



Royal Commission into Trade Union Governance and Corruption

Final Report

VOLUME FOUR

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Commonwealth of Australia
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REPORT

Volume 4

Royal Commission into Trade Union Governance and Corruption

PART 8: CFMEU QLD

CHAPTER 8.1

CORNUBIA HOUSE

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A – INTRODUCTION

The relevant entities

- From 2011 to 2014 David Hanna was the Secretary of the Builders’ Labourers’ Divisional Branch of the Construction, Forestry, Mining and Energy Union (**CFMEU**) (**federally registered BLF**). In the same period he was the Secretary of the Australian Building Construction Employees and Builders’ Labourers’ Federation (Queensland) Union of Employees (**State registered BLF**). For convenience, together the federally registered BLF (a branch of the CFMEU) and the State registered BLF are referred to as the **BLF**.

2. In 2014 there was a merger between the federally registered BLF and the Queensland Construction Workers' Divisional Branch of the Construction and General Division of the CFMEU. In the same year there was also a merger between the State registered BLF and the State registered equivalent of the CFMEU (**State registered CFMEU**). As a result of the mergers, David Hanna became President of the CFMEU Construction and General Division, Queensland and Northern Territory Divisional Branch and President of the Construction and General Division of the CFMEU. He resigned from those positions with effect from 30 July 2015.
3. At all material times Mirvac Ltd had a wholly owned subsidiary, Mirvac Constructions (Qld) Pty Ltd (**Mirvac Constructions**).¹ Where the precise identity of a Mirvac entity is relevant in this Chapter, that entity is referred to. In many circumstances, 'Mircvac' is referred to as shorthand for both organisations, and any related corporations.
4. Between 20 November 2008 and 8 August 2013, Adam Moore was a director of Mirvac Constructions. Jason Vieusseux (National Construction Director for Mirvac)² became a director of Mirvac Constructions on 19 November 2012. At all relevant times, the Board of Directors of Mirvac Constructions consisted of four persons.

¹ Cornubia House MFI-8, 13/11/15.

² Adam Moore, 18/9/15, T:569.34.

Overview

5. This Chapter concerns the construction in 2013 of a house on a property owned by David Hanna and his wife Jennifer Hanna at Cornubia, a suburb south of Brisbane, Queensland. The house is called the **Cornubia house**.
6. The following introductory overview is largely based on the submissions of counsel assisting. Where there remains a controversy, it is noted.
 - (a) During the course of 2013 tiling, interior decoration, electrical, plumbing, air-conditioning, plastering, painting and rendering works for the Cornubia house were organised for the Hannas by Mathew McAllum. He was a contractor for Mirvac Constructions providing project management service. In this activity a role was played by Adam Moore (then Mirvac's Construction Director for Queensland and Western Australia). But how large or small a role he played is intensely controversial. Mirvac had engaged various contractors on its wholly unrelated Orion PAD2 Project at Springwood in Brisbane's west (**Orion PAD2 Project**). Mathew McAllum (and, subject to the resolution of the controversy just referred to, perhaps Adam Moore) acted with the assistance of those various subcontractors.
 - (b) The Hannas did not pay for those works. Nor did they pay for the services Mathew McAllum provided in arranging those

works. But they did pay for some other works. In relation to the works not paid for by the Hannas, the cost was borne by either Mirvac or its subcontractors, and totalled at least \$150,412.50. The extent to which Mirvac knew of the activities (if it knew at all) is in issue.

- (c) It is also in issue whether, before the work was performed, Adam Moore and David Hanna met in early 2013 and agreed that Mirvac would arrange for works of this kind to be done at no expense to the Hannas. It is not in issue that David Hanna approached Adam Moore for *some* assistance in relation to the building of his house.
- (d) It is in issue whether David Hanna approached Adam Moore because he believed Mirvac had the resources, connections and willingness to extend favours to a person who held the powerful position of BLF State Secretary. It is further in issue whether Adam Moore was willing to offer to ensure the provision of free services for David Hanna's new home, and whether he was motivated by the nature and extent of union-led industrial action that was occurring in Brisbane at the time, the extent of which is also in issue. A further controversy is whether or not David Hanna received the free goods and services knowing that they were being given in the hope or expectation that he would not exercise his powers as a union official in a manner adverse to Mirvac, Adam Moore and Mathew McAllum.

- (e) It is in issue whether Adam Moore gave instructions to Mathew McAllum to facilitate the provision of these free services to the Hannas. But it is not in issue that Adam Moore asked Mathew McAllum to provide *some* assistance to the Hannas.
- (f) Counsel assisting argued that the instruction Mathew McAllum received was consistent with the general approach to union related expenses that Adam Moore sanctioned in Mirvac's Brisbane office at the time. This involved having subcontractors agree either to absorb the expense themselves, or alternatively, to include the expense within false quotes or variation claims made out to Mirvac for some project on which they were engaged (in the case of the Cornubia house, the Orion PAD2 Project). A controversy for resolution is why Adam Moore sanctioned such a practice, and the extent, if any, to which it was sanctioned further up the hierarchical chain within Mirvac.
- (g) The quotes or variation claims in relation to the work organised for the Cornubia house by Mathew McAllum were false. They included the amount of the relevant expense. But they created the false impression that the expense would be or had been legitimately incurred on the Orion PAD2 Project. Whether or not this was done with a view to Mirvac's funding of the Cornubia house being concealed from Mirvac's national management team, who Adam Moore knew would frown upon this activity, or for some other reason, requires resolution.

- (h) Was Mathew McAllum following Adam Moore's instruction? Or was he on a frolic of his own? Those matters are in issue. It is not in issue that in most instances Mathew McAllum selected trades who would either carry out (or pay for someone else to carry out) the work without charge to David Hanna. The extent to which Adam Moore was involved in selecting some trades is in issue.
- (i) Most of the Orion PAD2 Project subcontractors whom Adam Moore or Mathew McAllum involved in the scheme did as had been suggested to them. They issued Mirvac with false quotes or variation claims for the Orion PAD2 Project. Who made this suggestion? Whence did it come initially? These are matters to be resolved. In some cases the subcontractors did not even do the work at the Cornubia house. They agreed to act as an invoicing 'middle man' paying for the tradesmen who did the work at Cornubia and then included that cost in false invoices on the Orion PAD2 Project, thereby passing the cost back to Mirvac.

B – THE FACTS³

David Hanna

7. David Hanna was the Secretary of the BLF in the period from 2011⁴ to early 2014. At that latter time the State registered BLF merged with

³ These facts are largely as set out by counsel assisting in the Submissions of Counsel Assisting, 13/11/15. Where the facts are in issue and require resolution, that is made clear.

⁴ David Hanna, 18/9/15, T:646.15-17.

the State registered CFMEU,⁵ and the federally registered BLF merged with the CFMEU Construction and General Division, Queensland Construction Workers' Divisional Branch.

8. When the mergers came into effect, David Hanna occupied the positions of President of the CFMEU Construction and General Division, Queensland and Northern Territory Divisional Branch and President of the Construction and General Division of the CFMEU.⁶ Prior to taking office as Secretary of the BLF, David Hanna had worked as the BLF's Assistant Secretary, and before that as an organiser with the BLF (a position he first took in 1995).⁷ David Hanna resigned from all positions within the CFMEU with effect from 30 July 2015.⁸
9. On 24 February 2011, David Hanna and his wife purchased a property at Cornubia. That is a suburb south of Brisbane. But it is within the Logan City Council local government area.⁹ At that time, the property had a house and two sheds already built on it.¹⁰

⁵ *Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland and Australian Building Construction Employees and Builders' Labourers' Federation (Queensland) Union of Employees* (No. 2) [2014] QIRC 74.

⁶ David Hanna, 18/9/15, T:645.27-37. See CFMEU's annual returns for 2014 available at <https://www.fwc.gov.au/documents/documents/organisations/registered-orgs/105N/105n-AR2014-75.pdf>. See also Submissions of Counsel Assisting, 13/11/15, paras 23-25.

⁷ David Hanna, 18/9/15, T:645.45-646.13.

⁸ CFMEU DD MFI-26, 16/10/15, pp 27-28.

⁹ Cornubia House MFI-1, 14/9/15, Vol 3, p 1020; Cornubia House MFI-7, 18/9/15, pp 1-2; David Hanna, 18/9/15, T:647.11-26.

¹⁰ David Hanna, 18/9/15, T:647.28-44.

10. In 2012, in consultation with a builder, Shane Dalby, David and Jennifer Hanna had plans prepared for the construction of a new house on the property.¹¹

Mirvac representatives and the Orion PAD2 Project

11. Various companies in the Mirvac group conduct building businesses in the commercial sector of the building and construction industry in Queensland and other parts of Australia.¹²
12. Up until about March 2012, Mirvac was structured in a decentralised way. Each State company had primary responsibility for its own affairs.¹³ In March 2012 a centralised model was adopted. Under it there existed a national executive management team based in Sydney sitting above separate executive teams in each State.¹⁴

Adam Moore

13. One of the senior Mirvac executives in Queensland at the time of the relevant events was Adam Moore. He was the Construction Director for Mirvac in Queensland (as well as in Western Australia).¹⁵ Adam Moore had originally commenced work for Mirvac in Brisbane in

¹¹ David Hanna, 18/9/15, T:651.42-652.22; Shane Dalby, 14/9/15, T:12.6-19.

¹² Adam Moore, 18/9/15, T:567.41-568.21.

¹³ Bradley Garlick, 15/9/15, T:303.46-304.5; Adam Moore, 18/9/15, T:562.37-563.1, 629.26-27; Jason Vieusseux, 30/10/15, T:748.21-26.

¹⁴ Bradley Garlick, 15/9/15, T:303.46-304.5; Adam Moore, 18/9/15, T:562.37-563.1, 629.26-27; Jason Vieusseux, 30/10/15, T:748.21-26.

¹⁵ Adam Moore, 18/9/15, T:562.19-21; Jason Vieusseux, 30/10/15, T:748.46-749.2.

about the mid-1990s and had risen through the ranks of the Brisbane office over time.¹⁶

14. Following the Mirvac restructure in March 2012, Adam Moore began having to report to Jason Vieusseux. He was the National Construction Manager of Mirvac. He was part of the national executive team based in Sydney.¹⁷

Mathew McAllum

15. As at April 2013 Adam Moore had a team of Mirvac employees and contractors working underneath him and reporting to him in Queensland.¹⁸
16. One of those individuals was Mathew McAllum.¹⁹ He was a builder who had commenced employment as a cadet with Mirvac in Queensland in 1997.²⁰
17. Mathew McAllum initially worked under Adam Moore at Mirvac in Brisbane up until 2002.²¹ He then worked for a 'number of other larger commercial builders'. Later he started his own small domestic

¹⁶ Adam Moore, 18/9/15, T:558.24-32.

¹⁷ Adam Moore, 18/9/15, T:562.37-41; Jason Vieusseux, 30/10/15, T:748.21-26.

¹⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 6-1; Bradley Garlick, 15/9/15, T:302.32-35; Jason Vieusseux, 30/10/15, T:747.12-27.

¹⁹ Cornubia House MFI-1, 14/9/15, Vol 1, p 6-1.

²⁰ Mathew McAllum, 16/9/15, T:364.41-365.17.

²¹ Mathew McAllum, 16/9/15, T:364.41-365.17.

building company,²² Kylan Construction Pty Ltd (**Kylan Construction**).²³

18. During their years together at Mirvac between the mid-1990s and 2002, Adam Moore and Mathew McAllum had enjoyed a good working relationship. Mathew McAllum considered Adam Moore to be his mentor.²⁴
19. In 2012, after spending a number of years working in the domestic sector, Mathew McAllum began looking for opportunities to move back into commercial work.²⁵ He had kept in touch with Adam Moore over the years. He asked Adam Moore to let him know if any opportunities at Mirvac arose.²⁶
20. In 2012 Adam Moore contacted Mathew McAllum. He offered him the chance to work on a contract basis managing the design of a project for the expansion of the existing Orion Shopping Centre at Springfield in Brisbane.²⁷ One of the companies in the Mirvac group owned the centre, and Mirvac Constructions was undertaking the expansion work.²⁸ That project was called 'Stage 2' of the Orion Shopping Centre.²⁹

²² Mathew McAllum, 16/9/15, T:365.28-33.

²³ Mathew McAllum, 16/9/15, T:366.4-5.

²⁴ Mathew McAllum, 16/9/15, T:365.19-26; 18/9/15, T:551.33-34.

²⁵ Mathew McAllum, 16/9/15, T:365.41-45.

²⁶ Mathew McAllum, 16/9/15, T:366.10-18.

²⁷ Mathew McAllum, 16/9/15, T:366.20-24.

²⁸ Mathew McAllum, 16/9/15 T:366.22-38.

²⁹ Mathew McAllum, 16/9/15, T:366.26-45.

21. In the end the ‘Stage 2’ expansion project was deferred. Mathew McAllum was asked to work instead on another project being undertaken at the Orion Shopping Centre.³⁰ That project involved the construction of particular buildings on the fringes of the site. These buildings were to be let out to large retailers who were generally in the business of selling bulky goods, or in need of substantial floor space.³¹ The site was referred to as ‘PAD 2’.³² The proposed tenants of the finalised development included Boating Camping Fishing, AMART, a Hog’s Breath Café and Pet Barn.³³
22. The terms of Kylan Construction’s retainer with Mirvac were set out in a letter. It was dated 6 December 2012. It was signed by Adam Moore for Mirvac Projects Pty Ltd (**Mirvac Projects**). It was also signed by Mathew McAllum for Kylan Construction.³⁴ This ‘contract for services’ provided that Mirvac Projects would engage Kylan Construction to work with Mirvac Constructions.³⁵ It further provided that it would terminate on 5 December 2013 unless terminated earlier or extended. It provided that the agreement created a relationship of principal and contractor (not agency). And it provided that Kylan Construction would act lawfully in the provision of its services.³⁶

³⁰ Mathew McAllum, 16/9/15, T:367.35-38.

³¹ David Mullan, 14/9/15, T:28.13-14, 50.19-21; Mathew McAllum, 16/9/15, T:367.13-14, 35-38.

³² Mathew McAllum, 16/9/15, T:367.47-368.18.

³³ Cornubia House MFI-1, 14/9/15, Vol 6, p 1810.

³⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 16.

³⁵ Cornubia House MFI-1, 14/9/15, Vol 1, p 16.

³⁶ Cornubia House MFI-1, 14/9/15, Vol 1, pp 16-19.

23. In September 2013 the services of Kylan Construction were terminated.³⁷ From December 2012 to September 2013 Mathew McAllum had acted as project manager on the Orion PAD2 Project.³⁸ That role involved Mathew McAllum in the activities of programming work, budgeting, managing, coordinating and organising subcontractors. It also involved him in obtaining prices for work (with the assistance of Mirvac Constructions contract administrator, Natalie Croghan).³⁹ During that time Mathew McAllum was predominantly based in the Brisbane city office of Mirvac Constructions, reporting directly to Adam Moore.⁴⁰

Background to construction of the Cornubia house

24. On 3 February 2013, the Hannas executed a building contract with Dalby Constructions Pty Ltd.⁴¹ This was a domestic building company owned by Shane Dalby.⁴² The contract provided for the construction of a new house on the Cornubia property.⁴³ At the time at which the contract was signed, the Hannas were still living in the existing

³⁷ Mathew McAllum, 17/9/15, T:499.37-500.7; Cornubia House MFI-1, 14/9/15, Vol 3, p 1015.

³⁸ Mathew McAllum, 16/9/15, T:368.22-33.

³⁹ Mathew McAllum, 16/9/15, T:368.22-33.

⁴⁰ Mathew McAllum, 16/9/15, T:368.35-370.3.

⁴¹ Cornubia House MFI-1, 14/9/15, Vol 1, pp 20-24.

⁴² Shane Dalby, 14/9/15, T:7.46-8.12.

⁴³ Shane Dalby, 14/9/15, T:9.2-4.

dwelling on the property.⁴⁴ That dwelling was subsequently demolished.⁴⁵

25. The building of the Cornubia house involved two broad phases of construction work carried out when the Cornubia house was built.
26. The first phase involved the construction of the structure of the home to 'lock up stage'.⁴⁶ That expression referred to the stage where the slab, external walls, internal structural wall framing, and roof had been erected and windows installed.⁴⁷
27. Part of this first phase was undertaken by Shane Dalby. Part involved David Hanna in directly sourcing goods and services from other contractors. Some of what David Hanna did included work that was originally part of Shane Dalby's contract but which was removed from the scope of that contract by way of variations agreed between him and David Hanna.⁴⁸ In particular, a progress payment invoice dated 6 June 2013 noted that the following works were removed from Shane Dalby's original scope of work:

- (a) 'plumbing rough-in (\$6,000)';
- (b) 'electrical rough-in (\$6,000)';

⁴⁴ Shane Dalby, 14/9/15, T:9.15-34.

⁴⁵ Shane Dalby, 14/9/15, T:13.42-43.

⁴⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 21.

⁴⁷ Shane Dalby, 14/9/15, T:10.16-11.41.

⁴⁸ Shane Dalby, 14/9/15, T:15.27-18.23, 19.11-43; Cornubia House MFI-1, 14/9/15, Vol 1, pp 36, 330.

- (c) 'gas rough-in (\$1,000)';
- (d) 'supply of windows (\$9,500)'; and
- (e) 'supply of front door (\$2,900)'.⁴⁹

The sums next to each item of work detailed in the progress payment invoice represent the amount by which their non-performance by Shane Dalby reduced the total progress payment.

- 28. The 'plumbing rough-in' related to 'plumbing pipework for hot and cold water to run through the house' up to the point in a wall where internal fittings could be applied to that pipework.⁵⁰ Similarly, 'electrical rough-in' and 'gas rough-in' related to basic electrical and gas wiring and piping.⁵¹
- 29. The second phase of construction of the Cornubia house involved creating each of the rooms inside the structure. This involved application of plasterboard to the internal structural wall framing so as to complete the walls of each room. It involved the installation of electrical, plumbing and mechanical installations as required. It involved painting. It involved the provision of flooring (carpets, polished concrete and tiles). It involved joinery and the like. The focus of attention in this case study is on the second phase, together with some works carried out as part of the first phase.

⁴⁹ Cornubia House MFI-1, 14/9/15, Vol 1, p 330.

⁵⁰ Shane Dalby, 14/9/15, T:18.25-37.

⁵¹ Shane Dalby, 14/9/15, T:18.39-46.

Description of the Cornubia house

30. The completed Cornubia house was advertised for sale in 2015. The marketing material described the house as having an area of 505m², four king size bedrooms (each with walk in wardrobes), four bathrooms including a double sized en suite off the master bedroom, a ‘massive office’, reverse cycle air-conditioning throughout, polished concrete flooring, a walk through pantry, a second butler’s kitchen, and state of the art appliances.⁵² The property has a three car garage and a 12 metre long salt water pool with a babies’ pool.⁵³ The sales brochure described the home as ‘oozing luxury’.⁵⁴

The work accepted but not paid for by David Hanna

31. Counsel assisting submitted and it is not contested that the works that David Hanna received but did not pay for included:
- (a) tiles and tiling services provided (in respect of which Mirvac paid \$27,930 plus GST);
 - (b) interior decorating services (in respect of which Mirvac paid \$2,240 plus GST);
 - (c) electrical services (in respect of which Mirvac paid \$20,224);

⁵² Cornubia House MFI-7, 18/9/15, pp 7-8.

⁵³ Cornubia House MFI-7, 18/9/15, p 7.

⁵⁴ Cornubia House MFI-7, 18/9/15, p 7.

- (d) plastering, rendering and painting services (in respect of which Mirvac paid \$77,000 inclusive of GST);
 - (e) plumbing services (totalling \$14,984.78 not including GST, in respect of which Mirvac may have paid \$12,600); and
 - (f) air conditioning installation services (totalling \$12,501.50, which an unsuspecting contractor was ultimately forced to absorb).
32. The total of the benefits received by David Hanna based on the figures identified in the previous paragraph is \$154,980.28. That figure is conservative. It disregards any mark-up charged to Mirvac by the electrical contractor engaged by it on the Orion PAD2 Project and through whom payment was made for the electrical contractor sourced by David Hanna. It also includes the cost possibly paid by Mirvac for plumbing services on the Cornubia House, and not the (higher) value of those services as recorded by the relevant plumbing contractor.
33. The evidence in relation to these works, and the manner in which they were paid for, is summarised below. A more detailed summary as to the precise facts and circumstances relating to the trades considered below appears in the Appendix to this Chapter.

Tiling and interior design

34. David Hanna received, but did not pay for tiles and tiling services provided by Tilecorp Pty Ltd (**Tilecorp**). He also received but did not pay for interior design services provided by Diane Graham.

35. The relevant representative from Tilecorp with whom Adam Moore and Mathew McAllum dealt in relation to the matter was its owner, David Mullan. David Mullan's de facto partner was Diane Graham.
36. It was Adam Moore who first broached with David Mullan the idea of Tilecorp and Diane Graham providing tiling and interior design services for the Cornubia house.⁵⁵
37. Subsequently David Mullan submitted to Mathew McAllum a quote for the provision of those services (quoting \$27,930 plus GST) and for the Orion PAD2 Project.⁵⁶ At Mathew McAllum's direction, David Mullan then folded the price for the Cornubia house tiling services (and a further amount of \$2,240 plus GST for Diane Graham's services on the house) into a revised quote from Tilecorp for the Orion PAD2 Project.⁵⁷ The revised quote made no mention of the Cornubia house. Nor did it mention that the new quoted price included an amount for work done or to be done on that house.
38. The revised Tilecorp quote was accepted. Tilecorp was awarded the Orion PAD2 Project subcontract on the basis that it would be paid the price in the revised quote. In due course that sum was invoiced to and paid by Mirvac.⁵⁸ The result was that Mirvac paid \$30,170 plus GST in respect of tiling and interior design work performed on the Cornubia house.

⁵⁵ See para 223.

⁵⁶ See para 230.

⁵⁷ See paras 229-236.

⁵⁸ See para 237.

Electrical goods and services

39. Works relating to the ‘electrical rough-in’ for the Cornubia house were undertaken by Darren Wall, a friend of David Hanna’s.⁵⁹
40. David Hanna organised and obtained a quote from Darren Wall early on, in December 2012, before he had first spoken with Adam Moore.⁶⁰
41. After Darren Wall finished some of the works, he asked David Hanna about issuing an invoice. David Hanna did not ask for an invoice to be given to him for payment. Instead he told Darren Wall to ring another person whose name Darren Wall could not remember. He said that that person would be able to tell Darren Wall what to do with his invoice. David Hanna gave him the telephone number of that person.⁶¹
42. Darren Wall rang the other person who told Darren Wall to address the invoice to Klenner Murphy Electrical Pty Ltd (**Klenner Murphy**). He also told him to describe the works as though they were works on the Orion PAD2 Project. Darren Wall had not heard of either Klenner Murphy or the Orion PAD2 Project. He did not know that Klenner Murphy was, in fact, Mirvac’s electrical sub-contractor on that project.⁶²

⁵⁹ See paras 238-239.

⁶⁰ See para 240.

⁶¹ See para 259.

⁶² See para 260.

43. Darren Wall did as he was told. In due course he was paid by Klenner Murphy. When he later finished the electrical works at the Cornubia house he issued a further invoice to Klenner Murphy. Again he misdescribed the works in the same way. Again Klenner Murphy paid.⁶³
44. Mathew McAllum and Daniel Greenland of Klenner Murphy dealt with each other on the Orion PAD2 Project. They agreed that Klenner Murphy would pay Darren Wall's invoices and then include the cost of doing so in false variation claims to be submitted to Mirvac on the Orion PAD2 Project.⁶⁴
45. Klenner Murphy did this. However, the total amount claimed and paid appears to have included an additional \$5,000 over and above the cost that Klenner Murphy incurred in meeting Darren Wall's invoices.
46. The total amount claimed by Klenner Murphy in respect of Darren Wall's work on the Cornubia house, and paid by Mirvac, was \$20,224.

⁶³ See para 284.

⁶⁴ See paras 245-257, 266-284.

Plastering, painting and rendering

47. Plastering, painting and rendering services were provided to the Hannas through Mirvac to enable them to complete the Cornubia house. This was organised by Mathew McAllum, and, counsel assisting submitted, also by Adam Moore.
48. The services themselves were provided by LAD (plastering), Jason Manley (painting), and Shuttlewood (rendering and painting).⁶⁵
49. None of these trades invoiced the Hannas or Mirvac. Each invoiced Wadsworth Constructions Pty Ltd (**Wadsworth Constructions**). That was the company that had been awarded subcontracts for work on the Orion PAD2 Project in respect of painting, as well as ceilings and partitions.⁶⁶
50. Wadsworth Constructions paid those invoices. It then recovered the cost of doing so (together with a small margin) from Mirvac on the Orion PAD2 Project. The total amount paid by Mirvac in this regard was \$77,000.⁶⁷
51. Wadsworth Constructions was able to invoice and recover this \$77,000 in two ways. First, it artificially increased its quote for the Orion PAD2 Project by \$40,000. Then subsequently it did not reduce its contract price and invoice amount for work on the Orion PAD2 Project

⁶⁵ See para 292.

⁶⁶ See para 287.

⁶⁷ See paras 289-292, 295.

when there was a narrowing in the scope of works that ought to have resulted in a negative variation valued at \$37,000.⁶⁸

52. Counsel assisting contended that Adam Moore probably first raised with Wadsworth Constructions the prospect of it assuming the role described above. Mathew McAllum also played a part. He was aware that Wadsworth Constructions had agreed to play that role. The evidence demonstrates that Mathew McAllum was involved in causing Shuttlewood to generate and issue false invoices to Wadsworth Constructions for its work on the Cornubia house. They were false in the sense that the invoices described the work as having been done on the Orion PAD2 Project. In fact they squarely related to the Cornubia house. A detailed summary of the evidence is set out in the Appendix.
53. Adam Moore argued that Mathew McAllum's evidence in relation to Glen Wadsworth is detrimental to Mathew McAllum's credit. Adam Moore argued that Mathew McAllum faced irrefutable documentary evidence that he had intervened to have the invoice from Shuttlewood to Wadsworth changed so as to conceal any connection with the Cornubia house and make it look as though it was one in respect of the Orion project. Adam Moore argued that it was therefore important for Mathew McAllum to sheet knowledge of the transaction home to Adam Moore. Adam Moore pointed to Mathew McAllum's evidence to the effect that he had no relationship with Glen Wadsworth and in consequence told Adam Moore what was proposed and got him to deal with Glen Wadsworth. Adam Moore then contends that Mathew McAllum was 'contradicted' by the oral evidence of Glen Wadsworth

⁶⁸ See para 293.

saying '[h]e gave no evidence he had spoken at all with Mr Moore but said that his dealings had been with Mr McAllum'.⁶⁹

54. However, as the material in the Appendix makes clear, several aspects of the evidence in relation to Glen Wadsworth support counsel assisting's submission that it is more likely than not that Adam Moore had a greater involvement in the matter than he suggested.⁷⁰ In addition, Glen Wadsworth was not a particularly co-operative witness. He exhibited a casual attitude. More than once he had to be reminded about appropriate use of language.⁷¹ He stated a number of times he could not remember the details without his file which he had not had access to prior to entering the witness box. He stated that he had suffered extreme personal difficulties around the time of the issues in question arising.⁷² In any event, he was not directly asked about Adam Moore's involvement in the arrangements for the payment of invoices. Hence the submission that Glen Wadsworth 'contradicted' Mathew McAllum is overstated.

Plumbing

55. The subcontract for the plumbing work on the Orion PAD2 Project was awarded to a company called Nicoll Industries Pty Ltd (**Nicoll Industries**).⁷³ In addition, and at the same time as Nicoll Industries

⁶⁹ Submissions of Adam Moore, 23/11/15, paras 36-37.

⁷⁰ See evidence in the Appendix under the heading 'Rendering, painting and internal plastering' at paras 285-296.

⁷¹ Glen Wadsworth, 15/9/15, T:260.26-30, 263.28-40.

⁷² For example, Glen Wadsworth, 15/9/15, T:262.5-10.

⁷³ See para 298.

was performing work on that project, it also undertook the internal plumbing work at the Cornubia house.⁷⁴ It did so at the direction and request of Mathew McAllum.⁷⁵

56. The total cost to Nicoll Industries of performing this work was \$14,984.78. That sum did not include any profit margin that would normally be charged by the company.⁷⁶

57. It is probable that Nicoll Industries passed on \$12,600 of this cost to Mirvac by way of a false variation claim submitted by it on the Orion PAD2 Project.⁷⁷ At the time that claim was submitted, the cost that Nicoll Industries had incurred on the Cornubia house work was of that order. The payment claim that contained that variation also included an additional false claim. It was said to be for rock breaking work. But it was, in fact, to cover the cost that Nicoll Industries had incurred (at Mathew McAllum's direction) in paying for an invoice that the BLF had submitted to Mirvac for tickets to a BLF Charity Fight Night.

⁷⁴ See paras 299-310.

⁷⁵ See paras 299-310.

⁷⁶ See para 323.

⁷⁷ See paras 325-330.

Air-conditioning installation

58. Mathew McAllum approached a company called Value Added Engineering Group Pty Ltd (**VAE**). He requested it to install air-conditioning systems into the Cornubia house.⁷⁸ The air-conditioning units themselves were purchased separately by David Hanna.⁷⁹ VAE had been awarded the mechanical services subcontract for the Orion PAD2 Project.⁸⁰
59. VAE arranged for the systems to be installed in the house. He retained a business called Gray Brothers Airconditioning Pty Ltd (**Gray Bros**) to undertake that work.⁸¹ VAE had intended to charge for the work, with a view to recovering the cost of retaining Gray Bros, plus a margin.⁸²
60. However, Mathew McAllum subsequently proposed to VAE that it claim for the work on the Cornubia house by submitting false variation claims on the Orion PAD2 Project.⁸³
61. Ultimately VAE was not prepared to proceed on this basis. It did not invoice Mirvac any amount for the Cornubia house.⁸⁴ It decided instead to absorb the cost of the Gray Bros invoices, which totalled

⁷⁸ See para 333.

⁷⁹ See para 341.

⁸⁰ See para 332.

⁸¹ See para 342.

⁸² See para 347.

⁸³ See paras 348-349.

⁸⁴ See paras 351-353.

\$12,501.50 inclusive of GST.⁸⁵ The honest and appropriate decisions taken by VAE and its management, including Benjamin Carter, deserve commendation.

Unorthodox payments for union events by Mirvac in Queensland

62. It is convenient now to move to a more detailed consideration of some controversial aspects. It involves a contest of credibility on matters of substance between Jason Vieusseux and Adam Moore. That contest in turn has a considerable bearing on a contest of credibility on matters of substance between Adam Moore and Mathew McAllum. For the reasons given by counsel assisting, those contests must be resolved in favour of Jason Vieusseux and Mathew McAllum.
63. During 2012 and 2013 some employees of Mirvac in Queensland, and some subcontractors with whom they dealt, engaged in a practice under which donations and other payments made to trade unions (for functions, fund raising or charity events) were paid for by Mirvac subcontractors. The subcontractors then recovered the payments from Mirvac by way of false variation claims. In those variation claims the amount paid by the subcontractor was misdescribed as being in respect of work performed by that contractor on a Mirvac job.⁸⁶
64. Adam Moore endorsed this practice.⁸⁷ Importantly, Adam Moore claimed in turn that Jason Vieusseux, the National Construction

⁸⁵ See para 357.

⁸⁶ Adam Moore, 18/9/15, T:565.10-566.10; see also Cornubia House MFI-1, 14/9/15, Vol 1, p 83.

⁸⁷ Adam Moore, 18/9/15, T:566.9-10.

Director to whom he reported, had, in or about April/May 2012, directed that it occur to frustrate a company-wide policy which frowned upon Mirvac paying for such events directly.⁸⁸

65. Against this, Jason Vieusseux gave evidence in which he denied knowing about or condoning the practice Adam Moore described.⁸⁹ He gave evidence that, since 2007, his policy has been that Mirvac employees could attend ‘appropriate Union events’, which were ‘always paid by the business as we were representing Mirvac at those events’.⁹⁰ Jason Vieusseux cited events with a ‘safety message’ (for example those relating to Mates in Construction and an annual Sydney Safety Dinner) as being ‘appropriate’ ones for Mirvac staff to attend⁹¹ He said that any union donation or sponsorship payments would not be appropriate.⁹² Jason Vieusseux also relevantly said that ‘there was absolutely no problem’ with money for appropriate union events going through ‘Mircac books’ and that ‘there are a number of examples since that time where that has occurred’.⁹³ Jason Vieusseux did not refer to documentary evidence of the examples to which he referred. But his evidence on this point was not challenged in cross-examination.

⁸⁸ Adam Moore, 18/9/15, T:566.12-577.23.

⁸⁹ Jason Vieusseux, 30/10/15, T:750.7-18, 750.28-45.

⁹⁰ Jason Vieusseux, 30/10/15, T:749.39-43.

⁹¹ Jason Vieusseux, 30/10/15, T:756.28-32.

⁹² Jason Vieusseux, 30/10/15, T:766.18-21.

⁹³ Jason Vieusseux, 30/10/15, T:753.4-7.

66. Counsel assisting correctly submitted that the evidence of Jason Vieusseux should be preferred to that of Adam Moore.⁹⁴ Counsel assisting argued:

- (a) Jason Vieusseux displayed a notably more impressive demeanour in the witness box;
- (b) No records were produced to the Commission suggesting that Adam Moore ever sought or obtained approval from Jason Vieusseux to act in accordance with the practice, or suggesting that Jason Vieusseux was aware of the practice;
- (c) The explanations proffered by Adam Moore as to the rationale for the practice were varied. They did not make sense.

He said, for example, that the practice was intended to conceal from the public the fact that Mirvac was paying to attend union related events because, inter alia, Mirvac was trying to become a ‘non-EBA company’.⁹⁵ However this did not ring true in circumstances where some Mirvac employees attended the union functions in question, and were likely to be seen at those events by members of the public.

There is also no reasonable explanation for why such payments would *need* to be concealed from the public. And there was no reasonable explanation for how that concealment

⁹⁴ Submissions of Counsel Assisting, 13/11/15, para 39.

⁹⁵ Adam Moore, 18/9/15, T:568.34-569.7, 569.39-570.6, 570.25-29.

(as well as attendance at union events without direct payment for them), would have a bearing on whether or not Mirvac would succeed in reaching an enterprise agreement with its employees without the involvement of the union.

- (d) Adam Moore elsewhere claimed that the practice was introduced because, when Mirvac adopted a national management model, the national executives introduced a policy under which Mirvac would not pay for union events.⁹⁶ However Jason Vieuxseux was part of the national management team. If that policy was introduced at the instigation of the team of which he was a part, it is unlikely that he would have directed Adam Moore to act in a manner contrary to it. The reasons for any such direction have not been made out.
- (e) Adam Moore also suggested that Mirvac wished to hide attendance costs related to union events from a Victorian or possibly Federal Government taskforce, which was focussing on ‘increasing construction costs’.⁹⁷ Jason Vieuxseux’s evidence was that he recalled discussing the formation of a taskforce in Victoria, of which James MacKenzie (CEO of Mirvac Ltd) was to be a party.⁹⁸ However, the remainder of Adam Moore’s evidence on the topic did not accord with Jason Vieuxseux’s memory.⁹⁹ Adam Moore’s evidence is

⁹⁶ Adam Moore, 18/9/15, T:565.20-25, 566.30-567.6.

⁹⁷ Adam Moore, 18/9/15, T:567.10-23.

⁹⁸ Jason Vieuxseux, 30/10/15, T:752.31-38.

⁹⁹ Jason Vieuxseux, 30/10/15, T:752.31-38.

difficult to accept. The costs of the types of union events referred to by him in evidence hardly justified the effort of hiding those expenses in the first place.

67. Adam Moore submitted that counsel assisting ignored the consistency of his evidence.¹⁰⁰ He submitted that that was a powerful reason for his evidence to be preferred to that of Jason Vieusseux. Counsel assisting submitted that consistency *of itself* does not make his evidence reliable or credible. Counsel assisting also noted that it was only in his public hearing, not in his earlier private hearing, that Adam Moore gave evidence of Mirvac corporate policy and practice that permitted the cost of tables at various union-related events to be purchased by Mirvac and concealed through variations on project accounts.¹⁰¹

68. Adam Moore also submitted that counsel assisting have ‘in the main relied on evidence based in propensity, if not pure circumstance’.¹⁰² He submitted that counsel assisting’s submission can be broken down to the contention that since Adam Moore and his Queensland team at Mirvac were accustomed to hiding evidence of contributions to charitable Union events, therefore Adam Moore must be linked to the construction of the Cornubia house. Adam Moore went on to point to his own evidence that Jason Vieusseux sanctioned the hiding of contributions to union events.

¹⁰⁰ Submissions of Adam Moore, 23/11/15, paras 3, 4, 6, 8(a), 21(b).

¹⁰¹ Adam Moore, 18/9/15, T:565.4-47, 566.1-36. Submissions of Counsel Assisting, 3/12/15, para 14.

¹⁰² Submissions of Adam Moore, 23/11/15, para 48.

69. Adam Moore also pointed to evidence from Jason Vieusseux and Adam Moore that Brett Draffen contacted Jason Vieusseux to ‘vent his frustration’ at Mirvac’s involvement in union events and that Jason Vieusseux confirmed communicating with Brett Draffen about this topic. He submitted that Jason Vieusseux’s testimony was that he defended to Brett Draffen the practice of attending union events.¹⁰³
70. Adam Moore went on to argue that the evidence that Brett Draffen was displeased with information coming to him that Mirvac was involving itself at Union events was consistent with Adam Moore’s testimony, was not contradicted by Jason Vieusseux’s testimony, and explained Jason Vieusseux’s defensive position over the phone.¹⁰⁴
71. Adam Moore also pointed to Jason Vieusseux’s reliance on documentary evidence which was not placed before the Commission. He submitted that Adam Moore’s request to obtain documentary evidence from Mirvac was denied.¹⁰⁵ Adam Moore further noted Mirvac’s Code of Conduct which he claimed show that charitable donations were acceptable and that they appeared in Mirvac’s annual report.¹⁰⁶

¹⁰³ Submissions of Adam Moore, 23/11/15, para 52.

¹⁰⁴ Submissions of Adam Moore, 23/11/15, para 53.

¹⁰⁵ Submissions of Adam Moore, 23/11/15, paras 2, 54-55.

¹⁰⁶ Submissions of Adam Moore, 23/11/15, para 57.

72. Adam Moore argued that counsel assisting's reliance upon the practice of hiding union charitable donations in Mirvac accounts was undermined. Adam Moore was 'comfortable' with that practice as evidenced by several pieces of documentary evidence.¹⁰⁷ The same cannot be said of the Cornubia payments.¹⁰⁸ Further, Adam Moore argued that to 'describe as comparable donations such as a \$1,500 table at a charitable event, which was within corporate policy, and nearly \$150,000 of building expenses which was clearly outside the corporate policy, is to compare apples with oranges.'¹⁰⁹
73. Adam Moore also submits that Mirvac's submissions about Jason Vieuksseux should be treated with caution.¹¹⁰
74. Adam Moore further contended that it is convenient for Mirvac as an organisation to deny any involvement or knowledge of its current decision makers in the events evidenced before the Commission. It has done so by distancing itself from employees no longer a part of their organisation. Adam Moore contended that Mirvac's submissions should be seen as opportunistic. They did not carefully consider the evidence put before the Commission. He pointed to an ASX announcement published on 18 September 2015 shortly after the evidence given by Mathew McAllum and Adam Moore.¹¹¹

¹⁰⁷ Submissions of Adam Moore, 23/11/15, para 59.

¹⁰⁸ Submissions of Adam Moore, 23/11/15, para 61.

¹⁰⁹ Submissions of Adam Moore, 23/11/15, para 64.

¹¹⁰ Submissions of Adam Moore, 27/11/15, para 2.

¹¹¹ Submissions of Adam Moore, 27/11/15, paras 4, 19-24.

75. Adam Moore pointed to a publicly available document¹¹² which it is contended shows that charitable donations are acceptable and ‘that they appear in Mirvac’s Annual Report’.¹¹³
76. Mirvac submitted in response that the level of detail in its public accounts is insufficient to show payments for a union fight night and that Adam Moore incorrectly denied that proposition.¹¹⁴
77. Counsel assisting, with some support from Mirvac, submitted that the clandestine manner in which the works on the Cornubia house were on-charged to Mirvac and concealed in invoices and variations was identical to the methodology employed for concealing payment not only for attendance at union events but also other general entertainment activities from which Adam Moore and other attendees benefited personally.
78. Counsel assisting agreed with that submission of Mirvac. They further noted that Adam Moore admitted as much in cross-examination.¹¹⁵ The admission is itself supported by documentary evidence.
79. Thus counsel assisting noted¹¹⁶ the following entertainment expenses that were referenced on Klenner Murphy’s Client Entertainment

¹¹²http://www.mirvac.com/uploadedFiles/Main/Content/About/Corporate_Governance/130503-Code-of-Conduct.pdf

¹¹³ Submissions of Adam Moore, 23/11/15, p 13, para 57.

¹¹⁴ Submissions of Mirvac, 27/11/15, para 7; Adam Moore, 18/9/15, T:636.47-637.24.

¹¹⁵ Adam Moore, 18/9/15, T:631.40-43, 633.24-29.

¹¹⁶ Submissions of Counsel Assisting, 13/11/15, para 203; Submissions of Counsel Assisting, 3/12/15, paras 10-11.

Expenses document:¹¹⁷ ‘Night for Janice’, ‘Sharks night’, ‘Mirvac Lions game’, ‘Origin Jerseys’ and ‘Origin tables’. Counsel assisting further noted that the combined ‘item cost’ and ‘KME cost’ of these entertainment expenses was \$64,261. The expenses were split in the Client Entertainment Expenses document over a number of variations and items of work. The ‘approved’ sum of these expenses were then recovered by Klenner Murphy through work items or variations that were invoiced by it and misdescribed as relating to the Orion PAD2 Project.¹¹⁸ These were subsequently paid by Mirvac.¹¹⁹

80. Furthermore, counsel assisting noted Natalie Croghan’s evidence. She said that the ‘Night for Janice’ related to a fundraiser for a woman who had cancer. She said that she could not recall whether the cost was ultimately paid by Mirvac. She said that an attempt was made to claim the cost from Mirvac.¹²⁰ Natalie Croghan recalled that Janice was friend or relative of David Flood (a Mirvac project manager) and that she would have discussed the expense with Adam Moore.¹²¹ As described above, the Klenner Murphy costs that appear to be associated with the ‘Night for Janice’ were invoiced to Mirvac and paid by it.¹²²

¹¹⁷ Cornubia House MFI-1, 14/9/15, Vol 2, pp 623-627.

¹¹⁸ Cornubia House MFI-1, 14/9/15, Vol 3, pp 948-949.

¹¹⁹ Cornubia House MFI-1, 14/9/15, Vol 5, p 1799.

¹²⁰ Natalie Croghan, 16/9/15, T:357.6-358.4.

¹²¹ Natalie Croghan, 16/9/15, T:357:6-358.4.

¹²² Paragraph 79.

81. In this regard, counsel assisting submitted that Adam Moore's submissions failed to acknowledge that the impugned practice of concealing expenses was not confined to 'charitable' union events. It included other union events and general (costly) entertainment expenses. The means by which those costs were concealed is revealing. Further, counsel assisting argued that Adam Moore's submission that payment for a '\$1,500 table at a charity event ... and nearly \$150,000 of building expenses ... is to compare apples with oranges' ignored the purchase of a table for the BLF Fight Night. It also ignored the significant entertainment expenses incurred by Klenner Murphy,¹²³ as referred to in more detail above.¹²⁴
82. Two aspects of this matter should be cleared out of the way. The first is that counsel assisting noted¹²⁵ that, in its submissions, Mirvac referred to Adam Moore's evidence to the effect that he had requested and received approval from Jason Vieusseux to attend a BLF Charity Fight Night.¹²⁶ Nicoll Industries paid for the cost and then claimed it as a variation on the Orion PAD2 Project.¹²⁷ Adam Moore received the invitation for that Fight Night from the BLF media and communications officer on 6 June 2013.¹²⁸ In cross-examination, Mirvac put to Adam Moore an email dated 25 June 2012.¹²⁹ The email had been sent by Adam Moore to, among others, Jason Vieusseux.

¹²³ Submissions of Counsel Assisting, 3/12/15, para 19.

¹²⁴ Paragraph 79.

¹²⁵ Submissions of Counsel Assisting, 3/12/15, paras 12.

¹²⁶ Submissions of Mirvac, 23/11/15, paras 25-27; Adam Moore, 18/9/15, T:621.30-36.

¹²⁷ See Submissions of Counsel Assisting, 13/11/15, paras 237-242, 245.

¹²⁸ Cornubia House MFI-1, 14/9/15, Vol 1, pp 347-349.

¹²⁹ Adam Moore, 18/9/15, T:635.14-366.7.

The email was a response to a request sent on behalf of Jason Vieusseux's superior, Brett Draffen, asking various Mirvac managers to disclose sponsorship and community activities towards which they had made contributions.¹³⁰ Mirvac placed some significance on the fact that Adam Moore did not disclose the payment related to the Fight Night. Mirvac suggested that, if Adam Moore had spoken to Jason Vieusseux about attendance at the event, the omission by Adam Moore was inexplicable.¹³¹ However, as counsel assisting pointed out, this submission appears to be erroneous. The invitation to the Fight Night that Mirvac said was not disclosed was dated 6 June 2013; the sponsorship email from Adam Moore was dated 25 June 2012. Accordingly, the fact of the 6 June 2013 invitation could not have been disclosed in the 25 June 2012 email. The 25 June 2012 email is therefore neutral in relation to the findings to be made in respect of the contest between Adam Moore and Jason Vieusseux. The second aspect to be put aside is this. It was put to Adam Moore in cross-examination that Glen Wadsworth had paid for attendance by Mirvac staff at a BLF Fight Night in 'early 2012' and that he was reimbursed through a variation on the 'Park project', Adam Moore gave evidence that he did not recall this.¹³² No documentary evidence in respect of these matters (ie. any union charity events that preceded the 25 June 2012 email) was shown to Adam Moore by Mirvac. It is not possible to resolve this.

83. Counsel assisting correctly submitted that the clandestine manner in which the works on the Cornubia house were on-charged to Mirvac

¹³⁰ Cornubia House MFI-6, 14/9/15.

¹³¹ Submissions of Mirvac, 23/11/15, para 27.

¹³² Adam Moore, 18/9/15, T:632.27-33.

and concealed in invoices and variations was essentially identical to the methodology employed for concealing payment not only for attendance at union events but also other general entertainment activities. This method of charging for both union and non-union events is relevant to the Cornubia house case study.

Industrial landscape as at 2013 in south east Queensland

84. It was contended by counsel assisting that the period late 2012 to 2013 was part of a particularly difficult period for industrial relations in south east Queensland. Counsel assisting pointed to August 2012 as witnessing the beginning of a highly publicised and long running dispute between Lend Lease and the CFMEU at the Queensland Children's Hospital project in Brisbane. This was followed in 2013 with industrial disputation at Laing O'Rourke's McLachlan and Ann Project (**M&A Project**). That led to urgent Federal Court proceedings. Injunctions were granted in favour of Laing O'Rourke against officers of the BLF, CFMEU and CEPU.¹³³
85. On 4 March 2013 Adam Moore received an email concerning this state of affairs, described by counsel assisting as 'volatile'.¹³⁴ The email was from the Project Manager of the M&A Project, attaching an 'M&A Update' PowerPoint presentation. Among other matters, the update claimed that 'unions had asserted that their permission was

¹³³ *Laing O'Rourke Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCA 133.

¹³⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 61; Submissions of Counsel Assisting, 13/11/15, para 44.

required to undertake work outside ordinary hours and had put bans in place'.¹³⁵

86. Adam Moore was not an original recipient of the email. He suggested that he received it from David Mapleton of Fugen Bricklayers.¹³⁶ But Adam Moore did forward the email to Jason Vieusseux on 6 March 2013. He wrote that 'Laing O'Rourke are at war with the brothers'. And he wrote that the 'CFMEU are smashing all other Projects other than Mac & Anne'.¹³⁷ Adam Moore's note also stated that the union 'are calling meetings on most projects weekly'.¹³⁸
87. Adam Moore said he sent the email because what was happening industrially was 'very, very important to us'.¹³⁹ He said that 'there were problems every week with construction in Queensland'.¹⁴⁰
88. Counsel assisting submitted that the importance of industrial matters, and the impact of adverse attention from the BLF and CFMEU, was further borne out by emails between Adam Moore and Kane Pearson (then Assistant Secretary of the BLF) on 27 March 2013.¹⁴¹ In an earlier email, a subordinate of Adam Moore's had requested approval from Kane Pearson for the work to be carried out on a Mirvac project in Kawana over rostered days off to catch up on work lost due to

¹³⁵ Cornubia House MFI-1, 14/9/15, Vol 1, p 69.

¹³⁶ Adam Moore, 18/9/15, T:595.8-10.

¹³⁷ Cornubia House MFI-1, 14/9/15, Vol 1, p 61. See also Adam Moore, 18/9/15, T:600.29-36.

¹³⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 61.

¹³⁹ Adam Moore, 18/9/15, T:595.28-29.

¹⁴⁰ Adam Moore, 18/9/15, T:599.23-24.

¹⁴¹ Cornubia House MFI-1, 14/9/15, Vol 1, pp 88-90.

rain.¹⁴² That approval was not forthcoming. Adam Moore then wrote to Kane Pearson directly in the following terms:¹⁴³

Mate, give me a break, Gary Owen, Kris Simcoe and Bob Carnegie, mate I'm carrying them with no budget at all, all I ask is to catch up with works that have been affected by the rain.

89. Counsel assisting contended that that email is instructive for two reasons:
90. *First*, counsel assisting submitted that the email clearly showed that Adam Moore was prepared to go, and in the past did go, some way to win the favour of the BLF. Kris Simcoe and Bob Carnegie were no ordinary BLF members. As Adam Moore knew, Kris Simcoe was the son of former BLF Secretary, Greg Simcoe.¹⁴⁴ It is also a matter of public record that contempt proceedings had been brought (and ultimately dismissed) against Bob Carnegie in respect of his alleged involvement in organising industrial action at the Queensland Children's Hospital Project.¹⁴⁵ A person such as Adam Moore, for whom industrial and union issues were 'very very important', could not have missed the well-publicised support of the CFMEU and BLF for Bob Carnegie in respect of those proceedings. The language used by Adam Moore in the email clearly suggested that he was effectively doing a favour for the BLF by employing at least two persons with strong connections to the union in circumstances where their labour

¹⁴² Cornubia House MFI-1, 14/9/15, Vol 1, p 88.

¹⁴³ Cornubia House MFI-1, 14/9/15, Vol 1, p 88.

¹⁴⁴ Adam Moore, 18/9/15, T:605.25-39.

¹⁴⁵ *Abigroup Contractors Pty Ltd v Carnegie* [2013] FCCA 1099.

was not budgeted for on the project (presumably because it was not needed).

91. Adam Moore rejected this plain interpretation of the email. He insisted that his words meant to convey that the BLF had good representation on site and that there was 'no budget' for workers because the costs of the project had blown out.¹⁴⁶
92. *Secondly*, according to counsel assisting, the email showed that, as in respect of the M&A Project (and at around the same time), work outside of hours was required on the Kawana project to catch up on lost time. Ensuring that the BLF continued not to resist such work was clearly important for Adam Moore. He admitted that his email to Kane Pearson was emotive.¹⁴⁷ The desire to achieve continuing harmonious relations with the BLF so that Mirvac would not suffer the fate of the M&A Project was likely to be one motivating factor behind the provision of services to David Hanna in respect of the Cornubia House.
93. Mirvac disputed some of the contentions of counsel assisting on this topic. Mirvac took issue with counsel assisting's reliance on the email of 6 March 2013 referring to industrial activity on a Laing O'Rourke site. It argued that one instance of industrial activity in Queensland on an unrelated project for a different construction company was not evidence of an industrial action landscape across the state of Queensland that would warrant any form of response by a third party. Mirvac contended that it failed to provide an explanation of the conduct complained of. Mirvac referred to the evidence of Jason

¹⁴⁶ Adam Moore, 18/9/15, T:605.41-606.38.

¹⁴⁷ Adam Moore, 18/9/15, T:605.43-47.

Vieusseux that this was an ‘unremarkable email in that there was action on someone else’s site, and that was the extent of what I took it to be.’¹⁴⁸ It further noted that Jason Vieusseux’s evidence was also that the email did not give him cause for concern about any particular industrial activity in Queensland at the time.¹⁴⁹ It noted that according to Jason Vieusseux, ‘there was not a lot going on in Queensland [for Mirvac] at that time.’¹⁵⁰ Mirvac also pointed to Jason Vieusseux’s evidence that the broader construction industry in Queensland and the construction business of Mirvac in Queensland were relatively inactive during the relevant period, and that Jason Vieusseux would not describe the period as being terribly busy for Mirvac in comparison to other major construction markets in Australia in which Mirvac operates.¹⁵¹

94. Mirvac also tried to discount the relevance of the chain of emails dealing with work outside ordinary hours at the Kawana Project.¹⁵² Mirvac submitted that the communication relied upon was with Kane Pearson of the BLF, that there is no evidence that Kane Pearson was aware of the works to the Cornubia house and that David Hanna’s evidence was that he did not discuss the matter with anyone.
95. Mirvac further submitted that requests to allow employees RDOs were ordinary and commonplace within the building industry, and that it was ‘inconceivable’ that such a ‘minor matter’ would result in a substantial

¹⁴⁸ Jason Vieusseux, 30/10/15, T:755.29-31; Submissions of Mirvac, 23/11/15, paras 15-16.

¹⁴⁹ Jason Vieusseux, 30/10/15, T:756.7-12;

¹⁵⁰ Jason Vieusseux, 30/10/15, T:767.8-10;

¹⁵¹ Jason Vieusseux, 30/10/15, T:775.8-14;

¹⁵² Submissions of Mirvac, 23/11/15, paras 9-10.

benefit being requested by and provided to a union official. Mirvac submitted that its conduct in negotiating and consulting with union representatives on such a matter was a ‘minor and common event.’ Entitlements to RDOs are set out in Mirvac’s EBA. As unions are parties to the EBAs it is common practice to raise such matters directly. Mirvac stated that that is its practice nationally.

96. Mirvac also noted that by late May 2013, Adam Moore knew that he had obtained a position with Lend Lease, and that he left Mirvac in August 2013. Adam Moore and David Hanna had known each other from 1996. Mirvac submitted that Adam Moore would have had no motivation to further Mirvac’s interests at the relevant times. In short, Mirvac appeared to be submitting that the motivation was more personal rather than Mirvac-related.¹⁵³
97. In response to Mirvac, counsel assisting noted that David Hanna was not cross-examined as to whether or not he had any knowledge about Adam Moore’s intentions to leave. Counsel assisting argued that the fact that Adam Moore knew by late May 2013 he had a position with Lend Lease does not negate the probability that the benefits being received by David Hanna would tend to influence him to favour Mirvac until such time as Adam Moore resigned, which was not until August 2013.
98. Counsel assisting also contended¹⁵⁴ that union opposition to work outside ordinary hours is not a ‘minor matter’. Counsel assisting noted that in the case of Laing O’Rourke the issue was important enough to

¹⁵³ Submissions of Mirvac, 23/11/15, para 11.

¹⁵⁴ Submissions of Counsel Assisting, 3/12/15, para 6.

justify the seeking and granting of urgent interlocutory orders that bound the CFMEU and BLF.¹⁵⁵ The email chain between Kane Pearson and Adam Moore showed that the issue was also important to the latter.¹⁵⁶ Counsel assisting submitted that it was not to the point that consulting with unions in respect of such work may be a ‘common event’. Counsel assisting did not submit, as seemed to be suggested by Mirvac, that the benefits given to David Hanna were for the purposes of accommodating requests to work outside ordinary hours. Rather, the submission was that the emails were merely one group of circumstantial facts that were relevant to understanding Adam Moore’s intention. In circumstantial cases, it is necessary to approach the evidence as a whole and not consider it piecemeal.¹⁵⁷

99. David Hanna also complained about counsel assisting’s submission that the email sent by Adam Moore to the BLF is ‘entirely inconsistent with the evidence given by Adam Moore’. To the contrary, David Hanna contended that Adam Moore’s evidence is consistent with the text of the email and is not contradicted by any other evidence. David Hanna submitted that to assert otherwise raises the ‘spectre of apprehended bias since it appears to proceed on an assumption that any company dealing with the BLF necessarily must have taken steps to “curry favour” with the union or risk adverse consequences’.¹⁵⁸

¹⁵⁵ *Laing O’Rourke Australia Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCA 133.

¹⁵⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 88.

¹⁵⁷ *R v Hillier* (2007) 228 CLR 618 at [48]; Submissions of Counsel Assisting, 3/12/15, para 20.

¹⁵⁸ Submissions of David Hanna, 23/11/15, para 16.

100. This submission is hard to understand. On the simple question of what the email means, counsel assisting's submissions are to be preferred.
101. David Hanna also submitted that any link between industrial action being taken by the CFMEU in relation to Lend Lease and Laing O'Rourke and the alleged benefit said to be provided to David Hanna required an 'extraordinary leap unsupported by evidence'. He also submitted: [p]erhaps if David Hanna was working at the CFMEU and Adam Moore at Lend Lease or Laing O'Rourke the issue might require greater scrutiny'. Then he submitted that 'there is absolutely no evidence Mr Moore was in any way concerned about the BLF taking action against Mirvac, or in any way motivated to offer free services to Mr Hanna in anticipation of such action.'¹⁵⁹
102. Counsel assisting responded by saying that as the PowerPoint presentation forwarded by Adam Moore to Jason Vieusseux on 6 March 2013 made clear, the BLF were one of the unions (along with the CFMEU and CEPU) that were bound by orders made in respect of the M&A Project, and that these orders also applied to 'Kevin Griffin and Tim Jarvis of the BLF'.¹⁶⁰ Similarly, interlocutory orders were sought and granted against the CFMEU *and* the BLF in respect of the Queensland Children's Hospital dispute in August 2012,¹⁶¹ with those orders binding several BLF officials and employees as well as Robert

¹⁵⁹ Submissions of David Hanna, 23/11/15, para 18.

¹⁶⁰ Cornubia House MFI-1, 14/9/15, Vol 1, pp 64, 66.

¹⁶¹ *Abigroup Contractors Pty Ltd v CFMEU & Ors* [2012] FMCA 819; *Abigroup Contractors Pty Ltd v CFMEU & Ors (No.2)* [2012] FMCA 820; *Abigroup Contractors Pty Ltd v CFMEU & Ors (No.3)* *CFMEU v Abigroup Contractors Pty Ltd* [2012] FMCA 822.

Carnegie¹⁶² who was subsequently engaged by Mirvac on the Kawana Project.

103. Counsel assisting's submissions on the issue of Adam Moore's motivation lying in part in concerns to placate David Hanna in relation to industrial troubles are accepted.

Initial discussions about the Cornubia house between Adam Moore and David Hanna

104. Adam Moore first came to know David Hanna in about 1996. At that time Adam Moore held the position of construction manager with Mirvac.¹⁶³ David Hanna was an organiser with the BLF. BLF members worked on Mirvac projects.¹⁶⁴
105. Adam Moore's first substantive dealing with David Hanna concerned negotiating the terms of an enterprise agreement that would govern the relationship between Mirvac Constructions and its employees who were members of the BLF.¹⁶⁵ After that, and in 2011, the two of them worked more closely together on a project that involved arranging and paying for the reconstruction of a house for a family in Logan following its destruction in a horrific house fire.¹⁶⁶ By this stage David

¹⁶² *Abigroup Contractors Pty Ltd v Carnegie* [2013] FCCA 1099.

¹⁶³ Adam Moore, 18/9/15, T:559.24-560.40.

¹⁶⁴ Adam Moore, 18/9/15, T:560.31-561.26.

¹⁶⁵ Adam Moore, 18/9/15, T:561.39-43.

¹⁶⁶ Adam Moore, 18/9/15, T:561.43-46.

Hanna was the BLF's Assistant Secretary, and Adam Moore was Construction Director of Queensland.¹⁶⁷

106. According to Adam Moore, he had a chance encounter with David Hanna at South Bank in Brisbane in early April 2013.¹⁶⁸ He passed by a coffee shop where he saw David Hanna, who said to him 'Can I come and meet you?' To that Adam Moore said 'Yes'.¹⁶⁹

107. Adam Moore gave evidence that David Hanna subsequently telephoned him and arranged a meeting. They then met in Mirvac's office as arranged.¹⁷⁰ At that meeting David Hanna told Adam Moore that he was building a home, had been impressed with Mirvac's finishes on the Logan house, and wanted to speak with a Mirvac interior designer because he was 'no good at picking colours'.¹⁷¹ Adam Moore said that Mirvac did not have interior designers in Queensland any more, but that he could recommend someone whose work he had seen before.¹⁷² Adam Moore also gave evidence that David Hanna told him at this meeting that he was 'having trouble procuring windows...due to lead time'. He asked Adam Moore to 'get him a price on windows'.¹⁷³ Adam Moore said he agreed to do so, and

¹⁶⁷ Adam Moore, 18/9/15, T:562.10-21.

¹⁶⁸ Adam Moore, 18/9/15, T:559.8-16.

¹⁶⁹ Adam Moore, 18/9/15, T:575.6-38.

¹⁷⁰ Adam Moore, 18/9/15, T:575.40-45.

¹⁷¹ Adam Moore, 18/9/15, T:577.7-578.13.

¹⁷² Adam Moore, 18/9/15, T:578.13-23.

¹⁷³ Adam Moore, 18/9/15, T:580.37-581.37.

asked for a copy of the house plans.¹⁷⁴ David Hanna's evidence about this meeting was to similar effect.¹⁷⁵

108. Counsel assisting contended that it was not possible to be satisfied that the evidence given by Adam Moore and David Hanna accurately reflected the totality of their discussions at this time.

109. More likely than not, argued counsel assisting, David Hanna approached Adam Moore in the hope of securing various favours, and Adam Moore obliged. This involved Adam Moore agreeing to have Mirvac arrange for the plumbing, electrical rough-in and interior finishings to the Cornubia house to be carried out at no cost to the Hannas. That was to be organised by Adam Moore and Mathew McAllum with assistance from Mirvac's subcontractors on the Orion PAD2 Project.

110. Counsel assisting submitted:

(a) In a later meeting Adam Moore asked Mathew McAllum to arrange for such services to be provided in a way that did not result in David Hanna having to pay. The terms in which he spoke to Mathew McAllum were consistent with there having been a prior conversation with David Hanna as described above.

(b) Adam Moore had close relationships with a number of subcontractors of Mirvac Constructions on the Orion PAD2

¹⁷⁴ Adam Moore, 18/9/15, T:581.39-582.11.

¹⁷⁵ David Hanna, 21/9/15, T:662.13-663.44.

Project. These included David Mullan of Tilecorp and Glen Wadsworth of Wadsworth Constructions. Thus he had a degree of confidence in being able to assist David Hanna in this way.

- (c) As a result of the unorthodox practice of meeting union related costs of social events described above,¹⁷⁶ Adam Moore was aware that there were Mirvac subcontractors who were prepared to either meet such costs or issue false quotes or invoices to Mirvac to recover them. He therefore would have had a further degree of confidence that Mirvac would be able to assist a union official in a similar way.
- (d) The interior finishings (including the electrical and plumbing 'rough in') of the Cornubia house were actually supplied in this way, without any invoices being issued to the Hannas. It is inherently implausible that this would have occurred unless there had been an agreement between Adam Moore and David Hanna that it would occur.
- (e) When David Hanna and Mathew McAllum first met, they behaved in a manner consistent with them each knowing, independently of the other, that the Hannas would not be paying for the services that Mathew McAllum arranged.
- (f) The Hannas did not pay for any of that work at the time. Nor did they attempt to do so. Further, on at least one occasion, David Hanna acted positively so as to indicate he well knew

¹⁷⁶ See paras 62-83.

that there was an arrangement in place under which he would not have to pay for many of the services.

When an electrician whom David Hanna had organised wanted to invoice him for work done on the Cornubia house, David Hanna did not ask for an invoice, but instead directed him to ring someone else. That other person told the electrician to issue an invoice for the work to an Orion PAD2 Project subcontractor, and falsely describe the work as if it had been performed on that project. David Hanna's knowledge that he would not have to pay for many services most likely originated from the initial discussions he had with Adam Moore.

- (g) The suggestion that David Hanna, a long time participant in the building and construction industry, needed help from anyone (let alone Mirvac's most senior construction executive in Queensland) to obtain a supply source for windows or a good interior decorator is not believable.
- (h) If all David Hanna wanted to talk to Adam Moore about was a price for windows and the contact details of an interior designer he could have spoken to him over the telephone. He did not need to arrange a meeting with the most senior Mirvac construction executive in Queensland for such a routine enquiry. Why, if David Hanna only needed assistance of the limited kind Adam Moore claimed, did he not ring Adam Moore and ask for the name of a recommended window supplier? David Hanna could not provide any sensible

explanation. In answer to that question, he simply said 'I can't answer that'.¹⁷⁷

- (i) Nor did David Hanna provide a meaningful explanation for why he gave Adam Moore plans for the Cornubia house if all he really needed from Adam Moore was a recommended window supplier and interior decorator. He was asked the question five times, consecutively. Each time he could only say: 'Because I wanted to'.¹⁷⁸ The plans were totally unnecessary if David Hanna's inquiry was as narrow as that. But they were necessary if a much greater range of services were to be supplied.

111. Counsel assisting contended that a strong inference arose that Mathew McAllum's sourcing and Mirvac Constructions's paying for the internal finishes of the Cornubia house reflected what had been discussed and agreed between Adam Moore and David Hanna from the outset.

112. Further support for this conclusion came, counsel assisting argued, from the fact that, when David Hanna told Adam Moore in early 2015 that his house might be under investigation by the Commission, Adam Moore did not find it odd that this might be so. He said nothing in response.¹⁷⁹ The fact that David Hanna was prepared to raise this subject with Adam Moore, and the fact that Adam Moore did not find the information surprising, indicates that Adam Moore and David

¹⁷⁷ David Hanna, 21/9/15, T:663.41-44.

¹⁷⁸ David Hanna, 21/9/15, T:663.46-664.12.

¹⁷⁹ Adam Moore, 18/9/15, T:614.34-615.35.

Hanna both knew what had really occurred in relation to Mirvac's involvement in the construction of the Cornubia house.

113. Counsel assisting argued that it is to be remembered that the first relevant meeting between David Hanna and Adam Moore took place in early April 2013. That was within weeks of Adam Moore having received the presentation regarding the M&A Project. It was within weeks of his having forwarding the email to Jason Vieusseux with reference to industrial 'war' and the CFMEU 'smashing' Laing O'Rourke sites, in circumstances where industrial activity and union relations were 'very, very important' to him and Jason Vieusseux¹⁸⁰ and in an environment in which 'there were problems every week with construction in Queensland'.¹⁸¹
114. Counsel assisting submitted that Adam Moore would have his hearers believe that, when he met the most senior official of the BLF in Mirvac's office for the specific purpose of discussing assistance for David Hanna with work on his personal residence, the recent industrial strife which was the subject of the email was not on his mind.¹⁸² Counsel assisting argued that his evidence in this regard should not be accepted.
115. Counsel assisting submitted that it was probable that Adam Moore and David Hanna had a discussion at the meeting of the kind described above.¹⁸³ They submitted further that it is likely that Adam Moore's

¹⁸⁰ Adam Moore, 18/9/15, T:595.28-29.

¹⁸¹ Adam Moore, 18/9/15, T:599.23-24.

¹⁸² Adam Moore, 18/9/15, T:598.24-599.24.

¹⁸³ Paragraph 109.

agreement to assist David Hanna in the way described stemmed from the fact that David Hanna was a senior union official and in a position of influence in the construction industry, and that Mirvac, or Adam Moore himself, could be favourably or disadvantageously affected by the exercise of that influence. Indeed, Adam Moore gave evidence that, by January 2013, he was speaking with Lend Lease, a competitor of Mirvac, with a view to the creation of a position for him to occupy.¹⁸⁴ It is likely that Adam Moore intended that any goodwill generated by his assistance to David Hanna would follow him into any new roles that he undertook after he left Mirvac.

116. Counsel assisting submitted that it was in Adam Moore's interests, as the most senior Queensland based construction executive of Mirvac, to curry favour with the head of one of the powerful building unions in that State. David Hanna knew that. He approached Adam Moore hoping that Mirvac would be able to confer favours on him in the form of free goods and services for the Cornubia House of the kind he subsequently received. He received those favours from Mirvac knowing that Adam Moore hoped it would influence the way David Hanna would treat Mirvac, and him personally, when performing his functions as an official of the BLF.

117. Adam Moore took issue with counsel assisting. Adam Moore submitted that the email received by Adam Moore on 16 April 2013 from David Mullan, and forwarded to Mathew McAllum with contact details for Diane Graham tended to confirm Adam Moore's testimony to the effect that he only spoke to David Hanna about interior design

¹⁸⁴ Adam Moore, 18/9/15, T:624.15-38.

and advised him he would put him in touch with an interior designer with whom he was familiar.¹⁸⁵

118. Adam Moore also submitted that on 22 April 2013, Mathew McAllum copied Adam Moore into an email to David Hanna in which he included a quote for windows. He contended that this piece of evidence is consistent with Mr Moore's testimony. He contended that it was also the behaviour that might ordinarily be expected in a business where a subordinate (Mathew McAllum) was confirming to his superior (Adam Moore) that he had attended to some work which he had been given the task of carrying out.¹⁸⁶
119. Adam Moore went on to note¹⁸⁷ that the meeting invitation sent to Adam Moore and Glen Wadsworth by Mathew McAllum on 23 April 2013 with the subject 'Discuss Cornubia' was declined by Adam Moore's personal assistant. Adam Moore stated that he did not discuss the meeting with his personal assistant. He said that evidence was not contradicted. He further gave evidence that he did not see the meeting invitation at the time, that he was not aware of it, and that he did not attend the meeting with Mathew McAllum and Glen Wadsworth. Adam Moore pointed out that evidence was not contradicted. He submitted that the evidence seemed to suggest that if a meeting took place, it was between Mathew McAllum and Glen Wadsworth only. He further submitted that had this meeting been properly drawn to his attention, he may have prevented the 'folly' undertaken by Mathew McAllum in relation to Cornubia House.

¹⁸⁵ Submissions of Adam Moore, 23/11/15, paras 9-10.

¹⁸⁶ Submissions of Adam Moore, 23/11/15, para 11.

¹⁸⁷ Submissions of Adam Moore, 23/11/15, paras 12-19.

120. Adam Moore contended that of the three pieces of documentary evidence referred to by him, two tend to support his testimony and one (the meeting invitation) appears not to have been drawn to his attention. He argues that beyond these three pieces of contemporaneous documentary evidence, there was no documentary evidence directly contradicting his evidence. This is despite the great volume of documentary evidence assembled with the apparent cooperation of Mirvac.¹⁸⁸
121. Counsel assisting responded thus. On the one hand, Adam Moore was submitting that the fact he was copied to an email from Mathew McAllum to David Hanna regarding a quote for windows is significant because it demonstrates that Adam Moore's discussion with David Hanna was limited to that topic (and interior decorating).¹⁸⁹ On the other hand, Adam Moore tried to discount the significance of his having been sent the invitation from Mathew McAllum to meet Glen Wadsworth to 'Discuss Cornubia' on the basis that he did not see or was not aware of the invitation.¹⁹⁰ Counsel assisting asserts that Adam Moore has adopted inconsistent positions. In any event, whether or not he was aware of the meeting invitation relating to Glen Wadsworth is irrelevant. What matters is the circumstantial fact (as one among a number) that the meeting invitation was *in fact* sent to him.
122. The submission of counsel assisting on this issue is accepted. The circumstances disclosed by the evidence of what happened after the

¹⁸⁸ Submissions of Adam Moore, 23/11/15, para 20.

¹⁸⁹ Submissions of Adam Moore, 23/11/15, para 11.

¹⁹⁰ Submissions of Adam Moore, 23/11/15, paras 16-17.

David Hanna-Adam Moore meeting strongly support counsel assisting's inference about what happened at that meeting.

123. Mirvac argued that the clandestine nature of the way in which the works were paid for suggests that they could not have been performed to garner favour for Mirvac. That is, Adam Moore and Mathew McAllum would not have needed to have concealed the works from senior management and the Board of Management if the goal was to garner favour for Mirvac in its dealings with the BLF.¹⁹¹ In response, counsel assisting contended that the mere fact, if it was a fact, that Mirvac did not know of the benefits being bestowed upon David Hanna did not exclude the possibility that the benefits bestowed on him were intended by Adam Moore or Mathew McAllum, to influence him in relation to Mirvac. Further, it does not exclude the possibility that David Hanna understood the benefits bestowed on him to be intended to influence him in relation to Mirvac.¹⁹²

124. The submission of counsel assisting on this issue, too, is accepted.

Initial discussions about the Cornubia house between Adam Moore and Mathew McAllum

125. Mathew McAllum gave evidence that after David Hanna's initial meeting with Adam Moore, the latter then spoke to Mathew McAllum in Mirvac's Brisbane office.¹⁹³ He told Mathew McAllum that he

¹⁹¹ Submissions of Mirvac, 23/11/15, para 12.

¹⁹² Submissions of Counsel Assisting, 13/11/15, para 7.

¹⁹³ Mathew McAllum, 16/9/15, T:370.12-43.

needed help with a house, and wanted assistance in sourcing some trades and products for the house, including in particular windows and ‘internal finishes’.¹⁹⁴ The latter term signified services such as electrical, plumbing, mechanical (air conditioning) and internal linings.¹⁹⁵ It was Mathew McAllum’s understanding at the time of this conversation that the house belonged to someone within or associated with Mirvac in some way.¹⁹⁶

126. According to Mathew McAllum, during this conversation Adam Moore raised with him the fact that work on the house ‘could be funded out of Orion’.¹⁹⁷ He indicated that ‘we’d write it off to Orion’.¹⁹⁸ This would be done by having trades on the Orion PAD2 Project that did the work either absorb the cost themselves or pass it on to Mirvac by invoices on the Orion PAD2 Project.¹⁹⁹ In that way they ‘would cover the costs through Orion...in a way that it could be concealed’.²⁰⁰ However, there were also discussions between David Hanna and Mathew McAllum in respect of certain works that were organised by Mathew McAllum and to be paid by David Hanna (see further below).²⁰¹

¹⁹⁴ Mathew McAllum, 16/9/15, T:370.45-371.1, 371.16-20.

¹⁹⁵ Mathew McAllum, 16/9/15, T:371.22-39.

¹⁹⁶ Mathew McAllum, 16/9/15, T:372.21-24.

¹⁹⁷ Mathew McAllum, 16/9/15, T:372.29-40.

¹⁹⁸ Mathew McAllum, 16/9/15, T:373.4-5.

¹⁹⁹ Mathew McAllum, 16/9/15, T:376.45-377.6, 378.15-27; 17/9/15, T:411.24-413.36.

²⁰⁰ Mathew McAllum, 17/9/15 T:460.27-30.

²⁰¹ Mathew McAllum, 17/9/15 T:410.3-411.9.

127. Adam Moore subsequently emailed Mathew McAllum the plans for the Cornubia house.²⁰² Mathew McAllum noticed that the plans indicated that the house was owned by the Hannas.²⁰³ Mathew McAllum said that he did not know who David Hanna was at that moment. But soon after he became aware of David Hanna's position within the BLF.²⁰⁴
128. Adam Moore denied that the conversation with Mathew McAllum was in the terms described above.²⁰⁵ His version was that he told Mathew McAllum to pass on Diane Graham's contact details to David Hanna, to chase up a price for windows, to supply subcontractors' details 'if he needs [them]', and to 'look after Hanna'.²⁰⁶
129. Counsel assisting made the following point about Adam Moore's version of that conversation. Even if that version is correct, it casts light on what was initially discussed with Adam Moore and David Hanna in the prior meeting. It is unlikely that Adam Moore would have told Mathew McAllum to 'look after Hanna' and to provide subcontractors' details if his earlier conversation with David Hanna had been as limited as Adam Moore suggested.
130. Counsel assisting submitted that in relation to returning to the competing accounts of the meeting between Adam Moore and Mathew McAllum, the evidence of the latter should be preferred.

²⁰² Mathew McAllum, 16/9/15 T:373.37-41.

²⁰³ Mathew McAllum, 16/9/15 T:374.19-23.

²⁰⁴ Mathew McAllum, 16/9/15, T:374.25-375.2.

²⁰⁵ Adam Moore, 18/9/15, T:625.46-627.35.

²⁰⁶ Adam Moore, 18/9/15, T:582.14-22, 584.6-9.

131. *First*, if it is accepted that Adam Moore and David Hanna had the conversation earlier described, Mathew McAllum's account of his subsequent meeting with Adam Moore accords with this better than Adam Moore's. There are a range of matters unrelated to the content of the subsequent conversation between Adam Moore and Mathew McAllum which together demonstrate that the earlier conversation between Adam Moore and David Hanna probably occurred in the terms described above.²⁰⁷
132. *Secondly*, at this time Adam Moore was comfortable with the practice of making secret arrangements under which Mirvac would pay for union related matters through subcontractors and false variation claims so that Mirvac's national office would not be aware of it. From Adam Moore's perspective at the time, the Cornubia house is likely to have been just another example of that established practice in action. This makes it more likely than not that he would have spoken to Mathew McAllum as Mathew McAllum described.
133. *Thirdly*, as described elsewhere in this Chapter, Adam Moore's general demeanour lacked credibility on a range of matters. In contrast, Mathew McAllum was reasonably frank. He made a range of admissions very much against his own interests. He gave the impression of being the more believable witness of the two.
134. *Fourthly*, when Mathew McAllum commenced giving his evidence he was not aware of, and had not read, the transcript of Adam Moore's private hearing. It was made available to him prior to cross-

²⁰⁷ Paragraph 109.

examination by affected parties. On reading that transcript he would have appreciated that Adam Moore had decided to deny any knowledge of or responsibility for wrongdoing.

135. Counsel assisting submitted that Mathew McAllum felt a sense of betrayal from this point. That became apparent from the evidence he subsequently gave. It was near the end of his period in the witness box. He was asked about the nature of his relationship with Adam Moore. He had retained his composure in trying circumstances for most of his examination, which spread over three days. But he was not able to do so when this topic was raised. He broke down, and a brief adjournment was necessary.²⁰⁸ The impression conveyed both by this incident and by his demeanour was powerful. It was an impression that Mathew McAllum felt a deep sense of betrayal. It was not the reaction of a person who had truly acted alone. It was the reaction of someone whose actions had been authorised by a mentor, and who now appreciated that this mentor was prepared to let him ‘take the fall’ on his own.

136. *Finally*, counsel assisting submitted that there is no doubt that the account given by Mathew McAllum to police in respect of the Cornubia house on 21 July 2015 differed substantially from that which he gave before the Commission. When questioned by police, Mathew McAllum endeavoured to minimise his role in respect of the Cornubia house. In summary, Mathew McAllum told police that he had volunteered to assist David Hanna in obtaining ‘comparison prices’²⁰⁹ when Adam Moore mentioned to him that David Hanna was building a

²⁰⁸ Mathew McAllum, 18/9/15, T:551.20-26.

²⁰⁹ Cornubia House MFI-4, 18/9/15, p 11.8-13.

house.²¹⁰ He told the police that he left trades with David Hanna to organise once he had sourced prices,²¹¹ although he did attend the site ‘a few times’.²¹² Mathew McAllum gave evidence before the Commission that he deliberately did not elaborate on certain matters to the police. He conceded that, in at least one respect, he lied to the police.²¹³ Mathew McAllum’s reliance on a poor memory for failing to provide some information to the police can be at least partly disregarded. But counsel assisting pointed to the following statement as instructive:²¹⁴

I had, I guess you could say that I had blanked that out of my memory and I guess in a way of sort of trying to protect my involvement and other people’s involvement in what had occurred.

Counsel assisting argued that in his police interview, Mathew McAllum was shielding not only himself, but his mentor, Adam Moore. Mathew McAllum confirmed as much in cross-examination.²¹⁵ Faced with the documentary evidence, Mathew McAllum gave a credible account of the relevant circumstances. Adam Moore did not.

137. Against this, Adam Moore contended that with the exception of Mathew McAllum’s evidence, no oral testimony before the Commission had contradicted Adam Moore’s testimony as it related to the house at Cornubia.²¹⁶ Counsel assisting responded that this

²¹⁰ Cornubia House MFI-4, 18/9/15, p 12.36-42, 56.22-25.

²¹¹ Cornubia House MFI-4, 18/9/15, p 59.11-15.

²¹² Cornubia House MFI-4, 18/9/15, p 23.41.

²¹³ Mathew McAllum, 18/9/15, T:528.23-24.

²¹⁴ Mathew McAllum, 18/9/15, T:522.12-15.

²¹⁵ Mathew McAllum, 18/9/15, T:526.41-46.

²¹⁶ Submissions of Adam Moore, 23/11/15, para 23.

submission ignored the striking resemblance between the practices exhibited in respect of the Cornubia house and those exhibited in relation to other general entertainment expenses as discussed above.²¹⁷

138. Adam Moore also submitted that Mathew McAllum unquestionably made a false statement to police about his involvement in the Cornubia house. He contended that counsel assisting's characterisation of Mathew McAllum's evidence – that he 'blanked' the episode from his memory – should be rejected as unsound.²¹⁸ He pointed to Mathew McAllum's application to be excused from giving evidence on the basis of ill-health. He pointed to the unreliability of his recollection. He pointed to his telling the police only the truth which was convenient for him (which was consistent with Adam Moore's testimony), although he minimised his role in respect of the Cornubia house. He pointed to his change of evidence, when faced with the overwhelming documentary evidence and oral testimony assembled against him, by testifying that his actions were instructed by his superior at Mirvac. Adam Moore asserted that the fact that 'no' documentary evidence supported Mathew McAllum should not be ignored.

139. Adam Moore contended that counsel assisting was wrong to characterise Mathew McAllum's evidence as against his interests.²¹⁹ He suggested that Mathew McAllum had a choice. He could admit to being the sole party from Mirvac responsible for any illegal occurrences in relation to the Cornubia house or he could give false evidence to seek to hide behind a 'corporate chain of responsibility'.

²¹⁷ Submissions of Counsel Assisting, 3/12/15, paras 10-11.

²¹⁸ Submissions of Adam Moore, 23/11/15, para 28.

²¹⁹ Submissions of Adam Moore, 23/11/15, para 30.

Adam Moore contended that he chose the latter course to minimise his culpability even though that account is not supported by the balance of the evidence.²²⁰ Adam Moore argued that Mathew McAllum's testimony should be treated with extreme caution because of his previous false statements.²²¹ He contended that there was an abundance of documentary evidence implicating Mathew McAllum and 'absolving' Adam Moore.²²²

140. In response, counsel assisting argued that the fact that Mathew McAllum gave false evidence on certain matters to the police did not necessarily tarnish the bulk of Mathew McAllum's evidence in respect of his and Adam Moore's involvement with the Cornubia house. Counsel assisting pointed to the original submission that Mathew McAllum was shielding not only himself, but his mentor, Adam Moore, as Mathew McAllum confirmed in cross-examination.²²³

141. Counsel assisting in reply further took issue with Adam Moore's submission that there is an abundance of documentary evidence 'absolving'²²⁴ him. Counsel assisting submitted that there is no evidence before the Commission which clears him of any potential responsibility under s 442BA of the *Criminal Code* 1899 (Qld).

142. The submission of counsel assisting is correct. Of the reasons they gave one may be developed further briefly. Much of Adam Moore's

²²⁰ Submissions of Adam Moore, 23/11/15, para 30.

²²¹ Submissions of Adam Moore, 23/11/15, para 31.

²²² Submissions of Adam Moore, 23/11/15, para 35.

²²³ Mathew McAllum, 18/9/15, T:526.41-46.

²²⁴ Submissions of Adam Moore, 23/11/15, para 35.

evidence was not satisfactory either in its content or in the manner of its delivery. In contrast, Mathew McAllum's evidence was given in an ordered, serious and melancholy way. He seemed sorry for what he had done. But he seemed ready to reveal what he had done as best he could in answer to the questions asked.

Initial discussions about the Cornubia house: Adam Moore and Jason Vieuxseux

143. Counsel assisting referred to the evidence of Adam Moore that he told Jason Vieuxseux what had been discussed with David Hanna. Adam Moore said that was limited to procuring prices for windows and providing contact details for an interior designer. He said he did this because he told Jason Vieuxseux 'everything to do with unions, because it was required'.²²⁵ He said that he 'would have' told Jason Vieuxseux that he had asked someone junior to assist David Hanna in the task.²²⁶ Adam Moore claimed he could recall this conversation, and the date upon which it occurred, even though these events took place more than two years ago and he spoke to Jason Vieuxseux almost every day about a very large number of diverse matters.²²⁷ Jason Vieuxseux denied having been told about the Cornubia house at this time.²²⁸

²²⁵ Adam Moore, 18/9/15, T:584.34-585.7

²²⁶ Adam Moore, 18/9/15, T:587.26-588.12.

²²⁷ Adam Moore, 18/9/15, T:585.9-587.19.

²²⁸ Jason Vieuxseux, 30/10/15, T:754.15-19, 764.40-46, 765.21-22.

144. Counsel assisting submitted that Adam Moore’s evidence was not credible and should be rejected. It was not believable that Adam Moore could have remembered such a short conversation with Jason Vieuxseux. Mirvac endorsed the submission of counsel assisting. It added that the call from Adam Moore to Jason Vieuxseux only lasted 16 seconds – an insufficient time to discuss the matters which Adam Moore alleged to be the subject of that phone call.²²⁹ Mirvac also referred to Jason Vieuxseux’s denial that he was ever informed about the works on the Cornubia house.²³⁰
145. Adam Moore contended that it was open to find, and indeed that it was likely, that Adam Moore relayed to Jason Vieuxseux, by telephone on 17 April 2015, the details of Adam Moore’s conversation with David Hanna about the Cornubia house. That is consistent with Adam Moore’s evidence that it was his usual practice to contact Jason Vieuxseux for interactions with trade union representatives.²³¹ It would be ‘unremarkable’ for such a conversation to have occurred. And it was not remarkable that Jason Vieuxseux might not recall such a conversation.²³² In relation to this latter point, it can be observed, contrary to Adam Moore’s submission, that Jason Vieuxseux’s evidence went further than saying he could not recall such a conversation. As was later acknowledged in Adam Moore’s

²²⁹ Submissions of Mirvac, 23/11/15, paras 21-22.

²³⁰ Submissions of Mirvac, 23/11/15, para 24; Jason Vieuxseux, 30/10/15, T:764.40-47.

²³¹ Submissions of Adam Moore, 27/11/15, para 10.

²³² Submissions of Adam Moore, 27/11/15, para 11.

submissions, he denied it.²³³ Jason Vieusseux words were: ‘there was no such discussion’.²³⁴

146. Adam Moore continued his criticism of Mirvac’s submissions by noting that only the outgoing phone call records of Adam Moore were adduced in evidence, not incoming ones and not Jason Vieusseux’s phone records. Adam Moore contended that it was appropriate to surmise that, in the ordinary course of business, Jason Vieusseux probably returned Adam Moore’s initial (short) call later on 17 April 2013. But that submission rests only on speculation.
147. Counsel assisting submitted that, on the one hand, Adam Moore’s evidence was that the matter was significant enough for him to raise with his superior, Jason Vieusseux. Yet, on the other hand, his evidence was that he did not even bother to discuss the Cornubia house again with Mathew McAllum.²³⁵ There is tension between these two positions of a kind which suggested his evidence is not credible. Instead it represented an *ex post facto* reconstruction created by reference to Adam Moore’s own best interests.
148. Counsel assisting submitted that Adam Moore repeatedly gave the impression of being acutely aware of the particular pieces of documentary evidence which did not reflect well on him. He gave the impression of being at pains to attempt to distance himself from any responsibility for those items. He did so, in particular, by suggesting that Jason Vieusseux had effectively sanctioned his behaviour on each

²³³ Submissions of Adam Moore, 27/11/15, para 13.

²³⁴ Jason Vieusseux, 30/10/15, T:765.22.

²³⁵ Adam Moore, 18/9/15, T:591.17-42.

occasion. This was ironic, it was said, given the way Adam Moore sought to distance himself from his subordinate, Mathew McAllum.

149. Counsel assisting argued that the impression that both Adam Moore and Jason Vieusseux gave through their evidence was that Adam Moore was a man in a very senior position who knew his own mind. He was unaccustomed and unwilling to be running ‘cap in hand’ to Jason Vieusseux, giving disclosure and seeking approval at every turn.²³⁶ Adam Moore’s at times aggressive and brusque manner in having to answer questions in the witness box reinforced this impression. Counsel assisting contended that in all of these circumstances, it is improbable that Adam Moore would have told Jason Vieusseux about his conversation with David Hanna. The submissions of counsel assisting on this issue are accepted.

Initial discussions about the Cornubia house: subsequent meeting with Jennifer Hanna

150. Mathew McAllum gave evidence that some time shortly after this first meeting with Adam Moore, he and Adam Moore met with Jennifer Hanna at Mirvac’s offices in Brisbane. He said that he attended the meeting at Adam Moore’s request.²³⁷ Mathew McAllum thought the meeting could have occurred a week or less after his initial meeting with Adam Moore.²³⁸ At the meeting they discussed what work

²³⁶ See for example Jason Vieusseux’s evidence concerning the approach to employment and contracting, and the way in which certain external contractors were being billed: Jason Vieusseux, 30/10/15, T.762.40-763.13.

²³⁷ Mathew McAllum, 18/9/15, T:553.9-554.10.

²³⁸ Mathew McAllum, 18/9/15, T:554.12-27.

needed to be done to the house. They agreed that Mathew McAllum would be the contact and would be attending at the house to organise the work. They agreed that an interior designer (Diane Graham)²³⁹ would be in contact with Jennifer Hanna shortly.²⁴⁰ According to Mathew McAllum, Adam Moore and Jennifer Hanna did most of the talking.²⁴¹ His impression was that Jennifer Hanna was proceeding as if Mirvac would be completing the house for the Hannas.²⁴²

151. Adam Moore unequivocally denied participating in such a meeting.²⁴³ However Jennifer Hanna agreed that she did attend a meeting at Mirvac's offices at an early stage and discussed the plans for the house and colour selections.²⁴⁴ She thought David Hanna organised the meeting. And she thought that Adam Moore was in attendance.²⁴⁵
152. Adam Moore submitted that because the accounts of the meeting are conflicting, it is unsatisfactory to rely upon it in support of what he chose to term 'the case theory of counsel assisting'.²⁴⁶ He contended that at most it could be said a meeting probably occurred. But it was entirely unclear who attended or what was said.
153. The only submission made by David Hanna which touched upon this meeting is: 'the submissions allege a meeting between Messrs Hanna

²³⁹ See paras 223-225.

²⁴⁰ Mathew McAllum, 18/9/15, T:555.39-44, 556.24-25.

²⁴¹ Mathew McAllum, 18/9/15, T:556.27-29.

²⁴² Mathew McAllum, 18/9/15, T:557.11-19.

²⁴³ Adam Moore, 18/9/15, T:592.34-593.8.

²⁴⁴ Jennifer Hanna, 21/9/15, T:709.5-41.

²⁴⁵ Jennifer Hanna, 21/9/15, T:709.5-41.

²⁴⁶ Submissions of Adam Moore, 23/11/15, para 46.

and Moore in which an agreement is said to have been reached. There literally is no evidence that occurred.’²⁴⁷

154. David Hanna’s submission is plainly wrong. For instance, it does not deal with the evidence of Jennifer Hanna which places Adam Moore at a meeting with her involving discussion of the Cornubia house. That evidence is unlikely to have been invented by Jennifer Hanna. On any view, the evidence of Jennifer Hanna on this point provides some support for Mathew McAllum’s account. There is no reason to reject Mathew McAllum’s account.

Subsequent dealings between Mathew McAllum and David Hanna

155. After Mathew McAllum had spoken with Adam Moore and received the plans, he visited the Cornubia property. There he met David Hanna for the first time.²⁴⁸ He introduced himself. They walked around the site. They talked about the trades and services that would need to be sourced.²⁴⁹
156. The documents and evidence of tradesmen working on the Cornubia site demonstrate that, from this point onwards, Mathew McAllum operated as the de facto project manager for the construction of the Cornubia home. He made arrangements about when different trades should come and go. He arranged for particular trades to submit their invoices to Mirvac. He liaised extensively with David Hanna and Jennifer Hanna in relation to the progress of the works.

²⁴⁷ Submissions of David Hanna, 23/11/15, para 14.

²⁴⁸ Mathew McAllum, 16/9/15, T:376.1-4.

²⁴⁹ Mathew McAllum, 16/9/15, T:376.1-43.

157. Mathew McAllum did not, however, organise all the works. There were a substantial number of trades organised directly by David Hanna, using contacts known to him. Those trades were paid for their work directly by David Hanna.
158. The division of responsibilities, as between David Hanna and Mathew McAllum, for organising and paying for different aspects of the work was not the subject of much discussion when they first met.²⁵⁰ There was no discussion and organisation of the kind one would expect if the Hannas were going to pay for the work Mathew McAllum was going to organise. There was no discussion about ensuring that the work that Mathew McAllum was going to organise would not cost more than a certain amount. To the contrary, Mathew McAllum was informed that the Hannas would only have a certain amount of money to contribute to the overall cost of the works, making Mirvac's role essential to the completion of the Cornubia house.²⁵¹
159. Counsel assisting submitted that both men behaved consistently with each of them having an understanding, independently of the other, of two components. The first was that Mathew McAllum would be sourcing the 'internal finishing' trades (internal linings, such as tiles and plastering, plumbing, electrical, air-conditioning, and painting) on the basis that David Hanna would not need to pay for them. The second was that David Hanna would be organising the rest of the work (such as hardware, and unrelated works such as the pool). There was no need for them to have a detailed discussion about this when they met. Counsel assisting argued that each of them already understood

²⁵⁰ Mathew McAllum, 16/9/15, T:377.8-14.

²⁵¹ Mathew McAllum, 16/9/15, T:399.18-400.37.

what was to occur. That is because by this time they had each spoken separately with Adam Moore about it.

160. Counsel assisting submitted that the allocation of responsibility as between David Hanna and Mathew McAllum for organising and paying for trades obtained further precision organically, as the project moved forward and as particular items of work were actually arranged (or not) by Mathew McAllum or Adam Moore.²⁵²
161. In this regard, Mathew McAllum described having conversations with David Hanna during which the latter would indicate whether or not he had enough money to pay for certain costs, and if he did, David Hanna said he would pay.²⁵³ The purchase of the air-conditioning units from Daikin (as opposed to the installation services provided by Gray Bros) is a good example of this.²⁵⁴
162. Mathew McAllum also described conversations in which he indicated to David Hanna when he had not been able to organise for the cost of a particular internal finishing trade to be borne by Mirvac, with the result that David Hanna would need to organise and pay for it.²⁵⁵ He gave as an example a discussion he had with David Hanna in relation to joinery work for the Cornubia kitchen. He told David Hanna that the Orion PAD2 Project did not have a large joinery package, so that there was no opportunity to cover the costs of that work, which were a ‘big

²⁵² Mathew McAllum, 16/9/15, T:377.27-39; 17/9/15, T:406.19-23.

²⁵³ Mathew McAllum, 17/9/15, T:405.29-38.

²⁵⁴ See paras 339-341.

²⁵⁵ Mathew McAllum, 17/9/15, T:405.41-46, 410.20-26.

component' of the house.²⁵⁶ David Hanna then arranged and paid for that work himself.²⁵⁷ Another example was the windows, the cost of which would be covered by David Hanna because Mirvac did not have a window contractor on the Orion PAD2 Project that supplied domestic windows.²⁵⁸ David Hanna and Mathew McAllum discussed this.²⁵⁹

163. Mathew McAllum did not suggest that these subsequent discussions about Mirvac covering costs of certain trades came as a surprise to David Hanna. He did not suggest that these discussions in some way represented a departure from what David Hanna then expected would occur. Counsel assisting contended that this was because David Hanna had discussed the matter with Adam Moore at the outset.
164. The submissions of counsel assisting are accepted for the reasons just given and those about to be given.

Contest between David Hanna and Mathew McAllum

165. Counsel assisting submitted that Mathew McAllum's evidence as to these dealings with David Hanna should be accepted, and contrary evidence given by David Hanna (discussed below) should be rejected.
166. David Hanna's evidence was that he 'continually asked' Mathew McAllum for invoices for the services that Mathew McAllum had

²⁵⁶ Mathew McAllum, 17/9/15 T:410.29-32.

²⁵⁷ Mathew McAllum, 16/9/15, T:395.30-32.

²⁵⁸ Mathew McAllum, 17/9/15, T:410.47-411.2, 417.42-418.12.

²⁵⁹ Mathew McAllum, 17/9/15, T:418.14-24.

organised for the internal finishing trades to provide.²⁶⁰ That is contrary to the evidence that Mathew McAllum gave. His evidence was to the effect that there was no discussion about the Hannas paying for much of the work organised by Mathew McAllum either at their initial meeting or in the course of subsequent discussion.²⁶¹

167. Counsel assisting submitted that Mathew McAllum's evidence should be accepted for the following reasons.

- (a) Mathew McAllum regularly made admissions against his interests.
- (b) David Hanna had a powerful motive to lie. The Cornubia house was his family's home. It was a valuable asset. He had a strong interest in giving evidence which did not put that asset at risk (whether through confiscation proceedings or otherwise). And he had a strong interest in giving evidence which did not expose him to criminal charges.²⁶²
- (c) Other evidence demonstrates that David Hanna's assertions as to seeking invoices and wanting to pay for the services should be rejected. In particular, prior to having spoken with Adam

²⁶⁰ David Hanna, 21/9/15, T:669.18-30.

²⁶¹ Mathew McAllum, 16/9/15, T:377.8-14.

²⁶² This explains why much of David Hanna's evidence was not credible and should not be accepted in this case study. These considerations and motivations were not at play in the document destruction case study, in which David Hanna's demeanour and the quality of his evidence following the receipt into evidence of a secretly taped audio recording was noticeably different. Acceptance or rejection of the evidence of a witness is not an all-or-nothing proposition. A witness's evidence on one topic may be believed, and on another topic rejected.

Moore, David Hanna had already organised a friend, Darren Wall, to do electrical rough-in works on the house. However when that friend completed the works and spoke to David Hanna about invoicing him for it, David Hanna told him to ring someone else to discuss invoicing. The electrician did so, and was told to send a bill for the work on the Cornubia house to the electrician working on the Orion PAD2 Project and to misdescribe the work as having been performed on that project.²⁶³ Far from wanting to pay and attempting to do so, David Hanna knew that he would not be paying and took steps to take advantage of the arrangement that was in place and divert an invoice elsewhere. This is a powerful point against David Hanna. He did not deal with it in his submissions.

- (d) David Hanna was unable to provide any estimate of how often he allegedly tried to speak with Mathew McAllum about invoicing. He gave inconsistent evidence as to whether or not he was ‘continually’ chasing Mathew McAllum, and when this alleged chasing occurred. He said later ‘when I say “continually”, it was just a few calls’²⁶⁴ He repeatedly said that he could not recall how many such calls he had made.²⁶⁵
- (e) There is no record of David Hanna having made such a request. If David Hanna had been pressing for invoices as he

²⁶³ The evidence relevant to this incident is addressed subsequently.

²⁶⁴ David Hanna, 21/9/15, T:670.35.

²⁶⁵ David Hanna, 21/9/15, T:671.7-673.1.

suggested, it would have been expected that some record of the activity would exist.

- (f) It is unlikely that Mathew McAllum would have acted as he did (in having Mirvac cover the costs through false invoices from subcontractors) if, in fact, David Hanna was telling him that he wanted to receive and pay invoices.
- (g) David Hanna was not able to provide a credible explanation as to why, if he had not received a satisfactory response from Mathew McAllum or Adam Moore to his alleged requests for invoices, he did not seek invoices from the subcontractors who had done the work. After all, he knew some of them. And his evidence was that he was ‘happy’ to ‘pay the bill’ and ‘had the finance at the time to do so’.²⁶⁶

For example, David Hanna knew that David Mullan of Tilecorp had done the tiling²⁶⁷ (as shortly described below). He was asked why he had not requested David Mullan to send an invoice, David Hanna claimed that he had, and that David Mullan had said ‘I’ll get around to it. It will come’.²⁶⁸ David Mullan never suggested there was such a conversation. The conversation is inherently improbable. That is because, by the time it was alleged to have taken place, David Mullan had

²⁶⁶ David Hanna, 21/9/15, T:673.44-47.

²⁶⁷ See paras 221-237.

²⁶⁸ David Hanna, 21/9/15, T:695.38-39.

already caused Tilecorp to send Mirvac a quote and invoice for the work, and Mirvac had paid Tilecorp.²⁶⁹

- (h) Moreover, David Hanna suggested that he was happy to wait to pay for works until after the house was completed, when he could check defects and refinance the property.²⁷⁰ This was inconsistent with his claimed attempts to ‘chase’ payment of invoices during the second half of 2013.²⁷¹ There is no record of David Hanna having acted consistently with this claimed intention to pay after completion by seeking invoices from relevant subcontractors after 6 January 2014, when the Cornubia house underwent its final certification.²⁷²

168. According to David Hanna, it was just his ‘lucky day’ that he did not receive any invoices in respect of the work on his family home that had been arranged through Adam Moore and Mathew McAllum.²⁷³ If it were only one trade’s work which had not been invoiced, that might have been put down to luck. But it was not a case of there being just one missing invoice. All the invoices were missing. Counsel assisting argued that luck cannot explain the fact that the Hannas did not receive a single invoice in respect of the work done by any of the many and varied trades in question. David Hanna’s claim that Mathew McAllum offered his extensive assistance to David Hanna out of the kindness of

²⁶⁹ See paras 233-237.

²⁷⁰ David Hanna, 21/9/15, T:670.10-28.

²⁷¹ David Hanna, 21/9/15, T:681.27-35.

²⁷² Cornubia House MFI-1, 14/9/15, Vol 3, pp 1016-1017.

²⁷³ David Hanna, 21/9/15, T:696.41-44.

his heart and as a service akin to that of a pro bono lawyer²⁷⁴ is not credible.

169. For these reasons counsel assisting contended that David Hanna's evidence as to seeking invoices from Mathew McAllum and others is not believable. That evidence represents an unsuccessful attempt by David Hanna to explain away, after the event, the fact that he did not pay for the services. In truth he never intended to pay. And Adam Moore and Mathew McAllum did not expect him to.
170. David Hanna did not grapple with these submissions of counsel assisting. He only submitted generally that counsel assisting's submissions were based on speculation and supposition.
171. These unanswered submissions of counsel assisting, taken together, are powerful. They must be accepted. The consequences of that acceptance are set out below.

C – CONTRAVENTIONS

Section 442B of the *Criminal Code* 1899 (Qld)

172. Section 442B of the *Criminal Code* 1899 (Qld) provides as follows:

Any agent who corruptly receives or solicits from any person for himself or herself or for any other person any valuable consideration—

²⁷⁴ David Hanna, 21/9/15, T:675.7-17.

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business; or
- (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal's affairs or business;

commits a crime.

173. Section 442M(2) of the *Criminal Code* 1899 (Qld) relevantly provides:

Burden of proof that gift not secret commission

If in any prosecution under this chapter it is proved that any valuable consideration has been received or solicited by an agent from or given or offered to an agent by any person having business relations with the principal, without the assent of the principal, the burden of proving that such valuable consideration was not received, solicited, given, or offered in contravention of any of the provisions of this chapter shall be on the accused.

174. The term ‘agent’ is defined in s 442A of the *Criminal Code* 1899 (Qld) to include any person acting for or on behalf of any corporation, firm, or person, including any officer of any corporation or association. This definition captures officers of a trade union.²⁷⁵ The State registered BLF and federally registered BLF were incorporated entities²⁷⁶ capable of owning property. Each was therefore both an ‘association’ and a ‘person’²⁷⁷ falling within the language of s 442A of the *Criminal Code*

²⁷⁵ *R v Gallagher* [1986] VR 219.

²⁷⁶ *Industrial Relations Act* 1999 (Qld), s 423; *Fair Work (Registered Organisations) Act* 2009 (Cth), s 27.

²⁷⁷ *Criminal Code* 1899 (Qld), s 1.

1899 (Qld). David Hanna was an ‘agent’ of the BLF for the purposes of s 442B of the *Criminal Code* 1899 (Qld).

David Hanna’s potential liability under s 442B of the *Criminal Code* 1899 (Qld)

175. Counsel assisting argued, and with success, that through the actions of Mathew McAllum and Adam Moore, David Hanna received ‘valuable consideration’ from Mathew McAllum and Adam Moore. That term is defined in s 442A of the *Criminal Code* 1899 (Qld) very widely and includes not only personal property, but any benefit or advantage whatsoever. The valuable consideration that David Hanna received included:

- (a) the free goods and services for the Cornubia house that Adam Moore and Mathew McAllum organised and arranged to be paid by Mirvac Constructions;
- (b) the free services of Mathew McAllum in the project management of the building work; and
- (c) the free services provided by Adam Moore and Mathew McAllum in sourcing and arranging for particular trades to attend at the property and undertake work, the costs of which were absorbed by the relevant subcontractor/s.

176. At the time, Mirvac Constructions was a party to an enterprise agreement that covered the BLF.²⁷⁸ The two entities dealt with each

²⁷⁸ See Mirvac Constructions (Qld) Pty Limited and CFMEU Union Collective Agreement 2011-2015, cl 2.

other regularly in relation to worksites.²⁷⁹ Plainly, Mirvac had business relations with the BLF at the relevant time. Accordingly, s 442M(2) of the *Criminal Code* 1899 (Qld) would apply at this point in any prosecution of David Hanna. Assuming that the BLF (whether through its Committee of Management or otherwise) did not assent to the receipt by David Hanna of the valuable consideration discussed above,²⁸⁰ the burden would fall on him to prove that that receipt was not in contravention of s 442B of the *Criminal Code* 1899 (Qld). There is no record before the Commission in the evidence of any such assent. This is unsurprising given David Hanna's evidence that he did not discuss the matter with anyone.²⁸¹

177. The evidence does not indicate that David Hanna would be likely to discharge that burden. Indeed the evidence establishes that the remaining elements of the section are positively satisfied.
178. The receipt of free goods and services by David Hanna would tend to influence David Hanna to show favour to each of Mathew McAllum, Adam Moore and Mirvac²⁸² in relation to the BLF's affairs and business. The words 'in relation to his ... principal's affairs or business' are wide words.²⁸³

²⁷⁹ See, for example, para 88.

²⁸⁰ Paragraph 175.

²⁸¹ David Hanna, 21/9/15, T:675.32-38.

²⁸² Note that under s 442B of the *Criminal Code* 1899 (Qld) it will suffice if the corrupt receipt of any valuable consideration tends to influence an agent to show favour or disfavour to *any person* not necessarily the person from whom the valuable consideration is received.

²⁸³ *Morgan v DPP* [1970] 3 All ER 1053 at 1057.

179. The expression ‘affairs and business’ of the BLF included acting for and on behalf of members who worked on construction sites in Queensland. The expression included organising and advising those members about when and what industrial action to take. David Hanna held the most senior position in the BLF in Queensland. He held substantial power and influence with respect to industrial action. He could form views as to what industrial action should be taken by BLF members, against which employers, and on which developer’s worksites. He could give directions to promote and encourage that action to be taken. He could direct action himself to achieve that end. His power and influence extended to making decisions about whether industrial action should be taken on any Mirvac site in Queensland. It is obvious that the receipt of free goods and services at Mirvac’s expense would tend to influence David Hanna about whether or not he would so act in the ways just discussed.
180. So David Hanna received valuable consideration from Mirvac which would tend to influence him to show favour to Mirvac. This receipt is properly characterised as ‘corrupt’.
181. The term ‘corruptly’ is not defined in the *Criminal Code* 1899 (Qld). It does not connote dishonesty.²⁸⁴ On the current state of the law in Queensland²⁸⁵ whether a receipt is properly characterised as ‘corrupt’ depends instead on the belief of the recipient as to the hopes and intentions of the donor in giving the benefit. For example, a person’s receipt of a benefit will be corrupt when that person believes it is being given because the donor ‘hopes for an act of favouritism in return’. It

²⁸⁴ *R v Gallagher* [1986] VR 219 at 230-231.

²⁸⁵ *R v Nuttall* [2010] QCA 64 at [36].

will be corrupt where that person is ‘knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit’.²⁸⁶ For s 442B to be satisfied, it is not necessary to establish that the donor actually held such a hope or intention of influencing the agent. Nor does it matter that the agent did not actually show favour to the donor.²⁸⁷

182. The test discussed above has been endorsed in Victoria and Queensland. But as pointed out in the submissions of counsel assisting in relation to the Cleanevent case study,²⁸⁸ the NSW Court of Criminal Appeal has diverged, in part, from it. In *Mehajer v R*,²⁸⁹ the Court held that to satisfy the elements of the New South Wales equivalent to s 442B of *Criminal Code* 1899 (Qld), it is necessary also to establish that the benefit received is corrupt according to standards of conduct generally held. A payment or receipt without the knowledge of the principal for one of the proscribed purposes would generally be regarded as corrupt according to those standards.²⁹⁰
183. Ultimately, it is unlikely that the adoption of the approach in New South Wales would make any material difference in the context of the current circumstances. This so, for example, because on his own evidence, David Hanna denied telling anyone within the union that Mathew McAllum was providing him with any assistance and that

²⁸⁶ *R v Gallagher* [1986] VR 219 at 228 referring to *R v Dillon* [1982] VR 434 at 436.

²⁸⁷ *R v Gallagher* [1986] VR 219 at 226-227, 231. See also *R v Gallagher* (1987) 29 A Crim R 33 at 34-35.

²⁸⁸ Submissions of Counsel Assisting, AWU: Cleanevent Case Study, 6/11/15, para 511. See also Volume 4, Chapter 10.2 of this Report.

²⁸⁹ [2014] NSWCCA 167 at [59]-[63].

²⁹⁰ *Mehajer v R* [2014] NSWCCA 167 at [59]-[63].

work done on his house had not been invoiced. David Hanna said that he did not ‘see it as an issue’.²⁹¹ That evidence cannot be accepted.

184. In the present case, David Hanna knew that the gift of free goods and services placed him in a position of temptation. He knew that Mathew McAllum was not simply acting out of the goodness of his heart. He knew that Mathew McAllum was instead, and at the direction of Adam Moore, ‘greasing the wheels’ of the relationship between Mirvac and the BLF in the hope or expectation that it would run smoothly as a result of the giving of the free goods and services.
185. David Hanna opposed the submissions of counsel assisting on the ground that they did not properly identify the relevant elements of s 442B and did not properly apply them to the facts. He contended that the submissions were ‘tainted with speculation and supposition’. He also contended that the principal submissions gave rise to a reasonable apprehension of bias in relation to the authorship of the submissions of counsel assisting.²⁹²
186. Counsel assisting responded that David Hanna has not identified the misstatement of the law of which he complains. Counsel assisting also rejected the claim about bias as being without any basis – quite correctly. Counsel assisting submitted that it was proper to make submissions about whether the evidence as a whole supports a finding that a person *may* have contravened a particular law, including one that carries criminal penalties.

