflicts of interest that arise as a result of the powerful position that the CFMEU holds vis-à-vis Cbus.

281. It is relevant to observe that the leak of Lis-Con employees’ private information came not long after the CFMEU had been through the tender process and decided to stay with Cbus. At that time David Atkin and others must have been relieved that the CFMEU’s business had not been lost, and must have been at least a little sensitive to the fact that it was important for them to remain, as the CFMEU would say, ‘in touch with the reality’ that the union was ‘the heart’ of Cbus.

248 David Atkin, 10/6/15, T:15.18-19.
It is more probable than not that those considerations influenced the actions and decisions of David Atkin, Maria Butera and Lisa Zanatta in their handling of Brian Parker’s request.

282. Cbus has taken some initial steps to address the cultural issues it faces, and in particular instructing Graeme Samuel AC and Robert Van Woerkom to undertake a review. However, even within the context of that process problems of the kind described above arose. The union appointees to the Cbus board moved for changes which had the effect of narrowing some of the terms of reference (including the removal of an instruction to inquire into ‘cultural arrangements’), and were arguing that the CFMEU needed access to the private information held by Cbus.249

283. The report prepared by Graeme Samuel and Robert Van Woerkom250 indicates that Cbus has begun to deal with these difficult issues. It is a high level report, as one would expect having regard to the time frame within which it was produced, and does not so much identify solutions, as identify the next steps to be taken in finding those solutions. With respect to the authors, the report very usefully identifies a range of critical tasks that Cbus must undertake if it is to have any success in addressing these matters.

284. It is not necessary to reach a final view on these submissions. The Samuel Report was a very valuable first step. It remains to be seen whether the journey it marks out can be taken further.


# CHAPTER 7.2

## PAYMENTS TO ORGANISERS

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E – APPROPRIATE FINDINGS: DARREN GREENFIELD AND GEORGE ALEX

APPENDIX 1 – DOUGLAS WESTERWAY AND MICHAEL COHEN

A – INTRODUCTION

1. Darren Greenfield was at all relevant times an organiser with the Construction and General Division, New South Wales Divisional Branch of the Construction, Forestry, Mining and Energy Union (the CFMEU NSW). The principal issue addressed in this Chapter is whether George Alex and Joseph Antoun made cash payments to
Darren Greenfield to induce him to favour or to reward him for having favoured businesses associated with them. One of these businesses was a scaffolding business called ‘Elite’. The findings made in this Chapter, and the steps in the reasoning that leads to them, substantially correspond with those advocated in the submissions of counsel assisting. Those submissions are set out below. Arguments advanced by affected persons, principally, the CFMEU and Darren Greenfield, are examined at appropriate places.

2. The evidence demonstrating that payments were made to Darren Greenfield can be summarised as follows. During 2013 regular cash withdrawals of $2,500 were made from Elite’s bank account. They were referred to within Elite as ‘union payments’. A substantial body of documentary evidence, principally text messages between George Alex and others, demonstrates that cash payments in the amount of $2,500 were made by George Alex and Joseph Antoun to Darren Greenfield. Darren Greenfield and George Alex gave explanations for these incriminating text messages. One example was that George Alex left business records (and not cash) for Darren Greenfield to collect in a drawer of a basin next to a toilet in George Alex’s home. The explanations are not credible. Aside from these key documents, various broader circumstantial matters support a finding that Darren Greenfield received the payments. These include the unusual locations in which Darren Greenfield and George Alex met, Darren Greenfield’s relatively lenient treatment of businesses associated with George Alex in 2013, and Darren Greenfield’s aggressive behaviour in early to mid-2013 towards a fellow CFMEU official, Brian Fitzpatrick, when the latter started to raise difficult questions about some of these matters.
3. The principal submissions against those of counsel assisting came from the CFMEU. Brian Parker dealt only with points which counsel assisting made against him, and these are of reduced significance in view of the fact that no findings were requested against Brian Parker and none are made. The submissions of George Alex do not go much beyond taking the understandable but doomed course of relying on George Alex’s evidence.

4. It may assist in understanding the parameters of debate to set out the primary competing position advocated by the CFMEU. Its submission was that the references to Darren Greenfield or ‘union payments’ or the CFMEU can be explained in various ways. But the principal explanation was that they operated as a cloak for a scheme by which money earned by George Alex’s businesses was paid to Joseph Antoun who, instead of handing it on to Darren Greenfield, in effect stole it by keeping it as an additional share of the profits of the businesses for himself at the expense of other owners of shares in the businesses. According to the submission, this stratagem was devised so as to make the other owners of the businesses think that the payments were necessary as an ordinary cost of business to keep the union happy, when in fact the money never went to the union or any union official at all. The submission has what to some minds is the advantage of blaming a dead man – murdered before the eyes of his wife and children on the front steps of his house on 16 December 2013. Dead men tell no tales. But to other minds that is a disadvantage. The theory smacks of artificiality and contrivance. The CFMEU supplied very detailed submissions on particular passages. Some are dealt with in specific terms below. The submissions have been read and re-read. They have all been taken into account. But when they are taken as a
whole with the evidence taken as a whole, they do not support the CFMEU’s primary thesis.

5. For the reasons given below, the argument of counsel assisting is preferred to that of the CFMEU. It follows that Darren Greenfield and George Alex may have committed offences under section 249B of the *Crimes Act 1900* (NSW).

6. Argument was devoted to the relationship between George Alex and Brian Parker, the State Secretary of the CFMEU NSW, Construction and General Division. It is not necessary to deal with this controversy, since counsel assisting submitted that the evidence available was insufficient to support a finding that Brian Parker received inducements or rewards from George Alex.

7. The balance of this Chapter is structured as follows:

  Part B – The key individuals and businesses

  Part C – The key evidence of cash payments to Darren Greenfield

  Part D – Other evidence bearing on cash payments to Darren Greenfield

  Part E – Appropriate findings with respect to Darren Greenfield and George Alex
B – THE KEY INDIVIDUALS AND BUSINESSES

8. The purpose of this Part is to identify a number of key individuals and businesses relevant to the matters addressed in this Chapter.

Brian Parker and Darren Greenfield

9. Brian Parker was based in Lidcombe. Darren Greenfield was an organiser in the Branch. He was based in an office in the Sydney CBD.

George Alex and his businesses

10. George Alex lives in Sydney. He is an undischarged bankrupt. He was made bankrupt by order of the Federal Magistrates Court on 19 April 2011. This followed the hearing of a creditor’s petition filed by the Deputy Commissioner of Taxation.1 George Alex gave evidence that he did not know he had been made bankrupt until three or four years after the order was made.2 That evidence was totally incredible. He was represented by lawyers who made submissions to the Court regarding his circumstances in applying for an adjournment.3

11. Notwithstanding his bankruptcy, George Alex has played a significant role in the management of a number of businesses operating in the construction industry. One of these businesses was a labour hire business called ‘Active’. Another was a scaffolding business called

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1 Parker MFI-1, 18/6/15, Vol 1, pp 136-140.
2 George Alex, 24/6/15, T:901.22-902.27.
3 Parker MFI-1, 18/6/15, Vol 1, p 139.
‘Elite’. Another was a traffic management business called ‘Metropolis’. In 2014 Active and Metropolis failed, and their businesses and employees were transferred across to a new company called ‘Capital’.

12. As to the labour hire business called ‘Active’, George Alex has had a financial interest in and exercised control over it since 2008. The business has operated through different companies over time.4 As each failed, it left insufficient assets to pay the creditors of the failed company. But another company was set up to continue the business in its place. This practice is often referred to by the CFMEU, and more generally throughout the construction industry, as ‘phoenixing’.

13. In relation to the scaffolding business called ‘Elite’, George Alex became involved in it in 2012. Thereafter he exercised a level of control over it similar to that which he exercised over Active. George Alex and a close associate of his, Joseph Antoun, purchased a scaffolding business called ‘Hillsley’. They joined forces with Michael Cohen, the owner of a scaffolding business run through Elite Holdings Group Pty Ltd (Elite Holdings). In due course a number of other individuals obtained an interest in the merged scaffolding business run through Elite Holdings. In the result, there were, in total, six owners of the business, namely Michael Cohen, George Alex, Joseph Antoun, Jimmy Kendrovski, Jay Kilic and William Tofilau.5

4 See Part D of this Chapter for further evidence.
5 Douglas Westerway, 1/9/14, T:31.1-15; Michael Cohen, 1/9/15, T:87.34-44; Parker MFI-1, 18/6/15, Vol 4, p 1047. See also the evidence later referred to as to the regular payments of $2,500 to each of these six individuals.
14. Elite Holdings failed in mid-2013. Its business was phoenixed. A new company, Elite Access Scaffolding (NSW) Pty Ltd (Elite Access), was used to continue the business. The contracts and employees of Elite Holdings were transferred across to it.

15. In due course it will be necessary to consider in more detail the collapse and resurgence of the Active and Elite businesses. It will also be necessary to consider the CFMEU’s unusual and apparently favourable treatment of them.6

16. George Alex claimed that he did not direct or manage the affairs of these companies.7 Like his claim that he did not know that he was bankrupt until three or four years after the event, this is totally incredible and extraordinarily damaging. He routinely gave instructions in relation to withdrawing and depositing funds. He regularly undertook negotiations and discussions with others, including officials of the CFMEU, on behalf of these companies.

17. George Alex’s modus operandi was to run businesses through companies. He nominated compliant relatives or associates as directors for the purposes of ASIC’s register while maintaining effective control behind the scenes. This practice may have been initially driven by a desire to avoid personal liability for the companies’ tax debts when they failed.8 More recently the key factor

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6 See Part D of this Chapter.
7 George Alex, 24/6/15, T:915.5-916.9; George Alex, 26/6/15, T:970.31, 979.34-36, 999.9-14, 1028.25-1030.23, 1044.42-1045.13, 1045.25-1046.3
8 Taxation Administration Act 1953 (Cth), sch 1, s 269-25.
may be that because of his bankruptcy he is prohibited from acting as a company director.\textsuperscript{9}

18. Whatever the motivation may be, the evidence as to this \textit{modus operandi} is clear. George Alex indicated in his evidence that he ‘placed’ his wife as director of one of the Active companies.\textsuperscript{10} His sister, Athina Alex, was a director of a number of companies, including Active companies. Athina Alex lacked familiarity with these companies. She had difficulty even identifying them.\textsuperscript{11} She confirmed that she became a director of at least one of these companies because George Alex had asked her to.\textsuperscript{12} Lindsay Kirschberg, a financier of the businesses, recorded his understanding of George Alex’s relationship to the companies in documents he created at the time. He referred to a director (Abuzar Sultani) as one of ‘George’s straw men’.\textsuperscript{13} He referred to George Alex appointing ‘his people’.\textsuperscript{14} He said that George Alex ‘runs Active Labour – not in his name’.\textsuperscript{15}

19. The appearance that George Alex did not exercise control over these businesses was one he had difficulty sustaining. In intercepted telephone conversations, he admitted the true position on more than one occasion. For example, in a telephone conversation with Darren

\textsuperscript{9} \textit{Corporations Act} 2001 (Cth), s 206B.
\textsuperscript{10} George Alex, 24/6/15, T:894.13, 894.43-45, 896.34-35.
\textsuperscript{11} Athina Alex, 30/6/15, T:1122.10-1123.2. Athina Alex was unable to recall the circumstances in which she had signed a cheque for Active Workforce (NSW) Pty Ltd, on which ‘CFMEU’ had been crossed out and replaced with the word ‘cash’ – see Athina Alex 30/6/15, T:1126.13-16; Athina Alex MFI-1, 30/6/15.
\textsuperscript{12} Athina Alex, 30/6/15, T:1122.37-1124.23.
\textsuperscript{13} Alex MFI-10, 26/6/15, p 2.
\textsuperscript{14} Alex MFI-10, 26/6/15, p 1.
\textsuperscript{15} Alex MFI-10, 26/6/15, p 1.
Greenfield in August 2014 he referred to Capital’s EBA as ‘my EBA’.\textsuperscript{16} In a telephone conversation with Mazen Hourani in August 2014 he referred to Capital’s work as ‘our work’\textsuperscript{17} And in a call to an associate Abuzar Sultani, George Alex said ‘I do own Capital and I do own all these cunts’.\textsuperscript{18}

20. The fact that George Alex stood behind the Active and Elite businesses appears to have been well known to the CFMEU. It is apparent from the behaviour of Darren Greenfield and Brian Parker that they understood that George Alex was the person for them to approach in relation to these businesses.

21. In this regard, George Alex stated that ‘I always had the relationship with the unions’.\textsuperscript{19} He said that this had been the case for over 22 years. He further maintained that ‘I’ve had Assistant Secretaries come and go; they’re all there; I’m still here.’\textsuperscript{20} He said his role was to ‘take care of the union issues’.\textsuperscript{21} George Alex signed EBAs on behalf of various Active companies.\textsuperscript{22} On one occasion he identified himself as ‘Director/Manager’.\textsuperscript{23} His evidence that he did so only in order to have

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} Greenfield MFI-14, 23/6/15, call between George Alex and Darren Greenfield on 29/8/14, p 3.29.
\item \textsuperscript{17} Alex MFI-8, 26/6/15, pp 1.46, 2.3.
\item \textsuperscript{18} Alex MFI-5, 26/6/15, p 7.31-33.
\item \textsuperscript{19} George Alex, 24/6/15, T:907.44.
\item \textsuperscript{20} George Alex, 24/6/15, T:907.47-908.16.
\item \textsuperscript{21} George Alex, 24/6/15, T:921.24-25.
\item \textsuperscript{22} Parker MFI-1, 18/6/15, Vol 1, pp 67, 180; Vol 2, p 506. George Alex claimed that he did not sign the latter document, see George Alex, 24/6/15, T:919.35-920.14.
\item \textsuperscript{23} Parker MFI-1, 18/6/15, Vol 1, p 180.
\end{itemize}
\end{footnotesize}
‘some fun with it’ was flippant. It indicated that he was not prepared to give serious and honest evidence. That was an impression he imparted from soon after he entered the witness box. It grew stronger the longer he remained there.

C – KEY EVIDENCE OF CASH PAYMENTS

22. There is evidence that George Alex and Joseph Antoun made cash payments to Darren Greenfield.

23. In 2013 Joseph Antoun and George Alex told Douglas Westerway (manager of Elite) and Michael Cohen that the Elite business made regular weekly payments of $2,500 to the CFMEU. Michael Cohen was told that the payments were the cost of doing business with the union. The payments were often referred to as ‘union payments’ or ‘union fees’. After a time Douglas Westerway began to maintain a record of funds being withdrawn from Elite’s bank account for this purpose. Were cash payments in this amount made by George Alex and Joseph Antoun to Darren Greenfield?

24. The evidence strongly supported a finding that Darren Greenfield did receive regular cash payments of $2,500 from George Alex and Joseph Antoun in 2013, and may have received similar cash payments before that time. That evidence, dealt with in more detail below, comprised

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24 George Alex, 24/6/15, T:913.44-45.
27 Douglas Westerway, 30/6/15, T:1157.20-22, 1161.47-1162.1; Douglas Westerway, 1/9/14, T:43.8-9.
28 Douglas Westerway, 1/9/14, T:33.46-34.1, 38.44-39.6, 41.12-14.
three groups of material. One was the various text messages sent or received by George Alex from a mobile phone that the police seized from him when he was arrested on unrelated charges on 4 September 2014 (George Alex’s phone). A second comprised other text messages from George Alex’s phone which recorded the nature and extent of contact between George Alex and Darren Greenfield around the time of the cash withdrawals and in the period more generally, taken together with cash flow spreadsheets prepared by Douglas Westerway recording withdrawals from Elite’s bank account for ‘union payments’ in the period from September to December 2013 (Westerway spreadsheets). A third comprised other evidence, including evidence going to a range of broader relevant circumstances. This other evidence is considered later, in Part D of this Chapter.

Some of the more significant text messages

25. There are a number of particularly significant text messages extracted from George Alex’s phone which indicate Darren Greenfield received cash payments from George Alex.

29 Two mobile phones were seized from George Alex on that day. Almost all of the text messages which are relied upon were retrieved from one of the phones. Only a very small number were retrieved from the other phone.
24 April 2013 message from George Alex to Nectaria Alex – ‘2500 to Darren’

26. On 24 April 2013 the following messages were sent to or from George Alex’s phone.30

<table>
<thead>
<tr>
<th>From-to</th>
<th>Time</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darren Greenfield to George Alex</td>
<td>12.29</td>
<td>Mate is it possible to pick up that paperwork this arvo instead of Friday was going to go away tomorrow if possible</td>
</tr>
<tr>
<td>George Alex to Darren Greenfield</td>
<td>12.30</td>
<td>Yes buddy, just making arrangements now</td>
</tr>
<tr>
<td>Darren Greenfield to George Alex</td>
<td>12.49</td>
<td>Thanks see u about 5pm mate</td>
</tr>
<tr>
<td>George Alex to Darren Greenfield</td>
<td>12.52</td>
<td>Ok</td>
</tr>
<tr>
<td>George Alex to Nectaria Alex</td>
<td>16.40</td>
<td>1k to wisam 2500 to Darren give Michael Couts 1000 keep 500</td>
</tr>
<tr>
<td>Darren Greenfield to George Alex</td>
<td>16.43</td>
<td>On the way mate ok</td>
</tr>
<tr>
<td>George Alex to Darren Greenfield</td>
<td>16.45</td>
<td>Ok</td>
</tr>
<tr>
<td>Darren Greenfield to George Alex</td>
<td>18.18</td>
<td>Thanks mate</td>
</tr>
<tr>
<td>George Alex to Darren Greenfield</td>
<td>18.48</td>
<td>Love ya buddy</td>
</tr>
</tbody>
</table>

30 These messages appear in various locations throughout the evidence. The primary records are at Parker MFI-25, 18/6/15; Parker MFI-26, 18/6/15; Parker MFI-27, 18/6/15; Parker MFI-35, 18/6/15; Greenfield MFI-1–MFI-7, 19/6/15; Alex MFI-4, 24/6/15; Westerway MFI-1, 30/6/15.
Counsel assisting submitted that these contemporaneous records clearly indicate that George Alex intended the $2,500 ‘union payments’ discussed internally within Elite to be payments to Darren Greenfield, and that the payments were made.

It is convenient at this point to give an illustration of how the CFMEU saw this evidence as not inculpating Darren Greenfield. The CFMEU used the same technique in relation to other classes of evidence. One fundamental problem concerns localised difficulties: it is not easy to fit the CFMEU theory into the detail of the evidence. That can be seen, for example, from the CFMEU’s analysis of this particular group of records. The other fundamental problem is that when all the circumstantial evidence is taken together, explaining away each item of it as based on a series of unfortunate coincidences becomes impossible to credit.

The CFMEU put the following argument against counsel assisting’s argument:31

Counsel [assisting] seek to have the inference drawn that the paperwork referred to by Mr Greenfield was a payment of $2,500. Yet this is a bootstraps argument. The text exchange at 12:29pm and 12:30pm has Mr Alex making arrangements “now” so that Mr Greenfield could pick up the paperwork. There is no necessary link between that exchange and the text message between Mr Alex and his wife Nectaria at 4:40pm, 4 hours later that afternoon: “1k to wisam, 2500 to Darren give Michael [Couts] 1000 and keep 500”.

This is unconvincing. The link may not be ‘necessary’ as a matter of formal logic, but it is a very strong empirical link. At 12.20pm Darren Greenfield said he wanted to pick up the ‘paperwork’ (ie $2,500) ‘this

31 Submissions of the CFMEU, 29/10/15, p 17, para 28.
arvo’. At 12.30pm George Alex said he was making arrangements ‘now’. At 12.49pm Darren Greenfield said he would see George Alex ‘about 5pm’. Just before then, at 4.40pm, George Alex told his wife to give Darren Greenfield $2,500. At 4.43pm Darren Greenfield told George Alex he was on the way. At 6.18pm Darren Greenfield thanked George Alex for the money. There is every ‘necessary link’ between the 12.29pm and 12.30pm messages and the 4.40pm message.

30. The CFMEU also submitted:32

The scheme introduced by Messrs Alex and Antoun to disguise the payments involved Mr Cohen or Mr Westerway cashing cheques and the money being passed to Mr Antoun. It was no part of the scheme that Nectaria Alex make payments.

It does not follow that Joseph Antoun did not pass the cash to Nectaria Alex so that she could make payments. Further, the reasoning assumes a particular scheme without evidentiary support and seeks to nullify all evidence which does not fit it.

31. The CFMEU argued that earlier texts on that day, 24 April 2013, indicated that George and Nectaria Alex were in the middle of a serious personal dispute. That is true. It is one reason for disbelieving the proposition that George Alex’s telephone was capable of being used by everyone in his house as distinct from himself alone. The submissions continued:33

[T]he text quoted above is not a direction “to pay” Darren. The natural reading of the text indicates that it begins with an accounting process, i.e.

32 Submissions of the CFMEU, 29/10/15, p 18, para 29.
33 Submissions of the CFMEU, 29/10/15, p 18, paras 30-31.
Mr Alex accounting to Nectaria for amounts of money, having two minutes before asked her to “stop the 4 k cheque”.

That was a message not included in Table A. The CFMEU submissions continued:

The reference to a 4 k cheque can only be understood as a reference to $4,000 in a cheque account. It is not a reference to cash. One does not stop a cheque unless that cheque has issued. It is very likely to be a reference to a cheque for $4,000 that Mr Alex had promised to his wife, given the terms of the earlier text message exchanges between them concerning the closure of the Astoria bank account which was apparently in debit to the sum of $10,000 and the passing of Nectaria’s bank details to Mr Alex.

The sums referred to in Mr Alex’s next text message co-incidentally add up to $4,000. (emphasis added)

The text message referred to appears to be the message at 4.40pm. One problem is that the sums actually add up to $5,000. Further, the words ‘very likely’ cast doubt on the rigour of the reasoning.

32. The submissions continued:

That message cannot be a reference to how Nectaria was to divide up cash. The evidence does not support an inference that Darren was at the Alex house to collect cash in the sum of $2,500. It is far more likely to be an explanation by Mr Alex as to how he proposes to use the money that would otherwise have been dissipated had the “4k cheque” not been stopped. In the course of that explanation he provides a break-up of the $4,000. His use of the expression “2500 to Darren” is part of that accounting and it reflects no more than an extension of the subterfuge that had been set up with Mr Westerway.

But why would ‘$2,500 to Darren’ fit into that accounting exercise? What did ‘Darren’ have to do with some financial transaction or set of dealings between George and Nectaria Alex?
33. The CFMEU submissions went on as follows:\textsuperscript{34}

[T]he submissions of counsel assisting omit the reference to an exchange between Nectaria Alex and Mr Alex at 6:09pm wherein Nectaria writes, “I got Darren waiting and wis waiting”. If indeed Nectaria understood the text message from Mr Alex to be an instruction to give 2500 to Darren Greenfield then there is no reason why she would not have done so. If she understood the reference to “Darren” in the text at 4:40pm to be a reference to Mr Antoun, i.e. the subterfuge that payments to Darren Greenfield or the union were in reality payments to Mr Antoun, then there is every reason why when Mr Greenfield arrived at the Alex household he would be made to wait for the production of whatever paperwork he had been chasing Mr Alex for. There is no evidence that any money changed hands between Nectaria and Mr Greenfield.

The trouble is that the word ‘Darren’ has to work too hard. At one point ‘Darren’ is the real Darren Greenfield, but envisaged as literally waiting at the Alex household. At another point ‘Darren’ is Joseph Antoun. Then a third role is assigned to ‘Darren’ – it is said that the text message is ‘no more than an example of the use of Darren Greenfield’s name to falsely explain finances by a husband to his estranged wife’.\textsuperscript{35} That is, ‘Darren’ is the real Darren Greenfield being treated as some fictional character in a false accounting exercise.

34. These submissions owe more to ingenuity and imagination than to reality.

24 May 2013 message from Douglas Westerway to George Alex

35. On 24 May 2013 Douglas Westerway sent a text message to George Alex. It reads:\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{34} Submissions of the CFMEU, 29/10/15, p 19, para 33.
\item \textsuperscript{35} Submissions of the CFMEU, 29/10/15, p 19, para 35.
\item \textsuperscript{36} Greenfield MFI-3, 19/6/15.
\end{itemize}
6 after Darren’s is out.

36. Douglas Westerway confirmed in his evidence that this message of 24 May 2013 was intended to convey to George Alex that there was $6,000 left following the withdrawal from the Elite account of $2,500 for Darren Greenfield.37 ‘Darren’ was ‘Darren from the Union’.

37. Significantly, on the previous day, 23 May 2013, Darren Greenfield had sent a number of messages to George Alex in an attempt to have a quick chat with him. George Alex responded in terms which suggested he believed Darren Greenfield was contacting him about work. But Darren Greenfield replied ‘No wanted to chat about me’.38 George Alex sent a message back indicating that he would call him.

38. George Alex’s evidence that the message of 24 May 2013 from Douglas Westerway was not about taking money out for Darren Greenfield. He said the message should instead be understood to be referring to Darren Greenfield leaving the house.39 This evidence was illogical. It was not credible.

39. The CFMEU had a different approach:40

[T]here is a further explanation of the text message on 24 May. It is quite likely that the reference to “6 after Darren’s is out” is a reference to the balance of the account after the payment of arrears of entitlements that Mr Greenfield had been chasing from Mr Alex. A study of the complete record of text messages and phone calls from 16 May 2013 to 30 June is

37 Douglas Westerway, 30/6/15, T:1157.2-17.
38 Greenfield MFI-1, 19/6/15, p 7.
39 George Alex, 26/6/15, T:969.34-970.1.
40 Submissions of the CFMEU, 29/10/15, p 20, para 36. ‘ACIRT’ means ‘Australian Construction Industry Redundancy Trust’.
attached hereto and marked B. It is quite apparent that immediately following the reference to “6 after Darren’s is out” (which is timed at 11:28am) there are texts from Mr Alex to Mr Westerway (Doug CEO) which refer to “Elite?” (timed at 11:32am) and “Active?” also timed at 11:32am. The most likely explanation for these inquiries by Mr Alex is that he was attempting to find out whether the amount that had been taken out for “Darren” related to arrears of entitlements, e.g. ACIRT for Elite or Active. It is clear that payments had been made regarding ACIRT and at least one other entity regarding arrears from the text message from Mr Greenfield to Mr Alex at 1:42pm on 31 May 2013 when Mr Greenfield advises Mr Alex, “ACIRT bounced to(o) mate”. There is further contact between Mr Greenfield and Messrs Westerway, Cohen and Alex up to and beyond 3 June 2013 which, having regard to the reference to bouncing payments, most likely relate to unpaid entitlements. (emphasis in original)

A basic problem is that Douglas Westerway’s evidence is quite inconsistent with this theory. He read the material straightforwardly as having a plain meaning. He was, after all, the author of the message.

40. A further basic problem is that ‘6’, i.e. $6,000, is a suspiciously round number. Arrears of entitlements would not be in round numbers. And if the reference is to arrears of entitlements, why did the message not say: ‘6 after ACIRT’s is out’.
On 7 June 2013 the following messages were sent to or from George Alex’s phone.\(^4^1\)

\begin{table}[h]
\centering
\begin{tabular}{|l|c|l|}
\hline
From-to & Time & Content \\
\hline
George Alex to Darren Greenfield & 11.20 & Just at home buddy \\
Darren Greenfield replies & 11.21 & Call in about 2 will you be there \\
George Alex replies & 11.22 & Sweet \\
Darren Greenfield to George Alex & 14.30 & Home? \\
George Alex replies & 14.32 & Yes buddy \\
George Alex to Darren Greenfield & 16.41 & Toilet first draw \\
George Alex to Darren Greenfield & 16.41 & Thanx \\
Darren Greenfield replies & 17.03 & Thanks mate \\
George Alex replies & 17.04 & No prob mate \\
Darren Greenfield replies & 17.04 & Call u over weekend \\
George Alex replies & 17.04 & Sweet. And if ur around pop in \\
Darren Greenfield replies & 17.06 & Ok \\
\hline
\end{tabular}
\caption{TABLE B}
\end{table}

\(^4^1\) These messages appear in various locations throughout the evidence. That evidence has been assembled together in Submissions of Counsel Assisting, 20/10/15, Appendix II. The primary records are at Parker MFI-25, 18/6/15; Parker MFI-26, 18/6/15; Parker MFI-27, 18/6/15; Parker MFI-35, 18/6/15; Greenfield MFI-1–MFI-7, 19/6/15; Alex MFI-4, 24/6/15; Westerway MFI-1, 30/6/15.
42. The ‘Toilet first draw’ message is to be considered in the context of the following messages that were also extracted from George Alex’s phone.42

**TABLE C**

<table>
<thead>
<tr>
<th>From-to</th>
<th>Date, Time</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>George Alex to Mazen Hourani</td>
<td>31/5/13, 12.41</td>
<td>Put 5 k in toilet</td>
</tr>
<tr>
<td>George Alex to Mr Spanakakis</td>
<td>21/6/13, 15.04</td>
<td>Can u separate it please 2500 each. Leave 2500 in the toilet under sink</td>
</tr>
<tr>
<td>George Alex to Tom Mitchell</td>
<td>21/6/13, 15.16</td>
<td>Pl go to toilet under the sink</td>
</tr>
<tr>
<td>George Alex to Joseph Antoun</td>
<td>29/8/13, 16.04</td>
<td>Can y get that money off Doug when he gets here and put under the sink in toilet</td>
</tr>
</tbody>
</table>

43. George Alex’s home at Burwood had two separate bathrooms. One was located next to an office, and the other was located off the kitchen. Each bathroom had a toilet and a basin with a drawer.43

44. The above evidence demonstrates that:

   (a) George Alex used to arrange for cash to be left in a drawer in a bathroom at his Burwood home for other people to collect;

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42 These messages appear in various locations throughout the evidence, and that evidence has been assembled together in Submissions of Counsel Assisting, 20/10/15, Appendix II. The primary records are at Parker MFI-25, 18/6/15; Parker MFI-26, 18/6/15; Parker MFI-27, 18/6/15; Parker MFI-35, 18/6/15; Greenfield MFI-1–MFI-7, 19/6/15; Alex MFI-4, 24/6/15; Westerway MFI-1, 30/6/15.

43 Nectaria Alex, 30/6/15, T:1117.24-35, 1118-7-39.
(b) he adopted this secretive method of making cash payments because he appreciated that the payments were unlawful and should not be witnessed or traceable;

(c) on 7 June 2013 Darren Greenfield attended at George Alex’s home at Burwood, and once there, received a text from George Alex directing him to collect his cash payment of $2,500 from the toilet drawer. Darren Greenfield did so, and then sent George Alex a thank you text.

45. The CFMEU submitted that the expression ‘Toilet first draw’ did not refer to money or to a payment. It submitted that Darren Greenfield was not chasing money. Rather he was chasing documents proving that George Alex had paid workers’ entitlements, because George Alex had told Darren Greenfield that Michael Cohen had paid Australian Construction Industry Redundancy Trust arrears that morning.44 However, Darren Greenfield’s evidence did not support the submission. He said that he could have been picking up documents, not that he did. On being asked whether it was his practice to go to the toilet first drawer to get the documents, not surprisingly, he said: ‘No. Maybe on the handbasin or the drawer, the letterbox, the front table on the porch, whatever, wherever he left them’.45 Darren Greenfield said of the toilet drawer: ‘[H]e’d leave documents there, I’d pick up documents from there as well. So I don’t know whether he left money for people in there and documents in there. He left other stuff in there. As I said he left stuff all over the place there’.46 It would be strange for

44 Submissions of the CFMEU, 29/10/15, paras 40-45.
a man who supposedly habitually left documents all over the place to
nominate so precise and unusual a spot as a drawer in the toilet.

46. The CFMEU submitted that since George Alex often had large
numbers of people in his house, there is nothing criminal in him
wanting to maintain privacy about his provision of documents to
Darren Greenfield. This is contradicted by Darren Greenfield’s
evidence: far from maintaining privacy, George Alex’s practice with
business documents was to leave them for collection ‘all over the
place’.

19 June 2013 messages between Joseph Antoun and George Alex

47. In text messages passing between George Alex and Joseph Antoun on
19 June 2015 Joseph Antoun asked George Alex ‘where r we going to
get Tommy and this guy money from?’, and George Alex replied ‘I
sorted him and mace got 2500 for Tommy’.47 There was a CFMEU
organiser called Tommy Mitchell.

48. In circumstances where other documents record secretive payments of
$2,500 being made to each of Tommy Mitchell and Darren Greenfield,
and in light of all of the evidence described in this Chapter, it is to be
inferred that the person identified as ‘this guy’ is Darren Greenfield,
and that when George Alex said ‘I sorted him’ he was confirming he
had paid Darren Greenfield $2,500.

47 Greenfield MFI-5, 19/6/15, p 1.
26 September 2013 – ‘Don’t let Darren know you know’

49. On 26 September 2013 at 10.16 am $2,500 was withdrawn from the Elite account for a ‘union payment’, by presentation of a cheque for a total withdrawal of $5,000.48 A handwritten annotation on the back of the cheque sets out Douglas Westerway’s full name and date of birth, inter alia. That indicates that Douglas Westerway attended a branch to effect the withdrawal.49 Later that same morning, at 11.57 am, George Alex sent Douglas Westerway a text stating ‘Mate don’t let Darren know u know’. Douglas Westerway responded ‘This is what I just sent to Darren. Misunderstanding, it is for George. when I told him I was seeing you he asked me to give it to you, so when you saw him you could save me the trip. Sorry for the confusion’. George Alex replied ‘Ok gr8’.50

50. These messages are considered in more detail shortly, as the payment in question was one contemplated by the Westerway spreadsheets. For present purposes, it is to be inferred that George Alex was telling Douglas Westerway not to let Darren Greenfield know that Douglas Westerway knew about the secret union payments.

28 November 2013 – ‘get Darren his money’

51. On 28 November 2013 the following messages were sent to or from George Alex’s phone.

50 See Submissions of Counsel Assisting, 20/10/15, Appendix II. See also Greenfield MFI-3, 19/6/15, p 3.
TABLE D

<table>
<thead>
<tr>
<th>From-to</th>
<th>Time</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darren Greenfield to George Alex</td>
<td>9.26</td>
<td>See u in half hour mate.</td>
</tr>
<tr>
<td>George Alex to Joseph Antoun</td>
<td>12.56</td>
<td>Can we get Darren his money from account if Michael don’t come thru.</td>
</tr>
<tr>
<td>George Alex to Darren Greenfield</td>
<td>13.03</td>
<td>Just need ten min mate to organise.</td>
</tr>
</tbody>
</table>

52. This demonstrates that on 28 November 2013 George Alex and Joseph Antoun made arrangements to obtain cash to pay Darren Greenfield, and that arrangements were made between George Alex and Darren Greenfield to enable that payment to be made.

The Westerway spreadsheets and associated evidence

53. The next documents to be considered are Elite’s business records for the period September to December 2013, particularly in the light of other text messages extracted from George Alex’s phone. These materials further support a finding that Darren Greenfield was regularly paid $2,500 by George Alex and Joseph Antoun.

54. Douglas Westerway attempted to introduce some much needed cash flow controls into the Elite business. He began creating spreadsheets recording the weekly cash flow for the business, both on a forecast and actual basis. He inserted the budgeted expense figures. Later he reconciled the spreadsheets against the bank statements and shaded in
green those items of expense that were actually incurred. He followed this practice in the period from September 2013 to December 2013 inclusive.

The expenses recorded on these spreadsheets include payments of ‘rent’ of $2,500 to each of the six owners of the Elite business, including Joseph Antoun and George Alex. Various other expenses were typically noted. They often included a ‘union payment’ of $2,500.

An analysis of the bank statements, cheque butts, MYOB entries and other bank trace records for Elite Access confirms that the sum of $2,500 for ‘union payment’ would be withdrawn, either as an individual withdrawal or as part of a larger withdrawal. This is consistent with the fact that Douglas Westerway had shaded those entries green on his cash flow spreadsheets. The cash withdrawals from the Elite Access account identified as ‘union payments’ in the Westerway spreadsheets were as follows.

### TABLE E

<table>
<thead>
<tr>
<th>Date of withdrawal</th>
<th>Amount of ‘union payment’ withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>13/9/13</td>
<td>$2,50052 (as part of a larger withdrawal of $5,000).</td>
</tr>
<tr>
<td>19/9/13</td>
<td>$2,50053 (as part of a larger withdrawal of $7,500).</td>
</tr>
</tbody>
</table>

26/9/13  $2,500\textsuperscript{54} (as part of a larger withdrawal of $5,000).
14/10/13  $2,500\textsuperscript{55} (as part of a larger withdrawal of $9,000).
15/10/13  $2,500\textsuperscript{56}
17/10/13  $2,500\textsuperscript{57} (as part of a larger withdrawal of $7,500).
28/10/13  $2,500\textsuperscript{58}
13/11/13  $5,000\textsuperscript{59}
6/12/13   $2,500\textsuperscript{60}
20/12/13  $2,500\textsuperscript{61}

Relationship with text messages and other documents

57. Various documents, including text messages taken from George Alex’s phone, support a finding that Darren Greenfield was paid the sums of $2,500 identified as ‘union payments’ on the Westerway spreadsheets.

58. First, the above evidence from the text messages as to payments to Darren Greenfield on other occasions support a finding that he was also paid on the occasions contemplated by the Westerway spreadsheets.

\textsuperscript{54} Parker MFI-1, 18/6/15, Vol 5, pp 1218, 1220-1221, 1231; Greenfield MFI-15, 24/6/15, pp 41-42.
\textsuperscript{55} Parker MFI-1, 18/6/15, Vol 5 p 1263; Greenfield MFI-15, 24/6/15, pp 43-45.
\textsuperscript{56} Parker MFI-1, 18/6/15, Vol 5, p 1263 and Vol 6, pp 1409, 1415; Greenfield MFI-8, 22/6/1; Greenfield MFI-15, 24/6/15, p 51.
\textsuperscript{58} Parker MFI-1, 18/6/15, Vol 6, pp 1434, 1438; Greenfield MFI-15, 24/6/15, pp 55-56.
\textsuperscript{59} Parker MFI-1, 18/6/15, Vol 6, pp 1444, 1458; Greenfield MFI-15, 24/6/15, pp 57-58.
\textsuperscript{60} Parker MFI-1, 18/6/15, Vol 6, pp 1478, 1509.
\textsuperscript{61} Parker MFI-1, 18/6/15, Vol 6, pp 1503, 1508.
59. Secondly, the text messages in the period from September to December 2013 reveal that George Alex and Darren Greenfield met on many occasions at around the time of each of the dates of the cash withdrawals.\textsuperscript{62} They met either at George Alex’s Burwood home or the nearby unit used by George Alex. There were thus opportunities for the payments to have been made within the privacy of George Alex’s home or the nearby unit.

60. Thirdly, these messages are evidence that Darren Greenfield had the opportunity to receive the ‘union payments’. In addition, many of the text messages at around the dates of the cash withdrawals do not suggest that Darren Greenfield was chasing George Alex for payment of arrears (as he claimed he was). They are short and friendly messages, often using familiar shorthand, such as ‘big house’ for the home at Burwood and ‘little’ for the unit. The catch ups are sometimes initiated by George Alex, not Darren Greenfield. The arrangements appear, at times, to be extremely casual. Language such as ‘pop over’, ‘pop in’, catching up for a ‘cup of coffee’ are used.\textsuperscript{63} The tone of these messages is considered in further detail in Part D of this Chapter.

61. Fourthly, in respect of a number of the cash withdrawals identified in the Westerway spreadsheets, there are other specific relevant text messages to be considered. These are addressed below.

\textsuperscript{62} See Submissions of Counsel Assisting, 20/10/15, Appendix II.
\textsuperscript{63} See Submissions of Counsel Assisting, 20/10/15, Appendix II.
13 September 2013 entry in the Westerway spreadsheet

62. Texts taken from George Alex’s phone suggest Darren Greenfield and George Alex met on 12 September 2013. On that day George Alex asked Darren Greenfield to ‘pop over’, to which Darren Greenfield asked ‘U sure’, and George Alex replied ‘Sweet’. 64

63. The following day, 13 September 2013, $2,500 was withdrawn from the Elite account for a ‘union payment’ (see the above table). On the same day there were text exchanges between George Alex and Douglas Westerway about payment of the $2,500 to each of the stakeholders. Douglas Westerway indicated the payments had been made. George Alex responded to Douglas Westerway, stating:

    Looks like joe kept my 2500 cause he covered that guy yesterday. Lol. 65

64. It is to be inferred, having regard to the other evidence referred to in this Chapter, and the fact that a ‘union payment’ was scheduled for this very time, that the other ‘guy’ was Darren Greenfield. It is to be inferred that George Alex was telling Douglas Westerway that Joseph Antoun had paid Darren Greenfield $2,500 on 12 September 2013.

26 September 2013 entry in the Westerway spreadsheet

65. On 26 September 2013 $2,500 was withdrawn from the Elite account for a ‘union payment’ (see the above table). The withdrawal was made by Douglas Westerway at 10.16am. 66

64 Greenfield MFI-1, 19/6/15, p 20.
65 See Submissions of Counsel Assisting, 20/10/15, Appendix II. See also Greenfield MFI-3, 19/6/15, p 2.
Later that same morning, at 11.57am, George Alex sent Douglas Westerway a text stating:

Mate don’t let Darren know u know.

Douglas Westerway responded to George Alex as follows:

This is what I just sent to Darren. Misunderstanding, it is for George. when I told him I was seeing you he asked me to give it to you, so when you saw him you could save me the trip. Sorry for the confusion.

George Alex replied:

Ok gr8.

Each of Douglas Westerway, Darren Greenfield and George Alex gave evidence about this matter. That evidence was to the effect that Douglas Westerway met Darren Greenfield at the Elite office on 26 September 2013 and discussed Elite’s arrears position, following which Douglas Westerway gave Darren Greenfield a manila folder that contained some documents they had been discussing together with an amount in cash. Darren Greenfield said that when he arrived at George Alex’s house and opened the folder he discovered that it contained cash. An argument between Darren Greenfield and George Alex ensued. George Alex informed Douglas Westerway of the argument. Then he sent the text message ‘don’t let Darren know u know’.

All of that may be accepted. However, it is necessary to reject the evidence of Darren Greenfield and George Alex that the argument
between them arose because Darren Greenfield was outraged that he had unwittingly transported cash from Douglas Westerway to George Alex. 69 A more credible account was given by Douglas Westerway. He said that he was told by George Alex or Joseph Antoun to give their payment to Darren when he gave Darren all the other paperwork and he would bring it across to the Burwood house. 70 However, even this account does not accord entirely with the contemporaneous text messages.

In the light of the above evidence, whether taken alone or in the context of the whole of the evidence, the following findings are made:

(a) Douglas Westerway withdrew the cash for the ‘union payment’ on 26 September 2013 and put it (and quite possibly other cash for George Alex) inside a folder for Darren Greenfield to take to George Alex along with various business records. Ordinarily he would have provided the cash to George Alex or Joseph Antoun. However, because he knew Darren Greenfield was going to see George Alex, he took a shortcut that Darren Greenfield had not expected and placed the money inside the folder;

(b) when Darren Greenfield later discovered this, he became angry and concerned. He realised that George Alex may have told Douglas Westerway about the covert payments being made to Darren Greenfield. He told George Alex this when

69 Darren Greenfield, 22/6/15, T:713.8-13; George Alex, 26/6/15, T:982.1-18.
they met, and wanted George Alex to fix the potential problem;

(c) George Alex then contacted Douglas Westerway and told him that Darren Greenfield had been upset about there being cash in the folder. He wanted Douglas Westerway to behave in a way which indicated he did not know about the union payments. He sent the text message confirming this, and Douglas Westerway responded as earlier described.

71. The evidence of Darren Greenfield and George Alex that the dispute between them on this day was of a different nature is not accepted. To the extent that Douglas Westerway’s evidence did not indicate that the cash (or part of it) was for Darren Greenfield, it is not accepted. The reasons for these conclusions include the following:

(a) the evidence does not sit well with the language of the contemporaneous texts, which instead strongly suggest that George Alex was asking Douglas Westerway not to let Darren Greenfield know that he knew about the union payments;

(b) it is unlikely that Darren Greenfield would have been so offended and expressed such outrage for having unwittingly carried a folder containing documents and cash intended for George Alex from Douglas Westerway to George Alex, without it ever being suggested that the money was for him. On Darren Greenfield’s evidence ‘nothing was offered to me’
and the cash was for George Alex.\footnote{Darren Greenfield, 22/6/15, T:712.43-713.2.} On his story this was a simple misunderstanding that would not generate the outraged response Darren Greenfield claimed to have had;

(e) the notion that Darren Greenfield would have disgustedly rejected any suggestion of a cash payment is at odds with the other evidence indicating that Darren Greenfield did receive cash payments from George Alex and Joseph Antoun;

(d) in August 2014 Darren Greenfield denied having ever received any cash from George Alex or anyone associated with him for any purpose.\footnote{Greenfield MFI-3, 3/10/14; Darren Greenfield, 22/8/14, T:17.1-19.9.} He did so at a time when there was so particular a focus on that issue that he must have thought about matters very carefully at that time. Moreover, Darren Greenfield maintained this position in a written statement prepared in September 2014 and when he was subsequently questioned before the Commission on two occasions.\footnote{Darren Greenfield, witness statement, 3/10/14, para 13; Darren Greenfield, 3/10/14, T:686.20-27, 713.31-35; Darren Greenfield, 19/6/15, T:603.43-47.} Yet when he was confronted with these texts in 2015 he claimed suddenly to remember an occasion when he had not only received cash, but had dramatically thrown it back at George Alex in disgust.\footnote{Darren Greenfield, 22/6/15, T:707.7-28.} It is to be remembered that the alleged incident in question was said to have occurred in late September 2013, only months prior to the commencement of the Commission. If that event had
occurred, it is most unlikely that Darren Greenfield would have forgotten about it, and only have remembered it after seeing these texts in June 2015.

72. The appropriate finding is that Darren Greenfield and George Alex retained a memory of what occurred on 26 September 2013 throughout the course of this Commission, and when confronted with the texts, they gave a misleading account of the nature of the concern Darren Greenfield held and expressed to George Alex on that day.

17 October 2013 entry in the Westerway spreadsheet

73. On 17 October 2013 $7,500 was withdrawn from Elite’s account. On the bank statement appeared an entry ‘CFMEU Fees, Ga Dividends, JA Dividends’. The expenses for that day recorded on the Westerway spreadsheet include a $2,500 ‘union payment (week ending 18\textsuperscript{th} Oct)’ and payments of $2,500 to each of George Alex and Joseph Antoun.\textsuperscript{75}

74. A presented cash cheque number 17 dated 17 October 2013 in the sum of $7,500 obtained from Elite’s bank was received in evidence. Michael Cohen had written the words ‘Darren Greenfield – CFMEU’ on the back of this cheque. The words were later crossed out and replaced with the words ‘CFMEU Fees’.\textsuperscript{76} Michael Cohen said that it could have been the case that he intended the cash sum of $2,500 the subject of that cheque to be paid to Darren Greenfield.\textsuperscript{77} The express reference to Darren Greenfield on the back of the cheque suggests that

\textsuperscript{75} Parker MFI-1, 18/6/15, Vol 6, p 1415.

\textsuperscript{76} Parker MFI-1, 18/6/15, Vol 6, p 1411.

\textsuperscript{77} Michael Cohen, 1/9/14, T:92.41-47.
Michael Cohen knew that the cash so withdrawn was to be given to Darren Greenfield.\footnote{In 2015 the Commission obtained another bank trace of a transaction from Table D which included a document titled ‘Bank copy’ confirming a cash withdrawal of $2,500 on 15 October 2013, on which the words ‘CFMEU Fees’ had been handwritten. Greenfield MFI-8, 22/06/15, pp 1-2.}

\textbf{Unsatisfactory oral evidence given by Darren Greenfield and the Alexes}

75. Each of Darren Greenfield, George Alex and Nectaria Alex gave evidence in relation to the above documents which lacked any cogency. It must be rejected. The lack of a credible alternative explanation assists in coming to a conclusion that the interpretation of the messages and other documents set out above is correct.

\textit{Business documents in the toilet drawer}

76. Darren Greenfield claimed that he did not know what the ‘Toilet first draw’ message of 7 June 2013 from George Alex to him was about. He said ‘it could have been picking up documents from the BUS and ACIRT he hadn’t paid’.\footnote{Darren Greenfield, 19/6/15, T:642.46-643.18.} He said that George Alex left ‘other stuff in there’ (i.e. in the toilet drawer).\footnote{Darren Greenfield, 19/6/15, T:645.11-15.} And he said that George Alex would leave documents ‘wherever’.\footnote{Darren Greenfield, 19/6/15, T:643.28.}

77. Later in his evidence, in answer to questions by his senior counsel, he said his memory of the incident had improved after he had looked at other documents. Of course, that can happen. Did it in this case? He
claimed he could recall he was chasing entitlements on the day in question, and that while he was at George Alex’s home, and with George Alex and others in attendance, he received the text message from George Alex and then went to the bathroom and collected the paperwork which showed a list of names and amounts paid. Even though there were two separate bathrooms in the house, each with their own basin and drawers, Darren Greenfield seemingly had no difficulty understanding and following the instruction, heading straight to the correct bathroom and drawer and collecting the documents. This story was markedly different from that of George Alex, who denied having sent the text (as to which, see later).

78. Darren Greenfield’s evidence was not credible. His failure to give credible evidence on this subject is damaging to him in other respects.

79. George Alex had a desk at the back of his house. It was from there that he carried out his business. He also had a study. There is no reason why he could not have simply handed documents over to Darren Greenfield, had them delivered or otherwise sent to the union office, or at the very least left them for collection in a location where one would expect business documents to be located. It is not credible that George Alex would have hidden business documents in a toilet drawer in his house. It is equally implausible that he would then have sent Darren Greenfield a text discreetly directing him to collect these documents.

82 Darren Greenfield, 24/6/15, T:852.18-853.11.
from that location. Douglas Westerway’s evidence was that he never saw documents in a toilet drawer in George Alex’s home.  

80. What is to be made of the sudden shift in Darren Greenfield’s evidence after a period of time – from having no actual recollection of the text to later being able to describe what had occurred? There is nothing in particular about the documents he claimed he relied on to refresh his memory that would have had such an effect. They were documents relating to arrears. They were emails from Michael Cohen and people at the CFMEU attaching evidence of payments of the arrears (being normal business communications that one would expect). Darren Greenfield said he was chasing arrears all the time. If that was so, these documents would not stand out. None of them make any reference to a toilet. It is not credible that Darren Greenfield would have felt compelled to drive out to George Alex’s house in Burwood to pick up other documents in respect of those payments from a toilet drawer.

81. For a while George Alex attempted to give evidence similar to that of Darren Greenfield. He maintained that business records would be left in the drawer. But in what had become a familiar approach when difficult issues arose, he sought to distance himself from this by suggesting that it was the deceased Joseph Antoun (and not George Alex) who caused things to be left in the toilet drawer for collection. A fatal problem with this evidence was that one of the messages about leaving money in the toilet drawer was actually an instruction sent by

85 Douglas Westerway, 30/6/15, T:1167.34-35.
87 George Alex, 26/6/15, T:1010.39-41.
George Alex to Joseph Antoun (see the last entry in Table C). George Alex’s evidence was not credible. When pushed to provide a credible explanation he said ‘I’m not understanding the importance of it’.\(^88\) This answer is also not credible.

82. The fact that such incredible explanations were proffered by Darren Greenfield and George Alex for the text messages of 7 June 2013 is destructive of their credit. It also supports a finding that they were endeavouring to conceal the fact that George Alex was making secret payments to Darren Greenfield.

‘Office mobile’

83. George Alex attempted to distance himself from the incriminating text messages. He claimed that his mobile phone was really an office phone available to all ‘staff’ who attended his Burwood home. He said that his friend Joseph Antoun (murdered on 16 December 2013), Douglas Westerway or some other person sent the message of 24 April 2013 to Nectaria Alex,\(^89\) that the ‘toilet’ related messages had not been sent by him (but probably by Joseph Antoun),\(^90\) and that the message of 28 November 2013 to Joseph Antoun had been sent by Douglas Westerway.\(^91\)

84. This evidence cannot be accepted. It is clear from the clearly personal text messages passing between George Alex and Nectaria Alex on 24

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\(^{88}\) George Alex, 26/6/15, T:1021.16-18.

\(^{89}\) George Alex, 26/6/15, T:1004.23-27, 1008.2.

\(^{90}\) George Alex, 26/6/15, T:1010.39-41, 1014.27-34.

\(^{91}\) George Alex, 26/6/15, T:1026.12-14.
April 2013 (the date of the ‘2500 to Darren’ message) that George Alex was using the phone and Nectaria Alex knew that to be so. It is also clear that she knew this was not some general office phone that anyone might pick up and use.\(^92\) It is equally clear from an assessment of the whole of the text message material that George Alex was the one using this phone, that he was using it as his own personal phone, and that those he was communicating with knew that to be so.\(^93\) The other persons who allegedly used this so-called ‘office phone’ had and used their own phones. Consistently with this, Douglas Westerway’s evidence was that he never used or saw anyone else use George Alex’s phone.\(^94\) George Alex’s attempt to suggest that the messages sent from the phone were written by Joseph Antoun because they contained the word ‘buddy’\(^95\) was unpersuasive given George Alex also regularly used that salutation.\(^96\)

85. The fact George Alex gave this mendacious evidence in relation to his phone reflects poorly on his credit. The CFMEU submitted that this is irrelevant to any claim that Darren Greenfield accepted bribes.\(^97\) That cannot be accepted. George Alex tried to explain what was on his mobile phone by a claim that it was available to many people. That claim is false. The consequence is that the circumstantial weight of the

\(^93\) See Submissions of Counsel Assisting, 20/10/15, Appendix II which sets out, \textit{inter alia}, the messages.
\(^94\) Douglas Westerway, 30/6/15, T:1155.19-34.
\(^95\) George Alex, 24/6/15, T:947.12-13, 950.1; George Alex, 26/6/15, T:987.24-25.
\(^96\) See for example Parker MFI-45, 19/6/15 and text messages obviously from George Alex in Submissions of Counsel Assisting, 20/10/15, Appendix II. See also George Alex, 24/6/15, T:949.43-45.
\(^97\) Submissions of the CFMEU, 29/10/15, para 58(d).
‘toilet’ related messages, for example, resumes whatever weight it would have had before George Alex’s attempted explanation. The CFMEU also submitted that no evidence by George Alex to the Commission which was thought to be unreliable or false could be relevant against Darren Greenfield. 98 That is incorrect for the reasons given in relation to George Alex’s phone.

86. Nectaria Alex gave evidence on this subject very reminiscent of the evidence that George Alex had given shortly prior to her. She gave the impression either that she had been coached, or at the very least influenced by hearing George Alex’s evidence. For instance, in an early and unresponsive answer she made a voluntary reference to the ‘office phone’. 99 In due course she suggested that the text message to her of 24 April 2013 (‘1k to wisam 2500 to Darren’) could have been sent by anyone and she knew nothing about it. 100

87. Her evidence as to these matters was not credible. As already noted, it is plain from the clearly personal communications sent by Nectaria Alex to George Alex’s phone, including on the day in question and shortly after receipt of the text referring to ‘Darren’, 101 that she operated on the basis that it was George Alex’s phone (not some general office phone) and that messages from that number were from George Alex. Another piece of her evidence which was not very credible was Nectaria Alex’s claimed ignorance of the identity of the person called ‘wisam’ in the 24 April 2013 message from George

98 Submissions of the CFMEU, 29/10/15, para 58(d).
99 Nectaria Alex, 30/6/15, T:1106.33-34.
100 Nectaria Alex, 30/6/15, T:1109.42, 1114.40-41.
101 Nectaria Alex MFI-1, 30/6/15.
Alex. In a subsequent message to George Alex she raised a matter in relation to ‘wis’. Nectaria Alex did not attempt to give honest and helpful answers. Her evidence cannot be relied upon.

Joseph Antoun’s brothers

88. The next attempt made by George Alex to explain away the documents described above was to suggest that the $2,500 ‘union payment’ was for something other than a ‘union payment’, and that references to payments ‘to Darren’ were actually references to payments to entirely different people with different names. These explanations were inconsistent and not believable.

89. George Alex peddled the idea that the $2,500 payments were going to Joseph Antoun’s brothers, one of whom was a union delegate. He did so in telephone calls on 1 and 2 September 2014. The significance of these dates is that Douglas Westerway first gave evidence in a public hearing on 1 September 2014. Evidently George Alex felt that some explanation had to be devised to meet his evidence, which was far from helpful to George Alex’s interests.

90. George Alex’s actual evidence in this regard began with the text of 24 April 2013 to Nectaria Alex (‘2500 to Darren’). Although he denied having sent that text, George Alex nevertheless argued that the reference to ‘Darren’ in the text was a reference to ‘union payments’. He said that everyone knew that the ‘union payments’ were payments

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102 Nectaria Alex, 30/6/15, T:1109.13-14, 1110.15-16.
103 Nectaria Alex MFI-1, 30/6/15.
104 The calls are summarised in the Submissions of the CFMEU, 29/10/15, para 50.
to Tony and John Antoun, brothers of Joseph Antoun. He said that of the regular $2,500 payments, Tony Antoun received $2,000 and John Antoun $500.