²⁹¹ David Hanna, 21/9/15, T:673.40-674.14, 675.32-43.

²⁹² Submissions of David Hanna, 23/11/15, paras 3-4.

187. Counsel assisting drew attention to the following passage of the Interim Report:²⁹³

...a finding that a person's conduct **may** have been a breach of a relevant law, regulation or professional standard, ... is used to convey the view that there is credible evidence before the Commission raising a probable presumption that a breach of law, regulation or professional standard has occurred.

...

Here 'probable' means not certain, nor nearly certain, but more than merely possible. On this formulation, a finding could only be made that a breach of law, regulation or professional standard may have occurred where on credible evidence before it, it is probable, and not merely possible, that a contravention occurred.

188. David Hanna also complained, by referring to 'the standards of a fair trial' that no case study materials were disclosed *in advance* to David Hanna, but only when the hearing commenced on 15 September 2015.²⁹⁴ Counsel assisting responded that a Royal Commission is not required to provide notice of particulars of lines of inquiry to a person being examined, or to provide them with relevant evidence in advance of their examination. Disclosures of this kind could undermine the purposes of the factual inquiry sought to be undertaken.²⁹⁵

189. On 23 November 2015 David Hanna further complained, in his written submissions in reply, that documents seized from him by the Royal Commission police taskforce were not provided to him before or

²⁹³ Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, pp 19 [62], 20 [66].

²⁹⁴ Submissions of David Hanna, 23/11/15, para 5.

²⁹⁵ Submissions of Counsel Assisting, 3/12/15, para 27.

during the course of hearings before the Commission.²⁹⁶ On 17 September 2015 he had applied for the provision of those documents, including electronic hard drives. The application was made on the basis that the documents were necessary to determine whether his counsel should cross-examine Mathew McAllum.²⁹⁷ Solicitors for the Commission subsequently advised David Hanna's counsel that all documents relevant to the Cornubia house case study that were in the Commission's possession and had been reviewed by it had been disclosed to him. They also advised that electronic hardware seized by police was in the possession of the computer forensics department of the Queensland Police Service (**QPS**). The following morning, David Hanna's counsel advised the Commission that he did not seek to cross-examine Mathew McAllum.²⁹⁸ The issue of disclosure was not further pursued until David Hanna's submissions in reply.

190. Counsel assisting further noted that in any event, at no point during his examination or cross-examination did David Hanna suggest that any documents, including any held by the QPS, were capable of exculpating him. Rather, his answers to the matters put to him in respect of the construction of the Cornubia Property were that:

(a) he was 'lucky' that he did not receive any invoices for work organised by Mathew McAllum and Adam Moore;²⁹⁹

(b) Mathew McAllum offered his extensive assistance:

²⁹⁶ Submissions of David Hanna, 23/11/15, para 5.

²⁹⁷ Mathew McAllum, 17/9/15, T:502.6-11.

²⁹⁸ Mathew McAllum, 18/9/15, T:550.22-24.

²⁹⁹ David Hanna, 21/9/15, T:696.41-44.

- (i) out of the kindness of his heart;³⁰⁰
- (ii) as a service akin to a pro bono lawyer;³⁰¹
- (iii) because he wanted to;³⁰² and
- (iv) because both he and David Hanna were ‘good bloke[s]’.³⁰³

191. David Hanna also complained that he is unfairly obliged to answer counsel assisting’s principal submissions that findings be made against him. He complained that he ought not be forced to disclose his defence to the charges referred to by counsel assisting.³⁰⁴ Again he referred to the supposed obligations and pressures as being inconsistent with the notion of a ‘fair trial’. Counsel assisting responded that there is nothing which compelled David Hanna to respond to the principal submissions. Any decision (if one is made) by a prosecuting authority formally to charge David Hanna will be taken following a careful consideration of the admissible evidence against him. Counsel assisting contended that it is fanciful to suggest that an independent prosecutor would be improperly influenced by counsel assisting’s principal submissions.

³⁰⁰ David Hanna, 21/9/15, T:675.12.

³⁰¹ David Hanna, 21/9/15, T:675.9-10.

³⁰² David Hanna, 21/9/15, T:689.46-690.3.

³⁰³ David Hanna, 21/9/15, T:690.5-9.

³⁰⁴ Submissions of David Hanna, 23/11/15, para 7.

192. David Hanna further argued that the evidence before the Commission does not support a finding that David Hanna may have committed an offence under s 442B(b). He argued that certain identified paragraphs of counsel assisting's submissions involve 'supposition' and 'speculation'.³⁰⁵ Counsel assisting rejected that complaint. They contended in response that the paragraphs in question are rather a summation of conclusions which are open on the direct and circumstantial evidence presented to the Commission.³⁰⁶
193. Further, David Hanna contended that the 'Commission should reject outright the proposition that David Hanna should now be called upon to discharge a burden of proof under s 442M of the *Criminal Code* 1899 (Qld) to prove his innocence in response to [counsel assisting's] selection of evidence and commentary upon it'.³⁰⁷
194. Counsel assisting contended in response that this submission was misconceived. Nothing needed to be proved or disproved by David Hanna before the Commission. The principal submissions³⁰⁸ merely made the point that, because Mirvac and the BLF had business relations, the reverse onus in s 442M *would* be engaged in any potential prosecution of David Hanna provided the BLF had not assented to the receipt of the alleged benefits. The principal submissions did no more than state the effect of s 442M.³⁰⁹

³⁰⁵ Submissions of David Hanna, 23/11/15, paras 9-11.

³⁰⁶ Submissions of Counsel Assisting, 3/12/15, para 32.

³⁰⁷ Submissions of David Hanna, 23/11/15, para 12.

³⁰⁸ Submissions of Counsel Assisting, 13/11/15, paras 128-129.

³⁰⁹ Submissions of Counsel Assisting, 3/12/15, para 32.

195. David Hanna also complained that counsel assisting does not suggest that the allegations made against David Hanna could be proven beyond reasonable doubt. He submitted that the phrase ‘more likely than not’ appears five times. He submitted that assertions that some matter is ‘likely’, or ‘unlikely’ appear another 19 times. David Hanna further complained that certain matters are asserted to be ‘probable’ or ‘improbable’, or to have ‘probably’ occurred, seven times. This culminates in a submission that ‘[t]hese are not submissions upon which a finding of guilt could be based.’³¹⁰
196. David Hanna also notes that it is not suggested by counsel assisting that David Hanna should actually be charged with any offence. He submits that findings that David Hanna ‘may have committed’ an offence ought not to be made.³¹¹
197. In response, counsel assisting submitted that its reference to matters being probable or likely is consistent with the approach adopted by the Commission in respect of the Interim Report. It is also consistent with the Commission’s lack of power to conclude that a person *has* (as opposed to *may have*) engaged in conduct in contravention of the law.³¹² But the principal submissions do not urge that any finding of guilt be made. That is a matter for the courts, after considering any prosecution brought by prosecuting authorities. A referral may be made to the prosecuting authorities, but the grounds for a referral are quite different from the grounds on which a court might convict.

³¹⁰ Submissions of David Hanna, 23/11/15, para 21.

³¹¹ Submissions of David Hanna, 23/11/15, paras 22-23.

³¹² Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 18-19 [58]-[59].

198. The arguments advanced by David Hanna exhibit numerous fallacies. They confuse the function of a Royal Commission with the function of prosecuting authorities and the function of courts. They do so in a radical way. Notions of a ‘fair trial’, however rhetorically appealing, do not apply to commissions of enquiry including this Royal Commission. Criminal trials involve a final adjudication of guilt. Commissions of inquiry have a duty to inquire. They have a power to recommend.
199. For the reasons discussed above, David Hanna may have committed an offence under s 442B of *Criminal Code* 1899 (Qld).

Potential liability of Adam Moore and Mathew McAllum

200. Section 442BA applies to the giver of a benefit, and is in the following terms:

442BA Gift or offer of secret commission to an agent

Any person who corruptly gives or offers to any agent any valuable consideration—

(a) as an inducement or reward for or otherwise on account of the agent doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal’s affairs or business; or

(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal’s affairs or business;

commits a crime.

201. Section 442BA strikes at the intention of the giver of valuable consideration.³¹³ Counsel assisting contended that in the circumstances, it can be inferred that Mathew McAllum and Adam

³¹³ *R v Gallagher* [1986] VR 219 at 230-231.

Moore intended that the provision of the goods and services described in these submissions would tend to influence David Hanna to show favour to each of them and Mirvac in relation to the BLF's affairs.

202. Counsel assisting further submitted that even if the additional element required in *R v Mehajer*³¹⁴ is adopted, the clandestine way in which payment for works on the Cornubia house were processed and attributed to the Orion PAD2 Project strongly suggests that, according to normally received standards of conduct, the giving of those benefits was corrupt within the meaning of s 442BA.
203. Counsel assisting also argued that s 442M of the *Criminal Code* 1899 (Qld) would similarly apply to Mathew McAllum and Adam Moore assuming that the BLF did not assent to the giving of the benefits.
204. Adam Moore responded that on the evidence it is just as likely that Mathew McAllum undertook an enterprise 'entirely of his own accord. in consultation directly' with David Hanna. He submitted that the only involvement required of Adam Moore was that which accords with Adam Moore's testimony and the documentary evidence. He further contended that '[i]n light of the absence of documentary evidence before the Commission contradicting Adam Moore's testimony, [his] case theory is to be preferred'.³¹⁵
205. Adam Moore further argued that counsel assisting had not demonstrated any actual benefit to Adam Moore or Mathew McAllum as a result of what transpired at Cornubia house. He conceded that no

³¹⁴ [2014] NSWCCA 167 at [67]-[71].

³¹⁵ Submissions of Adam Moore, 23/11/15, para 67.

such element is part of the offence, but submitted that actual benefit would have gone towards (a) contradicting David Hanna's evidence that what occurred at the Cornubia house was no more than generosity on the part of Mathew McAllum and (b) overcoming the threshold test difficulties presented by s 442J of the *Criminal Code* 1899 (Qld).³¹⁶

206. Adam Moore went on to contend that it is '[o]nly the uncorroborated evidence of Mr McAllum, who has admitted to providing a false statement to police, [which] links Mr Moore to Cornubia House'. He further referred to there being 'no contemporaneous documentary evidence' which supports counsel assisting's 'case theory'.

207. Counsel assisting responded by noting s 442J provides for a court order withdrawal of trifling or technical cases dealing with secret commissions:

If in any prosecution under this chapter it appears to the court that the offence charged is, in the particular case, of a trifling or merely technical nature, or that in the particular circumstances it is inexpedient to proceed to a conviction, the court may in its discretion, and for reason stated on the application of the accused, dismiss the case; but the court may, if it thinks fit, make the order mentioned in section 442I.

208. If charges were brought against Adam Moore under s 442BA, it would be difficult to categorise payments amounting to \$154,980.28, being the minimum total benefits received by David Hanna based on the

³¹⁶ Submissions of Adam Moore, 23/11/15, para 68.

figures identified in the principal submissions,³¹⁷ as founding an offence of ‘a trifling or merely technical nature’.

209. As to Adam Moore’s complaint that no contemporaneous documents exist that support the findings urged by counsel assisting, and that the approach of counsel assisting betrays an ‘agenda’,³¹⁸ counsel assisting submitted that the rhetoric should be rejected for the reason that it ignores the whole of the circumstantial evidence, including documentary evidence.³¹⁹ For example, Adam Moore was invited to a meeting with Glen Wadsworth, and Jennifer Hanna said Adam Moore was present at an initial meeting with her to discuss the house. Whilst Adam Moore has attempted to make light of these pieces of evidence, these, along with the balance of the evidence discussed above and set out in more detail in the Appendix, cannot be ignored.
210. The reasons of counsel assisting are to be preferred to those of Adam Moore. Adam Moore and Mathew McAllum may have breached s 442BA of the *Criminal Code* 1899 (Qld).

Potential liability of Mirvac Constructions

211. Section 442I of the *Criminal Code* 1899 (Qld) makes it plain that a corporation can breach ss 442B and 442BA.

³¹⁷ See para 32.

³¹⁸ Submissions of David Hanna, 23/11/15, para 77.

³¹⁹ Submissions of Counsel Assisting, 3/12/15, paras 21- 23.

212. Counsel assisting submitted that there is no cogent evidence to suggest that the activities of Adam Moore with respect to the Cornubia house could be attributed to Mirvac Constructions (or its holding company, Mirvac Ltd) in the sense described in *Environment Protection Authority v Caltex Refinery Co Pty Ltd*.³²⁰ That is correct.

Summary of findings

213. David Hanna, an agent of the BLF, corruptly received free goods and services from Adam Moore and Mathew McAllum in circumstances where doing so would tend to influence him to show favour to them personally as well as Mirvac in relation to the BLF's affairs.
214. David Hanna may have committed an offence under s 442B of the *Criminal Code* 1899 (Qld). Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all other relevant materials have been referred to the Director of Public Prosecutions of Queensland and the Queensland Commissioner of Police so that consideration may be given to commencing proceedings against David Hanna in relation to possible offences pursuant to s 442B of the *Criminal Code* 1899 (Qld).
215. Adam Moore and Mathew McAllum both gave free goods and services to David Hanna with the intent that it would tend to influence David Hanna to show favour to them and Mirvac in relation to the BLF's affairs.

³²⁰ (1993) 178 CLR 477 at 514-515. See also *Grocon v CFMEU* [2013] VSC 275 at [60].

216. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all other relevant materials have been referred to the Director of Public Prosecutions of Queensland and the Queensland Commissioner of Police so that consideration may be given to commencing proceedings against Mathew McAllum in relation to possible offences pursuant to s 442BA of the *Criminal Code* 1899 (Qld).
217. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all other relevant materials have been referred to the Director of Public Prosecutions of Queensland and the Queensland Commissioner of Police so that consideration may be given to commencing proceedings against Adam Moore in relation to possible offences pursuant to s 442BA of the *Criminal Code* 1899 (Qld).
218. There is insufficient evidence for imputing the actions of Adam Moore and Mathew McAllum to Mirvac Constructions or Mirvac Ltd so as to render those corporations liable for any breaches of s 442BA of the *Criminal Code* 1899 (Qld).
219. Hence no recommendation is made in relation to those corporations.

APPENDIX

220. This Appendix, based substantially on the submissions of counsel assisting, contains a more detailed summary of the evidence concerning the work done by individual trades on the Cornubia house that were organised by Mathew McAllum, and describing how that work was invoiced and paid for. For ease of reference, the paragraph numbering continues on from the body of the Chapter.

Tilecorp and Diane Graham

221. Tilecorp is a relatively large Queensland based ceramic tiling company owned by David Mullan.³²¹ It had a lengthy history of working on Mirvac projects. As a result David Mullan and Adam Moore were well acquainted.³²² Their relationship was such that Adam Moore was aware that, in 2013, David Mullan had purchased an apartment constructed by Mirvac. He was aware that he had changed the finishings in the apartment with interior design input from Diane Graham. He was aware that Diane Graham was David Mullan's personal partner.³²³ Adam Moore had actually gone to their apartment and viewed these different finishes.³²⁴
222. In about April 2013, following his initial meeting with David Hanna, Adam Moore telephoned David Mullan and asked him whether Diane Graham would be interested in picking tile and paint colours for

³²¹ David Mullan, 14/9/15, T:27.21-30.

³²² David Mullan, 14/9/15, T:27.43-28.2.

³²³ Adam Moore, 18/9/15, T:578.25-580.23.

³²⁴ Adam Moore, 18/9/15, T:578.25-580.23.

someone.³²⁵ David Mullan initially said in his evidence that Adam Moore had identified the person for whom the services were required as ‘a client’, although later he said he could not recall this detail, and Adam Moore may have referred to a ‘client of a friend’.³²⁶

223. During this call, Adam Moore asked David Mullan to provide him with Diane Graham’s contact details.³²⁷ Adam Moore said that he contacted David Mullan within a week of his meeting with David Hanna.³²⁸ David Mullan subsequently obliged, sending Adam Moore an email on 16 April 2015 attaching a copy of Diane Graham’s business card.³²⁹ Adam Moore then forwarded that email on the same day.³³⁰ David Mullan also independently sent Diane Graham’s contact details to Mathew McAllum on 18 April 2013.³³¹

224. Not long after, Diane Graham received a phone call³³² from Mathew McAllum. They met to discuss the Cornubia house project.³³³ Mathew McAllum told Diane Graham that he was helping out a person called Jenny Hanna in relation to a residential building project, and that some assistance was required with colour selections and internal fit

³²⁵ David Mullan, 14/9/15, T:27.38-41.

³²⁶ David Mullan, 14/9/15, T:29.21-27.

³²⁷ David Mullan, 14/9/15, T:29.1; Adam Moore, 18/9/15, T:603.42-604.16.

³²⁸ Adam Moore, 18/9/15, T:604.15-19.

³²⁹ Cornubia House MFI-1, 14/9/15, Vol 1, pp 96-97.

³³⁰ Cornubia House MFI-1, 14/9/15, Vol 1, p 98.

³³¹ Cornubia House MFI-1, 14/9/15, Vol 1, p 101.

³³² Diane Graham, 14/9/15, T:74.43-47.

³³³ Diane Graham, 14/9/15, T:75.18-28.

outs.³³⁴ At the time, Diane Graham understood Jennifer Hanna to be a client of Mirvac's.³³⁵ Though she believed that she was doing work for Mirvac,³³⁶ she had not worked for the company in the past, and her only other client generally was a different housing company.³³⁷

225. Following this initial meeting, Diane Graham then had a number of meetings with Jennifer Hanna. She provided her with advice and assistance in relation to matters such as tile selection, internal and external fittings and the like.³³⁸

226. During that same period Mathew McAllum had extensive email communications with Diane Graham about the progress she was making.³³⁹ He largely used his Mirvac email address in doing so. He requested and obtained information from her that would enable him to give directions and coordinate the purchase of materials and the performance of other works at the Cornubia house.³⁴⁰ At some point,

³³⁴ Cornubia House MFI-3, Diane Graham, police statement, 18/9/15, paras 12-15. See also Diane Graham, 14/9/15, T:75.26-28.

³³⁵ Diane Graham, 14/9/15, T:75.46-76.3.

³³⁶ Diane Graham, 14/9/15, T:79.19-21.

³³⁷ Diane Graham, 14/9/15, T:79.30-40.

³³⁸ Cornubia House MFI-3, Diane Graham, police statement, 18/9/15, paras 19-36. See also Diane Graham, 14/9/15, T:76.24-42, 78.3-10, 79.3-7, 80.30-39, 83.3-7, 84.17-20, 85.42-44, 86.22-32, 87.6-12; Cornubia House MFI-1, 14/9/15, Vol 2, pp 544-1-544-15.

³³⁹ Cornubia House MFI-1, 14/9/15, Vol 1, pp 182, 192, 207, 208, 210, 314, 315, 379, 380, 381, 394, 395, 395-1; Cornubia House MFI-1, 14/9/15, Vol 2, pp 405-406, 426, 464, 465, 472-481, 483, 493, 494-1, 519, 539.

³⁴⁰ Cornubia House MFI-1, 14/9/15, Vol 1, pp 182, 192, 210, 314, 315, 379, 380, 381, 394, 395, 395-1; Cornubia House MFI-1, Vol 2, pp 405-406, 426, 464, 465, 472-481, 483, 493, 494-1, 519, 539.

she learned that David Mullan was going to do the tiling at the Cornubia House, though she did not recall how that came about.³⁴¹

227. Although Adam Moore denied it,³⁴² the preponderance of the evidence demonstrates that, prior to 30 June 2013, Adam Moore and David Mullan had spoken about Tilecorp:

- (a) being awarded a subcontract to provide tiling to the Orion PAD2 Project;
- (b) also providing the tiling for the Cornubia house; and
- (c) passing the costs of its work carried out on the Cornubia house, as well as the work of Diane Graham on to Mirvac by way of an inflated quote from Tilecorp on the Orion PAD2 Project.

228. In this regard:

- (a) On 30 June 2013 Diane Graham submitted an invoice to Tilecorp (not David or Jennifer Hanna) for the consulting work she had done on the Cornubia house.³⁴³ The invoice was for the sum of \$2,240 plus GST.³⁴⁴ Diane Graham did

³⁴¹ Cornubia House MFI-1, 14/9/15, Vol 2, p 464; Diane Graham, 14/9/15, T:91.35-37.

³⁴² Adam Moore, 18/9/15, T:627.43.

³⁴³ Cornubia House MFI-1, 14/9/15, Vol 2, p 544-14.

³⁴⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 544-14.

not describe on that invoice what project she had supplied her services to. It simply read ‘colour consultation as directed’.³⁴⁵

- (b) When interviewed by the police, Diane Graham stated that she invoiced Tilecorp in this way because she knew that Tilecorp was providing tiling for the Cornubia house, and it was more efficient for her to invoice Tilecorp for her work on that project.³⁴⁶
- (c) A different version of Diane Graham’s invoice, this time dated 1 July 2013 was also produced to the Commission.³⁴⁷ It is clear from the document, that the date on the invoice had been altered and that a description of work, which read ‘Mirvac Orion Pad Stage 2’ had been added. David Mullan gave evidence that the change in dates was likely related to the ‘tax year’, and that both changes would have been implemented by someone in his office whom he ‘would have’ instructed to do so ‘because the costs were going to the pads job’.³⁴⁸
- (d) In two emails dated 21 June 2013 to Mathew McAllum, Diane Graham spoke in terms which suggested that David Mullan would be undertaking the tiling work.³⁴⁹ In the

³⁴⁵ Cornubia House MFI-1, 14/9/15, Vol 2, p 544-14.

³⁴⁶ Diane Graham, police statement, 18/9/15, para 38.

³⁴⁷ Cornubia House MFI-1, 14/9/15, Vol 2, p 544-15.

³⁴⁸ David Mullan, 14/9/15, T:56.24-57.24.

³⁴⁹ Cornubia House MFI-1, 14/9/15, Vol 2, pp 426, 464.

second email of 21 June 2013 Diane Graham said ‘David is doing the tiles that are required in all bathrooms...’.³⁵⁰

- (e) Mathew McAllum gave evidence that he did not speak with David Mullan in relation to Tilecorp tiling the Cornubia house.³⁵¹ Prior to his involvement with the house, Adam Moore already had discussions with Diane Graham, and possibly David Mullan.³⁵² Mathew McAllum understood David Mullan’s role when he attended the site one day and saw David Mullan already there.³⁵³
- (f) David Mullan was vague about how it came to be that he was asked to provide tiling services.³⁵⁴ Although he said that Mathew McAllum had asked him to have a look at the plans, he did not specify when this was.³⁵⁵ David Mullan said that he did not remember dealing with Mathew McAllum in respect of the Orion PAD2 Project.³⁵⁶
- (g) Mathew McAllum was reasonably frank when he gave evidence about his dealings with other trades which participated in the fraudulent invoicing of Mirvac for the Cornubia house. His frankness was such that it is unlikely he

³⁵⁰ Cornubia House MFI-1, 14/9/15, Vol 2, pp 426, 464.

³⁵¹ Mathew McAllum, 16/9/15 T:378.43-379.6.

³⁵² Mathew McAllum, 17/9/15, T:489.16-25.

³⁵³ Mathew McAllum, 17/9/15, T:489.16-25.

³⁵⁴ David Mullan, 14/9/15, T:36.31-34.

³⁵⁵ David Mullan, 14/9/15, T:36.36-38.

³⁵⁶ David Mullan, 14/9/15, T:38.31-36.

would have denied having dealt with David Mullan if the true position was otherwise.

- (h) Adam Moore had a more recent, and longer-term relationship with David Mullan than David Mullan had with Mathew McAllum.³⁵⁷ Adam Moore had originally approached David Mullan and spoken to him about Diane Graham providing interior design assistance.³⁵⁸
- (i) On 9 July 2013 David Mullan sent an email to Michael Hutchinson of Tile City (a tile supplier) with a subject line ‘Cornubia’, asking for Tile City to supply (not merely quote for) certain quantities of two kinds of tile.³⁵⁹
- (j) That same day Tile City issued a packing note to Tilecorp in respect of those tiles. The reference given by Tile City on the packing note read ‘David: PAD2’ (not Cornubia).³⁶⁰
- (k) On 9 July 2013 David Mullan sent an email to Beaumont Tiles (another tile supplier) requesting the supply of other tiles for the Cornubia property.³⁶¹ The following day, Beaumont Tiles issued a tax invoice for the supply of those tiles to Tilecorp; ‘Cornubia’ was listed as the ‘order

³⁵⁷ David Mullan, 14/9/15, T:27.43-28.2, 31.9-16, 31.45-47, 33.34-37; Mathew McAllum, 16/9/15, T:379.35-37.

³⁵⁸ Adam Moore, 18/9/15, T:603.42-604.6.

³⁵⁹ Cornubia House MFI-1, 14/9/15, Vol 2, p 572-1.

³⁶⁰ Cornubia House MFI-1, 14/9/15, Vol 2, p 574.

³⁶¹ Cornubia House MFI-1, 14/9/15, Vol 2, p 573-1.

number³⁶² On some date subsequent to the receipt of that invoice, David Mullan wrote the words 'PAD2 Mirvac' on that invoice.³⁶³

- (l) David Mullan sent various other emails on 9 and 10 July 2013 to other tile suppliers in relation to the supply, or possible supply, of tiles for the Cornubia house.³⁶⁴

229. On 25 July 2013 Mark Veitch (an estimator and project administrator at Tilecorp) sent Mathew McAllum an email attaching a quote for the Orion PAD2 Project.³⁶⁵ The quoted price was \$32,370 excluding GST.³⁶⁶

230. The following day, 26 July 2013, David Mullan sent Mathew McAllum an email with a quote for the Cornubia house.³⁶⁷ The email read simply 'supply and install ceramic tiles and waterproofing - \$27930.00 + GST'.³⁶⁸

231. According to Mathew McAllum, he received the quote without having asked for it, and without having had any discussion with Mathew McAllum about providing Mirvac with a quote for work on the Cornubia house.³⁶⁹ However, in light of the fact he had seen David

³⁶² Cornubia House MFI-1, 14/9/15, Vol 2, p 575.

³⁶³ David Mullan, 14/9/15, T:45.22-23.

³⁶⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 574-1-574-5.

³⁶⁵ Cornubia House MFI-1, 14/9/15, Vol 3, p 796-797.

³⁶⁶ Cornubia House MFI-1, 14/9/15, Vol 3, p 796-797.

³⁶⁷ Cornubia House MFI-1, 14/9/15, Vol 3, p 799; David Mullan, 14/9/15, T:51.38-52.12.

³⁶⁸ Cornubia House MFI-1, 14/9/15, Vol 3, p 799.

³⁶⁹ Mathew McAllum, 17/9/15, T:488.32-37.

Mullan on the Cornubia site and been told by him (and Diane Graham) that he was doing the tiling, and having regard to the fact that Tilecorp had tendered for the Orion PAD2 Project and the conversation he had previously had with Adam Moore about covering the Cornubia costs through this project, Mathew McAllum assumed that David Mullan's quote for the Cornubia house costs should be treated in that way.³⁷⁰

232. As a result, Mathew McAllum responded to David Mullan 20 minutes later by email of the same date, stating:³⁷¹

David

Can you add this figure [that is, Tilecorp's figure for Cornubia] to the current quote sent from Mark for Orion plus add Di's costs [that is, the cost of Diane Graham's services] and resend please.

233. David Mullan's evidence was that the direction to add Tilecorp's costs for the Cornubia house onto the Orion PAD2 Project quote came from Mathew McAllum. He agreed that it was 'not entirely' appropriate to do so but that he followed the direction because Mirvac were a 'good client'.³⁷² David Mullan presumed that Mathew McAllum had authority to make the request.³⁷³ David Mullan admitted that the costs of tiling for David Hanna's house were 'passed on' to Mirvac through the inflated quote, by that time. David Mullan had produced

³⁷⁰ Mathew McAllum, 17/9/15, T:489.3-22.

³⁷¹ Cornubia House MFI-1, 14/9/15, Vol 3, p 800.

³⁷² David Mullan, 14/9/15, T:45.34-46.13.

³⁷³ David Mullan, 14/9/15, T:46.15-21.

documents to the Commission that clearly showed this state of affairs.³⁷⁴

234. Strictly speaking, there is no conflict between the evidence of Mathew McAllum, and Adam Moore as outlined above.³⁷⁵ David Mullan did not give evidence that, prior to his provision of the Cornubia house quote of 26 July 2015, it was to be added to the quote for the Orion PAD2 Project. That this direction only came after the quote was received by Mathew McAllum is consistent with the direction referred to by David Mullan being given after this time; otherwise there would have been no need for a separate quote for the house or Mathew McAllum's written direction that it be absorbed by Tilecorp's pricing for the Orion PAD2 Project. It is also consistent with David Mullan's statement that, at the time at which he ordered the tiles, he did not know 'what was happening [with payment] at that stage'.³⁷⁶
235. On 29 July 2013 David Mullan sent an email to Mathew McAllum which read 'revised pricing including additional works as discussed - \$62540.00 + GST'.³⁷⁷ That figure represented the total of the original Orion PAD2 Project quote (\$32,370), the tiling quote for Cornubia (\$27,930), and Diane Graham's invoiced amount of \$2,240.³⁷⁸

³⁷⁴ David Mullan, 14/9/15, T:39.44-46, 65.28-30.

³⁷⁵ Paragraphs 229-232.

³⁷⁶ David Mullan, 14/9/15, T:52.23.

³⁷⁷ Cornubia House MFI-1, 14/9/15, Vol 3, p 811.

³⁷⁸ David Mullan, 14/9/15, T:58.4-8.

236. Mathew McAllum then sent an email to David Mullan asking him to amend the previous Orion PAD2 quote and send it to him.³⁷⁹ David Mullan arranged for that to happen through Mark Veitch,³⁸⁰ and on 30 July 2013 Mark Veitch sent Mathew McAllum the revised quote in the amount of \$62,540 plus GST.³⁸¹
237. Documents produced by Mirvac demonstrate that this price, together with other additional sums, was claimed by Tilecorp³⁸² and paid by Mirvac Constructions to Tilecorp.³⁸³

Electrical services

Darren Wall is engaged by David Hanna

238. The electrical works for the Cornubia house were undertaken by Darren Wall. He carried on business as an electrician under the business name 'Wall to Wall Electrical'.³⁸⁴
239. Darren Wall and David Hanna have known each other for between 10 to 15 years.³⁸⁵ Their families lived in the same street for a time.³⁸⁶ They are friends but do not often socialise together.³⁸⁷

³⁷⁹ Cornubia House MFI-1, 14/9/15, Vol 3, p 811.

³⁸⁰ Cornubia House MFI-1, 14/9/15, Vol 3, p 814; David Mullan, 14/9/15, T:58.10-18.

³⁸¹ Cornubia House MFI-1, 14/9/15, Vol 3, pp 821-822.

³⁸² Cornubia House MFI-1, 14/9/15, Vol 3, pp 1002-1, 1015-2.

³⁸³ Cornubia House MFI-1, 14/9/15, Vol 4, p 1396.

³⁸⁴ Darren Wall, 14/9/15, T:103.17-25.

³⁸⁵ Darren Wall, 14/9/15, T:103.30-31.

240. In about December 2012, David Hanna called Darren Wall and asked for a quote for electrical works for the Cornubia house.³⁸⁸ On 14 December 2012 David Hanna sent Darren Wall an email with a list of the items of the work he wanted undertaken.³⁸⁹
241. Darren Wall considered the job and subsequently gave David Hanna a quote of \$13,844 plus GST.³⁹⁰ David Hanna accepted the quote and asked Darren Wall to do the work.³⁹¹
242. Darren Wall did the electrical works in various phases.³⁹² He started work by laying conduit ready for the slab to be laid.³⁹³ That work did not take very long – perhaps an hour and a half. While Darren Wall was there doing the work he spoke to David Hanna³⁹⁴ and Jennifer Hanna.³⁹⁵

³⁸⁶ Darren Wall, 14/9/15, T:103.33-34.

³⁸⁷ Darren Wall, 14/9/15, T:103.36-104.7. See also Shane Dalby, 14/9/15, T:20.25-40.

³⁸⁸ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 7; Darren Wall, 14/9/15, T:104.32-38.

³⁸⁹ Cornubia House MFI-1, 14/9/15, Vol 1, p 19-1; Darren Wall, 14/9/15, T:104.20-26.

³⁹⁰ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 8; Cornubia House MFI-1, 14/9/15, Vol 1, pp 328-329; Darren Wall, 14/9/15, T:104.20-26.

³⁹¹ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, paras 8-9; Darren Wall, 14/9/15, T:105.8-12.

³⁹² Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, paras 10-12, 18; Darren Wall, 14/9/15, T:105.29.

³⁹³ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 10; Darren Wall, 14/9/15, T:105.31-45.

³⁹⁴ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 11; Darren Wall, 14/9/15, T:106.15-18.

³⁹⁵ Darren Wall, 14/9/15, T:106.7-9.

243. On 31 May 2013 Jennifer Hanna sent Darren Wall an email thanking him for his time that morning, and asking him to say hello to his wife.³⁹⁶ It appears from this that some services were provided by Darren Wall to the Hannas that day.
244. In mid-June 2013 Darren Wall returned to the house and laid the electrical rough in before the gyprocking was undertaken.³⁹⁷ This job took about four days.³⁹⁸ During that time Darren Wall received an email from Jennifer Hanna dated 16 June 2013 in which she described where she wanted various data points placed.³⁹⁹

Mathew McAllum approach to Klenner Murphy

245. Klenner Murphy is an electrical company that concentrates on the installation of the electrical work on large industrial projects.⁴⁰⁰ Daniel Greenland has been one of the owners of that company since around 2010.⁴⁰¹
246. In 2013, Klenner Murphy provided services to Mirvac on the Orion PAD2 Project.⁴⁰² It submitted quotations for that work to Mathew

³⁹⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 315-1.

³⁹⁷ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 11; Darren Wall, 14/9/15, T:106.26-107.15.

³⁹⁸ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 12.

³⁹⁹ Darren Wall, police statement, 18/9/15, para 11; Cornubia House MFI-1, 14/9/15, Vol 1, 3461; Darren Wall, 14/9/15, T:106.40-107.15.

⁴⁰⁰ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 3.

⁴⁰¹ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 2.

⁴⁰² Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 4.

McAllum in January and April 2013 (each for over \$500,000).⁴⁰³ It executed a formal subcontract dated 27 May 2013 with Mirvac Constructions.⁴⁰⁴ Mathew McAllum and Daniel Greenland dealt with each other in relation to these matters, and on the progress of works on the Orion PAD2 Project generally.⁴⁰⁵

247. Daniel Greenland gave the following account to police in a statement to police taken in July 2015.

- (a) At some point, Mathew McAllum approached him and asked Klenner Murphy to provide a quote for electrical work relating to a residential property.⁴⁰⁶ Mathew McAllum provided Daniel Greenland with plans for the house for this purpose.⁴⁰⁷
- (b) After Mathew McAllum received a quote from Klenner Murphy, which he judged was too expensive, Daniel Greenland told him that it would be easier to engage the other electrician, but that Klenner Murphy 'were in a position to absorb the costs for the work'.⁴⁰⁸
- (c) Daniel Greenland spoke with his business partners. He decided that Klenner Murphy would 'help [Mathew

⁴⁰³ Cornubia House MFI-1, 14/9/15, Vol 5, pp 1574-1580, 1581-1587.

⁴⁰⁴ Cornubia House MFI-1, 14/9/15, Vol 5, p 1594.

⁴⁰⁵ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 5.

⁴⁰⁶ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 6.

⁴⁰⁷ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 6.

⁴⁰⁸ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, paras 7-8.

McAllum] out by absorbing the costs',⁴⁰⁹ as a 'business marketing expense'.⁴¹⁰ Daniel Greenland communicated this to Mathew McAllum.⁴¹¹

- (d) Daniel Greenland was subsequently contacted by an electrician who he told to fill out an invoice and to forward it to him so that he knew 'what it was for'.⁴¹² He told the electrician to describe the work as 'being for consultancy work provided for the Orion Project ... so the company could absorb this cost as there was room to move in the Orion project'.⁴¹³
- (e) Daniel Greenland subsequently received two invoices from the electrician. He forwarded them to Klenner Murphy's accounts team for payment.⁴¹⁴
- (f) Daniel Greenland told police that, he did not believe that Klenner Murphy ever received or gained any benefit from Mathew McAllum or Mirvac for providing the service but that it was simply provided 'in efforts in [sic] continuing building customer relations'.⁴¹⁵

⁴⁰⁹ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 10.

⁴¹⁰ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 10.

⁴¹¹ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 11.

⁴¹² Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 11.

⁴¹³ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 11.

⁴¹⁴ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 12.

⁴¹⁵ Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 20.

248. In the face of relevant documents, Daniel Greenland's account to the Commission eventually differed markedly from the sworn statement he gave to police. Parts of his police statement are untenable. They appear to have been intended to mislead the police in their investigations. Key discrepancies are considered further below.
249. According to Daniel Greenland, Mathew McAllum approached him when they were both on the Orion PAD2 Project site. He told him that there was a house he was 'looking after'. He told him that he wanted Klenner Murphy to give him a quote to do the electrical work at the house.⁴¹⁶
250. This appears to have occurred in about early May 2013, because on 7 May 2013 Mathew McAllum sent an email to Daniel Greenland asking him to 'provide price to supply and install standard electrical services for the attached property'.⁴¹⁷ The email attached plans for the Cornubia house.⁴¹⁸
251. David Hanna had already retained Darren Wall to provide the electrical services. Hence it was unusual for Mathew McAllum to have made that request of Daniel Greenland.
252. For this reason, and other reasons set out below, the probable explanation is that Mathew McAllum and Daniel Greenland were really discussing an arrangement under which Klenner Murphy could undertake or at least pay for the Wall to Wall electrical works at the

⁴¹⁶ Daniel Greenland, 14/9/15, T:118.26-28, 120.13-15.

⁴¹⁷ Cornubia House MFI-1, 14/9/15, Vol 1, p 184.

⁴¹⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 184.

Cornubia house, and then invoice Mirvac for those works through the Orion PAD2 Project, rather than ‘absorbing’ the costs themselves.

253. Daniel Greenland provided Mathew McAllum with a quote for the Cornubia house by way of an attachment to an email of 21 May 2013.⁴¹⁹ The attached quote, numbered 3171, was addressed to Mathew McAllum at Mirvac, listed items of work to be provided for the Cornubia house and had the subject line of ‘Re: Electrical Price – House at Cornubia’. However, the quote itself described the job location as ‘Orion PAD Sites Stage 2’ and summarised the work as ‘V004-Community services changes’. The quoted price for the works was \$45,209.10 (inclusive of GST) – substantially in excess of the price Darren Wall had given David Hanna.
254. Initially Daniel Greenland’s evidence was that he worded the quote in this way because it was administratively easier to do so, as Klenner Murphy already had the Orion job in the system.⁴²⁰ However when challenged about his explanation, Daniel Greenland said that Mathew McAllum had asked for the quote to be worded this way so that he could ‘relate it back to that job’ because ‘he probably may have wanted to put the costs there’ possibly to ‘bury’ it.⁴²¹ Mathew McAllum admitted that it was likely that this occurred.⁴²²
255. A couple of weeks later, on 7 June 2013, Darren Wall resent David Hanna a copy of his quote, stating in the covering email ‘Please find

⁴¹⁹ Cornubia House MFI-1, 14/9/15, Vol 1, pp 271-273.

⁴²⁰ Daniel Greenland, 14/9/15, T:124.17-25.

⁴²¹ Daniel Greenland, 14/9/15, T:124.33-34, 125.15-17, 125.39-126.5.

⁴²² Mathew McAllum, 17/9/15, T:451.26-28.

attached list of electrical requirements for your place’.⁴²³ David Hanna then sent that email on to Mathew McAllum, in the process providing him with Darren Wall’s mobile number.⁴²⁴ This is consistent with the fact that each of David Hanna and Mathew McAllum knew, by this time, that Darren Wall (not Klenner Murphy) was doing the electrical works at Cornubia.

256. On 13 June 2013 Darren Wall was either conducting, or about to conduct, the electrical rough in works on the Cornubia site. On that day Mathew McAllum sent Daniel Greenland an email attaching a copy of Darren Wall’s quote for the Cornubia house.⁴²⁵ He stated that the quote still needed to add all fittings including lights, fans, aerial and smoke alarms.⁴²⁶ In the email Mathew McAllum stated ‘can you let me know your thoughts’.⁴²⁷
257. About a week later, on 20 June 2013, Daniel Greenland sent Mathew McAllum an email attaching a quote and a price breakdown.⁴²⁸ Again, the quote was addressed to Mathew McAllum of Mirvac Constructions. It was stated to be in reference to ‘Orion PADs Sites Stage 2’ and the email attached Darren Wall’s original quote.⁴²⁹ It is clear from the price breakdown that the quote was, in fact, in respect of

⁴²³ Cornubia House MFI-1, 14/9/15, Vol 1, p 328.

⁴²⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 328.

⁴²⁵ Cornubia House MFI-1, 14/9/15, Vol 2, p 421.

⁴²⁶ Cornubia House MFI-1, 14/9/15, Vol 2, p 421.

⁴²⁷ Cornubia House MFI-1, 14/9/15, Vol 2, p 421.

⁴²⁸ Cornubia House MFI-1, 14/9/15, Vol 2, p 421.

⁴²⁹ Cornubia House MFI-1, 14/9/15, Vol 2, pp 422-424.

the Cornubia property. The price, including GST, was again stated to be \$45,209.10.

Darren Wall's first invoice for work

258. Darren Wall's first invoice for work performed at the Cornubia site was dated 5 July 2013.⁴³⁰ Its terms, and the circumstances surrounding its creation, are revealing.
259. Darren Wall's evidence was that, prior to sending this first invoice, he had a discussion with David Hanna about how payment was to be made.⁴³¹ David Hanna told him to ring someone, and gave him a telephone number for that person.⁴³²
260. Darren Wall could not recall the name of the person he rang.⁴³³ He did recall, however, that the person he spoke with told him to invoice Klenner Murphy and include the following description on the invoice 'Orion Project re: electrical consultancy to carry out various work items as discussed for the Orion Project at Springfield'.⁴³⁴ The person with whom he spoke told Darren Wall 'exactly what he wanted stated

⁴³⁰ Cornubia House MFI-1, 14/9/15, Vol 2, pp 5691-5692.

⁴³¹ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 13; Darren Wall, 14/9/15, T:107.17-108.17.

⁴³² Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 13; Darren Wall, 14/9/15, T:108.14-17.

⁴³³ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 13; Darren Wall, 14/9/15, T:108.14-17.

⁴³⁴ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, paras 13-14; Darren Wall, T:108.19-32. See also Cornubia House MFI-3, Daniel Greenland, police statement, 18/9/15, para 11 (note the contradiction between Daniel Greenland's statement in this paragraph and his evidence in Daniel Greenland, 14/9/15, T:141.1-28).

on his invoice'.⁴³⁵ Darren Wall had never heard of the Orion Project or Klenner Murphy.⁴³⁶

261. Darren Wall then invoiced Klenner Murphy in this way on 5 July 2013. He caused the invoice to be sent (by his wife) as an attachment to an email addressed to Daniel Greenland.⁴³⁷ The invoice totalled \$7,150 inclusive of GST.
262. The email and invoice did not come as a surprise to Daniel Greenland. He maintained his statement to police that Mathew McAllum had told him that Klenner Murphy's price for the electrical work was too expensive, and Klenner Murphy volunteered to do the job and use Darren Wall as a subcontractor to carry out the works because Darren Wall's price was cheaper.⁴³⁸ He also gave evidence that this was agreed to by Mathew McAllum, who then organised for Darren Wall to do the work for Klenner Murphy.⁴³⁹
263. This is an unlikely explanation for the relevant sequence of events. Darren Wall did not act as Klenner Murphy's subcontractor. He was never retained or given any instruction by Klenner Murphy. Darren Wall had already done work before Klenner Murphy was approached.
264. The most likely explanation for the relevant events is that Mathew McAllum arranged for Darren Wall's invoice to be sent to and paid by

⁴³⁵ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 14.

⁴³⁶ Darren Wall, 14/9/15, T:108.47-109.5.

⁴³⁷ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 16; Cornubia House MFI-1, 14/9/15, Vol 2, pp 569-1-569-2A.

⁴³⁸ Daniel Greenland, 14/9/15, T:136.17-45.

⁴³⁹ Daniel Greenland, 14/9/15, T:136.42-45.

Klenner Murphy for the sole purpose of being able to have that cost covered by Mirvac on the Orion PAD2 Project. It was nothing more than a contrivance to enable the cost to be borne by Mirvac and not David Hanna. The latter knew this was so. That is why he directed Darren Wall to speak to a stranger about how to invoice for the work done on the house rather than simply asking for the invoice to be given to him so he could pay it in the usual way. Daniel Greenland must have known this at the time Darren Wall contacted him.

265. Darren Wall's invoice of \$7,150 (inclusive of GST) was paid by Klenner Murphy on 10 July 2013.⁴⁴⁰

Klenner Murphy includes Cornubia costs in variation claims on Orion PAD2

266. When taken to his police statement, Daniel Greenland gave evidence to the Commission that initially, when Klenner Murphy 'took on the job', it was not the plan to put the costs through Mirvac, but that after Wall to Wall's costs had been borne, he 'dealt with the costs into variations across the [Orion PAD 2 Project]' because Klenner Murphy had to recover its running costs, and that he had Mathew McAllum's permission to do so.⁴⁴¹ This is at odds with Daniel Greenland's statement to police that the costs of Wall to Wall was a marketing expense, that it would be absorbed by Klenner Murphy and that the company received no benefit from providing the service to Mirvac or Mathew McAllum. Daniel Greenland's claim that Klenner Murphy

⁴⁴⁰ Cornubia House MFI-1, 14/9/15, Vol 2, pp 575-1–575-2.

⁴⁴¹ Daniel Greenland, 14/9/15, T:137.43-138.13, 141.14-17.

did not charge a profit margin on top of Wall to Wall's costs also does not appear correct for reasons discussed further below.⁴⁴²

267. Not long after receipt of Darren Wall's first invoice, and on 15 July 2013, Mathew McAllum sent Daniel Greenland an email with the subject line 'PAD costs'.⁴⁴³ In that email Mathew McAllum:

- (a) listed what he said were a number of variations to the Klenner Murphy contract for the Orion PAD2 Project, indicating that the variations had been or would be approved;
- (b) as a separate matter, asked for Daniel Greenland to let him know 'the extra over for' performing various other tasks, which again were described as if they were tasks performed or to be performed on the Orion PAD2 Project; and
- (c) stated 'make sure your next claim includes the above'.

268. Daniel Greenland responded by email dated 17 July 2013, attaching an 'additional variation pricing & job summary' for the Orion PAD2 Project. Daniel Greenland's concluding statement in the email was 'let me know if you need anything else. Thanks.'⁴⁴⁴

⁴⁴² Daniel Greenland, 14/9/15, T:142.13-26.

⁴⁴³ Cornubia House MFI-1, 14/9/15, Vol 2, p 601.

⁴⁴⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 601.

269. Later that same day Mathew McAllum sent an email to Daniel Greenland, in which he wrote:⁴⁴⁵

Can you add to these figures to cater for the 2nd half of wall to wall. Ie add \$1k to each as required to cover the cost.

There will be light fittings still to add. ...

Daniel Greenland responded by way of a further email attaching two documents, one headed 'Customer job number 2062' and another headed 'Client Entertainment Expenses – PAD site S2'.⁴⁴⁶

Mathew McAllum gave evidence that, by that email, he was indicating to Daniel Greenland that 'he would be paying for the Wall to Wall invoices'.⁴⁴⁷

270. The 'job number 2062' document⁴⁴⁸ was stated to be in respect of 'Orion PAD Site stage 2' and was addressed to Natalie Croghan. That document set out the price for various heads of works and, in addition, the price for a number of variations. In total the document referred to 15 separate variations.

271. The Client Entertainment Expenses document⁴⁴⁹ contained a one page table that included the same variation numbers that appeared on the job number 2062 document (and also, in some cases, on Mathew McAllum's initial email of 15 July 2013). The total cost of each

⁴⁴⁵ Cornubia House MFI-1, 14/9/15, Vol 2, pp 623-624.

⁴⁴⁶ Cornubia House MFI-1, 14/9/15, Vol 2, pp 623-624.

⁴⁴⁷ Mathew McAllum, 17/9/15, T:476.44-45.

⁴⁴⁸ Cornubia House MFI-1, 14/9/15, Vol 2, p 628.

⁴⁴⁹ Cornubia House MFI-1, 14/9/15, Vol 2, p 627. Daniel Greenland sent this same document to Mathew McAllum on a further occasion, as an attachment to an email of 18 July 2013: Cornubia House MFI-1, 14/9/15, Vol 2, p 635.

variation matched the sum contained in the last column (titled ‘approved’) of the Client Entertainment Expenses document.

272. All three documents (that is the Client Entertainment Expenses Document, the job number 2062 document, and Mathew McAllum’s email of 15 July 2013⁴⁵⁰) referred to a variation number 4 in the amount of \$8,465.
273. Mathew McAllum’s 15 July 2013 email, and the job number 2062 document, both referred to this variation as being in respect of ‘Community services changes’.
274. The Client Entertainment Expense document, however, stated that variation 4 was made up of two ‘item costs: ‘Mat’s joint \$3,800’ (which Daniel Greenland said related to light fitting supplied by Klenner Murphy for Mathew McAllum’s private residence)⁴⁵¹ and ‘Cornubia #1 \$7,865’. It also recorded that, of those amounts, a total of \$8,465 (that is, the same figure as set out in Mathew McAllum’s email and the job number 2062 document for variation 4) had been ‘approved’. The sum of \$7,865 appears to include a 10% mark up on Wall to Wall’s first invoice (referred to in paragraph 261).
275. The job number 2062 document also referred to variations numbered 10-15 inclusive. The description of works set out in that document for those variations corresponded with the description for the items of work set out in Mathew McAllum’s 15 July 2013 email in respect of which he had asked for an ‘extra over’ figure from Daniel Greenland.

⁴⁵⁰ Cornubia House MFI-1, 14/9/15, Vol 2, p 601.

⁴⁵¹ Daniel Greenland, 14/9/15, T:154.31-36.

276. Those same variations numbered 10-15 inclusive also appear on the Client Entertainment Expenses document. In the case of each, the work was described as being in respect of 'Cornubia #2'.
277. Variations 2, 3, 5-9 appear on the Client Entertainment Expenses document as relating to a 'Night' for Janice', 'Sharks night', 'lap top & screens', 'Mirvac Lions game', 'Origin Jerseys' and 'Origin tables'. That work was said to total \$64,261.
278. Daniel Greenland's evidence was that the amounts claimed for variations numbered 10-15 included some genuine Orion PAD2 Project costs and some Cornubia costs which had been misdescribed⁴⁵² with the actual costs Klenner Murphy had incurred or was expected to incur in paying Darren Wall for the Cornubia work having been spread across those items on a proportional basis.⁴⁵³
279. At this stage at least, it appeared that Klenner Murphy was seeking to recover the costs it had incurred or expected to incur in paying Darren Wall for the Cornubia work, without charging a margin. Daniel Greenland said that he had Mathew McAllum's permission to do this,⁴⁵⁴ and that, in giving the permission, Mathew McAllum was acting in his capacity as a representative of Mirvac.
280. However a similar Client Entertainment Expenses document was later prepared by Daniel Greenland which described additional sums (totalling \$5,000) as variations recoverable on the Orion PAD2 Project,

⁴⁵² Daniel Greenland, 14/9/15, T:145.38-45, 149.12-43.

⁴⁵³ Daniel Greenland, 14/9/15, T:148.19-21; 155.6-9.

⁴⁵⁴ Daniel Greenland, 14/9/15, T:149.45-47.

being sums that were, in fact, referable to the Cornubia house and were said to relate to ‘Cornubia fixtures’⁴⁵⁵ There is no evidence that these sums were costs actually incurred by Klenner Murphy in relation to the Cornubia house, although Daniel Greenland believed that they were charged to Mirvac.⁴⁵⁶ Daniel Greenland gave confused and unreliable evidence in respect of whether the sums said to relate to Cornubia fixtures were overtaken by genuine variations to the Orion PAD2 Project.⁴⁵⁷

281. Documents produced by Mirvac record that Klenner Murphy did submit invoices which included the amounts for all of these variations, and that those invoices were paid by Mirvac.⁴⁵⁸
282. These documents, taken together, demonstrate that:
- (a) Daniel Greenland submitted variation claims to Mathew McAllum on the Orion PAD2 Project to cover both the costs that Klenner Murphy had incurred or would incur in paying the invoices of Darren Wall’s for work on the Cornubia property, together with a margin;
 - (b) this was done with Mathew McAllum’s knowledge and encouragement;

⁴⁵⁵ Cornubia House MFI-1, 14/9/15, Vol 3, p 947.

⁴⁵⁶ Daniel Greenland, 14/9/15, T:158.30-35.

⁴⁵⁷ Daniel Greenland, 14/9/15, T:157.41-160.3.

⁴⁵⁸ Cornubia House MFI-1, 14/9/15, Vol 5, p 1799.

- (c) Mathew McAllum approved and facilitated payment of these variation claims by Mirvac, knowing that they were in respect of the Cornubia project and not in respect of the Orion PAD2 Project.

Further work and invoicing regarding Cornubia house

283. In October 2013 Darren Wall returned to the Cornubia site and carried out further works.⁴⁵⁹ This included fitting and installing lights, fans, switches, smoke alarms, data points, an oven, TV points, phone points, air conditioning circuits, a switchboard and an aerial.⁴⁶⁰ He performed that work over the course of about a week.⁴⁶¹
284. After that work was complete and on 11 November 2013, Darren Wall arranged for his second and final invoice to be sent.⁴⁶² It was for the total sum of \$8,074 including GST.⁴⁶³ As with the first invoice, he contacted the person he first spoke with who instructed him to address the invoice to Klenner Murphy and use the description previously given to him.⁴⁶⁴ That invoice was paid by Klenner Murphy on 25 November 2013 (Klenner Murphy having already received payment

⁴⁵⁹ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 18.

⁴⁶⁰ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 19; Darren Wall, 14/9/15, T:111.28-112.21.

⁴⁶¹ Darren Wall, 14/9/15, T:112.23-24.

⁴⁶² Darren Wall, 14/9/15, T:114.43-45.

⁴⁶³ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 22; Cornubia House MFI-1, 14/9/15, Vol 3, p 1015-5.

⁴⁶⁴ Cornubia House MFI-3, Darren Wall, police statement, 18/9/15, para 23; Cornubia House MFI-1, 14/9/15, Vol 3, p 1015-5; Darren Wall, 14/9/15, T:115.28-29, 116.7-15.

from Mirvac to cover this cost through previous false variation claims on the Orion PAD2 Project).⁴⁶⁵

Rendering, painting and internal plastering

285. Wadsworth Constructions is a commercial fit out subcontractor.⁴⁶⁶ It was at all relevant times owned and controlled by Glen Wadsworth.
286. Adam Moore and Glen Wadsworth had known each other for about 12 years.⁴⁶⁷ By contrast, Mathew McAllum had only recently met Glen Wadsworth. Neither had particularly enjoyed the experience.⁴⁶⁸
287. In 2013, Wadsworth was engaged to provide services to Mirvac Constructions on the Orion PAD2 Project in respect of two separate trades: (a) painting, and (b) ceiling and partitions.⁴⁶⁹
288. Glen Wadsworth gave evidence that, even though he was not retained to undertake or organise any work on the Cornubia house, and did not do so, he was asked by Mathew McAllum to have Wadsworth Constructions pay for various invoices for painting, plastering and rendering work done on the house, and to claim the cost of doing so from Mirvac on the Orion PAD2 Project.⁴⁷⁰

⁴⁶⁵ Cornubia House MFI-1, 14/9/15, Vol 3, p 1015-6.

⁴⁶⁶ Glen Wadsworth, 15/9/15, T:257.5-6.

⁴⁶⁷ Adam Moore, 18/9/15, T:609.9-17.

⁴⁶⁸ Glen Wadsworth, 15/9/15, T:264.19-21, Mathew McAllum, 15/9/15, T:390.43-47, 468.26-34.

⁴⁶⁹ Cornubia House MFI-1, 14/9/15, Vol 6, pp 1805-1806.

⁴⁷⁰ Glen Wadsworth, 15/9/15, T:270.46-271.1, 272.39-273.7, 274.5-11, 285.30-287.19, 288.42-291.21, 293.19-294.26.

289. Mathew McAllum's evidence was that, although he did have some dealings with Glen Wadsworth and was involved in organising the creation of false invoicing in relation to Wadsworth Constructions (as to which see below), he did not initiate Wadsworth Constructions' involvement in the matter.⁴⁷¹ He assumed that given their good relationship, Adam Moore had spoken with Glen Wadsworth. Adam Moore denied this.⁴⁷²
290. It is more likely than not that Adam Moore had a greater involvement in the matter than he suggested. It was Adam Moore, not Mathew McAllum, who had a relationship with Glen Wadsworth enabling him to broach the subject of Glen Wadsworth's involvement. Further, there is a substantial lack of documentation concerning approaches to and dealings with Glen Wadsworth. Had Mathew McAllum been involved at the start it is likely that there would be a documentary trail leading back to him (for there exists such a trail in relation to other subcontractors with whom he dealt on the Cornubia house).
291. In addition, Mathew McAllum was relatively candid in his evidence to the Commission about his involvement in with the Cornubia house. That being so, it is unlikely that he would have denied having initiated the involvement of Wadsworth Constructions if that is what had occurred.

⁴⁷¹ Mathew McAllum, 17/9/15, T:468.40-469.3.

⁴⁷² Adam Moore, 18/9/15, T:609.19-21.

292. The sums paid by Wadsworth and invoiced to and paid by Mirvac in respect of the Cornubia house were:

- (a) \$14,223 inclusive of GST for rendering and painting of render undertaken by Shuttlewood Building Services Pty Ltd (**Shuttlewood**);⁴⁷³
- (b) \$17,500 inclusive of GST for painting undertaken by Jason Manley;⁴⁷⁴
- (c) \$39,600 inclusive of GST for plastering work undertaken by L.A.D. Services Pty Ltd (**LAD**).⁴⁷⁵

293. Wadsworth Constructions was able to pass this cost on to Mirvac (with Mathew McAllum's consent),⁴⁷⁶ together with a margin, by:

- (a) increasing its quote for Orion PAD2 Project by \$40,000;⁴⁷⁷ and
- (b) not reducing its contract price for the Orion PAD2 Project when there was a narrowing of the scope of the project works (described by Glen Wadsworth as a negative variation) that, if it had been subjected to proper action by Mathew McAllum

⁴⁷³ Cornubia House MFI-1, 14/9/15, Vol 6, pp 1903-1904.

⁴⁷⁴ Cornubia House MFI-1, 14/9/15, Vol 6, pp 1922-1923.

⁴⁷⁵ Cornubia House MFI-1, 14/9/15, Vol 6, p 1921.

⁴⁷⁶ Glen Wadsworth, 15/9/15, T:321.15-27.

⁴⁷⁷ Glen Wadsworth, 15/9/15, T:319.38-320.20, 320.46-321.1.

and Glen Wadsworth, would have reduced the price payable by \$37,000.⁴⁷⁸

294. This is consistent with Mathew McAllum's evidence that Glen Wadsworth 'already had money within his contract amount to cover the costs for both' the render and painting of Cornubia house and the Orion PAD2 Project work.⁴⁷⁹

295. As a result, Mirvac paid Wadsworth Constructions \$77,000 more than it ought to have for the Orion PAD2 Project. The sum of \$71,323 represented the cost of work done on the Cornubia house (inclusive of GST), with the balance of \$5,677 effectively comprising Wadsworth Constructions' profit for having participated in the scheme.

296. In relation to the rendering and the painting of render work undertaken by Adam Shuttlewood and invoiced to Wadsworth Constructions (and ultimately passed on to Mirvac), the evidence establishes that:

- (a) Adam Shuttlewood and Mathew McAllum had known each other professionally for some years.⁴⁸⁰
- (b) Mathew McAllum approached Adam Shuttlewood in 2013 and asked him to provide a quote for this work.⁴⁸¹

⁴⁷⁸ Glen Wadsworth, 15/9/15, T:320.22-41, 321.3-13.

⁴⁷⁹ Mathew McAllum, 17/9/15, T:483.19-29; see also T:510.17-22.

⁴⁸⁰ Adam Shuttlewood, 15/9/15, T:240.5-9.

⁴⁸¹ Adam Shuttlewood, 15/9/15, T:240.26-28.

- (c) On 12 July 2013, Adam Shuttlewood sent two emails to Mathew McAllum attaching quotes for the supply and application of render to the Cornubia house (\$9,823 inclusive of GST)⁴⁸² and for gapping joints and painting render work (\$4,400 inclusive of GST).⁴⁸³ The quotes had been made out to 'the owner' of and were said to relate to the Cornubia property.
- (d) Mathew McAllum sent an email to Glen Wadsworth on 17 July 2013 confirming that the rendering work would be done to the Cornubia house.⁴⁸⁴
- (e) The rendering work was done. Mathew McAllum told Adam Shuttlewood to send his invoice for the work to Glen Wadsworth at Wadsworth Constructions. Adam Shuttlewood had not heard of either.⁴⁸⁵
- (f) On 19 July 2013 Adam Shuttlewood sent an email to Glen Wadsworth attaching an invoice for rendering work undertaken on the Cornubia house. The work description on the invoice read 'Supply and apply render on brick work and blue board on residence at 19 Gramzow Road, Cornubia (Orion 2D)'.⁴⁸⁶

⁴⁸² Cornubia House MFI-1, 14/9/15, Vol 2, pp 580-581.

⁴⁸³ Cornubia House MFI-1, 14/9/15, Vol 2, pp 582-583.

⁴⁸⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 592.

⁴⁸⁵ Adam Shuttlewood, 15/9/15, T:246.35-41, 248.40-249.13.

⁴⁸⁶ Cornubia House MFI-1, 14/9/15, Vol 2, pp 651-652.

- (g) Glen Wadsworth then forwarded that invoice on to Mathew McAllum by email, seeking his approval to pay it.⁴⁸⁷
- (h) Later that day, Mathew McAllum sent an email to Adam Shuttlewood which read ‘Can you please remove the description and only have the following – Supply Render and Painting services to carry out works as directed at Orion 2D’.⁴⁸⁸
- (i) Adam Shuttlewood obliged, and arranged for amended invoices to be prepared⁴⁸⁹ and sent to Glen Wadsworth, who then arranged for them to be paid by Wadsworth Constructions.⁴⁹⁰

Plumbing goods and services

Nicoll Industries and Orion PAD2

297. Nicoll Industries carried on a plumbing business in 2013 that operated in the commercial and domestic sectors in Queensland.⁴⁹¹

⁴⁸⁷ Cornubia House MFI-1, 14/9/15, Vol 2, pp 651-652.

⁴⁸⁸ Cornubia House MFI-1, 14/9/15, Vol 2, pp 653-654.

⁴⁸⁹ Cornubia House MFI-1, 14/9/15, Vol 2, pp 655-1–655-2; Adam Shuttlewood, 15/9/15, T:252.17-30.

⁴⁹⁰ Adam Shuttlewood, 15/9/15, T:252.32-36; Glen Wadsworth, 15/9/15, T:291.38-41.

⁴⁹¹ Lucas Nicoll, 15/9/15, T:166.7-23.

298. By a subcontract dated 3 June 2013 Nicoll Industries was formally retained by Mirvac Constructions to provide plumbing goods and services to the Orion PAD2 Project.⁴⁹² However, Lucas Nicoll believes that Nicoll Industries began working on the project earlier than that.⁴⁹³ The contract was negotiated between Lucas Nicoll of Nicoll Industries and Mathew McAllum on behalf of Mirvac Constructions.

Nicoll Industries and Cornubia house

299. At some point in April or early May 2013, Mathew McAllum and Lucas Nicoll met at Mirvac's offices in Brisbane.⁴⁹⁴ Mathew McAllum asked Lucas Nicoll if he was 'interested in helping [him] out with a house' with some work on a house at Cornubia. He gave Lucas Nicoll a set of plans for the house. He asked him to provide a price.⁴⁹⁵

300. On 7 May 2013 Mathew McAllum sent Lucas Nicoll an email, the subject line of which read 'Plumbing price – house at Cornubia'.⁴⁹⁶ In the body of the email Mathew McAllum asked Lucas Nicoll how he was 'progressing with the price for the house at Cornubia'.⁴⁹⁷

301. Lucas Nicoll gave evidence that he never supplied Mathew McAllum with a price for doing plumbing work on the Cornubia house.⁴⁹⁸ He proceeded on the basis that he would be doing the work for free as a

⁴⁹² Cornubia House MFI-1, 14/9/15, Vol 4, p 1031.

⁴⁹³ Lucas Nicoll, 15/9/15, T:170.37-43.

⁴⁹⁴ Lucas Nicoll, 15/9/15, T:169.36-44.

⁴⁹⁵ Lucas Nicoll, 15/9/15, T:169.30-171.31.

⁴⁹⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 183.

⁴⁹⁷ Cornubia House MFI-1, 14/9/15, Vol 1, p 183.

⁴⁹⁸ Lucas Nicoll, 15/9/15, T:172.43.

favour to Mirvac.⁴⁹⁹ He said that he did not ‘pursue being paid for [the work]’, that he assumed it was for ‘someone further in the organisation of Mirvac’ and that he was ‘trying to progress his business’.⁵⁰⁰

302. Lucas Nicoll’s attitude does not seem particularly likely in circumstances where, on his own evidence, he was asked to provide a price when he met with Mathew McAllum, and was then asked in the email of 7 May 2013 as to how he was progressing with that price. Further, in a statement given to police in mid-July 2013, Lucas Nicoll said that he had assumed during discussion with Mathew McAllum that he would be paid for the work that was to be performed.⁵⁰¹ This conflict does not reflect well on the reliability of Lucas Nicoll’s evidence.

303. There were further discussions between Mathew McAllum and Lucas Nicoll about the Cornubia project subsequent to their first meeting in April 2013.⁵⁰² Lucas Nicoll agreed to do the work. Mathew McAllum liaised with him about when the work should commence.⁵⁰³

304. On 12 June 2013 Mathew McAllum sent an email to Lucas Nicoll asking whether he would be able to start on the Cornubia house the following week.⁵⁰⁴ Mathew McAllum also provided Lucas Nicoll in that email with some details about other work being undertaken at the

⁴⁹⁹ Lucas Nicoll, 15/9/15, T:172.11-14.

⁵⁰⁰ Lucas Nicoll, 15/9/15, T:173.8-13.

⁵⁰¹ Cornubia House MFI-3, Lucas Nicoll, police statement, 18/9/15, para 11.

⁵⁰² Lucas Nicoll, 15/9/15, T:174.20-31.

⁵⁰³ Lucas Nicoll, 15/9/15, T:174.20-35.

⁵⁰⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 331.

site, and Mathew McAllum understood him to be project managing the construction of the property.⁵⁰⁵

305. By mid-June 2013 Mathew McAllum had liaised extensively with Diane Graham in relation to the plumbing details for the Cornubia property and the tapware selections that the Hannas had made.⁵⁰⁶
306. On 19 June 2013 Mathew McAllum sent Diane Graham an email asking her to send him the tapware information so that an order could be placed to enable the plumbing works to proceed.⁵⁰⁷
307. Diane Graham provided Mathew McAllum with the tapware details by an email dated 20 June 2013. Mathew McAllum forwarded that information on to Lucas Nicoll by email of the same date.⁵⁰⁸ In doing so, he asked Lucas Nicoll various questions about lead times for these items.
308. Later that same day Lucas Nicoll sent Rory Martin (of the tapware supplier, Reece) an email asking for an amended quote in relation to various tapware products.⁵⁰⁹ He referred to a previous quote having been obtained for the Cornubia house. He also referred to the fact that Nicoll Industries had started undertaking the plumbing rough-in at the Cornubia house. The email was copied to Mathew McAllum.

⁵⁰⁵ Lucas Nicoll, 14/9/15, T:177.29-38.

⁵⁰⁶ Cornubia House MFI-1, 14/9/15, Vol 1, pp 379, 380, 381, 394, 395, Vol 2, pp 405-406, 426, 472-481,493.

⁵⁰⁷ Cornubia House MFI-1, 14/9/15, Vol 1, p 380.

⁵⁰⁸ Cornubia House MFI-1, 14/9/15, Vol 2, pp 405, 407.

⁵⁰⁹ Cornubia House MFI-1, 14/9/15, Vol 2, p 416.

309. Emails of 21 June 2013 indicate a meeting was planned between Diane Graham, Lucas Nicoll and Mathew McAllum at the Cornubia site for Monday, 24 June 2013.⁵¹⁰ On the same day various documents relating to tapware materials were emailed by David Mullan to Diane Graham (which both said was done as a matter of convenience because she did not have access to an adequate scanner but David Mullan did),⁵¹¹ and copied to Jennifer Hanna and Mathew McAllum.⁵¹²
310. It appears that the proposed on-site meeting scheduled for 24 June 2013 proceeded. However, Mathew McAllum was unable to attend due to a business commitment in Sydney on the same day.

The BLF Fight Night invoice

311. At the same time these communications were taking place in relation to the Cornubia property, Mathew McAllum was engaging with Lucas Nicoll about their mutual attendance at a BLF Charity boxing event.
312. In this regard, on 14 June 2013 a BLF media and communications officer sent Adam Moore an email attaching an invoice for 2 tables (of 10) for the BLF Fight Night.⁵¹³ Adam Moore forwarded that email to Mathew McAllum on 16 June 2013.⁵¹⁴ The amount to be paid for the two tables was \$4,400 inclusive of GST.

⁵¹⁰ Cornubia House MFI-1, 14/9/15, Vol 2, pp 426, 461.

⁵¹¹ David Mullan, 14/9/15, T:35.4-8, 35.43-36.13; Diane Graham, 14/9/15, T:90.29-44.

⁵¹² Cornubia House MFI-1, 14/9/15, Vol 2, p 427.

⁵¹³ Cornubia House MFI-1, 14/9/15, Vol 1, pp 347-349.

⁵¹⁴ Cornubia House MFI-1, 14/9/15, Vol 1, pp 347-349.

313. The next day, 17 June 2013, Mathew McAllum sent Lucas Nicoll an email attaching that invoice.⁵¹⁵ In his email, Mathew McAllum stated:

Please find attached invoice for payment. Please claim as a variation – excavation in rock (cost + 10%). Let me know if any questions. We can get the invoice name changed as required with your details.

The last sentence of the above passage appears to relate to the fact that the invoice from BLF Charity Foundation Pty Ltd was addressed to Mirvac Constructions not Nicoll Industries.

314. Lucas Nicoll replied by email of 20 June 2013 asking whether Mathew McAllum had had any success in changing the invoice. He added '[i]f not I will just pay it how it is on Friday'.⁵¹⁶
315. On 21 June 2013 Lucas Nicoll sent an email to Mathew McAllum confirming that he had paid the invoice for the BLF Fight Night.⁵¹⁷
316. The BLF Fight Night was scheduled for 4 July 2013. On that day Mathew McAllum emailed Lucas Nicoll. He invited him to come to his house at 5.30pm so that they could get a lift together to the event.⁵¹⁸

Cost of works on the Cornubia house up to 22 July 2013

317. During the course of the works undertaken on the Cornubia site Lucas Nicoll maintained an electronic accounting system that recorded, amongst other things, costs incurred by Nicoll Industries on different

⁵¹⁵ Cornubia House MFI-1, 14/9/15, Vol 1, 365.

⁵¹⁶ Cornubia House MFI-1, 14/9/15, Vol 2, p 401.

⁵¹⁷ Cornubia House MFI-1, 14/9/15, Vol 2, p 466.

⁵¹⁸ Cornubia House MFI-1, 14/9/15, Vol 2, p 564.

projects. In relation to the Cornubia house, those costs were listed in a dedicated job transactions ledger in this system.

318. That ledger recorded that various goods and services were provided by Nicoll Industries for the Cornubia house during the course of June and July 2013. It recorded that as at the end of 22 July 2013 a sum only slightly in excess of \$12,600 had been incurred by Nicoll Industries on that project.⁵¹⁹
319. In evidence to the Commission, Lucas Nicoll admitted that he had paid for the BLF Fight Night event, and that he was reimbursed for it through a variation on the Orion PAD2 Project which he was directed to claim by Mathew McAllum.⁵²⁰ However, he denied that it was odd that Mathew McAllum sent him the original 17 June 2013 email, notwithstanding that he did not usually deal with the CFMEU or BLF and that, on his account, he had not spoken to Mathew McAllum about the BLF Fight Night event prior to receiving it.⁵²¹

Invoicing Mirvac

320. On 23 July 2013 Lucas Nicoll sent Natalie Croghan an email, and copied that email to Mathew McAllum. The subject line of the email read 'Claim 3 Orion'.⁵²² The email attached two documents. One of them was an Excel document which set out Nicoll Industries Progress Claim 3 for the Orion PAD2 Project.

⁵¹⁹ Cornubia House MFI-1, 14/9/15, Vol 4, p 1332-1333.

⁵²⁰ Lucas Nicoll, 15/9/2015, T:177.40-178.21.

⁵²¹ Lucas Nicoll, 15/9/2015, T:179.42-180.10, 181.4-11.

⁵²² Cornubia House MFI-1, 14/9/15, Vol 2, p 734.

321. Lucas Nicoll stated in his email that ‘Mat and I have been in lengthy discussion with regards to the formulation of this claim and if you need any clarification please talk to him. Following that please advise if you require anything further’.
322. The following observations may be made in relation to the Progress Claim 3 spreadsheet:
- (a) the tab of the Excel spreadsheet entitled ‘Annexure A’ set out the claim in summary form.⁵²³ It stated that a claim was being made for, *inter alia*, ‘variations completed to date \$81,999.50 as set out in Annexure C’;
 - (b) the tab of Excel spreadsheet entitled ‘Annexure C’ listed fourteen variations.⁵²⁴ They included (i) two variations described as ‘rock breaking June’; and (ii) variation 3 described as ‘Temporary Services \$12,600’;
 - (c) the Excel spreadsheet contained various standalone tabs purporting to explain in more detail each of the variations summarised in Annexure C; and

⁵²³ Cornubia House MFI-1, 14/9/15, Vol 2, p 736.

⁵²⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 738.

(d) the tab of the spreadsheet that was described as pertaining to variation 3 was entirely blank (as were the tabs that followed it).⁵²⁵

323. Lucas Nicoll said that the proximity between the sum of variation 3 and the costs incurred by Nicoll Industries at that date in respect of the Cornubia house was a coincidence⁵²⁶ notwithstanding that the description in the ledger was 'Orion Cornubia'.⁵²⁷ He said that, had he intended to recoup the costs of the Cornubia house through a variation, he would have sought a much higher variation, since, according to him, that variation did not cover his costs⁵²⁸. At the same time, however, he seems (on his evidence) to have been prepared to abstain from recouping (and ultimately did not recoup) any of the costs of the Cornubia work (which the final ledger recorded as being \$14,984.78).

324. Other documents produced by Mirvac record that Nicoll Industries did submit invoices which included the amounts for these variations, and that those invoices were paid by Mirvac.⁵²⁹

325. It is clear that one of the 'rock breaking' variations was not a genuine variation to the Orion PAD2 Project scope of works, and in fact

⁵²⁵ This is only visible when the document is viewed in its native electronic form. This is why there is no document in between Cornubia House MFI-1, 14/9/15, p 747 (which concerns variation 2) and Cornubia House MFI-1, 14/9/15, p 745 (which concerns variation 4); see also Lucas Nicoll, 15/9/2015, T:200.9-25.

⁵²⁶ Lucas Nicoll, 15/9/2015, T:198.9-10, 199.1-2.

⁵²⁷ Lucas Nicoll, 15/9/2015, T:199.4-21.

⁵²⁸ Lucas Nicoll, 15/9/2015, T:198.19-32.

⁵²⁹ Cornubia House MFI-1, 14/9/15, Vol 4, pp 1314, 1319, 1329-1331.

represented the cost to Nicoll Industries of paying for tickets to the BLF fight night. Lucas Nicoll seemed to accept this.⁵³⁰

326. It also appears more likely than not that variation 3 was not a genuine variation to the Orion PAD2 Project scope of works. It is possible that it was instead intended to cover the costs incurred by Nicoll Industries in performing work on the Cornubia house up to the date upon which the progress claim was submitted to Mathew McAllum (being 23 July 2013).

327. This possibility emerges from:

- (a) the practice that Mathew McAllum had been following generally in relation to covering the cost of the Cornubia house;
- (b) the language and tone of Lucas Nicoll's email of 23 July 2013;
- (c) the fact Lucas Nicoll was prepared to submit a false claim in relation to the BLF Fight Night expense;
- (d) the fact that Lucas Nicoll's accounting records attributed costs on the Cornubia house to 'Orion Cornubia';
- (e) the symmetry between the figure claimed in variation 3 (\$12,600) and the actual cost incurred by Nicoll Industries on the Cornubia house up to that point;

⁵³⁰ Lucas Nicoll, 15/9/2015, T:195.9-14.

- (f) the vague description of the variation given in progress claim three ('Temporary Services');
- (g) the fact that the tab of Progress Claim 3 devoted to an explanation of that variation was left completely blank; and
- (h) the absence of any documents submitted by Nicoll Industries to Mirvac in respect of that variation.

328. Lucas Nicoll initially denied this. He said he did not claim any sum from Mirvac in relation to the services provided for the Cornubia house.⁵³¹ He said he bore the costs of the job as a 'relationship building' exercise with Mirvac.⁵³² However as some of the features described in the above paragraph were drawn to his attention, Lucas Nicoll retreated slightly and said that 'to the best of his recollection' the variation 3 was not in relation to Cornubia, and added 'Like, I don't recall exactly every – I mean, it was two years ago'.⁵³³

329. Clearly, Lucas Nicoll already had a reasonably close relationship with Mathew McAllum. They had known each other since around 2000⁵³⁴ and Mathew McAllum invited him to his house ahead of attending the BLF Fight Night. Accordingly, this sheds further doubt on the possibility that costs incurred by Nicoll Industries on the Cornubia house were absorbed by it in the interests of relationship building.

⁵³¹ Lucas Nicoll, 15/9/15, T:198.34-37.

⁵³² Lucas Nicoll, 15/9/15, T:198.39-40.

⁵³³ Lucas Nicoll, 15/9/15, T:199.45-46.

⁵³⁴ Lucas Nicoll, 15/9/15, T:166.35-37.

330. However, it is noted that Mathew McAllum did not give evidence that variation 3 related to the Cornubia House. Rather, his evidence was that the variation may have related to State of Origin tickets purchased by Nicoll Industries on his instructions.⁵³⁵ Given Mathew McAllum's frank evidence in respect of how payment for works by other trades was concealed, his evidence in respect of Nicoll Industries goes some way to supporting Lucas Nicoll's account.
331. In any event, and according to the ledger utilised by Nicoll Industries, the benefit of work provided to David Hanna by that company was \$14,984.78 (which figure would be unlikely to have included GST). That benefit would not have been provided without Mathew McAllum's involvement.

Air-conditioning installation

332. On 7 February 2013 Mathew McAllum invited VAE to submit an offer for the provision of mechanical services on the Orion PAD2 Project.⁵³⁶ VAE submitted a quote on 21 February 2013.⁵³⁷ Negotiations over the terms of that contract were conducted between Mathew McAllum on behalf of Mirvac and Benjamin Carter,⁵³⁸ the chief executive officer of VAE.⁵³⁹ The result was the execution of a formal instrument of agreement dated 11 June 2013.⁵⁴⁰

⁵³⁵ Mathew McAllum, 17/9/15, T:487.3-10.

⁵³⁶ Cornubia House MFI-1, 14/9/15, Vol 5, p 1398.

⁵³⁷ Cornubia House MFI-1, 14/9/15, Vol 5, p 1399.

⁵³⁸ Benjamin Carter, 14/9/15, T:212.26-35.

⁵³⁹ Benjamin Carter, 14/9/15, T:209.13-14.

⁵⁴⁰ Cornubia House MFI-1, 14/9/15, Vol 5, p 1403.

333. Having been awarded that contract, on 7 May 2013, Benjamin Carter of VAE received an email from Mathew McAllum requesting him to provide a price to install some air-conditioners for a 'House at Cornubia'.⁵⁴¹ Mathew McAllum attached to that email some floor plans for the Cornubia house.⁵⁴² Benjamin Carter then met Mathew McAllum. They discussed the Cornubia house in more detail.⁵⁴³ Benjamin Carter asked whether the job was for 'somebody in Mirvac', to which Mathew McAllum said 'no'.⁵⁴⁴ Benjamin Carter saw from the plans that the owners appeared to be David and Jennifer Hanna, but he did not know who they were.⁵⁴⁵
334. Following that meeting Benjamin Carter made arrangements for Gray Bros to provide a quote for the Cornubia works and for the supply of the necessary air-conditioning units.⁵⁴⁶ Benjamin Carter did this because VAE frequently used Gray Bros for smaller jobs.⁵⁴⁷ He sent an email on 19 May 2013 to Gary Clark (customer account manager from VAE) asking him to contact Steven Gray of Gray Bros, which Gary Clark then did.⁵⁴⁸

⁵⁴¹ Cornubia House MFI-1, 14/9/15, Vol 1, p 185.

⁵⁴² Benjamin Carter, 15/9/15, T:213.30-32.

⁵⁴³ Benjamin Carter, 15/9/15, T:214.9-13.

⁵⁴⁴ Benjamin Carter, 15/9/15, T:214.15-22.

⁵⁴⁵ Benjamin Carter, 15/9/15, T:214.24-34.

⁵⁴⁶ Benjamin Carter, 15/9/15, T:215.33-37.

⁵⁴⁷ Benjamin Carter, 15/9/15, T:215.39-44.

⁵⁴⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 274.

335. Two days later Steven Gray sent a letter to Gary Clark at VAE setting out his quote for the supply of air-conditioning equipment and installation services.⁵⁴⁹
336. Following receipt of that quote, Benjamin Carter spoke to Mathew McAllum about it.⁵⁵⁰ Mathew McAllum told him that the price was too high. Benjamin Carter agreed to arrange to obtain a quote directly from Daikin Australia for the supply of the air-conditioning units, with Gray Bros to provide a new quote for the cost of installation only.⁵⁵¹
337. Benjamin Carter appears to have sought and obtained this revised pricing from Gray Bros in early June 2013, because on 6 June 2013 Mathew McAllum sent him an email asking whether he was ‘able to confirm the revised pricing as discussed’.⁵⁵² Benjamin Carter’s reply asked whom the quote should be addressed to.⁵⁵³ The quote being referred to at that time was probably the quote for the air-conditioning units themselves. This is because, on 10 June 2013, Benjamin Carter sent Mathew McAllum another email confirming the price for the units and indicating that the quote was to arrive the following day.⁵⁵⁴
338. The formal quote for the units did arrive from Daikin on 11 June 2013.⁵⁵⁵ It was addressed to VAE. Benjamin Carter sent that quote on

⁵⁴⁹ Cornubia House MFI-1, 14/9/15, Vol 1, p 269 (the document did not have the handwriting on it at that time).

⁵⁵⁰ Benjamin Carter, 15/9/15, T:216.43-44.

⁵⁵¹ Benjamin Carter, 15/9/15, T:217.2-21.

⁵⁵² Cornubia House MFI-1, 14/9/15, Vol 1, p 326.

⁵⁵³ Cornubia House MFI-1, 14/9/15, Vol 1, p 326.

⁵⁵⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 327.

⁵⁵⁵ Cornubia House MFI-1, 14/9/15, Vol 1, p 334.

to Mathew McAllum on 13 June 2013.⁵⁵⁶ He sent a further email asking Mathew McAllum how the units would be paid for.⁵⁵⁷

339. Mathew McAllum then forwarded Benjamin Carter's email on to David Hanna. He asked David Hanna how payment for the air-conditioning units would be made.⁵⁵⁸ David Hanna emailed back, indicating that he could 'drop off tomorrow or post a cheque let me know witch [sic] suits'.⁵⁵⁹ There was then further email communication between Mathew McAllum and Benjamin Carter in relation to payment.⁵⁶⁰
340. The next day, 14 June 2013, Benjamin Carter sent an email to Mathew McAllum again asking him how he wanted to proceed with payment for the air-conditioning units.⁵⁶¹ He said that once he knew how Mathew McAllum wanted to proceed with payment, he would 'contact a subby to pick up units and install for you'.⁵⁶²
341. There then followed further email correspondence between Mathew McAllum and David Hanna in relation to payment for the air-conditioning units on 14 and 17 June 2013. Ultimately arrangements were made for David Hanna to pay by credit card.⁵⁶³

⁵⁵⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 333.

⁵⁵⁷ Cornubia House MFI-1, 14/9/15, Vol 1, p 335.

⁵⁵⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 337.

⁵⁵⁹ Cornubia House MFI-1, 14/9/15, Vol 1, p 337.

⁵⁶⁰ Cornubia House MFI-1, 14/9/15, Vol 1, pp 338-339.

⁵⁶¹ Cornubia House MFI-1, 14/9/15, Vol 1, p 344.

⁵⁶² Cornubia House MFI-1, 14/9/15, Vol 1, p 344.

⁵⁶³ Cornubia House MFI-1, 14/9/15, Vol 1, pp 345-346, 350-364.

342. With the units paid for, Mathew McAllum and Benjamin Carter then corresponded further to arrange for delivery of the units to the Cornubia site, and for the installers (Gray Bros) to undertake the installation work. On 18 June 2013, Mathew McAllum sent an email to Benjamin Carter telling him that tradesmen were currently sealing the floor at the Cornubia site and that the earliest the air-conditioning installers would be able to start work would be Friday, 21 June 2013.⁵⁶⁴ Benjamin Carter responded on 19 June 2013 to let Mathew McAllum know that the installers were ready to commence work that Friday.⁵⁶⁵ He indicated that the installers wanted to pick up the units as soon as possible and asked for an order or receipt number from Daikin to enable this to occur. Mathew McAllum responded by email later that same day indicating that the 'order number is David Hanna'.⁵⁶⁶
343. During this same time frame, and as the above communications suggested, Benjamin Carter was liaising with Steven Gray with a view to instructing him to undertake the installation works.⁵⁶⁷
344. In this regard, Gary Clarke had sent Steven Gray an email on 18 June 2013 describing the works that would be required.⁵⁶⁸ Steven Gray gave evidence that upon receiving this information he revised his prices and

⁵⁶⁴ Cornubia House MFI-1, 14/9/15, Vol 1, p 372.

⁵⁶⁵ Cornubia House MFI-1, 14/9/15, Vol 1, p 390.

⁵⁶⁶ Cornubia House MFI-1, 14/9/15, Vol 1, p 390.

⁵⁶⁷ Benjamin Carter, 14/9/15, T:219.26-31.

⁵⁶⁸ Cornubia House MFI-1, 14/9/15, Vol 1, p 376.

gave Benjamin Carter a price for installing the units.⁵⁶⁹ The price was \$11,365 plus GST.⁵⁷⁰

345. On 20 June 2013 Benjamin Carter wrote to Mathew McAllum by email. He informed him that Gray Bros were ready to start the air-conditioning installation. He confirmed that he had given Mathew McAllum's contact details to Steven Gray.⁵⁷¹ He also provided Mathew McAllum with Steven Gray's telephone number by email.⁵⁷² Mathew McAllum replied by email later that day in terms which indicated he had spoken with Steven Gray.⁵⁷³ He also sent an email to David Hanna to confirm that Steven Gray would shortly commence the rough-in works for the air-conditioning. He told David Hanna that Jennifer Hanna should be there, because Steven Gray wanted to be able to explain the design and confirm locations for the return air grilles.⁵⁷⁴
346. Steven Gray liaised directly with Mathew McAllum in order to make arrangements to attend at the site and commence the work.⁵⁷⁵ He undertook that work progressively in and around various other works as they were completed.⁵⁷⁶ Those works were performed in three

⁵⁶⁹ Steven Gray, 15/9/15, T:236.11-46.

⁵⁷⁰ See the handwriting on the original quote at Cornubia House MFI-1, 14/9/15, Vol 1, p 269.

⁵⁷¹ Cornubia House MFI-1, 14/9/15, Vol 2, p 396.

⁵⁷² Cornubia House MFI-1, 14/9/15, Vol 2, p 396.

⁵⁷³ Cornubia House MFI-1, 14/9/15, Vol 2, pp 410, 411.

⁵⁷⁴ Cornubia House MFI-1, 14/9/15, Vol 2, p 410.

⁵⁷⁵ Steven Gray, 15/9/15, T:238.10-20.

⁵⁷⁶ Steven Gray, 15/9/15, T:237.42-238.8.

separate stages – an initial rough-in, later cutting holes for vents into the ceilings in every room, and a final fit off stage.⁵⁷⁷

347. After the commencement of the installation of the air-conditioning units at Cornubia (that is after late June 2013) Benjamin Carter raised the issue of payment with Mathew McAllum.⁵⁷⁸ Benjamin Carter had priced the job to be \$13,751.60, which encompassed the Gray Bros' price of \$12,501.50 (the inclusive of GST figure) plus a 10% margin.⁵⁷⁹ The price he ultimately proposed to Mathew McAllum was rounded down to \$13,500.⁵⁸⁰
348. Mathew McAllum responded by indicating that he would provide some documentation that would enable VAE to claim and receive payment for this work.⁵⁸¹ He said that he wanted VAE to claim payment by way of a variation on the Orion PAD2 Project.⁵⁸² On hearing this Benjamin Carter became very uncomfortable. He asked Mathew McAllum if the Cornubia house was a legitimate Mirvac job.⁵⁸³ Mathew McAllum said that it was.⁵⁸⁴
349. On 30 July 2013, Mathew McAllum sent Benjamin Carter an email asking him to forward variations on the Orion PAD2 Project for five separate items, which together totalled \$13,500 (that is, an amount

⁵⁷⁷ Steven Gray, 15/9/15, T:238.3-8.

⁵⁷⁸ Benjamin Carter, 15/9/15, T:223.27-32.

⁵⁷⁹ Benjamin Carter, 15/9/15, T:221.2-33.

⁵⁸⁰ Benjamin Carter, 15/9/15, T:226.25-28.

⁵⁸¹ Benjamin Carter, 15/9/15, T:223.30-32.

⁵⁸² Benjamin Carter, 15/9/15, T:223.35-40.

⁵⁸³ Benjamin Carter, 15/9/15, T:224.4-6.

⁵⁸⁴ Benjamin Carter, 15/9/15, T:224.9.

almost identical to the price that VAE had quoted for the Cornubia air-conditioning works).⁵⁸⁵ Each of the five variations was described as if they concerned works on the Orion PAD2 Project. As Mathew McAllum admitted, these variations had been priced so as to cover VAE's price for the Cornubia work. He had talked to Benjamin Carter about VAE obtaining payment for that work in this way.⁵⁸⁶

350. On receipt of this email Benjamin Carter understood that the proposed variation claims on the Orion PAD2 Project were intended to cover the VAE price for the Cornubia air-conditioning works.⁵⁸⁷ Benjamin Carter was about to take holiday leave. He forwarded the email on to Ben Getley (a VAE employee) to process.⁵⁸⁸

351. Although Benjamin Carter forwarded the email for processing, he continued to feel uncomfortable about what Mathew McAllum was proposing. That level of discomfort grew while he was on leave, and particularly following receipt of a further email from Mathew McAllum, in which Mathew McAllum asked Benjamin Carter to purchase \$3,600 worth of tickets for a table for Mathew McAllum at a Melbourne Cup function.⁵⁸⁹ Although the email about the Melbourne Cup table does not state so, Benjamin Carter understood that Mathew McAllum was effectively asking him to buy the table, and to then

⁵⁸⁵ Cornubia House MFI-1, 14/9/15, Vol 3, p 817.

⁵⁸⁶ Mathew McAllum, 17/9/15, T:491.28-30.

⁵⁸⁷ Benjamin Carter, 15/9/15, T:226.6-28.

⁵⁸⁸ Benjamin Carter, 15/9/15, T:230.14-17.

⁵⁸⁹ Cornubia House, MFI-2, 16/9/15, p 1; Benjamin Carter, 15/9/15, T:230.42-231.2.

claim it as a variation on the Orion PAD2 Project.⁵⁹⁰ Benjamin Carter gave evidence that the email:⁵⁹¹

changed my view that the way in which we were asked to be invoicing the [Cornubia house] job was no longer plausible ... I could see that was blatantly not right

352. As a result Benjamin Carter spoke with his partner in the VAE business. They agreed that they should not invoice Mirvac for the work that had been undertaken on the Cornubia house.⁵⁹²
353. Benjamin Carter then gave an instruction to Ben Getley to ensure that VAE did not invoice Mirvac for that work.⁵⁹³
354. As it transpired, during Benjamin Carter's absence, Ben Getley had arranged for VAE to submit to Mathew McAllum the five separate variation claims (dated 20 August 2013) that Mathew McAllum had referred to in his email of 30 July 2013.⁵⁹⁴ Later that same day Mathew McAllum responded, suggesting a modification to the terms for one of the five variations.⁵⁹⁵
355. Although those variation claims had been submitted, they had not been made the subject of any invoices issued by VAE to Mirvac by the time Benjamin Carter gave Ben Getley the instruction not to proceed.

⁵⁹⁰ Benjamin Carter, 15/9/15, T:231.1-5.

⁵⁹¹ Benjamin Carter, 15/9/15, T:232.25-26, 232.36.

⁵⁹² Benjamin Carter, 15/9/15, T:227.20-34, 232.20-27.

⁵⁹³ Benjamin Carter, 15/9/15, T:232.35-41.

⁵⁹⁴ Cornubia House MFI-1, 14/9/15, Vol 3, pp 975-980.

⁵⁹⁵ Cornubia House MFI-1, 14/9/15, Vol 3, p 975.

356. Documents produced by Mirvac to the Commission do not suggest that VAE received payment from Mirvac for these ‘variations’, or otherwise for the work undertaken on the Cornubia house.⁵⁹⁶ Benjamin Carter denied that VAE invoiced or received payment for the false variations.⁵⁹⁷
357. Gray Bros did invoice VAE for the works undertaken on the Cornubia project. VAE paid those invoices.⁵⁹⁸ The invoices were dated 20 August and 23 September 2013 respectively.⁵⁹⁹ They were for a total amount equal to the quoted price. Though the invoices referred to an unrelated construction project on O’Connell Terrace in Brisbane, Benjamin Carter’s evidence was that for a VAE purchase order to be generated in its invoice processing system, it had to relate to a particular project.⁶⁰⁰ VAE absorbed the whole of that cost.⁶⁰¹

⁵⁹⁶ Cornubia House MFI-1, 14/9/15, Vol 5, p 1570.

⁵⁹⁷ Benjamin Carter, 15/9/15, T:233.16-18.

⁵⁹⁸ Benjamin Carter, 15/9/15, T:228.27-31.

⁵⁹⁹ Cornubia House MFI-1, 14/9/15, Vol 3, pp 966, 1014.

⁶⁰⁰ Benjamin Carter, 15/9/15, T:228.22-26.

⁶⁰¹ Benjamin Carter, 15/9/15, T:233.20-21.

CHAPTER 8.2

DOCUMENT DESTRUCTION

‘Away, burn all the records of the realm: my mouth
shall be the Parliament of England.’ – Jack Cade

Shakespeare, *Henry VI, Part 2*, Act 4, Scene 7

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A – INTRODUCTION

1. This Chapter requires the resolution of a controversy surrounding the destruction of several tonnes of documents. Those responsible were the officers and staff of a trade union. The trade union was the Queensland and Northern Territory Divisional Branch of the Construction, Forestry Mining and Energy Union, Construction and General Division in early April 2014. In this Chapter, the federally registered union is called the **CFMEU**. The divisional branch is called the **CFMEU QLD**. The Secretary of the CFMEU QLD was Michael Ravbar. The President was David Hanna.
2. This is not the only case study involving the CFMEU and document suppression and destruction. In February 2014 a solicitor employed by the CFMEU NSW instructed an employee to remove documents from files which a barrister conducting an inquiry into that branch on behalf of the national body had asked for.¹ In June 2014 officials and employees of the CFMEU NSW (some of them solicitors) ‘deleted’ – that is, destroyed – a large number of emails which might have been caught by notices to produce that had been issued or were later issued to the union.² This Chapter examines a third instance of the union preventing potential evidence from coming to light. The first two were serious episodes. The third is much more serious.
3. The destruction of the documents in April 2014 not only commenced with their removal from the offices of the CFMEU QLD on the same

¹ Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014) (hereinafter referred to as ‘Interim Report’), Vol 2, ch 8.6, part C, pp 1355-1395.

² Interim Report, Vol 2, ch 8.6, part B, pp 1333-1354.

day as the CFMEU received its first notice to produce from this Commission, which had been recently established. It also coincided with the formal merger of the CFMEU QLD with the Builders' Labourers Federation (Queensland) Union of Employees (**State BLF**).

4. Was the destruction of the documents an innocent part of a routine office 'clean up' organised by Michael Raybar which coincidentally commenced on the same day that the first notice to produce was served on the CFMEU? Or was the destruction a criminal act done with the intention of destroying documents which were potentially relevant to the Commission's inquiries? Counsel assisting posed these as the essential issues. For reasons given later, it is not desirable to consider the second question in the precise terms in which it was framed. But the factual controversies which underlie both questions will be examined.
5. The CFMEU contended that this dichotomy was an 'artifice'.³ That is not so. Instead it reflects the manner in which the evidence emerged. The underlying problem turns on what factual conclusions follow from the evidence.
6. In summary, as submitted by counsel assisting, the essential facts are relatively simple.⁴ They do not appear to be in dispute. At approximately 12.50pm AEST (1.50pm AEDST) on 1 April 2014, the CFMEU was served, at its national office in Melbourne, with the first of a number of notices to produce from the Royal Commission requiring the production of documents. In the late afternoon and

³ Submissions of the CFMEU, 29/10/15, para 19.

⁴ Submissions of Counsel Assisting, 20/10/15, para 2.

evening of 1 April 2014, several tonnes of documents were removed from the Bowen Hills office of the CFMEU QLD. During that process, all the security cameras in the CFMEU QLD office were covered. The documents were taken in a horse float trailer and a box trailer to the Cornubia property of the then President of the CFMEU QLD, David Hanna. The following day an attempt was made to burn the documents at the Cornubia property. That attempt was largely unsuccessful. Two days later, on 4 April 2014, the remaining documents were loaded, along with some soil, into a tip truck and dumped at a landfill.

B – POTENTIAL CRIMINAL OFFENCES

The contempt of court analogy

7. The law sets its face against attempts to remove evidence from the consideration of those institutions which have to decide matters of legal right (like courts and tribunals). It is a contempt of court to destroy a document which falls within the terms of a subpoena that has been served. It is also a contempt of court to destroy a document which one thinks may be caught by a future subpoena.⁵ In certain circumstances it is a contempt of court to persuade the recipient of a subpoena that a document caught by it need not be produced.⁶

⁵ *Registrar of the Equity Division, Supreme Court of New South Wales v McPherson* [1980] 1 NSWLR 688.

⁶ *Lane v Registrar of the Equity Division, Supreme Court of New South Wales* (1981) 148 CLR 245.

‘Implied admissions’

8. Further, conduct of this kind can count in litigation as an ‘implied admission’ or as damaging circumstantial evidence. Examples include concealing evidence,⁷ destroying evidence,⁸ attempting to procure the destruction of evidence,⁹ and destroying chattels.¹⁰ It is often said that the deliberate destruction or hiding of evidence by a party to litigation can reveal a consciousness of guilt on the part of the responsible person: a knowledge that the evidence put out of the way would have established a case against the responsible person. There is a maxim *omnia praesumuntur contra spoliatores*: everything is presumed against a wrongdoer. The Privy Council has said:¹¹

If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him. ...

The principle depends upon destruction with the intention of destroying evidence.¹²

⁷ *Consul Development Pty Ltd v DVC Estates Pty Ltd* (1975) 132 CLR 373 at 391; *R v Rice* [1996] 2 VR 406; *R v Burrows* (2003) 140 A Crim R 533; *R v Chang* (2003) 7 VR 236. See also *Hargrave v Hargrave* (1848) 2 Car & K 701; 175 ER 293; *R v Farquharson* (2009) 26 VR 410 at [174]; *Pollard v R* (2011) 31 VR 416.

⁸ *R v Panozzo* (2007) 178 A Crim R 323 at [28]; *R v Farquharson* (2009) 26 VR 410 at [174]; *Cooper v R* (2012) 293 ALR 17 at [87].

⁹ J F Stephen, ‘An Introduction on the Principles of Judicial Evidence’ in *The Indian Evidence Act, 1872*, p 103, discussing *R v Palmer* (1856).

¹⁰ *Katsilis v Broken Hill Pty Ltd Co* (1977) 18 ALR 181 at 197-198.

¹¹ *The Ophelia* [1916] 2 AC 206 at 229-230 per Sir Arthur Channell.

¹² *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66 at [30], [34]. See also *Clark v New South Wales* (2006) 66 NSWLR 640 at [77]-[81].

9. The relevant reasoning can apply outside litigation. And it can apply against people who are not parties to litigation.
10. In addition, there are a number of criminal offences associated with the destruction of documents that are potentially relevant to the inquiries of a Royal Commission or Commission of Inquiry. The following account is based on the submissions of counsel assisting, which are correct. In one sense it is not necessary to arrive at any conclusions about the correct construction of the legislation. That is because, for reasons to be explained, it is thought wrong in this case study to consider whether recommendations to prosecuting authorities should be made that they inquire into whether criminal offences may have been committed and whether prosecutions should be instituted. But some account of the legislation is desirable in order to highlight the attitude of the legislatures to what is alleged to have happened in this case study.

Queensland offences

11. In Queensland, s 129 of the *Criminal Code* (Qld) provides:

A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour.

Maximum penalty – 7 years imprisonment.

12. Section 119 defines ‘judicial proceeding’ widely. It includes ‘any proceeding had or taken in or before any court, tribunal or person, in which evidence may be taken on oath’. To avoid any doubt, s 22 of the *Commissions of Inquiry Act 1950* (Qld) provides that:

For the purposes of removing any doubt as to the application of the Criminal Code, sections 120, 123, 126, 127, 128, 129, and 130 respectively to and with respect to an inquiry into or with respect to any matter or matters by any commission, it is hereby declared that any reference therein to a ‘judicial proceeding’ shall be deemed to be a reference to an inquiry by a commission, any reference therein to a ‘tribunal’ shall be deemed to be a reference to a ‘commission’, and any reference therein to the holder of a judicial office, howsoever worded, shall be deemed to be a reference to ‘a commissioner’ within the meaning of this Act and that those sections shall be read subject to all such other adaptations thereof as are necessary for purposes of their application as provided in this section.¹³

13. Prior to amendments in 2008 by the *Criminal Code and Other Acts Amendment Act 2008* (Qld), s 129 provided:

Any person who, *knowing* that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment for 3 years imprisonment. (emphasis added)

14. The Queensland Court of Appeal held that in that provision, ‘knowing’ meant ‘believing’. Accordingly it held that a person could commit an offence against s 129 even though the person did not know the document would be used in a judicial proceeding, and did not know that a judicial proceeding was then in existence or might be a likely occurrence.¹⁴ It was enough that the person believed that the document

¹³ The *Commissions of Inquiry Act 1950* (Qld) applies to the Commission by virtue of Letters Patent issued on 24 March 2014 by the Governor of Queensland.

¹⁴ *R v Ensbey* [2005] 1 Qd R 159 at 161-162 per Davies JA (Williams and Jerrard JJA agreeing).

might be required in a possible future judicial proceeding.¹⁵ The drafting amendments to s 129 were not intended to have any substantive effect (other than increasing the penalty).¹⁶ There is no reason to think that the principles stated by the Court of Appeal would not apply to s 129 in its current form.

15. Pursuant to s 7(1) of the *Criminal Code* (Qld):

- (a) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit an offence;
- (b) every person who aids another person in committing an offence; and
- (c) any person who counsels or procures any other person to commit an offence

is liable as a principal and may be convicted of the offence itself.

16. Further, any person who procures another to do or omit to do any act such that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission: s 7(4).

¹⁵ *R v Ensby* [2005] 1 Qd R 159 at 161-162 per Davies JA (Williams and Jerrard JJA agreeing).

¹⁶ Explanatory notes to the *Criminal Code and Other Acts Amendment Bill* 2008 (Qld), p 9.

17. Accordingly, a person who believes a document may be needed in evidence in an existing or future possible Commission under the *Commissions of Inquiry Act* 1950 (Qld) and who damages, or procures another to damage, that document with an intent to stop the document being used in evidence in the Commission commits an offence against s 129 of the *Criminal Code* (Qld).

Commonwealth offences

18. Section 39 of the *Crimes Act* 1914 (Cth) is similar to the pre-2008 form of s 129 of the *Criminal Code* (Qld). Section 39 reads:

Destroying evidence

- (1) A person commits an offence if:
- (a) the person knows that a book, document or thing of any kind is, or may be, required in evidence in a judicial proceeding; and
 - (b) the person:
 - (i) destroys the book, document or thing; or
 - (ii) renders the book, document or thing illegible, undecipherable or incapable of identification; and
 - (c) the person does so with the intention of preventing the book, document or thing from being used in evidence; and
 - (d) the judicial proceeding is a federal judicial proceeding.
- Penalty: Imprisonment for 5 years.
- (2) Absolute liability applies to the paragraph (1)(d) element of the offence.

19. Section 31 sets out the definitions of ‘judicial proceeding’ and ‘federal judicial proceeding’. Relevantly, a ‘judicial proceeding’ includes a proceeding before a person, or body, acting under a law of the Commonwealth, State or Territory in which evidence may be taken on oath. A ‘federal judicial proceeding’ relevantly includes a judicial proceeding before a person or body acting under a law of the Commonwealth. Thus, the proceeding of a Commonwealth Royal Commission is a federal judicial proceeding.
20. The *Criminal Code* (Cth) applies to an offence against s 39 of the *Crimes Act*. Relevantly, the *Criminal Code* (Cth) requires the establishment of both the physical elements of the offence and the fault elements of each of those physical elements for which a fault element is required. Section 5 provides:

5.1 Fault Elements

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

21. Under an earlier version of s 39, it was held by the New South Wales Court of Criminal Appeal that it was necessary to establish that the accused knew that the judicial proceeding was a federal judicial proceeding.¹⁷ The section in its present form is the result of an amendment in 2011 to overcome the Court of Criminal Appeal's decision. The amended section makes it clear that such knowledge is not necessary. The reasoning of the Queensland Court of Appeal in *R v Ensbey* would seem to be directly applicable to the requirements in s 39(1)(a). That is, it would be sufficient to establish that the accused believed that the document or thing may be required in a future or possible federal judicial proceeding.
22. As in Queensland, persons who aid, abet, counsel or procure the commission of an offence by another person are taken to have committed the offence.¹⁸ Further, a person who has, in relation to each physical element of an offence, a fault element applicable to that physical element and procures conduct of another person that would have constituted an offence on the part of the procurer if the procurer had engaged in it, is taken to have committed that offence.¹⁹
23. Thus, a person who believes that a document is or may be required in evidence in an existing or future possible Commonwealth Royal

¹⁷ *R v JS* (2007) 230 FLR 276.

¹⁸ *Criminal Code* (Cth), s 11.2(1).

¹⁹ *Criminal Code* (Cth), s 11.3.

Commission and destroys, or procures another person to destroy, the document with the intention of preventing that document from being used in evidence commits an offence against s 39 of the *Crimes Act* 1914 (Cth).

24. In addition to s 39 of the *Crimes Act* 1914 (Cth), s 6K of the *Royal Commissions Act* 1902 (Cth) creates a more specific offence limited to Commonwealth Royal Commissions. Subsection 6K(1) provides:

- (1) A person commits an offence if:
 - (a) the person acts or omits to act; and
 - (b) the act or omission results in a document or other thing being:
 - (i) concealed, mutilated or destroyed; or
 - (ii) rendered incapable of identification; or
 - (iii) in the case of a document, rendered illegible or indecipherable; and
 - (c) the person knows, or is reckless as to whether, the document or thing is one that:
 - (i) is or may be required in evidence before a Commission; or
 - (ii) a person has been, or is likely to be, required to produce pursuant to a summons, requirement or notice under section 2.

25. An offence against s 6K(1) is an indictable offence (although in some circumstances it may be tried summarily) and the maximum penalty is two years imprisonment or a \$10,000 fine.²⁰

²⁰ *Criminal Code* (Cth), s 6K(2).

26. A significant difference between s 6K on the one hand and s 129 of the *Criminal Code* (Qld) and s 39 of the *Crimes Act* (Cth) on the other is that s 6K does not require the accused to know or believe that the document may be required in evidence. It is sufficient if the accused is reckless as to that circumstance. Section 5.4 of the *Criminal Code* (Cth) provides that a person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
27. Further, s 6K(1) creates a separate offence where a person destroys a document or thing and the person knows, or is reckless as to whether, the document or thing is one that a person has been or is likely to be required to produce pursuant to a summons or notice to produce under s 2 of the *Royal Commissions Act*.
28. The CFMEU criticised counsel assisting's statement of the elements of the various offences as set out above.²¹ Counsel assisting contended in response that contrary to the CFMEU submissions, its submissions expressly identify the element of intention necessary to establish an offence against s 129 of the *Criminal Code* (Qld) and s 39 of the *Crimes Act* (Cth). It is clear that this is so. The CFMEU's criticism should be rejected.
29. Counsel assisting further argued that the element of intention can be satisfied, in essence, from circumstantial evidence.²²

²¹ Submissions of the CFMEU, 29/10/15, paras 9-10, 12-14, 18.

²² Submissions of Counsel Assisting in Reply, 30/11/15, para 9.

30. Counsel assisting also took issue with the CFMEU's reliance on *R v Selim*.²³ There Fullerton J distinguished *R v Ensby*²⁴ on the basis that 'the definition of knowledge in s 5.3 [of the *Criminal Code* 1995 (Cth)] eschews belief and imposes a more exacting standard of conscious awareness'.²⁵ Counsel assisting is correct to submit that, with respect, her Honour's statement requires qualification in view of the definition of 'knowledge' in s 5.3 of the *Criminal Code* 1995 (Cth). It provides that a person:

has knowledge of a circumstance or result if he or she is aware that it exists or *will exist in the ordinary course of events*'. (emphasis added)

The contention that by referring to future circumstances or results that 'will exist in the ordinary course of events', the definition necessarily imports an element of belief is also correct.

31. The CFMEU alleged that counsel assisting has not properly particularised the documents allegedly destroyed.²⁶ In reply, counsel assisting noted that no authority had been cited for the CFMEU's proposition. They further submitted that, if accepted, the proposition would frustrate the legislative purpose of the provisions in question. It was also submitted by counsel assisting that even if in some cases the Crown is able to articulate what particular documents or categories of documents have been destroyed, that does not mean such particularisation is required in circumstances where there has been a wholesale destruction of tonnes of paper and there has been no record

²³ [2007] NSWSC 362.

²⁴ [2005] 1 Qd R 159.

²⁵ *R v Selim* [2007] NSWSC 362 at [26].

²⁶ Submissions of the CFMEU, 29/10/15, paras 11, 17, 18.

kept of what has been destroyed. It is contended that the requisite knowledge and intention can plainly be inferred from the circumstances surrounding the destruction, depending on what they are.²⁷ The submissions of counsel assisting are correct.

C – SUMMARY OF FACTS

32. The following section of the Chapter sets out the main facts.

Background: amalgamation of the BLF and CFMEU in Queensland

33. The following factual summary, largely taken from the submissions of counsel assisting²⁸ is not in dispute, except where noted. From 1994 to early 2014, there were two divisional branches of the federally registered CFMEU Construction and General Division in Queensland. One was the Queensland Construction Workers' Divisional Branch. The other was the Builders' Labourers' Divisional Branch (**Federal BLF**).²⁹ Prior to 2014 there were also two separate State registered unions in the Queensland state industrial system. One was the Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland (**CFMEUQ**). The other was the Australian Building Construction Employees and the State BLF.³⁰

²⁷ Submissions of Counsel Assisting, 30/11/15, para 11.

²⁸ Submissions of Counsel Assisting, 20/10/15, paras 23-72.

²⁹ Michael Ravbar, witness statement, 6/8/14, para 5.

³⁰ Michael Ravbar, witness statement, 6/8/14, para 5.

34. During 2013 there were negotiations about the merger or amalgamation of the two federal divisional branches and the CFMEUQ and the State BLF.³¹ At this time, Michael Ravbar was the Branch Secretary of the Queensland Construction Workers' Divisional Branch and State Secretary of the CFMEUQ. David Hanna was the Branch Secretary of the Federal BLF and Secretary of the State BLF. The State and Federal BLF entities operated out of premises at Upper Roma Street in Brisbane. The Queensland Construction Workers' Divisional Branch and the CFMEUQ operated out of premises at 16 Campbell St, Bowen Hills, a suburb of Brisbane.
35. In about October 2013, at a CFMEU conference in Cairns, a resolution was passed approving the amalgamation of the two federal divisional branches in Queensland.³² It was agreed that the staff at the BLF offices would relocate to the Bowen Hills offices. The formal amalgamation of the federal divisional branches occurred on 31 January 2014.³³ But the formal amalgamation of the State entities did not occur until 1 May 2014.³⁴
36. In about December 2013, David Hanna instructed the BLF office manager, Lisa Stiller, to start packing up the BLF offices.³⁵ At this time, a large amount of documentary material from the BLF offices

³¹ David Hanna, 24/9/15, T:449.31-34.

³² David Hanna, 24/9/15, T:449.31-34.

³³ *Construction, Forestry, Mining and Energy Union* [2014] FWCD 752; Paula Masters, 23/9/14, T:198.19-23.

³⁴ *Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland and Australian Building Construction Employees and Builders' Labourers' Federation (Queensland) Union of Employees* (No 2) [2014] QIRC 74; David Hanna, 24/9/15, T:450.9-10.

³⁵ David Hanna, 24/9/15, T:451.17-21.

was archived. It was sent to a storage shed in Yatala.³⁶ In addition, in December 2013 and into early 2014, a large number of documents and some other materials were boxed and transferred to the CFMEU's Bowen Hills offices.³⁷ David Hanna said that Lisa Stiller liaised with Paula Masters, who was at the time the Administration Manager at the Bowen Hill offices, about what material should be sent to the archive at Yatala and what should be transferred to the CFMEU's offices.³⁸

37. During January and February 2014, boxes of documents along with furniture and other items from the BLF offices were transferred.³⁹ The administrative staff who transferred from the BLF commenced work at the Bowen Hills office in January 2014,⁴⁰ as did the training co-ordinators.⁴¹ The organisers commenced at the beginning of February 2014.⁴² However, the BLF staff were not formally transferred off the BLF payroll until 31 March 2014.⁴³

³⁶ David Hanna, 24/9/15, T:451.21-23.

³⁷ David Hanna, 24/9/15, T:449.40-47, 451.24-30. See also Jessica Kanofski, 22/9/15, T:118.20-44.

³⁸ David Hanna, 24/9/15, T:451.24-30.

³⁹ Bob Williams said most of the material from the BLF had been shifted by February: Bob Williams, 23/9/15, T:240.10-20. Brian Humphrey said that in the week of 6 January he was involved in moving 'furniture, boxes and a whole heap of stuff across' to the new office: Brian Humphrey, 23/9/15, T:257.28-258.9. David Hanna said that some stuff was moved in January but in February a lot more was moved: David Hanna, 24/9/15, T:449.45-450.1. On the other hand, Paula Masters said that the office staff brought their own gear including their files in January, and the rest of the files came over in March 2014: Paula Masters, 23/9/15, T:199.1-5.

⁴⁰ Jessica Kanofski, 22/9/15, T:115.12-116.14; Hollie Bradshaw, 22/9/15, T:152.5; Cherie Shaw, 22/9/15, T:165.19; Paula Masters, 23/9/15, T:199.1-3.

⁴¹ Bob Williams, 23/9/15, T:240.1-2; Brian Humphrey, 23/9/15, T:257.24-40.

⁴² David Hanna, 24/9/15, T:450.2-4.

⁴³ Cherie Shaw, 22/9/15, T:165.18-22; David Hanna, 24/9/15, T:450.4-7.

38. During the early part of 2014, there were also renovations to the Bowen Hills offices.⁴⁴ It appears that the majority of the work had occurred by March, but some parts were still being completed. By the end of March 2014, the CFMEU QLD had two premises at Bowen Hills. One was the main office at 16 Campbell St (**No 16 office**). The other was an adjoining office connected with a walkway at 14 Campbell St (**No 14 office**).

Background: creation of the Royal Commission

39. On 10 February 2014, the Prime Minister, the Minister for Employment and the Attorney-General issued a joint press release announcing the Prime Minister's intention to recommend that the Governor-General establish a Royal Commission into Trade Union Governance and Corruption. The statement enclosed proposed Terms of Reference. They specifically named the CFMEU amongst others.⁴⁵
40. On 13 March 2014, Letters Patent establishing the Royal Commission were signed by the Governor-General. The Letters Patent were publicly released the next day.⁴⁶ The CFMEU was specifically named in the Letters Patent. So was the CEPU.⁴⁷
41. Counsel assisting submitted that by mid to late March 2014, staff and officers of the CFMEU QLD were aware of the existence of the Royal

⁴⁴ Jessica Kanofski, 22/9/15, T:118.28-29; David Hanna, 24/9/15, T:450.24-43.

⁴⁵ CFMEU DD MFI-1, 21/9/15.

⁴⁶ CFMEU DD MFI-1, 21/9/15.

⁴⁷ The full name of the CEPU is the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

Commission, were aware of the specific naming of the CFMEU in the Terms of Reference and were expecting to receive a notice to produce documents to the Commission. That submission is correct for the following reasons.

- (a) Leanne Butkus was the Officer Manager of the CFMEU QLD. She was on leave from 20 March 2014 to 7 April 2014.⁴⁸ She gave evidence that prior to going on leave she had learnt of the Royal Commission, she had learnt the fact that the CFMEU was one of the unions named in the Terms of Reference and she had come to an understanding that there was an expectation within the CFMEU QLD office that the office may be required to produce documents to the Royal Commission.⁴⁹
- (b) Paula Masters was the Administration Manager for the CFMEU QLD in April 2014.⁵⁰ Her evidence was to similar effect.⁵¹ Paula Masters also said that there had been a briefing by senior officers of the branch to the organisers and administration staff advising them of the Royal Commission. She thought, but ‘couldn’t say for sure’, that the briefing had occurred before 1 April 2014.⁵²

⁴⁸ Leanne Butkus, 23/9/15, T:320.30-32.

⁴⁹ Leanne Butkus, 23/9/15, T:322.5-19.

⁵⁰ Paula Masters, 23/9/15, T:197.22-40.

⁵¹ Paula Masters, 23/9/15, T:215.25-43.

⁵² Paula Masters, 23/9/15, T:227.4-16.

- (c) Jacqueline Collie was the Executive Assistant to the Secretary, Assistant Secretaries and President of the CFMEU QLD.⁵³ She testified that she learnt there was a Royal Commission, and that the CFMEU was included in the Terms of Reference, probably soon after she started employment on 3 February 2014.⁵⁴ She also came to an understanding that the CFMEU QLD might be required to produce documents to the Royal Commission. But she did not know when she came to that understanding.⁵⁵
- (d) Michael Ravbar said that by about mid-March 2014 he knew that the Royal Commission had been established, that the Terms of Reference included, among other unions, the CFMEU and that it was likely that the CFMEU would be required to produce documents at some point, or some points, to the Royal Commission.⁵⁶

42. In addition the existence of the Royal Commission had been widely published in the media. It would be expected in the ordinary course of affairs that senior officers and staff would familiarise themselves with matters concerning the Royal Commission.

⁵³ Jacqueline Collie, 23/9/15, T:305.31-42.

⁵⁴ Jacqueline Collie, 23/9/15, T:306.7-11, 309.25-310.5.

⁵⁵ Jacqueline Collie, 23/9/15, T:309.44-310.5.

⁵⁶ Michael Ravbar, 24/9/15, T:378.9-32.

On what day did the relevant events take place?

43. During the late afternoon and evening of 1 April 2014, a number of staff and officers of the CFMEU QLD were involved in various tasks directed towards the removal and destruction of a large number of documents held at the CFMEU QLD's office at 14–16 Campbell Street, Bowen Hills. The individuals who were principally involved were:

- (a) Michael Ravbar;
- (b) David Hanna;
- (c) Darren 'Bob' Williams, Brian Humphrey, Rob Cameron (training coordinators⁵⁷ for the CFMEU QLD);
- (d) Phil Blair (the CFMEU QLD's apprentice coordinator);⁵⁸
- (e) Paula Masters;
- (f) Jacqueline Collie;
- (g) Stacey Davidson (membership supervisor and acting office manager in Leanne Butkus's absence);⁵⁹ and

⁵⁷ Bob Williams, 23/9/15, T:239.34-36; Brian Humphrey, 23/9/15, T:257.2-7; Rob Cameron, 23/9/15, T:332.1-2.

⁵⁸ Phil Blair, 23/9/15, T:346.18-19.

⁵⁹ Stacey Davidson, 23/9/15, T:286.25-26, 292.19-23.

(h) Cherie Shaw (the CFMEU QLD's part-time finance officer).⁶⁰

44. Paula Masters and Stacey Davidson were long term employees of the CFMEU. They and Michael Ravbar described the events that took place as merely part of an office 'clean up' which would ordinarily have been done earlier in the year but had been delayed because of the amalgamation with the BLF.⁶¹ Paula Masters' evidence was that the 'clean up' was larger than usual because of the amalgamation. Indeed she said it was the largest 'clean up' that she had been involved with.⁶² But she said the events of the day were 'business as usual'.⁶³ She also gave this evidence:⁶⁴

Q. But the fact that it seemed that the documents had to be sorted for destruction on one particular afternoon into evening, you say that that's business as usual?

A. Yes. We would normally do the clean-up over a period of about six hours and it would normally be, as I said before, myself, the Secretary and the Assistant Secretary. In this case we were dealing with bigger volumes, and other people were brought in to assist.

45. Michael Ravbar's evidence was that apart from what he alleged was David Hanna's 'stupidity' in covering the cameras there was nothing unusual about the activities of the afternoon and evening.⁶⁵

⁶⁰ Cherie Shaw, 22/9/15, T:162.17-36.

⁶¹ Paula Masters, 23/9/15, T:204.8-19, 213.33-35, 218.9-12; Stacey Davidson, 23/9/15, T:292.42-47, 293.8-9, 294.10-11, 298.44-46, 299.10-14; Michael Ravbar, 24/9/15, 380.37-46.

⁶² Paula Masters, 23/9/15, T:218.23-24.

⁶³ Paula Masters, 23/9/15, T:227.18-31, see also T:204.5-26.

⁶⁴ Paula Masters, 23/9/15, T:227.24-31.

⁶⁵ Michael Ravbar, 24/9/15, T:381.27-32, 423.25-33, 427.32-428.5, 428.16-25.

46. Some of the witnesses could not be sure precisely which day the so-called office ‘clean up’ occurred. All who could give a date thought it was either late March or early April. However, the irresistible conclusion from the evidence is that the ‘clean up’ occurred on 1 April 2014. The CFMEU accepted this.⁶⁶ Its acceptance is supported by the following matters.

- (a) Cherie Shaw testified that it was on 1 April 2014 that she was asked to shred some documents and that she heard that ‘stuff’ was being taken out of the office.⁶⁷ She was confident about the date because she had checked her payroll records. She did overtime on that day of 2.5 hours, but had been away on 31 March 2014.⁶⁸
- (b) Michael Ravbar identified 1 April 2014 as the day of the ‘clean up’.⁶⁹
- (c) Bob Williams’ evidence was that he drove, with his son, in a horse float trailer containing a load of documents from the CFMEU’s office to David Hanna’s property at Cornubia.⁷⁰ He went back to the Cornubia property the following day to

⁶⁶ Submissions of the CFMEU, 29/10/15, para 72.

⁶⁷ Cherie Shaw, 22/9/15, T:166.36-47, 173.4-21.

⁶⁸ Cherie Shaw, 22/9/14, T:166.44-167.6.

⁶⁹ Michael Ravbar, 24/9/14, T:382.9-18.

⁷⁰ Bob Williams, 23/9/15, T:240.33-42, 246.6-19.

try to burn some of the documents.⁷¹ Brian Humphrey was also at the property with Bob Williams on that day.⁷²

(d) Brian Humphrey gave evidence that the burning occurred the day after he had retrieved the box trailer and assisted loading it at the Campbell Street offices.⁷³

(e) The call charge records for Bob Williams and Brian Humphrey both support the conclusion that the documents were removed from the CFMEU QLD office on 1 April 2014 and the largely unsuccessful burning attempt occurred on 2 April 2014.⁷⁴

47. Counsel assisting submitted that David Hanna also said that the documents were removed from the CFMEU QLD's offices on 1 April 2014.⁷⁵ To the contrary, the CFMEU submitted that 'Mr Hanna in his 22 September evidence says unequivocally that the clean-up, or 'shredding' as he terms it, occurred on 2 April 2014, or sometime after 1 April'.⁷⁶ It was further submitted by the CFMEU that David Hanna 'is caught out extolling [sic] falsehoods' and that he 'was adamant that the clean-up occurred *after* 2 April'.⁷⁷ The CFMEU further submitted

⁷¹ Bob Williams, 23/9/15, T:247.44-248.4.

⁷² Bob Williams, 23/9/15, T:248.9-10.

⁷³ Brian Humphrey, 23/9/15, T:260.4-9, 261.30-35, 263.36-39.

⁷⁴ CFMEU DD MFI-8, 23/9/15; CFMEU DD MFI-9, 23/9/15; Bob Williams, 23/9/15, T:250.42-251.15; Brian Humphrey, 23/9/15, T:269.27-270.17.

⁷⁵ David Hanna, 22/9/15, T:72.3-11, 72.29-73.46. See also CFMEU DD MFI-2, 21/9/15, p 2.

⁷⁶ Submissions of the CFMEU, 29/10/15, para 72.

⁷⁷ Submissions of the CFMEU, 29/10/15, paras 72-74.

that: ‘The evidence of Mr Hanna in this and other respects on even the most marginal scrutiny is simply unbelievable.’⁷⁸

48. Counsel assisting submitted in reply that David Hanna was not adamant that the ‘clean up’ occurred after 2 April 2014. Rather, he said that on 1 April, documents in archive boxes were ‘taken away’ having been loaded onto a ‘horse float’. David Hanna’s words ‘a day or two after’ referred to there being an unusual amount of shredding of paper at the office.⁷⁹ Counsel assisting was right to characterise this submission of the CFMEU as a misrepresentation of David Hanna’s evidence. There was no evidence that contradicted his evidence. There was no evidence that showed, as the CFMEU wrongly assert, that it ‘was demonstrably false’.⁸⁰ The following portion of David Hanna’s testimony makes it hard to understand how the CFMEU could submit that David Hanna was adamant that the ‘clean-up occurred after 2 April’.⁸¹

Q. What documents do you understand he [Michael Ravbar] was requesting or directing be removed from the office?

A. I don’t know what those documents were other than he had a talk with the staff and, you know, told them what was to go and what not to go and whatever documents the staff put out or pointed to, coordinators and myself would take out and load in the horse float trailer.

Q. What date did this occur, or dates?

⁷⁸ Submissions of the CFMEU, 29/10/15, para 75.

⁷⁹ Submissions of Counsel Assisting, 30/11/15, para 21; see David Hanna, 22/9/15, T:79.6-35, 83.11-12.

⁸⁰ Submissions of Counsel Assisting, 30/11/15, para 21.

⁸¹ David Hanna, 22/9/15, T:71.42-72.7.

A. 1 April.

Q. You are clear about that?

A. Yes.

At what time on 1 April 2014 did the relevant events take place?

49. The next factual issue relates to what time of day on 1 April 2014 the ‘clean up’ occurred at. The evidence on this topic is as follows:

- (a) On 1 April 2014, the sun set in Brisbane at 5.46pm.⁸² Civil twilight ended at 6.10pm.⁸³ Nautical twilight ended at 6.37pm.⁸⁴ According to Geoscience Australia, for all practical purposes it is dark at the end of nautical twilight in the absence of moonlight, artificial lighting or adverse atmospheric conditions.⁸⁵ Astronomical twilight ended at 7.04pm.⁸⁶ According to Geoscience Australia, at this time the illumination from the Sun is less than from other natural sources in the sky.
- (b) This submission was the subject of criticism by the CFMEU ‘as a further episode of [counsel assisting] leading evidence in submissions’.⁸⁷ This characteristic criticism is entirely

⁸² CFMEU DD MFI-18, 14/10/15.

⁸³ CFMEU DD MFI-18, 14/10/15.

⁸⁴ CFMEU DD MFI-18, 14/10/15.

⁸⁵ CFMEU DD MFI-18, 14/10/15.

⁸⁶ CFMEU DD MFI-18, 14/10/15.

⁸⁷ Submissions of the CFMEU, 29/10/15, para 93.

unfounded. The evidence underlying the submission was tendered on 14 October 2015, six days before the submissions of counsel assisting. In any event, counsel assisting submitted⁸⁸ that it appears that it is accepted by the CFMEU in its submission that the clean-up and the loading of the horse float and trailer ‘all occurred (and were no doubt completed) after dark.’⁸⁹ This in turn countered, it was submitted by counsel assisting, the CFMEU submission that the loading was done in apparently plain view of the public.⁹⁰ Counsel assisting also noted that the box trailer was loaded in the garage and was not visible from the street.⁹¹ These points were fairly made by counsel assisting.

- (c) Hollie Bradshaw was the officer junior.⁹² She was asked to stay back after work one afternoon by David Hanna to help with files. But after about 20 minutes spent waiting for instructions she was told by one of the senior female administrative officers that she could leave.⁹³ The next day she complained to a friend, Nick Williams, that she was not going to be paid for the time she spent staying back.⁹⁴ Nick Williams apparently told her that the previous day documents

⁸⁸ Submissions of Counsel Assisting, 30/11/15, para 23.

⁸⁹ Submissions of the CFMEU, 29/10/15, para 93.

⁹⁰ Submissions of the CFMEU, 29/10/15, para 81-82.

⁹¹ Submissions of Counsel Assisting, 30/11/15, para 23.

⁹² Hollie Bradshaw, 22/9/15, T:152.13.

⁹³ Hollie Bradshaw, 22/9/15, T:154.36-44.

⁹⁴ Hollie Bradshaw, 22/9/15, T:157.14-25.

had been moved to David Hanna's property.⁹⁵ It is to be inferred that Hollie Bradshaw was asked to stay back on 1 April 2014. Her time records show that she worked until 4.30pm on that day.⁹⁶ It is also to be inferred that she left the office at 4.50pm. It follows that the bulk of the 'clean up' activity did not occur until after that time.

- (d) Apart from Hollie Bradshaw, junior office staff left at their usual time at 4.30pm.⁹⁷ They were not asked to stay back to be involved in the 'clean up'.
- (e) Cherie Shaw left the office at 3pm on 1 April 2014 to pick up her daughter. She returned at 5pm.⁹⁸ From 5pm to 7.30pm she was involved in shredding and possibly other work in relation to payroll. She was 'extremely busy' at the time.⁹⁹ When she left work at 7.30pm there were still others at work.¹⁰⁰
- (f) Paula Masters said the 'clean up' started in the 'middle of the afternoon'. She later said around '3-ish'. She said it continued until the middle of the night, by which she meant

⁹⁵ Hollie Bradshaw, 22/9/15, T:157.8-22.

⁹⁶ CFMEU DD MFI-19, 14/10/15. See also Hollie Bradshaw, 22/9/15, T:155.31-34.

⁹⁷ Paula Masters, 23/9/15, T:228.23-34; Stacey Davidson, 23/9/15, T:296.26-31.

⁹⁸ Cherie Shaw, 22/9/15, T:169.4-27.

⁹⁹ Cherie Shaw, 22/9/15, T:169.26-47.

¹⁰⁰ Cherie Shaw, 22/9/15, T:175.31-42.

around 7.30pm or 8pm.¹⁰¹ She was the last to leave and she locked up the office at around 8pm or 8.30pm.¹⁰²

- (g) Bob Williams recalled receiving a call from David Hanna, probably late afternoon around 3.30pm or 4pm, to collect the horse float trailer and bring it to the CFMEU offices.¹⁰³ Bob Williams recalled having later conversations with David Hanna that day. In one of them Bob Williams told David Hanna that he would pick up his son, Nick Williams, to assist.¹⁰⁴ By that time Bob Williams had collected the horse float trailer which was empty. He collected his son. They came to the CFMEU building.¹⁰⁵ Bob Williams thought that was about 4pm or 4.30pm.¹⁰⁶ The horse float trailer was parked outside the No 14 office in the car spaces.¹⁰⁷ He and his son loaded the horse float trailer with boxes.¹⁰⁸ Bob Williams guessed that it took maybe 45 minutes or an hour to load the trailer.¹⁰⁹ He said it was not dark when he left with the documents.¹¹⁰

¹⁰¹ Paula Masters, 23/9/15, T:205.41-206.14, 221.11-15.

¹⁰² Paula Masters, 23/9/15, T:214.31-43.

¹⁰³ Bob Williams, 23/9/15, T:241.23-242.17.

¹⁰⁴ Bob Williams, 23/9/15, T:242.19-24.

¹⁰⁵ Bob Williams, 23/9/15, T:242.32-44.

¹⁰⁶ Bob Williams, 23/9/15, T:242.47-234.1.

¹⁰⁷ Bob Williams, 23/9/15, T:242.43-44.

¹⁰⁸ Bob Williams, 23/9/15, T:243.39-244.18.

¹⁰⁹ Bob Williams, 23/9/15, T:244.32-47.

¹¹⁰ Bob Williams, 23/9/15, T:244.35-37.

Call charge records from 1 April 2014 disclose the following about Bob Williams' dealings with David Hanna on that day:

- (i) David Hanna called Bob Williams' phone at 10.38am and again at 11.51am.¹¹¹
- (ii) At 1.56pm and 3.01pm calls made to Bob Williams' mobile phone show that it was in the vicinity of the mobile phone tower at Cornubia.¹¹²
- (iii) The next time that David Hanna called Bob Williams was 3.44pm.¹¹³ That call was followed by two more calls from David Hanna at 3.48pm and 4.16pm.¹¹⁴ At 4.17pm there was a call made from Bob Williams' phone.¹¹⁵ At each of these times, Bob Williams' phone was using the Cornubia tower.
- (iv) At 4.55pm David Hanna called Bob Williams' mobile phone. At that time the phone was in the vicinity of the mobile phone tower at Holland Park East.¹¹⁶ That is on the way between Cornubia and the CFMEU offices. At 5.21pm Bob Williams' phone received a telephone call. At that time it was

¹¹¹ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-29, 20/10/15.

¹¹² CFMEU DD MFI-29, 20/10/15.

¹¹³ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-29, 20/10/15.

¹¹⁴ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-29, 20/10/15.

¹¹⁵ CFMEU DD MFI-29, 20/10/15.

¹¹⁶ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-29, 20/10/15.

in the vicinity of the mobile phone tower at Bowen Hills South.¹¹⁷ This is consistent with travel by Bob Williams from Cornubia to the CFMEU office and with his arrival there by around 5.20pm.

- (v) There were SMS texts and calls between David Hanna and Bob Williams at 5.49pm, 5.50pm and 5.51pm. They show that Bob Williams' mobile phone was in the vicinity of mobile phone towers at Bowen Hills South, Royal Brisbane Hospital (which is close to Bowen Hills) and then Bowen Hills.¹¹⁸
- (vi) At 6.35pm, a text message received by Bob Williams showed that his phone was in the vicinity of Cornubia.¹¹⁹ This is consistent with Bob Williams leaving the CFMEU offices by shortly before or around 6pm so as to permit his arrival at Cornubia by at least 6.35pm.
- (vii) A call from Bob Williams to his son was recorded as occurring at 7.06pm at which time Bob Williams' phone was in the vicinity of Cornubia.¹²⁰ There was a phone call from Bob Williams' phone to David Hanna's phone at 7.07pm which also used the

¹¹⁷ CFMEU DD MFI-29, 20/10/15.

¹¹⁸ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-29, 20/10/15.

¹¹⁹ CFMEU DD MFI-29, 20/10/15.

¹²⁰ CFMEU DD MFI-29, 20/10/15.

Cornubia tower.¹²¹ At 7.58pm Bob Williams' phone was recorded as making a call using the Bowen Hill South tower.¹²² These records are consistent with Bob Williams travelling from Cornubia after 7.07pm to the CFMEU offices and being there by at least 8pm.

These records suggest that the earliest time Bob Williams could have arrived to load documents at the CFMEU's offices was around 5.20pm. They also disclose that Bob Williams appears to have been contacted by David Hanna and to have retrieved the horse float earlier than he recalled.

Bob Williams' evidence about contacting his son and the call at 7.06pm suggest that the empty horse float trailer did not arrive at the CFMEU office until after 7pm. However, it may be that the call at 7.06pm from Bob Williams to his son was about another topic.¹²³ It may be that Bob Williams was returning the empty horse float trailer for a second time to the CFMEU QLD's office to pick up another load of documents. At one point in his evidence, David Hanna suggested this is what occurred.¹²⁴

- (h) Brian Humphrey gave evidence that he received a call on 1 April 2014 from either David Hanna or Bob Williams to

¹²¹ CFMEU DD MFI-29, 20/10/15.

¹²² CFMEU DD MFI-29, 20/10/15.

¹²³ Bob Williams, 23/9/15, T:251.26-47.

¹²⁴ David Hanna, 22/9/15, T:72.30-73.17.

grab the CFMEU QLD's box trailer, which was stored at Cornubia, and bring it into the office at the CFMEU.¹²⁵ He had a 'feeling' that he might already have been at Cornubia. But he was not sure why this would have been the case.¹²⁶

He recalled it was 'late' when he had to bring the box trailer into the office.¹²⁷ Brian Humphrey later said that he believed it was 'late afternoon' when he arrived and he believed the horse float trailer was already there.¹²⁸ Brian Humphrey assisted loading the box trailer with boxes from the garage to 16 Campbell Street. After that task was complete he left.¹²⁹ When he finished the trailer was fairly full.¹³⁰ He thought that it was late afternoon when he left. It might have been just on dusk or just after.¹³¹

Phone records show that an SMS was sent from David Hanna to Brian Humphrey at 2.06pm. At that time Brian Humphrey's phone was in the Cornubia area.¹³² Telephone

¹²⁵ Brian Humphrey, 23/9/15, T:259.28-260.9.

¹²⁶ Brian Humphrey, 23/9/15, T:260.3-18.

¹²⁷ Brian Humphrey, 23/9/15, T:260.7-260.9.

¹²⁸ Brian Humphrey, 23/9/15, T:261.20-27.

¹²⁹ Brian Humphrey, 23/9/15, T:262.4-45.

¹³⁰ Brian Humphrey, 23/9/15, T:244.2.

¹³¹ Brian Humphrey, 23/9/15, T:262.4-45.

¹³² CFMEU DD MFI-28, 20/10/15.

calls made and received by Brian Humphrey between 3.00pm and 4.22pm show his phone as using the Cornubia tower.¹³³

The table set out below extracts some of the calls and text made or received by Brian Humphrey between 4.22pm and 9.12pm, and their location:

| Time | Mobile Phone Tower |
|--------|----------------------------------|
| 4.22pm | Cornubia ¹³⁴ |
| 4.48pm | Gaven ¹³⁵ |
| 5.22pm | Kerrydale ¹³⁶ |
| 5.28pm | Andrews West ¹³⁷ |
| 5.41pm | Varsity Lakes ¹³⁸ |
| 5.51pm | Mudgeeraba ¹³⁹ |
| 5.53pm | Mudgeeraba North ¹⁴⁰ |
| 6.36pm | Loganholme ¹⁴¹ |
| 7.12pm | Cornubia ¹⁴² |
| 7.41pm | Bowen Hills South ¹⁴³ |
| 8.10pm | Bowen Hills |
| 8.17pm | Bowen Hills South |
| 8.20pm | Spring Hill |
| 8.54pm | Logan Hyperdome |
| 9.12pm | Mudgeeraba |

¹³³ CFMEU DD MFI-28, 20/10/15.

¹³⁴ CFMEU DD MFI-28, 20/10/15.

¹³⁵ CFMEU DD MFI-28, 20/10/15. Note: CFMEU DD MFI-9 contains an error in that it attributes the location of the 4.48pm call to Cornubia, not Gaven.

¹³⁶ CFMEU DD MFI-28, 20/10/15.

¹³⁷ CFMEU DD MFI-28, 20/10/15.

¹³⁸ CFMEU DD MFI-28, 20/10/15.

¹³⁹ CFMEU DD MFI-28, 20/10/15.

¹⁴⁰ CFMEU DD MFI-28, 20/10/15.

¹⁴¹ CFMEU DD MFI-28, 20/10/15.

¹⁴² CFMEU DD MFI-28, 20/10/15.

¹⁴³ CFMEU DD MFI-27, 20/10/15.

The records suggest that Brian Humphrey, after having originally been at Cornubia earlier in the day, travelled to the Gold Coast, returned to Cornubia, picked up the box trailer and then travelled to the CFMEU offices to arrive at around 7.40pm. Though there had been calls between Brian Humphrey and David Hanna throughout the day, David Hanna called Brian Humphrey at 5.22pm, and shortly before Brian Humphrey started travelling back towards Cornubia.¹⁴⁴

Brian Humphrey then remained at the CFMEU's offices until at least 8.17pm. He began travelling towards the Gold Coast shortly thereafter.¹⁴⁵

- (i) Stacey Davidson remembered 'working till late at night.'¹⁴⁶ She later said she was there until around 7pm.¹⁴⁷
- (j) Jacqueline Collie was involved on the night of the 'clean up' in moving unwanted files selected by either Michael Ravbar or Paula Masters from the No 16 office to the No 14 office and placing them on the floor in the No 14 office.¹⁴⁸ She thought she did this for a couple of hours.¹⁴⁹ However, during

¹⁴⁴ CFMEU DD MFI-27, 20/10/15; CFMEU DD MFI-28, 20/10/15.

¹⁴⁵ CFMEU DD MFI-28, 20/10/15.

¹⁴⁶ Stacey Davidson, 23/9/15, T:287.23.

¹⁴⁷ Stacey Davidson, 23/9/15, T:293.5-8.

¹⁴⁸ Jacqueline Collie, 23/9/15, T:307.9-15, 314.30-32.

¹⁴⁹ Jacqueline Collie, 23/9/15, T:316.7-9.

the night she was also in her office doing her own work.¹⁵⁰ When Jacqueline Collie left on 1 April, which was about 7pm or 7.30pm, there were still piles of files and lots of documents located in the big open area of No 14.¹⁵¹

- (k) Michael Ravbar said he started work in relation to the filing system at around 2.30pm on 1 April 2014. He finished his work at around 7.30pm or 8pm that night.¹⁵² Call charge records in respect of Michael Ravbar's mobile phone show that he was still in the vicinity of the CFMEU's office at 8.10pm.¹⁵³
- (l) David Hanna believed he stayed at the CFMEU offices all afternoon.¹⁵⁴ Call charge records in respect of David Hanna's mobile phone show David Hanna's mobile phone being in the vicinity of the Bowen Hills South mobile phone tower from 2.05pm until at least 8.05pm.¹⁵⁵

50. The following conclusions are probable. The bulk of the 'clean up' on 1 April did not commence until close to 5pm. A substantial amount of the loading of documents into the trailers occurred after 5.30pm (in the case of the first load of the horse float) and 7.40pm (in the case of the box trailer) when it was dark. The 'clean up' and loading of

¹⁵⁰ Jacqueline Collie, 23/9/15, T:318.43-45.

¹⁵¹ Jacqueline Collie, 23/9/15, T:314.14-315.15.

¹⁵² Michael Ravbar, 24/9/15, T:410.1-5, 419.31-34.

¹⁵³ CFMEU DD MFI-30, 20/10/15.

¹⁵⁴ David Hanna, 22/9/15, T:74.42.

¹⁵⁵ CFMEU DD MFI-27, 20/10/15.

documents did not finish until close to or after 8pm on that evening. As noted above, the CFMEU appears to accept this to be the case.¹⁵⁶

51. The CFMEU, however, relied on this evidence as a matter which undermines David Hanna's credibility. His evidence, described as 'unequivocal',¹⁵⁷ was that he thought there was an attempt to burn material on the afternoon of 1 April.¹⁵⁸ It is worth noting the precise words in which the CFMEU submissions are cast. They stated: 'No doubt Mr Hanna in giving this "unequivocal" evidence was motivated to paint as bleak a picture of Mr Ravbar as possible by contending that the burning had occurred the day Mr Hanna was aware the notice to produce was issued.'¹⁵⁹ The submissions of counsel assisting responded to this point by contending that it was not 'unequivocal' evidence, but rather just what he *thought* had occurred. There was no suggestion that David Hanna was present during the burning. Hence he could be innocently mistaken as to the date. The submission of counsel assisting on this point is accepted.

52. The CFMEU also took issue with what it said was an 'insinuation' suggested by counsel assisting that 'something malevolent was on foot' because, with the exception of Hollie Bradshaw, only salaried staff were asked to stay back to assist in the removal of documents. The CFMEU contended this is not borne out by the evidence which indicated that junior wage-earning office staff were not asked to stay

¹⁵⁶ Submissions of the CFMEU, 29/10/15, para 93.

¹⁵⁷ Submissions of the CFMEU, 29/10/15, para 98.

¹⁵⁸ Submissions of the CFMEU, 29/10/15, paras 93-94.

¹⁵⁹ Submissions of the CFMEU, 29/10/15, para 98.

back and assist for the economically rational reason that they would have had to be paid overtime.¹⁶⁰ This issue need not be resolved.

Michael O'Connor's email

53. Earlier on 1 April at 4.16pm AEST, Michael Ravbar, David Hanna, Paula Masters and Jacqueline Collie were sent an email from Michael O'Connor, the National Secretary of the CFMEU.¹⁶¹ He was in Melbourne. The subject of the email was:¹⁶²

URGENT – Notice to Produce Documents from the Royal Commission –
To all CFMEU Division Secretaries/Presidents, Divisional Branch
Secretaries and District Branch Presidents

54. The body of the email included the following:¹⁶³

Re : URGENT – Notice to Produce Documents from the Royal Commission

Please find attached for your urgent attention, noting the 10.00am 11 April deadline, two attachments:

- The Notice to Produce Documents
- A letter regarding it

55. The notice to produce attached required the production of 11 categories of documents including all financial records kept by each reporting unit of the CFMEU pursuant to s 252 of the *Fair Work (Registered*

¹⁶⁰ Submissions of the CFMEU, 29/10/15, para 61.

¹⁶¹ CFMEU DD MFI-12, 24/9/15.

¹⁶² CFMEU DD MFI-12, 24/9/15.

¹⁶³ CFMEU DD MFI-12, 24/9/15.

Organisations) Act 2009 (Cth). The letter attached to the email was from Michael O'Connor and contained the following text:¹⁶⁴

URGENT

...

To:

**All Division Secretaries/Presidents
Divisional Branch Secretaries and
District Branch Presidents ...**

Please find attached a Notice to Produce Documents issued by the Royal Commission into Trade Union Governance and Corruption directed to the Union. ...

I would request that you all give this matter your very urgent attention and that you take immediate steps to comply with the Notice.

It might be said in passing that this email communication from Michael O'Connor and its attachments were, with respect, responsible and appropriate. It will be necessary to return to his conduct in this regard later.

56. David Hanna could not recall getting the email at all.¹⁶⁵ However, he gave the following evidence as to what Michael Ravbar said to him on 1 April 2014:¹⁶⁶

Michael Ravbar told me that it's expected to be getting the notice that day. He told me the office staff had been informed not to pass any phone calls through to him, not to look at certain, not to open certain emails, and that he wanted to – wanted to not have to be in a position of spending the next month photocopying documentation, so he wanted to remove some of

¹⁶⁴ CFMEU DD MFI-12, 24/9/15.

¹⁶⁵ David Hanna, 24/9/15, T:449.2-25.

¹⁶⁶ David Hanna, 22/9/15, T:71.32-40.

those items from the office and he, you know, said “We need to do this”, and I followed direction.

On 16 July 2015, David Hanna told Leo Skourdoumbis much the same thing about Michael Ravbar’s statements concerning the photocopying.¹⁶⁷

57. Paula Masters said she did not read the email on 1 April 2014. She said that in all probability she read it on 2 April 2014.¹⁶⁸ She also said that she would have seen the subject on 2 April 2014, which included the word ‘URGENT’. But she said that, given that the email was addressed to the Secretary, ‘unless he directed me to read it and do something with it, I had no reason to read it.’¹⁶⁹ Her evidence was to the effect that emails sent to Michael Ravbar into which she was copied were not her business.¹⁷⁰ She could not recall being told by anyone not to look at her emails on the afternoon and evening of 1 April 2014.¹⁷¹ However, while she did not hear about the notice to produce on ‘that particular day’, Paula Masters thought that she ‘had heard that the Plumbers had received one’.¹⁷² This is a reference to the CEPU. It is consistent with the evidence of Bradley O’Carroll.¹⁷³

¹⁶⁷ CFMEU DD MFI-5, 22/9/15, p 34.

¹⁶⁸ Paula Masters, 24/9/15, T:362.20-25.

¹⁶⁹ Paula Masters, 24/9/15, T:363.8-22.

¹⁷⁰ Paula Masters, 24/9/15, T:362.27-37.

¹⁷¹ Paula Masters, 24/9/15, T:360.32-34.

¹⁷² Paula Masters, 23/9/15, T:215.27-28.

¹⁷³ See paras 70-71.

58. Jacqueline Collie did not recall seeing Michael O'Connor's email on 1 April 2014.¹⁷⁴ Nor could she recall anyone telling her on the afternoon or evening of 1 April 2014 not to look at her emails or not to answer telephone calls.¹⁷⁵ She could not recall when she saw the email.¹⁷⁶
59. Michael Ravbar denied seeing Michael O'Connor's email on 1 April. He said he did not see it until mid to late morning on 2 April 2014.¹⁷⁷ He denied telling David Hanna that he expected to get the notice that day.¹⁷⁸ Michael Ravbar also denied telling David Hanna that he had told the staff not to open certain emails.¹⁷⁹ He did say to the staff that he was not to be disturbed while he was 'going through the – with the filing system'.¹⁸⁰ He could not recall telling David Hanna that he did not want to be in the position of spending the next month photocopying information.¹⁸¹

The events of the 'clean up'

60. What precisely occurred during the 'clean up'? Most of the evidence concerning the loading of the horse float trailer and the box trailer with boxes of documents has already been summarised. The horse float

¹⁷⁴ Jacqueline Collie, 24/9/15, T:368.38-369.1.

¹⁷⁵ Jacqueline Collie, 24/9/15, T:369.37-370.18.

¹⁷⁶ Jacqueline Collie, 24/9/15, T:372.45-47.

¹⁷⁷ Michael Ravbar, 24/9/15, T:419.22-420.10.

¹⁷⁸ Michael Ravbar, 24/9/15, T:433.15-17.

¹⁷⁹ Michael Ravbar, 24/9/15, T:433.32-34.

¹⁸⁰ Michael Ravbar, 24/9/15, T:433.25-26. See also Michael Ravbar, 24/9/15, T:380.21-23.

¹⁸¹ Michael Ravbar, 24/9/15, T:434.4-7.

trailer, which was parked at the front of No 14, was loaded with boxes of documents and other documents located in the foyer and open areas of the No 14 office.¹⁸² The box trailer was loaded with boxes and documents which had been stacked outside the archive room in the No 16 garage.¹⁸³

61. Michael Ravbar's evidence was that the majority of the documents loaded at No 14 were boxes which had earlier been brought over from the BLF.¹⁸⁴ However, in addition to the BLF documents, Jacqueline Collie had throughout the afternoon been transferring files from No 16 which had been selected by Michael Ravbar or Paula Masters for destruction.¹⁸⁵ That is, a number of unwanted CFMEU files were taken and left in No 14. It is to be inferred that these documents were collected by those persons loading the horse float trailer and taken for destruction.
62. The evidence of Michael Ravbar, Paula Masters and Jacqueline Collie was that on 1 April 2014, Michael Ravbar sorted a number of files. Paula Masters said that during the afternoon and evening of the 'clean up' she saw Michael Ravbar looking through the CFMEU 'green files'. These were general files containing documents such as property records and right of entry applications for organisers.¹⁸⁶ Paula Masters estimated that there were about 100 or 150 such files. They varied in

¹⁸² Bob Williams, 23/9/15, T:242.43-243.9.

¹⁸³ Brian Humphrey, 23/9/15, T:261.29-262.2.

¹⁸⁴ Michael Ravbar, 24/9/15, T:382.9-18.

¹⁸⁵ Jacqueline Collie, 23/9/15, T:307.9-15, 314.14-42.

¹⁸⁶ Paula Masters, 23/9/15, T:205.30-39. See also Stacey Davidson, 23/9/15, T:293.28-294.8.

size from one or two documents to two or three folders of approximately 5cm in width.¹⁸⁷ These files were stored in a hanging file arrangement outside the kitchen at No 16.¹⁸⁸ Michael Ravbar asked Paula Masters about certain files and determined which should be kept.¹⁸⁹ The unwanted files were taken by Jacqueline Collie to No 14.¹⁹⁰ Paula Masters guessed it might have taken Michael Ravbar maybe an hour to complete this task.¹⁹¹

63. In addition to the 'green files', about 300 CFMEU EBA files or 'blue files' were moved from inside a compactus at No 16 to No 14.¹⁹² Michael Ravbar sorted through those files.¹⁹³ Some were put into a compactus at No 14 and the others put aside for destruction.¹⁹⁴ Paula Masters guessed this task took about 2 hours.¹⁹⁵
64. Paula Masters also gave evidence that she and Michael Ravbar examined the contents of the BLF files which were in boxes at No 14.¹⁹⁶ She said there were a lot of boxes. Some contained EBA files and old gazettes. Some even had stationery items.¹⁹⁷ In contrast, Michael Ravbar said he had already examined all of the BLF files

¹⁸⁷ Paula Masters, 23/9/15, T:206.29-47.

¹⁸⁸ Paula Masters, 23/9/15, T:207.16-18.

¹⁸⁹ Michael Ravbar, 24/9/15, T:384.42-385.13.

¹⁹⁰ Jacqueline Collie, 23/9/15, T:307.9-14, 314.29-31.

¹⁹¹ Paula Masters, 23/9/15, T:207.39.

¹⁹² Paula Masters, 23/9/15, T:207.43-210.17.

¹⁹³ Paula Masters, 23/9/15, T:210.2.

¹⁹⁴ Paula Masters, 23/9/15, T:210.2-4.

¹⁹⁵ Paula Masters, 23/9/15, T:210.7-8.

¹⁹⁶ Paula Masters, 23/9/15, T:205.38-206.27, 211.25-212.8.

¹⁹⁷ Paula Masters, 23/9/15, T:212.3-212.4.

before 1 April 2014.¹⁹⁸ Finally, there were yellow files containing correspondence which were all destroyed.¹⁹⁹

65. Apart from this, there was a culling of CFMEU membership and finance records.

(a) Stacey Davidson said that she was involved in ‘working out which membership documents after seven years were ready to be destroyed and which ones to be kept’.²⁰⁰ She said that at the end of every year membership records for that year were supposed to be wrapped up in brown paper and stored in the archive room which was in the No 16 garage area.²⁰¹ Apparently, each year there was supposed to be a clean out of old membership records from the archive room, but this had not occurred for a couple years.²⁰² On the day of the ‘clean up’ Stacey Davidson might have wrapped up a couple of membership records for 2013.²⁰³ But her main task was clearing out membership records from the archive room.²⁰⁴ She said she took out records for 2006 and prior years and placed to the side on the ground.²⁰⁵ She did not know what

¹⁹⁸ Michael Ravbar, 23/9/15, T:393.24-394.2, 408.7-20.

¹⁹⁹ Paula Masters, 23/9/15, T:212.13-24.

²⁰⁰ Stacey Davidson, 23/9/15, T:287.23-26.

²⁰¹ Stacey Davidson, 23/9/15, T:299.1-300.38.

²⁰² Stacey Davidson, 23/9/15, T:289.16-21, 290.15-21, 299.39-300.5.

²⁰³ Stacey Davidson, 23/9/15, T:294.33-35, 300.14-15.

²⁰⁴ Stacey Davidson, 23/9/15, T:294.38-39.

²⁰⁵ Stacey Davidson, 23/9/15, T:288.10-34, 289.43-44.

happened after that.²⁰⁶ But she assumed that they were put in a destruction bin or loaded into a trailer to be taken away.²⁰⁷

- (b) Paula Masters said that on the evening of 1 April 2014 finance and membership records were removed from the archive room under her direction.²⁰⁸ She did not say what documents were destroyed. She could only say that ‘we would have been destroying a year’s worth of documents at that stage from seven years prior’.²⁰⁹ This may be compared with Stacey Davidson’s evidence. Paula Masters said that she remembered the training organisers ‘helping carry the files from the archive room to document destruction bins’. But she also said she ‘couldn’t tell you exactly what they were doing’.²¹⁰ She also said that the two document destruction bins, which were the size of a garbage bin, were full.²¹¹ She did not recall that any documents were taken away on that night, or that any documents from the archive area were shredded that evening.²¹²
- (c) Cherie Shaw gave evidence that she understood there had been a ‘clean out of the archive room’ where old finance and membership records were kept on the night of the ‘clean

²⁰⁶ Stacey Davidson, 23/9/15, T:290.9-11.

²⁰⁷ Stacey Davidson, 23/9/15, T:289.46-290.11.

²⁰⁸ Paula Masters, 23/9/15, T:217.2-8.

²⁰⁹ Paula Masters, 23/9/15, T:217.11-13.

²¹⁰ Paula Masters, 23/9/15, T:216.31-34.

²¹¹ Paula Masters, 23/9/15, T:217.13-14.

²¹² Paula Masters, 23/9/15, T:217.31-36, 218.35-36, 224.36-41.

up'.²¹³ She and Paula Masters were also involved in shredding documents from her office, including invoices and phone bills.²¹⁴

66. Finally, at some point during the afternoon or evening all of the security cameras at the CFMEU office were covered.

(a) There were four cameras in the office. One was in the No 16 office. One in the garage under No 16. One was in the foyer of No 14. One was on the exterior of No 14.²¹⁵

(b) Rob Cameron said he covered the cameras at David Hanna's direction. He said Michael Ravbar was not present when David Hanna gave him the direction.²¹⁶ He covered the one in No 16 and the one outside No 14 with a large roll out fabric banner which was leaned against the camera.²¹⁷ These banners were stored under the staircases in No 14.²¹⁸ The camera in the garage was covered with a shirt.²¹⁹

(c) Paula Masters said she knew that the No 16 camera and the camera in the office were covered.²²⁰ She thought she saw the one in the office being covered. But she was not sure

²¹³ Cherie Shaw, 22/9/15, T:176.4-30.

²¹⁴ Cherie Shaw, 22/9/15, T:171.15-37; Paula Masters, 23/9/15, T:217.31-36, 224.43-225.33.

²¹⁵ Paula Masters, 23/9/15, T:199.36-38.

²¹⁶ Rob Cameron, 23/9/15, T:334.29-33, 335.14-16, 336.8-14.

²¹⁷ Rob Cameron, 23/9/15, T:334.36-47, 336.25-30, 336.32-38.

²¹⁸ Rob Cameron, 23/9/15, T:336.44-46.

²¹⁹ Rob Cameron, 23/9/15, T:336.32-38.

²²⁰ Paula Masters, 23/9/15, T:219.44-47.

about the one in the garage area.²²¹ Inferentially, she saw or was told about the one in the garage. Paula Masters was not there when the decision to cover the cameras was made. But she said David Hanna organised it.²²² When asked as to her understanding why they were covered, she said:²²³

I honestly have no idea. It wasn't my decision to make. I saw no necessity for it. To me, we were just doing a clean-up, but it wasn't my call to make. ... That was their decision to make.

- (d) David Hanna said that the cameras were covered and he was involved with covering them up.²²⁴ He said Michael Ravbar gave a direction to him to cover the cameras.²²⁵ He thought that Rob Cameron or Paula Masters might have been there when the direction was given.²²⁶ He said he went to Rob Cameron to carry out the task he had been 'assigned' by Michael Ravbar because Rob Cameron knew where the cameras were.²²⁷
- (e) Michael Ravbar denied seeing or knowing on 1 April 2014 that the security cameras had been covered over on the day. He denied directing or approving that the cameras be covered

²²¹ Paula Masters, 23/9/15, T:221.1-3.

²²² Paula Masters, 23/9/15, T:219.13-42.

²²³ Paula Masters, 23/9/15, T:220.4-11, 220.13-31.

²²⁴ David Hanna, 22/9/15, T:87.1-16.

²²⁵ David Hanna, 22/9/15, T:87.22-27; David Hanna, 24/9/15, T:454.37-455.12.

²²⁶ David Hanna, 22/9/15, T:87.41-45, 456.8-9.

²²⁷ David Hanna, 22/9/15, T:461.12-15.

up. He said he found out about it two weeks later from Rob Cameron.²²⁸

67. The CFMEU made certain submissions about the covering of the cameras. The CFMEU argued amongst other things that David Hanna's evidence was inconsistent as to who was or was not there when he received the instruction to cover the cameras. It submitted that this was a further example of David Hanna's unreliability.²²⁹ The CFMEU also submitted that Rob Cameron was 'uncomfortable' about David Hanna's instruction. He did not think they were doing anything wrong and did not know why there was any need to cover the cameras. The CFMEU submitted that this evidence had not been undermined to any extent. It submitted that it belied the theory that the cameras were covered up to conceal something sinister.²³⁰

68. The CFMEU also referred to Michael Ravbar's evidence that he did not direct David Hanna to cover up the cameras. It contended that counsel assisting's submission that Michael Ravbar must have seen the cameras was 'baseless'. The CFMEU submitted that there is 'no reason' to reject Michael Ravbar's evidence. It submitted that it is supported by the testimony of Rob Cameron and Paul Masters.²³¹ The CFMEU further submitted that the idea that something sinister was going on that required secrecy was contradicted by the loading of the

²²⁸ Michael Ravbar, 24/9/15, T:398.43-399.5, 409.27-32, 410.42-411.15, 426.6-9, 427.28-30.

²²⁹ Submissions of the CFMEU, 29/10/15, para 77.

²³⁰ Submissions of the CFMEU, 29/10/15, para 79.

²³¹ Submissions of the CFMEU, 29/10/15, para 80.

horse float loaded in a public place, directly in front of the CFMEU offices with peak hour traffic driving by.²³²

69. Counsel assisting responded that those submissions misrepresented the evidence.²³³ In particular counsel assisting contended that the CFMEU submission failed to deal with the evidence that in fact almost all of the loading occurred after sunset and most of it in the dark. Counsel assisting noted that the CFMEU, far from challenging these conclusions, as noted above in the context of the discussion about the evidence about sunset,²³⁴ appeared to accept them. Counsel assisting further pointed to the evidence which showed that the box trailer was loaded in the garage and was not visible from the street. Counsel assisting submitted that the covering of the cameras under Michael Ravbar's instruction is strong evidence of a consciousness of guilt. The submission is accepted. The covering of the cameras is an important part of a circumstantial case against both David Hanna and Michael Ravbar.

70. Significant evidence came to light following the oral hearings in September 2015. Bradley O'Carroll was the Secretary of the Queensland Branch of the Plumbing Division of the CEPU as at 1 April 2014. On 29 October 2015 he provided an affidavit dealing with some relevant emails and minutes of meetings. These included an email from him to Michael Ravbar attaching the notice to produce which had been served on the CEPU by the Royal Commission on

²³² Submissions of the CFMEU, 29/10/15, paras 81-82.

²³³ Submissions of Counsel Assisting, 30/11/15, paras 22-23.

²³⁴ See para 49(b).

31 March 2014.²³⁵ They also included the minutes of back-to-back meetings of the board of directors of Construction Income Protection Ltd (**CIPQ**).²³⁶ Those meetings took place between 8.00am and 10.30am on 1 April 2014. Both Bradley O’Carroll and Michael Ravbar (amongst others) were in attendance.

71. Bradley O’Carroll was not required to give oral evidence.²³⁷ His affidavit was neither challenged nor contradicted. It established that by about 10.06am (AEST) on 1 April 2014 Michael Ravbar was aware (as a result of a discussion that he had with Bradley O’Carroll that morning) that the CEPU had been served with a notice to produce from the Royal Commission on 31 March 2014. It also established that Michael Ravbar had been emailed a copy of that notice to produce. The CEPU was one of the other five unions named in the Terms of Reference, along with the CFMEU.

72. In submissions to the Commission dated 29 October 2015, and written before Bradley O’Carroll’s affidavit was tendered, the CFMEU and Michael Ravbar had advanced the following argument:²³⁸

... David Hanna’s evidence was that on 1 April Michael Ravbar told him that he expected to receive a notice to produce that day and directed David Hanna to inform all staff members not to pass any calls through to Michael Ravbar. How Michael Ravbar came to have knowledge of a notice to produce that had not yet been served on the CFMEU National Office is a missing link in the case theory. There is no intercepted telephone

²³⁵ CFMEU DD MFI-31, 24/11/15.

²³⁶ CFMEU DD MFI-32, 24/11/15.

²³⁷ Although the affected persons were invited by the Commission to seek to cross-examine Bradley O’Carroll or adduce further evidence if they so wished, they subsequently notified the Commission that they did not.

²³⁸ Submissions of the CFMEU, 29/10/15, para 50.

conversation, no email or other evidence from which it could possibly be concluded that Michael Ravbar had notice that the Commission was going to serve a notice to produce on the CFMEU on 1 April 2014. Counsel assisting's case theory and the first condition precedent to the thesis that what occurred on 1 April 2014 was possibly a criminal act is again exposed as fundamentally flawed as it requires Michael Ravbar to have clairvoyant like powers.

73. In supplementary submissions,²³⁹ counsel assisting submitted that not only did this submission grossly understate the circumstantial evidence but that Bradley O'Carroll's evidence also critically undermined the CFMEU's submission. By the time the 'clean-up' began on the afternoon of 1 April 2014, Michael Ravbar need not have possessed 'clairvoyant like powers' to anticipate that the CFMEU would shortly be served with a notice to produce. Rather, based on his earlier communications with Bradley O'Carroll, Michael Ravbar knew there was a very high likelihood that service of a notice to produce on the CFMEU was imminent.
74. Counsel assisting also submitted that Bradley O'Carroll's evidence explained Paula Masters' testimony that, though she did not hear about the CFMEU notice to produce on 'that particular day' (being 1 April 2014), she thought she 'had heard that the Plumbers had received one'.²⁴⁰ The obvious inference was, counsel assisting submitted, that she had heard this from Michael Ravbar. That added to the circumstantial case that the 'clean up' was not an ordinary event but a deliberate attempt to remove and destroy documents that Michael Ravbar believed would or may be required by the Commission.

²³⁹ Submissions of Counsel Assisting, 24/11/15, para 8.

²⁴⁰ Paula Masters, 23/9/15, T:215.27-28.

75. Counsel assisting further submitted that Bradley O’Carroll’s evidence also assisted in explaining why Michael Ravbar would have told David Hanna that he expected to receive a notice that day and why he would have instructed staff not to pass calls through to him or open certain emails.²⁴¹ They submitted that the evidence was further circumstantial evidence supporting David Hanna’s account over that of Michael Ravbar.

The nature of the material destroyed

76. What material was destroyed? The CFMEU contended, first, in an argument which is textually somewhat difficult, that ‘[t]here were no documents not able to be provided by the Queensland branch of the CFMEU pursuant to the notice to produce served on the National Office of the CFMEU on 1 April 2014.’²⁴² Secondly, the CFMEU submitted that all hard copy documents disposed of during the clean-up were reproducible.²⁴³ These propositions underlie a question posed thus by the CFMEU:²⁴⁴

How can it possibly be established that a person either:

- (a) intended to destroy a document that may be or was required for by [sic] the Commission; or
- (b) was aware there is a substantial risk that a particular document will be required and it was unjustifiable to destroy a hard copy of such document,

²⁴¹ David Hanna, 22/9/15, T:71.32-40; Michael Ravbar, 24/9/15, T:433.22-33.

²⁴² Submissions of the CFMEU, 29/10/15, para 66.

²⁴³ Submissions of the CFMEU, 29/10/15, paras 66-67.

²⁴⁴ Submissions of the CFMEU, 29/10/15, para 67.

in circumstances where there is no contention that any particular document was ever not provided as required to the Commission?

77. Counsel assisting further submitted that the second submission of the CFMEU is factually incorrect. The evidence relied upon is the testimony of Paula Masters. She asserted she could obtain the telephone records. However, archived finance and membership records were also destroyed.²⁴⁵ There was no evidence that those documents could be reproduced. This submission is accepted.
78. Counsel assisting answered the first of the CFMEU's submissions and the concluding question thus. There is no record of what was destroyed during the 'clean up'. Therefore, no one at the union can say that what was produced in answer to any given notice to produce was everything which the union had before the 'clean up' falling within the terms of the notice. Counsel assisting further submitted that it is wrong to focus on the terms of the individual notices to produce: it is enough that a destroyed document might be relevant to the Commission's future proceedings. These submissions are plainly correct.

Events of 2 April 2014: a bonfire of documents

79. On 2 April 2014, an attempt was made by Bob Williams and Brian Humphrey to burn the documents which had been taken to David Hanna's Cornubia property.²⁴⁶ Bob Williams said David Hanna gave him the direction to do that.²⁴⁷ Brian Humphrey did not recall who

²⁴⁵ Submissions of Counsel Assisting, 20/10/15, para 51.

²⁴⁶ Bob Williams, 23/9/15, T:248.2-24; Brian Humphrey, 23/9/15, T:263.18-264.16.

²⁴⁷ Bob Williams, 23/9/15, T:248.12-13.

contacted him, but he thought that it may have been David Hanna.²⁴⁸ However, it became apparent to both men that it would take too long to burn the documents.²⁴⁹ Bob Williams estimated that the two men might have attempted to burn around 10 boxes of documents over a couple of hours.²⁵⁰

80. In due course they gave up. A call was then put to David Hanna. Brian Humphrey thought that he was the caller. Either he or Bob Williams informed David Hanna that it would take too long to burn the documents. At that point David Hanna told them to stop.²⁵¹

Arranging for the tip truck

81. In his conversation with Leo Skourdoumbis on 16 July 2015, David Hanna said this about the removal of documents:²⁵²

Ravbar said ‘aw listen can we take it down your place, can you burn it or something?’

...

So I said, ‘yeah mate I’ll get fucking rid of it, yeah no worries, (INDISTINCT) take it down.’ They took it all down it couldn’t fucking burn, it was just too much to fucking burn the fucking fire brigade would have turned up. So I put it in the old hay shed, right? And organised a tip truck to come get it, loaded it up, got a training coordinator, followed it out to the tip, watched it get tipped over the edge, gone.

²⁴⁸ Brian Humphrey, 23/9/15, T:263.20-22.

²⁴⁹ Bob Williams, 23/9/15, T:248.19-24; Brian Humphrey, 23/9/15, T:264.6-11.

²⁵⁰ Bob Williams, 23/9/15, T:250.1-3.

²⁵¹ Bob Williams, 23/9/15, T:248.19-31; Brian Humphrey, 23/9/15, T:264.13-45; David Hanna, 22/9/15, T:73.38-74.38.

²⁵² CFMEU DD MFI-2, 21/9/15, p 3.

82. David Hanna's oral evidence on 21 and 22 September 2015²⁵³ was substantially to the same effect. He maintained that Michael Ravbar had asked him to take the documents to his property to burn. After this method failed, there was a discussion between him and Michael Ravbar during which the suggestion of getting a tip truck to dispose of the documents was raised, possibly by David Hanna. David Hanna also said that Michael Ravbar wanted to make sure that someone went with the tip truck to ensure that the documents were disposed of.²⁵⁴
83. Michael Ravbar accepted that he directed David Hanna to take the documents away from the union. But he denied that he had directed or learnt about any burning of documents at the time. He also denied any discussion about getting a tip truck.²⁵⁵ He said his only understanding of where David Hanna was taking the documents was that he said 'that he was going to bury it'.²⁵⁶ Michael Ravbar said that he did not discuss any other method of disposal '...[be]cause it should have just been dumped at the tip, like normally happens'.²⁵⁷
84. It was submitted by counsel assisting that Michael Ravbar's evidence on this topic was inherently unlikely.²⁵⁸ This submission is accepted. On Michael Ravbar's own evidence, this was the first year David Hanna was involved with a 'clean up'. Apparently, the removal of

²⁵³ David Hanna, 21/9/15, T:6.12-39, 7.43-47, 20.40-47, 47.2-48.45, 53.20-54.2; David Hanna, 22/9/15, 73.36-74.38, 83.45-84.8.

²⁵⁴ David Hanna, 22/9/15, T:92.30-33.

²⁵⁵ Michael Ravbar, 24/9/15, T:413.12-415.36.

²⁵⁶ Michael Ravbar, 24/9/15, T:413.26-28.

²⁵⁷ Michael Ravbar, 24/9/15, T:413.38-41.

²⁵⁸ Submissions of Counsel Assisting, 20/10/15, para 58.

documents was usually organised by Peter Close, who was away.²⁵⁹ The evidence of a number of witnesses, including Michael Ravbar himself, was that he had a very ‘hands-on’ leadership style. He was particular about things being done in the way he wanted, and being done properly.²⁶⁰ Michael Ravbar agreed with Bob Williams’ evidence that ‘[n]othing happens in the CFMEU office that Michael doesn’t oversee.’²⁶¹ Counsel assisting submitted that it is not credible that Michael Ravbar would not have given some direction to David Hanna about the way the documents were to be destroyed. It is a topic which would naturally arise in any conversation in which Michael Ravbar directed David Hanna to dispose of trailer loads of documents. That submission too, is accepted.

Events of 4 April 2014: dumping the documents

85. After the unsuccessful burning attempt, David Hanna hired a truck and excavator combo from Harrington Bobcat Hire Pty Ltd to come to his property on 4 April 2014.²⁶²
86. On the morning of 4 April 2014, the truck arrived at David Hanna’s Cornubia property at around 7.30am.²⁶³ David Hanna, Bob Williams

²⁵⁹ Michael Ravbar, 24/9/15, T:414.16-415.17.

²⁶⁰ David Hanna, 21/9/15, T:53.43-45; David Hanna, 22/9/15, T:71.15-23, 89.34-35; David Hanna, 24/9/15, 463.27-31; Jessica Kanofski, 22/9/15, T:142.8-21; Cherie Shaw, 22/9/15, T:178.6-14; Bob Williams, 23/9/15, T:250.22-25; Brian Humphrey, 23/9/15, T:271.3-4; Stacey Davidson, 23/9/15, T:303.24-30; Michelle Clare, 23/9/15, T:327.28-39.

²⁶¹ Michael Ravbar, 24/9/15, T:376.39-377.10.

²⁶² CFMEU DD MFI-2, 21/9/15, p 3; David Hanna, 22/9/15, T:66.45-67.5, 75.40-46, 76.35-43.

²⁶³ Ben Flanagan, 23/9/15, T:285.17. See also CFMEU DD MFI-7, 22/9/15.

and Brian Humphrey were there. Along with the truck driver, Ben Flanagan, they loaded onto the truck the boxes of documents which had previously been transported from the CFMEU offices (apart from the relatively few documents that had been successfully burnt).²⁶⁴ To help keep the documents from blowing away, some dirt was placed on the top of the documents and a tarpaulin.²⁶⁵ The truck driver estimated that between 2–3 backhoe bucket loads of soil (each bucket being around one-third of a cubic metre) were placed on top. Bob Williams thought about 4–5 loads were placed, with each bucket being around one-quarter of a cubic metre.²⁶⁶ Counsel assisting submitted that the estimates given were consistent with approximately 1–1.7 m³ of soil being loaded onto the truck. On the evidence, however, the range would appear to be 0.67–1.25m³. This is an illustration of the extreme conservatism of counsel assisting’s calculations.

87. The documents and soil were taken and dumped at the New Chum landfill.²⁶⁷ The delivery docket recorded the weight of the dumped material at 10.36 am at 6.86 tonnes.²⁶⁸ Brian Humphrey rode in the truck with the driver at David Hanna’s request.²⁶⁹ As recorded above,

²⁶⁴ David Hanna, 23/9/15, T:15.5-15, 80.1-46; Bob Williams, 23/9/15, T:249.37-44; Brian Humphrey, 23/09/15, T:265.35-266.37. See also CFMEU DD MFI-2, 21/9/15.

²⁶⁵ David Hanna, 21/9/15, T:14.26-29, 56.11-12, 80.44-46, Bob Williams, 23/9/15, T:249.42-44, 255.22-26; Brian Humphrey, T:265.41-46; Ben Flanagan, 23/9/15, T:279.16-25.

²⁶⁶ Ben Flanagan, 23/9/15, T:279.31-32; Bob Williams, 23/9/15, T:255.31-32.

²⁶⁷ Ben Flanagan, 23/9/15, T:275.15-23. See also CFMEU DD MFI-10, 23/9/15.

²⁶⁸ CFMEU DD MFI-10, 23/9/15.

²⁶⁹ Brian Humphrey, 23/9/15, T:267.8-17. See also Ben Flanagan, 23/9/15, T:280.39-42.

David Hanna's evidence was that Michael Ravbar had asked for this to occur. But Michael Ravbar denied this.²⁷⁰

88. How many documents were dumped? Various witnesses gave different estimates. Rob Cameron, who assisted Bob Williams in loading the horse float trailer, guessed that there were between 60 to 80 boxes of documents loaded from No 14 into the horse float trailer.²⁷¹ Michael Ravbar estimated that around 70 to 80 boxes were taken from that area, plus some material from the garage which he did not know about because he did not go downstairs.²⁷² Bob Williams estimated that the total number of boxes at Cornubia was originally 80 boxes, and that an attempt was made to burn perhaps 10 the day after being transported to David Hanna's property.²⁷³
89. A fairly full box trailer of documents was taken from the garage at No 16, in addition to the material from No 14. It is therefore likely that to estimate the total amount of material dumped at the landfill as 80 boxes is fairly conservative. This is supported by a consideration of the weight of the documents and soil dumped. The 6.86 tonnes consisted of the weight of the documents plus the weight of the boxes plus the weight of the soil. Depending on the type and moisture content of soil added, the weight of 1 m³ of soil is likely to be between 1 to 2 tonnes.²⁷⁴ Based on the estimates of the volume of soil loaded,

²⁷⁰ Michael Ravbar, 24/9/15, T:421.37-41.

²⁷¹ Rob Cameron, 23/9/15, T:341.18-24.

²⁷² Michael Ravbar, 24/9/15, T:424.35-425.9.

²⁷³ Bob Williams, 23/9/15, T:249.3-7, 249.46-250.6.

²⁷⁴ Bulk (dry) density for soils range from 1.1-1.3 g/cm³ (1.1-1.3 t/m³) for silty or clay soils to 1.6-1.7 g/cm³ (1.6-1.7 t/m³) for sandy soils.

the weight of the soil could have been up to 3.4 tonnes, leaving over 3.3 tonnes of documents. By way of comparison:

- (a) 1 sheet of standard A4 printer paper (80 gsm) weighs 5 grams;
- (b) 1 ream (500 sheets) of standard A4 printer paper weighs 2.5 kilograms;
- (c) 1 large box (10 reams) of standard A4 printer paper weighs 25 kilograms; and
- (d) 132 large boxes (660,000 sheets) of standard A4 printer paper weigh 3.3 tonnes.

90. The CFMEU complained about the lack of formal evidence in relation to the weight of the paper and the soil.²⁷⁵ In relation to the paper analysis, counsel assisting submits that the complaints are unfounded. The estimates given by the witnesses as to the exact number of a large number of boxes are quite likely to be inaccurate. The exercise undertaken by counsel assisting²⁷⁶ was an attempt to assess the accuracy of the estimates. Contrary to the submissions of the CFMEU, counsel assisting did not purport to state that there was a specific number of boxes. Rather, they submitted that, based on a combination of factors including the number of loads, it is probable that there were at least 80 boxes. The submission of counsel assisting is accepted.

²⁷⁵ Submissions of the CFMEU, 29/10/15, paras 21-26.

²⁷⁶ Submissions of Counsel Assisting, 20/10/15, para 63.

91. As to the soil density figures, the CFMEU made the complaint that such matters were properly the province of expert evidence. If so, what is to be made of the sentence following the CFMEU complaint, to which counsel assisting drew attention? There it was asserted that Ben Flanagan, the truck driver and back hoe operator, who had no demonstrated expertise about soil density, could have given evidence about it. Either the matter is one for expertise or it is not. If it is, Ben Flanagan could not have given evidence. If it is not, counsel assisting's calculations were permissible and useful for the limited purpose they were designed to serve. Counsel assisting further noted that the figures provided are based on publicly available information, the source of which is provided.²⁷⁷ Counsel assisting pointed out that if the CFMEU wished to present evidence to suggest the figures were incorrect they could have taken that course. Counsel assisting submitted that the course was not taken because the estimate of 3.4 tonnes of soil is conservative. It was an estimate being based on the *maximum* possible estimate of soil loaded, being just under half the weight of the entire truck load. No suggestion was made by the CFMEU that the weight of the soil would be more than half of the weight of the total load. Further, the reference to A4 boxes was explicitly made, according to the submissions of counsel assisting, by way of comparison only. It is contended that an average weight of 25 kg per box is entirely reasonable.²⁷⁸

²⁷⁷ 'Bulk Density - Measuring' Fact Sheet, published by soilquality.org.au (an initiative of a range of government, industry and academic partners), https://s3.amazonaws.com/soilquality-production/fact_sheets/26/original/Phys_-_Bulk_Density_Measurement_web.pdf.

²⁷⁸ Submissions of Counsel Assisting, 30/11/15, paras 13-14.

92. The position adopted by counsel assisting is entirely reasonable. The calculations rest on extraordinarily generous concessions to the CFMEU point of view. It is necessary, in fact, to record that the submissions of the CFMEU on these aspects convey an impression of desperation. They suggest a complete lack of confidence in the more substantive elements of the case study. For in principle it does not matter whether the paper weighed 6 tonnes or 3 tonnes or 1 tonne. Whatever the precise weight, an extraordinarily large quantity of material was destroyed. Some of it may have been potentially valuable.

Later events: payment of truck fees

93. At some time after the documents were dumped at the landfill, David Hanna was posted an invoice for the cost of the truck and excavator hire for \$770.²⁷⁹ David Hanna went to Cherie Shaw and requested petty cash to pay for the excavator.²⁸⁰ Cherie Shaw could not remember how much cash was requested but she thought around \$300–\$600.²⁸¹ The CFMEU's records show a petty cash payment to David Hanna for \$770 on 21 May 2014.²⁸² David Hanna was paid the cash in an envelope. It was in turn paid to the truck company.²⁸³

²⁷⁹ CFMEU DD MFI-7, 22/9/15; David Hanna, 22/9/15, T:67.4-5, 89.13-14.

²⁸⁰ David Hanna, 22/9/15, T:67.5-6, 77.5-8; Cherie Shaw, 22/9/15, T:178.36-179.18.

²⁸¹ Cherie Shaw, 22/9/15, T:178.44-46.

²⁸² CFMEU DD MFI-7, 22/9/15.

²⁸³ David Hanna, 22/9/15, T:67.8-9, 77.9-10.

94. Cherie Shaw said that she would not ordinarily have needed approval to make the payment. But on this occasion, because the transaction was out of the ordinary, she requested and obtained Michael Ravbar's approval to make the payment.²⁸⁴ David Hanna gave her a handwritten document – she could not recall whether it was a receipt or invoice – and told her to get rid of it.²⁸⁵ Cherie Shaw could not recall whether she told Michael Ravbar about David Hanna's request to get rid of the document or whether she showed the document to Michael Ravbar.²⁸⁶ However, she did say that David Hanna told her that he needed the petty cash to 'pay for an excavator, that old documents were being disposed of and that he was organising for them to be buried'.²⁸⁷ David Hanna admitted that he told Cherie Shaw words to the effect of 'You're probably best not keeping that.'²⁸⁸ Michael Ravbar admitted Cherie Shaw came to him to approve the payment, but he said he thought it was for tip fees, not for a truck.²⁸⁹ His evidence was that Cherie Shaw did not tell him the quantum of the payment.²⁹⁰
95. In the course of the CFMEU submissions about the receipt, it was contended that David Hanna's evidence about paying in cash to conceal what had occurred is 'unbelievable' and 'spurious'. Counsel assisting responded²⁹¹ with two submissions. *First*, the suggestion by

²⁸⁴ Cherie Shaw, 22/9/15, T:179.13-43.

²⁸⁵ Cherie Shaw, 22/9/15, T:179.45-181.22.

²⁸⁶ Cherie Shaw, 22/9/15, T:180.24-25, 181.44-182.3.

²⁸⁷ Cherie Shaw, 22/9/15, T:179.15-18.

²⁸⁸ David Hanna, 24/9/15, T:448.43-44.

²⁸⁹ Michael Ravbar, 24/9/15, T:422.42-46, 437.44-439.25.

²⁹⁰ Michael Ravbar, 24/9/15, T:438.25-32, 439.14-18.

²⁹¹ Submissions of Counsel Assisting, 30/11/15, para 25.

the CFMEU that a cash transaction is not easier to conceal than a transaction involving a cheque or bank transfer is odd.²⁹² They contended that there is no document within the CFMEU Qld which readily explains what the \$770 cash was paid for or to whom it was paid. *Secondly*, counsel assisting submitted that the submission that David Hanna was concerned about the invoice because he was defrauding the CFMEU QLD in having it pay for landscaping work carried out by Ben Flanagan is baseless and should not have been made for the reasons referred to elsewhere.²⁹³ These submissions are correct.

Later events: charges by Michael Ravbar against David Hanna

96. On 10 June 2015, Michael Ravbar laid charges against David Hanna in accordance with the CFMEU Construction and General Rules.²⁹⁴ In summary, Michael Ravbar alleged that David Hanna had in or about April 2015 engaged in ‘gross misbehaviour’ and ‘gross neglect of duty’ by:

- (a) procuring \$3000 from certain employers to the BLF Charity Foundation Pty Ltd (**BLF Charity**) for the purpose of the BLF Charity making payments to assist with IVF treatment for the partner of a CFMEU organiser (the **Organiser**); and

²⁹² Submissions of the CFMEU, 29/10/15, para 89.

²⁹³ Paragraph 119.

²⁹⁴ CFMEU DD MFI-26, 20/10/15, pp 3-6.

- (b) directing or instructing officials of the CFMEU QLD to procure funds from employers to assist with IVF treatment for the Organiser's partner.

97. Initially the charges were to be dealt with by the CFMEU Qld at a meeting on 17 June 2015.²⁹⁵ However, consideration of the charges was adjourned to 20 July 2015.²⁹⁶

98. David Hanna said that, at around the time Michael Ravbar laid these charges, he formed the view that he should have something to protect his position and give him leverage in negotiations. He therefore obtained a copy of the invoice from Harrington Excavators.²⁹⁷ When he obtained the invoice he said that the invoice should also say 'CFMEU'. The woman at Harrington Excavators wrote that on the invoice.²⁹⁸

99. On 19 June 2015, a motion was circulated among the members of the CFMEU National Executive Committee to appoint an independent investigator to investigate the subject matter of the charges against David Hanna with a view to the investigator preparing a report to the National Executive Committee.²⁹⁹ That motion was agreed to. On

²⁹⁵ CFMEU DD MFI-26, 20/10/15, pp 7-10.

²⁹⁶ CFMEU DD MFI-26, 20/10/15, pp 12-15.

²⁹⁷ David Hanna, 22/9/15, T:67.11-18.

²⁹⁸ David Hanna, 22/9/15, T:67.18-20.

²⁹⁹ CFMEU DD MFI-26, 20/10/15, pp 16-18.

25 June 2015, Leo Skourdoumbis accepted appointment as the investigator.³⁰⁰

100. David Hanna's evidence was that at some time prior to the decision being made by the National Executive Committee, he attended a National Executive meeting in Sydney to discuss a number of issues including those surrounding Michael Ravbar's charges.³⁰¹ David Hanna said that just prior to going to Sydney for this meeting, he altered the invoice he had obtained by deleting his name and writing in Michael Ravbar's.³⁰² David Hanna said that at the meeting in Sydney he briefly showed Michael O'Connor the document, although Michael O'Connor did not pay much attention to it.³⁰³ David Hanna said that he told Michael O'Connor about the destruction of the documents.³⁰⁴
101. The CFMEU drew attention to the fact that Michael O'Connor was not called by counsel assisting, and that this showed a failure to ensure fairness to the CFMEU and Michael Ravbar.³⁰⁵ There was also an intimation that counsel assisting had been unfair in not calling David Noonan about whom David Hanna had a vague recollection that he spoken to about the receipt but was not '100 per cent'.³⁰⁶ Whilst counsel assisting did not specifically respond to these complaints, there

³⁰⁰ CFMEU DD MFI-26, 20/10/15, p 25.

³⁰¹ David Hanna, 22/9/15, T:90.27-35, 94.42-95.39.

³⁰² David Hanna, 22/9/15, T:67.22-25.

³⁰³ David Hanna, 22/9/15, T:67.27-70.12.

³⁰⁴ David Hanna, 22/9/15, T:68.42-45, 69.19-24, 69.37-70.1.

³⁰⁵ Submissions of the CFMEU, 29/10/15, para 36.

³⁰⁶ Submissions of the CFMEU, 29/10/15, para 38; see David Hanna, 22/9/15, T:67.28-29.

is nothing to suggest any request by the CFMEU to counsel assisting to call either Michael O'Connor or David Noonan. Further, David Hanna stated that Michael O'Connor had a 'glance at it [...] I think that's about it'.³⁰⁷ It is not possible to make a positive finding that in the rushed circumstances in which David Hanna showed it to Michael O'Connor it made any impact on him. Nor is it possible to make a finding that David Hanna spoke to David Noonan in any way which stimulated an understanding of David Hanna's point. Counsel assisting did not seek any finding adverse to Michael O'Connor or David Noonan in this respect. It is not proposed to make any finding adverse to either of them. The claim that counsel assisting has behaved unfairly is utterly empty. Submissions of this kind by the CFMEU, again, convey an impression of desperation.

Later events: investigation and report by Leo Skourdoumbis

102. As part of his investigation, Leo Skourdoumbis interviewed David Hanna on two occasions: first on 29 June 2015 and later on 16 July 2015. The second meeting was secretly recorded.
103. On 27 July 2015, Leo Skourdoumbis provided his report to the CFMEU National Executive.³⁰⁸ Leo Skourdoumbis concluded in his report that he believed that David Hanna had acted in a seriously inappropriate manner in procuring the funds as alleged by Michael Ravbar. He stated that in his view it was appropriate, at the least, for

³⁰⁷ David Hanna, 22/9/15, T:67.30-31.

³⁰⁸ CFMEU DD MFI-26, 20/10/15, p 26.

David Hanna to be censured and reprimanded.³⁰⁹ On 30 July 2015, David Hanna resigned as the President of the CFMEU QLD and as National President of the CFMEU Construction and General Division.³¹⁰ David Hanna's evidence was that his resignation was voluntary, in the belief that it was in the best interests of the union,³¹¹ and on the understanding that no-one would stand in his way of getting re-employment.³¹²

D – IMPORTANT MATTERS FOR CONSIDERATION

104. To what extent did Michael Ravbar direct, or otherwise become involved in, David Hanna's activities on the evening of 1 April 2014 and in the aftermath of the 'clean up' which occurred that day? That is a key issue, about which there is considerable divergence between David Hanna and Michael Ravbar. In particular, the following questions are to be considered:

- (a) Did Michael Ravbar tell David Hanna that he expected to receive a notice to produce that day and that he had instructed staff not to look at certain emails?
- (b) Did Michael Ravbar direct David Hanna to cover up the security cameras?
- (c) Did Michael Ravbar tell David Hanna to burn the documents?

³⁰⁹ CFMEU DD MFI-25, 16/10/15, p 7.

³¹⁰ CFMEU DD MFI-26, 20/10/15, pp 27-28.

³¹¹ David Hanna, 22/9/15, T:95.36-39.

³¹² David Hanna, 22/9/15, T:96.5-7.

- (d) Did Michael Ravbar, after learning from David Hanna that the burning operation had been unsuccessful, discuss arranging a tip-truck to dump the documents?

Credibility of David Hanna

105. Counsel assisting submit that David Hanna's evidence in chief can be divided into four parts.³¹³ That is a convenient way to approach the evidence. The first part consists of evidence given by him on 21 September 2015 from 2pm until approximately 2.44pm when David Hanna was stood down and Leo Skourdoumbis gave evidence for the first time. The second part consists of evidence given by David Hanna on 21 September 2015 after hearing Leo Skourdoumbis's evidence but before hearing a secret recording of the 16 July 2015 conversation. The third part consists of the evidence given on 21 September 2014 after the recording was played. The fourth part is David Hanna's evidence given on 22 September 2015.
106. There are inconsistencies between the four parts. In the first part of his evidence, David Hanna said that:
- (a) he could not recall the name of the tip-truck company that had dumped the documents;³¹⁴

³¹³ Submissions of Counsel Assisting, 20/10/15, para 74.

³¹⁴ David Hanna, 21/9/15, T:6.34-45.

- (b) he definitely could not recall getting a receipt in relation to the tip-truck or taking the documents to the tip and he definitely did not know whose name was on the receipt;³¹⁵
- (c) he was sure that he had never told anybody in the National office of the CFMEU about the document destruction;³¹⁶ and
- (d) he had never told anybody that he knew the documents which were destroyed were relevant to the notice to produce served on the CFMEU on 1 April 2014.³¹⁷

107. Leo Skourdoumbis gave evidence that David Hanna had discussed the document destruction with him, though he did not say that the documents were relevant.³¹⁸ After Leo Skourdoumbis gave that evidence, David Hanna, in the second part of his evidence, recalled speaking with Leo Skourdoumbis. However, consistently with Leo Skourdoumbis's evidence, he said he was certain that he had not mentioned document destruction in relation to the notice to produce.³¹⁹ Even after the secret recording of the 16 July 2015 conversation was played, David Hanna said he definitely could not recall the name of, or any details about, the tip-truck operator,³²⁰ could not recall the cost of

³¹⁵ David Hanna, 21/9/15, T:6.47-7.16.

³¹⁶ David Hanna, 21/9/15, T:15.40-16.8.

³¹⁷ David Hanna, 21/9/15, T:17.46-18.1.

³¹⁸ Leo Skourdoumbis, 21/9/15, T:26.24-27.

³¹⁹ David Hanna, 21/9/15, T:31.26-31.

³²⁰ David Hanna, 21/9/15, T:49.26-38.

the tip-truck, or how it was paid,³²¹ and denied ever showing Michael O'Connor a docket or receipt for the tip-truck.³²²

108. It was not until David Hanna gave evidence on 22 September 2015 that he could recall:

- (a) the name of the tip-truck company;
- (b) the fact that the company had been paid in cash; and
- (c) the fact that he had shown Michael O'Connor an altered invoice which showed Michael Ravbar as the person who had organised the tip-truck.³²³

Counsel assisting correctly submitted that on the second day David Hanna was considerably more forthcoming in his evidence to the Commission.

109. David Hanna explained the substantial change in his evidence as follows:³²⁴

... Ah, I had an opportunity to get my thoughts together overnight. It was quite a big week last week and yesterday and so my mind wasn't set on that matter, it was set on others, other matters, the previous matter, so I've had an opportunity to go through that.

...

³²¹ David Hanna, 21/9/15, T:50.4-51.1.

³²² David Hanna, 21/9/15, T:32.26-29, 56.41-43.

³²³ David Hanna, 22/9/15, T:67.3-31.

³²⁴ David Hanna, 22/9/15, T:67.37-41, 70.18-25.

Q. Why should we accept what you are saying now as opposed to what you said yesterday about the receipt?

A. I guess that's a view for you. You know, I've had an opportunity overnight – as I said earlier, my head was in a different space yesterday. I still had concerns with my wife taking the chair, so it was – you know, I felt a bit ambushed in the afternoon and overnight I've had an opportunity to get my thoughts together.

His references to 'last week and yesterday' are references to the oral hearings in the Cornubia case study – for him a serious and much publicised matter in which many witnesses gave evidence, including his wife and himself.

110. The course of the evidence points to a conclusion that parts of David Hanna's evidence on 21 September 2015 were deliberately misleading. Counsel assisting submitted that that is a significant matter which weighs against accepting David Hanna's evidence in respect of Michael Ravbar's involvement. That submission is accepted. It is certainly an important factor in deciding which of the two officials should be believed.

111. Another matter which is relevant in assessing David Hanna's evidence in relation to this issue is David Hanna's animosity towards Michael Ravbar. David Hanna described their relationship at the time Michael Ravbar brought charges against David Hanna, in June 2015, as 'past the word of toxic'³²⁵ and said there was a 'hatred ... I underline "hatred"'³²⁶ between the two men.

³²⁵ David Hanna, 22/9/15, T:95.27-33.

³²⁶ David Hanna, 22/9/15, T:96.12-13.

112. David Hanna freely admitted that he had altered a copy of the Harrington invoice to create a deliberately false document to implicate Michael Ravbar in the organisation of the tip-truck.³²⁷ He freely admitted, both in the third and fourth parts of his evidence, that he embellished his account to Leo Skourdoumbis about the documents being relevant to the notice to produce.³²⁸ In cross-examination by senior counsel for the CFMEU he gave evidence about his motives when speaking with Leo Skourdoumbis. This evidence was described by senior counsel for the CFMEU as ‘frank’.³²⁹

Q. I’m not challenging you about this, but you freely admit that you were wanting at that time to damage Michael Ravbar and at least for the word to go out through Leo [Skourdoumbis] that you had the goods on him?

A. Yes.

Q. And you hoped that in some way that might influence the National Executive in relation to your future?

A. Yes.

Q. And I won’t use the word ‘blackmail’, but what you were doing was building the strongest case you could to try to impress upon people that if you went down, you were going to take Michael Ravbar with you?

A. Yes.

113. Counsel assisting submitted³³⁰ that the fact that David Hanna was willing to go so far as to create a false document to implicate Michael Ravbar – an inherently dishonest act – also weighs against accepting David Hanna’s account. This submission is accepted.

³²⁷ David Hanna, 24/9/15, T:67.22-25; 460.15-17.

³²⁸ David Hanna, 15/10/15, T:34.28-44, 52.34-53.11.

³²⁹ David Hanna, 24/9/15, T:458.3-17; Submissions of Counsel Assisting, 20/10/15, para 81.

³³⁰ Submissions of Counsel Assisting, 20/10/15, para 82.

114. However, counsel assisting further submitted that contrary to the line of questioning put to David Hanna in cross-examination by senior counsel representing Michael Ravbar, the circumstances do not support a conclusion that on 22 September 2015 David Hanna, after realising his ‘future was looking pretty black’, made up evidence in relation to Michael Ravbar directing the covering up of the cameras as part of a ‘last-ditch attempt to take’ Michael Ravbar with him.³³¹ Neither do the circumstances support a conclusion, also suggested by Michael Ravbar’s counsel, that David Hanna would go a long way to see Michael Ravbar come down with him, and would go so far as to forge an invoice falsely implicating Michael Ravbar.³³²
115. *First*, the evidence shows that David Hanna, in falsifying the invoice whilst he was still President of the CFMEU, was not motivated by pure malice against Michael Ravbar. Rather, he was using, or intending to use, the falsified invoice as a bargaining chip to improve his negotiating position at the National Executive of the CFMEU with a view to being allowed to maintain his position and power at the union, along with Michael Ravbar. That is, David Hanna was motivated by self-interest, not malice. By the time David Hanna gave evidence in September 2015, his position had changed in that he had left the union, but on reasonable terms, at least so far as the public could see.³³³ In this regard, counsel assisting drew attention to David Hanna’s

³³¹ David Hanna, 24/9/15, T:459.43-460.17; Submissions of Counsel Assisting, 20/10/15, para 83.

³³² David Hanna, 24/9/15, T:459.42-460.16

³³³ CFMEU DD MFI-26, 20/10/15, p 29.

unchallenged evidence about what happens to those who leave the CFMEU QLD on bad terms:³³⁴

Q. What happens - just to be clear about it - to your understanding, if you are placed on some sort of black-ban list? ...

A. Well, I go bankrupt, I lose everything.

Q. You say you can't get a job –

A. Correct.

Q. – what, in any related form of employment?

A. Within the construction industry.

116. If David Hanna did in fact have such a deep and lasting hatred of Michael Ravbar that he would have acted in a way which was contrary to his interest, he would have implicated Michael Ravbar in the first and second parts of his evidence. But he did not.

117. *Secondly*, at no point in David Hanna's evidence did he suggest that the documents destroyed were relevant to the notice to produce. On 21 September 2015, he said that that thought had not even crossed his mind.³³⁵ He said that in telling Leo Skourdoumbis otherwise he was embellishing.³³⁶ His evidence on 22 September 2015 was to the same effect.³³⁷ So was his evidence in cross-examination on 24 September 2015.³³⁸ In cross-examination, he said he was not surprised by Michael Ravbar's evidence that many of the documents in the BLF

³³⁴ David Hanna, 22/9/15, T:96.7-97.11. See also CFMEU DD MFI-5, 22/9/15, p 78. Submissions of Counsel Assisting, 20/10/15, para 84.

³³⁵ David Hanna, 21/9/15, T:54.30-35.

³³⁶ David Hanna, 21/9/15, T:34.41-44, 52.34-53.11.

³³⁷ David Hanna, 22/9/15, T:84.10-29.

³³⁸ David Hanna, 21/9/15, T:457.10-38..

boxes were old. He said that it was not unreasonable for Michael Ravbar to have set a deadline to have all of the materials, which he accepted were taking up space, cleared away and organised.³³⁹ If David Hanna was motivated to implicate Michael Ravbar falsely, counsel assisting submitted, he was very half-hearted about it.³⁴⁰

118. *Thirdly*, apart from a small number of matters which remain in contest between David Hanna and Michael Ravbar, David Hanna's account given in the fourth part of his evidence is substantially supported by documents and other witnesses. His evidence that documents were burnt was supported by other witnesses. His evidence that the security cameras were covered was supported by other witnesses. His evidence about the tip-truck was supported by documents and other witnesses. Despite suggestions in cross-examination, David Hanna's evidence about the covering up of cameras and the calling in of training co-ordinators was not contradicted by any witness other than Michael Ravbar. David Hanna's evidence on the latter topic was that Michael Ravbar 'gave the direction for them to come in' but he was not sure on how they were notified to come in.³⁴¹

119. The CFMEU raised an additional matter relating to David Hanna's credibility.³⁴² It was suggested that David Hanna, by dishonest means, had the CFMEU pay for earthworks at his Cornubia property, with Ben Flanagan spending half his time performing landscaping work on

³³⁹ David Hanna, 24/9/15, T:453.3-34.

³⁴⁰ Submissions of Counsel Assisting, 20/10/15, para 86.

³⁴¹ David Hanna, 24/9/15, T:82.29-83.3. This was consistent with the recording of the 16 July 2015 conversation where David Hanna said 'On that day Ravbar had all the training coordinators come in...' (see CFMEU DD MFI-2, 21/9/15, p 2).

³⁴² Submissions of the CFMEU, 29/10/15, para 40.

David Hanna's property.³⁴³ The CFMEU seek to make much of this submission.³⁴⁴ Counsel assisting submitted³⁴⁵ that this submission should not have been made. It was also noted by counsel assisting that David Hanna's submissions in response³⁴⁶ pointed to evidence which in fact showed that Ben Flanagan spent less than 10 minutes, out of 5.5 hours charged, in levelling off soil.³⁴⁷ The submissions of counsel assisting and of David Hanna should be accepted on this issue. This was another submission by the CFMEU indicating desperation.

120. A further matter in relation to David Hanna's credibility was the subject of additional comment by counsel assisting in reply to the CFMEU's submissions. The CFMEU submitted that David Hanna was motivated by personal gain.³⁴⁸ But, according to counsel assisting, this submission was not congruent with the lack of any explanation by the CFMEU why it was in David Hanna's interests to damage Michael Ravbar during the Commission. This submission is accepted.
121. Finally on this point, counsel assisting submitted that having regard to all matters, the Commission should be cautious in accepting that part of David Hanna's evidence which is not supported by other evidence, whether direct or circumstantial.³⁴⁹ This submission is accepted.

³⁴³ Submissions of the CFMEU, 29/10/15, para 40.

³⁴⁴ Submissions of the CFMEU, 29/10/15, paras 41, 90.

³⁴⁵ Submissions of Counsel Assisting, 30/11/15, para 16.

³⁴⁶ Submissions of David Hanna, 5/11/15, paras 5-9.

³⁴⁷ Ben Flanagan, 23/9/15, T:283.32-284.39.

³⁴⁸ Submissions of the CFMEU, 29/10/15, para 41.

³⁴⁹ Submissions of Counsel Assisting, 20/10/15, para 88.

Credibility of Michael Ravbar

122. The CFMEU contended that Michael Ravbar was denied procedural fairness in that certain matters were not put to him during the course of the public hearing.³⁵⁰ Counsel assisting rejected that complaint. They contended that Michael Ravbar, in answer to questions, gave evidence that he was not concerned that the documents he saw were ones that the Royal Commission may require during the course of its inquiry.³⁵¹ Michael Ravbar was also asked whether he was at all concerned that the material he had sent for destruction might be the subject of a notice to produce. He gave evidence to the effect that he was ‘very comfortable’ that it was not.³⁵² When asked whether he was concerned after learning of the notice to halt the destruction process, he gave evidence that he was ‘quite comfortable, very comfortable’ that the material that left the union was ‘basically of no use’.³⁵³ Counsel assisting submitted that in those circumstances, where Michael Ravbar was asked and gave evidence about the critical factual matters for consideration, procedural fairness did not require any more detailed examination of Michael Ravbar. Counsel assisting’s submission is accepted. Nevertheless, counsel assisting also submit that the Commission should also be cautious in accepting Michael Ravbar’s uncorroborated evidence. As with the equivalent submission for David Hanna, that is accepted.

³⁵⁰ See Submissions of the CFMEU, 29/10/15, p 4, paras 14-15, pp 52-55, 76, paras 6, 11, 15, 17-18, 102.

³⁵¹ Michael Ravbar, 24/9/15, T:389.33-42.

³⁵² Michael Ravbar, 24/9/15, T:421.4-18.

³⁵³ Michael Ravbar, 24/9/15, T:423.16-33.

123. It is accepted, as counsel assisting argued,³⁵⁴ that Michael Ravbar was not frank about the nature of his relationship with David Hanna. He gave the following evidence:³⁵⁵

Q. You would have also heard, especially from David Hanna, that there was some real hostility between you and him, at least following the merger between the BLF and the CFMEU?

A. You mean David Hanna's evidence.

Q. Yes.

A. Which version?

Q. Well, do you say there is no hostility between you and David Hanna?

A. I wouldn't call it hostility. It is that – at the end of the day we had a good, a reasonable working relationship. I wouldn't call it a hostile working relationship. Sometimes we didn't agree on the strategy of the Union, some of the decisions of the Union, but at the end of the day we worked together and we did the best that we could for the interests of the members.

124. Yet, later he gave evidence that as at late-March to early-April 2014, he 'didn't trust David Hanna'.³⁵⁶ He also said David Hanna had a style of 'secrecy', of which he did not approve.³⁵⁷ It is fair to say that these are not the statements of a person who had a 'good, a reasonable working relationship' with David Hanna.

³⁵⁴ Submissions of Counsel Assisting, 20/10/15, para 90.

³⁵⁵ Michael Ravbar, 24/9/15, T:377.12-28.

³⁵⁶ Michael Ravbar, 24/9/15, T:421.25, 428.32.

³⁵⁷ Michael Ravbar, 24/9/15, T:427.35-40, 429.1-6.

125. In addition, Michael Ravbar characterised David Hanna as the Commission's 'star witness'³⁵⁸ and that there was 'only one witness, David Hanna' in relation to matters concerning document destruction.³⁵⁹ Yet Michael Ravbar must have known that in fact much of what David Hanna had said was supported by other witnesses. When asked a simple question about whether he was the head of the office, Michael Ravbar gave a lengthy non-responsive answer blaming David Hanna.³⁶⁰ Michael Ravbar's attempt to downplay David Hanna's evidence by portraying falsely the extent to which David Hanna's account was contradicted by the accounts of many other witnesses. These attempts are suggestive of the deep hostility which David Hanna referred to and undermine Michael Ravbar's credit more generally.
126. Further, counsel assisting's submission is accepted that considerable parts of Michael Ravbar's evidence were inherently incredible. His evidence concerning his conversation with David Hanna about the destruction of the documents has already been considered.³⁶¹ He gave implausible evidence about approving the payment for the 'tip-truck fees' but not discussing the amount of the payment or its purpose with Cherie Shaw, in circumstances where, because of the unusual nature of the transaction, she had required his approval.

³⁵⁸ Michael Ravbar, 24/9/15, T:427.34. That is an illustration of Michael Ravbar's occasional use of insults or discourtesies towards counsel assisting. Counsel assisting chose to ignore them. But they do not reflect well on him or his credibility.

³⁵⁹ Michael Ravbar, 24/9/15, T:409.20-22.

³⁶⁰ Michael Ravbar, 24/9/15, T:427.33-428.5.

³⁶¹ Paragraphs 83-84.

127. Another implausible part of his testimony, according to counsel assisting's submissions,³⁶² concerned his assertion that he had gone through the BLF boxes in No 14 on Friday 28 March 2015 from 11am to 7pm. Initially Michael Ravbar gave a detailed and lengthy account along the following lines.³⁶³ He had a mid-morning meeting at Westfield at Garden City and after that he was clear for the day to review material.³⁶⁴ He said he reviewed 8-10 boxes of BLF wage claims files. Then he reviewed the BLF EBA files.³⁶⁵ He explained in some detail that there was a lot of project agreements from the late 1970s to the early 1990s and more recently but there was a big gap in between.³⁶⁶ He recounted, again in detail, how he went through boxes concerning superannuation, industry funds, the BERT fund including manuals, trust deeds and for some reason, a lot of 'stuff' from 2003 and 2004.³⁶⁷
128. Counsel assisting's submission that that evidence was unbelievable³⁶⁸ is accepted. Michael Ravbar could apparently recall significant detail about the number of boxes he had reviewed and what was in them. But he had made no note of what he had reviewed.³⁶⁹ Instead he claimed to have a reasonable memory.³⁷⁰

³⁶² Submissions of Counsel Assisting, 20/10/15, para 94.

³⁶³ Michael Ravbar, 24/9/15, T:385.36-393.35.

³⁶⁴ Michael Ravbar, 24/9/15, T:387.11-27.

³⁶⁵ Michael Ravbar, 24/9/15, T:387.29-44.

³⁶⁶ Michael Ravbar, 24/9/15, T:387.43-388.7.

³⁶⁷ Michael Ravbar, 24/9/15, T:390.3-11.

³⁶⁸ Submissions of Counsel Assisting, 20/10/15, para 95.

³⁶⁹ Michael Ravbar, 24/9/15, T:394.2.

³⁷⁰ Michael Ravbar, 24/9/15, T:394.26.

129. However, his memory was shown to be less than reliable. On at least five occasions³⁷¹ Michael Ravbar identified Friday 28 March 2014 as the day he examined (by himself) the BLF materials. He was certain that that was the day. He said he had no doubt about it. He gave himself no room for manoeuvre. But call charge records for his mobile phone for that day in fact showed he was only in the office for a relatively short period until he left some time prior to 10.49am, went to Garden City and then went home.³⁷² That is, Michael Ravbar was nowhere near the CFMEU offices from 11am to 7pm. As observed by counsel assisting,³⁷³ the truth about his day was almost the reverse of what he had originally claimed – in that he was in the office prior to 11am before being out the office for the balance of the day.
130. In re-examination, counsel for Michael Ravbar sought to support Michael Ravbar's version of events in this way. He pointed to his electronic diary³⁷⁴ for Thursday 27 March 2014. He elicited evidence that Michael Ravbar could not recall participating in certain events recorded in it. Michael Ravbar ultimately said that he was 'pretty confident, if not 100 per cent confident, that I did [the review] on Thursday, 27 March'.³⁷⁵ Michael Ravbar did not recall participating in a 1–2pm teleconference recorded in his diary.³⁷⁶ This was supported by contemporaneous documents.³⁷⁷ So was his denial that he attended

³⁷¹ Michael Ravbar, 24/9/15, T:381.21-24, 387.3-5, 400.30-39.

³⁷² CFMEU DD MFI-14, 24/9/15.

³⁷³ Submissions of Counsel Assisting, 20/10/15, para 96.

³⁷⁴ See CFMEU DD MFI-16, 24/9/15.

³⁷⁵ Michael Ravbar, 24/9/15, T:447.8-9.

³⁷⁶ Michael Ravbar, 24/9/15, T:445.47-446.8.

³⁷⁷ CFMEU DD MFI-23, 16/10/15.

a Gold Coast Sub-branch meeting.³⁷⁸ Counsel assisting submitted that apart from Michael Ravbar's own evidence, there is no documentary material available to the Commission to establish whether Michael Ravbar did or did not attend the other events recorded in his diary for 27 March 2014.³⁷⁹

131. It was submitted by counsel assisting that on one view, Michael Ravbar deliberately concocted an elaborate story to try to establish that, days before the notice to produce was served, he had adopted some sort of proper process in reviewing the documents that were ultimately disposed of. On another view, Michael Ravbar was completely wrong in his supposedly very clear recollection, albeit innocently.³⁸⁰ On either view, it is fair to conclude that his evidence on this matter should be examined very carefully before accepting any account by Michael Ravbar which is not directly or indirectly supported by other evidence.

Significance of police investigation

132. The CFMEU filed submissions responding to the supplementary submissions of counsel assisting concerning the evidence of Bradley O'Carroll. In them the CFMEU submitted that given the execution of a warrant on 18 November 2015, it has become apparent that the 'Joint Police Taskforce assisting the Commission' had commenced a criminal

³⁷⁸ Michael Ravbar, 24/9/15, T:446.41-46; CFMEU DD MFI-24, 16/10/15.

³⁷⁹ Submissions of Counsel Assisting, 20/10/15, para 97.

³⁸⁰ Submissions of Counsel Assisting, 20/10/15, para 98.

investigation into the matters dealt with in this case study.³⁸¹ That submission is correct. The CFMEU then submitted that in those circumstances, it was inappropriate that any further submission be made in this case study. It also submitted that having regard to the criminal investigation, no finding should be made in relation to the case study.³⁸²

133. In response counsel assisting submitted that there is no impediment to the Commission making factual findings in relation to the case study, and that it was in the public interest that the Commission express a view on the considerable body of material that has been assembled.³⁸³ As to findings in relation to whether criminal conduct may have occurred, if a police investigation is actively under way with respect to an issue arising in a case study, then, depending on all the circumstances arising in the particular case, it may not be desirable for a Royal Commission to make findings as to whether criminal conduct may have occurred with respect to that issue. However much will depend on what findings of fact are made by the Commission in the particular case study and the precise issues of fact and law arising.

Assessment of the competing accounts

134. The CFMEU submission was partly right and partly wrong. It was wrong to contend that this case study should come to an immediate halt. It was also wrong to contend that no factual findings should be

³⁸¹ Submissions of the CFMEU, 27/11/15, para 5.

³⁸² Submissions of the CFMEU, 27/11/15, paras 6-7.

³⁸³ Submissions of Counsel Assisting, 30/11/15, para 6.

made. However, it was right to contend that no expression of opinion about whether any criminal offence may have been committed should be stated. To do so in the circumstances arising in this case study might have undesirable consequences for the ongoing police investigation.

135. It was submitted by counsel assisting³⁸⁴ that for the following reasons, the Commission should accept David Hanna's evidence that Michael Ravbar:

- (a) told David Hanna that he had told staff not to look at certain emails;
- (b) directed David Hanna to cover the security cameras;
- (c) told David Hanna to burn the documents; and
- (d) was involved in discussion with David Hanna about tipping the documents at a landfill after the burning was unsuccessful.

136. There was evidence of a number of witnesses to the effect that Michael Ravbar was in charge of the CFMEU QLD, was a tough boss with exacting standards and was an official who did not permit anything to occur in the CFMEU QLD's office without his oversight. That evidence is clearly significant.³⁸⁵ Another matter of significance is

³⁸⁴ Submissions of Counsel Assisting, 20/10/15, para 99.

³⁸⁵ David Hanna, 21/9/15, T:53.43-45; David Hanna, 22/9/15, T:71.15-23, 89.34-35, 463.27-31; Jessica Kanofski, 22/9/15, T:142.8-21; Cherie Shaw, 22/9/15, T:178.6-14; Bob Williams, 23/9/15, T:250.22-25; Brian Humphrey, 23/9/15, 271.3-4; Stacey Davidson, 23/9/15, T:303.26-32; Michelle Clare, 23/9/15, T:327.28-39.

that, on all accounts, Michael Ravbar gave the instructions for the 'clean up' to occur.

137. In relation to David Hanna's evidence about what Michael Ravbar told him about staff being instructed not to look at certain emails, it is extraordinary that none of the four recipients saw Michael O'Connor's 'URGENT' 4.16pm email on 1 April 2014. The 'clean up' operation does not appear to have been in full operation until closer to 5pm. Granted that the various participants would have been occupied in various tasks, Jacqueline Collie at least was throughout the evening in her office doing other work. As personal assistant to Michael Ravbar and David Hanna, she would be expected to have reviewed their emails and brought those marked 'URGENT' to their attention. It is of some importance that Jacqueline Collie, who was visibly nervous whilst giving her evidence, did not deny seeing the email on 1 April 2014 nor did she deny receiving an instruction not to look at her emails on 1 April 2014. Paula Masters, who otherwise had a fairly good recollection of the events, did not deny receiving such a direction either. The circumstantial probabilities support David Hanna's account. The evidence of Bradley O'Carroll is also clearly highly significant.
138. In relation to the covering of the security cameras, it is not credible that Paula Masters, who saw or knew the cameras were being covered, but did not see any reason for this, and who had been involved in numerous previous CFMEU 'clean ups', would not have raised the matter with Michael Ravbar if she was of the opinion that he did not otherwise know. It is also difficult to accept that Michael Ravbar, whose intention was to clean up the offices, would not have noticed a

large rolled out banner in the corner of the No 16 office which had suddenly appeared. Counsel assisting submitted that Michael Ravbar's denial that he did not know the cameras were covered should be rejected. That submission is correct. Given David Hanna's relative unfamiliarity with the office – he had only moved into the new office from January or February 2014 – and his relatively junior status it is also not credible that David Hanna would have sought, on his own initiative, to cover the cameras.

139. It is inherently unlikely that Michael Ravbar would not have given David Hanna a specific direction on what was to happen to the documents which were being selected for destruction. Even if this was a standard 'clean up', as Michael Ravbar said, it was David Hanna's first 'clean up' at the CFMEU. It would be expected that Michael Ravbar would tell David Hanna what the usual practice was. That is, Michael Ravbar would direct David Hanna what to do. For the same reasons, once the burning was unsuccessful, it would be expected that David Hanna would speak to Michael Ravbar about what to do next. Those submissions are correct.

E – OVERALL FINDINGS

140. Counsel assisting submitted that if the events of 1 April 2014 and the following days were a part of an ordinary 'clean up' there would have been:
- (a) no reason for Michael Ravbar to tell staff not to look at certain emails on 1 April 2014;

- (b) no reason for David Hanna, at Michael Ravbar's direction, to be involved in covering the security cameras at the Bowen Hills office;
- (c) no reason for David Hanna, at Michael Ravbar's direction, to arrange for the documents to be taken to his property to be burned and when that burning was unsuccessful for the document to be loaded in a tip-truck and dumped at a landfill; and
- (d) no reason for David Hanna to tell Cherie Shaw to destroy the invoice for payment from Harrington Excavators.

141. Furthermore, apart from the fact that the Commission had served a notice to produce documents on the CFMEU on 1 April 2014, it was probably one of the worst times for the union to have a 'clean up'. The new union term ordinarily begins on 1 April. For that reason no staff are permitted to take leave one week either side of 1 April.³⁸⁶ In addition, 15 new staff from the BLF were being transferred to the CFMEU payroll at around the same time.³⁸⁷

142. The CFMEU contended that there were, in reality, more pedestrian reasons for 1 April to be chosen for the clean-up.³⁸⁸ Due to the delayed amalgamation of the CFMEU and BLF offices, no clean-up had occurred at the end of 2013 or start of 2014. Further, the end of March and start of April marked the actual physical transportation of much

³⁸⁶ CFMEU DD MFI-21, 14/10/15.

³⁸⁷ Submissions of Counsel Assisting, 20/10/15, paras 104-105.

³⁸⁸ Submissions of the CFMEU, 29/10/15, paras 42-51.

material from the BLF offices to the CFMEU offices and that space was needed. Finally, the CFMEU contended that the official commencement of the amalgamated union was 1 April and that Michael Ravbar wanted a clean and orderly office to mark the beginning of the new union. The CFMEU contended that it was ‘plainly’ an ordinary, run of the mill clean-up. ‘Mr Ravbar chose 1 April 2014 for the mundane reasons set out above.’

143. Counsel assisting submitted that if Michael Ravbar is to be believed, he saw the notice to produce on the morning of 2 April 2014.³⁸⁹ In such circumstances, a person in Michael Ravbar’s position who was honest and not reckless would have made immediate inquiries of David Hanna as to where the documents were and would have immediately halted the process of destruction. That is so even if the person knew exactly what documents were removed for destruction. That is because in circumstances where documents were destroyed so closely in time to the notice to produce, there would be natural suspicion that the documents had been destroyed inappropriately. That is even more the case in the present circumstances, where the amount of material removed from destruction was so large and where Michael Ravbar apparently had no specific knowledge of the documents removed from the archive room in the No 16 garage. Counsel assisting contended that the fact that Michael Ravbar took no such steps suggests that either he was highly reckless as to the identity of the documents destroyed or he wanted to destroy documents that could have been relevant to the Commission’s inquiries.