When giving this evidence George Alex noted that Tony Antoun was a union delegate. He did so in an attempt to explain why the words ‘union payment’ were used. However this evidence does not withstand scrutiny. Most obviously, the person referred to in the text (and some other documents) was ‘Darren’, not Tony or John Antoun. Further and in any event, Tony Antoun was not a union delegate for Elite, the company whose money was being withdrawn and applied.

On other occasions George Alex gave different evidence, saying that the ‘union payments’ money was actually paid to Joseph Antoun, because he was receiving $7,500 per week by way of rent for the scaffolding (as only George Alex and Joseph Antoun owned the scaffolding), and that Joseph Antoun was in the habit of passing on some of his money he received to his brothers. This evidence was inconsistent with that described in the previous paragraphs. Further, it was based on the incorrect premise that Joseph Antoun and George Alex alone owned the scaffolding and were entitled to payments for rent. The contemporaneous records make it clear that there were six owners of the business, each receiving a payment of ‘rent’ of $2,500

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105 George Alex, 26/6/15, T:1004.12-16, 1005.16-28, 1006.6-10, 1008.34-42, 1020.31-34, 1026.4-38.
106 George Alex, 26/6/15, T:1078.1-7, 1081.47-1082.31.
per week. That evidence further supported by the evidence of Douglas Westerway and Michael Cohen.

93. The CFMEU submissions took up and modified George Alex’s idea, though, wisely, they do not attribute the authorship of it to him. The submission was that it was an error to read references in the documentary records to ‘union’ or Darren Greenfield as meaning the CFMEU or a representative of it. It was submitted that in truth this was a subterfuge to cover additional payments of $2,500 to Joseph Antoun. Brian Parker’s submissions describe this, modestly, as a ‘hypothesis’. The CFMEU said it was a ‘reasonable hypothesis’. It was also said to be ‘a real and not remote possibility’. But as the CFMEU’s written submissions went on, its confidence in the argument grew. It became the ‘distinct probability’. By the end, however, it had reverted to being a ‘reasonable hypothesis’.

94. But is it sufficient if it is only a reasonable hypothesis? The present question is not whether, if the Commission hearings were treated as a criminal trial of Darren Greenfield, the jury ought to find a reasonable doubt. It is whether there is sufficient evidence to establish facts on the balance of probabilities which warrant a reference of the Report and relevant materials to the prosecuting authorities for them to

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107 See the spreadsheets collated at Westerway MFI-2, 1/9/14, pp 446-490.
108 Douglas Westerway, 1/9/14, T:31.1-8, 32.40-33.8; Michael Cohen, 1/9/14, T:87.34-40.
109 Submissions of Brian Parker, 29/10/15, para 6.
110 Submissions of the CFMEU, 29/10/15, p 8, para 2(i), (ii), (iv).
111 Submissions of the CFMEU, 29/10/15, p 14, para 16.
112 Submissions of the CFMEU, 29/10/15, p 17, para 27.
113 Submissions of the CFMEU, 29/10/15, p 28, para 59.
consider whether, at a later time, there is admissible evidence to warrant instituting a criminal prosecution.

95. The argument of the CFMEU on the facts was said to be supported by the following. Douglas Westerway described the payments as ‘union payments’ because Joseph Antoun told him to.14 “[P]articular lengths were gone to in order to have certain payments marked in the records as union payments or CFMEU fees’.15 Douglas Westerway gave the cash to Joseph Antoun.16 These three points, however, are neutral. Stress was placed on the fact that Douglas Westerway wondered whether ‘they were just taking it off us and doing whatever they wanted with it’.17 He was described as having ‘worked closely with Mr Antoun and Mr Alex’.18 He had actually worked for them only for a short time, in a climate of increasing fear. Vasko Boskovski (a friend of Khaled Sharrouf and Bilal Fatrouni) was murdered in June. Douglas Westerway himself was badly beaten up by Joseph Antoun in October. Then Joseph Antoun was brutally murdered on 16 December 2013. The CFMEU said that Douglas Westerway’s ‘judgment has reliability’.19 It was actually not judgment, but pure speculation. As the CFMEU submissions say elsewhere, ‘Mr Westerway, was not, himself, a knowing party to that deception.’20

114 Submissions of the CFMEU, 29/10/15, p 12, para 8.
115 Submissions of the CFMEU, 29/10/15, p 13, para 11.
116 Submissions of the CFMEU, 29/10/15, p 13, para 12.
117 Submissions of the CFMEU, 29/10/15, p 14, paras 12-13.
118 Submissions of the CFMEU, 29/10/15, p 14, para 14.
119 Submissions of the CFMEU, 29/10/15, p 14, para 14.
120 Submissions of the CFMEU, 29/10/15, p 17, para 27.
In view of these various types of praise for Douglas Westerway, which seemed to erect him as some kind of testimonial paragon, it is necessary to bear in mind some qualifying factors. In some respects he was a satisfactory witness. But he was not a fully frank one. And he appeared to be affected to some degree by fear. So, too, did Michael Cohen. The testimony of these two witnesses is discussed in Appendix 1. The present point is simply that much weight was placed by the CFMEU on Douglas Westerway’s speculation. There seemed to be pressures on him which undermined confidence in his complete veracity.

Counsel for George Alex submitted that evidence by Michael Cohen that in his understanding Joseph Antoun would give the money given to him to the CFMEU would not prove that that actually happened. It is true that that is certainly weak evidence. But by the same token the speculation of Douglas Westerway that Joseph Antoun was not giving the money onto the CFMEU does not prove that that is true either.

The CFMEU thesis – that the $2,500 payments did not pass from Joseph Antoun to George Alex to Darren Greenfield, but remained with Joseph Antoun for his own use – was said to be supported by ‘the undeniable fact that after Joseph Antoun’s murder payment of the “union fee” ceased’. The CFMEU submitted that counsel assisting had deliberately failed to refer to this ‘undeniable’ fact. Far from being an ‘undeniable’ fact, it was quite incorrect. Joseph Antoun was

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121 Submissions of George Alex, 29/10/15, para 5.
122 Submissions of the CFMEU, 29/10/15, p 9, para 2(vii). See also pp 15-16, paras 18-23.
murdered on 16 December 2013. However, the evidence shows that a union fee of $2,500 was paid after Joseph Antoun’s death, beginning with a funds transfer on 20 December 2013. That was an internet transfer from an account held in the name of Elite Access Scaffolding (NSW) Pty Ltd with the annotation ‘Union Fee 20 Dec’. The transaction was reflected in the Westerway spreadsheets for the week ending on the same date. Documents produced in response to a trace of the relevant transaction show that the money was transferred to a bank account held in the name of Auswide Assets Pty Ltd (the Auswide account). Bank statements for the Auswide account confirmed that $2,500 was received into the account on the same date, and that more than $13,000 was withdrawn from that account, in cash, within the week that followed.

Counsel assisting further submitted that taken together, these transactions show that $2,500 (which was described as a Union fee) was ultimately withdrawn as cash after Mr Antoun died. Moreover, text messages indicate Darren Greenfield met George Alex in person

123 Parker MFI-1, 18/6/15, Vol 7, p 1571.
124 Parker MFI-1, 18/6/15, Vol 6, p 1503.
125 Parker MFI-1, 18/6/15, Vol 6, p 1512.
126 That was a bank account maintained by the ANZ Bank. The final three digits of the account number were ‘903’: Parker MFI-1, 18/6/15, Vol 6, p 1508.
127 Parker MFI-1, 18/6/15, Vol 6, p 1507.
128 Parker MFI-1, 18/6/15, Vol 6, p 1507.
on 30 December 2013, that is, within a few days of the cash withdrawals.  

100. In early 2014 the narrations contained in bank statements for Elite Scaffolding ceased to refer to union fees. The submissions for the CFMEU appear to rely on this fact as evidence that the payments attributed as payments to the union or to ‘Darren’ ceased at this time. However, this feature alone does not demonstrate that the payments ceased. There is evidence to suggest that payments may have continued in January 2014. In particular:

(a) Payments referred to as ‘Union fees’ continued to be recorded in the Westerway spreadsheets after the death of Joe Antoun, in the documents for the weeks ending 3 January 2014, 10 January 2014, 24 January 2014 and 31 January 2014.

(b) Significant amounts of cash continued to be withdrawn regularly from the bank accounts held in the names of Elite Scaffolding and the Auswide account. Consequently, George Alex and others involved with the businesses continued to have the means to make regular cash payments of $2,500 to Darren Greenfield.

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130 Submissions of Counsel Assisting, 20/10/15, Appendix III. On 30 December 2013 George Alex messaged Darren Greenfield ‘Hey pal, just at the house’ at 12:30pm, Darren Greenfield responded ‘See u in 30’ at 12:31pm and George Alex wrote ‘Sweet’ at 12:31pm.

131 Parker MFI-1, 18/6/15, Vol 6, p 1523.

132 Parker MFI-1, 18/6/15, Vol 6, p 1527.

133 Parker MFI-1, 18/6/15, Vol 6, p 1546.

134 Parker MFI-1, 18/6/15, Vol 7, p 1578.
The contact, via phone and/or in person, between Darren Greenfield and George Alex appeared to continue in similar fashion after Joe Antoun’s death.135

101. It is also relevant that a number of significant events occurred in early 2014 which may otherwise explain why Union fees were no longer referred to in bank statements around that time, or which provide an explanation, independent of Joe Antoun’s death, as to why they may have ceased. Firstly, from November 2013 Tony Slevin had been conducting investigations into various matters, including the CFMEU’s dealings with George Alex.136 Secondly, in late January a number of media articles were published in relation to allegations that CFMEU officials had been receiving bribes from George Alex.137 Prior to that publication, at least by 25 January 2014, Darren Greenfield was made aware of media interest about this issue, as can be seen by emails copying him in around this date.138 Thirdly, from early 2014 there were growing signs that the Federal Government would call a Royal Commission to inquire into the affairs of trade unions, which concluded with an announcement to that effect issued on 10 February 2014. Fourthly, on 13 January 2014 Doug Westerway ceased to be a director of Elite Scaffolding (NSW).139 When all of these matters are considered together, the mere discontinuation of references to ‘Union

135 Submissions of Counsel Assisting, 20/10/15, Appendix III.
136 Parker MFI-1, 18/6/15, Vol 7, pp 1606-1609. Tony Slevin is a barrister. He was asked by the CFMEU National Office to investigate some aspects of the affairs of CFMEU NSW.
137 Parker MFI-1, 18/6/15, Vol 7, pp 1564-1568; pp 1569-1570; p 1571. Each of these articles was dated 28 January 2014. Additionally see the questions circulated within the CFMEU NSW on or around 25 January 2014 as shown by Parker MFI-1, 18/6/15, Vol 7, pp 1549-1553.
138 Parker MFI-1, 18/6/15, Vol 7, p 1549.
139 Parker MFI-30, 18/6/15, p 3.
fees’ in bank statements falls short of demonstrating that the payments stopped at that time, or if they did, that the discontinuation related to Joe Antoun’s death.

102. The submissions of counsel assisting are accepted.

103. The CFMEU’s thesis was that the money was paid to Joseph Antoun and that the language of ‘union fee’ was designed only to deceive the other backers of Elite into believing that paying off the union was the cost of doing business. The CFMEU submitted that counsel assisting had failed to take account of evidence indicating ‘that on occasion the union fee was sometimes transferred to an Auswide account. There is no evidence linking this account to the union or to Mr Greenfield.’

Counsel assisting correctly submitted that the occasional involvement of that bank account was of no consequence given that even a cursory review of the Auswide bank statements shows that money deposited in the Auswide account was then often withdrawn in cash. The Auswide account acted as little more than a ‘layover’ for funds, before they reached their intended recipient in cash. The use of that account neither proves nor disproves whether any monies temporarily paid into it were ultimately provided to Darren Greenfield.

104. A further difficulty in the CFMEU theory that references to ‘union’ were tactics designed to deceive turns on who was being deceived. Was it the equity owners other than Joseph Antoun and George Alex? Or was it George Alex as well? At one point the CFMEU seemed to suggest that it was George Alex as well. Thus the CFMEU submitted

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140 Submissions of the CFMEU, 29/10/15, p 9, para 2(viii). See also pp 16-17, paras 24-25.

141 Parker MFI-1, 18/6/15, Vol 6, pp 1505, 1507; Vol 7, p 1605.
that the text messages relied on by counsel assisting which suggested payments of $2,500 to Darren Greenfield had to be read in the following way:142

[T]he text must be read in light of the distinct probability that payments to Mr Antoun were being disguised as payments to the union and the circumstance that Mr Westerway was not, himself, a knowing party to that deception. That is, whilst Mr Westerway had been told that the money was being paid to the union he was not told that Mr Antoun was retaining that money for his own use. Thus, Mr Westerway’s text message to Mr Alex saying "6 after Darren’s is out" may only be probative of the fact that Mr Westerway had been told to record payments as payments to the union, not of the fact that payments were actually being made to the union.143 Similar doubt is cast on the text messages from Mr Alex to Nectaria Alex,144 and from Mr Alex to Mr Antoun.145

105. So it seems that Douglas Westerway’s list is to be explained on the basis that he did not know the truth, but was relying only on what Joseph Antoun told him to be the truth. Does it follow that George Alex did not know the truth in relation to his two text messages either? Yet a little later the CFMEU spoke of ‘[t]he scheme introduced by Messrs Alex and Antoun to disguise the payments’.

106. Outside the witness box George Alex had given yet another explanation for the ‘union payment’. He did so during an intercepted telephone call between George Alex and Darren Greenfield. That call took place after the Westerway spreadsheets had been received into evidence and Douglas Westerway had been publicly examined, George

142 Submissions of the CFMEU, 29/10/15, p 17, para 27. See also p 19, para 36.
143 Cf Submissions of Counsel Assisting, 20/10/15, para 26.
144 See Submissions of Counsel Assisting, 20/10/15, para 24.
145 See Submissions of Counsel Assisting, 20/10/15, para 38.
146 Submissions of the CFMEU, 29/10/15, p 18, para 29.
Alex rang Darren Greenfield and said that the ‘union payments’ had been made to Darren Greenfield, who in turn had paid the money on to Tony and John Antoun because one of them was a union delegate.\textsuperscript{147} George Alex was letting Darren Greenfield know what his story to the Commission would be. What he did not know was that Darren Greenfield could not adopt that story because he had already given evidence in a private examination on 22 August 2014 to say he had never received cash of any kind for any purpose from George Alex or anyone associated with him.\textsuperscript{148}

107. George Alex’s evidence as to these matters should be rejected. Not only was each explanation inconsistent with the others, it also jarred with the plain language of the texts. George Alex was inviting belief in the proposition that in texts sent by George Alex to his own wife or to Joseph Antoun, when George Alex referred to payments to ‘Darren’ (as he did on 24 April 2013\textsuperscript{149} and 28 November 2013\textsuperscript{150}), he was not actually referring to Darren Greenfield or anyone else called Darren, but was instead referring to money to be paid to different individuals called Joe, or in the alternative (depending on which version of George Alex’s evidence one takes), Tony and John. The invitation must be rejected. That lack of credibility also damages the related theory set out above that the language of ‘union fees’ and ‘Darren’ was used as a cover for payments to Joseph Antoun.

\textsuperscript{147} Greenfield MFI-13, 23/6/15, pp 1-2.
\textsuperscript{149} Greenfield MFI-2, 19/6/15, p 1.
\textsuperscript{150} Greenfield MFI-5, 19/6/15, p 1.
George Alex’s conspiracy theory

108. At one point George Alex gave yet another explanation for the text message of 24 April 2013 from him to his wife. He said Douglas Westerway sent the text message to Nectaria Alex referring to ‘Darren’, and that Douglas Westerway had done so to pursue an ‘agenda’ because ‘they wanted Darren out’.\textsuperscript{151} For reasons set out above, that evidence was not credible. The message was sent by George Alex. Douglas Westerway had no agenda of that kind.

Convenient tax vehicle

109. There is one theory of the CFMEU’s which George Alex rejected. The theory concerned why the $2,500 was referred to as a union fee. It was suggested in a leading question to counsel for the CFMEU that it might ‘be a convenient tax vehicle because payments to the Union would be a tax deduction, whereas payments by the company to others might be income in the hands of the others’.\textsuperscript{152} George Alex rejected that.

Darren Greenfield’s conspiracy theory

110. On various occasions Darren Greenfield suggested that he had been ‘set up’ in circumstances where there had been a split between the six owners of Elite. He suggested that one of the owners was taking more money than the other partners and was using him and the union to

\textsuperscript{151} George Alex, 26/6/15, T:1008.34-1009.1.
\textsuperscript{152} George Alex, 26/6/15, T:1081.43-47.
‘cover that’. Although he made this assertion, he could not say or guess which of the owners was taking the extra money.

Darren Greenfield’s evidence on this subject changed over time. In evidence before the Commission on 3 October 2014 he said that ‘it’s my opinion – and it’s only my opinion’ that ‘certain individuals’ had prepared Elite’s documents ‘to get at me’. He agreed, however, that this was just ‘speculation’. He said ‘I have no other opinion of it’.

In June 2015 Darren Greenfield gave different evidence, asserting that he had been told things by two Elite scaffolders that led him to have the opinion he previously expressed.

When questioned about this matter, Darren Greenfield could not describe what he was told in any real detail. He could not describe either of these two scaffolders at all (either in terms of hair colour, height or appearance), other than to suggest one of them might have been called Vaughan or Lorne. He could not say when this alleged conversation with the two scaffolders occurred, beyond suggesting ‘last year or the year before.’

Further, Darren Greenfield said that even though he was concerned about what these scaffolders had told him, he did not tell anyone about

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157 Darren Greenfield, 23/6/15, T:826.13-44.
When he appreciated that his evidence did not appear credible he attempted to change it, suggesting instead that he had made a comment on it to a delegate.160

115. Further still, Darren Greenfield contended that even though it had been reported to him by unidentifiable scaffolders that he was being ‘set up’ by some of the owners of Elite, and even though he did not make any real report of that serious matter to his superiors at the CFMEU, he thereafter continued to deal with George Alex and Elite as he always had, including routinely meeting George Alex alone, at George Alex’s home, or in the presence of George Alex’s associates (as discussed further in Part D below). This is not believable.

116. At one point there may have been scope for uncertainty as to whether the ‘union payments’ were being taken by George Alex and Joseph Antoun rather than being paid to Darren Greenfield.161 That is no longer the case following the discovery of the text messages on George Alex’s phone and Darren Greenfield’s and George Alex’s implausible evidence in respect of them. This evidence further demonstrates that the conspiracy theory advanced by Darren Greenfield is not maintainable.

117. Although Darren Greenfield gave no evidence of it himself, his counsel examined George Alex to suggest that Darren Greenfield’s position was that the owners of the Elite business who had conspired to take the

161 Douglas Westerway wondered this from time to time. See Douglas Westerway, 1/9/14, T:44.41-45.5, 46.18-23, 47.47-48.14.
$2,500 ‘union payments’ for themselves were George Alex and Joseph Antoun.¹⁶²

118. This theory is not supported by the evidence. In particular, a number of the documents which demonstrate that Darren Greenfield was paid cash by George Alex and Joseph Antoun are records of private communications between the would-be conspirators. As has already been seen, George Alex and Joseph Antoun spoke to each other about a payment to ‘Darren’, and George Alex sent a text to Nectaria Alex about payment of $2,500 to ‘Darren’. If Joseph Antoun or George Alex were trying to organise money for themselves and communicating with each other or Nectaria Alex to facilitate that, they did not need to pretend the payment was going to ‘Darren’.

119. The CFMEU submitted that Darren Greenfield’s offering of unsatisfactory theories about conspiracies against him was irrelevant to whether he took bribes.¹⁶³ That must be rejected. Putting aside the formal fact that Darren Greenfield is not party to any litigation, it is capable of operating as a type of ‘admission’ against Darren Greenfield’s interests. Taken alone it may not be strong. Taken with other circumstances, it has some force.

120. For these reasons Darren Greenfield’s evidence that he believed in the explanation he proffered should be rejected, along with the explanation itself. The findings made are as follows:

¹⁶² George Alex, 26/6/15, T:1078.46-1079.28, 1080.45-1082.35.

¹⁶³ Submissions of the CFMEU, 29/10/15, para 58(e).
Darren Greenfield did receive cash payments (as earlier described);

George Alex and Joseph Antoun were not receiving the sums of $2,500 referred to as payments to the ‘union’ or ‘Darren’, and the payments were not so described in order to conceal such a receipt from the other owners;

on 3 October 2014 Darren Greenfield gave a speculative explanation as to why Elite’s records may have included references to ‘union payments’ at a time when he appreciated those records were harmful to his position; and

when confronted with further damaging documents in June 2015 he sought to embellish the explanation earlier given, and in doing so, gave an implausible account of an alleged conversation between him and two scaffolders.

D – OTHER EVIDENCE

121. There are a number of other general matters bearing on whether Darren Greenfield received cash payments of $2,500 from Joseph Antoun and George Alex. They are, broadly speaking:

(a) the unusual locations used for meetings between George Alex and Darren Greenfield;

(b) the general nature and tone of the relationship between George Alex and Darren Greenfield as evidenced by the text messages and telephone intercepts;
the contrast between the union’s stated position with respect to phoenix operators and labour hire companies and its actual, aberrant treatment of businesses associated with George Alex, and the absence of any credible explanation for this behaviour;

Darren Greenfield’s threats to Brian Fitzpatrick;

the evidence of Jimmy Kendrovski; and

the evidence of James (Jim) Byrnes.

Meetings at George Alex’s house

122. One of the curious features of the relationship between George Alex on the one hand and Darren Greenfield on the other is the frequency with which he would meet George Alex in the privacy of the latter’s home, rather than at the offices of the CFMEU or Elite.

123. Darren Greenfield maintained that the meetings were in respect of union business, notwithstanding the setting in which they occurred. Darren Greenfield’s evidence is that he attended George Alex’s home as part of the alleged ‘nightmare’ of incessantly chasing outstanding monies owed to Elite workers.164

124. It is difficult to accept that Darren Greenfield would meet so regularly at George Alex’s family home for the purpose of union business. This raises a question as to whether the meetings really were solely for the

purpose claimed, or whether instead George Alex’s home provided a secret and secure environment in which inducements and rewards could more easily be provided to Darren Greenfield.

125. Adding to the weight of these questions is the fact that there were often other imposing figures in attendance at George Alex’s home. George Alex had a reputation for associating with persons who had previously been convicted of serious criminal offences. Of course there is not necessarily anything wrong with him doing so. That is not the issue. The issue concerns whether Darren Greenfield would be likely to agree to conduct official union business in the environment that he and others described.

126. In this regard, a photograph published in the Sydney Morning Herald on 10 March 2013 showed George Alex arm in arm with various attendees at a $3,000 a head private event with the former world heavyweight champion boxer Mike Tyson. When photographed, George Alex had his right arm around Bilal Fatrouni, a man previously convicted and jailed in relation to steroid and gun charges. Pictured on the other side of the group was Sam Hamden, a former Comancheros bikie, and Khaled Sharrouf, a man convicted and jailed in relation to a terror plot. The accompanying article reported that George Alex was once in business with Peter Sidiourgous, a convicted amphetamine manufacturer.

127. George Alex gave evidence that Sam Hamden, Khaled Sharrouf, Mohamed Elomar, Bilal Fatrouni and Joseph Antoun all attended his

165 Parker MFI-1, 18/6/15, Vol 4, p 929.
home at his home in Burwood. The evidence from George Alex that Khaled Sharrouf was only there to do ‘boxing training’, and Mohamed Elomar only there as Khaled Sharrouf’s ‘manager’ was not credible.

The various individuals referred to above formed a protective and somewhat intimidating protective circle around George Alex. At least some of these individuals were present when Darren Greenfield attended.

Darren Greenfield gave evidence that, in respect of this group of people there were ‘murders, bashings…all sorts of crap’. He told Rita Mallia that George Alex was someone with a ‘colourful history’. He told Tony Slevin that George Alex and others had a ‘reputation as underworld figures’.

It is inherently improbable that someone in Darren Greenfield’s position, wishing to confront a recalcitrant employer in relation to arrears, would do so by making unaccompanied visits to that employer’s home, particularly where that employer was likely to have around him some imposing associates with criminal histories and was someone with a reputation as an underworld figure. It is an environment that a union official conducting that sort of union business would be likely to go to great lengths to avoid.

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166 George Alex, 24/6/15, T:956.33-957.12.
170 Parker MFI-1, 18/6/15, Vol 4, p 985.
171 Parker MFI-1, 18/6/15, Vol 7, p 1654.
Darren Greenfield could have insisted on meetings occurring in the union office or some other public location. He could have ensured that at least one other official went with him. He could have insisted on documents being provided to him by email, fax, post or delivery. He could have contacted the relevant administrators of ACIRT and Cbus to check on arrears. As the evidence in the LisCon/Cbus case study indicated, this was not only possible but very regularly done. His explanation for not doing so was not convincing. And if Darren Greenfield did not get a satisfactory response from Elite, he could do what union organisers frequently do, namely speak with the workers and help them organise legitimate industrial action of a kind that is regularly taken against defaulting employers.

But this is not how Darren Greenfield behaved. There was no aggressive industrial action against Elite. Darren Greenfield never asked for assistance from Rob Kera, his immediate superior. He positively rejected Rob Kera’s suggestion that he accept some assistance when dealing with George Alex. And as will shortly be detailed, he reacted aggressively when Brian Fitzpatrick attempted to become involved.

George Alex tried to explain why he met Darren Greenfield so frequently at the house in Burwood, asserting that his health was such that he was largely house bound. He badly injured his left leg in a road accident some years ago. He is said to depend on a complex

172 See Chapter 7.1.
174 Rob Kera, 23/6/15, T:843.6-8.
mixture of drugs to deal with the pain and related conditions. 176 His wife gave evidence that he was ‘busy resting’ – a new oxymoron she repeated several times. 177

133. Whatever the precise status of George Alex’s health may have been from time to time, the evidence does not support a finding that he was house bound and unable to regularly attend meetings at locations away from his home when required. Indeed, the evidence indicates that George Alex was reasonably mobile. He could and did regularly attend meetings with Darren Greenfield and undertake other activities around Sydney and elsewhere, including at the union office, solicitor’s offices, in and near hotels, in and near apartments, at cafes, in restaurants, and in Melbourne. 178 Darren Greenfield described George Alex as someone who moved around. 179

134. The suggestion by George Alex that he had significant mobility issues was contradicted by his own later evidence to the effect that he did not need to have ‘hired muscle’ around him because ‘I’ve been doing kung-fu since I was four. I’ve got titanium legs. I’m pretty good. I take care of myself’. 180

176 George Alex, 24/6/15, T:869.20-35.
177 Nectaria Alex, 30/6/15, T:1106.43-44, 1107.42-1108.9.
178 For some examples see Submissions of Counsel Assisting, 20/10/15, Appendix II: entries for 15/7/11 at 1:56pm (Balkan Restaurant), 18/7/11 at 3:04pm (George Alex’s office), 30/4/13 at 11:14am (Melbourne), 15/5/13 at 1:27pm (Shangrila Hotel), 28/6/13 at 11:16am (office in Burwood), 23/7/13 at 1:18pm (Melbourne), 26/9/13 at 2:59pm (Lindsey Kirshberg’s office), 27/10/13 at 3:50pm (Ottos Restaurant), 13/11/13 at 11:44am (A Tavloa Restaurant), 24/5/14 at 10:02am (Tropicana Café), and 18/1/14 at 9:28am (union office).
180 George Alex, 24/6/15, T:959.28-30.
For these reasons, the fact that meetings occurred in the privacy of George Alex’s home raises real suspicion that the venue was selected, at least in part, to facilitate the making of secret cash payments to Darren Greenfield. Those suspicions are not alleviated by the fact George Alex and Darren Greenfield each gave evidence about this subject that was not credible. Those suspicions are confirmed by the text messages and other documents earlier addressed.

Those suspicions are increased by the following factors. It is inherently improbable that ordinary union officers would have dealings with a man like George Alex, whether at home or elsewhere. In the witness box he swung between charm, affability, anger, wild exaggeration and threats of violence. But one thing was constant: he was almost always unbelievable. He conveyed an impression of being a phoney. If not a crook, he was an associate of crooks. In his ordinary dealings he seemed to have similar traits. His lack of credibility, to be seen in his denial that he knew he was bankrupt, his denial that he managed his companies and in much other absurd evidence, is bound to have been noticed by those he dealt with in business. He was a phoenix. In addition, he appeared to be totally unreliable, not only in paying late, but in terms of punctuality. He was utterly unbusinesslike.

**General tone of text messages and phone calls**

Darren Greenfield and George Alex maintained that the relationship between them was professional. They said that for the most part the communications between Darren Greenfield and George Alex took place against a backdrop of tension between the union’s demand for
compliance on the one hand and defaults by George Alex’s businesses on the other. Darren Greenfield called this a two year nightmare of such proportions that he had not even been able to sleep through the period.\textsuperscript{181} George Alex described it as a ‘headache’.\textsuperscript{182} But the terms and tenor of the communications between these men suggest otherwise.

138. There were numerous recorded communications between Darren Greenfield and George Alex, together with a record of communications between George Alex and various other persons.

139. These communications suggest that Darren Greenfield had a close, personal and accommodating relationship with George Alex. While there are occasional text messages referring to arrears and payments, generally speaking the messages do not suggest that their relationship was burdened by an underlying and ongoing conflict with respect to payment of workers’ entitlements. They suggest the opposite. The messages are jovial, friendly, at times personal and very familiar,\textsuperscript{183} and suggestive of a mutual desire to catch up regularly. They reveal the two knew each other so well that it was often not necessary for one to spell out to the other either where they would meet or where things would be collected, including a location referred to simply as the

\textsuperscript{181} Darren Greenfield, 22/6/15, T:682.27-36.
\textsuperscript{182} George Alex, 24/6/15, T:937.32-40.
\textsuperscript{183} See for example Submissions of Counsel Assisting, 20/10/15, Appendix II: the ‘Necta spewin...’ text of 20/5/13 at 1:59pm; ‘Can see joe in his speedo on the beach’ text of 18/10/13 at 3:38pm.
‘usual spot’.\textsuperscript{184} When Darren Greenfield was asked what the ‘usual spot’ referred to he gave the implausible answer ‘I don’t know’. \textsuperscript{185} This is damaging to his credit.

140. These messages also make it clear that there were times when Darren Greenfield did not want to talk to George Alex about work and wanted to talk, instead, about matters of personal interest to Darren Greenfield.\textsuperscript{186} In this context, often messages were exchanged on weekends, public holidays, or in the evenings, and those messages do not convey the impression that the subject of their interaction was workers’ arrears.

141. Darren Greenfield told Rita Mallia in 2013 that he ‘emphatically’ denied any friendly relationship with George Alex.\textsuperscript{187} The text messages demonstrate the existence of a friendly relationship. In short, Darren Greenfield did not tell Rita Mallia the truth. The most likely explanation for this is that he wanted to lead those investigating his conduct away from the truth, which was that his relationship with George Alex was close and involved cash payments.

\textsuperscript{184} See, for example, Submissions of Counsel Assisting, 20/10/15, Appendix II: ‘Usual spot….4’ message of 12/7/13 at 12:00pm; ‘pop into little’ message of 18/9/13 8:27am; ‘Great can we meet at Kent’ and immediate response ‘yep’ on 17/7/14 at 9:01am.

\textsuperscript{185} Darren Greenfield, 19/6/15, T:653.36-655.4. It is acknowledged that there are many telephone calls between Darren Greenfield and George Alex, the content of which was not captured as there was no telephone interception in place in 2013. However, whilst that may explain the lack of discussion of the detail of meeting places on some occasions, it does not explain all, and the submission remains. In the example in this paragraph, and in many others, the timing and content of the text messages indicate that the two men had a high level of familiarity with proposed meeting spots so that the location was not spelled out.

\textsuperscript{186} See Submissions of Counsel Assisting, 20/10/15, Appendix II: messages from Darren Greenfield on 23/5/13, ‘Don’t forget me mate’ and later message indicating he did not want to discuss availability of funds for workers, ‘No wanted to chat about me’.

\textsuperscript{187} Parker MFI-1, 18/6/15, Vol 4, p 985.
142. At first glance there is some evidence that appears to support Darren Greenfield’s assertions that he was only ever chasing arrears, that his dealings with George Alex were a ‘nightmare’, and that he was not supportive of George Alex. That evidence comprises two intercepted telephone calls between Darren Greenfield and Jose (Mario) Barrios on 21 August 2014.\textsuperscript{188} In those conversations Darren Greenfield referred to the fact that Mario Barrios had received a threatening phone call from George Alex. He said that he would stand up for Mario Barrios if ‘these bastards want to make fucking threats to you’ and said that dealing with Elite had been the worst two years of his life. He also boasted to having ‘fronted’ Mazen Hourani with a threat to ‘come after him’.

143. If these calls were considered in isolation, they would appear to support Darren Greenfield’s account. However other evidence, described below, indicates that Darren Greenfield’s treatment of Mario Barrios at this time was duplicitous. He simply said what he thought Mario Barrios wanted to hear, with a view to appeasing him in circumstances where there was growing agitation between George Alex and Mario Barrios. The message he was really conveying to Mario Barrios was ‘if anything further needs to be sorted out, leave it to me’.

144. The day Darren Greenfield spoke with Mario Barrios in the way just described, he also spoke with George Alex over the telephone about a range of matters, including George Alex’s call to Mario Barrios.\textsuperscript{189}

\textsuperscript{188} Greenfield MFI-9, 22/6/15; Greenfield MFI-10, 22/6/15.
\textsuperscript{189} Alex MFI-6, 26/6/15.
George Alex told Darren Greenfield that he had rung Mario Barrios and ‘straightened him out’, that he had been annoyed with Mario Barrios, and that Mario Barrios had felt intimidated and gone to the police as a result. Darren Greenfield’s response to this information did not resemble what one would expect after having heard his discussion with Mario Barrios later that day. He did not express concern. He did not express alarm. He did not admonish George Alex. Instead, Darren Greenfield used expressions like ‘fair enough’, ‘right’ and ‘okay’ as George Alex described what had happened. When George Alex complained about Mario Barrios having ‘mouthed off about Capital’, Darren Greenfield’s sympathetic response was ‘people seem to be doing that to you all the time, don’t they’. During this same call they expressed strong support for each other, each offering the other consolation about recent events.

Then, only a couple of days after Darren Greenfield’s discussions with Mario Barrios, Darren Greenfield was on the telephone to Mazen Hourani, recognising him as a ‘mate’, telling Mazen Hourani to ‘keep his chin up’, that he was a gentlemen, and had done nothing wrong. He was strongly supportive of Mazen Hourani, and indicated that George Alex was ‘no different to 95 per cent of the other ...bosses out there’. This was contrary to his assertion to Mario Barrios (and in evidence) that George Alex’s companies were so bad that they had given him the worst two years of his life.

In light of this evidence Darren Greenfield’s behaviour on the telephone calls to Mario Barrios on 21 August 2014 does not assist

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190 Greenfield MFI-11, 23/6/15.
him. It is apparent that when speaking to Mario Barrios and when giving evidence, Darren Greenfield said what he thought would cast him in the best light, without regard for the truth.

**Favourable treatment of George Alex’s businesses**

147. Another general factor bearing on the likelihood of Darren Greenfield having received cash payments from George Alex and Joseph Antoun is the fact that the CFMEU and Darren Greenfield dealt with businesses associated with George Alex more favourably than would have been the case had the union’s publicly stated policies and views been followed.

148. The website of the CFMEU NSW stated that the union has publicly campaigned against the phoenix ‘plague’ in the building industry. In another article published by the national secretary, David Noonan, on the website of the Construction Forestry Mining and Energy Union, Construction and General Division National Office (CFMEU National office) on 27 January 2014, the union’s challenges in the industry were said to include ‘non payment of wages, phoenix companies and the insecure nature of employment in Labour Hire [sic].’ Brian Parker made a similar statement on the same website page. He described the growth of labour hire as unfortunate. He stated that the CFMEU had long campaigned against the proliferation of labour hire as the vehicle...
of employment ‘as it renders workers [sic] to a life of casual and precarious employment’.  

149. Consistently with this publicly stated view, the CFMEU does not enter into EBAs with every labour hire company that seeks one, and refuses to enter into EBAs with companies it considers will not meet obligations to workers (whether they operate in the scaffolding sector, labour hire, or otherwise).

150. This is certainly so in the scaffolding industry. As will be seen shortly, prior to 2012 Darren Greenfield rejected Michael Cohen’s request for an EBA for Elite Holdings. He cited concerns that the company would not be ‘compliant’. The selection process in the labour hire industry is even more discerning. The union has a policy of limiting the number of EBAs, as otherwise it would have labour hire companies ‘lined up around the block’. Factors to be considered when choosing between businesses include a track record of complying with legal obligations and obligations to employees, and the viability of a business.

151. As explained below, these attitudes and policies of the CFMEU were not applied in respect of the businesses associated with George Alex.

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193 Parker MFI-1, 18/6/15, Vol 7, pp 1563A-1563B, p 1563B.
194 Brian Parker, 3/10/14, T:567.1-22.
195 Peter McClelland, 29/8/14, T:10.19, 10.25 (transcript received into evidence 23/9/14).
196 Peter McClelland, 29/8/14, T:10-11 (transcript received into evidence 23/9/14); Rita Mallia, 25/9/14, T:417.38; Brian Parker, 3/10/14, T:567.42-568.16.
Phoenixing of labour hire business

152. The first Active company to have an EBA with the CFMEU was Active Workforce Pty Ltd (Active Workforce). In December 2010, during the term of the EBA, the company was placed into external administration. George Alex made claims that the company was ‘dormant’ and never traded after he became associated with it in 2010, but that ‘if it did trade...all entitlements would have been paid’, and that it did not owe any money when administered. Those claims were not credible. The evidence demonstrates that the company had traded, and failed when it could not pay its creditors, including employees. George Alex knew this to be so. But he would not admit it even when confronted with evidence.

153. The next Active company was Active Workforce (NSW) Pty Ltd (Active Workforce NSW). George Alex appointed Athina Alex to be a director of this company on 29 March 2010. That company entered into an EBA with the CFMEU. George Alex signed on the company’s behalf. It entered into a further EBA on or about 7 June 2011. George Alex signed it again. He described himself as ‘Director/Manager’. He made an attempt to downplay this by claiming that he just ‘threw that [description] in there’ and was ‘having

197 Parker MFI-1, 18/6/15, Vol 1, p 16.
198 Parker MFI-30, 18/6/15, tab 4, pp 1-2, 6.
200 Alex MFI-1, 24/6/15, pp 3-4.
201 George Alex, 24/6/15, T:904:31-906.19.
202 Parker MFI-30, 18/6/15, tab 5, p 4.
203 Parker MFI-1, 18/6/15, Vol 1, p 67.
204 Parker MFI-1, 18/6/15, Vol 1, p 180.
a go’ and having ‘some fun with it while I was doing it’. This attempt was neither rational nor credible.205

154. On 20 April 2012 (only nine months into the 2011 EBA) administrators were appointed to Active Workforce NSW.206 Not long before that appointment, and on 3 February 2012, Active Labour Pty Ltd (Active Labour) was incorporated.207 A few months later, on 5 June 2012, Active Site Payroll Services (NSW) Pty Ltd (Active Payroll) was also incorporated.208 Active Labour and Active Payroll were established to operate together, to run the business previously operated by Active Workforce NSW. Active Labour entered into sub-contracts with builders, while Active Payroll employed the workers.209

155. In October 2012 the CFMEU entered into an EBA with Active Payroll. Brian Parker signed that EBA for the union. George Alex (although not formally recorded as director) was recorded as the CEO and signatory for Active Payroll.210 George Alex claimed he did not sign this document.211

156. By the following year, 2013, the business was again in financial trouble. George Alex and Mazen Hourani (a director of Active Labour and associate of George Alex) each broke promises to pay arrears. A

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205 George Alex, 24/6/15, T:913.44-45.
206 Parker MFI-30, 18/6/15, tab 5, pp 5, 8-9.
207 Parker MFI-30, 18/6/15, tab 7, p 1.
208 Parker MFI-30, 18/6/15, tab 6, p 1.
210 Parker MFI-1, 18/6/15, Vol 2, p 506.
211 George Alex, 24/6/15, T:919.35-920.14.
number of Active Payroll cheques bounced. Mazen Hourani had agreed to make an interim payment to ACIRT on 23 July 2013 but the cheque was dishonoured. The same occurred in relation to a further payment on 1 August 2013.

Liquidators were appointed to Active Payroll on 6 August 2013, with the company owing large sums of money to workers. Those workers were then transferred across to Active Labour. An EBA between the CFMEU and Active Labour was put in place. On 16 September 2013, Mazen Hourani and George Alex met Rita Mallia of the CFMEU and agreed that Active Labour would meet the Active Payroll arrears.

Despite that promise, by the end of 2013 and into the start of 2014 the Active Payroll arrears had not been paid and Active Labour itself was falling behind. An email dated 22 January 2014 from Dennis Matthews of ACIRT reveals that Active Labour had made an ACIRT payment for December 2013, but the payment had been dishonoured. He indicated that the only other payment that had been received was for July 2013, but that payment had also been dishonoured. The email concluded with confirmation that the company had effectively made no payment since 1 July 2013.

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212 Brian Fitzpatrick, witness statement, 15/7/14, para 81.
213 Parker MFI-1, 18/6/15, Vol 5, p 1186.
214 Alex MFI-11, 26/6/15.
216 Parker MFI-1, 18/6/15, Vol 5, p 1189.
217 Parker MFI-1, 18/6/15, Vol 6, p 1541.
Progress was only made when a factoring agency called FIFO Capital, directed by Lindsay Kirschberg, agreed to provide financial assistance to Active Labour. On 20 January 2014 Lindsay Kirschberg confirmed to the CFMEU that substantial payments had been made to meet some of Active Payroll’s arrears.\(^\text{218}\)

Unsurprisingly, the drain on Active Labour in making such a substantial payment took its toll on the company. By the middle of June 2014 it was again in arrears. Money owed by builders to Active Labour was being paid directly to the CFMEU in an attempt to meet those arrears. Active Labour was subsequently placed into liquidation, following the hearing of a winding up application brought by the Deputy Commissioner of Taxation.\(^\text{219}\)

At about the same time as Active Labour was failing, a traffic management and security company also associated with George Alex, namely Metropolis,\(^\text{220}\) was in similar financial strife. Metropolis ended up heavily in arrears in meeting employee entitlements, and had receivers and managers appointed to it in July 2014.\(^\text{221}\)

Darren Greenfield stepped in to deal with a number of arrears issues surrounding Active Labour and Metropolis,\(^\text{222}\) even though they were outside his usual area of operation.\(^\text{223}\)

\(^{218}\) Parker MFI-1, 18/6/15, Vol 6, pp 1537-1538.

\(^{219}\) Parker MFI-30, 18/6/15, tab 7, p 4.

\(^{220}\) Parker MFI-30, 18/6/15, tab 8, p 4.

\(^{221}\) Some funds owed to Active Labour by builders were used to meet some of the arrears owed to workers of Metropolis.

\(^{222}\) See for example Parker MFI-1, 18/6/15, Vol 8, pp 2040-2041.
163. In the face of this latest financial collapse, George Alex and his associates, including Mazen Hourani, transferred their contracts and employees to a new company, Capital Workforce Pty Ltd (Capital). Brian Parker facilitated this by executing EBAs in favour of Capital.\textsuperscript{224} Brian Parker understood that Capital was assuming the business of Active Labour and Metropolis.\textsuperscript{225}

164. When the fact that Brian Parker had permitted yet another company associated with George Alex to obtain an EBA became more widely known and questions began to be asked by Mario Barrios, Brian Parker withdrew the application to Fair Work for approval of the EBA. He told Mazen Hourani that he had done so, that he was ‘devastated’, and assured him it was only temporary.\textsuperscript{226}

165. When George Alex came to hear of this he was irate. He said to Mazen Hourani that ‘the union themselves fucking need to fucking do exactly what we’re paying [the next part of the audio recording is indistinct]’. It was plain from the call that George Alex considered himself to be in a position to influence control over the union in response to what had occurred. Who did he ring then? Darren Greenfield.\textsuperscript{227} He did so after Mazen Hourani said to George Alex over the telephone ‘I don’t know if you want to call “D” and see what the fuck is going on’.\textsuperscript{228} When Darren Greenfield was then called,

\textsuperscript{223} Darren Greenfield, witness statement dated 15/8/14, tendered 3/10/14, para 40; Parker MFI-1, 18/6/15, Vol 8, p 1819.
\textsuperscript{224} Parker MFI-1, 18/6/15, Vol 8, p 2016.
\textsuperscript{225} Brian Parker, 3/10/14, T:673.14-32.
\textsuperscript{226} Parker MFI-53, 20/10/15, p 4.12-34.
\textsuperscript{227} Greenfield MFI-14, 29/8/14, George Alex calls Darren Greenfield at 1:26pm on 29/8/14.
\textsuperscript{228} Alex MFI-8, 26/6/15, p 2.27-28.
Darren Greenfield made immediate arrangements to placate George Alex. He organised a meeting between Mazen Hourani and George Alex and Brian Parker and himself to discuss the matter privately.\textsuperscript{229}

\textit{Phoenixing of scaffolding businesses}

166. Elite Holdings was incorporated in August 2006. Its former directors and shareholders included Michael Cohen and various relatives or apparent associates of his. For a number of years the company worked on small to medium sized projects.\textsuperscript{230} By 2012 Michael Cohen hoped to expand and take on larger projects.\textsuperscript{231}

167. In late 2011 and early 2012 Michael Cohen explored with Darren Greenfield the possibility of entering into an EBA with the union. Darren Greenfield rejected Michael Cohen’s approaches. He said that Elite Holdings was not a ‘compliant company’ that could be trusted to do the right thing by workers.\textsuperscript{232}

168. An acquaintance of Michael Cohen’s then suggested that he speak with George Alex, who was at this time purchasing a scaffolding company called Hillsley.\textsuperscript{233} The merger earlier described then occurred, after which George Alex liaised with Darren Greenfield in relation to the creation of an EBA for Elite Holdings.\textsuperscript{234} Subsequently Michael

\textsuperscript{229} Greenfield MFI-12, 23/6/15, p 1.13-34; Parker MFI-45, 19/6/15, p 1.34-40.
\textsuperscript{230} Michael Cohen, 1/9/14, T:65.30.
\textsuperscript{231} Michael Cohen, 1/9/14, T:66.7-12.
\textsuperscript{232} Parker MFI-1, 18/6/15, Vol 4, pp 975-976.
\textsuperscript{233} Michael Cohen, 1/9/14, T:66.2-4.
\textsuperscript{234} Darren Greenfield, witness statement, 3/10/14, para 9.
Cohen became involved in those discussions. Darren Greenfield said that if the company was going to have an EBA it had to comply with its terms. He said that he, Darren Greenfield, was ‘not going to cop non-compliance’.

The EBA between Elite Holdings and the CFMEU was executed on 18 June 2012. Michael Cohen signed for Elite Holdings, and Brian Parker for the union. The agreement was given a nominal expiry date of 30 June 2014.

Only one year into the term of the EBA, and in July 2013, Elite Holdings went into external administration. About a month prior to that occurrence, a company then called ‘Banq Collections’ changed its name to Elite Access. Clearly arrangements were being made by no later than June 2013 for the Elite scaffolding business to be phoenixed.

In conjunction with this phoenixing operation, various payments of arrears were made by Elite Holdings in June and July 2013. The majority, but not all, of its workers received their entitlements. The workers who were not paid out were amongst the many casualties of the collapse of Elite Holdings.

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236 Parker MFI-1, 18/6/15, Vol 4, p 976.
238 Parker MFI-30, 18/6/15, tab 2, p 1.
239 Parker MFI-1, 18/6/15, Vol 4, pp 1007-1008.
240 Michael Cohen, 1/9/14, T:78.19-80.4.
172. Contrary to his evidence, Darren Greenfield had not been pursuing Elite Holdings for payment of workers’ arrears throughout. Yet a diligent organiser solely concerned with the rights of workers would have been doing so.

173. When Brian Fitzpatrick drew attention to this in March 2013 he received a threatening call from Darren Greenfield.\(^{241}\) When that was investigated, Darren Greenfield sought to explain away his inaction to Rita Mallia. On 16 May 2013 he told Rita Mallia that he ‘didn’t pick up on the problem [with] Elite’, because he ‘didn’t receive any complaints’ from Elite’s workers, and he became aware of the arrears position only in March 2013 when someone informed him of it.\(^{242}\) This account is supported by a text message from Darren Greenfield to George Alex made just two days after the threatening phone call ‘Can u ring mate scaffolders ringing me not paid’.\(^{243}\)

174. That evidence is directly opposed to the evidence he gave to the Commission to the effect that he had battled to deal with the arrears position at Elite throughout.\(^{244}\) Darren Greenfield has given inconsistent and thus unreliable accounts as to this important matter. The likely position is that he had not pursued Elite with the vigour one would expect from a union organiser, and that he was influenced so to act by the cash payments he was receiving from George Alex and Joseph Antoun.


\(^{242}\) Parker MFI-1, 18/6/15, Vol 4, pp 978, 980-981.

\(^{243}\) Greenfield MFI-1, 19/6/15, p 1.

Not only had Elite Holdings not been vigorously pursued until Brian Fitzpatrick began to complain about the union’s treatment of George Alex, but further, notwithstanding the movement of Elite Holdings into external administration, the CFMEU agreed to enter into an EBA with the new vehicle for the business.

Although Darren Greenfield had refused to accede to Michael Cohen’s requests for an EBA prior to 2012 because he thought it was ‘not compliant’, and although he later told Michael Cohen that he would ‘not cop’ non-compliance, a decision was nevertheless taken within the CFMEU to enter into a fresh EBA with Elite Access. This occurred only after discussions between Darren Greenfield, George Alex and Joseph Antoun in 2013. It occurred notwithstanding the fact that George Alex was clearly involved in the running of phoenix operations and the Elite business itself was being phoenixed. Again, this outcome was influenced by the fact that Darren Greenfield had been receiving cash payments from George Alex and Joseph Antoun.

No credible explanations for aberrant treatment of George Alex’s businesses

The above analysis demonstrates that the CFMEU’s treatment of the businesses associated with George Alex was out of keeping with its typical and highly publicised approach to phoenix operators, both generally, and in particular in the labour hire sector. The aberrant treatment was particularly strong in mid-2013, at a time when both the Active and Elite businesses were being phoenixed.

245 Darren Greenfield, witness statement, 3/10/14, para 12.
178. Brian Parker did not deny this. When he was asked whether he agreed that it was a text book case where the union would refuse to enter into an EBA, he accepted that ‘it could be looked at that way’.246

179. According to Brian Parker and Darren Greenfield, the CFMEU continued to enter into new EBAs with each new company because workers could retain employment by joining the new company,247 and, in the case of Capital, because it also promised to pay the money still owed by the old company to the workers.248

180. These explanations do not withstand scrutiny. They run counter to the union’s publicly stated position concerning labour hire companies and phoenix operators. If the explanations were valid, they would have had general application, and the union’s approach would not have been as publicised.

181. There was no good reason why any worker would want to remain employed by a business that could not be trusted to pay him or her. The underlying requirement for the work to be done continued to exist when a sub-contractor fails. If a company such as Active Labour could not finish the job, a reliable company could have been retained in its place. That company would have needed workers to carry out that work. It could have employed Active Labour’s employees for that purpose. The CFMEU could have facilitated these arrangements.

246 Brian Parker, 3/10/14, T:568.10-13.
248 Brian Parker, 3/10/14, T:671.10-672.19.
In this regard, it is of note that in an interview with Rita Mallia, Darren Greenfield described the role he had played in getting workers for an insolvent company jobs with another company.\textsuperscript{249} The switch in labour hire companies and the movement of workers from one labour hire company to another was nothing new.\textsuperscript{250}

Brian Parker and Darren Greenfield both refused to accept the force of these propositions when questioned by counsel assisting.\textsuperscript{251} However Darren Greenfield adopted a different attitude when dealing with the same issue during questions from his senior counsel.\textsuperscript{252} He said he had taken aggressive action against Elite Access in late 2014 (that is, during the life of this Commission, after the spotlight had been focussed on his relationship with George Alex, and after the relationship between Elite’s owners had collapsed). The consequence was that Elite could not continue to operate. Darren Greenfield explained how, in respect of two of Elite’s projects then in existence the builders ‘brought in another contractor and that contractor took over the employees on those two jobs and continued to employ them until they were finished’.\textsuperscript{253}

Through this evidence Darren Greenfield succinctly illustrated the point he had earlier declined to accept, and described the process that could (and consistently with union policy, should) have been followed

\textsuperscript{249} Greenfield MFI-2, 19/6/15, pp 9-10.

\textsuperscript{250} See for example the Hindmarsh case study where Global HR replaced the Lack Group and Zoran Bogunovic and others moved from one to the other.

\textsuperscript{251} Brian Parker, 3/10/14, T:568.37-41; Darren Greenfield, 3/10/14, T:685.34-686.2.

\textsuperscript{252} Darren Greenfield, 24/6/15, T:848.37-849.27.

in 2013 when George Alex was yet again phoenixing his businesses. This evidence was damaging in respect of the particular issue now under consideration. It was also damaging to his credit generally given his earlier failure to accept the point he later volunteered.

185. What of Brian Parker’s theory that the benefit of the new EBA for Active Labour was that the union obtained a promise from that company to pay the arrears of the old insolvent company? That was a hollow promise. It is not realistic to suggest that the new company, running the same business as the old company, would not only be able to pay workers what could not be paid before, but also what needed to be paid into the future.

186. For these reasons, the justifications that Brian Parker and Darren Greenfield have advanced for acting as they did are not credible.

187. George Alex gave a different account as to why it was that the CFMEU would be prepared to continue to deal with businesses associated with him. He appeared to suggest that he was not a phoenix operator, and that responsibility for the repeated collapses of his businesses lay at the feet of failed builders who could not pay their sub-contractors.

188. That explanation is inconsistent with the evidence of Darren Greenfield and Brian Parker. But further in many respects it is not supported by the documentary evidence. In particular, the evidence as to the collapses of Active and Elite in 2013 demonstrates that the builders and the underlying contracts were secure. The phoenixing operations undertaken in 2013 involved, in the case of each of Elite and Active, transferring the workers from one entity to another so that existing
contracts with the builders could be honoured. The builders and the
contracts had not fallen over. Elite and Active did not have the cash to
pay workers, the tax office and others. Too much cash had been
stripped out of the companies’ accounts by the owners of the
businesses. This is consistent with the opinions expressed by the
external administrators of these companies for their demise.

In these circumstances, Darren Greenfield, Brian Parker and George
Alex did not provide the Commission with a credible explanation as to
why the CFMEU treated businesses associated with George Alex more
favourably than it would have done had the publicly stated policies of
the union been applied.

It must be inferred that George Alex was receiving favourable
treatment from Darren Greenfield in return for regular cash payments
of $2,500. That treatment included negotiating EBAs in favour of the
Elite businesses, and not responding as aggressively as he otherwise
could have done when workers were owed money.

Threat to Brian Fitzpatrick

The conclusion that Darren Greenfield received cash bribes and sought
to favour George Alex is further supported by the fact that he made a
violently worded threat to Brian Fitzpatrick on 27 March 2013 when
the latter was highlighting the union’s failure to deal with George Alex
appropriately. The relevant findings as to this incident appear in
Chapter 8.4 of the Interim Report. Further evidence now reveals that,

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contrary to Darren Greenfield’s previous denial,256 he had actually attended George Alex’s home on the day the threat was made.257

192. Darren Greenfield wanted Brian Fitzpatrick to ‘back off’ the issue of the union’s favourable treatment of George Alex. Darren Greenfield did not want questions asked about why George Alex’s phoenixing was being tolerated. This was because Darren Greenfield wanted to protect George Alex (because he was being paid by him). And Darren Greenfield wanted to prevent the answers to those questions (i.e. that he was being paid by George Alex) from being discovered.

193. It is of significance that George Alex communicated with Darren Greenfield about the fate of Brian Fitzpatrick at the very time Brian Fitzpatrick was being marginalised by Brian Parker, Darren Greenfield and others in the union.258 On 27 September 2013, at around the time of Brian Fitzpatrick’s exit from the union, George Alex sent a message to Darren Greenfield which asked ‘Any news on the Fitzy front’.259

194. The CFMEU said little about Brian Fitzpatrick, beyond alleging that he was meddling in the affairs of scaffolders without authority.260 Yet that was a factor that caused light to be cast on Darren Greenfield’s

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257 Greenfield MFI-1, 19/6/15, p 1 (text messages between Darren Greenfield and George Alex on 27/3/13); Darren Greenfield, 19/6/15, T:605.33-36.
259 Submissions of Counsel Assisting, 20/10/15, Appendix II; Greenfield MFI-1, 19/6/15, p 22.
260 Submissions of the CFMEU, 29/10/15, para 58(c).
favourable treatment of George Alex – whatever the significance of that treatment.