³⁸⁹ Submissions of Counsel Assisting, 20/10/15, para 106.

144. Counsel assisting further noted in reply³⁹⁰ that the CFMEU had no adequate answer to the contention that an honest and not reckless person in Michael Ravbar's position would have immediately taken steps to arrest the destruction on 2 April 2014. The best that is asserted is that Michael Ravbar knew that the documents were all available to be produced electronically.³⁹¹ Counsel assisting further emphasised the importance of the evidence of Michael Ravbar himself that he did not know what was destroyed from the archive room. They stressed that there was no evidence that the finance and membership records that were removed from there and destroyed were available electronically. He had no list of the documents that had been destroyed. He did not care what was destroyed. He did not care because he wanted the documents to be destroyed so they could not be put before the Commission. These observations are cogent.
145. David Hanna submitted that s 6DD of the *Royal Commissions Act 1902* 'forecloses the use of evidence given by Mr Hanna in relation to two of the three findings against him' ultimately recommended by counsel assisting.³⁹² Counsel assisting contended in response that that section has no application to the Commission itself nor any charge under that Act, and further submitted that in any event the evidence of David Hanna is not, by any measure, the only evidence supporting the suggested finding that he may have breached s 129 of the *Criminal Code* (Qld) or s 39 of the *Crimes Act 1914* (Cth). The other evidence includes, amongst other things, the admissions made by David Hanna

³⁹⁰ Submissions of Counsel Assisting, 30/11/15, para 28.

³⁹¹ Submissions of the CFMEU, 29/10/15, para 102.

³⁹² Submissions of David Hanna, 28/10/15, paras 13-16.

in the course of the Skourdoumbis interview.³⁹³ That submission is accepted.

146. David Hanna invited the Commission, in considering what findings should be made, to consider the consequences for David Hanna if those findings are not open to be resolved by a fair trial in due course. An example is that the possibility of a fair trial may have been rendered impossible or futile for a number of stated reasons, including the extent of publicity and the possibility of obtaining evidence from David Hanna in examination might fall foul of the principles considered in *Lee v The Queen*.³⁹⁴ Counsel assisting submitted in response that neither *Lee v The Queen* nor any other case supported the proposition that a person who has not been charged with an offence and who is required to give evidence before a Royal Commission cannot be later afforded a fair trial in relation to an offence about which the person was asked questions. Counsel assisting further points to section 6A of the *Royal Commissions Act* 1902 (Cth) which preserves the privilege of self-incrimination in respect of natural persons who have been charged with an offence, but abolishes it in respect of those who have not been charged.³⁹⁵ The submissions of counsel assisting are accepted.

147. Having regard to all of the circumstances, the conclusion is that the conduct of Michael Ravbar and David Hanna may have been done with an intention to conceal the removal and destruction of documents

³⁹³ Submissions of Counsel Assisting, 30/11/15, para 3.

³⁹⁴ (2014) 253 CLR 455, Submissions of David Hanna, 28/10/15, para 33.

³⁹⁵ Submissions of Counsel Assisting, 20/10/15, para 4.

which they believed were or could be relevant to the conduct of the Commission's future proceedings.

148. The above findings place the primary responsibility for the destruction of documents on Michael Ravbar. It was he who gave the operative orders. But David Hanna must share the responsibility. The short term consequences of disobeying Michael Ravbar's orders might have been inconvenient or even painful, but he was not subjected to any duress. He went along with Michael Ravbar's desires when he should not have done.
149. The conduct of Michael Ravbar and David Hanna would have been open to serious criticism even if no notice to produce had been served on 1 April 2014 and even if the motive was spring cleaning. It was at best foolish and at worst sinister to destroy documents shortly after a Royal Commission had been announced and set up. It was for the staff of the Royal Commission to decide which documents in the possession of the union should be examined. It was no excuse to say that some of the documents were fairly old. In many of the case studies conducted by the Commission quite old documents have proved crucial. One example concerns the business records analysed in the CFMEU NSW Drug and Alcohol Foundation case study. This is not surprising, because with the best will in the world witnesses cannot be expected to give accurate accounts of conversations and other events which may have taken place years earlier. Contemporary documents are an essential aid to factual investigation.
150. The conduct discussed in this Chapter is important for many reasons. But the fundamental reason is that the law depends on institutions with

the power to find facts. Depending on what facts are found and by which institutions, rights under the law can be enforced, or legislatures can create or amend laws in their future application to the conduct of those within the Queen's peace. These processes are obstructed and thwarted from the outset if the core material for fact-finding – evidence – is destroyed or kept secret. The mass destruction of documents by the CFMEU QLD was as great a danger to the rule of law as any threat of violence on a building site, any illegal strike, any corrupt payment, any blatant non-compliance with legal governance standards.

151. Finally, the CFMEU submitted that police interrogation of four of the CFMEU office staff was open to criticism in various ways.³⁹⁶ The submission abstained from any contention that the interrogation was unlawful. The submission requested an apology from the Commission.
152. No apology is called for. The evidence about the police interrogation was elicited through questions by senior counsel for the CFMEU. The subject was outside the Terms of Reference. Had there been an objection, the questions would have been rejected. The evidence even on its face appears to be exaggerated. The evidence does not justify the criticisms which are purportedly based on it. Finally, the Commission is not responsible for the conduct of Police Taskforces which are autonomous and operate independently of it.

³⁹⁶ Submissions of the CFMEU, 29/10/15, pp 5-7, paras 20-29.

CHAPTER 8.3

HINDMARSH

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A – PRELIMINARY

The case study in outline

1. This case study concerns the conduct of officers of the Queensland Branch of the Construction & General Division of the CFMEU towards Hindmarsh Construction Australia Pty Ltd (**Hindmarsh**). The conduct took place on the Brooklyn on Brookes project in Fortitude Valley, Brisbane.
2. The officers in question are Michael Ravbar (Branch Secretary), David Hanna (Branch President), Jade Ingham (Assistant Secretary) and Chad Bragdon (Organiser).
3. At the time when counsel assisting served submissions in chief about this case study on 31 October 2015, there were on foot proceedings in the Federal Circuit Court to do with the Hindmarsh matter – *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy*

Union, Chad Bragdon, Jade Ingham and John Cummins (the Proceedings). Counsel for the CFMEU and certain officers submitted, in response to the 31 October 2014 submissions, that no finding should be made while the Proceedings remained on foot. For various reasons associated with that submission, it was decided not to deal with the Hindmarsh case study in 2014.¹

4. Counsel assisting indicated that they wished to proceed with the case study. The CFMEU parties take three positions. The primary position is a repetition of last year's: that no findings should be made in the case study. If that is not accepted, the secondary position is that any findings made should not depart from a Statement of Agreed Facts arrived at by the parties to the proceedings. That document is Annexure A to this Chapter. If that is not accepted, the tertiary position is that various criticisms are made by the CFMEU parties of counsel assisting's submissions of 31 October 2014.

The first CFMEU position: should any findings be made?

5. The position of the CFMEU parties is that the Proceedings are still on foot. That is true, but only in a limited sense. At the end of the Statement of Agreed Facts the parties indicated that various declarations relating to contraventions of the *Fair Work Act* 2009 (Cth), which they were willing to have made, were supported by the Statement of Agreed Facts. The principal

¹ Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, Ch 8.8.

remaining issue is the quantum of penalties. The respondents have agreed to an order imposing penalties, but the amount remains to be determined by the Federal Circuit Court. Nor have the declarations yet been made.

6. The CFMEU parties did not advance any argument in support of its first position. They concentrated on the second and third positions. However, in deference to the CFMEU parties, the first position will be examined.
7. Counsel assisting agreed that no findings should be made that Jade Ingham and David Hanna may have committed offences under s 359 of the *Criminal Code* (Qld). In view of that concession, it is unnecessary to examine or evaluate the reasons for it.
8. If the first position of the CFMEU parties is to be accepted, they must establish a negative answer to the following question. Can the Commission reach its conclusions without creating ‘a substantial risk of injustice’ in what remains of the Proceedings?² One claim in counsel assisting’s submissions of 31 October 2014 was that Chad Bragdon and Jade Ingham engaged in industrial action in the period 3-14 April 2014 in contravention of s 417 of the *Fair Work Act* 2009 (Cth). To make findings about that does not create a substantial risk of injustice. Those two respondents have already admitted that they have engaged in at least parts of

² *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at 99 per Mason J.

the conduct in question in the Statement of Agreed Facts.³ They have agreed to the making of declarations to that effect.⁴ The penalties claimed are claimed under ss 545 and 546 of the *Fair Work Act*: they are civil penalties. It is difficult to see how findings of fact made by the Commission could affect or influence the quantum of penalty which the Federal Circuit Court decides.

9. Another claim made in counsel assisting's submissions of 31 October 2014 was that Chad Bragdon and Jane Ingham engaged in conduct in contravention of s 417 after 4 April 2014 in contravention of orders of the Fair Work Commission and after 8 April 2014 in contravention of orders of the Federal Circuit Court. This does not appear to be an issue in the Proceedings. The Statement of Agreed Facts says nothing about it. Hence findings about it by the Commission would not appear to create a substantial risk of injustice.
10. A further claim in counsel assisting's submissions was that Michael Ravbar condoned or approved the conduct of Chad Bragdon and Jade Ingham. This is not an issue in the Proceedings. Michael Ravbar is not a party to them. He is not mentioned in the Statement of Agreed Facts. There is no risk of inconsistent findings. Again, there does not appear to be a substantial risk of injustice.

³ Paragraphs 12-20.

⁴ Statement of Agreed Facts, paras 36(b) and (c).

11. The primary position of the CFMEU parties is therefore rejected.

The second CFMEU position: should any findings departing from the Statement of Agreed Facts be made?

12. The second position of the CFMEU parties is that any findings made should not depart from the Statement of Agreed Facts. The debate about this is very close to being an academical tourney, since the factual conclusions urged by counsel assisting differ very little from those stated in the Statement of Agreed Fact. The principal difference lies in this: what counsel assisting has urged is much more detailed than the Statement of Agreed Facts. However, it is desirable to examine the CFMEU parties' second position.
13. The CFMEU parties said that to arrive at findings different from those in the Statement of Agreed Facts could 'tend to undermine' the Proceedings. They said that the Commission 'should not second guess' them 'by making the inconsistent findings sought by counsel assisting'.⁵ Again, though, no substantial risk of injustice has been demonstrated. If the CFMEU parties have managed to negotiate an agreement with the applicant in the Proceedings about what facts should be relied on for the purpose of determining civil penalties, and the facts agreed are favourable to the CFMEU parties, they are to be congratulated for their success in negotiation. But a court is not bound to accept as true a matter of fact merely because it is admitted or agreed as

⁵ Submissions of the CFMEU, 16/10/15, para 10.

between the parties.⁶ And a Royal Commission cannot be bound to accept as true a matter of fact merely because it is admitted or agreed as between the parties to litigation on similar subject matter (unless, perhaps, it creates a judgment in rem). A finding by the Commission differing from the facts agreed cannot prejudice the CFMEU parties. It will be for the Federal Circuit Court to accept the agreed facts if it wishes. If it were to decide not to, it would do so on the basis of evidence which might or might not differ from that which is before the Commission. In view of the length of time which has passed since the Statement of Agreed Facts was agreed on 11 June 2015, it seems very unlikely that the Federal Circuit Court will depart from it.

14. Hence the second position of the CFMEU parties is rejected.

The third CFMEU position: criticisms

15. The third position of the CFMEU parties is to direct specific criticisms at the submissions of counsel assisting. That is obviously permissible. The criticisms will be taken into account at appropriate points in the analysis of counsel assisting's submissions. There are not in fact many concrete criticisms except in relation to credit.

⁶ *Gramophone Ltd v Magazine Holder Co* (1911) 28 RPC 221; *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 at 7; *Adams v Naylor* [1946] AC 543; *Royster v Cavey* [1947] KB 204; *Termijtelen v Van Arkel* [1974] 1 NSWLR 525 at 530 and 534-5; *Damberg v Damberg* (2001) 52 NSWLR 492 at [157]-[163]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at [42]-[51]; *Holdway v Arcuri Lawyers* [2009] 2 Qd R 18 at [5] and [65].

B – RELEVANT FACTS

The findings requested by counsel assisting: an outline

16. The findings requested by counsel assisting were, in outline, as follows (apart from those alleging criminal conduct, which, following the concession by counsel assisting, do not receive substantial consideration in this Chapter).
- (a) Chad Bragdon and Jade Ingham organised and engaged in industrial action on the project site across a period from 3 to 14 April 2014. They did so on and after 7 April 2014 knowing that they were breaching orders made by the Fair Work Commission on 4 April 2014. They did so after 8 April 2014 knowing that they breaching orders made on that day from the Federal Circuit Court.
 - (b) By so acting, Chad Bragdon and Jade Ingham contravened ss 417 and 421 of the *Fair Work Act* 2009 (Cth), they contravened ss 297, 300 and 302 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) and they acted in contempt of court.
 - (c) On 7 April 2014 Jade Ingham threatened Hindmarsh that, unless it allowed Zoran Bogunovic to work on the project, the CFMEU would cause industrial action against Hindmarsh to continue. He did so intending to

compel Hindmarsh to allow Zoran Bogunovic to work on the project, when Hindmarsh was lawfully entitled to do otherwise.

- (d) On 11 April 2014 David Hanna threatened Hindmarsh that industrial action would continue unless Hindmarsh signed a deed of release (effectively signing away its rights against the CFMEU and its officers as a result of their conduct as described above) and gave Zoran Bogunovic a good reference. He did so intending to compel Hindmarsh to sign the deed and give Zoran Bogunovic a good reference when Hindmarsh was lawfully entitled to refuse to do so.

- (e) Michael Ravbar condoned behaviour of the kind described above.

- 17. Counsel assisting set out the background as follows. The submissions are accepted, save that points of controversy are dealt with as they arise.

The project

- 18. In 2014 Hindmarsh was carrying out work as the head contractor on a project that involved the construction of a 14 floor apartment building called 'Brooklyn on Brookes' in Fortitude Valley in Brisbane.

19. Ian Busch was the Queensland construction manager of Hindmarsh. He was involved in the management of the project. He commenced working for Hindmarsh in December 2013, sometime after the company had commenced works on the project.

Two union delegates

20. When he first became involved in the project, Ian Busch came to learn that there were two union delegates on the site. The first was Jack Cummins, who was a CFMEU delegate, and an employee of the Lack Group, the labour hire sub-contractor for the project.
21. The second delegate was Zoran Bogunovic. He was a delegate from the BLF branch of the CFMEU in Queensland. He too was employed by the Lack Group.
22. Ian Busch was informed by the Hindmarsh Project Manager that Roland Cummins and Zoran Bogunovic had each been allowed to work on the site and also act as delegates in order to ensure 'industrial peace' for the project.⁷
23. The presence of two delegates on site was unusual, in that the enterprise agreement between Hindmarsh and the CFMEU did not provide for it.

⁷ Ian Busch, witness statement, 5/8/14, para 7.

24. The enterprise agreement⁸ was entered into in about May 2013, and continued to apply throughout the life of the project.
25. Clause 6.15 of that agreement defined 'Union Delegate' to mean:
- [A]n employee elected by union members and endorsed by the relevant union to represent the industrial interests of union members employed by the Company as required. All parties to this Agreement shall be notified as soon as practicable after the election of a Union Delegate.
26. Clause 6.14 of the same agreement defined 'Union' to mean '*the Union* set out in clause 4 of this Agreement' (emphasis added).
27. Clause 4 in turn, only referred to one union, namely the CFMEU. Although it is true that clause 4 acknowledged the fact that the union had a Queensland branch of the Construction and General Division and a Queensland BLF branch of the Construction and General Division, it was perfectly clear from the terms of clause 4 that they were no more than divisional branches of the one legal entity, and that there was only one Union.
28. These contract terms were consistent with the fact that the CFMEU was a single legal entity, being the registered organisation called the 'Construction Forestry Mining & Energy Union'. That legal entity, the union, had a number of divisions and branches. Neither the divisions nor the branches were legal entities in their own right. This fact was well understood by

⁸ Michael Ravbar, witness statement, 6/8/14, MR-1.

Michael Ravbar, as is apparent from the language employed by him in his witness statement.⁹

29. In these circumstances, under the enterprise agreement the CFMEU was only entitled to have one delegate on the Project. It could have had Zoran Bogunovic or Roland Cummins, but not both.
30. Michael Ravbar's evidence was that, notwithstanding the plain meaning and operation of clause 4, '[t]he practice was that each branch endorsed it [sic] own delegate'.¹⁰
31. That practice, if and to the extent it existed, did not find expression in the enterprise agreement. Medy Hassan, the National General Manager of Hindmarsh, an experienced operator in the construction industry, said that he was surprised by the fact that there were two delegates, and that this was not consistent with his experience.¹¹
32. Counsel assisting submitted that the appropriate finding was that although the enterprise agreement did not permit it, the CFMEU insisted upon having two delegates on site, and was able to have its way in circumstances where, if its demands were not met, industrial peace could not be assured.

⁹ Michael Ravbar, witness statement, 6/8/14, para 5.

¹⁰ Michael Ravbar, witness statement, 6/8/14, para 6.

¹¹ Medy Hassan, 5/8/14, T:216.19-217.11, 218.26-36.

33. The CFMEU parties put the following submission:¹²

The CFMEU contests the finding sought ... concerning the entitlement to have two delegates under the enterprise agreement prior to the amalgamation with the BLF. Mr Ravbar gave evidence¹³ ... that it was not unusual as a matter of practice to have two delegates on Queensland construction sites prior to amalgamation. A debate over the terms of the agreement is an arid debate in circumstances where there were two recognised delegates prior to the agreement to reduce the number to one.

This submission does not actually confront counsel assisting's submission head on. The submission does not seek to explain that the enterprise agreement permitted two delegates. Nor does it dispute the proposition about the ability of the CFMEU to have its way. The submissions of counsel assisting just set out are accepted.

Agreement to remove one delegate

34. Counsel assisting then submitted as follows. In late 2013 it became apparent that the CFMEU was about to embark upon an internal structural change pursuant to which the Queensland BLF divisional branch would be folded into the Queensland Construction and General divisional branch. That change would mean that there would no longer exist two separate divisional branches within the union.

¹² Submissions of the CFMEU, 16/10/15, para 12(a).

¹³ Michael Ravbar, witness statement, 6/8/14, paras 5-6.

35. Ian Busch thought that there was no need for two delegates on the project (let alone two from the same union). He had a number of meetings and discussions with Chad Bragdon, a CFMEU organiser, about reducing the number of delegates on the project from two to one.¹⁴
36. By early March 2014 Chad Bragdon had agreed that one of the delegates should be removed from the project. He nominated Zoran Bogunovic as the one who would leave. In particular, Chad Bragdon said that Zoran Bogunovic would leave the site as soon as the union found him another site to transfer to, and gave assurances that the transfer would take place within two weeks.¹⁵
37. In early March 2014 there was a change in the labour hire sub-contract arrangements that Hindmarsh had in place for the project. The Lack Group withdrew their services. In their place, the work was sub-contracted to a company called Global HR. The employment of Zoran Bogunovic and Roland Cummins was transferred to Global HR.
38. The CFMEU parties did not criticise these submissions.

Water in the lunch room – 28 March 2014

39. Counsel assisting then put some further submissions. The CFMEU parties took issue with some of them.

¹⁴ Ian Busch, witness statement, 5/8/14, paras 14-16.

¹⁵ Ian Busch, witness statement, 5/8/14, paras 16-18.

40. During the evening of 27 March 2014 and into the early morning of 28 March 2014, heavy rain fell in the Brisbane area.
41. The rainfall caused a pipe to burst or overflow. In the early hours of 28 March 2014 some water leaked onto part of the floor of the workers' lunch room. That lunch room was situated in the recently constructed basement of the building under development.¹⁶
42. A video of the lunch room taken at about 6.30am on 28 March 2014 demonstrated the extent to which water had penetrated the area.¹⁷
43. There were considerable portions of the floor of the lunch room that were not affected by water. There were a large number of workers standing in and around the lunch room in areas not affected by water. In those areas of the floor of the lunch room where water was apparent, the water was not deep. The water did not affect the good humour of the workers. They did not appear to be experiencing any discomfort whatsoever. They were in good spirits. They were in no way concerned for their own health and safety or that of anyone else on the site.
44. The impression to be gained from the video is that the presence of water on the floor of the lunch room was a relatively minor

¹⁶ Andrew Toms, 6/8/14, T:295.12-29.

¹⁷ Ravbar MFI-3, 7/8/14; Michael Ravbar, 7/8/14, T:379.23-34.

occurrence, and with a modicum of good will and common sense would have been able to be dealt with swiftly.

45. That impression is confirmed by the evidence of Andrew Toms. By about 7.15am the water in the lunch room had been squeegeed away and the vinyl floor had been stripped out in the affected areas. Only about 35% of the total area of the lunch shed was unusable. All fridge and hot water systems remained available.¹⁸
46. In addition, the original crib rooms which had been installed prior to the construction of the basement remained available for use. They were in the gantry, fully operational, with all water, hot water and tea and coffee facilities ready to use. The evidence of Andrew Toms was that those rooms were big enough to accommodate everyone working on the site that day.¹⁹
47. Michael Ravbar tried to argue that the alternative rooms were not big enough, even though he had never seen them. Zoran Bogunovic tried to argue the same thing. This evidence cannot be accepted, particularly when it is appreciated that the crib rooms had actually functioned as such, without any apparent crowding or controversy, prior to the construction of the basement. As Ian Busch said in evidence, the crib rooms in the gantry 'were the ones that were used from the beginning of the

¹⁸ Andrew Toms, witness statement, 6/8/14, para 14.

¹⁹ Andrew Toms, witness statement, 6/8/14, para 25.

project for all the workers', and remained in working condition throughout.²⁰

48. Thus the position was as follows. The water penetration in part of the lunch room had been resolved by 7.15am. The vast majority of the lunch room remained available for use. The original crib rooms were also available for use. However, the union delegates on site, Roland Cummins and Zoran Bogunovic, took it upon themselves to determine that the project should be closed down for the day and all workers sent home. The replacement lino flooring material had not yet arrived. But that of itself did not make the space unusable. When Andrew Toms became aware of the fact that this was occurring, he spoke to those delegates. They told him that the project was closed. Andrew Toms said that was not correct and that the site was to remain open. The delegates then indicated they had spoken to Chad Bragdon. He had told them 'the site is closed and all men are to go home'.²¹

49. The workers left the site in accordance with the directions of the union delegates. Part of the daily responsibilities of Andrew Toms on site was to make sure records were kept as to which workers were on site each day. As such, he took a record of the

²⁰ Ian Busch, 5/8/14, T:229.23-29.

²¹ Andrew Toms, witness statement, 6/8/14, paras 9-11.

workers as they were leaving. It is plain that he did not approve of their departure.²²

50. The result of the directions given by Chad Bragdon and the other CFMEU representatives on site on 28 March 2014 was that no workers on the project, other than plumbers, performed any work on 28 March 2014.²³

51. The CFMEU parties put the following submission about the events of 28 March 2014:²⁴

The CFMEU disagrees with the description of events on Hindmarsh Project on 28 March 2014 described in ... counsel assisting's submissions.²⁵ It is contrary to the accounts given by Mr Bogunovic and the contemporaneous video and documents which describe the events. The water on the floor of the crib room was not "a relatively minor occurrence" as counsel assisting suggest²⁶ As Mr Ravbar explains ...²⁷ it was a safety issue. It was also considered by the site Safety Committee as Mr Bogunovic described²⁸

52. Let it be assumed, for the sake of argument, that for a time there was a safety issue. Let it also be assumed, for the sake of argument, that for a time the event might be regarded as more than a relatively minor occurrence. But even the CFMEU parties do not deny that with a modicum of goodwill and common sense

²² Andrew Toms, 6/8/14, T:294.15-303.47; Andrew Toms, witness statement, 6/8/14, paras 9-25.

²³ Ian Busch, witness statement, 5/8/14, para 39.

²⁴ Submissions of the CFMEU, 16/10/15, para 12(b).

²⁵ Submissions of Counsel Assisting, 31/10/14, paras 25-35.

²⁶ Submissions of Counsel Assisting, 31/10/14, para 29.

²⁷ Michael Ravbar, witness statement, 6/8/14, paras 16-18.

²⁸ Zoran Bogunovic, witness statement, 2/9/14, paras 12-13.

the issue could have been dealt with swiftly. The materials to which the CFMEU parties referred do not materially undercut the line of reasoning underlying counsel assisting's submissions. Qualified by the two assumptions set out above, those submissions are accepted.

Hindmarsh correspondence

53. The submissions of counsel assisting continued as follows. The CFMEU parties took issue with them, but at a rather general level.
54. The following day, 29 March 2014, work occurred as normal.
55. Hindmarsh then received claims for payment from sub-contractors seeking pay for workers who had not worked on 28 March 2014. Hindmarsh refused to pay those claims. On 31 March 2014 Hindmarsh sent the sub-contractors a note pointing out that it would be a breach of the *Fair Work Act 2009* (Cth) for sub-contractors to pay their workers for the industrial action that had occurred on 28 March 2014.²⁹
56. The CFMEU's response to Hindmarsh's correspondence was swift.
57. The following day, 1 April 2014, the project was subjected to rolling stoppages, without prior warning. Key structural trades,

²⁹ Ian Busch, witness statement, 5/8/14, paras 41, 43.

such as form workers, were pulled off the project for two hour meetings. The excuse given by Roland Cummins and Zoran Bogunovic was that they were conducting meetings pursuant to the '2 hour meeting clause' in the enterprise agreement.³⁰ Zoran Bogunovic told Ian Busch that there would be continuing stoppages 'for as long as it takes'.³¹

58. The reference to the '2 hours clause' was a reference to clause 32.9 of Hindmarsh's enterprise agreement with the CFMEU. It provided that employees were entitled to have paid time off to attend union meetings of up to two hours. However there were some important conditions and limitations attaching to this right. First, the union had to give at least 24 hours' notice to the project manager. No such notice had been given in this case.³² Secondly, the meetings could not be more frequent than was reasonable. There is no evidence to support a finding that the frequency and occurrence of the meetings was reasonable.
59. At the time, Ian Busch had no doubt that these stoppages and disruptions formed part of an escalating industrial campaign against Hindmarsh in response to Hindmarsh's position with respect to the payment of workers who went home on 28 March 2014.³³ He was right to hold this belief. This is apparent from the obvious coincidence in time between Hindmarsh's

³⁰ Ian Busch, witness statement, 5/8/14, para 44.

³¹ Ian Busch, witness statement, 5/8/14, para 44.

³² Ian Busch, witness statement, 5/8/14, para 44.

³³ Ian Busch, witness statement, 5/8/14, para 45.

correspondence and the commencement of stoppages, and the absence of any evidence demonstrating the appropriateness of such stoppages.

60. Further, Ian Busch's conclusions were reinforced by comments made by Chad Bragdon on 1 April 2014. On that day, Chad Bragdon said to Ian Busch that the action was in the context of the letters that Hindmarsh sent about the industrial action of the workers on 28 March 2014. Chad Bragdon said that if Hindmarsh intended to go 'running to Fair Work' about the stoppages, it would create another 'Ark Tribe'. That was a reference to industrial unrest that the union had caused on another Hindmarsh project in South Australia. Chad Bragdon made it clear to Ian Busch that it was not for Hindmarsh to dictate how sub-contractors paid their employees. The same day, Roland Cummins told Ian Busch that Chad Bragdon had given him instructions that if Hindmarsh wanted the rolling stoppages to come to an end, Hindmarsh would have to retract the letters and pay the workers for the day they performed no work.³⁴

Change in labour levels

61. The position was that both the person who had been performing the role of hoist operator and Zoran Bogunovic were on site. Zoran Bogunovic was able to operate the hoist. The project did

³⁴ Ian Busch, witness statement, 5/8/14, paras 46-48.

not require both of them to be on site. Hindmarsh therefore wanted the hoist operator to leave.

62. This view was communicated to the labour hire company that employed both individuals, Global HR. Global HR had by then taken over from the Lack Group as labour hire provider.³⁵ As a result the previous hoist operator was rotated off the project and deployed elsewhere by Global HR. Zoran Bogunovic was asked by Global HR to operate the hoist on the Hindmarsh site.³⁶
63. The CFMEU has, from time to time, attempted to mischaracterise the treatment of the previous hoist operator as a 'sacking'.³⁷ It was nothing of the sort, as the CFMEU well knows. The worker in question remained in the employ of Global HR and was relocated by Global HR to another site. He did not lose his job with Global HR. Indeed he would shortly be allocated back to the Hindmarsh site. Unfortunately he was unable to work there because of the industrial action instigated on site by the CFMEU.³⁸
64. On the following day, 2 April 2014 Jade Ingham and Chad Bragdon met Ian Busch and others on the Hindmarsh site. During that meeting, Chad Bragdon complained that Hindmarsh had been sending 'bullshit letters'. He wanted the letters retracted and the men paid in full for 28 March 2014 despite the fact they

³⁵ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, p 20.

³⁶ Ian Busch, witness statement, 5/8/14, paras 50-51.

³⁷ Michael Ravbar, witness statement, 6/8/14, para 21.

³⁸ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, p 23.

had not been working. Ian Busch asked what the issues really were. Jade Ingham replied saying '[w]hat do you think? You have asked a delegate to do the work of someone you sacked the day before'. Chad Bragdon added that Zoran Bogunovic would not drive the hoist as he had union duties to do.³⁹

65. Jade Ingham's suggestion that Hindmarsh had 'sacked' the previous hoist operator was not correct. He must have known this at the time. It was an attempt by him to create a false platform from which to make a complaint in circumstances where no genuine ground for complaint existed.
66. As Chad Bragdon had indicated in the discussion with Ian Busch, Zoran Bogunovic refused to perform any work as hoist operator on the site on 2 April 2014.⁴⁰
67. Counsel assisting submitted that the proposition put forward by the CFMEU that Zoran Bogunovic could not perform the role of hoist operator on 2 April 2014 because he was a union delegate should be rejected.
68. The Hindmarsh enterprise agreement gave the CFMEU delegate had no right to refuse to perform work on site. It gave him no right to insist upon attending on site for union purposes only. Under clause 30.1 of the enterprise agreement, the delegate was entitled to paid time off work to represent the interests of

³⁹ Ian Busch, witness statement, 5/8/14, para 57.

⁴⁰ Ian Busch, witness statement, 5/8/14, para 58.

members. The delegate was also entitled to reasonable paid time during normal working hours to consult with union members. The clause said nothing about delegates being entitled to do no work. It said nothing about delegates being entitled to spend all of every day carrying out tasks on behalf of the union. Even Michael Ravbar was prepared to accept this was so.⁴¹

69. Contrary to that accepted position, the CFMEU put to Ian Busch that it would be the ‘reasonable expectation’ of anyone in his position that Zoran Bogunovic would do no work on site. That proposition, which was contrary to Michael Ravbar’s own evidence, was rejected by Ian Busch as well.⁴²
70. There was no reason why Zoran Bogunovic could not carry out normal work duties as hoist operator and, if necessary, be relieved for a period for the purpose of undertaking any union duties that were required of him. Equally, to the extent union issues arose, the CFMEU still had two delegates on the project at that time.⁴³
71. Hindmarsh’s response to Zoran Bogunovic’s refusal to perform normal work duties was to inform Global HR that it did not want Zoran Bogunovic returning to the site. It said that it expected

⁴¹ Michael Ravbar, 6/8/14, T:337.36-44.

⁴² Ian Busch, 6/8/14, T:274.10-20.

⁴³ Ian Busch, 6/8/14, T:279.9-19.

Global HR to deal with Zoran Bogunovic's disobedience through an appropriate disciplinary process.⁴⁴

72. Again, there has been some attempt by the CFMEU to mis-describe this occurrence, and to pretend that it constituted a 'sacking' of Zoran Bogunovic by Hindmarsh.⁴⁵ Zoran Bogunovic was not employed by Hindmarsh and therefore could not be sacked by it. Further, and perhaps more significantly, Zoran Bogunovic was not sacked by anyone. He was redeployed by his employer. He was later employed by another sub-contractor and returned to site.⁴⁶

Industrial action on 3 April 2014

73. Hindmarsh's request of Global HR to deploy Zoran Bogunovic elsewhere was sent by an email at 6.01pm on 2 April 2014.⁴⁷
74. The following day, 3 April 2014, no worker performed work at the project site.
75. It is inconceivable that all of the workers on site somehow became aware of this email of 6.01pm on 2 April 2014, and thereafter each individually determined of his or her own accord that he or she would not show up to work at 6.00am the

⁴⁴ Ian Busch, witness statement, 5/8/14, para 58.

⁴⁵ Michael Ravbar, witness statement, 6/8/14, para 23.

⁴⁶ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, p 15.

⁴⁷ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, p 21.

following morning. This could not have occurred without the presence of a central co-ordinating body working to inform the workers of what had occurred and marshalling them to a common position. It is beyond doubt that this is what officers of the CFMEU did, including in particular Jade Ingham and Chad Bragdon, the CFMEU officers dealing with the site.

76. The CFMEU parties argued:⁴⁸

Counsel assisting's attempts⁴⁹ to argue the industrial merits of the actions of the CFMEU concerning the claims for payment for 28 March 2014, the removal of the hoist operator from site and the treatment of Mr Bogunovic in early April 2014 is of no assistance to the Commission. Put at its highest this analysis reflects the existence of a dispute on the site at the relevant time. For what it is worth, the Commission will note, contrary to ... counsel assisting's submission,⁵⁰ the statement of agreed facts at paragraph 16 records that Mr Bogunovic's employment at the project was terminated on about 2 April 2014 at the direction of Hindmarsh.

77. The enterprise on which the CFMEU parties have to embark is to show error in the reasoning in the submissions of counsel assisting. The quoted passage does not demonstrate error in the argument of counsel assisting in any particular. The closest the criticism comes to particularity is the last sentence. But the fact that the applicant and the respondents have, for their own purposes, agreed on a factual position does not demonstrate error in a contention by counsel assisting that a different position is supported by evidence. That is particularly so where the applicant may not have been attuned to the precise nuance in

⁴⁸ Submissions of the CFMEU, 16/10/15, para 12(c).

⁴⁹ Submissions of Counsel Assisting, 31/10/14, paras 36-57.

⁵⁰ Submissions of Counsel Assisting, 31/10/14, para 54.

paragraph 16 of the Statement of Agreed Facts on which the CFMEU parties now rely. The submission of the CFMEU parties does not demonstrate error in what counsel assisting submitted in any way. Even if it did, that would not affect the fundamental points to which counsel assisting then turned in the balance of its submissions.

Fair Work Commission orders

78. Counsel assisting turned to the following submissions.
79. No workers performed work at the project site the following day, 4 April 2014. Hindmarsh then applied for and obtained an order from the Fair Work Commission that ‘All persons and organisations bound by this order must stop, not engage in and/or not organise industrial action as defined in s 418 of the *Fair Work Act 2009*’.⁵¹
80. The parties bound by the order were stated to be Hindmarsh; the CFMEU and its officials, employees and delegates; and employees employed by any sub-contractor to Hindmarsh who worked at the project and who were members or eligible to be members of the CFMEU and who were taking unprotected industrial action.

⁵¹ Hindmarsh Hearing Book, 5/8/14, p 39.

81. That order was made on 4 April 2014 following argument before Senior Deputy President Richards. The CFMEU appeared and was represented during the course of that argument.
82. At the same time as that order was made, the Fair Work Commission also made orders as to the means by which the orders were to be served on the CFMEU, its delegates, officers, employees, agents and members, and on the employees working on the project. Under the terms of those orders, service on those parties was to be effected by:
- (a) sending a copy of the orders and various other documents by fax or email marked to the attention of the National Secretary of the CFMEU; and
 - (b) by posting a copy of the documents on a noticeboard at the project site.⁵²
83. In accordance with those orders for service, the orders of the Fair Work Commission made on 4 April 2014 were sent by email marked for the attention of the National Secretary of the CFMEU.⁵³
84. Although he did not admit to it in his written statement, under examination Michael Ravbar acknowledged that the CFMEU took steps on 4 April 2014 to inform its officers and members

⁵² Hindmarsh Hearing Book, 5/8/14, p 43.

⁵³ Busch MFI-1, 5/8/14.

that the orders had been made. The orders were put on the CFMEU website. The CFMEU delegates and officials were notified. They were told to pass the message on to the workers. As Michael Ravbar said, ‘he has never had a problem about... getting out to any workplace’ orders made by the Fair Work Commission.⁵⁴ Michael Ravbar confirmed that Chad Bragdon had been made aware of the Fair Work Commission orders on 4 April 2014.⁵⁵

85. The CFMEU parties did not criticise this part of counsel assisting’s argument.

Breach of the Fair Work Commission orders on 5 and 7 April

86. Counsel assisting then argued as follows.
87. Although the orders of the Fair Work Commission had been served and disseminated as Michael Ravbar described, no workers performed work at the Hindmarsh site on the following working day, 5 April 2014.
88. The next working day after that was Monday, 7 April 2014.

⁵⁴ Michael Ravbar, 6/8/14, T:342.30-32.

⁵⁵ Michael Ravbar, 6/8/14, T:346.33.

89. On that day Ian Busch attended the project site before 6.00am to make sure copies of the orders had been posted around the site.⁵⁶
90. Ian Busch noticed that a copy of the orders had been placed on the notice board outside the lunch rooms and the basement. He noticed that another copy had been placed on the notice board just inside the gate where day-to-day site activities were listed. He also noticed a large copy of the orders, printed on A3 paper, on the hoarding at the gate into the site.⁵⁷
91. Ian Busch was further aware that a copy of the orders had been issued electronically to all of the sub-contractors over the course of the preceding weekend.⁵⁸
92. At about 6.15am on 7 April 2012, Ian Busch saw Chad Bragdon standing on the footpath outside the project site. He also saw Roland Cummins at the front gate. Roland Cummins said to Ian Busch that the union was holding a meeting offsite, and said the meeting was being held offsite because 'the place is bugged'. In fact, the project site was not bugged.⁵⁹
93. As Ian Busch came to learn, Chad Bragdon had come on to the project site earlier that morning. He had interrupted a meeting that was being held in the lunch room between Hindmarsh's Industrial Relations Advisor, Theresa Moltoni, and workers who

⁵⁶ Ian Busch, witness statement, 5/8/14, para 64.

⁵⁷ Ian Busch, 5/8/14, T:234.19.

⁵⁸ Ian Busch, 5/8/14, T:234.25-27.

⁵⁹ Ian Busch, witness statement, 5/8/14, para 65.

had returned to the site in compliance with Commission's order. He had called the workers out and taken them out to the footpath.⁶⁰ There were approximately 100 or so workers waiting for him on the footpath outside.⁶¹

94. When Chad Bragdon noticed Ian Busch on the project site, he walked back onto the site. Ian Busch asked him to show an entry permit. Chad Bragdon refused.
95. Ian Busch then spoke to Chad Bragdon about the fact of the Fair Work Commission orders. Chad Bragdon pretended to be unaware of them.⁶² It is inconceivable that Chad Bragdon was unaware of the orders on 7 April 2014 in light of the evidence given by Michael Ravbar and Ian Busch, Chad Bragdon's position within the CFMEU, his involvement with the site to that point and the CFMEU management's knowledge of the orders on 4 April 2014.
96. After his exchange with Ian Busch, Chad Bragdon left the site again and joined the workers who were standing outside.
97. Ian Busch took a video of this.⁶³ The video showed Jade Ingham, Chad Bragdon and Roland Cummins all at the site that morning. None of the workers standing around appear agitated or remotely passionate about anything.

⁶⁰ Ian Busch, 5/8/14, T:237-239.

⁶¹ Ian Busch, witness statement, 5/8/14, para 67.

⁶² Ian Busch, witness statement, 5/8/14, para 66.

⁶³ Busch MFI-2, 5/8/14.

98. In spite of the existence of the Fair Work Commission orders and the knowledge of the orders held by the CFMEU officers and representatives, none of these officers (including Jade Ingham or Chad Bragdon) took any step to encourage the workers to comply with the orders that had been made.
99. In fact, they adopted a contrary position. Jade Ingham indicated he would ensure the industrial action continued unless Hindmarsh changed its position towards Zoran Bogunovic. Jade Ingham said to Ian Busch that he would ‘get the men back to work if [Hindmarsh] let [Bogunovic] walk through the gate’.⁶⁴
100. Jade Ingham also said to Ian Busch ‘Are you sure you want this to go where it’s going, because this will go to the pointy end’. When Ian Busch said that Hindmarsh simply wanted the men to return to work, Jade Ingham said Hindmarsh could stop the action now by guaranteeing Zoran Bogunovic could walk through the gate. When Ian Busch said he could not give that guarantee, Jade Ingham said ‘Ok, we’ll see what happens now’.⁶⁵
101. When Jade Ingham joined Chad Bragdon outside, the union representatives and the workers gathered at a park near the project site. Ian Busch was then informed by other Hindmarsh

⁶⁴ Ian Busch, witness statement, 5/8/14, para 68.

⁶⁵ Ian Busch, witness statement, 5/8/14, para 71.

staff members that workers from other sites within the area were being 'called in' to participate in further activity.⁶⁶

102. Shortly after, Ian Busch began to hear chanting from outside the project site. The video of the demonstration⁶⁷ confirmed that Chad Bragdon was leading that chanting. He led a pack of workers waving CFMEU flags and banging and rocking the fence of the project site in an intimidating manner. The conduct of Chad Bragdon and the workers participating in the vocal demonstration stands in sharp contrast to many of the other workers who were simply standing around, not exhibiting any degree of passion or irritation.
103. The video confirms that Chad Bragdon, a CFMEU official, was the ring leader of the disruptions by workers on this day. The CFMEU's initiation and encouragement of the industrial activity is visibly evident from the presence of CFMEU flags, and audibly evident from the cry of 'CFMEU' which Chad Bragdon was leading.
104. Michael Ravbar viewed this footage and then was asked about these matters in the following exchange:⁶⁸

Q. You have no issue, do you, as the divisional branch secretary, with officials of the CFMEU engaging in activities of the kind we just saw on that footage, despite orders having been made injuncting that sort of activity?

⁶⁶ Ian Busch, witness statement, 5/8/14, para 72.

⁶⁷ Busch MFI-5, 6/8/14.

⁶⁸ Michael Ravbar, 6/8/14, T:347.25-39.

A. At the end of the day, I don't have a problem with that, no. If the decision had been made of the workforce not to return to work, if they want to send a protest, if they wanted to send a message back to the company that they're not happy, I don't think – I think people have a right, whether it's the official or the workers that he's with, to send a message back to the company. These disputes are very robust in the construction industry and there's always a little bit of emotion and passion in it, but you've got to look at the circumstances of how this all came about. It was certainly set up by the company.

105. This evidence demonstrates a lamentable disregard by Michael Ravbar and the CFMEU for the rule of law.
106. Orders had been made by the Fair Work Commission. The CFMEU, Chad Bragdon and Jade Ingham all knew about the orders. They deliberately acted in defiance of them. They deliberately organised the workers to defy the Fair Work Commission's orders.
107. The conduct exhibited by Chad Bragdon and Jade Ingham, and Michael Ravbar's acceptance of that conduct, demonstrates the existence of a troubling state of lawlessness within the CFMEU in Queensland.
108. An order of the Fair Work Commission is to be obeyed. If the CFMEU or some other person is not happy with the order, they have a right of appeal. They can choose to exercise that right.
109. Obedience to an order that has not been overturned on appeal is not optional. It is compulsory. Michael Ravbar, Jade Ingham and Chad Bragdon knew this to be so. However they did not

care. They considered themselves to be above the law, and able to operate outside of it. They were seriously mistaken.

110. The conduct of the union officers and the workers they were encouraging was so bad that the police had to be called. The police arrived. In due course, the workers dispersed. No work was performed on the project site that day, 7 April 2014.⁶⁹

Court orders

111. Despite the Fair Work Commission's orders and the absence of any appeal successful against them, no work was performed on the project site on 8 April 2014.
112. On 8 April 2014, as a result of continued non-compliance with the Fair Work Commission's orders, the Fair Work Building Inspectorate commenced an action in the Federal Circuit Court against the CFMEU, Chad Bragdon, Jade Ingham and Roland Cummins. Urgent injunctive relief was sought.
113. That application was heard by Judge Burnett on 8 April 2014. On that date an order was made that the CFMEU, Chad Bragdon, Jade Ingham and Roland Cummins be restrained from organising or being involved in organising, or engaging or being involved in engaging, in any industrial action as defined in s 19 *Fair Work*

⁶⁹ Ian Busch, witness statement, 5/8/14, para 76.

Act 2009 (Cth) against Hindmarsh in respect of the project, and against any sub-contractor of Hindmarsh engaged at that site.⁷⁰

114. The CFMEU was served with that and other orders. That is apparent from a letter dated 10 April 2014 sent by the CFMEU's lawyers to Michael Ravbar noting that the parties had agreed on 9 April 2014 to a variation of the orders made on 8 April 2014.⁷¹ The effect of the 9 April variation in orders was to extend the operation of the injunction for a further period.

Breach of court orders

115. Notwithstanding the Fair Work Commission orders on 4 April 2014, and notwithstanding the orders of the Federal Circuit Court on 8 and 9 April 2014, industrial action continued unabated. That action comprised not only the workers not attending for work, but also the presence of intimidating 'enforcers' outside the project site.
116. For example, on 10 April 2014 a large man stood at the front gate of the project site wearing dark glasses and a mask.⁷² He was obviously aware of the existence of the orders of the Commission and the Court. That is why he hid behind a mask so as to conceal his true identity.

⁷⁰ Hindmarsh Hearing Book, 5/8/14, pp 45-46.

⁷¹ Hindmarsh MFI-1, 31/10/14, pp 1-3.

⁷² Busch MFI-4, 5/8/14.

117. Complaints were made to Hindmarsh by various sub-contractors that their employees were being intimidated by people standing and making comments to them as they were attempting to walk towards work.⁷³
118. Events of this kind were reported to Hindmarsh by various sub-contractors in emails sent at the time.⁷⁴ One sub-contractor wrote to confirm that its employees had attempted to attend for work on 9, 10 and 11 April 2014, but had been intimidated and held concerns for their personal safety. Another said that its employees had sought to enter the site on 8 April, 10 April and 11 April 2014 but had been prevented on each occasion from entering the site by persons unknown who had used intimidating and threatening language. Another wrote to Hindmarsh to report that they had undertaken a risk assessment and had identified significant risks to their staff through intimidation.
119. It would be fanciful to think that the individuals who took part in this intimidatory behaviour had been organised into doing so by the workers of their own volition. The workers had dispersed on 7 April 2014. Many had been unable to return to work because of the presence of ‘enforcers’ at and around the gate. The presence of these persons around the site was an orchestrated event. The conductor of the orchestra was the CFMEU. Chad Bragdon and Jade Ingham were the CFMEU officers dealing with

⁷³ Ian Busch, 5/8/14, T:244.25-245.45.

⁷⁴ Busch MFI-8, 6/8/14.

the site. They must, therefore, have been intimately involved in this orchestration.

120. On 11 April 2014 the Director of the Fair Work Building Industry Inspectorate obtained orders from the Federal Circuit Court joining Heinrich Constructions, Global HR and a number of named employees to the proceeding.⁷⁵
121. Following the making of these orders, and from 14 April 2014, there was a progressive return to work on the project site.⁷⁶

Settlement proposal

122. Faced with complaints concerning defiance of the orders of the Fair Work Commission and the Federal Circuit Court, on 11 April 2014, David Hanna, the President of the CFMEU in Queensland, met Ian Busch. David Hanna had been very busy. He had spent much time in the period 1-4 April complying with Michael Ravbar's instructions to destroy tonnes of CFMEU and BLF records. Now he turned his attention to Hindmarsh. He presented a form of deed for Hindmarsh to sign.⁷⁷
123. The deed recited that workers on the project had taken industrial action; Hindmarsh had applied for and obtained an order from the Fair Work Commission; and Hindmarsh was claiming to have

⁷⁵ Hindmarsh Hearing Book, 5/8/14, tab 9, pp 51-53.

⁷⁶ Ian Busch, witness statement, 5/8/14, para 85.

⁷⁷ Ian Busch, witness statement, 5/8/14, Exhibit IB-1.

suffered loss and damage as a result of industrial action and that CFMEU was liable for that loss and damage.

124. The proposed form of deed contemplated that the CFMEU would pay Hindmarsh \$100. The payment was to be in full and final satisfaction of all claims that Hindmarsh might have against any person arising out of or connected with the industrial action and Hindmarsh would release the CFMEU and its officers from all claims arising out of, or in any way connected with, the industrial action.
125. When David Hanna presented this deed to Ian Busch he told him that '[o]thers with bigger lawyers than yours have signed it'.⁷⁸
126. David Hanna also made a number of other statements during that meeting, including the following. If the matter was to resolve, Hindmarsh would have to accept that Zoran Bogunovic would remain as a delegate for the duration of the form work on the project. Another was that Hindmarsh would have to provide a good reference for Zoran Bogunovic and if this did not occur 'all hell breaks loose'. A third was that the union was prepared to fight, and that if necessary the stoppages would continue for as long as those that were experienced at the Children's Hospital, and this would occur if the deed was not signed. Fourthly, every dollar the union spent, it would cost Hindmarsh double. Finally,

⁷⁸ Ian Busch, witness statement, 5/8/14, para 88.

he could have the site operational as soon as Hindmarsh signed the deed.⁷⁹

127. The CFMEU parties submitted that the Commission should not depart from what appears in the Statement of Agreed Facts.⁸⁰ The Commission was not party to the Statement of Agreed Facts. It has heard evidence. The argument of the CFMEU parties does not demonstrate error in the argument of counsel assisting. Indeed, there is no fundamental difference between the argument of counsel assisting and the Statement of Agreed Facts. The former is simply much more detailed than the latter. That does not reveal inconsistency.

Disposing of CFMEU's factual contentions about Ian Busch and Northbuild

128. Counsel assisting's submissions proceeded as follows.
129. The CFMEU sought to contend that, by asking Zoran Bogunovic to do some work on 2 April 2014, Ian Busch was attempting to provoke the industrial action which followed.
130. There are a number of problems with this theory:

⁷⁹ Ian Busch, witness statement, 5/8/14, para 89.

⁸⁰ Submissions of the CFMEU, 16/10/15, para 12(d).

- (a) at a factual level, it is nonsensical and should be rejected for the reasons set out in the following paragraphs; and
- (b) the theory is irrelevant to the matters under consideration. Whatever the history of the relationship between Zoran Bogunovic and Ian Busch may have been, it does not excuse Zoran Bogunovic from refusing to work, and has nothing to do with an assessment of whether officers of the CFMEU engaged in the unlawful action under consideration.

- 131. The factual proposition advanced by the CFMEU is improbable. Ian Busch was an experienced operator in the construction industry. He was aware of the enormous costs and losses that are incurred by contractors if industrial action is taken. He did not wish to provoke anything of the kind.
- 132. Aware of the illogicality of this theory, the CFMEU tried to invent a reason why Ian Busch would have behaved in such an aberrant a fashion as effectively to seek to incite industrial action against his own employer and the project he was responsible for managing.
- 133. The reasons which the CFMEU invented was that Ian Busch had been sacked by his former employer, Northbuild, because of the way he had treated Zoran Bogunovic on a project that company had pursued some years earlier.

134. The initial peddler of this theory was Michael Ravbar. He did so in the following passage of one of his statements:⁸¹

It is my understanding that Mr Busch developed a personal animosity towards Mr Bogunovic when they were both previously employed for a company called Northbuild. I recall that on one Friday afternoon Mr Busch abruptly told Mr Bogunovic to get his things and leave the site where they were working on and that he wouldn't be coming back. Mr Bogunovic then spoke to Northbuild's Queensland State Manager and told him that Mr Busch had just sacked him. The Manager told Mr Bogunovic that he didn't know anything about that and that as far as he was concerned Mr Bogunovic could stay on the job for as long as he liked. Accordingly, Mr Bogunovic turned up for work as usual on the following Monday morning and was informed that Mr Busch had been sacked by Northbuild a few hours after Mr Bogunovic had left the worksite on the previous Friday.

135. As was the case with a good deal of his evidence, Michael Ravbar did not have a reliable basis for advancing his theory.

136. Although Michael Ravbar claimed in that passage to have 'recalled' a certain incident relating to the alleged sacking, under examination it was revealed that he had no knowledge of the matters at all.⁸² He was relying on something that others had told him, being persons who (allegedly) had heard it from other unknown sources. Michael Ravbar had not even asked Zoran Bogunovic about it. Nor had he asked anyone from Northbuild.⁸³

137. Michael Ravbar's so called 'evidence' to support this unlikely CFMEU theory was therefore the product of compounded

⁸¹ Michael Ravbar, witness statement, 6/8/14, para 8.

⁸² Michael Ravbar, 6/8/14, T:309.15-310.7.

⁸³ Michael Ravbar, 6/8/14, T:309.36-45, 310.23-43.

multiple hearsay. It was not possible to trace it back to any primary source.

138. To make matters worse, by the time Michael Ravbar entered the witness box and verified the passage in his statement on oath, a letter had been tendered and received in evidence which gave every indication that Michael Ravbar's statements were wrong.

139. The letter in question was dated 4 June 2012. It was signed by Paul Boddington, the managing director of Northbuild Construction Pty Ltd. It was addressed to Ian Busch.⁸⁴ In that letter Paul Boddington acknowledged the fact that Ian Busch had resigned on 30 May 2012. He noted that his last day at Northbuild would be 30 June 2012. He confirmed that all of his entitlements and final pay would be accounted for at the end of that period. The letter ended:

I would like to take this opportunity to thank you for your many years of commitment and service. You have played a major role in the growth and continued success of Northbuild and I would like to extend sincere wishes for your future.

140. Michael Ravbar was aware of that letter, and its contents, before he entered the witness box.⁸⁵ Yet he made no attempt to change the terms of the relevant paragraph of his statement. To the contrary, he swore it was true.

⁸⁴ Busch MFI-9, 6/8/14.

⁸⁵ Michael Ravbar, 6/8/14, T:314.36-39.

141. When this was pointed out to Michael Ravbar in the witness box, he admitted that, on the face of it, the letter did not sound like one that would be written to a person who had been sacked for misconduct.⁸⁶
142. He said that, having seen the letter, he actually gave consideration to the possibility of saying that there might be some doubt about what he had said against Ian Busch in his statement. He said that he had spoken to his legal counsel about the matter that morning. But he said that having done so, he remained 'comfortable with my statement'.⁸⁷ He continued to say that he believed that the paragraph was true.⁸⁸
143. Michael Ravbar appears to have been willing to give sworn evidence smearing Ian Busch's reputation, without having any real idea whether the smear was justified, and indeed having seen correspondence which, on its face, indicated it was not. This was much to his discredit. It reflected very poorly on him. He was prepared to make serious statements, potentially damaging to the reputation of others, when he either knew or at least had good reason to suspect that those statements are not true. This is not the behaviour of an honest person.
144. Zoran Bogunovic also gave unimpressive evidence on this subject. He was prepared to state in the witness box that when

⁸⁶ Michael Ravbar, 6/8/14, T:314.41-44.

⁸⁷ Michael Ravbar, 6/8/14, T:316.4-11.

⁸⁸ Michael Ravbar, 6/8/14, T:317.16.

they were both working on the Northbuild site, Ian Busch, out of the blue, approached him one Friday afternoon and told him he was terminated, and that the following Monday he was told by a Northbuild foreman that Ian Busch had been asked to leave the company for trying to sack him.⁸⁹

145. However, documents produced by Northbuild demonstrate that Zoran Bogunovic's evidence was false. There certainly had been an altercation between Ian Busch and Zoran Bogunovic on the Friday before Ian Busch left Northbuild (and about a month after Ian Busch had given notice of his resignation). But the altercation was not as Zoran Bogunovic described it. What in fact occurred is that Zoran Bogunovic had spread a false rumour that a sub-contractor was in receivership, the sub-contractor had complained, Ian Busch had reprimanded Zoran Bogunovic, and Zoran Bogunovic had agreed to apologise to the people he had spoken to.⁹⁰ The documents also show that, to the knowledge of all of the Northbuild foremen, Ian Busch left Northbuild on good terms.⁹¹ Ian Busch was not sacked or asked to leave, and the suggestion that one of Northbuild's foremen expressed a contrary view cannot be accepted in light of the contemporaneous communications with those men.

146. Ian Busch gave evidence that, consistently with the Northbuild letter, he resigned from that company. He was not sacked. He

⁸⁹ Zoran Bogunovic, witness statement, 2/9/14, paras 3-4.

⁹⁰ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, pp 1-2.

⁹¹ Hindmarsh Additional Hearing Bundle, 2/9/14, Vol 1, pp 4-8.

was not asked to resign.⁹² This was confirmed by Paul Boddington in an affidavit tendered in evidence. The CFMEU confirmed that it did not wish to cross-examine Paul Boddington, even though an offer had been made for arrangements to be put in place for this to occur if required.

147. Ultimately then, but far too late to save Michael Ravbar's or Zoran Bogunovic's credit, the unwarranted attack on Ian Busch was abandoned.

148. The CFMEU parties made several submissions. The first was as follows:⁹³

As to the credit of Mr Ravbar and Mr Bogunovic⁹⁴ ... counsel assisting make much of the evidence given as to Mr Busch's motives in directing Mr Bogunovic to perform work on 4 April 2014. The evidence that is dealt with is the understanding that Mr Ravbar and Mr Bogunovic had about Mr Busch's dealings with Mr Bogunovic previously on another building site. Both men understood that Mr Busch had been dismissed for mistreating Mr Bogunovic. The Commission obtained a letter from Mr Busch's former employer indicating that that understanding was misplaced as Mr Busch had resigned [Counsel assisting contend]⁹⁵ that the matter was irrelevant to the matters under consideration although then go to some length to rely upon it to challenge Mr Ravbar's credit. The CFMEU agrees that the matter is irrelevant and also submits that the challenge to Mr Ravbar's credit fails.

149. This is a misunderstanding of counsel assisting's argument. Counsel assisting said that even if Ian Busch was attempting to provoke industrial action, that was irrelevant to whether Zoran

⁹² Ian Busch, 5/8/14, T:242.10-20.

⁹³ Submissions of the CFMEU, 16/10/15, para 15.

⁹⁴ Submissions of Counsel Assisting, 31/10/14, paras 108-124.

⁹⁵ Submissions of Counsel Assisting, 31/10/14, para 109(b).

Bogunovic could be excused from refusing to work. What counsel assisting discussed is relevant to Michael Ravbar's credit, and that was not without importance.

150. The CFMEU parties next put the following submission:⁹⁶

The CFMEU does not accept that Mr Ravbar and Mr Bogunovic's credit is impugned by the exercise of establishing the actual reason for Mr Busch's termination of employment. The belief they held was based on what they had been told. They indicated in their evidence why they held that belief.

151. The actual reason is important because it demonstrates at least the recklessness of what Michael Ravbar and Zoran Bogunovic said, and perhaps worse than recklessness.

152. Then the CFMEU parties put the following submission:⁹⁷

It is suggested by counsel assisting⁹⁸ ... that Mr Ravbar's failure to change the evidence in ... his statement was to his discredit. However, a fair reading of [the] statement is all that is necessary to refute this submission. Mr Ravbar simply states that he understood that there was personal animosity on behalf of Mr Busch towards Mr Bogunovic based on a report that Mr Bogunovic had been told that Mr Busch was sacked after he asked Mr Bogunovic to leave the site. The provision of the letter that Mr Busch resigned rather than was sacked only deals with one aspect of the basis for holding the belief. The belief, that there was animosity from Mr Busch's, need not be dispelled by the evidence that part of the reason for it is disproven. The fact that Mr Bush had, on his last day on the site, told Mr Bogunovic to collect his things and leave may still justify a basis for the belief that there was animosity. Further, Mr Ravbar in his statement did not state as a fact that Mr Busch was dismissed for that event. He stated that Mr Bogunovic was told that. Those

⁹⁶ Submissions of the CFMEU, 16/10/15, para 16.

⁹⁷ Submissions of the CFMEU, 16/10/15, para 17.

⁹⁸ Submissions of Counsel Assisting, 31/10/14, paras 116-121.

circumstances do not justify the attack on Mr Ravbar's credit in counsel assisting's submission.

153. Unfortunately the reasoning of counsel assisting is much more convincing than the reasoning set out in this passage.

154. Finally, the CFMEU parties put the following submission:⁹⁹

... Mr Bogunovic's evidence about his dealings with Mr Busch was described by counsel assisting as unimpressive and to his discredit.¹⁰⁰ The matters dealt with in these paragraphs are peripheral to the matters being investigated by the Royal Commission in the case study. There can be no purpose in making adverse findings about Mr Bogunovic's credit in those circumstances. The Commission should not do so.

155. It is necessary to register strong disagreement with the last three sentences. It is necessary to deal with credit in order to rehabilitate the character of a witness which the CFMEU endeavoured to assassinate. Incidentally, the submissions of counsel assisting are supported by the way in which Zoran Bogunovic gave evidence. He was unimpressive in both the content of what he said and his demeanour while giving it – for he seemed extremely ill at ease and uncertain about what he was saying. He had good reason for this behaviour. Michael Ravbar had put forward evidence which, if true, was very adverse to Ian Busch's reputation. Zoran Bogunovic supported it. Whether Ian Busch had a personal animosity to Zoran Bogunovic on the ground assigned was a material fact. Evidence that he did not have it on that ground was relevant. That evidence tended to redound badly to the credit of both Zoran Bogunovic and

⁹⁹ Submissions of the CFMEU, 16/10/15, para 18.

¹⁰⁰ Submissions of Counsel Assisting, 31/1-/14, para 18.

Michael Ravbar. In one sense credit findings are always peripheral. In another sense they can be central because of their bearing on facts in issue. That was the case here.

156. In substance the submissions of counsel assisting on the facts are correct.

C – CONCLUSIONS

157. What conclusions should be drawn from these facts?

Breach of s 417 of the *Fair Work Act 2009* (Cth)

158. Section 417(1) of the *Fair Work Act 2009* (Cth) provides:

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
 - (a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or
 - (b) a workplace determination comes into operation until its nominal expiry date has passed;
 - (c) whether or not the industrial action relates to a matter dealt with in the agreement or determination.
- (2) The persons are:
 - (a) an employer, an employee, or employee organisation, who is covered by the agreement or determination; or
 - (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

159. 'Industrial action' is defined in s 19(1)(c) of the *Fair Work Act* 2009 (Cth) as the failure or refusal by an employee to attend for work or a failure or refusal to perform any work at all by employees who attend for work, except where such action is authorised or agreed to by the employer or based on a reasonable concern of the employee about an imminent risk to his health or safety where the employee did not unreasonably fail to perform other available work when directed to do so.
160. Employees of sub-contractors engaged by Hindmarsh engaged in industrial action on 28 March and again from 2 April to at least 14 April 2014 by failing to work during that period.
161. As the facts set out above demonstrate, Chad Bragdon and Jade Ingham may have breached s 417(1) of the *Fair Work Act* 2009 (Cth) by organising and engaging in that industrial action. In part they have admitted this in the Statement of Agreed Facts in the Proceedings. For reasons that have been explained in detail in the recitation of the facts, the suggestion by Michael Ravbar that the workers were protesting and refusing to attend work of their own accord is false. It is not supported by the evidence, including the video footage, of what actually occurred on the days in question. It is inherently improbable.
162. Section 417 (1) of the *Fair Work Act* 2009 (Cth) is a civil remedy provision.
163. In addition, the Federal Court or the Federal Circuit Court may make any order that it considers appropriate if satisfied that a

person has contravened s 417 of the *Fair Work Act* 2009 (Cth). This includes, without limitation, an order awarding compensation for loss that a person has suffered because of the contravention: s 545 (2) of the *Fair Work Act* 2009 (Cth).

164. The maximum penalty capable of being imposed on the CFMEU or its officials for organising industrial action in contravention of s 417 of the *Fair Work Act* 2009 (Cth) in 2014 was \$10,200. This is manifestly deficient. It is no deterrent. The penalty has since been increased to \$10,800. That is manifestly deficient as well. The penalties should be substantially increased so that officers of the CFMEU, and other trade union officials, are required to give serious consideration to whether they should break the law before they decide whether to take action.

Breach of s 421 of the *Fair Work Act* 2009 (Cth)

165. Where the Fair Work Commission makes an order under s 418 of the *Fair Work Act* 2009 (Cth), the person to whom the order applies must not contravene a term of that order: *Fair Work Act* 2009 (Cth) s 421.
166. The CFMEU, Chad Bragdon and Jade Ingham each knew of the fact of the order of the Fair Work Commission made on 4 April 2014, and contravened a term of that order by organising industrial action in the period from 4 to 14 April 2014.

167. As s 421 of the *Fair Work Act* 2009 (Cth) is a civil penalty provision, either Hindmarsh or an Inspector of the Fair Work Building Inspectorate may commence proceedings against Chad Bragdon, Jade Ingham and the CFMEU in the Federal Court or the Federal Circuit Court seeking the imposition of a penalty of up to \$10,200 each: *Fair Work Act* 2009 (Cth) s 539.
168. In addition, Hindmarsh may take proceedings in the Federal Court or the Federal Circuit Court seeking relief including, amongst other things, an order awarding compensation to it for the loss it has suffered because of the contraventions: *Fair Work Act* 2009 (Cth) s 545.
169. The maximum penalties that may be imposed on registered organisations such as the CFMEU, and their officers, for breach of an order of the Fair Work Commission are grossly deficient. They do not deter behaviour of the kind revealed in this case study. Penalties should be substantially increased.
170. An officer of a registered organisation who deliberately defies an order of the Fair Work Commission should be liable to punishment by a significant period of imprisonment in addition to financial sanctions.

**Breaches of *Fair Work (Registered Organisations) Act* 2009 (Cth) –
breach of Fair Work Commission order of 4 April 2014**

171. Section 300 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) provides that an officer of a registered organisation must not knowingly or recklessly contravene an order of the Fair Work Commission prohibiting the officer from doing something.
172. Section 297 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) provides that an officer of a registered organisation must not do anything that would cause the organisation to contravene an order of the Commission prohibiting the organisation from doing something either knowing, or reckless as to whether, the doing of the thing would result in the contravention.
173. Section 302 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) provides that, if the Commission makes an order prohibiting an employee from doing something, an officer of a registered organisation must not do anything that would contravene the order if the order had applied to him, knowing, or reckless as to whether, the doing of the thing would result in such a contravention.
174. As has already been explained, Chad Bragdon and Jade Ingham knew on 4 April 2014 that the Fair Work Commission had made its order, and the terms and effect of the order. But they

continued to organise the industrial action thereafter, knowing that in doing so they were acting in contravention of the order.

175. By so acting, they may have breached ss 297, 300 and 302 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
176. Those sections are civil penalty provisions. That being so, the Federal Court has power under s 306 (1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) to make an order imposing on a person or organisation whose conduct contravened those provisions, a pecuniary penalty of not more than 300 penalty units (\$51,000) in the case of a body corporate, or 60 penalty units (\$10,200) in any other case. These financial sanctions are too low. And they should be complemented by the power to impose prison sentences.
177. Aside from civil penalties, under s 307 of the *Fair Work (Registered Organisations) Act 2009* (Cth), the Federal Court may make an order that the person who has contravened these provisions pay compensation to a party who suffers damage by reason of those contraventions.
178. It is worth observing that the civil penalty provisions in Part 3 of Chapter 9 of the *Fair Work (Registered Organisations) Act 2009* (Cth), concern contraventions of an order of either the Federal Court or the Fair Work Commission. ‘Federal Court’ is defined in the Act to mean the Federal Court of Australia. Federal Circuit Court is separately defined. There appears to be a gap in this Part of the Act because the civil penalty provisions do not

extend to contraventions of orders of the Federal Circuit Court. This gap should be closed by way of amendment to the legislation so as to include a reference to the Federal Circuit Court in s 297 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) and the sections which follow it.

Contempt of the Federal Circuit Court order of 7 April 2014

179. Section 17 of the *Federal Circuit Court of Australia Act* 1999 (Cth) provides the Federal Circuit Court with the same power to punish contempts of its authority as the High Court has to punish contempts of its authority.
180. For the reasons set out earlier in this Chapter, the appropriate finding is that the CFMEU, Jade Ingham and Chad Bragdon continued to organise industrial action, and use intimidation to scare sub-contractors away from returning to work after being prohibited from doing so by order of the Federal Circuit Court. There is no suggestion that any of them did not know about the fact of the orders and their effect.
181. In these circumstances, the evidence establishes that the CFMEU, Jade Ingham and Chad Bragdon may have acted in contempt of the order of the Federal Circuit Court. If they did, they are liable to be punished by that Court.

Breach of s 359 of the *Criminal Code Act 1899* (Qld)

182. The submissions of counsel assisting considered the position of Jade Ingham and David Hanna in relation to s 359 of the *Criminal Code Act 1899* (Qld).¹⁰¹ As explained earlier, counsel assisting is now content for this not to be dealt with.

¹⁰¹ Submissions of Counsel Assisting, 31/10/14, paras 153-157.

APPENDIX A

IN THE FEDERAL CIRCUIT COURT
OF AUSTRALIA
REGISTRY: BRISBANE

File number: (P)BRG318/2014

Director, Fair Work Building Industry Inspectorate
Applicant

Construction, Forestry, Mining and Energy Union
First Respondent

Chad Bragdon
Second Respondent

Jade Ingham
Third Respondent

John Cummins
Fourth Respondent

STATEMENT OF AGREED FACTS

This Statement of Agreed Facts is made for the purposes of section 191 of the *Evidence Act 1995* (Cth) and the admissions are made only for the purposes of this proceeding

Background

- 1 The Applicant is the Director of the Fair Work Building Industry Inspectorate under the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**). The Applicant is, and was at all material times, authorised to bring these proceedings and make application for the relief sought under section 59C of the FWBI Act and section 539(2), item 14 of the *Fair Work Act 2009* (Cth) (**FW Act**).
- 2 The First Respondent is and was at all material times:
 - (a) an organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth) and able to be sued in its registered name; and
 - (b) a "building association" within the meaning of section 4 of the FWBI Act.

| | | | |
|----------------------------------|---|----------------|---------------|
| Filed on behalf of | Applicant | | |
| Prepared by | Martin Osborne | Lawyer's code | |
| Name of law firm | Norton Rose Fulbright Australia | | |
| Address for service in Australia | Level 21, ONE ONE ONE, 111 Eagle St, Brisbane | | |
| | State | QLD | Postcode 4000 |
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| Tel | 07 3414 2230 | Fax | 07 3414 2999 |
| | Attention | Martin Osborne | |

APAC-#27039720-v5

- 3 At all material times, each of the Second Respondent and Third Respondent was:
 - (a) an employee, official, member and/or organiser of the First Respondent;
 - (b) working within a Divisional Branch of the First Respondent;
 - (c) a "permit holder" within the meaning of that term in section 12 of the FW Act;
 - (d) an officer or agent of the First Respondent acting in that capacity; and
 - (e) a "building industry participant" within the meaning of section 4 of the FWBI Act.
- 4 At all material times, the Fourth Respondent was:
 - (a) a delegate for, and member of, the First Respondent;
 - (b) an "officer" of the First Respondent within the meaning of that term in section 12 of the FW Act;
 - (c) a "building industry participant" within the meaning of section 4 of the FWBI Act; and
 - (d) employed by Global HR to perform building work on the Brooklyn on Brookes Project, situated at Brookes Street, Fortitude Valley, Brisbane in the State of Queensland (**Brooklyn Project**).
- 5 The Brooklyn Project consisted of the construction of a 14-floor building of apartments. The development is valued at approximately \$105 million.
- 6 Hindmarsh Construction Australia Pty Ltd (**Hindmarsh**) was at all material times, the Head Contractor for the Brooklyn Project.
- 7 For the purposes of the Brooklyn Project, Hindmarsh employed some employees and also engaged subcontractors to assist in providing labour to build the Brooklyn Project (**Employers**). All but one of the Employers had an enterprise agreement in term at all relevant times. The Employers and their relevant enterprise agreements included:

| | Employers | Enterprise agreement |
|-----|--|--|
| (a) | G James Glass & Aluminium (Qld) Pty Ltd | <i>G James Glass and CFMEU Union Collective Agreement</i> , approved 23 October 2013, expiring 30 June 2016 |
| (b) | Superior Walls & Ceilings (Qld) Pty Ltd as Trustee for Superior Walls & Ceilings (Qld) Trust | <i>Superior Walls & Ceilings (Qld) Pty Ltd as Trustee for Superior Walls & Ceilings (Qld) Trust and CFMEU Union Collective Agreement 2011 – 2015</i> , approved 7 December 2012, expiring 31 March 2015 |
| (c) | National Concreting Pty Ltd | n/a |
| (d) | Pump Corp (Australia) Pty Ltd as Trustee for Pump Corp Trust | <i>Pump Corp (Australia) Pty Ltd Trustee of Pump Corp Trust and CFMEU Union Collective Agreement 2011- 2015</i> , approved 23 February 2012, expiring 31 March 2015 |
| (e) | Klenner Murphy Electrical Pty Ltd | <i>Klenner Murphy Electrical Pty Ltd & CEPU Electrical Division Queensland Enterprise Agreement 2012 – 2015</i> , approved 11 March 2013, expiring 31 December 2015 |
| (f) | Microfire Systems Pty Ltd | <i>Microfire Systems Pty Ltd & CEPU Electrical Division Queensland Enterprise Agreement 2012 – 2015</i> , approved 12 November 2013, expiring 31 December 2015 <i>Microfire Systems Pty Ltd Enterprise Agreement – 2013/2016</i> , approved 31 May 2013, expiring 31 March 2016 |
| (g) | Select Fire Systems Pty Ltd | <i>Select Fire Systems Pty Ltd and CEPU Plumbing Division Union Collective Agreement 2011 – 2015</i> , approved 30 May 2012, expiring 31 October 2015 |
| (h) | Heinrich Constructions Pty Ltd | <i>Heinrich Constructions Pty Ltd and CFMEU Union Collective Agreement 2011 – 2015</i> , approved 6 December 2011, expiring 31 March 2015 |
| (i) | Isle Plumbing Pty Ltd | <i>Isle Plumbing Pty Ltd and CEPU Plumbing Division Union Collective Agreement 2011 – 2015</i> , approved 1 August 2013, expiring 31 October 2015 |
| (j) | Tasklake Pty Ltd | <i>Tasklake Pty Ltd and CFMEU Union Collective Agreement 2011 – 2015</i> , approved 27 February 2013, expiring 31 |

| | | |
|-----|--|---|
| | | March 2015 |
| (k) | Global HR Pty Ltd | <i>Global HR Pty Ltd and CFMEU Union Collective Agreement 2011 – 2015, approved 23 May 2012, expiring 31 March 2015</i> |
| (l) | Schindler Lifts Australia Pty Ltd | <i>Schindler Lifts Australia Pty Ltd Queensland Enterprise Agreement 2011 – 2014, approved 6 December 2011, expiring 31 December 2014</i> |
| (m) | HVAC Queensland Pty Ltd | <i>HVAC Queensland Pty Ltd and CEPU Plumbing Division Union Collective Agreement 2011 – 2015, approved 3 April 2012, expiring 31 October 2015</i> |
| (n) | Trustee for Brisbane Pre-Cast Unit Trust | <i>Trustee for Brisbane Pre-cast Unit Trust T/A Brisbane Precast Pty Ltd and CFMEU Union Collective Agreement 2011 – 2015, approved 5 July 2012, expiring 31 March 2015</i> |
| (o) | Johnston Contracting Pty Ltd | <i>Johnston Contracting Pty Ltd and CFMEU Union Collective Agreement 2011 – 2015, approved 1 August 2011, expiring 31 March 2015</i> |
| (p) | S & K Commercial Pty Ltd | <i>S & K Commercial Waterproofing Australia Pty Ltd and CFMEU Union Greenfield Agreement 2011 – 2015, approved 10 December 2012, expiring 31 March 2015</i> |
| (q) | J Hutchinson Pty Ltd | <i>J Hutchinson Pty Ltd T/A Hutchinson Builders and CFMEU Union Collective Agreement 2011 – 2015, approved 10 May 2012, expiring 31 March 2015</i> |
| (r) | Syfon Systems Pty Ltd | <i>Syfon Systems Pty Ltd and CEPU Plumbing Division Collective Agreement 2011-2015, approved 22 March 2012, expiring 31 October 2015</i> |
| (s) | Thermal Activity Pty Ltd | <i>Thermal Activity Pty Ltd and CEPU Plumbing Division Major Commercial Lagging Services – Union Collective Agreement 2011 – 2015, approved 31 May 2013, expiring 31 October 2015</i> |
| (t) | Trustee for TSSS Family Trust | <i>Trustee for TSSS Family Trust T/A Tony Dalton Installations (TDI) and CFMEU Union Collective Agreement 2011 – 2015, approved 24 October 2013, expiring 31 March 2015</i> |

- 8 At all material times, the Employers performed their contracted work on the Brooklyn Project through a number of employees (**Employees**). At all material time the starting time for work by Employees engaged on the Brooklyn Project was 6.30am on each working day.
- 9 Hindmarsh also had an in term enterprise agreement at all material times, being the *Hindmarsh Construction Australia Pty Ltd and CFMEU Union Greenfields Agreement (Queensland and Northern Territory) 2011-2015*, approved 24 May 2013, expiring 31 March 2015.
- 10 At all material times, each of the enterprise agreements referred to in paragraph 7 above:
 - (a) applied respectively to the Employees who fell within the application provisions of each respective enterprise agreement;
 - (b) had not passed their nominal expiry dates; and
 - (c) was an enterprise agreement pursuant to Chapter 2, Part 2-4 of the FW Act.
- 11 As at 7 April 2014, Hindmarsh and the Employers employed approximately 120 - 130 employees, being the Employees, to perform work on the Brooklyn Project.

Industrial action

Second Respondent

- 12 At or after 6.00am on 7 April 2014, the Second Respondent:
 - (a) entered the Brooklyn Project site;
 - (b) shortly after 6.30am told those of the Employees who were present on the site to attend a meeting, by means of entering a toolbox meeting being conducted with Employees onsite, and saying words to the effect of: "Let's go, we've got a meeting off-site", following which a substantial number of employees left the toolbox meeting and the worksite; and then
 - (c) convened and attended, together with the Third and Fourth Respondents, a meeting attended by a substantial number of the Employees who had left

(or not entered) the worksite, which meeting was commenced off-site at or about 6.30am at a location near the Brooklyn Project site; and then

- (d) after the conclusion of the meeting, participated with others in loud chanting and verbal protests in support of the industrial action described in paragraph 13 immediately outside the front entrance to the project site.

- 13 At the conclusion of that meeting after 6.30am on 7 April 2014, most of the Employees failed or refused to attend for work on that day, and/or failed or refused to perform any work or any further work at all if at work on that day. By attending at that meeting after 6.30am and thereafter failing or refusing to attend at work or perform any work, each of the Employees engaged in "industrial action" as defined in section 19 of the FW Act.
- 14 The industrial action occurred on each of 8, 9, 10, 11 and 12 April 2014. Each of the days 7-12 April was a normal working day for most or all of the Employees and a day on which those persons were required by their respective Employers to attend for work. That conduct by each of the Employees was not "protected" industrial action within the meaning of the FW Act, and the participation in that action was prohibited by section 417 of the FW Act.
- 15 By engaging in the conduct described in paragraph 12, the Second Respondent contravened section 417 of the FW Act, in that the Second Respondent thereby organised unprotected industrial action by Employees on a day on which an enterprise agreement approved by the Fair Work Commission had not passed its nominal expiry date, which is conduct prohibited by that section.

Third Respondent

- 16 In early April 2014, Zoran Bogdanovic (**Zoran**) was employed by Global HR as a labour hire worker at the Brooklyn Project site, and was a delegate of the First Respondent. His employment at the project site was terminated on or about 2 April 2014 at the direction of Hindmarsh.
- 17 On 7 April 2014, the Third Respondent:
 - (a) entered the Brooklyn Project site at or about 6.00am;

- (b) convened and attended the off-site meeting with a substantial number of the Employees at a location near the Brooklyn Project site, which is the meeting referred to in paragraphs 12(c) and 13 above.
- 18 By convening and attending at that meeting after 6.30 am, the Third Respondent contravened section 417 of the FW Act, in that the Third Respondent organised industrial action on a day on which an enterprise agreement approved by the Fair Work Commission had not passed its nominal expiry date.
- 19 At the conclusion of that meeting after 6.30am on 7 April 2014, most of the Employees failed or refused to attend for work on that day, and/or failed or refused to perform any work or any further work at all if at work on that day. By not attending work and attending at that meeting after 6.30 am and thereafter failing or refusing to attend at work or perform any work, each of the Employees engaged in "industrial action" as defined in section 19 of the FW Act.
- 20 The industrial action occurred on each of 8, 9, 10, 11 and 12 April 2014. Each of the days 7-12 April was a normal working day for most or all of the Employees and a day on which those persons were required by their respective Employers to attend for work. That conduct by each of the Employees was not "protected" industrial action within the meaning of the FW Act, and the participation in that action was prohibited by section 417 of the FW Act.

Fourth Respondent

- 21 On 7 April 2014, the Fourth Respondent:
- (a) entered the Brooklyn Project site at or about 6.00am;
 - (b) at or about 6.15am, when asked whether there were any issues on that day, said to Mr Busch words to the effect of "*Yes, we're having a report back meeting. It won't be here, the place is bugged. We'll be having it offsite.*";
 - (c) shortly after 6.30 am, entered a toolbox meeting of Employees then underway at a location below street level and told those of the Employees who were present words to the effect that "*Guys, we've got a meeting upstairs*", as a result of which a number of Employees left the toolbox meeting and the worksite; and then

- (d) attended a meeting with a substantial number of the Employees at a location near the Brooklyn Project site, which was the meeting referred to in paragraphs 12(c) and 13 above.
- 22 By engaging in the conduct described in paragraph 21, the Fourth Respondent thereby contravened section 417 of the FW Act, in that the Fourth Respondent organised industrial action on a day on which an enterprise agreement approved by the Fair Work Commission had not passed its nominal expiry date.
- 23 At the conclusion of that meeting after 6.30am on 7 April 2014, most of the Employees failed or refused to attend for work on that day, and/or failed or refused to perform any work or any further work at all if at work on that day in breach. By attending at that meeting after 6.30 am and thereafter failing or refusing to attend at work or perform any work, each of the Employees engaged in "industrial action" as defined in section 19 of the FW Act.
- 24 The industrial action occurred on each of 8, 9, 10, 11 and 12 April 2014. Each of the days 7-12 April was a normal working day for most or all of the Employees and a day on which those persons were required by their respective Employers to attend for work. That conduct by each of the Employees was not "protected" industrial action within the meaning of the FW Act, and the participation in that action was prohibited by section 417 of the FW Act.
- 25 In assisting in organising that meeting, and telling the Employees to attend the off-site meeting at and after 6.30am on 7 April 2014, the Fourth Respondent contravened section 417 of the FW Act, in that the Fourth Respondent thereby organised unprotected industrial action by Employees on a day on which an enterprise agreement approved by the Fair Work Commission had not passed its nominal expiry date, which is conduct prohibited by that section.
- 26 At or about 6.30am on 7 April 2014, the Fourth Respondent contravened section 417 of the FW Act, in that the Fourth Respondent was involved in the contravention of section 417 of the FW Act by the Employees, which contravention is described in paragraphs 12(c), 13 and 14 above.

First Respondent

- 27 The Second and Third Respondents are officers, employees and/or agents of the First Respondent and were, at all material times, acting within their official capacity and within the scope of their actual or apparent authority.
- 28 The Fourth Respondent is an officer, and/or an agent of the First Respondent and was, at all relevant times, acting within his official capacity and within the scope of his actual or apparent authority.
- 29 Accordingly, by operation of section 793 of the FW Act, the conduct of the Second, Third and Fourth Respondents is taken to be the conduct of the First Respondent.

Reason for the industrial action

- 30 The reason for the industrial action described herein was to attempt to compel Hindmarsh to employ, or cause to be reinstated, a delegate of the First Respondent, Zoran, whose engagement on the Brooklyn Project by one of the Employers had recently been terminated at the direction of Hindmarsh.
- 31 No attempt was made by the First Respondent (or any other Respondent) to invoke any of the Dispute Settlement procedures in any of the existing enterprise agreements in force in respect of any of the Employers at the Brooklyn Project, nor to seek any redress in relation to that matter from the Fair Work Commission, prior to or in lieu of, taking or organising unprotected industrial action.

Consequences of industrial action

- 32 As a consequence of the industrial action set out herein, effectively no productive construction work was able to be performed on the Brooklyn Project from commencement of work on 7 April 2014 to close of business on 12 April 2014, at the least.
- 33 Accordingly, the construction of the Brooklyn Project was delayed from 7 – 12 April 2014 and the input of approximately 130 Employees engaged to perform work on the Brooklyn Project was lost for the whole of that period.
- 34 The industrial action caused Hindmarsh and the other Employers to suffer loss and damage.

- 35 During the course of this proceeding, Hindmarsh has reached an agreement with the First Respondent in relation to compensation, the effect of which is that the First Respondent will pay a sum of \$20,000 to Hindmarsh as compensation for the loss and damage suffered by Hindmarsh as a consequence of the industrial action taken.

Declarations and Orders

- 36 The terms of the following declarations and orders (other than as to penalty) are agreed by the Applicant and the First to Fourth Respondents as being supported by the Statement of Agreed Facts:
- (a) For the purposes of these declarations and orders, "the Employees" means those persons engaged as employees of contractors and subcontractors engaged to perform building work at the Brooklyn on Brookes construction project at Brookes Street, Fortitude Valley, in the State of Queensland (**the Brooklyn Project**); and
 - (b) A declaration that at or after 6.30 am on 7 April 2014, the Second Respondent contravened section 417 of the FW Act, in that the Second Respondent organised and/or was involved in industrial action by the Employees, in that the Second Respondent assisted in the convening of the off-site meeting of the Employees in working time, and telling employees to attend at such meeting, at which meeting a decision was taken for the Employees to engage in strike action, and thereafter engaged in a verbal protest outside the entrance to the Brooklyn project on 7 April 2014; and
 - (c) A declaration that at or after 6.30 am on 7 April 2014, the Third Respondent contravened section 417 of the FW Act, in that the Third Respondent organised industrial action by the Employees by convening and attending the meeting of Employees held in working time, at which meeting a decision was taken by the Employees to engage in strike action; and
 - (d) A declaration that at or after 6.30am on 7 April 2014, the Fourth Respondent contravened section 417 of the FW Act and/or was involved in the contravention of section 417 of the FW Act by the Employees, by

attending the off-site meeting of the Employees in working time and telling Employees to attend such meeting; and

- (e) A declaration that by operation of section 793 of the FW Act, the First Respondent is taken to have contravened section 417 of the FW Act; and
- (f) An order under section 545 of the FW Act imposing penalties against each of the First to Fourth Respondents for contraventions of section 417 of the FW Act, in an amount to be determined by the Court; and
- (g) An order that each of the penalties imposed on the Respondents be paid within 28 days to the Consolidated Revenue Fund of the Commonwealth.

Signature:

Norton Rose Fulbright Australia

Signed by Norton Rose Fulbright Australia

Lawyers for the Applicant

Date: *11 June 2015*

Signature:

[Signature]

Signed by Luke Tiley, Principal of Hall Payne Lawyers

Lawyer for the First to Fourth Respondents

Date: *11/6/15*

PART 9: CFMEU VIC

CHAPTER 9

ANDREW ZAF

| Subject | Paragraph |
|---|------------------|
| A – INTRODUCTION | 1 |
| B – NEW MATERIAL | 10 |
| C – COUNSEL ASSISTING’S POSITION | 16 |
| D – CONSIDERATION | 19 |

A – INTRODUCTION

1. For reasons which will appear below, this case study has had an inconclusive outcome. It is therefore not desirable to analyse in detail either the complaints which Andrew Zaf has made about others or the complaints which others have made about him.
2. Counsel assisting set out the substance of the background in the following way.¹

¹ Submissions of Counsel Assisting, 13/11/15, paras 1-6.

3. In October 2015 further evidence was adduced in a case study which was originally before the Commission in 2014. The case study concerns evidence given by Andrew Zaf, a witness from Victoria. In 2014, it had reached a final stage, but as set out at Chapter 8.11 of the Interim Report, shortly before that report was completed (but after submissions had been made by counsel assisting and affected parties) material came to the attention of the Commission which required further investigation before any concluded findings could be made. The material did not come to the attention of the lawyers assisting the Commission until after 27 November 2014.²
4. The issue to be dealt with in these submissions is whether or not, in light of the new material coming to the Commission's attention, the submissions made last year by counsel assisting stand or should be changed.
5. Last year counsel assisting submitted:³
 - (a) That many of the events Andrew Zaf described in his evidence had occurred a long time ago, and there were no longer any records available that would assist the Commission in undertaking a thorough investigation into the matters raised. Accordingly, it was then further submitted that it was undesirable to give consideration to whether any of the conduct Andrew Zaf described might properly be characterised as criminal or unlawful, and unrealistic to

² Submissions of Counsel Assisting, 25/11/14, para 3.

³ Submissions of Counsel Assisting, 31/10/14, ch 8.11, paras 71-72.

expect that, even if it could be so characterised, legal action would be taken at this time.

(b) It was further submitted that the matters raised by Andrew Zaf appeared to demonstrate:

(i) the improper use of pressure and intimidation by John Setka in order to advance his own personal interests – for example the acquisition of free building materials for his own home, and the payment of moneys claimed by his partner in a matter which had nothing to do with the CFMEU. He was able to exert this pressure and intimidation by reason of the fact that he was, at the time, an officer of the union able to threaten and implement industrial action against those who did not please him; and

(ii) the improper use of pressure by officers of the CFMEU (and its predecessors) to influence a builder, here Andrew Zaf, to employ particular individuals as a ‘favour’ to the union. In agreeing to do these favours, Andrew Zaf was buying industrial peace.

6. The CFMEU’s submissions in reply dated 14 November 2014 stated among other things:⁴

⁴ Submissions of the CFMEU, 14/11/14, p 94, para 2.

The CFMEU agrees with the candid conclusions reached by counsel assisting at paragraph [71], p936 that the historical nature of the events means that there are no longer any records available that would assist the Commission in undertaking a thorough investigation into the matters raised.

7. In 2014 Andrew Zaf had given evidence by way of a statement dated 29 June 2014,⁵ and oral evidence on 8 July and 17 September 2014. Other witnesses had also been called who gave evidence in relation to some of the matters raised by Andrew Zaf which put a number of matters in issue.
8. The additional material which came to the attention of the Commission and which was the subject of a hearing in 2015 went only to the credibility of Andrew Zaf. It was initiated by Gary Cheetham. Gary Cheetham had been a business associate and friend of Andrew Zaf.⁶ In 2014 the two men had had a falling out.⁷ Given the nature of their relationship and the material provided by Gary Cheetham, the Commission attempted to investigate the claims of Gary Cheetham with a view to seeing if they had independent support. In this regard, a number of additional statements from other witnesses,⁸ together with other material,⁹ were obtained. In the 2015 hearing, Andrew Zaf also returned to the witness box.¹⁰

⁵ Andrew Zaf, witness statement, 8/7/14.

⁶ Gary Cheetham, witness statement, 29/10/15, paras 5-6.

⁷ Zaf MFI-1, 29/10/15, p 81; Zaf MFI-1, 29/10/15, pp 2, paras 9, 48.

⁸ Tom Boglis, witness statement, 29/10/15; Hamish McDonell, witness statement, 29/10/15.

⁹ Zaf MFI-1, 29/10/15, pp 36-285 (including material received from Victoria Police, Whittlesea Council, The Environment Protection Authority Victoria, Telstra, WorkSafe and Stockland).

¹⁰ Andrew Zaf, 29/10/15, T:85.16-129.40.

9. Counsel assisting then set out certain aspects of the conflict between Gary Cheetham and Andrew Zaf along the following lines.

B – NEW MATERIAL

10. Gary Cheetham provided evidence about a number of matters including the following. He stated that Andrew Zaf had made a number of admissions to him, namely: that Andrew Zaf had lied to the Royal Commission;¹¹ that Andrew Zaf had stated that he had provided John Setka with roofing materials at cost ‘as a suck job’ rather than at no cost;¹² that Andrew Zaf had admitted that the injuries sustained by Andrew Zaf in March 2014, described by him as retribution for being involved in an ABC television story on the 7.30 program, were self-inflicted;¹³ that Andrew Zaf had submitted false invoices to the developer Stockland;¹⁴ that Andrew Zaf had illegally dumped asbestos and that Gary Cheetham could prove this.¹⁵
11. Because of the conclusions reached about the overall state of the evidence, it is not proposed to analyse Gary Cheetham’s evidence in detail. However, it can be observed that whilst in many ways Gary Cheetham’s evidence was unsatisfactory and his demeanour

¹¹ Gary Cheetham, 29/10/15, T:9.31-38; Zaf MFI-1, 29/10/15, pp 5, 23, 26, 111, 204, 207.

¹² Gary Cheetham, 29/10/15, T:21.4-10; Zaf MFI-1, 29/10/15, p 27.

¹³ Gary Cheetham, 29/10/15, T:19.3-7; Gary Cheetham, witness statement, 29/10/15, paras 8-11; Gary Cheetham, supplementary witness statement, 29/10/15, paras 11-13; Zaf MFI-1, 29/10/15, pp 5, 22.

¹⁴ Gary Cheetham, witness statement, 29/10/15, para 19; Zaf MFI-1, 29/10/15, pp 23, 28, 44, 114, 116, 119, 120, 164-176; Gary Cheetham, 29/10/15, T:22.10-23.16.

¹⁵ Zaf MFI-1, 29/10/15, p 26.

unconvincing, some aspects of his evidence were supported, at least to an extent.

12. For instance, information obtained from Victoria Police in 2015 (which was not available to the Commission in 2014 because of a claim of public interest immunity based on (then) ongoing investigations) indicated that Victoria Police had commenced its investigations into the possibility of the self-infliction of injuries by Andrew Zaf shortly after the incident in question and, significantly, well prior to any complaint by Gary Cheetham.¹⁶ A forensic medical report prepared for the police in April 2014, and obtained by the Commission in 2015, was not definitive one way or the other, in that it stated that certain features of the incident and injuries raised the possibility of self-infliction, whilst other features did not.¹⁷ The police prepared a wide-ranging report in September 2015.¹⁸ A note from a senior police officer commenting on the September 2015 report stated that the evidence relating to the incident indicated that a false report had been made, but there was insufficient evidence to support that charge.¹⁹
13. As to the allegation of false invoices, the Commission obtained supportive independent evidence which showed that the invoices in question were not true, did not reflect actual work done, and were in

¹⁶ Zaf MFI-1, 29/10/15, pp 61-70.

¹⁷ Zaf MFI-1, 29/10/15, p 68.

¹⁸ Zaf MFI-1, 29/10/15, pp 72-79.

¹⁹ Zaf MFI-1, 29/10/15, p 71.

fact obtained by Andrew Zaf from a business colleague of his and were supplied by Andrew Zaf to Stockland.²⁰

14. On the other hand, in relation to Gary Cheetham's allegation that Andrew Zaf had illegally dumped asbestos and that he could prove that allegation, not only was the Commission unable to find any direct evidence to support this claim, but Gary Cheetham was not able to make good his claim that he could prove the allegation.
15. Andrew Zaf entered the witness box to respond to Gary Cheetham's claims. His evidence included the following. He maintained that he had only told the truth to the Commission.²¹ He maintained his evidence that he had supplied roofing materials to John Setka at no cost.²² He rejected the claim that he had self-inflicted injuries.²³ He denied illegally dumping asbestos.²⁴ As to the issue of false invoices he gave the following evidence:²⁵

- Q. Did you submit false invoices to Stockland?
A. The invoices in question were submitted by myself under the advice of Gary Cheetham.
- Q. So you did submit false invoices to Stockland?
A. Yes, we did – I did.
- Q. You arranged to get those invoices, did you?
A. I called up Tom upon Gary Cheetham's request to fabricate the invoices for a variation that he wanted to get through.

²⁰ Tom Boglis, witness statement, 29/10/15, paras 17-43.

²¹ Andrew Zaf, 29/10/15, T:85.34-36.

²² Andrew Zaf, 29/10/15, T:85.38-46.

²³ Andrew Zaf, 29/10/15, T:86.1-6.

²⁴ Andrew Zaf, 29/10/15, T:87.27-32.

²⁵ Andrew Zaf, 29/10/15, T:86.17-37.

- Q. Right. You realise, do you, that providing false invoices to a company is the wrong thing to do?
- A. I thought it was a little bit innocent but very naïve on my part as being so stupid as to do that and requesting to get a variation approved that actually never occurred.
- Q. Well, do you realise it was wrong to provide a false invoice?
- A. Yes, it was wrong.

C – COUNSEL ASSISTING’S POSITION

16. Counsel assisting then stated the following conclusions.
17. Gary Cheetham’s evidence was unsatisfactory in a number of ways, albeit supported in some respects. However, even if one disregards his evidence entirely there remains the evidence independent of him which has emerged since counsel assisting’s 2014 submissions were made. This includes the police material which at the very least indicates that the police suspected that Andrew Zaf’s injuries may have been self-inflicted well before any complaint was made by Gary Cheetham. Further, the evidence about the false invoices obtained and submitted by Andrew Zaf, whilst initially brought to the Commission’s attention by Gary Cheetham, was independently corroborated by other cogent evidence.²⁶ It is also of note, as can be seen from the above extract of transcript, that Andrew Zaf was initially reluctant to admit the wrongfulness of his actions in submitting false invoices to Stockland.
18. The present controversy is in many ways a narrow one. In 2014 counsel assisting submitted that the evidence did not support any finding of criminal or unlawful conduct. The only issue is whether the

²⁶ Tom Boglis, witness statement, 29/10/15, paras 17-43.

evidence as it now stands would prove to ‘the reasonable satisfaction’ of the Commissioner even the narrower findings described above in paragraph 5(b).²⁷ The evidence which the Commission heard in 2015 does not bear directly on the substantive issues. However it does have some impact upon Andrew Zaf’s credibility. The evidence identified in the preceding paragraph, which did not depend in any way on the oral evidence of Gary Cheetham, has particular weight in this regard. Given the impact that this evidence has had on Andrew Zaf’s credibility, and given the limitations on the evidence already identified as set out above,²⁸ counsel assisting submitted that no positive submission based on Andrew Zaf’s evidence can now be maintained.²⁹

D – CONSIDERATION

19. The effect of counsel assisting’s reference to the authority they cited, *Rhesa Shipping Co SA v Edmunds*, is that while they do not urge positive acceptance of the conclusions which might flow from Andrew Zaf’s evidence if it were believed, they do not urge acceptance of the positive case which persons affected by that evidence might wish to be accepted either. *Rhesa Shipping Co SA v Edmunds* is a House of Lords decision holding that a judge in a civil case is not bound always to make a positive finding one way or the other. In appropriate cases it may be necessary to hold that the plaintiff has simply failed to prove its case without deciding that the contrary position urged by the defendant is correct.

²⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

²⁸ See para 5(a).

²⁹ See *Rhesa Shipping Co SA v Edmunds* [1985] 2 All ER 712 at 715.

20. In view of the stance adopted by counsel assisting, making either the findings advocated by counsel assisting last year or any other findings adverse to persons affected by the substance of Andrew Zaf's claims is not open. That could not be done without informing affected persons of the possibility of departure from what counsel assisting urged so that they might deal with that possibility. This has not happened.
21. Two points should be made.
22. The first is that counsel assisting is unduly laudatory about Gary Cheetham's evidence. He was very ably cross-examined. The effect was extremely damaging.
23. The second is that while it would tell heavily against the credibility of most witnesses that they had submitted false invoices, that is not necessarily so in the trade union world or the construction industry world. There are copious examples appearing in the Interim Report and this Report of the preparation of false and misleading invoices and other documents. They can be found in studies affecting the AWU WA, the AWU Vic (in many spheres), the HSU (involving three State Secretaries), the TWU WA, the NUW, the CFMEU NSW and BLF Qld. There are also several examples of the destruction or non-production of documents in a way which is capable of conveying a false or misleading effect. Those examples emerged from studies concerning the CFMEU NSW and the CFMEU Qld. These practices, incidentally, are very far from being confined to unions. They have been engaged in most extensively by large corporations as well. In a world where conduct causing documents to have a false or misleading appearance seems very common, it is not necessarily correct to treat

Andrew Zaf's false invoicing as automatically having 'some impact' on his 'credibility'. There may be a distinction between discreditable commercial behaviour and the willingness of a witness to endeavour to be truthful on entering the witness box.

24. Those appearing for the CFMEU and other persons and those appearing for Gary Cheetham have advanced very detailed arguments adverse to Andrew Zaf's credibility.
25. Gary Cheetham has requested a finding that his evidence is 'a truthful account' and has also requested that 'no adverse findings or comments in relation to his credit or demeanour' should be made. It is not possible to comply with these requests. In view of the fact that it is not proposed to make any finding adverse to those about whom Andrew Zaf complained, there is no utility in explaining in detail why it is not possible to comply with those requests.
26. Those appearing for the CFMEU and other persons have requested a recommendation that the Report be referred to the Director of Public Prosecutions of Victoria in order that consideration may be given to prosecuting Andrew Zaf for (a) forgery and uttering, and attempting to obtain a financial advantage by deception in relation to the false Stockland invoices; and (b) handling stolen goods. They have also requested a finding that Andrew Zaf has been conducting a campaign to besmirch the reputations of the CFMEU and its officers on nine bases.³⁰ However, it has not been shown that to make the findings implicitly or explicitly requested would be within the Terms of

³⁰ Submissions of the CFMEU, 20/11/15, pp 5-10, paras 7-15.

Reference. The findings are not within the governance-related paragraphs ((a)-(f) and (k)). Nor are they within the paragraphs centring on misconduct by officers of employee associations ((g)-(k)).

27. The CFMEU and other persons have also requested a finding that Andrew Zaf inflicted certain injuries on himself.³¹ They also request another credit-related finding.³² The issue of whether the injuries were self-inflicted, and the other issue raised, go only to credibility. In view of the decision not to disagree with counsel assisting's submissions that Andrew Zaf's evidence should not be relied on, his credibility becomes irrelevant.

³¹ Submissions of the CFMEU, 20/11/15, pp 3-5, para 6.

³² Submissions of the CFMEU, 20/11/15, p 3, para 5.

PART 10: AUSTRALIAN WORKERS' UNION

CHAPTER 10.1

INTRODUCTION

1. Over the course of about five weeks in 2015, the Commission received evidence concerning a number of case studies dealing with the conduct of the Victorian Branch of the AWU and its officials. Those case studies are examined in the following chapters of this Report. They are:
 - (a) Cleanevent, which includes consideration of Douglas Site Services (Ch 10.2);
 - (b) Thiess John Holland (Ch 10.3);
 - (c) Paid education leave (Ch 10.4);
 - (d) ACI (Ch 10.5);
 - (e) Chiquita Mushrooms – a continuation of hearings that had been conducted in 2014 – (Ch 10.6);

- (f) Unibuilt (Ch 10.7);
 - (g) Winslow (Ch 10.8);
 - (h) A series of separate case studies referred to as Miscellaneous Membership Issues (Ch 10.9); and
 - (i) Downer EDI (Ch 10.10).
2. Submissions were received from counsel assisting and from numerous affected parties. Not each and every aspect of those submissions is specifically addressed in this Report. All submissions, however, have been considered.
 3. Several themes pervade these case studies. It will be helpful to identify them by way of introduction.
 4. The first is the payment of large sums to the Victorian Branch of the AWU by employers. In some cases the arrangements pursuant to which these payments were made were undocumented and their precise purposes described in oral evidence in vague terms. In the case of Cleanevent, the arrangement was documented and its purpose clear. In all cases, the arrangements were made in the context of bargaining for enterprise agreements. In all cases, they were undisclosed to the members on whose behalf that bargaining was taking place.
 5. Arrangements of this kind are highly unsatisfactory. They inhibit the ability of a union to pursue the interests of its members. It is of the nature of arrangements of this kind that their precise effect on

negotiations is difficult to pinpoint. Often these arrangements are undocumented precisely because their impropriety makes those involved uncomfortable about the arrangement being discovered.

6. That discomfort was apparent in the Cleanevent case study but, nonetheless, the arrangement was documented. That documentation gives a very clear indication of how highly disadvantageous these arrangements can be for members. In exchange for payments of \$25,000 per year, the Victorian Branch of the AWU in substance agreed for three years not to seek better terms and conditions for those of its members employed by Cleanevent. It would not have been difficult to obtain better terms and conditions. But the Victorian Branch of the AWU preferred to take money for itself. For workers employed by Cleanevent the outcome was appalling. The members of the Cleanevent management team involved in the deal described it as saving the company amounts ranging from \$1 million to \$2 million. All involved benefited from the deal except the people the union was supposed to be representing.
7. The case studies do not, generally, seek to explore why it was that AWU officials were prepared to enter into arrangements of this kind. There are a number of possible motivations. One is that wealthy unions with many members obtain power and prestige for themselves and their officials. That can be an end in itself. It can also lead to other things. As the Industry 2020 case study in the Interim Report demonstrates, a career in public office may be but a short step away for an official at the head of a powerful union. There are other possible motivations. The issue considered in this part of the Report is not

motivation but whether particular conduct may have amounted to breaches of duty or offences.

8. A second theme is the false inflation of membership numbers. This also was a feature of the Cleanevent case study, together with the Winslow and Miscellaneous Membership case studies. A common feature here is a focus on membership numbers rather than on whether particular individuals truly wish, and are truly entitled, to become members. These case studies throw up examples of persons added to the membership register in circumstances where they could not have known about it and, in some examples, where they were already members of other branches; indeed in one case the purported 'member' had previously refused to join the union.
9. A similar focus on membership numbers was apparent in the CFMEU ACT case study. There was no suggestion in any of the AWU case studies of coercion or undue pressure placed on employers to ensure their employees became union members. However the result of the AWU's conduct was substantially the same as in some of the ACT case studies: persons with no apparent desire, and no entitlement, to become union members come to have their names recorded on the membership register. This gives the appearance of membership growth but it is a result driven not by the desires of employees to become members but instead by the desires of employers who wish to be on good terms with the union.
10. A third theme is falsification of documents, for the most part, invoices. To some extent this was a feature of all of the case studies. In the Thiess John Holland case study it was the mechanism for

implementing a side deal negotiated during the bargaining process for the payment of \$100,000 per year to the AWU. In the Winslow case study it was the mechanism for implementing an arrangement under which an employer paid membership fees. In the Unibuilt case study it facilitated the payment by a labour hire company of the wages of an individual working on the electoral campaign of the National Secretary. In other cases, such as the ACI and Chiquita Mushrooms case studies, descriptions on invoices were not so much false as misleadingly vague and inaccurate descriptions of the true purpose of the payments.

11. As the above remarks indicate, these three themes overlapped. The false inflation of membership numbers was combined with the payment of membership fees by employers to AWU. The implementation of side deals was facilitated by false or misleading invoices.
12. These three themes together paint an unattractive picture of a union concerned not with its role as the instrument through which to protect the interests of its members but with self-interest – interest in itself and its officials as a self-perpetuating institution – an institution more concerned with gathering members than servicing them. The Cleanevent case study demonstrates clearly how the pursuit of the Union's interests can be to the detriment of the members, or a class of them.
13. The following Chapters of this Report conclude that the conduct of the AWU and its officials and, in some cases, the conduct of employers, may have involved breaches of duty and criminal offences. The case

studies also raise issues of policy that are considered later in this Report.

14. Before turning to the Cleanevent case study, it is convenient to refer to two matters in connection with the general approach taken in the following Chapters. It is the same as the general approach taken in the Report as a whole.
15. *First*, many of the possible contraventions considered are serious. Proof of elements of criminal offences before a court, generally, must be proof beyond reasonable doubt. These matters require clear and cogent evidence as a basis for finding facts sufficiently to make a decision to recommend that the prosecuting authorities examine whether or not to charge in relation to possible offences. This has been borne consistently in mind.
16. *Secondly* and relatedly, generally this Report seeks to rely upon the contemporaneous documents and the objective probability of events, rather than on the recollections of persons called to give evidence. That is, for the most part, a reflection of the fact that memory is fallible and some of the events in question occurred some time ago. There are some exceptions to this approach. For example, evidence given against self-interest may generally be taken to be reliable. However, where reliable contemporaneous documents are available, usually great weight is accorded to them.

CHAPTER 10.2

CLEANEVENT

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A – INTRODUCTION

1. There is a company which provides cleaning services predominantly at events, such as sporting events, shows and concerts, and at particular entertainment venues, known as Cleanevent Australia Pty Ltd (**Cleanevent**). Cleanevent is part of a corporate group which provides cleaning, waste management and associated services around Australia and internationally.
2. This case study centrally concerns an arrangement entered into in 2010 by Cleanevent and the Victorian Branch of the Australian Workers' Union (**AWU Vic**). The arrangement concerned a Workchoices-era Enterprise Bargaining Agreement (**EBA**). The effect of the arrangement was to extend the EBA beyond its nominal expiry date. In exchange, Cleanevent agreed to make a payment of \$25,000 per annum to the AWU.
3. The issues that arise include the following:

- (a) whether the AWU and its officials owed duties of a fiduciary nature to members on whose behalf they acted in the course of the business of the union, including in relation to negotiations for enterprise agreements on behalf of workers;
 - (b) whether, by accepting payments from employers in the course of representing workers in negotiations for enterprise agreements and other matters, the AWU and its officials were in a position of actual or potential conflict of interest and duty;
 - (c) whether, by seeking, paying, and/or receiving payments in the course of representing workers in negotiations for enterprise agreements and other matters, the AWU, employers and their respective officers might have been guilty of offences associated with corrupt commissions contrary to s 176 of the *Crimes Act 1958* (Vic);
 - (d) whether the AWU and relevant employers were liable for the conduct of their officers in respect of the above offences and other contraventions of industrial relations legislation; and
 - (e) whether as a result of the implementation of the arrangement, membership numbers were falsely inflated.
4. The evidence and submissions also examined the manner in which enterprise bargaining agreements were negotiated by the AWU Vic over the period between 2004 and the present.

5. Many of these issues in the Cleanevent case study arose in other AWU case studies considered in this Report. Consequently, the reasoning applied in some aspects of this Chapter will be applied, where appropriate and subject to any relevant factual differences, in other Chapters of this Report concerning the AWU.

B – THE CLEANEVENT BUSINESS

General

6. The Cleanevent business related to the provision of cleaning services for sporting and other events, including the Australian Formula One Grand Prix, the Melbourne Cup and the Sydney Royal Easter Show. Steven Webber summarised the Cleanevent business as follows:¹

Predominantly, prior the Spotless acquisition, it was a cleaning business that started in Australia that grew to, you know, the USA, and the United Kingdom in regards to major events. Wimbledon in the UK, for instance, and predominantly stadiums and racecourses, anywhere where there was, you know, a sporting, I guess, attachment to it.

7. At any one time the Cleanevent business had about 40 or 50 fulltime employees.² It also had a number of casual cleaners. It is necessary to consider the latter in more detail.

The casual cleaners

8. Cleanevent's casual cleaners did the bulk of the actual cleaning work. The number of casual employees varied from time to time depending

¹ Steven Webber, 28/5/15, T:13.2-8.