**Jimmy Kendrovski’s evidence**

195. Jimmy Kendrovski, one of the part owners of Elite Access, gave evidence that he spoke to George Alex and Joseph Antoun about the ‘union payments’. He was told things like: ‘We need that for the union. That’s union fees’. 261

196. During his evidence Jimmy Kendrovski showed signs of significant discomfort. When he was asked questions about whether he had seen union officials receive cash payments there were often lengthy pauses, sometimes combined with a lowering of his head towards his lap. He described how he had been the victim of an assault in jail after he had been served with his summons and shortly prior to the day appointed for him to give evidence. 262 He refused to comment on whether the aggressor had said anything to him about him giving evidence to the Commission. He explained that refusal by saying ‘because I have a wife and three kids outside on their own and I just can’t comment on that’. 263

197. At one point in his evidence, he was asked whether he felt unable to give truthful evidence because of the recent assault on him. He replied: ‘I am being as truthful as I can’. 264 When later asked to

261 Jimmy Kendrovski, 1/9/14, T:104.36-38.
262 Jimmy Kendrovski, 1/9/14, T:105.13-14.
264 Jimmy Kendrovski, 1/9/14, T:106.6-7.
explain that answer, he said that he was telling the Commission and
counsel assisting as much as he truthfully could having regard to the
fears for his safety and that of his family.265 The examination then
continued as follows:266

Q: If you didn’t have those fears, might you be saying something
else?
A: I can’t comment.

Q: Do I take it from that, that the answer is, ‘Yes’?
A: I just can’t comment. If you were in my position, where I am at
the moment – I can’t comment on that.

198. The impression left is that Jimmy Kendrovski was, due to concerns
over his safety and that of his family, unable to provide the
Commission with truthful answers to the questions he was being asked
in relation to what he had seen and heard in relation to the payment of
the cash withdrawn for ‘union payments’. The inference to be drawn
from the witness’s reluctance is that truthful evidence would be
harmful to the interests of any persons who are the subject of the
allegations and who would be in a position to arrange for harm to be
caused to Jimmy Kendrovski and his family if that truth was revealed.
George Alex is the only person who appears to fit such a description.
Evidence that would be harmful to George Alex’s interests is evidence
to the effect that he committed the crime of bribing a union official.
The CFMEU criticised this inference as being too indirect to be safe.267
If it stood alone that might be so. But it has some force when
considered in the light of all the circumstances.

265 Jimmy Kendrovski, 1/9/14, T:107.18-22.
266 Jimmy Kendrovski, 1/9/14, T:107.24-30.
267 Submissions of the CFMEU, 29/10/15, para 58(a).
Jim Byrnes’s evidence

199. The evidence given by Jim Byrnes is relevant to a consideration of issues of this kind, although the particular incident he described pre-dates the ‘union payments’ documentation described above.

200. Jim Byrnes is a convicted criminal and former bankrupt, who once had various dealings with George Alex. His credit is thus clearly in issue. He has relocated to the United States, where he currently works as a chief executive officer.

201. Jim Byrnes’ evidence was that, at a meeting at George Alex’s house in late 2011 or early 2012, he saw George Alex toss an envelope in gregarious fashion to Darren Greenfield and said ‘there you go’. The envelope had a window, through which Jim Byrnes saw a hundred dollar note. The envelope was about 6 or 7 mm thick, and had ‘$3,000’ written in handwriting on the front of it. Jim Byrnes also gave evidence that George Alex was ‘regularly boasting how he was looking after the union and the union were in his pocket’.

202. Darren Greenfield denied this incident occurred. He denied ever receiving a cash payment of any kind or for any purpose from George Alex or any person or company associated with him.

203. Having regard to the evidence as to Jim Byrnes’ character, the Commission should be slow to act on his evidence unless it is

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268 James Byrnes, 3/10/14, T:618.33-620.40.
corroborated. If Jim Byrnes’ evidence represented the only evidence available in respect of the making of cash payments to Darren Greenfield, it would not provide a sufficient basis for a finding against Darren Greenfield.

204. However, counsel assisting submitted that in circumstances where there is now a substantial body of documentary evidence which strongly supports a finding that Darren Greenfield was paid by George Alex and Joseph Antoun, the occurrence of the event Jim Byrnes described in his evidence remains a real possibility.

205. In this regard, it is relevant to observe that one of the bases of Darren Greenfield’s denial of Jim Byrnes’s assertion was that he did not meet George Alex for the first time until after early 2012.271 However the documents and George Alex’s evidence demonstrate that Darren Greenfield and George Alex probably had met in about mid April 2012.272 This basis of denial is therefore unsound.

206. However, it is not necessary to decide whether counsel assisting’s submission was right. Nor is it necessary to deal conclusively with the CFMEU’s strongly worded attack on Jim Byrnes, though a couple of its points are adopted in this paragraph.273 The documentary evidence suggests that Darren Greenfield would not have been averse to accepting the bribe which Jim Byrnes testified to. But the modus operandi revealed in the documentary evidence, with its goal of secrecy, was radically different from the quite open conduct to which


272 George Alex, 24/6/15, T:931.44-932.2; Parker MFI-1, 18/6/15, Vol 2, p 336.

273 Submissions of the CFMEU, 29/10/15, para 58(b).
Jim Byrnes testified. Perhaps less importantly, the figure of $3,000 is different in amount from the ‘union fee’ of $2,500.

**Darren Greenfield’s financial position**

207. The CFMEU submitted that counsel assisting had failed to refer to the examination of the Greenfield family’s finances conducted in private hearings and then tendered in a public hearing. It submitted that there was no evidence of any illicit income, or of a family living beyond its legitimate earnings. This is not determinative of Darren Greenfield’s involvement of bribe taking or his innocence of bribe taking. If he were involved in bribe taking, there are many ways in which he could have spent the cash apart from using it for household purposes or letting it come to the attention of others within the family.

**Imperfect records**

208. Another of the CFMEU’s submissions was that counsel assisting had failed to understand that not all relevant telephonic and other communications had been captured. The CFMEU submitted:

There are no intercepts of telephone conversations between Messrs Alex and Antoun, or between Mr Alex and Mr Greenfield. There are no listening device recordings of any conversations which would have taken place between these parties. There is no reference to the metadata available from phone records of Mr Greenfield recording the time and date of telephone conversations. Without this background it is dangerous and unfair to infer criminality from the text messages.

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274 Submissions of the CFMEU, 29/10/15, p 9, para 2(v); p 26, para 57(b).
275 Submissions of the CFMEU, 29/10/15, p 8, para 2(iii).
276 Submissions of the CFMEU, 29/10/15, p 17, para 26.
The world is an imperfect place. Perhaps more information would have been desirable. But what would this extra information have revealed? How would it have cut down the strength of the messages that are in evidence?

**Darren Greenfield’s influence**

209. The CFMEU attributed to counsel assisting a submission that secret commissions were paid to Darren Greenfield so as to secure his favour when it came to questions of whether or not an enterprise bargaining agreement should be entered into by the union. The CFMEU criticised the reasoning on two grounds. The first was that it is the union members and not an organiser in the position of Darren Greenfield who determined whether an agreement is made and it is the union not the organiser which decides if the union is covered by the agreement. There seems to be an element of fallacy in attributing to union members any real power over enterprise bargaining decisions. Several case studies have made it clear that it is union officials who have the major influence on who gets enterprise bargaining agreements and on what terms. The other point made by the CFMEU was that there was no hard and fast rule that people who undertook phoenix-like behaviour could not seek to enter an EBA with the union. The justification for the union doing so is that if it did not do so it would remove important protections for workers’ pay and conditions. In effect it was submitted that a phoenixer would not pay for outstanding wages and entitlements unless a new EBA was granted. The CFMEU submitted that Darren Greenfield pressed hard for, and succeeded in,

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277 Submissions of the CFMEU, 29/10/15, pp 9-10, para 2(ix).
ensuring that outstanding wages and entitlements were paid. It might be retorted that at some point there must come a limit. It may be that the defence which the CFMEU offers has merit in relation to some phoenixers. It is impossible to see how it could have any merit in relation to a man with the unsavoury record and characteristics of George Alex.

210. But the fundamental difficulty in the CFMEU’s argument is that it is beside the point. Whether or not Darren Greenfield had any power in relation to enterprise bargaining decisions did not matter, so long as George Alex thought he did.

211. There is another CFMEU argument to be mentioned, for it parallels one of the claims made by the CFMEU in the arguments just considered. The argument was that there was evidence of ‘the huge amounts of money that Mr Greenfield was instrumental in recouping from the very person from whom it was said he was receiving bribes’. 278

212. The CFMEU submissions overrate Darren Greenfield’s success in this regard. As late as January 2014, relevant companies remained in breach of their obligations. Thus on 22 January 2014 an employee of ACIRT sent an email to Rita Mallia which stated that Active Labour had ‘effectively made no payments since the employees of Active payroll were transferred to them on 1 July 2013’. 279 The email pointed out that the only two attempts to pay money had led to the dishonouring of cheques. Even when payments had been made there is

278 Submissions of the CFMEU, 29/10/15, p 9, para 2(vi).
279 Parker MFI-1, 18/6/15, Vol 6, p 1541.
a want of evidence to show that this was initiated by or achieved solely because of Darren Greenfield. To the contrary, it seems that Rita Mallia and ACIRT played key roles in ensuring that entitlements were paid. In some instances payments were made by reason of repayment agreements between particular entities. Even if Darren Greenfield had some success, that is not inconsistent with the proposition that he also received secret commissions from George Alex.

‘Union stuff’ as code for money-skimming

213. The CFMEU put the following submission:\footnote{Submissions of the CFMEU, 29/10/15, paras 48-49.}

Text messages … indicate that on 28 November 2013 at 1:30pm Mr Alex informed Mr Antoun that he had sent a text to Jay (another partner in the business) asking Jay whether he had been taking Mr Alex’s $2,500. Mr Alex told Jay that Mr Antoun (Joe) had been chasing “2500 for union stuff”. Mr Alex told Jay that “they said” (“they” referring to at least Michael Cohen), that he, Jay, “had been taking that too”, i.e that Jay had been taking the “union stuff” too.

It is apparent from this text message that from as early as November 2013 Messrs Alex, Antoun and Jay too were aware that $2,500 for “union stuff” was code for skimming money out of the company.

The evidence is obscure. Perhaps for that reason, the submission is too. One construction is that it reveals one of the complaints being made by equity owners concerning the pilfering of money from the businesses. It is insufficiently clear that references to ‘union’ comprise a code for the regular skimming of money from the businesses.

\footnote{Submissions of counsel assisting, 20/10/15, Appendix I. See also Parker MFI-1, 18/6/15, Vol 5, pp 1183-1184, 1188-1189.}
214. Section 249B of the *Crimes Act 1900* (NSW) provides as follows:

(1) If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit:

(a) as an inducement or reward for or otherwise on account of:

   (i) doing or not doing something, or having done or not having done something, or

   (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

   in relation to the affairs or business of the agent’s principal, or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent’s principal,

   the agent is liable to imprisonment for 7 years.

(2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit:

(a) as an inducement or reward for or otherwise on account of the agent’s:

   (i) doing or not doing something, or having done or not having done something, or

   (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,
in relation to the affairs or business of the agent’s principal, or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent’s principal,

the firstmentioned person is liable to imprisonment for 7 years.

(3) For the purposes of subsection (1), where a benefit is received or solicited by anyone with the consent or at the request of an agent, the agent shall be deemed to have received or solicited the benefit.

A conclusion that a person has engaged in conduct of a criminal nature is a serious one, and should not be reached lightly. The evidence to support such a conclusion should be of a sufficiently high quality.\(^{282}\) For the reasons set out above, the evidence in the present case is of sufficiently high quality. The factual findings made are that:

(a) Darren Greenfield, an agent of the CFMEU, regularly received cash payments of $2,500 from George Alex and Joseph Antoun during 2013, and may have received other cash payments before that time;

(b) Darren Greenfield received that cash as an inducement or reward for showing favour to George Alex and Joseph Antoun and the businesses associated with them in relation to the affairs or business of the CFMEU, including facilitating the creation of new EBAs and not treating those businesses as

\(^{282}\) *Briginshaw v Briginshaw* (1938) 60 CLR 366.
aggressively as he otherwise would when they owed workers money;

(c) the impugned payments were corrupt according to normally received standards of conduct.\(^{283}\)

216. On that basis, the appropriate ultimate finding is that Darren Greenfield and George Alex may have committed offences under s 249B of the *Crimes Act* 1900 (NSW).

217. In addition, Darren Greenfield may have contravened the professional standards expected of him, including those set out in the CFMEU Code of Conduct for officials, which prohibits the receipt of gifts, rewards and inducements from employers.\(^{284}\)

218. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to the commencement of a prosecution of George Alex in relation to possible offences under s 249B of the *Crimes Act* 1900 (NSW).

219. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that

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\(^{283}\) *Mehajer v R* [2014] NSWCCA 167.

\(^{284}\) Parker MFI-1, 18/6/15, Vol 4, p 1027.
consideration can be given to the commencement of a prosecution of
Darren Greenfield in relation to possible offences under s 249B of the
Crimes Act 1900 (NSW).
Douglas Westerway

1. On 1 September 2014, Douglas Westerway gave evidence. He is an ex-police officer. He was then a project manager at a licensed builder. He has worked as an executive with both the scaffolding and the labour hire companies run by George Alex. He seemed to be a decent and intelligent man, testifying on these subjects with reasonable clarity and freedom, until he began to be questioned about a financial crisis in the business in May 2013. The transcript records the following:¹

Q. You had jobs on, didn’t you?
A. Yes.

Q. And you were being paid for those jobs?
A. Yes.

Q. So where was the money going?
A. The labour in the business was far too expensive and they weren’t getting the productivity they needed, so a big portion of it was going to labour.

Q. Were funds being taken out from time to time?
A. From the business?

Q. Yes.
A. Yes.

Q. Who was taking the funds out?
A. I’m not 100 per cent sure.

¹ Douglas Westerway, 1/9/14, T:17.1-19.7.
Q. You must have had some idea, working there?
A. I didn’t really have a great deal of control over the books or records at that stage.

Q. Did Mr Antoun take any funds out of the business?
A. I don’t know for sure.

Q. Did you suspect that that was the case?
A. I don’t remember, sorry.

Q. What about Mr Alex, did he take any funds out of the business?
A. I don’t know for sure.

Q. When you say you “don’t know for sure”, did you have a view that that was occurring?
A. Not directly.

Q. What do you mean “not directly”?
A. Well, I didn’t see a situation where money went out and I said, “I think George Alex took that out.”

Q. Were workers being paid things like super entitlements, tax and the like?
A. More often than not behind.

Q. What was the reason for that?
A. Lack of funds.

Q. Was it the case, though, that Mr Alex or Mr Antoun were taking funds out of those businesses?
A. I don’t know.

Q. Did you remain comfortable working in the business, or did you start to have concerns yourself?
A. I started to have concerns.

Q. What were the nature of your concerns?
A. That they were getting behind in payments, and that the systems being put in place to make sure people were paid weren’t being followed through.

Q. Were there any other things that occurred that gave you concerns about your continued employment in these businesses?

A. Not in May.

Q. What about in June?

A. I don’t remember the exact date, but in June Vasko Boskovski was murdered and that, obviously, gave me serious reservations about being there.

Q. What was Mr Boskovski’s involvement, if any, in the businesses?

A. Well, not the businesses of the scaffolding business, but he was a friend of Khaled Sharrouf’s and Bill Fatrouni’s.

Q. You had now become aware that Mr Fatrouni and Mr Sharrouf were people who were at George Alex’s house?

A. Yes.

Q. And that you had seen them visiting there when you’d been there?

A. Yes.

Q. Had there been some disputation or conflict, that you know of, between those persons and others?

A. Yes.

Q. What was the nature of that?

A. There was an argument over a debt collection.

Q. Did that, so far as you know, lead to some altercation or otherwise with Mr Boskovski?

A. I don’t know.

Q. In any event, that event occurred. And then did anything else happen that caused you to have concerns about remaining in that business?
A.  *Just generally the way it was being run.*

(emphasis added)

2. The passages to which emphasis has been added reveal some verbal dexterity on Douglas Westerway’s part. They also reveal considerable unease and evasiveness. His demeanour, too, was very troubled. There were often long and agonised pauses before he answered a question as he mulled over various competing but unattractive candidates for a response. And the testimony was replete not only with genteel euphemisms, but lies revealed by later testimony. One example is his evidence that he did not know for sure whether George Alex or Joe Antoun were taking funds out of the business. His later evidence was that $2,500 in ‘union payments’ were given to Joe Antoun each week and ‘they were just taking it off us and doing whatever they wanted with it’.²

3. The same impressions were left by his evidence after he testified that he had been beaten up by Joe Antoun in October 2013. This was no gentle rebuke. It occasioned two perforated eardrums requiring hospital treatment. He said that this attack was provoked by his refusal to supply Joe Antoun with money from the business. He had been asked for money from the business from the middle of 2013 as ‘a recurring pattern’.³ Then the transcript records:⁴

Q. But to your knowledge, from working in the business, was one of the factors that contributed to its demise in mid-2013, the fact that funds had been taken out and provided to third parties?

² Douglas Westerway, 1/9/14, T:35.44-36.5.
³ Douglas Westerway, 1/9/14, T:26.15-17.
⁴ Douglas Westerway, 1/9/14, T:26.27-42.
A. I think so.

Q. And do you know who the third parties were who had been provided that money?

A. No, I don’t.

Q. Do you suspect that those persons included Mr Antoun?

A. That would be speculation. I don’t know.

Q. Do you suspect that those persons included Mr Alex?

A. Again, the same thing. That would be purely speculation on my part. I just don’t know.

(emphasis added)

4. Counsel was entitled to ask Douglas Westerway for his suspicions. He refused to answer by falling back on a claimed lack of knowledge.

5. Similar evasions were employed by Douglas Westerway when he was asked about accounts showing payments of $2,500 per week to each of various ‘investors’ in a business described as ‘Elite Access Scaffolding NSW’. The questioning continued:5

Q. And then there is an entry, “Union payment $2,500”?

A. Yes.

Q. What was that, Mr Westerway?

A. Sorry, I missed that question?

Q. What was the union payment?

A. That was a payment that Joe Antoun would be given from Michael Cohen.

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5 Douglas Westerway, 1/9/14, T:33.16-35.29.
Q. And was that, to your understanding, to be passed on to officers of the CFMEU?
A. I don’t know what they did with the payment.

Q. Why did you call it “union payment”, Mr Westerway?
A. That was the phrase that Joe asked me to put in there.

Q. Did he tell you that he wanted money to be given to him in the amount of $2,500 a week?
A. Yes.

Q. Did he tell you what he was going to do with that money?
A. No, he didn’t.

Q. Did he tell you he was going to hand it over to persons in the union?
A. No, he didn’t.

Q. And is that that why you called it “union payment”?
A. I called it “union payment” because that’s what he told me to call it. I had to call it something.

Q. Your understanding was, was it not, that he was going to be handing that over to persons in the CFMEU?
A. I didn’t know what he was going to do with it.

Q. That was your understanding, was it not, Mr Westerway?
A. I didn’t know what the guy was going to do with it.

Q. How was that union payment made?
A. More often than not I would withdraw cash from the bank and I would give it to Michael Cohen who would then give it to Joe Antoun.

Q. Did Mr Antoun tell you that it was needed for some particular purpose?
A. He was very vague about what it was needed for.
Q. Did Mr Alex tell you that it was needed for a particular purpose?
A. No.

Q. Was it to keep the union on side?
A. I don’t know what it was for.

Q. Were these payments made out of the Elite bank account from time to time?
A. Yes.

Q. If we go to that spreadsheet, at page 446 it says “Union payment” for the week ending 13 September 2013?
A. Yes.

Q. If we go to page 505 of this bundle, there is a cheque butt. Is that your handwriting?
A. Yes.

Q. So you drew a cash cheque.
A. Yes.

Q. For Mr Kilic, and I take it that is short for “high-rise”, that looks like “high” and then a capital R?
A. Yes.

Q. And then “union $2,500”?
A. Yes.

Q. You drew a cash cheque, did you?
A. Yes.

Q. And you obtained $5,000?
A. Yes.

Q. Who did you hand it to?
A. I’m – again, I don’t remember that exact amount of money, that exact day, but I would have handed $2,500 to Michael Cohen and I presume I would have given Jay Kilic the other $2,500.

Q. To Michael Cohen to be handed on to Mr Antoun?

A. That’s correct.

Q. To be handed on to the union?

A. I don’t know where it went.

Q. Mr Westerway, you are describing it as $2,500 in your own handwriting on page 505 for the union.

A. Yes.

Q. You knew very well that the purpose of that payment was to be handed over to the union; that’s right, isn’t it?

A. I don’t know very well. I don’t know where it went.

Q. In your mind it was a payment to officers of the CFMEU; correct?

A. In my mind it was payment going to –

…

(emphasis added)

6. Then there was an objection. After it, the questioning continued:6

Q. I am not asking you what ultimately happened to the money, Mr Westerway. What I’m saying is, so far as you were concerned, on 13 September 2013 when you procured this sum of money, your understanding or belief was that it would be handed over by Mr Cohen to Mr Antoun to be passed on to persons at the CFMEU?

A. No, that’s not correct. I also had thoughts in my head that they were just taking it off us and doing whatever they wanted with it.

Q. Did Mr Antoun and Mr Alex ever tell you that it was important to maintain good relations with the union?

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6 Douglas Westerway, 1/9/14, T:35.44-36.24.
Q. They had quite a number of dealings with the union?

A. I don’t remember those exact words, but the first – the first question I agree with.

Q. Did they participate in the negotiations pursuant to which EBAs were obtained?

A. I don’t know.

Q. When they told you that they had good relations with the union, was that in the same conversations in which they asked you to provide – or directed you to provide $2,500 a week and describe it as “union payment”?

A. I don’t know if the two conversations were in the same conversation.

7. The first answer in that passage was calculated to appease whoever would be damaged by the evidence that the money would not stay in the hands of George Alex or Joe Antoun but be passed on as ‘union payments’, or bribes. It corresponds with the CFMEU ‘line’: that money extracted from Douglas Westerway and Michael Cohen on the pretence that it was going to the CFMEU or its officials was in fact pocketed by George Alex and Joe Antoun in transit. And to the ‘suspicion/knowledge’ evasion Douglas Westerway added its trusty ally, the ‘understanding/knowledge’ evasion.

8. Counsel assisting then took Douglas Westerway through numerous other payments of $2,500 described as ‘union payments’ on cheque butts. Douglas Westerway said that when the payments were not made George Alex or Joe Antoun would ask why the payment was not made.
He also said that the payments continued even after Joe Antoun’s murder on 16 December 2013. The evidence continued:

Q. Did you have any conversation with anyone, after Mr Antoun’s murder, about the continuation of the union payments?
A. I don’t remember.

Q. Did you wonder whether you should keep making these payments?
A. You’re asking me to remember something, you know, eight months ago. I don’t remember what I thought at that stage about it.

Q. In any event, you kept making the payments - -
A. Again, I don’t know if that was me or her.

Q. -- when Mr Antoun was murdered; was no longer with us?
A. Yes, he wasn’t, no.

Q. What was your understanding as to what was happening with the money by this stage, end of December?
A. No more than my understanding was previously. I had no idea where the money was going.

Q. Well, you had an idea, did you not? To your understanding, it was going to be paid to the union?
A. No, that’s not my understanding.

Q. When did the payments cease?
A. I don’t know.

Q. When did your involvement in the Elite business cease?
A. Pretty much after December. I stayed around and worked for Michael [Cohen] for a bit, but it was pretty uncomfortable.

(emphasis added)

7 Douglas Westerway, 1/9/14, T:49.38-50.23.
9. Again this evidence conveyed an appearance of evasiveness.

10. That appearance was fortified by the following testimony. Here a new distinction was introduced and a new journey undertaken – from having no knowledge, to assuming, to remembering the most common practice.

Q. I’m not asking you to look at any documents Mr Westerway. I’m asking you to cast your mind back to earlier this year and tell the Commission, on your oath, what happened about the payments that were made January/February described as “union payments”. Now, how did it work?

A. I don’t know.

Q. You don’t know?

A. No.

Q. Mr Westerway, you’ve agreed with me that you prepared the spreadsheets?

A. Yes.

Q. You were operating the account?

A. Yes.

Q. You were causing cash sums to be withdrawn from the account?

A. Yes.

Q. You were, in 2013, handing cash sums for the most part to Mr Cohen, to your understanding, to be handed on to Mr Antoun?

A. Yes.

Q. From time to time you were handing them to Mr Antoun?

A. Yes.

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8 Douglas Westerway, 1/9/14, T:52.39-54.23.
Q. These are cash sums designed as “union payments”?
A. Yes.

Q. I am now asking you about the period earlier this year, the first few months?
A. Yes.

Q. I’m asking you what was the practice in the period earlier this year?
A. Well, all I can say is you’ve shown me - -

Q. I’m not asking you to look at documents, Mr Westerway.
A. Okay.

Q. I’m saying cast your mind back, what was the practice?
A. I’m going to make an assumption because I don’t remember exactly the events you’re asking me about.

Q. What is the assumption?
A. That I would have given them to Mr Cohen, if we drew it out.

Q. What about the one on 20 December, is that what you did with it?
A. All I can tell you is that the most common practice was to give it to Michael and on a number of occasions I gave it directly to Joe Antoun.

Q. So you had no difficulty remembering that practice for the 2013 year; is that right?
A. Yes.

Q. But you have difficulty remembering what happened earlier this year?
A. You showed me a whole lot of transactions which made it easier to remember.

Q. I see. So, is it the case that you are tailoring your evidence according to what documents you are being shown, is that the position?
A. No. You are showing me things, that I wrote a bank cheque out and so I said, “Yes, I wrote it out.” “Would you have withdrawn it?”, and I said, “Most probably I would have.” If it’s an internet transaction, I said it could have been Karen or myself. If you’s asking me for specific evidence in February, and I tell you that I don’t recall those specific transactions, I’m just telling you what I remember.

(emphasis added)

11. That was Douglas Westerway’s explanation. Another possible explanation is that he was employing cautious tactics. He would make testimonial disclosures where they were compelled by the pressure of a document. But where there was no document with which he could be contradicted, he was not forthcoming. He was keen to avoid accusations by his enemies that he had provided the Commission with information it did not already have.

12. A little later Douglas Westerway gave evidence of a conversation in around the middle of 2013 in which Joe Antoun said: ‘I’ll need to be getting the $2,500 I need to, you know, cover things’. The evidence continued:9

Q. When he said “cover things”, what sort of things was he referring to?
A. I don’t know.

Q. But he must have, at some point, told you it was for union fees?
A. I don’t exactly remember the full conversation.

Q. Did he tell you the money would be used for the purposes of something connected with the union?
A. I think he inferred that. I don’t think he actually said it.

---

9 Douglas Westerway, 1/9/14, T:56.31-57.23.
Q. How did he infer it?

A. The way these guys always did. They speak around things. They talk about taking care of things, you know, “George has a lot of expenses. You can’t expect him to kind of – you know, he takes care of this business. You can’t expect him to be just, you know, managing on $2,500 a week. You guys understand that.” You know, “We’ve got a lot of things we deal with.” You know, just all that kind of round the topic discussions. They’re very good at that.

Q. Was it your understanding that he was saying you needed to keep the union on side?

A. I think it probably was.

Q. Did he tell you what precisely you’d be getting for the $2,500 that was going to the union?

A. No.

Q. But he didn’t point to any legitimate basis for paying $2,500 to the union, did he?

A. No.

Q. So far as you understood it, that money was to be used to ensure that you didn’t have any difficulties with the union; is that right?

A. No. I don’t know what they were using it for.

( emphasis added )

13. Again there is a mixture of vagueness, evasion and preparedness to give evidence implicating Joe Antoun in union bribery, but only up to a point.

14. What was the cause of Douglas Westerway’s testimonial haziness? Why was he so taciturn? Did he have a fear of reprisals if he were more forthcoming? He was asked whether any threats had been made
to him since Joe Antoun beat him up in October 2013. He answered affirmatively. Then he said:

Q. What has happened?

A. I’ve had plenty – not plenty. I’ve had situations where people have walked up to me in the street, walked up to me in coffee shops; when I was buying a sandwich once in Burwood and, essentially, just warned me.

Q. Tell me about that particular incident. What actually happened?

A. I don’t remember the exact date. It was before Christmas in 2013 and this bloke just walked up and he said, “You’re a smart-arse, aren’t you?” I didn’t even turn around. I thought, “Here we go.” I just ignored him, and he said, “I told you you’re a smart-arse, aren’t you?” He said, “Don’t fuck around with that business, it’s not your business to fuck around with. This is your last warning.”

Q. Have any incidents taken place closer to the time that you’ve been, or closer to the present time?

A. I’ve had phone calls. I’ve had text messages.

Q. Do you know where these are coming from?

A. No.

Q. Anything else?

A. No.

Q. Has anyone warned you about giving evidence to this Commission?

A. No.

Q. What has the nature of the warning been?

A. What do you mean?

Q. What is the nature of these threats that you are getting, then? What is being put to you?

10 Douglas Westerway, 1/9/14, T:57.31-58.23.
A. That I’m trying to manage a business with Michael Cohen, not in the best interests of other people, and that that’s – I should stop doing it and, you know, step away from it.

15. That denial of a link between the threats and his testimony is inherently unconvincing.

Michael Cohen

16. Michael Cohen was brought up in South Africa. He worked in the United Kingdom for about six years and became involved in scaffolding. Since 2006 he has run scaffolding businesses in Australia. In 2012 he began dealing with George Alex and Joe Antoun in the Elite Scaffolding business. He had known Darren Greenfield since 2010, before he went to the CFMEU. He saw Darren Greenfield at George Alex’s house. He saw Brian Parker there once. He also saw Tommy Mitchell there, though he was not with the CFMEU at that time. And he saw Richie Auimatagi. He also saw Khaled Sharrouf, Bilal Fatrouni and Abuzar Sultani.

17. He was shown the Elite Holdings documents referring to “union fees”. Then he gave the following evidence:11

Q. It is correct, is it, that a sum of $2,500 was being paid by Elite Access each week in an amount described as a “union payment”?

A. It didn’t go directly to the union.

Q. How was it paid?

A. I used to give that money to Joe Antoun.

11 Michael Cohen, 1/9/14, T:83.5-86.38.
Q. In cash?
A. Cash mostly, yes, the majority of the time.

Q. And to your understanding he was handing it over to the union?
A. No, mate. No. *Not really.*

Q. Well, why did Elite Access – I withdraw that. Did you have a conversation with any person about Elite starting to make payments of this kind?
A. To the union?

Q. Yes.
A. No, I never.

Q. You were involved in running Elite; you were the director?
A. Correct.

Q. And you knew that it was making a payment described as a “union payment” every week; that’s right?
A. That’s correct.

Q. And in fact you were handing over the cash to Mr Antoun; correct?
A. That’s right.

Q. How did that arrangement start? Who did you discuss it with?
A. Joe Antoun discussed that with myself.

Q. When was that?
A. Probably the time of Elite – novating the contracts into the new Elite – Elite Access Scaffolding.

Q. So around about mid-2013?
A. Yes, about then.

Q. Had the old Elite business been making payments of $2,500 to Mr Antoun designated as “union payment”?
A. *Not that I recall, no.*

Q. Well, it is something that you would recall, isn’t it?

A. *No, it isn’t.*

Q. In any event, you had a discussion with Mr Antoun, did you, about starting to make these payments; where were you when you had that conversation?

A. That would have been at George’s house in Burwood.

Q. Well, would have been or you actually remember it?

A. It was. It was.

Q. Who else was present?

A. It would have been George and Joe.

Q. And you, yourself. Anyone else?

A. Not that I can recall.

Q. Doing the best you can, what did Mr Antoun say to you?

A. He just asked me to get a sum of $2,500 to him a week on top of dividends, shareholder dividends.

Q. Did he tell you that that was money that had to be given to the union?

A. He never mentioned that to me.

Q. You then started designating them as “union payments”, correct?

A. Well, I never did, no. This isn’t my document so - -

Q. You say, what, you never recorded any payments as union payments yourself?

A. That’s correct.

Q. Just remember what I said earlier, Mr Cohen, about the necessity to give truthful evidence in this Commission; you remember we had that discussion.

A. Yes, I do.
Q. And I want you to think carefully about your answers before you give them.

A. Sure.

Q. You had a discussion with Mr Antoun and he said he wanted $2,500 in addition to the investor payments. Did he tell you that that money was to be given to the union?

A. He could have told me that.

Q. Did he tell you that that money was to be given to the union?

A. Mate, he could have told me that, yes.

Q. And is that the reason the payments were classified as “union payments” in the accounts?

A. To be honest with you, I’m not sure why it was classified like that in the accounts. There was money going left, right and centre to the shareholders, so - -

Q. To your understanding, Mr Cohen, the $2,500 weekly payment was to be handed to Mr Antoun and thereafter to be given to persons at the CFMEU, that’s right, isn’t it?

A. Could have been.

Q. To your understanding the payment of $2,500 that you were handing to Mr Antoun each week was to be given by him to officials of the CFMEU; that’s right, isn’t it?

A. I was just told to give it to Joe Antoun. That’s the reason I did so.

Q. I’ll ask you again.

A. I wouldn’t – I wouldn’t - -

Q. To your understanding, Mr Cohen, the payment of $2,500 that you were handing to Mr Antoun each week was to be given to the CFMEU; that’s right, isn’t it?

A. To my understanding.

Q. That’s right, isn’t it?

A. Correct.
Q. You arrived at that understanding because that’s what Mr Antoun told you?
A. That’s correct.
Q. And he told you that in the presence of George Alex; correct?
A. Correct.
Q. Did you talk to Mr Westerway about these records being kept?
A. No, I never.
Q. Did you tell him to record them as union payments?
A. No, I never.
Q. He wasn’t present at this conversation that you had with Mr Alex and Mr Antoun, though, you’ve told us?
A. He could have been. I don’t remember. It’s a long time ago, I’m sorry.
Q. Well, it wasn’t that long ago, was it? It was about mid last year?
A. In the normal day-to-day running of a business, it’s a long time ago.
Q. Was Mr Kendrovski involved in the day-to-day running of the business?
A. Towards the end he was.
Q. Did he ever withdraw any cash to give to Mr Antoun or Mr Alex?
A. He could have done so. Otherwise what?
Q. You have given evidence that you provided the money to Mr Antoun with a certain understanding. Did you, yourself, make any payments to the union?
A. Myself, never. Never.
Q. Did you ever make a payment to Mr Greenfield?
A. Never.
Q. Are you sure, Mr Cohen?
A. The only thing I would have ever given Darren money for is for the union memberships which I think you’ll see in the bank accounts came up to – once was $7,000, I think there was a cheque, and the next time could have been 14,000 for the boys’ membership, the union memberships.

(emphasis added)

18. There is considerable movement in this testimony. Initially it was said that there had never been a mention of money being given to the union. Then the possibility that there was was conceded. Then his understanding that there was was conceded. Then he said he arrived at that understanding because of what Joe Antoun told him. There was also a sudden movement from denying any payment to Darren Greenfield to admitting payments, though only for union memberships. Later he said he could not recall giving union payments to Darren Greenfield; then he denied doing so.12

19. His attention was then drawn to a cheque on which he had written ‘Darren Greenfield – CFMEU’. He was asked:13

Q. Well, it says on this occasion you have actually drawn it. You have written on the back of the cheque, “Darren Greenfield”, and that’s because when you wrote out that on the back of the cheque, you intended that on 17 October 2013, that the sum of $2,500 be paid to Darren Greenfield; correct?

A. Could have been.

Q. You expected, on 17 October 2013, that the sum of $2,500 would be paid to Darren Greenfield; correct?

A. I gave the money to Joe Antoun and whatever he did - -

12 Michael Cohen, 1/9/14, T:91.10-17.
13 Michael Cohen, 1/9/14, T:92.41-96.5.
Q. I'd like you to answer my question, please, Mr Cohen. You expected on 17 October 2013 that the sum of $2,500 was going to be paid to Darren Greenfield?

A. It could have been paid anywhere. I’m sorry.

Q. Well, Mr Cohen, you’ve written in your own handwriting, “Darren Greenfield CFMEU”?

A. That’s correct. It’s crossed out there. It’s crossed out.

Q. Yes, that’s because someone else has made some changes on the documents. Do you recognise the handwriting of, “2 times investor dividends”?

A. That’s my handwriting.

Q. No. The lighter writing, whose is that? It looks like a different hand?

A. Couldn’t tell you.

Q. And then the word “fees” just above it in, it looks like, a different hand, who’s is that?

A. Couldn’t tell you.

Q. In any event, on 17 October 2013, you expected that the sum of $2,500 would be paid by Mr Antoun to Mr Greenfield; correct?

A. That’s incorrect.

Q. And that is precisely why you’ve written that information on the back of the cheque; correct?

A. It’s been crossed out there, sir.

Q. That is why you wrote that information on the back of the cheque; correct?

A. I gave Joe Antoun the money, the $7,500, and I’m not too sure what he’s done with it.

Q. Well, you knew very well what he’d done with it, don’t you, Mr Cohen?

A. That’s not correct.
Q. He was paying it over to the unions, that’s what you expected and intended would be the case?
A. *I can’t say. I would be speculating if I said that, sir, I’m sorry.*

Q. You expected and intended that that would be the case; correct?
A. *Sorry, no.*

Q. And you did that to achieve good relations with the union; correct?
A. That’s incorrect.

Q. You regarded it as part of the cost of doing business, that you would pay $2,500 to the union?
A. *It’s incorrect, sir. I’d be speculating, sorry.*

Q. No, I’m not asking you to speculate about what happened afterwards. I’m saying that - -
A. But I would be because I don’t know where that money went.

Q. From your point of view, Mr Cohen, just focus on that for the moment, you are operating a business called Elite; correct? And you regarded it as a cost of doing business that you would need to pay $2,500 to the union each week; correct?
A. That’s what Joe told me to, then yes, I’d say so.

Q. When you say that’s what Joe told you to, that was your understanding and expectation at the time, that it was a cost of doing business with the CFMEU; correct?
A. That’s what Joe instructed me then, yes, that’s correct.

Q. Well, that was your understanding at the time.
A. Yeah, if that’s what Joe’s told me, yes, correct.

Q. Is this practice of paying sums to the union still continuing?

... 

Q. Is your practice of paying sums to either Mr Alex, or anyone else, continuing?
A. No.

Q. When did it cease?
A. I would say just after Joe’s death. I’m not too sure of the date.

Q. It was certainly continuing until early this year, wasn’t it?
A. Not that I recall. If there’s – if there’s proof of that in the bank statements. But not that I recall. I know after Joe’s death it would have ceased.

Q. Did you have some conversation with anyone about it ceasing?
A. No, not really.

Q. Did you speak to Mr Alex about it?
A. No, I never.

Q. What do you mean, no, you never? You did have conversations from time to time with Mr Alex about this?
A. Correct.

Q. But you didn’t have a conversation with him after Mr Antoun’s death, is that what you say?
A. That’s right.

Q. From time to time were payments made late, the union payments?
A. For memberships or?

Q. No, the union payments that you were making to Mr Antoun, from time to time were you late making them?
A. The money I gave to Joe Antoun, yeah, it could have been late, yes.

Q. And did Mr Antoun or Mr Alex chase you up about it?
A. Not that I recall, no.

Q. Might they have chased up Mr Westerway about it, or don’t you know?
A. I’m not too sure of that.

Q. Why did the payments cease after Mr Antoun’s death?

A. They just did when money got tight. None of the shareholders got any dividends. No money went out to anyone, really.

Q. So is it the position that the company simply couldn’t afford to keep making the payments?

A. I’d say so, yes.

(emphasis added)

20. Again there is a movement. First he denied an expectation that the $2,500 cheque with Darren Greenfield’s name on it was to be paid to him. Then he said that that would be speculating. Then he said that paying $2,500 per week to the union was the cost of doing business in his understanding. Then he said that understanding was based on what Joe Antoun told him.
## CHAPTER 7.3

### DONATIONS & EBAS

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A – INTRODUCTION

1. This Chapter deals with two interrelated issues concerning the Construction, Forestry, Mining and Energy Union (CFMEU), Construction and General Division, New South Wales Divisional Branch (CFMEU NSW). Those issues are:

(a) whether the CFMEU NSW, under the leadership of the current Secretary, Brian Parker, improperly obtained and/or managed donations from Jianqiu Zhang and his group of companies; and

(b) whether the CFMEU, Brian Parker, and Yulei Zhou, an organiser with the CFMEU NSW, may have committed criminal offences against the Charitable Fundraising Act 1991 (NSW).

2. The submissions of counsel assisting set out below are accepted.

3. In summary, for the reasons that follow, each of the CFMEU, Brian Parker and Yulei Zhou may have committed a number of criminal offences against the Charitable Fundraising Act 1991 (NSW).

4. This Report and all relevant materials have been referred to the Minister administering the Charitable Fundraising Act 1991 (NSW), being the Minister for Innovation and Better Regulation, in order that consideration be given to conducting an inquiry pursuant to Division 1 of Part 3 of that Act into all of the CFMEU NSW’s practices concerning charitable fundraising.
B – DONATIONS FROM JIANQIU ZHANG’S GROUP OF COMPANIES

5. Jianqiu Zhang is currently a director of more than forty Australian companies.1 A number of these companies work cooperatively within the construction and development sectors, and are referred to as ‘JQZ’.2 The JQZ website3 describes past and current developments with an estimated total value of more than $2 billion.4 JQZ is described as ‘a successful Sydney based property development company with [its] own in-house building business established solely to undertake [its] construction works’. It has ‘grown substantially’ since its inception to become ‘one of New South Wales’ most prestigious Australian-Chinese based providers of development and construction services’.

6. The description on the website accords with descriptions given by witnesses in their testimony to the Commission. Brian Parker stated that Jianqiu Zhang was ‘getting very large these days. He’s starting […] building units’.5 Nick Cai, himself the director of a successful business supplying plasterboard and other building materials, stated that Jianqiu Zhang has ‘a lot of big job sites’ and ‘he’s a quite well-

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1 CFMEU MFI-8, 1/10/15, pp 13-30. These include SPC Building Constructions Pty Ltd, Concourse Constructions Pty Ltd, JQZ Holdings Pty Ltd (formerly Tong International Pty Ltd), JQZ Group Pty Ltd and Southpac Constructions Pty Ltd.
2 CFMEU MFI-8, 1/10/15, pp 1, 3, 4, 7, 12.
3 CFMEU MFI-8, 1/10/15, p 1. Note: website reproduced as at 27/9/15.
4 CFMEU MFI-8, 1/10/15, p 3 and the webpages cited therein.
5 Brian Parker, 1/10/15, T:78.37-38.
known person in the society’. Nick Cai further stated ‘[Jianqiu Zhang] is a – not just a developer, he is a big developer, he’s probably the biggest now so far on the market in the Chinese developer […] probably of whole Australia’.7

Jianqiu Zhang’s companies do not have a CFMEU EBA

7. None of Jianqiu Zhang’s companies are party to a CFMEU NSW enterprise agreement/enterprise bargaining agreement (EBA). Jianqiu Zhang gave evidence to the effect that neither Brian Parker nor Yulei Zhou nor anyone else from the building union had discussed with him the idea of any his companies entering into an EBA.8

8. When questioned about the topic, Brian Parker stated that he would not even enter discussions with Jianqiu Zhang about whether or not he should be entering into an EBA because ‘I think he’s got about three employees. The bulk of his employees on his sites are all subcontractors’.9 He further stated: ‘Why would I want to enter into an EBA with Mr Zhang? […] When he only has three employees. If he builds his employees up further, we would enter into an EBA with him.’10 Whilst at one point Brian Parker also conceded that the CFMEU NSW does enter into EBAs with builders with Jianqiu

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6 CFMEU MFI-13, 2/10/15, p 44.14-18.
7 CFMEU MFI-13, 2/10/15, p 45.11-17.
8 CFMEU MFI-9, 1/10/15, pp 15.5-16.9.
9 Brian Parker, 1/10/15, T:78.43-45.
10 Brian Parker, 1/10/15, T:78.47-79.4.
Zhang’s type of business, he then reiterated ‘the fact of the matter is he doesn’t employ a lot of labour’.\(^{11}\)

9. Yulei Zhou provided a similar reason for not having spoken to Jianqiu Zhang about whether or not his companies should enter an EBA with the CFMEU. He stated: ‘I think in terms of putting in place an enterprise bargaining agreement, it does require a large number of workers. Say, for instance, for gyprockers, you would be looking at 10, 20 or 30.’\(^{12}\) He maintained that apart from the managers, supervisors or work leaders, there were not many labourers or ordinary workers directly employed by Jianqiu Zhang’s companies, and that workers he spoke with told him they worked under different contractors.\(^{13}\)

10. Counsel assisting submitted that contrary to the unequivocal statements of Brian Parker and Yulei Zhou, the companies in question appear to have had significantly more employees on various sites during the relevant period.

11. In support of this submission, counsel assisting relied on a bundle of documents produced to the Commission by JQZ Holdings Pty Limited (\textit{JQZ Holdings}) and related entities after the public hearing in relation to this case study in October 2015. Those documents disclosed that Southpac Constructions Pty Ltd (\textit{Southpac}), SPC Building Constructions Pty Ltd (\textit{SPC Building}), Concourse Constructions Pty Limited (\textit{Concourse}) and JQZ Group Pty Ltd each had a number of

\(^{11}\) Brian Parker, 1/10/15, T: 79.8-9.

\(^{12}\) Yulei Zhou, 1/10/15, T: 31.27-44.

\(^{13}\) Yulei Zhou, 1/10/15, T: 32.32-42.
employees, whose arrangements are discussed in further detail below.\textsuperscript{14} The bundle of documents produced by JQZ Holdings and related entities will hereafter be referred to as the \textit{JQZ Employee Records}.

12. Brian Parker submitted that it would be unsafe to rely on those records, because they were not source records and were not explored in evidence, let alone put to Brian Parker or Yulei Zhou.\textsuperscript{15} These points have no force. The records are extracts from the accounting records of the respective companies produced by those companies. Further, there was no need to put the documents to Brian Parker or Yulei Zhou in evidence. There was no point in doing so. Inevitably they would have denied knowledge of them.

13. The records of two of the companies produced as part of the JQZ Employee Records – JQZ Group Pty Ltd and Tong International Pty Ltd\textsuperscript{16} – suggest that those two entities primarily employ staff in office and project manager roles.

14. The JQZ Employee Records show that at least three companies of which Jianqiu Zhang was a director each employed numerous workers who would apparently have been eligible for membership of the CFMEU; namely Southpac,\textsuperscript{17} SPC Building\textsuperscript{18} and Concourse.\textsuperscript{19} Cumulatively, the payroll activity summaries for these companies list

\textsuperscript{14} CFMEU MFI-17, 20/10/15.
\textsuperscript{15} Submissions of Brian Parker, 28/10/15, paras 21-25.
\textsuperscript{16} Tong International Pty Ltd is now registered as JQZ Holdings Pty Limited (see CFMEU MFI-8, 1/10/15, p 38), but it still appears to keep some records under its former name.
\textsuperscript{17} CFMEU MFI-17, 20/10/15, pp 1-13.
\textsuperscript{18} CFMEU MFI-17, 20/10/15, pp 14-35.
\textsuperscript{19} CFMEU MFI-17, 20/10/15, pp 36-41.
just over 100 employees and their employment details include job titles such as ‘labourer’, ‘hoist operator’, ‘crane driver’ and ‘forklift driver’. Some of the workers were employed for extremely short periods of time. However, some were not. Counsel assisting was correct to submit that the records are clearly inconsistent with Brian Parker’s repeated assertion that Jianqiu Zhang only had around ‘three’ employees.20

15. For example, the payroll records for just one of these companies, SPC Building, lists 58 employees who had commenced since March 2012.21 Of those, 38 were casually employed.22 A number of these employees appear to have worked for very short periods of time. However, of the people who worked for the company for a significant period (approximately 3 months or more), a number were paid less than the hourly rate which was provided for in CFMEU NSW EBAs signed by an unrelated company (Foxville Projects Group (NSW) Pty Ltd (Foxville)).23 Between February and October 2014 one casual labourer was employed by SPC Building with an hourly rate of $18.31.24 Under a CFMEU EBA signed by Foxville, the most junior category of construction worker (CW) appears to have been entitled to be paid an hourly rate of between $26.67 and $27.20, together with other entitlements, during the same period of time.25 This was not an

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20 Brian Parker, 1/10/15, T:78.43-44, 79.3, 80.27-29.
21 CFMEU MFI-17, 20/10/15, pp 14-35.
22 CFMEU MFI-17, 20/10/15, pp 14-26.
24 CFMEU MFI-17, 20/10/15, p 16.
25 CFMEU MFI-1, 1/10/15, p 639.
isolated example from SPC Building. Other casual labourers have been paid as little as $17 per hour by SPC Building. These included one who was employed between September 2012 and January 2013, at which time the Foxville EBA would apparently have entitled the most junior category of CW to be paid between $25.08 and $25.61 per hour.

16. Similar illustrations appear in the documents regarding Southpac and Concourse. For example, one casual labourer was employed by Southpac on an hourly rate of $18 for a period of approximately seven months between 2012 and 2013. Under a contemporaneous CFMEU EBA signed by Foxville, the most junior category of construction worker (CW1) apparently would have been entitled to be paid an hourly rate of between $25.08 and $26.14, together with other entitlements, during the same period of time. Similarly, a forklift driver who is still employed by Concourse has an hourly rate of $22. Pursuant to a CFMEU EBA recently signed by Foxville, some forklift operators would be entitled to hourly rates as CW5, in circumstances where the applicable hourly rate for an employee of that level would be

26 CFMEU MFI-17, 20/10/15, pp 14, 17, 18, 20-22, 25.
27 CFMEU MFI-17, 20/10/15, p 18.
28 CFMEU MFI-1, 1/10/15, p 638.
29 CFMEU MFI-17, 20/10/15, p 5.
30 CFMEU MFI-1, 1/10/15, p 638.
31 CFMEU MFI-17, 20/10/15, p 36.
between $33.70 and $36.29 for the period in question.\textsuperscript{32} Incidentally, this Foxville EBA was signed by Brian Parker.\textsuperscript{33}

17. In a statement published on the CFMEU website dated 27 January 2014, Brian Parker is quoted as having said:\textsuperscript{34}

   The CFMEU represents the interests of workers in the construction industry and we strive to attain the best wages and conditions for them.

18. Counsel assisting submitted that these facts raise two questions. Why did Jianqiu Zhang’s group of companies have no CFMEU EBA? Why, in these circumstances, have Jianqiu Zhang’s companies made a large number of donations to the union?

**Jianqiu Zhang’s companies: donations to the CFMEU**

19. In respect of that second question, the evidence showed that some of Jianqiu Zhang’s companies made a number of donations to the CFMEU NSW, or to organisations or people suggested by officers of the CFMEU NSW, between April 2011 and April 2015.\textsuperscript{35} The donations include:

   (a) $2,200 on 1 April 2011 by Southpac, which was described on the CFMEU NSW receipt as being for ‘Safety Industry Dinner 11 10 x tickets’;

\textsuperscript{32} CFMEU MFI-1, 1/10/15, pp 698, 700, 761.  
\textsuperscript{33} CFMEU MFI-1, 1/10/15, p 696.  
\textsuperscript{34} Parker MFI-1, 18/6/15, Vol 7, p 1563A.  
\textsuperscript{35} CFMEU MFI-8, 1/10/15, pp 68-87.
(b) $3,000 on 19 September 2012 by Southpac, which was described on the CFMEU NSW receipt as being for ‘Bankstown Fire Tragedy Donation’;

(c) $5,000 on 19 October 2012 by Southpac, which was described on the CFMEU NSW receipt as ‘Picnic Donation’, with the original word ‘membershi’ (sic) crossed out;

(d) $1,500 on 7 December 2012 by Southpac, which was described on the CFMEU NSW receipt as being for ‘Fighting Funds Donation’;

(e) $30,000 on 14 March 2013 by Southpac, which was described on the CFMEU NSW receipt as being for ‘Fighting Fund Donation’;

(f) $2,310 on 9 April 2013 by SPC Building, which was described on the invoice as being for ‘1 x Table for 10 Safety Dinner 2013’;

(g) $12,000 on 26 August 2013 by SPC Building, which was described on a CFMEU NSW tax invoice as being for ‘2013 picnic sponsorship’;

(h) $2,000 on 13 December by SPC Building, which was described on the CFMEU NSW receipt as being for ‘Fighting Fund Donations’;
(i) $30,000 on 13 December 2013 by SPC Building, which was described on the CFMEU NSW receipt as being for ‘Fighting Fund Donation’;

(j) $10,000 on 25 August 2014 by SPC Building, which was described on the CFMEU NSW receipt as ‘Friends of Sinn Féin Donation’; a tax invoice issued by Cairde Sinn Féin Australia describes the donation as ‘Uniting Ireland: Sinn Féin Australian Speaking Tour 2014 with Mary Lou McDonald TD and Francie Molloy MP, Contribution to tour travel costs’; and

(k) $20,000 on 8 December 2014 by SPC Building, which was described on a CFMEU NSW tax invoice as ‘being for 2014 Industry Picnic Sponsorship’.

20. Jianqiu Zhang’s evidence in relation to these donations was vague in every respect. In part, that vagueness may have resulted from the fact that his evidence was given through an interpreter and it was apparent from his demeanour and the way he answered questions that he spoke little English. Jianqiu Zhang and other witnesses gave evidence that he only spoke with representatives from the CFMEU NSW other than Yulei Zhou through an interpreter – either Yulei Zhou or someone whom Jianqiu Zhang arranged himself.36 But even accounting for possible language difficulties, Jianqiu Zhang could remember very little about why he had given a considerable number of donations to the union.

36 CFMEU MFI-9, 1/10/15, p 12.29-32; Yulei Zhou, 1/10/15, T:22.35-37; Brian Parker, 2/10/15, T:92.33-34, 99.45-47.
21. When asked why he had given donations to the CFMEU NSW, Jianqiu Zhang first stated that he could not remember why he had done so, but he remembered participating in some events and ‘donating $1,000, $2,000, something like that’.\(^{37}\) When asked if he had ever donated an amount of $30,000 to the building union he stated he could not really remember.\(^{38}\) When shown documents evidencing the donations from his companies he still could not remember what the payments were for.\(^{39}\)

22. When Jianqiu Zhang was asked about a donation of $30,000 to the fighting fund on 14 March 2013 he stated ‘No, I don’t remember anything. I know that this is for the Union, but as to what purpose or to what division of the Union, I really have no idea.’\(^{40}\) Jianqiu Zhang stated he had no idea what ‘Fighting Fund’ meant.\(^{41}\) When asked whether he expected any benefit or privilege or favour from the Union in return for making the donations, he stated: ‘The only thing we need is the important regulations and safety concerns, and the Union will do – will perform its duty to help us in this regard, and what they do exactly is not my concern and I do not know anything about.’\(^{42}\)

\(^{37}\) CFMEU MFI-9, 1/10/15, p 16.15-19.  
\(^{38}\) CFMEU MFI-9, 1/10/15, p 16.45-47.  
\(^{39}\) CFMEU MFI-9, 1/10/15, p 17.20-18.2.  
\(^{40}\) CFMEU MFI-9, 1/10/15, p 18.37-42.  
\(^{41}\) CFMEU MFI-9, 1/10/15, p 19.3-17.  
\(^{42}\) CFMEU MFI-9, 1/10/15, p 19.26-32.
23. As to the donation to Sinn Féin for $10,000, Jianqiu Zhang stated he had no idea who Sinn Féin were, and could not remember why his company paid the money.  

24. Much of Jianqiu Zhang’s evidence is not believable.

25. Yulei Zhou gave the following evidence about the donations that he collected:

(a) He collected the $3,000 donation on 19 September 2012 for the ‘Bankstown Fire Tragedy’ from Jianqiu Zhang. His evidence was to the effect that the donation was to assist overseas Chinese students injured in a unit fire in Bankstown.

(b) He collected the $1,500 ‘Fighting Funds’ donation on 7 December 2012 from Jianqiu Zhang. He could not recall the purpose of the donation.

(c) He collected the $30,000 ‘Fighting Fund’ donation on 14 March 2013 from Jianqiu Zhang. He could not recall the purpose of the donation, only that he thought he was asked to seek a donation from his ‘leaders’.

(d) He collected a $30,000 ‘Fighting Fund’ and $2,000 ‘Fighting Fund’ donation on 13 December 2013 from Jianqiu Zhang.

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43 CFMEU MFI-9, 1/10/15, p 20.8-20.
44 Yulei Zhou, 1/10/15, T:39.33-40.16.
45 Yulei Zhou, 1/10/15, T:40.44-41.20.
46 Yulei Zhou, 1/10/15, T:41.26-42.30.
47 Yulei Zhou, 1/10/15, T:41.33-46.
His evidence was to the effect that the $2,000 donation was a Picnic Day donation and the $30,000 donation was for a safety campaign in relation a crane tower.48

(e) He also collected $10,000 from Jianqiu Zhang on 25 August 2014 for ‘Friends of Sinn Féin’. Yulei Zhou said that ‘[t]his was something that I did upon request of my Secretary and I went and collected the – collected it’.49

26. Brian Parker’s evidence was that from the first time he ever met him, Jianqiu Zhang ‘always said that, you know, “If the Union requires me to make a donation to assist you with any issue that you think is going to help the industry, well, I will.”’50 When asked why Jianqiu Zhang made donations in the realm of $30,000, Brian Parker suggested that he had done so because he wanted to contribute to decent safety in the industry.51 In relation to the two $30,000 donations made by Jianqiu Zhang, Brian Parker’s evidence was to the effect that:

(a) the $30,000 donation on 14 March 2013 was for the purpose of employing a person to assist in improving crane safety and in educating and raising awareness about crane safety issues at a time when there was a problem in the industry concerning crane safety;52 and

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49 Yulei Zhou, 1/10/15, T:43.27-30.
50 Brian Parker, 1/10/15, T:85.19-26.
51 Brian Parker, 1/10/15, T:87.27-33.
52 Brian Parker, 2/10/15, T:91.31-93.11, 94.12-15.
the $30,000 donation on 13 December 2013 was for the purpose of raising funds for Mates in Construction, which is an organisation directed towards suicide prevention in the construction industry.  

CFMEU NSW’s accounting records

27. More light is shone on the purpose of some of the donations by the CFMEU NSW’s general ledgers.

28. Each of the donations was deposited in the CFMEU NSW’s ‘Trading Cheque Account’. It is apparent from a comparison between the general ledger and bank statements that this account is an account with the Commonwealth Bank of Australia with account number 06 2194 10127561. This is the union’s general trading account. Items of income deriving from a range of sources of income are deposited into it. Wages and a range of expenses are paid out of it.

29. In relation to each of the $30,000 donations about which Yulei Zhou and Brian Parker gave evidence:

(a) As to the first amount of $30,000, the ledger records a deposit of $30,000 on 20 March 2013 to the Trading Cheque Account with details of ‘SOUTHPAC MIC’. The inference is that this is the donation for Mates in Construction which Brian Parker was referring to and not the December 2013 donation as he

54 CFMEU MFI-16, 20/10/15, pp 13-32.
thought. The deposit is recorded as a credit to the ‘Contra – General’ ledger account. That ledger account also appears to reflect a number of other donations for Mates in Construction around March 2013 and July 2013, totalling $51,300. There is a debit to the ‘Contra – General’ ledger account recorded on 31 July 2013 for $6,709.09 apparently for a ‘TRADING MIC DINNER’ and a debit on 13 May 2014 of $44,590.91 with the detail ‘MIC’, which together total $51,300.55.

(b) As to the second amount of $30,000, the ledger account records a deposit of $30,000 on 16 December 2013 to the Trading Cheque Account with details ‘SPC BUILDING’. The deposit is recorded as a credit to the ‘CFMEU Fighting Fund’ general ledger account. There is no other obviously relevant ledger entry for expenditure in relation to crane safety programs.

Conclusions

30. Counsel assisting submitted that the evidence supported the conclusion that some of the donations made by Jianqiu Zhang were solicited and used for a legitimate purpose. That submission, which was not challenged, is accepted.

31. Counsel assisting went on to submit that it was an available inference from the circumstances surrounding the making of other payments by

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55 CFMEU MFI-16, 20/10/15, pp 5, 8.
56 CFMEU MFI-16, 20/10/15, p 25.
Jianqiu Zhang that the payments were made in return for the CFMEU NSW agreeing not to seek to enter into EBAs with Jianqiu Zhang’s companies. It was submitted that it was somewhat extraordinary that Jianqiu Zhang would have made a $10,000 donation to the ‘Friends of Sinn Féin’ in circumstances where he did not know who Sinn Féin were and Yulei Zhou said he was simply following Brian Parker’s orders in obtaining the donation. However, on the state of the current evidence, it was not possible to exclude the possibility that Jianqiu Zhang made the donations voluntarily and without any intention to influence or seek to influence an officer of the CFMEU NSW to show him, or his companies, favour.

32. Brian Parker made a number of submissions devoted to the proposition that the Commission should not draw any adverse inferences, let alone make any adverse findings, against the union, let alone himself, in relation to their dealing with Jianqiu Zhang.57

33. Brian Parker also submitted that nothing could be taken from the payment to the Friends of Sinn Féin and that it might have been to assist the union in the industry or in relation to safety regulations or concerns.58 Counsel assisting observed that that submission is, to put it nicely, a very courageous one.

34. However, it is unnecessary to deal with these submissions at length. On the material, the inference raised by counsel assisting is a possible one. But there is insufficient evidence to say anything more definitive one way or another.

57 Submissions of Brian Parker, 28/10/15, paras 3-25.
58 Submissions of Brian Parker, 28/10/15, para 16.
C – CHARITABLE FUNDRAISING ACT 1991 (NSW)

35. The evidence also raises the question whether each of the CFMEU, Brian Parker and Yulei Zhou may have contravened the Charitable Fundraising Act 1991 (NSW).

A preliminary objection

36. Written submissions filed on behalf of the CFMEU and Yulei Zhou complained it would be unfair to make any findings about contraventions by Brian Parker and Yulei Zhou of the Charitable Fundraising Act 1991 (NSW). The unfairness was apparently said to arise because counsel assisting did not mention the Charitable Fundraising Act 1991 (NSW) in opening, because it was not put to Brian Parker that he or the union had contravened that Act and because it was not put to Yulei Zhou that he had contravened the Act.59

37. Brian Parker took the same point in his written submissions.60

38. These objections are unsustainable. Even in adversarial litigation where the ‘rule in Browne v Dunn’ is strictly applied, there is no requirement to put a legal conclusion to a witness for comment. Here, the evidence touching on possible contraventions of the Charitable Fundraising Act 1991 (NSW) fell from the witnesses’s own mouths in the course of their explanations of certain donations. All affected persons were on notice that those donations would be investigated

59 Submissions of the CFMEU, 29/10/15, pp 47, 49, paras 6, 16.
60 Submissions of Brian Parker, 28/10/15, para 26.
during the hearing. The response of the CFMEU and of Brian Parker to the submissions of counsel assisting concerning the Charitable Fundraising Act 1991 (NSW) have not endeavoured to advance any argument as to why they have not, or even may not have, contravened the Charitable Fundraising Act 1991 (NSW).

Summary of the law

39. The objects of the Charitable Fundraising Act 1991 (NSW) are to promote proper and efficient management and administration of fundraising appeals for charitable purposes, to ensure proper keeping and auditing of accounts in connection with such appeals, and to prevent deception of members of the public who desire to support worthy causes.\(^6^1\)

40. In summary, the Charitable Fundraising Act 1991 (NSW) operates as follows:

(a) Section 9 provides that a person who conducts a ‘fundraising appeal’ commits an offence unless the person is:

(i) the holder of an authority authorising the person to conduct the appeal;

(ii) a member, employee or agent of a person or organisation authorised to conduct the appeal; or

\(^6^1\) Charitable Fundraising Act 1991 (NSW), s 3.
(iii) authorised to conduct the appeal without an authority.

A person conducts a fundraising appeal if the person organises the appeal. The Charitable Fundraising Regulation 2015 (NSW), and its predecessor the Charitable Fundraising Regulation 2008 (NSW), exempt certain organisations and fundraising activities from the requirement to hold an authority.

(b) A person who participates in a fundraising appeal which the person knows, or could reasonably be expected to know, is being conducted unlawfully commits an offence. A person participates in a fundraising appeal if the person solicits or receives money in the course of an appeal, or assists in conducting the appeal.

(c) Subject to the terms of an authority, all monies collected in a fundraising appeal must be paid immediately into an account with a bank or authorised deposit taking institution. The account must consist only of monies raised in the fundraising appeal, or in other such appeals conducted by the same persons. A person conducting a fundraising appeal, or any member of the governing body of an organisation on whose behalf the appeal is conducted who by any act or omission is

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63 Charitable Fundraising Act 1991 (NSW), s 10.
64 Charitable Fundraising Act 1991 (NSW), s 6.
65 Charitable Fundraising Act 1991 (NSW), s 20(6).
in any way concerned in a contravention of these requirements commits an offence, punishable by a fine of 50 penalty units or 6 months imprisonment or both.\textsuperscript{66}

(d) The \textit{Charitable Fundraising Act} 1991 (NSW) imposes a number of accounting requirements in respect of monies collected in fundraising appeals.\textsuperscript{67}

(e) A ‘fundraising appeal’ means the soliciting or receiving of money, property or other benefit by any person, if in the course of or before such soliciting or receiving, the person represents that the purpose of that soliciting or receiving is or includes a charitable purpose.\textsuperscript{68} A ‘charitable purpose’ includes any benevolent, philanthropic or patriotic purpose.\textsuperscript{69}

(f) Certain fundraising activities do not constitute a fundraising appeal.\textsuperscript{70} In addition, the \textit{Charitable Fundraising Regulation} 2015 (NSW), and its predecessor the \textit{Charitable Fundraising Regulation} 2008 (NSW), exempt certain fundraising activities from the definition of fundraising appeal.

\footnotesize
\textsuperscript{66} \textit{Charitable Fundraising Act} 1991 (NSW), s 20(7).
\textsuperscript{67} \textit{Charitable Fundraising Act} 1991 (NSW), ss 22-24.
\textsuperscript{68} \textit{Charitable Fundraising Act} 1991 (NSW), s 5.
\textsuperscript{69} \textit{Charitable Fundraising Act} 1991 (NSW), s 4.
\textsuperscript{70} \textit{Charitable Fundraising Act} 1991 (NSW), s 5(3)
Application of the law to the facts

41. A search of the public register kept by NSW Fair Trading discloses that the CFMEU NSW does not have an authority under the Act. Nor does it appear that the CFMEU NSW is generally exempt from the requirement to hold an authority.

42. At least the following donations collected by Yulei Zhou would be donations collected in connection with a ‘fundraising appeal’ within the meaning of the Act:

(a) the $3,000 donation collected for the ‘Bankstown Fire Tragedy’,

(b) the $30,000 donation collected for Mates in Construction; and

(c) the $30,000 donation apparently collected for a crane safety campaign for the benefit of the construction industry.

43. On each occasion an offence may have been committed.

44. The absence of an authority under the Charitable Fundraising Act 1991 (NSW) raises one problem. The CFMEU NSW’s treatment of the donations raises another. That treatment has not been in accordance with the Act. Even if Yulei Zhou was collecting the donations in accordance with an authority held by the union, or by another organisation such as Mates in Construction (which does hold a

71 It should be noted that the union’s ledgers suggests that a number of such donations were solicited from a number of persons: see CFMEU MFI-16, 20/10/15, p 4.
current authority under the *Charitable Fundraising Act 1991 (NSW)*, the monies should not have been deposited into the union’s general trading account. The *Charitable Fundraising Act 1991 (NSW)* requires such monies to be paid into an account containing only monies raised from one or more fundraising appeals.

45. The CFMEU submitted that such contraventions would be ‘technical contraventions of inadvertence’ which ‘pale’ against the merits of the raising funds for three particular charitable purposes. Counsel assisting contended that the submission is nonsense. It is certainly not acceptable. The whole point of the legislation is to regulate fundraising for charitable purposes. The merit or otherwise of the recipient of the funds is no answer to a breach of the law.

46. Brian Parker submitted that the Commission should not make any findings of contravention or make findings by reference to possibilities. The approach taken to findings in relation to criminal guilt were considered in the Interim Report, and are restated in Volume 1 of this Report.

47. On the material available to the Commission, each of the CFMEU NSW, Brian Parker and Yulei Zhou may have committed various offences against the *Charitable Fundraising Act 1991 (NSW)*:

(a) The CFMEU NSW may have conducted a fundraising appeal in relation to the Bankstown Fire Tragedy, the appeal for Mates in Construction and the appeal for crane safety without

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72 Submissions of the CFMEU, 29/10/15, p 49, para 17.
73 Submissions of Brian Parker, 28/10/15, para 27.
an authority, contrary to s 9. Brian Parker and Yulei Zhou have assisted in those appeals and Brian Parker at least if not Yulei Zhou might reasonably be expected to know that they were conducted without an authority. Accordingly, each may have contravened s 10.

(b) In each case, the way in which the monies have been dealt with may have involved contraventions by the CFMEU NSW and/or Brian Parker, as Secretary, of the requirements in s 20 of the Act.

48. Having regard to what appears to be a complete failure by the CFMEU to comply with the *Charitable Fundraising Act 1991* (NSW), pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, that that this Report and all other relevant materials have been referred to the Minister administering the *Charitable Fundraising Act 1991* (NSW), being the Minister for Innovation and Better Regulation, in order that consideration be given to conducting an inquiry pursuant to Division 1 of Part 3 of that Act into all of the CFMEU NSW’s practices concerning charitable fundraising.
# CHAPTER 7.4

**BUILDING TRADES GROUP DRUG AND ALCOHOL COMMITTEE**

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A – INTRODUCTION

1. This Chapter concerns the Building Trades Group Drug and Alcohol Committee (BTG D&A Committee). It also deals in part with the Construction Industry Drug and Alcohol Foundation (CIDAF), a registered charity.

2. In particular, it examines two matters. In general the submissions of counsel assisting about them are accepted. The points made in the collectively voluminous submissions of affected persons are dealt with in appropriate places.

3. The first matter examined is the payment of $100,000 made in April 2006 by the Thiess-Hochtief Joint Venture carrying out the Epping to Chatswood Rail Link. The payment was made to the BTG D&A Committee. The payment was ostensibly for the purposes of drug and alcohol safety training. In fact, most of the money ended up, after round robins of payments over three years, in the ‘fighting fund’ of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch. (In this Chapter, the federally registered union is referred to as the CFMEU and the divisional branch as the CFMEU NSW.)
4. This Chapter considers whether the $100,000 payment was a ‘corrupt commission’ given and solicited in breach of s 249B of the *Crimes Act* 1900 (NSW).

5. The second matter examined concerns a clause in CFMEU NSW enterprise bargaining/enterprise agreements (EBAs). Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting ‘with the provision of drug & alcohol rehabilitation & treatment services / safety programs for the building industry’.¹ From 2004 to 2011 inclusive, employers paid approximately $2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was siphoned to the CFMEU NSW and deposited into its general revenue.

**B – BACKGROUND**

**BTG D&A Committee**

6. Patricia Carr was a Workers Compensation Officer employed by the Building Workers Industrial Union (BWIU). In around 1989 she established the BTG D&A Committee.² Trevor Sharp was invited by Patricia Carr to become a member of the committee shortly after its establishment and was from 1994 to mid-2011 the Project Co-ordinator for the BTG D&A Committee. He gave evidence that the Committee

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¹ See, for example, BTG D&A MFI-6, 11/8/15, pp 340, 377, 440.

² Trevor Sharp, witness statement, 11/8/15, para 5.
was established for the purpose of attempting to address the issue of drug and alcohol safety in the workplace.³

7. The BTG D&A Committee was primarily a BWIU initiative. But it was set up as a sub-committee of the Building Trades Group of Unions (BTG) because it was expected that it would represent members of all building unions, not just the BWIU.⁴

8. The BTG itself was originally an industry sub-committee under the rules of the then NSW Trades and Labour Council. In the mid-1980s the rules of the Labour Council were changed. The BTG ceased to be a formal part of the structure of the Labour Council. However, the BTG, as an unincorporated association, continued to meet. It had representatives from the BWIU (which later amalgamated to form the CFMEU). It had representatives from the Electrical Trades Union (ETU). It had representatives from the Plumbers and Gasfitters Union (PGU). It had representatives from the Australian Manufacturing Workers Union (AMWU).⁵

9. In late 1991, the BTG D&A Committee secured a grant from the National Committee Against Drug Abuse to implement a drug and alcohol safety program to be rolled out across work sites in the construction industry.⁶ The program was called the Building Trades Group Drug and Alcohol Program (BTG D&A Program). The grant

³ Trevor Sharp, witness statement, 11/8/15, para 5; Trevor Sharp, 11/8/15, T:217.31-34.
⁴ Trevor Sharp, witness statement, 11/8/15, para 5.
enabled the BTG D&A Committee to employ a Drug and Alcohol Education Officer. That person was initially Trevor Sharp. Subsequently, the BTG D&A Committee secured recurrent funding from the New South Wales Health Department for the BTG D&A Program. The monies from this grant were paid into a dedicated BTG D&A Committee account. They were used to pay the salary of the education officer and a secretary part time.

Later, in around 1995, the BTG D&A Committee secured funding from the CERT Education and Training Fund to present drug and alcohol safety courses to apprentices in the construction industry in conjunction with TAFE NSW (BTG Apprentice Program). That funding allowed the BTG D&A Committee to employ a new Apprentices Education Officer. Subsequently, the BTG D&A Committee obtained recurrent funding from WorkCover to cover the cost of the BTG Apprentice Program. Like the grant from the Health Department, the monies in relation to this grant were paid into a separate bank account.

By around 1994, Trevor Sharp had moved into a more administrative role as Project Co-ordinator. Over the years a number of employees held the positions of Drug and Alcohol Education Officer or Apprentices Education Officer. One of them was Tom Simpson.

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7 BTG D&A MFI-25, 6/10/15.
8 Toni Mitchell, witness statement, 13/8/15, para 6(a).
9 Construction Employees Redundancy Trust.
11 BTG D&A MFI-24, 6/10/15.
12. From its inception until 2010, the BTG D&A Committee was an unincorporated association. In May 2010, the BTG D&A Committee was incorporated as an association under the *Associations Incorporation Act 1984 (NSW).*

**CIDAF**

13. In around 1994, the BTG D&A Committee established CIDAF. CIDAF is a not-for-profit incorporated association and a registered charity. It was established to support the BTG D&A Committee’s activities financially through fundraising, to provide drug and alcohol treatment and support services to people with problems. Some employers were not comfortable donating to the union movement directly. But they were willing to support an organisation where they had representation on the board and could determine how their money was being spent. CIDAF was set up to accept donations from those employers. CIDAF was administered by a Committee of Management consisting of representatives from unions, industry and the community.


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12 BTG D&A MFI-23, 17/8/15.
C – THIESS PAYMENT: SUMMARY OF THE EVIDENCE

Introduction

15. The Thiess-Hochtief Joint Venture (THJV) was a joint venture between Thiess Pty Ltd (Thiess) and Hochtief AG Australia (Hochtief). In July 2002 it was awarded the contract to build the Epping to Chatswood Underground Rail Link in Sydney (Project). Part of the Project involved building a rail tunnel under the river at Lane Cove. The Project continued until February 2009.

16. In early 2003 THJV entered into the Thiess/Hochtief Epping to Chatswood Underground Rail Link CFMEU, AMWU Construction Enterprise Agreement 2003–2006 (First EBA). The First EBA expired in January 2006. It was replaced by the Thiess-Hochtief Australian Workers Union, AMWU, CFMEU, ETU Epping to Chatswood Rail Line Tunnel Fitout Construction Enterprise Agreement 2006–2008 (Second EBA). It came into effect on 7 February 2006. Peter Chatburn, who was the THJV Construction Director on the Project from September 2005 to September 2006, gave evidence that the negotiations for the Second EBA were difficult. The First EBA had expired mid-project. It was necessary to negotiate with

four separate unions. And, according to Peter Chatburn, the employees had unrealistic expectations of what could be achieved.\textsuperscript{18}

17. Steve Dixon was the CFMEU NSW’s Organiser on the Project until his departure in May 2006.\textsuperscript{19} He was involved in negotiating the EBAs for the Project. He said he was a bargaining representative on behalf of CFMEU NSW members employed on site,\textsuperscript{20} though his counsel cast a cloud over this evidence.\textsuperscript{21} Michael Deegan was the Project Director employed by Thiess from September 2005 to September 2006. He said that Steve Dixon was the effective leader of the different union representatives on the Project.\textsuperscript{22}

18. At the same time as THJV was undertaking the Project, Thiess was also undertaking another significant New South Wales infrastructure project – the Lane Cove Tunnel. This road tunnel project was undertaken by Thiess in a joint venture with John Holland.

19. On 13 April 2006, THJV paid the BTG D&A Committee $100,000 by electronic funds transfer.\textsuperscript{23} It was paid into an account held by the BTG D&A Committee with the Commonwealth Bank of Australia (CBA). The account was called the ‘Building Trades Group of Unions

\textsuperscript{18}Peter Chatburn, witness statement, 11/8/15, para 9.
\textsuperscript{20}Steven Dixon, 12/8/15, T:352.4-9.
\textsuperscript{21}Submissions of Steve Dixon, 29/10/15, paras 32-36.
\textsuperscript{22}Michael Deegan, 6/10/15, T:895.15-19.
\textsuperscript{23}BTG D&A MFI-1, 10/8/15, p 89; BTG D&A MFI-3, 10/8/15, pp 90-91.
Drug and Alcohol – Safety Program’ (BTG D&A Safety Program Account).24

20. Toni Mitchell was the administration officer for the BTG D&A Committee. She was responsible for banking. She gave evidence that the payment was highly unusual.25 Apart from this payment, and bank interest, the only other deposits into the account were monthly contributions by employers pursuant to an EBA clause.

21. Over the next three years, amounts referable to the $100,000 payment moved first from the BTG D&A Committee to the BTG, then from the BTG to the CFMEU NSW, then back to the BTG D&A Committee and then eventually back to the CFMEU NSW. Each of these transfers is depicted in Diagram 1 on the following page.

22. The evidence concerning the details and reasons for these transfers of money are summarised in the following paragraphs. That evidence is all directed towards one critical question. Why did THJV pay $100,000 to the BTG D&A Committee?

24 BTG D&A MFI-3, 10/8/15, pp 1, 2, 4, 5, 7, 90-91. The account number of the account is 06 2032 10104676.

Background to the payment of $100,000

23. Michael Deegan’s main responsibilities on the Project were:\textsuperscript{26}

   to resolve a significant commercial dispute with the Government, which
   was in the order of $100 million, resolve safety and productivity issues on
   the job and to improve relations with stakeholders to ensure the successful
delivery of the project.

24. Michael Deegan gave evidence that when he arrived, there were clearly
safety issues on the job.\textsuperscript{27} He gave a long catalogue of them.\textsuperscript{28} Of one
item on the long list, Michael Deegan commented that he had noticed
men under the influence of drugs and alcohol on site.\textsuperscript{29} He gave
evidence that on one occasion he saw someone who he thought was
clearly under the influence of drugs or alcohol and suggested he leave
the job.\textsuperscript{30} He also said that he felt that there was ‘a lack of safety
culture on the job in relation to drugs and alcohol.’\textsuperscript{31} Michael Deegan
could not recall any industrial unrest other than in relation to concerns
about safety.\textsuperscript{32} That evidence was contradicted to some extent by a
letter written by him in September 2006 to Andrew Ferguson, then

\textsuperscript{26} Michael Deegan, 6/10/15, T:890.11-17.
\textsuperscript{27} Michael Deegan, 6/10/15, T:890.19-20.
\textsuperscript{28} Michael Deegan, 6/10/15, T:890.28-891.39.
\textsuperscript{29} Michael Deegan, 6/10/15, T:891.30-31, 892.27-29.
\textsuperscript{30} Michael Deegan, 6/10/15, T:892.13-27.
\textsuperscript{31} Michael Deegan, 6/10/15, T:892.33-34.
\textsuperscript{32} Michael Deegan, 6/10/15, T:896.47-897.7.
Secretary of the CFMEU NSW, describing the Project as distressed ‘in every sense – financially, commercially, industrially and safety.'

25. Steve Dixon gave evidence that there were numerous serious safety issues on site, not just in 2005 but around 2004. Steve Dixon and Michael Deegan referred to a fatality on site in July 2005. A subcontractor was found in a sedimentation pond on-site a number of hours after he died from a heart attack. Steve Dixon described the site as the worst site he had been on in terms of safety.

26. Peter Chatburn gave evidence that he was transferred to the role of Industrial Director because of the ‘strained industrial climate’ on the project in the aftermath of the fatality on site. He could recall one incident of drug use on site and one instance where a worker exceeded the legal limit for alcohol. In contrast to the other witnesses, Peter Chatburn could not recall any serious safety issues on the Project in the 12 months from September 2005 to September 2006.

27. It is likely, however, that the death of the subcontractor on site contributed to the ‘strained industrial climate’ on the Project referred to by Peter Chatburn. It is also likely that this caused tension in the relations between the various stakeholders, including THJV.

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37 Peter Chatburn, 11/8/15, T:147.27-37.
management and the CFMEU NSW. It was against this backdrop that THJV decided to pay $100,000 to the BTG D&A Committee.

28. The solicitors for Michael Deegan submitted that they were ‘not aware of any evidence before the Commission which suggests that industrial action had been threatened or was in prospect in the lead up to the decision to provide drug and alcohol awareness training on site.’\textsuperscript{39} This is a narrowly framed submission. Michael Deegan’s letter and Peter Chatburn’s evidence suggests that there was a strained industrial climate. To that may be added an article in \textit{The Sydney Morning Herald} on 18 July 2015.\textsuperscript{40} A strained industrial climate is likely to have made it difficult to negotiate the Second EBA. The solicitors for Michael Deegan also submitted that the enterprising bargaining process was completed in the relatively short period from October 2005 to January 2006; that Peter Chatburn had carriage of it; that Michael Deegan only attended an initial meeting; and that the bargaining involved four unions, not just the CFMEU. These are material factors. But from the point of view of industrial unrest, the CFMEU is likely to have been the most feared union. And it was Peter Chatburn who referred to the strained industrial climate.

29. Senior counsel for Andrew Ferguson relied on Michael Deegan’s denial of unrest.\textsuperscript{41} But Michael Deegan was a self-interested and in many ways unsatisfactory witness. Senior counsel for Andrew Ferguson also relied on Andrew Ferguson’s own evidence, but he too

\textsuperscript{39} Submissions of Michael Deegan, 29/10/15, para 3.6.

\textsuperscript{40} BTG D&A MFI-1, 10/8/15, pp 54-55.

\textsuperscript{41} Submissions of Andrew Ferguson, 29/10/15, para 22.
was self-interested. Senior counsel for Andrew Ferguson complained that the question of industrial disputation was not put to Steve Dixon. But Steve Dixon was aware of the case against him. And, in view of the infirmities of Steve Dixon’s evidence, it is not likely that any objectively useful evidence could have been obtained.

**Transfer 1: Payment by THJV of $100,000 to the BTG D&A Committee**

30. The events leading up to the payment of $100,000 by THJV to the BTG D&A Committee on 13 April 2006 are contested. It is necessary first to summarise the objective evidence and recount the evidence of the relevant witnesses. The accounts of the various witnesses overlap and conflict. It is therefore difficult to assess the evidence without also having regard to events after the payment of $100,000 was made, at least on the CFMEU NSW side. However, where it is possible to draw conclusions about the evidence without having regard to events after the payment was made, that is done below.

**Objective material**

31. By 2 December 2005 THJV had apparently made the decision to engage Tom Simpson to conduct drug and alcohol training. Some documents seem to contemplate that the training would commence in January 2006 or February 2006. Shortly after this at a meeting of the

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42 Submissions of Andrew Ferguson, 29/10/15, para 24.
43 Submissions of Andrew Ferguson, 29/10/15, para 23.
44 BTG D&A MFI-1, 10/8/15, p 69.
45 BTG D&A MFI-1, 10/8/15, pp 401, 411.
THJV Management Committee on 8 December 2005, which Michael Deegan attended, the progress of the EBA negotiations was noted.46

32. On 4 February 2006, Robert Thompson, Project Safety Officer, sent an email to various Thiess employees informing them that:47

On 15/02/2006 THJV have invited the Drugs and Alcohol Foundation representatives from the Building Trades Group, Tom Simpson and Tony Palla [sic, scil Papa], to address the PSC on this very important issue as we enter into the next phase of this Project – railworking.

33. On 15 February 2006, Tom Simpson from the BTG D&A Committee gave the presentation to the Project Safety Committee or PSC.48

34. On 10 March 2006, the weekly project note from Michael Deegan to employees on the Project stated that the BTG D&A Program would be rolled out on site. The sessions were said to be for 1 hour and would be conducted between 20 March 2006 and 5 April 2006. The note said that a schedule was being prepared which would be distributed shortly.49

46 BTG D&A MFI-1, 10/8/15, p 70.
47 BTG D&A MFI-1, 10/8/15, p 73.
48 BTG D&A MFI-1, 10/8/15, p 76.
49 BTG D&A MFI-1, 10/8/15, p 80.
35. On 13 March 2006, the BTG D&A Committee issued tax invoice No. OT-301 to THJV for the amount of $100,000 inclusive of GST. The invoice described the services provided by the BTG D&A as:50

Provision of the Building Trades Group Model Drug and Alcohol Education and Awareness Training Courses and Safety Consultancy Services for the Epping to Chatswood Rail Link Project.

36. On 14 March 2006, an email was sent to senior staff attaching the schedule of sessions. The sessions were scheduled for 1 ½ hours each. 16 sessions in March and April 2006 were planned. Attendance was recommended to all employees but was not compulsory.51

37. On 16 March 2006, Michael Deegan approved payment of the BTG D&A Committee invoice.52

38. On 21 March 2006, Tom Simpson from the BTG D&A Committee began providing Drug and Alcohol Awareness sessions at the Project.

39. The Project OHS report for March 2006 records that the project-wide drug and alcohol awareness training was 75% complete and that at that time 122 persons had been trained to date.53 The equivalent report for April 2006 records that the training was 100% complete, although the number of persons trained to date did not increase.54 The following month’s report indicates there was training in May 2006 with an

50 BTG D&A MFI-1, 10/8/15, p 82.
51 BTG D&A MFI-1, 10/8/15, pp 83-87.
52 BTG D&A MFI-1, 10/8/15, p 82; Michael Deegan, 6/10/15, T:906.41-47.
53 BTG D&A MFI-1, 10/8/15, pp 444, 450.
54 BTG D&A MFI-1, 10/8/15, pp 454, 459.
additional 40 people trained.\textsuperscript{55} The July 2006 Project OHS report records that drug and alcohol training concluded on the Project during July 2006 and this ‘included workers and staff from United’.\textsuperscript{56} The report records that to date a total of 204 persons had attended the drug and alcohol awareness courses.\textsuperscript{57} The figure does not increase in later reports.\textsuperscript{58} These figures stand in contrast with the (claimed) figure of 1,200 workers on site. In the OHS reports, THJV accounted for the training it received from the BTG D&A Committee as an internal cost of $45 per hour for a total cost to the business of $13,770.\textsuperscript{59} Unlike other safety related training provided by an external provider the external cost (i.e. $100,000 paid to the BTG D&A Committee) was not included.

**Steve Dixon’s evidence**

40. Steve Dixon gave evidence that he had a problem with his memory and that some of the medication he took caused memory loss.\textsuperscript{60}

41. Steve Dixon said that there were serious issues of drug abuse on site. He said it was ‘becoming out of control’.\textsuperscript{61} He himself had not witnessed any incidences of drug abuse but had heard of them.\textsuperscript{62}

\textsuperscript{55} BTG D&A MFI-1, 10/8/15, p 468.
\textsuperscript{56} BTG D&A MFI-1, 10/8/15, p 479. United Group were contracted to do the fit-out and lining for the overhead on the railway track: Michael Deegan, 6/10/15, T:912.41-42.
\textsuperscript{57} BTG D&A MFI-1, 10/8/15, p 481.
\textsuperscript{58} BTG D&A MFI-1, 10/8/15, pp 487, 492, 497, 502, 507.
\textsuperscript{59} BTG D&A MFI-1, 10/8/15, p 481.
\textsuperscript{60} Steve Dixon, 12/8/15, T:373.4-10.
42. Steve Dixon gave evidence that he would have initiated discussions with Michael Deegan and possibly Peter Chatburn about drug and alcohol training being provided by the Drug and Alcohol Education Officers from the ‘Drug and Alcohol Foundation’. His best recollection was that this first occurred at a meeting around the end of 2005. Steve Dixon said that Michael Deegan agreed in principle to meet with the trainers and see what they had to offer. According to Steve Dixon, no figure of the cost of training was discussed at this first meeting.

43. Steve Dixon said that he believed that after this first meeting he telephoned Trevor Sharp. He told him that Thiess had agreed to use their education services. He asked him if he could get Tom Simpson to contact Steve Dixon. Steve Dixon said Trevor Sharp agreed that he would get Tom Simpson to call. Steve Dixon did not ask for a quote for the service in this conversation.

44. Steve Dixon recalled that he arranged for Tom Simpson to attend the site. After his presentation, training began on site pretty well straight after.

45. Steve Dixon testified that, to the best of his recollection, after the training had begun, he spoke to Michael Deegan (and he thought Peter

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64 Steve Dixon, 12/8/15, T:355.5-40.
Chatburn). He raised a figure of $100,000 as a fee for services for the provision of drug and alcohol safety training to be provided by BTG D&A Committee personnel. At some point – he could not recall when – Michael Deegan agreed to the $100,000 figure. He said there was no discussion whatsoever of a donation. He said the word was never used by him, by Michael Deegan or by Trevor Sharp. Steve Dixon did not ask the BTG D&A Committee for a quote for the cost of training. But he did come up with the ‘ballpark’ figure himself, although the figure might have come out of conversations with Trevor Sharp. He did not estimate the number of workers on site or the number of sessions required. Rather he seemed to have plucked the figure of $100,000 out of the air.

46. He said after the agreement by Michael Deegan he went to see Trevor Sharp at Foundation House at Rozelle prior to the invoice for the $100,000 being raised. He thought he was later told by Trevor Sharp that Thiess had paid the invoice.

47. Steve Dixon denied that he ever had a conversation with Michael Knott, who among other roles was the General Manager of the CFMEU NSW until 2011, about the payment. He said he ‘couldn’t

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71 Steve Dixon, 12/8/15, T:360.3-5.
72 Steve Dixon, 12/8/15, T:366.40-44.
stand' Michael Knott and it was ridiculous to suggest he would have spoken to him.\textsuperscript{76} He denied even speaking to Peter McClelland, then President of the CFMEU NSW, about the matter either.\textsuperscript{77} The credibility of these denials is under challenge.

48. He could not recall being present at a conversation between Trevor Sharp and Andrew Ferguson about the $100,000.\textsuperscript{78} He could not recall but said he ‘would have’, ‘must have’, had a conversation with Andrew Ferguson about it. Later he said he did have a conversation but had no recollection of it.\textsuperscript{79} Nevertheless, he knew that Andrew Ferguson had never, in Steve Dixon’s presence, spoken about a donation from Thiess or any 80/20 split between the union and the BTG D&A Committee.\textsuperscript{80} He was adamant that the payment was not a donation. He said that Trevor Sharp, Michael Deegan, Tom Simpson and, he assumed, Andrew Ferguson knew this.\textsuperscript{81}

49. Steve Dixon seemed to think that the figure of $100,000 was not very high if the BTG D&A Committee had ‘done their job properly’ and provided more training sessions.\textsuperscript{82}

\textsuperscript{76} Steve Dixon, 12/8/15, T:365.47-366.2.
\textsuperscript{77} Steve Dixon, 12/8/15, T:369.6-13.
\textsuperscript{78} Steve Dixon, 12/8/15, T:366.18-22, 368.10-13.
\textsuperscript{80} Steve Dixon, 12/8/15, T:366.18-28, 368.10-25.
\textsuperscript{81} Steve Dixon, 12/8/15, T:366.42-367.1.
\textsuperscript{82} Steve Dixon, 12/8/15, T:366.33-38.
Michael Deegan’s evidence

50. Michael Deegan gave evidence that he recalled receiving an approach from Steve Dixon. It concerned formalising some training for drugs and alcohol on the job.\(^{83}\) He said that he and Steve Dixon had a number of discussions about drug and alcohol training and that the issue had been discussed at the first meeting of the unions and THJV management for the preparation of the Second EBA.\(^{84}\) Michael Deegan thought that the discussions between himself and Steve Dixon occurred over a period of weeks, if not months, probably ‘not far’ after Michael Deegan had started on the job in September 2005.\(^{85}\)

51. Michael Deegan could not recall how the $100,000 figure was agreed. His recollection was that it was proposed by Steve Dixon.\(^{86}\) At one point in his evidence, he said he thought he asked Steve Dixon to give some costing proposals, but later said he could not recall asking Steve Dixon for any costings.\(^{87}\)

52. He was certain the payment was for drug and alcohol training in relation to safety, and was not intended for general safety.\(^{88}\)

53. Michael Deegan did not think that $100,000 was a large amount of money for the training. He said that the plan was to train all of the


\(^{84}\) Michael Deegan, 6/10/15, T:897.12-19.

\(^{85}\) Michael Deegan, 6/10/15, T:897.32-39.

\(^{86}\) Michael Deegan, 6/10/15, T:898.7-11, 899.39-41.

\(^{87}\) Michael Deegan, 6/10/15, T:898.9-11, 899.39-45.

\(^{88}\) Michael Deegan, 6/10/15, T:899.47-900.44.
employees on the project. He thought the payment was an appropriate investment.\textsuperscript{89} Michael Deegan denied that the payment was a donation to the union.\textsuperscript{90} He also denied that it was a payment for industrial peace.\textsuperscript{91}

**Peter Chatburn’s evidence**

54. Peter Chatburn’s evidence was to the effect that he probably first became aware of the invoice for the $100,000 payment in around April 2006 and was not involved in its raising or approval.\textsuperscript{92} In cross-examination, he said that it would have been Michael Deegan’s responsibility to ensure that the $100,000 payment was not irregular.\textsuperscript{93}

**Michael Knott’s evidence**

55. Michael Knott (General Manager, CFMEU NSW) gave evidence that in approximately late December 2005, Steve Dixon came to his office and there was a conversation to the following effect:\textsuperscript{94}

\begin{quote}
Dixon: I’ve got a donation of $100,000 from Thiess for the union.

Knott: What do you mean you have a donation?
\end{quote}

\begin{flushright}
\textsuperscript{89} Michael Deegan, 6/10/15, T:899.15-25, 904.5-9, 905.34-39, 908.14-28.
\textsuperscript{90} Michael Deegan, 6/10/15, T:909.41-42.
\textsuperscript{91} Michael Deegan, 6/10/15, T:909.44-45.
\textsuperscript{92} Peter Chatburn, witness statement, 11/8/15, para 13; Peter Chatburn, 11/8/15, T:154.19-27.
\textsuperscript{93} Peter Chatburn, 11/8/15, T:156.20-28.
\textsuperscript{94} Michael Knott, witness statement, 10/8/15, paras 25-30; Michael Knott, 10/8/15, T:65.18-41.
\end{flushright}
Dixon: Thiess have approached me with an offer of a $100,000 donation to the union.

Knott: That’s a fucking kickback! Under no circumstances have anything to do with it. It’s corruption.95

Dixon: The AWU do it all the time. It’s a donation.

Knott: We’re the CFMEU not the AWU. It’s a kickback, it’s corruption I am directing you to have nothing to do with it.

56. After that conversation, Michael Knott said he immediately went to Andrew Ferguson’s office. He recounted to Andrew Ferguson what Steve Dixon had said.96 He gave evidence that Andrew Ferguson’s immediate response was that the donation may be legitimate. The two men discussed the matter for around 15 minutes. The discussion ended with Andrew Ferguson saying he would speak to Steve Dixon about the matter. After that, Michael Knott said he had no further discussion with Steve Dixon or Andrew Ferguson. As far as he was concerned the matter was Andrew Ferguson’s responsibility to deal with.97 In cross-examination, Michael Knott said that he did not talk to anyone else about the matter after speaking with Andrew Ferguson.98

95 Michael Knott said he could remember this part of the conversation exactly: Michael Knott, 10/8/15, T:65.34-36.
Peter McClelland’s evidence

57. Peter McClelland was President of the CFMEU NSW. He testified that one day in 2005 he had a conversation with Michael Knott. Michael Knott told him that he had had a meeting with Steve Dixon in which Steve Dixon said that he had been approached by Thiess who were prepared to give a donation to the union. Peter McClelland said that Michael Knott was not happy about it and that he told him that he had reported the matter to Andrew Ferguson to deal with. Peter McClelland was absolutely sure that Michael Knott mentioned a ‘donation to the union’.

58. Immediately prior to the conversation, Peter McClelland had seen Steve Dixon in Michael Knott’s office, had subsequently seen Michael Knott leave his office and walk towards Andrew Ferguson’s office. About 15 to 20 minutes after seeing Michael Knott leave his office he came into Peter McClelland’s office.

59. Peter McClelland gave the following evidence about what happened next:

I think it was probably the following day, Andrew Ferguson came into my office and said ‘Look’ – Michael Knott saw him and told him about this donation that Steve Dixon had organised or was party to in a discussion with Thiess and that we need to meet with Steve Dixon and make sure that everything’s aboveboard.

99 Peter McClelland, 6/10/15, T:856.31-857.13.
100 Peter McClelland, 6/10/15, T:858.8-10, 859.26-41.
101 Peter McClelland, 6/10/15, T:857.15-858.6.
102 Peter McClelland, 6/10/15, T:858.18-23.
60. Peter McClelland said that he agreed to meet with Steve Dixon but that no meeting occurred which he attended. Peter McClelland said that he did not follow up with Andrew Ferguson about the issue. But (inferentially later) he came to an understanding through some discussion or consultation with Andrew Ferguson that 20% of the $100,000 would go to CIDAF and the balance was to support industry safety.

Andrew Ferguson’s evidence

61. Andrew Ferguson testified that the issue of the $100,000 payment was first raised with him by Michael Knott prior to the payment being made. He was not sure of the date.

62. Andrew Ferguson recalled Michael Knott coming into his office and saying words to the effect that ‘There’s a proposed donation of $100,000 to the Union from Thiess.’ Andrew Ferguson recalled Michael Knott not being comfortable about the proposed donation. Andrew Ferguson did not think Michael Knott had enough information to assess whether the payment was legitimate. He did not recall any specific reference by Michael Knott to Steve Dixon. He denied

103 Peter McClelland, 6/10/15, T:858.28-859.2.
104 Peter McClelland, 6/10/15, T:859.4-17.
105 Andrew Ferguson, 14/8/15, T:602.4-34.
106 Andrew Ferguson, 14/8/15, T:602.38-40.
107 Andrew Ferguson, 14/8/15, T:602.42-43.
108 Andrew Ferguson, 14/8/15, T:603.33-44.
hearing Michael Knott describe the payment as a ‘kickback’ or ‘corruption’. But he definitely recalled the word donation. He told Michael Knott he would look into the matter.

63. Shortly after his discussion with Michael Knott, Andrew Ferguson spoke to Peter McClelland about the issue. According to Andrew Ferguson, Peter McClelland was already aware of the issue. Together they agreed to discuss the payment with Steve Dixon. Andrew Ferguson said that sometime after this he had a discussion in his office at Lidcombe with Steve Dixon and Peter McClelland. Andrew Ferguson testified that he informed Steve Dixon that Michael Knott had raised some concerns in respect to a donation from Thiess and asked for an explanation.

64. Andrew Ferguson’s evidence on Friday 14 August 2015 was as follows. Steve Dixon indicated that it was a donation to the union for safety purposes. In addition Thiess had a preference or desire for some drug and alcohol training to be performed. They agreed that perhaps 10–15 courses were appropriate. Andrew Ferguson then quizzed Steve Dixon in relation to the contribution for safety and Steve Dixon informed him that Thiess were not prescriptive about the type of safety work but that the payment was for the safety work of the union. He specifically asked Steve Dixon ‘Are you sure this is aboveboard? Is there no issue of duress? Is it voluntary?’ He got assurances in respect

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109 Andrew Ferguson, 14/8/15, T:604.3-14.
110 Andrew Ferguson, 14/8/15, T:604.31-44.
111 Andrew Ferguson, 14/8/15, T:605.7-34.
112 Andrew Ferguson, 14/8/15, T:605.26–606.8.
113 Andrew Ferguson, 14/8/15, T:606.11-26.
of those issues. Andrew Ferguson was certain that the word ‘donation’ was used and that it was a donation to the union.

However, when giving evidence three days later on Monday 17 August 2015, Andrew Ferguson was shown a document written by him in 2011. In it he had said that the payment was a donation to the BTG. Andrew Ferguson then gave evidence that the payment was not a donation to the union, but to the BTG.

Andrew Ferguson had no recollection of any conversation about the payment with Steve Dixon and Trevor Sharp. He also denied any conversation with Trevor Sharp about the $100,000 in 2006. Later, however, he gave the following evidence:

I remember having a discussion with Trevor Sharp in my office in relation to the proposed payment from Thiess. I outlined to him clearly that it was a donation to the union, that was the advice I had been given; that in my discussions with Mr Dixon he had advised that Thiess had requested that a number of drug and alcohol training sessions be conducted on the site and we discussed that, and based on the assessment given from Steve Dixon of 10 to 15 courses, that perhaps $20,000 would reimburse the Drug and Alcohol Safety Committee for their costs and that the Union intended to use the balance for its BTG safety program.

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115 Andrew Ferguson, 14/8/15, T:606.28-30.
116 BTG D&A MFI-17, 14/8/15. See para 123.
117 Andrew Ferguson, 17/8/15, T:664.3-36.
118 Andrew Ferguson, 14/8/15, T:607.43-608.24.
119 Andrew Ferguson, 14/8/15, T:608.18-24.
120 Andrew Ferguson, 14/8/15, T:625.29-40.
67. Inferentially, given Andrew Ferguson’s earlier denial of a conversation in 2006, any such conversation must have occurred in 2005. Andrew Ferguson denied emphatically that there was any discussion with Trevor Sharp in which Andrew Ferguson asked Trevor Sharp to use the BTG D&A Committee’s account to receive the $100,000 for which the Committee could keep 20%.\footnote{Andrew Ferguson, 14/8/15, T:608.26-609.43.}

68. Andrew Ferguson gave evidence that he was not involved with the invoicing for the $100,000.\footnote{Andrew Ferguson, 14/8/15, T:606.32-35.} However, a memo he wrote to Peter McClelland in 2007\footnote{BTG D&A MFI-15, 14/8.15. See para 98.} indicates that he was involved in causing Tony Papa to send the invoice.

**Trevor Sharp’s evidence**

69. Trevor Sharp said in early in 2006 he had been called by Andrew Ferguson to a meeting at the CFMEU NSW office at Lidcombe.\footnote{Trevor Sharp, 11/8/15, T:249.23-35.} Present at the meeting were Steve Dixon and Andrew Ferguson. Trevor Sharp gave the following evidence of the gist of the conversation.\footnote{Trevor Sharp, 11/8/15, T:250.8-251.6.}

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Ferguson: Thiess want to make [a] 100K donation.

Sharp: That’s great, we could do with the money. Tell them to put it into the CIDAF gift fund and they can claim it as a tax deduction.
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Ferguson: What makes you think that you are getting it all?

Sharp: Well how else do we do it?

Ferguson: We want you to put it in your account and transfer it to us in a couple of weeks.

Sharp: We can’t do that, The Foundation can’t do that because it’s a charity and is under close scrutiny from many areas. We have financial audits and hold regular meetings. Everyone would see it go into our account and then come out again and they would start asking questions.

Ferguson: Well what about the BTG D&A accounts?

Sharp: That’s possible.

Ferguson: We’ll take 80% and you can have 20%.

70. Trevor Sharp said he agreed to the arrangement because Andrew Ferguson told him what to do and controlled him quite rigidly when need be. He said he understood that he had no choice in the arrangement. Trevor Sharp gave evidence that Andrew Ferguson gave him instructions on how to issue the 13 March 2006 invoice. Trevor Sharp said that he instructed Toni Mitchell to prepare the 13 March 2006 invoice and gave her the words to use. Trevor Sharp said there was no way that the BTG D&A Committee was going to provide $100,000 of training. To his mind, the invoice was ‘bogus’.

126 Trevor Sharp, 11/8/15, T:251.5-16.
131 Trevor Sharp, 12/8/15, T:326.1, 329.45.
71. Trevor Sharp’s evidence was that shortly after the conversation with Andrew Ferguson he told Toni Mitchell and Tom Simpson that the BTG D&A Committee needed to provide drug and alcohol training to Thiess employees up to a value of at least $20,000.\(^{132}\)

**Tony Papa’s evidence**

72. At the time of the payment, Tony Papa\(^{133}\) was the Secretary of the BTG and a member of BTG D&A Committee. He gave evidence that his only knowledge about the payment was that Steve Dixon raised the payment of the $100,000 from Thiess at an organisers’ meeting. Tony Papa’s evidence on this point was very vague. He not could recall the details of what was said, but could recall that Steve Dixon said that the payment from Thiess was to go to the union to assist with its safety program.\(^{134}\)

**Preliminary observations about the evidence of the witnesses**

73. There is no witness whose evidence in relation to the reason for the $100,000 payment is not contradicted, either expressly or implicitly, by another witness. On one view, that is not surprising, given the length of time that has passed since the payment was made. However, a surprising feature of the evidence is the certainty with which parts of it

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\(^{132}\) Trevor Sharp, witness statement, 11/8/15, para 20.

\(^{133}\) His actual name is Anthony Papaconstntinos. But in the evidence he is so constantly referred to as Tony Papa that, without intending disrespect, it is convenient to adopt that name in this Report.

\(^{134}\) Tony Papa, 18/8/15, T:806.9-808.13.
were given. At various points in their evidence Michael Knott, Peter McClelland, Andrew Ferguson and Steve Dixon all gave very definite accounts of conversations and events which occurred almost 10 years ago. Yet they conflicted. In those circumstances, it is difficult to draw many conclusions about the competing accounts of the witnesses without considering the events subsequent to the $100,000 payment. Michael Deegan objected to these events being used against him, since he knew nothing about them.\footnote{Submissions of Michael Deegan, 29/10/15, paras 4.1-4.2.} That is a reasonable submission so far as the events might be used against him directly. Counsel assisting did not submit that they could be used in that way. But the later events can cast legitimate light on what was happening on the CFMEU NSW side of the hill, and that in turn can have an indirect impact on Michael Deegan’s position. The conduct of others can damage one’s own position even though one knows nothing about that conduct.

74. For the following reasons at least, Steve Dixon’s recollection of events was, at the very least, generally unreliable:

(a) He admitted problems with his memory.

(b) The evidence of both Michael Knott and Peter McClelland was that Michael Knott had a meeting with Steve Dixon. Although Andrew Ferguson did not say that Michael Knott had met Steve Dixon his evidence strongly suggests that the meeting occurred. How else would Michael Knott have known about the proposed payment? Yet Steve Dixon gave the most emphatic denial of meeting Michael Knott. The
denial should not be accepted. Indeed counsel assisting submitted that the denial was deliberately false. Unfortunately this submission of counsel assisting is correct. As counsel for Michael Knott correctly pointed out,¹³⁶ the written submissions for Steve Dixon did not attempt to explain why Steve Dixon’s evidence should be preferred. Since Andrew Ferguson was told of the payment by Michael Knott, the latter can only have become aware of it because Steve Dixon told him about it. Yet in other respects Steve Dixon’s written submissions did contain explanations of why his evidence should be preferred over other witnesses, including Michael Knott. Counsel for Steve Dixon went so far as to submit that Michael Knott ‘clearly had deep animus towards many CFMEU officials’.¹³⁷ But there is no evidence to support the submission.

(c) His evidence concerning his conversations with Michael Deegan was vague and general. His evidence that he came up with a figure of $100,000 to be paid by Thiess for the payment of services out of his own head without any estimate of the number of workers or sessions required was unbelievable.

(d) Steve Dixon cast wild aspersions on the characters of Michael Knott and Peter McClelland by twice accusing them of always being ‘at the pub or smoking dope’.¹³⁸ Counsel

¹³⁷ Submissions of Steve Dixon, 29/10/15, para 25.
assisting submitted that these should be rejected. That submission is correct. But it is necessary to go further. These allegations are inherently difficult to accept. Peter McClelland paid two visits to the witness box. On each occasion he appeared to be a business-like and efficient person. In general he seemed dedicated to advancing the interests of the CFMEU NSW as he saw them. These traits are not consistent with Steve Dixon’s allegation. It seems highly unlikely that he would spend his working days befuddled by drink or drugs. Peter McClelland emphatically denied the allegations. He was not challenged in his denial by counsel for Steve Dixon or any other counsel. In this respect Steve Dixon’s behaviour goes beyond suggesting unreliability. It indicates a total lack of credibility – an unwillingness to limit himself to his honest recollections of what he had observed. Witnesses have considerable protection from defamation actions. The witness box is not a place for personal attacks on those whom the witness dislikes. Nor is it a place for feckless remarks thrown out to get out of some tight testimonial corner. Witnesses who behave in this fashion deserve no credit.

75. It follows that the submissions of Michael Deegan which contend that corroboration is to be found in Steve Dixon’s evidence must fail. Both Michael Deegan and Steve Dixon have a strong self-interest in

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139 Peter McClelland, 6/10/15, T:872.6-28.
140 Submissions of Michael Deegan, 29/10/15, paras 3.3-3.5.
Steve Dixon’s evidence being correct. It is in fact completely untrustworthy.

**Transfer 2: Payment to the BTG Account**

76. On 20 April 2006, one week after the transfer of $100,000, the sum of $90,909.09 was transferred by electronic funds transfer from the BTG D&A Safety Account. It went into a CBA account in the name of the Building Trades Group (BTG Account).\(^{141}\) The Quickline Transfer form approving the payment was signed by Tony Papa.\(^{142}\) Toni Mitchell gave evidence that it was unusual for Tony Papa to sign such a transfer.\(^{143}\) That is significant evidence.

77. The Quickline Transfer form stated that the reason for the payment was:\(^{144}\) ‘Thiess Hochtief Drug & Alcohol and Safety consultancy payment – GST held for payment to the ATO’.

78. At the time of the transfer to the BTG Account, Michael Knott and Tony Papa were the only signatories on the BTG D&A Safety Account.\(^{145}\)

79. Tony Papa said that he did not prepare the form. He said that all he was asked to do was sign it. He said he was unaware of the transfer.

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\(^{141}\) BTG D&A MFI-3, 10/8/15, Vol 1, p 91; BTG D&A MFI-1, 10/8/15, p 94. The account number is 06 2194 10142083.

\(^{142}\) BTG D&A MFI-1, 10/8/15, p 93; Tony Papa, 18/8/15, T:810.16-27.

\(^{143}\) Toni Mitchell, 13/8/15, T:498.32-41.

\(^{144}\) BTG D&A MFI-1, 10/8/15, p 93.

\(^{145}\) BTG D&A MFI-3, 10/8/15, Vol 1, pp 4-8.
He said he knew nothing about the accounts, which were looked after by Michael Knott and Trevor Sharp.  

Andrew Ferguson gave evidence that he had no recollection of the movement of the money from the BTG D&A Safety Account to the BTG Account.  

**Transfers 3A and 3B: Payments to the CFMEU NSW and CIDAF**  

On 24 July 2006, the BTG D&A Committee had sent Tax Invoice OT-317 to Tony Papa at the BTG for $18,181.82 with the following description: ‘Reimbursement for presentation of Drug and Alcohol Education Sessions on Thiess Hochtief Lane Cove Tunnel project’. Michael Knott gave evidence that on 25 July 2006, Tony Papa requested that Michael Knott draw up two cheque requisitions on the BTG Account. Michael Knott said that Tony Papa gave him the details for the requisitions. The requisition forms dated 25 July 2006 which were drawn up were for:  

(a) cheque 00054 payable to the ‘Drug and Alcohol Committee’ in the amount of $18,181.82 for ‘Thiess Hodgkiss [sic] Drug & Alcohol Education [sic] Lane Cove Tunnel Project’; and

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146 Tony Papa, 18/8/15, T:810.32-47.  
147 Andrew Ferguson, 14/8/15, T:615.17-19.  
150 Michael Knott, 10/8/15, T:68.33-35.  
(b) cheque 00055 payable to the CFMEU in the amount of $72,727.27 payable for ‘Thiess Hodgkiss [sic] Safety Lane Cove Tunnel Project’.

82. Michael Knott gave evidence that at the time he was the treasurer of the BTG D&A Committee. He said he was unaware of this work performed by the Committee. He said that he telephoned Trevor Sharp to check with Trevor Sharp what work had been performed by the BTD D&A Committee, and was assured that it had been done.\(^{152}\)

83. After that conversation, Michael Knott drew up the requisitions and forwarded them to Andrew Ferguson for authorisation, as requested by Tony Papa.\(^{153}\) Andrew Ferguson signed both requisitions approving the cheques.

84. On 28 July 2006, the sum of $72,727.27 was debited from the BTG Account.\(^{154}\) Cheque 000055 was deposited into the CFMEU NSW’s general cheque account (CFMEU General Account).\(^{155}\) A duplicate of the receipt issued by the union describes the amount as being for ‘Miscellaneous BTG SAFETY CAMPAIGN’.\(^{156}\)

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\(^{152}\) Michael Knott, witness statement, 10/8/15, paras 35-36.

\(^{153}\) Michael Knott, witness statement, 10/8/15, para 37; Michael Knott, 10/8/15, T:68.13-16.

\(^{154}\) BTG D&A MFI-1, 10/8/15, p 111.

\(^{155}\) BTG D&A MFI-3, 10/8/15, Vol 2, pp 765, 767; BTG D&A MFI-1, 10/8/15, p 110. The account number is 06 2194 10127561.

\(^{156}\) BTG D&A MFI-1, 10/8/15, p 110.
85. On 4 August 2006, $18,181.82 was debited from the BTG Account\textsuperscript{157} and cheque 000054 was deposited into one of CIDAF’s bank accounts.\textsuperscript{158}

86. Tony Papa denied requesting the requisitions.\textsuperscript{159} He also denied ever seeing or requesting Tax Invoice OT-317.\textsuperscript{160} Andrew Ferguson said he was asked to sign the requisitions by someone but he could not recall who.\textsuperscript{161} He denied that he arranged the transfer to the CFMEU NSW.\textsuperscript{162}

87. If it was not Tony Papa or Andrew Ferguson who requested the transfers, who could it have been?

88. The BTG Account was established in May 2002, following a meeting of the BTG.\textsuperscript{163} At that time the officers of the BTG were:

(a) Tony Papa – BTG Secretary;
(b) Mick Doust from the ETU\textsuperscript{164} – BTG President;
(c) Andrew Ferguson – Vice President; and

\textsuperscript{157} BTG D&A MFI-1, 10/8/15, p 111.
\textsuperscript{158} BTG D&A MFI-1, 10/8/15, pp 112, 113A.
\textsuperscript{159} Tony Papa, 18/8/15, T:812.28-813.27.
\textsuperscript{160} Tony Papa, 18/8/15, T:813.29-814.6.
\textsuperscript{161} Andrew Ferguson, 14/8/15, T:616.2-24.
\textsuperscript{162} Andrew Ferguson, 17/8/15, T:675.8-9.
\textsuperscript{163} BTG D&A MFI-3, 10/8/15, Vol 2, pp 457-459.
\textsuperscript{164} Andrew Ferguson, 14/8/15, T:601.29.
Brian Beer from the AMWU\textsuperscript{165} – Vice President.