² Steven Webber, 28/5/15, T:13.29-30.

on Cleanevent's requirements. For example, the Melbourne Cup Carnival was Cleanevent's largest event. It required the services of some 500 casual cleaners.³ Cleanevent kept a 'staff pool'. That was a database of people that it could call on to come in and carry out casual work as and when required.⁴

9. On the other hand, many of Cleanevent's casual cleaners were long-standing employees of Cleanevent. While classified as casual, in a practical sense they held permanent, or at least longstanding, positions.
10. Cleanevent maintained a division of labour as between venues and events. A *venue* was a permanent site for regular sporting events or entertainment such as the Opera House, ANZ Stadium or the Rosehill Racecourse. By contrast, *events* such as the Royal Easter Show, International Tennis, or the Mercedes Benz Fashion Week were seasonal one-off events that are not held in a venue in regular use. Employees at venues worked regularly at that venue. But they were employed on a casual basis.⁵
11. For example, Robyn Cubban was employed by Cleanevent as a casual cleaner. She had worked as such at Cleanevent since 2004.⁶
12. Robyn Cubban described her work in more detail as follows:⁷

³ Steven Webber, 28/5/15, T:13.39-45.

⁴ Steven Webber, 28/5/15, T:14.8-14.

⁵ Robyn Cubban, 28/5/15, T:83.9-28.

⁶ Robyn Cubban, witness statement, 28/5/15, para 2.

⁷ Robyn Cubban, witness statement, 28/5/15, para 3.

In my role as a casual cleaner, I work at major events in and around Sydney, New South Wales. These events include the Sydney Royal Easter Show, the APIA International Tennis Tournament, the Manly Surfing Competition and the Mercedes Benz Fashion Week Australia. I also clean boats owned by Spotless called MV Epicure I and MV Epicure II which are used for functions located at Jones Bay Wharf, Pyrmont, NSW. I am not based at a particular event and instead work wherever an event is being held.

13. The casual cleaners carried out hard, grinding work. In the nature of things the work tended to be carried out at night, when the crowds had left. The nature of the work is revealed in part by a letter Robyn Cubban wrote to her employer headed 'to whom it may concern' in 2011.⁸ This letter set out many of the practical difficulties which Robyn Cubban and persons in her position faced. Robyn Cubban said among other things:

Stephine and myself worked from 6.30am to midnight due to lack of staff was rang by night supervisor at 2.00am screaming he had no staff, crap everywhere. Stephine ended up going back in at 2.30am trying to get it up to standards before the client arrived. When client did arrive we were told that a formal complaint would be made regarding the situation. Lack of staff/mess.

14. Robyn Cubban's letter included other observations:⁹

I worked every day from April 2 to April 29 in the lead up to and during the Sydney Royal Easter show I had two days off and returned for a further 6 days for Fashion Week during this time.

15. Robyn Cubban confirmed in oral evidence that she had worked on the public holidays during the Easter Break and ANZAC Day. She had also worked on Sundays.¹⁰

⁸ Cubban MFI-1, 28/5/15, pp 16-21.

⁹ Cubban MFI-1, 28/5/15, p 17.

¹⁰ Robyn Cubban, 28/5/15, T:82.29-31.

16. Ken Holland had started working for Cleanevent as a casual cleaner in 2003, before moving to Melbourne in 2004 and continuing to work for Cleanevent.¹¹ Ken Holland said that in 2006 he had become a cleaning supervisor in which role he managed a team of seven to eleven cleaners working at major events such as the Melbourne Cup, the Australian Grand Prix and the Moto GP.
17. Nayan Debnath had started working at Cleanevent as a casual cleaner in 2007 working on night shifts.¹² In around 2009 or 2010 he became a supervisor of the cleaning nightshift at the Sydney Opera House and in September 2004 was promoted to venue manager (second in charge) of the Sydney Opera House.
18. The nightshifts which Nayan Debnath was working required him to start at 11 o'clock in the evening and work through to 7 o'clock in the morning.¹³
19. Colleen Ellington had worked as a casual cleaner at Cleanevent since 2004.¹⁴ Her role included: 'cleaning toilets, removing garbage and cleaning offices, the VIP area and change rooms'. She became a member of the AWU NSW in 2004 when she started working for Cleanevent and paid her union membership fees via payroll deduction.¹⁵

¹¹ Ken Holland, witness statement, 28/5/15, paras 3-4.

¹² Nayan Debnath, witness statement 29/5/15, para 3.

¹³ Nayan Debnath, 29/5/15, T:165.40-46.

¹⁴ Colleen Ellington, witness statement, 29/5/15, para 2.

¹⁵ Colleen Ellington, witness statement, 29/5/15, paras 8-9.

20. Shalee-Nicole Allameddine had started working for Cleanevent in 2003 as a casual cleaner at ANZ Stadium at Sydney Olympic Park.¹⁶ She also became a member of the AWU NSW at about the time she started working for Cleanevent. She paid her membership dues by payroll deduction.
21. Marcin Pawlowski had started work at Cleanevent in 2010 as a casual cleaner at major events. The first one was at Flemington Racecourse in Victoria.¹⁷
22. Brian Miles was a casual cleaner at Dandenong Market in Victoria. He had been since August 2011.¹⁸ His role at Cleanevent included pressure washing, operating ride on scrubbers, cleaning toilets and waste management.¹⁹
23. The evidence of the Cleanevent casual employees was consistent in many respects. Each was a loyal, long term employee, having worked for Cleanevent in most cases for many years. Each did hard work, often at night, on public holidays or on weekends. The work included tidying up after crowds, including cleaning toilets.
24. No disrespect is intended in saying that these witnesses did not appear to be sophisticated in the detail of industrial relations laws. Nor did they appear to be sophisticated in dealing with management. In short they were the very people who need and depend upon a strong union,

¹⁶ Shalee-Nicole Allameddine, witness statement, 29/5/15, para 4.

¹⁷ Marcin Pawlowski, witness statement, 28/5/15, para 5.

¹⁸ Brian Miles, witness statement, 28/5/15, para 2.

¹⁹ Brian Miles, witness statement, 28/5/15, para 3.

dedicated to advancing their interests, and unswervingly loyal to them and their interests.

C – THE 1999 AWARD

25. The reference award for many of the EBAs considered in this case study²⁰ was the *Cleaning Industry – AWU/LHMU – Cleanevent Pty Ltd Award 1999 (1999 Award)*.²¹
26. The 1999 Award was of national application.²² It contained, relevantly, the following provisions in relation to the employment of casual labour:
- (a) Employees were to be paid minimum weekly rates of pay appropriate to seniority-based classification levels, subject to arbitrated safety net adjustments each year (cl 9);
 - (b) Casual employees were entitled to a base hourly rate of 1/38th of the appropriate weekly classification rate plus a 20% loading (cl 6.3);

²⁰ Being the Cleanevent Australia Pty Ltd Enterprise Agreement 2004 certified 20 December 2004 (**2004 EBA**) (Shorten MFI-5, 8/9/15, Vol 2, p 3 cl 6.1), and the Cleanevent Australia Pty Ltd AWU Agreement 2006 (**2006 EBA**) (Shorten MFI-5, 8/9/15, Vol 2, p 127). Clause 39 of the 2006 EBA expressly excluded the operation of any award in relation to relevant matters, including penalty rates, consistently with the provisions of the *Workplace Relations Act* 1996 (Cth) then in force. By the time of negotiation of the 2010 MOU, the AWU proceeded on the basis that the 1999 Award remained applicable: Cleanevent MFI-1, 19/10/15, p 307, cl 2.7(c).

²¹ Winter MFI-2, 20/10/15 (containing all consolidations as at 23 June 2005). The relevant substantive terms of the 1999 Award were unchanged over the period considered in this case study: Craig Winter, 20/10/15, T:718.5-21, but the rates of pay were varied by review from time to time.

²² Winter MFI-2, 20/10/15, p 3, cl 4.1.

- (c) All employees were entitled to overtime for work performed in excess of the hours mutually arranged (cl 6.4.7), payable as time and a half for the first two hours and double time hereafter (cl 13.1);
- (d) All employees were entitled to overtime for work performed on Saturdays at the rate of time and a half for the first two hours and double time thereafter (cll 13.2, 14.1.1);
- (e) All employees were entitled to overtime for work performed on Sundays at double time (cl 14.2);
- (f) All employees were entitled to payment at a rate of double time and a half for work performed on a public holiday (cl 14.9).

27. The 1999 Award did not make any distinction between employees engaged to work at venues (such as sporting grounds and concert halls) and those engaged to work at events (such as major sporting tournaments, agricultural shows and music festivals).

D – THE 2004 EBA

28. Cleanevent and the AWU entered into an enterprise bargaining agreement in 2004 (the **2004 EBA**).

29. Bill Shorten was, from 1996, an organiser for Cleanevent. In 1998 he became Victorian State Secretary. He continued to deal with Cleanevent, with organisers directly servicing worksites.²³

Negotiations for the 2004 EBA

30. Negotiations for the 2004 EBA took place in 2002 and 2003. Peter Smoljko was the organiser responsible for the negotiations on behalf of the AWU. Bill Shorten also participated in discussions.²⁴ Graeme Beard later participated in negotiations on the AWU side. Ivan Dalla Costa and Bruce McNab participated on the Cleanevent side. Jo-Anne Schofield participated in the negotiations on behalf of the Australian Liquor Hospitality and Miscellaneous Workers Union (**LHMU**).²⁵ This union also had coverage in the industry.
31. The negotiations proceeded as follows.
32. The position of the AWU and the LHMU was that the rate for casuals employed at events was not appropriate: it did not take into account weekend and holiday loadings. Cleanevent's position was that the event rate was in line with industry standards. Craig Lovett contended in a letter dated 25 March 2003.²⁶

It is our firm belief that a Cleanevent rate of \$17.44 for new entrants is well above that of similar deployment within our industry.

²³ Bill Shorten, 8/7/15, T:43.32-38.

²⁴ Shorten MFI-5, 8/9/15, Vol 1, pp 350-352, 356; Bill Shorten, 8/7/15, T:87.44-46, 88.9

²⁵ This union, or the successor to it, has been known as 'United Voice' since 1 March 2011.

²⁶ Shorten MFI-5, 8/7/15, Vol 1, p 356.

33. In a letter to Bill Shorten dated 29 March 2004, Bruce McNab wrote:²⁷

...I again suggest that your proposals are not supported by what is actually occurring in the industry. Are you able to provide hard evidence of actual cases where the rates you are claiming are actually paid?

Jo-Anne Schofield has indicated that our proposed rates will not pass the 'no disadvantage' test. This does not seem to us to be the case, however if you or Jo-Anne are able to direct us to any authorities which would support the contention that the rates would not be sufficient then I would be grateful if you would do so.

34. The AWU pushed for an increase to the specialised 'event rate' to account for the fact that the existing rate was worse than that provided for in the relevant award. In a letter dated 3 May 2004, Graeme Beard stated:²⁸

I have discussed the issue with Jo-Anne Scofield [sic] and we believe that the rate does not properly represent an appropriate 'all-up' rate for casuals engaged at events. Events are usually active over weekends and can also include public holidays. Eg. Sydney Royal Easter Show.

Your rate does not provide adequate compensation for these matters. Currently, under the award with the Safety Net Review May 2003, a level I employee would receive \$31.30 per hour for work performed on a public holiday.

...

To ensure that casual employees would not be subject to any disadvantage, we believe that overtime, weekend work and public holidays for [sic] should be calculated in accordance with the award.

35. Cleanevent strenuously resisted any increase in their preferred rate of \$17.44 per hour for event casuals.²⁹ It contemplated cancelling

²⁷ Shorten MFI-5, 8/7/15, Vol 1, pp 361-363.

²⁸ Shorten MFI-5, Vol 1, pp 369-371.

²⁹ Shorten MFI-5, Vol 1, pp 356, 374, 378-379 (some compromise was made in Cleanevent's letter dated 20 May 2004, page 379), 385-386. The 'no disadvantage' test arose from ss 170LT(1)-(3) and 170XA(2) of the *Workplace Relations Act 1996* (Cth). In essence it permitted the Australian Industrial Relations Commission to refuse to certify an

negotiations to secure its preferred rate. In an internal memorandum dated 29 September 2004, Bernadette Mynott of Cleanevent noted that the draft EBA put forward in 2003 did not pass the ‘no disadvantage’ test, and that casuals were at that time being paid below the 120% loading provided for in the Award.³⁰

36. On 21 May 2004 Ivan Dalla Costa, Group Finance Director of Cleanevent, observed that another certified agreement reached in relation to specific venues would not pass the no-disadvantage test because the rate was substantially short of the award rate.³¹ Bill Shorten stated that that EBA must have passed the no-disadvantage test in order to obtain approval. He did not know whether Graeme Beard showed him the correspondence,³² or whether there were specific discussions as to whether the 2004 EBA passed the no-disadvantage test.³³ Bill Shorten said that whether an EBA satisfied the no-disadvantage test was not the primary focus of the AWU. The primary focus was achieving an agreement that members thought was fair and reasonable.³⁴

EBA if it would be contrary to the public interest to do so because the EBA reduced the overall terms and conditions of employment of employees covered by the agreement under relevant or designated awards or laws of the Commonwealth, a State or a Territory.

³⁰ Shorten MFI-5, 8/7/15, Vol 1, pp 393-394.

³¹ Shorten MFI-5, 8/7/15, Vol 1, p 381.

³² Bill Shorten 8/7/15, T:91.40-45.

³³ Bill Shorten 8/7/15, T:94.17.

³⁴ Bill Shorten 8/7/15, T:92.13-17.

37. LMHU withdrew from negotiations on 5 November 2004.³⁵ AWU and Cleanevent then engaged in discussions to finalise an AWU-only agreement.³⁶

Pay rates for casual employees under the 2004 EBA

38. The casual rates propounded by Cleanevent were included in the EBA that was put to members and signed by Bill Shorten in 2004.³⁷ Bill Shorten stated that the AWU had, during his time as AWU Vic Secretary, a practice of State Secretaries reviewing EBAs prior to execution. Organisers were expected to give monthly reports and submit summaries when putting forward EBAs for approval.³⁸ He relied on those summaries to form a view of the appropriateness of the EBA.³⁹

39. The relevant provisions of the 2004 EBA were as follows:⁴⁰

8.3 Subject to clauses 8.4 and 8.5, the minimum hourly rates of pay for casual workers shall be as specified below:

| | 1 Aug 2003 | 1 Aug 2004 | 1 Aug 2005 | 1 Aug 2006 |
|---------|---------------|---------------|---------------|---------------|
| Level 1 | 15.62 | 16.28 | 17.45 | 17.80 |
| Level 2 | 16.24 | 16.94 | 18.15 | 18.51 |
| Level 3 | 17.73 | 18.49 | 19.81 | 20.21 |

³⁵ Shorten MFI-5, 8/7/15, Vol 1, p 403.

³⁶ Shorten MFI-5, 8/7/15, Vol 1, p 404.

³⁷ Shorten MFI-5, 8/7/15, Vol 2, pp 1-12, esp p 4, para 8.4.

³⁸ Bill Shorten, 8/7/15, T:97.44-47, 98.1-7, 105.1-12.

³⁹ Bill Shorten, 8/7/15, T:98.20-31.

⁴⁰ Shorten MFI-5, 8/7/15, Vol 2, pp 4-5.

8.4 Notwithstanding the provisions of clause 8.3, the minimum hourly rate for level 1 casual workers working at events shall be \$16.28 per hour, \$17.44 per hour for level 2 casual workers and \$18.44 per hour for level 3 casual workers.

8.5 Notwithstanding the provisions of clause 8.3, the minimum hourly rate for casual workers working on weekends and public holidays, but not at events, shall be \$19.17 until 1 August 2005, \$20.50 until 1 August 2006 and \$20.90 thereafter.

...

8.6.3 Cleanevent Australia Pty Ltd shall pay in addition to any wages or other entitlements due, a Public Holiday Event Allowance of \$55.00 to casual workers who work a minimum of 7.6 hours at an event on a gazetted public holiday.

40. The 2004 EBA had the following consequences for Cleanevent casual workers:

- (a) The casual rates provided for in clause 8.3 were slightly above 120% of the hourly rate of pay for permanent employees provided for in clause 8.1, and there was provision for pay rises for these casuals.
- (b) Casuals working at events were not entitled to a pay rise over the term of the agreement, though they would have been under the 1999 Award by operation of the arbitrated safety net adjustments.
- (c) The weekend and public holiday rates for venue casuals were less than time and a half. The workers would have been entitled to that rate for the first two hours of work on a Saturday under the 1999 Award. The rates were far below the allowances for Sundays and public holidays under the 1999 Award.

- (d) Casuals working at events were not entitled to penalty rates for work on Saturdays or Sundays. Event casuals were entitled to an allowance for working in excess of 7.6 hours on a gazetted public holiday. The allowance breaks down to \$7.23 per hour worked over the 7.6 hours (and nothing for time exceeding 7.6 hours).

41. Appendix 1 contains a comparison of the rates of pay to which Cleanevent casual workers would have been entitled under the 1999 Award and the rates they were entitled to under the 2004 EBA. Significantly, the base rates of pay for venue casuals and event casuals were above those payable under the 1999 Award, but:

- (a) the flat penalty rate to which venue casuals were entitled on Saturdays, Sundays and public holidays was below time and a half, being the rate applicable for Saturday work under the 1999 Award;
- (b) the public holiday allowance payable to event casuals that worked more than 7.6 hours was above time and a half, but well below double time and a half which was the public holiday rate under the 1999 Award; and
- (c) event casuals were otherwise not entitled to penalty rates, which they have under the 1999 Award.

42. At the time of certification of the 2004 EBA, 194 of the 244 employees of Cleanevent covered by the EBA were casuals.⁴¹
43. The result was not a good one for members who were casual workers. Why did the AWU agree to it? There is no suggestion, as there was in 2010, that Cleanevent paid money to the AWU to secure the deal. It seems that the AWU simply accepted the position put forward by Cleanevent that commercial and competitive constraints prevented it from paying in line with the 1999 Award.
44. Bill Shorten described the notion that event cleaners were being paid award penalty rates as ‘fanciful in the real world’⁴² and said that double time and a half was a ‘gold standard’ rate in that industry.⁴³ But these rates were not so outlandish that the AWU and LWHC did not advance them in negotiations. Nor were they so fanciful that they were not reflected in the various State-based awards that would have applied in the absence of the 1999 Award. With two exceptions,⁴⁴ each of these awards provided for casual loadings of 20% or higher on the base

⁴¹ Shorten MFI-5, 8/7/15, Vol 2, p 16.

⁴² Bill Shorten, 8/7/15, T:82.1-8.

⁴³ Bill Shorten, 8/7/15, T:88.21-26.

⁴⁴ The New South Wales *Cleaning and Building Services Contractors (State) Award* applied a casual loading of 8.3% (cl 7.2) and lower penalty rates than time and a half and double time on Saturdays and Sundays for casual cleaners, but double time and a half on public holidays. The Award included a special rate for events with a slightly higher loading and a flat penalty rate on Saturdays, Sundays and public holidays that was well below time and a half (cl 9(i), Part B). Unlike the public holiday loading in the 2004 EBA, the rate applied without having worked a full day. The *(Building and Property Services)(ACT) Award 1998* applied a casual loading of 6% (cl 15.4; Schedule A). However it applied a Saturday rate of time and a half (cl 30), a Sunday rate of time and three quarters (cl 31) and a public holiday rate of double time and a half (cl 37.6).

rate.⁴⁵ Each of them also provided for casuals to be paid penalty rates on Saturdays, Sundays and public holidays, most at standard rates,⁴⁶ some at a slightly lower rate.⁴⁷

45. If it was the case that there was a general practice of employers in the event cleaning industry to fail to pay workers their award entitlements, it is a very odd course for a union to assist in continuing that practice. Award entitlements cannot be treated as ‘gold standard’. They are the minimum conditions to which workers are entitled. Moreover, the 1999 Award was an enterprise award obtained specifically for Cleanevent’s employees.
46. There is some evidence of the communications with Cleanevent employees in relation to the 2004 EBA.⁴⁸ It reveals that employees were provided with a copy of the proposed agreement. They were advised that they would be eligible for back pay in respect of the pay rises provided for in the agreement. There is no evidence that the employees were advised of the differences between the 2004 EBA and

⁴⁵ *Building Services (Victoria) Award 2003* (cl 12.4.3), *Contract Cleaning Industry Award - State 2003* (Queensland) (cl 5.2.2(c)); *Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003* (cl 12.3.3); *Caretakers and Cleaners Award* (South Australia) (Part A, S1.4.2); *Cleaning and Property Services Award* (Tasmania) (cl 22(c)); *Contract Cleaners Award* (Western Australia) (cl 20).

⁴⁶ *Building Services (Victoria) Award 2003* (cll 25, 27.1), *Contract Cleaning Industry Award - State 2003* (Queensland) (cll 6.5, 6.2 and 7.6); *Cleaning (Building and Property Services) (ACT) Award 1998* (cl 37.6); *Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003* (cll 29.13, 29.14, 38.18); *Caretakers and Cleaners Award* (South Australia) (cll 6.2, 6.4); *Cleaning and Property Services Award* (Tasmania) (cll 18(e)(i), 22(c), 29); *Contract Cleaners Award* (Western Australia) (cl 6.4).

⁴⁷ Another consent award covering LHMU, the *Cleaning Services - Spotless Services Australia/ALHMMWU - Outdoor Facilities - Consent Award 1998* provided for a 20% casual loading (cl 13.3.2(a)) and lower penalty loadings for casual and permanent employees on Saturdays, Sundays and public holidays (cll 25.2, 25.3 and 13.3).

⁴⁸ Shorten MFI-5, 8/9/15, Vol 1, pp 404-411.

the 1999 Award. Nor is there evidence that it was explained to them why the 2004 EBA was fair and reasonable. There is also no evidence that they indicated (other than by voting in favour of the 2004 EBA) that they believed that the 2004 EBA was fair and reasonable. This is of particular concern when it is considered that casuals employed at events, those most disadvantaged by the agreement, may not all have had the terms of the proposed 2004 EBA brought to their attention.

Certification of the 2004 EBA

47. All of the above matters give rise to considerable cause for concern. Of greatest concern, however, is that the parties side-stepped the scrutiny of the Australian Industrial Relations Commission.
48. Both the AWU and Cleanevent were conscious during the negotiation process that, if Cleanevent's rates were accepted, it was unlikely that the 2004 EBA would meet the no disadvantage test. However, that was a matter kept from the Australian Industrial Relations Commission.
49. Craig Winter prepared and ran the application for certification of the 2004 EBA with the Australian Industrial Relations Commission (AIRC).⁴⁹ Craig Winter had been an industrial officer at the AWU since 1988. His responsibilities included representing members in various tribunals, negotiating agreements and running applications for certification of those agreements.⁵⁰

⁴⁹ Shorten MFI-5, 8/7/15, Vol 2, p 1; Craig Winter, 20/10/15, T:699.1-5.

⁵⁰ Craig Winter, 20/10/15, T:698.6-24.

50. Craig Winter gave evidence as to the process that was undertaken at that time when preparing for certification of EBAs. He was not in any sense a satisfactory witness. He generally sought to avoid any responsibility for his conduct. Both his demeanour and general approach to giving evidence were poor. The surly manner he adopted to senior counsel assisting was quite different from that which he adopted to counsel appearing for clients whom he seemed to regard as more meritorious. His evidence at times strained credulity.
51. Craig Winter said that he did not believe that an organiser's report was prepared for the 2004 EBA. He said that the usual practice was that he was provided with a signed copy of the agreement and a copy of the statutory declaration of the employer. He spoke to the responsible organiser to obtain any additional information required. He then completed a statutory declaration, on the basis of the information in the employer's statutory declaration and the information he received from the organiser.⁵¹
52. The statutory declaration form completed by Craig Winter identified the relevant award as the 1999 Award. The statutory declaration contained three questions addressed to the no-disadvantage test then applicable under ss 170LT(1)-(3) and 170XA(2) of the *Workplace Relations Act 1996* (Cth), as follows:⁵²

7.3 State whether certification would result, on balance, in a reduction in the overall terms and conditions of employment of employees covered by the agreement under relevant or designated awards or laws of the Commonwealth, a State or Territory (see s 170XA(2)).

⁵¹ Craig Winter, 20/10/15, T:701.12-19, 702.1-14, 41-42.

⁵² Shorten MFI-5, 8/7/15, Vol 2, p 22.

7.4 To be answered only if there is **any** reduction in the terms and conditions of employees covered by the agreement or under any relevant or designated award or other law **but not resulting** in a reduction in the overall terms and conditions of employees.

By referring to specific clauses in the agreement, specify any such reductions.

By referring to specific clauses in the agreement, specify any terms or conditions which result, on balance, in there being no reduction in the overall terms and conditions of employment of the employees under the agreement.

7.5 To be answered only if certification **would result** in a reduction of the overall terms and conditions of employees covered by the agreement.

Indicate why the Commission should be satisfied that certifying the agreement is not contrary to the public interest...

53. The intention of these questions in the statutory declaration forms is plain. They enabled the Commissioner hearing the application: (a) in respect of question 7.3, to assess the deponent's opinion as to whether the no-disadvantage test was satisfied; (b) in respect of question 7.4, to test the deponent's opinion by requiring that he or she identify whether there were any reductions in the terms of the agreement when compared with competing instruments and explain with specificity why there was no disadvantage on balance; and (c) where there is an overall disadvantage, to assess whether there were any circumstances attracting the public interest exception.
54. Bruce McNab completed the employer's statutory declaration on behalf of Cleanevent. He did so by ticking a box beside question 7.3 stating: 'certification would not result in a reduction in the overall

terms and conditions of employment.’⁵³ The responses to questions 7.4 and 7.5 were left blank.

55. Craig Winter’s statutory declaration contained the same box beside 7.3. It was not ticked and the responses to questions 7.4 and 7.5 were left blank.⁵⁴
56. Thus, both statutory declarations before the Australian Industrial Relations Commission were to the effect that there was neither any reduction in the overall terms and conditions of employment (question 7.3) nor any reduction in specific terms and conditions (question 7.4).
57. On any view, at least question 7.4 should have been answered in the affirmative. Bill Shorten agreed that it should have.⁵⁵ It is likely also that question 7.3 should have been as well.
58. Craig Winter adopted a contrary position in his evidence. His evidence was that, regardless of the difference in rates as between the 1999 Award and the terms of the 2004 EBA, clauses 6.1 and 6.3 of the 2004 EBA operated to incorporate the 1999 Award so that the event casuals were not disadvantaged.⁵⁶ He described this as an ‘industrial fact’ that led to there being no reduction in the terms and conditions of the event casuals that would require an answer to questions 7.3 or 7.4.⁵⁷

⁵³ Shorten MFI-5, 8/7/15, Vol 2, p 17.

⁵⁴ Shorten MFI-5, 8/7/15, Vol 2, p 22.

⁵⁵ Bill Shorten, 8/7/15, T:103.9-11, 41.

⁵⁶ Craig Winter, 20/10/15, T:721.8-13.

⁵⁷ Craig Winter, 20/10/15, T:721.20-38.

59. This highly artificial, legalistic argument was advanced with some eagerness by Craig Winter in oral evidence. It was then pursued by him in submissions. It is a hopeless argument. Clauses 6.1 and 6.3 provided as follows:

6.1 This agreement shall be read and interpreted in conjunction with the AWU/LHMU Cleanevent Pty Ltd Award 1999 (or its successor) ("the Award"). Where there is inconsistency between this agreement and the Award, the provisions contained in this agreement shall prevail. No person shall be disadvantaged in any way by the operation of this agreement.

...

6.3 Should an employee have reasonable grounds for believing that this agreement results in an overall disadvantage in comparison to the Award, Cleanevent Australia Pty Ltd will conduct an audit of the employee's employment records over a 12 month period. Cleanevent Australia Pty Ltd, the employee concerned and, if the employee elects, the AWU, agree to consult in accordance with clause 17 to resolve any matter arising as a result of such an audit.

60. It is obvious from the terms of clause 6.1 that the 2004 EBA prevails over the Award in the event of an inconsistency. What of the last sentence of clause 6.1? On a generous view, it might be thought of as aspirational. On a less generous view, it might be thought of simply as false. On any view, it did not rewrite the rest of clause 6.1 or anything else in the 2004 EBA. Clause 6.3 reinforced the point. It gave employees the right to assert that they were disadvantaged in comparison with the Award and then for an audit to take place to ascertain the true position. It would be entirely unnecessary if Craig Winter's argument were correct. That is because there could be no disadvantage. Counsel assisting made a variety of other criticisms of this argument in submissions. It is not necessary to deal with all of them. That is because the argument is obviously wrong. It is

significant that the AWU itself did not advance or support the argument.

61. Although it is not necessary to make any finding, it is difficult to accept Craig Winter actually believed in an argument of this kind. Belief in the validity of the argument would be inconsistent with what transpired in the negotiations that preceded the 2004 EBA. It would also be inconsistent with what occurred after the EBA was entered into. Cleanevent paid its workers in accordance with the 2004 EBA and not in accordance with the Award. If Craig Winter's view were correct, the AWU ought to have done something about that. It did not.
62. Craig Winter appeared on behalf of the AWU before Commissioner Mansfield on 20 December 2004. The extent of the submissions on the question of the no-disadvantage test are contained in the following exchange:⁵⁸

THE COMMISSIONER: Good. Now, Mr Winter, my question: do you generally assert that this agreement meets the no disadvantage test?

MR WINTER: Yes, we believe it does, and---

THE COMMISSIONER: Good, that is sufficient.

63. It is evident that the Commissioner was reliant on Craig Winter's submissions in satisfying himself that the no-disadvantage test was satisfied. Craig Winter tried to defend his conduct before the Commission in the following way. He asserted that the transcript showed that he was cut off, and that the Commissioner required summary answers to be given in relation to the operation of the

⁵⁸ Shorten MFI-5, 8/7/15, Vol 2, pp 30-31.

agreement.⁵⁹ He said that it was apparent that the Commissioner had read the terms of the EBA. He posited that the Commissioner may have come to the same conclusion as Craig Winter says he did.

64. This submission involves speculation as to the Commissioner's state of mind. It understates both Craig Winter's role and his capacity. It was for him to identify the relevant terms of the 2004 EBA to the Commissioner. It was for him to satisfy the Commissioner that the agreement conferred no disadvantage. On his own evidence, clause 6.3 was unusual.⁶⁰ It should have been brought to the Commissioner's attention if it was relevant to the question of disadvantage. Fairness to the members whom Craig Winter represented required that he discharge his role as their advocate fully.

65. The position was thus that the Australian Industrial Relations Commission was presented with misleading statutory declarations regarding a critical aspect of the 2004 EBA. That position was not corrected by Craig Winter's oral submissions. As a result, the Commission was prevented from considering whether the disadvantages that accrued to workers under the 2004 could be justified in the public interest. What the Commission would have done had it considered this issue is quite uncertain. However it will be seen that in 2010 one of Cleanevent's competitors, Douglas Site Services, was in a similar position. It made proper disclosure to the Fair Work Commission that its proposed agreement did not satisfy the no-disadvantage test. It argued that it was in the public interest that the

⁵⁹ However, the portion of the transcript relied upon relates to an entirely different question.

⁶⁰ Craig Winter, 20/10/15, T:721.5-6.

agreement be approved because otherwise it would be unable to compete with Cleanevent. The argument found no favour.

66. The overall result in 2004 was that the Cleanevent employees were deprived of one of the important protections afforded to them under the industrial legislation at the time. As will be seen, this occurred again in 2010.

E – THE 2006 EBA

67. In 2006 the AWU and Cleanevent entered into an enterprise bargaining agreement which came into force on 22 December 2006 (**2006 EBA**).⁶¹
68. The 2006 EBA applied to all employees of Cleanevent in Australia who fell within the classification structures set out in the 2006 EBA, including permanent and casual employees. Because the 2006 EBA operated Australia wide it was signed off by the AWU at National Office. At that time the National Secretary was Bill Shorten. In fact the 2006 EBA was ultimately signed by Graham Roberts, then Assistant National Secretary to Bill Shorten. From August 2006, negotiations were primarily undertaken by John-Paul Blandthorn, by then an organiser for Cleanevent.⁶² John-Paul Blandthorn reported to Bill Shorten, Cesar Melhem, Peter Smoljko and Mick Eagles.⁶³

⁶¹ SW1, 28/5/15, pp 1-33.

⁶² John-Paul Blandthorn, 20/10/15, T:733.24-26.

⁶³ John-Paul Blandthorn, 20/10/15, T:733.32-41.

69. The Cleanevent executives who negotiated the 2006 EBA were Craig Lovett, then Chairman, and Ivan Dalla Costa, then the Chief Financial Officer.⁶⁴
70. The negotiations were canvassed in some detail in the evidence. It is not necessary to deal with all of this evidence. There were some matters which the evidence left unexplained.
71. The first arose out of an email sent on 2 October 2006 by Ivan Dalla Costa.⁶⁵ The email circulated a draft by email of the 2006 EBA that had been presented to John-Paul Blandthorn on 29 September 2006. In his email Ivan Dalla Costa stated:
- None of the issues we have re-drafted present a problem, except for the leave loading whereby our proposal to build the amount in the weekly rate will present a fundamental political issues [sic] to Bill Shorten – (not a real issue for us).
72. John-Paul Blandthorn was not able to shed any light on what this referred to. Nor was Bill Shorten.⁶⁶
73. Another unexplained matter arose out of an email sent by John-Paul Blandthorn. The email was sent on 20 October 2006. It provided a further proposed version of the agreement to Cleanevent. It was sent to Ivan Dalla Costa. It was copied to (amongst others) Bill Shorten and

⁶⁴ Steven Webber, 28/5/15, T:15.31-37.

⁶⁵ Shorten MFI-5, 8/7/15, Vol 2, p 40.

⁶⁶ John-Paul Blandthorn, 20/10/15, T:735.21-34; Bill Shorten, 8/7/15, T:47.20-24.

Cesar Melhem (then State Assistant Secretary). In that email he stated:⁶⁷

I have spoken to the hierarchy of the AWU and they can't afford to trade core Award conditions at the moment, because we can't afford other unions attacking us.

74. The evidence did not reveal what this was a reference to. Bill Shorten confirmed that he was in the hierarchy of the AWU at the time.⁶⁸ But he said that he would not have communicated this position to John-Paul Blandthorn as that was not what he thought.⁶⁹ John-Paul Blandthorn said that the reference to hierarchy was 'more likely' to refer to Cesar Melhem or Mick Eagles, but that he had no memory of the conditions referred to.⁷⁰ The reference to other unions appears to be a reference to the LHMU with which AWU had a history of demarcation dispute in this industry.⁷¹
75. The process by which the 2006 EBA was negotiated was similar to that preceding the 2004 EBA. In particular, penalty rates and the application of the no-disadvantage test were features of discussions.⁷²
76. Bill Shorten stated that, on the basis that the document went to a vote of the members, he was satisfied that it was appropriate for his delegate to sign the 2006 EBA.⁷³ That is what occurred. The 2006 EBA was

⁶⁷ Shorten MFI-5, 8/7/15, Vol 2, p 116A.

⁶⁸ Bill Shorten, 8/7/15, T:48.1-3.

⁶⁹ Bill Shorten, 8/7/15, T:48.35-36.

⁷⁰ John-Paul Blandthorn, 20/10/15, T:736.22-30.

⁷¹ Bill Shorten, 8/7/15, T:50.43-47.

⁷² See for example, Shorten MFI-5, 8/7/15, Vol 2, p 117B; Bill Shorten, 8/7/15, T:55.7-12.

⁷³ Bill Shorten, 8/7/15, T:57.9-15.

signed by Graham Roberts, Assistant National Secretary of the AWU on 21 December 2006,⁷⁴ with acceptance by a majority of Cleanevent employees on a formal vote undertaken on 21 and 22 December 2006.⁷⁵ It was lodged with the Office of the Employment Advocate on 22 December 2006.⁷⁶

77. Clause 39 of the 2006 EBA provided that the agreement excluded any protected conditions in an Award, including those relating to shift loadings and penalty rates.⁷⁷ Some of the conditions in the 2006 EBA were less favourable to workers than the corresponding conditions under the 1999 Award. Appendix 2 to this Chapter contains a comparison of the rates of pay to which Cleanevent casual workers would have been entitled under the 1999 Award and the rates they were entitled to under the 2006 EBA. The comparison reveals that:

- (a) Level 1 event casuals in other States were being paid at the award minimum base rate and Level 2 event casuals in other States were being paid below the 1999 Award minimum base rate;
- (b) All casuals at all levels in all states were being paid below time and a half for Saturdays, Sundays and public holidays,

⁷⁴ Shorten MFI-5, 8/7/15, Vol 2, pp 123A, 159.

⁷⁵ Shorten MFI-5, 8/7/15, Vol 2, p 159A; Cleanevent MFI-1, 19/10/15, pp 8-9. The voting results were 77 for and 15 against. No votes were recorded for workers at a number of Cleanevent sites, including Bluetongue Stadium, Brisbane Cricket Ground, Homebush Tennis Centre, Melbourne Convention Centre, and Rosehill Racecourse.

⁷⁶ Shorten MFI-5, 8/7/15, Vol 2, p 125.

⁷⁷ SW1, 28/5/15, p 32.

whereas they would have been entitled to standard penalty rates under the 1999 Award; and

- (c) Level 1 and 4 event casuals were not entitled to penalty rates, or a public holiday allowance. Level 2 and 3 event casuals were entitled to a public holiday allowance after working more than 7.6 hours on a public holiday, which was lower than time and a half and well below the double time and a half entitlement under the 1999 Award.

78. As indicated above, Cleanevent employees voted to approve the agreement. The evidence was that 92 employees voted, 77 in favour and 15 against.⁷⁸ The evidence does not make it clear how many of these were casual employees. Since all of the votes took place at venues, it may be that the voters were not event casuals.

79. It is unlikely that the attention of the workers was drawn to any comparison between their position under the proposed agreement and their position under the 1999 Award. The practice of the AWU was that that delegates ascertained the attitude of the workers.⁷⁹ On this occasion, John Paul Blandthorn visited Cleanevent's Melbourne sites on 21 December 2006⁸⁰ and Cleanevent prepared 'talking points' for its management to discuss with employees.⁸¹ Six of the ten talking points related to permanent employees rather than casuals. None of the

⁷⁸ Cleanevent MFI-1, 19/10/15, p 9.

⁷⁹ Bill Shorten, 8/7/15, T:106.1-22.

⁸⁰ Cleanevent MFI-1, 19/10/15, p 5.

⁸¹ Cleanevent MFI-1, 19/10/15, p 7.

ten talking points dealt with the disadvantages to casual employees as compared with the position under the Award.

80. Although, as stated above, some consideration was given to the application of the 'no disadvantage test' during the negotiation of the 2006 EBA, that test in fact had no application. The 2006 EBA was made under Part 8 of the *Workplace Relations Act 1996* (Cth). In other words, the Work Choices regime was in force. As a result, the fact that some workers in some respects were worse off under the 2006 EBA than under the 1999 Award was not a matter that required disclosure to the Commission in the certification process.

Engagement after execution of the 2006 EBA

81. After execution of the 2006 EBA, the AWU and Cleanevent engaged in discussions in relation to ongoing demarcation disputes with the LHMU. On 29 January 2007 Nicko Mavro, Managing Director of the Cleanevent Group emailed personnel at the Sydney Opera House in relation to these disputes. He then sent an email to John-Paul Blandthorn stating:⁸²

Mate, Please look below at the email I have just sent the client at the Opera House. I think that you could help us here. If the LHMU is talking to our clients at your sites, maybe your NSW guys can do the same. The client this that their operations will be effected [sic] by the LHMU and are quite concerned. Can you assist? Please pass this on to Bill.

82. John-Paul Blandthorn responded the same day, stating:⁸³

⁸² Shorten MFI-5, 8/7/15, Vol 2, pp 161-162.

⁸³ Shorten MFI-5, 8/7/15, Vol 2, p 160.

I will chat to Bill and explain to him the situation (we will help). Bill mentioned some time ago that Cleanevent were going to make some donation to the AWU so as they could have one organiser, rather than a number around the country. Is this still happening. I think it would help to defuse the situation with the LHMU and make sure there are no mixed messages getting around.

83. John-Paul Blandthorn said that his understanding at the time was that Cleanevent wanted to have one organiser look after their sites across the country, and they had raised the issue with Bill Shorten. His evidence was that Cleanevent 'wanted to be able to pay for the organiser.'⁸⁴ He did not know the quantum of the donation.⁸⁵ He was not, at that stage, aware of whether arrangements pursuant to which donations were made referable to the costs of an organiser had occurred in the past.⁸⁶
84. Bill Shorten stated that, during the negotiations in relation to the 2006 EBA, there was a single discussion with Cleanevent about making a donation to the AWU during the negotiation of the 2006 EBA.⁸⁷ He described the proposal as follows:⁸⁸

Cleanevent was a national business. We'd looked at having, to the best of my recollection, one organiser, so you'd have different individuals, as I think I said in evidence this morning; you know, someone from the Queensland Branch can visit the Queensland venue of work, someone from the Sydney branch, the Sydney venue and in Melbourne, Melbourne venues. Quite often it is useful to have a single point of contact for resolving issues. What we raised or what – Cleanevent might have said, "We want one organiser", we might have raised having one organiser. What we might have asked Cleanevent for is to assist with the airline costs and duties out of the ordinary to service a national agreement. There's

⁸⁴ John-Paul Blandthorn, 20/10/15, T:738.5-22.

⁸⁵ John-Paul Blandthorn, 20/10/15, T:738.24-25.

⁸⁶ John-Paul Blandthorn, 20/10/15, T:739.1-17.

⁸⁷ Bill Shorten, 8/7/15, T:84.47.

⁸⁸ Bill Shorten, 8/7/15, T:85.4-19.

plenty of precedent across the union movement that you might ask the company, whose workers you're organising, to help pay the transportation costs.

85. Bill Shorten said that he did not recall whether the donation was in fact made.⁸⁹
86. Nicko Mavro responded to John-Paul Blandthorn's email, again on the same day, stating:⁹⁰

Thanks JP. We will definitely entertain the one organiser principal [sic] and happy for you and Ivan to come up with the details. Thanks for your prompt response regarding the Opera house, but we do need your involvement.

87. John-Paul Blandthorn responded on 30 January 2007, indicating that he would 'talk to Bill about it' later that day.⁹¹ He did not recall whether he in fact had a conversation with Bill Shorten.⁹² He did not know whether any donation was ultimately made.⁹³ The evidence does not support a finding that a donation was in fact made.
88. The significance of this evidence is the factual similarity between what was occurring at this stage of the dealings between Cleanevent and the AWU, its earlier dealings with Thiess John Holland,⁹⁴ and its later dealings with Cleanevent, detailed below.

⁸⁹ Bill Shorten, 8/7/15, T:86.7.

⁹⁰ Shorten MFI-5, 8/7/15, Vol 2, p 160.

⁹¹ Shorten MFI-5, 8/7/15, Vol 2, p 163.

⁹² John-Paul Blandthorn, 20/10/15, T:741.35-37.

⁹³ John-Paul Blandthorn, 20/10/15, T:742.14-16.

⁹⁴ As to which see Submissions of Counsel Assisting, AWU, 6/11/15, Ch 3, and Ch 10.3 of this Report.

F – DOUGLAS SITE SERVICES

89. A substantial amount of evidence was received concerning the dealings between the AWU and Douglas Site Services (**DSS**). This could have been a separate case study, although there were factual connections with the Cleanevent case study. No submission was made that the AWU or its officials may have contravened any law or breached any duty as a result of the evidence. No finding to this effect is made either. Nonetheless, much of the evidence was challenged and there were substantial debates about it in submissions.
90. The main point of significance in the DSS evidence is that it provides another example of the AWU seeking benefits or payments from an employer during EBA negotiations. It reveals that this sort of conduct cannot be regarded as unusual or isolated in nature.
91. Steven Hunter was an employee of Cleanevent between 1996 and 2001. He held the positions of Venue Manager of the Melbourne Exhibition Centre and later the Acer Arena in Homebush.⁹⁵ From 2001 to 2003 he was employed by Cleanevent International in the United Kingdom.⁹⁶
92. From 2003, Steven Hunter went out on his own. He operated a company known as Douglas Site Services (**DSS**) which provided

⁹⁵ Steven Hunter, witness statement, 19/10/15, paras 4-5.

⁹⁶ Steven Hunter, witness statement, 19/10/15, para 7.

consultancy services to Cleanevent and tendered for cleaning work, initially outside of events and entertainment venues.⁹⁷

93. By early 2006, DSS had begun bidding for cleaning work at events.⁹⁸ By that time, DSS had full time staff of between 25 and 30, full time contract staff of 20 workers and fluctuating levels of casual workers numbering between 120 to 150.⁹⁹ In about 2006 DSS had also acquired a hospitality cleaning business.¹⁰⁰ It had obtained a cleaning contract for the Commonwealth Games.¹⁰¹
94. Steven Hunter approached the AWU to seek an EBA covering all of his workers. He contacted John-Paul Blandthorn in early 2006 and negotiations commenced.
95. It is necessary, at the outset, to say something about the significant attacks on the credit of Steven Hunter by John-Paul Blandthorn in submissions. None was persuasive. Many were not put to Steven Hunter in oral examination. For example, it was submitted, without any supporting evidence and without it having been put to Steven Hunter, that DSS was an operator 'that paid discounted cash-in-hand rates to independent contractors in order to secure work and undercut operators such as Cleanevent.'¹⁰² Steven Hunter gave his evidence carefully and in a reasoned way. His demeanour was calm, even under

⁹⁷ Steven Hunter, witness statement, 19/10/15, paras 9-10.

⁹⁸ Steven Hunter, 19/10/15, T:641.14-19.

⁹⁹ Steven Hunter, 19/10/15, T:616.31-617.24.

¹⁰⁰ Steven Hunter, 19/10/15, T:618.19-21.

¹⁰¹ Steven Hunter, 19/10/15, T:616.45-46.

¹⁰² Submissions of John-Paul Blandthorn, AWU, 20/11/15, paras 10-11.

sustained cross-examination. He made appropriate concessions. The attacks on his credit are rejected. It is not necessary to canvass them here in any detail because the primary points of significance emerge from the documents themselves.

96. On 21 February 2006, John-Paul Blandthorn sent an email to Steven Hunter. It attached a copy of the Cleanevent 2004 EBA. It stated that it 'will give you some indication of the pay rates we will discuss.'¹⁰³
97. At that time, much of DSS's business concerned a contract at Mt Hotham ski resort. The staff of DSS were covered by the Victorian Alpine Resorts Award 1999 (**Alpine Award**). The Alpine Award was relatively generous to casuals. It provided for a casual loading of 25% which was the base for calculation of penalty rates, a site allowance of \$2.60 per hour, and standard penalties for weekends and public holidays.¹⁰⁴
98. In about early February 2006, Steven Hunter attended a meeting at the offices of the AWU. His evidence is that the meeting was attended by John-Paul Blandthorn and, briefly, Cesar Melhem and Mick Eagles.¹⁰⁵
99. Negotiations in relation to the draft EBA continued between March 2006 and early 2007.¹⁰⁶ There appears to be some uncertainty during this period as to whether the DSS EBA had been executed, as John-Paul Blandthorn emailed on more than one occasion seeking

¹⁰³ Hunter MFI-1, 19/10/15, p 1.

¹⁰⁴ Steven Hunter, witness statement, 19/10/15, paras 11-12; Hunter MFI-1, 19/10/15, p 47.

¹⁰⁵ Steven Hunter, witness statement, 19/10/15, para 17.

¹⁰⁶ Steven Hunter, witness statement, 19/10/15, para 21.

confirmation as to whether DSS was operating under the EBA.¹⁰⁷ On 5 February 2007, John-Paul Blandthorn sent an email to Steven Hunter attaching a copy of the Cleanevent 2006 EBA and stating ‘thought you may want to look before we finish ours up.’¹⁰⁸

100. On 3 December 2007, John-Paul Blandthorn sent an email to Steven Hunter with a copy to Cesar Melhem. It attached a substantially different proposed agreement.¹⁰⁹ The covering email contained the statement:

For the AWU to agree to be a party to the Agreement we would need a guarantee of membership as discussed.

101. Steven Hunter’s evidence was that in late 2007 John-Paul Blandthorn had begun asking him to guarantee a minimum number of members in order to secure agreement to the EBA. This was described as making a ‘financial commitment’ to the Union. Steven Webber understood that John-Paul Blandthorn was asking DSS to make a commitment to the number of staff that would remain members of the Union.¹¹⁰ Steven Hunter said that a numerical figure was not proposed by John-Paul Blandthorn. Rather he requested a commitment from DSS.¹¹¹

102. Steven Hunter said that his initial response was that he thought it was the job of the union to market their services to staff, but that he was more than happy to give John-Paul Blandthorn access to the staff for

¹⁰⁷ Hunter MFI-1, 19/10/15, pp 115-116.

¹⁰⁸ Hunter MFI-1, 19/10/15, p 121.

¹⁰⁹ Hunter MFI-1, 19/10/15, p 156.

¹¹⁰ Steven Hunter, 19/10/15, T:598.9-12.

¹¹¹ Steven Hunter, 19/10/15, T:598.18-20.

the purpose of recruiting members.¹¹² The staff base of DSS was quite transient. Most casual employees at Mt Hotham did not stay in employment for more than one season. Hence there was a high turnover of staff.¹¹³ Steven Hunter said that, in response to the email, he told John-Paul Blandthorn that he could not and would not guarantee union memberships.¹¹⁴

103. John-Paul Blandthorn placed a different characterisation on the reference to ‘guarantee of membership.’ He stated in his oral evidence that the email was ‘clumsily written.’¹¹⁵ He said that Steven Hunter’s account of the conversation between them is ‘a lie’ – rarely a satisfactory course for one witness to take about the evidence of another.¹¹⁶ John-Paul Blandthorn’s account of the 3 December 2007 email was as follows:¹¹⁷

What the AWU had been seeking with Douglas Site Services for a large period of time, without much success, was access to recruitment. They were not necessarily forthcoming in doing that, and to enter into an enterprise agreement with this organisation at the time, we had to have members to be able to do so. That had been made very clear.

104. It was suggested to Steven Hunter that AWU representatives could not have demanded a guarantee of membership numbers if they did not know how many staff were employed by Steven Hunter. Steven Hunter responded that the AWU knew the size of the business that

¹¹² Steven Hunter, witness statement, 19/10/15, para 24.

¹¹³ Steven Hunter, 19/10/15, T:599.20-24.

¹¹⁴ Steven Hunter, witness statement, 19/10/15, para 26.

¹¹⁵ John-Paul Blandthorn, 20/10/15, T:761.12.

¹¹⁶ John-Paul Blandthorn, 20/10/15, T:762.11; Submissions of John-Paul Blandthorn, 20/11/15, para 22.

¹¹⁷ John-Paul Blandthorn, 20/10/15, T:761.12-18.

DSS conducted because he told them about the contracts DSS had won and the representatives he engaged with were well versed in the cleaning industry and aware of the fluctuating employment that characterised that industry.¹¹⁸ That explanation should be accepted. It is evident from the history of the AWU's dealings with Cleanevent that the responsible officials were familiar with the industry. That is evident also from the evidence of John-Paul Blandthorn, Cesar Melhem and Bill Shorten in relation to their dealings with Cleanevent. Further, it is consistent with the logic of events that the AWU would seek some financial guarantee of membership precisely *because* employment in the industry is transient.¹¹⁹

105. When John-Paul Blandthorn's interpretation of the email was put to Steven Hunter by senior counsel for Cesar Melhem, he disagreed with it.¹²⁰ He said that Cesar Melhem asked for a firm commitment as to the number of staff that would become members of the AWU.¹²¹
106. Steven Hunter's account of the request made of him is accepted. As will be seen, the proposition advanced by John-Paul Blandthorn, namely that what was sought was merely 'access' to members for recruitment purposes, is inconsistent with the fact that access was in fact given. Notwithstanding that, as will be seen, similar requests of this nature continued to be made. None was ever phrased in terms of a request for 'access'. It was not a case of just one clumsily written

¹¹⁸ Steven Hunter, 19/10/15, T:623.28, 33-41, 635.27-44, 636.13-40.

¹¹⁹ See, for example, Cesar Melhem's evidence in relation to the services that were provided to Cleanevent employees, whether members or non-members: Cesar Melhem, 22/10/15, T:886.23-25, 37-46, and to like effect, John-Paul Blandthorn, 20/10/15, T:747.42-47.

¹²⁰ Steven Hunter, 19/10/15, T:633.14-20.

¹²¹ Steven Hunter, 19/10/15, T:633.22-37.

email. For the reasons explained in Chapter 10.1 of this Report, great weight should be given to the contemporaneous documents.

107. Steven Hunter said that at a further meeting attended by John-Paul Blandthorn and Cesar Melhem, the issue of providing a guarantee of a certain number of AWU memberships was again raised.¹²² It would appear that at this meeting, in this context, a suggestion was raised that DSS include an opt-out clause in the application forms provided to applicants. Steven Hunter did not remember whether it was he who proposed the opt out clause or whether it was the AWU.¹²³ Steven Hunter said that he agreed to this on the basis that the clause was prominent, that it clearly described that membership was optional and that it stated the financial commitment for which the employees would be liable if they did not opt out.¹²⁴

108. Shortly after the meeting, Steven Hunter amended the DSS job application forms to include a box with the words:¹²⁵

It is an option for employees to become a union member. You have the option now to opt out of membership by putting a tick in this box.

109. John-Paul Blandthorn stated that he did not remember a conversation in which an opt-out clause was discussed. He stated that he was ‘not sure where [Steven Hunter’s] evidence came from.’¹²⁶ Later, faced with further correspondence referring to the opt-out clause, John-Paul

¹²² Steven Hunter, witness statement, 19/10/15, para 27.

¹²³ Steven Hunter, 19/10/15, T:598.39-46, 624.2-16.

¹²⁴ Steven Hunter, witness statement, 19/10/15, para 28; Steven Hunter, 19/10/15, T:599.4-8.

¹²⁵ Steven Hunter, witness statement, 19/10/15, para 28.

¹²⁶ John-Paul Blandthorn, 20/10/15, T:763.29-37.

Blandthorn conceded that it was ‘possible’ that there were discussions to that effect.¹²⁷ An inference arises on the face of these contemporaneous documents. The inference is that John-Paul Blandthorn, Cesar Melhem and Steven Hunter discussed the inclusion of an opt-out clause as a means of attracting membership from DSS workers, and that Steven Hunter introduced an opt-out clause accordingly.¹²⁸ That inference is drawn.

110. The DSS EBA was finalised at about this time. On 23 July 2008, Steven Hunter sent an email to employees attaching the proposed EBA and informing them that a vote will be taken on the agreement.¹²⁹ The email stated:

A representative from the (AWU) will be available to meet with staff at the locations:

- Mt Hotham - Time and Date to be confirmed
- Prince of Wales - Time and Date to be confirmed

Following the opportunity to meet with both the AWU and DSS representatives a vote will be taken. Every employee has the option to place a vote, although it is not compulsory.

...

Employees have the right to choose to be and or not to be a member of the AWU. Once the agreement is ratified formal documentation will be forwarded to all active employees confirming the details of the agreement. Staff who do not wish to become members will need to complete and return either by email or post a section noting their intent not to become members. All employees will be covered by the agreement, regardless of membership status with the AWU.

¹²⁷ John-Paul Blandthorn, 20/10/15, T:765.20-23.

¹²⁸ See, in particular Hunter MFI-1, 19/10/15, p 387.

¹²⁹ Hunter MFI-1, 19/10/15, p 230.

111. The email also included contact details for John-Paul Blandthorn. The attached EBA contained some changes to the rates set out in the previous draft. But the rates remained identical or very similar to those in the Cleanevent 2006 EBA.¹³⁰
112. On 24 July 2008, John-Paul Blandthorn responded to Steven Hunter proposing a date to meet with the workers.¹³¹ Further email correspondence ensued, during which John-Paul Blandthorn indicated his unavailability to meet that week.¹³²
113. On 5 August 2008, John-Paul Blandthorn sent an email to Steven Hunter stating:¹³³

Just wondering if you could send the names of the people who will be attending our function on Friday, otherwise Cesar was happy for just a donation if you can't attend.

114. Steven Hunter does not remember what the function was that he was invited to.¹³⁴ His evidence was that he had been asked by John-Paul Blandthorn to donate an amount in the region of \$10,000, being equivalent to a table of 10 at \$1,000.00 per head.¹³⁵ John-Paul Blandthorn also said that his recollection was that various businesses were asked by the AWU to buy a table for an event.¹³⁶

¹³⁰ Hunter MFI-1, 19/10/15, pp 242-245.

¹³¹ Hunter MFI-1, 19/10/15, p 299.

¹³² Hunter MFI-1, 19/10/15, p 302.

¹³³ Hunter MFI-1, 19/10/15, p 307.

¹³⁴ Steven Hunter, 19/10/15, T:600.24-28.

¹³⁵ Steven Hunter, 19/10/15, T:600.43-45, 601.1-3.

¹³⁶ John-Paul Blandthorn, 20/10/15, T:765.1-2

115. On 6 August 2008, Steven Hunter responded stating:¹³⁷

I have left a message on your phone last week. Unfortunately we will not be able to attend this coming Friday. Niamh and Scott are booth [sic] out of the country and I am packing my bags to jump on a plane as well. I will speak with Niamh about the option of making a donation to the AWU. I might suggest to Niamh that as soon as we get the award up and running that we make a donation at that point. I am hoping that with your visit to the Hotham and a visit to St Kilda that we are very close to getting it signed off.

116. The reference in the email to 'award' was to the enterprise agreement.¹³⁸ Steven Hunter gave the following account of his attitude at the time of sending the email:¹³⁹

At that point I was playing a little bit of a standoff. We needed to get an agreement in place. I wasn't going to have my hands tied behind my back and forced to make commitments that I didn't see as fair and reasonable, but I did see that there'd been, on both sides of the fence, an amount of work, quite a considerable amount of work had gone in to getting our award to what should have been finalisation and having it ratified, and, at that point, a donation in my mind would have been in recognition for works completed.

117. John-Paul Blandthorn responded on the same day, stating:¹⁴⁰

...This is the only function we will ask for tickets as it goes to the reelection of the Secretary.

Will be up there tomorrow and happy to do St Kilda at your convenience [sic].

118. On 28 October 2008 Steven Hunter sent an email to employees stating.¹⁴¹

¹³⁷ Hunter MFI-1, 19/10/15, p 307.

¹³⁸ Steven Hunter, 19/10/15, T:600.36-38.

¹³⁹ Steven Hunter, 19/10/15, T:601.3-12.

¹⁴⁰ Hunter MFI-1, 19/10/15, p 307.

Staff have now been given the opportunity to meet with myself and John-Paul from the AWU to discuss any concerns and or questions which they may have had regarding the proposed agreement.

119. The email invited votes on the proposed EBA by return email. John-Paul Blandthorn said that he does not recall ever meeting with DSS employees, but accepted that it was possible that he did so.¹⁴² The correspondence reveals that Steven Hunter made several attempts to have John-Paul Blandthorn meet with his workers. The meetings were expressly referred to in the email to DSS workers above. Whether such meetings ever took place is unclear on the documents following the distribution of the proposed EBA to employees. What is clear is that several attempts were made to arrange meetings with staff. The principal reason for them not occurring was John-Paul Blandthorn's unavailability. The evidentiary position is against John-Paul Blandthorn's suggestion that the references to 'guaranteed membership' were to the provision of access to prospective AWU members in the employ of DSS.

120. On 6 November 2008, Steven Hunter sent an email to John-Paul Blandthorn stating:¹⁴³

Our voting closed last night at 5pm and I am pleased to say that we have had 3 votes, all in favour of the agreement. Can you please confirm if you need copies of the emails and forward a sample of the opt out clause to be included on our application forms for new employees.

121. Steven Hunter said that at that stage DSS was already using an opt-out clause in its application forms but he wanted to see John-Paul

¹⁴¹ Hunter MFI-1, 19/10/15, p 315.

¹⁴² John-Paul Blandthorn, 20/10/15, T:764.26-28.

¹⁴³ Hunter MFI-1, 19/10/15, p 351.

Blandthorn's proposed wording to ensure that it was agreeable to both parties.¹⁴⁴

122. John-Paul Blandthorn responded on the same day stating:

I have been reading the agreement and there are a couple of tidy ups that I will forward shortly that are marked up.

Cesar will also need some sort of commitment regarding membership. (emphasis added)

123. Steven Hunter said that after receipt of this email, John-Paul Blandthorn then sent a further email to Steven Hunter, copying in Cesar Melhem and stating:¹⁴⁵

I have marked up changes to the document for you to look over.

Clause 19.4 can only be changed by increasing the overall rate or else it will fail the no-disadvantage test.

As discussed *Cesar will only sign* if we are guaranteed membership through some arrangement. (emphasis added)

124. The changes to the EBA (that had, by this stage, been voted on by members) included changes to the rates of pay.¹⁴⁶ Steven Hunter's understanding of the 'arrangement' referred to in this email, based on his conversation with John-Paul Blandthorn, was as follows:¹⁴⁷

What he was asking me to do was enter into - whether he's asking - he never directly asked me for a list of names that would marry up against a set number of memberships or agreed memberships. He was asking - from what I take from the conversation, or took from the conversation was that if - at that point he still hadn't confirmed what the rate per membership

¹⁴⁴ Steven Hunter, witness statement, 19/10/15, para 32.

¹⁴⁵ Hunter MFI-1, 19/10/15, p 353.

¹⁴⁶ Hunter MFI-1, 19/10/15, pp 364-367.

¹⁴⁷ Steven Hunter, 19/10/15, T:603.23-32.

was going to be, but let's just say it was \$12 a fortnight per member, he was asking for 20 members, and do your calculation on that for an annual amount.

125. The correspondence between John-Paul Blandthorn and Steven Hunter supports this interpretation. The AWU was not seeking a guarantee of access to members. Nor was it seeking a guarantee that DSS had at least one member whose employment would be subject to the agreement and whom the AWU was entitled to represent in relation to the work covered by the agreement.¹⁴⁸ The correspondence from John-Paul Blandthorn was seeking a guarantee that the AWU would receive an unspecified number of members in return for signing the EBA: ‘Cesar *will only sign* if we are guaranteed membership through some arrangement’ (emphasis added).¹⁴⁹
126. Steven Hunter said that once the employment form was distributed to employees, all of the staff had ticked to opt out of AWU membership.¹⁵⁰ Steven Hunter said that he had raised with the representatives of the AWU that he could not as a matter of practicality commit his workers to membership.¹⁵¹
127. Steven Hunter responded to John-Paul Blandthorn the same day, stating:¹⁵²

With regard to membership, we are already using the opt out clause on our application forms. We have not nominated the rate for employee contributions. From the conversations we had with yourself and Cesar

¹⁴⁸ *Workplace Relations Act* 1996 (Cth) s 328.

¹⁴⁹ Hunter MFI-1, 19/10/15, p 353.

¹⁵⁰ Steven Hunter, 19/10/15, T:601.42-47.

¹⁵¹ Steven Hunter, 19/10/15, T:602.23-32.

¹⁵² Hunter MFI-1, 19/10/15, p 387.

when we last met, I took it that we were to agree on a 1% of gross wage with a cap of \$12 per fortnight for all employees who do not opt out.

128. Steven Hunter said that he does not recall receiving wording for an opt-out clause, or confirmation of what the membership fee would be for DSS employees who became members of the AWU.¹⁵³
129. Steven Hunter said that, for reasons he cannot recall, the EBA that he had been negotiating with the AWU was never finalised.¹⁵⁴
130. In about August 2009, DSS engaged solicitors to prepare a single-enterprise EBA.¹⁵⁵ The EBA was drafted on the basis that it would not, on its terms, pass the no-disadvantage test when compared with two State awards.¹⁵⁶ DSS submitted to Fair Work Australia that the exceptional circumstances warranting approval of the agreement in the public interest were that DSS's main competitor was Cleanevent which had an award and EBA providing for low casual rates, and without equivalent rates, DSS would not be able to compete for events.¹⁵⁷
131. On 10 February 2010, Commissioner Lewin declined to approve the EBA on the basis that it did not pass the no-disadvantage test.¹⁵⁸ Commissioner Lewin rejected the argument identified above, observing:

¹⁵³ Steven Hunter, 19/10/15, T:605.32-42.

¹⁵⁴ Steven Hunter, witness statement, 19/10/15, para 39.

¹⁵⁵ Steven Hunter, witness statement, 19/10/15, para 40; Hunter MFI-1, 19/10/15, pp 389-464.

¹⁵⁶ Steven Hunter, witness statement, 19/10/15, para 41; Hunter MFI-1, 19/10/15, pp 478-479.

¹⁵⁷ Hunter MFI-1, 19/10/15, pp 483, 510-511.

¹⁵⁸ *Douglas Labour Services Pty Ltd; re Douglas Labour Services Pty Ltd Agreement 2009* [2010] FWA 555 (Hunter MFI-1, 19/10/15, p 514).

[20] The Applicant submits that because a competitor was fortunate to avail itself of the window of opportunity to apply and have approved a collective agreement against the lesser or less demanding test of approval operating between 26 March 2006 and 6 May 2007, it would not be contrary to the public interest to approve an agreement which fails the no-disadvantage test prescribed by the Fair Work Act 2009. The potential implication of accepting this Submission should be starkly apparent. It is difficult to see how, if adopted, such an approach should not also apply to any employer which operates in an industry in which competitor companies operate with existing agreements approved under the test which applied under the Workplace Relations Act 1996 in the period between 26 March 2006 and 6 May 2007. This would give rise to what would seem to be a new and exotic basis for the approval of enterprise agreements made during the bridging period. One which would have particular rather than general application and arise serendipitously for some employers and not for others operating in the same marketplace, depending upon what agreements were approved in the period between 26 March 2006 and 7 May 2007 and remain in operation.

[21] To introduce such a novel test of approval against what appears to be the clear and determined policy of the Parliament in the circumstances would seem to me to be contrary to a well established and considered view of the legislature of what the public interest requires in respect of the level of terms and conditions of employment to be provided by collective agreements between employers and employees, in order to be given statutory force by Federal legislation.

132. DSS was not a successful business. On 19 December 2012, it was placed into administration and was ultimately wound up.¹⁵⁹
133. There was a debate on the evidence and in submissions as to the causes of the failure of the business. It is not necessary to enter into that debate. Much of it involved unpersuasive attacks on the credit of Steven Hunter. Those attacks have been rejected. It is sufficient to note that the Administrators' report to creditors identified the reasons for the insolvency of the company as including high operating costs, including substantial employment costs.¹⁶⁰

¹⁵⁹ Steven Hunter, witness statement, 19/10/15, para 44.

¹⁶⁰ Hunter MFI-1, 19/10/15, p 524.

G – RENEWING THE 2006 EBA

134. The nominal expiry date of the 2006 EBA was 1 December 2009. As at 1 January 2010, the new industrial relations regime in the *Fair Work Act* 2009 (Cth) was due to commence. This included the introduction of the National Employment Standards, the ‘better off overall test’ for approval of enterprise agreements and the Modern Awards (subject to applicable transitional provisions).
135. There was a significant change in the environment in which the AWU could conduct its negotiations for a new EBA after this date. In particular, it was open to the AWU to apply to the Fair Work Commission for the termination of:
- (a) the 1999 Award, pursuant to Item 5 of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth); and
 - (b) the 2006 EBA, pursuant to item 16 of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) applying ss 225-227 of the *Fair Work Act* 2009 (Cth).
136. In the event that both of these instruments were terminated, a Modern Award would apply to determine the terms and conditions of employment for cleaning workers. The Modern Award which was relevant, for reasons set out below, was the *Cleaning Services Award* 2010. If the 1999 Award was terminated and approval was requested for a new enterprise agreement, the ‘better off overall’ test would be

applied by reference to the Modern Award.¹⁶¹ Application of the Modern Award would have resulted in significantly more beneficial terms and conditions of employment for Cleanevent employees. This did not occur until 2015, in circumstances described below.

137. The legislative changes effected by the *Fair Work Act 2009* (Cth) did not, however, require the AWU or Cleanevent to apply to terminate either the 1999 Award or the 2006 EBA. From Cleanevent's perspective, it was highly important not to do so. Application of the 'better off overall test' would have required Cleanevent to pay casual workers penalty rates of up to double time and half for public holidays. The cost to the Cleanevent business in being required to comply with the Modern Award was estimated by Steven Webber in 2012 as being as in the order of \$2,000,000.¹⁶² At an early stage of negotiations Michael Robinson (Cleanevent's General Manager of Human Resources and Risk) in an internal Cleanevent email referred to a 'saving of \$1.5M'.¹⁶³ In another internal email after negotiations had concluded, Michael Robinson spoke of a saving of 'greater than \$1 million in wages'.¹⁶⁴
138. Michael Robinson's evidence further explained the importance of avoiding the Modern Award:¹⁶⁵

¹⁶¹ Item 18(2)(b) of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

¹⁶² SW1, 28/5/15, pp 119-120.

¹⁶³ Cleanevent MFI-1, 19/10/15, pp 55-56.

¹⁶⁴ Cleanevent MFI-1, 19/10/15, p 312.

¹⁶⁵ Michael Robinson, witness statement, 29/5/15, para 17.

It was very commercially important to Clean Event to maintain the rates of pay contained in the 2006 EBA, as far as possible in any renewed or renegotiated arrangement. In December 2009, the 2006 EBA reached its nominal expiry date and prior to its expiry, negotiations for a renewed EBA began. I recall that the beneficial casual pay rates and overall agreement terms were very attractive to Spotless and one of the reasons it acquired the Clean Event business in 2010.

139. Michael Robinson agreed in oral evidence that the casual rates were very attractive to Spotless because there were many casual workers working for Cleanevent; the bulk of their work was on weekends and public holidays or at night; and this 'army' of casual workers was not receiving penalty rates for their weekend or public holiday work comparable to those which would have been paid pursuant to the Modern Award.¹⁶⁶
140. Before the nominal expiry date of the 2006 EBA John-Paul Blandthorn initiated discussions with Cleanevent concerning a replacement EBA. John-Paul Blandthorn was the organiser employed by AWU Vic in connection with Cleanevent at this time. He reported to the then State Secretary of the AWU Vic, Cesar Melhem.¹⁶⁷ AWU Vic prepared a commencement of bargaining letter to Cleanevent on about 9 November 2009.¹⁶⁸
141. Various negotiations on this subject proceeded as between John-Paul Blandthorn for the AWU and Steven Webber and Michael Robinson for the company in the latter part of 2009 and early 2010. At least initially, the negotiations were directed at replacing the 2006 EBA with

¹⁶⁶ Michael Robinson, 29/5/15, T:102.35-103.10.

¹⁶⁷ John-Paul Blandthorn, 3/6/15, T:426.14-15.

¹⁶⁸ Cleanevent MFI-1, 19/10/15, pp 48-49.

a standalone agreement on similar terms.¹⁶⁹ Subsequently it was decided that the better course was to 'roll over' the 2006 EBA, rather than enter into a replacement EBA.¹⁷⁰

The MOU and Side Letter

142. It is convenient at this point to examine the two end results of the negotiations. One was the execution by Cleanevent and the AWU of a memorandum of understanding continuing the 2006 EBA ('**MOU**'). The other was a promise by Cleanevent pay \$25,000 per annum to the AWU Vic: it was contained in a side letter dated 13 October 2010 (**Side Letter**).

143. The MOU was executed by Steven Webber on behalf of Cleanevent on 13 October 2010. It was executed by Paul Howes on behalf of the AWU on 12 November 2010.¹⁷¹ The circumstances in which that document came to be executed by Paul Howes are set out in more detail below. For present purposes it is convenient to note the following matters about it. In substance, it was an agreement between the AWU and Cleanevent to continue the 2006 EBA subject to some minor changes, including small increases in wages. By clause 2.7 it purported to prevent the AWU, Cleanevent and Cleanevent employees from taking industrial action, commencing enterprise bargaining or seeking to terminate the MOU or the 1999 Award. It is doubtful whether this clause was enforceable. It certainly could not have been enforceable against Cleanevent employees without their express

¹⁶⁹ Cleanevent MFI-1, 19/10/15, pp 14-15, 26-28, 31.

¹⁷⁰ Michael Robinson, witness statement, 29/5/15, para 23.

¹⁷¹ Cleanevent MFI-1, 19/10/15, pp 313-318.

agreement. There is no doubt however that the intention of both Cleanevent and the AWU was to abide by the clause.

144. The MOU endeavoured, therefore, to obtain for Cleanevent what would have been one of the results of an enterprise agreement certified under the *Fair Work Act 2009* (Cth) but without embarking on the statutory process required under that Act. As occurred in 2004, the parties avoided subjecting their arrangement to the scrutiny that the legislative regime required to be applied to arrangements of this kind.
145. The AWU Vic and Cleanevent had an agreement collateral to the MOU. It was documented in the Side Letter. It was signed by Michael Robinson on behalf of Cleanevent. It was in the following terms:¹⁷²

Dear Cesar,

I am writing to you regarding the implementation of new pay scales and the continuation of the terms and conditions as prescribed in the “Cleanevent Australia Pty Ltd AWU Agreement 2006” (Cleanevent EBA) and the agreements by Cleanevent to pay membership fees on behalf of some employees who wish to join the AWU.

While the MOU is in operation, Cleanevent will pay, on behalf of employees of Cleanevent who are or become members of the AWU, the employees’ union fees up to \$25,000 for each financial year up to 30 June 2013. Payments will be made by Cleanevent biannually (December and June) to the AWU on receipt of a list of Cleanevent employees and the associated membership fees that Cleanevent are being requested to pay.

During the period of operation of the MOU it is understood that the AWU will not commence or take any step which may result in the commencement of enterprise bargaining under the *Fair Work Act 2009*; or seek to terminate (or support or encourage the termination of) the Cleanevent EBA or the aforementioned MOU

¹⁷² Cleanevent MFI-1, 19/10/15, p 241.

146. The last paragraph quoted above repeated, in substance, what was promised by the AWU in paragraph 2.7 of the MOU. The promise in the first two paragraphs was expressed to be a promise to pay ‘up to’ \$25,000. On one view, it contemplated that the amount to be paid might be dependent upon the number of workers who wished to become members of the AWU. However, as will become apparent, the agreement was treated by both parties as an agreement to pay \$25,000 per annum. In substance what occurred was that Cleanevent, at the time of payment, provided a list of its employees to the AWU Vic without regard to whether they were already members of the AWU and without regard to whether they wished to become members. The AWU Vic then entered their names on the membership roll.
147. There was a substantial amount of evidence, and discussion in submissions, about how the above arrangements were negotiated. Much of that evidence is set out in what follows. Some of the details about how the arrangement was negotiated are unclear. But it is not necessary to deal, in what follows, with every aspect of these negotiations or make precise findings about what occurred at every step.

Conduct of the negotiations on behalf of the AWU

148. There is no controversy surrounding the fact that the negotiations in relation to renewing or replacing the 2006 EBA were led on behalf of Cleanevent by Michael Robinson and Steven Webber.
149. There was a dispute as to the role of Cesar Melhem in the negotiations on behalf of the AWU Vic. On the one hand, while John-Paul

Blandthorn said that he had carried out many of the day to day negotiations himself he also said that at all times he kept Cesar Melhem informed as to the progress of those negotiations. This included regularly seeking instructions from Cesar Melhem as to what to do next.

150. On the other hand Cesar Melhem claimed that he was not personally involved in the negotiation of the replacement to the 2006 EBA. Indeed he said that he did not even familiarise himself with the terms of the 2006 EBA. By way of example, Cesar Melhem's oral evidence included the following:¹⁷³

Q. You were personally involved, were you not in the negotiation of the MOU, certainly in 2010?

A. I wasn't directly; no, I was not.

Q. You familiarised yourself, I take it, with the content of the 2006 EBA for the purposes of the negotiations you conducted in 2010?

A. No.

Q. Not at all?

A. No.

Q. Wouldn't that have been an important thing for you to do, in the interests of your members?

A. No, the EBA is a national EBA; it is not a state based EBA, and I don't necessarily get involved in every single EBA. I've got 2000 employers, 2000 EBAs and don't expect me to get involved in every single EBA discussion.

151. The truth is that Cesar Melhem did have direct involvement in the conduct of the negotiations, in the sense that he received regular

¹⁷³ Cesar Melhem, 1/6/15, T:189.1-18.

reports from, and gave regular instructions to, John-Paul Blandthorn throughout the process. He also attended meetings with Cleanevent representatives, as set out below.

152. Cesar Melhem's submissions to the contrary are rejected. The contemporaneous documents clearly show that Cesar Melhem knew of and approved the arrangements that ultimately were entered into, and that he was centrally involved in their negotiation. They also indicate that he was centrally involved in the implementation of the arrangement in the Side Letter. John-Paul Blandthorn's evidence to this effect is supported by the surrounding circumstances. He was not an especially experienced organiser. On the other hand, Cesar Melhem was highly experienced and held the office of State Secretary. It is unlikely that Cesar Melhem would have relinquished any role in the negotiations and left matters in the hands of John-Paul Blandthorn.
153. Cesar Melhem was in general not a credible witness. His evidence was not satisfactory on many points, including this one. Often he gave implausible evidence in the face of what was obvious from documents. An example was his insistence in oral evidence that the arrangement in the Side Letter was a 'service fee', discussed below. It is not possible to accept his evidence on controversial points unless it is against his interest or corroborated.

The First Meeting at Cesar Melhem's office

154. The electronic calendars of both John-Paul Blandthorn and Cesar Melhem suggest that there were two meetings at the AWU offices

between AWU officials and Cleanevent representatives.¹⁷⁴ The first meeting in those calendars is recorded as being scheduled for 13 May 2010, with Cesar Melhem, Michael Robinson and John-Paul Blandthorn attending. The second is recorded as being scheduled for 17 September 2010. There is no record of who attended.

155. There was some confusion in the evidence regarding what was said at which meeting, engendered in part because the above calendars were not produced by the AWU until after the examination of Steven Webber, Michael Robinson and the first examination of Cesar Melhem.¹⁷⁵ No one made notes at either meeting.
156. It is not necessary to review the oral evidence about this meeting. It is likely that there was a discussion about Cleanevent paying a sum of money to the AWU as part of the process of rolling over the 2006 EBA. So much is suggested by two emails sent by Michael Robinson to Julianne Page.
157. The first, sent on 17 May 2010, attached a comparison of the 1999 Award to the proposed MOU with the AWU.¹⁷⁶ Julianne Page was at that time the Group General Manager for the Spotless Cleaning Division.¹⁷⁷ She was the person responsible for giving approval to the agreement that was being negotiated. She did so on the recommendation of the HR Department and after taking advice from

¹⁷⁴ Blandthorn MFI-3, 4/6/15; Blandthorn MFI-4, 4/6/15.

¹⁷⁵ Blandthorn MFI-3, 4/6/15; Blandthorn MFI-4, 4/6/15.

¹⁷⁶ Cleanevent MFI-1, 19/10/15, pp 55-56.

¹⁷⁷ Steven Webber, 28/5/15, T:21.2-3; Julianne Page, 19/10/15, T:545.30-33.

the legal department.¹⁷⁸ She was not herself involved in meetings with the AWU concerning the negotiations in relation to the MOU. The email was sent to her by way of update.¹⁷⁹

158. In his email of 17 May 2010 Michael Robinson noted that the difference between the 1999 Award and the 2006 EBA was approximately \$420,000 for event casuals and about \$1,200,000 for venue casuals. He then said:¹⁸⁰

The union are looking for an “opt out” clause in our casual application forms. Whilst this is not illegal there is some grey area surrounding the freedom of association and whether our part would constitute a violation of this. There is also the ethical argument that we are taking advantage of poor literacy in our workforce to push our own agenda.

On the flip side of this we are using the same form and trusting the same level of literacy to provide details of workcover injuries and criminal records and while it could be argued that these are usual parts of the application process these cleaners are used to, we are not hiding the process and could certainly highlight this again during inductions and assist in the “opt out” process to balance any disadvantage the cleaner may have.

... The union are looking at \$2 per shift for casuals which if they were lucky they would get, lets say, 100 at Victoria tracks and stadiums. Multiply that \$200 by about 50 footy games and race meets and the union would be lucky to pull \$10K per annum. For a saving of \$1.5M we could make a donation of \$20K to the union in some way, shape or form (tables at the AWU ball, paying our level 3 casuals membership, etc) and this would get over the line. This deal would only be locked to the Consent Award/ MOU while it stands, and after that all bets are off.

I am sure that making this “donation” in what ever [sic] form we choose would be legal but then this becomes a question of scruples. I have run this past Amanda (cc’d) she is certainly in favour of the high road on both the above scenarios, it saves any issues with integrity. While I share Amanda’s concerns for any exposure we may be opening ourselves to I feel there is

¹⁷⁸ Julianne Page, 19/10/15, T:550.35-47.

¹⁷⁹ Julianne Page, 19/10/15, T:547.10-20.

¹⁸⁰ Cleanevent MFI-1, 19/10/15, pp 55-56.

definitely merit in fleshing this out simply for the massive competitive advantage that we will be creating for ourselves in the market.

159. The reference to making a donation indicates that a proposal by the AWU Vic that Cleanevent pay it a sum of money was made at the first meeting. It is not clear from the email, and does not matter very much, whether it involved both a donation and a sum of money per casual. But both John Paul Blandthorn and Cesar Melhem accepted that that the latter matter was raised, at least at some point in discussions.¹⁸¹
160. The email also suggests that the AWU was looking for an ‘opt out’ clause. It is likely that this, too, was discussed at the meeting. Cesar Melhem accepted that it was.¹⁸² John-Paul Blandthorn had no recollection but accepted that it was possible.¹⁸³
161. The second email that suggests that a proposal to pay money was raised at this time was an email sent on 27 May 2010 by Michael Robinson to Steven Webber and Julianne Page.¹⁸⁴ In the email he referred to a meeting with David Jenkinson, Julianne Page and Amanda Ratnam at which a proposed further meeting with the AWU was discussed. Michael Robinson referred to Amanda Ratnam’s suggestion that an MOU should be drafted in advance of the meeting, and continued as follows:

...Amanda felt the terms of our payment of membership should sit within this document. The union will never agree to having any trade off for lower wages with a payment of membership in the one document. They indicated in our initial discussion on the MOU by saying “a separate

¹⁸¹ Cesar Melhem, 22/10/15, T:888.4-13; John-Paul Blandthorn, 20/10/15, T:746.30-42.

¹⁸² Cesar Melhem, 22/10/15, T:887.24-45.

¹⁸³ John-Paul Blandthorn, 20/10/15, T:743.29-43, 745.25-31.

¹⁸⁴ Cleanevent MFI-1, 19/10/15, p 175.

agreement''. It would be crazy for the union to put that down on a page and to be honest I wouldn't feel happy with it being on the same document either.

...

First, lets agree with the union on a price. JP phoned me this morning to discuss changing the meeting time to Tuesday and we bantered around amounts, he suggested \$20K may be too high and that he feels Cesar would go for a little less (what a great relationship). His flawed rationale though was that \$20K was about 1.2% of payroll and Cesar would be happy with 1%. Now we know that our payroll is much larger than that so I don't think we mess around with trying to save a thousand or two when we have a much bigger prize at the end. I don't want to alert them to the true payroll percentage of what we are going to offer because it may put an unnecessary sour on a negotiation we want to keep positive. So lets assume that \$20K is our resting agreement with the union.

...

Thirdly we need to work out the documentation. The reality is no matter what we sign at any time the AWU can pull this deal out from under us (Which we are pretty sure they wont [sic] if we can get the deal finalised) We need to document in the MOU that we agree to a set of pay scales and that the union agree to not terminate the consent agreement or the MOU until the MOU has expired.

...

As far as documentation of the membership agreement I think we could go either way depending on our legal advice from Amanda. If we have a handshake deal, the union will be happy, there is no risk to the union that we wont [sic] pay it as they will simply terminate all privileges and send us straight to the Modern Award rates. Why would we need a document of that, I suggest that we simply stage our payments of membership so that if the MOU for some reason fell through mid year then we wouldn't have paid all the memberships for nothing. Even if we agree to pay all memberships after 6 months then we would have saved that \$20K thirty fold in wages by then. I don't care if we document that part or not.

I also suggest that we commit to a tick box for the union on our application forms and invite them to our inductions...

162. It would seem from this email that by 27 May 2010 a specific proposal to pay \$20,000 had been floated. It is clear, too, that the discussions with John-Paul Blandthorn referred to as having occurred on the

morning on which the above email was sent were not the first occasion on which a proposal of that kind had been made.

163. The email also addresses a question that seems to have greatly exercised the minds of those involved in the arrangements. Should it be documented and, if so, how? It was clearly a sensitive matter. As has been seen, the ultimate decision was to record the arrangement in writing, but in a separate document.

First draft of the side deal

164. The attention given to this topic is apparent from Michael Robinson's email of Monday 31 May 2010, sent an email to Steven Webber and Julianne Page.¹⁸⁵ It attached a draft MOU which incorporated a draft of what became the Side Letter. Michael Robinson's email of 31 May 2010 was in the following terms:

See the attached MOU adjusted by the legal team. Note clause 2.2 and 2.3 that tied the membership to the EBA. This cannot be our approach. These clauses need to be omitted. Please comment.

165. Clauses 2.2 and 2.3 of the draft MOU attached to this email provide in substance that Cleanevent would pay on behalf of the employees of Cleanevent 'who are or would become members of the AWU,' amounts described as 'union fees' up to \$10,000 for the next three financial years.
166. It would seem from the content of the 31 May 2010 email (taken with the earlier email dated 27 May 2010) that Michael Robinson had

¹⁸⁵ SW1, 28/5/15, p 34-37.

serious reservations about recording the payments suggested in the draft MOU attached to his email.

167. John-Paul Blandthorn accepted that he indicated that the AWU did not wish the arrangement in respect of membership and the MOU to be recorded in the one document.¹⁸⁶ His reasoning was that the MOU was to govern the employment terms of the employees.¹⁸⁷ He did not accept, but would not demur, from the proposition that a reason for this suggestion was that it could be seen as a trade-off for the low wages provided for in the MOU.¹⁸⁸
168. Cesar Melhem said that he did not recall whether there was any discussion about recording the side deal separately to the MOU. He said that he did not really care how the agreement was recorded. ‘A handshake would have done the job.’¹⁸⁹

August correspondence

169. The next email produced to the Commission by either Cleanevent or the AWU Vic relating to these negotiations was dated 19 August 2010.¹⁹⁰ It is apparent from the evidence that there was no cessation in negotiations between 31 May 2010 and this time. Why were no documents produced? This question was canvassed with various witnesses. But no clear answer is apparent.

¹⁸⁶ John-Paul Blandthorn, 20/10/15, T:748.9-12.

¹⁸⁷ John-Paul Blandthorn, 20/10/15, T:748.14-20.

¹⁸⁸ John-Paul Blandthorn, 20/10/15, T:748.14-40.

¹⁸⁹ Cesar Melhem, 22/10/15, T:887.1-22.

¹⁹⁰ SW1, 28/5/15, tab 3, p 39.

170. Whether the production is incomplete or not, it is at least clear that on 19 August 2010 Michael Robinson sent an email to John-Paul Blandthorn with a copy to Steven Webber under the subject heading ‘EBA Changes’.¹⁹¹ Michael Robinson’s email of 19 August 2010 noted that Cleanevent accepts certain changes to what was presumably a draft memorandum of understanding under discussion at that time. Michael Robinson’s email of 19 August 2010 concluded:¹⁹²

I trust these adjustments find you favourably. I think we are getting close to finalising this document.

171. On 31 August 2010 John-Paul Blandthorn sent an email in response to Michael Robinson, with a copy to Steven Webber.¹⁹³ John-Paul Blandthorn’s response was as follows:

This seems fine.

Cesar would like a letter or email from Cleanevent stating that it is happy to pay a contribution to the AWU if you are ok with that?

Do we need to meet to wrap this up?

Probably best if I bring Cesar as well.

172. Cesar Melhem’s evidence was that it was possible – although he also said ‘I don’t quite remember’ – that he told John-Paul Blandthorn that he wanted a letter or email from Cleanevent stating it was happy to pay a contribution.¹⁹⁴

¹⁹¹ SW1, 28/5/15, tab 3, p 39.

¹⁹² SW1, 28/5/15, tab 3, p 39.

¹⁹³ SW1, 28/5/15, tab 3, p 38.

¹⁹⁴ Cesar Melhem, 1/6/15, T:206:22-26.

173. The following day, 1 September 2010, Michael Robinson responded by email as follows:¹⁹⁵

I will get the letter to you, and then if you are happy with that we will come over and sign it off.

174. A short time later John-Paul Blandthorn sent an email back to Michael Robinson stating 'Sounds good'.¹⁹⁶

175. Later, on 1 September 2010 Michael Robinson sent a further email to John-Paul Blandthorn with a copy to Steven Webber, this time with the subject heading reading 'Membership contribution'.¹⁹⁷ Michael Robinson's email of 1 September 2010 read as follows:

I thought Cesar might like this membership contribution drafted as an MOU also. Let me know if this is acceptable or if you think changes are required (This is what I understood was agreed to by both parties). It will be good to set this part of the relationship out formally so that each party understands the process.

176. Michael Robinson's email of 1 September 2010 at 1.56pm had attached a draft memorandum of understanding.¹⁹⁸ This memorandum of understanding was in similar terms to that which was that sent under cover of Michael Robinson's email of 31 May 2010 (see above), except that clause 2.2 now refers to an amount of \$20,000 rather than \$10,000. It is not clear why Michael Robinson's position has changed from that which articulated in his email of 31 May 2010, namely that the side deal could not be recorded in the MOU.

¹⁹⁵ SW1, 28/5/15, tab 3, p 38.

¹⁹⁶ SW1, 28/5/15, tab 3, p 38.

¹⁹⁷ SW1, 28/5/15, tab 4, p 41.

¹⁹⁸ SW1, 28/5/15, tab 4, pp 43-45.

177. On 2 September 2010 John-Paul Blandthorn sent an email in response in the following terms:¹⁹⁹

I think this is too formal and we should steer clear of a MOU or deed as such.

Cesar is just looking for an undertaking that Cleanevent will contribute the money each year as discussed from year to year by us.

178. Cesar Melhem said it was possible but he did not recall whether John-Paul Blandthorn had showed him the draft letter. However he denied that he had said words ‘I’m just looking for an undertaking’. His evidence was: ‘no, I don’t recall I’ve said that, and I wouldn’t say that’.²⁰⁰ He gave that evidence on 1 June 2015. On 22 October 2015, his position was that he did not care at the time whether a signed document was prepared. As he put it: ‘A handshake would have done the job.’²⁰¹ It is likely that John-Paul Blandthorn in the above email was accurately conveying to Michael Robinson a position that had been communicated to him by Cesar Melhem. This underscores the proposition, discussed earlier, that Cesar Melhem had a significant role in the negotiations. It also indicates the close consideration given by all concerned to the question of whether the side deal should be documented, and if so how.

Drafts of the Side Letter

179. Michael Robinson accepted the approach suggested by John-Paul Blandthorn in the above email. On 6 September 2010 he sent an email

¹⁹⁹ SW1, 28/5/15, tab 4, p 41.

²⁰⁰ Cesar Melhem, 1/6/15, T:207.1-4.

²⁰¹ Cesar Melhem, 22/10/15, T:887.1-22.

to John-Paul Blandthorn with the subject heading 'Email to Cesar'. It began:²⁰²

Just looking for your thoughts on this letter. Does this reflect your understanding of our agreement? If you think it is fine ill [sic] wack [sic] it on letterhead or send it straight to Cesar and then we can meet to finalise.

180. The email went on to set out the text of what would become in due course the Side Letter.
181. John-Paul Blandthorn was asked in evidence if he got instructions from Cesar Melhem on the form of letter contained within Michael Robinson's email and he replied that that would have been his practice.²⁰³ It is likely that he did get such instructions.
182. The draft prepared by Michael Robinson on 6 September 2010 was in the following terms (save that John-Paul Blandthorn struck through the indicated parts of the text in circumstances described below):²⁰⁴

Cesar,

I am writing to you regarding the implementation of new pay scales and the continuation of the terms and conditions as prescribed in the "Cleavevent Australia Pty Ltd AWU Agreement 2006" (Cleavevent EBA) and the agreement by Cleavevent to pay membership fees on behalf of some employees who wish to join the AWU.

While the MOU is in operation, Cleavevent will pay, on behalf of employees of Cleavevent who are or become members of the AWU, the employees' union fees up to \$20,000 for each financial year up to 30 June 2013 (This approximately represents 1% of payroll). Payments will be made by Cleavevent biannually (December and June) to the AWU, and

²⁰² SW1, 28/5/15, tab 5, p 46.

²⁰³ John-Paul Blandthorn, 3/6/15, T:446.46-447.2.

²⁰⁴ SW1, 28/5/15, tab 5, p 46.

Cleanevent will provide a list of names that the union fees will be paid for. ~~on receipt of a list of Cleanevent employees and the associated membership fees that Cleanevent are being requested to pay.~~

During the period of operation of the MOU it is understood that the AWU will not commence or take any step which may result in the commencement of enterprise bargaining under the *Fair Work Act 2009*; or seek to terminate (or support or encourage the termination of) the Cleanevent EBA or the aforementioned MOU.

Cleanevent look forward to continuing the many years of positive association with the AWU.

183. John-Paul Blandthorn struck through the indicated parts in an email sent on 7 September 2010.²⁰⁵

I would make the following change that I have highlighted.

184. The change which John-Paul Blandthorn seems to have made was the deletion of the words in ‘~~strikethrough~~’ in the above quote. It makes it plain that it was not intended that the AWU Vic provide any lists of members to Cleanevent for the purposes of calculating the amount of membership fees. As stated at the outset, the arrangement was in fact implemented by the provision of lists by Cleanevent to the AWU.

185. On 12 September 2010, Michael Robinson sent an email to John-Paul Blandthorn, stating:²⁰⁶

I have the letter and MOU ready, just need a time and place to meet with Cesar and yourself to sign this off and then work out the back pay to the permanent staff members.

186. That email was forwarded to Cesar Melhem on 14 September 2010.²⁰⁷

²⁰⁵ SW1, 28/5/15, tab 5, p 46.

²⁰⁶ Cleanevent MFI-1, 19/10/15, p 191.

²⁰⁷ Cleanevent MFI-1, 19/10/15, p 193.

187. On 15 September 2010 Michael Robinson sent an email to John-Paul Blandthorn with the following words:²⁰⁸

Please find attached the MOU and pay scales as agreed and below and the email to Cesar regarding the contribution of membership fees.

188. As is apparent from the above words, this email included a draft of the Side Letter. The draft was an amended version of the draft sent in his email of 6 September 2010.²⁰⁹
189. On 15 September 2015, John-Paul Blandthorn forwarded the above email from Michael Robinson to Cesar Melhem, with the message ‘HERE IT IS.’²¹⁰ Cesar Melhem maintained that he did not recall seeing the letter.²¹¹ However it is likely that he read it at the time.
190. There was evidence concerning the processes through which the Side Letter and MOU were approved within Cleanevent. It is not necessary to canvass that evidence. It is sufficient to note that both the MOU and Side Letter were approved by Julianne Page. That approval was within the scope of her authority.

The Second Meeting in Cesar Melhem’s office and finalising the MOU

191. On 19 September 2010 a second meeting took place in Cesar Melhem’s office attended by Cesar Melhem, John-Paul Blandthorn, Steven Webber and Michael Robinson. There was oral evidence given about it. But there were no contemporaneous notes which recorded

²⁰⁸ SW1, 28/5/15, tab 6, p 48.

²⁰⁹ SW1, 28/5/15, tab 6, p 48.

²¹⁰ Cleanevent MFI-1, 19/10/15, p 194.

²¹¹ Cesar Melhem, 22/10/15, T:891.44-46.

what occurred during it. It is not necessary to canvass that evidence, save to say that it appeared to be common ground that there was some discussion about the payment of a fee by Cleanevent to the AWU. This is to be expected, having regard to the negotiations that had been ongoing since the time of the first meeting.

192. The circumstances in which approval of the MOU by the AWU National Office was requested and given are discussed below. For present purposes it is sufficient to note that this approval process seems to have commenced with a 21 September 2010 email sent by John-Paul Blandthorn to Zoe Angus, an AWU legal officer.²¹² More is said later in this Report about that email and its response. For present purposes it is sufficient to note that there then followed communications involving John-Paul Blandthorn, Cesar Melhem and Zoe Angus about aspects of that draft document.²¹³

193. The result of the above process was that on 5 October 2010 John-Paul Blandthorn sent an email to Michael Robinson and Steven Webber attaching the draft memorandum of understanding and the proposed letter to Cesar Melhem (now on letterhead).²¹⁴

194. John-Paul Blandthorn's email of 5 October 2010 read as follows:

Attached are two documents.

If you are happy Cesar will send to National Office for signing.

²¹² Zoe Angus, witness statement, 20/10/15, Annexure 1; Cleanevent MFI-1, 19/10/15, pp 202-210.

²¹³ Cleanevent MFI-1, 19/10/15, p 211; Cleanevent MFI-1, 19/10/15, pp 224-228; Cleanevent MFI-1, 19/10/15, p 229.

²¹⁴ SW1, 28/5/15, pp 62-69.

195. It is clear that the draft letter to Cesar Melhem did not need to be sent to the National Office ‘for signing’. The only proposed signatory of the draft letter was Michael Robinson.²¹⁵ Nonetheless, the terms of John-Paul Blandthorn’s email suggest that, at that time, he may have thought that the Side Letter would be provided to the National Office.
196. There followed email correspondence between Michael Robinson and John-Paul Blandthorn about these draft documents. The correspondence suggests that Cesar Melhem was kept closely informed by John-Paul Blandthorn and was overseeing the negotiation process.
197. On 8 October 2010 at 11.51am Michael Robinson sent an email to John-Paul Blandthorn with a copy to Steven Webber, responding to John-Paul Blandthorn’s email of 5 October 2010.²¹⁶
198. Michael Robinson’s email raised questions or issues concerning the draft documentation, in relation to clauses 2.6 and 3.3, and the proposed fee of \$25,000. In relation to the last point Michael Robinson’s email of 8 October 2010 stated as follows:

For the purposes of signing off this document we need to keep the fee at \$20k because this is what we have gained sign off for. It is outside our authority limits to approve anything higher at this particular point though you have SW’s word that upon winning an additional contract of some significance we will meet with you and discuss the amount again. We will certainly be on the front foot with this discussion or we can delay this process further with the Spotless bureaucracy and request an increase. Thoughts?

²¹⁵ SW1, 28/5/15, p 69.

²¹⁶ SW1, 28/5/15, p 71.

199. On 8 October 2010 at 3.37pm John-Paul Blandthorn sent an email in response to Michael Robinson.²¹⁷ In his email John-Paul Blandthorn provided some information concerning the operation of clause 2.6 and stated that he had changed the wording of clause 3.3. He also states:

Cesar is keen on the \$25K I would have to get his approval to go back to \$20K.

200. Sixteen minutes later, at 3.53pm on 8 October 2010 Michael Robinson sent an email to John-Paul Blandthorn in the following terms:²¹⁸

Thanks for that.

I'll work on getting the fee to \$25K if we can look at 3.3 again. I am just concerned that, as happened with the consent agreement, by signing this I may preclude Cleanevent from a competitive advantage that I am not aware of. I understand that the consent will probably not be in existence by the time we renegotiate and the modern award will probably be the reference document at that time but in absence of sending this back past our legal team I would not like to box us into that without allowing the business to explore other options. Can you move on this so I don't have to involve legal?

201. Eight minutes later, at 4.01pm on 8 October 2010 John-Paul Blandthorn responded to this email in the following terms:²¹⁹

The beauty of a MOU is it is not enforceable.

Cesar is pretty keen in putting something in their [sic] but I understand if you need to run it past your legal department.

202. At 4.32pm on 8 October 2010 Michael Robinson responded to John-Paul Blandthorn's email as follows:²²⁰

²¹⁷ SW1, 28/5/15, tab 9, p 71.

²¹⁸ SW1, 28/5/15, tab 9, p 71.

²¹⁹ SW1, 28/5/15, tab 9, p 70.

The issue that I have here is twofold.

1. It is my understanding that Cleanevent was bought under certain warranties that included governing industrial instruments. When I take this to legal I am sure that a response to that effect will prevent a clause like this being agreed to.
2. The appropriate reference agreement cannot be “agreed to”, it must be one that applies by law. The commission will make that determination based on both our submissions depending on the business and industrial environment at the time.

Can you please run this past Cesar, I am happy to come down and discuss this position and the reasoning behind it with him if he so wishes.

203. At 5.43pm on 8 October 2010 John-Paul Blandthorn responded to Michael Robinson’s email stating:²²¹

I will run it pass [sic] Cesar and get back to you.

204. On 11 October 2010 at 12.27pm John-Paul Blandthorn sent an email to Michael Robinson stating in respect of clause 3.3:²²²

What if we shifted that clause or something similar into the letter?

205. At 3.10pm on 11 October 2010 Michael Robinson responded to John-Paul Blandthorn’s email rejecting that proposal:²²³

Execution of the MOU and Side Letter by Cleanevent

206. On 13 October 2010 at 9.05am John-Paul Blandthorn sent an email to Michael Robinson attaching the draft memorandum of understanding

²²⁰ SW1, 28/5/15, tab 9, p 70.

²²¹ SW1, 28/5/15, tab 9, p 70.

²²² SW1, 28/5/15, tab 10, p 73.

²²³ SW1, 28/5/15, tab 10, p 73.

and the letter to Cesar Melhem from Cleanevent and stating as follows:²²⁴

Attached are final documents.

1. We have removed the reference to any Modern Award.
2. The \$25,000 needs to remain.

This is as far as the AWU are prepared to move from the attached documents.

I am very keen to meet with members on Thursday or Friday to do a vote for approval because I will be away the next two weeks.

If you could let me know if Cleanevent are happy to proceed that would be appreciated.

207. The draft letter to Cesar Melhem was the final version of the Side Letter that has been set out in full earlier in this Report.
208. Shortly after this email was received, both the MOU and Side Letter were executed by Cleanevent: the former by Steven Webber and the latter by Michael Robinson. The documents were sent to John-Paul Blandthorn by Michael Robinson by email on 13 October 2010.²²⁵

Did Cleanevent employees approve the MOU and/or Side Letter?

209. There is some suggestion in the evidence that the MOU was approved by Cleanevent employees. John-Paul Blandthorn's email of 13 October 2010 at 9.05am suggested that he would be meeting with members on either 14 or 15 October 2010.²²⁶ Michael Robinson's

²²⁴ SW1, 28/5/15, tab 10, p 73.

²²⁵ Cleanevent MFI-1, 19/10/15, pp 234-241.

²²⁶ SW1, 28/5/15, tab 10, p 73.

email of the same day likewise referred to a meeting with employees.²²⁷ On 15 October 2010 in an email to Zoe Angus, John-Paul Blandthorn stated ‘We have polled the member [sic] and they are 100% in favour of the deal’. Zoe Angus gave evidence that she did not enquire of John-Paul Blandthorn as to records of polling of members or a breakdown of voting on the agreement.²²⁸ Although voting records were produced to the Commission in respect of the 2004 and 2006 EBAs, none was produced in respect of the 2010 MOU.

210. Cesar Melhem deposed that he did not know ‘specifically’ whether a meeting with members took place but he assumed that a meeting took place.²²⁹ Steven Webber was unsure as to whether the MOU was authorised or approved by employees by Cleanevent, although he said also ‘I would say it would have been put through the delegates’.²³⁰
211. None of the Cleanevent workers who gave evidence said they recalled voting on an enterprise agreement or the MOU. Shalee Nicole Allameddine gave evidence that she thought that she would have been aware of any EBA negotiations in 2010 if they had occurred.²³¹ Robyn Cubban recalled that in 2010 there was ‘talk around Cleanevent of a new enterprise agreement coming into place’, but to the best of her

²²⁷ Cleanevent MFI-1, 19/10/15, p 234.

²²⁸ Zoe Angus, 20/10/15, T:677.29-47.

²²⁹ Cesar Melhem, 1/6/15, T:216.6-8.

²³⁰ Steven Webber, 28/5/15, T:41.45-46.

²³¹ Shalee-Nicole Allameddine, witness statement, 29/5/15, para 10

knowledge, it never did come into place. She was not aware that the MOU had been entered into.²³²

212. It is not possible to be satisfied on the above evidence that the MOU was approved by any Cleanevent workers. However, there was no suggestion in the evidence or submissions that John-Paul Blandthorn was attempting to mislead Zoe Angus when he suggested that there had been a 'poll' of some kind. As indicated, the evidence suggests that a meeting of some kind was planned. However the evidence does not enable any finding to be made as to what precisely occurred.
213. It is, however, unlikely that any attempt was made to inform any Cleanevent employees of the existence or terms of the Side Letter. Julianne Page accepted that, looking back, Cleanevent should have informed the workers about the Side Letter, because its effect in her mind was that 'we had signed them up'.²³³ It follows, from that acceptance, that she took no steps to ensure that the casual workers were made aware that they were entitled to access the services of the union following the execution of the Side Letter. Steven Webber himself did not take any steps himself to notify members of the AWU, or for that matter Cleanevent's employees generally, about it.²³⁴ Neither John-Paul Blandthorn nor Michael Robinson suggested that they took any such steps.

²³² Robyn Cubban, witness statement, 28/5/10, paras 15, 17.

²³³ Julianne Page, 19/10/15, T:564.1-29.

²³⁴ Steven Webber, 28/5/15, T:42.9-21.

214. The Cleanevent workers who gave evidence said that they were not aware of any arrangement pursuant to which Cleanevent paid money on their behalf for union membership fees.²³⁵

Execution of the MOU by AWU National Office

215. The MOU regulated all Cleanevent employees regardless of which State they were in. The practice at the AWU was that such agreements required approval by the AWU National Office.²³⁶ In the circumstances that are discussed below, that approval was given. These circumstances raise three factual issues. The first is whether approval of the Side Letter was ever sought by the AWU Vic or given by the National Office. The second is whether and under what circumstances the consent of the Queensland Branch was obtained. The third is the level of consideration given by the National Office to the agreement: how did such a disadvantageous agreement find favour at National level?
216. The first issue is relatively straightforward. It is fairly clear that the Side Deal was never sent to National Office for approval, or in fact approved. It would seem National Office knew nothing about it. What is less clear is why.

²³⁵ Ken Holland, witness statement, 28/5/15, para 12; Robyn Cubban, witness statement, 28/5/15, para 8; Brian Miles, witness statement, 28/5/15, para 9; Marcin Pawlowski, witness statement, 28/5/15, para 11; Graeme Heatley, witness statement, 28/5/15, para 12; Nayan Debnath, witness statement, 29/5/15, para 7; Colleen Ellington, witness statement, 29/5/15, para 12; Shalee-Nicole Allameddine, witness statement, 29/5/15, para 12.

²³⁶ See, for example, Zoe Angus, 20/10/15, T:674.3-22; John-Paul Blandthorn, 3/6/15, T:453.11-22, 36-46; John-Paul Blandthorn, 3/6/15, T:451.32-45.

217. On 13 October 2010 John-Paul Blandthorn sent an email to Cesar Melhem stating:²³⁷

Cesar,

Attached are the final documents.

Do you want me to send to National Office?

218. There was no attachment to the email. Cesar Melhem responded seeking the attachment and John-Paul Blandthorn responded attaching both of the documents sent to him by Michael Robinson earlier that day, the MOU and the Side Letter.²³⁸

219. On 15 October 2010 John-Paul Blandthorn sent an email to Zoe Angus attaching only the MOU and not the Side Letter. The email stated:²³⁹

Attached is the MOU Cesar has agreed to with Cleanevent.

We have polled the member [sic] and they are 100% in favour of the deal.

We are hoping you could get Paul or Scott to sign on behalf of the National Office.

220. Counsel assisting submitted that the appropriate inference to draw from these emails is that Cesar Melhem instructed John-Paul Blandthorn not to send the Side Letter to National Office. Cesar Melhem disagreed.

221. John-Paul Blandthorn's evidence supports the submission of counsel assisting. He stated that, as per his email, he had tried to discuss with

²³⁷ Cleanevent MFI-1, 19/10/15, p 242.

²³⁸ Cleanevent MFI-1, 19/10/15, p 243. The attachments bore the same file names as the attachments to Michael Robinson's email.

²³⁹ Zoe Angus, witness statement, 20/10/15, Annexure 4; Cleanevent MFI-1, 19/10/15, pp 251-257.

Cesar Melhem whether the documents attached to his email should be sent to the National Office.²⁴⁰ He said that he did not have a specific recollection.²⁴¹ But he said that to the best of his memory the effect of the conversation he had with Cesar Melhem was that the letter was between the AWU Vic and Cleanevent, and he should send the document to National Office that pertained to the National Office.²⁴² He agreed that a decision was made not to send the Side Letter to the National Office.²⁴³ He accepted that, in hindsight, the existence of a Side Letter was an important matter that should have been referred to the National Office.²⁴⁴ The decision not to do so was taken by Cesar Melhem as Secretary, with whom he was in contact.²⁴⁵

222. Cesar Melhem in his evidence denied that he told John-Paul Blandthorn not to send the Side Letter to the National Office.²⁴⁶ He would not accept that proposition that it was apparent from these two emails the Side Letter was not sent (although he did not positively assert that it was sent).²⁴⁷ He gave evidence that he had no recollection of instructing John-Paul Blandthorn not to send the Side Letter to National Office and that there was no reason for him to do so.²⁴⁸

²⁴⁰ John-Paul Blandthorn, 20/10/15, T:752.32-37.

²⁴¹ John-Paul Blandthorn, 20/10/15, T:754.7-10.

²⁴² John-Paul Blandthorn, 20/10/15, T:752.39-43.

²⁴³ John-Paul Blandthorn, 20/10/15, T:753.4-6.

²⁴⁴ John-Paul Blandthorn, 20/10/15, T:753.15-18, 755.30-34, 756.20-24.

²⁴⁵ John-Paul Blandthorn, 20/10/15, T:753.26-43.

²⁴⁶ Cesar Melhem, 22/10/15, T:878.15-31.

²⁴⁷ Cesar Melhem, 22/10/15, T:882.14-31.

²⁴⁸ Cesar Melhem, 22/10/15, T:879.21-24.

223. Not entirely consistently, Cesar Melhem also maintained that the arrangement reflected in the Side Letter was a matter for the Victorian Branch, and had nothing to do with the National Office.²⁴⁹ Asked whether he considered that the other Branches might be interested in knowing that the Victorian branch was receiving an additional benefit, he responded:²⁵⁰

It's the matter for other branches to negotiate their own things.

224. If, as he suggested, his view was the Side Letter was nothing to do with National Office, then it is likely that Cesar Melhem would have expressed that view to John-Paul Blandthorn if asked. In John-Paul Blandthorn's email of 13 October 2010 Cesar Melhem was asked. It is clear from John-Paul Blandthorn's email of 15 October 2010 that the Side Letter was not sent. It is highly likely that this was because of an instruction from Cesar Melhem. Counsel assisting's submission that the decision not to inform National Officer was deliberate is correct.

225. Both Zoe Angus and Paul Howes disclaimed any knowledge of the side deal.²⁵¹ Having regard to the above emails, and to the absence of any positive evidence from John-Paul Blandthorn or Cesar Melhem that the Side Letter was drawn to their attention, that evidence should be accepted.