89. Both the BTG minutes and bank records from that time show that the BTG Account’s method of operation was as follows:

(a) Andrew Ferguson with either Michael Doust or Brian Beer; or

(b) Tony Papa with either Michael Doust or Brian Beer.\textsuperscript{166}

90. As at July 2006, there had been no formal change of signatory on the BTG Account.\textsuperscript{167} However, there is no document that suggests that Michael Doust or Brian Beer requested the transfers. In fact, the evidence suggests that the BTG Account was controlled for a considerable period by the CFMEU NSW:

(a) Over the period from November 2007 to October 2010 (when Andrew Ferguson ceased to be Secretary of the CFMEU), Andrew Ferguson and Tony Papa co-signed every cheque – 35 in all – on the BTG Account. All but two of these were payable to the CFMEU NSW.\textsuperscript{168} This was not in accordance with the bank authority which required one ‘CFMEU NSW person’ with a ‘non-CFMEU NSW person’.

\textsuperscript{165} Andrew Ferguson, 14/8/15, T:601.28-29.

\textsuperscript{166} BTG D&A MFI-3, 10/8/15, pp 457-459.


\textsuperscript{168} BTG D&A MFI-3, 10/8/15, pp 576-613.
A formal change of signatory did not take place until Andrew Ferguson ceased being Secretary. In February 2011, the signatories were changed to be Tony Papa and Malcolm Tulloch, Andrew Ferguson’s successor.169 After Malcolm Tulloch ceased to be Secretary, the signatories were again changed to Tony Papa and Brian Parker, Malcolm Tulloch’s successor.170 The minutes of the meetings recording the change of signatories do not record anyone in attendance other than Tony Papa and the current CFMEU NSW secretary. They do not record any other business. They do not record any previous meetings.

Michael Knott gave evidence that the principal officers responsible for the operation, authorisation and signatories to the BTG accounts were Andrew Ferguson and Tony Papa.171 He said that the records of the BTG were kept at the CFMEU NSW office.172

For his part, Tony Papa said he never exercised any decision-making role when signing the cheques on the BTG Account. He said he could have had his eyes closed.173 He was merely asked to sign the cheques by staff in the accounts department at the CFMEU NSW.174 The evidence that Tony Papa ‘knew

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171 Michael Knott, witness statement, 10/8/15, para 41.
nothing’ is difficult to accept. But, either way, it is at least consistent with CFMEU NSW control of the BTG.

91. The obvious inference is that one or both of Andrew Ferguson and Tony Papa were involved in making the decision to approve the transfers. Support for this conclusion can be found in a memo written by Andrew Ferguson to Peter McClelland on 2 October 2007. Among other things, Andrew Ferguson wrote in that memo:

When we got the payment BTG Exec officers met & decided $18,181.82 for drug & alcohol & $72,727.29 for BTG for safety. As BTG did not have a safety officer they allocated this to CFMEU as we do 99% of the industry OHS work.

**Transfer 4: Payment of $72,727.29 from the CFMEU NSW**

92. In September 2007 an investigation into the payment made by THJV to the BTG D&A Committee was commenced by the Australian Building and Construction Commission (ABCC). The ABCC notes recorded that it had received a complaint that the payment made by THJV was a payment to the CFMEU NSW ‘not to strike or talk about safety breaches’ and ‘was allegedly disguised as drug and alcohol education and training but no training took place’.

93. On 19 September 2007 Investigator Bernard Kozakiewicz contacted Trevor Sharp at the CIDAF. Trevor Sharp was not present when he

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175 Paragraph 98.
176 BTG D&A MFI-15, 14/8/15.
177 BTG D&A MFI-1, 10/8/15, pp 144–150.
178 BTG D&A MFI-1, 10/8/15, p 144.
called and Bernard Kozakiewicz left a message asking Trevor Sharp to call him regarding a complaint made in connection with Invoice No. OT-301.179

94. Trevor Sharp gave evidence that he immediately contacted Andrew Ferguson and told him he needed to meet him.180 He said Andrew Ferguson told him not to return the investigator’s calls and if the investigator got on to him to ‘stonewall’.181

95. Andrew Ferguson said he recalled having a discussion with Trevor Sharp and possibly Peter McClelland regarding a phone call from the ABCC. His evidence was initially that he thought that the ABCC’s enquiry related to an invoice in the amount of $18,000 odd issued by the BTG D&A Committee. But on being shown the note recording the call received by the BTG D&A Committee from the ABCC he did not dispute that it related to the $100,000 payment by THJV to the BTG D&A Committee.182 Andrew Ferguson denied telling Trevor Sharp not to speak to the ABCC investigator.183

96. Andrew Ferguson said that he discussed the issue thoroughly with Peter McClelland. They jointly decided that, although the money had been paid correctly in terms of it being a donation to the union, it was appropriate to return the money to the BTG and await the outcome of

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182 Andrew Ferguson, 14/8/15, T:618.27-619.39.
183 Andrew Ferguson, 14/8/15, T:626.10-33.
the investigation.\textsuperscript{184} His explanation for not corralling the money in a separate CFMEU NSW account was simply that at the end of the financial year it would have been ‘spent’.\textsuperscript{185} Andrew Ferguson’s evidence on this point was somewhat confusing. The money was not paid into a separate bank account. The CFMEU NSW did not even have a dedicated general ledger account for the payment of ‘safety’ expenses.\textsuperscript{186}

97. Peter McClelland recalled Andrew Ferguson speaking to him in the corridor of the CFMEU NSW office at Lidcombe. He said Andrew Ferguson told him that the CFMEU NSW had received the payment from Thiess and that he had heard from Trevor Sharp that it was being investigated by the ABCC.\textsuperscript{187} He said Andrew Ferguson suggested that the amount be paid back to the BTG D&A Committee\textsuperscript{188} and that he agreed because he did not ‘want money in the Union’s account which may have a question mark over it.’\textsuperscript{189}

98. A handwritten memo written by Andrew Ferguson to Peter McClelland dated 2 October 2007 also sheds light on why the money was to be paid back. The memo reads as follows:\textsuperscript{190}

\begin{quote}
I finally caught up with a backlog of work today. As you are aware the ABCC have been pestering T. Sharp re a payment made to BTG D&A last
\end{quote}

\textsuperscript{184} Andrew Ferguson, 14/8/15, T:620.40-621.1.
\textsuperscript{185} Andrew Ferguson, 14/8/15, T:621.6-20.
\textsuperscript{186} U-Plus/Coverforce MFI-7, 15/10/15.
\textsuperscript{187} Peter McClelland, 6/10/15, T:860.14-26.
\textsuperscript{188} Peter McClelland, 6/10/15, T:860.25-26.
\textsuperscript{189} Peter McClelland, 6/10/15, T:861.41-45.
\textsuperscript{190} BTG D&A MFI-15, 14/8/15.
year. I got off M. Knott last week a copy of invoice sent for $100,000. The invoice says for BTG Drug & Alcohol etc & safety Consultancy. I got Tony Papa to get invoice sent last year when S.Dixon told me what Thiess Hochtief had agreed. I was a bit perplexed at the time but S.D assured me etc. You know what S.D was like. Anyway I double checked this recently with S.D who now has a different story. He says really money was only for drug and alcohol not OHS. When we got the payment BTG Exec Officers met and decided $18,181.82 for drug and Alcohol & $72,727.29 for BTG for Safety. As BTG did not have a Safety Officer they allocated this to CFMEU as we do 99% of the industry OHS work. In any case I am not comfortable with this therefore arrange for the full amount to go to T Sharpe [sic] CFMEU pay $72,727.29 to D+A.

99. Andrew Ferguson denied that the inference from the memo was that the money being paid to the BTG D&A Committee was to ‘go back’ for all time. At first, he had no recollection of any change of story or apparent change of story by Steve Dixon. Later, he said that he was absolutely convinced that what Steve Dixon was saying was not correct: Andrew Ferguson knew it was a donation and he knew it was for safety.

100. On 3 October 2007, Peter McClelland authorised the issue of cheque 8792 to the BTG D&A Committee in the amount of $72,727.29. On 17 October 2007, that cheque was deposited in the BTG D&A Safety Account and the amount debited from the CFMEU General Account on which the cheque had been drawn.
Transfer 5: BTG D&A Cash Deposit Account

101. On 18 October 2007, one day after $72,727.29 had been returned from the CFMEU NSW to the BTG D&A Safety Account, Trevor Sharp sent a letter on BTG D&A Committee letterhead to the CBA asking that Andrew Ferguson be added as a signatory to the BTG D&A Safety Account.\footnote{BTG D&A MFI-1, pp 132–139. Andrew Ferguson, 14/8/15, T:631.32-43.} The letter included a statement by Trevor Sharp that he ‘would appreciate it if [the change of signatories] could be recorded as soon as possible.’ The effect of the change was to replace Michael Knott with Andrew Ferguson, keeping Tony Papa as a signatory.

102. Andrew Ferguson was never a member of the BTG D&A Committee.\footnote{Andrew Ferguson, 13/8/15, T:523.5-6.} There is no evidence that he was ever a signatory on any of the many other BTG D&A Committee bank accounts.\footnote{BTG D&A MFI-33, 6/10/15.} Andrew Ferguson said he did not know and could not recollect why he was made a signatory of the BTG D&A Safety Account.\footnote{Andrew Ferguson, 14/8/15, T:632.13-43; Andrew Ferguson, 17/8/15, T:659.38-660.2.} He denied that he became a signatory to that account to ensure that he kept control of the money that he had caused to be transferred from the CFMEU NSW.\footnote{Andrew Ferguson, 14/8/15, T:660.4-13.}

103. Once again, Tony Papa said he knew nothing about why the signatories were changed.\footnote{Tony Papa, 18/8/15, T816.39-41.}
104. On 22 October 2007, Toni Mitchell wrote to the CBA and asked that a new cash deposit account be created in the name of the BTG D&A Committee, linked to the BTG D&A Safety Account (Cash Deposit Account).\(^{203}\) Again, the letter asked that the new account application be ‘processed as soon as possible.’ The request for the new account was signed by Andrew Ferguson and Tony Papa.

105. Tony Papa said that Toni Mitchell prepared the request form, and that she must have been authorised by Trevor Sharp or Michael Knott.\(^{204}\) Tony Papa again maintained that he simply signed the document without reading its contents and did not know why the account was being set up.\(^{205}\)

106. Toni Mitchell gave evidence that she was instructed to set up this account because the ‘money was going to be sitting around for a while.’\(^{206}\) She said she was told this by Trevor Sharp but didn’t know why.\(^{207}\) Trevor Sharp assumed he gave Toni Mitchell the instructions to set up the account, but he had no precise recollection of it.\(^{208}\)

107. Like Tony Papa, Andrew Ferguson could not recall anything about the Cash Deposit Account.\(^{209}\)

\(^{203}\) BTG D&A MFI-1, 10/8/15, pp 140-143.
\(^{204}\) Tony Papa, 18/8/15, T:818.22-33.
\(^{205}\) Tony Papa, 18/8/15, T:818.35-47.
\(^{207}\) Toni Mitchell, 13/8/15, T:505.10-16.
\(^{208}\) Trevor Sharp, witness statement, 11/8/15, para 25.
\(^{209}\) Andrew Ferguson, 14/8/15, T:634.37-41, 635.23-33.
On 29 October 2007, $72,727.29 was transferred from the BTG D&A Safety Account to the linked Cash Deposit Account.210

On 2 April 2008 the ABCC referred their investigation to the NSW Police. Shortly thereafter the NSW Police informed the ABCC that due to a lack of evidence no action would be taken in respect of this matter. The NSW Police file was closed on 24 April 2008.211

**Transfer 6: Withdrawal of $80,230.88 from the Cash Deposit Account**

For almost 2 years, the $72,727.29 sat in the Cash Deposit Account. Apart from interest earned, there were no other credits to the account. Until 8 October 2009 there were no debits.212 On that day, the entire balance of the account, being $80,230.88, was withdrawn from the Cash Deposit Account and transferred back to the BTG D&A Safety Account.213 Tony Papa gave evidence that he knew nothing about this transfer.214

**Transfer 7: Transfer of $72,000 back to the CFMEU NSW**

On 9 October 2009, Tony Papa and Andrew Ferguson co-signed cheque 000001 drawn on the BTG D&A Safety Account in the amount

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211 BTG D&A MFI-1, 10/8/15, p 144.
213 BTG D&A MFI-3, 10/8/15, pp 214, 663.
of $72,000 in favour of the CFMEU.\textsuperscript{215} This was the first and only cheque drawn on the account.

112. On 19 October 2009, the cheque was paid into the CFMEU General Account.\textsuperscript{216} The receipt for the deposit of the $72,000 describes the payment as being a donation to the ‘fighting fund’.\textsuperscript{217}

113. The cheque was the subject of a two page cheque requisition on BTG D&A Committee letterhead. The first page described the payee as the CFMEU and details of the payment as ‘Return of funds as requested’.\textsuperscript{218} The second page included the words ‘Please advise amount of cheque’. It was signed by Tony Papa and Andrew Ferguson. Toni Mitchell said that it was not her who had written the total amount of the cheque on the requisition.\textsuperscript{219} She said she did not recall who told her to prepare it.\textsuperscript{220}

114. Tony Papa maintained that he knew nothing about this cheque, despite acknowledging that he had signed it. He said he did not draw it up and did not request it. He said he was only asked to sign because he happened to be a signatory on that account.\textsuperscript{221} He acknowledged

\textsuperscript{215} BTG D&A MFI-1, 10/8/15, p 152.
\textsuperscript{217} BTG D&A MFI-1, 10/8/15, p 156.
\textsuperscript{218} BTG D&A MFI-11, 13/8/15.
\textsuperscript{219} Toni Mitchell, 13/8/15, T:508.32-34.
\textsuperscript{220} Toni Mitchell, 13/8/15, T:508.6-9.
\textsuperscript{221} Tony Papa, 18/8/15, T:820.46-822.21.
signing the cheque requisition but said that the document was drafted by Toni Mitchell and he ‘certainly didn’t give her any instructions.’

Andrew Ferguson acknowledged that he signed the cheque but said he was not sure what the payment was made in relation to and could only assume that it was payment to the CFMEU NSW for the ‘Thiess safety money’. He denied that he and Tony Papa authorised the return of the money to the CFMEU once they had ascertained that there was going to be no further investigation.

Andrew Ferguson gave evidence that on his return from long service leave he was asked to sign a requisition to pay the money to the CFMEU NSW and he signed accordingly. He had no understanding of where the request came from and did not know what had prompted the writer of the requisition to write ‘Return of funds as requested’. Andrew Ferguson later said that he took his long service leave in 2010. However, a document apparently prepared by him sent to Brian Parker in 2011 said that his long service leave was from 26 February to 4 September 2009.

Andrew Ferguson gave evidence that he had no knowledge as to how the money paid to the CFMEU NSW came to be categorised as a

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222 Tony Papa, 18/8/15, T:821.30-42.
223 Andrew Ferguson, 14/8/15, T:641.25-46.
224 Andrew Ferguson, 17/8/15, T:675.32-35.
225 Andrew Ferguson, 14/8/15, T:639.36-42.
226 Andrew Ferguson, 14/8/15, T:640.27-29.
227 Andrew Ferguson, 14/8/15, T:641.6-11.
228 Andrew Ferguson, 14/8/15, T:640.36-641.1.
229 BTG D&A MFI-18, 17/8/15.
donation to the fighting fund. He stated that he was not involved in receipting the money despite being the Secretary of the union. He went on to add that his understanding was that donations to the union are often designated to the fighting fund ledger.

118. On 20 October 2009, the remaining $8,230.88 from the Cash Deposit Account was transferred to another BTG D&A Committee account.

Events in late 2011

119. In late November 2011 Michael Knott undertook an inspection of the financial records of the CFMEU NSW, including those of the BTG. Michael Knott said he did so because he had heard that a number of people were accusing him of financial impropriety and he wanted to check the books in order to say with absolute authority that the rumours were untrue.

120. Michael Knott’s inspection revealed what he thought were irregularities in the BTG records that he said he was previously not aware of. He gave evidence that he brought these irregularities to the attention of Brian Parker, at that time the Acting Secretary of the CFMEU NSW, at a meeting on 1 December 2011.

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230 Andrew Ferguson, 14/8/15, T:642.5-35.
231 Andrew Ferguson, 14/8/15, T:642.37-43.
233 Michael Knott, witness statement, 10/8/15, paras 41-43.
234 Michael Knott, 10/8/15, T:75.37-44.
235 Michael Knott, witness statement, 10/8/15, para 43.
121. Andrew Ferguson gave evidence that he was asked to comment on a report from Michael Knott. Andrew Ferguson had by this stage left the union’s employment. On 9 December 2011, Andrew Ferguson sent Kylie Price an email, copied to Michael Knott. The email stated:

Brian
As requested I spoke to senior Theiss [sic] management people today and have examined the file you provided me. I have also examined my file. This matter was the subject of an ABCC and NSW Police examination several years ago. There was an individual trying to make mischief and waste police resources. The issue was thoroughly investigated and resolved to be bogus…

122. Andrew Ferguson also handwrote two notations on a print out of the email. The first was, in reference to senior Thiess management, that he had spoken with Ray Miranda. Ray Miranda gave evidence that he recalled a fairly short conversation with Andrew Ferguson but in contrast to Andrew Ferguson’s recollection he recalled telling Andrew Ferguson that the money was paid to the ‘Drug and Alcohol Foundation.’

123. The second notation was more extensive:

When Steve Dixon [was] an official he had a discussion I think with John Lee of Theiss [sic] in 2006. They resolved to donate $100,000 (inclusive of GST) to BTG for OHS/D&A work in the industry. BTG donated $20,000 inclusive of GST to D&A. Tom Simpson specifically did D&A training etc on a Theiss [sic] project. Balance of money used by CFMEU for OHS. Recently T.Sharpe [sic] indicated to B. Parker if he did not get a

236 Andrew Ferguson, 14/8/15, T:644.36-39.
237 BTG D&A MFI-17, 14/8/15.
238 Ray Miranda, witness statement, 6/10/15, para 9.
239 BTG D&A MFI-17, 14/8/15.
job with BTG doing D&A he would blow this issue up. This was a form of blackmail/extortion.

124. On 12 December 2011, Michael Knott sent an email to Brian Parker and Rita Mallia, respectively the incoming Secretary and President of the CFMEU NSW. He canvassed his concerns and dealt with Andrew Ferguson’s response to those concerns.\textsuperscript{240} Michael Knott took issue with Andrew Ferguson’s suggestion that the matter was ‘thoroughly investigated’. Rita Mallia gave evidence that she gave a copy of Michael Knott’s email to Andrew Ferguson for his comment.\textsuperscript{241}

125. Around the same time, in December 2011, Andrew Ferguson also prepared some typed notes for officials at the CFMEU NSW purporting to refute Michael Knott’s account. Four of these documents containing handwritten notations were made available to the Commission. Andrew Ferguson acknowledged that the handwritten notations on these documents belonged to him.\textsuperscript{242} He agreed that the four separate documents were likely to be various versions of the same document prepared by him.\textsuperscript{243}

126. There are numerous substantive differences between the various drafts suggesting, at the very least, that Andrew Ferguson’s recollection was uncertain to a considerable degree. For example, in two of the drafts Andrew Ferguson asserts that Peter McClelland authorised the final return of the funds from the BTG D&A Committee to the CFMEU

\textsuperscript{240} BTG D&A MFI-1, 10/8/15, pp 225-228.
\textsuperscript{241} Rita Mallia, 12/8/15, T:341.23-30.
\textsuperscript{242} Andrew Ferguson, 17/8/15, T:667.40-44.
\textsuperscript{243} Andrew Ferguson, 17/8/15, T:668.2-8.
NSW, when in fact it was Andrew Ferguson. Peter McClelland said he had no involvement with the BTG D&A Committee and the documentary record supports that. In one draft Andrew Ferguson said that ‘[a]t some point, Steve [Dixon] advised Peter McClelland and myself that Thiess had made a substantial contribution to the BTG.’

This was consistent with the notation he made on the 9 December 2011 email. However, in what would appear to be a later draft of the document, he described the Thiess contribution as ‘to assist the CFMEU to provide safety services to the Lane Cove Tunnel Project and our industry efforts to improve safety and more specifically in the civil sector and in tunnel safety.’

D – THIESS PAYMENT: FINDINGS ON THE EVIDENCE

127. The events in question occurred a number of years ago. It is therefore necessary in assessing the evidence to give great weight to the contemporaneous documents and the objective circumstances.

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244 BTG D&A MFI-18, 17/8/15, Documents 2 and 3.
245 Peter McClelland, 6/10/15, T:856.3-5.
Not a donation to CFMEU for safety purposes

128. The $100,000 payment was not a donation to the CFMEU NSW for safety purposes. Andrew Ferguson’s evidence that it was must be rejected for the following reasons:

(a) If the THJV wished to make a donation to the union for some legitimate purpose such as safety programs or activities, it would naturally be expected that the payment would be made directly to the union. The fact that the payment by THJV was not made to the union directly is damning evidence against the idea that the payment was intended as a donation to the union for safety purposes or any other legitimate purpose.

(b) Apart from Andrew Ferguson’s evidence, and Tony Papa’s evidence about what Steve Dixon had apparently said at an organisers’ meeting, there was no evidence that the payment was a donation to the CFMEU NSW for safety purposes. Tony Papa’s evidence was vague. Given his averred failure to recall almost anything, his account is not accepted. In addition the evidence of Peter McClelland and Michael Knott does not support Andrew Ferguson’s account.

(c) Andrew Ferguson himself gave inconsistent accounts about the reason the payment was made. He was, at first, very definite that it was a donation to the union for safety purposes. But later he said it was a donation to the BTG, after he was shown a document he had written in 2011 where
he had described the payment in that way. His denial of any inconsistency was fanciful and unacceptable. In one draft of notes prepared in 2011 he said that payment was a contribution to the BTG; in others it was to the CFMEU NSW for safety.

**Not a payment for drug and alcohol safety training**

129. The $100,000 payment was not a legitimate payment for the provision of drug and alcohol training to THJV workers by the BTG D&A Committee.

130. A telling matter is the size of the payment. At the time Michael Deegan approved the payment of the $100,000 on 16 March 2006, 16 sessions each of 1½ hours’ duration were planned. That is, the sum of $100,000 was approved to be paid for 24 hours work. That equates to an *hourly* rate of pay of $4,166.67. By way of contrast, the *annual* salary of Tom Simpson, who was to perform the training, was in the order of $60,000.248 The OHS safety report for December 2006 recorded that to date THJV had spent $17,255 on an externally provided Senior First Aid course of 12 hours’ duration and $19,200 on an externally provided WorkCover course of 32 hours’ duration.249 Sometimes a disparity between what actually happened and a claim that something greater was expected to happen does not disprove the sincerity with which the latter claim is made. But here the disparity is so gross as to discredit the theory that $100,000 worth of drug and

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248 BTG D&A MFI-30, 6/10/15.
249 BTG D&A MFI-1, 10/8/15, p 507.
alcohol training was to be provided. In light of all of the circumstances, Trevor Sharp’s evidence that there was no way that the BTG D&A Committee was going to provide $100,000 of training is to be accepted.

131. Steve Dixon and Michael Deegan submitted that the submission of counsel assisting in the preceding paragraph is incorrect on several grounds. Some grounds were relied on by both, some by only one. One is that the records are unreliable and the costing figures are incorrect. It is impossible to evaluate this contention since it is not said which figures are incorrect and why. Another ground is that the drug and alcohol training is incorrectly recorded as an internal cost, not an external cost. But this does not show that the records are unreliable. It suggests rather that they were deliberately incorrect, since if they had been correct, the unlikeliness that the sum of $100,000 was paid for drug and alcohol safety training would have become apparent at once.

132. A third argument is that it was intended that the whole workforce be trained, and this would have made the cost the allegedly reasonable figure of only $83.33 per head. However, for reasons given, it is not clear that there were 1,200 people employed by THJV on the Project; nothing like that number were ever given any form of training; and Michael Deegan’s anticipations of the drug and alcohol training before approving the payment were for a small fraction of the workforce only. Michael Deegan also contended that conclusions about his intention when he approved the payment from the lower numbers of

250 Submissions of Steve Dixon, 29/10/15, para 46; Submissions of Michael Deegan, 29/10/15, paras 3.9-3.12.
251 See para 130.
persons who actually received the training could not be drawn, because he was not involved in the actual delivery of the training. Yet somewhat inconsistently, Michael Deegan’s submissions attacked Trevor Sharp for his supposed ignorance of what work was actually done. He also submitted that it was specious to compare Tom Simpson’s salary with the $100,000 figure, in part because Steve Dixon said that Tom Simpson would not be the only provider of the training. These criticisms made by Michael Deegan must fail as being inconsistent with the objective evidence.\footnote{See paras 31-39.} Further, on 16 March 2006, when Michael Deegan approved the payment of the invoice he had already sent on 10 March 2006 a note to staff indicating that the training sessions would be one hour sessions to be conducted between 20 March and 5 April 2006, and that a schedule was currently being put together. Further, on 14 March 2006 he received the schedule indicating 16 sessions of a maximum duration of one and a half hours each.\footnote{See paras 34, 36.} Thus Michael Deegan could not have thought that he was paying for more than about 24 hours’ work. In any event, save for Michael Deegan’s evidence, there is little material to suggest that 1,200 people were employed by THJV on the Project at any one time. There is even less evidence that each of those 1,200 people would receive drug and alcohol training. The OHS reports between June 2005 and December 2006 indicate that, save for induction training, there was no other formal training undertaken by anything remotely approaching 1,200 people on the Project during that period.\footnote{BTG D&A MFI-1, 10/8/15, pp 352, 361, 369, 377, 387, 397, 407, 417, 440, 450, 459, 468, 475, 481, 487, 492, 497, 502, 507.}
133. Senior counsel for Andrew Ferguson criticised counsel assisting for not analysing the evidence of Ray Miranda. Ray Miranda gave some evidence that the $100,000 figure was consistent with the terms of the Second EBA so far as it related to drug and alcohol training. Counsel assisting submitted that Ray Miranda’s evidence was not dealt with in their submissions in chief because he was obviously mistaken.

His evidence was that the $100,000 was paid by cheque. In fact it was paid by EFT. He thought the $100,000 went to the “Drug and Alcohol Foundation”. In fact it went to the BTG D&A Committee. He said the payment was in respect of unpaid EBA contributions. However, the bank statements from the BTG D&A Safety Account show regular monthly payments from “Thiess Hochtief” consistently on or around the 14th day of the month, in accordance with the EBA clause. Moreover, the accounts payable voucher and approval of the $100,000 payment are clearly not in respect of EBA contributions.

134. Those submissions are correct.

135. Another significant matter is the evidence about how the quantum of the payment was determined. Steve Dixon’s evidence was to the effect that he plucked it out of the air. He did not even estimate the number of workers or the number of sessions. It is not likely that someone having Michael Deegan’s position and experience would have agreed

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255 Submissions of Andrew Ferguson, 29/10/15, paras 31-33.
256 Submissions of Counsel Assisting, 12/11/15, para 22.
257 Ray Miranda, 6/10/15, T:875.3-26.
258 Ray Miranda, 6/10/15, T:877.16-27.
260 BTG D&A MFI-6, 11/8/15, p 76.
261 BTG D&A MFI-1, 10/8/15, pp 81-82.
to pay a substantial amount for what was truly to be training without some proper basis for the cost. Particulars of that basis would have to have come from the BTG D&A Committee but there is no evidence to suggest that THJV ever obtained them.

136. Another factor is that on a project which apparently had many safety issues it is implausible that THJV would spend so disproportionately large an amount on drug and alcohol training as compared with other safety matters. Apart from the vague and self-serving evidence of Michael Deegan and Steve Dixon, there is nothing in the OHS reports which suggests that drug and alcohol safety issues were a problem so great as to warrant such a significant expenditure of funds. Peter Chatburn gave evidence of only two incidents on site.

137. If Michael Deegan truly believed he was approving a payment for drug and alcohol safety training he could not possibly have agreed to the amount he did unless he were grossly negligent, or entirely reckless with the joint venture’s money, or desirous of wasting the joint venture’s money. But Michael Deegan was brought onto the Project for the precise purpose of assisting it commercially. His extensive background and work history shows that Michael Deegan was not a person who was likely to be negligent or to waste money recklessly or deliberately. In fact, his background indicates that he was someone with considerable ability and experience in the successful delivery of a variety of construction and infrastructure projects. The possibility that Michael Deegan approved the $100,000 payment negligently, recklessly or with a desire to waste money intentionally is rejected.
One of Steve Dixon’s arguments for the proposition that the purpose of the payment was drug and alcohol safety training was that that was how it was described on the invoice and the accounts payable voucher. But this is circular. One cannot establish that an alleged misdescription for an invoice is not actually a misdescription by relying on the description given.

$100,000 payment was a disguised payment to the CFMEU NSW

For the above reasons, the evidence given by Andrew Ferguson, Steve Dixon and Michael Deegan about why the payment was made is rejected. Their accounts, unfortunately, were self-serving fabrications.

A particular protest is made by Michael Deegan about counsel assisting’s submissions that that finding should be made. His solicitors complain that it was not put to him that the purpose of making the payment was to secure the assent of CFMEU NSW to the Second EBA, and that it was not put to him that he was being untruthful in his evidence. It is clear that Michael Deegan was aware of the case being put to him. To require counsel in the position of counsel assisting to put to a witness the proposition that a particular answer was untruthful would simply lead to an infinite regress (‘Did you meet him that day?’ ‘No.’ ‘I put it to you that that last answer was a lie?’ ‘I deny that.’ ‘And I put it to you that that denial was a lie?’ ‘I deny that.’, and so on.) The solicitors for Michael Deegan also complained

262 BTG D&A MFI-1, 10/8/15, pp 81-82.

263 Submissions of Michael Deegan, 29/10/15, paras 3.2, 3.7(c). This submission was also put by Steve Dixon: Submissions of Steve Dixon, 29/10/15, para 20.
that in assessing the veracity of his evidence, counsel assisting had had no regard to his long history in senior safety-related roles, his experience in dealing with serious workplace incidents, his commitment to workplace safety and his general standing. This submission about Michael Deegan’s record was put even more strongly by his ally Steve Dixon: ‘Deegan is a person of considerable responsibility and integrity. He has served State and Federal, ALP and Coalition governments in numerous senior positions.’

It was submitted that these matters were relevant both to credibility as a witness and to the unlikelihood of Michael Deegan engaging in criminal conduct.

141. These are certainly material matters. Unfortunately, in relation to the THJV payment, they have insufficient weight. The force of circumstance points against them. So did Michael Deegan’s demeanour as a witness. It was quite unimpressive. He tended to give very long answers. Sometimes they were self-serving and non-responsive. He was very eager to present himself as totally dedicated to safety. He is one of a long line of witnesses in the building industry, and indeed some other industries, who seem to think that anything may be forgiven as long as one desires greater safety at work. Yet every decent human being has those emotions. In seeking support from Steve Dixon – and there were numerous points of similarity and reciprocity between their two sets of written submissions – he allied himself with an even less satisfactory witness. The vices of

264 Submissions of Steve Dixon, 29/10/15, para 21.
265 Submissions of Michael Deegan, 29/10/15, paras 4.5, 4.6.
266 For example, Michael Deegan, 6/10/15, T:894.7-26.
an alliance must be accepted along with its hoped-for gains. It is not wise to manacle oneself to a corpse.

142. It must also be remembered that it is the qualities which Michael Deegan’s solicitors rely on which give him a strong degree of self-interest in denying the inferences that flow from the surrounding circumstances. That is because those qualities have given him a reputation he did not want to lose.

143. The solicitors for Michael Deegan also submitted that the analysis of what the true purpose of the payment was should be based on those directly involved in reaching agreement, not on ‘hearsay accounts of others who had no such involvement’. This is a reference to the evidence of Michael Knott, Peter McClelland and Andrew Ferguson. There is prima facie force in the submission, at least at a theoretical level. But the ‘hearsay’ evidence of those who dealt with Steve Dixon on the CFMEU NSW side of the hill, depending on what can be concluded from it, is capable of establishing what Steve Dixon said; and what he said can be the basis of inferences about what had been said on the THJV side of the hill. The reasoning of counsel assisting is not illegitimate.

144. Senior counsel for Andrew Ferguson complained that the finding which counsel assisting seeks about the motive of the payment which THJV made was not put to him. Andrew Ferguson was questioned for a long time. Even if no direct questions had been put to him on the point, there is no doubt that he understood the possibility of counsel

267 Submissions of Michael Deegan, 29/10/15, para 3.5.
268 Submissions of Andrew Ferguson, 29/10/15, paras 26-30.
assisting seeking the finding under discussion. But the submission is rendered utterly empty by the fact that the relevant finding was put to him.\footnote{Andrew Ferguson, 17/8/15, T:675.37-676.5.}

\begin{quote}
Q. I further suggest that you knew that the payment of $100,000 made by Thiess had no legitimate purpose?

A. Definitely not the case.

Q. And you knew that the $100,000 payment by Thiess was intended to ensure industrial peace between Thiess and the Union in relation to the Epping to Chatswood project which had had a poor safety record?

A. Part of your question has got some merit about the safety problems on the job, so is it possible to break up the question?

Q. I suggest that the purpose of the payment to your understanding, that is the $100,000 by Thiess to the Union, was in order to ensure industrial peace on the project?

A. Definitely not the case.
\end{quote}

145. Senior counsel for Andrew Ferguson criticised counsel assisting’s submission that the accounts of Andrew Ferguson, Steve Dixon and Michael Deegan were self-serving fabrications. He relied on what was said by Gibbs J in \textit{Steinberg v Federal Commissioner of Taxation}:\footnote{(1975) 134 CLR 640 at 694.}

‘The fact that a witness is disbelieved does not prove the opposite to what is asserted.’ This citation was preliminary to an attempt by senior counsel for Andrew Ferguson to downplay or discount Michael Knott’s evidence about his protests when he heard of the $100,000 payment.\footnote{See para 55.} There is no justification for that course. And it must be remembered that Gibbs J also said that there may be circumstances in which an
inference can be drawn from the falsity of a witness’s story that the truth would be harmful to the witness. That is certainly true of Steve Dixon. It is true of Michael Deegan, who had to explain away a highly suspicious payment. And it is true of Andrew Ferguson, who had to explain away the artificial and contrived round robins of the years after the highly suspicious payment had been received. While in general the mere fact of disbelief in a witness’s evidence does not render the opposite of what the witness says true, Michael Deegan, Steve Dixon and Andrew Ferguson gave extremely precise accounts. Their accounts were about matters central to the issues. They were not on peripheral matters. They seemed not to accept any possibility that they might be mistaken. Yet they were wrong. Each had a strong motive to lie – exculpation. Appropriate inferences are available.

146. An example of Andrew Ferguson’s difficulties is his evidence\textsuperscript{272} that Steve Dixon told him that Thiess had offered a donation of $100,000 to the union for safety purposes. Andrew Ferguson submitted:\textsuperscript{273}

\begin{enumerate}
  \item first, it is inherently credible: the answers attributed to Mr Dixon are, for example, consistent with the evidence about the level of drug use on the project;
  \item secondly, the evidence is consistent with Mr Dixon’s evidence, to the extent that the latter recalled reporting to Mr Ferguson about the offer of payment;\textsuperscript{274}
  \item thirdly, and most importantly, Mr Ferguson’s evidence is consistent with – and corroborated by – his note to Mr McClelland of 2 October 2007 and his handwritten annotations to an email of 10 December 2011.
\end{enumerate}

\textsuperscript{272} Andrew Ferguson, 14/8/15 T:605.36-606.26.
\textsuperscript{273} Submissions of Andrew Ferguson, 29/10/15, para 57.
\textsuperscript{274} Steve Dixon, 12/8/15, T:368.36-40.
147. It is dangerous for Andrew Ferguson to appeal to Steve Dixon as a testimonial ally. Never reinforce failure. And never seek reinforcements from failure. The appeal is unsuccessful. But in any event, Steve Dixon said the payment was *not* a donation, while in the passage referred to Andrew Ferguson said it was. Another problem is that Andrew Ferguson gave other versions of the conversation. Yet another problem is that the evidence is not credible in view of the terms of the invoice sent to THJV. Finally, Andrew Ferguson’s memorandum to Peter McClelland is completely inconsistent with Andrew Ferguson’s account. In the memorandum he refers to getting the $100,000 invoice sent. But if the payment was a donation to the union for safety purposes, the invoice would not have had GST included, and it would have been sent to the union.

148. A related submission of Andrew Ferguson’s was that Trevor Sharp was hostile to Andrew Ferguson and gave ‘wrong’ evidence ‘deployed to discredit Mr Ferguson’. The ‘wrong’ evidence seemed to be a statement that he did not contact an investigator from the ABCC. This was said to be part of conduct blaming Andrew Ferguson for muzzling him, when in fact a record made by the investigator ‘records no hesitation on his part in communicating with the investigator’. In fact the record shows no such thing. What it does show is that the

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275 The version referred to is summarised in para 64. For other versions, see paras 65, 126, 128(c).
276 See para 98.
277 Submissions of Andrew Ferguson, 29/10/15, paras 68-69.
investigator contacted Trevor Sharp, not the other way round.\textsuperscript{278} Hence Trevor Sharp’s ‘wrong’ evidence was true.

149. In these circumstances it is unnecessary and undesirable to embark on a line-by-line refutation of the criticisms which senior counsel for Andrew Ferguson made of Trevor Sharp.\textsuperscript{279}

150. Senior counsel for Andrew Ferguson undertook the task of defending his conduct in relation to the round robins of 2006 and after. It was said he did not exercise day-to-day control of the union’s finances; had to rely on the variable nature of what Steve Dixon told him; therefore did not have a completely consistent recollection; and acted with propriety in ensuring that the funds were paid to the BTG D&A Safety Account pending the outcome of the ABCC investigation. In considering these submissions it is necessary to bear in mind that sometimes Andrew Ferguson prays in aid Steve Dixon’s testimony as credible, but sometimes he criticises it. It must also be remembered that Andrew Ferguson seemed to be a very able man and a very well prepared witness. He examined most documents shown to him very thoroughly before answering questions about them. There is nothing to criticise in any of these things, but it cannot be said that he was some testimonial neophyte or innocent. The truth is that the round robins have not been adequately explained, and they are damning.

151. The finding which must be made is that Michael Deegan intended to make a payment of $100,000 to benefit the CFMEU NSW. But for the purposes of disguising that fact, Andrew Ferguson procured the

\textsuperscript{278} See Trevor Sharp, 12/8/15, T:278.21-280.17.

\textsuperscript{279} Submissions of Andrew Ferguson, 29/10/15, paras 70-76.
payment to be made under a false invoice to the BRG D&A Committee which would then, via an intermediate siphoning account, transfer 80% of the money to the CFMEU NSW. Steve Dixon, Trevor Sharp, Tony Papa and Michael Deegan knew the essential matters of fact in that conduct. The following factors support that conclusion:

(a) Trevor Sharp’s evidence of the conversation with Andrew Ferguson and Steve Dixon strongly supports the finding. Against interest, Trevor Sharp freely described the invoice which he sent as ‘bogus’.\(^{280}\) Senior counsel for Andrew Ferguson said that Trevor Sharp’s hostility to Andrew Ferguson was so great that in fact the description was in Trevor Sharp’s interest.\(^{281}\) That submission is rejected. So is Andrew Ferguson’s account of the conversation. Steve Dixon’s statement about what would have happened, even though he could not remember any meeting, is also rejected.

(b) Michael Knott’s evidence of what Steve Dixon said in the meeting between the two, and the events following that meeting, also support the finding. Steve Dixon had arranged for a $100,000 donation for the union. Subsequently, after discussions between Andrew Ferguson and Steve Dixon the payment was made to the BTG D&A Committee.

(c) Andrew Ferguson’s oral denial that he was involved in the invoice sent to THJV should also be rejected. His 2007 memo to Peter McClelland is a much more nearly

\(^{280}\) Trevor Sharp, 12/8/15, T:326.1, 329.45.

\(^{281}\) Submissions of Andrew Ferguson, 29/10/15, para 73.
contemporaneous record. It is also against interest. It establishes that he was involved in causing it to be sent. Trevor Sharp’s evidence was consistent with Andrew Ferguson causing the invoice to be sent. Even if one were to accept Andrew Ferguson’s account that the payment was a donation to the union for safety purposes (which it was not), Andrew Ferguson must have known that the invoice was false.

(d) The events surrounding the ‘return’ of the money which the CFMEU NSW received strongly implicate Andrew Ferguson. The fact that one day after $72,727.29 was paid out of the CFMEU General Account Andrew Ferguson became a signatory on the BTG D&A Safety Account (even though he was never a member or involved with the BTG D&A Committee or a signatory on any other relevant account) points to the conclusion that, contrary to the memo he prepared for Peter McClelland, Andrew Ferguson was not concerned to return the money to the BTG D&A Committee. Rather, he wanted it to appear as if the money had been returned but at the same time keep control of the funds which had always been intended to be the union’s.

(e) The scheme was clandestine in its nature. The BTG Account was used to receive the funds from the BTG D&A Committee. After a time the funds were distributed to the CFMEU and CIDAF. At this time, the BTG Account operated almost exclusively as an account to siphon money received from the BTG D&A Safety Program Account to the
CFMEU General Account. If one puts aside the very occasional small credit or debit, the BTG Account had no other purpose or function.

(f) The finding that Andrew Ferguson arranged affairs in that way is supported not only by Trevor Sharp’s evidence, but also the fact that Andrew Ferguson was the Secretary of the union, the fact that the scheme operated to benefit the union, and the fact that on both Michael Knott and Peter McClelland’s accounts Andrew Ferguson was the person to deal with Steve Dixon about the issue.

(g) Tony Papa was an integral part of the scheme. He was a signatory on both the BTG D&A Safety Account and the BTG Account. Apart from the initial payment by Thiess (Transfer 1) and the transfer out of the CFMEU General Account (Transfer 4) he was involved in all of the transfers identified above. The evidence that he ‘knew nothing’ is quite implausible. At the very least, he willingly carried out Andrew Ferguson’s instructions as to the transfers. In all the circumstances rejection of his evidence means that his denials of liability in truth create a basis for inferring that he actually did have knowledge.

(h) For the reasons outlined above, Michael Deegan must have known that the $100,000 invoice he approved was false. The $100,000 payment was intended to benefit THJV in ways other than drug and alcohol training.
152. The want of truthful evidence from Steve Dixon and Michael Deegan makes it necessary to focus on the surrounding circumstances and objective facts.

153. There is no evidence that there was any kind of duress in making the payment. But the probable inference from the circumstances is that Michael Deegan believed and intended that the payment would advance the THJV's interests in some way. The payment was probably negotiated in late 2005. At that time negotiations for the Second EBA were underway. Those negotiations were difficult. The industrial climate was strained, partly as a result of the death of a worker on site. The Project was also in some financial difficulty. Hence it could ill afford delays caused by industrial action either generally or in relation to safety.

154. The solicitors for Michael Deegan advocated a different approach to the timing issue. They objected to the proposition that the payment was negotiated in late 2005 and the proposition that by 2 December 2005 THJV had made a decision to engage Tom Simpson to conduct the drug and alcohol training. Submissions to similar effect were made by Steve Dixon and Andrew Ferguson. The critics submit that counsel assisting has selected late 2005 so as to achieve conformity with the voting on the Second EBA on 13 December 2005 and the antecedent agreement to that end in late November 2005.

283 Submissions of Steve Dixon, 29/10/15, para 59.
284 Submissions of Mr Ferguson, 29/10/15, paras 42-43.
The argument of Michael Deegan was as follows:\footnote{Submissions of Michael Deegan, 29/10/15, para 3.14.}

(a) the only evidence cited by Counsel Assisting … is the minutes of the meeting of the Safety and HR Communication Meeting held on Friday 2 December 2005 which state … that Tom Simpson is to conduct drug and alcohol training;

(b) as is clear from the minutes, Mr Deegan did not attend the 2 December 2005 meeting;

(c) the Commission has not called any person who attended the 2 December 2005 meeting to give evidence regarding the decision made during the meeting about the training and, in particular, whether senior management approval for the training had been obtained at that time;'

(d) Mr Simpson did not meet with the Project Safety Committee until 15 February 2006, that is, more than two months after the 2 December 2005 meeting;

(e) it was not until 10 March 2006 that Mr Deegan sent out a weekly project note informing employees about the rollout of the drug and alcohol awareness training on the Project. That note stated that “[i]n the coming weeks, THJV will be launching an Alcohol & Drugs Awareness Program on-site”;

(f) there is no reference to the drug and alcohol training contained in the minutes of the THJV Management Committee minutes prior to 12 April 2006.

The argument continued:\footnote{Submissions of Michael Deegan, 29/10/15, para 3.15.}

[These] matters … strongly suggest that the decision to run the training was not made until February 2006. This is consistent with the evidence given by Mr Dixon that during a meeting with Mr Deegan at around the end of 2005, Mr Deegan agreed in principle to meet with the trainers to see what they had to offer, and that no figure of the cost of training was discussed at that meeting. It also aligns with Mr Deegan’s recollection that the discussions he had with Mr Dixon about the training occurred over a period of weeks, if not months, after he started work on the Project.
157. Steve Dixon’s argument was put thus:287

(a) Knott says Dixon advised him of the payment in late December 2005;

(b) Sharp says he was called to a meeting and advised of the payment in early 2006;

(c) Dixon says he reached agreement on the payment after the training had commenced, which was in February 2006;

(d) Ferguson said he became aware of the payment four weeks to two months before the invoice was raised. The invoice was raised on 13 April 2006;

(e) Deegan says the approach from Dixon occurred in 2006 (it is noteworthy that Counsel Assisting did not directly ask Deegan when the payment was proposed or agreed to);

(f) there is no documentary reference to the amount of the payment prior to March 2006.

It was not put to any witness that the payment was solicited, agreed to or made prior to the terms of the Second EBA being finalised in November 2005.

158. In passing it may be noted that if counsel for Steve Dixon were discontented with the questioning of counsel assisting, it was open to him to fill the gap by asking his own questions of Michael Deegan. He asked none.

159. Andrew Ferguson’s argument was:288

Mr Chatburn claimed that he negotiated the agreement between October 2005 and January 2006; the EBA was signed on 9 January 2006 and

287 Submissions of Steve Dixon, 29/10/15, paras 59-60.
288 Submissions of Mr Ferguson, 29/10/15, para 42.
ratified by the Australian Industrial Relations Commission on 7 February 2006. The payment of $100,000 was made approximately two months after the latter date. The gap of two months does not suggest that the payment was made in consideration of the finalisation of the EBA. The more anodyne explanation comes from the contemporaneous records – namely that Mr Simpson gave his address to the Project Safety Committee on 15 February 2006. The payment fits the chronology of services being performed by Mr Simpson.

160. The dating suggested by counsel assisting is preferable for the following reasons. By 2 December 2005, THJV had already apparently decided to engage Tom Simpson from the BTG D&A Committee. There are THJV documents which contemplate that training would begin in January or February 2006.²⁸⁹ It may be inferred that the payment was discussed prior to this time. Steve Dixon’s evidence was that the first conversation concerning ‘drug and alcohol training’ occurred in late 2005.²⁹⁰ Admittedly his evidence is in general of very limited value. He also said that the amount of the payment was not determined until after the training commenced.²⁹¹ That is inherently unlikely: why would THJV buy a pig in a poke? Contrary to Steve Dixon’s submissions,²⁹² Michael Deegan’s evidence was consistent with the discussions concerning ‘drug and alcohol training’ beginning shortly after September 2005 over a period of weeks or months.²⁹³ There is an inference that the payment had been negotiated in the latter months of 2005. The evidence of Michael Knott was that in approximately late December 2005, Steve Dixon had

²⁸⁹ See para 31.
²⁹⁰ See para 42.
²⁹¹ See para 45.
²⁹² Submissions of Steve Dixon, 29/10/15, para 59(e).
²⁹³ See para 50.
already arranged the donation. Peter McClelland dated the relevant events, definitely, as being in 2005. Andrew Ferguson was vague about when the payment occurred. He said he learned of it several months before the payment occurred. It is to be inferred that he had a conversation about the payment in 2005. The evidence of Trevor Sharp was that early in 2006, the $100,000 donation from Thiess had already been arranged. Hence the evidence supports the conclusion that the payment was arranged and negotiated in late 2005. It had probably been arranged prior to December that year.

161. The most likely reasons for the $100,000 payment by THJV were to seek to avoid the prospect of industrial action arising from safety issues and to seek to ensure Steve Dixon’s agreement in relation to the negotiations concerning the Second EBA.

294 See para 55.
295 See para 57.
296 Andrew Ferguson, 14/8/15, T:602.4-20.
297 See paras 66-67.
298 See para 69.
E – THIESS PAYMENT: LEGAL ISSUES

Corrupt commissions

162. In 1987, s 249B of the *Crimes Act* 1900 (NSW) was introduced. It deals with ‘corrupt commissions’. The section provides:

(1) If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit:

(a) as an inducement or reward for or otherwise on account of:

   (i) doing or not doing something, or having done or not having done something, or

   (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

   in relation to the affairs or business of the agent’s principal, or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent’s principal,

the agent is liable to imprisonment for 7 years.

(2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit:

(a) as an inducement or reward for or otherwise on account of the agent’s:

   (i) doing or not doing something, or having done or not having done something, or
(ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

in relation to the affairs or business of the agent’s principal, or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent’s principal,

the firstmentioned person is liable to imprisonment for 7 years.

(3) For the purposes of subsection (1), where a benefit is received or solicited by anyone with the consent or at the request of an agent, the agent shall be deemed to have received or solicited the benefit.

163. Section 249A defines ‘agent’ to include ‘any person … acting for or on behalf of, any other person (who in this case is referred to in this Part as the person’s principal) in any capacity’.

164. The effect of s 249F is, relevantly, that any person who aids, abets, counsels, procures, solicits or incites the commission of an offence against s 249B commits an offence punishable by imprisonment for 7 years.

165. A union official entitled to act on behalf of workers in negotiating terms and conditions of employment is an ‘agent’ of those workers for the purposes of the statute. The negotiations of the workers’ terms and conditions of employment is in relation to their affairs.299

166. In s 249B(1)(b) and (2)(b) the expression ‘would in any way tend to influence’ invites attention to whether the benefit would objectively

have that tendency, regardless of whether it in fact influences the agent.\textsuperscript{300}

167. In relation to the offence under s 249B(1)(b), a number of Victorian decisions have held that an agent acts ‘corruptly’ within the meaning of the statute if ‘he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal’s affairs.’\textsuperscript{301} On this view, it is not necessary for the agent to have an actual intention to be influenced by the payment.\textsuperscript{302} The New South Wales Court of Criminal Appeal has, however, qualified the Victorian approach, holding that it is necessary to establish that the benefit is corrupt according to standards of conduct generally held.\textsuperscript{303} A payment or receipt without the knowledge of the principal for one of the proscribed purposes would generally be regarded as corrupt according to such standards.\textsuperscript{304}

168. Accordingly, in relation to the offence against s 249B(2)(b), the elements of the offence are as follows:\textsuperscript{305}

(a) the accused must give or offer a benefit to the agent or another person with the consent or at the request of the agent;

\textsuperscript{300}\textit{Mehajer v R} [2014] NSWCCA 167 at [100].


\textsuperscript{303}\textit{Mehajer v R} [2014] NSWCCA 167 at [59]-[63].

\textsuperscript{304}\textit{Mehajer v R} [2014] NSWCCA 167 at [59]-[63].

\textsuperscript{305}\textit{Mehajer v R} [2014] NSWCCA 167 at [67].
the benefit must be one which objectively speaking would tend to influence the agent to show favour or disfavour in the principal’s affairs or business;

c) the benefit must be provided by the accused intending, knowing or believing that it would tend to influence the agent to show favour or disfavour; and

d) the provision of the benefit must be corrupt according to normally received standards of conduct.

Analysis

169. In the present case, Steve Dixon was a bargaining representative for the CFMEU NSW members on the site and was, consistently with authority, an ‘agent’ within the meaning of s 249B. Relevantly, his principals were the CFMEU NSW members at the Project he was representing in enterprise bargaining negotiations.

170. The argument of counsel assisting just recorded was attacked by Andrew Ferguson and Steve Dixon. Andrew Ferguson’s submissions on this point proceeded largely by slab quotation from cases and statutes, but it boils down to the following argument. The Second EBA was executed by the CFMEU NSW. It was a party to it. The employers of THJV covered by the agreement also constituted a party. But there is no evidence that CFMEU NSW in fact acted for the

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306 Submissions of Andrew Ferguson, 29/10/15, paras 9-14.
307 Submissions of Steve Dixon, 29/10/15, paras 31-40.
employees. Hence Steve Dixon was the agent of the CFMEU NSW, but no more. Hence there could be no breach of s 249B for the reasons given by Burchett J in *R v Turner.* Steve Dixon’s submissions were to similar effect. The central point of those submissions was that a union does not act as an agent of its members when negotiating an enterprise agreement.

171. In point of law, however, the word ‘agent’ in s 249B is not limited to a person who at common law is an agent. It includes any person employed, or acting on behalf of another, or someone purporting or intending to do so: see s 249A. Despite the assertion of senior counsel for Andrew Ferguson to the contrary, *R v Gallagher* is authority for the proposition that a union official may be both an ‘agent’ of the union and an ‘agent’ for members of the union or some sub-set of them for the purposes of the section. It is also authority for the proposition that a union official negotiating an agreement with an employer may, as a matter of law, be said to be an agent on behalf of members on whose behalf he or she is negotiating. Senior counsel for Andrew Ferguson strongly stressed that no secret commission was established in *R v Turner.* However, critically, in that case the indictment alleged that the union official was an agent of the union. The case is not an authority directly applicable to circumstances where the union official is an agent of the members.

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310 Submissions of Andrew Ferguson, 29/1015, paras 5-7, 13-14.
172. Counsel for Steve Dixon cited *Ryan v Textile Clothing & Footwear Union of Australia*[^311] in support of the proposition that ‘[a] union does not act as an agent of its members when negotiating an enterprise agreement’.[^312] In fact the case merely supports the proposition that when a union negotiates a common law contract which is not a certified agreement, it will usually as a matter of contract law negotiate as principal.[^313] The case says nothing about whether a union official is an ‘agent’ within the meaning of the statute.

173. The submissions under consideration also face a factual difficulty. Steve Dixon gave the following evidence.[^314]

Q. Were you involved in EBA negotiations?
A. Yes, I was.

Q. What was your role in EBA negotiations?
A. I was a bargaining representative on behalf of Union members employed on site.

174. Counsel for Steve Dixon argued that the meaning of the phrase used by his client was undefined and that he was not asked to identify it. (Counsel assisting did not ask him; nor, incidentally, did his own counsel.) He submitted that it had the meaning given in the *Fair Work Act* 2009 (Cth) to ‘bargaining representative’. It is, however, unlikely that Steve Dixon was intending to convey the same meaning as that as

[^312]: Submissions of Steve Dixon, 29/10/15, para 38.
a statutory phrase first introduced in 2009 to describe his role in 2005.\textsuperscript{315} The better view is that Steve Dixon was using the phrase ‘bargaining representative’ in its natural and ordinary sense. His evidence shows that he saw himself as acting on behalf of the union members on the site. Hence he was an agent within the meaning of ss 249A and 249B.

175. In light of the conclusions above,\textsuperscript{316} and particularly having regard to the circumstances of ongoing and difficult enterprise bargaining negotiations between THJV and union representatives including Steve Dixon, it is probable that the disguised payment of $100,000 to the BTG D&A Committee, 80\% of which was to end up in the CFMEU General Account:

(a) would objectively tend to influence Steve Dixon to show favour to the THJV; and

(b) was actually intended by Michael Deegan to influence Steve Dixon to show favour to the THJV.

176. It is also probable that Steve Dixon understood that Michael Deegan agreed to make the $100,000 payment for the desired purpose of Steve Dixon showing favour towards the THJV. The inference arises from the absence of any other satisfactory explanation. Steve Dixon did deny that he would have involved himself in a payment designed to introduce an inappropriate outcome.\textsuperscript{317} But unfortunately Steve

\textsuperscript{315} The term bargaining agent was introduced in March 2006.

\textsuperscript{316} Paras 128-161.

\textsuperscript{317} Steve Dixon, 12/8/15, T:381.35-43.
Dixon’s general credibility is so poor as to compel rejection of that particular piece of evidence, to suggest that the payment had no legitimate purpose, and to suggest that Steve Dixon knew that. And even if that particular piece of evidence by Steve Dixon were to be accepted, as noted above, for the purposes of an offence against s 249B(1)(b) it does not matter whether Steve Dixon had any intention to show favour. There is a strong inference that Michael Deegan authorised the payment in the hope of influencing Steve Dixon.

Additional submissions for Steve Dixon

177. Counsel for Steve Dixon made a large number of submissions with which it has been difficult to deal conveniently at particular points in counsel assisting’s submissions. Hence they are collected here.

178. The first of these submissions was said to be based on procedural fairness. It was said that counsel assisting never put to Steve Dixon except in the most oblique way the proposition that he solicited a corrupt commission to avoid the prospect of industrial action arising from safety issues and to ensure his consent to the Second EBA. Steve Dixon submitted that had that allegation been put to him he would have given many explanations about the benefits of the Second EBA. Steve Dixon’s position in evidence was that the $100,000 payment was a payment for legitimate services. He denied it was anything else. He denied it was a donation. He said that if he had been at a meeting in which anyone said it was a donation he would have objected. He said that the people involved in the payment knew it was

318 Submissions of Steve Dixon, 29/10/15, paras 13-14, 64-65.
not a donation.\textsuperscript{319} He denied that the payment was ‘a payment not to strike or talk about safety breaches’. He said it was ‘offensive’ to suggest ‘that the payment was designed to produce an outcome that was inappropriate’.\textsuperscript{320} He denied the suggestion that his evidence about the quantum of the payment was ‘simply not true’.\textsuperscript{321} He denied the suggestion that it was incredible that $100,000 was paid simply for training purposes.\textsuperscript{322} In the face of all these denials, what further questioning of Steve Dixon could usefully have been undertaken? It must have been clear to him that counsel assisting might be going to allege that the $100,000 payment was a donation to the CFMEU NSW for some purpose other than a legitimate payment for services rendered. The absolute nature of the position he had adopted made any more detailed exploration of why his position was tenable or untenable superfluous. Further, Steve Dixon’s submissions are advanced as if he were unrepresented and not permitted to be represented. If his own counsel had wished to conduct a demonstration of how the terms of the Second EBA supported his position or nullified that which might be taken up by counsel assisting, that could easily have been done. But it was not.

179. In any event, the evidence which Steve Dixon could have been ‘likely’ to have given about the objective merits of the Second EBA and his personal view of it is irrelevant. Counsel assisting did not submit that Steve Dixon in fact intended to provide favours to THJV. Any such

\textsuperscript{319} Steve Dixon, 12/8/15, T:357.10-18, 364.40-367.1
\textsuperscript{320} Steve Dixon, 12/8/15, T:381.33-43.
\textsuperscript{321} Steve Dixon, 12/8/15, T:359.39-360.10.
\textsuperscript{322} Steve Dixon, 12/8/15, T:373.47-374.4.
subjective intention is irrelevant. Hence Steve Dixon’s opinion that the deal was good for the union is not germane to the inquiry. So far as Steve Dixon referred to matters of objective benefit, it might readily be accepted that a mid-project EBA on a distressed government project would result in an increase in worker entitlements.

180. Steve Dixon made a specific complaint about the failure of counsel assisting to question him about the alleged motivation for the $100,000 payment lying in avoiding industrial action based on safety issues. The complaint was:

[I]n terms of industrial action associated with safety, such implication is unfair on Dixon as it was never put to him. Dixon indicated that he believed that the “turnaround in safety was as a result of what Thiess management did following the fatality”. Consistent with that observation, had it been put to him he would likely have observed that:

(a) The key improvement to safety on the site arose because of changes in the management of THJV, including particularly the appointment of Deegan who placed a much higher priority on safety;

(b) There was a reduction in safety issues on the site over the period of Deegan’s tenure. Such an observation is supported by the OH&S documents.

181. But his own counsel actually did ask Steve Dixon why he said it was ‘rubbish’ to say that the payment was a payment not to strike or talk about safety breaches. The matters put in the quoted submission did

323 See paras 167-168.
324 Submissions of Steve Dixon, 29/10/15, para 68, some footnotes omitted.
325 Footnote in original; Compare OHS&R performance at BTG D&A MFI-1, 10/8/15, pp 358 (in respect of July 2005) and 496 (in respect of September 2006). There is a reduction in all categories across the period.
326 Steve Dixon, 12/8/15, T:381.34.
not figure in Steve Dixon’s answer, though they had figured earlier in his evidence. This makes the submission appear very contrived. The detail of the point is another matter on which counsel for Steve Dixon could have questioned him if he had thought it profitable to do so. In truth it could not have been profitable. Evidence of improvements in the fact of safety after a payment does not help to establish whether that payment was motivated by a desire to avoid industrial action based on claims about safety. The OHS&R reports relied on do not refer to any safety incidents which are drug or alcohol related.

182. Steve Dixon made another ‘unfairness’ submission.

It was also surprising that the content of Knott’s evidence subject to suppression orders was not provided to Dixon (or apparently the other witnesses). The existence of that evidence only became public in some cross examination of Sharp. That evidence may have made available submissions as to the credit of Knott as well as assisting in determining lines of further cross examination.

183. If counsel for Steve Dixon had wanted access to the relevant evidence – i.e. evidence taken in confidential hearings – he had only to ask. Affected parties in other case studies have done this with success. Had senior counsel assisting refused to tender the material, counsel for Steve Dixon might have had some theoretical ground of complaint, depending on all the circumstances there arising. But the issue never arose.

327 Steve Dixon, 12/8/15, T:381.33-43.
329 Submissions of Steve Dixon, 29/10/15, para 15.
Counsel for Steve Dixon made many laudatory submissions about his client's evidence – that it was honest, consistent with contemporary documents, corroborated by Michael Deegan, frank and honest. He also made many attacks on the credibility of other witnesses (save for Michael Deegan). Thus Michael Knott and Trevor Sharp were strongly attacked. Michael Knott thus suffered the usual fate of someone who blows a whistle about behaviour in a union – ostracism by his former colleagues and a belting from the lawyers acting for interests associated with the union. The unfortunate fact is that Steve Dixon was a very bad witness, and it was an error for him to have held himself out as credible in the way he did. He threw stones, but he lives in a very fragile glasshouse.

Tony Papa and Trevor Sharp

The elaborate actions and structures implemented to disguise the $100,000 support the view that the payment was 'corrupt' according to ordinary standards of conduct. Andrew Ferguson played a central role in arranging that conduct. Each of Tony Papa and Trevor Sharp were parties to its implementation.

Those submissions of counsel assisting are to be accepted. Trevor Sharp and Tony Papa met the submissions by arguing that no finding should be made that they may have contravened s 249F.\textsuperscript{330} Tony Papa submitted that it was necessary to show that the accused was present at the time when the offence is committed. That may have been so at

\textsuperscript{330} Submissions of Trevor Sharp, 5/11/15, paras 2-6; Submissions of Anthony Papaconstuntinos, 29/10/15, paras 3-15.
common law. It is not so in relation to s 249F. Assuming that the commission of a principal offence can be established, to demonstrate that a person is liable for ‘aiding, abetting, counselling or procuring’ it is necessary to show that the accused accessory knew all the essential factual matters which must be established to show the offence by the principal offender; and the accessory intentionally assisted or encouraged the commission of the principal offence. Both Tony Papa and Trevor Sharp were involved in sending the $100,000 invoice. The sending of the invoice was part of the conduct concerning the making and receipt of the corrupt commission.\textsuperscript{331} Trevor Sharp’s evidence is that he did so under the direction of Andrew Ferguson. On this point, he is credible. Andrew Ferguson did appear to be efficient, determined and ruthless with subordinates when necessary. It may also be accepted that Trevor Sharp was not happy about sending the ‘bogus’ invoice. In one sense he had no choice. But it could not be found that he acted under duress, and only that finding might exculpate him if other criteria of criminal responsibility are met.

187. Trevor Sharp’s knowledge is established by his evidence about the conversation with Andrew Ferguson and Steve Dixon.\textsuperscript{332} He gave evidence that he thought Steve Dixon would have said that he was the one who would organise the donation on site.\textsuperscript{333} That is evidence that he thought the payment was improper.\textsuperscript{334} He also viewed the invoice he sent as ‘bogus’.\textsuperscript{335} This evidence supports the inference that Trevor

\textsuperscript{331} See paras 70, 98.
\textsuperscript{332} See para 69.
\textsuperscript{333} Trevor Sharp, 12/8/15, T:328.9-12.
\textsuperscript{334} Trevor Sharp, 11/8/15, T:271.21-46.
\textsuperscript{335} Trevor Sharp, 12/8/15, T:326.1, 329.45.
Sharp knew the payment was not legitimate and was made with a proscribed purpose.

188. Tony Papa’s knowledge should be inferred from the fact that he was, on the fairly contemporaneous account of Andrew Ferguson, involved in sending the $100,000 invoice to THJV. It is to be inferred that he, as a member of the BTG D&A Committee sending the false invoice, would have been aware of the reason for the invoice. Tony Papa’s knowledge is also to be inferred from the fact, contrary to his denials, that he was intimately involved with the affairs of the BTG and the BTG D&A, and from the transfers of funds, particularly the transfer which occurred on 20 April 2006, one week after the $100,000 payment from the THJV was made. These facts, in combination with Tony Papa’s involvement with the invoice, suggests that he was aware of the reasons for the payment.

189. The solicitors for Tony Papa submitted that he was not a decision-maker; he signed documents when asked to but did not make inquiries; he was only an organiser out in the field, an underling instantly compliant with the wishes of his boss, Andrew Ferguson.336 But even underlings who obey orders can be liable for aiding and abetting. And there are strong reasons for rejecting Tony Papa’s claims that he could not remember why he signed so many documents or what was said. When those claims are taken with various adamant denials it is right to conclude that he was determined to say anything, true to his knowledge or untrue to his knowledge, which distanced him from criticism. In view of his very close involvement in CFMEU affairs at quite a senior

336 Submissions of Tony Papa, 29/10/15, para 13.
level over a long period of time, the converse of what he said is to be inferred. These lies support the conclusion that he knew why the $100,000 payment was made.

190. Accordingly:

(a) Steve Dixon may have committed an offence against s 249B(1)(b) of the *Crimes Act* 1900 (NSW) by soliciting a corrupt commission;

(b) Michael Deegan may have committed an offence against s 249B(2)(b) of the *Crimes Act* 1900 (NSW) by giving a corrupt commission; and

(c) Andrew Ferguson, Tony Papa and Trevor Sharp may have committed an offence against s 249F of the *Crimes Act* 1900 (NSW) by aiding, abetting, counselling or procuring Steve Dixon’s possible offence.

191. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Steve Dixon in relation to a possible offence under s 249B(1)(b) of the *Crimes Act* 1900 (NSW).

192. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been
referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Michael Deegan in relation to a possible offence under s 249B(2)(b) of the Crimes Act 1900 (NSW).

193. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Andrew Ferguson in relation to a possible offence under s 249F of the Crimes Act 1900 (NSW).

194. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Tony Papa in relation to a possible offence under s 249F of the Crimes Act 1900 (NSW).

195. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Trevor Sharp in relation to a possible offence under s 249F of the Crimes Act 1900 (NSW).
196. There is insufficient evidentiary material available to decide whether THJV may have committed an offence.

F – SIPHONING OF EBA FUNDS: OVERVIEW

197. From 2004 to 2012 funds paid into the BTG D&A Safety Program Account pursuant to a standard form clause in CFMEU NSW EBAs (EBA levy clause). They were then transferred to the CFMEU NSW. This part of the Chapter concerns the circumstances in which this took place.

198. The discussion is divided into two sections. The first section explains the basic arrangements and structures by which the CFMEU NSW received funds from the EBA levy clause. The second section examines whether there was anything illegal or improper in the CFMEU NSW receiving the money that it did.

G – SIPHONING OF EBA FUNDS: SUMMARY OF EVIDENCE

Evolution of EBA levy clause

199. For many years, one of the principal sources of funding of CIDAF (sometimes called in the evidence ‘the Foundation’ or ‘Foundation House’) was contributions paid by employers pursuant to the EBA levy clause. On a trip to Canada in 1996 Trevor Sharp learned about a drug and alcohol rehabilitation facility in Vancouver which was funded by levying a charge per worker on employers through industrial agreements. Trevor Sharp raised the idea with Andrew Ferguson.
Sometime later the CFMEU NSW asked employers to pay a one-off fee to the BTG D&A Committee to support its activities.\textsuperscript{337}

200. In around 1998 or 1999, the EBA levy clause took a form which required an employer company to pay a service fee of $250.00 to the BTG D&A Committee for the presentation of its workplace training courses; provision of assessment and referral/counselling services; and, if necessary, for the treatment of employees for drug and alcohol addictions.\textsuperscript{338} In addition the sum of 40 cents per week of the redundancy contribution for each employee was to be reallocated from ACIRT to CIDAF.\textsuperscript{339}

201. Later the amount to be paid to the CIDAF increased from 40 cents to $1 per week per employee. However, the clause in this form did not work as intended because employers were making the contribution directly to ACIRT. It proved impossible under the rules of ACIRT to extract money once it had been received into the members’ account.\textsuperscript{340}

202. There were various later versions of the EBA levy clause. Some provided for direct payment of $1 to CIDAF.\textsuperscript{341} There were a number

\textsuperscript{337} Trevor Sharp, witness statement, 11/8/15, para 10.
\textsuperscript{338} See BTG D&A MFI-6, 11/8/15, p 165, clause 4(d).
\textsuperscript{339} See BTG D&A MFI-6, 11/8/15, p 165, clause 4(e). ACIRT is the Australian Construction Industry Redundancy Trust.
\textsuperscript{340} Trevor Sharp, 11/8/15, T:225.34-38, 227.37–228.6; Andrew Ferguson, 13/8/15, T:525.4-15.
\textsuperscript{341} See BTG D&A MFI-6, 11/8/15, p 236.
of CFMEU NSW negotiated agreements in 2003 which contained the following clause: 342

Employees may elect on a company basis to have $1.00 per week of their ACIRT contribution paid to an organisation of their choice e.g. Construction Industry Drug & Alcohol Foundation.

203. However, it would seem that in around early 2003 and certainly by 2004, many agreements began to include the following standard clause: 343

The Company will contribute $1.00 per week per Employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program, to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry. (BTG D&A Clause)

204. Andrew Ferguson gave evidence that the CFMEU NSW effected a fundamental change in the wording of the EBA to ensure that the BTG D&A Committee receive the funds rather than the CIDAF directly. He said that this change had been brought about in recognition of the CFMEU NSW’s contribution to the establishment of Foundation House and a recognition of a changed priority in that more needed to be done on the issue of workplace safety, while at the same time continuing the work of the BTG D&A Committee. 344

205. The evidence suggests that sometime in early 2005, the BTG D&A Clause was amended to require a $2 per week contribution, but was otherwise unaltered. 345 A clause in this form was the standard form of

342 BTG D&A MFI-12, 14/8/15.
344 Andrew Ferguson, 13/8/15, T:525.39-526.5.
345 An example of the clause can be found at BTG D&A MFI-6, 11/8/15, p 440.
clause until the beginning of 2012 when the CFMEU NSW altered the
standard clause to require a $3 donation per week per employee to
CIDAF.\textsuperscript{346}

\textbf{BTG D&A Safety Program Account}

206. On its face the BTG D&A Clause was not particularly clear in two
respects. One will be examined later.\textsuperscript{347} The other arises in this way.
The clause specified that the monies were to be paid to an
administrator ‘nominated by the Building Trade Group (BTG) of
Unions Drug & Alcohol/Safety Program’. However, a ‘program’ is
not a person. Who exactly was to nominate the administrator?

207. Andrew Ferguson at least thought it was ‘crystal clear’ that the
administrator was appointed as the collector of the ‘Building Trades
Group of Unions Drug and Alcohol Committee’.\textsuperscript{348} Whether it was
‘crystal clear’ or not, in practice the evidence indicates that what
occurred was as follows:

(a) The BTG D&A Committee established a separate bank
account – the BTG D&A Safety Account – in December 2002
to receive EBA levy contributions. The account was closed
in June 2013.

\textsuperscript{346} BTG D&A MFI-6, 11/8/15, pp 486, 536.
\textsuperscript{347} See paras 242-248.
\textsuperscript{348} Andrew Ferguson, 13/8/15, T:533.39–534.4.
(b) Each month monies were deposited in or transferred into the BTG D&A Safety Account.\footnote{349 Toni Mitchell, witness statement, 13/8/15, para 9. See BTG D&A MFI-3, 10/8/15, Vols 1-2 for the banking records beginning in 2004. A summary of the transactions can be found in BTG MF1-14, 14/8/15, pp 1–11.}

(c) Some payments were transferred directly to the BTG D&A Safety Account by employers. However, a substantial amount was collected by a company called Laytins Mayfair. It was operated by Steve Parker. According to Trevor Sharp, he was the ‘independent administrator’ referred to in the clause.\footnote{350 Trevor Sharp, 11/8/15, T:228.7-28.} In consideration for collecting the contributions from employers, it was agreed that Laytins Mayfair was entitled to a 10% commission plus costs. The financial records for the BTG D&A Committee show Laytins Mayfair’s fee was paid from the previous months’ contributions, which were all banked to the BTG D&A Safety Account. The bank statements for the BTG D&A Safety Account do not record regular payments to Laytins Mayfair prior to January 2006.\footnote{351 BTG D&A MFI-3, 10/8/15, pp 29-80.}

(d) Apart from the Thiess Payment discussed above, the only payments into the BTG D&A Safety Account were the EBA levy contributions.\footnote{352 See BTG D&A MFI-3, 10/8/15, Vol 1, pp 29–338 covering the period from 2004 onwards. A summary of the transactions can be found in BTG MF1-14, 14/8/15, pp 1–11.}
(e) Each month the contributions made from the previous month were distributed to entities other than the BTG D&A Committee. At no time was any money paid to the BTG D&A Committee.  

208. Under the BTG D&A clause, the monies were contributed by employers to be used only for a specific purpose, namely ‘to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’.

209. Counsel assisting submitted that the arrangement was an express trust, being either:

(a) a trust for a charitable purpose (the relief of sickness or a beneficial purpose to a section of the community within the spirit and intendment of the Preamble to the Charitable Uses Act 1601 (UK)); or

(b) a so-called ‘Quistclose trust’.

Pursuant to that trust, the members of the BTG D&A Committee held the funds in the BTG D&A Safety Account on trust, such funds to be applied for the purpose of assisting ‘with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’. In Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq), Gibbs ACJ explained that the decision

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353 Toni Mitchell, witness statement, 13/8/15, para 10; See BTG D&A MFI-3, 10/8/15, Vols 1 and 2. A summary of the transactions can be found at BTG MFI-14, 14/8/15, pp 1–11.

354 (1978) 141 CLR 335 at 353.
in *Barclays Bank Ltd v Quistclose Investments Ltd*355 was authority for the following proposition:

... [W]here money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

A strong attack on counsel assisting’s submissions in this respect is examined below.356

**Application of money from the BTG D&A Safety Account**

210. The bank and financial records of various entities reveals funds from the BTG D&A Safety Account from July 2004 to January 2012 inclusive were applied as follows.357

(a) From July 2004 to August 2005, a total of $505,634 in EBA levy contributions was received and $489,123 was distributed. Approximately 50.2% was paid to the CIDAF and 48.8% was paid directly to the CFMEU General Account.

(b) From September 2005 to January 2012, a total of $2,173,013 in EBA levy contributions was received and $2,217,303 was

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356 See paras 238-241.
357 BTG D&A MFI-14, 14/8/15, Diagrams. For a more detailed summary see BTG D&A MFI-14, 14/8/15, pp 1-11.
distributed. Of the amount distributed, $233,461 was paid in agreed commission and fees to Laytins Mayfair. Of the balance distributed, 50% was distributed to CIDAF and the remaining 50% was paid to the BTG Account. Every dollar transferred to the BTG Account was subsequently transferred to the CFMEU General Account. During this time, CIDAF continued to receive some direct EBA levy contributions under earlier EBA levy clauses, but the bulk of its funding was received from the BTG D&A Committee.

(c) From February 2012 onwards, after issues had been raised by board members of the CIDAF concerning CIDAF’s funding, the EBA levy clause was altered to nominate CIDAF once again as the direct recipient of the EBA levy contributions. From February 2012 to March 2013, the BTG D&A Safety Account continued to receive some funds which were remitted entirely to the CIDAF. By March 2013, the BTG D&A Safety Account had a nil balance and it was closed in June 2013.

211. The funds flow across the three periods is illustrated in the three diagrams on the following pages.

358 See paras 215-227.
BTG Drug & Alcohol Committee
Flow of EBA Levy Contributions September 2005 to January 2012

Employer with CFMEU EBA

EBA Levy Contributions $2,173,013

EBA Levy Contributions $42,997

BTG D&A Committee
CBA Account 062032 10104676
EBA Levy Payments $1,083,842
Payments to Laytins Mayfair $233,461

EBA Levy Payment $593,695

CIDAF - Foundation House/Rehab

Payments to Laytins Mayfair $233,461

BTG of Unions
CBA Account 062194 10142083

EBA Levy Payment $990,147

Payments to CFMEU CBA A/C $992,902

Laytins Mayfair

CFMEU (NSW)
CBA Account 062194 10127561

Notes:
1. The difference between the amount received by the BTG of $990,147 and the amount remitted by the BTG to the CFMEU of $992,902 (difference of $2,758) is due to:
   1) Cheque 00006 for $17,504.64 from BTG to CFMEU on 22 October 2008 exceeded the corresponding levy payment to BTG of $14,812 on 9 October 2008 by $2,773, and
   2) Cheque 00030 for $19,379.56 from BTG to CFMEU is $18 less than the corresponding levy payment to BTG in transaction EFT1111 for $19,397.56.
In what circumstances did the CFMEU NSW come to receive distributions from the BTG D&A Safety Account? On this there was a degree of dispute between Trevor Sharp and Andrew Ferguson.

According to Trevor Sharp, sometime in 2004 he saw a new EBA levy clause which the CFMEU NSW had changed without his knowledge. The amended EBA clause was along the following lines: ‘Employees may elect on a company basis to have $1.00 per week of the ACIRT contribution paid to an organisation of their choice eg. Construction Industry Drug & Alcohol Foundation’.

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359 Trevor Sharp, 11/8/15, T:238.3-11.
360 BTG D&A MFI-6, 11/8/15, p 411.
214. Trevor Sharp gave evidence that the clause prompted him to go and see Andrew Ferguson immediately because he was worried that the change in wording would result in the flow of funds to CIDAF ceasing.\(^{361}\) Trevor Sharp said they had a conversation in which Andrew Ferguson told him that the CFMEU NSW would be increasing the contribution to $2.00 and would be taking half of that $2.00.\(^{362}\) He thought that Andrew Ferguson had mentioned that the CFMEU NSW intended to use their half of the money for ‘safety purposes’.\(^{363}\)

215. Trevor Sharp’s evidence was that Andrew Ferguson instructed him to keep quiet about the arrangements because employers would not be happy if they realised they were funding the union.\(^{364}\) Trevor Sharp said that at the end of the conversation with Andrew Ferguson whilst at the doorway to Andrew Ferguson’s office, Brian Fitzpatrick, an organiser for the CFMEU NSW, joined the conversation and said:\(^{365}\) ‘[G]ive them 25\% or better still give ‘em nothing. They are our EBAs and we should decide where the money goes to’.

216. Trevor Sharp recalled that Andrew Ferguson’s response was: ‘No, we can’t do that. We need them to hide behind.’\(^{366}\) Following the meeting Trevor Sharp sent Andrew Ferguson a letter confirming the arrangement reached during the conversation. The letter, on BTG


\(^{365}\) Trevor Sharp, witness statement, 11/8/15, para 16.

D&A Committee letterhead, was dated 25 February 2005. It included the following:\textsuperscript{367}

Following our meeting today I wish to confirm the following details regarding the clause referring to companies “contributing $2 per week per employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug and Alcohol/Safety Program to assist with the provision of drug & alcohol rehabilitation & treatment services/safety programs for the building and construction industry” in Enterprise Bargaining Agreements and Deed [sic] of Agreements.

Further to that meeting it is agreed that

1. Where possible and practicable the CFMEU will insert the above mentioned clause into all Enterprise Bargaining Agreements or Deed of Agreements which are negotiated by the union.

2. The BTG Drug and Alcohol Program will administer, manage and make all necessary financial transfers to the CFMEU monthly, providing the CFMEU with all necessary documentation involved in the process.

3. All income derived from the above mentioned process will be divided as follows:
   - Both the CFMEU and the BTG Drug and Alcohol Program shall receive an equal share (50\%) of the first $40,000 raised per month.
   - The CFMEU shall receive 60\% and the BTG Drug and Alcohol Program shall receive 40\% of all income raised in excess of $40,000 per month.

... 

As discussed in our meeting, it is agreed that if you have not responded to this document within 14 days from the date of writing, this agreement shall be in place effective immediately and be adhered to for the full duration of any agreements negotiated by the CFMEU.

\textsuperscript{367} BTG D&A MFI-1, 10/8/15, p 50.
217. So much for Trevor Sharp’s version. Andrew Ferguson said he thought he would have had more than one conversation with Trevor Sharp about where the money from the EBA levy clause should be going, but he could only recollect one about the time the standard contribution increased from $1 to $2 in early 2005.\textsuperscript{368} He said he indicated to Trevor Sharp that the CFMEU NSW was changing the standard clause to make provision for $2 per employee and the union’s proposal was that 50\% of the money be allocated to the Committee for the purposes of drug and alcohol work and 50\% for the CFMEU NSW to assist with safety programs.\textsuperscript{369} Andrew Ferguson denied that he told Trevor Sharp to keep the arrangement quiet.\textsuperscript{370}

218. For some reason Andrew Ferguson treated counsel assisting as having supported Trevor Sharp’s version on this point. Whether counsel assisting did or did not support Trevor Sharp does not matter. The principal point of collision between the two versions concerned that denial by Andrew Ferguson that he told Trevor Sharp to keep the arrangement quiet. Andrew Ferguson submitted that there were good reasons for accepting his denial. The main reason given by Andrew Ferguson in support of his denial is that he agreed to inform the CFMEU NSW’s Committee of Management,\textsuperscript{371} and that precluded any attempt at secrecy. That evidence is not implausible. Let it be assumed that Andrew Ferguson is accepted in that respect. His argument then evolved into a larger argument that he and Trevor Sharp agreed to disclose the grant to the Drug and Alcohol Safety Committee

\textsuperscript{368} Andrew Ferguson, 13/8/15, T:528.21-35.
\textsuperscript{369} Andrew Ferguson, 13/8/15, T:528.40-529.1.
\textsuperscript{370} Andrew Ferguson, 14/8/15, T:546.6-14.
\textsuperscript{371} Andrew Ferguson, 14/8/15, T:548.34-40.
and Foundation House. From this it was submitted that this meant the involvement of employers’ representatives. That led into the submission, recorded above, that in other ways employers could have found out that money was going to the CFMEU. But even if that is so, and the later stages of the argument are rather speculative, it would not excuse any breach of trust involved.

Andrew Ferguson did not think the clause was misleading although he conceded it did not refer to the CFMEU NSW receiving funds. He said that if an employer had asked during negotiations, they would have been told how the money was split up. He also thought a reasonable employer might have an understanding that the money might be contributed to the union.

**CFMEU NSW/BTG D&A Committee arrangement: industry knowledge**

What did employers and other industry participants know about the ‘split’ of the funds? There was considerable evidence from members of the Committee of Management of CIDAF about what they knew in 2011 about the arrangements. The context of that evidence was that in early 2011, the Committee of Management began to be concerned about the ongoing viability of Foundation House. It began to consider more closely the sources of CIDAF’s funds. It is unnecessary to set

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372 Andrew Ferguson, 14/8/15, T:554.15-25.
373 Submissions of Andrew Ferguson, 29/10/15, paras 102-113.
374 Andrew Ferguson, 14/8/15, T:552.27-42.
375 Andrew Ferguson, 14/8/15, T:553.40-554.13.
376 Andrew Ferguson, 14/8/15, T:554.18-25.
out the full details of the evidence. For present purposes, the important point is that until near the end of 2011 and the early part of 2012 a number of the committee members had a view that all of the EBA levy contributions were being paid to CIDAF.\(^{377}\)

221. Significantly, Brian Seidler who was and is the Executive Director of the Master Builders Association of New South Wales (MBA) gave evidence that in the middle of 2011 he thought, and believed members of his association thought, that the monies being paid pursuant to the BTG D&A Clause were simply being paid directly to the Foundation.\(^{378}\) Brian Seidler gave evidence that he asked Tony Papa whether there was something called the BTG Safety Program and asked to see the CFMEU NSW’s clause. He also asked why the money deposited by Laytins Mayfair did not come directly to Foundation House.\(^{379}\)

222. Tony Papa, however, gave evidence that Brian Seidler knew that 50% of the EBA levy contributions were being paid to the CFMEU NSW and that if he said otherwise he was ‘not telling the truth’.\(^{380}\) This answer does his credit no good. Tony Papa did not tell Brian Seidler about it himself. Nor was he present when anyone told him. However, he thought it was common knowledge and Brian Seidler must have known. Tony Papa also said that the other board members knew. But

\(^{377}\) Kaye Bellear, 10/8/15, T:41.30-42.6; Brian Seidler, 10/8/15, T:11.8-20 and Colin Huntley, 11/8/15, T:179.3-7.

\(^{378}\) Brian Seidler, witness statement, 10/8/15, para 31.

\(^{379}\) BTG D&A MFI-1, 10/8/15, pp 222-223; Brian Seidler, 10/8/15, T:14.33-42.

he could offer no cogent explanation as to why he thought that, despite extensive questioning seeking detail.  

223. Tony Papa’s evidence in respect of Brian Seidler was exposed as false by correspondence between the MBA and the CFMEU NSW from December 2011 to June 2012 which is summarised below. Brian Seidler’s account that he did not know that 50% of the EBA levy contributions was being paid to the CFMEU NSW is accepted in preference to Tony Papa’s.

224. On 12 December 2011, Brian Seidler sent a letter to Brian Parker, who had just become State Secretary for the Construction and General Division of the CFMEU NSW. Brian Seidler, on behalf of the MBA, requested ‘full disclosure’ from the CFMEU NSW about the distribution of the contributions.

225. On 25 January 2012, the union responded in a letter. It was drafted principally by Andrew Ferguson. The letter explained that the EBA levy clauses made no reference to CIDAF. The only explanation about the distribution of the contributions was that the ‘contributions raised have assisted the BTG to make a significant contribution to improving drug and alcohol and safety awareness.’ It made no reference to the fact that the CFMEU NSW received approximately 50% of the contributions from the BTG D&A Committee. Notwithstanding this Andrew Ferguson maintained that the letter was transparent about

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381 Tony Papa, 18/8/15, T:776.6-780.36.
382 Paras 219-227.
383 BTG D&A MFI-1, 10/8/15, pp 229-230; Brian Seidler, 10/8/15, T:17.3-11.
where the levy money was going. This was clearly not so. Andrew Ferguson’s unwillingness to accept the obvious fact that there had not been ‘full disclosure’ must weigh heavily against accepting Andrew Ferguson’s evidence generally unless it is against interest or corroborated or confirmed by contemporary documents or supported by the probabilities.

226. On 5 March 2012 Brian Seidler, together with three other members of the Committee of Management of CIDAF, resigned from the Committee. Brian Seidler resigned because the Committee had been struggling to find out where funds from the industry had gone so that they would be appropriately paid to CIDAF.

227. On 7 March 2012, Brian Seidler on behalf of the MBA sent a further letter to the CFMEU NSW. The letter contained the following:

For its part, Master Builders acknowledges that some years ago the union amended its wording on this matter in their enterprise bargaining agreements. However, at no time did the union communicate its intention to divert the vast bulk of the monies subsequently paid, away from the Construction Industry Drug and Alcohol Foundation (CIDAF). Clearly, the major focus of the clause remained on providing assistance and services to the industry on drug and alcohol rehabilitation. Therefore, it was not the expectation of Master Builders and its members who concluded enterprise bargaining agreements with the union that the bulk of such monies would be siphoned off to fund other unknown purposes or causes.

… Again we request a detailed explanation of where the monies paid by industry to the Building Trades Group has [sic] or [have] been spent.

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385 Andrew Ferguson, 14/8/15, T:570.27-572.20.
386 BTG D&A MFI-1, 10/8/15, pp 283-287.
387 Brian Seidler, 10/8/15, T:30.9-32.
On 19 June 2012, the CFMEU NSW responded to Brian Seidler’s letter. The letter indicated that the BTG D&A Committee contribution had helped support the following:

(a) a full time occupational health and safety coordinator;

(b) publication of the BTG Safety Handbook;

(c) the hosting of monthly industry Brian Miller Safety Forums;

(d) the promotion of the CIDAF through the work of the Drug and Alcohol Committee Officer, formerly a position held by Tom Simpson;

(e) the promotion of the CIDAF through the placement of vending machines on building sites;

(f) the promotion of an annual golf day which ran for several years; and

(g) the cost of electricity, phones and the other services at Foundation House.

The letter also noted that BTG D&A Committee had helped pay the wages of Nita Nunes and thereby effectively subsidised the CIDAF. Significantly, the letter did not say that 50% of the EBA levy contributions were paid to the CFMEU NSW.

BTG D&A MFI-1, 10/8/15, pp 299-300
230. It was Rita Mallia who had drafted the letter. She gave evidence that the information contained in the letter was supplied to her by Andrew Ferguson and Tony Papa.\footnote{Rita Mallia, 12/8/15, T:398.12-46; 13/8/15, T:434.17-21, 437.27-30.} She said she understood that the portion of the EBA levy clause that did not go to Foundation House was used to support the initiatives referred to above.\footnote{Rita Mallia, 13/8/15, T:435.13-436.38.} She said that not all these initiatives were funded by the CFMEU NSW but rather were funded in combination with the BTG D&A Committee.\footnote{Rita Mallia, 13/8/15, T:436.25-438.42.}

231. Andrew Ferguson denied that he was the source of many of the specific points made in the letter.\footnote{Andrew Ferguson, 14/8/15, T:577.34-37.} He gave evidence that he was not sure that the EBA levy contributions assisted with the publication of the BTG Safety Handbook.\footnote{Andrew Ferguson, 14/8/15, T:579.31-33.} He said any costs associated with hosting the Safety Forum would have been incidental.\footnote{Andrew Ferguson, 14/8/15, T:579.44-46.} He said that although he thought the golf day was valid he would not have raised it himself.\footnote{Andrew Ferguson, 14/8/15, T:580.4-6.} However, Rita Mallia did email a draft of the letter to Andrew Ferguson asking for comment to which Andrew Ferguson replied ‘No great’.\footnote{BTG D&A MFI-13, 14/8/15.}

232. Andrew Ferguson also said that if he had drafted the letter he would ‘have raised many, many other issues.’\footnote{Andrew Ferguson, 14/8/15, T:578.27-33.} He described them in a speech – long and perhaps well-prepared. He gave evidence that he
would have included in it reference to the fact that the union used the money to engage two safety officers – Dick Whitehead and Rick Rech – and at different points of time there were other organisers employed who had safety roles. He also identified other safety matters including:

(a) 2 or 3 courses conducted by WorkCover New South Wales in relation to workplace safety involving 10 weeks of training 1 day per week for all officials;

(b) the production by Dick Whitehead and Rick Rech of a fortnightly safety alert and the provision of safety information by Dick Whitehead on a web page he operated;

(c) the publication by the BTG of a ‘Safety Rectification Notice’ where union officials could detail safety breaches identified on site;

(d) the publication by the BTG of a number of posters and leaflets;

(e) a union program to stop WorkCover’s decision to close down an internal unit inside WorkCover concerned with tunnel safety.

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399 Andrew Ferguson, 14/8/15, T:582.22-38.
400 Andrew Ferguson, 14/8/15, T:584.39-585.13.
401 Andrew Ferguson, 14/8/18, T:585.15-37.
402 Andrew Ferguson, 14/8/15, T:585.39-586.11.
403 Andrew Ferguson, 14/8/15, T:586.20-43.
(f) a campaign to improve asbestos licensing;\textsuperscript{405}

(g) a variety of training programs for officials in relation to legislative requirements for safety;\textsuperscript{406}

(h) time spent by organisers on safety issues, which Andrew Ferguson estimated at about 40% of their time;\textsuperscript{407} and

(i) publication of a variety of CFMEU NSW posters, leaflets and stickers.\textsuperscript{408}

H – SIPHONING OF EBA FUNDS: FINDINGS

Relevant legal principles

233. The members of the BTG D&A Committee held the funds in the BTG D&A Safety Account on trust to be applied for a specific purpose, namely to ‘assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’.\textsuperscript{409}

234. Application of funds not for that purpose, but for other purposes, would constitute a breach of trust with possible civil consequences for the trustees or any persons procuring a breach of trust. Apart from the

\textsuperscript{404} Andrew Ferguson, 14/8/15, T:586.45-587.1.
\textsuperscript{405} Andrew Ferguson, 14/8/15, T:587.3-18.
\textsuperscript{406} Andrew Ferguson, 14/8/15, T:587.20-38.
\textsuperscript{407} Andrew Ferguson, 14/8/15, T:587.40-588.6.
\textsuperscript{408} Andrew Ferguson, 14/8/15, T:588.8-34.
\textsuperscript{409} Paragraph 198.
possible civil consequences, in certain circumstances a breach of trust or an inducement to commit a breach of trust will constitute a criminal offence.\footnote{See \textit{Crimes Act} 1900 (NSW), s 172 (trustees fraudulently disposing of property, repealed in 2009), s 192E (fraud).}

235. In addition, if particular employers were caused by officials of the CFMEU NSW to believe that they were contributing to the CIDAF, whereas in fact 50% of their contributions were being paid to the CFMEU NSW, then the union officials might be liable for the criminal offence of obtaining a benefit by a false pretence or by deception.\footnote{See \textit{Crimes Act} 1900 (NSW), ss 178BB, 179, 180 (repealed 2009), s 192E, Part 9.}

\textbf{Conclusions}

236. The monies paid to the CFMEU NSW were contributed ‘to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’. Those monies were not applied or used solely for that purpose. The better reading of that condition is that the monies were to be applied by the BTG D&A Committee for drug and alcohol rehabilitation services or drug and alcohol safety programs for the building industry. On that interpretation the monies contributed could not be used for general safety purposes.

237. However, regardless of the interpretation adopted, the simple fact is that the contributions received by the CFMEU NSW were paid into the
CFMEU General Account,\textsuperscript{412} i.e. into the general trading account of the CFMEU NSW. The union did not have a safety program or safety expense account in its ledgers. Hence it is not possible to say that the funds paid were specifically appropriated for expenditure on safety. The evidence of Andrew Ferguson and Rita Mallia is too vague to support the view that it was. Even if they were right about the safety programs which the CFMEU NSW funded, it has not been demonstrated that the EBA levy monies funded them as distinct from non-safety activities of the CFMEU.

238. The conclusion that the monies paid to the union went towards general expenditure is in part supported by the union’s 13 June 2012 letter to the MBA. It arguably deliberately misstated the true position in a number of respects. An examination of the BTG D&A Safety Program Account statements from 2004 onwards shows that not a single dollar of the EBA levy contributions was used by the BTG D&A Committee in that period for the wages of Tom Simpson, or for the wages of Nita Nunes, or for electricity, or for phones, or for any other thing. The BTG D&A Committee did not benefit from any of the EBA levy contributions. Some items listed did not result in \textit{any} expenditure by the CFMEU NSW (e.g. the BTG Handbook, the golf day which was organised by Tom Simpson, a BTG D&A Committee employee,\textsuperscript{413} or the placement of vending machines). Other items listed resulted only in very limited expenditure by the CFMEU NSW (e.g. the hosting of the Safety Forum). The only substantive expenditure identified in the

\textsuperscript{412} Andrew Ferguson, 14/8/15, T:629.23-35; see also the CFMEU General Account statements at BTG D&A MFI-3, 10/8/15, Vol 2, pp 672-930 and the summary of transactions at BTG D&A MFI-14, 14/8/15, pp 12-15.

\textsuperscript{413} Trevor Sharp, 11/8/15, T:235.31-40.
letter solely concerning safety was the employment of a full-time
safety coordinator. Payroll records show that Dick Whitehead was
employed from 2004–2008 and Rick Rech from 2009–2011, with
salaries of no more than $56,205 and $76,267 respectively. For
most years from 2004–2011, each of those amounts was less than half
of the payments received in a given year by the CFMEU NSW. If
the union really had spent the money on safety programs, rather than
simply the wages of organisers and conducting ordinary union activity,
it would be expected that the union could, and would, have prepared a
more detailed and accurate response.

The additional programs which Andrew Ferguson recited in evidence
at considerable length consisted largely of things which are the core
business of unions e.g. the cost of the salaries of organisers, the cost of
posters and promotional material, the cost of training delegates and
organisers. His list reinforced the proposition that the money received
from the BTG D&A had been used in the ordinary running of the
CFMEU NSW.

Significantly, in the years 2004 to 2012 the CFMEU NSW accounted
for the EBA levy money it received from the BTG D&A Committee as
the ‘BTG Apprentices and Safety Program’. Trevor Sharp gave
evidence that the BTG D&A obtained government funding (not
funding from the CFMEU NSW) to present the ‘Drug and Alcohol
Safety in the Workplace Training to apprentices in TAFE colleges’.

\[414\] BTG D&A MFI-29, 6/10/15; BTG D&A MFI-31, 6/10/15.


He said this role was performed by a number of people over the years that he recruited.418

The arrangement entered into between Trevor Sharp, on behalf of the BTG D&A Committee and Andrew Ferguson, on behalf of the CFMEU NSW, concerning the distribution of funds to the union was thus in breach of trust.

At this point it is convenient to consider three attacks made on the above reasoning. First, it was said there was no trust. Secondly, it was said that even if there was, the construction of it put forward was wrong. Thirdly, it was said that even if there were a trust and the construction were correct, Andrew Ferguson was not involved in any breach of it.

Was there a trust? The CFMEU did not concede that the Committee held funds under a trust.419 But Andrew Ferguson went further. He argued against that proposition at length.420 To some extent the argument seemed to be that Gibbs ACJ’s proposition was wrong. Thus there are suggestions that Gibbs ACJ misunderstood either the argument advanced to him or the argument advanced in Barclays Bank Ltd v Quistclose Investments Ltd.421 Andrew Ferguson relied on statements in an intermediate appellate court.422 Andrew Ferguson also relied on other authorities not from ultimate appellate courts to

419 Submissions of the CFMEU, 29/10/15, paras 16-17.
420 Submissions of Andrew Ferguson, 29/10/15, paras 94-101.
422 Raulfs v Fishy Bite Pty Ltd [2012] NSWCA 135 at [43], [49].
distinguish the present facts. At the best of times these criticisms of Gibbs ACJ would be very risky. The position is worsened by the fact that Gibbs ACJ was stating the majority position of the High Court of Australia. His statement has been followed in many cases.\footnote{See the cases cited in \textit{Compass Resources Ltd v Sherman} (2010) 42 WAR 1 at [58], [62]-[64].}

244. To some extent Andrew Ferguson’s argument was that principles of trust law are not readily invoked in commercial transactions. But sometimes they can be.

245. To some extent Andrew Ferguson’s argument is that here ‘there exists no matter that converts a payment for a purpose into an express trust. The payment made by the employers was unaccompanied by any offer to repay the contributions if the purpose failed and there was no holding out that the monies would be paid into a separate, discrete account.’\footnote{Submissions of Andrew Ferguson, 29/10/15, para 99.} In order to invoke \textit{Barclays Bank Ltd v Quistclose Investments Ltd} it is not necessary that any offer to repay the contributions if the purpose fails be found: the operation of trust law ensures that the contributions will revert to those who provided them if the purpose fails. The monies were in fact paid into a separate account. The important factor is that the EBA levy clause makes it clear that the monies were not to be the BTG D&A Committee’s to dispose of as they wished. They were not to be part of the BTG D&A Committee’s general assets. The monies were to be used only for a particular purpose. Hence the monies were held on trust.
Andrew Ferguson submitted that there was no charitable trust. One ground for the submission was the commercial context. As already indicated, this point is far from conclusive. The other ground was that the principal objects of the BTG D&A Committee were not charitable. But that does not prevent the members of the BTG D&A Committee or some component of it holding particular property on a charitable trust. For present purposes, it does not matter whether the trust was a Quistclose trust or a charitable trust.

The second criticism of counsel assisting creates a controversy as to what the purpose was. One aspect of Andrew Ferguson’s construction of the BTG D&A clause is important. The clause provided:

The company will contribute $1.00 per week per Employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program, to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry.

Andrew Ferguson contended that the clause allowed funds to be used for either the provision of drug and alcohol rehabilitation services or safety programs. This was supported by the CFMEU.

The issue of construction was seen by the CFMEU NSW as important. It is certainly important to the issue of breach. The CFMEU NSW argued that it was lawful to spend 50% of the funds on Foundation House and 50% on the CFMEU NSW. Foundation House provided

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425 Submissions of Andrew Ferguson, 29/10/15, para 101.

426 Submissions of Andrew Ferguson, 29/10/15, paras 90-93; Andrew Ferguson, 13/8/15, T:528.3-7.

427 Submissions of the CFMEU, 29/10/15, p 89, para 8.
drug and alcohol services. And the CFMEU NSW provided safety programs. In this regard the CFMEU seized on what it called a ‘concession’ by counsel assisting that the CFMEU NSW ‘runs safety programs as part of its core business’. But it does not provide ‘drug and alcohol rehabilitation … safety programs’ as part of its core business. Hence the issue is: what do the words ‘drug and alcohol’ govern? Only ‘rehabilitation services’? Or ‘safety programs’ as well?

250. The submissions of Andrew Ferguson were as follows:\textsuperscript{429}

\[\text{T}\]he BTG D&A clause contemplates two uses for the contributions – including “safety programs for the building industry”. On the true construction of the clause, this object is in addition to, and distinct from, the provision of “drug & alcohol rehabilitation services”. Grammatically, the two concepts are separated by a slash (\textit{solidus}), which is conventionally used [sic] the word substitute for “or”, which indicates a choice (often mutually-exclusive) is present. In truth what it separates are discrete: there is no reason to think that the former qualified the latter, particularly having regard to the Union’s long-held concern with industrial safety.

251. Andrew Ferguson then referred to authorities favouring a generous construction of industrial instruments.\textsuperscript{430} Andrew Ferguson’s submissions continued:\textsuperscript{431}

The construction of the BTG D&A clause has significance on two levels. Its true construction bears on the question of whether a breach has occurred. However, a construction that was open to the reader (even if not correct) would absolve him from liability as an accessory to a breach of trust. There was nothing inherently implausible about Mr Ferguson’s

\textsuperscript{428} Submissions of the CFMEU, 29/10/15, p 91, para 18.

\textsuperscript{429} Submissions of Andrew Ferguson, 29/10/15, para 90.

\textsuperscript{430} The Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd [2014] FWCFB 7447 at [19]-[22] and cases cited therein.

\textsuperscript{431} Submissions of Andrew Ferguson, 29/10/15, para 93.
construction of the clause as authorising the use of the contributions for safety programs *simpliciter*.

252. The latter level of submission will be mentioned below. Assuming the correctness of the suggested approach to construction, Andrew Ferguson’s arguments about the first level must be rejected. The ‘slash (*solidus*)’ argument only begs the question. Given that the two concepts are separated by the slash, the question is: what is the second concept? The ‘slash (*solidus*)’ argument, hyper-pedantic as it is, does not resolve the problem created by the fact that the provision is capable of being read Andrew Ferguson’s way or counsel assisting’s way. Counsel assisting’s way limits the purpose to (a) the provision of drug and alcohol rehabilitation services and (b) drug and alcohol safety programs. Counsel assisting’s construction is preferable. The recipient of the monies was the BTG D&A Committee. It was not involved in general safety programs, only in drug and alcohol safety programs. There are doubtless hundreds of ways in which safety in the building industry, or anywhere else, can be imperilled otherwise than by the abuse of drugs and alcohol. Whether or not one calls the distinction between the two as ‘bright line’, it is perfectly easy conceptually and practically to draw it.432

253. It follows that it was a breach of trust for part of the funds contributed to be given to the CFMEU. That is because even if safety programs for the building industry are part of the CFMEU’s ‘core business’, it is not the case that drug and alcohol safety programs for the building industry are part of the CFMEU’s core business. Andrew Ferguson, in his very

432 Submissions of the CFMEU, 29/10/15, pp 90-91, paras 12-19.
long and seemingly well-rehearsed answers about what Rita Mallia’s letter of 19 June 2012 had left out, did not say that they were. And Rita Mallia’s account of how the monies coming to the CFMEU NSW were spent on safety programs and on support for safety in the building industry did not involve any drug and alcohol safety programs. The submissions of counsel assisting on this point were not contradicted by the CFMEU NSW or Andrew Ferguson.

The third criticism of counsel assisting’s submissions was that Andrew Ferguson could not have been in breach of trust. He was not the trustee. Various candidates were confusingly promulgated by Andrew Ferguson as candidates for the trusteeship – the ‘administrator nominated’, ‘the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program’, ‘Laytins Mayfair’. But counsel assisting’s submissions did not suggest that Andrew Ferguson was in breach of trust. They submitted that the members of the BTG D&A Committee (through Trevor Sharp) was in breach of trust in entering the letter agreement of 25 February 2005. That gave the CFMEU half the first $40,000 raised per month under the relevant EBA clause, and 60% thereafter. There was no requirement that the CFMEU NSW only spend the money on the two purposes of the trust. Andrew Ferguson submitted:

He was not a member of BTG D&A Committee and he did not participate in any of the decisions that implemented the agreement manifested in the letter of 25 February 2005.

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433 See para 227.
435 See paras 232-236.
436 Submissions of Andrew Ferguson, 29/10/15, para 87.
Andrew Ferguson relied on the following evidence he gave: 437

Q. Are you saying that you had no knowledge of what the BTG component of that division was going to be used for?

A. Well, the clause makes no reference to Foundation House. I’m aware that the Building Trades Group of Unions Drug and Alcohol/Safety Committee had discretion about where they spent their money, and I’m also aware that money went to Foundation House. I’m not in a position to verify that 100 percent of the money went to Foundation House. I don’t know that detail.

255. Counsel assisting’s submissions in reply disavowed having contended in submissions in chief that Andrew Ferguson was personally liable for assisting in a breach of trust. However, Andrew Ferguson took a different view and devoted some space to refuting the submission supposedly not made. He knew what the terms of the trust were. He knew what the 25 February 2005 letter said. His evidence quoted above, and his submission, overlooks the fundamental point that whether or not the letter itself was in breach of trust, it contemplated and triggered breaches of trust, and Andrew Ferguson was in agreement with that letter. He did not respond within 14 days of its date, with the result that he and the CFMEU NSW would be bound at least in honour, if not in contract. 438 Thus the evidence of Andrew Ferguson which is relied on is beside the point. It overlooks the fact that Andrew Ferguson knew he had agreed to future expenditures going in particular directions. So far as the direction of the CFMEU

437 Submissions of Andrew Ferguson, 29/10/15, para 88, referring to Andrew Ferguson, 14/8/15, T:23-31.

438 See Felthouse v Bindley (1862) 11 CB (NS) 869; 142 ER 1037.
NSW share was concerned, it was not a direction that conformed with the relevant clause.

256. Andrew Ferguson also argued that he could not be liable for participation in a breach of trust for the following reason. If he believed in ‘a construction that was open to [him] (even if not correct)’ he would not be liable as an accessory to a breach of trust. This is a highly contentious submission. The orthodox approach to secondary participation in wrongdoing is that the secondary participant must know the facts which made the conduct wrongdoing. But is it necessary that the alleged secondary participant appreciate that those facts were wrongdoing? Or is it sufficient that the facts which the secondary participant does know, correctly appreciated, amounted to a breach of trust? It is not necessary to resolve these questions here. That is because it is not proposed to make a finding that Andrew Ferguson and through him the CFMEU NSW were secondary participants to a breach of trust. The dangers in the course which was taken have been sufficiently pointed out.

257. The CFMEU NSW’s possible involvement in a breach of trust by the BTG D&A Committee was a critical part of a general scheme by the union to obtain funds from employers who, generally at least, believed the money was being used solely for particular purposes. The union’s correspondence at the end of 2011 and the beginning of 2012 contradicts any suggestion that employers in the industry were generally aware that 50% of the contributions made were being paid to the union. It also contradicts Andrew Ferguson’s evidence that

439 Submissions of Andrew Ferguson, 29/10/15, para 93.
employers would have been told the true destination of the funds if only they had asked. If it was general knowledge, why did the union not simply say so in its responses to the MBA? If the union was not trying to keep the arrangement a secret, why did it not provide the ‘full disclosure’ requested?

258. At a high level of generality, the conduct of the CFMEU NSW may be seen as a general scheme to obtain money from employers by deception. However, in order to assess whether the union or any officers of the union may have committed the offence of fraud, or obtaining a benefit by a false pretence, it would be necessary to call evidence from each individual employer who gave money pursuant to the clause. In the absence of that material, it could not be concluded that the conduct of the union in question constitutes a criminal offence. That question must be left open.

259. However, a finding is made that Andrew Ferguson’s conduct fell short of the professional standards to be expected from a trade union official.
## CHAPTER 7.5

COMMITTEE TO DEFEND TRADE UNION RIGHTS

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A – INTRODUCTION AND SUMMARY

1. This chapter deals with the Committee to Defend Trade Union Rights Pty Ltd (CTDTUR). It is the corporate trustee of the Defend Trade Union Rights Trust (the Trust). CTDTUR is a relevant entity associated with the Construction, Forestry, Mining and Energy Union (CFMEU), Construction and General Division, New South Wales Divisional Branch (the CFMEU NSW). CTDTUR and the Trust were established in July and August 2005 respectively.

2. On 26 September 2005, the CFMEU NSW transferred $7,000,000 out of its general operating funds into the Trust (the Transfer). Apart from de minimis contributions, the CFMEU NSW has been the only contributor to the Trust. Furthermore, the overwhelming majority of distributions made from the Trust have been to the CFMEU NSW. For all practical purposes, the CFMEU NSW retains control over the Trust and its assets.
3. For the reasons set out below, it is concluded that:

(a) the Trust may have been established and the Transfer may have been made to defraud future creditors, including potentially the Commonwealth of Australia, contrary to s 37A of the *Conveyancing Act* 1919 (NSW); and

(b) in supporting the establishment of the Trust and the Transfer, Andrew Ferguson, then Secretary of the CFMEU NSW, and Peter McClelland, then President of the CFMEU NSW, may have breached their duties to the union to act for a proper purpose.

4. The summary of the primary facts set out in counsel assisting’s submissions was unchallenged and it has been largely adopted below. There were significant challenges in relation to the inferences to be drawn from those facts and the consequent legal conclusions. The various submissions of affected persons on those points are dealt with below.

**B – SUMMARY OF EVIDENCE**

**Formation of CTDTUR and the Trust**

5. CTDTUR was registered on 21 July 2005.¹ Its membership and board of directors² consisted of various ‘old trade union officials’ and

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¹ CTDTUR MFI-2, 17/8/15, p 1.
‘prominent working class individuals’.

Relevantly the following were founding members and directors of CTDTUR:

(a) Andrew Ferguson (then Secretary of the CFMEU NSW);

(b) Stanley Sharkey (former National Secretary of the Building Workers’ Industrial Union (BWIU) and later of the CFMEU);

(c) Dennis Matthews (former NSW State Secretary of the BWIU);

(d) Tom McDonald (former National Secretary of the BWIU); and

(e) Don McDonald (former NSW State Secretary of the BWIU).

With the exception of Don McDonald, each of those persons remain directors and members of CTDTUR.

6. In addition to those persons, James Macken (former judge of the Industrial Court of NSW), Daryl Melham (then a Labor member of the House of Representatives) and Ian West (then a Labor member of the

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3 Michael Knott, 10/8/15, T:92.4-9.
4 Although Andrew Ferguson is no longer listed on ASIC records as a director of CTDTUR (CTDTUR MFI-2, 17/8/15, p 3), this appears to be an oversight as minutes of the company record him as having resumed a position on the board on 30 May 2012 (CTDTUR MFI-1, 10/8/15, Vol 1, p 293).
5 Andrew Ferguson, 17/8/15, T:679.2-16.
NSW Legislative Council) were founding members and directors of CTDTUR and remain as members and directors.

7. Apart from Andrew Ferguson, Stanley Sharkey, Dennis Matthews, Tom McDonald, James Macken, Daryl Melham and Ian West, the only other current director is Brian Parker, the current Secretary of the CFMEU NSW, Construction and General Division.

8. The Trust was established by a deed of settlement dated 8 August 2005. The trust deed lists Stanley Sharkey as the settlor and CTDTUR as the trustee.

9. CTDTUR was established for the sole purpose of being the trustee of the Trust. At the inaugural meeting of the CTDTUR board on 8 August 2015, lawyers from Gilbert + Tobin attended with a finalised copy of the trust deed and the Trust deed is dated the same date. Minutes of the CTDTUR board of directors dated 14 November 2005 set out a brief summary of the record of events that led to the establishment of the [Trust].

In January 2005 trustees of the Pat Clancy Memorial Fund met to discuss the Howard Government's unprecedented attack on the trade union movement and workers' rights.

The trustees were concerned that individual trade unions would not survive in Australia or internationally unless the movement adopted a radically

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6 CTDTUR MFI-1, 10/8/15, Vol 1, p 76.
7 CTDTUR MFI-1, 10/8/15, Vol 1, p 29.
8 CTDTUR MFI-1, 10/8/15, Vol 1, p 113.
9 CTDTUR MFI-1, 10/8/15, Vol 1, p 123; see also Michael Knott, witness statement, 10/8/15, para 48.
new approach, act collectively and respond in a more united and cohesive fashion in future years.