226. The failure of the Victorian Branch to draw the attention of National Office to the Side Letter was highly unsatisfactory. It obviously would have been important for the National Office to know about it,

²⁴⁹ Cesar Melhem, 22/10/15, T:882.37-46.

²⁵⁰ Cesar Melhem, 22/10/15, T:884.47-885.4.

²⁵¹ Zoe Angus, 20/10/15, T:674.28-38; Paul Howes, witness statement, 20/10/15, para 16.

particularly when, as discussed below, a number of problematic aspects of the MOU were identified by Zoe Angus.

227. The above deals with the first issue identified above: whether the Side Letter was drawn to the attention of the National Office. The second and third issues can be dealt with together. They concern the process of approval of the MOU within National Office.

228. Also on 19 October 2010 at 10.50am, Zoe Angus forwarded John-Paul Blandthorn's email of 15 October 2010 to a large number of AWU staff, setting out the key effects of the MOU and requesting that branches contact Scott McDine with any concerns about committing to the MOU on a National basis by 22 October 2010.²⁵²

229. Zoe Angus then sent a further email to John-Paul Blandthorn on 19 October 2010 at 10.52am, stating:²⁵³

I've only just twigged this is a national agreement ... gotta go through the internal process of consultation ... will take about a week, will advise if any probs emerge.

230. John-Paul Blandthorn responded on 20 October 2010.²⁵⁴

It is a national agreement but there is [sic] very few people it has an impact on outside Victoria.

231. On 22 October 2010, Zoe Angus sent an email to John-Paul Blandthorn, copying Scott McDine and stating the following.²⁵⁵

²⁵² Zoe Angus, witness statement, 20/10/15, Annexure 6; Cleanevent MFI-1, 19/10/15, pp 261-268.

²⁵³ Zoe Angus, witness statement, 20/10/15, Annexure 5; Cleanevent MFI-1, 19/10/15, p 269.

²⁵⁴ Cleanevent MFI-1, 19/10/15, p 269.

...Looks like we've hit a snag with the Cleanevent MOA.

After circulating the MOA to other Branches, Qld Branch sent back some concerns, most particularly in relation to the "other states" wage rates. See the email from Tom Jeffers below. Scooter then asked me to review the MOA against the relevant award. I include below my comments to Scooter about the MOA. As you will see, there is a problem with the wage rates falling below the award rates.

What do you want to do? Clearly Paul is unlikely to sign the MOA in its current form. Do you want to raise these issues with Cesar and/or Cleanevent? Let me know...

232. This email in substance identified two areas of concern. The first arose out of Zoe Angus' own analysis of the MOU. That is explored below. The second was that the Queensland Branch had identified that wages payable to Queensland workers under the MOU were less than those paid to workers in Victoria and New South Wales.²⁵⁶ The person dealing with the matter at the Queensland Branch was Tom Jeffers, Branch Vice President and Southern District Secretary. He was reporting on this issue to Ben Swan, Branch Assistant Secretary.
233. It was unclear from the evidence how, if at all, the second issue was resolved to the satisfaction of the Queensland Branch. The discrepancy between wage rates was not changed. On 11 November 2010, Cesar Melhem sent an email to John-Paul Blandthorn stating 'I spoke to Tom Jeffrey [sic] from QLD branch his [sic] OK with it'.²⁵⁷ Tom Jeffers' evidence was to the effect that he had no recollection of speaking with Cesar Melhem; that the usual practice would have been for Cesar Melhem to speak to Ben Swann or to the Branch Secretary;

²⁵⁵ Zoe Angus, witness statement, 20/10/15, Annexure 9; Cleanevent MFI-1, 19/10/15, pp 273-277.

²⁵⁶ Zoe Angus, witness statement, 20/10/15, Annexure 9; Cleanevent MFI-1, 19/10/15, p 277.

²⁵⁷ Cleanevent MFI-1, 19/10/15, p300.

and that neither of those two officers contacted him about this issue.²⁵⁸ Tom Jeffers's evidence was to the effect that he had no further role in the process after identifying this issue.²⁵⁹ Zoe Angus gave evidence that she was advised, she did not say by whom, that Tom Jeffers had discussed the MOU with Cesar Melhem on 12 November 2010 and had agreed to it.²⁶⁰ The documentary record does not assist in explaining what occurred.

234. There was a degree of misinformation provided by John-Paul Blandthorn to Zoe Angus regarding the position of the Queensland Branch. On 2 November 2010 Zoe Angus by email asked John-Paul Blandthorn how many Cleanevent employees worked in Queensland.²⁶¹ John-Paul Blandthorn responded that, as far as he knew, there were two permanent employees at the Gabba in Queensland.²⁶² This response made no reference to casuals. In that respect it was misleading. John-Paul Blandthorn affirmed that the contract that Cleanevent had with the Gabba involved work by casual cleaners at events, who were members of the AWU. He could explain why he referred only to the two permanents in the email.²⁶³ It is not possible to say whether the provision of the correct information would have made any difference. However, as noted below, two of the three

²⁵⁸ Tom Jeffers, 20/10/15, T:695.9-30.

²⁵⁹ Tom Jeffers, 20/0/15, T:695.1-3.

²⁶⁰ Zoe Angus, witness statement, 20/10/15, para 35.

²⁶¹ Zoe Angus, witness statement, 20/10/15, Annexure 11; Cleanevent MFI-1, 19/10/15, p 285.

²⁶² Zoe Angus, witness statement, 20/10/15, Annexure 12; Cleanevent MFI-1, 19/10/15, p 292.

²⁶³ John-Paul Blandthorn, 20/10/15, T:757.1-23.

concerns identified by Zoe Angus in doing her own analysis of the MOU related to the position of casual workers.

235. Zoe Angus' email of 22 October 2010 also raised concerns based on her own analysis of the MOU. That email forwarded to John-Paul Blandthorn an email dated 21 October 2010 that Zoe Angus sent to Scott McDine. The latter email contained a comparative analysis of the MOU wage rates, the *Cleaning Services Award* 2010 and the *Amusement, Events and Recreation Award* 2010. The analysis, which was done at the request of Scott McDine²⁶⁴, identified what were described as three 'problems' with the MOU.²⁶⁵
236. The first problem was that the ordinary wage rates for level 1 and level 3 cleaners in other states were below those provided for in the *Cleaning Services Award* 2010.
237. The second problem identified by Zoe Angus was that the casual loading was approximately 15% for all casuals, regardless of location, rather than 25% as provided for in the *Cleaning Services Award* 2010 and the *Amusement, Events and Recreation Award* 2010;
238. The third problem identified by Zoe Angus in her 21 October 2010 email was that casual event cleaning rates were below the federal minimum wage for level 1 casuals and below both award rates for all levels.

²⁶⁴ Zoe Angus, witness statement, 20/10/15, para 30.

²⁶⁵ Zoe Angus, witness statement, 20/10/15, Annexure 9; Cleanevent MFI-1, 19/10/15, pp 273-277.

239. Zoe Angus' evidence was that she was made aware by the organiser that there was a high level of permanent employment in Cleanevent, but could not recall whether she turned her attention to this at the time of undertaking the above analysis.²⁶⁶ It is unlikely that she in fact thought this at the time. The email from John-Paul Blandthorn to Zoe Angus on 21 September 2010²⁶⁷ refers to the 'high nature of casuals in the industry' and the likelihood that casuals would replace any permanents that took industrial action. Two of the three problems identified in her own analysis on 21 October 2010 concern casual cleaners.
240. John-Paul Blandthorn responded to Zoe Angus on 1 November 2010.²⁶⁸ The email was copied to Cesar Melhem. The email sought to alleviate all of the concerns that she had identified. The concern raised by the Queensland Branch was addressed by the statement that historically rates in New South Wales and Victoria had been different from those in other states.
241. The other concerns that the analysis by Zoe Angus raised were addressed in the following way. The first concern, dealing with the rates of permanent employees, was said to be incorrect because the applicable award was the 1999 Award and not a new Modern Award. In one sense the 1999 Award was 'applicable': it would remain in force until 2013 unless the AWU applied to terminate it. That begs the question why the AWU would not apply to terminate it if doing so

²⁶⁶ Zoe Angus, 20/10/15, T:680.21-46.

²⁶⁷ Cleanevent MFI-1, 19/10/15, p 202.

²⁶⁸ Zoe Angus, witness statement, 20/10/15, Annexure 10; Cleanevent MFI-1, 19/10/15, pp 278-279.

would result in more favourable conditions of employment for AWU members.

242. This latter question was addressed, albeit indirectly, by John-Paul Blandthorn in the email. His answer, in substance, was that Cleanevent could not afford to pay. He then explained that in more detail in a series of bullet points that included the following:²⁶⁹

Most cleaning companies (Cleanevent included) have a 28-day termination clause with the venue operator.

If Cleanevent were forced to pay the new Modern Award they would have to seek to renegotiate all their agreements to remain viable.

The result would be that every contract would be terminated and we would lose all the members but more importantly they would either lose their job or be re-employed on lower wages (as most big cleaning companies have a NAPSA).

The biggest problem is that the cleaning industry is so competitive and has such low union membership that shonky operators dominate the industry.

The other issue is that whilst a reputable company may get a contract they often sub-contract to other companies that will pay cash or just withhold monies.

243. The last two of the above matters were issues that, one might have thought, would lead a union to take action to ensure that workers in the industry were paid in accordance with what had been determined by the legislature to be the minimum rates acceptable. The AWU, however, appear to have treated them as reasons not to take steps to ensure Cleanevent employees would be paid in accordance with a Modern Award.

²⁶⁹ Cleanevent MFI-1, 19/10/15, pp 278-279.

244. John-Paul Blandthorn's email did not at any point address the concern of Zoe Angus regarding the payment of event casuals beneath the minimum wage rate. That concern was taken no further until 2015, when the AWU applied to terminate the MOU.
245. The concern expressed by the Queensland Branch and the exchange between John-Paul Blandthorn and Zoe Angus were the only suggestions of any substantive concerns expressed within the AWU about the appropriateness of the terms and conditions in the MOU.
246. In substance, it would seem, Zoe Angus accepted John-Paul Blandthorn's response to her concerns. When asked whether she responded to John-Paul Blandthorn and asked why the AWU was not pressing for the Modern Award, Zoe Angus responded that it was her view that whatever was the best outcome for employees was what should be advanced.²⁷⁰ She did not put this proposition to John-Paul Blandthorn, but rather put the issues she had identified to him and asked how he wished to proceed.²⁷¹ She did not see it as her role to question John-Paul Blandthorn's 'industrial judgment.'²⁷² She accepted John-Paul Blandthorn's explanation in his email of 1 November 2010, notwithstanding that it did not address the point she had raised about the level 1 event casuals being paid below the Federal Minimum Wage.²⁷³

²⁷⁰ Zoe Angus, 20/10/15, T:682.34-39.

²⁷¹ Zoe Angus, 20/10/15, T:682.41-44.

²⁷² Zoe Angus, 20/10/15, T:683.4-17.

²⁷³ Zoe Angus, 20/10/15, T:683.19-30.

247. The next communication was on 11 November 2010, when John-Paul Blandthorn sent an email to Zoe Angus and Scott McDine, copying Cesar Melhem and stating:²⁷⁴

...Wondering how you are progressing with the Cleanevent deal?

Not to put too much pressure on but I am getting calls on the hour every hour from delegates and the bosses wanting information.

248. Zoe Angus said that she went to Alice Springs between 9 November and 14 November 2010, and that she was unlikely to have been progressing the matter during that period.²⁷⁵

249. Paul Howes, the National Secretary of the AWU, signed the MOU, it would appear on 16 November 2010.²⁷⁶ His evidence was that he did not recall the circumstances in which he signed it.²⁷⁷ His evidence as to his practice was as follows:²⁷⁸

Whilst I was National Secretary of the AWU, I required a report to accompany industrial agreements brought to me for signing. As National Secretary, it was not my role to personally analyse the terms of industrial agreements to check their adequacy. I was dependent on the report to highlight any relevant issues.

250. The report referred to by Paul Howes was an organiser's report prepared by Zoe Angus on 16 November 2010 and forwarded him on

²⁷⁴ Zoe Angus, witness statement, 20/10/15, Annexure 13; Cleanevent MFI-1, 19/10/15, p 299.

²⁷⁵ Zoe Angus, witness statement, 20/10/15, para 34.

²⁷⁶ SW1, 28/5/15, tab 11, p 88. Zoe Angus witnessed the signature. Her signature is dated 15 November 2010. However according to her diary she returned from holidays on 16 November 2010. Her evidence was that it was in fact signed on 17 November. It is not necessary to make any finding.

²⁷⁷ Paul Howes, witness statement, 20/10/15, para 15.

²⁷⁸ Paul Howes, witness statement, 20/10/15, para 14.

that day, together with the MOU for signing. The report is a two page document.²⁷⁹ There is nothing in the report which identifies any of the issues that had been referred to by Zoe Angus and John-Paul Blandthorn in the email correspondence referred to above. The report is a pro forma document headed 'Agreement Summary'. The word 'Agreement' is struck through and replaced with 'MOU'.

251. Zoe Angus says that she does not recall why she completed the organiser's report, but says that she thinks it likely that John-Paul Blandthorn had not done it and it was a simple administrative task for her to complete.²⁸⁰ She accepted that the usual practice was for the organiser to undertake this task.²⁸¹ The organiser's report contains two notes in Zoe Angus' handwriting²⁸² additional to the information required in the form.²⁸³

252. A note at the bottom of the page stated:

Circulated nationally. Only branch to respond – QLD gave OK (after Tom Jefferies [sic] talked Cesar on 12/11/10)

253. Another note on a post-it stuck to the form stated:

There has been delay on this (due internal consultation) ALL CLEARED WITH BRANCHES. Vic now keen for \$.

²⁷⁹ Cleanevent MFI-1, 20/10/15, pp 302-303.

²⁸⁰ Zoe Angus, witness statement, 20/10/15, para 35.

²⁸¹ Zoe Angus, 20/10/15, T:687.26-32.

²⁸² Zoe Angus, witness statement, 20/10/15, paras 40-41.

²⁸³ Zoe Angus, witness statement, 20/10/15, Annexure 14; Cleanevent MFI-1, 19/10/15, pp 301-303.

254. The first note supports Zoe Angus' account of her information that the MOU was now approved nationally (although not the source of this information). Zoe Angus says the following in respect of the latter note:²⁸⁴

In this note I was referring to the fact that the Victorian Branch was anxious to get the pay rise provided by the MOU which had been agreed to commence almost five months earlier, from 1 July 2010. I certainly recall the impression at the time that Blandthorn was checking in with me regularly to ensure that the agreement was signed so the wage increase would flow to employees as soon as possible. This persistence from Organisers was not unusual where the commencement date of an agreement had already passed. I also note that Blandthorn had told me in the email of 11 November 2010 that delegates had been contacting him asking about when they would get their pay increases.

255. Zoe Angus denied that the reference to "\$" was a reference to the arrangement in the Side Letter.²⁸⁵ Zoe Angus disclaimed any knowledge of that arrangement.²⁸⁶ Paul Howes also denied any knowledge of the Side Letter.²⁸⁷ Their evidence is consistent with the contemporaneous documents referred to above. It has been accepted. It follows from that acceptance that Zoe Angus' explanation for the reference to '\$' should also be accepted.

Conclusions to be drawn

256. Counsel assisting submitted that the process by which the MOU came to be signed on behalf of the National Office of the AWU reveals serious failures in the processes that were in place to ensure that

²⁸⁴ Zoe Angus, witness statement, 20/10/15, para 41.

²⁸⁵ Zoe Angus, witness statement, 20/10/15, para 43; Zoe Angus, 20/10/15, T:688.22-24.

²⁸⁶ Zoe Angus, witness statement, 20/10/15, para 42.

²⁸⁷ Paul Howes, witness statement, 20/10/15, para 16.

Enterprise Agreements with national coverage were properly scrutinised.

257. That submission must be accepted. The entire approach of the AWU was flawed from the start because of the position adopted by John-Paul Blandthorn and Cesar Melhem in seeking a payment for the Victorian Branch in exchange for keeping the MOU on foot. The consequences that flow from that are explored in the concluding section of this Chapter of the Report. For present purposes, however, the point to be made is that this approach comprised the position of the officials negotiating the MOU. The failure to draw the attention of the National Office to the Side Letter meant that those involved at the National Office could not be expected to have known that or to have understood that the process of negotiation of the MOU was fundamentally flawed.
258. The above matters in one sense excuse those involved at a National Office level from any serious falling short in their conduct. On the other hand, the conduct of those involved can hardly be regarded as exemplary. Zoe Angus was legally qualified. She was capable of turning an independent mind to whether the MOU was properly in the interests of members and compliant with the then prevailing legislative requirements. She in fact performed an analysis of the MOU and identified serious concerns. She decided not to question the ‘industrial judgment’ of John-Paul Blandthorn in giving his response to those concerns. His response did not address perhaps the most important difficulty that she had identified, namely that the rates provided for in the MOU, fell below the Federal Minimum Wage in some instances. But, at the same time, she took it upon herself to prepare the organiser’s report, being the document required for the National

Secretary to make an informed decision about whether to sign off on the MOU. The report did not identify any of the concerns that she had raised.

259. Against the above matters, it must be said that Zoe Angus was examining the MOU in a context in which she had circulated it to all Branches and only one had raised any objection. That objection appears to have fallen away. Further, the Branch that contained the most members affected by the MOU, AWU Vic, was pressing strongly for its approval by National Office, in circumstances where, unbeknownst to Zoe Angus, it had an ulterior motive for doing so.
260. Counsel assisting submitted that as National Secretary at the time, Paul Howes should take ultimate responsibility for the various failures of process that occurred. Paul Howes perhaps misunderstood the import of the submission and was critical of it. His evidence, which is accepted, was that he was dependent on the organiser's report to identify any relevant issues for his consideration. No such issues were identified. Nor was anything drawn to his attention in any other way which could have alerted him to the various difficulties with the MOU. Nonetheless, he was National Secretary. He executed the MOU. The defects in the MOU and the process that produced them are his ultimate responsibility even if he lacked personal knowledge of those defects. Thus so far as what operated could be described as a 'system', the system failed. One question is whether there could have been a better system.

H – PAYMENTS PURSUANT TO THE SIDE LETTER

261. This section of the Chapter examines the circumstances in which the arrangement in the Side Letter was implemented.

The first payment

262. On 6 December 2010 an employee of the AWU Vic, Rebecca Eagles, sent an email to Cesar Melhem with the subject heading: 'Final documents from Cleanevent'.²⁸⁸ The email from Rebecca Eagles of 6 December 2010 attached the copy of the letter of 13 October 2010 signed by Michael Robinson.
263. Two days after receipt of this email, John-Paul Blandthorn telephoned Steven Webber and Michael Robinson about Cleanevent making a payment to the AWU Vic. Until that time the AWU did not appear to have taken any steps with respect to seeking payment by Cleanevent of the first 'biannual' instalment of what were described in the Side Letter as 'union fees' payable in December 2010.
264. At 2.25pm on 8 December 2010 John-Paul Blandthorn sent an email to Michael Robinson and Steven Webber, with a copy to Cesar Melhem, stating:²⁸⁹

...Just following up from our phone call today that you guys will action the payment?

²⁸⁸ Melhem MFI-2, 1/6/15.

²⁸⁹ SW1, 28/5/15, p 92.

265. There followed attempts by Steven Webber and John-Paul Blandthorn to ensure that payment was arranged. On 13 December 2010 at 2.47pm John-Paul Blandthorn sent an email to Steven Webber with a copy to Cesar Melhem and Mei Lin giving two ways of making the payments sought, namely by cheque or by electronic funds transfer.²⁹⁰
266. At 4.10pm on 13 December 2010 Steven Webber sent an email to John-Paul Blandthorn, with a copy to Cesar Melhem, Mei Lin and Rohan Harris advising that: 'An EFT will take place before the end of the week'.²⁹¹ It was paid on 17 December 2010.

The first list of names

267. On 17 December 2010 Mei Lin sent an email to Cesar Melhem, copied to John-Paul Blandthorn, stating:²⁹²

We receive \$12,500.00 from Cleanevent today. Record it as membership??

268. Cesar Melhem responded the same day, stating:²⁹³

Yes, Ask JP to get them to send us a list

269. Mei Lin sent an email to John-Paul Blandthorn stating:²⁹⁴

Could you please ask Cleanevent to send us a list for \$12,500 we receive today?

²⁹⁰ SW1, 28/5/15, p 91.

²⁹¹ SW1, 28/5/15, p 94.

²⁹² Cleanevent MFI-1, 19/10/15, p 322.

²⁹³ Cleanevent MFI-1, 19/10/15, p 322.

²⁹⁴ Cleanevent MFI-1, 19/10/15, p 322.

270. On 26 May 2011 Steven Webber sent an email to Michelle Ference, a payroll officer at Cleanevent, stating:²⁹⁵

I need 100 names of our regular cleaners, these names will go to the union as new members as I pay for there [sic] memberships

In [sic] need this fairly quickly

271. It would appear that Steven Webber did not receive a response to his email to Michelle Ference immediately. On 30 May 2011 at 1.35pm Steven Webber sent a further email to Michelle Ference and, this time Kim Dodd with a copy to Michael Robinson stating:²⁹⁶

Michelle, the request below has now become urgent, I need these names to me by 10.00am tomorrow morning

272. At 2.01pm on 30 May 2011 Michelle Ference sent an email to Steven Webber in response providing a list of the 'regular cleaners' that Steven Webber had sought.²⁹⁷

273. As Steven Webber accepted in evidence, it was clear from this list that it was simply a set of names collected at random with no regard for whether those persons had actually made, or communicated, any conscientious wish to join the AWU. Among other things it had been prepared some 26 minutes after Steven Webber's email, and the list of names was simply set out in alphabetical order culminating at the letter 'G'.

²⁹⁵ SW1, 28/5/15, p 100.

²⁹⁶ SW1, 28/5/15, p 99.

²⁹⁷ SW1, 28/5/15, p 97.

274. Steven Webber's oral evidence included the following exchange concerning the list of names put together on 30 May 2011:²⁹⁸

- Q. She [*i.e.*, *Ms Ference*] has simply inserted in the body of the email a list of names. Do you see that?
- A. Yes.
- Q. And the list goes from pages 97 through to 98 through to 99?
- A. Yes.
- Q. And it looks as though that is simply an alphabetical list of names?
- A. It appears that way, yes.
- Q. It gets to "G" and stops?
- A. It does.
- Q. At page 99 – presumably because she'd got to 100.
- A. I imagine so, yes.
- Q. You didn't give her any instructions about how to pick the names?
- A. No.
- Q. As far you were concerned, your evidence earlier was that they would be picked at random.
- A. Yes.
- Q. No thought was given, was there, as to where these employees worked? They could work anywhere in Australia; is that right?
- A. Well, if it's alphabetical, then yes.
- Q. I am sorry?
- A. Yes. Yes.

²⁹⁸ Steven Webber, 28/5/15, T:44.2-43.

Q. You gave no thought, did you, to whether they were levels 1, 2, or 3 employees.

A. Correct, yes.

Q. As far as you were concerned, she just had to grab 100 names, whoever they might be, and you would pass that on?

A. That was my note to her, yes.

275. One minute after he had received Michelle Ference's email, Steven Webber forwarded it to John-Paul Blandthorn, with a copy to Michael Robinson, stating:²⁹⁹

100 names below as requested.

276. The short period of time that elapsed between his receiving Michelle Ference's email and his forwarding it (namely, one minute) confirms the oral evidence given by Steven Webber.

277. At 2.06pm on 30 May 2011 John-Paul Blandthorn sent an email to Angela Leo, with a copy to Cesar Melhem and Ben Davis, stating:³⁰⁰

100 names from Cleanevent for May intensive they are forwarding addresses on.

278. According to Cesar Melhem the 'May Intensive' was an 'intensive campaign to recruit members throughout industries' which was carried out on a national basis.³⁰¹

²⁹⁹ SW1, 28/5/15, p 97.

³⁰⁰ SW1, 28/5/15, p 97.

³⁰¹ Cesar Melhem, 1/6/15, T:225.41-226.1.

279. At 2.46pm on 30 May 2011 Cesar Melhem sent an email to Angela Leo, with a copy to Claire Raimondo, John-Paul Blandthorn and Ben Davis stating:³⁰²

As you know we have received a cheque for \$ 15000 in Dec 2010, can you allocate that amount to members listed below.

280. There are several errors in Cesar Melhem's email. The amount seems to have been paid by EFT not cheque. Further, the amount was \$12,500, not \$15,000. Nevertheless the intention was clear enough. Cesar Melhem wished to have the first instalment paid by Cleanevent allocated to the 100 names of casual cleaners which had been forwarded by Cleanevent earlier that day.

281. Claire Raimondo then sent an email to Angela Leo at 2.58pm on 30 May 2011 stating:³⁰³

Full year's membership December to December.

100 members \$150 membership payment for each member.

282. At 3.02pm on the same day, Claire Raimondo sent a further email to Angela Leo stating:

Checked with Accounts it was only 12,500 so its [sic] \$125 per member not \$150

283. Angela Leo confirmed that, consistently with Claire Raimondo's advice and Cesar Melhem's instructions, she entered the names of the 100 persons on the membership roll and allocated a membership fee of \$125 to each name, regardless of what the formal fee structure was

³⁰² SW1, 28/5/15, p 97.

³⁰³ Angela Leo, witness statement, 21/10/15, Annexure 1, p 7.

under the AWU rules.³⁰⁴ She did not know whether the employees on the list were aware of their inclusion on the membership roll. She said that her role was to take the information supplied and process it accordingly.³⁰⁵

284. The names forwarded by Cleanevent on 30 May 2011 included those of Shalee-Nicole Allameddine, Robyn Cubban, Nayan Debnath and Colleen Ellington.³⁰⁶ Each of these persons gave evidence to the Commission. Each was at all relevant times including May 2011, a resident of New South Wales. None knew of, let alone authorised or permitted, the release of his or her name by Cleanevent to the AWU. Each, except for Nayan Debnath was a member of AWU NSW and making membership payments by payroll deduction.³⁰⁷

285. It is apparent from the above analysis that Cesar Melhem was closely involved at each step of the way in the process: in procuring payment from Cleanevent, in procuring a list of names from Cleanevent, and in ensuring that the payment would be allocated as membership fees to the names on the list.

The second payment

286. It would not appear that any further payments were sought until 2012.

³⁰⁴ Angela Leo, witness statement, 21/10/15, para 26; Angela Leo, 21/10/15, T:797.39-43.

³⁰⁵ Angela Leo, 21/10/15, T:797.39-43.

³⁰⁶ SW1, 28/5/15, pp 98-99.

³⁰⁷ Robyn Cubban, witness statement, 28/5/15, paras 5-7; Colleen Ellington, witness statement, 29/5/15, paras 8-9; Shalee-Nicole Allededdine, witness statement, 29/5/15, paras 6-7.

287. On 18 April 2012 Cesar Melhem appears to have left a telephone message for Michael Robinson to ring him.³⁰⁸

288. On 18 April 2012 Mei Lin sent an email to Michael Robinson, with a copy to Cesar Melhem, and the subject 'Re: Membership Invoice'. The email stated:³⁰⁹

...Please find attached invoice for membership for financial year 2011-2012. It would be much appreciated if you could arrange the payment as soon as possible.

Please feel free to contact me should you have any queries...

289. The email attached tax invoice 023590 from AWU Vic to Cleanevent, marked to the attention of Steven Webber.³¹⁰ The description of services for which payment was sought in tax invoice 023590 was 'membership fees for Financial Year 2011-2012'. The tax invoice was in a total amount of \$27,500, inclusive of GST. The item code was 'membership'.

290. At 5.27pm on 18 April 2012, Michael Robinson responded to Cesar Melhem by email in the following terms:³¹¹

Good afternoon Cesar, you were on my call back list but I see the subject below. I have sent that through to Steven Webber and the Accounts payable department and spoken to them both and this should be sorted soon for you. Please let me know if there is any delays [sic] and I will chase it up for you (sometimes the cogs can turn a little slow here)

Talk to you soon.

³⁰⁸ SW1, 28/5/15, p 103.

³⁰⁹ SW1, 28/5/15, pp 103-104.

³¹⁰ SW1, 28/5/15, p 111.

³¹¹ SW1, 28/5/15, p 103.

291. Cesar Melhem responded three minutes later by email sent at 5.30pm to Michael Robinson stating:³¹²

We need an up to date list of employees for the financial year so we can put them on our system.

292. On 20 April 2012 Steven Webber sent an email to Cesar Melhem, with a copy to Michael Robinson. The subject was 'Names of Cleanevent Employees'. The email said:³¹³

Hope all is well in your world and they are not making you work to [sic] hard!!

Following on from your request to Michael, I have attached the names of cleaning staff

293. Steven Webber's email of 20 April 2012 attached a list of 100 employees. In at least some instances the list included names that had been provided in the earlier list of casual cleaners sent on 30 May 2011.³¹⁴

294. The list of names forwarded by Steven Webber on 20 April 2012 is not so obviously at random as the alphabetical list sent 30 May 2011. Nevertheless it is clear that it was simply a list of names pulled together for no discernible reason, and did not represent persons who had indicated a desire to become members of the AWU. This emerges from the following evidence of Steven Webber:³¹⁵

Q. How did you cause that list to be drawn up?

³¹² SW1, 28/5/15, p 103.

³¹³ SW1, 28/5/15, pp 106-108.

³¹⁴ SW1, 28/5/15, pp 97-99.

³¹⁵ Steven Webber, 28/5/15 T:29.33-30.1.

- A. I got someone from administration to pull together a list.
- Q. So it was simply a list of the names of certain cleaning staff of Cleanevent.
- A. Yes.
- Q. That someone had pulled together—
- A. Yes.
- Q. — more or less at random?
- A. Yes.

295. On 13 June 2012 Duc Vu sent an email to Steven Webber, requesting payment of the invoice.³¹⁶ Subsequent to receiving that email Steven Webber sent an email to Simon Jaensch forwarding the email from Duc Vu, and stating:³¹⁷

Simon can you please put in a prompt payment for these please, we have to keep the union happy!!!

296. Despite Steven Webber's request the invoices were not paid. Mei Lin sent emails to Steven Webber requesting payment on 15 June 2012, on 20 June 2012³¹⁸ and again on 27 June 2012.³¹⁹
297. On 25 June 2012 at 11.36am Wendy Field (the group general manager-cleaning services at Spotless) sent an email to Steven Webber, with a

³¹⁶ SW1, 28/5/15, pp 109-112.

³¹⁷ SW1, 28/5/15, p 109.

³¹⁸ Cleanevent MFI-1, 19/10/15, p 327.

³¹⁹ SW1, 28/5/15, p 114.

copy to others seeking an explanation for the payment. Steven Webber responded in the following terms:³²⁰

The below is all associated with our EBA

In May 2010 the EBA was reworked, this was a very difficult negotiation and at times looked as though it would not get done. We managed to lock a new agreement away through an MOU for a further 3 years.

The \$25k was part of that negotiation and was approved by Julianne, the \$25k is an annual cost

The implication to the business by not having the EBA and employing labour through the modern award is circa \$2Mill per annum. We are about to enter our third and final year of this agreement to which we will need to start discussing how we can continue this

...

The relationship with the union has been long and very good which has allowed us to continue to remain competitive with what is a pretty good EBA

298. Tom Gibbons was the national cleaning manager.³²¹ Steven Webber reported to Tom Gibbons, who in turn reported to Wendy Field.³²² The email is an accurate reflection of the importance of the MOU to Cleanevent. Steven Webber described the figure of \$2,000,000 as his 'best guesstimate' as to the savings to the business by not being required to comply with the Modern Award.³²³ As indicated above, figures of \$1,500,000 and 'greater than' \$1,000,000 were referred to by Michael Robinson in contemporaneous documents. Clearly the saving to Cleanevent was in this order of magnitude.

³²⁰ SW1, 28/5/15, pp 119-120.

³²¹ Steven Webber, 28/5/15, T:55.7-9.

³²² Steven Webber, 28/5/15, T:55.11-15.

³²³ Steven Webber, 28/5/15, T:57.46-58.12, 58.42-59.8.

299. Mei Lin at 10.00am on 29 June 2012 sent a further email stating:³²⁴

We have not received the payment. Could you please investigate how it is processing? It would be much appreciated if you could make the payment by today.

300. Two minutes after receiving this email, Steven Webber forwarded it to Simon Jaensch, Jeremy Johansson and Andrew McBride stating:³²⁵

This one has been going around in circles for 3 weeks

This has the ability to cost us some \$2Mil if we pee them off

Can this be finalised today!!

301. After a further series of emails within Cleanevent which it is unnecessary to reproduce, Julianne Page approved payment. The money was paid on the same day.

The third payment

302. On or about 4 March 2013 the AWU Vic issued tax invoice 024239 to Cleanevent, marked to the attention of Steven Webber, seeking an amount of \$27,500 inclusive of GST in respect of what was described as 'Membership Fees for Financial Year 2012-2013'.³²⁶

303. On 14 March 2014 Mei Lin sent an email to Steven Webber attaching tax invoice 024962 from AWU Vic to Cleanevent in respect of

³²⁴ SW1, 28/5/15, p 114.

³²⁵ SW1, 28/5/15, p 113.

³²⁶ SW1, 28/5/15, p 132.

Membership fees for financial year 2013-2014 in the amount of \$27,500.³²⁷

304. On 26 March 2014 Mei Lin sent a further email to Steven Webber asking when tax invoice 024962 would be paid.³²⁸ Steven Webber responded on 26 March 2014 stating: 'Hi, this was sent to accounts last week for payment Should be with you shortly'.³²⁹
305. Steven Webber gave evidence to the effect that he authorised invoice 024962 to be paid and did not notice that the term of the MOU had on its face expired.³³⁰ This is confirmed by a payment requisition form dated 19 March 2014, raised by Ashley Hill and authorised by Steven Webber.³³¹ The requisition is in the amount of \$27,500 payable to AWU Vic, referring to invoice number 024962. The requisition is stamped as being received by accounts payable on 28 March 2014.
306. No list of names was produced in respect of this payment. However, it may be assumed that this payment was dealt with in the same way as the first two. The payment was recorded as membership income in the general ledgers of the AWU Vic. The evidence of Angela Leo was to the effect that the payment would have been allocated to employees on

³²⁷ SW1, 28/5/15, pp 137-138.

³²⁸ SW1, 28/5/15, p 144.

³²⁹ AWU MFI-14, 6/11/15, pp 1-2.

³³⁰ Steven Webber, witness statement, 20/5/15, para 17.

³³¹ SW1, 28/5/15, p 135.

a list provided by the company and that, if no list was provided, the Membership department would contact the company for one.³³²

Conclusions regarding membership numbers

307. The arrangements pursuant to which Cleanevent provided lists of members in exchange for payment resulted in falsely inflated membership numbers. Because the question of falsely inflated membership numbers arises in a number of other AWU case studies, it is convenient to examine the position under the AWU rules in some detail.
308. Section 166 of the *Fair Work (Registered Organisations Act) 2009* (Cth) makes membership subject to, amongst other matters, ‘payment of any amount properly payable in relation to membership’. Neither that section nor any other section of the Act specifies how such an amount may be paid.
309. Rule 7 subsections 1 and 2 of the AWU Rules provides:³³³

RULE 7 – ADMISSION TO MEMBERSHIP

(1) Application for membership in the Union may be made by:

- a. electronically completing and submitting an application form including consent to the method of payment of the contribution as prescribed by Rule 9, through the official website of The Australian Workers’ Union or a Branch of The Australian Workers’ Union, or

³³² Angela Leo, witness statement, 21/10/15, para 11.

³³³ AWU MFI-2, 30/10/15, pp 61-62. Rules 7-10 of the registered rules of the Australian Workers Union 23/5/06 are quoted here. They are substantially the same as rules 7-10 of the registered rules of the Australian Workers Union 19/3/15 being Melhem MFI-1, 1/6/15, pp 58-65.

- b. signing of an application form of which the original must be provided to the union; and
 - i. the signing of a payroll deduction authority, or
 - ii. the signing of a Financial Institution Direct Debit Authority which has been approved by the National Executive, or
 - iii. the payment of the contribution as prescribed by Rule 9.

(2) Any person having made application for membership as prescribed in sub-rule (1) of this Rule must, except as otherwise provided for in these Rules, be admitted to membership of the Union. A person will become a member from the date that the first payment of the contribution as prescribed in Rule 9 is received.

310. The last sentence of subsection 2 makes admission to membership conditional upon the receipt of the first payment of the membership contribution fee. However, it does not impose any limitations on how that fee can be paid. Rule 7(1)(b)(iii) refers to payment of the contribution ‘as specified by Rule 9’. Rule 9 relevantly provides that contributions ‘to be paid by members’ are those determined by the National Executive from time to time. Provision is made for the waiver of contributions by the National Executive.³³⁴

311. Rule 10 provides:³³⁵

RULE 10 - CONTRIBUTIONS – WHEN AND HOW PAYABLE

WHEN CONTRIBUTIONS ARE PAID

(1) Quarterly contributions are due and payable on the first day of the first month of each quarter and must be paid no later than the last day of the first month of each quarter. Quarters are deemed to begin on the first day of July, October, January and April respectively.

³³⁴ AWU MFI-2, 30/10/15, p 65 (r 9(1)).

³³⁵ AWU MFI-2, 30/10/15, pp 66-67.

- (2) Annual contributions are payable by members as determined from time to time by the National Executive. Annual contributions become payable on the first day of July each year and must be paid either by way of a lump sum or over such period and in such part payments as may be determined by the relevant Branch Secretary.

RECOVERY OF OWED CONTRIBUTIONS

- (3) Members who continue in arrears after 31st July each year, after being notified, may be sued for the recovery of any contributions owing.

PAYING CONTRIBUTIONS

- (4) All contributions, fines, levies and dues owing by a member must be paid to the Branch Secretary or other duly appointed representative of the Branch on whose register the member is enrolled, and such duly appointed representatives must immediately pay all such moneys received into the registered office of the Branch. Where there is no Branch established members must pay their dues to the National Secretary.

WAIVING PAYMENT OF CONTRIBUTIONS

- (5) National Executive may if it sees fit and subject to the agreement of any affected Branch Executive, waive payment of the whole or any portion of contributions, levies or other dues owing by any member or class of member if in its opinion special circumstances exist which make it desirable or reasonable to do so.

PAYROLL DEDUCTIONS

- (6) Notwithstanding anything elsewhere contained in the Rules, Branch Secretaries or other authorised Officers may, subject to the approval of the National Executive, make an arrangement with an employer for deducting, on the written authority of a member in the employment of the employer, amounts by way of contributions, levies, or other moneys payable to the Union, from the wages or moneys payable to a member by the employer. So long as such arrangement is in force, and a written authority by a member employed by the employer for the making of deductions in accordance with the arrangement remains in force, the member is (unless the member was an unfinancial member of the Union at the end of the quarter immediately preceding that during which he gave the authority) to be deemed to be a financial member of the Union and of their Branch and to be fully financial in the Union and their Branch, notwithstanding any other provision of these Rules. If such member owes any money to the Union (whether by way of arrears owing at the time the authority came into force, or other amounts the collection of which is not provided for by the arrangement) such money remains owing by the member and may be

recovered by the Union, but does not affect their financial status as determined under this subrule. A member who was unfinancial at the end of the quarter immediately preceding that during which he gave the authority continues to remain unfinancial until he pays all amounts owing at such end of quarter, but as from the date of such payment their financial status is to be determined as if he had made such payment prior to giving authority.

Where such an arrangement was made, or such an authority was given before this subrule came into force, the financial status of any member who has given the authority, or has given any authority pursuant to the arrangement, is to be determined as if this subrule had been in force at that time.

DIRECT DEBIT PAYMENTS

- (7) Notwithstanding anything elsewhere contained in the Rules, Branch Secretaries or other authorised Officers may, subject to the approval of the National Executive, make an arrangement with a financial institution for deducting, on the written authority of a member who holds an account with the financial institution, amounts by way of contributions, levies or other moneys payable to the Union, from the member's account. So long as such arrangement is in force, and a written authority by a member who holds an account with the financial institution for the making of deductions in accordance with the arrangement remains in force, the member is (unless an unfinancial member of the Union at the end of the quarter immediately preceding that during which he gave the authority) to be deemed to be a financial member of the Union and of their Branch and to be fully financial in the Union and their Branch, notwithstanding any other provision of these Rules. If such member owes any money to the Union (whether by way of arrears owing at the time the authority came into force, or other amounts the collection of which is not provided for by the arrangement) such money remains owing by the member and may be recovered by the Union, but does not affect their financial status as determined under this subrule. A member who was unfinancial at the end of the quarter immediately preceding that during which he gave the authority continues to remain unfinancial until he pays all amounts owing at such end of quarter, but as from the date of such payment their financial status is to be determined as if he had made such payment prior to giving authority.

Within this subrule "financial institution" includes a bank, building society, credit union or credit card organisation.

Where such an arrangement was made or such an authority given before this subrule came into force, the financial status of any member who has given the authority or has given any authority pursuant to the

arrangement, is to be determined as if this subrule had been in force at the time.

312. In the period 2008 to 2013 the contribution rates set by the National Executive was as follows:³³⁶

| | 1 July 2008 | 1 July 2011 | 1 July 2013 |
|--|------------------------|------------------------|------------------------|
| Adult | \$450 | \$500 | \$550 |
| Part Time | \$374.40 | \$375 | \$390 |
| Junior (under 21) | \$324.50 | \$325 | \$325 |
| Apprentice 1st and 2nd year | | | \$52 |
| Apprentice 3rd year | \$324.50 | \$325 | \$360 |
| Apprentice 4th year | \$324.50 | \$325 | \$463 |
| WorkCover (not receiving makeup pay) | \$274.55 | \$275 | \$275 |
| Offshore | \$600 | \$630 | \$630 |
| Offshore – KTT Members | | \$652 | |
| Shearers | | \$450 | \$500 |
| Wool Classers | | \$400 | \$450 |
| Shed Hands | | \$320 | \$370 |
| Learners (1st Year Pastoral Trainees) | | \$250 | \$300 |
| Netball Players Assoc | | \$125 | \$200 |
| Australian Jockeys Assoc | | \$125 | \$125 |
| Stable Employees Assoc | | \$260 | \$332 |
| Retired | \$9.00 | | \$10 |

313. It is apparent from rule 10(2) that annual contributions are ‘payable by members’. There is a question as to whether the words ‘payable by members’ in rule 10(2) and the words ‘paid by members’ in rule 9(1) preclude the payment of membership fees by employers. The answer probably depends on the circumstances. If a payment is made by an employer with the knowledge and consent of an employee then it may be that, on analysis, the payment is made by the member within the

³³⁶ See BMD bundle, 29/5/15, pp 356-360.

meaning of these rules because in effect, the employer is acting as the employee's agent. On the other hand, in circumstances where an employer makes a payment purportedly for membership but without the knowledge of the employee in question it is difficult to see how the payment could in this situation be described as one in which the contributions is paid 'by' the member.

314. As discussed above, there are difficulties with a person becoming a member by virtue of a payment made by his or her employer, particularly where, as in the case of the employees on the lists randomly compiled at the request of Steven Webber, the employees had no idea membership was being paid on their behalf and cannot be taken to have authorised it.
315. An additional problem that arises, fairly obviously, from an arrangement pursuant to which an employer pays the membership contributions of an employee and does not tell the employee is that the employee is not in a position to take advantage of many of the benefits of membership of the union for which the employer is paying.
316. The evidence discloses that amounts less than the required amounts under rules 9 and 10 of the AWU Rules were paid by way of membership contributions. As is apparent from the terms of those rules, the amount of the contribution that has to be paid is fixed by the National Executive. Only the National Executive has the power to vary or waive that contribution amount.³³⁷ A person can only become a member if the amount of that contribution is paid. It is clear from the

³³⁷ See Rule 9 (1): AWU MFI-2, 23/10/15, p 65.

terms of Claire Raimondo's emails to Angela Leo of 30 May 2011 that the amounts allocated to each member for a full year's membership were far below the prescribed contributions.

317. Thus, in the case of the 100 persons referred to in the email of 30 May 2011, those persons would not have become members at all if the payment was applied as their first membership contribution. In the case of those persons who were already members, the effect of the payment depends upon the operation of rule 15(3). That rule provides that a member is deemed to have resigned if he or she has not paid the annual contribution for a continuous period of 24 months.³³⁸ However, if the existing member was up-to-date with membership contributions, by way of payroll deductions or direct debit, he or she would be entitled to a refund or credit against future membership contributions to the extent of the overpayment.

318. There is no evidence that steps were taken to obtain from the employees in question signed membership applications as required under rule 9 of the AWU rules. Angela Leo, who has been Team Leader of the Membership department since 30 September 2009, gave evidence that it was the practice of the membership department, in relation to Company Paid membership, to enter names into the membership roll on the basis of lists provided by the company to the AWU, even if persons on the list had not filled out membership applications.³³⁹

³³⁸ See Rule 9 (1): AWU MFI-2, 23/10/15, p 69.

³³⁹ Angela Leo, 21/10/15, T:785.33-44, 796.37-41.

319. An analysis of the membership status of 100 of the named employees provided by Cleanevent to the AWU on 30 May 2011 in the light of the membership register shows the following:³⁴⁰

- (a) all 100 names were recorded in the membership register;
- (b) 99 were recorded as having joined the AWU on 1 January 2011;
- (c) of these 99:
 - (i) each is recorded as having last paid membership contributions on 30 June 2011;
 - (ii) 98 were archived from the membership register on 14 August 2014;
 - (iii) 98 had their address listed as the address of Cleanevent rather than their personal address; and
 - (iv) no membership applications were produced by the AWU in respect of those names.

320. One name on the list was recorded in the membership register as having joined the AWU on 14 December 2011. The register records the member as being paid (as at December 2014) up to September 2014, and the address recorded in the register is the member's personal address. An application form has been produced for this member.

³⁴⁰ Melhem MFI-10, 2/6/15.

321. Other members of the AWU recorded on the list have given evidence that they were members of the AWU NSW Branch and paid contributions by payroll deduction.³⁴¹ They were not aware that the AWU Vic was also paying membership fees on their behalf.³⁴² Their membership was not previously recorded on the AWU Vic register (rather, it was recorded on the register of a different branch) and therefore they are listed as AWU members twice. One member gave evidence that he was not, to his knowledge, ever a member of the AWU and had no dealings with the AWU while employed at Cleanevent.³⁴³
322. A similar analysis has been performed in respect of a list of 100 names provided by Cleanevent on 20 April 2012.³⁴⁴ The reconciliation with the AWU's membership register reveals the following:
- (a) All 100 names were recorded on the membership register;
 - (b) 21 were recorded as having authorised payment of membership contributions by payroll deduction;
 - (c) AWU produced membership applications in respect of 5 of the names;

³⁴¹ Robyn Cubban, witness statement, 28/5/15, paras 5-7; Colleen Ellington, witness statement, 29/5/15, paras 8-9; Shalee-Nicole Allameddine, witness statement, 29/5/15, paras 6-7.

³⁴² Robyn Cubban, witness statement, 28/5/15, para 8; Colleen Ellington, witness statement, 29/5/15, para 12; Shalee-Nicole Allameddine, witness statement, 29/5/15, para 12.

³⁴³ Nayan Debnath, witness statement, 29/5/15, paras 5-7.

³⁴⁴ Melhem MFI-11, 2/6/15.

- (d) For each of the names referred to in (b) and (c) above, the date on which they were recorded as having joined varied, and the address recorded in the register was a personal address;
- (e) 66 became members on 27 April 2012, none of whom responded to the descriptions in (b) and (c) above. Of these 66 names:
 - (i) all had their address listed as the address of Cleanevent rather than their personal address;
 - (ii) all except one of the names were recorded as having last paid membership on 27 March 2014;
 - (iii) no membership application forms were produced in respect any of them.

323. Thus, the arrangement with Cleanevent has resulted in a significant number of persons becoming recorded as members of the AWU when in truth what happened did not make them members under the rules, and in circumstances in which some of the employees on the list were already paying members of the AWU, and others did not know that they had become members.

324. Other arrangements entered into with other companies had a similar effect. The arrangements with entities such as Winslow, BMD, the Australian Jockeys Association and the Australian Netballers' Association are dealt with in Chapter 10.9 below. It is convenient in

this connection to deal with one submission made by Cesar Melhem. In a statement dated 9 October 2015, he said that the issue of losing or gaining a seat on the National Executive did not concern him.³⁴⁵ He said this on the basis that membership of the National Executive was conferred on the basis of 1 seat for every 11,000 members or part thereof, and that the Branch always had three members during his time as State Secretary. When he gave evidence on 1 June 2015, it was put to Cesar Melhem that he was seeking to inflate membership numbers at the AWU, and put to him that he was seeking to inflate membership numbers at the AWU for the purposes of increasing the influence of the Branch at National Level. He denied these propositions.³⁴⁶ His assertion in his statement of 9 October 2015 regarding seats on the National Executive was not taken up with him when he gave evidence on 22 October 2015.

325. Cesar Melhem submitted, on the basis of what was described as his unchallenged evidence in his statement of 9 October 2015, that it should be found that there was no advantage to the AWU in inflating its membership numbers.³⁴⁷ The evidence was challenged, sufficiently, on 1 June 2015: his statement of 9 October 2015 was a response to the challenge. The more important point is that the submission extends well beyond that evidence. There are a number of reasons why increasing membership numbers might be perceived as advantageous by officials of a Branch. Some were identified by counsel assisting in opening. They include prestige, increased income arising from the

³⁴⁵ Cesar Melhem, witness statement re membership for the purpose of AWU National Executive, 22/10/15, para 3.

³⁴⁶ Cesar Melhem, 1/6/15, T:264.1 - .10.

³⁴⁷ Submissions of Cesar Melhem, 20/11/15, ch 2, para 30; ch 9, para 2.

inflated membership, and demonstration that the union in a particular Branch area is industrially strong. They also include various delegate and voting advantages, over and above representation on the National Executive, that flow under the rules. Those include:

- (a) For every 2,500 members or part thereof a Branch was entitled to one delegate at the National Conference.³⁴⁸
- (b) For every 1,000 members or part thereof a Branch was entitled to one vote at the National Conference.³⁴⁹
- (c) For every 1,000 members or part thereof a Branch was entitled to one vote at the National Executive.³⁵⁰

326. Thus, inflating membership numbers had a number of advantages for the Branch over and above the advantage Cesar Melhem referred to. It is significant that he did not in his statement address any of these other advantages or deny that they were of importance to him and the Branch.

327. According to Cesar Melhem's statement dated 9 October 2015, the numbers of members of the AWU Vic varied between 2006 to 2013 from 22,525 in 2006 to a high of 28,852 in 2012, and down to 26,697 in 2013.³⁵¹ It is not possible to isolate any particular respect in which the various membership arrangements conferred an advantage on Cesar

³⁴⁸ Melhem MFI-1, 1/6/15, p 71, rule 20(2).

³⁴⁹ Melhem MFI-1, 1/6/15, p 72, rule 20(6)(a).

³⁵⁰ Melhem MFI-1, 1/6/15, p 76, rule 24(3)(a).

³⁵¹ Cesar Melhem, witness statement (AWU Membership issues), 22/10/15, para 4.

Melhem or the AWU Vic. It is certainly not possible to say that they did not confer such advantages. It is likely that they were pursued in order to obtain such advantages.

I – COMPARISON OF THE MOU AND THE MODERN AWARD

328. The purpose of this section is to set out in more detail the extent to which the arrangements in 2010 were to the detriment of Cleanevent employees. This detriment is a corollary of the fact that the arrangements conferred large financial benefits on Cleanevent.
329. What follows is a comparison of the wage rates applicable under the MOU with those that would have been applicable had the employees been paid under the Modern Award. The Modern Award adopted as the comparison is the *Cleaning Services Award 2010*.
330. The reason that this is the relevant comparison has already been articulated but is worth repeating. It is that it was open to the AWU to apply to the Fair Work Commission to terminate both the 1999 Award and the 2006 MOU. Had it done so successfully then the conditions of employment of Cleanevent employees would have been determined on the basis of the Modern Award. There is no reason to think an application of this kind would not have been successful.
331. Whether the relevant Modern Award is the *Cleaning Services Award 2010* is presently a matter of dispute in the Federal Court.³⁵² That is a dispute about which Award applies at the present time. Cesar Melhem in submissions argued that the relevant Modern Award in 2010 was the

³⁵² Submissions of Cesar Melhem, 20/11/15, ch 2, para 3.

Amusement, Events and Recreation Award 2010. The submission is unmeritorious. Neither the AWU nor Cleanevent took that position in 2010. It was the AWU's position that the *Cleaning Services Award 2010* was the relevant Modern Award. That is apparent from the analysis done by Zoe Angus in October 2010, referred to above.

332. It is also apparent from an amendment proposed to the draft MOU by the AWU. The amendment was the result of a request sent by John-Paul Blandthorn to Zoe Angus, copied to Cesar Melhem on 21 September 2010.³⁵³ Part of the request stated 'Cesar has told the company he is not willing to recommend the deal to National Office unless there is a preamble that includes the following things'. One the things was '[t]hat the future agreement will be tested against the new modern cleaning award'. Zoe Angus responded by sending a draft MOU with an additional clause 3.3 that stated that the 'appropriate reference instrument for the purpose of the FWA better off overall test is the *Cleaning Services Award 2010*'.³⁵⁴ John-Paul Blandthorn then forwarded the email to Cesar Melhem.³⁵⁵

333. It was also Cleanevent's position in 2010 that the Cleaning Services Award applied. That is apparent from Michael Robinson's response:³⁵⁶

As our business changes and our relationships with our client's [sic] develop, it would be our preference that our business be tested against the most suitable instrument at the time of renegotiation. This may mean that our discussion around the amusements award be reignited if our business aligns closer to this award than the CSA.

³⁵³ Cleanevent MFI-1, 19/10/15, pp 202-210

³⁵⁴ Cleanevent MFI-1, 19/10/15, pp 225-228

³⁵⁵ Cleanevent MFI-1, 19/10/15, p 229.

³⁵⁶ SW-1, 28/5/15, p 72.

The effect of this response was: the *Cleaning Services Award 2010* is presently applicable, but may not be at the time the MOU is renegotiated in 2013. This indicates that both sides accepted its applicability in 2010.

334. In any event, even if the *Amusement, Events and Recreation Award 2010* been the applicable award,³⁵⁷ the employees covered by it would have been entitled to casual loadings and Sunday and Public Holiday penalty rates better than those provided for in the MOU.³⁵⁸
335. Cesar Melhem also sought to challenge the proposition that there was any relevance in the comparison between a Modern Award and the MOU.³⁵⁹ The submission was made on the basis that whilst the 1999 Award was in force, that was the relevant point of comparison. The argument proceeded to submit that, since the 1999 Award remained in force until its expiry in 2013, there was no proper basis to compare wages under the MOU with wages under a Modern Award.
336. Cesar Melhem's submission, for the most part, ignores the fact that it was open to the AWU to apply to the Commission to terminate the 1999 Award. It appears to take this position on the basis that it was never put to Paul Howes that such an application should have been

³⁵⁷ A doubtful proposition when regard is had to clauses 4.1 and 4.2 of that award which gives coverage to employers operating various amusements, event and recreation venues, not their contractors: Fair Work Ombudsman, *Amusement, Events and Recreation Award 2010* http://awardviewer.fwo.gov.au/award/Version/321219#_Hlt210096405, (as at 4 November 2010), accessed 28 November 2015.

³⁵⁸ Fair Work Ombudsman, *Amusement, Events and Recreation Award 2010* http://awardviewer.fwo.gov.au/award/Version/321219#_Hlt210096405, (as at 4 November 2010), accessed 28 November 2015, clauses 23.3(a), 23.3(b), 10.4(d).

³⁵⁹ Submissions of Cesar Melhem, 20/11/15, ch 2, paras 7-16.

made. There is no substance to this submission. It is significant that the AWU does not itself make any submission of this kind. It must have been obvious to all involved in 2010 that the AWU could have terminated the 1999 Award: that is why the MOU itself in clause 2.7c) contains an express promise not to seek to terminate it, or encourage its termination.³⁶⁰ If the 1999 Award had been terminated, then the Modern Award was the relevant reference point for the application of the ‘better off overall’ test.

337. There is the additional point that, even if the 1999 Award is the relevant comparison, most Cleanevent employees were worse off in any event because their entitlement to penalty rates was vastly reduced under the MOU. An analysis of the position appears at Appendix 3 to this Chapter of the Report.

338. Cesar Melhem takes a further legal point on this topic. It is that, because the 1999 Award had not terminated in 2010, the ‘better off overall test’ never had any application. The point assumes that only Modern Awards could be used under that test. The assumption is wrong. The ‘better off overall’ test applies to the EBA against the relevant award-based transitional instrument and the transitional Australian Pay and Classification Scale.³⁶¹ The 1999 Award (since it was not terminated) was the relevant award-based transitional instrument.

³⁶⁰ Cleanevent MFI-1, 19/10/15, p236.

³⁶¹ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 7, item 18(2)(b).

339. For the above reasons, the comparison between the Modern Award and the MOU is the relevant one. For the purposes of the comparisons that follow, only employees working in New South Wales and Victoria are considered. Employees working outside of those states receive lower rates. Therefore these calculations are a best case scenario for employees. For the purposes of these comparisons the following employee classifications³⁶² are used as comparators:

- (a) Level 1 under the MOU most closely aligns to Level 1 under the Modern Award;
- (b) Level 2 under the MOU most closely aligns to Level 1 under the Modern Award;
- (c) Level 3 under the MOU most closely aligns to Level 2 under the Modern Award; and
- (d) Level 4 under the MOU most closely aligns to Level 3 under the Modern Award.

Permanent employees

340. At face value³⁶³ the base rates of pay in the MOU are higher when compared to the Modern Award.

³⁶² See Schedule D of the Modern Award at Melhem MFI-1, 1/6/15, pp 443-445; see cl 15 of the 2006 EBA at SW1, 28/5/15, p 10.

³⁶³ That is, without taking into account the effect of transitional phasing in the Modern Award which may affect these calculations.

341. For permanent employees the Modern Award base rate ranges from approximately 3% to 18% lower in comparison to the MOU during the 2010 to 2014 financial years.

MOU vs. Modern Award (permanent base rate Monday to Friday)

| | 1.07.2010 | | 1.07.2011 | | 1.07.2012 | |
|-----------|-----------------|-------------------|----------------|-------------------|----------------|-------------------|
| Level | MOU | MA ³⁶⁴ | MOU | MA ³⁶⁵ | MOU | MA ³⁶⁶ |
| MOU Lvl 1 | 632.32 | 608.80 | 656.64 | 629.49 | 682.10 | 647.80 |
| MA Lvl 1 | 3.86% higher | | 4.3% higher | | 5.2% higher | |
| MOU Lvl 2 | 657.40 | 608.80 | 682.86 | 629.49 | 709.08 | 647.80 |
| MA Lvl 1 | | 7.98% lower | | 8.47% lower | | 9.45% lower |
| MOU Lvl 3 | 717.82 | 629.90 | 753.16 | 651.31 | 774.44 | 670.20 |
| MA Lvl 2 | | 13.9% lower | | 15.63% lower | | 15.5% lower |
| MOU Lvl 4 | 773.68 | 663.60 | 803.32 | 686.16 | 834.10 | 706.10 |
| MA Lvl 3 | | 16.5% lower | | 17% lower | | 18.1% lower |

³⁶⁴ *Cleaning Services Award 2010* as at 30 June 2010 which provides wages for the 2010-11 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/312343>, accessed 5/11/15.

³⁶⁵ *Cleaning Services Award 2010* as at 23 June 2011 which provides wages for 2011-12 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/351866>, accessed 5/11/15.

³⁶⁶ *Cleaning Services Award 2010* as at 21 June 2012 which provides wages for 2012-13 financial year, Fair Work Ombudsman, http://awardviewer.fwo.gov.au/award/Version/363596#_Ref208655928, accessed 5/11/15.

| | 1.07.2013 | | 1.07.2014 | |
|-----------|-----------|--------------------------------------|-----------|--------------------------------------|
| Level | MOU | MA ³⁶⁷ | MOU | MA ³⁶⁸ |
| MOU Lvl 1 | - | 666.59 | - | 686.58 |
| MA Lvl 1 | - | 6.37% <i>lower</i> ³⁶⁹ | - | 3.27% <i>lower</i> ³⁷⁰ |
| MOU Lvl 2 | - | 666.59 | - | 686.58 |
| MA Lvl 1 | - | 6.37% <i>lower</i> | - | 3.27% <i>lower</i> |
| MOU Lvl 3 | - | 689.64 | - | 710.32 |
| MA Lvl 2 | - | 12.2% <i>lower</i> | - | 9% <i>lower</i> |
| MOU Lvl 4 | - | 726.58 | - | 748.37 |
| MA Lvl 3 | - | 14.7% <i>lower</i> | - | 11.4% <i>lower</i> |

342. Whilst the base rates of pay for permanent employees under the MOU are higher in comparison to the Modern Award, shift work, weekend and public holiday penalties and overtime are significantly lower.

Overtime

343. Clause 2.8 of the MOU provides that all time worked by permanent employees in excess of 76 hours in a fortnight will be paid overtime at the rates attached in the schedules. These overtime rates equate to a fixed 33% loading on the permanent base rate regardless of when the overtime is worked.

³⁶⁷ *Cleaning Services Award 2010* as at 27 June 2013 which provides wages for 2013-14 financial year, Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/383236>, accessed 5/11/15.

³⁶⁸ *Cleaning Services Award 2010* as at 27 June 2014 which provides wages for 2014-15 financial year. Fair Work Ombudsman, <http://awardviewer.fwo.gov.au/award/Version/394810>, accessed 5/11/15.

³⁶⁹ In comparison to the wages for the 2012-13 financial year in the MOU.

³⁷⁰ In comparison to the wages for the 2012-13 financial year in the MOU.

344. Clause 24 of the Modern Award provides that the ordinary hours of full-time employees will not exceed 38 hours per week, to be worked in periods of not more than 7.6 hours per day, in not more than 5 days, on any day Monday to Sunday inclusive.
345. Clause 28 of the Modern Award provides that all time worked outside a permanent employees rostered hours is overtime and all time worked in excess of 7.6 hours per day, five days per week or 38 hours in any week by part-time employees is overtime. Overtime worked from Monday to Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter. Overtime worked on Sundays will be paid at the rate of double time. Overtime worked on public holidays will be paid at the rate of double time and one half.
346. Whilst the base rates in the MOU for permanent employees are higher than those in the Modern Award, the rate and entitlement to overtime in the MOU, particularly for overtime worked on weekends and public holidays, is less than that provided for in the Modern Award.

Penalties and allowances

347. The pay rates included in the schedules to the MOU do not provide any shift work, weekend or public holiday percentage loading for permanent employees. Rather the continued operation of clause 22 of the 2006 EBA provides a fixed payment of \$55 for permanent employees who work 7.6 hours on a public holiday.³⁷¹

³⁷¹ This equates to an additional \$7.23 per hour over 7.6 hours. This calculation has not been incorporated into the comparison tables in this section.

348. In comparison, clause 27 of the Modern Award provides that early morning, afternoon and non-permanent shift workers are paid an additional 15% loading on their ordinary hourly rate. Employees who work permanent night shifts are entitled to an additional 30% loading.³⁷² Employees are also entitled to time and a half on Saturday, double time on Sunday and double time and a half on public holidays.
349. Clause 18 of the 2006 EBA provides that employees staying away from home for an event are entitled to accommodation, meals and an out of pocket expense allowance. Employees are also entitled to a one off first aid allowance of \$250 plus the fees for their first aid qualification. Under the Modern Award, employees are entitled to 11 different allowances as set out in clause 17.³⁷³
350. Permanent employees who work shift work, weekends, public holidays or overtime would be better off under the Modern Award in comparison to the MOU.

Casual employees

351. The MOU does not provide for penalties for work on weekends, public holidays or shift work for casual employees who work at events. These employees also receive a lower rate (up to 10%) in comparison to casuals who do not work at events.

³⁷² These shift loadings have not been incorporated into the comparison tables in this section.

³⁷³ These allowances have not been incorporated into the comparison tables in this section.

352. The Modern Award does not delineate between casual work at events or otherwise. This results in the base rates for casuals working at events under the MOU ranging from approximately 1% to 19% lower in comparison to the base rates under the Modern Award from the 2010 financial year.

MOU vs. Modern Award – Minimum casual rate (Monday to Friday at events)

| | 1.07. 2010 | | 1.07.2011 | | 1.07.2012 | |
|------------------|--------------------|---------------------|--------------------|---------------------|--------------------|---------------------|
| Level | MOU | MA | MOU | MA | MOU | MA |
| MOU Lvl 1 | 18.05 | 20.07 | 18.59 | 20.07 | 19.15 | 21.31 |
| | <i>11.1% lower</i> | | <i>11.4% lower</i> | | <i>11.2% lower</i> | |
| MA Lvl 1 | | | | | | |
| MOU Lvl 2 | 18.14 | 20.07 | 18.50 | 20.71 | 18.87 | 21.31 |
| | | <i>10.6% higher</i> | | <i>11.9% higher</i> | | <i>12.9% higher</i> |
| MA Lvl 1 | | | | | | |
| MOU Lvl 3 | 19.86 | 20.72 | 20.26 | 21.42 | 20.87 | 22.05 |
| | | <i>4.3% higher</i> | | <i>1.25% higher</i> | | <i>5.65% higher</i> |
| MA Lvl 2 | | | | | | |
| MOU Lvl 4 | 21.58 | 21.83 | 22.29 | 22.57 | 22.74 | 23.22 |
| | | <i>1.15% higher</i> | | <i>1.15% higher</i> | | <i>2.1% higher</i> |
| MA Lvl 3 | | | | | | |

| | 1.07.2013 | | 1.07.2014 | |
|------------------|------------------|------------------------------------|------------------|------------------------------------|
| Level | MOU | MA | MOU | MA |
| MOU Lvl 1 | - | 21.86 | - | 22.51 |
| | | <i>14.1% higher</i> ³⁷⁴ | | <i>17.5% higher</i> ³⁷⁵ |
| MA Lvl 1 | | | | |
| MOU Lvl 2 | - | 21.86 | - | 22.51 |
| | | <i>15.8% higher</i> | | <i>19.2% higher</i> |
| MA Lvl 1 | | | | |
| MOU Lvl 3 | - | 22.61 | - | 23.30 |
| | | <i>8.3% higher</i> | | <i>11.6% higher</i> |
| MA Lvl 2 | | | | |
| MOU Lvl 4 | - | 23.83 | - | 24.55 |
| | | <i>4.7% higher</i> | | <i>7.9% higher</i> |
| MA Lvl 3 | | | | |

³⁷⁴ In comparison to the wages for the 2012-13 financial year in the MOU.

³⁷⁵ In comparison to the wages for the 2012-13 financial year in the MOU.

353. Casual base rates (Monday to Friday) for casuals not working at events under the MOU are also lower for employees classified as Levels 1 and 2 in comparison to the Modern Award from the 2010 financial year.
354. Casuals employed under Levels 3 and 4 receive a higher base rate under the MOU in comparison to the Modern Award for the 2010-2013 financial years.
355. From 1 July 2014, all casual base rates for all classifications regardless of whether they are working at an event or not are higher under the Modern Award.

MOU vs. Modern Award – Minimum casual rate (Monday to Friday not at events)

| | 1.07. 2010 | | 1.07.2011 | | 1.07.2012 | |
|------------------|---------------|----------------|------------|-----------------|------------|----------------|
| Level | MOU | MA | MOU | MA | MOU | MA |
| MOU Lvl 1 | 19.22 | 20.07 | 19.50 | 20.71 | 19.89 | 21.31 |
| MA Lvl 1 | 4.4% lower | | 6.2% lower | | 7.1% lower | |
| MOU Lvl 2 | 20.02 | 20.07 | 20.42 | 20.71 | 20.83 | 21.31 |
| MA Lvl 1 | | 0.2% higher | | 1.42% higher | | 2.3% higher |
| MOU Lvl 3 | 21.82 | 20.72 | 22.28 | 21.42 | 22.71 | 22.05 |
| MA Lvl 2 | | 5.3% lower | | 4% lower | | 2.9% lower |
| MOU Lvl 4 | 23.53 | 21.83 | 24.00 | 22.57 | 24.45 | 23.22 |
| MA Lvl 3 | | 7.78% lower | | 6.3% lower | | 5.2% lower |

| Level | 1.07.2013 | | 1.07.2014 | |
|------------------|-----------|--------------------------------------|-----------|---------------------------------------|
| | MOU | MA | MOU | MA |
| MOU Lvl 1 | - | 21.86 | - | 22.51 |
| MA Lvl 1 | - | 9.9% <i>higher</i> ³⁷⁶ | - | 13.1% <i>higher</i> ³⁷⁷ |
| MOU Lvl 2 | - | 21.86 | - | 22.51 |
| MA Lvl 1 | - | 4.9% <i>higher</i> | - | 8% <i>higher</i> |
| MOU Lvl 3 | - | 22.61 | - | 23.3 |
| MA Lvl 2 | - | 0.44% <i>lower</i> | - | 2.59% <i>higher</i> |
| MOU Lvl 4 | - | 23.83 | - | 24.55 |
| MA Lvl 3 | - | 2.5% <i>lower</i> | - | 0.4% <i>higher</i> |

356. Casuals who work on weekends or public holidays but not at events receive approximately a 12.8% loading on their base rate. This 12.8% loading applies regardless of whether the casual employee works on a Saturday, Sunday or public holiday. In comparison, clause 27 of the Modern Award provides that casuals are entitled to the Saturday, Sunday and public holiday penalties which are significantly higher than the 12.8% loading set out above. Therefore they are disadvantaged under the MOU.

357. Casuals who work at events which fall on weekends or public holidays are the most disadvantaged by having their employment regulated by the MOU instead of the Modern Award. For example, casuals who work at events on a Saturday have rates which range from approximately 146% to 167% lower in comparison to the rates they would receive if they were covered by the Modern Award.

³⁷⁶ In comparison to the wages for the 2012-13 financial year in the MOU.

³⁷⁷ In comparison to the wages for the 2012-13 financial year in the MOU.

*MOU (casuals at events) vs. Modern Award (Saturday casual rate)*³⁷⁸

| | 1.07. 2010 | | 1.07.2011 | | 1.07.2012 | |
|------------------|-----------------|------------------|---------------|------------------|-----------------|----------------|
| Level | MOU | MA | MOU | MA | MOU | MA |
| MOU Lvl 1 | 18.05 | 28.03 | 18.59 | 28.98 | 19.15 | 29.83 |
| MA Lvl 1 | 166.7% lower | | 167% lower | | 166.8% lower | |
| MOU Lvl 2 | 18.14 | 28.03 | 18.50 | 28.98 | 18.87 | 29.83 |
| MA Lvl 1 | | 154.5% higher | | 156.6% higher | | 158% higher |
| MOU Lvl 3 | 19.86 | 29.00 | 20.28 | 29.99 | 20.87 | 30.86 |
| MA Lvl 2 | | 146% higher | | 147% higher | | 147% higher |
| MOU Lvl 4 | 21.58 | 32.74 | 22.29 | 33.85 | 22.74 | 34.83 |
| MA Lvl 3 | | 151% higher | | 151% higher | | 153% higher |

| Level | 1.07.2013 | | 1.07.2014 | |
|------------------|-----------|-------------------------------|-----------|-------------------------------|
| | MOU | MA | MOU | MA |
| MOU Lvl 1 | - | 30.69 | - | 31.61 |
| MA Lvl 1 | | 160% higher ³⁷⁹ | | 165% higher ³⁸⁰ |
| MOU Lvl 2 | - | 30.69 | - | 31.61 |
| MA Lvl 1 | | 162% higher | | 167% higher |
| MOU Lvl 3 | - | 31.75 | - | 32.71 |
| MA Lvl 2 | | 152% higher | | 156% higher |
| MOU Lvl 4 | - | 35.74 | - | 36.82 |
| MA Lvl 3 | | 157% higher | | 161% higher |

358. Casuals who work at events on a Sunday have rates which range from approximately 182% to 215% lower in comparison to the rates they would receive if they were covered by the Modern Award.

³⁷⁸ Calculated by multiplying the permanent base rate by 1.75 (casual loading of 25% (cl 12.5(a)) plus Saturday loading of 150% (cl 27.2(a)).

³⁷⁹ In comparison to the wages for the 2012-13 financial year in the MOU.

³⁸⁰ In comparison to the wages for the 2012-13 financial year in the MOU.

*MOU (casuals at events) vs. Modern Award (Sunday casual rates)*³⁸¹

| | 1.07.2010 | | 1.07.2011 | | 1.07.2012 | |
|------------------|----------------------|-----------------------|----------------------|-----------------------|----------------------|-----------------------|
| Level | MOU | MA | MOU | MA | MOU | MA |
| MOU Lvl 1 | 18.05 | 36.04 | 18.59 | 37.27 | 19.15 | 38.35 |
| MA Lvl 1 | 199% <i>lower</i> | | 200% <i>lower</i> | | 200% <i>lower</i> | |
| MOU Lvl 2 | 18.14 | 36.04 | 18.50 | 37.27 | 18.87 | 38.35 |
| MA Lvl 1 | | 198% <i>higher</i> | | 201% <i>higher</i> | | 203% <i>higher</i> |
| MOU Lvl 3 | 19.86 | 37.29 | 20.28 | 38.56 | 20.87 | 39.68 |
| MA Lvl 2 | | 187% <i>higher</i> | | 190% <i>higher</i> | | 190% <i>higher</i> |
| MOU Lvl 4 | 21.58 | 39.29 | 22.29 | 40.62 | 22.74 | 41.80 |
| MA Lvl 3 | | 182% <i>higher</i> | | 182% <i>higher</i> | | 183% <i>higher</i> |

| Level | 1.07.2013 | | 1.07.2014 | |
|------------------|-----------|--------------------------------------|-----------|--------------------------------------|
| | MOU | MA | MOU | MA |
| MOU Lvl 1 | - | 39.46 | - | 40.65 |
| MA Lvl 1 | | 206% <i>higher</i> ³⁸² | | 212% <i>higher</i> ³⁸³ |
| MOU Lvl 2 | - | 39.46 | - | 40.65 |
| MA Lvl 1 | | 209% <i>higher</i> | | 215% <i>higher</i> |
| MOU Lvl 3 | - | 40.83 | - | 42.05 |
| MA Lvl 2 | | 195% <i>higher</i> | | 201% <i>higher</i> |
| MOU Lvl 4 | - | 43.00 | - | 44.31 |
| MA Lvl 3 | | 189% <i>higher</i> | | 194% <i>higher</i> |

359. Casuals who work at events on a public holiday have rates which range from approximately 22% to 263% lower in comparison to the rates they would receive if they were covered by the Modern Award.

³⁸¹ Calculated by multiplying the permanent base rate by 2.25 (casual loading of 25% (cl 12.5(a)) plus Sunday loading of 200% (cl 27.2(b)).

³⁸² In comparison to the wages for the 2012-13 financial year in the MOU.

³⁸³ In comparison to the wages for the 2012-13 financial year in the MOU.

*MOU (casuals at events) vs. Modern Award (Public Holiday casual rates)*³⁸⁴

| | 1.07.2010 | | 1.07.2011 | | 1.07.2012 | |
|------------------|----------------------|-----------------------|----------------------|-----------------------|----------------------|-----------------------|
| Level | MOU | MA | MOU | MA | MOU | MA |
| MOU Lvl 1 | 18.05 | 44.05 | 18.59 | 45.54 | 19.15 | 46.86 |
| MA Lvl 1 | 244% <i>lower</i> | | 244% <i>lower</i> | | 244% <i>lower</i> | |
| MOU Lvl 2 | 18.14 | 44.05 | 18.50 | 45.54 | 18.87 | 46.86 |
| MA Lvl 1 | | 242% <i>higher</i> | | 246% <i>higher</i> | | 248% <i>higher</i> |
| MOU Lvl 3 | 19.86 | 45.37 | 20.28 | 47.10 | 20.87 | 48.48 |
| MA Lvl 2 | | 228% <i>higher</i> | | 232% <i>higher</i> | | 232% <i>higher</i> |
| MOU Lvl 4 | 21.58 | 48.01 | 22.29 | 49.63 | 22.74 | 51.09 |
| MA Lvl 3 | | 222% <i>higher</i> | | 222% <i>higher</i> | | 224% <i>higher</i> |

| Level | 1.07.2013 | | 1.07.2014 | |
|------------------|------------------|--------------------------------------|------------------|--------------------------------------|
| | MOU | MA | MOU | MA |
| MOU Lvl 1 | - | 48.23 | - | 49.66 |
| MA Lvl 1 | | 251% <i>higher</i> ³⁸⁵ | | 259% <i>higher</i> ³⁸⁶ |
| MOU Lvl 2 | - | 48.23 | - | 49.66 |
| MA Lvl 1 | | 255% <i>higher</i> | | 263% <i>higher</i> |
| MOU Lvl 3 | - | 49.88 | - | 51.39 |
| MA Lvl 2 | | 239% <i>higher</i> | | 246% <i>higher</i> |
| MOU Lvl 4 | - | 52.52 | - | 54.14 |
| MA Lvl 3 | | 230% <i>higher</i> | | 238% <i>higher</i> |

³⁸⁴ Calculated by multiplying the permanent base rate by 2.75 (casual loading of 25% (cl 12.5(a)) plus public holiday loading of 250% (cl 27.3).

³⁸⁵ In comparison to the wages for the 2012-13 financial year in the MOU.

³⁸⁶ In comparison to the wages for the 2012-13 financial year in the MOU.

Conclusions

360. The above comparisons speak for themselves.
361. Cesar Melhem submitted that, because the cleaning services industry is heavily casualised, and because union representation is low, it is somehow acceptable to disregard the applicable award provided that regularity of income and work is secured. Moreover, acceptance of a payment from the employer for doing so is also acceptable.³⁸⁷ The fallacy in assertions of this kind is addressed in connection with the 2004 EBA, in section D, above.
362. Cesar Melhem also tried to cast blame on John-Paul Blandthorn for ‘selling out’ the workers.³⁸⁸ This submission was rather inconsistent with his submission that the arrangement was acceptable from the point of view of the workers because of the reality of the cleaning industry. John-Paul Blandthorn in turn seeks to cast blame on Cesar Melhem.³⁸⁹ In truth they are both to blame.
363. Cesar Melhem’s assertion that he was not responsible for the negotiations with Cleanevent in 2010 fails on the facts. A plain reading of the evidence, and in particular the contemporaneous documents, shows that both Cesar Melhem and John-Paul Blandthorn were involved in and directly responsible for what occurred in relation to the MOU.³⁹⁰ John-Paul Blandthorn could not properly have been

³⁸⁷ Submissions of Cesar Melhem, 20/11/15, ch 2, paras 21-23.

³⁸⁸ Submissions of Cesar Melhem, 20/11/15, ch 2, para 24.

³⁸⁹ Submissions of John-Paul Blandthorn, 20/11/15, paras 35-37; Submissions of Cesar Melhem, 26/11/15.

³⁹⁰ See Submissions of Counsel Assisting, 6/11/15, ch 2, paras 169-173.

described as a senior organiser at this time, but even if one accepts Cesar Melhem's submissions that he was, Cesar Melhem himself actually took responsibility for both the negotiation and implementation of the Side Letter.

364. Cesar Melhem also submitted that the assessment of Ben Davis that acceptance of payments from employers weakens the bargaining position of the AWU should be disregarded.³⁹¹ However, what occurred in 2010 in respect of Cleanevent actually demonstrates the point made by Ben Davis. As the Side Letter documented, the AWU Vic accepted \$25,000 per annum in return for agreeing to continue the 2006 EBA and not terminate the 1999 Award. Negotiations in 2010 between Cleanevent and the AWU Vic were at least as much concerned with two questions: 'What amount is to be paid to the AWU Vic?' and 'How if at all is the arrangement to be documented?' as they were with the terms and conditions on which Cleanevent workers were to be employed. It is pure fantasy to suggest that in these circumstances the payment did not influence those negotiations adversely from the point of view of those workers. The AWU Vic had a very powerful bargaining chip in negotiations: a new statutory regime which required satisfaction of the 'better off overall test'. Cesar Melhem and John Paul Blandthorn cashed in that chip not for the benefit of the Cleanevent workers but for the benefit of the AWU Vic.
365. In section L, below, consideration is given to whether these matters may have involved contraventions of the law.

³⁹¹ Submissions of Cesar Melhem, 20/11/15, ch 2, paras 25, 27.

J – MEMBERSHIP ARRANGEMENTS: OPT-OUT CLAUSES

366. It is convenient at this point to diverge briefly to discuss opt-out arrangements. It is clear that, for some time, Cleanevent included in its employment application forms an ‘opt out clause’ for AWU membership. The effect of the clause was that, if the employee did not tick the box next to the clause when completing the application form, he or she was deemed to have joined the AWU. As has been indicated, a similar arrangement was proposed with Steven Hunter from DSS.
367. The precise time at which the arrangement was in force was not clear. Steven Hunter said that the form was in use during his time at Cleanevent from 1996 through to about 2001.³⁹² Bill Shorten stated that he ‘might well have aspired to an opt-out arrangement’ during his time as a Cleanevent organiser, but that he would have to see the membership forms to confirm whether that arrangement was in place.³⁹³ He denied that the AWU was forcing people to be in the union.³⁹⁴ Cesar Melhem said such an arrangement was in place up to about 2009.³⁹⁵
368. It is evident that, by 2010, this practice was no longer in place. Julianne Page said that she did not believe that opt-out forms were ever

³⁹² Steven Hunter, 19/10/15, T:591.28-30.

³⁹³ Bill Shorten 8/7/15, T:59.6-8.

³⁹⁴ Bill Shorten 8/7/15, T:59.14-15.

³⁹⁵ Cesar Melhem, 22/10/15, T:887.24-34.

put into practice. To her understanding, the application forms for Spotless workers always had an area for them to join any union.³⁹⁶

369. Nonetheless, it would appear that the AWU continued to seek that Cleanevent use clauses of this nature. This seems to be what was referred to in an email from Michael Robinson to Julianne Page of 17 May 2010.³⁹⁷ The issue was still being pursued in late 2012. On 7 September 2012 the executive assistant to Cesar Melhem sent an email to Michael Robinson proposing a meeting with Cesar Melhem and John-Paul Blandthorn at the offices of AWU Vic.³⁹⁸ Several dates for the meeting are proposed between 17 September 2012 and 25 September 2012. On 8 October 2012 John-Paul Blandthorn sent an email to Steven Webber, copied to Cesar Melhem, stating:³⁹⁹

As per our discussions attached is a clause drafted by our lawyers to be included in the letter of offer to employees.

Cleanevent has a sound, cooperative and collaborative relationship with The Australian Workers' Union. Together, Cleanevent and the AWU strive towards best practice standards for service to clients and working terms and conditions for all workers. Cleanevent promotes full AWU membership across its workforce. By accepting your offer of employment you agree to become a member of the AWU, unless you advise Cleanevent to the contrary, by ticking the box below.

[] I do not wish to become a member of the AWU.

³⁹⁶ Page MFI-1, 19/10/15, T:8.43-47, 9.3-4.

³⁹⁷ Page MFI-1, 19/10/15, p 2

³⁹⁸ Cleanevent MFI-1, 19/10/15, p 330.

³⁹⁹ Cleanevent MFI-1, 19/10/15, p 331.

370. Cesar Melhem again affirmed that this issue was raised in 2012 and that the AWU Victorian Branch sought legal advice in relation to the clause at that time.⁴⁰⁰
371. Opt-out clauses raise several issues.
372. *First*, the adoption of such forms, particularly in circumstances in which applicants for casual cleaning work might be transient and may well not be sophisticated in matters of industrial relations, carries a risk of denying workers an informed choice as to whether to join a union. That denial is inconsistent with right of free association.
373. *Secondly*, depending on the wording of the form, the worker may not be properly informed about the financial consequences of membership. If payroll deductions or direct debits are processed without some express written authorisation of the worker (rather than a failure to tick a box on an unrelated form) it is likely that AWU rules 10(6) and (7) would not be complied with.⁴⁰¹
374. *Thirdly*, there are obvious privacy issues associated with the union learning personal information about workers who became members without having read or understood the opt-out clause.
375. The use of opt-out forms to secure increases in membership is beset with many of the problems associated with payment of membership contributions by an employer, discussed in section G above. The problems are also akin to some that arose in the CFMEU ACT case

⁴⁰⁰ Cesar Melhem, 22/10/15, T:887.38-45.

⁴⁰¹ See para 311.

study, which dealt in part with the attempts by organisers to compel employers to make their workers become union members. All of these categories of conduct undermine freedom of association.⁴⁰²

K – THE FATE OF THE 2006 EBA

376. Despite the fact that the term of the MOU came to an end on 1 July 2013, Steven Webber gave evidence that the AWU and Cleanevent proceeded on the basis that it was still on foot following after that time.⁴⁰³ It would seem that no further payments under the Side Letter were made.

377. On 4 July 2013 Steven Webber sent an email to John-Paul Blandthorn stating:⁴⁰⁴

A note to inform you that we have made a decision to pass on to all staff under the EBA a 2.6% increase pending finalisation of our agreement.

Once we finalise all staff will be back payed [sic] any short pay.

I am sure you will receive some calls on this so I wanted to ensure you were fore armed with our position.

378. John-Paul Blandthorn responded on 4 July 2013, attaching the 1999 Award and noting that the rates were ‘not right’.⁴⁰⁵

379. On 7 July 2013, Steven Webber sent an email to John-Paul Blandthorn attaching a letter from the Fair Work Commission and stating that he

⁴⁰² See Ch 6.4.

⁴⁰³ Steven Webber, witness statement, 28/5/15, para 16.

⁴⁰⁴ Cleanevent MFI-1, 19/10/15, p 334.

⁴⁰⁵ Cleanevent MFI-1, 19/10/15, pp 334-372.

would ring John-Paul Blandthorn on Monday to discuss.⁴⁰⁶ The letter, dated 3 July 2013, refers to the 1999 Award and advises that, by operation of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), the 1999 Award will be terminated unless an application to modernise the Award is made and granted by 31 December 2013.⁴⁰⁷

380. John-Paul Blandthorn responded on 8 July 2013, stating:⁴⁰⁸

This is what I was talking to you guys about.

You have a short window of opportunity to make a new agreement with this as the reference award before you fall under the Modern award.

It is unlikely you will get the Enterprise Award extended because United Voice will easily be able to knock it off by claiming the Modern Award already deals with it.

I am around today and tomorrow if you want to catch up.

381. It appears that, following this exchange, John-Paul Blandthorn and Steven Webber continued negotiations with a view to agreeing an EBA with the 1999 Award as the relevant award, prior to the termination deadline. A diary invitation sent from Steven Webber to John-Paul Blandthorn and Ryan Murphy proposed an ‘EBA Workshop’ at Cleanevent’s offices on 31 July 2013.⁴⁰⁹

382. On 31 July 2013 at 8.25am, John-Paul Blandthorn sent an email to Steven Webber. It confirmed that the correct industrial instrument for

⁴⁰⁶ Cleanevent MFI-1, 19/10/15, p 373.

⁴⁰⁷ Cleanevent MFI-1, 19/10/15, pp 378-379.

⁴⁰⁸ Cleanevent MFI-1, 19/10/15, p 394.

⁴⁰⁹ AWU MFI-14, 6/11/15, p 3.

the then applicable Better Off Overall Test was the 1999 Award. It set out a table showing the weekly increases in weekly and hourly pay rates for level 1 and 2 employees following the increases granted by the Australian Fair Pay Commission and Fair Work Australia. The email concluded ‘See you shortly.’⁴¹⁰

383. It is evident from the above exchange that John-Paul Blandthorn continued to be alive to the commercial attractiveness of retaining the rates in the 1999 Award as the comparator, compared with the Modern Award. The fact that he actively sought to assist Cleanevent to extend its advantage in the face of a clear legislative provision that Cleanevent’s employees should be benefiting from a more generous industrial regime further illustrates the extent to which the AWU Vic’s capacity to represent its members was undermined by what occurred in 2010.

384. The next dealing between the AWU and Cleanevent appears to have occurred in June 2014, when Cleanevent approached the AWU seeking approval of a proposed EBA underpinned by the *Amusement, Events and Recreation Award 2010*.⁴¹¹ The proposed agreement was circulated nationally and officials of several branches expressed concern about the terms of the proposed EBA. On 27 June 2014 Daniel Walton, Assistant National Secretary of the AWU, informed Steven Webber that the AWU would not sign the agreement and would oppose approval by the Commission.⁴¹² It appears, from submissions to the Fair Work Commission on the AWU’s application to terminate the

⁴¹⁰ Cleanevent MFI-1, 19/10/15, p 395.

⁴¹¹ Shorten MFI-5, 8/7/15, Vol 2, p 196.

⁴¹² Shorten MFI-5, 8/7/15, Vol 2, p 197.

EBA, that further negotiations proceeded between Cleanevent and the AWU after this time.⁴¹³

385. Ben Davis gave evidence that he first became aware of the Side Letter when he came upon it when preparing documents in response to a Notice to Produce issued by the Commission.⁴¹⁴ After that, he spoke with John Douglas of Cleanevent on about 13 March 2015 and told him that the arrangement was off.⁴¹⁵ Ben Davis's evidence is that he did so because he believed that the arrangement was 'untoward'. He said:⁴¹⁶

Q. You thought it was untoward that – well, what particular aspect of the arrangement did you regard as untoward?

A. As well as the whole notion of paying – the employer paying membership fees, the fact that it was attached to the MOU.

386. On 4 June 2015 the AWU filed with the Fair Work Commission and served on Cleanevent an application to terminate the 2006 EBA.⁴¹⁷ The letter of service advised that the AWU's position was that the *Cleaning Services Award 2010* was the relevant Modern Award, and not the *Amusement, Events and Recreation Award 2010*.

387. In the submissions filed with the Fair Work Commission, the AWU contended:⁴¹⁸

⁴¹³ Shorten MFI-5, 8/7/15, Vol 2, pp 200-201.

⁴¹⁴ Ben Davis, 4/6/15, T:647.12-27.

⁴¹⁵ Ben Davis, 4/6/15, T:647.29-46, 653.27-40.

⁴¹⁶ Ben Davis, 4/6/15, T:648.1-9.

⁴¹⁷ Shorten MFI-5, 8/7/15, Vol 2, pp 177-181.

⁴¹⁸ Shorten MFI-5, 8/7/15, Vol 2, p 189 [11]-[12].

Employees covered by the 2006 Agreement are currently being denied access to the safety net contemplated by the *Fair Work Act 2009*.

This is because their employment conditions are still governed by the 2006 Agreement which was negotiated under predecessor legislation which did not require an assessment of whether employees would be better off overall under the proposed agreement than they otherwise would be under the relevant modern award.

388. The submission also noted that the casual loading and rates of pay in the 2006 EBA both fell below the 2014 National Minimum Wage Order.⁴¹⁹
389. On 12 June 2015, the 2006 EBA was terminated by order of the Fair Work Commission.⁴²⁰ The submissions put forward by the AWU and accepted by the Fair Work Commissioner included statements to the effect that:⁴²¹
- (a) the view of the AWU, and employees the AWU has spoken with, is that the 2006 EBA should be terminated;
 - (b) under the 2006 EBA, employees working at events do not receive higher rates when they work on weekends and public holidays;
 - (c) although the termination of the 2006 EBA might result in higher operating costs for the employer, the Award rates have been carefully determined by the Fair Work Commission and are presumably being paid by Cleanevent's competitors; and

⁴¹⁹ Shorten MFI-5, 8/7/15, Vol 2, p 189 [15].

⁴²⁰ Shorten MFI-5, 8/7/15, Vol 2, pp 217-221.

⁴²¹ Bill Shorten 8/7/15, T:63.43, 65.18-25, 41, Shorten MFI-5, 8/7/15 Vol 2, pp 189-190, 208, 219 [15], [17]-[18].

- (d) there does not seem to be any real benefit for an employee from the 2006 EBA remaining operative, the only purpose of which is to deny employees, particularly casual employees, access to penalty rates.⁴²²

390. The accuracy of all of these statements is borne out by the evidence. They were all equally valid statements in 2010. All, it is overwhelmingly likely, would have been accepted by the Commission in 2010 had an application been made to terminate the 1999 Award and 2006 EBA.

L – CONCLUSIONS

391. Counsel assisting submitted that, as a result of the conduct described above, findings should be made that various persons may have breached their fiduciary duties and may have committed criminal offences. Many of the features of this case study were present in the Thiess,⁴²³ ACI⁴²⁴ and Chiquita⁴²⁵ case studies, discussed below. Some of these issues arise also in the CFMEU NSW Building Trades Group Drug and Alcohol⁴²⁶ and CFMEU CSI and CCW⁴²⁷ case studies. It is convenient, in dealing with counsel assisting's submissions, to deal also with some common legal issues that arise and which were debated

⁴²² Shorten MFI-5, 8/7/15, Vol 2, pp 189-190, 208.

⁴²³ Chapter 10.3.

⁴²⁴ Chapter 10.5.

⁴²⁵ Chapter 10.6.

⁴²⁶ Chapter 7.4.

⁴²⁷ Chapter 6.6.

in submissions. At times in what follows, some familiarity is assumed with some of the other AWU case studies.

Fiduciary Duties

392. Counsel assisting submitted that the relevant industrial officers undertaking negotiations on behalf of AWU members and other workers to be covered by an industrial agreement owed fiduciary duties to those workers. The submissions by affected parties denied any duty of this nature, and said that if the duty existed, it was not breached. Similar submissions were made in the other case studies referred to above. Some of the various issues thrown up in these submissions are addressed in this section.

Circumstances in which the duties arose

393. There are some categories of fiduciary duty which are accepted as automatically arising, for example, trustee/beneficiary, agent/principal, solicitor/client, employee/employer, director/company, partners, certain receivers, guardian/ward. The relationship of union official and member is not one of these established categories of fiduciary duty. Those categories are not closed. Other categories of fiduciary duty arise out of the circumstances of the particular case. The question of whether fiduciary relationships arise outside of those categories depends upon a close analysis of the particular facts involved. The answer to that question depends upon the application of the principle expressed in the following passage of the judgment of Mason J in

Hospital Products Ltd v United States Surgical Corporation (1984)
156 CLR 41.⁴²⁸

... The critical feature of these relationships is 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 that other person **in a legal or practical sense**. The relationship ... 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. ...

It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.

394. All of the case studies in which this question arises concern negotiations for industrial instruments by unions and their officials. For that reason, it is relevant, in considering whether any fiduciary duties are owed, to consider the statutory framework within which those negotiations took place. Different provisions were applicable in different case studies. Some of the submissions of affected parties appeared to approach the matter from the perspective that these provisions were the only matters capable of giving rise to a fiduciary relationship. That perspective is incorrect. They are one of many matters. The question requires the application of the principle articulated by Mason J in all of the factual circumstances.

395. The statutory provisions relevant in respect of the Cleanevent case study and the CFMEU CSI and CCW case study are contained in the *Fair Work Act 2009* (Cth). From 1 July 2009, s 176 of the *Fair Work*

⁴²⁸ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 per Mason J (emphasis added).

Act 2009 (Cth), provided that a union is automatically a ‘bargaining representative’ for each employee who is a member of the union who will be covered by a proposed enterprise agreement which is not a ‘greenfields agreement’ (the union member employees), provided that the union is entitled to represent the industrial interests of the employees in relation to work that will be performed under the agreement: ss 176(1)(b), 176(3).

396. A union member employee who will be covered by the proposed agreement may appoint another person as his or her bargaining representative, but in the absence of such appointment the union will be the bargaining representative of the union member employee: ss 174(3), 176(1)(b).
397. The role of a union bargaining representative is to engage in ‘good faith bargaining’ with employer bargaining representatives. While s 228 of the *Fair Work Act 2009 (Cth)* is directed in the main at the conduct of a bargaining representative with respect to his or her employer counterpart, it is an inherent aspect of the process of enterprise bargaining that during negotiations the union, through its relevant officers, acts on behalf of and represents the interests of the union member employees.
398. A bargaining representative cannot bind members to an enterprise agreement. In order for an agreement that is not a greenfields agreement to be made, the employees who will be covered by it need to approve it (*Fair Work Act 2009 (Cth)*, ss 181, 182). This was said by many affected parties to have the consequence that bargaining representatives are not fiduciaries. Such submissions take too narrow a

view of the circumstances in which a fiduciary relationship may arise. They put to one side Mason J's reference to the capacity of a fiduciary to affect the interests of a principal in a 'practical sense'. Some of the established categories of fiduciaries cannot affect the interests of their principals in a legal sense: to take just one example, the relationship of doctor and patient.

399. These submissions also do not reflect the reality of the bargaining process. In the ordinary course, workers asked to vote on an agreement will not know any or all of the complexities of the bargaining process that preceded it. They will not ordinarily be in a position to judge to what extent that process has been undertaken in their interests. They are in a position where they are asked to trust that it has been. They are free at any point during this process to appoint some other bargaining agent. But if they do not they must assume that the agreement they are asked to approve is the best that the union has been able to achieve on their behalf. All of these matters point strongly to the conclusion that the bargaining representative is a fiduciary.

400. The above analysis has dealt with the position under the *Fair Work Act* 2009 (Cth). The other case studies pre-date the coming into force of that Act. The statutory provisions in the ACI and Chiquita Mushrooms case studies are different but the differences are not overly significant. The *Workplace Relations Act* 1996 (Cth) as in force at the times of the negotiations of the enterprise agreements considered in those case studies did not include a statutory recognition of the role of 'bargaining agent'. However the position was in substance no different. The AWU was negotiating with ACI and Chiquita Mushrooms for the

purposes of making an enterprise agreement under s 170LJ. In doing so, the AWU was negotiating on behalf of its members who were employed by those respective companies. Workers were not bound by that agreement unless and until it was approved by a requisite majority and certified by the Commission (see ss 170LJ(2), 170LT(5)). The absence of any statutorily defined concept of bargaining agent does not detract from the proposition that the negotiations affected the interests of the workers in question in a real and practical sense.

401. The Thiess case study throws up a different situation because it concerned a greenfields project. In one sense the negotiations for the Thiess project more clearly involved a fiduciary relationship than do ordinary enterprise negotiations. That is because under the statutory regime in force, the agreement reached between the AWU and Thiess, once certified, bound those who came to be employed by Thiess.⁴²⁹ Thus, this is an example of a situation where someone has the capacity to affect the interests of another in both a legal and a practical sense. It was submitted by Thiess that the AWU must have negotiated the agreement as principal and not agent because (since no employees had at that time been engaged by the joint venture) there was no identified principal. Let it be assumed that the AWU was not an agent. However that does not conclude the question of whether fiduciary duties were owed. It is perfectly possible for fiduciary duties to be owed by persons who contemplate the creation of a relationship which will be fiduciary even though the relationship in its substantive operation will exist only in the future. A joint venture arrangement, not yet formally documented, for the development of certain land has been held

⁴²⁹ *Workplace Relations Act 1996* (Cth), ss 170LL, 170M.

analogous to a partnership, so that the relationship between the venturers was fiduciary in character even before the execution of the joint venture agreement.⁴³⁰ Similarly, a fiduciary relationship was found between parties who were negotiating for, but had not yet concluded, a partnership to operate a pharmacy.⁴³¹ It is true that in those instances the identity of those whose interests the fiduciary must protect is known to the fiduciary. But a promoter of a venture can be a fiduciary even though the ‘principals’ are not known to the promoter. If it is objected that this cannot be so, because of the difficulty facing the promoter in getting informed consent to conduct while in a position of conflict – a difficulty which may be even greater for a union and its officials negotiating corporations in relation to a greenfields project – there is an answer. Equity does not say: ‘It is a precondition to recognition of a fiduciary duty that the fiduciary be able to avoid breach by getting the principal’s informed consent.’ Equity rather says: ‘If there is a fiduciary duty, the fiduciary can avoid breach by establishing informed consent if it can; if it cannot, unfortunately, the consequences of breach follow.’ An illustration of that arises when a fiduciary relationship is based on or is governed by a contract and the fiduciary wishes to vary the contract to its advantage. At once the fiduciary is in a position of conflict between the burden of its duty under the original contract and its self-interest in lightening that burden. It can be very hard for the fiduciary to make sufficient disclosure to ensure that any consent given is fully informed. It can be very difficult to formulate in advance which fiduciary protections are being surrendered and which types of hitherto forbidden conduct on

⁴³⁰ *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

⁴³¹ *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1.

the fiduciary's part are thus being permitted. But in a sense this debate does not matter. That is, it does not matter whether or not a fiduciary duty is owed by a trade union (or its officials) in negotiating an agreement with a proprietor or a construction company on a greenfields project. Even if there is no fiduciary duty, there are other duties. They are the duties which paragraphs (f) and (g) of the Terms of Reference mention – the professional standards applying to officers of an employee association. Trade union officials acting for the union and negotiating with proprietors or construction companies, behaving professionally, could not take money either for themselves or for the union in the course of negotiations. To do so would tend to weaken the zeal and skill with which they attempt to secure the interests of those persons who will eventually become the workers on the contemplated project.

402. For the reasons given above, unions and their officials involved in the bargaining process owe duties of one kind or another to those members who are or who may be employed by the company in question. It is necessary to deal with further submissions said by affected parties to undermine this conclusion. They were not persuasive.
403. In relation to the Cleanevent case study, it was submitted by Cesar Melhem that the statutory context was irrelevant because the MOU was not covered by the *Fair Work Act* 2009 (Cth). It was said that the employees were 'entirely at liberty' to negotiate their own terms and conditions.⁴³² This is a highly unattractive submission because it ignores the fact that the plain intention of everyone involved in the

⁴³² Submissions of Cesar Melhem, 20/11/15, ch 2, para 14.

negotiations was to reach an agreement which would govern the rights of Cleanevent employees despite their non-participation in negotiations.

404. In any event, if Cesar Melhem's submission is right, it makes the existence of the fiduciary duty all the more plain. Because the provisions of the *Fair Work Act 2009* (Cth) were not followed, the MOU purported to bind Cleanevent employees. It is certain that not all of them consented. It is unlikely that any of them consented.⁴³³ The scrutiny of the Fair Work Commission was avoided. These circumstances make it all the more obvious that the AWU had the capacity to affect the interests of Cleanevent employees in a practical sense. In addition, the AWU's role as a default bargaining representative was factually relevant to the course of events that led to the MOU. As the correspondence outlined in section G makes plain, Cleanevent negotiated with the AWU to secure the MOU precisely because, as Michael Robinson indicated an email to Steven Webber and Julianne Page, the AWU was in a position under the prevailing legislation to 'send us straight to the Modern Award rates.'⁴³⁴

405. A number of affected parties advanced the proposition that neither the AWU nor its officials were agents of the workers on behalf of whom they were negotiating. It may be accepted that neither the AWU nor its officials had authority to bind those workers to the terms of the agreements that were negotiated. For reasons already given, that is not

⁴³³ As stated in section G, above, a 'poll' of some kind was conducted by John-Paul Blandthorn. There is no suggestion that this involved the MOU itself as distinct from a survey of some unspecified persons as to their attitude to the wage increases for which the MOU provided.

⁴³⁴ Cleanevent MFI-1, 19/10/15, p 175.

decisive. The question of whether they were agents in some particular sense during the bargaining process is debatable but not necessary to determine. Not every agent will owe fiduciary duties.⁴³⁵ The issue is whether fiduciary duties were owed.

406. A number of affected parties submitted that union officials owed duties to their respective unions, and not to the members of those unions. The submission that union officials owe duties to their union is correct.⁴³⁶ But it does not entail the conclusion that they do not, in particular circumstances, also owe duties to their members. Thus, for example, in particular circumstances, a company director can owe fiduciary duties to shareholders notwithstanding that it also owes fiduciary duties to the company.⁴³⁷ As Evatt and Northrop JJ pointed out in *Allen v Townsend*:⁴³⁸

In our opinion, members of the committee of management of an organization, a branch of an organization or a sub-branch of a branch of an organization owe a fiduciary duty to members of the organization, to members within the branch and to members within the sub-branch as the case may be. Members of committees of management are to be compared with directors of incorporated bodies being companies incorporated under legislation such as the *Companies Acts* of the States of Australia. The courts have developed principles of law of general application regulating the manner in which directors of companies are required to exercise powers conferred upon them. Subject to necessary adaptations, similar principles of law should apply to regulate the exercise of powers conferred upon members of a committee of management of an organization or of a branch of an organization or of a sub-branch of a branch of an organization.

⁴³⁵ See *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (5th ed) LexisNexis Butterworths, Sydney 2015 [5-215]-[5-225].

⁴³⁶ See Chapter 3, Volume 5 of this Report.

⁴³⁷ *Bunninghausen v Glavanics* (1999) 46 NSWLR 538 at 558 per Handley JA, and the authorities cited at 549-560; *Charlton v Baber* (2003) 47 ACSR 31.

⁴³⁸ (1997) 31 FLR 431 at 483-484.

There are many similarities between organizations and legal persons incorporated under the *Companies Acts*. Each is a creature of statute. Their essential similarity is that each has a legal personality separate and distinct from its members. Each has an independent existence as a legal person. Each is given a personality which is distinct from that of all or any of its members and which continues to subsist unchanged notwithstanding the changes which are bound to occur from time to time in its membership. Each has perpetual succession. Each maintains its identity and its personality notwithstanding changes in its membership, which may occur from day to day. The property of each does not belong to its members from time to time. Each must act at the direction of individuals who manage its activities. The powers of these individuals depend upon the rules which regulate the affairs of the incorporated body. The rules may be included in the memorandum and articles of association of companies incorporated under the *Companies Acts* or in the rules of organizations made pursuant to the Act. The rules include not only the objects to be pursued by the incorporated body but also the powers by which those objects are to be pursued. The rules also contain provisions regulating the affairs of the members as between themselves. Normally the rules provide for a small group of natural persons to be the appropriate group to manage the affairs of the incorporated body subject to eventual control by all the members. Though in theory the ultimate control is conferred upon and retained by the members of the incorporated body, in practice, the group managing the affairs of the incorporated body has a very substantial control over the affairs of that body, the affairs of its members, and the privileges and obligations affecting different groups of members within that body. Within organizations, the committees of management constitute the managing group.

The analogy between company directors and union officials suggests that the latter, like the former, owe fiduciary duties. And the analogy also suggests that those fiduciary duties are owed not only to the company or the registered organisation, but to the members.

407. Nor is it possible to see, at least in the particular situation of the enterprise bargaining process, how there could be any conflict between duties owed by officials to their union and duties owed to the members on behalf of whom they are bargaining. Some of the primary objects

of the AWU include the object of acting in the interests of members.⁴³⁹ It is not without significance that union officials themselves perceived that during the EBA negotiation process they were acting on behalf of AWU members. John-Paul Blandthorn for example accepted that when undertaking negotiations for the EBA and the MOU, he was acting on behalf of the AWU members employed by Cleanevent.⁴⁴⁰ Cesar Melhem said that in that capacity he was acting for the members, the employees and the enterprise.⁴⁴¹

408. Counsel assisting drew attention to the potential difficulty that might arise by reason of the potential for conflict as between the interests of members on behalf of whom the union and its officials are bargaining. So, for example, a particular EBA might be a better result for permanent workers than for casual workers. This, however, does not undermine the proposition that fiduciary duties are owed directly to members. The particular duty in question is a duty during the bargaining process. It is not a duty to obtain any particular outcome for members at the end of that process. And, in any event, if there is a significant risk of conflict during that process, the union and its officials can declare it and seek consent to proceed, or withdraw. There is the further point that balancing the competing interests of classes of persons to whom duties are owed is not unknown to the law of fiduciaries. For example, it can arise in a trust with different classes of beneficiary. It can arise in a trust where there are beneficiaries interested in income and other beneficiaries interested in remainder,

⁴³⁹ See AWU Rules, 2006, r 4 (AWU MFI-2, 23/10/15, pp 23-24), AWU Rules, 2015, r 4 (Melhem MFI-1, 1/6/15, p 8).

⁴⁴⁰ John-Paul Blandthorn, 20/10/15, T:758.29-31.

⁴⁴¹ Cesar Melhem, 22/10/15, T:889.1-5.

and therefore in capital. In a slightly different context, a director when discharging his duties to a company in financial difficulties must have regard to the interests of shareholders and creditors,⁴⁴² notwithstanding that the interests of each may differ, or the interests of different creditors may differ as between them.

409. Counsel assisting drew attention to the decision of the Fair Work Commission in *Jupiters Ltd v United Voice*.⁴⁴³ That was a determination of an application under s 229 of the *Fair Work Act* 2009 (Cth) for bargaining orders against a union. The complaint was that the union was disseminating false information about a wages offer made by an employer during the bargaining process. This was said to contravene the requirement that the union bargain in good faith. The particular orders sought were orders requiring the union to desist from displaying and disseminating particular information about the bargaining process. The Commission accepted that a deliberate misrepresentation of the kind alleged could trigger the discretion to make a bargaining order but found that the union was not making any misrepresentations, deliberate or otherwise. On this basis, the application was dismissed.⁴⁴⁴

410. A submission was made by the applicant that the union during the bargaining process owed fiduciary duties to its members. That submission was rejected by the Commission. Counsel assisting submitted that the reasoning on this point was plainly wrong. That submission, with great respect to the Commission, is accepted

⁴⁴² *Walker v Wimborne* (1976) 137 CLR 1 at 6-7 per Mason J.

⁴⁴³ [2011] FWA 8317.

⁴⁴⁴ [2011] FWA 8317 at [40]-[41], [49].

(although there is, also with respect, no reason to doubt the correctness of the ultimate result reached by the Commission). The reasoning commences with the proposition⁴⁴⁵ that ‘Fiduciary obligations arise from a general rule that a fiduciary must not benefit or gain an advantage from a fiduciary position in terms of conflict of duty or interest, without the informed consent of the beneficiary’. It is then said⁴⁴⁶ that ‘[i]t is difficult to see how a union (or its officials...) could obtain a personal benefit, profit or advantage in the context of representing members in negotiations for an enterprise agreement’. The first step incorrectly treats the result of the existence of a fiduciary relationship as a reason for finding that a fiduciary relationship exists. The second step asserts a factual proposition that is demonstrated by the AWU case studies to be false. The reasoning goes on to refer to the argument that unions cannot affect the legal interests of their members during the bargaining process. The difficulties with that argument have been dealt with above. It is also said that the obligations imposed on bargaining representatives by s 228 of the *Fair Work Act 2009* (Cth) are sufficient to ensure they ‘conduct themselves properly’. However, these obligations are obligations to the other bargaining party. They are not obligations to the persons represented by the bargaining representatives. This rather reinforces the proposition that the persons represented by the bargaining representatives are, in the relevant sense, vulnerable and may have their interests affected in a practical sense.

⁴⁴⁵ [2011] FWA 8317 at [36].

⁴⁴⁶ [2011] FWA 8317 at [37].