It was resolved to explore the concept of establishing a discretionary trust fund with the principal objective of defending trade union rights, supporting rank and file workers engaged in industrial struggles, and also assisting the broader movement for peace, social justice and workers [sic] rights.

Stan Sharkey was delegated to approach the CFMEU on behalf of the Pat Clancy Memorial Fund for assistance in facilitating appropriate legal advice in order to progress this matter. The Pat Clancy Memorial Fund resolved to meet all legal expenses associated with the project.

Subsequently Stan Sharkey met with Peter McClelland, President of the NSW Branch of the CFMEU. The CFMEU indicated an interest in the concept.

A meeting with Jonathon Leek of Gilbert & Tobin was set for the 10th February 2005. Peter McClelland, President CFMEU NSW Branch, and Michael Knott, Trustee for the Pat Clancy Memorial Fund attended and the [sic] consequently the Pat Clancy Fund initiated the process of establishing the Trust.

Over subsequent months “the Defend Trade Union Rights Trust” was established and registered on 17th August 2005.

The Committee to Defend to Trade Union Rights Pty Ltd ACN 115 399 776 was registered under the Corporations Act 2001, on the 21st July 2005.

The Committee to Defend Trade Union Rights Pty Ltd was appointed trustee for Defend Trade Union Rights Trust.

The Directors of Committee to Defend Trade Union Rights Pty Ltd who administer the trust are experienced and committed supporters of international solidarity and trade unionism. They include former leaders of the building unions and office bearers of the ACTU, the judiciary and progressive members of the State and Federal Parliamentary ALP.

10. Michael Knott was the General Manager of the CFMEU NSW at the time of the Transfer and one of the trustees of the Pat Clancy Memorial Fund. Michael Knott gave evidence that the Pat Clancy Memorial Fund offered to

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10 Michael Knott gave evidence that the Pat Clancy Memorial Fund was a fund administered by Stanley Sharkey, Pat Carr and himself and comprised of a bequest made by a person who had passed away some years before: Michael Knott, 10/8/15, T:90.12-26.
‘engage and pay for lawyers to devise a strategy to protect the CFMEU’s assets in New South Wales’.

His evidence was that, as a result of that advice, CTDTUR was ‘established to act as the trustee for the benefit of nominated trade unions and workers organisations including CFMEU members in New South Wales’.

In oral evidence, Michael Knott said that the assets to be protected were the assets of both the State and Federally registered CFMEU as well as of other unions.

Peter McClelland was the President of the CFMEU NSW from 1990 to January 2012. He attended all of the meetings with Gilbert + Tobin concerning the drafting of the Trust deed. His evidence was that the CTDTUR ‘came out of an idea that we would develop this Trust Fund and seek other unions to do likewise, to use for what we saw as socially progressive issues’.

Approval of the Transfer

On 9 August 2005 – the day after the inaugural meeting of the CTDTUR board of the directors – the Committee of Management of the CFMEU NSW held a meeting. The minutes record a number of persons in attendance including Andrew Ferguson, Peter McClelland and Brian Parker. The minutes also record that after a report by Peter McClelland, the Committee of Management approved the Trust deed and the Trustee.

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12 Michael Knott, witness statement, 10/8/15, para 49.
13 Michael Knott, 10/8/15, T:105.45-106.22.
14 Peter McClelland, 6/10/15, T:866.41-42.
15 Peter McClelland, 6/10/15, T:866.45-47.
16 CTDTUR MFI-1, 10/8/15, Vol 1, pp 312-312F.
McClelland and discussion the Committee of Management approved the following resolution:

In furtherance of the Union’s Objects and activities the Committee of Management resolves that:

i. An amount of up to $8 million be donated to the “Defend Trade Union Rights Trust”. In accordance with Rule 42(s) of the Divisional Rules, the Committee is satisfied that such donation is in accordance with and consistent with the Rules of the Union. Such funds shall be donated from funds invested as investments mature.

ii. The State Secretary shall take all necessary steps, including obtaining all relevant advice and instructions to give effect to this resolution.

iii. In so making such a contribution, the Secretary shall ensure that the Union has appropriate representation on the Defend Trade Union Rights Trust to ensure that the Objects of the Union are, and continue, to be met.

13. Although Peter McClelland could not specifically recall, he said that the purpose of setting up the Trust would have been discussed in some detail at the Committee of Management meeting.

14. His evidence about the size of the Transfer was as follows: His evidence about the size of the Transfer was as follows:

Q. Was a certain amount of money decided that needed to be given to that Trust?

A. I think it was $7 million that the Union transferred into the Trust after decisions were made by the various governing bodies of the Union.

Q. That’s a lot of money. Why was that large amount of money decided upon?

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17 CTDTUR MFI-1, 10/8/15, Vol 1, p 312E.
18 Peter McClelland, 6/10/15, T:868.18-20.
19 Peter McClelland, 6/10/15, T:867.2-17.
A. Because that still left us with sufficient funds to be able to operate the Union.

Q. So you wanted to give away the largest possible amount, did you, and leaving the Union with sufficient operating costs?

A. Yes, I think it was about 50 per cent, at the time, of our funds.

15. The financial statements filed in the Australian Industrial Relations Commission Registry by the CFMEU NSW show the total ‘Current Assets’ at the end of 2004 were just under $14 million. At the end of 2005 they were just under $7,000,000.20 ‘Accumulated Members’ Funds’21 (i.e. net equity) at the end of 2004 amounted to approximately $12,900,000. At the end of 2005 they amounted to approximately $4,400,000.22 Hence, the $7,000,000 transferred was more than half of the branch’s net equity. The accounts for later years show a steadily declining net equity position from 2005 to 2010 when the branch had negative net equity (as it has ever since).23 In the five years after 2005, the accounts show substantial operating cash flow losses for the branch in 2006 and 2010. They show only marginally positive operating cash flows in 2007 and 2008. The year 2009 was the only year with a healthy operating cash flow profit.24

21 Representing total assets less total liabilities.
23 BTG D&A MFI-4, 10/8/15, pp 13, 63, 113, 158, 193, 227, 259, 294; U-Plus/Coverforce MFI-8, 15/10/15, pp 135 and 244.
16. Peter McClelland was asked whether, in sending $7,000,000 to the Trust, he was ‘trying to protect the assets of the Union by sending half of the assets off to the Trust’. He said:\textsuperscript{25}

That was appealing to myself. Other people had different ideas. I was concerned that should the Federal Government at the time deregister the Union, then those funds, which were the accumulation of many years by workers, would end up in general revenue, so to speak, in the hands of the Federal Government, where it should be used in a way that was of benefit to working people.

17. Andrew Ferguson’s evidence was that the purpose of setting up the Trust was to defend the assets of not just the CFMEU but of the whole of the labour movement. He explained that he meant defending:\textsuperscript{26}

\textit{[f]rom possible deregistration of the Union. We’ve seen Right Wing governments in other countries deregister a union, take their assets by legislation, and that was the thinking of the Union at the time, and it was not just about the CFMEU. Our vision was a much broader Trust to assist the whole of the labour movement.}

\textbf{Contributions to the Defend Trade Union Rights Trust}

18. On 26 September 2005, $7,000,000 was transferred by electronic funds transfer from CBA Account 062194 10127561, being the general bank account of the CFMEU NSW, to a CTDTUR cheque account.\textsuperscript{27}

19. Although CTDTUR publicly sought donations to the Trust, up until 30 June 2014 only two members of the public had donated to the Trust,

\textsuperscript{25} Peter McClelland, 6/10/15, T:867.22-27.
\textsuperscript{26} Andrew Ferguson, 17/8/15, T:680.8-13.
\textsuperscript{27} CTDTUR MFI-1, 10/8/15, pp 104, 107, 109, 121, 314, 315.
and their collective contribution was $60.\(^{28}\) In respect of additional contributions:

(a) $2,000 was donated by the CFMEU Officers’ Solidarity Fund on 5 September 2005;\(^{29}\) and

(b) $500 was donated by Keryn McWhinney (Senior Industrial Officer of the CFMEU NSW)\(^{30}\) on 20 December 2005.\(^{31}\)

20. In addition the sum of $57,573.79 was minuted by the CTDTUR board as having been contributed by the Pat Clancy Memorial Fund on account of legal fees associated with the formation of CTDTUR and the Trust.\(^{32}\) That sum was subsequently refunded in two portions in November 2005 and August 2012.\(^{33}\)

Terms of the Trust deed

21. The Trust is similar in form to many discretionary trusts. It gives the trustee a wide discretion to distribute the capital and income of the Trust for the benefit of any one or more of the ‘General Beneficiaries’. There are 122 named ‘General Beneficiaries’ in the Annexure to the


\(^{29}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 105 and Vol 3, p 562.

\(^{30}\) Keryn McWhinney, witness statement, 2/10/14, p 1.

\(^{31}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 125 and Vol 3, p 562.

\(^{32}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 121.

\(^{33}\) CTDTUR MFI-1, 10/8/15, Vol 3, p 564 (refund of $6,405.15) and Vol 1, p 293A and Vol 3, p 822 (refund of $51,168.64).
Deed.\textsuperscript{34} They include a wide range of unions, organisations associated with those unions, and political parties such as the Australian Labor Party and The Greens NSW.

22. However, the combined effect of cl 3.3\textsuperscript{35} of the Trust deed, together with the definition of ‘Free Net Income’ in Attachment A to the deed,\textsuperscript{36} is that each financial year if the trustee has not made a valid distribution of the income for that year by the end of 30 June, then the trust income for that year defaults to the ‘Specified Beneficiaries’\textsuperscript{37}.

The CFMEU NSW is the only ‘Specified Beneficiary’ under the Trust deed.

23. In addition, cl 11.2 of the Trust deed gives the ‘Appointor’ the power to remove the trustee and appoint any new or additional trustee or trustees.\textsuperscript{38} The ‘Appointor’ is specified as the Committee of Management from time to time of the CFMEU NSW.\textsuperscript{39}

24. Further, pursuant to cl 18 of the Trust deed, the ‘Guardian’ of the Trust has the power to exercise a degree of control over the trustee in respect of the trustee’s exercise of certain ‘Reserved’ and ‘Restricted’ powers. For example, the trustee’s power to appoint the capital of the Trust and the power to amend the Trust deed are ‘Reserved Powers’.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{34} CTDTUR MFI-1, 10/8/15, Vol 1, pp 76-83.
\item \textsuperscript{35} CTDTUR MFI-1, 10/8/15, Vol 1, p 32.
\item \textsuperscript{36} CTDTUR MFI-1, 10/8/15, Vol 1, p 91.
\item \textsuperscript{37} CTDTUR MFI-1, 10/8/15, Vol 1, p 32.
\item \textsuperscript{38} CTDTUR MFI-1, 10/8/15, Vol 1, pp 55-56.
\item \textsuperscript{39} CTDTUR MFI-1, 10/8/15, Vol 1, p 84.
\item \textsuperscript{40} CTDTUR MFI-1, 10/8/15, Vol 1, p 69.
\end{itemize}
trustee must not exercise any of the Reserved Powers without first giving the Guardian 14 days’ notice. The ‘Guardian’ is the Committee of Management from time to time of the CFMEU NSW.\footnote{\textit{CTDTUR MFI-1, 10/8/15, Vol 1, p 83.}}

**Distributions from the Trust**


(a) legal proceedings launched against 107 CFMEU members by the Australian Building and Construction Commission (\textit{ABCC}), and related matters;\footnote{\textit{CTDTUR MFI-1, 10/8/15, Vol 2, pp 366-367.}}

(b) the CFMEU’s ‘Workchoices campaign’;\footnote{\textit{CTDTUR MFI-1, 10/8/15, Vol 2, pp 409-420.}}

(c) a ‘wall of remembrance’ for workers killed or injured at work;\footnote{\textit{CTDTUR MFI-1, 10/8/15, Vol 2, pp 387-395.}}

(d) the purchase of a motor vehicle to facilitate an indigenous training/employment program;\footnote{\textit{CTDTUR MFI-1, 10/8/15, Vol 2, pp 387-395.}} and
26. The grants made to the CFMEU were, at least in the early years of the trust, the subject of formal minuted decision-making processes within the CTDTUR board. Grant applications made by the CFMEU were never rejected. They related to matters that would otherwise be expected to be funded by the CFMEU as part of its ordinary day-to-day operations.

27. A significant payment was made to the Maritime Union of Australia (MUA). Another significant payment was made to the Trade Union Centre Pty Ltd in Wollongong (TUCW). A minor payment was made for reimbursements associated with a White Ribbon fundraising event. Each of those payments is discussed further below. Apart from those three payments, payments from the Trust that were not made to the CFMEU NSW were limited to the following:

(a) $250 to the Nature Conservation Council on 30 November 2005;48

(b) $200 to the Stop the War Coalition on 16 December 2005;49

(c) $3,000 to Workers’ Radio Sydney on 8 January 2007;50

49 CTDTUR MFI-1, 10/8/15, Vol 1, p 122 and Vol 2, pp 320-324.
50 CTDTUR MFI-1, 10/8/15, Vol 1, p 145 and Vol 2, pp 396-398.
(d) $5,000 to the UITBB\textsuperscript{51} on 7 February 2007,\textsuperscript{52}

(e) $1,000 to the Pat Clancy Memorial Fund to assist the New Theatre Building Refurbishment Programme on 18 August 2008;\textsuperscript{53} and

(f) $5,500 to the Sydney Alliance on 1 September 2009.\textsuperscript{54}

28. The last of these small distributions was provided in 2009. They total $14,950.

Grant to MUA

29. On 21 June 2006, the MUA wrote to the CTDTUR seeking $300,000 in funding from the Trust to support ‘a comprehensive programme to develop an international Network to Defend Workers Rights’.\textsuperscript{55} On 23 June 2006 the CTDTUR board approved the grant,\textsuperscript{56} which was purportedly for ‘international solidarity work’. Prior to the MUA’s formal grant application, Andrew Ferguson sent Peter McClelland an email. It recorded his shock that the MUA were making a submission


\textsuperscript{52} CTDTUR MFI-1, 10/8/15, Vol 1, p 145 and Vol 2, pp 399-402.

\textsuperscript{53} CTDTUR MFI-1, 10/8/15, Vol 1, p 245 and Vol 2, pp 421-422.

\textsuperscript{54} CTDTUR MFI-1, 10/8/15, Vol 1, p 261 and Vol 2, pp 432-436.

\textsuperscript{55} CTDTUR MFI-1, 10/8/15, Vol 2, pp 331-351.

\textsuperscript{56} CTDTUR MFI-1, 10/8/15, Vol 1, p 133.
to the Trust and stated that ‘in any case mua is a worthy cause and got knocked around by waterfront dispute years ago’.57

30. The following year, minutes of the CFMEU NSW’s Committee of Management dated 14 December 2007 recorded a recent donation of $330,000 being made to the CFMEU NSW by the MUA.58 The minutes stated that the donation was:

as a consequence of the extensive financial, political and industrial support that this Union has given the MUA, the Seaman’s Union of Australia, and the Waterside Workers Federation of Australia over many decades, and also as a result of the attacks by the Australian Building and Construction Commission and its Taskforce upon the CFMEU …

31. Andrew Ferguson was questioned on the grant made by the Trust to the MUA and the subsequent donation by the MUA to the CFMEU NSW. He said that the proximity and similar quantum of the two payments were a ‘coincidence’,59 which related to the ‘long history of extraordinary financial and organisational and political support between the two unions’.60

TUCW debt/equity transaction

32. On 18 December 2006, Michael Knott wrote to the CTDTUR on behalf of the TUCW. The letter stated that Michael Knott was the TUCW’s ‘Public Officer and Chair’. It relayed a resolution of the

57 CTDTUR MFI-1, 10/8/15, Vol 2, p 480.
60 Andrew Ferguson, 17/8/15, T:689.26-29.
TUCW board to the effect that CTDTUR could, if it so desired, take up an offer of shares in TUCW in return for the payment of $436,370.\(^{61}\)

The relevant minutes of the TUCW board recorded that: \(^{62}\)

The chair reported on negotiations with the CFMEU (NSW Branch) C&G Division, the South Coast Labor Council, and the CFMEU Mining & Energy Division South Western District regarding a proposal to settle all current loans by way of a share issue. It is proposed that the company shares become fully subscribed with the aim of performing a debt/equity transition.

33. The CFMEU NSW’s financial reports disclose that at the end of 2005, the CFMEU NSW rented office space from the TUCW during the year totalling $9,580. The report further disclosed that the TUCW owed the CFMEU NSW $429,095 as at the end of the 2005 year, that the ‘advance’ to the TUCW attracted a 4.5% interest rate, and that it had ‘no set repayment date’. \(^{63}\)

34. The minutes of the CTDTUR board referred to an investment committee report relating to the TUCW. \(^{64}\) It provided that the debt/equity transaction was intended to ‘ensure the Trade Union movement still controls the company and all existing loans were extinguished’. \(^{65}\) The report also referred to the TUCW as having a loan liability of $673,859 owed to three unions. One of them included the ‘CFMEU Construction Division’. \(^{66}\)

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\(^{61}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 150.

\(^{62}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 151.

\(^{63}\) BTG D&A MFI-4, 10/8/15, pp 26, 36.

\(^{64}\) CTDTUR MFI-1, 10/8/15, Vol 1, pp 154-155.

\(^{65}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 155.

\(^{66}\) CTDTUR MFI-1, 10/8/15, Vol 1, p 155.
35. CTDTUR’s financial records disclosed a payment of $436,370 was made on 26 February 2007 to TUCW. The CFMEU NSW’s disclosures to the Australian Electoral Commission show that a payment of $436,370 was made by the TUCW in the 2006/07 financial year. The ledgers of the CFMEU show that the payment was debited to a union bank account on 6 March 2007. They also show that it was then applied to a liability (described as an ‘advance’) owed to it by TUCW.

36. Andrew Ferguson gave evidence that his understanding of the transactions was that the Trust purchased property, which was a ‘good investment’, and that he ‘[didn’t] have a recollection now about the effect in terms of the CFMEU’.

37. Overall, the effect of the transaction was that CTDTUR obtained shares in TUCW at a cost of $436,370 which money was paid by TUCW to the CFMEU NSW to satisfy TUCW’s loan to that branch.

Administrative overlap between the CTDTUR and the CFMEU NSW

38. Rita Mallia is the current President of the CFMEU NSW. She gave evidence that, though she was not certain, she believed that the CTDTUR’s accounts and any payments approved by its board were

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67 CTDTUR MFI-1, 10/8/15, Vol 1, p 170 and Vol 3, p 599.
68 CTDTUR MFI-1, 10/8/15, Vol 1, p 174.
69 CTDTUR MFI-3, 19/10/15.
70 Andrew Ferguson, 17/8/15, T:693.42-694.2.
administered through the CFMEU NSW’s Financial Officer\textsuperscript{71} or its General Manager, Kylie Wray.\textsuperscript{72} Rita Mallia gave further evidence that since she became President of the CFMEU NSW, it has been her responsibility to make annual submissions to the CTDTUR for the payment of grants to the union.\textsuperscript{73} All of them have been successful.\textsuperscript{74}

39. Peter McClelland gave evidence that, during his tenure as President of the CFMEU NSW, he made submissions to the CTDTUR as instructed by Andrew Ferguson.\textsuperscript{75} Peter McClelland further said that while he was President, Michael Knott had day-to-day responsibility for administration of the CTDTUR, and that he did so outside of his normal union work hours in order to assist Stanley Sharkey in his capacity as secretary of the CTDTUR.\textsuperscript{76} On the other hand there are emails from Michael Knott stating that he and the CFMEU have no involvement with the Trust other than being a beneficiary and that it was inappropriate to use the CFMEU NSW office as a conduit for the business dealings of the Trustee.\textsuperscript{77}

40. A series of documents produced to the Commission illustrate the overlap between the CTDTUR and the CFMEU NSW. In correspondence dated 12 May 2014, the Western Australian Divisional Branch of the Construction and General Division of the CFMEU wrote

\textsuperscript{71} Rita Mallia, 12/8/15, T:400.29-39.
\textsuperscript{72} Rita Mallia, 13/8/15, T:424.20-34.
\textsuperscript{73} Rita Mallia, 12/8/15, T:400.20-24; 13/08/15, 420.37-44.
\textsuperscript{74} Rita Mallia, 13/8/15, T:420.46-421.1.
\textsuperscript{75} Peter McClelland, 6/10/15, T:868.39-42, 869.2-20.
\textsuperscript{76} Peter McClelland, 6/10/15, T:869.12-20.
\textsuperscript{77} CTDTUR MFI-1, 10/8/15, Vol 2, pp 492, 493, 497.
to the CFMEU NSW asking for contributions to a fundraising event in support of White Ribbon Australia.\footnote{CTDTUR MFI-2, 17/8/15, p 32.}

41. Kylie Wray then forwarded the request to Jennifer Glass (personal assistant to Brian Parker). She directed her to send a request to the directors of the CTDTUR on CTDTUR letterhead suggesting that it contribute $1,000 to the event.\footnote{CTDTUR MFI-2, 17/8/15, pp 28-29.} The finalised correspondence, which also sought a contribution of $550 for an apparently unrelated fundraiser, was dated 19 May 2014.

42. On the same day, Kylie Wray forwarded a receipt of payment addressed to ‘CFMEU C&G Div NSW branch’ for the $550 payment to Sudesh Singh (assistant to the CFMEU’s payroll officer)\footnote{Rita Mallia, 13/8/15, T:428.17-25.} and wrote: ‘[t]his was purchased using Brian’s Mastercard. Reimbursement for this will be from the CDTUR please.’\footnote{CTDTUR MFI-2, 17/8/15, p 34.} In oral evidence, Rita Mallia accepted the proposition that, ‘on the face of that document … there is an expectation that this amount of money would simply be reimbursed out of the [T]rust’.\footnote{Rita Mallia, 13/8/15, T:428.41-46.}

43. On 26 May 2014, Kylie Wray forwarded a receipt addressed to ‘CFMEU NSW’ for the payment of $1,050 to White Ribbon Australia.\footnote{CTDTUR MFI-2, 17/8/15, p 39.} In her email, Kylie Wray wrote ‘[t]his is a $1000 donation paid for on Brian’s Credit card. It needs to be reimbursed from the
CDTUR trust.\textsuperscript{84} She was questioned about this document, and asked whether it appeared to indicate that the Trust was ‘just another fund available to the CFMEU’.\textsuperscript{85} She said:\textsuperscript{86} 

I think it’s regarded as a fund to which we can make application in accordance with its Trust Deed and it’s available to us to do so. It’s up to the Committee then to decide whether or not it will grant the application, or not.

44. A payment of $1,600 was subsequently made from the Trust and receipted by the CFMEU NSW.\textsuperscript{87} No evidence was produced to the Commission that showed any decision-making process by CTDTUR in respect of the payment.

45. Similarly, correspondence sent between Kylie Wray and Patricia Hamson, the Finance Officer at the CFMEU NSW, relating to late fees charged by ASIC in respect of the CTDTUR in October 2014 clearly show that Kylie Wray and the CFMEU administrative staff had significant day-to-day administrative control over the affairs of CTDTUR at the relevant time including access to the Trust bank accounts. Rita Mallia thought Kylie Wray had access to the bank account which she could operate on.\textsuperscript{88}

46. Moreover, there were grant requests from the CFMEU NSW sent by email to the board of CTDTUR on 16 December 2013 (which was approved by email on 18 December 2013) and on 16 December 2014

\textsuperscript{84} CTDTUR MFI-2, 17/8/15, p 39.
\textsuperscript{85} Rita Mallia, 13/8/15, T:429.30-31.
\textsuperscript{86} Rita Mallia, 13/8/15, T:429.33-37.
\textsuperscript{87} CTDTUR MFI-2, 17/8/15, pp 38, 41, 42.
\textsuperscript{88} Rita Mallia, 13/8/15, T:424.32-37.
(which approved by email later the same day). The emails between Kylie Wray and Jennifer Glass show that the CFMEU NSW had direct access to the funds of CTDTUR, and made payments out of those funds on behalf of CTDTUR.\(^9\)

47. Counsel assisting submitted that it was extremely unusual for a beneficiary of a trust to have control of the trust bank account. That is an understatement.

C – RELEVANT LEGAL PRINCIPLES

Transfers to defeat creditors

48. Section 37A of the *Conveyancing Act* 1919 (NSW) relevantly provides:

37A Voluntary alienation to defraud creditors voidable

1. Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act* 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

2. This section does not affect the law of bankruptcy for the time being in force.

3. This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

49. Section 7 of the *Conveyancing Act* 1919 (NSW) defines ‘property’ as including ‘real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and

any other right or interest’. Thus, an alienation made with the relevant intention will be within the section.

50. What needs to be established in terms of intention was considered by the High Court at length in *Marcolongo v Chen*.90 ‘Defraud’ is synonymous with ‘delay, hinder or [otherwise] defraud’ and so includes the hindering or delaying of creditors in the exercise of their legal remedies.91 It is not necessary to prove that the relevant intention is the sole or even predominant intention.92

51. Whether an alienation is made with intent to ‘defraud’ creditors (in the sense explained above) depends on all of the circumstances surrounding it.93 Where the relevant transaction is voluntary and the natural consequence of the transaction is to defeat a creditor, the court may draw an inference of the necessary intention even in the absence of direct proof of intention.94

52. Though not defined in the *Conveyancing Act* 1919 (NSW), it is clear that the ‘intent to defraud creditors’ is an intent to defraud *any* creditors.95 The law in that regard was recently summarised by

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90 (2011) 242 CLR 546.
91 *Marcolongo v Chen* (2011) 242 CLR 546 at [19], [56] per French CJ, Gummow, Crennan and Bell JJ.
93 *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 523-525 per curiam.
95 See *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557 at 566 per Brennan CJ and McHugh J referring to ss 6 and 121 of the *Bankruptcy Act* 1966 (Cth).
Gilmour J in *Commissioner of Taxation v Oswal* in the context of the Western Australian equivalent to s 39A of the *Conveyancing Act* 1919 (NSW):

The word ‘creditors’ does not refer to any one or more particular creditors of a defendant at the time the impugned alienation occurred. ‘Creditors’ includes present and future creditors, whether individually or collectively: *Cannane v J Cannane Pty Limited (in liq)* (1998) 192 CLR 557 at 566, 574; *Barton v Deputy Commissioner of Taxation of the Commonwealth of Australia* (1974) 131 CLR 370 at 374. As Young JA noted in *Chen v Marcolongo* (2009) 260 ALR 353 at [180]:

The word “creditors” in the section has been held on more than one occasion to mean present or future creditors, so that if a person fears that his or her activities may generate creditors and puts property out of the reach of such possible persons, the transfer of the property can be attacked under the section; see for example *Mackay v Douglas* (1872) LR 14 Eq 106. In *Barling v Bishopp*, 17 days before an action in trespass was tried in which Bishopp was a defendant, he transferred his property to his daughter. Bishopp had no creditors at that stage, but Romilly Mr had no difficulty at … 420 … finding that the conveyance was in fraud of creditors saying:

It is obvious that the statute is not, in terms, restricted to existing creditors alone, but that it extends to future creditors also.

53. Thus, if the alienation is made with the intention to defeat the alienor’s future creditors collectively, it is irrelevant that the alienor did not have a specific creditor in contemplation.

**Duties of union officers**

54. Section 285 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (*FW(RO) Act*) requires an officer of an organisation or branch

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96 [2015] FCA 276. See also *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 (FC); *Windoval v Donnelly* (2014) 226 FCR 89 (FC); *Young v Smith* [2015] NSWSC 400 at [41]-[42], [165], [169]-[170] per Sackar J and the authorities cited.
to exercise his or her powers and discharge his or her duties with reasonable care and diligence. An officer will be taken to discharge his or her duty in respect of a particular judgment if the officer:

(a) makes the judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the judgment;

(c) informs himself or herself about the subject matter of the judgment to the extent that he or she reasonably believes to be appropriate; and

(d) rationally believes that the judgment is in the best interests of the organisation.

55. Section 286 of the FW(RO) Act provides:

286 Good faith—civil obligations

(1) An officer of an organisation or a branch must exercise his or her powers and discharge his or her duties:

(a) in good faith in what he or she believes to be the best interests of the organisation; and

(b) for a proper purpose.

56. Section 283 provides that ss 285 and 286 (and ss 287 and 288) apply in relation to officers and employees of an organisation or branch only in relation to the exercise of powers and duties related to financial management of the organisation or branch.
57. Section 292 provides that if:

(a) an officer relies on information, or professional or expert advice, given or prepared by:

(i) an employee of the organisation or the branch whom the officer believes on reasonable grounds to be reliance and competent in relation to the matters concerned; or

(ii) a professional adviser or expert in relation to matters that the officer believes on reasonable grounds to be within the person’s professional or expert competence; or

(iii) another officer in relation to matters within the officer’s authority; or

(iv) a collective body on which the officer did not serve in relation to matters within the collective body’s authority; and

(b) the reliance was made:

(i) in good faith; and

(ii) after making proper inquiry if the circumstances indicated the need for inquiry; and

(c) the reasonableness of the officer’s reliance on the information or advice arises in proceedings brought to determine whether an officer has performed a duty under this Part or an equivalent duty at common law or in equity;

then the officer’s reliance on the information or advice is taken to be reasonable, unless the contrary is proved.

58. Prior to the introduction of the FW(RO) Act, statutory provisions equivalent to ss 283, 285, 286 and 292 were found in identically numbered provisions of Schedule 1B of the Workplace Relations Act 1996 (Cth). Those provisions were introduced by the Workplace Relations Amendment (Registration and Accountability of

59. Unlike the equivalent provision of the Corporations Act 2001 (Cth) (s 181), s 286(1)(a) only requires an officer to exercise his or her powers and discharge his or her duties in what the officer ‘believes to be the best interests of the organisation’. Thus, the section imports a subjective, rather than objective, test.

60. Conversely, whether a company director (and by extension a union officer) exercises his or her powers for a ‘proper purpose’ is determined by an objective test. The law in this respect was recently summarised by Brereton J in Hancock v Rinehart:97

In determining whether a power has been exercised for an extraneous or ulterior purpose, the court determines first, as a matter of law, for what purpose or purposes the power may properly be exercised and second, as a matter of fact, whether the purpose for which the power was in fact exercised was within the category of permissible purposes.... In ascertaining the purpose for which the power was in fact exercised, the court is concerned with the state of mind of the trustee and is informed by the surrounding circumstances, as was explained by the Privy Council in Howard Smith Ltd v Ampol Ltd [1974] 1 NSWLR 68; [1974] AC 821[...].

Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.

In that respect, the burden of proof is born by those who allege a fraud on the power [...] However, the crucial question is simply whether the power (or discretion) was exercised bona fide for a proper purpose, and an answer that it was not does not depend in every case on proof of what the extraneous purpose was, so long as it can be established that the power was not exercised bona fide for the purpose for which it was conferred. In other words, it may be discernible that the power (or discretion) could not have been exercised bona fide for a proper purpose, without proving for what collateral purpose it was in fact exercised.\textsuperscript{98}

\section*{D – ANALYSIS AND CONCLUSIONS}

\textbf{CFMEU NSW’s control of the Trust}

61. Counsel assisting submitted that the Committee of Management of the CFMEU NSW has retained, and was intended to retain, de facto control over the Trust and the assets representing the $7,000,000 transferred to it by the branch in September 2005.

62. That submission was not seriously contested. For the following reasons it must be accepted:

(a) Under the Trust deed, the CFMEU NSW is the only ‘Specified Beneficiary’. As ‘Appointor’ of the Trust the Committee of Management of the CFMEU NSW may remove and appoint a new trustee at any time. As ‘Guardian’ of the Trust the Committee of Management of the CFMEU NSW must be given notice of any intention by the trustee to appoint the capital of the fund or amend the trust deed. The entire

\textsuperscript{98} See also Westpac Banking Corporation and Others v The Bell Group Ltd (in liq) and Others (No 3) (2012) 44 WAR 1 at [933] per Lee AJA (referring to Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285 at 294 per Mason CJ, Deane and Dawson JJ) and [1988] per Drummond AJA.
Trust deed is designed to ensure that the CFMEU NSW retains control of the trust assets.

(b) Apart from contributions totalling $2,560, the only contribution to the Trust has been a single $7,000,000 payment from the CFMEU NSW. This could be because the Trust has been spectacularly unsuccessful in promoting its activities. But the more likely reason is because the Trust does not actively promote its activities. Apart from a single web page, there is no evidence of the Trust’s promotional activities. That reinforces the conclusion that the Trust is intended to operate as a CFMEU NSW controlled entity.

(c) Except for the distribution of $300,000 to the MUA, all but a small fraction of the distributions from the Trust have been made to the CFMEU NSW. Further, the proximity in time and quantum of the $330,000 payment from the MUA to the CFMEU NSW in the year following the distribution to the MUA suggests that the distribution to the MUA occurred with the CFMEU NSW’s approval and has the appearance of a loan repaid with interest rather than a bona fide distribution.

(d) Apart from cash or cash equivalents, the only tangible asset held by the CTDTUR as trustee are the shares in the TUCW. The subscription monies for those shares were paid to the TUCW. They were then forwarded by it to the CFMEU NSW.
A majority of the directors of the current trustee of the Trust are current or former officials of the CFMEU NSW, the CFMEU and the CFMEU’s predecessor, the BWIU.

Staff of the CFMEU NSW operate on the trust bank account and have a high degree of day-to-day administrative control of the Trustee’s affairs.

During the public hearing, Andrew Ferguson gave evidence that the CFMEU NSW retained substantial control of the $7,000,000 transferred to the Trust. But he was not convinced ‘that was the intention long-term’. He said:

We had a vision of other unions making contributions to this Trust and, inevitably, that would have meant a change to the Trust Deeds, if that’s the correct terminology, to embrace other unions and other stakeholders in the labour movement.

That suggestion is rejected. It is rejected for the simple reason that it would be exceedingly unlikely that the Committee of Management of the CFMEU NSW would agree to relinquish control over so substantial a proportion of the branch members’ accumulated funds. That course would almost certainly be inconsistent with the obligations then imposed by ss 285 and 286 of Sch 1B of the Workplace Relations Act 1996 (Cth) on officers of the union. It was not the course adopted when the Trust was established. As explained above, the CFMEU NSW made sure, by suitable provisions in the Trust deed, that it would retain de facto control over the money transferred.

100 Andrew Ferguson, 17/8/15, T:680.40-44.
Purpose of the Transfer

65. Counsel assisting submitted that the retention of control through the careful and deliberate structuring of the Trust led to one conclusion. That conclusion was that in setting up the Trust and making the Transfer, the CFMEU NSW wanted to part with legal ownership of its assets in a way that would prevent a future claim being made by a third party against those assets, at the same time as retaining effective control over, and obtaining the benefit of, those assets. In short, the Trust was established and the Transfer effected for the purpose of what can be described, euphemistically, as ‘asset protection’.

66. This submission is supported by the evidence of each of Peter McClelland, Michael Knott and Andrew Ferguson. Peter McClelland’s evidence was that he supported the Transfer because it involved ‘trying to protect the assets of the Union.’ The evidence of Michael Knott and Andrew Ferguson was to the same effect, but subject to the qualification that the Trust was also established to defend the assets of other trade unions and the broader labour movement. The qualification is to be rejected. As explained above, de facto control of the Trust’s assets under the Trust deed lies with the Committee of Management of the CFMEU NSW, not with any other union or unions.

67. Counsel assisting also submitted that on the whole of the evidence, the Commission should conclude that the Transfer may have been undertaken, not merely to hinder or defeat any future claim against the CFMEU NSW by the Commonwealth but more generally to hinder or defeat claims by any future or prospective creditors of the branch.
Separate written submissions made on behalf of the CFMEU, Andrew Ferguson and Peter McClelland attacked this conclusion. Four main arguments were advanced.

The first was that counsel assisting had failed to consider the full extent of the CFMEU’s assets. Considering the CFMEU’s assets nationally, the CFMEU (which after all is the only relevant separate entity) would have had plenty of assets available to potential creditors. Andrew Ferguson made a closely related submission that the CFMEU NSW still had sufficient funds to operate, and accordingly it could not be concluded that the Transfer was made with an intention to defeat creditors.

The fact that the CFMEU would have had other assets which may have been available to creditors, does not prevent a conclusion that the intention of the Transfer was to prejudice the claims which could be brought against the union. It is sufficient if there is an intention to ‘delay’ or ‘hinder’ creditors in their resort to legal remedies. Further, in assessing the intention of the relevant officials, it is the financial position of the CFMEU NSW branch that is more relevant. As the Trust deed makes clear, the concern was that the CFMEU NSW should retain control over assets under that branch’s control. It is the Committee of Management of that branch that is the Appointor and the Guardian of the Trust and it is that branch that is the Specified
Beneficiary. Contrary to Andrew Ferguson’s submission, the figures above show that the branch was not in a strong financial position.103

71. The second main argument was that the Transfer could not have been made to hinder or defeat claims by any future or prospective creditors because s 37A would have applied.104 This argument is circular.

72. The third main argument was that s 37A could not apply because there had been no identification of a future creditor whose interests had in fact been prejudiced.105 The section does not require that. That no creditors have challenged the Transfer has no bearing on the intention that underlay it.

73. The fourth main argument attacked counsel assisting’s submission that although it might be accepted that the CFMEU was concerned about the activities of the Howard government it was difficult to accept the evidence of Andrew Ferguson and Peter McClelland that the Transfer was motivated by a desire to prevent the Howard government deregistering the CFMEU and seizing its assets.

74. Counsel assisting referred to the fact that if the CFMEU’s registration had been cancelled in about 2005 under the Workplace Relations Act 1996 (Cth) the union’s property would have been dealt with in accordance with s 32 of Schedule 1B of that Act. In essence, that section would have required the property to be held and applied for the purposes of the CFMEU under its rules so far as they could still be

103 See para 15.
104 Submissions of Peter McClelland, 29/10/15, para 31.
105 Submissions of Andrew Ferguson, 29/10/15, para 18.
carried out or observed. The High Court explained in *Victoria v Sutton*\(^{106}\) that, subject to any provisions of the rules, for example providing for the vesting of property in trustees or in some other body, the property would be that of the members of the CFMEU. If the CFMEU was de-registered by special Commonwealth legislation, such legislation could not have validly expropriated the CFMEU’s assets: s 51(xxxi) of the *Constitution* prevents the Commonwealth acquiring property without providing ‘just terms’. Indeed when the BLF was de-registered the relevant Commonwealth legislation provided for the distribution of the BLF’s property in much the same way as specified in s 32 of Schedule 1B of the *Workplace Relations Act 1996* (Cth).\(^{107}\)

75. In neither case, counsel assisting submitted, was there a realistic prospect of the Federal government ‘seizing’ the CFMEU NSW’s assets, and certainly not a risk that would justify transferring more than 50% of accumulated members’ funds to the CTDTUR.

76. Andrew Ferguson attacked this reasoning as unfair, as none of this reasoning was put to him in evidence.\(^{108}\) Further, contrary to counsel assisting’s submission, in truth deregistration would have the real effect of taking, diminishing – because the assets would be subject to expensive outside control – and distributing the union’s assets.\(^{109}\) Peter McClelland said that it stretched credulity to attribute to him (and presumably the other officers of the union) knowledge of the legal and


\(^{107}\) See *Builders Labourers’ Federation (Cancellation of Registration - Consequential Provisions) Act 1986* (Cth), s 4.

\(^{108}\) Submissions of Andrew Ferguson, 29/10/15, paras 20-23.

\(^{109}\) Submissions of Andrew Ferguson, 29/10/15, paras 16-19.
77. Taking these specific arguments in turn:

(a) There is nothing unfair in assessing Andrew Ferguson’s evidence with reference to objective circumstances, particularly objective circumstances of law, even though they have not been put to him.

(b) The point made by counsel assisting was that the funds of a deregistered organisation would not, in fact, become the property of the Commonwealth but either continue to be applied in accordance with the rules or be distributed to the members. The suggestion that there would be ‘(expensive) outside control’ in the event of deregistration diminishing the value of the members’ assets is of little weight: the CFMEU NSW has a very extensive bureaucracy that already draws on the funds contributed by its members.

(c) It does not stretch credulity that in circumstances where legal advice was sought by Peter McClelland, if he had been concerned about the prospect of deregistration of the CFMEU, he might have obtained advice about the consequences of deregistration. However, it is true that there is no evidence of what legal advice was provided, if any.

\[110\] Submissions of Peter McClelland, 29/10/15, para 29.
There is also a broader answer to the submissions made by Andrew Ferguson and Peter McClelland. If they did think that the Commonwealth could and would seek to seize the union’s assets, then the Commonwealth was, on their way of thinking at least, a future creditor and the Transfer was made to defeat the Commonwealth’s future claims. If they did not think that the Commonwealth could and would seize the union’s assets, then the Transfer was motivated by a different intention. As noted above, the compelling inference from the evidence is that it was an intention to part with legal ownership of its assets in a way that would prevent a future claim being made by a third party against those assets, at the same time as retaining effective control over, and obtaining the benefit of, those assets.

On the whole of the evidence, and having regard to the voluntary nature of the Transfer, the Transfer may have been undertaken, not merely to hinder or defeat any future claim against the CFMEU NSW by the Commonwealth but more generally to hinder or defeat claims by any future or prospective creditors of the branch.

**Breaches of duty: Transfer made for improper purpose**

Transactions entered into for the purpose of defrauding creditors have been proscribed in English law since 1571 and in Australian law since English law was received here. Counsel assisting submitted that a transaction entered into for that purpose cannot be said to have been entered for a proper purpose. Accordingly it was submitted that it

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112 See *Lewis v Condon* (2013) 85 NSWLR 99 at [64] per Leeming JA.
should be concluded that by supporting and endorsing the Transfer both Peter McClelland and Andrew Ferguson may have breached their statutory duty created by s 286 of Sch 1B of the *Workplace Relations Act* 1996 (Cth), to exercise their powers for a proper purpose.

81. Peter McClelland challenged this submission on the basis that a transaction in contravention of s 37A could be within the rules of a registered organisation and therefore could be for a proper purpose, particularly if the relevant union retained effective control of the property alienated.113

82. That submission is rejected. Section 142(1)(a) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) provides that the rules of an organisation must not be contrary to law. The prevailing view is that a rule in breach of the prohibition in s 142 is invalid.114 A rule that permitted a transaction in breach of s 37A would be contrary to law, and consequently invalid. Further, even if such a rule were permissible, the rules would need to indicate that transactions could be entered into in breach of s 37A with unmistakeable clarity. There is no suggestion that this is the case in the present circumstances.

83. Both the CFMEU and Peter McClelland also sought to rely on s 292. The CFMEU submitted that in effecting the Transfer, Andrew

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113 Submissions of of Peter McClelland, 29/10/15, paras 10-15.

114 See, eg, *Re Keely; ex parte Kingham* (1995) 129 ALR 255 at 264-268 per Wilcox CJ (Spender and Ryan JJ agreeing), following the predominant view in *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union* (1960) 103 CLR 368.
Ferguson and Peter McClelland ‘acted in accordance with legal advice and pursuant to the resolution of governing bodies of the union’.\textsuperscript{115}

84. There are at least four reasons to reject this submission.

85. \textit{First}, s 292 only applies where the reasonableness of an officer’s reliance on information is in issue. That issue does not arise in relation to breach of the duty in s 286 to act for a proper purpose.

86. \textit{Secondly}, there is no evidence that Andrew Ferguson or Peter McClelland were given legal advice to make the Transfer. The advice given by Gilbert & Tobin, which is prima facie subject to legal professional privilege, was not tendered in evidence.

87. \textit{Thirdly}, there is no evidence from which it could be inferred that the advice which was given concerning the establishment of the Trust dealt with whether the Transfer would or would not be liable to be set aside. As counsel assisting submitted, it is conceivable that the advice dealt with matters relating to the structure of the Trust. However, it is not obvious that it would have touched upon s 37A. If the advice was exculpatory, it would have been expected that the CFMEU NSW would have sought its tender. They did not.

88. \textit{Fourthly}, endorsement of the Transfer by the Committee of Management does not immunise Andrew Ferguson or Peter McClelland from liability under s 286. Relevantly s 292 refers to an officer relying on information or professional or expert advice given by

\textsuperscript{115} Submissions of the CFMEU, 29/10/15, pp 92-94, paras 6-9. See also submissions of Peter McClelland, 29/10/15, paras 16-19.
another officer of the union within the officer’s authority, or a collective body on which the officer did not sit. Peter McClelland and Andrew Ferguson were the two highest ranking officers in the branch. Both sat on the Committee of Management. Both were heavily involved in the decision to make the Transfer.

89. For the reasons above, both Andrew Ferguson and Peter McClelland may have breached their statutory duty under s 286 of Sch 1B of the Workplace Relations Act 1996 (Cth).

90. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration may be given to commencing proceedings against Andrew Ferguson in relation to a possible contravention of s 286 of Sch 1B of the Workplace Relations Act 1996 (Cth).

91. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration may be given to commencing proceedings against Peter McClelland in relation to a possible contravention of s 286 of Sch 1B of the Workplace Relations Act 1996 (Cth).
ANNEXURE A: DISTRIBUTIONS MADE FROM DEFEND TRADE UNIONS RIGHTS TRUST TO CFMEU NSW

<table>
<thead>
<tr>
<th>Date of payment</th>
<th>Sum</th>
<th>Reference to CTDTUR MFI-1</th>
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</thead>
<tbody>
<tr>
<td>22/12/2006</td>
<td>$4,000.00</td>
<td>135-139, 142, 356-365</td>
</tr>
<tr>
<td>22/12/2006</td>
<td>$50,000.00</td>
<td>145, 366-373</td>
</tr>
<tr>
<td>22/12/2006</td>
<td>$35,322.00</td>
<td>145,374-379</td>
</tr>
<tr>
<td>22/12/2006</td>
<td>$10,000.00</td>
<td>145,387-395</td>
</tr>
<tr>
<td>31/01/2007</td>
<td>$50,000.00</td>
<td>145, 403-408</td>
</tr>
<tr>
<td>22/06/2007</td>
<td>$250,000.00</td>
<td>191-194, 409-420</td>
</tr>
<tr>
<td>9/07/2008</td>
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<tr>
<td>30/07/2009</td>
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<tr>
<td>18/12/2009</td>
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<tr>
<td>18/08/2010</td>
<td>$193,886.09</td>
<td>268-273, 437-439</td>
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<tr>
<td>17/02/2011</td>
<td>$2,000.00</td>
<td>281, 440-441</td>
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<tr>
<td>20/06/2011</td>
<td>$457,299.03</td>
<td>282-284, 442-444</td>
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<td>18/12/2012</td>
<td>$379,286.00</td>
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<td>22/12/2013</td>
<td>$150,000.00</td>
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<tr>
<td>16/12/2014</td>
<td>$200,000.00</td>
<td>299-300, 302-310, 465-467</td>
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<td><strong>Total</strong></td>
<td><strong>$2,441,928.98</strong></td>
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# CHAPTER 7.6

## U-PLUS/Coverforce

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A – INTRODUCTION

1. This Chapter considers certain financial arrangements of the Construction, Forestry, Mining and Energy Union (CFMEU), Construction and General Division, New South Wales Divisional Branch (CFMEU NSW). The relevant period is 2003 to 2015. The relevant arrangements are those involved in the ‘UPlus’ workers compensation top-up and income protection insurance scheme (UPlus Scheme). The CFMEU NSW has received and continues to receive many millions of dollars in what are effectively commissions from the operation of the UPlus Scheme. In particular, the Chapter is concerned with the arrangements by which money flowed in the period from 2003 from employers pursuant to enterprise agreements to one or more of Coverforce Pty Ltd (Coverforce) and U-Plus Pty Ltd (U-Plus). The money then flowed to the CFMEU NSW.
2. There are three main issues. They are:

(a) whether there may have been systemic breaches of fiduciary duty by officers of the CFMEU NSW when negotiating enterprise agreements on behalf of union members;

(b) whether officers of the CFMEU NSW negotiating enterprise agreements have satisfied the good faith bargaining requirements in s 228 of the *Fair Work Act 2009* (Cth) (*FW Act*), particularly whether those officers disclose to employers relevant information concerning the effect of the CFMEU NSW’s standard clause concerning income protection insurance so that those employers can inform their employees of the effect of the clause; and

(c) whether there may have been contraventions of s 911A of the *Corporations Act 2001* (Cth) by the CFMEU NSW.

B – SUMMARY OF FINDINGS

3. In summary, for the reasons that follow:

(a) Since 2003 the CFMEU NSW has included an income protection insurance clause in its standard enterprise agreement, the effect of which is to provide a very substantial financial benefit to the union. From 2003 to 2009 the financial benefit to the union was over $230,000 per annum. From 2010 to June 2013, the financial benefit to the union was over $680,000 per annum. From July 2013 to May 2015,
the financial benefit to the union was approximately $810,000 per annum.\(^1\)

(b) The CFMEU NSW does not routinely, if at all, disclose that financial benefit to employees on whose behalf it acts in enterprise negotiations. The inclusion of the standard clause has created an environment in which there are inherent conflicts of interest between union officials and the workers they represent and a substantial systemic risk of breaches of fiduciary duty.\(^2\)

(c) In addition, the CFMEU NSW may since 2003 have contravened s 911A of the *Corporations Act* 2001 (Cth), a criminal offence. This Report and all the relevant materials have been referred to the Australian Securities and Investments Commission to give consideration to whether a civil or criminal proceeding should be commenced against the union.\(^3\)

C – RELEVANT FACTS

4. Subject to specific matters dealt with below, there was no challenge to the summary of the primary facts propounded by counsel assisting. Accordingly, the following summary of the primary facts is based substantially on counsel assisting’s submissions.

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1 See paras 17-48.
2 See paras 66-84.
3 See paras 91-127.
Background

5. For a considerable period, the CFMEU NSW has negotiated income protection insurance clauses in enterprise agreements (previously enterprise bargaining agreements) with different employers. Those clauses oblige the contracting employer to effect income protection insurance and workers compensation top-up cover for their employees.

6. Occasionally the clause negotiated will oblige an employer to effect cover under the UPlus Scheme.\(^4\) Another possibility, where the enterprise agreement is with a number of unions, is that the clause may give the employer a choice between the UPlus Scheme and the insurance scheme promoted by another union.\(^5\) However, the most common clause obliges the employer to effect an agreed insurance policy which has ‘terms, conditions and benefits which are equal [to] or better’ than the UPlus insurance product.\(^6\) The most recent standard

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clause in CFMEU NSW negotiated enterprise agreements appears to be as follows:7

12.5 Top-Up Worker's Compensation Insurance/Income Protection

The Company shall affect [sic] an agreed non-cancellable “Workcover Top-Up” and “Income Protection” insurance policy for Employees covered by this Agreement. The terms, conditions and benefits provided by the agreed insurance policy must be equal or better than that provided by “U-Plus”.

The cost of this policy is $97.50 per Employee per month from 1 February 2014 and the cost will increase annually by no greater than the CPI (Sydney) during the life of the Agreement, if at all.

For the purposes of this clause, “Workcover Top-Up Insurance” refers to additional lump sum payments for death and permanent injury as awarded under the NSW Workers Compensation Act.

The UPlus Scheme summarised

7. In general terms, the UPlus Scheme is a scheme by which employers in the building and construction industry in New South Wales pay for income protection insurance and workers’ compensation top-up insurance for their workers. Employers pay monthly premiums to an insurance broker. The broker remits the premium, less a commission, to an insurer. The insurer provides a group insurance policy covering the employers’ workers. The insurance policy provided by the insurer is described as the UPlus insurance product.

7 See, eg, U-Plus/Coverforce MFI-1, 24/8/15, Vol 10, pp 343, 402. For an earlier similar example of the clause, save as to the cost, see U-Plus/Coverforce MFI-1, 24/8/15, Vol 10, p 112.
8. The structure and operation of the UPlus Scheme has changed over time in point of detail.8

9. The scheme was initially established by Coverforce in 1994. Coverforce was founded in 1994. It is currently a subsidiary of Coverforce Holdings Pty Ltd. Coverforce holds an Australian Financial Services Licence (AFSL). This enables it to deal in and provide financial product advice to retail and wholesale clients on general insurance products. Prior to 2005 the scheme was known as the Coverforce Top-Up Accident Scheme (CTAS). References to the UPlus Scheme in this Chapter include a reference to CTAS.

10. From 1994 to June 2013, Coverforce was the insurance broker for the UPlus Scheme. It was also the owner of the UPlus insurance product. Employers under the scheme paid insurance premiums to Coverforce. Coverforce remitted those premiums, less commission, to the insurer.9

11. In June 2013, U-Plus was registered as an incorporated joint venture between the CFMEU and Coverforce. Coverforce holds 5,001 ordinary shares in U-Plus and the CFMEU holds 5,000 ordinary shares. The reason for Coverforce’s additional share is to ensure that Coverforce could exercise a controlling vote in matters pertaining to its financial services licence.10

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9 James Angelis, witness statement, 24/8/15, paras 20, 40.
10 James Angelis, witness statement, 24/8/15, para 64.
12. The composition of the board of directors of U-Plus is structured to accord with the joint venture arrangement between Coverforce and the CFMEU NSW. Several persons who are now or have been officials of the CFMEU NSW are on the board. The current board includes Andrew Ferguson (a very long serving past Secretary), Brian Parker (the current Secretary) and Rita Mallia (the current President). It also includes Stephen Costigan and Jose Barrios, who are members of the Committee of Management of the CFMEU NSW.  

13. At the time of the establishment of U-Plus in June 2013, the UPlus insurance product was transferred to U-Plus. That is, the group policy was thereafter held in the name of ‘U-Plus Pty Ltd’. From June 2013, almost all employers under the UPlus Scheme began to pay premiums to U-Plus, rather than to Coverforce (New System premiums). Coverforce continued to collect premiums from a small number of employers (Old System premiums). U-Plus, however, outsources the entire administration of the UPlus Scheme to Coverforce. 

14. In June 2014, the U-Plus Trust was established. U-Plus was trustee. Coverforce and the CFMEU NSW were fixed beneficiaries of the trust.

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12 James Angelis, witness statement, 24/8/15, para 59.
The UPlus insurance product was transferred to U-Plus as trustee of the UPlus Trust.¹⁴

15. Over the life of the UPlus Scheme, the insurer has changed on a number of occasions.¹⁵ Since 2011, the insurer underwriting the UPlus insurance product has been Hannover Life Re of Australasia Ltd (Hannover). In addition to paying commission, Hannover pays Coverforce a claims management fee for managing claims made under the UPlus Scheme.

16. Hannover currently pays U-Plus an 18% commission in respect of New System premiums, and Coverforce a 22% commission in respect of Old System premiums. The claims management fee paid to Coverforce is 8% of New System premiums and 4% of Old System premiums.¹⁶

Money flow to the CFMEU NSW: 2003 to 2009

17. James Angelis has been involved with Coverforce from 1994. He has been the full-time Chief Executive Officer since 2004.¹⁷ He gave evidence that from 1994 to around 2002 the CFMEU NSW did not

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receive any payment in respect of the UPlus Scheme. He gave the following evidence about the initial arrangements:

The CFMEU was responsible for promoting the U-Plus product to employees and employers within the industries in which it was operating, and seeking to include in bargaining agreements that an employer would take out income protection insurance for its employees.

Over time, the CFMEU has also provided training to delegates and members in relation to the U-Plus product, assisted injured workers with claims, promoted U-Plus on its journal, website and social media, promoted U-Plus with employers and distributed materials relevant to the product.

18. However, in around 2002 an agreement was reached between Coverforce and the CFMEU NSW by which Coverforce would pay to the CFMEU NSW a dollar amount per month for each employee that was covered by the UPlus Scheme. At this point, there was no written agreement between Coverforce and the CFMEU NSW for the payment of the amount out of Coverforce’s commission.

19. The records produced by the CFMEU NSW reveal that each month the CFMEU NSW invoiced Coverforce for the fee with the description on the invoices being ‘UPlus Shared Service Agreement’. Andrew Ferguson gave evidence that the amount per month per worker was

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18 James Angelis, witness statement, 24/8/15, para 42. This is supported by the fact that income from the ‘Shared Services Agreement’ only appears in the CFMEU NSW’s accounts from 2003 onwards: U-Plus/Coverforce MFI-8, 15/10/15, p 24.

19 James Angelis, witness statement, 24/8/15, para 40(b).

20 James Angelis, witness statement, 24/8/15, paras 42-44.

21 James Angelis, witness statement, 24/8/15, para 52; Andrew Ferguson, 17/8/15, T:698.34-42.

something like $1’.  

A comparison between financial reports issued by Coverforce and invoices sent by the CFMEU NSW from October 2006 to June 2009 shows that during this period the CFMEU NSW was paid $1 (plus GST) per month for each worker covered.  

The CFMEU NSW’s financial records disclose total revenue from the ‘Shared Services Agreement’ in the period 2003–2009 of $1,657,355.  

The annual average over that seven year period was just over $236,000.

Andrew Ferguson gave evidence that the payment received at this time was a ‘reimbursement’ of expenses incurred by the CFMEU NSW. He identified the expenses incurred as the expenses of disseminating information in relation to the product and promoting the UPlus insurance product, at no cost, in the Union journal and in leaflets, posters, stickers and the like.

Counsel assisting submitted that Andrew Ferguson’s evidence that the payment was a reimbursement of expenses should not be accepted. Five reasons were advanced in support of the submission. 