411. What would follow if the submissions for affected parties were correct, and no fiduciary duties were owed? It would greatly undermine the enterprise bargaining process, unless there were equivalent standards of a professional character in operation. Absent any provision to the contrary in their rules (and there is none in the AWU rules), and provided they obeyed the criminal law, unions would be entitled to use that process to extract from employers as much money as possible for the union's own benefit and leave employees with terms and conditions of employment no better than award rates. Workers would have no interest in permitting unions to be bargaining representatives. They could have no confidence that the bargaining process was conducted in their interests, and no redress if it was not.
412. These consequences may not compel rejection of the submissions of the affected parties on this point. But they sit very comfortably with that rejection.
413. The submissions of counsel assisting on this topic are, generally, accepted. A union and its officials negotiating enterprise agreements on behalf of members are fiduciaries. That may be so even in 'greenfields' circumstances.⁴⁴⁷ But even if it is not so there, there must be equivalent duties arising out of the operation of professional standards. As such, they owe those members duties to:

⁴⁴⁷ See above para 401.

- (a) 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;⁴⁴⁸ and
- (b) avoid using their positions to confer an advantage on themselves or someone else or to act to the detriment of the members.⁴⁴⁹

Conflict of interest

414. Counsel assisting submitted that Cesar Melhem, John-Paul Blandthorn and the AWU all acted in a position of conflict of interest in relation to the Cleanevent MOU. That submission is accepted. The conflict was stark. The AWU Vic wanted an amount of \$25,000 a year for three years. The price for obtaining it was abstention from seeking better terms and conditions for its members employed by Cleanevent.
415. Submissions for affected parties asserted, both in the Cleanevent case study and in other AWU case studies, that there was no conflict of interest. These submissions were cast in different terms but in substance came down to two propositions. First, that the payments of money to the union procured during or as a result of the negotiation process were for the ultimate benefit of the union's members. Secondly, that the bargaining process was not compromised in any way, and that the workers in question obtained good results or the best results that could have been achieved in the circumstances.

⁴⁴⁸ *Breen v Williams* (1996) 186 CLR 71 at 113; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 197 [74], 198 [77]-[79]; *Clay v Clay* (2001) 202 CLR 410 at 436; *Howard v FCT* (2014) 88 ALJR 667 at 677 [33], 681 [56], [59], [61].

⁴⁴⁹ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

416. Both propositions, even if correct, are irrelevant to the question of whether there was a breach of fiduciary duty. To establish a breach it is not necessary to show actual conflict or actual detriment as a result. It is necessary only to show that a fiduciary duty exists and that the fiduciary acted in a position of real or sensible possibility of conflict.
417. On a factual level, these submissions are most obviously wrong in the case of the Cleanevent case study. To obtain a better deal for workers all that was necessary was for the AWU to go to the Fair Work Commission. It did not because of the promise in the side-letter to pay \$25,000 a year to the union. It is true that that money was an ultimate benefit to the union, but the side deal was contrary to the interests of the AWU members who were employed by Cleanevent because (for the reasons explained in section I, above) it resulted in less favourable conditions of employment than would otherwise have been achieved. The union and its officials acted in a position of actual conflict. This resulted in demonstrable detriment to those members.
418. In the ACI, Thiess and Chiquita case studies these submissions also cannot be accepted. Particular factual issues that arise in those case studies are considered in the Chapters of this Report dealing with those case studies. The general difficulty with submissions of this kind is that they are no more than speculation. The basic problem with an assertion that these EBAs were good (or bad) results for workers is that it is impossible to assess what those EBAs would have been like, or how they would have been implemented, had the corrupt payments not been made (or had full disclosure of them been made). It is often in the very nature of such payments that their precise effect cannot easily be assessed.

419. Both Cesar Melhem⁴⁵⁰ and John-Paul Blandthorn endeavoured to suggest that the payment of \$25,000 was not really a benefit to the AWU because it was really a payment to compensate the AWU for the work that it was doing. John-Paul Blandthorn put the matter this way in his evidence:⁴⁵¹

It was to compensate for the extra work the AWU was doing servicing people who were not members of the Union.

...I'm not necessarily sure it was a benefit to the AWU for the amount of time and effort. I mean, it could be well argued by the AWU that the time and effort put in was at the cost of \$100,000 or \$5 million and that receiving \$25,000 went nowhere near to making it a benefit...

420. Similar evidence was given by Cesar Melhem, who persisted in describing these payments as 'service fees'. These characterisations of the payments cannot be accepted. They are inconsistent with what appears on the face of the Side Letter. They are inconsistent with the emails that document the negotiations that preceded it. They are inconsistent with the implementation of the Side Letter. Non-members never asked the AWU to provide services to them. Members of the AWU employed by Cleanevent never asked the AWU to provide services to non-members. The result of the provision of the 'services' that Cesar Melhem and John-Paul Blandthorn appear to claim were provided was that both classes of worker were worse than they would have been had no services at all been provided and the matter left to the Fair Work Commission.

421. Arguments of this kind do not, in any event, show that the AWU Vic did not obtain a benefit. And they do not show that the Side Letter was

⁴⁵⁰ Cesar Melhem, 22/10/15, T:889.7-17.

⁴⁵¹ John-Paul Blandthorn, 20/10/15, T:758.38-759.3.

not arrived at in circumstances where there was a real possibility of a conflict or an actual conflict. In the absence of the Side Letter, no amount would have been paid to the AWU Vic. Therefore the Side Letter was a benefit to the AWU Vic.

422. It is for those reasons that it is necessary to accept the submission of counsel assisting that Cesar Melhem, John-Paul Blandthorn and the AWU by their conduct in negotiating the Cleanevent 2010 MOU and Side Letter, may have breached their fiduciary duties to members employed by Cleanevent.

Unlawful commissions

423. Section 176 of the *Crimes Act* 1958 (Vic) relevantly provides:

- (1) Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—
 - (a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business; or

shall be guilty of an indictable offence, and shall be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.

424. The term 'agent' is defined in s 175(1) to include:⁴⁵²

⁴⁵² This is the present definition. In 2005 the term 'legal practitioner' was inserted to replace 'barrister or solicitor'. The amendment is immaterial.

any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any corporation or other person whether as agent partner co-owner clerk servant employee banker broker auctioneer architect clerk of works engineer legal practitioner surveyor buyer salesman foreman trustee executor administrator liquidator trustee within the meaning of any Act relating to bankruptcy receiver director manager or other officer or member of committee or governing body of any corporation club partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or otherwise and a person serving under the Crown

425. The term ‘principal’ is defined in the same section to include ‘a corporation or other person for or on behalf of whom the agent acts has acted or is desirous or intending to act’.
426. Counsel assisting submitted that the conduct concerning the entry into, and payments in accordance with, the MOU may constitute offences against s 176 of the *Crimes Act* 1958 (Vic). Similar submissions are made in relation to similar conduct arising in the AWU case studies concerning Thiess John Holland,⁴⁵³ ACI⁴⁵⁴ and Chiquita Mushrooms.⁴⁵⁵ The operation of the equivalent section in New South Wales also arises in the CFMEU NSW Building Trades Group Drug and Alcohol case study.⁴⁵⁶ It is convenient, in the course of dealing with the position in relation to Cleanevent, to deal with some of the common issues raised in these other case studies.

⁴⁵³ See Ch 10.3 paras .

⁴⁵⁴ See Ch 10.5 paras .

⁴⁵⁵ See Ch 10.6 paras .

⁴⁵⁶ See Ch 7.4 paras .

Agency

427. The Full Court of the Supreme Court of Victoria observed in *R v Gallagher*⁴⁵⁷ that ‘it is clear that the definition [of agent] includes many who would not be within the common law concept of an agent’. In *R v Gallagher* itself a union official engaged in negotiating terms of industrial agreements for members was found to be their ‘agent’ within the meaning of s 176 (notwithstanding that he was also, at the same time, the agent of his union).
428. A number of affected persons have submitted⁴⁵⁸ that neither the AWU nor any of its officials was, at common law, the agent of its members employed by the company with whom EBA negotiations were being conducted. The point made is that neither the AWU nor its officials had the capacity to bind those members to industrial agreements without their express approval. So much is expressly accepted in counsel assisting’s submissions. However, the point is not material. It does not deal with the definition of ‘agent’ in s 175 of the *Crimes Act* 1958 (Vic), which plainly extends beyond the common law concept. As the Full Court observed in *R v Gallagher*, ‘the requirements of the section in relation to agency are ... not strong’.⁴⁵⁹
429. In the present case, Cesar Melhem and John-Paul Blandthorn were bargaining representatives for Cleanevent AWU members in respect of any enterprise agreement that was to have been reached with

⁴⁵⁷ [1986] VR 219 at 224.

⁴⁵⁸ See for example Submissions of the AWU, 20/11/15, para 54; Submissions of Cesar Melhem, 20/11/15, ch 1, paras 23-26.

⁴⁵⁹ *R v Gallagher* [1986] VR 219 at 226.

Cleanevent in 2010. They assumed an equivalent role in relation to the negotiations for the MOU and were, consistently with authority, an ‘agent’ within the meaning of s 176.

430. Cesar Melhem submitted that he could not have been an agent in connection with the Thiess John Holland and ACI case studies because there was no recognition in the statutory regimes in force at the time of those arrangements of the role of a bargaining representative.⁴⁶⁰ This is a similar point to that raised by various affected parties and discussed above in relation to the issue of whether the AWU and its officials owe fiduciary duties to the members. In the present context, it is irrelevant. There is no doubt that Cesar Melhem was, in fact, bargaining ‘for or on behalf of’ AWU members. He was negotiating the terms and conditions on which these members would be employed with these respective companies. Nobody suggests that he was doing this ‘for or on behalf of’ himself. It does not matter that the bargaining role was not defined in express terms in the *Workplace Relations Act 1996* (Cth): that does not detract from the fact that he was negotiating industrial agreements under that Act on behalf of his members.
431. Cesar Melhem’s position in this regard is no different from the union official in *R v Gallagher*.⁴⁶¹ The Full Court observed in that case that the jury in that case might have concluded the official was an ‘agent’

⁴⁶⁰ Submissions of Cesar Melhem, 20/11/15, ch 1, para 22. The submission wrongly states that the only basis on which he is said to be an ‘agent’ is either common law agency or as a result of the statutory position of bargaining representative. In fact, the submission is made in each relevant case study that he is an ‘agent’ because, as a matter of fact, he was acting or intending to act ‘for or on behalf of’ the employees for whom he was negotiating the industrial agreement in question: see Submissions of Counsel Assisting, 6/11/15, ch 2, paras 508, 512, ch 3, paras 196, 207, ch 5, para 112.

⁴⁶¹ [1986] VR 219.

simply because he was entitled to negotiate the terms and conditions of employment of the union's members.⁴⁶² Cesar Melhem had that entitlement in each of the case studies in question, regardless of the statutory designation of his role.

Section 176(1)(b) and 'influence'

432. The reference in ss 176(1)(b) to 'would in any way tend to influence' invites attention to whether the benefit would objectively have that tendency, whether it influences the agent or not.⁴⁶³
433. In relation to the offence under s 176(1)(b), a number of 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'.⁴⁶⁴ It is not necessary for the agent to have an actual intention to be influenced by the payment.⁴⁶⁵ The New South Wales Court of Criminal Appeal has, however, qualified the Victorian approach in holding that it is necessary to establish that the benefit is corrupt according to standards of conduct generally held.⁴⁶⁶ It held that a payment or receipt without the knowledge of the principal for one of

⁴⁶² *R v Gallagher* [1986] VR 219 at 226.

⁴⁶³ *Mehajer v R* [2014] NSWCCA 167 at [100].

⁴⁶⁴ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231 (FC); *R v Jamieson* [1988] VR 879 (FC). See also *R v Nuttall* [2011] 1 Qd R 270 at [36].

⁴⁶⁵ *R v Dillon and Riach* [1982] VR 434 at 436; *Mehajer v R* [2014] NSWCCA 167 at [101].

⁴⁶⁶ *Mehajer v R* [2014] NSWCCA 167 at [59]-[63].

the proscribed purposes would generally be regarded as corrupt according to such standards.⁴⁶⁷

434. Cesar Melhem submitted that the requirement in s 176 that the payments ‘tend to influence’ the agent to show favour is not an objective one.⁴⁶⁸ It is said, instead, that the ‘relevant tendency to influence will be the recipient’s perception of the intended effect’. *R v Dillon*⁴⁶⁹ is cited for that proposition. However, that case dealt only with the meaning of ‘corruptly’ in s 176. That the requirement is objective is obvious from the phrase ‘tend to’, as was confirmed in *Mehajer v R*.⁴⁷⁰
435. The consequence of the above construction is that s 176 is of potentially very broad application. It may, for example, apply to conduct that may not immediately be considered criminal because the relevant benefit was not obtained personally. So much was recognised by the New South Wales Court of Appeal in *Mehajer v R*:⁴⁷¹

The Second Reading Speech of the Bill added the following remarks:

"The target of the bill ... is the corrupt activities of those agents who either accept bribes in relation to their principals' affairs, or who do not make full disclosure to their principals of matters which may affect the carrying out of the agents' duties ... Because these offences are very broad in their scope, and could cover activity which it is not intended to cover, and which few people would consider criminal, the present provision, which allows a court to dismiss a charge which is trivial or purely technical, has been retained ... This bill brings the offences covered by this legislation

⁴⁶⁷ *Mehajer v R* [2014] NSWCCA 167 at [59]-[63].

⁴⁶⁸ Submissions of Cesar Melhem, 20/11/15, ch 1, para 40.

⁴⁶⁹ [1982] VR 434 at 436.

⁴⁷⁰ [2014] NSWCCA 167 at [100], [103].

⁴⁷¹ [2014] NSWCCA 167 at [44].

into line with other comparable offences of dishonesty ... The aim...is to ensure that corrupt practices by agents, such as the receiving or the soliciting of bribes, are dealt with..."

436. The Cleanevent Side Letter was arrived at during negotiations for the extension of the 2006 EBA. The Side Letter provided that money would be paid to the AWU Vic in return for substantial advantages that accrued to Cleanevent by the extension of that EBA through the MOU. In these circumstances, both of paragraphs (a) and (b) of s 176(1) may have been satisfied. That is, by seeking the side deal, Cesar Melhem and John-Paul Blandthorn were soliciting payments as an inducement or reward for doing something (agreeing to the MOU) or forbearing to do something (applying to terminate the 2006 EBA and/or 1999 Award). Similarly, they were soliciting payments, the receipt or expectation of which would tend to influence them to show favour to Cleanevent in respect of the MOU negotiations.
437. The relationship between the payment and the MOU was made plain – to the extent it was not already - in the concluding stages of the negotiations. In John-Paul Blandthorn's email dated 13 October 2015 he stated 'the \$25,000 needs to remain ... This is as far as the AWU is prepared to move from the attached documents'. Payment of the AWU's nominated sum was the price of assent to the MOU.
438. Cesar Melhem and John-Paul Blandthorn must have understood that Michael Robinson and Steven Webber agreed to make the payments referred to in the Side Letter for the desired purpose of those officials showing favour towards Cleanevent, or refraining from doing the things identified in the final paragraph of the Side Letter. So much is obvious from the Side Letter itself. As noted above, for the purposes

of an offence against s 176(1)(b) it does not matter whether either of the officials had any intention to show favour.

439. Cesar Melhem's submissions contended, in relation to Cleanevent, that there was no evidence, and it was never put to him, that he believed that the payees intended that the payments should influence him to show favour in relation to the affairs of AWU members.⁴⁷² In fact the proposition was put to Cesar Melhem and denied by him.⁴⁷³ However, his denial cannot be accepted in the face of the contemporaneous documents and the probabilities arising from events. The best evidence that, contrary to his denials, he had that understanding is to be found in the terms of the Side Letter itself and the objective circumstances that the 2006 EBA was due to expire and the AWU could have sought a new EBA on the basis of the Modern Award.

A requirement for actual influence?

440. The submissions of various affected parties contended that, in fact, the AWU's bargaining position was not weakened by the side deals or by the payments made pursuant to them. Additionally or alternatively, they contended that the EBAs in connection with which the side deals were negotiated were good outcomes for the workers in question (or not demonstrably bad outcomes).⁴⁷⁴

⁴⁷² Cesar Melhem's Submissions in Reply to Counsel Assisting, 20/11/15, Ch 1, para 41.

⁴⁷³ Cesar Melhem, 22/10/15; T:889.19-35, 892.9-13.

⁴⁷⁴ See for example Submissions of Cesar Melhem, 20/11/15, ch 1, paras 16, 17, 35, 37; ch 4, para 5, ch 5, paras 10-14; ch 8, para 7; Submissions of Julian Rzesniowiecki, 20/11/15, para 44; Submissions of Mike Gilhome, 23/11/15, paras 37-41; Submissions of Frank Leo, 20/11/15, paras 54-58.

441. The submission is similar in substance to the one considered above in connection with fiduciary duties. The submission fails in the present context also. The factual difficulties with it have been dealt with above. As a matter of law in the present context it is bad because s 176(1)(b) of the *Crimes Act* 1958 (Vic) does not require that the corrupt payment *actually* influence the agent. It requires that the receipt or expectation of the payment ‘would in any way *tend* to influence’ the agent to show favour or disfavour. It requires proof of an objective *tendency* of the payment to have that influence, not proof of *actual* influence. Nor does s 176(1)(b) require proof that the agent intends to show or withhold favour. As Brooking J put it in *R v Dillon* [1982] VR 434 at 436:

In my view, an agent does act corruptly 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. If he accepts a benefit which he believes is being given to him because the donor hopes for an act of favouritism in return, even though he does not intend to perform that act, he is, by the mere act of receiving the benefit with his belief as to the intention with which it is given, knowingly encouraging the donor in an act of bribery or attempted bribery, knowingly profiting from his position of agent by reason of his supposed ability and willingness, in return for some reward, to show favouritism in his principal's affairs and knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit.

442. Thus, the submissions of affected persons do not answer the proposition that offences have been committed under s 176.

Is a conflict of interest required?

443. Cesar Melhem made submissions in relation to the decision in *R v Gallagher* along the following lines.⁴⁷⁵ He contended that in *R v*

⁴⁷⁵ Submissions of Counsel Assisting, 20/11/15, ch 1, paras 32-37.

Gallagher the interests of the recipient of the benefit (the official) conflicted with the interests of his principals (the members). He then said that, because the recipient in the present cases was the AWU, the submissions of counsel assisting ‘must be contending’ that the interests of the AWU and its members were conflicting. He then said that there was no such conflict and therefore that he is not liable under s 176.

444. This argument does not get to grips with the terms of s 176(1)(b). To establish an offence under that section it is necessary to establish (a) that a person was an agent; (b) that the person corruptly receives or solicits for himself or anyone else valuable consideration; (c) that the receipt or expectation of that valuable consideration would tend to influence him to show or forbear to show favour or disfavour in relation to his principal’s affairs. It is not necessary to show that the interests of the AWU must have been in conflict with its members or some class of them. The question is not whether the payments tended to influence Cesar Melhem in dealings as between the AWU and its members. The question is whether they did so in dealings between the respective employers and AWU members.

445. Nor is it correct to assert, as did some affected parties, that because the Side Letter reflected an arrangement whereby each of Cleanevent and the AWU acted in their respective best interests, the arrangement carried no risk of a conflict of interest or did not satisfy s 176 of the *Crimes Act* 1958 (Vic).⁴⁷⁶ Indeed, many such arrangements would have these features.

⁴⁷⁶ Submissions of Michael Robinson, 26/11/15, paras 17-18.

Corrupt nature of the payments

446. It is not suggested, nor is it necessary, that the Side Letter was completely secret from persons within Cleanevent or the AWU for it to be a corrupt arrangement.⁴⁷⁷ A number of submissions take issue with the proposition that the various side deals were secretive in nature. For the reasons set out below, these criticisms are ill-founded. Before dealing with them, it is worth noting why the issue is relevant to the question of whether the payments under the side deals were ‘corrupt’. They were ‘corrupt’ from the point of view of the person making the payments because they were made for the purpose of influencing the AWU or its officials to show favour in relation to the affairs of AWU members. They were corrupt from the point of view of AWU officials because they believed that this was the purpose for which the payments were made.
447. It is not necessary to establish that the payments under the side deals were secretive in order to make good that they were ‘corrupt’ in either of the two senses described above. However, the secretive nature of the side deals supports that proposition. It supports it, amongst other matters, because it is easier to influence the affairs of an agent vis-à-vis his principal if the principal is not told about the payment.
448. Thus, the relevant issue is not whether the payments were secret within the AWU, or for that matter secret within the organisation of the employer in question. The relevant issue is whether the payments were kept secret from employees.

⁴⁷⁷ See Submissions of Counsel Assisting, 6/11/15, ch 2, paras 510, 517.

449. The submissions of affected parties on this issue for the most part ignore the above distinction.⁴⁷⁸ Cesar Melhem, for example, claimed that the Cleanevent Side Letter was ‘open and transparent’ – apparently because John-Paul Blandthorn also knew about it and because John-Paul Blandthorn acceded to the proposition put to him by Cesar Melhem’s counsel that the arrangement was ‘well known’ within the Victorian Branch.⁴⁷⁹ However the fundamental point is that the arrangement was kept secret from the persons whose interests it most affected: the Cleanevent employees.
450. Further and in any event, the Cleanevent deal was secretive in numerous other ways. A deliberate decision was made not to disclose it to National Office. A deliberate decision was made, after careful consideration, not to include it in the MOU. A deliberate decision was made to record the income from the Side Letter as membership income notwithstanding that none of the persons added to the AWU membership roll as a result of it were entitled to be recorded as members unless they were already on it. Even if they were already on it, none of the income was ‘membership’ income.
451. Finally, the AWU is and was a body corporate by operation of s 27 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) and its predecessor legislation. Counsel assisting submitted that the conduct and position of Cesar Melhem, being at the relevant time the Branch Secretary and the person who provided the directions to enter into the side deal and issue the invoices pursuant to the side deal, is a sufficient

⁴⁷⁸ See for example, Submissions of Frank Leo, 20/11/15, para 60.

⁴⁷⁹ Submissions of Cesar Melhem, 20/11/15, ch 1, para 42.

basis on which to find that for the purposes of soliciting the payments, he was the ‘directing mind and will’ of that organisation.⁴⁸⁰ The AWU, it is submitted, on any view adopted Cesar Melhem’s conduct by receiving the payments in question and dealing with them for its own benefit.⁴⁸¹ These submissions were disputed by the AWU. The merits of that objection are addressed in the following section. They are, for the reasons there given, rejected.

452. Accordingly:

- (a) Cesar Melhem may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act* 1958 (Vic) by soliciting a corrupt commission; and
- (b) The AWU may have committed an offence against s 176(1)(a) and/or (b) of the *Crimes Act* 1958 (Vic) by soliciting a corrupt commission.

Membership issues

453. Turning to the inflation of membership numbers through the implementation of the side deal, the following potential contraventions arise.

⁴⁸⁰ See *Tesco Supermarkets v Natrass* [1972] AC 153 at 170; *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at [82].

⁴⁸¹ See *Grocon v CFMEU* [2013] VSC 275 at [60] (adopting Brennan J’s analysis in *Environment Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477 at 514-515).

454. The payments were recorded as membership income in the financial statements of AWU Vic. As explained above, they were not in truth membership income. As a result, s 253(3) of the *Fair Work (Registered Organisations) Act 2009* (Cth) may have been contravened by the AWU. That section requires that the financial statements of a reporting unit must give a true and fair view of its financial position. This is a civil penalty provision.
455. The AWU submitted that it cannot be held to have contravened the section because the conduct of the officials involved in the contravention cannot be attributed to it. The submission fails on the facts for reasons set out in more detail below. It has an element of absurdity in the present context. The reporting unit is the AWU Vic. Although a separate reporting unit, it is not a separate legal entity. It would be a surprising result of the legislation if a union could avoid liability under this section by an argument of this kind.
456. The resulting inflation of membership numbers has the result that the AWU may have contravened s 230 of the *Fair Work (Registered Organisations) Act 2009* (Cth). The AWU Vic Branch failed to keep records of the members of the AWU so as to record persons who had in fact become members. A similar submission is made by the AWU in response to this submission as is made in connection with s 253(3). It is rejected for the substantially the same reasons.
457. Counsel assisting submit that Cesar Melhem may have contravened s 285 of the *Fair Work (Registered Organisations) Act 2009* (Cth). In procuring the payment of the amounts received by Cleanevent, and in making directions as to how the membership records were to be treated

in relation to those payments, Cesar Melhem was acting in the exercise of the powers or duties of his office in relation to the financial management of the Branch. He did so recklessly and contrary to the requirements of the AWU Rules, including the rules requiring payment by members of prescribed membership contributions. He also acted so as to expose the AWU Vic Branch to civil penalties arising from contraventions of the above provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth).

458. Counsel assisting also submitted that Cesar Melhem may have contravened s 286 of the *Fair Work (Registered Organisations) Act 2009* (Cth), in that he acted otherwise than in good faith and for an improper purpose in falsely inflating the membership numbers of the AWU Vic Branch at the expense of the other branches of the AWU. In the circumstances in which his conduct exposed the Union to a penalty, and operated to bring disadvantage to the other branches of the AWU, counsel assisting submitted that it would not be accepted that Cesar Melhem genuinely believed he was acting in the best interests of the Union by falsely inflating its membership.

459. For his part, Cesar Melhem suggested⁴⁸² that a finding that he contravened s 285 of the *Fair Work (Registered Organisations) Act 2009* (Cth) is not available because it was not put to him by counsel assisting that he did not have a defence under s 285(2) of the Act. He did not refer to any evidence that would suggest that each element of the defence in s 285(2) is made out. There was no relevant unfairness. Cesar Melhem was examined by counsel assisting about the factual

⁴⁸² Submissions of Cesar Melhem, 20/11/15, Ch 2, para 29.

matters surrounding the MOU and the manipulation of the membership register on two occasions, and has had the opportunity to make submissions about it. Prior to the first occasion on which Cesar Melhem was examined, counsel assisting opened on the factual issues concerning the Cleanevent arrangements.⁴⁸³ On both occasions on which he was examined, Cesar Melhem was given the opportunity to, and did, put on a statement addressing any matters he wished to address. On both occasions, he was represented by senior counsel who were given the opportunity to ask Cesar Melhem questions in relation to the evidence he gave.

460. Counsel assisting's submissions are accepted. Cesar Melhem may have contravened ss 285 and 286 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

Liability of the AWU for the conduct of Cesar Melhem

461. As indicated, the AWU contested all of the findings that counsel assisting submitted should be made against it on the basis that the conduct of various officials could not be attributed to it.
462. Counsel assisting submitted in connection with the Cleanevent case study that the conduct and state of mind of Cesar Melhem is to be attributed to the AWU for the purposes of s 176. The AWU, and, at times, Cesar Melhem, disputed that. These submissions are made also in connection with the other AWU case studies. The question also arises in connection with liability for false invoices under s 83 of the *Crimes Act* 1958 (Vic) and with breach of the obligation under the *Fair*

⁴⁸³ Counsel Assisting, 28/5/15, T:2-7.

Work (Registered Organisations) Act 2009 (Cth) to keep an accurate register of members. There is no dispute that these provisions are capable of applying to unions (at least if incorporated). The issue is whether, in the circumstances under consideration, the AWU should be liable.

463. The basic proposition advanced on behalf of the AWU is that Cesar Melhem (and, in relation to Chiquita Mushrooms, Frank Leo) did not have actual authority under the rules of the AWU to do any of the things that it is alleged they did and thus, it is said, their conduct cannot be attributed to the AWU.⁴⁸⁴ Counsel assisting submitted that this argument takes both too narrow a view of the AWU rules and too narrow a view of the circumstances in which the conduct and state of mind of an individual may be attributed to a corporation. In substance, counsel assisting's submission is correct in both respects.

464. Under rule 39(1), as Branch Secretary, Cesar Melhem had powers, duties and functions that included:⁴⁸⁵

- (a) responsibility for the administration of the Branch (r 39(1)(a));
- (b) control of clerical and accountancy staff (and other staff) (r 39(1)(b));
- (c) responsibility for there being a correct account of all moneys received and expended (r 39(1)(c)); and

⁴⁸⁴ Submissions of the AWU, 20/11/15, paras 10-29, 36-44, 48-50, 54-74.

⁴⁸⁵ AWU MFI-2, 23/10/15, p 97.

(d) keeping a correct membership register (r 39(1)(h)).

465. In his capacity as Branch Secretary, therefore, Cesar Melhem had actual authority and responsibility under the Rules for the issuing and keeping of invoices, for the Branch accounts, and for the maintenance of the membership register (and for the control of the Branch staff charged with attending to these matters). That is sufficient to deal with all of the attribution points taken by the AWU on the false invoicing and membership arrangements whilst Cesar Melhem was Branch Secretary.

466. That leaves the side deals in the Cleanevent, Thiess John Holland, ACI and Chiquita case studies. So far as actual authority under the rules is concerned, the offence under s 176 is concerned with solicitation and receipt of corrupt payments. In the case studies under consideration, the solicitation of the corrupt payments was not confined to negotiating the deals in question. It extended to the issuing of invoices pursuant to which those corrupt commissions were paid. Whilst he was Branch Secretary Cesar Melhem, under the rules of the AWU, had actual responsibility for the issuing of those invoices. The invoices were issued in the name of the Branch. As required by r 51(6), the invoices sought payment into accounts maintained by the Branch. Thus, the payments were solicited by the purported exercise of actual authority under the AWU rules. Similarly, the effect of the rules was that the payments were received by the AWU: r 51(2) deemed monies paid to the Branch to be ‘absolutely vested’ in the AWU.⁴⁸⁶

⁴⁸⁶ AWU MFI-2, 23/10/15, p 107.

467. Thus, even accepting the premise of the AWU's argument, namely that the question must be considered solely by reference to the rules, Cesar Melhem's conduct in soliciting payments whilst Branch Secretary should be attributed to the AWU.
468. The above matters deal with the payments from Cleanevent and the payments from Thiess John Holland solicited after Cesar Melhem became Branch Secretary on 1 August 2006.⁴⁸⁷
469. So far as the payments made by Thiess John Holland and ACI whilst Cesar Melhem was Assistant Branch Secretary are concerned, the only reasonable inference to be drawn is that he was also exercising authority under the rules. The AWU submitted that the position of Assistant Branch Secretary was a 'relatively lowly' position.⁴⁸⁸ But that is a mischaracterisation, both under the rules and in practice. By r 39(2), an Assistant Branch Secretary must carry out such functions as are determined from time to time by the Branch Executive or the Branch Secretary.⁴⁸⁹ Bill Shorten made it quite clear in his evidence that he had nothing to do with the issuing of any of the Thiess John Holland or ACI invoices. He did not view the issuing of invoices as part of his role.⁴⁹⁰ He said, in connection with the Thiess John Holland Project, that once the EBA was negotiated Cesar Melhem became responsible for day-to-day project administration.⁴⁹¹ So far as the ACI

⁴⁸⁷ That is, the payments pursuant to the invoices at Shorten MFI-9, 9/7/15, pp 204, 206, 207, 210, 211, 217, 218, 229 and 233.

⁴⁸⁸ Submissions of the AWU, 20/11/15, para 40.

⁴⁸⁹ AWU MFI-2, 23/10/15, p 98.

⁴⁹⁰ See Bill Shorten, 9/7/15, T:112.41-113.7 (regarding Thiess); T:152.38-40 (regarding ACI).

⁴⁹¹ See Bill Shorten, 9/7/15, T:114.5-8, 114.45-115.1.

deal was concerned, Bill Shorten was not involved in the issuing of invoices.⁴⁹² There is no evidence of any specific act on the part of Bill Shorten or the Branch Executive delegating authority to Cesar Melhem to issue invoices. However it is plain that in fact this was a function for which he had assumed sole responsibility: it was he who gave the actual instructions for the issue of the Thiess John Holland and ACI invoices.

470. Thus, even if one focuses on the question of actual authority under the rules, Cesar Melhem's conduct in implementing the side deals should be attributed to the AWU.

471. Counsel assisting identify a further answer to the AWU's submission. The AWU's submission is founded on the proposition that the question of whether the conduct of Cesar Melhem and Frank Leo is to be attributed to the AWU depends solely on the construction of the AWU's rules.⁴⁹³ That proposition is incorrect. The true position is that the question of attribution depends upon the circumstances in which attribution is sought to be made (including the terms of any statute under which it is said the corporation has committed an offence). This is apparent from the speech of Lord Diplock in *Tesco Supermarkets v Natrass*⁴⁹⁴ referred to in the AWU's submissions.

⁴⁹² See Bill Shorten, 9/7/15, T:146.27-29, 147.21-30, 151.47-152.12.

⁴⁹³ Submissions of the AWU, 20/11/15, para 19.

⁴⁹⁴ [1972] AC 153 at 200.

472. In *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*, Owen J made the following points.⁴⁹⁵ The knowledge and state of mind of directors (and to a lesser extent senior officers) will generally be taken to be that of the company. But this will not always be the case. Management and control are not things to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point. The directing mind and will of the company in relation to a given transaction will not necessarily be that of a single person. This person may vary from transaction to transaction. People will often be treated as the directing mind and will of the company if they have been granted authority to act on behalf of the company in relation to the transaction, or have been vested with autonomy, control, discretion or a significant degree of responsibility in relation to the transaction (or similar transactions).⁴⁹⁶

473. This approach to corporate attribution has been taken in all Australian jurisdictions, including Victoria.⁴⁹⁷ It is a broader approach than that urged by the AWU. Some concrete examples of its application include *Nationwide News Pty Ltd v Naidu*,⁴⁹⁸ where the conduct of a company's national fire and safety officer was attributed to the

⁴⁹⁵ (2008) 70 ACSR 1 at [6143]-[6144]. The authorities to which his Honour referred are well worth perusal. This statement of principle was not the subject of any challenge on appeal (see *Westpac Banking Corporation v The Bell Group Ltd (in Liq) (No 3)* (2012) 270 FLR 1 at [2177] and [2189]). There was a distinct issue on appeal as to the circumstances in which knowledge of different employees of a company could be aggregated: on this issue the trial judge's findings were upheld (see at [1100], [2178] - [2199]).

⁴⁹⁶ *El Ajou* (at All ER 705-6; BCLC 482-4); *Re Morris v Bank of India* [2005] 2 BCLC 328 at [126]; *Highwater Nominees Pty Ltd v Mead* [2006] WASC 17 at [49].

⁴⁹⁷ See, for example, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 at [102] - [110] (Vic CA).

⁴⁹⁸ (2007) 71 NSWLR 471.

company that employed him. The fire and safety officer supervised the work of the employee of an independent contractor and in the course of doing so humiliated and harassed him. His conduct was attributed to the company.⁴⁹⁹ *Bunnings Group v CHEP Australia*⁵⁰⁰ is another example. In that case the knowledge of a national supply chain manager was attributed to a company. The attribution was made for the purposes of the question of whether the company knew that it had goods in its possession that were the subject of a demand for return. The national supply chain manager was described as part of senior management.⁵⁰¹ His superior, another senior manager, and his ultimate superior, the CEO, did not have the same knowledge.⁵⁰²

474. It was not contested by the AWU, that a corporation can commit an offence under ss 83 and 176 of the *Crimes Act* 1958 (Vic). That concession is correct.⁵⁰³ It would be surprising if the legislature were to confine the circumstances in which an individual's conduct could be attributed to a company to those in which the articles of the company (or rules of the union) conferred actual authority to engage in the conduct in question. It is unlikely that any articles or rules would be construed to authorise criminal conduct. And indeed the AWU submitted⁵⁰⁴ that side deals of the kinds in question are not authorised under the rules. In other contexts, it is well established that conduct

⁴⁹⁹ (2007) 71 NSWLR 471 at [84]-[86], [236]-[238].

⁵⁰⁰ (2011) 82 NSWLR 420.

⁵⁰¹ (2011) 82 NSWLR 420 at [101].

⁵⁰² (2011) 82 NSWLR 420 at [103]-[105].

⁵⁰³ Section 38 of the *Interpretation of Legislation Act* 1984 (Vic) defines 'person' to include a body corporate.

⁵⁰⁴ Submissions of the AWU, 20/11/15, paras 26, 39.

not authorised by union rules can be attributed to a union.⁵⁰⁵ The position is the same in the present context.

475. Section 176 focuses on the corrupt ‘recei[pt]’ or ‘solicit[ation]’ of valuable consideration. It is not clear whether the AWU contested the proposition that Cesar Melhem had actual authority to negotiate the industrial agreements in question on behalf the union.
476. So far as the Cleanevent Side Letter is concerned, the AWU correctly submitted that it was not sent to National Office for approval and was not in fact approved by it.⁵⁰⁶ However this adds weight to the proposition that Cesar Melhem’s conduct should be attributed to the AWU. The Side Letter was a matter dealt with only by the Victorian Branch. Cesar Melhem was the Branch Secretary. In negotiating and implementing the Side Letter on behalf of the Branch of which he was secretary, he was the directing mind of the Branch. The Branch was no more than an emanation of the AWU in Victoria.
477. For the above reasons, even to the extent Cesar Melhem’s conduct in relation to the above side deals was not actually authorised under the rules, it was for all practical purposes, and for the purposes of s 176, the conduct of the AWU.
478. There is a high degree of artificiality in the stance taken by the AWU. Its position would appear to be that, since under the rules the Branch Executive and/or National Executive were the relevant decision

⁵⁰⁵ *Employment Advocate v NUW* (2000) 100 FCR 454 at [121]; *Hanley v AFMEPKIU* (2000) 100 FCR 530 at [84]; *Hamberger v CFMEU* (2000) 104 IR 45 at [71]; *Alfred v Wakelin (No 2)* (2008) 176 IR 430 at [59](5).

⁵⁰⁶ Submissions of the AWU, 20/11/15, para 28.

making bodies of the union, it is to the members of those bodies that one needs to look in the present context. But neither body played any role in the negotiation or implementation of any of these side deals. The way the AWU operated was to negotiate industrial agreements through Branch Secretaries or Branch Assistant Secretaries and then, if what was involved was a national agreement, seek approval of the final arrangement from the National Secretary. The side deals in the case studies under consideration were entered into during the negotiation process – that is, during that part of the process that had expressly been left to Branch Secretaries and Branch Assistant Secretaries to oversee. The AWU now endeavours to ignore the reality of how it operated and to hide behind rules that were never followed.

479. For the above reasons the AWU's submissions on this topic are rejected.

M – RECOMMENDATIONS

480. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 176(1)(a) and/or (b) of the *Crimes Act* 1958 (Vic).
481. 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 Victorian Commissioner of Police and the Director of

Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 176(1)(a) and/or (b) of the *Crimes Act 1958* (Vic).

482. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 253(3) of the *Fair Work (Registered Organisations) Act 2009* (Cth).
483. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 230 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
484. 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 can be given to the General Manager commencing proceedings against the Cesar Melhem for pecuniary penalty orders in relation to possible contraventions of ss 285 and 286 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

APPENDIX 1 TO CHAPTER 10.2: COMPARISON OF CLEANING AWARD 1999⁵⁰⁷ AND 2004 AGREEMENT RATES⁵⁰⁸

Permanent employees⁵⁰⁹

1999 Award rates

| Level | Ordinary rate (cl 9.1) ⁵¹⁰ | Saturday rate (time and a half: cl 14.1) ⁵¹¹ | Sunday rate (double time: cl 14.2) ⁵¹² | Public holiday rate (double time and a half: cl 14.9) ⁵¹³ |
|---------|--|--|--|---|
| Level 1 | \$13.02 (\$495.10/38) | \$19.53 (\$13.02 x 1.5) | \$26.04 (\$13.02 x 2) | \$32.50 (\$13.02 x 2.5) |
| Level 2 | \$13.88 (\$527.50/38) | \$20.82 (\$13.88 x 1.5) | \$27.76 (\$13.88 x 2) | \$34.70 (\$13.88 x 2.5) |

⁵⁰⁷ Winter MFI-1, 20/10/15.

⁵⁰⁸ Shorten MFI-5, 8/7/15, Vol 2, pp 1-13.

⁵⁰⁹ As at 15 December 2004, the date the 2004 EBA was certified.

⁵¹⁰ Winter MFI-1, 20/10/15, p 6; Shorten MFI-5, 8/7/15, Vol 2, p 255.

⁵¹¹ Winter MFI-1, 20/10/15, pp 9-10.

⁵¹² Winter MFI-1, 20/10/15, p 10.

⁵¹³ Winter MFI-1, 20/10/15, p 11.

2004 Agreement rates (employed on a weekly basis)

| Level | Ordinary rate (cl 8.1) ⁵¹⁴ | Saturday rate (Award applies) ⁵¹⁵ | Sunday rate (Award applies) | Public holiday rate (Award applies) |
|---------|--|---|--------------------------------|--|
| Level 1 | \$13.42 (\$510.10/38) | \$20.13 (13.42 x 1.5) | \$26.84 (13.42 x 2) | \$33.55 (13.42 x 2.5) |
| Level 2 | \$13.96 (\$530.50/38) | \$20.94 (13.96 x 1.5) | \$27.92 (13.96 x 2) | \$34.90 (13.96 x 2.5) |
| Level 3 | \$15.24 (\$579.10/38) | \$22.86 (15.24 x 1.5) | \$30.48 (15.24 x 2) | \$38.10 (15.24 x 2.5) |

2004 Agreement rates (employed on a yearly basis)

| Level | Ordinary rate (cl. 8.2) ⁵¹⁶ | Saturday rate (cl 8.2.1) ⁵¹⁷ | Sunday rate (cl. 8.2.1) | Public holiday rate (cl. 8.2.1) |
|---------|---|--|----------------------------|------------------------------------|
| Level 2 | \$17.64 (\$34,870/52/38) | \$17.64 | \$17.64 | \$17.64 |
| Level 3 | \$19.26 (\$38,064/52/38) | \$19.26 | \$19.26 | \$19.26 |

⁵¹⁴ Shorten MFI-5, 8/7/15, Vol 2, p 4.

⁵¹⁵ The 2004 EBA is silent on whether permanent employees employed on a weekly basis are entitled to weekend and public holiday penalty rates. Whilst it is a matter of construction the operation of section 170LY of the *Workplace Relations Act 1996* and cl 6.1 of the 2004 EBA may result in weekend and public holiday penalty rates in the 1999 Award applying to permanent employees employed on a weekly basis.

⁵¹⁶ Shorten MFI-5, 8/7/15, Vol 2, p 4.

⁵¹⁷ Shorten MFI-5, 8/7/15, Vol 2, p 4.

Casual employees⁵¹⁸

1999 Award rates

| Level | Ordinary rate (cl 6.3, ⁵¹⁹ 9.1 ⁵²⁰) | Saturday rate (time and a half: cl 14.1) ⁵²¹ | Sunday rate (double time: cl 14.2) ⁵²² | Public holiday rate (double time and a half: cl 14.9) ⁵²³ |
|---------|---|---|--|--|
| Level 1 | \$15.63 (495.10/ 38 x 1.2) | \$22.14 (13.02 x 1.7) | \$28.64 (13.02 x 2.2) | \$35.15 (13.02 x 2.7) |
| Level 2 | \$16.65 (527.50/38 x 1.2) | \$23.59 (13.88 x 1.7) | \$30.53 (13.88 x 2.2) | \$37.47 (13.88 x 2.7) |

2004 Agreement non-event casual rates

| Level | Ordinary rate (cl 8.3) ⁵²⁴ | Saturday rate (cl 8.5) ⁵²⁵ | Sunday rate (cl 8.5) | Public holiday rate (cl 8.5) |
|---------|--|--|-------------------------|---------------------------------|
| Level 1 | \$16.28 | \$19.17 | \$19.17 | \$19.17 |
| Level 2 | \$16.94 | \$19.17 | \$19.17 | \$19.17 |
| Level 3 | \$18.49 | \$19.17 | \$19.17 | \$19.17 |

⁵¹⁸ As at 15 December 2004, the date the 2004 EBA was certified.

⁵¹⁹ Winter MFI-1, 20/10/15, p 3.

⁵²⁰ Shorten MFI-5, 8/7/15, Vol 2, p 255.

⁵²¹ Winter MFI-1, 20/10/15, pp 9-10.

⁵²² Winter MFI-1, 20/10/15, p 10.

⁵²³ Winter MFI-1, 20/10/15, p 11.

⁵²⁴ Shorten MFI-5, 8/7/15, Vol 2, p 4.

⁵²⁵ Shorten MFI-5, 8/7/15, Vol 2, p 4.

2004 Agreement event casual rates

| Level | Ordinary rate (cl 8.4) ⁵²⁶ | Saturday rate (cl 8.4) | Sunday rate (cl 8.4) | Public holiday rate (cl 8.4) |
|---------|--|---------------------------|-------------------------|-------------------------------------|
| Level 1 | \$16.28 | \$16.28 | \$16.28 | \$16.28 (\$23.51) ⁵²⁷ |
| Level 2 | \$17.44 | \$17.44 | \$17.44 | \$17.44 (\$24.67) |
| Level 3 | \$18.44 | \$18.44 | \$18.44 | \$18.44 (\$25.67) |

⁵²⁶ Shorten MFI-5, 8/7/15, Vol 2, p 4.

⁵²⁷ Clause 8.6.3 of the 2004 EBA provides that event casuals who work 7.6 hours on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 5.

APPENDIX 2 TO CHAPTER 10.2: COMPARISON OF CLEANING AWARD 1999⁵²⁸ AND 2006 AGREEMENT⁵²⁹

Permanent employees

1999 Award rates

| Level | Ordinary rate (cl 9.1) ⁵³⁰ | Saturday rate (time and a half: cl 14.1) ⁵³¹ | Sunday rate (double time: cl 14.2) ⁵³² | Public holiday rate (double time and a half: cl 14.9) ⁵³³ |
|---------|--|---|---|--|
| Level 1 | \$13.47 (\$512.10/38) | \$20.20 (\$13.47 x 1.5) | \$26.94 (\$13.47 x 2) | \$33.67 (\$13.47 x 2.5) |
| Level 2 | \$14.32 (\$544.50/38) | \$21.48 (\$14.32 x 1.5) | \$28.64 (\$14.32 x 2) | \$35.80 (\$14.32 x 2.5) |

⁵²⁸ As at 22 December 2006, the date the 2006 EBA was certified; Shorten MFI-5, 8/7/15, Vol 2, p 260.

⁵²⁹ Shorten MFI-5, 8/7/15, Vol 2, p 127. As a sample, rates applicable are for the period to 1 December 2006 to 1 July 2007.

⁵³⁰ Shorten MFI-5, 8/7/15, Vol 2, p 266.

⁵³¹ Shorten MFI-5, 8/7/15, Vol 2, p 269.

⁵³² Shorten MFI-5, 8/7/15, Vol 2, p 270.

⁵³³ Shorten MFI-5, 8/7/15, Vol 2, p 271.

2006 Agreement rates in NSW and VIC (employed on a weekly basis)

| Level | Ordinary rate (cl 16.2) ⁵³⁴ | Saturday rate (cll 16.2, 39) ⁵³⁵ | Sunday rate (cl 16.2 & 39) | Public holiday rate (cll 16.2, 22.10, 39) |
|---------|---|--|-------------------------------|--|
| Level 1 | \$14.24 | \$14.24 | \$14.24 | \$14.24 (\$21.63) ⁵³⁶ |
| Level 2 | \$14.81 | \$14.81 | \$14.81 | \$14.81 (\$22.04) |
| Level 3 | \$16.17 | \$16.17 | \$16.17 | \$16.17 (\$23.40) |
| Level 4 | \$17.43 | \$17.43 | \$17.43 | \$17.43 (\$24.66) |

2006 Agreement rates in NSW and VIC (employed on a yearly basis)

| Level | Ordinary rate (cl 16.3) ⁵³⁷ | Saturday rate (cl 16.4) | Sunday rate (cl 16.4) | Public holiday rate (cl 16.4) |
|---------|---|----------------------------|--------------------------|----------------------------------|
| Level 2 | \$18.89 (37,346/ 52 / 38) | \$18.89 | \$18.89 | \$18.89 |
| Level 3 | \$20.63 (40,766/ 52 / 38) | \$20.63 | \$20.63 | \$20.63 |
| Level 4 | \$22.23 (43,940/ 52 / 38) | \$22.23 | \$22.23 | \$22.23 |

⁵³⁴ Shorten MFI-5, 8/7/15, Vol 2, p 137.

⁵³⁵ Shorten MFI-5, 8/7/15, Vol 2, pp 137, 158.

⁵³⁶ Cl 22.10 of the 2006 EBA provides permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

⁵³⁷ Shorten MFI-5, 8/7/15, Vol 2, p 137.

2006 Agreement rates in other States (employed on a weekly basis)

| Level | Ordinary rate (cl 16.11) ⁵³⁸ | Saturday rate (cll 16.11, 39) ⁵³⁹ | Sunday rate (cl 16.11, 39) | Public holiday rate (cll 16.11, 22.10, 39) |
|---------|--|---|-------------------------------|---|
| Level 1 | \$13.53 (\$514.05/38) | \$13.53 | \$13.53 | \$13.53 (\$20.76) ⁵⁴⁰ |
| Level 2 | \$14.20 (\$539.46/38) | \$14.20 | \$14.20 | \$14.20 (\$21.43) |
| Level 3 | \$15.36 (\$583.63/38) | \$15.36 | \$15.36 | \$15.36 (\$22.59) |
| Level 4 | \$16.56 (\$629.19/38) | \$16.56 | \$16.56 | \$16.56 (\$23.79) |

2006 Agreement rates in other States (employed on a yearly basis)

| Level | Ordinary rate (cl 16.12) | Saturday rate (cll 16.13, 39) | Sunday rate (cll 16.13, 39) | Public holiday rate (cll 16.13, 39) |
|---------|--------------------------------|----------------------------------|--------------------------------|--|
| Level 2 | \$17.95 (\$35,479/ 52 / 38) | \$17.95 | \$17.95 | \$17.95 |
| Level 3 | \$19.59 (\$38,728/ 52 / 38) | \$19.59 | \$19.59 | \$19.59 |
| Level 4 | \$21.12 (\$41,743/ 52 / 38) | \$21.12 | \$21.12 | \$21.12 |

⁵³⁸ Shorten MFI-5, 8/7/15, Vol 2, pp 138-139.

⁵³⁹ Shorten MFI-5, 8/7/15, Vol 2, pp 138-139, 158.

⁵⁴⁰ Clause 22.10 of the 2006 EBA provides permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

Casual employees

1999 Award rates

| Level | Ordinary rate (cl 6.3, 9.1) ⁵⁴¹ | Saturday rate (time and a half: cl 14.1) ⁵⁴² | Sunday rate (double time: cl 14.2) ⁵⁴³ | Public holiday rate (double time and a half: cl 14.9) ⁵⁴⁴ |
|---------|---|---|---|--|
| Level 1 | \$16.17 (512.10/ 38 = \$13.47 x 1.2) | \$22.89 (13.47 x 1.7) | \$29.63 (13.47 x 2.2) | \$36.36 (13.47 x 2.7) |
| Level 2 | \$17.19 (544.50/38 = 14.32 x 1.2) | \$24.34 (14.32 x 1.7) | \$31.50 (14.32 x 2.2) | \$38.66 (14.32 x 2.7) |

2006 Agreement non-event rates for NSW and VIC

| Level | Ordinary rate (cl 16.6) ⁵⁴⁵ | Saturday rate (cl 16.8) ⁵⁴⁶ | Sunday rate (cl 16.8) | Public holiday rate (cl 16.8) |
|---------|---|---|--------------------------|----------------------------------|
| Level 1 | \$17.80 | \$20.09 | \$20.09 | \$20.09 |
| Level 2 | \$18.54 | \$20.90 | \$20.90 | \$20.90 |
| Level 3 | \$20.21 | \$22.81 | \$22.81 | \$22.81 |
| Level 4 | \$21.50 | \$24.27 | \$24.27 | \$24.27 |

⁵⁴¹ Shorten MFI-5, 8/7/15, Vol 2, pp 263, 266.

⁵⁴² Shorten MFI-5, 8/7/15, Vol 2, pp 269-270.

⁵⁴³ Shorten MFI-5, 8/7/15, Vol 2, p 270.

⁵⁴⁴ Shorten MFI-5, 8/7/15, Vol 2, p 271.

⁵⁴⁵ Shorten MFI-5, 8/7/15, Vol 2, p 138.

⁵⁴⁶ Shorten MFI-5, 8/7/15, Vol 2, p 138.

2006 Agreement event rates for NSW and VIC

| Level | Ordinary rate (cl 16.7) ⁵⁴⁷ | Saturday rate (cl 16.7) | Sunday rate (cl 16.7) | Public holiday rate (cll 16.7, 22.9) |
|---------|---|----------------------------|--------------------------|---|
| Level 1 | \$16.28 | \$16.28 | \$16.28 | \$16.28 |
| Level 2 | \$17.44 | \$17.44 | \$17.44 | \$17.44 (\$24.67) ⁵⁴⁸ |
| Level 3 | \$18.44 | \$18.44 | \$18.44 | \$18.44 (\$25.67) |
| Level 4 | \$20.00 | \$20.00 | \$20.00 | \$20.00 |

2006 Agreement non-event rates for other States

| Level | Ordinary rate (cl 16.15) ⁵⁴⁹ | Saturday rate (cl 16.17) ⁵⁵⁰ | Sunday rate (cl 16.17) | Public holiday rate (cl 16.17) |
|---------|--|--|---------------------------|-----------------------------------|
| Level 1 | \$16.91 | \$19.08 | \$19.08 | \$19.08 |
| Level 2 | \$17.59 | \$19.85 | \$19.85 | \$19.85 |
| Level 3 | \$19.20 | \$21.67 | \$21.67 | \$21.67 |
| Level 4 | \$20.43 | \$23.05 | \$23.05 | \$23.05 |

⁵⁴⁷ Shorten MFI-5, 8/7/15, Vol 2, p 138.

⁵⁴⁸ Clause 22.9 of the 2006 EBA provides that Level 2 and 3 casuals who work 7.6 hours at an event on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

⁵⁴⁹ Shorten MFI-5, 8/7/15, Vol 2, pp 139.

⁵⁵⁰ Shorten MFI-5, 8/7/15, Vol 2, p 140.

2006 Agreement event rates for other States

| Level | Ordinary rate (cl 16.16)⁵⁵¹ | Saturday rate (cl 16.16) | Sunday rate (cl 16.16) | Public holiday rate (cl 16.16, 22.9) |
|--------------|---|-------------------------------------|-----------------------------------|---|
| Level 1 | \$16.16 | \$16.16 | \$16.16 | \$16.16 |
| Level 2 | \$17.04 | \$17.04 | \$17.04 | \$17.04 (\$24.27) ⁵⁵² |
| Level 3 | \$18.06 | \$18.06 | \$18.06 | \$18.06 (\$25.29) |
| Level 4 | \$19.00 | \$19.00 | \$19.00 | \$19.00 |

⁵⁵¹ Shorten MFI-5, 8/7/15, Vol 2, pp 139-140.

⁵⁵² Clause 22.9 of the 2006 EBA provides that Level 2 and 3 casuals who work 7.6 hours at an event on a public holiday are paid a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

APPENDIX 3 TO CHAPTER 10.2: COMPARISON OF 1999 AWARDⁱ AND 2010 MOUⁱⁱ

Permanent Employees

1999 Award rates

| Level | Ordinary rate (2010 National Min. Wage Order) | Saturday rate (time and a half: cl 14.1) ⁱⁱⁱ | Sunday rate (double time: cl 14.2) ^{iv} | Public holiday rate (double time and a half: cl 14.9) ^v |
|---------|---|---|--|--|
| Level 1 | \$15.00 | \$22.50 (\$15.00 x 1.5) | \$30.00 (\$15.00 x 2) | \$37.50 (\$15.00 x 2.5) |
| Level 2 | \$15.00 | \$22.50 (\$15.00 x 1.5) | \$30.00 (\$15.00 x 2) | \$37.50 (\$15.00 x 2.5) |

MOU non-event rates in NSW and VIC^{vi}

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|----------------------------------|
| Level 1 | \$16.64 | \$16.64 | \$16.64 | \$16.64 (\$23.87) ^{vii} |
| Level 2 | \$17.30 | \$17.30 | \$17.30 | \$17.30 (\$24.53) |
| Level 3 | \$18.89 | \$18.89 | \$18.89 | \$18.89 (\$26.12) |
| Level 4 | \$20.36 | \$20.36 | \$20.36 | \$20.36 (\$27.59) |

MOU non-event rates in other States^{viii}

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|---------------------------------|
| Level 1 | \$15.81 | \$15.81 | \$15.81 | \$15.81 (\$23.04) ^{ix} |
| Level 2 | \$16.58 | \$16.58 | \$16.58 | \$16.58 (\$23.81) |
| Level 3 | \$17.95 | \$17.95 | \$17.95 | \$17.95 (\$25.18) |
| Level 4 | \$19.34 | \$19.34 | \$19.34 | \$19.34 (\$26.57) |

MOU event rates in NSW and VIC (clause 2.5)^x

| Levels | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|------------|---------------|---------------|-------------|---------------------------------|
| Levels 1-4 | \$20.36 | \$20.36 | \$20.36 | \$20.36 (\$27.59) ^{xi} |

MOU event rates in other States (clause 2.5)^{xii}

| Levels | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|------------|---------------|---------------|-------------|-----------------------------------|
| Levels 1-4 | \$19.34 | \$19.34 | \$19.34 | \$19.34 (\$26.57) ^{xiii} |

Casual employees

1999 Award rates

| Level | Ordinary rate (cl 6.3 and 2010 National Min. Wage Order) ^{xiv} | Saturday rate (time and a half: cl 14.1) ^{xv} | Sunday rate (double time: cl 14.2) ^{xvi} | Public holiday rate (double time and a half: cl 14.9) ^{xvii} |
|---------|--|--|---|---|
| Level 1 | \$17.17 (\$14.31 x 1.2) | \$24.32 (14.31 x 1.7) | \$31.48 (14.31 x 2.2) | \$38.63 (14.31 x 2.7) |
| Level 2 | \$17.17 (\$14.31 x 1.2) | \$24.32 (14.31 x 1.7) | \$31.48 (14.31 x 2.2) | \$38.63 (14.31 x 2.7) |

MOU non-event rates for NSW and VIC

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|---------------------|
| Level 1 | \$19.22 | \$21.69 | \$21.69 | \$21.69 |
| Level 2 | \$20.02 | \$22.56 | \$22.56 | \$22.56 |
| Level 3 | \$21.82 | \$24.63 | \$24.63 | \$24.63 |
| Level 4 | \$23.53 | \$26.55 | \$26.55 | \$26.55 |

MOU event rates for NSW and VIC

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|------------------------------------|
| Level 1 | \$18.05 | \$18.05 | \$18.05 | \$18.05 |
| Level 2 | \$18.14 | \$18.14 | \$18.14 | \$18.14 (\$25.37) ^{xviii} |
| Level 3 | \$19.86 | \$19.86 | \$19.86 | \$19.86 (\$27.09) |
| Level 4 | \$21.85 | \$21.85 | \$21.85 | \$21.85 |

MOU non-event rates for other States

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|---------------------|
| Level 1 | \$18.26 | \$20.61 | \$20.61 | \$20.61 |
| Level 2 | \$18.99 | \$21.43 | \$21.43 | \$21.43 |
| Level 3 | \$20.73 | \$23.40 | \$23.40 | \$23.40 |
| Level 4 | \$22.35 | \$25.23 | \$25.23 | \$25.23 |

MOU event rates for other States

| Level | Ordinary rate | Saturday rate | Sunday rate | Public holiday rate |
|---------|---------------|---------------|-------------|----------------------------------|
| Level 1 | \$18.05 | \$18.05 | \$18.05 | \$18.05 |
| Level 2 | \$18.14 | \$18.14 | \$18.14 | \$18.14 (\$25.37) ^{xix} |
| Level 3 | \$19.43 | \$19.43 | \$19.43 | \$19.43(\$26.66) |
| Level 4 | \$20.76 | \$20.76 | \$20.76 | \$20.76 |

ⁱ *Cleaning Industry – AWU/LHMU – Cleanevent Pty Ltd Award 1999* as at 15 November 2010, the date the MOU was finalised, as modified by *Annual Wage Review 2009-10* [2010] FWAFB 4000 (order PR072010); *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Schedule 9, Items 13(3), 13(4); Shorten MFI-5, 8/7/15, Vol 2, p 324.

ⁱⁱ Cleanevent MFI-1, 19/10/15, pp 248-249. As a sample, rates applicable are for the period from 1 July 2010 to 30 June 2011.

ⁱⁱⁱ Shorten MFI-5, 8/7/15, Vol 2, p 333.

^{iv} Shorten MFI-5, 8/7/15, Vol 2, p 334.

^v Shorten MFI-5, 8/7/15, Vol 2, p 335.

^{vi} Cleanevent MFI-1, 19/10/15, p 249.

^{vii} Clause 22.10 of the 2006 EBA provided permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/07/15, Vol 2, p 143.

^{viii} Cleanevent MFI-1, 19/10/15, p 248.

^{ix} Clause 22.10 of the 2006 EBA provided permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

^x Cleanevent MFI-1, 19/10/15, pp 245, 249.

^{xi} Clause 22.10 of the 2006 EBA provided permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

^{xii} Cleanevent MFI-1, 19/10/15, p 248.

^{xiii} Clause 22.10 of the 2006 EBA provided permanent employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

^{xiv} Shorten MFI-5, 8/7/15, Vol 2, p 263; *Annual Wage Review 2009-10* [2010] FWAFB 4000.

^{xv} Shorten MFI-5, 8/7/15, Vol 2, p 333.

^{xvi} Shorten MFI-5, 8/7/15, Vol 2, p 334.

^{xvii} Shorten MFI-5, 8/7/15, Vol 2, p 335.

^{xviii} Clause 22.9 of the 2006 EBA provided Level 2 and 3 casual employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

^{xix} Clause 22.9 of the 2006 EBA provided Level 2 and 3 casual employees who work 7.6 hours on a public holiday receive a \$55 allowance. \$55 divided by 7.6 hours equates to an additional \$7.23 per hour for 7.6 hours; Shorten MFI-5, 8/7/15, Vol 2, p 143.

CHAPTER 10.3

THIESS JOHN HOLLAND

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A – INTRODUCTION

1. The Eastlink project involved the construction of a 39 kilometre roadway connecting Mitcham and Frankston. It cost \$2,500,000. It opened ahead of schedule and on budget on 28 June 2008.¹
2. The design and construct contract for the road was let to a joint venture. One party was Thiess Pty Ltd (**Thiess**). The other was John Holland Pty Ltd (**John Holland**). The joint venture was called Thiess John Holland (**TJH**). The contract was let in about November 2004. Construction of the roadway commenced in 2005.²

¹ Stephen Sasse, witness statement, 12/10/15, p 1.

² Rzesniowiecki MFI-1, 13/10/15, p 4.14-21.

3. This Chapter concerns an arrangement whereby TJH paid to the AWU the sum of \$100,000 per year plus GST per year for the three year life of the project.
4. This Chapter considers the following potential consequences of this arrangement:
 - (a) Whether the arrangement was made and implemented in circumstances where the AWU and its officials owed fiduciary duties and, if so, whether the making and implementation of this arrangement may have involved breach of these duties;
 - (b) Whether the implementation of the arrangement involved the payment of corrupt commissions in such a way that offences may have been committed under s 176 of the *Crimes Act* 1958 (Vic); and
 - (c) Whether the implementation of the arrangement involved false invoices in such a way that offences may have been committed under s 83 of the *Crimes Act* 1958 (Vic).
5. Some of the legal issues involved in the first and second of the above matters have been considered in the previous Chapter in the context of the Cleanevent case study. The potential operation of s 83 of the *Crimes Act* 1958 (Vic) arises in relation to a number of other case studies concerning the AWU, namely, those in relation to ACI, Winslow Constructors, Downer EDI and miscellaneous membership issues. The law applicable to the offence will be considered in this

Chapter. Whether the offence may have been committed in the particular circumstances of each case study will be addressed in other Chapters.

B – THE AGREEMENT

6. TJH and the AWU entered into an enterprise bargaining agreement which came into force on 18 March 2005 (**2005 EBA**).³ An enterprise bargaining agreement in identical terms was reached between TJH and the Victorian Branch of CFMEU which came into force on 18 March 2005.⁴
7. Negotiations on behalf of the joint venture were conducted in the first instance by Stephen Sasse (for John Holland) and Mike Connell (for Thiess) and later, once the contract was awarded, Julian Rzesniowiecki.⁵
8. For the AWU, initial negotiations were undertaken by Bill Shorten.⁶ Later, Cesar Melhem and Craig Winter undertook the negotiations for the 2005 EBA.⁷ John Cummins and Tom Watson participated in the negotiations on behalf of the CFMEU.⁸

³ Shorten MFI-9, 9/7/15, p 1.

⁴ Shorten MFI-9, 9/7/15, p 63.

⁵ Rzesniowiecki MFI-1, 13/10/15, p 5.36-47, 6.1-12.

⁶ Bill Shorten, 9/7/15, T:113.39-42.

⁷ Rzesniowiecki MFI-1, 13/10/15, p 5.29-34.

⁸ Rzesniowiecki MFI-1, 13/10/15, p 6.27-31.

9. Following entry into the 2005 EBA, Cesar Melhem was responsible for the day to day administration of the project.⁹ The person with day-to-day management of industrial relations and human resources on the project for TJH was Julian Rzesniowiecki. He reported to Chris Herbert, managing director for TJH.¹⁰ From about September 2005, Julian Rzesniowiecki reported to Gordon Ralph who replaced Chris Herbert as project director.¹¹
10. During the course of the Eastlink project, from early 2005, the AWU invoiced TJH and was paid an amount of \$300,818.17 plus GST.¹² The descriptions on the invoices issued in 2005 and 2006 referred to advertising in the *Australian Worker* magazine, tickets to the AWU Members' Ball, attendance at OH&S training and IR Regulations Seminars, sponsorship for OH&S conferences, and research projects.¹³ The details of the various invoices will be outlined further below.
11. It is clear, from correspondence and documentation that emerged during the course of the project, that there was an agreement to pay a sum of \$100,000 per year plus GST, and that the payment would be accounted for by the AWU issuing invoices for various services as described above, without many of the services in fact being delivered by the AWU. That an agreement of this kind was reached is, to a large

⁹ Bill Shorten, 9/7/15, T:114.7-8.

¹⁰ Rzesniowiecki MFI-1, 13/10/15, p 10.6-9.

¹¹ Rzesniowiecki MFI-1, 13/10/15, p 15.18-19.

¹² Shorten MFI-10, 9/7/15 is a summary prepared by the solicitors assisting the Commission reconciling the payments recorded in the general ledgers of the Victorian and National branches of the AWU against the invoices issued to TJH.

¹³ Shorten MFI-9, 9/7/15, pp 168A-233.

extent, undisputed by those persons affected who made submissions in relation to the Thiess John Holland case study.¹⁴

12. The first document evidencing the agreement is an undated handwritten table apparently prepared by someone at the joint venture which contemplates three years of annual payments yielding a total of \$300,000.¹⁵ The payments include three payments for ‘research grants’. The grant for year one is described as ‘attracting employees to civil construction industry’.
13. Because the year one grant is described in these terms it is reasonable to infer that this document was created during 2005 and well before 18 January 2006, the date on which an invoice was issued for ‘research work done on Back Strain in Civil Construction Industry’.¹⁶ By the time this invoice was issued it is reasonable to infer that the initial contemplated ‘research grant’ was no longer under consideration.
14. The next document is another undated handwritten note which appears to have been created in early 2006. The note stated:¹⁷

\$74K already paid ← **Check JR**

\$26K END of June 2006

\$100K 1/7/06 → 30/6/07

¹⁴ Cesar Melhem went only so far as to accept that he and Julian Rzensiowiecki had a ‘common understanding’ on behalf of their respective employers that was reflected in the invoices that were issued: Submissions of Cesar Melhem, 20/11/15, ch 3, para 13.

¹⁵ Shorten MFI-9, 9/7/15, p 236.

¹⁶ Shorten MFI-9, 9/7/15, p 186.

¹⁷ Shorten MFI-9, 9/7/15, p 226.

\$100 1/7/07 → 30/6/08

15. The handwriting on the note is Cesar Melhem's, save for the words 'check JR' which is in Julian Rzesniowiecki's handwriting.¹⁸ Julian Rzesniowiecki said that the note was an exercise in which he and Cesar Melhem tried to reconcile what had been paid and what was owing under the arrangement they had entered into. His note referred to his desire to check that \$74,000 was in fact what TJH had paid at the date of the note.¹⁹ This was consistent with a practice he said that he adopted to ensure that TJH was not paying more than the agreed sum.²⁰ Cesar Melhem, however, denied that the note reflected any agreement.²¹
16. On 12 September 2006 Cesar Melhem emailed Julian Rzesniowiecki as follows:²²

Julian

AWU Ball 50 @ \$125 = \$6250
Australian Worker 4 @ 7500 = \$30,000
Sponsorship of AWU OH&S Conference 12/08/2006 25,000
OH&S trainig [sic] for HRS reps on eastlink \$38750

Total \$100,000

17. Julian Rzesniowiecki responded on 13 September 2006, as follows:²³

¹⁸ Julian Rzesniowiecki, 13/10/15, T:193.22-34; Cesar Melhem, 22/10/15, T:905.39-43.

¹⁹ Julian Rzesniowiecki, 13/10/15, T:193.38-45.

²⁰ Rzesniowiecki MFI-1, 13/10/15, p 15.41-47.

²¹ Cesar Melhem, 22/10/15, T:906.22-27.

²² Shorten MFI-9, 9/7/15, p 199.

²³ Shorten MFI-9, 9/7/15, p 199.

Cesar

4 separate invoices please and also you need to deduct the \$2K I paid for the AWU calendars and \$500 for the Workchoices conference.

1. AWU ball invoice \$6250 – send now
2. Aus Worker \$30,000 – send now
3. OHS Conference \$25,000 sponsorship – send now
4. HSR training \$38,750 less \$2500 = \$36250 - send in November

18. Cesar Melhem then forwarded that email to Michael Chen, the AWU's financial controller, on 15 September 2009.²⁴ Michael Chen then wrote on the hard copy of the email 'Mei Lin, pls follow this. Mich.'²⁵
19. A number of observations may be made in relation to this email chain. *First*, the email from Cesar Melhem contained a breakdown of services, and prices for those services, that added up to precisely \$100,000. It is highly unlikely that, if the email was referring to genuine services to be delivered, the value of those services would add up to an exact round number, still less the very figure of \$100,000 referred to elsewhere. *Secondly*, Julian Rzesniowiecki's email in response indicated that what was involved was not the implementation of an agreement for the provision of the services referred to in the respective emails but rather an accounting exercise for the purposes of ensuring that a pre-determined amount was paid. In particular, his email asked Cesar Melhem to deduct certain amounts already paid in respect of one service, and directs that invoices be issued at various times. That is not consistent with the invoices being issued in relation to a service that was in fact delivered.

²⁴ Shorten MFI-9, 9/7/15, p 201.

²⁵ Michael Chen, 21/10/15, T:807.7-22.

20. Julian Rzesniowiecki said that he requested the deduction from the amount allocated for HSR training because he did not believe it had been provided.²⁶ Cesar Melhem, on the other hand, insisted that the services described in the emails were delivered. He said that the deduction from the amount attributed to the cost of HSR training was ‘negotiated... to absorb that part of the invoice.’²⁷

21. On 16 April 2007 Julian Rzesniowiecki sent a letter to Cesar Melhem stating the following:²⁸

Re: Invoices

- a. *Instalments* 1 & 2 will be paid.
- b. Please ask Michael to withdraw *instalment* 3. It will be covered by the ads in Australian Worker, attendance at the ball etc.
- c. If we don’t reach the *agreed* sum we can address at end of year. (emphasis added)

22. Cesar Melhem did not write back contesting that an agreement had been reached. The reference in this letter to ‘instalments’ (and in an email below to ‘\$37,000 1st’ and ‘\$37,000 2nd’) is to invoices issued on 28 February 2007 with the description ‘Services – First Instalment As per Cesar Melhem’ and ‘Services – Second Instalment As per Cesar Melhem.’²⁹ Further reference will be made to those invoices later in this Chapter. They are an example of false invoices issued in connection with the implementation of the arrangement.

²⁶ Julian Rzesniowiecki, 13/10/15, T:184.31-44.

²⁷ Cesar Melhem, 22/10/15, T:910.23-27.

²⁸ Shorten MFI-9, 9/7/15, p 222.

²⁹ Shorten MFI-9, 9/7/15, pp 217-218.

23. Also in evidence is a handwritten note in Julian Rzesniowiecki's handwriting³⁰ which was undated but appeared to have been created in 2007 or 2008.³¹ The note recorded the following calculation:

Agreed amount \$100,000 plus GST = revised *agreed* amount of \$110,000.

For 2007 TJH has paid:

\$37,000 *1st*

\$37,000 *2nd*

\$5000 AWU Ball

\$5,500 Australian Worker

\$10,083.00 Red Card Training

\$94,583

∴ balance ... \$15,416.5 (emphasis added)

24. On 31 March 2008 Julian Rzesniowiecki wrote to Cesar Melhem stating:³²

On our breakdown the *agreed amount* is \$110,000 inc GST

We have paid 2X \$37,000 = \$74,000. We have also paid \$5000 ball tickets, \$5500 Australian Worker and \$10,083 Red card. (Red card otherwise would have cost us nothing because John Holland run it).

Therefore we believe that the *outstanding amount* is \$15,416.50 inc GST. (emphasis added)

25. Each of the documents referred to above indicated clearly that there was an agreement that \$100,000 plus GST each year would be paid and that money would be accounted for by way of invoices issued by the

³⁰ Julian Rzesniowiecki, 13/10/15, T:175.44-45, 176.1-2.

³¹ Shorten MFI-9, 9/7/15, p 237.

³² Shorten MFI-9, 9/7/15, p 231.

AWU describing various services. The references by Julian Rzesniowiecki in his emails to Cesar Melhem to 'the agreed sum', 'the agreed amount', 'the outstanding amount' and 'Instalments', are not rationally capable of any other meaning. Faced with these documents, Cesar Melhem continued to deny the existence of an agreement. He responded, at one point: 'show me a copy of it.'³³ This was another example of his unsatisfactory evidence. It is rejected. His submissions that there was merely a 'common understanding' are also rejected. They underplay what, plainly, was an agreement for the payment of a precise sum.

26. It is convenient at this point to mention two matters of detail that emerge from the above documents. The first is that the 'agreed sum' was \$110,000 inclusive of GST. Julian Rzesniowiecki said that in the second year of the project, TJH paid an additional sum to account for the GST that had been omitted in the first year of the project.³⁴ The second matter is that two of the above documents refer to red card training for which \$10,083 was paid. Julian Rzesniowiecki said that the training was provided at a facility at Morwell, but that the amount was used to offset the agreed amount because John Holland would otherwise have provided the service.³⁵ This was an example of the arrangement being implemented through an invoice which would have been genuine but for the fact that it referred to services which, but for the arrangement, would not have been required or sought. There were other such examples.

³³ Cesar Melhem, 22/10/15, T:895.37-47, 896.1-13.

³⁴ Julian Rzesniowiecki, 13/10/15, T:176.16-19.

³⁵ Julian Rzesniowiecki, 13/10/15, T:194.14-42, see also Cesar Melhem, 22/10/15, T:899.23-34.

27. The next section addresses the questions of the genesis of the above agreement, when it was reached and by whom.

C – HOW WAS THE AGREEMENT REACHED?

28. Practically the only contemporaneous documents that have been made available and which shed light on how the agreement was reached are the diaries of Julian Rzesniowiecki. Otherwise, it is necessary to rely on accounts given by participants in discussions largely unsupported by any contemporaneous documents.
29. Evaluating this evidence is difficult. A lot of time has passed since the events in question. The persons involved have done much else in that time. It is unsurprising that accounts of recollections differ. That does not make the assessment of those accounts any easier. The other difficulty is that, in at least some instances, documents that may have shed light on the process through which the agreement was reached are no longer available. For reasons explained further below, the extensive efforts that have been made to obtain the diaries of Stephen Sasse strongly suggest that they have (quite innocently) been destroyed. The result of that is not merely a gap in the evidence. It is also to create a risk that the few written records that are available will be given a significance that they otherwise would not have. In some respects, that seems to have occurred with Julian Rzesniowiecki's diary notes, for reasons that will become apparent.
30. What follows sets out the evidence, largely by reference to the submissions of counsel assisting. There then follows an evaluation of that evidence. The negotiations need to be considered as a whole. But

it is convenient, bearing that in mind, to deal separately with events up to December 2004 and events after that date.

Negotiations to December 2004

31. The early negotiations took the form of preliminary discussions for the purpose of Thiess and John Holland preparing for tender. The participants in the early negotiations included Stephen Sasse and Bill Shorten, and to a lesser extent, Mike Connell.

Stephen Sasse's account

32. Stephen Sasse said that the TJH bid for the Eastlink project was undertaken against a background of several major construction projects in Melbourne that had suffered serious delays as a result of industrial intervention by the CFMEU. This caused labour productivity problems. Examples included the Spencer Street Station, the Geelong Road, and Federation Square projects.³⁶
33. Stephen Sasse was given authority by John Holland to look at alternative labour practices that would create greater flexibility among the workforce. Some of the limitations that he proposed to include in the EBA for the project included removal of lockdown weekends (weekends on which all workers are on set rostered days off), inclement weather practices that stopped work across the labour line,

³⁶ Stephen Sasse, witness statement, 12/10/15, p 1.

the presence of non-working delegates, and head contractor protections for subcontract labour.³⁷

34. Stephen Sasse said that he prepared a strategy paper which was presented to Leighton Holdings, the parent company for the joint venture participants. The paper set out the process for negotiating an EBA that achieved labour efficiencies by eliminating the limitations identified above, as follows:³⁸

- (a) Provoke the CFMEU into taking unlawful industrial action at worksites of Leighton Group companies (which included Thiess and John Holland);
- (b) Put to the CFMEU representatives that TJH intended to seek an agreement that removed rostered days off and non-working delegates, in the expectation that they would refuse to engage in negotiations; and
- (c) Put to the AWU that entry into an EBA as the principal union would reinstate it as the principal union for civil construction,

³⁷ Stephen Sasse, witness statement, 12/10/15, pp 1-2; Stephen Sasse, 12/10/15, T:39.33-46, 40.10-47. Cesar Melhem's submissions take issue with the characterisation of these matters as 'limitations' or 'removal of beneficial conditions,': Submissions of Cesar Melhem, 20/11/15, ch 3, para 2. It does not matter, for the purposes of this case study, whether they were, due to the ultimate conclusion that the EBA that was ultimately reached in relation to the project was of benefit to the workers on the project (see Section F below). However, it is accepted that the lockdown and inclement weather conditions were generous to workers in the sense that they provided guarantees as to when work would be stopped on the project.

³⁸ Stephen Sasse, witness statement, 12/10/15, pp 2-3; Stephen Sasse, 12/10/15, T:41.2-15.

and also put that unless it agreed to TJH's terms, the site would be resourced on Australian Workplace Agreements.³⁹

35. Stephen Sasse negotiated with Bill Shorten on behalf of AWU to achieve an EBA that restricted the labour practices identified above, in exchange for high pay rates and the exclusion of the CFMEU from the Eastlink project. The initial meetings between him and Bill Shorten occurred between September and October.⁴⁰ Stephen Sasse said that the high level aspects of the agreement were agreed to by Bill Shorten almost immediately.⁴¹
36. There is some inconsistency in Stephen Sasse's evidence about the discussions he had with Bill Shorten in late 2004. In his statement, Stephen Sasse said that there was a proposal in relation to an organiser discussed between him Bill Shorten, but that there was no agreement to that effect:⁴²

There was some limited discussion in relation to how the AWU would ensure that the workforce on EastLink would become members of the AWU. These discussions included the possibility that the project might directly fund the costs of an organiser (salary plus car equating to approximately \$100K per annum) but this was not finalised, and the idea did not form part of the in-principle agreement. Secondly, within days of the in-principle agreement being reached, Shorten had unilaterally 'invited' the CFMEU to become party to the industrial agreement for the project. When I questioned him as to why he had reneged on our agreement, and on such a fundamental component of that agreement, he replied that there were 'political' imperatives which I 'would not understand'.

³⁹ Stephen Sasse, 12/10/15, T:39.33-46, 42.15-46.

⁴⁰ Stephen Sasse, 12/10/15, T:41.34-43.

⁴¹ Stephen Sasse, witness statement, 12/10/15, pp 2-3.

⁴² Stephen Sasse, witness statement, 12/10/15, pp 3-4.

...

... there was a very broad discussion about supporting the AWU in organising the Project through the JV funding or part funding an organiser who would be largely dedicated to the Project. I was deliberately vague in discussing this issue as I felt that the only value that could be extracted from the AWU was the Greenfield EA in the terms discussed.

... at no stage was there any claim by Shorten that the JV should 'pay' for the EA.

37. What is said in Stephen Sasse's statement is broadly consistent with an earlier informal interview in which Stephen Sasse made reference to the idea that the \$100,000 per year was equivalent to the salary of an organiser plus a car.⁴³ However, Stephen Sasse said that Bill Shorten did not mention a specific number and that the figure was his estimate by putting two and two together in relation to the numbers.⁴⁴ He said that 'the payment issue was never, ever agreed at the Shorten level at all.'⁴⁵

38. The account given in Stephen Sasse's private hearing, which is also in evidence, was different. In that hearing, Stephen Sasse gave the following evidence:⁴⁶

Q. Were these matters that were actually discussed by Bill Shorten and yourself?

A. Yes, they were.

Q. Was there any discussion of the salary that the organiser might receive?

⁴³ Sasse MFI-3, 12/10/15, p 11.9-22.

⁴⁴ Sasse MFI-3, 12/10/15, p 12.15-24.

⁴⁵ Sasse MFI-3, 12/10/15, p 13.46-47.

⁴⁶ Sasse MFI-4, 12/10/15, T:27.1-12.

A. Yes. The number that was worked with was, you know, cost of a Union official, plus car, is 100 grand a year.

Q. Over the life of the project?

A. Over the life of the project.

39. Stephen Sasse said in his private hearing that there was a high level agreement as to the primary terms of the EBA, but that this did not include the reference to an organiser.⁴⁷

40. In his oral evidence at the public hearing, Stephen Sasse said that Bill Shorten suggested that an organiser should be appointed full-time to the project and funded by the joint venture.⁴⁸ Of significance is the description of the rationale that Bill Shorten gave for that commitment, according to Stephen Sasse:⁴⁹

From the Union's perspective, their income is, essentially, the Union dues that members pay, so it's an important business imperative, if you like, for unions to attract and retain financial members. ... The unions look for opportunities to capture that workforce as members, so they might want to - they have the right to present at an induction, for example, to sell their wares to prospective members who are employees of the company. One of the discussions that came out of the negotiation I had with Bill Shorten was that if the AWU had a dedicated organiser on the project then that would enhance the Union's ability to maximise the proportion of employees who were members of the Union...

41. That rationale is very similar to Cesar Melhem's evidence of the services that he told Julian Rzesniowiecki the union could provide in exchange for payment, namely, attending inductions.⁵⁰

⁴⁷ Sasse MFI-4, 12/10/15, T:28.2-37.

⁴⁸ Stephen Sasse, 12/10/15, T:45.26-36.

⁴⁹ Stephen Sasse, 12/10/15, T:45.7-24.

⁵⁰ Cesar Melhem, 22/10/15, T:904.1-8, 937.28-42.

42. Stephen Sasse said that he was deliberately non-committal about Bill Shorten's proposal.⁵¹ He also said that a figure was mentioned during the course of the negotiations, being \$75,000 a year plus a car.⁵² Faced with the content of his interview at the public hearing, Stephen Sasse maintained that there was a discussion regarding a figure. He said that he could not remember who raised the figure but he was sure that it was discussed.⁵³ He said that he left the meeting with Bill Shorten with a specific figure in mind, and said that he must have had some information from Bill Shorten in order to reach that figure.⁵⁴
43. Following the entry of the CFMEU into the negotiations, the parties engaged in conciliation in the Australian Industrial Relations Commission (AIRC). Stephen Sasse said that, shortly after the conciliation process commenced, he handed over primary responsibilities for the EBA negotiations to Julian Rzesniowiecki. As he understood it, Bill Shorten also handed over responsibility for the project to Cesar Melhem.⁵⁵
44. Stephen Sasse's evidence is that he told Julian Rzesniowiecki about the arrangement at the time he was recruiting him for the project, including the proposal in relation to funding of an organiser.⁵⁶ Significantly, Stephen Sasse also said that the discussion regarding an organiser 'may

⁵¹ Stephen Sasse, 12/10/15, T:47.6-7.

⁵² Stephen Sasse, 12/10/15, T:47.33-42.

⁵³ Stephen Sasse, 12/10/15, T:49.10-14.

⁵⁴ Stephen Sasse, 12/10/15, T:50.43-47, 51.1-2.

⁵⁵ Stephen Sasse, witness statement, 12/10/15, p 3; Stephen Sasse, 12/10/15, T:44.1-9.

⁵⁶ Sasse MFI-4, 9/7/15, T:33.34-47, 34.1-13.

have come up in a handover meeting at some stage' which Cesar Melhem and Mike Connell also attended.⁵⁷

45. Stephen Sasse was tested on his differing versions. He said that, at the time of his interview, he did not have any documents available to him and gave the best recollection he had at the time.⁵⁸ He said that, prior to his interview, he assumed that documentation might be available to assist his memory.⁵⁹ Following the interview, he sat down and prepared a statement after carefully considering his memory of events.⁶⁰ Ultimately, he repeated his evidence that the proposal for payment in relation to an organiser was not agreed with Bill Shorten.⁶¹ Stephen Sasse accepted that the figure of \$100,000 per year was possibly a figure that he had surmised himself.⁶² It was not put to him in cross-examination that he gave false evidence or a false answer in relation to any of the evidence that he gave. No submissions were made by any affected person that he should be disbelieved.
46. Some of the difficulties with his competing accounts are explained by the fact that he has not had access to the notes and records of his negotiations. His evidence is that he maintained extensive notes of meetings in notebooks, and that there was significant email traffic and correspondence documenting the negotiations as they proceeded. None of that documentation has been produced by John Holland

⁵⁷ Stephen Sasse, 12/10/15, T:44.41-45.

⁵⁸ Stephen Sasse, 12/10/15, T:82.22-24, 97.25-35.

⁵⁹ Stephen Sasse, 12/10/15, T:79.17-24.

⁶⁰ Stephen Sasse, 12/10/15, T:82.15-19.

⁶¹ Stephen Sasse, 12/10/15, T:89.20-43.

⁶² Stephen Sasse, 12/10/15, T:91.32-47.

despite detailed information being provided by Stephen Sasse and his former assistant as to where the documentation was stored and how it was archived.⁶³ A statement of Christopher Burton, group general counsel for the John Holland Group, which has been provided to the Commission details, in an uncontroversial fashion, the searches undertaken in response to the requests for documents and notices to produce issued by the Commission to John Holland. In short, the email records were deleted in the ordinary course of the information management processes of John Holland, and despite an exhaustive search of the hard copy documents in archive storage, none of Stephen Sasse's notebooks or correspondence in relation to the negotiations have been found.

Bill Shorten's account

47. Bill Shorten said that he does not recall discussing an arrangement with Stephen Sasse pursuant to which TJH would pay three instalments of \$100,000 a year plus GST for the life of the Eastlink project.⁶⁴ Bill Shorten gave evidence that he did not believe that there was any such agreement.⁶⁵
48. Bill Shorten stated that in his negotiations with Stephen Sasse the latter drove 'a hard bargain' and threatened, in response to Bill Shorten's bargaining position, to engage with the CFMEU.⁶⁶ Bill Shorten said that he was open to exchanges about improvements in productivity,

⁶³ Stephen Sasse, 12/10/15, T:51.43-47; Sasse MFI-5, 13/10/15.

⁶⁴ Bill Shorten, 9/7/15, T:116.31-36, 118.20-28, 133.46-47.

⁶⁵ Bill Shorten, 9/7/15, T:118.14, 133.46-47.

⁶⁶ Bill Shorten, 9/7/15, T:128.45-47, 129.1-3.

and stated that in exchange he would have committed to active organisation of the work site.⁶⁷

I would have made it clear that the Union will take an active role in organising this and that will involve training and the other work which unions legitimately do every day.

49. Following questioning about whether he discussed payments being made by TJH on an annual basis, Bill Shorten said the following:⁶⁸

I would have had discussions about the EBA and how the AWU would organise, after the EBA, to make sure we had an active presence. That would and could have involved services being delivered by the AWU to make sure we had an engaged membership of the site.

50. To Bill Shorten's knowledge, those discussions were not recorded in writing. Bill Shorten stated that it was standard practice for unions to seek payments from employers for services that unions provide to members.⁶⁹ He said in relation to the Eastlink site in particular:⁷⁰

I am very confident that in my time as leader of the AWU in Victoria, that if we were sending out invoices for services, it's my expectation that work would be done consistent with what would be the invoices rendered and employers wanted – this employer wanted the AWU engaged. There had been rocky industrial relations with a range of more militant unions. This project, I have to say, was different and there was more cooperation than there had previously been, and I do think - I do think - that the company saw a value to having the AWU as signatory to this civil construction project and that we were servicing our members regularly...

⁶⁷ Bill Shorten, 9/7/15, T:134.40-46, 128.45-47, 129.1-10.

⁶⁸ Bill Shorten, 9/7/15, T:137.40-45.

⁶⁹ Bill Shorten, 9/7/15, T:138.14-17.

⁷⁰ Bill Shorten, 9/7/15, T:127.35-46.

51. Bill Shorten stated in response to a question of whether the services agreed amounted to \$110,000 per year:⁷¹

Well, I don't recall and I don't believe I would have said a specific amount and also it would have been for services, so - you know, I believe in user pays.

52. A few observations may be made in relation to this evidence.
53. *First*, Bill Shorten did not deny discussions regarding the arrangement. Rather he said that he did not recall any such discussion.
54. *Secondly*, Bill Shorten said that there were discussions during the course of negotiations with Stephen Sasse about dedicating organisers to the site and providing various services.
55. *Thirdly*, Bill Shorten's understanding of the benefits of the above exercise was that it would play a role in achieving industrial stability on a site that might otherwise be at risk of problems caused by more militant unions.

Julian Rzesniowiecki's account

56. Julian Rzesniowiecki also gave different accounts of the genesis of the agreement.
57. In his private hearing he gave the following account. Before he joined the Eastlink Project, he understood from conversations with Stephen Sasse that there had been some preliminary industrial relations discussions between the AWU and the representatives for Thiess and

⁷¹ Bill Shorten, 9/7/15, T:138.20-22.

John Holland, respectively Mike Connell and Stephen Sasse, General Manager for Human Resources, Industrial Relations and Safety.⁷² Upon joining the project Julian Rzesniowiecki initially attended meetings with the AWU together with Stephen Sasse, and subsequently undertook the negotiations with Don Johnson, reporting to Stephen Sasse and Mike Connell.⁷³

58. Julian Rzesniowiecki's evidence was that TJH proceeded with negotiations on the basis that AWU was the preferred union. At some point in the negotiations, Bill Shorten expressed discomfort at an approach that excluded the CFMEU. Bill Shorten then invited the CFMEU to join the negotiations. TJH was not able to reach an agreement acceptable to both the AWU and CFMEU, so a dispute was notified to the AIRC and resolved by conciliation.⁷⁴
59. Julian Rzesniowiecki gave evidence at his private hearing that, before he joined the Eastlink project, TJH reached agreement with the AWU to provide full time organisers to the Eastlink project.⁷⁵ The agreement was to provide a nominal \$100,000 per year plus GST to cover the annual salary of an organiser plus provision of a vehicle, over the 3 years for which the 2005 EBA was in force in relation to the Eastlink project.⁷⁶

⁷² Rzesniowiecki MFI-1, 13/10/15, p 5.4-8, 36-42; Sasse MFI-3, 12/10/15, p 8.32-34.

⁷³ Rzesniowiecki MFI-1, 13/10/15, p 6.1-15.

⁷⁴ Rzesniowiecki MFI-1, 13/10/15, p 7.1-30; Sasse MFI-3, 12/10/15, p 6.42-47.

⁷⁵ Rzesniowiecki MFI-1, 13/10/15, p 8.20-30.

⁷⁶ Rzesniowiecki MFI-1, 13/10/15, p 9.29-34, 11.22-36.

60. Julian Rzesniowiecki said that he was informed of the details of this agreement by Stephen Sasse or Mike Connell.⁷⁷ His understanding was that an agreement had been reached to this effect.⁷⁸ He believed that the agreement was reached prior to December 2004 between Bill Shorten, Cesar Melhem and Stephen Sasse. He was not sure whether Mike Connell was also involved.⁷⁹
61. On about 13 October 2015 Julian Rzesniowiecki put forward a statement that changed his account in some respects. It was based on his review of diary notes not previously available to him, and of the AWU invoices that had been produced.⁸⁰ He said:⁸¹

It appears from a review of my diaries that although by December 2004 there was an understanding with the AWU regarding the provision of support for the Project, the dollar value of the support was not settled at that time. The level of support that was to be provided to the AWU to assist in the provision of organisers to the Project, and the composition of the organiser team, was the subject of discussions within the JV and between the JV and the AWU during the period from early December 2004 to March 2005 when the Greenfields Agreement was finalised. The agreed composition of the organiser team is not recorded in my Project diaries...

62. It is apparent that while there were some departures in Julian Rzesniowiecki's statement from the version he gave during his private hearing, he did not depart from his understanding that at the time he joined the Project team, there was, at least, an arrangement pursuant to which financial support would be given by TJH to support an organiser or organisers. Where he departed from his previous evidence was in

⁷⁷ Rzesniowiecki MFI-1, 13/10/15, p 8.39-41.

⁷⁸ Rzesniowiecki MFI-1, 13/10/15, p 9.2-5.

⁷⁹ Rzesniowiecki MFI-1, 13/10/15, p 9.12-16.

⁸⁰ Julian Rzesniowiecki, witness statement, 13/10/15, paras 12-13.

⁸¹ Julian Rzesniowiecki, witness statement, 13/10/15, paras 12-13.

relation to whether a figure, and the nature of the support provided, was agreed at the time that he joined TJH.

63. In his evidence at the public hearing Julian Rzesniowiecki said the following by way of explanation:⁸²

...my understanding or recollection about the events was informed by those diaries and I believe that there was an agreement in principle around providing some sort of support or dealing with that issue of organiser representation on the project, and then during the negotiations and the discussions, before the agreement was developed or finalised, then that arrangement firmed up.

64. In response to Stephen Sasse's version of events, Julian Rzesniowiecki said that he recalled a discussion about the concept of providing support to the AWU to commit officials to the job, but he did not believe the figure of \$100,000 was settled at that time. He understood that there was no firm value for the financial support that would be committed at that time.⁸³ He characterised the position as there being agreement around providing assistance, but the terms of the agreement and the level of support were yet to be finalised.⁸⁴

Mike Connell's account

65. Mike Connell was the Executive General Manager for Health and Safety at Thiess. He was involved in formulating the strategy for

⁸² Julian Rzesniowiecki, 13/10/15, T:153.14-20.

⁸³ Julian Rzesniowiecki, 13/10/15, T:165.17-35.

⁸⁴ Julian Rzesniowiecki, 13/10/15, T:166.30-34.

industrial relations for the Eastlink project and was involved in negotiations, effectively at the same level as Stephen Sasse.⁸⁵

66. Mike Connell had no memory of a discussion about a proposal pursuant to which TJH would make a payment to the AWU each year.⁸⁶ He did not have any discussions about the possibility of TJH defraying the cost of an organiser.⁸⁷ He said that concept was surprising to him, because it was not consistent with the joint venture's industrial relations strategy and commitment not to take non-working delegates on the project.⁸⁸ Mike Connell said that such a concept would create a conflict of interest between the project, the organiser and the Union.⁸⁹ No such proposal was brought to Thiess or to the joint venture for agreement.⁹⁰

67. He said that it would not have surprised him if payments were made to the AWU at the time that the project commenced recruitment of employees, as significant resources were dedicated to that task.⁹¹

Conclusions

68. Bill Shorten in late 2004 made a proposal to Stephen Sasse that TJH fund an organiser for the Project. No submissions were made by any affected person that this did not occur. Stephen Sasse was consistent in

⁸⁵ Mike Connell, 13/10/15, T:136.1-14.

⁸⁶ Mike Connell, 13/10/15, T:136.35-46.

⁸⁷ Mike Connell, 13/10/15, T:137.39-42.

⁸⁸ Mike Connell, 13/10/15, T:138.2-28.

⁸⁹ Mike Connell, 13/10/15, T:139.17-21.

⁹⁰ Mike Connell, 13/10/15, T:144.15-24.

⁹¹ Mike Connell, 13/10/15, T:137.4-25.

this aspect of his evidence. Bill Shorten could not recollect discussing any such proposal, but he accepted that there were discussions regarding an organiser and a presence for the AWU on the site for the purpose of, in effect, maintaining industrial peace in the face of the potential involvement of the CFMEU.

69. It is possible that during discussions about the about proposal a specific amount of money was mentioned. On balance, however, the evidence before the Commission does not suggest that it was a probability. That was Stephen Sasse's ultimate position in his public hearing.
70. On balance, the evidence supports the proposition that there was no concluded agreement as at December 2004 about the above proposal. That is suggested by the fact that the CFMEU became involved at about this time and, as a result, subsequently conciliation commenced in the Australian Industrial Relations Commission. As a result, it is unlikely that at this time either the AWU or the Joint Venture would have regarded any aspect of the negotiations to be set in stone. That, in substance, was the effect of Stephen Sasse's evidence on this point.
71. To some extent this conclusion is inconsistent with Julian Rzesniowiecki's evidence. However the difference should not be overstated. His final position, after having the benefit of his examining his diaries, was that at the time he joined the Project there was an 'agreement in principle around providing some sort of support' which was 'firmed up' in subsequent negotiations. This was his understanding and as a description of his understanding it may reflect some of the difficulties in giving precise labels to the state of fluid

negotiations at any particular point in time. More is said about his evidence below.

Negotiations from December 2004

72. The persons involved in the negotiation and conciliation process from December 2004 were more numerous than were involved in the initial investigations. Additionally, there is some documentation of these discussions, in the form of Julian Rzesniowiecki's diary notes.⁹² During the hearing the whole of his diaries were produced and those referred to in the evidence were tendered to the Commission.⁹³

Julian Rzesniowiecki's account

73. Julian Rzesniowiecki's statement addressed a number of notes of meetings held between 10 December 2004 and 15 March 2015. A number of people are listed as having attended those meetings, including, on the joint venture side, Stephen Sasse, Don Johnson, Mike Connell, Chris Herbert, and Greg Sparkman, and on the AWU side, Bill Shorten, Cesar Melhem and Craig Winter.⁹⁴
74. The substance of Julian Rzesniowiecki's statement was that, having reviewed his notes, he interpreted some references to organisers and other union officers to be notes of discussions concerning the number of AWU officers to be dedicated to the project, and the cost of providing financial support for that dedication. Julian Rzesniowiecki

⁹² Sasse MFI-2, 12/10/15, pp 23-27; Rzesniowiecki MFI-3, 13/10/15.

⁹³ Rzesniowiecki MFI-3, 13/10/15.

⁹⁴ Julian Rzesniowiecki, witness statement, 13/10/15, para 6.

said that the discussions therefore related to the agreement he had referred to in his previous evidence.⁹⁵ The substance of the evidence can be best summarised in the following exchange:⁹⁶

Q. ... There were discussions between, as you understood it back then, Stephen Sasse, Bill Shorten?

A. Correct.

Q. And on page 9 you say "probably Cesar Melhem" but, anyway, there were discussions between at least the first two gentlemen I have mentioned and possibly also Cesar Melhem. It was about providing resources to the AWU to assist them to provide organisers to the project?

A. That's correct.

Q. But you think now from having read your diary notes that there was no certainty around the number of positions at that stage?

A. Yes, I'd say that there was an agreement around providing assistance, but the terms of that agreement, the level of support, you know, the way in which the arrangement was going to be delivered, had not been settled between them.

Q. And then in these discussions it was put to you that the support should, in fact, be in respect of four positions?

A. That's correct.

Q. And then you negotiated that down to one?

A. Yes, that's probably - that's correct.

Q. How do you say that that process was gone through, that it went from the four down to the one?

A. Well –

Q. Who was involved? Was it you?

⁹⁵ Julian Rzesniowiecki, witness statement, 13/10/15, paras 7-11.

⁹⁶ Julian Rzesniowiecki, 13/10/15, T:166.13-46, 167.1-12.

A. I think it was myself and Cesar Melhem. I think during all these negotiations there were discussions about, you know, who the people might be, how many, and so forth, and then in the conciliation process before Ian Ross, Ian Ross indicated to me at that stage that Cesar Melhem was looking for six organisers and I indicated to Ian Ross that that would have to be dealt with outside the AIRC process, we weren't in a position to deal with it here, and that we'd come to an understanding with Cesar Melhem and my recollection is that Cesar Melhem and I had a discussion at some point where we settled on the deal.

75. The submissions of Bill Shorten at one point described Julian Rzesniowiecki's evidence as 'disingenuous'. But there were otherwise no attacks on his credit in a general sense. To the extent the submissions of Bill Shorten endeavour to suggest that Julian Rzesniowiecki was attempting to do other than give his best and honest recollection of events, those submissions are rejected. Much of his evidence was given against his own interest. He was attempting to give honest evidence. He was an outstandingly capable, calm and responsible witness.

76. The above conclusions do not compel acceptance of Julian Rzesniowiecki's evidence. The evidence he gave interpreting some of his diary notes cannot be accepted. One difficulty is that, as will be seen, Julian Rzesniowiecki gave evidence that he attempted to conceal the arrangement from Thiess representatives, including Don Johnson and Mike Connell. Consistently with this, Don Johnson and Mike Connell gave evidence that they knew nothing about the arrangement.⁹⁷ However if Julian Rzesniowiecki's interpretation of his notes is to be accepted, then Don Johnson and Mike Connell were present for discussions in relation to the funding of an organiser. That suggests his interpretation is wrong.

⁹⁷ Don Johnson, 13/10/15, T:234.17-46; Michael Connell, 13/10/15, T:142.47, 143.1-9.

77. Another difficulty is that, on Julian Rzesniowiecki's interpretation, the negotiation commenced with the idea of committing to a single organiser with a salary and benefits of \$100,000, and proceeded with proposals of four and as many as six organisers with a corresponding escalation in price, and then reduced back to one organiser again. There is no evidence which would explain such excessive fluctuation in the negotiations.
78. The content of the notes does not compel acceptance of Julian Rzesniowiecki's interpretation. For example, the notes of a meeting dated 10 December 2004 refer to '2 convenors employed by MFP',⁹⁸ which is said to relate to a proposal for employment of two organisers by the joint venture. However, that arrangement (direct employment, rather than funding of an organiser employed by the AWU) is not a term of the agreement that Julian Rzesniowiecki said was reached at this time. It is inconsistent with the evidence of Stephen Sasse and Mike Connell that non-working delegates were unacceptable to the project. Nor do any of the notes actually say anything to the effect that they are references to an arrangement for which the joint venture would have to pay. There are, for example, no notations to the effect 'JV to pay'. The notes could equally well be recording what resources the AWU was able to make available to the joint venture. This in fact was in substance how Don Johnson and Mike Connell explained them.⁹⁹

⁹⁸ Sasse MFI-2, 12/10/15, p 23. The 'MFP' refers to the Mitcham-Frankston Project.

⁹⁹ Don Johnson, 13/10/15, T:232.21-47; T:251.37-41; Mike Connell, 13/10/15, T:146.1-38, 147.9-19.

79. It is not necessary to review the terms of every note. It is sufficient to say that they do not shed any significant light on the nature of the negotiation of the arrangement at which, ultimately, Cesar Melhem and Julian Rzesniowiecki arrived. It is necessary to consider the balance of the oral evidence on that issue.

80. Julian Rzesniowiecki said that the ultimate agreement that was reached occurred during a discussion he had with Cesar Melhem:¹⁰⁰

The gist of what was said was that, you know, the AWU had worked with us to deliver on all the aspects of the agreement that we were looking for, such as the flexible working calendar, drug and alcohol testing, sensible demarc with the CFMEU, congruent subcontractor arrangements and the like, and that there was also this understanding about providing assistance and that we should deliver on that and we haggled over it and we came to an understanding.

81. The figure ultimately settled on was \$100,000 being referable to an organiser plus vehicle plus on-costs.¹⁰¹

82. Julian Rzesniowiecki gave the following evidence.

- (a) The arrangement was set up to ensure that the Eastlink project was delivered successfully. The view within TJH was that if AWU was not proactive in managing the worksite, the CFMEU would come in and fill the gap and cause problems.¹⁰²

¹⁰⁰ Julian Rzesniowiecki, 13/10/15, T:167.45-47, 168.1-5.

¹⁰¹ Julian Rzesniowiecki, 13/10/15, T:168.7-11.

¹⁰² Rzesniowiecki MFI-1, 13/10/15, p 14.2-13.

- (b) The existence and terms of the agreement were not common knowledge within TJH. The project director for the Eastlink project was Chris Herbert and he was told of the agreement by Julian Rzesniowiecki.¹⁰³ Chris Herbert said that he had no recollection of being told of the arrangement,¹⁰⁴ or of a proposal that the joint venture fund an organiser.¹⁰⁵ Chris Herbert's successor to that position was Gordon Ralph. Julian Rzesniowiecki told Gordon Ralph of the arrangement and, as will be seen, Gordon Ralph accepted this. Julian Rzesniowiecki does not recall the agreement being discussed openly with the board of TJH.¹⁰⁶
- (c) The arrangement was not disclosed by Julian Rzesniowiecki to Don Johnson¹⁰⁷ or Mike Connell,¹⁰⁸ because he understood that Thiess employees took a different view of such arrangements.¹⁰⁹

¹⁰³ Rzesniowiecki MFI-1, 13/10/15, p 10.15-18.

¹⁰⁴ Chris Herbert, 12/10/15, T:129.33-45.

¹⁰⁵ Chris Herbert, 12/10/15, T:130.20-26.

¹⁰⁶ Rzesniowiecki MFI-1, 13/10/15, p 23.11-12.

¹⁰⁷ Julian Rzesniowiecki, 14/10/15, T:267.10-16.

¹⁰⁸ Julian Rzesniowiecki, 14/10/15, T:267.44-47, 268.1.

¹⁰⁹ Julian Rzesniowiecki, 14/10/15, T:267.30-34.

Don Johnson's account

83. Don Johnson said that he did not attend many meetings with Stephen Sasse. He was involved in the negotiations with Julian Rzesniowiecki, Bill Shorten, Cesar Melhem and Craig Winter.¹¹⁰
84. Don Johnson had no recollection of a proposal for TJH to pay to the AWU \$100,000 plus GST per year,¹¹¹ or to make a payment to defray the cost of an organiser.¹¹² He had some recollection of there being a discussion between Julian Rzesniowiecki, Bill Shorten and Cesar Melhem in relation to organisers.¹¹³ That included discussions as to how the AWU would manage the site as the principal construction union.¹¹⁴ He had no knowledge that the arrangement was implemented by the joint venture.¹¹⁵

Mike Connell's account

85. Mike Connell said that the references to organisers and representatives in Julian Rzesniowiecki's notes¹¹⁶ related to discussions with the AWU as to how it was going to represent members on the project, to ensure that the AWU would maintain an adequate presence on a large-scale project.¹¹⁷ He described the suggestion that the notes referred to the

¹¹⁰ Don Johnson, 13/10/15, T:231.21-32.

¹¹¹ Don Johnson, 13/10/15, T:231.41-44.

¹¹² Don Johnson, 13/10/15, T:232.1-2.

¹¹³ Don Johnson, 13/10/15, T:232.21-47.

¹¹⁴ Don Johnson, 13/10/15, T:251.37-41.

¹¹⁵ Don Johnson, 13/10/15, T:233.44-47, 234.1-7.

¹¹⁶ See Sasse MFI-2, 13/10/15, pp 23, 25.

¹¹⁷ Mike Connell, 13/10/15, T:146.1-38, 147.9-19.

arrangements to defray the costs of an organiser as ‘a piece of fiction.’¹¹⁸

Cesar Melhem’s account

86. Cesar Melhem said that he had very little contact with Stephen Sasse during the course of negotiations for the 2005 EBA. He said that Bill Shorten took the lead in those negotiations and told Cesar Melhem about those discussions from time to time.¹¹⁹ He denied being told by Bill Shorten about discussions regarding the possibility of the joint venture providing funds to the AWU, or paying for an organiser.¹²⁰ Cesar Melhem confirmed that, during the discussions in which he participated, there was discussion about the organiser resources that the AWU could dedicate to the site.¹²¹ He said the nature of the discussions recorded in Julian Rzesniowiecki’s note related to convincing the joint venture that the AWU could service the job.¹²² He described the suggestion that the notes refer to proposals that the AWU pay for 4 or 6 organisers as ‘laughable.’¹²³
87. As referred to above, Cesar Melhem denied that there was any agreement. He said that the genesis of the payments was as follows:¹²⁴

¹¹⁸ Mike Connell, 13/10/15, T:146.25-26.

¹¹⁹ Cesar Melhem, 22/10/15, T:941.8-15.

¹²⁰ Cesar Melhem, 22/10/15, T:941.17-24.

¹²¹ Cesar Melhem, 22/10/15, T:942.1-20.

¹²² Cesar Melhem, 22/10/15, T:947.1-9.

¹²³ Cesar Melhem, 22/10/15, T:947.28-39.

¹²⁴ Cesar Melhem, 22/10/15, T:894.3-12.

...There was a discussion after the EBA, as I recall, with Julian in relation to the AWU providing services and the joint venture to support and sponsor various AWU activities during the life of the project and later on, part of their internal budgeting, the 100,000 issue came up. That was after the EBA was done and about providing services. What I've heard in this Commission in the last week or so about an agreement about an organiser, 100,000 during the negotiations, I don't recall any of that.

88. Cesar Melhem said that the abovementioned discussion took place in about May 2005.¹²⁵ He denied that the arrangement had anything to do with the provision of an organiser.¹²⁶ Cesar Melhem's evidence is that in the discussion in May 2005, he and Julian Rzesniowiecki discussed the services that the AWU could provide and sponsorship that TJH could provide, however he said that at that time, no fixed amount was agreed.¹²⁷
89. On this point (and on some others), it is somewhat difficult to reconcile Cesar Melhem's evidence with his submissions. Although he 'absolutely' denied in his evidence that the arrangement was for the provision of an organiser,¹²⁸ it was submitted on his behalf that he had consistently adopted the position that the substance of the arrangement was that 'the union was prepared to provide an organiser as and when needed to the project equivalent to one full time organiser, that the organiser would be paid for by the union, not the Joint Venture, but that the revenue generated by the services and other activities provided by the union and paid for by the Joint Venture would enable the union to provide that organiser'¹²⁹. The submission in fact is not supported

¹²⁵ Cesar Melhem, 22/10/15, T:894.28-29.

¹²⁶ Cesar Melhem, 22/10/15, T:898.1-5.

¹²⁷ Cesar Melhem, 22/10/15, T:900.19-32.

¹²⁸ Cesar Melhem, 22/10/15, T:897.33-898.5.

¹²⁹ Submissions of Cesar Melhem, 20/11/15, para 12.

by the evidence of any witness about the arrangement. The submission cannot be accepted. It is no more than an attempt, after the event, to justify the many false invoices that were issued for the purpose of concealing the arrangement.