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23 Andrew Ferguson, 17/8/15, T:695.38-43.

24 U-Plus/Coverforce MFI-1, 24/8/15, Vol 4, tab 2, pp 105 and 106, 108 and 109, 118 and 119, 122 and 124, 125 and 126, 128 and 129, 131 and 132, 140 and 141, 143-145, 156 and 157, 159 and 160, 162 and 163, 165 and 166, 168 and 169, 175 and 177, 180 and 181, 184 and 185, 192 and 193, 199 and 200. Financial reports prior to 2006 were not produced to the Commission.


27 Submissions of Counsel Assisting, 20/10/15, para 21.
for Andrew Ferguson took issue with them, submitting they were at best equivocal.28

23. The first matter identified by counsel assisting was the fact that James Angelis described the amount paid as a fee for services provided by the CFMEU NSW, not a reimbursement of expenses incurred.29 Andrew Ferguson submitted that his evidence was not inconsistent with that of James Angelis. Andrew Ferguson gave evidence about services he said that the union had provided30 and said it was not inconsistent to say that the remuneration paid was a reimbursement of the expenses incurred in providing those services.31

24. It is convenient to set out in full the parts of James Angelis’s statement relied upon by counsel assisting:32

Initially the CFMEU did not receive any payment for the insurance placed through U-Plus. To the best of my knowledge it was approximately 2002 when an agreement was reached between Coverforce and the CFMEU that the CFMEU would receive a fee paid from Coverforce’s commission in respect of the insurance placed through U-Plus. My recollection is that I initiated the proposal to pay a fee to the CFMEU in consideration of the work undertaken by the CFMEU in relation to the U-Plus product.

It was also an acknowledgment that the terms on which the insurance was obtained was because of the number of workers which were covered by bargaining agreements negotiated through the CFMEU. The high number of insured workers meant that Coverforce was able to obtain premiums that were significantly lower than the premiums that an individual employer or employee would be required to pay if they were seeking to

28 Submissions of Andrew Ferguson, 30/10/15, paras 2-8.
29 James Angelis, witness statement, 24/8/15, paras 42, 44.
30 Andrew Ferguson, 17/8/15, T:696.23-697.46.
31 Submissions of Andrew Ferguson, 30/10/15, para 5.
32 James Angelis, witness statement, 24/8/15, paras 42-44.
arrange the insurance individually. This was a major benefit of the program to employers and employees and important to sustain a quality group income protection product.

Accordingly, from about 2002 Coverforce paid to the CFMEU a set fee each month for each employee that was covered by U-Plus. This amount was paid from the commission Coverforce earned as a result of the placement of the insurance.

25. The whole tenor of that evidence is inconsistent with the arrangement merely reimbursing the union for expenses incurred. The fee is a reward for services paid out of Coverforce’s commission rather than an amount merely to defray costs.

26. The second matter relied upon by counsel assisting was the structure of the fee paid. The fee was a flat-fee per worker per month. This is not how a reimbursement arrangement would ordinarily be structured. Later documentary records also confirmed that this is how the future arrangement was structured. Contrary to the submission advanced on behalf of Andrew Ferguson, there is no evidence suggesting any significant change to the basis of calculation of the fee until 2013 when U-Plus was created.

27. Andrew Ferguson submitted that there was nothing strange in having a flat-fee reimbursement given that some of the union’s work involved educating a diverse work force about the benefits of the policy, which would be difficult to distribute pro rata. The difficulty with Andrew Ferguson’s submission is that self-evidently, and consistently with the

33 See paras 19, 24.

34 See also the evidence summarised in paragraph 19 and U-Plus/Coverforce MFI-1, 24/8/15, Vol 1, tab 9, p 81; U-Plus/Coverforce MFI-1, 24/8/15, Vol 1, tab 11, p 88 (cl 3.1.1).

35 Submissions of Andrew Ferguson, 30/10/15, para 6.
evidence of James Angelis,\textsuperscript{36} the most important service to Coverforce was the promotion of the product to employers. That is so because promotion is the service which would result in employers being signed up to the UPlus Scheme. Andrew Ferguson did not identify any particular expense or cost in promoting the product to employers other than the costs of printing promotional materials, or, perhaps, the income forgone by providing free promotion in the union magazine. It would have been feasible to have quantified those costs and to have agreed an annual amount to be paid by Coverforce, irrespective of the number of persons covered by the scheme. The calculation of the fee results in the union receiving additional money for every employee covered by the scheme. This strongly suggests that the union was being rewarded for the success of its promotional activities rather than being reimbursed for costs.

28. The third matter identified by counsel assisting was that the quantum of fees paid in each year vastly exceeds what could be possibly said to be a reimbursement for the CFMEU NSW’s expenses. Andrew Ferguson submitted that this may be doubted given the size of the union’s membership.\textsuperscript{37} Counsel assisting’s submission is supported by the union’s accounting records. Taking 2005 as an example, the union’s trial balance records printing costs of approximately $43,000 and the costs of printing and distributing the union magazine as approximately $230,000. In the same year, the union received approximately $280,000 from Coverforce.\textsuperscript{38} Thus, the amount

\textsuperscript{36} James Angelis, witness statement, 24/8/15, para 40.

\textsuperscript{37} Submissions of Andrew Ferguson, 30/10/15, para 7.

\textsuperscript{38} U-Plus/Coverforce MFI-7, 15/10/15, p 1.
received in relation the UPlus Scheme exceeded the entire printing costs incurred by the branch for the year. Yet self-evidently a great deal of that expenditure was unrelated to the UPlus Scheme.

29. The fourth matter identified by counsel assisting is that the CFMEU NSW had a separate ledger account for promotional and advertising reimbursement from a number of parties. The years for which there are records in evidence are 2005-2015. In each of those years the amount in that account was less than the amount received under the UPlus Scheme alone. In many years the difference was hundreds of thousands of dollars. The size of the Coverforce account and its differentiation from promotional and advertising reimbursement arrangements points to the conclusion that it was not a reimbursement arrangement. Andrew Ferguson criticised reliance on the records without oral evidence explaining them. But they do speak for themselves.

30. The fifth matter relied upon by counsel assisting was that later draft agreements between the parties, which appear to be similar to the arrangements at earlier times, are expressly structured as arrangements whereby the CFMEU NSW obtains a fee for promotional services. Although there are limitations on using post-contractual events to

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39 The position is the same for all years from 2006 to 2015, except 2008 where the amount paid in relation to the UPlus Scheme is just less than the total printing costs: U-Plus/Coverforce MFI-7, 15/10/15, pp 1, 2, 5, 6, 8, 9, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 26, 29, 32.

40 U-Plus/Coverforce MFI-7, 15/10/15, pp 1, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32.

41 Submissions of Andrew Ferguson, 30/10/15, para 8.

construe a written contract, there is no prohibition on using later events to determine the terms of an oral agreement or arrangement.43

31. Having regard to all of those matters, Andrew Ferguson’s submission that the payments made to the CFMEU NSW were merely to reimburse its expenses is not accepted.

Money and benefits flow to the CFMEU NSW: 2010 to June 2013

32. In late 2009 and early 2010, there were discussions between Coverforce and the CFMEU NSW about changing the arrangements between themselves. James Angelis attended a CFMEU NSW Committee of Management meeting on 27 November 2009. He presented a proposal for Coverforce to offer a ‘travel program’ to members of the CFMEU NSW.44

33. A formal ‘Service Agreement’ was drafted. It was never formally executed. But James Angelis said that it was implemented in practice.45 The subsequent financial records confirm this. A version of

43 See Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 at [101]-[149], especially at [136]-[149] per Campbell JA (Basten JA and Sackar J agreeing).
45 James Angelis, witness statement, 24/8/15, para 52. See the records at U-Plus/Coverforce MFI-1, 24/8/15, Vol 4, tab 2, pp 215–225 and tab 3 which show an increase of the fee to $2 per month per worker covered from approximately October or November 2009. In respect of the travel and journey claims insurance and ambulance benefits, see paras 35-40.
the draft ‘Service Agreement’ dated 5 April 2010 contains the following terms:46

(a) Pursuant to cl 3, in consideration of the ‘Services’ to be provided by the CFMEU NSW, Coverforce agreed to pay the CFMEU NSW $2 per month for each person covered by the UPlus Scheme. In addition, for the first time, Coverforce agreed to provide all financial members of the CFMEU NSW with insurance cover for interstate and international travel by the member and his or her accompanying immediate family. Coverforce also agreed to provide ‘ambulance benefits’ to CFMEU NSW financial members who were not otherwise covered for ambulance costs.

(b) In return, in cl 4 the CFMEU NSW undertook a range of marketing and promotional obligations in respect of the UPlus Scheme. In particular, the CFMEU NSW agreed to use its ‘best endeavours to ensure that when negotiating Enterprise Bargaining Agreements with employers that the [UPlus Scheme] is promoted as the [CFMEU NSW’s] preferred product for top up benefits.’ The CFMEU NSW also agreed not to sell or assist any other person to sell (whether directly or indirectly) ‘services of the same description as the Services provided to Coverforce, or which perform the same function.’ In effect, the CFMEU NSW promised that it would not promote any other insurance product other than the UPlus Scheme.

34. Later draft agreements, and accompanying correspondence, show that in around April 2012, the arrangement was varied. Thenceforth the CFMEU NSW was to receive $2 per month per worker covered under the scheme up to 15,000 workers, and $5 per month for every worker covered over 15,000.47

35. Minutes of the CFMEU NSW’s Committee of Management from February 201048 and articles in the CFMEU NSW’s magazine, Unity, show that the travel insurance and ambulance benefits schemes commenced operation from 1 April 2010.49 The CFMEU NSW promoted the fact that it had ‘introduced free travel insurance and ambulance benefits for eligible financial union members.’ The actual arrangements in respect of the travel insurance and ambulance benefits were as follows:

(a) From April 2010 until June 2013, Coverforce paid premiums on a group travel insurance policy taken out with the CFMEU NSW as the named insured, and covering all executives, employees and financial members of the CFMEU NSW.50 The policy was underwritten by Accident & Health International Underwriting Pty Ltd (AHI). Coverforce Insurance Broking Pty Ltd (CIB) acted as broker. Each quarter, CIB would issue an invoice for the premium ‘to’

50 James Angelis, witness statement, 24/8/15, para 48.
But the invoice would be paid by Coverforce. CIB would then remit the premium to AHI.

(b) From February 2010 to June 2013, Coverforce paid the cost of ambulance trips for eligible financial members of the CFMEU NSW. If a member had already paid the ambulance cost, Coverforce would reimburse the member directly. However, on most occasions, Coverforce would pay the ambulance provider directly.52

36. In April 2013, Coverforce introduced an additional ‘members only benefit’. This conferred insurance cover for the financial members of the CFMEU NSW for injuries sustained during their journey to and from work, provided the claim is not covered under workers’ compensation (journey claims insurance).53 The arrangements for the journey claims insurance were similar to those for the travel insurance.54

37. Counsel assisting submitted that the payment by Coverforce of the travel insurance, journey claims insurance and ambulance benefits was a financial benefit to the CFMEU NSW. The CFMEU, however, submitted it was wrong to attribute these benefits to the union, because

51 See U-Plus/Coverforce MFI-1, 24/8/15, Vol 5, tab 6, pp 778, 781, 784, 787, 790, 792, 795, 798, 801, 806, 809, 813. It does not appear that these invoices were sent to the CFMEU NSW.
53 James Angelis, witness statement, 24/8/15, para 49.
there is ‘no evidence that these benefits would be offered by the CFMEU NSW out of its own funds if the U-Plus arrangements did not exist’.\textsuperscript{55} The CFMEU accused counsel assisting of ‘exaggerating’ the benefit to the union.\textsuperscript{56}

38. The CFMEU’s submission cannot be accepted. The union promotes itself as having arranged and providing for its members the travel insurance, journey claims insurance and ambulance benefits.\textsuperscript{57} The payment of insurance premiums by Coverforce on policies issued to the union in the union’s name which the union promotes as having arranged and providing itself is self-evidently a benefit to the union. Similarly, the payment of ambulance benefits to financial members of the union which the union promotes as having arranged and providing itself is a clear benefit to the union. These benefits are only available to financial members of the union. They are key tools that the union uses to attract members to the union and collect membership dues.

39. The CFMEU’s submission appears to proceed on the notion that only cash paid to the union is a benefit to it. This is antediluvian. For example, the concept of constructive receipt – that money paid to B at the direction of A is a benefit to A – is well-understood in tax law. In the present case, the union arranged for money to be paid by Coverforce in consideration for services provided by the union. Some money was paid directly to the union. Some money was used by

\textsuperscript{55} Submissions of the CFMEU, 29/10/15, p 77, para 6.

\textsuperscript{56} Submissions of the CFMEU, 29/10/15, pp 77, para 4, 78, para 7.

\textsuperscript{57} See U-Plus/Coverforce MFI-1, 24/8/15, Vol 2, tab 26, p 456; tab 29, pp 462-463; tab 44, p 603; tab 62, pp 783, 784, 785, 786, 788, 789, 797, 800, 802.
Coverforce to pay the premiums on union insurance policies. And some money was paid directly to union members. Each category of payment was a benefit to the union.

40. The table below sets out the total financial benefits provided to the CFMEU NSW by Coverforce under the Shared Services Agreement in the period from 2010 to June 2013 inclusive.  

<table>
<thead>
<tr>
<th></th>
<th>2010 $</th>
<th>2011 $</th>
<th>2012 $</th>
<th>June 2013 $</th>
<th>Total $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payments to CFMEU NSW</td>
<td>359,641</td>
<td>330,073</td>
<td>358,483</td>
<td>211,317</td>
<td>1,259,514</td>
</tr>
<tr>
<td>Travel and journey claims</td>
<td>192,563</td>
<td>352,545</td>
<td>260,213</td>
<td>139,122</td>
<td>944,443</td>
</tr>
<tr>
<td>insurance premiums</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ambulance benefits</td>
<td>18,470</td>
<td>69,328</td>
<td>61,351</td>
<td>41,850</td>
<td>190,999</td>
</tr>
<tr>
<td>Total</td>
<td>570,674</td>
<td>751,946</td>
<td>680,047</td>
<td>392,289</td>
<td>2,394,996</td>
</tr>
</tbody>
</table>

The average benefit to the CFMEU NSW over that three and a half year period was approximately $684,000 per annum.

Money and benefits flow to the CFMEU NSW: July 2013 to date

41. As explained above, from around July 2013 with the establishment of U-Plus as a joint venture company the majority of employer premiums – the New System premiums – were paid to U-Plus rather than Coverforce. Premiums in relation to a small number of employees – the Old System premiums – continued to be paid to Coverforce. In relation to the Old System premiums the financial arrangements with

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59 See para 13.
the CFMEU NSW were largely unchanged. The CFMEU NSW received an amount per month per worker covered which was either $2 or $2.50.\[^{60}\]

42. On 28 June 2013, Coverforce and the CFMEU NSW entered into a Shareholders Agreement relating to U-Plus. Under that agreement, the CFMEU NSW:\[^{61}\]

(a) agreed not to use, promote or market any other entity other than U-Plus to provide insurance products and services as described in the business plan to its members; and

(b) agreed to use its best endeavours to promote and market U-Plus’s products and services to its members.

43. In relation to the distribution of profits, the parties agreed to conduct the business of U-Plus in accordance with a ‘Business Plan’.\[^{62}\] In summary, the ‘Business Plan’ operates as follows.\[^{63}\]

(a) U-Plus receives premiums from employers each month and remits the premiums less an 18% commission to the insurer.

(b) From the 18% commission retained each month:

\[^{60}\] See U-Plus/Coverforce MFI-1, 24/8/15, Vol 5, tab 4, pp 405-583.

\[^{61}\] U-Plus/Coverforce MFI-1, 24/8/15, Vol 1, tab 16, p 176.


(i) A fixed amount is subtracted each month for administration costs. It is paid to Coverforce. Coverforce is also entitled in a month where more than 14,000 persons are covered by the scheme to a ‘variable administration fee’ equal to 3% of the premium for the number of persons in excess of 14,000.

(ii) An amount is set aside each month for ‘CFMEU member benefits’. The amount is $2.15 per person covered under the scheme. This amount is retained by U-Plus. It is used to allow U-Plus to pay for travel insurance, journey claims insurance and ambulance benefits which were previously paid for by Coverforce.

(iii) The remainder of commission for the month is considered to be ‘profit’ from the arrangement and is divided 50-50 between the CFMEU NSW and Coverforce.

44. The financial model for the business is that depending on the number of persons covered by the UPlus Scheme, the CFMEU NSW will receive, either in money directly or by the provision of the member benefits which it does not have to pay for, between 5 and 6.6% of the total premiums paid by employers under the UPlus Scheme.\(^\text{64}\)

\(^{64}\) U-Plus/Coverforce MFI-1, 24/8/15, Vol 1, tab 16, p 200.
Clause 17 of the Shareholders Agreement also obliges the CFMEU NSW and Coverforce to keep confidential information concerning the contents of the Shareholders Agreement. This includes the Business Plan which describes the way profits will be distributed between Coverforce and the CFMEU NSW. It also included ‘any transaction undertaken under’ the Shareholders Agreement. That would include any transaction under the Business Plan that is not already in the public domain. The parties may disclose the information to ‘officers, employees and consultants or advisors … who have a need to know (and only to the extent that each has a need to know)’ the confidential information. This provision, however, would not permit the CFMEU NSW to disclose the terms of the Shareholders Agreement to its members.

The table below sets out the total financial benefits provided to the CFMEU NSW from July 2013 to May 2015 under both the New and Old Schemes.65

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<table>
<thead>
<tr>
<th></th>
<th>July to December 2013 $</th>
<th>2014 $</th>
<th>January to May 2015 $</th>
<th>Total $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payments to CFMEU NSW from Coverforce</td>
<td>33,293</td>
<td>14,162</td>
<td>5,564</td>
<td>53,109</td>
</tr>
<tr>
<td>Payments to CFMEU NSW from U-Plus</td>
<td>177,564</td>
<td>454,913</td>
<td>187,653</td>
<td>820,130</td>
</tr>
<tr>
<td>Travel and journey claims insurance premiums paid by U-Plus</td>
<td>120,565</td>
<td>271,292</td>
<td>150,466</td>
<td>542,323</td>
</tr>
<tr>
<td>Ambulance benefits paid by Coverforce</td>
<td>3,750</td>
<td></td>
<td></td>
<td>3,750</td>
</tr>
<tr>
<td>Ambulance benefits paid by U-Plus</td>
<td>11,581</td>
<td>92,677</td>
<td>29,903</td>
<td>134,161</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>346,753</strong></td>
<td><strong>833,044</strong></td>
<td><strong>373,586</strong></td>
<td><strong>1,553,473</strong></td>
</tr>
</tbody>
</table>

The average benefit to the CFMEU NSW over that 23 month period was approximately $810,000 per annum.

47. The CFMEU’s submission that this is exaggerated has been considered and rejected above. It is instructive to note that in the accounts of U-Plus, the ‘Members benefit pool’ to the CFMEU NSW is accounted for as a paid/payable to the union.

48. Diagrams showing the financial arrangements of the UPlus Scheme from 2003 to May 2015 are set out on the following pages.

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66 See paras 37-40.
68 U-Plus/Coverforce MFI-3, 24/8/15.
UPlus Insurance Scheme
Flow of employer payments from January 2003 to December 2009

Employer with CFMEU NSW EBA

Coverforce Pty Ltd
Commission

Insurer for "UPlus" insurance scheme

CFMEU Construction and General Division New South Wales

Insurance premiums for "UPlus" insurance cover

Insurance premiums less commission

U-Plus "shared services payments $1,657,305"
UPlus Insurance Scheme
Flow of employer payments from January 2010 to June 2013

Employer with CFMEU NSW EBA

Insurer for "UPlus" insurance scheme

Coverforce Pty Ltd
Commission

Accident & Health International Underwriting P/L (Travel Insurer)

CFMEU Construction and General Division New South Wales

Note:
1. Travel insurance offered from 1 April 2010.
UPlus Insurance Scheme
Flow of employer payments from July 2013

Employer with CFMEU NSW EBA

U-Plus Pty Ltd
Commission on New System premiums (18%)

Coverforce Pty Ltd
Commission on Old System premiums (12%)

Hannover Life Re of Australasia

Accident & Health International Underwriting P/L (Travel and Journey Claims insurer)

CFMEU Members’ Ambulance Provider

Claims management fee (4% of Old and 8% of New System premiums)
Old System premiums less commission

UPlus “shared services” agreement $53,109

Ambulance benefits $134,163

New System premiums less commission

Travel and journey claims insurance premiums paid on behalf of CFMEU $542,336

Administrative cost $3,336,643
Distributions $807,834
Dividend $12,296

Ambulance reimbursement $3,750

CFMEU Construction and General Division New South Wales
D – DUTIES OF UNION OFFICIALS NEGOTIATING ENTERPRISE AGREEMENTS

Fiduciary duties

49. Counsel assisting submitted that union officials engaged in enterprise bargaining were in a fiduciary relationship with the union member employees that will be covered by the proposed agreement.

50. Rita Mallia, the current President of the CFMEU NSW, gave evidence that when CFMEU NSW organisers are negotiating enterprise agreements they are acting for and on behalf of the workers.\(^{69}\) In its submissions, the CFMEU accepted the narrower proposition that CFMEU NSW officials acting for the union in the capacity of default bargaining representative under the FW Act act on behalf of, and represent the interests of, union members.\(^{70}\)

51. However, the CFMEU submitted that there are strong arguments that the provisions of the FW Act preclude a finding that union officials hold a fiduciary duty in bargaining.\(^{71}\) Perhaps there are. But none of those arguments were stated. It was also submitted that any conclusion about the existence of a fiduciary duty must take into account the whole of Part 2.4 of the FW Act.\(^{72}\) However, again, the submissions

\(^{69}\) Rita Mallia, 13/8/15, T:447.7-13.

\(^{70}\) Submissions of the CFMEU, 29/10/15, p 79, para 15.

\(^{71}\) Submissions of the CFMEU, 29/10/15, p 79, para 17.

\(^{72}\) Submissions of the CFMEU, 29/10/15, p 79, paras 16-17.
failed to identify any particular provision which was said to be inconsistent with the existence of a fiduciary duty.

52. More detailed arguments concerning the existence of fiduciary duties in enterprise bargaining are considered in Chapter 10.2 of the Report. For the reasons more fully set out there, union officials engaged in enterprise bargaining should be considered as fiduciaries vis-à-vis the union employee members proposed to be covered by an enterprise agreement on whose behalf, and in whose interest, those officials act. In essence, they exhibit what Mason J described in Hospital Products Ltd v United States Surgical Corporation73 as the ‘critical feature’ of a fiduciary. That feature was that:

the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of the other person in a legal or practical sense.

53. His Honour went on to state that:

[the] relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions ‘for’, ‘on behalf of’ and ‘in the interests of’ signify that the fiduciary acts in a ‘representative’ character in the exercise of his responsibility…

54. Counsel assisting submitted that, as fiduciaries, union officials negotiating enterprise agreements have a duty, without fully informed consent, to avoid acting in a position where there is a conflict, or a sensible, real or substantial possibility of conflict, between their interest and duty or between their duties.

Counsel assisting’s statement of the law was a conventional one. However, submissions filed on behalf of Andrew Ferguson contended that the law was not as clear cut as counsel assisting submitted in relation to the proposition that ‘a breach of fiduciary duty occurs by reason of a potential conflict being entertained’. The submission suggested that there was a conflict in the authorities. The decision of Edelman J in *Agricultural Land Management Ltd v Jackson* was cited as a case in support of counsel assisting’s statement of the law. Two cases were cited and quoted against the proposition – the reasons of Owen J in *Fitzsimmons v R* and the reasons of Barrett J in *Dunn v CTK Engineering Pty Ltd*.

Two things must be said about this submission.

First, there is no conflict in the authorities. The law is clear. Acting in a position where there is a possibility of conflict is sufficient to give rise to a liability for breach of fiduciary duty. It has been so for a long time. In reply, counsel assisting quoted the famous words of Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Bros*.

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74 Submissions of Andrew Ferguson, 30/10/15, para 9 (emphasis in original). See also paras 10-12.
77 [2002] NSWSC 365 at [66].
78 (1854) 1 Macq 461 at 471-472 (HL). For approval of this statement, see *Birchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408-409 per Dixon J (Rich J agreeing); *Phipps v Boardman* [1967] 2 AC 46 at 105-106 per Lord Hodson, 124 per Lord Upjohn; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 103 per Mason J. For other cases to the same effect, see M Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010), pp 62-75.
[N]o one having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.

58. The Privy Council made it clear in *Queensland Mines Ltd v Hudson*\(^ {79} \) that the possibility of conflict referred to by Lord Cranworth LC must be real, sensible or substantial. The High Court has repeatedly approved that view of the law.\(^ {80} \) Thus, if there was anything in the reasons of Owen J or Barrett J to the contrary it would not represent the law.

59. *Secondly*, there is nothing in the reasons of Owen J or Barrett J to suggest that a real or substantial possibility of conflict is insufficient to generate liability for breach of fiduciary duty. Instead the point made in the passages quoted was that where a person holds directorships in multiple companies, the existence of a conflict or a real or substantial possibility of conflict does not necessitate resignation from one or both companies. Rather, the director must take appropriate steps, such as by disclosing the relevant interest, to deal with the conflict or possibility of conflict properly.

60. The reference to a sensible, real or substantial possibility of conflict is important. It makes clear that a fiduciary must not only avoid a

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\(^{79}\) (1978) 18 ALR 1 at 3 per Lord Scarman (for the Board). The appeal was from the Supreme Court of New South Wales.

situation where there is in fact a divergence between duty and interest, or between duties, but also where there is a sensible, real or substantial possibility of such divergence. As noted, fully informed consent is a defence to a claim of breach of fiduciary duty. It is a matter for the fiduciary to establish. Whether it is established will depend on all the circumstances of the case.\textsuperscript{81} In general terms, the fiduciary must make full disclosure to the person to whom the duty is owed of all relevant facts known to the fiduciary and that person must consent to the proposed conduct.

**Duty to disclose relevant information**

61. Counsel assisting also submitted that both employer and union bargaining representatives must meet the good faith bargaining requirements in s 228(1) of the FW Act. One of the obligations on bargaining representatives is to disclose ‘relevant information (other than confidential or commercially sensitive information) in a timely manner’.\textsuperscript{82}

62. In response, the CFMEU appeared to submit that s 228(1) imposes no obligation on bargaining representatives. It relied on a dictum of Flick J in *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia*.\textsuperscript{83} His Honour said that s 228(1) ‘does not expressly impose upon a “bargaining representative”

\textsuperscript{81} See, eg, *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at [3], [133], [135].
\textsuperscript{82} *Fair Work Act* 2009 (Cth), s 228(1)(b).
\textsuperscript{83} (2012) 206 FCR 576.
any duty or obligation to meet the “requirements” there referred to’. The CFMEU’s reliance on Flick J’s dictum is misconceived. His Honour was merely observing that failure to comply with the requirements that a bargaining representative ‘must meet’ under s 228(1) has no normative sanction of itself. However, breach of the requirements enlivens the jurisdiction of the Fair Work Commission to make a bargaining order requiring a bargaining representative to take action. Breach of the order gives rise to a civil remedy. Thus, in substance bargaining representatives are under a duty to comply with the bargaining requirements.

63. As counsel assisting submitted, what is ‘relevant information’ will depend on the particular circumstances. However, it is clear that the concept of ‘relevant information’ must be read in the light of the other provisions of the FW Act.

64. Significantly, s 180(5) of the FW Act obliges an employer, before requesting that employees approve a proposed enterprise agreement by voting for it, to take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to all of the employers’ existing employees who will be covered by the agreement. The function of s 180(5) is to provide employees with as much information as possible about the operation of the agreement before voting for or against it. Hence the preferable view is that an explanation of the ‘effect of the terms’ would include an explanation of any commissions and fees being paid, and the amount of any such fees, under the proposed agreement.

65. Thus, ‘relevant information’ would seemingly include any information that a union official has about the nature and quantum of commission and fees to be paid to the union under the proposed agreement. However, the union official’s obligation to disclose that information would be subject to the fact that a bargaining representative is not required to disclose any ‘confidential or commercially sensitive information’.

E – BREACHES OF FIDUCIARY DUTY

66. Counsel assisting submitted that the CFMEU NSW officials who have negotiated enterprise agreements from 2003 onwards have had a duty to the CFMEU NSW to promote the UPlus Scheme in enterprise negotiations and in seeking to sign up as many employers as possible to the UPlus Scheme. The duty arose because the officials had a duty to ensure that the CFMEU NSW fulfilled its contractual obligations to Coverforce to promote, exclusively, the UPlus Scheme. The duty also arose out of the more general duty on those officials to ensure that the union was profitable. Further, since 2003, the CFMEU NSW has had a substantial financial interest in ensuring that workers, whether union members or not, are covered by the UPlus Scheme. In the early years, the CFMEU NSW received a dollar amount per worker covered, but in more recent years the CFMEU NSW has become an (almost) equal joint venturer in the U-Plus business. The benefit to the union for the arrangements is clearly an important consideration for the union in deciding which insurance broker it should conduct business with.85 The fact that the CFMEU has that interest, and the fact that officials of

the CFMEU have a duty to advance its interests, create a further duty on officials to ensure that workers are covered by the UPlus scheme.

67. At the same time, each official had a duty during bargaining for an enterprise agreement to act in the interests of the union member employees who would be covered by proposed agreements.

68. Counsel assisting submitted that in circumstances where the inclusion of the standard income protection clause leads to a very substantial pecuniary benefit to the CFMEU NSW the inclusion of that clause placed the officials in a position where there was a real possibility of conflict between their duties to the union and their duties to the particular union members to be covered by the agreement. Unless it could be demonstrated that those officials obtained the fully informed consent of the union employee members, it was submitted that they will have breached their fiduciary duties.

69. The CFMEU attacked the submissions of counsel assisting on essentially two grounds.

70. The first ground was that trade union officials have no duty to ensure the profitability of the union, because the union is a not-for-profit entity run only to benefit the members.86

71. Whilst unions may be not-for-profit entities, it is clearly a duty of union officers to ensure that the union receives as much money as possible in order (hopefully) to benefit the members. In any event, the

86 Submissions of the CFMEU, 29/10/15, p 81, para 24.
CFMEU’s submission does not deny the duty of the officials to ensure that the union complies with its contractual obligations, nor their duty to advance the union’s interest in receiving the profits under the UPlus Scheme.

72. The second ground was that there was nothing in the evidence to suggest that the UPlus Scheme does not offer the best deal for employees. Linked with this ground was a contention that counsel assisting had erred in arguing that employees were ‘worse off’ under the UPlus Scheme because of the commission taken by the CFMEU NSW. The error was said to lie in ignoring two things. One was the additional benefits that members would receive under the ‘Members Benefits’ program. The other was the benefit that the union derived which might ultimately flow through to the members.

73. The CFMEU’s attacks must be rejected. They must be rejected for four reasons.

74. First, the whole of the CFMEU’s submission is legally infirm. The law does not permit any:

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87 Submissions of the CFMEU, 29/10/15, p 81, para 25.
88 Submissions of the CFMEU, 29/10/15, p 81, paras 26-27.
89 Parker v McKenna (1874) LR 10 Ch App 96 at 124-125 per James LJ. There are many other cases to the same effect: see Ex parte James (1803) 8 Ves 337 at 348-349 per Lord Eldon LC; 32 ER 385 at 389; Hamilton v Wright (1842) 9 Cl & Fin 111 at 123 per Lord Brougham (the other Lords agreeing); 8 ER 357 at 362; Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461 at 471-472 per Lord Cranworth LC (HL); Bithchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384 at 399 per Isaacs J, 408-409 per Dixon J (Rich J agreeing), and see generally the cases cited at M Conaglen, Fiduciary Loyalty (Hart, 2010) at p 65 n 32.
evidence, or suggestion, or argument as to whether the principal did or did not suffer an injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

Counsel assisting pointed out this fundamental flaw in the CFMEU’s approach in written submissions in chief.\textsuperscript{90} The CFMEU made no attempt to respond to it. It is in truth unanswerable.

75. \textit{Secondly}, the CFMEU’s submission assumes that it is easy to compare insurance policies in the market to determine which is ‘best’. The insurance market is a competitive one. That point was emphasised in the submissions made by Coverforce when applying for confidentiality orders and reinforced by the fact that other branches of the CFMEU in different states use a number of different providers of similar insurance products. Insurers structure their products with different terms and conditions.

76. \textit{Thirdly}, even if it were relevant, the CFMEU submission about the benefits obtained by members under the ‘Members Benefits program’ wrongly assumes an overlap of interest between the members to be covered by a particular enterprise agreement and the members of the union as a whole.

77. \textit{Fourthly}, the assertion that members might see some benefit as a result of the money paid to the union is not supported by any evidence. There is no evidence of lower union membership fees for the employees covered by enterprise agreements.

\textsuperscript{90} Submissions of Counsel Assisting, 20/10/15, para 50.
78. Counsel assisting was thus correct to submit that there is a strong inference that employees covered by the enterprise agreements were in fact worse off at least from June 2013. Under the arrangements with U-Plus, the CFMEU NSW takes an effective 5% commission on the premiums paid on behalf of employees. There are a number of obvious ways that this commission could be used to the direct advantage of the particular employees who will be covered by the proposed agreement: For example, Hannover could pay a reduced commission rate of 13% in return for increasing the policy benefits. Or the price to employers could be reduced in return for other better employment terms.

79. These points also answer the submission by Andrew Ferguson that ‘there could not, sensibly speaking, be a real possibility of conflict’. Andrew Ferguson’s additional argument that it is not wrong in principle for a fiduciary to recover a fee from its principal for costs incurred by the fiduciary is, speaking very generally, correct. But that principle can have no application where there is a substantial profit made without the principal’s consent, not merely a recovery of costs.

80. Notwithstanding denials by Rita Mallia and Andrew Ferguson, the negotiation by CFMEU NSW officials of proposed enterprise agreements containing the standard income protection clause gave rise to a potential conflict of duties or of duty with interest.

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91 Submissions of Andrew Ferguson, 30/10/15, para 14.
92 Rita Mallia, 13/8/15, T:444.14, 449.20-47.
93 Andrew Ferguson, 17/8/15, T:703.42-704.9.
That leaves the issue of informed consent. The evidence on this topic was as follows:

(a) Rita Mallia’s evidence was that the payments made to the CFMEU NSW from Coverforce were only disclosed to CFMEU NSW members generally through the union’s financial accounts. She gave evidence that the value of the member benefits (e.g. travel insurance, journey claims insurance and ambulance benefits) was not disclosed in the accounts. A perusal of the accounts from 2003 onwards shows that from 2003–2012 income derived from a ‘Shared Service Agreement’ was disclosed. But there were no further details about who paid those amounts and why. In 2013, the accounts disclose that the CFMEU NSW purchased 49.99% of the shares in U-Plus. The related party transactions disclose ‘[f]ees from UPlus shares [sic] service agreement’. However, the statement of revenue still simply disclosed revenue from a ‘Shared Service Agreement’. It gave no explanation of the nature of the agreement.

(b) Rita Mallia also said that since 2013 the CFMEU NSW’s involvement with the U-Plus joint venture has been disclosed

94 Rita Mallia, 13/8/15, T:453.28-33.
95 Rita Mallia, 13/8/15, T:454.44-46, 468.47-469.2.
in the PDS issued by Hannover, and she thought that people could extrapolate from that that there was an income stream for the CFMEU NSW.\textsuperscript{98} There is a statement in the current PDS that the ‘U-Plus Trust is a joint venture between Coverforce … and the CFMEU’. But apart from that single sentence there is nothing in that document to disclose either the size of the CFMEU NSW’s stake in the joint venture, the amount of any financial return it obtains from the joint venture, or the effective amount of commission it takes on premiums paid under the UPlus Scheme.

Andrew Ferguson is now employed by Coverforce. He gave evidence about what was disclosed to employers and workers during his period as Secretary (which was up until 2010). At points in his evidence he said he was unsure whether employers and workers were made aware of the amounts of money paid by Coverforce to the CFMEU NSW, and he was not sure that they were systematically made aware of it.\textsuperscript{99} On the other hand, he said that ‘a number of workers were aware of it’ and that it ‘wasn’t a secret’.\textsuperscript{100} He said delegates were ‘clearly advised that the Union was being reimbursed for the expenses’ the union incurred.\textsuperscript{101} Given that the union was receiving a substantial profit, rather than being reimbursed for expenses, if that disclosure occurred to union delegates it was

\textsuperscript{98} Rita Mallia, 13/8/15, T:441.45-442.8.
\textsuperscript{99} Andrew Ferguson, 17/8/15, T:698.44-699.5, 701.28-38.
\textsuperscript{100} Andrew Ferguson, 17/8/15, T:701.32-.38.
\textsuperscript{101} Andrew Ferguson, 17/8/15, T:701.40-702.5.
incomplete at best. At a later point he said he was confident that the fact that the CFMEU NSW received money from Coverforce was systematically communicated to workers by delegates.\textsuperscript{102} To his knowledge there was nothing in writing to support that fact. He also said he did not know what employers were told during enterprise negotiations.\textsuperscript{103}

(d) The Commission is not aware of any documentary material routinely provided during enterprise negotiations to employers or employees in which the nature of the arrangements between Coverforce, U-Plus and the CFMEU NSW are disclosed. The confidentiality obligations under the Shareholders Agreement prevent the disclosure of the information concerning the Shareholders Agreement including the ‘Business Plan’ or any transaction carried out under the Shareholders Agreement to the extent that the information is not already in the public domain. Those confidentiality obligations would prevent the CFMEU NSW from disclosing the proportionate interest which the CFMEU NSW has in the joint venture and the proportion of the premiums paid which flows to the CFMEU NSW.

82. Overall, the evidence indicates that any disclosure to CFMEU NSW members whom the union represents in bargaining negotiations and employers involved in negotiations has been incomplete and haphazard at best.

\textsuperscript{102} Andrew Ferguson, 17/8/15, T:703.8-13.
\textsuperscript{103} Andrew Ferguson, 17/8/15, T:703.27-33.
The CFMEU submitted\(^{104}\) that fully informed consent is ensured because of the FW Act – particularly Subdivision A of Division 4 of Part 2.4 of the FW Act – and ‘associated typical processes’. That submission rests on a confusion between what should occur and what the evidence shows has occurred. Under the FW Act, the obligation to disclose to employees under s 180 rests on the employer. The evidence indicates disclosure was haphazard at best. In particular, there is nothing to suggest employers and employees knew anything about the fact that the premiums paid were being used to fund the travel insurance, journey claims insurance and ambulance benefits.

Overall, the CFMEU NSW’s past and present arrangements with Coverforce and U-Plus, and the failure to provide full and complete disclosure of those arrangements, have created a substantial and systemic risk of breach of fiduciary duty by CFMEU NSW organisers or officials negotiating enterprise agreements. It cannot be said whether in any particular case any particular CFMEU NSW organiser or official negotiating an enterprise agreement may have breached his or her fiduciary duty. It may be that in a particular case, the organiser or official did provide a full and complete disclosure sufficiently to establish the defence of fully informed consent. But in general what can be said is that there is a strong likelihood that breaches of fiduciary duty have occurred in the past and will continue into the future.

\(^{104}\) Submissions of the CFMEU and Rita Mallia, 29/10/15, pp 79-80, paras 18-20.
F – GOOD FAITH BARGAINING REQUIREMENTS

85. Counsel assisting submitted that, subject to one issue, the ‘good faith bargaining’ requirements in the FW Act would require CFMEU NSW officials negotiating proposed enterprise agreements with the standard UPlus Scheme clause to disclose to employers the quantum of the CFMEU NSW’s benefits under the UPlus Scheme.

86. The qualification was that s 228(1)(b) of the FW Act does not require a bargaining representative to disclose ‘confidential or commercially sensitive information’. The total amount of the money received by the CFMEU NSW from the UPlus Scheme is not confidential. It is publicly disclosed, albeit obscurely, in the CFMEU NSW’s accounts. But the fact that U-Plus pays for very substantial additional benefits is not publicly disclosed. And the quantum of the CFMEU NSW’s benefit as a proportion of the insurance premiums paid is not publicly disclosed. These two pieces of information are confidential information under the terms of the Shareholders Agreement and hence do not need to be disclosed.

87. The CFMEU’s submission in response that s 228(1) creates no obligations has been considered and rejected above.105

88. The CFMEU’s other submissions on this topic were directed towards the submission by counsel assisting that the operation of s 228(1) in the present context creates an unsatisfactory result. Counsel assisting submitted that employers and employees are not aware, and cannot

105 See paras 61-62.
know, that under the UPlus Scheme non-union members subsidise CFMEU NSW members. Approximately 5% of the premiums paid on the employees’ behalf by their employers are used to provide benefits exclusively to the members of the CFMEU NSW. That is a matter which all employees should be aware of before they are asked to vote for an enterprise agreement.

89. Counsel assisting submitted that consideration should be given to amending the FW Act to include a specific requirement that any bargaining representative who will receive a benefit, whether direct or indirect, under a proposed enterprise agreement must fully disclose the nature and quantum of that benefit and the arrangements under which that benefit will be derived. The CFMEU argued that this would be ungainly and make bargaining even more complicated that it already is. This is no real argument against increased disclosure. This argument, and more general issues concerning amendments to the enterprise bargaining provisions of the FW Act, are considered in Volume 5 of this Report.

G – BREACH OF THE CORPORATIONS ACT 2001 (CTH)

90. The final issue for consideration is whether the CFMEU may have persistently contravened s 911A of the Corporations Act 2001 (Cth).

Section 911A(1) generally

91. Chapter 7 of the Corporations Act 2001 (Cth) sets out a regulatory framework in relation to the provision of financial services. In
particular, subject to certain exceptions, s 911A(1) of the *Corporations Act* 2001 (Cth) requires a person who carries on a ‘financial services business’ in Australia to hold an AFSL covering the provision of the financial services.

92. Contravention of s 911A(1) is a criminal offence. The maximum penalty is 200 penalty units (1,000 penalty units for a body corporate) or imprisonment for 2 years, or both.\(^\text{106}\)

93. The operation of s 911A depends on a series of cascading definitional provisions.\(^\text{107}\)

94. A ‘financial services business’ means a ‘business of providing financial services’: s 761A. Section 761C provides that ‘[i]n working out whether someone carries on a financial services business’, Division 3 of Part 1.2 of the *Corporations Act* 2001 (Cth) (ss 18–21), except s 21(3)(e), must be taken into account. Those sections expand the ordinary concept of carrying on a business so that a reference to a person carrying on a financial services business includes:

(a) a reference to a person carrying on that business otherwise than for profit;\(^\text{108}\)

(b) a person carrying on that business as part of another business;\(^\text{109}\) and

\(^{106}\) *Corporations Act* 2001 (Cth), s 1311(1A)(db), Sch 3, item 262C.

\(^{107}\) For a recent examination of the relevant principles, see *ASIC v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527.

\(^{108}\) *Corporations Act* 2001 (Cth), s 18.
Apart from ss 18–20, the concept of a ‘business of providing financial services’ is informed by the general law concept of a business. Under the general law, there are a number of key indicia in determining whether a business is being carried on. They include whether:

(a) activities are engaged in on a continuous and repetitive basis;

(b) activities are of an organised or systematic character;

(c) activities or transactions are of a commercial character; and

(d) there is a purpose of deriving profit.

However, as emphasised by the High Court in *Spriggs v Federal Commissioner of Taxation*,111 no one factor is determinative. The authorities in the specific context of s 911A of the *Corporations Act 2001 (Cth)* have emphasised ‘a repetition of acts’ and ‘activities which possess something of a permanent character’ as key indicia of ‘carrying on a financial services business’.112

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109 *Corporations Act 2001 (Cth), s 19.
110 *Corporations Act 2001 (Cth), s 20.
111 (2009) 239 CLR 1 at [59]. See also *One Call Interpreters & Translators Agency Pty Ltd v FCT (No 3) (2011) 214 FCR 82 at [217].
112 *ASIC v Cycclone Magnetic Engines Inc* (2009) 71 ACSR 1 at [61]-[64].
97. Section 766A defines the circumstances when a person ‘provides a financial service’. Relevantly, a person provides a financial service if they provide ‘financial product advice’.  

98. Financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:

   (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

   (b) could reasonably be regarded as being intended to have such an influence.

99. Counsel assisting submitted that a general contract of insurance, such as that offered by Hannover under the UPlus Master Policy, is a financial product falling within the definition in s 764A(1)(d). The CFMEU, however, sought to argue that the UPlus insurance product fell within the exclusion in s 764(1)(d)(i), or the exclusion in s 765A(1)(u).  

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113 *Corporations Act* 2001 (Cth), s 766A(1)(a).
114 *Corporations Act* 2001 (Cth), s 766B(1).
115 *Corporations Act* 2001 (Cth), s 764A(1!d).
116 Submissions of the CFMEU, 29/10/15, pp 83-84, paras 37-38.
100. The CFMEU’s submissions on this point were clearly wrong. Section 764A(1)(d)(i) excludes from the ambit of the inclusive part of s 764A(1)(d)

\[ \ldots \text{a contract of insurance:} \]

(i) to the extent that it provides for a benefit to be provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependent of a member…

101. The ambit of the exclusion closely mirrors the exception to the definition of ‘insurance business’ in s 3 of the *Insurance Act 1973* (Cth) the effect of which is to allow a registered organisation to provide insurance to its members or dependents without a licence from the Australian Prudential Regulatory Authority.

102. Section 765A(1)(u) provides that the following is not a financial product for the purposes of Chapter 7:

\[ \text{a benefit provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependent of a member.} \]

103. On its plain words, s 764A(1)(d)(i) only applies to an insurance policy that provides a benefit to be provided by an employee association for a member or the association or a dependant of the member. In other words, the employee association is the insurer and the benefits can only be provided to members of the association, or their dependants.
104. The CFMEU NSW does not provide any insurance benefit to any of its members under the UPlus Scheme. The UPlus Scheme is not limited to CFMEU NSW members or their dependants. It does not apply. Similar reasoning applies in relation to s 765A(1)(u).

105. As counsel assisting submitted in reply, the CFMEU submissions ignore the obvious and fundamental difference between (1) insurance actually provided by a union *solely* for its members and their dependants and (2) insurance offered by a commercial insurer to persons many of whom are not members of the union.

106. The CFMEU endeavoured to support its argument by arguing that it would be incongruous to conclude that the CFMEU would not be providing an insurance benefit but could be conducting a business providing financial services, as counsel assisting submitted the CFMEU were doing. Once again, the CFMEU’s submission is misconceived. It fails to distinguish between two fundamentally different concepts: (1) providing a benefit under a contract of insurance and (2) providing financial product advice about a contract of insurance provided by some other person.

107. Another submission made by the CFMEU was that the result was contrary to the specific intention of the exemptions, which were ‘clearly designed to facilitate the provision of benefits for

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117 Submissions of the CFMEU, 29/10/15, pp 84, para 39.
employees”. This submission is affected by the fallacy just identified.

108. Thus, subject to any relevant exemption or exception, a person carrying on a business of providing recommendations or statements of opinion which are intended, or which could reasonably be regarded as being intended, to influence a decision in relation to the purchase of UPlus insurance product must have an AFSL.

109. Counsel assisting submitted that the CFMEU NSW has been engaged since 2003 in the promotion, for reward, of the UPlus insurance product to employers in the construction industry throughout New South Wales. This was said to be evidenced by, among other things, the Shared Service Agreements, the many enterprise agreements negotiated by the union containing the standard income protection clause, and the substantial revenue generated by the union. The CFMEU NSW’s conduct has all the indicia of a business of providing financial product advice.

110. The CFMEU criticised these submissions. It contended that the main evidence offered by counsel assisting was ‘a vague term in a draft agreement where the CFMEU NSW commits to using its “best endeavours” to promote UPlus as the Union’s preferred product’. This was a thoroughly disingenuous submission. The evidence

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118 Submissions of the CFMEU, 29/10/15, pp 84, para 40.
119 See para 105.
120 Submissions of the CFMEU, 29/10/15, pp 84, para 39.
121 See paras 17-18, 24, 33.
shows there was an arrangement between the CFMEU NSW and Coverforce from around 2002 onwards whereby, in return for reward, the CFMEU NSW agreed to promote the UPlus Scheme in enterprise agreements. The crux of the whole arrangement was for the CFMEU NSW to seek to ensure that employers signed up to the UPlus Scheme, for that was how the union and Coverforce were to get their money.

111. Subject to any relevant exception or exemption, the CFMEU NSW was required to hold an AFSL.

**Exceptions and exemptions to s 911A(1)**

112. There are a number of exceptions to and exemptions from the requirement to hold an AFSL.

113. Section 911A(2)(a) of the *Corporations Act 2001* (Cth) provides that a person is exempt from the requirement to hold an AFSL for a financial service the person provides in circumstances where the person provides the service as representative of a second person who carries on a financial services business and who either holds an AFSL that covers the provision of the service, or is exempt under s 911A(2) from the requirement to hold an AFSL that covers the provision of the service.

114. An attempt may be made to argue that the CFMEU NSW provides financial product advice as a ‘representative’ of Coverforce which holds an AFSL covering the provision of financial product advice in relation to insurance products, and accordingly s 911A(2)(a) applies. ‘Representative’ is relevantly defined in s 910A to include any person
who acts on behalf of a financial services licensee. Whilst arguably the CFMEU NSW may have acted as Coverforce’s representative prior to June 2013, since that time the CFMEU NSW has been a joint venturer with Coverforce rather than acting as its representative. However, even if it were concluded that the CFMEU NSW acts as a representative of Coverforce, s 911B would apply. The effect of that section is that a person in the position of the CFMEU NSW (called the ‘provider’) must not provide a financial service on behalf of a person in Coverforce’s position (the ‘principal’) unless the provider is an authorised representative of the principal: s 911B(1)(b). Contravention of s 911B is also a criminal offence, the maximum penalty for which is 200 penalty units or 2 years’ imprisonment, or both.122

115. Section 911A(2)(k) provides that a person carrying on a financial services business in Australia is exempt from the requirement to hold an AFSL if the service is covered by an exemption in the regulations. There are two potentially relevant exemptions in rr 7.6.01(e) and 7.6.01(ea) of the Corporations Regulations 2001 (Cth) which relate to referral services. Those exemptions provide as follows:

(1) For paragraph 911A(2)(k) of the Act, the provision of the following services is covered by an exemption from the requirement to hold an Australian financial services licence:

(e) a financial service provided by a person (person 1) in the following circumstances:

(i) the service consists only of:

(A) informing a person (person 2) that a financial services licensee, or a representative of the

122 Corporations Act 2001 (Cth), s 1311(1A)(db); Sch 3, item 263A.
financial services licensee, is able to provide a particular financial service, or a class of financial services; and

(B) giving person 2 information about how person 2 may contact the financial services licensee or representative;

(ii) person 1 is not a representative of the financial service licensee, or of a related body corporate of the financial services licensee;

(iii) person 1 discloses to person 2, when the service is provided:

(A) any benefits (including commission) that person 1, or an associate of person 1, may receive in respect of the service; and

(B) any benefits (including commission) that person 1, or an associate of person 1, may receive that are attributable to the service;

(iv) the disclosure mentioned in subparagraph (iii) is provided in the same form as the information mentioned in subparagraph (i)

(ea) a financial service provided by a person (person 1) in the following circumstances:

(i) the service consists only of:

(A) informing a person (person 2) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and

(B) giving person 2 information about how person 2 may contact the financial services licensee or representative;

(ii) person 1 is a representative of the financial service licensee, or of a related body corporate of the financial services licensee.
116. Neither r 7.6.01(e) nor r 7.6.01(ea) applies because:

(a) the financial services provided by the CFMEU NSW consist of more than a mere referral to Coverforce/U-Plus. The CFMEU NSW promotes and seeks to agree with the particular employer that they will purchase the U-Plus insurance product; and

(b) the evidence supports the conclusion that the CFMEU NSW does not disclose to employers any or all of the benefits (which would include the value of the travel insurance, journey claims insurance and ambulance benefits which are paid on its behalf) that it receives as a result of its promotion of the UPlus insurance product.

117. Another possible exemption is that provided by ASIC Class Order [CO 08/1] which is relevantly made under s 911A(2)(I) of the Corporations Act 2001 (Cth). Class Order [CO 08/1] exempts a ‘group purchasing body’ providing financial product advice in relation to a ‘risk management product’ (which includes a contract of general insurance) to the extent that the advice is provided as a result of the body giving information or statements under subparagraph 10(e) of the class order. A ‘group purchasing body’ means a ‘body which arranges for the issue of a risk management product or for a person to be covered by an existing risk management product’.  

123 Australian Securities and Investments Commission, Class Order [CO 08/1], p 6.
118. It is unlikely that the CFMEU NSW is a group purchasing body, as it neither arranges for the issue of an insurance policy nor arranges for a person to be covered by an existing insurance policy. It is not the body that has made the effective purchasing decision in relation to the risk management product. In the circumstances, the relevant group purchasing body would be the employer effecting the UPlus insurance product pursuant to an enterprise agreement.

119. However, even if the CFMEU NSW were a group purchasing body it would still not be entitled to relief under Class Order [CO 08/1]. That is because a group purchasing body must satisfy at least one of the two conditions set out in paragraph 5(b) of Class Order [CO 08/1] to entitle it to relief.

120. One of those conditions is that the body does not receive any payments, remuneration or other benefits related to the provision of financial services concerning the risk management product, except for:

(a) payments by persons covered by the risk management product (i.e. employees) which must be paid to the body and an equivalent amount is to be paid to the issuer of the product (i.e. the insurer);

(b) payments by members of the body or persons covered by the risk management product to cover the costs reasonably

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incurred by the body for the purposes of providing the financial services; or

(c) certain rebates: see paragraph 6 of Class Order [CO 08/1].

121. The CFMEU NSW does not satisfy this condition because the payments it receives are not merely to cover costs incurred: the CFMEU NSW makes a substantial profit from the arrangements.

122. The second condition is satisfied if the group purchasing body provides the financial services ‘only incidentally to another relationship with the persons who will be covered by the risk management product’, and does not carry on any business in order to make monetary payments to members. The CFMEU NSW does not satisfy this condition, because although it has a relationship with its members, it has no other relationship with the employees covered by the UPlus Scheme who are not members of the CFMEU NSW.

123. Accordingly, the CFMEU NSW is not entitled to rely on Class Order [CO 08/1] for relief.

124. The CFMEU NSW argued that it was exempt by virtue of another class order, Class Order [CO 05/1070] and its successor which came into force this year, ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682.

125 Australian Securities and Investments Commission, Class Order [CO 08/1], para 5(b)(i).
The short point is that, for each of the following reasons, neither of those instruments is capable of applying to the CFMEU NSW:

(a) Those instruments only apply to ‘dealing’ in relation to, relevantly, a general insurance product. Dealing is defined in s 766C of the Corporations Act 2001 (Cth). The CFMEU NSW does not apply, acquire, issue, vary or dispose of a financial product. Arguably it does ‘arrange’ for people to apply or acquire financial products, but only by way of giving financial product advice, which is not dealing. Therefore, the instruments do not apply to persons providing advice. Hence they have no application here.

(b) Neither Coverforce nor U-Plus has provided written authorisation to the CFMEU NSW to deal on either of their behalves, which is essential for relief to apply.

(c) In order for any relief under either instrument to be available to a person, the holder of the ASFL must take reasonable steps to ensure that when the person provides financial

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125. The short point is that, for each of the following reasons, neither of those instruments is capable of applying to the CFMEU NSW:

(a) Those instruments only apply to ‘dealing’ in relation to, relevantly, a general insurance product. Dealing is defined in s 766C of the Corporations Act 2001 (Cth). The CFMEU NSW does not apply, acquire, issue, vary or dispose of a financial product. Arguably it does ‘arrange’ for people to apply or acquire financial products, but only by way of giving financial product advice, which is not dealing. Therefore, the instruments do not apply to persons providing advice. Hence they have no application here.

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(c) In order for any relief under either instrument to be available to a person, the holder of the ASFL must take reasonable steps to ensure that when the person provides financial

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126 Australian Securities and Investments Commission, Class Order [CO 05/1070], para 4(d); ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682, cl 5(1)(a).

127 Corporations Act 2001 (Cth), s 766C(2).

128 See, Explanatory Statement to Class Order [CO 05/1070], p 3; Explanatory Statement to ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682, p 3.

129 Australian Securities and Investments Commission, Class Order [CO 05/1070], para 4(b)(i); ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682, cl 5(2)(b).
services to another person as a retail client, the client is given written information about, among other things, (a) who the person acts for when providing the financial services and (b) any remuneration (including commission) or other benefits that the person, or an associate of the person, may receive in respect of, or that is attributable to, the provision of the financial service. On the evidence, neither of those conditions is satisfied.

126. The result is that the CFMEU NSW may have persistently contravened s 911A of the Corporations Act 2001 (Cth) since 2003. Section 1101B(4) of that Act would allow permanent injunctive relief to be given preventing the CFMEU NSW from promoting the UPlus Scheme.

Conclusion

127. Pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the Australian Securities and Investments Commission to consider whether sufficient grounds exist for proceedings to be commenced against the CFMEU NSW for persistent contravention of s 911A of the Corporations Act 2001 (Cth).

130 Australian Securities and Investments Commission, Class Order [CO 05/1070], para 4(f); ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682, cl 5(2)(c).