Craig Winter's account

90. Craig Winter was an industrial officer at the AWU and participated in the negotiations for the 2005 EBA.¹³⁰ He remembered participating in discussions about who was going to work on the project and look after the project. But he did not recall the particular discussion referred to in Julian Rzesniowiecki's note of a meeting on 14 December 2014, at which he is recorded as being in attendance.¹³¹
91. Craig Winter stated that an arrangement for the joint venture to pay to the AWU a sum of money for the purpose of funding organisers was never discussed at a meeting he attended, and he had no knowledge of such an arrangement.¹³² He stated that there were discussions about the resources that the AWU was going to put on the project, and he recalled putting forward names of organisers, but he otherwise stated emphatically that there was never a discussion about payment.¹³³ Craig Winter said that he never had a discussion with Cesar Melhem about that matter.¹³⁴

¹³⁰ Craig Winter, 20/10/15, T:711.10-11.

¹³¹ Rzesniowiecki MFI-3, 13/10/15, p 45; Craig Winter, 20/10/15, T:712.12-14.

¹³² Craig Winter, 20/10/15, T:712.16-34.

¹³³ Craig Winter, 20/10/15, T:713.7-13.

¹³⁴ Craig Winter, 20/10/15, T:715.27-34.

Resolving the differing accounts

92. For the reasons already given, Julian Rzesniowiecki's interpretation of his diary notes is rejected as mistaken. Ultimately, those notes are of little utility for present purposes other than as an objective record of the dates of meetings and the persons in attendance at those meetings.
93. Plainly, however, the arrangement that came to be implemented by Cesar Melhem and Julian Rzesniowiecki was negotiated at some point. But when and how? It is likely that the matter was the subject of ongoing discussion between Cesar Melhem and Julian Rzesniowiecki during EBA negotiations. The matter was first raised by Bill Shorten with Stephen Sasse in the context of discussions about a proposed EBA. The objective probabilities are that the arrangement was further discussed and finalised by Cesar Melhem and Julian Rzesniowiecki in the same context.
94. Julian Rzesniowiecki's evidence was that the agreement was reached 'in principle' by the time the EBA had been certified, but that '[t]he finalisation' of the agreement had not occurred by that time.¹³⁵ The effect of this evidence, properly understood, was that agreement was reached at around this time to pay \$100,000 per year to the AWU, but the mechanism by which those payments were to be made had not been finalised. As will be seen, the first invoice issued as part of the arrangement was issued on 15 February 2005, prior to certification of the EBA.¹³⁶

¹³⁵ Julian Rzesniowiecki, 13/10/15, T:181.43-182.2.

¹³⁶ Shorten MFI-9, 9/7/15, p 168A.

95. Cesar Melhem, in the evidence set out above, said that an agreement was reached after EBA negotiations had concluded.¹³⁷ However this was in the context of his seeking to say that all that was involved was an agreement about the provision of services that were actually provided. That was not the agreement and this evidence cannot be accepted.
96. The most likely position on the evidence is that an agreement was reached at about the time that EBA negotiations concluded that \$100,000 year would be paid to the AWU.
97. There is a question as to how to describe the arrangement. What was it actually for? Cesar Melhem persisted in describing the arrangement as one for the provision of ‘services’ that, ultimately, were rendered. This description is manifestly inaccurate because, as will be seen, many of the services described on the invoices were not rendered. The arrangement was referred to by Julian Rzesniowiecki as an arrangement for ‘[f]or organising resources’¹³⁸ or for the payment of the cost of an organiser. There is no dispute that the Project did not in fact receive a dedicated organiser. Rather, a range of organisers worked on the project at various stages of the construction, including an organiser who regularly attended the pre-cast concrete facility servicing the Eastlink project at Morwell.¹³⁹

¹³⁷ Cesar Melhem, 22/10/15, T:894.3-12.

¹³⁸ Julian Rzesniowiecki, 13/10/15, T:170.20.

¹³⁹ Rzesniowiecki MFI-1, 13/10/15, p 11.42-47; Julian Rzesniowiecki, 13/10/15, T:177.41-42; Gordon Ralph, 12/10/15, T:104.37-46.

98. Gordon Ralph said that Julian Rzesniowiecki explained to him that the expenditure in implementing the arrangement related to an amount of money being paid to the AWU in consideration for the EBA that had been reached with the AWU.¹⁴⁰ Julian Rzesniowiecki said he did not believe he told Gordon Ralph this.¹⁴¹ Whether or not Julian Rzesniowiecki said this to Gordon Ralph, it is as accurate as a description of the arrangement as one to provide ‘resources’ or to provide an organiser. The ‘resources’ and personnel that the AWU provided in connection with the Project were (or at least ought to have been) services to its members, not the Joint Venture.

D – IMPLEMENTATION OF THE AGREEMENT

99. Julian Rzesniowiecki said that his understanding of the initial arrangement was that the invoices would be sent to John Holland. However, at some point the invoices were redirected from John Holland to the joint venture, at which time he and Cesar Melhem reached an arrangement as to how the invoices would be described so that they could be processed through the joint venture,¹⁴² by describing the services as matters such as advertising, sponsorship, and other matters that would be approved by the joint venture.¹⁴³ Julian Rzesniowiecki said that the reason why the invoices were not described as being for the provision of an organiser to the project was that the AWU, and TJH, did not wish that to become public

¹⁴⁰ Gordon Ralph, 12/10/15, T:105.45-106.7.

¹⁴¹ Julian Rzesniowiecki, 13/10/15, T:181.2 - .8.

¹⁴² Julian Rzesniowiecki, 13/10/15, T:168.37-44.

¹⁴³ Julian Rzesniowiecki, 13/10/15, T:169.1-5.

information¹⁴⁴ because it might have had an impact on the other unions involved in the project.¹⁴⁵

Joint venture accounting practices

100. It is now necessary to discuss the joint venture accounting practices. These practices shed some light on the implementation of the arrangement and in particular on why false invoices were created.

101. Mike Minnotti gave evidence as to the proper procedure for raising expenditures and approving payment on the project. In summary, his evidence was as follows:

- (a) Following the award of the contract for the project TJH developed a delegation of authority matrix for expense approval and a detailed budget based on cost analysis of the project as it progressed.¹⁴⁶
- (b) On a monthly basis, the general manager commercial (Rob Johnson) and the finance manager (Michael Minotti) prepared a transaction ledger of the costs for each cost centre and met the head of that centre to undertake a costs and budgeting review. Julian Rzesniowiecki was one of the managers that

¹⁴⁴ Julian Rzesniowiecki, 13/10/15, T:169.34-38.

¹⁴⁵ Julian Rzesniowiecki, 13/10/15, T:169.40-45.

¹⁴⁶ Michael Minotti, 19/10/15, T:575.7-33.

participated in the costs review for the HR/IR department, which had its own costs centre and budget.¹⁴⁷

- (c) The transaction ledger for each costs centre was provided to the Project Director (first Chris Herbert, then Gordon Ralph¹⁴⁸) for review on a monthly basis.¹⁴⁹
- (d) The project used JD Edwards enterprise accounting software (**JDE**).¹⁵⁰
- (e) The JDE system included approval authorities that allowed expense approval to be automated. The payment approval process was that Julian Rzesniowiecki could authorise invoices for an amount that was within his delegation limit, and anything above that limit would be escalated to the project director.¹⁵¹ Michael Minotti guesses that Julian Rzesniowiecki's approval limit would have been \$50,000 to \$75,000.¹⁵²
- (f) While the usual practice was for invoices to be raised against a commitment, such as a contract or purchase order which was raised before the service was provided and the invoice

¹⁴⁷ Michael Minotti, 19/10/15, T:574.17-29, 576.34-41.

¹⁴⁸ Gordon Ralph, 12/10/15, T:105.21-27.

¹⁴⁹ Michael Minotti, 19/10/15, T:575.1-5.

¹⁵⁰ Michael Minotti, 19/10/15, T:575.35-39.

¹⁵¹ Rzesniowiecki MFI-1, 13/10/15, p 15.8-22.

¹⁵² Michael Minotti, 19/10/15, T:576.11-14.

issued,¹⁵³ it was possible to raise an invoice without such a commitment in the JDE system.¹⁵⁴

(g) Where a purchase order had been raised and approved, there was no need for payment approval of the invoice, however Michael Minotti and other personnel in his department would approve payment of the invoice through the JDE system. Part of the approval was verifying that the work to which the invoice referred was done.¹⁵⁵

(h) Where the invoice did not refer to a purchase order or other reference to a pre-approved payment, supporting material such as a scope of work or evidence of delivery of the service would be required.¹⁵⁶

102. Deborah Swinley was Human Resources Administrator on the project from about April 2005.¹⁵⁷ Her role included processing Human Resources related invoices for payment. The usual practice was for those invoices to be authorised by Julian Rzesniowiecki.¹⁵⁸ His practice was to hand her an invoice or to give a verbal or written instruction as to what he wanted done with them. Julian Rzesniowiecki indicated approval of invoices for payment by signing them. Deborah Swinley processed the invoice by entering the details of

¹⁵³ Michael Minotti, 19/10/15, T:577.32-40.

¹⁵⁴ Michael Minotti, 19/10/15, T:577.1-13.

¹⁵⁵ Michael Minotti, 19/10/15, T:578.2-12, 582.45-583.26.

¹⁵⁶ Michael Minotti, 19/10/15, T:582.1-22.

¹⁵⁷ Deborah Swinley, witness statement, 13/10/15, para 6.

¹⁵⁸ Deborah Swinley, witness statement, 13/10/15, para 8.

it into the JDE system, including the invoice number, amount and the party issuing the invoice. Her practice was to enter a series of accounting codes on the face of the invoice to correspond to the account codes within the JDE system.¹⁵⁹ Deborah Swinley then delivered the invoice to the accounting department and on occasion attached other supporting documentation to the invoice.¹⁶⁰ Deborah Swinley processed a number of the invoices that are considered in these submissions. She does not have a particular memory of any of them.¹⁶¹ The invoices that she processed are identified in extracts from the JDE system showing the electronic approval of payment by members of the accounts department.¹⁶²

103. A number of observations may be made about the accounting processes adopted by TJH.
104. *First*, the Human Resources department had a budgetary allocation that should have placed limits on unauthorised expenditure. Michael Minotti said that if there had been an arrangement for employment of an organiser or the commitment of costs to defray the costs of an organiser, he would expect that there would have been approval at JV Board level, and a direction to allow for the expenditure within the forecasts for the project.¹⁶³ There is no evidence of a resolution for this expenditure by the JV Board or any direction to make an allowance for it.

¹⁵⁹ Deborah Swinley, witness statement, 13/10/15, paras 9-10.

¹⁶⁰ Deborah Swinley, witness statement, 13/10/15, para 11.

¹⁶¹ Deborah Swinley, witness statement, 13/10/15, paras 13-15.

¹⁶² Deborah Swinley, witness statement, 13/10/15, Annexure A.

¹⁶³ Michael Minotti, 19/10/15, T:663.6-664.1-29.

105. *Secondly*, Michael Minotti said that he recalled a discussion with Julian Rzesniowiecki and Rob Johnson at the commencement of the project in which he raised the possibility of technical training or recruitment services being obtained from the AWU, and requested that an allowance be made for the expenditure in his forecasting.¹⁶⁴ Michael Minotti said that this request was not followed up in writing, but that the ordinary practice would be that the budget would have been developed on the basis of the discussion.¹⁶⁵ He said that the discussion took place in about the middle of 2005 when cost forecasting was commencing.¹⁶⁶ Julian Rzesniowiecki gave evidence that he had a discussion with Gordon Ralph, and possibly Michael Minotti and Rob Johnston in which he ‘explained the arrangement’ and the budgetary allocation for it.¹⁶⁷ Michael Minotti’s description of what he had been told differed from that of Julian Rzesniowiecki, but the similarity in their accounts is sufficient to support a finding that there was a budgetary allocation for the expenditure. The fact that the invoices that were issued pursuant to the agreement did not describe the services as ‘providing support for an organiser’ suggests that Michael Minotti’s account of what he was told should be preferred. Moreover, the timing of the conversation also suggests that it occurred as described by Michael Minotti: Gordon Ralph did not join the project until September 2005 when the project was underway and budget allocations were presumably set.¹⁶⁸ The above evidence indicates that

¹⁶⁴ Michael Minotti, 19/10/15, T:579.1-18.

¹⁶⁵ Michael Minotti, 19/10/15, T:581.1-14.

¹⁶⁶ Michael Minotti, 19/10/15, T:659.43-47.

¹⁶⁷ Julian Rzesniowiecki, 13/10/15, T:185.23-41.

¹⁶⁸ Cesar Melhem submitted on the basis of the evidence of Julian Rzesniowiecki that the discussion with Michael Minotti showed that he was not concealing the arrangement: Submissions of Cesar Melhem, 20/11/15, ch 3, para 64. The submission does not address

provision was made within the TJH budget for expenditure pursuant to the arrangement to pay \$100,000 per year. However, for the purposes of that budgetary allocation, that expenditure was treated as expenditure for various services to be provided by the AWU, and not the provision of 'resources' to the Project or the costs of providing support by means of an organiser.

106. Gordon Ralph says that he became aware of the arrangement when he was reviewing the cost ledgers for the Human Resources department and observed a large expenditure (he recalled in the amount of \$100,000, about 3-5 months into the project) which caused him to enquire about what the payment involved.¹⁶⁹ Gordon Ralph said that Julian Rzesniowiecki explained to him that the costs related to an amount of money being paid to the AWU in consideration for the EBA that had been reached with the AWU.¹⁷⁰ Gordon Ralph said that he considered that he had no option but to honour the agreement that had been made.¹⁷¹ He thought that the arrangement was consistent with other arrangements he had heard about pursuant to which a sum of money was paid to a union in exchange for settling industrial disputes or negotiations, and he understood that such arrangements were not typically found in writing.¹⁷² He assented to the arrangement, despite

the matters referred to in this paragraph. The conclusion is addressed further in section F below, in relation to possible criminal offences.

¹⁶⁹ Gordon Ralph, 12/10/15, T:105.1-35.

¹⁷⁰ Gordon Ralph, 12/10/15, T:105.45-106.7.

¹⁷¹ Gordon Ralph, 12/10/15, T:106.31-36.

¹⁷² Gordon Ralph, 12/10/15, T:107.4-23.

considering it to be inappropriate, because he wished to maintain industrial peace on the project:¹⁷³

I wanted to ensure that industrial peace was maintained and the same lack of industrial disputation that had been, you know, the case on the project for the preceding 12 months remained in place and for, you know, the next - for the duration of the project. Now, if that was - if that was all consequent of the payments that had been made, or the payment that was being made, and that agreement had previously been made, then I was happy to go along with that agreement, or willing to go along with that agreement.

107. *Thirdly*, there were processes in place for monitoring the costs of the project as it progressed. There were monthly costs reviews by the accounts department and, additionally, the project director. That process enabled the project director to detect the arrangement, but it does not appear that the accounts department did. That may be explained by the fact that the costs records, reflecting the invoices that were issued, did not on their face give cause for concern.
108. *Fourthly*, there were two mechanisms for expenditure approval within the JDE system. The first was at the time the expenditure was raised, by way of purchase order and the like, and the second was at the time of payment. That would ordinarily provide sufficient controls to enable unusual or unjustifiable expenses to be detected. However, in the present case the approval of invoices for the HR department was under the control of Julian Rzesniowiecki. There was no independent review of the expenditures that he approved at the time he approved them, and it was possible to obtain payment of an invoice without raising a purchase order prior to the services described in the invoices

¹⁷³ Gordon Ralph, 12/10/15, T:108.28-37.

being delivered. That increased the likelihood of invoices being approved for payment without close scrutiny.

Preliminary comments on TJH invoices and payments

109. What follows is an account of all of the invoices that have been produced by the AWU in relation to the Eastlink project. Counsel assisting made submissions as to the findings that they contended should be made in relation to them. Some of the affected persons, and in particular Cesar Melhem, have also made submissions as to the findings that should be made in respect of the invoices.

110. One preliminary observation may be made in relation to the evidence and submissions of Cesar Melhem. In a witness statement, he stated that:¹⁷⁴

The services invoiced by the AWU to the JV (advertising, the Ball, training, attending at all site inductions, etc) were provided by the AWU. The Union made a profit on those services which allowed it to provide more resources to the site without diminishing other services. All invoices were drawn up after consultation between me and Julian Rzesniowiecki.

111. Cesar Melhem adhered to this position in his oral evidence. He denied categorically that the services that were the subject of the invoices were for an organiser.¹⁷⁵ He said, in relation to each of the invoices, that the services described in them were provided.¹⁷⁶

¹⁷⁴ Cesar Melhem, witness statement, 22/10/15, para 10.

¹⁷⁵ Cesar Melhem, 22/10/15, T:898.1-5.

¹⁷⁶ Cesar Melhem, 22/10/15, T:898.45-46; T:910.45-47, T:911.1-11.

112. The submissions put on behalf of Cesar Melhem do not appear to put the matter in such unequivocal terms. Paragraph 12 of the submissions contends:

Mr Melhem's position has been consistent. He says that the union was prepared to provide an organiser as and when needed to the project equivalent to one full time organiser, that the organiser would be paid for by the union, not the Joint Venture, but that the revenue generated by the services and other activities provided by the union and paid for by the Joint Venture would enable the union to provide that organiser.

113. That was not Cesar Melhem's evidence in his statement.¹⁷⁷ Nor was it his evidence at the public hearing. It is not clear from the submissions whether Cesar Melhem maintained his evidence that each of the invoices issued by the AWU represented services that were in fact delivered. He did not seek to justify every invoice in his written submissions, including some that counsel assisting submitted were false invoices. In any event, Cesar Melhem made submissions in respect of some of the invoices or classes of invoices. Those submissions are addressed, where relevant, in the following section.

The 2005 payments

114. The following invoices were issued by the AWU in 2005.¹⁷⁸
115. The first invoice, numbered 009304, was issued by AWU National Office on 15 February 2005, in the amount of \$5,000 exclusive of GST.¹⁷⁹ The invoice description was 'Advertising in the summer

¹⁷⁷ Cesar Melhem, witness statement, 22/10/15, para 9.

¹⁷⁸ Omitting invoices for which credit notes were subsequently issued.

¹⁷⁹ Shorten MFI-9, 9/7/15, p 168A.

edition of The Australian Worker Magazine.’ The General Ledger for the AWU National Office records this income as ‘Advertising Income AWU Journals.’¹⁸⁰ The amounts recorded in this account for the financial years between 2005 and 2008 are between \$2,500 and \$10,000.

116. The second invoice, numbered 010249, was issued by AWU Victorian Branch on 27 May 2005, in the amount of \$750 exclusive of GST.¹⁸¹ The invoice description was ‘AWU OH&S 5 Day Representatives Training Course from Monday 23rd to Friday 27th May 2005. Attendee: Jason Morgan.’ It is stamped as having been paid in July 2005, by EFT to State Funds.

AWU Population Forum

117. The third invoice, numbered 010410, was issued by AWU Victorian Branch on 9 June 2005, in the amount of \$9,000 exclusive of GST.¹⁸² The invoice description was ‘Booking for twenty tickets to the 2005 AWU POPULATION FORUM: ‘Growing Australia – Population challenges for the future.’ It is stamped as having been paid in August 2005, by EFT to State Funds. A booking form for the conference, signed by Julian Rzesniowiecki, is in evidence.¹⁸³ The General Ledger for the AWU Victorian Branch records this income as ‘seminar income.’¹⁸⁴ The most commonly recorded amount for this income

¹⁸⁰ Shorten MFI-9, 9/7/15, p 263.

¹⁸¹ Shorten MFI-9, 9/7/15, p 169.

¹⁸² Shorten MFI-9, 9/7/15, p 170.

¹⁸³ Shorten MFI-9, 9/7/15, p 171.

¹⁸⁴ Shorten MFI-9, 9/7/15, p 242.

code is \$450. The amount for this invoice was one of the highest credited to the seminar income account of the general ledger for May and June 2006.

118. Julian Rzesniowiecki did not recall attending the forum.¹⁸⁵ He did not know whether other employees of TJH attended the forum. He said that TJH did not supply 20 people to attend the forum, it simply bought 20 tickets.¹⁸⁶ He said that ‘the basis of the agreement was to provide funds to the Union to support the project and I guess that would be fair to say that we weren’t particularly troubled by what was described in the invoice.’¹⁸⁷ He accepted that he was happy to make payment on the invoices, consistently with the agreement, regardless of whether TJH had received the services described in the invoice,¹⁸⁸ provided that the invoices did not make plain that they were for the provision of an organiser.¹⁸⁹ Later, in his evidence before the Commission, Julian Rzesniowiecki described the payment as making a ‘donation’ of 20 places for the forum.¹⁹⁰
119. A number of other TJH personnel agreed that it was unlikely to have been of any benefit for the employees of TJH working on the project to take a day from work to attend a forum on population growth.¹⁹¹

¹⁸⁵ Rzesniowiecki MFI-1, 13/10/15, p 14.34-43, 15.1-3.

¹⁸⁶ Julian Rzesniowiecki, 13/10/15, T:171.24-26.

¹⁸⁷ Rzesniowiecki MFI-1, 13/10/15, p 15.24-33.

¹⁸⁸ Rzesniowiecki MFI-1, 13/10/15, p 15.35-38.

¹⁸⁹ Julian Rzesniowiecki, 13/10/15, T:170.39-47.

¹⁹⁰ Julian Rzesniowiecki, 13/10/15, T:170.22-31.

¹⁹¹ Stephen Sasse, 12/10/15, T:58.43-47, 59.6-14; Gordon Ralph, 12/10/15, T:112.20-24.

Gordon Ralph, the Project Director, said that the forum had ‘no relevance to the project at all.’¹⁹²

120. Counsel assisting submitted that the invoice numbered 010410 dated 9 June 2005 was a false invoice in that it described services that were not in fact received by TJH, and was created with the intention of concealing the true purpose of the payment it sought.
121. Cesar Melhem submitted that, ‘from a disinterested point of view,’ civil construction companies might be interested to know about predicted centres of population growth and construction and construction opportunities arising from it.¹⁹³ That submission is speculative, both as to the subject matter of the forum,¹⁹⁴ and the interest of any construction company in such a forum. It stands against the evidence of TJH personnel outlined above, and the evidence of Julian Rzesniowiecki. Counsel assisting’s submission is accepted in respect of this invoice.
122. The fourth invoice, numbered 011235, was issued by the AWU National Office on 1 July 2005, in the amount of \$5000 exclusive of GST.¹⁹⁵ The invoice description was ‘Full page advertisement in The Australian Worker Issue 6, Winter 05.’

¹⁹² Gordon Ralph, 12/10/15, T:113.1-5.

¹⁹³ Submissions of Cesar Melhem, 20/11/15, para 9.

¹⁹⁴ The booking form at Shorten MFI-9, 9/7/15 p 171 said nothing to this effect.

¹⁹⁵ Shorten MFI-9, 9/7/15, p 171A.

123. The fifth invoice, numbered 011173, was issued by AWU Victorian Branch on 5 August 2005, in the amount of \$750 exclusive of GST.¹⁹⁶ The invoice description was 'AWU OH&S 5 Day Representatives Training in HASTINGS from Monday 1st to Friday 5th August 2005. Attendee: Robert Johnston.' It is stamped as having been paid on 9 September 2005, by EFT to State Funds.
124. The sixth invoice, numbered 011505, was issued by AWU Victorian Branch on 9 September 2005, in the amount of \$750 exclusive of GST.¹⁹⁷ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 5th to Friday 9th September 2005. Attendee: Mark Brennan.' It is stamped as having been paid in October 2005, by EFT to State Funds.
125. The seventh invoice, numbered 011908, was issued by AWU Victorian Branch on 11 October 2005, in the amount of \$954.55 exclusive of GST.¹⁹⁸ The invoice description was 'Booking for ONE Table to the 7th ANNUAL AWU MEMBERS' BALL on Saturday 22 October 2005.' It is stamped as having been paid by EFT to State Funds.
126. The eighth invoice, numbered 012438, was issued by the AWU National Office on 16 November 2005, in the amount of \$5000 exclusive of GST.¹⁹⁹ The invoice description was 'Full Page advertisement in 'The Australian Worker' Issue 7, Spring 05 Edition.'

¹⁹⁶ Shorten MFI-9, 9/7/15, p 174.

¹⁹⁷ Shorten MFI-9, 9/7/15, p 176.

¹⁹⁸ Shorten MFI-9, 9/7/15, p 177.

¹⁹⁹ Shorten MFI-9, 9/7/15, p 180A.

127. The majority of the invoices issued in 2005 were in relation to the placing of advertising in the Australian Worker magazine, and the provision of training to named employees of the joint venture. There is evidence that advertisements relating to the Eastlink project were placed in the corresponding issues of the Australian Worker described in the above invoices,²⁰⁰ and that the amounts charged for advertising, and for training, were in the range of what the AWU typically charged for such services as recorded in the general ledgers of the AWU Vic Branch and National Office.²⁰¹

The 2006 payments

128. The following invoices were issued by the AWU in 2006.

The Australian Worker \$10,000 invoice

129. The first invoice, numbered 013041, was issued by the AWU Vic Branch on 18 January 2006, in the amount of \$10,000 exclusive of GST.²⁰² The invoice description was ‘Advertising in ‘The Australian Worker’ magazine, Summer 05 and Autumn 05 edition.’ Counsel assisting submitted that this invoice was not a genuine invoice. The reasons for that conclusion are that (a) the invoice was issued by the Victorian Branch and paid into Victorian State Funds account, whereas advertising in the *Australian Worker* is invoiced by and paid to the

²⁰⁰ Melhem MFI-1, 22/10/15.

²⁰¹ Shorten MFI-9, 9/7/15, pp 241-246, 263-265.

²⁰² Shorten MFI-9, 9/7/15, p 185. The invoice was then reversed by a credit note and reissued by the National Office, after having been paid into the Vic Branch State Funds account: Shorten MFI-9, 9/7/15, pp 184-184A.

National Office;²⁰³ (b) in respect of advertising for the Summer 2005 edition, one advertisement was placed that was invoiced and paid for in February 2005;²⁰⁴ and (c) there was no advertisement for the Eastlink project in the Autumn 2005 edition of the Australian Worker.²⁰⁵ Cesar Melhem's submissions in respect of the advertising invoices, including this invoice, are addressed further below.

Back Strain Research

130. The second invoice, numbered 013042, was issued by the AWU Victorian Branch on 18 January 2006 (the same day as the preceding invoice), in the amount of \$30,000 exclusive of GST.²⁰⁶ The invoice description was 'Research work done on Back Strain in Civil Construction Industry.' The item code for the invoice is 'VIC OTHER.' It is stamped as having been paid by EFT to State Funds on 2 March 2006.
131. The invoice requisition form for this payment was completed by Michael Chen on 18 January 2006, with the annotation 'per Cesar's instruction.'²⁰⁷ Michael Chen confirmed that this annotation confirmed that he had raised the invoice on the instructions of Cesar Melhem.

²⁰³ Bill Shorten, 9/7/2015, T:121.5-12.

²⁰⁴ Shorten MFI-9, 9/7/15, p 168A (see above); Melhem MFI-1, 22/10/15, Summer 2005 issue, p 62.

²⁰⁵ Melhem MFI-1, 22/10/15, comparative table, Autumn 2005 issue. However, an advertisement was placed in the Summer 2005 issue for John Holland which may cover a service being performed by the AWU, although this service was not for Thiess John Holland or the Eastlink project. There was also an advertisement placed in issue 8 of the Australian Worker with no corresponding invoice, so invoice numbered 013511 may cover a service that was performed by the AWU. It does not, however, do so on the face of the invoice.

²⁰⁶ Shorten MFI-9, 9/7/15, p 186.

²⁰⁷ Shorten MFI-9, 9/7/15, p 187.

There were no supporting documents attached to the requisition form.²⁰⁸

132. The General Ledger for the AWU Victorian Branch recorded this income as ‘other income.’²⁰⁹ No additional description was entered into the journal to describe the payment. The amount for this invoice was the highest credited to the ‘other income’ account for 2006 by a significant margin. It was also one of the only credits that was recorded in the ‘other income’ account in a round figure.
133. There was no evidence that research was undertaken in relation to back strain by AWU for the purposes of the Eastlink project. None of the TJH personnel recalled such a report being commissioned. None of them recalled receiving a report concerning back strain during the project.²¹⁰ Stephen Sasse described the notion that the AWU would be commissioned by TJH to undertake health and safety research as ‘unorthodox.’²¹¹
134. Stephen Sasse and Michael Minotti agreed that, if the research was to be commissioned by the joint venture, a detailed scope of works and tender would be required before the expenditure was authorised.²¹²

²⁰⁸ Michael Chen, 21/10/15, T:814.5-13.

²⁰⁹ Shorten MFI-9, 9/7/15, p 251.

²¹⁰ Julian Rzesniowiecki, 13/10/15, T:173.38-44; Stephen Sasse, 12/10/15, T:59.16-37; Gordon Ralph, 12/10/15, T:127.8-15; Michael Minotti, 19/10/15, T:587.9-12; Sparkman MFI-1, 13/10/15, T:14.10-18; Johnson MFI-1, 13/10/15, T:14.38-40.

²¹¹ Stephen Sasse, 12/10/15, T:59.25-31.

²¹² Stephen Sasse, 12/10/15, T:60.30-61.31; Michael Minotti, 19/10/15, T:586.16-587.12; Minotti MFI-1, 19/10/15, T:24.22-47, 28.22-46.

135. Julian Rzesniowiecki treated the payment as an instalment on the \$100,000 payable pursuant to the agreement with the AWU.²¹³ He said that he had some discussion with Cesar Melhem in relation to research that was being done with one of the Universities but he has no memory of the detail of it.²¹⁴ Julian Rzesniowiecki accepted in his evidence that the invoice for back strain research was a false invoice.²¹⁵
136. Cesar Melhem confirmed that he had given the instruction to Michael Chen to raise the invoice with the description that it bore.²¹⁶ It was suggested by counsel for Cesar Melhem to Julian Rzesniowiecki that the relevant research consisted of a study undertaken in collaboration with the Victorian Workcover Authority with an apparent title 'Flips and Flops in Manual Handling in the Civil Construction Industry'.²¹⁷ No documents were produced in answer to a notice to produce addressed to the AWU seeking copies of the research relating to the invoice for back strain.²¹⁸ Following the questioning of Julian Rzesniowiecki on this issue, the AWU produced a copy of a report dated May 2005 and entitled 'Sprains, Strains And Fatalities In The Civil Construction Industry'.²¹⁹ Later it produced further documentation relating to its communications with third parties in

²¹³ Julian Rzesniowiecki, 13/10/15, T:173.46-47, 174.9.

²¹⁴ Rzesniowiecki MFI-1, 13/10/15, p 16.36-44.

²¹⁵ Julian Rzesniowiecki, 13/10/15, T:189.32-190.20.

²¹⁶ Cesar Melhem, 22/10/15, T:924.28-33.

²¹⁷ Julian Rzesniowiecki, 13/10/15, T:221.18-30.

²¹⁸ Melhem MFI-2, 22/10/15.

²¹⁹ Melhem MFI-2, 22/10/15, p 1 of the report titled 'Sprains, Strains And Fatalities In The Civil Construction Industry' dated May 2005.

relation to the research detailed in the report.²²⁰ The author of the report was said to be Gavin Merriman of the AWU.

137. The report had nothing to do with the Eastlink project. It was completed in May of 2005, some seven months before the invoice was issued. The report was described as a ‘Worksafe (Vic) Safety Development Fund Project,’ pursuant to a Safety Development Funding Agreement between Worksafe Victoria and the AWU.²²¹ That was a funding initiative undertaken by the State Authority, which on 18 April 2002 agreed to fund the report in the amount of \$300,000.²²² The invoices issued to the Workcover Authority to recover funding are coded ‘OHS’ and describe the project by the name of the report.²²³ On page 4 of the report a number of companies were thanked for the time and resources dedicated to the project. The list does not include Thiess, John Holland or TJH. The report was a fully funded project that was completed with the input of a number of companies, but not TJH. Finally, the report contained only one reference to back injury.²²⁴ It is apparent that the research undertaken in relation to the report was not focused on back strain.

138. Cesar Melhem contended that the research project continued beyond the publication date of the report in 2005, implementing the

²²⁰ Melhem MFI-2, 22/10/15.

²²¹ Melhem MFI-2, 22/10/15, p 2 of the report titled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’ dated May 2005.

²²² Melhem MFI-2, 22/10/15.

²²³ Melhem MFI-2, 22/10/15 (invoice dated 5 May 2005, numbered 010023).

²²⁴ Melhem MFI-2, 22/10/15, p 37 of the report titled ‘Sprains, Strains And Fatalities In The Civil Construction Industry’ dated May 2005.

recommendations in the report.²²⁵ He claimed that Gavin Merriman had a number of meetings with the health and safety department of TJH and Cesar Melhem agreed with Julian Rzesniowiecki to support the project.²²⁶

139. Cesar Melhem adhered to this explanation in his written submissions.²²⁷ He contended that it is ‘neither here nor there’ that the research was complete before payment was sought from TJH, relying on the fact that the invoice refers to ‘research work done,’ and that it was ‘unremarkable’ that the union might have wanted a contribution to the research. Cesar Melhem also submitted that the research was of relevance to the project even if, as appears to be accepted, it had little to do with back strain, because it related to traffic management on civil construction projects, a matter in which the joint venture might be interested both in relation to this project and generally.
140. Cesar Melhem’s explanation is rejected. It is inconsistent with the documents that have been produced and the evidence of the personnel of TJH, none of whom were aware of the research referred to in the invoice, despite evidence that, as a matter of process, they would have been.
141. The fact that the invoice refers to work ‘done’ does not provide compelling support for an inference that TJH was paying for research that had been done, when there is documentary evidence of the substantial funding committed to the research project by the Victorian

²²⁵ Cesar Melhem, 22/10/15, T:928.27-31.

²²⁶ Cesar Melhem, 22/10/15, T:930.12-16.

²²⁷ Submissions of Cesar Melhem, 20/11/15, ch 3, paras 7-8.

government,²²⁸ and no documentary evidence has been produced by the AWU or TJH suggesting an agreement to fund the research retrospectively. Similarly, the fact that the report relates to traffic management on civil construction sites does not, as a matter of common sense, have anything to do with back strain which is the subject matter of the research for which TJH was invoiced and for which it paid.

142. Moreover, Julian Rzesniowiecki under cross-examination affirmed that he had no knowledge of the arrangements concerning the research project.²²⁹ No records have been produced by the AWU suggesting that the research project continued beyond May 2005, or that TJH was in any way involved.
143. This evidence indicates that the invoice was a false invoice in that it described a research project that did not exist and was not in fact commissioned by TJH, and was created with the intention of concealing or disguising the true purpose of the payment it sought.
144. On 18 January 2006, that is, the day on which the invoices referred to above were issued,²³⁰ Julian Rzesniowiecki emailed Matt Fuller asking for a report of 'all the payments that were made from my cost codes to the AWU.'²³¹ Matt Fuller responded on 24 January 2006 and later on 2 February 2006 confirming payments of \$5,000 coded as external

²²⁸ Melhem MFI-2, 22/10/15.

²²⁹ Julian Rzesniowiecki, 13/10/15, T:221.18-222.46.

²³⁰ Paragraphs 129-130.

²³¹ Shorten MFI-9, 9/7/15, p 188.

relations, publications and recruitment (being the payments detailed in paragraphs above).²³²

145. The third invoice, numbered 013387, was issued by the AWU Victorian Branch on 16 February 2006, in the amount of \$750 exclusive of GST.²³³ The invoice description was ‘AWU OH&S 5 Day Representatives Training from Monday 12th-Friday 16th February 2006. Attendee: Heath Fletcher.’ It was stamped as having been paid by EFT.

IR Regulations Seminar

146. The fourth invoice, numbered 013882, was issued by the AWU Victorian Branch on 17 May 2006, in the amount of \$25,250 inclusive of GST.²³⁴ The invoice description was ‘Purchase of tickets to the 2006 IR REGULATIONS SEMINAR: ... Wednesday 17th May 2006.’ The quantity described in the invoice is 1. It was stamped as having been paid by EFT to State Funds. The General Ledger for the AWU Victorian Branch recorded this income as ‘seminar income.’²³⁵ The most commonly recorded amount for this income code was \$450. The amount for this invoice was the highest credited to the seminar income account for May and June 2006 by a significant margin.

²³² Shorten MFI-9, 9/7/15, pp 188-190. See paras 115, 122, 126 above.

²³³ Shorten MFI-9, 9/7/15, p 191.

²³⁴ Shorten MFI-9, 9/7/15, p 196.

²³⁵ Shorten MFI-9, 9/7/15, p 243.

147. A handwritten note in Cesar Melhem's handwriting²³⁶ directed an amount of \$25,250 to be drawn, attention to Julian, with the description 'Seminar 17 May 2006 re: Workchoices.'²³⁷ Cesar Melhem did not remember how many people attended the seminar.²³⁸ Stephen Sasse, Gordon Ralph and Julian Rzesniowiecki agreed that TJH would not have used the AWU to obtain information on the operation of the new industrial relations laws, it would have had recourse to its lawyers.²³⁹ Julian Rzesniowiecki said that he attended the seminar but he could not recall whether anyone else did. It was possible that he was the only person in attendance.²⁴⁰ The invoice was for the purpose of finding ways to provide money in accordance with the agreement with the AWU.²⁴¹
148. An invitation to the IR Regulations Seminar was in evidence.²⁴² The seminar took place on 17 May 2006, the date of the invoice. The invitation disclosed that a single ticket was \$450 inclusive of GST. The sum of \$25,250 cannot be divided so as to account for a set number of tickets, but the sum is closest to 56 tickets. Moreover, in his email dated 13 September 2013, Julian Rzesniowiecki referred to the need to deduct \$500 paid for attendance at the Workchoices conference.²⁴³ That suggests that (a) Julian Rzesniowiecki paid

²³⁶ Michael Chen, 21/10/15, T:814.23; Cesar Melhem, 22/10/15, T:935.17-26.

²³⁷ Shorten MFI-9, 9/7/15, p 195.

²³⁸ Cesar Melhem, 22/10/15, T:936.1-3.

²³⁹ Julian Rzesniowiecki, 13/10/15, T:183.18-22; Stephen Sasse, 12/10/15, T:61.34-46; Gordon Ralph, 12/10/15, T:116.1-3.

²⁴⁰ Julian Rzesniowiecki, 13/10/15, T:184.6-9.

²⁴¹ Julian Rzesniowiecki, 13/10/15, T:183.31-47.

²⁴² Shorten MFI-12, 9/7/15, p 58.

²⁴³ Shorten MFI-9, 9/7/15, p 199.

separately for the ticket to the conference and was seeking to offset that amount against future payments; and (b) the invoice of 17 May 2006 was a false invoice, issued in relation to services not received by TJH and of no benefit to the Eastlink project, and created with the intention of concealing the true purpose of the payment it sought.

149. Cesar Melhem submitted that the invoice was genuine, because, again, the seminar might be something in which employer representatives have an interest, the evidence is that the seminar occurred, and Julian Rzesniowiecki said that he supported it financially. It was suggested that Stephen Sasse might be interested, because of his evidence as to his strategy for dealing with the CFMEU during negotiations for the 2005 EBA.²⁴⁴
150. Counsel assisting submitted that the submissions of Cesar Melhem should be rejected. Supposition as to what might or might not be of interest to the management of civil construction companies or whether it had relevance to the activities of those companies does not support a contention that payments of invoices for those matters were for a genuine purpose, particularly in light of the evidence of several of the personnel engaged on the project (including Stephen Sasse) that the seminar was completely irrelevant to the project.
151. It is plain from the evidence that the invoice was a false invoice in that it described a service not requested and not used by TJH, and was created with the intention of concealing or disguising the true purpose of the payment it sought.

²⁴⁴ Submissions of Cesar Melhem, 20/11/15, ch 3, paras 9-11.

152. The fifth invoice numbered 014860 was issued by the AWU Victorian Branch on 23 June 2006, in the amount of \$750.00 exclusive of GST.²⁴⁵ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 19th-Friday 23rd June 2006. Attendee: Barry Howlett.' It was stamped as having been paid by EFT to State Funds.
153. The sixth invoice numbered 015169 was issued by the AWU Victorian Branch on 28 July 2006, in the amount of \$750.00 exclusive of GST.²⁴⁶ The invoice description was 'AWU OH&S 5 Day Representatives Training from Monday 24th-Friday 28th July 2006. Attendee: Joel Hurst.' It was stamped as having been paid by EFT to State Funds.
154. The seventh invoice numbered 015624 was issued by the AWU National Branch on 31 July 2006, in the amount of \$5000.00 exclusive of GST.²⁴⁷ The invoice description was 'Full Page Advertisement in 'The Australian Worker' Issue 9, Autumn 06 edition.'
155. As referred to above, the email exchange between Julian Rzesniowiecki and Cesar Melhem dated 13 September 2006 was forwarded by Michael Chen to Mei Lin with the direction to 'follow this.'²⁴⁸ Michael Chen did not recall any discussions in relation to the amounts nominated by Julian Rzesniowiecki in the email.²⁴⁹

²⁴⁵ Shorten MFI-9, 9/7/15, p 197.

²⁴⁶ Shorten MFI-9, 9/7/15, p 198.

²⁴⁷ Shorten MFI-9, 9/7/15, p 198A.

²⁴⁸ Shorten MFI-9, 9/7/15, p 201, see paras 17, 18.

²⁴⁹ Michael Chen, 21/10/15, T:808.19-21, 33-40.

156. On 18 September 2006, the AWU Vic Branch issued three invoices to TJH, in accordance with Julian Rzesniowiecki's email of 13 September 2006. Cesar Melhem agreed that the invoices were sent on his instructions.²⁵⁰

AWU Members' Ball

157. The eighth invoice numbered 015701 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$6250.00 exclusive of GST.²⁵¹ The invoice description was 'Places to the 8TH ANNUAL AWU MEMBERS' BALL on Saturday 28 October 2006.' The quantity in the invoice was 1. The invoice was stamped as having been paid by EFT to State Funds.
158. The previous year, TJH made a booking for one table to the AWU members' ball, at a cost of \$1,050.00.²⁵² Julian Rzesniowiecki gave evidence that he attended the AWU balls for each year of the project.²⁵³ Gordon Ralph said that TJH may have paid for a booking for one table, as a 'contribution' to the AWU.²⁵⁴ He did not know whether anyone at TJH in fact attended the ball.²⁵⁵ It is unlikely in the extreme that 70 employees of TJH attended the AWU ball that year.

²⁵⁰ Cesar Melhem, 22/10/15, T:923.9-11.

²⁵¹ Shorten MFI-9, 9/7/15, p 204.

²⁵² Shorten MFI-9, 9/7/15, p 177.

²⁵³ Julian Rzesniowiecki, 13/10/15, T:215.19-25.

²⁵⁴ Gordon Ralph, 12/10/15, T:113.45-47, 116.1.

²⁵⁵ Gordon Ralph, 12/10/15, T:118.26-44.

159. Cesar Melhem submitted that the evidence disclosed that many of the joint venture staff had attended the ball.²⁵⁶ That may be, but evidence that Julian Rzesniowiecki attended the AWU Ball each year does not support a proposition that all of the invoices issued for the AWU Ball represented bookings for tickets that were in fact used by persons at TJH attending the ball. Moreover, there was evidence that purchase of tickets to the AWU ball was not something that was typically done by the joint venture partners.²⁵⁷
160. Gordon Ralph did not give evidence that TJH personnel attended the ball, rather that TJH paid for a table as a ‘contribution.’²⁵⁸ He later said that he did not recall whether a company of representatives from TJH attended the ball and did not change his answer when told that Julian Rzesniowiecki attended the ball each year.²⁵⁹
161. For his part, Julian Rzesniowiecki was asked by counsel for Cesar Melhem whether the tickets to the AWU ball was ‘part of what made it possible to defray the cost of the organisers’ and he agreed.²⁶⁰ He said that there was a table of management-level people and their partners and there were tables dedicated for AWU delegates and their members.²⁶¹ Julian Rzesniowiecki did not at any time give evidence that all of the invoices that were issued for the AWU ball represented

²⁵⁶ Submissions of Cesar Melhem, 20/11/15, para 4.

²⁵⁷ Sasse MFI-4, 12/10/15, T:50.20-32.

²⁵⁸ Gordon Ralph, 12/10/15, T:113.45-114.4.

²⁵⁹ Gordon Ralph, 12/10/15, T:118.26-44.

²⁶⁰ Julian Rzesniowiecki, 13/10/15, T:216.2-7.

²⁶¹ Rzesniowiecki MFI-1, T:16.17-23.

places that were in fact used.²⁶² His evidence was that there was an arrangement for payment of an amount for one table for TJH personnel and some further payment for AWU delegates.

162. Counsel assisting submitted that it is patently clear from the correspondence of 12 September 2006²⁶³ and 16 April 2007²⁶⁴ that sums of money not referable to the purchase of tickets were committed as part of the side deal.²⁶⁵ That submission is accepted.

Sponsorship for OHS conference

163. The ninth invoice, numbered 015703, was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$25,000.00 exclusive of GST.²⁶⁶ The invoice description was ‘Sponsorship for OH&S conference – As per agreement with Cesar Melhem.’ The date of the conference was not specified. There was no evidence of what the conference related to and when and where it was held. The invoice was stamped as having been paid by EFT to State Funds.
164. The description the invoice ‘as per agreement with Cesar Melhem’ was understood by Julian Rzesniowiecki to be a reference to the agreement to pay \$100,000 plus GST per year, so that Julian Rzesniowiecki would understand that the invoice was for the purposes of that

²⁶² He gave evidence that he used the tickets that he bought: Julian Rzesniowiecki, 13/10/15, T:215.39-40.

²⁶³ Shorten MFI-9, 9/7/15, page 221.

²⁶⁴ Shorten MFI-9, 9/7/15, page 235.

²⁶⁵ Submissions of Counsel Assisting, 6/11/15, ch 3, paras 142-143, 188.

²⁶⁶ Shorten MFI-9, 9/7/15, p 206.

arrangement.²⁶⁷ Michael Minnotti gave evidence as to the process for approval of sponsorship, namely that it was in the nature of a donation and required approval from the project director.²⁶⁸ Gordon Ralph said that the project would not have paid out \$25,000 for sponsorship of an AWU conference. He said that he could not recall Julian Rzesniowiecki asking him for approval to donate \$25,000 which he would have been required to do.²⁶⁹

165. Julian Rzesniowiecki said that he could not recall whether he obtained approval from Gordon Ralph to pay for the sponsorship. His evidence is that:²⁷⁰

What I did do with Gordon Ralph, when he arrived is I explained the arrangement we had and explained what funds would need to be remitted over the life of the project, and we've got a process within the joint venture, or on a lot of projects, called the "cost to complete" where we calculate what expenditure we anticipate to spend between, you know, the current time and the end of the project. All of the commitments that we'd made to the AWU, and all the other budget items that were under my control were included in that and he would have been aware of that.

166. Julian Rzesniowiecki said that the invoice was a method of providing funds to the AWU pursuant to the agreement.²⁷¹
167. The above evidence clearly established that the invoice was a false invoice in that it described sponsorship for an event that did not take place, and was created with the intention of concealing or disguising the true purpose of the payment it sought.

²⁶⁷ Julian Rzesniowiecki, 13/10/15, T:18.23-28.

²⁶⁸ Minotti MFI-1, 19/10/15, T:31.32-40.

²⁶⁹ Gordon Ralph, 12/10/15, T:119.11-21.

²⁷⁰ Julian Rzesniowiecki, 13/10/15, T:185.23-32.

²⁷¹ Julian Rzesniowiecki, 13/10/15, T:186.6-11.

Advertising in the Australian Worker

168. The tenth invoice numbered 016248 was issued by the AWU Victorian Branch on 18 September 2006, in the amount of \$30,000.00 exclusive of GST.²⁷² The invoice description was ‘Advertising in “The Australian Worker” Magazine. Invoiced mistakenly by National Office before.’ The description made no reference to the issues for which advertising was placed. The invoice had the item code ‘VIC OTHER.’ It was stamped as having been paid by EFT to State Funds. That reference was to an earlier invoice, also dated 18 September 2006 and numbered 015702.²⁷³ That invoice was issued from the National Office, the publisher of the Australian Worker and the proper accounting centre for advertising income, bearing the item code ‘ADVERTISE.’ The copy of the invoice in evidence contained handwritten notes, stating:

Mei Lin, I need to have a look at the supporting documents for this invoice. It may belong to Vic Branch. Thanks, Mich.

It is for Vic not Nat. Need to trf fund internally when receiving payment.

169. Invoice 015702 was then reversed by credit note²⁷⁴ and reissued from the AWU Vic Branch. The first note was in Michael Chen’s handwriting.²⁷⁵ Michael Chen did not have a memory of his reasons

²⁷² Shorten MFI-9, 9/7/15, p 207.

²⁷³ Shorten MFI-9, 9/7/15, p 205.

²⁷⁴ Shorten MFI-9, 9/7/15, p 206A.

²⁷⁵ Michael Chen, 21/10/15, T:808.47.

for making the note. He did not recall examining any supporting documents.²⁷⁶

170. The invoice demonstrably did not relate to any advertising placed in the *Australian Worker*. A reconciliation of the issues of the *Australian Worker* containing advertising placed by TJH over the course of the project, and the invoices issued by the National Office, shows that all of the advertising that was placed was paid for pursuant to those invoices.²⁷⁷

171. Julian Rzesniowiecki described the invoice as, at best, an inflated price.²⁷⁸ He agreed that the purpose of describing the invoice as ‘advertising’ was to disguise what it was for.²⁷⁹

172. Cesar Melhem did not proffer an explanation as to how this invoice came to be raised. He submitted that the evidence was that there had been many issues of the *Australian Worker* in which TJH had placed advertisements, and that the advertising was an advantage to TJH because it assisted with recruitment.²⁸⁰ In response, counsel assisting pointed to the schedule accounting for the advertising that was in fact placed, and paid for, by TJH. That evidence is irrefutable. Because of it, a debate as to whether advertising in the *Australian Worker Magazine* was of any commercial benefit to the project is of diminished relevance. Nonetheless, evidence not referred to in Cesar

²⁷⁶ Michael Chen, 21/10/15, T:809.18-36.

²⁷⁷ Melhem MFI-1, 22/10/15.

²⁷⁸ Julian Rzesniowiecki, 13/10/15, T:186.13-30.

²⁷⁹ Rzesniowiecki MFI-1, 13/10/15, p 20.8-15.

²⁸⁰ Submissions of Cesar Melhem, 20/11/15, para 6.

Melhem's submissions provides a sound evidentiary basis for a suggestion that advertising in that publication was of minimal, if any, commercial benefit to the joint venture:

- (a) Steven Sasse, a person of extensive experience in industrial relations for large construction projects,²⁸¹ gave evidence that the project might place advertising in a union journal for relationship purposes, but that there would otherwise be minimal commercial benefit for the project.²⁸²
- (b) Stephen Sasse was not alone in giving this evidence. Don Johnson gave similar evidence as to the purpose for which advertising was typically placed in union publications.²⁸³ Gordon Ralph also gave evidence that '\$30,000 worth of advertising in the AWU magazine is highly unlikely to have occurred and certainly wouldn't have been required by the project.' Chris Herbert also could not see the benefit to the project of placing \$30,000 worth of advertising in 2006.²⁸⁴
- (c) Moreover, to the extent a large recruitment campaign was undertaken, the evidence of both Mike Connell and Chris Herbert was that this took place while the 2005 EBA was under negotiation, and involved placing advertising worth

²⁸¹ And it was suggested by Cesar Melhem that great weight should be given to his judgment: Submissions of Cesar Melhem, 20/11/15, ch 3, para 1.

²⁸² Stephen Sasse, 12/10/15, T:63.19-28; Sasse MFI-3, 12/10/15, T:22.32-47, T:23.2-24; Sasse MFI-4, 12/10/15, T:47.28-47, T:48.1-7. It was Stephen Sasse who gave evidence supportive of the proposition that the market rate would be about \$450-\$500: Sasse MFI-4, 12/10/15, T:50.1-18, Stephen Sasse, 12/10/15, T:63.30-34.

²⁸³ Johnson MFI-1, 13/10/15, T:13.40-47.

²⁸⁴ Gordon Ralph, 12/10/15, T:117.3-9; Herbert MFI-1, 12/10/15, T:16.35-41.

several hundreds of thousands of dollars in newspapers in capital cities, before the invoices for advertising in the *Australian Worker* post-March 2005.²⁸⁵

(d) Julian Rzesniowiecki described the expenditure on advertising in the *Australian Worker* as ‘you know, a way of us making a donation or providing money to the AWU.’²⁸⁶ To the extent that there was any commercial benefit to TJH in relation to recruitment, Julian Rzesniowiecki said that in the context of the side deal there were ‘other reasons to do it.’²⁸⁷

(e) While Julian Rzesniowiecki accepted the suggestion put to him that the advertising placed in the *Australian Worker* was in the nature of a recruitment advertisement, in reality the majority of the advertisements do not fit this description.²⁸⁸ With the exception of the advertisement for the Summer 2005 issue, which expressly sought online applications via a dedicated website, none of the advertisements placed in the *Australian Worker* invited applications for employment on the project.²⁸⁹

173. The invoice of 18 September 2006 was a false invoice, issued in relation to services not received by TJH, and created with the intention of concealing the true purpose of the payment it sought.

²⁸⁵ Mike Connell, 13/10/15, T:137.1-37; Herbert MFI-1, 12/10/15, T:6.24-40; T:16.17-33.

²⁸⁶ Julian Rzesniowiecki, 13/10/15, T:170.22-31.

²⁸⁷ Julian Rzesniowiecki, 13/10/15, T:210.30-34.

²⁸⁸ Julian Rzesniowiecki, 13/10/15, T:207.1-3.

²⁸⁹ Melhem MFI-1, 22/10/15.

OH&S Training

174. The eleventh invoice numbered 016425 was issued by the AWU Victorian Branch on 6 November 2006, in the amount of \$36,250.00 inclusive of GST.²⁹⁰ The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem.’ It is stamped as having been paid by EFT to State Funds.
175. The date of the invoice was consistent with the instruction in Julian Rzesniowiecki’s email of 13 September 2015 to ‘send in November’ an invoice for HSR training in the amount of \$36,250.²⁹¹ Typically, invoices for OH&S training issued in respect of the project were in respect of training provided to a named participant and describe the dates and period of the training courses paid for.²⁹² This practice was consistent with Michael Minotti’s account of the detailed reporting and accounting requirements that the joint venture had in place in respect of training.²⁹³
176. The General Ledger for the AWU Victorian Branch recorded this income as ‘OH&S Training income.’²⁹⁴ The most commonly recorded amount for this income code is \$750 or multiples thereof. The amount for this invoice was the highest credited to the account for 2006-2007 by a significant margin.

²⁹⁰ Shorten MFI-9, 9/7/15, p 210.

²⁹¹ Shorten MFI-9, 9/7/15, p 199.

²⁹² See, for example, Shorten MFI-9, 9/7/15, pp 169, 174, 176, 191, 197, 198.

²⁹³ Michael Minotti, 19/10/15, T:588.2-12.

²⁹⁴ Shorten MFI-9, 9/7/15, p 254.

177. The twelfth invoice numbered 016485 was issued by the AWU Victorian Branch on 13 November 2006, in the amount of \$3,295.45 exclusive of GST.²⁹⁵ The invoice description was ‘Occupation Health & Safety training course for HRS reps on eastlink – As per Cesar Melhem – Additional to the inv 016425, bring the total amount of HSR training up to \$36,250 plus GST.’ It is stamped as having been paid by EFT to State Funds. Again, the invoice appears to relate to Julian Rzesniowiecki’s direction of 13 September 2006, with the purpose of this invoice to account for the fact that the \$36,250 agreed on at that time was invoiced exclusive of GST.
178. Julian Rzesniowiecki said that the invoices were false invoices in that training was not provided in respect of those invoices.²⁹⁶ Gordon Ralph also stated with certainty that the project would not have provided training to the extent of invoicing \$33,000, as training of that scale would have been sourced from an external provider.²⁹⁷ Cesar Melhem disagreed, stating that the services were provided, but without access to the records he could not verify that this was the case.²⁹⁸ Notices to the AWU seeking production of records relating to training provided by the AWU to Thiess John Holland, including in respect of the above invoices,²⁹⁹ did not lead to the production of any records enabling a conclusion that training was provided as referred to in this invoice. In the absence of any documentary evidence supporting Cesar Melhem’s claim, and in light of the admissions of Julian

²⁹⁵ Shorten MFI-9, 9/7/15, p 211.

²⁹⁶ Julian Rzesniowiecki, 13/10/15, T:189.18-40, 190.30-33.

²⁹⁷ Gordon Ralph, 12/10/15, T:120.14-46, 122.10-18.

²⁹⁸ Cesar Melhem, 22/10/15, T:936.10-23.

²⁹⁹ AWU MFI-2, 23/10/15, pp 175-187.

Rzesniowiecki and the evidence of Gordon Ralph, the appropriate conclusion is that these invoices were false invoices.

179. The thirteenth invoice numbered 016838 was issued by the AWU National Office on 30 November 2006, in the amount of \$5,000 exclusive of GST.³⁰⁰ The invoice description was 'Full Page advertisement in 'The Australian Worker Issue 10, Summer 06 Edition.' It is stamped as having been paid by EFT to State Funds.

The 2007 payments

180. The pattern of invoicing for 2007 was different. It proceeded as follows:

The services invoices

181. An invoice requisition was raised on 27 February 2007 for \$100,000 plus GST with the description 'services.'³⁰¹ The requisition was requested by Michael Chen and authorised by Cesar Melhem. The description 'services' was written in by Cesar Melhem.³⁰²
182. An invoice 017606 was issued by the AWU Vic Branch on 28 February 2007, in the amount of \$100,000.00 exclusive of GST.³⁰³ The invoice description was 'Services – As per Cesar Melhem.'

³⁰⁰ Shorten MFI-9, 9/7/15, p 212A.

³⁰¹ Shorten MFI-9, 9/7/15, p 215.

³⁰² Michael Chen, 21/10/15, T:812.12-20.

³⁰³ Shorten MFI-9, 9/7/15, p 215A.

183. Also 28 February 2007 the invoice was reversed by a credit note numbered 017711, with the description ‘Services – As per Cesar Melhem – REVERSE THIS AS THIESS JOHN HOLLAND WOULD LIKE TO PAY IN INSTALMENTS.’³⁰⁴
184. Two invoices were then issued by the Victorian Branch on 28 February 2007, numbered 017713 and 017714, both for \$37,000 inclusive of GST and described respectively as ‘Services – First Instalment – As per Cesar Melhem’ and ‘Services – Second Instalment – As per Cesar Melhem.’ Both invoices were stamped as being paid on the same day, 18 April 2007, by EFT to State Funds.³⁰⁵
185. A further invoice was issued by the AWU Vic Branch on 22 March 2007, numbered 017715, in the amount of \$36,000 inclusive of GST and described as ‘Services – Third Instalment – As per Cesar Melhem.’³⁰⁶
186. The day before payment of the first two invoices, on 17 April 2007, Julian Rzesniowiecki wrote to Cesar Melhem stating ‘Instalments 1 & 2 will be paid. Please ask Michael to withdraw instalment 3. It will be covered by the ads in Australian Worker, attendance at the ball etc. If we don’t reach the agreed sum we can address at end of year.’³⁰⁷
187. Each of the above invoices was recorded in the General Ledger for the AWU Victorian Branch as ‘other income,’ without any description in

³⁰⁴ Shorten MFI-9, 9/7/15, p 215B.

³⁰⁵ Shorten MFI-9, 9/7/15, pp 217-218.

³⁰⁶ Rzesniowiecki MFI-2, 13/10/15, p 135.

³⁰⁷ Shorten MFI-9, 9/7/15, p 222.

the journal of the nature of the transactions to which the invoices related.³⁰⁸

188. Stephen Sasse provided an explanation of the circumstances in which an invoice of such opacity would be paid:³⁰⁹

The invoice should relate to a purchase order or to a contract or to some other document that creates the commercial relationship between the party invoicing and the party paying the invoice. There are very, very rare occasions where you might specifically request an invoice that's not specific or clear about what it's for, in which case most companies and most audit functions require a two-up sign-off process to make sure that everything is above board.

189. There is no evidence of such a process having been adopted in the present case. Michael Minotti described the invoice for \$110,000 as an unacceptable invoice. He said it should not be approved for payment without an understanding of what the scope of the services were and who authorised the services.³¹⁰ The invoices for the First and Second instalments retained in TJH's records are in evidence.³¹¹ Each appear to have been approved for payment by Julian Rzesniowiecki.³¹²

190. Julian Rzesniowiecki said that he assumed that he asked Cesar Melhem to break the invoice into instalments for cash flow purposes.³¹³ Julian Rzesniowiecki said that he considered that the services that were described in these invoices were provided: namely, that 'services' described the commitment of organisers to the project. Accepting that

³⁰⁸ Shorten MFI-9, 9/7/15, p 259.

³⁰⁹ Stephen Sasse, 12/10/15, T:64.19-27.

³¹⁰ Michael Minotti, 19/10/15, T:589.13-25.

³¹¹ Shorten MFI-9, 9/7/15, pp 216-219.

³¹² Compare the signature at Shorten MFI-9, 9/7/15, p 222.

³¹³ Julian Rzesniowiecki, 13/10/15, T:191.10-21.

he never saw any supporting materials that confirmed what organising services were performed, Julian Rzesniowiecki said.³¹⁴

I mean, you may not agree with the arrangement we entered into, but that was the agreement that was entered into and we weren't concerned to have organisers filling out time sheets and spending a particular time at the project. That wasn't - that wasn't the purpose of what was agreed and it wasn't - it's not reality on an industrial project either, no.

...

...we made an agreement that we would provide funding to assist the AWU to provide organisers to the project. That was the agreement and we honoured our agreement. Now, as I've mentioned to you, we didn't require the organisers to be there for a particular time or duration, or undertake particular activities. It was a general agreement that organisers would be provided, as and when required, in order to make sure the project was delivered successfully and without industrial disruption. So, that's the nature of the arrangement. So, when I was signing off on invoices, I was signing off consistent with the arrangement that we'd entered into. I wasn't checking to see, you know, how much time they'd spent there.

191. Michael Chen described the description on the invoice as 'a bit too short, too brief.'³¹⁵ He was otherwise unable to shed light on how the original invoice in the amount of \$110,000 came to be raised in that manner, or why it was broken into instalments.
192. Cesar Melhem stated that he caused Michael Chen to raise the original tax invoice for \$100,000.00. Cesar Melhem said that the chain of invoices reflected an agreement between himself and Julian Rzesniowiecki that \$110,000 in services would be provided and that they agreed on the budget and invoices for those services.³¹⁶ His

³¹⁴ Julian Rzesniowiecki, 13/10/15, T:192.16-34.

³¹⁵ Michael Chen, 21/10/15, T:812.33-36.

³¹⁶ Cesar Melhem, 22/10/15, T:898.29-42, 937.7-11.

description of the services that were provided by reference to these invoices was as follows:³¹⁷

The services were where Union officials or officers of the AWU and specialists went to the site on the 45 kilometre project attending inductions on a weekly basis, attending crew meetings on a weekly basis, that was in addition to the other services that were provided by the Union to its members for dispute procedure handling, grievances handling, all those sorts of things, they were separate. That was in addition to the day-to-day representation by the organisers to members, so that's additional services to attend inductions and various other activities.

193. Both Cesar Melhem and Julian Rzesniowiecki gave evidence to the effect that the 'services' invoices reflected the services that were in fact provided pursuant to the agreement, namely, the provision of organiser support for the project. Even if it were assumed that the services were provided in the manner described by Julian Rzesniowiecki, and Cesar Melhem, the invoices do not evidence that they were provided or that they represented any value to the project. To that extent, they are false invoices because they too conceal the true purpose of the payments that they represent.
194. Invoice 018826 was issued by the AWU Victorian Branch on 30 June 2007, in the amount of \$8146.36 exclusive of GST and bearing the description 'On-site OH&S Industry Induction (Red Card) Training'.³¹⁸ A detailed breakdown of the courses and the cost per participant was then set out.
195. Invoice 019565 was issued by the AWU Victorian Branch on 1 October 2007, in the amount of \$4,545.45 exclusive of GST and

³¹⁷ Cesar Melhem, 22/10/15, T:937.28-42.

³¹⁸ Shorten MFI-9, 9/7/15, p 225.

bearing the description 'FOUR tables to the 9TH ANNUAL AWU MEMBERS' BALL on Saturday 27 October 2007.'³¹⁹ It is signed as being approved for payment and annotated 'paid'.

The final services invoice

196. As described in section A above, Julian Rzesniowiecki and Cesar Melhem corresponded on 31 March 2008 in relation to the final breakdown of the amount owing for that year.³²⁰

197. The final invoice numbered 020645 was issued on 9 April 2008 from the AWU Victorian Branch in the amount of \$19,015.45 exclusive of GST. It was described as 'Services – third instalment' and then contained a breakdown as follows:

Original amount: \$36000.00

Absorb the payments made from January 2007:

- OHS Training \$825.00
- Red Card Training \$9,258.00
- AWU Ball \$5000.00

198. The breakdown in the invoice was not identical to that in Julian Rzesniowiecki's email of 31 March 2008: it referred to OHS Training rather than the Australian Worker. The invoice also stated 'As per

³¹⁹ Shorten MFI-9, 9/7/15, p 229.

³²⁰ Shorten MFI-9, 9/7/15, p 233.

Cesar Melhem'.³²¹ The invoice was stamped as having been paid on 15 May 2008 by EFT to State Funds.

199. On 10 April 2008 Julian Rzesniowiecki sent an email to Cesar Melhem stating:³²²

Hi mate,

You haven't deducted the Australian Worker Ad \$5500 paid in May 07.

200. Despite this email, the invoice was paid in full on 15 May 2015.³²³
201. The final services invoice is consistent with the approach to invoicing that was adopted at the commencement of that year: namely, some invoices were issued for 'services' and the balance of the agreed sum was accounted for with services that TJH did not, on many occasions, need. Julian Rzesniowiecki's email of 31 May 2015 made plain that the Red Card Training, even if delivered, was not a cost the joint venture needed to incur because that service could have been delivered by John Holland. Moreover, advertising in the Australian Worker would have been of little commercial utility to TJH towards the end of the project. Indeed, as observed above both Gordon Ralph and Stephen Sasse agreed that there was little if any commercial benefit to placing advertisements in union publications.³²⁴

³²¹ Shorten MFI-9, 9/7/15, p 233.

³²² Shorten MFI-9, 9/7/15, p 234.

³²³ Shorten MFI-9, 9/7/15, p 235.

³²⁴ Stephen Sasse, 12/10/15, T:58.27-34; Gordon Ralph, 12/10/15, T:113.22-28, 114.26-29, 117.15-20, 119.3-9.

Accounting and approval of the invoices

202. Two sets of records from the JDE system are in evidence that relate to the processing of the invoices described above.
203. The first is the purchase orders. Purchase orders have been produced corresponding to each of the invoices described above.³²⁵ However, none of the invoices issued by the AWU made reference to a purchase order number as would ordinarily be expected. An analysis of the purchase orders reveals that, on all but one occasion,³²⁶ the purchase order was raised *after* the invoice was received by TJH. That is not consistent with usual accounting practice.³²⁷ Julian Rzesniowiecki said that he assumed that the purchase order was raised when he approved payment of an invoice.³²⁸ The evidence suggested that the invoices were almost invariably received from the AWU without the expenditure having been approved at the time the services were arranged or agreed to. This fact supports an inference that the services described in the invoices were not provided and is consistent with Julian Rzesniowiecki's frank admissions about them.
204. The second set of records in evidence are approvals records from the JDE system.³²⁹ These records show approvals of invoices, up to a set payment approval threshold, by personnel in the accounts department.

³²⁵ Rzesniowiecki MFI-2, 13/10/15, pp 136 to 179.

³²⁶ The purchase order relating to purchase of tickets to the IR regulations seminar: Shorten MFI-9, 9/7/15, p 196.

³²⁷ Michael Minotti, 19/10/15, T:577.28-40.

³²⁸ Julian Rzesniowiecki, 13/10/15, T:172.31-33.

³²⁹ Sasse MFI-2, 12/10/15, pp 1-22.

The approvals process was initiated by administrative staff in the human resources department (often either Deborah Swinley or Ms Viles).³³⁰ It then went to the accounts department officer with the relevant approval threshold. Michael Minotti gave evidence that, as co-signer of cheques for the joint venture, he undertook checks on the invoices immediately prior to payment, but that this process did not involve an inquiry as to whether the work described in an invoice was in fact done.³³¹ Thus, although the Joint Venture had an approvals process in place, it was not such as would have picked up the falsity of the invoices in question.

E – WERE THE INVOICES GENUINE?

205. Cesar Melhem submitted that ‘the approach of those assisting the Commission towards this case study has apparently changed over time.’³³² If correct, that is hardly a surprising proposition. The Commission is a commission of inquiry. Its function is to investigate the matters within the Terms of Reference and pursue various lines of inquiry that emerge in the course of the evidence that emerges. The somewhat contradictory submission that counsel assisting has viewed the evidence through a ‘distorting lens’ of some ‘preoccupation’ is, counsel assisting submitted, misplaced and based on a misapprehension of the evidence.

³³⁰ Michael Minotti, 19/10/15, T:577.42-47.

³³¹ Michael Minotti, 19/10/15, T:583.1-29.

³³² Submissions of Cesar Melhem, 20/11/15, ch 3, para 3.

206. As described above, Cesar Melhem asserted that each of the invoices described above related to a service provided by the AWU.³³³ Bill Shorten gave evidence that he was satisfied that AWU was providing OH&S training, red card training and HSR training at the Eastlink Project.³³⁴ Bill Shorten said that many of the services that are described in the invoices described above are the standard business of unions.³³⁵ It was, according to Bill Shorten, in the interests of workers to have employers pay for services to union members such as OH&S training and entertainment.³³⁶
207. It is likely, on the evidence available, that the AWU did provide services in relation to some of the invoices described above. For example, with the exception of the two invoices issued by the AWU Vic branch, it is clear that TJH placed advertising in the Australian Worker, and that according to the general ledgers of the National Office the price charged for the advertising was in the range of what the AWU National Office was able to command for such a service.
208. Moreover, it is clear that (a) personnel from TJH and their partners attended the AWU ball; and (b) some training was conducted by the AWU in the nature of OH&S and Red Card training.
209. The AWU produced a brochure setting out the training courses offered by the Victorian branch, including 5 day OH&S training and Red Card

³³³ Cesar Melhem, witness statement, 22/10/15, para 10.

³³⁴ Bill Shorten, 9/7/15, T:119.17-26.

³³⁵ Bill Shorten, 9/7/15, T:116.24-29.

³³⁶ Bill Shorten, 9/7/15, T:117-118.

training.³³⁷ The prices for those courses were advertised as \$825.00 and \$100.00 respectively, the former of which is consistent with the amounts charged on some of the above invoices. The invoices for OH&S training for individual representatives, and Red Card training in May 2007,³³⁸ described the training provided, to whom and when, and for a verifiable price. There seems little doubt that the AWU provided some services of this kind.

210. That services were provided in connection with some of the invoices has the consequence that some of the invoices are not false and there is no finding that s 83 of the *Crimes Act* 1958 (Vic) may have been contravened. Notwithstanding this, it is difficult to describe the invoices in this category as genuine. That is because they were for services which, although actually provided, probably would not have been sought or provided had there been no agreement for the payment of \$100,000 per annum.
211. Julian Rzesniowiecki admitted that the purpose of issuing the invoices was to disguise their true purpose. Taking that evidence and the inferences that can be drawn from the documentary evidence, the proper finding is that a number of the invoices are false invoices, for the reasons described in section D above. In particular, the invoices at Shorten MFI-9, pages 170, 185, 186, 196, 204, 206, 207, 210, 211, 217, 218, 229 and 233 are false invoices in that either they do not describe services that were provided to the project or they describe services that were provided, but at an inflated price, for the purpose of

³³⁷ Shorten MFI-9, 9/7/15, pp 239-240.

³³⁸ Shorten MFI-9, 9/7/15, p 225.

obscuring the true nature of the payments made to the AWU by TJH in relation to the invoices.

F – CONCLUSIONS

212. The evidence detailed above discloses that there was an agreement that TJH would pay a sum of \$100,000 plus GST to the AWU each year for the duration of the project. Moreover, the evidence also gives rise to the following findings:

- (a) the genesis of the agreement was a proposal by Bill Shorten to Stephen Sasse in late 2004 that the joint venture provide financial support to the AWU in relation to the dedication of an organiser or organisers to the project;
- (b) that proposal was not the subject of a concluded agreement at the time that the contract was let and Julian Rzesniowiecki and Cesar Melhem assumed primary conduct of the negotiations;
- (c) discussions regarding financial support for the provision of an organiser or organisers took place between Julian Rzesniowiecki and Cesar Melhem while the negotiations for the EBA were completed;
- (d) at some point at around the time the 2005 EBA was finalised, Julian Rzesniowiecki and Cesar Melhem agreed on a sum of \$100,000 per year;

- (e) shortly thereafter, Julian Rzesniowiecki and Cesar Melhem determined that the payments pursuant to the agreement would be effected by the AWU issuing invoices to TJH described as services that the AWU might provide to the joint venture.

213. As set out in section D above, the agreement was implemented by payment of invoices issued by the AWU, many of which were false invoices.

Breach of duty

214. The 2005 EBA was a radical agreement in the civil construction industry at that time. It involved the removal of a number of provisions beneficial to workers but detrimental to efficiency and productivity, such as provisions relating to fixed rostered days off, inclement weather, and non-working delegates.³³⁹ In exchange, the workers covered by the 2005 EBA were paid handsomely.³⁴⁰ None of the above matters was in contest on the evidence.

215. Nonetheless, that that result was achieved in circumstances that also involved the negotiation of a substantial payment by TJH to the AWU is troubling. It casts a different light on the high praise heaped on the 2005 EBA by those involved in its negotiation.

³³⁹ Bill Shorten, 9/7/15, T:133.29-32, 134.3-46.

³⁴⁰ Cesar Melhem, witness statement, 22/10/15, paras 6, 8.

216. The question presently to be considered is whether the negotiation and implementation of the arrangement involved any breach of fiduciary duty. The question of whether such a duty existed have been discussed in the Chapter 10.2 (Cleavevent). The application of the reasoning in that Chapter leads to the conclusion that both the AWU and Cesar Melhem owed fiduciary duties to the AWU members in connection with the negotiation of the EBA.
217. Counsel assisting submitted that the negotiation and payment of this ‘side deal’ involved a conflict, or a substantial possibility of a conflict, between the interests of the AWU on the one hand and the interests of AWU members on the other. The submission was disputed by affected parties.
218. Plainly, it was in the interests of the AWU to receive the money paid pursuant to the arrangement. Did this give rise to a conflict of interest and duty or a conflict of duty and duty? The payments were in one important respect contrary to the interests of the AWU members. They were no more than large donations made upon the solicitation of Cesar Melhem. They must inevitably have weakened the AWU’s bargaining position, both in relation to the 2005 EBA and in relation to the AWU’s engagement with the workers on the Eastlink site over the life of the project. They compromised the AWU’s capacity to represent the interests of its members when it came to industrial relations issues that may arise on site. That is because the relevant organisers and officials were effectively in the pay of the employers.
219. The fact that the payments were described as being for the purpose of compensation or defraying of expenses involved in maintaining a

presence on the site did not cure the apparent conflict for the reasons stated above. Moreover, the fact that the terms of the 2005 EBA, and the commitment of organisers and other officials to the Eastlink project, may have been of benefit to the workers, is irrelevant to the question of whether negotiation of a side deal produces a conflict of interests. The AWU submitted that, because the 2005 EBA was an agreement containing terms that benefited the workers employed on the Eastlink project, there could be no conflict of interest or potential for such a conflict.³⁴¹ Submissions of this kind have been considered and rejected in the Chapter 10.2 (Cleavevent). They ignore that a real and sensible possibility of conflict is sufficient to give rise to a breach of duty. Submissions of this kind also assume without argument or justification that a ‘good result’ is the same as a satisfactory process of negotiation leading to that result. But to say that a result is a good one says nothing about whether the side arrangement influenced the result. As has been discussed, assessment of the relevant counterfactual is very difficult. But equity does not require that assessment in order to establish a breach of duty. It is sufficient to establish a real and sensible possibility of a conflict. That is established here.

220. There is no suggestion that the agreement was disclosed to the AWU members at any stage of the project.³⁴²

³⁴¹ Submissions of the AWU, 20/11/15, paras 33-34; Submissions of TJH, 20/11/15, paras 36-38. The authority cited in the latter submissions, *Stoelwinder v Southern Health* [2001] FCA 115 at 44-47, does not support the proposition stated, relating as it does to the entitlement of an employee negotiating his own salary package to have regard to his own interests rather than his employer’s.

³⁴² Gordon Ralph was not aware of arrangement being disclosed to members: Gordon Ralph, 12/10/15, T:109.16-22.

221. Accordingly, the AWU and Cesar Melhem each owed fiduciary duties to members employed by TJH. The AWU, in entering into the arrangement and seeking payments pursuant to it, acted in a position of actual conflict of interest and duty or where there was a real and substantial possibility of such conflict. The AWU's self-interest conflicted with its fiduciary duties to the TJH employees. Cesar Melhem advanced the interests of the AWU in circumstances where those interests conflicted, or where there was a real and substantial possibility of conflict, with his duties to the members of the AWU.

Unlawful commissions: AWU and Cesar Melhem

222. Section 176 of the *Crimes Act* 1958 (Vic) has been discussed in Chapter 10.2 (Cleavevent). Counsel assisting submitted that the payments may have involved offences under s 176 by Cesar Melhem, the AWU, Julian Rzesniowiecki and TJH.
223. As to the AWU and Cesar Melhem, application of the reasoning in Chapter 10.2 (Cleavevent) leads to the conclusion that, in soliciting and receiving the payments, they were 'agents' within the meaning of this section.
224. It was submitted that the payments fell within either or both paragraphs (a) and (b) of s 176(1). That is, it was submitted that they were actually an inducement or reward for doing or for forbearing to do some act in relation to the affairs of AWU members. It was also submitted that they were payments 'the receipt or any expectation of which would in any way tend to influence' the AWU and Cesar

Melhem to show or to forbear to show favour or disfavour in relation to those affairs.

225. These submissions were partly based on the evidence of Stephen Sasse and Mike Connell about the significance of the 2005 EBA to the project and the ongoing significance of the AWU maintaining a presence on the site (as accepted by Gordon Ralph). It was submitted that it is apparent that:

- (a) the payments agreed to and made by TJH would objectively tend to influence Cesar Melhem and the AWU to show favour to TJH in relation to its attendances on site and its attitude to industrial relations issues arising in the course of the project;
- (b) to make the promised commitments to dedicate organisers to the project would, inter alia, increase the influence of the AWU and reduce that of the CFMEU and promote industrial peace, being a step taken in relation to the business and affairs of the members; and
- (c) the payments agreed to and made by TJH were actually intended by Julian Rzesniowiecki and TJH to influence Cesar Melhem and the Union to do these things.

226. These submissions are accepted. The inference that the payments were of this kind is overwhelming. It is supported by the elaborate scheme of falsification of invoices. It must also be concluded that Cesar Melhem (and through him the AWU) understood that Julian Rzesniowiecki agreed to make and made the payments for the purpose

of AWU officials showing favour towards TJH. Rational employers do not make payments of this size for no reason. This is the only rational reason for making them that is apparent in the present case. As has been explained, for the purposes of an offence against s 176(1)(a) or (b) it does not matter whether Cesar Melhem had any intention to show favour or to act in a particular way.

227. The above matters also indicate that the payments were ‘corrupt’. But if further proof be needed, it is provided by that elaborate scheme which was implemented to disguise the payments as payments for services, and to conceal the arrangement.
228. For the above reasons, counsel assisting’s submission is accepted. Both the AWU and Cesar Melhem may have contravened s 176. The question of whether Cesar Melhem’s conduct should be attributed to the AWU has been dealt with in the Cleanevent Chapter.

Unlawful commissions: TJH and Julian Rzesiowiecki

229. To some extent the above analysis also deals with the position of Julian Rzesniowiecki and TJH. They accept that the invoices arranged and approved by Julian Rzesiowiecki were false. However, they submitted that it was appropriate for an employee of the joint venture to conceal the true nature of the payments for the reasons given by Julian Rzesniowiecki in his evidence, in circumstances where Julian Rzesniowiecki held a genuine view that it was in the interests of TJH, the AWU and its members to withhold the existence of the agreement

from the CFMEU.³⁴³ It may be accepted that Julian Rzesniowiecki genuinely held this view. However this does not deal with the fact that the payments were concealed, not just from the CFMEU, but from many employees of TJH, many employees of the joint venture partners, and officers, employees and members of the AWU.

230. TJH also submitted that the relevant payment in the present case was to the principal (being the AWU) and not the agent (being Cesar Melhem). It put an alternative submission that the AWU had no identified principal.³⁴⁴ The alternative submission is incorrect. The AWU's principals were its members employed by TJH. The primary submission misconceived the effect of s 176. It does not matter, under s 176, who received the 'valuable consideration'. The section says that it may be solicited 'for himself or for any other person'.
231. On his own evidence, Julian Rzesniowiecki caused the payments to be made for the purposes described above. That evidence is sufficient to justify the conclusion that he gave or offered the payments 'corruptly', either with an actual intention that they be on account of doing or forbearing to do some act in relation to the affairs of the AWU members or in circumstances where their receipt or expectation would in some way tend to influence those affairs.
232. Accordingly, Julian Rzesniowiecki may have committed an offence under s 176(2) of the *Crimes Act 1958* (Vic).

³⁴³ Submissions of TJH, 20/11/15, para 47; Submissions of Cesar Melhem, 20/11/15, ch 1, paras 45, 53-54.

³⁴⁴ Submissions of TJH, 20/11/2015, para 51.

233. Whether either joint venture party is liable under s 176 requires consideration. Counsel assisting submitted that the conduct of Julian Rzesniowiecki and Gordon Ralph should be attributed to TJH for the purposes of this section. As indicated at the outset, Gordon Ralph became Project Director in September 2005. It is clear that from at the latest early 2006, Julian Rzesniowiecki had disclosed the nature of the agreement to Gordon Ralph and that the latter had assented to the payment arrangement continuing.³⁴⁵ Further, it is plain that Julian Rzesniowiecki had authority to cause expenses to be incurred in relation to human resources matters, and that he exercised this authority in approving the invoices that were issued pursuant to the arrangement. In doing so, he acted in accordance with a budgetary allocation that enabled the expenses to be incurred without scrutiny, but on the basis that he was not entirely forthcoming as to the purpose of the payments.³⁴⁶

234. TJH submitted that either the joint venture management committee, or the supervisory board, would be the directing mind and will of the joint venture for the purpose of attributing liability to TJH.³⁴⁷ For the reasons identified in Chapter 10.2 (Cleavevent), it is not necessary for the side deal and the payments made pursuant to it to be approved by executive management or the board for liability to be attributed to TJH in respect of the transactions considered in this case study. It is not disputed that both Julian Rzesniowiecki and Gordon Ralph were authorised to bind TJH to financial obligations in amounts equivalent to the side deal, and were given autonomy and control in relation to (a)

³⁴⁵ See paragraph 106 above.

³⁴⁶ See paragraphs 104-105 above.

³⁴⁷ Submissions of TJH, 20/11/15, para 56.

the negotiations and dealings with the unions; and (b) financial transactions incurred in relation to the project. In the ordinary business of the project, they did so.

235. In all of the above circumstances, the conduct of Julian Rzesniowiecki and Gordon Ralph is to be attributed to TJH for the purposes of s 176 and as a result TJH itself may have committed an offence under that section. However, TJH was a joint venture. The details of the invoices were kept secret from Thiess Pty Ltd by John Holland Pty Ltd. Hence it is proper to treat only John Holland Pty Ltd as affected by the conduct of the executives.

False accounting records

236. At all relevant times, s 83 of the *Crimes Act* 1958 (Vic) provided:

False Accounting

- (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another-
 - (a) Destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
 - (b) In furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in material particular-

He is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

- (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material in particular,

or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

237. It is clear that the invoices issued by the AWU to TJH were records or documents made or required for any accounting purpose within the meaning of s 83(1)(a). Moreover, entry of the invoices into the accounting systems of TJH for the purposes of facilitating payment of the invoices (including raising the purchase orders and causing records of approval and payment of the invoices) is the creation of a record or records for an accounting purpose, as well as making use of false accounting records, being the invoices.
238. It is also clear that whoever prepared the invoices, and entered the accounting records into the TJH systems, and whoever concurred in their preparation, falsified them within the meaning of s 83(1)(a). That follows from the terms of s 83(2).
239. The question is whether the person who prepared the invoices (or concurred in their preparation) did so ‘dishonestly, with a view to gain for himself or another’ within the meaning of s 83(1). Counsel assisting submit that both Cesar Melhem and Julian Rzesniowiecki did act ‘dishonestly’ in this sense. Several submissions of affected parties disputed that.

Requirement of dishonesty

240. Cesar Melhem contended, it would seem, in reliance on *R v Salvo*,³⁴⁸ that proof of the commission of an offence under s 83 required proof

³⁴⁸ [1980] VR 410.

that the accused had no subjective belief in an entitlement to the payment or gain obtained.³⁴⁹ The submission is confused. To see why, it is necessary to examine the decision in *R v Salvo*.³⁵⁰

241. That case concerned the offences of obtaining property by deception under s 81 of the *Crimes Act* 1958 (Vic). That section requires proof that the accused ‘by any deception dishonestly obtains property belonging to another’. The defendant purchased a car from an acquaintance, Kapauks, and paid by cheque. At the time he gave the cheque to Kapauks, the defendant intended to cancel the cheque before presentation and he in fact did so. The defendant admitted that in paying by cheque with this intention he deceived Kapauks. The defendant however claimed that he was not acting dishonestly because he believed Kapauks owed him more than the value of the car. He believed this, he said, because Kapauks had previously sold to him a stolen car which had been repossessed.
242. On these facts, a majority of the Full Court of the Supreme Court of Victoria held that, if the jury had a reasonable doubt as to whether the accused in fact believed he had an entitlement to obtain the car, then the accused was entitled to be acquitted, and the appeal was allowed on the basis that the trial judge’s direction to the jury did not make this clear. A majority of the Full Court held that, in essence, dishonesty under s 81 meant without a belief in a claim of right. That interpretation remains the law in Victoria.³⁵¹

³⁴⁹ Submissions of Cesar Melhem, 20/11/15, ch 1, paras 53-62.

³⁵⁰ [1980] VR 410.

³⁵¹ See *SAJ v R* (2012) 36 VR 435 at [47]-[48] and cases there cited.

243. Once the nature of the decision is understood, it is apparent that there is no particular reason to think that the reasoning in it would have any application to s 83. That is because there is no requirement under that section of any proof of deception and no requirement that any property be obtained. Cesar Melhem's submission thus fails at the threshold.
244. But even if *Salvo* were applied by analogy to s 83, it would make no difference to Cesar Melhem's position. At one point³⁵² Cesar Melhem's submissions attempted to say that application of the *Salvo* test would require proof that Cesar Melhem 'did not believe that he had a legal right to the payment or gain'. However, this submission cannot be accepted. The particular conduct that the offences in *Salvo* required to have been engaged in dishonestly was the obtaining of property.³⁵³ If that case is to be applied by analogy to s 83, then it is necessary to focus on the particular conduct that s 83 requires be engaged in dishonestly. The particular conduct is, relevantly, the falsification of a document made for an accounting purpose. Application of the *Salvo* test to s 83 would mean that it would be necessary to show that the conduct was engaged in without any belief in an entitlement to falsify the document.
245. There is the further point that, in any event, the AWU had no legal entitlement to payments pursuant to the false invoices. For example, the AWU did not do or cause to be done any back strain research for TJH and had no basis on which to seek payment for it. Nor did the AWU have any entitlement to seek the payment of that amount on any basis. It could not have successfully sued Thiess John Holland for any

³⁵² Submissions of Cesar Melhem, 20/11/15, ch 1, para 60.

³⁵³ See ss 74 and 81 of the *Crimes Act* 1958 (Vic).

part of the \$100,000 per year that was agreed. It is thus impossible to see how Cesar Melhem could have had any belief in any entitlement to falsify these documents.

246. Cesar Melhem also submitted that dishonesty must require proof of something more than knowledge of the falsity of the accounting record. A similar submission was implicit in the submissions of Winslow.³⁵⁴ However that is not so. If the *Salvo* test is applied, then, as stated above, on the present facts knowledge of the falsity of the accounting record is sufficient.³⁵⁵ If the *Salvo* test is not applied then the question is simply whether the conduct of the person in question was dishonest as judged by contemporary standards of morality. That, as counsel assisting put it, is a jury question.

247. Cesar Melhem acted dishonestly within the meaning of this section. He protested that all invoices were in relation to services that were in fact delivered. But that is demonstrably not the case. Cesar Melhem must have known this to be the case. Moreover, to the extent that the invoices did reflect a service in fact delivered in whole or in part, Cesar Melhem knew that they concealed an entirely different arrangement, namely, payment for the dedication of organisers to the project. He did so with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.

³⁵⁴ Winslow Constructors' Submissions in Reply to Counsel Assisting's Submissions, 20/11/15, para 19.

³⁵⁵ And nor is there necessarily any substantive difference between 'deception' and 'dishonesty' under s 81. As Murphy J stated in *Salvo* itself [1980] VR 410 at 422: '[t]he very deception practised may, in all the circumstances, demonstrate the accused's dishonesty, that is, show that he makes no claim of right'

248. Julian Rzesniowiecki also acted dishonestly within the meaning of this section. He knew, as he himself frankly admitted, that the purpose of all of the invoices being issued in the form that they were was to conceal their true purpose. He actively concealed the nature of the true arrangement from other personnel at TJV and at Thiess, and the falsification of the invoices was another aspect of this concealment. Julian Rzesniowiecki also acted with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.

249. TJH appeared to submit that Julian Rzesniowiecki did not act dishonestly because he honoured the deal that he made with Cesar Melhem.³⁵⁶ The submission cannot be accepted. The fact that the side deal was agreed and carried out in accordance with its purpose does make the conduct of either Julian Rzesniowiecki or Cesar Melhem ‘honest’ for the purposes of this section. It simply means that the dishonest conduct was carried out as planned. Nor, contrary to what appears to be TJH’s position, does the fact that the payments were remunerative in nature mean that they were not a gain. For the purposes of s 83, gain does not equate to a windfall.

Requirement of deception?

250. Cesar Melhem submitted that counsel assisting ‘concede that no act of deception occurred’.³⁵⁷ This misstates counsel assisting’s position. The submission of Cesar Melhem appears to be a reference to the fact that in a number of case studies involving false invoices both sender

³⁵⁶ Submissions of TJH, 20/11/15, paras 59-60.

³⁵⁷ Submissions of Cesar Melhem, 20/11/15, Ch 1, para 60.

and recipient knew the invoice was false. But, in any event, the fact that sender and recipient know an invoice does not mean that no act of deception occurs. It is in the very nature of false accounting records that they are relied upon by third parties, sometimes to their detriment.³⁵⁸ The Downer and Winslow case studies are examples of this: see Chapters 10.10 and 10.8 respectively.

251. In any event, this is not the position in the present case. Thiess and its representatives did not know about the arrangement or about the falsity of the invoices issued pursuant to it.
252. There is the further point that the relevant dishonesty, in the present case does not flow merely from the proposition that the creation of the false invoices was for the purpose of deceiving the staff or management of TJH. It is also sufficient to say that the relevant dishonesty flowed from the creation of invoices with the knowledge that they were for services never delivered, or for services that concealed a different arrangement. It is not necessary, for the purposes of s 83 of the *Crimes Act* 1958 (Vic), for there to be any attempt to deceive anyone.
253. It follows from that it is not necessary to show that Cesar Melhem took particular steps to conceal the arrangement from TJH. The ample evidence of the steps he took to arrange for the false invoices to be issued³⁵⁹ is sufficient to establish the dishonesty element of the offence.

³⁵⁸ See, for example, the facts in *R v Ellery* [2012] VSC 349: a s 83 sentencing decision.

³⁵⁹ Submissions of Counsel Assisting, 6/11/15, ch 3, paras 10-24, 107-190.

254. But, in any event, there is evidence that concealment was part of the purpose of the false invoicing. Julian Rzesniowiecki's evidence was that the arrangement was struck with Cesar Melhem for the very purpose of ensuring that the payments were processed through TJH, John Holland having refused to pay the invoice:³⁶⁰

A. ...what I'd arranged with Mr Melhem was that the invoices would be sent to John Holland and they wouldn't come to the project and then at some point they were redirected from Hollands to the project and so Mr Melhem and I sorted out an arrangement as to how those invoices would be struck so they could be processed through the joint venture.

Q. Can you explain that in a bit more detail? What was the arrangement that was sorted out?

A. You know, that the invoices we'd made out for thing such as, you know, advertising, sponsorship of events, other things that were, you know, providing, you know, finances to the AWU that could be approved within the project.

Q. Yes. Do you mean that, in fact, those services had not been provided?

A. No, I don't mean that. I meant --

Q. The invoices were made out --

A. -- that we didn't want to describe them as providing, you know, an organiser, you know, paying funds for an organiser, so --

Q. You didn't want to say that?

A. We didn't want to say that.

255. The evidence indicates that Cesar Melhem actively participated in the creation of false invoices to effect that purpose.

256. For the above reasons, the submissions of Cesar Melhem that the arrangement reflected a common understanding between him and

³⁶⁰ Julian Rzesniowiecki, 13/10/15, T:168.38-169.17.

Julian Rzesniowiecki as to what the invoices reflected does not justify a conclusion that the arrangement was one that was open and beyond reproach, but merely subject to confidentiality for reasons of competitive concern.³⁶¹

257. In the above circumstances, Cesar Melhem and Julian Rzesniowiecki may have contravened s 83 of the *Crimes Act* 1958 (Vic). No submission was made that Julian Rzesniowiecki's conduct should be attributed to TJH. In those circumstances it is not necessary to pursue that possibility.
258. For the reasons given in the Cleanevent Chapter, Cesar Melhem's conduct should be attributed to the AWU.
259. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).
260. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).

³⁶¹ Submissions of Cesar Melhem, 20/11/15, ch 3, paras 13-16.

261. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Julian Rzesiowiecki in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).
262. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of John Holland Pty Ltd in relation to possible offences under s 176 of the *Crimes Act* 1958 (Vic).
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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
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CHAPTER 10.4

PAID EDUCATION LEAVE

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| E – CONCLUSIONS ON PAID EDUCATION LEAVE | 28 |

A – INTRODUCTION

1. Counsel assisting put forward introductory comments in relation to paid education leave.
2. The evidence set out in what follows is uncontroversial. The submissions of counsel assisting about what to make of that evidence were challenged only in some respects and only by Cesar Melhem. For

reasons set out below counsel assisting's submissions are accepted. The findings in relation to specific case studies are set out in the following Chapters 10.5 and 10.6 concerning ACI and Chiquita Mushrooms respectively.

B – THE CONCEPT

3. 'Paid education leave' was described in similar terms by a number of union officials. Ben Davis described paid education leave in the following terms:¹

Paid education leave was a clause we sought to negotiate in agreements for a period of time in which the employer would pay to the union a sum of money per employee, that we would then put towards training – not training in a particular workplace; training across the branch.

4. Bill Shorten's description of the paid education arrangement with ACI was a 'levy used to help facilitate the education and training of our members and activists across the union'.² Frank Leo gave a similar description of the concept.³
5. The concept described by these officials appears to have been introduced to the AWU by Bill Shorten in around 2001. The minutes of the Victorian Branch Committee of Management of 9 October 2001 record as item 7 the following report:⁴

7. Paid Education Leave – Alcoa, One Steel, Cleanevent

¹ Ben Davis, 4/6/15, T:634.30-35.

² Bill Shorten, 9/7/15, T:154.15-18.

³ Frank Leo, witness statement, 15/9/14, para 15.

⁴ Shorten MFI-11, 9/7/15, p 9.

The AWU is currently negotiating with the above companies to secure paid education leave for AWU activists to do further training. The model for the negotiations is based upon the Canadian Auto Workers who receive an amount for ever [sic] hour worked by their members from the employer of the members into a union education trust account. It is proposed that the employers would pay 5 cents for every hour worked by an AWU member into the special fund.

6. A recommendation was moved and carried that AWU Officers be authorised to open an additional bank account titled 'AWU Victoria Branch Paid Education Leave' to receive payments from employers under PEL clauses and agreements and to expend monies under the terms of those clauses and agreements.⁵ It is apparent from a speech given by Bill Shorten to the Industrial Relations Society Annual Dinner at Newcastle that the contribution of 5 cents for every hour worked was taken to be roughly equivalent to 1% of the total payroll of employees.⁶
7. A similar report was made by Bill Shorten in his capacity as National Secretary to the National Executive on 28 May 2002. Item 33 of the minutes of the executive meeting record that a resolution was carried for the opening of a national office bank account for paid education leave, and the establishment of a PEL Education Trust and Trust Account and PEL training company under the control of AWU officers.⁷

⁵ Shorten MFI-11, 9/7/15, p 9.

⁶ Shorten MFI-1, 8/7/15, p 215.

⁷ Shorten MFI-11, 9/7/15, p 93.

8. Bill Shorten's evidence was that the above resolutions were never implemented. No separate trust account or training company were established.⁸

C – PAID EDUCATION LEAVE IN ENTERPRISE AGREEMENTS

9. Although the above resolutions were not implemented, it is clear that the AWU was seeking paid education leave contributions from employers in enterprise agreement (**EBA**) negotiations. The AWU succeeded in that endeavour in the case of two companies. One was Ausreo Pty Ltd (**Ausreo**). The other was Potters Industries Pty Ltd (**Potters**).
10. An EBA between Ausreo and the AWU in 2003 contained a clause requiring the company to pay into a 'special education trust' 5 cents per hour per employee for all compensated hours of work. The clause required those monies to be used to fund training programs and education for financial members of the AWU. Provision was made for decisions concerning the allocation of those trust monies by a committee comprising of AWU and Ausreo representatives.⁹ Similar clauses were contained in the 2005 and 2008 Ausreo EBAs.¹⁰
11. EBAs between the AWU and Potters are further examples. An EBA certified in 2003 required the payment of an amount equal to \$3.80 per week per employee into a nominated fund. This fund was stated to be for the purpose of developing training programs and providing paid

⁸ Bill Shorten, 9/7/15, T:141.10-47, 142.1-36.

⁹ Shorten MFI-1, 8/7/15, p 19.

¹⁰ Shorten MFI-1, 8/7/15, pp 39, 55.

education leave for ‘employees’ (presumably, employees of Potters). Provision was made for the fund to be managed by the Victorian Branch Executive of the AWU and for reports to be made to a joint advisory committee on the operation of the program. The AWU and Potters were to nominate representatives to that committee.¹¹ The reference to \$3.80 per week is equivalent, in a 38 hour week, to 10 cents per hour. A similar provision was contained in the 2005 Potters EBA. However, this clause referred not to an amount of \$3.80 per week but rather to ‘1% of weekly wages per week per employee of the Company.’¹²

12. Invoices were issued by the AWU to Ausreo pursuant to these EBAs. The invoices to Ausreo appear to have been issued on an annual basis. Each is coded ‘PAID EDUC’. Each is described as an invoice for paid education leave with the formula contained in the EBA in question.¹³ The structures contemplated in the Ausreo EBAs were never established. That is, there do not appear to have been any separate trust funds or committees established to administer monies paid pursuant to the paid education leave clause. The monies paid by Ausreo were paid into the AWU’s general bank accounts. They were recorded as paid education in the AWU’s ledgers and financial statements.¹⁴
13. The position in respect of payments under the Potters’ EBAs is similar. Invoices were issued on an annual basis, with the same item code and

¹¹ Shorten MFI-1, 8/7/15, p 92.

¹² Shorten MFI-1, 8/7/15, p 110.

¹³ Shorten MFI-1, 8/7/15, pp 59, 63, 71, 74A, 74C, 74D, 74E.

¹⁴ Shorten MFI-1, 8/7/15, pp 75-82.

with a formula including an amount of \$3.80 per week.¹⁵ The formula of 1% of payroll referred to in the 2005 Potters EBA was not used. Like the payments made by Ausreo, these monies were paid into AWU bank accounts and recorded in general ledgers as paid education.¹⁶ The advisory committee referred to in the EBAs does not appear to have been established.

14. The Ausreo and Potters EBAs appear to be the only examples of AWU EBAs containing a 'paid education leave' clause in the sense of the concept introduced to the AWU by Bill Shorten. More commonly, the label 'paid education leave' was included in other EBAs in a very different way. For example, in the 2003 ACI Operations Pty Ltd EBA (discussed in the next chapter) there appeared a clause headed 'paid trade union training leave'. This clause obliged the company to pay delegates during the time at which they attended trade union sponsored training courses. The obligation was one to pay the delegate, and not the union. The clause caps the company's obligation to make these payments at 10 days' full pay per delegate. The cap is expressed in the following way:¹⁷

15.5 The total paid education leave utilised by any one union shall not exceed the equivalent of ten days' full pay per shop steward as established under paragraph (vi) hereof.

15. A number of witnesses gave evidence that this is how they understood the phrase 'paid education leave'. For example, Joseph Agostino,¹⁸

¹⁵ Shorten MFI-1, 8/7/15, pp 136, 142, 150, 155, 157.

¹⁶ Shorten MFI-1, 8/7/15, pp 165A-170.

¹⁷ Shorten MFI-12, 9/7/15, pp 194-195 (clause 15).

¹⁸ Joseph Agostino, 18/9/14, T:170.10-23.

Brendan Mitchell,¹⁹ Neil Cooper,²⁰ and Mario Minniti²¹ all gave evidence as to their understanding to this effect.

D – PAID EDUCATION LEAVE IN AWU ACCOUNTING RECORDS

16. Paid education was a separate line item in the AWU Victorian Branch financial statements from the 2002- 2003 financial year until the 2013-2014 financial year. Consistently with this, the AWU Victorian Branch General Ledgers contained separate paid education income and paid education expense ledgers for each of these financial years.
17. It is apparent from the AWU ledgers that since 1 July 2002 the only significant²² payments ever recorded in the AWU Vic Branch financial records as paid education income have been: the payments from Ausreo and Potters, referred to above; payments from ACI Operations Pty Ltd and Chiquita Mushrooms Pty Ltd (discussed to in the next two chapters), and payments from Huntsman Chemicals Pty Ltd (**Huntsman**).²³ It is convenient to say something briefly about the Huntsman payments.
18. Alan Bugg was an employee at Huntsman who was given notice that his position would be made redundant.²⁴ Alan Bugg's position was

¹⁹ Brendan Mitchell, 14/10/15, T:338.34-47, 339.1-6.

²⁰ Cooper MFI-1, 15/10/15, pp 6.23-47, 7.1-8.

²¹ Mario Minniti, 15/10/15, T:421.47, 422.1-16.

²² There were, in addition, the following amounts: a payment of \$981.82 from Adecco on 28 May 2005, two payments referenced as 'Victorian Ch' for \$500 and a payment for \$1,000 made by Cognis Australia on 28 October 2003 pursuant to its EBA.

²³ Shorten MFI-15, 9/7/15, pp 275-297.

²⁴ Shorten MFI-15, 9/7/15, p 5.

described as that of a full time shop steward. Before the time for the redundancy to be effective came, the AWU and Huntsman entered into an arrangement under which Alan Bugg would remain at Huntsman, but as a contractor supplied by the AWU.²⁵ The AWU and Huntsman entered into a written agreement each year from 2001 for the payment by Huntsman to the AWU of a fee for the services of Alan Bugg.²⁶ Alan Bugg invoiced the AWU for his services and the AWU invoiced Huntsman. The amounts which the AWU charged Huntsman exceeded the amounts that Alan Bugg charged the AWU, by different amounts in different years. There does not appear to have been a written agreement between the AWU and Alan Bugg.

19. The relationship between the payments received by the AWU pursuant to the above arrangement and 'paid education leave' in the sense described above by AWU officials is tenuous. 'Paid education leave' as referred to in section B of this Chapter involved payments to the union to be used for the purposes of training 'across the board'. The Huntsman payments were for specific services provided to a particular company. They were more akin to the payments made pursuant to the arrangement entered into by Cesar Melhem and Ted Lockyer in respect of Lance Wilson (described in Chapter 10.7) than they were, for example, to the payments made under the Potters and Ausreo arrangements. Bill Shorten's explanation for the inclusion of the Huntsman payments as 'paid education' was that the role that Alan

²⁵ Shorten MFI-15, 9/7/15, p 7-9.

²⁶ Shorten MFI-15, 9/7/15, pp 1-30.

Bugg performed at Huntsman related to the provision of education and training.²⁷

20. The only monies ever recorded in AWU accounting records as paid education expenses are the payments to Alan Bugg pursuant to the above arrangement.²⁸ That is curious not only because the arrangement with Alan Bugg appears unrelated to paid education in any sense of that term but also because of the claims of numerous AWU officials that monies paid pursuant to ‘paid education’ arrangements were deployed for the purposes of training AWU members.
21. To evaluate claims of the latter kind, and in anticipation of the evaluation in the following chapters of the evidence before the Commission on the ACI and Chiquita case studies, it is necessary to make further observations about the AWU accounts. The AWU Victorian Branch accounts for the financial years 2001 to 2006 recorded the income and expenditure for education leave and training as follows:²⁹

| | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
|------------------------------------|-----------|-----------|-----------|-----------|------------------------|-----------|
| Training Courses & Seminars Income | \$212,555 | \$212,357 | \$157,943 | \$273,351 | \$49,500 ³⁰ | \$134,868 |

²⁷ Bill Shorten, 9/7/15, T:191.13-36.

²⁸ Robinson MFI-2, 14/10/15, pp 99-104, 17.

²⁹ Melhem MFI-8, 2/6/15, pp 19-20 (2001-2002), 34-35 (2002-2003), 60-61 (2003-2004), 82-83 (2004-2005), 103-104 (2005-2006).

³⁰ Described as seminar income. From 2005 AWU separately accounted for Seminar and Red Card training income.

| | | | | | | |
|---|-----------|-----------|-----------|-----------|-----------|-----------|
| Red Card Training | N/A | N/A | N/A | N/A | \$106,591 | \$66,909 |
| OHS Training | N/A | N/A | \$74,205 | \$80,331 | \$99,436 | \$136,261 |
| Paid education income | Nil | Nil | \$113,643 | \$327,008 | \$221,540 | \$89,782 |
| Training & Tuition expenditure (total) | \$197,238 | \$192,284 | \$165,810 | \$254,109 | \$211,383 | \$158,602 |
| OH&S Expenses ³¹ | | | \$45,834 | \$25,317 | \$27,192 | \$28,762 |
| Delegates and shop stewards ³² | \$79,130 | \$48,918 | \$4,666 | \$3,652 | \$2,836 | \$4,457 |
| Paid education expenses ³³ | Nil | Nil | \$16,750 | \$73,476 | \$74,557 | \$75,742 |

22. No separate line item appears in the AWU financial statements for wages paid to staff dealing with training. However the AWU general ledgers indicate that the following amounts were paid in that regard in these financial years:

| | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
|-------------------------|---------------------|---------------------|-------------|-------------|-------------|--------------|
| Wages - Training | No ledgers produced | No ledgers produced | \$43,678.86 | \$81,849.43 | \$52,279.53 | \$105,639.73 |

23. The accounts of the Victorian Branch do not support Cesar Melhem's assertions that:

- (a) The AWU on average spends about \$500,000 to \$600,000 on training for members;³⁴ or

³¹ These include expenses incurred in connection with projects for which government grants were received. Only OH&S training expenses have been included in this table (since the income from those grants has not been included)

³² Recorded as a separate line item included in the total expenditure for training and tuition.

³³ Recorded as a separate line item included in the total expenditure for training and tuition.

- (b) The AWU spends far more on training than they ever receive, whether through paid education or invoicing for services.³⁵
24. Further, the accounts do not support Cesar Melhem's assertion³⁶ that the AWU itself paid for any significant training of ACI employees, discussed in the following chapter. Although the AWU appears to have conducted significant training for delegates and shop stewards, including at ACI, that training was paid for separately by the employers of the delegates (including ACI).
25. The AWU financial records also do not support Bill Shorten's evidence that 'anything that we raised in terms of paid education was always spent for education and training of members'.³⁷ There are two difficulties with assertions of this kind. First, apart from the payments made to Alan Bugg, no attempt ever was made to account separately for the expenditure of monies recorded as paid education income. Those monies formed part of AWU general revenue. In the following chapter, it will be seen that two payments of about \$145,000.00 each from ACI were in fact deposited into the AWU long service leave account and monies from that account were lent to the AWU national office to pay down a loan related to the renovation of the Victorian Branch and National Offices.
26. The second difficulty with the assertion that monies received as paid education were deployed for the purposes of training is that the AWU

³⁴ Cesar Melhem, 22/10/15, T:971.7-10.

³⁵ Cesar Melhem, 22/10/15, T:976.19-27.

³⁶ Cesar Melhem, 22/10/15, T:961.2-11.

³⁷ Bill Shorten, 9/7/15, T:193.27-29. See also at T:193.41-47.

Victorian Branch accounts do not suggest that any increase in paid education income resulted in an increase in training expenditure. Those accounts do not disclose any material increase in training that was not being funded by the income received for that training. Further, the AWU has produced minutes of Branch Committee Meetings for the period 1999 – 2015. Those minutes do not record any consideration by the Branch Committee of how to expend any monies actually received as ‘paid education’.³⁸

27. The above matters point to one of the many difficulties with the paid education leave concept if the arrangement to make paid education leave payments were not disclosed to employees of the company in question. A member who happened to find out that his or her employer was making paid education contributions would need to look at the ledgers to ascertain the breakdown of paid education income. If he or she wanted to know about how paid education payments had been deployed, the AWU financial records would be of no assistance: the only paid education expenses recorded are the payments to Alan Bugg.

E – CONCLUSIONS ON PAID EDUCATION LEAVE

28. ‘Paid education’, in the way that that concept was implemented by the AWU, was capable of covering more or less any kind of payment made to the AWU. Cesar Melhem accepted as much.³⁹

³⁸ Shorten MFI-11, 9/7/15.

³⁹ Cesar Melhem, 22/10/15, T:977.22-30.

29. For the most part, payments of ‘paid education’ amounted to no more than donations from employers. The ACI and Chiquita Mushrooms case studies provide examples of this, but the same is true of the payments made pursuant to the Potters and Ausreo EBAs referred to above. There appears to have been no attempt to abide by the requirements in those EBAs in relation to the payment of funds into trusts, if those trusts could have been valid, and ensuring that it was deployed for the purposes of training. Payments for paid education leave, of any kind, were simply treated as part of the union’s general revenue.
30. For the reasons given in the ACI and Chiquita case studies, in some circumstances the making and receipt of payments of this kind may have amounted to breaches of fiduciary and possibly criminal offences. For present purposes, it is sufficient to note that the basic difficulty with the concept, as actually implemented by the AWU, is that payments of this kind from employers fundamentally weaken the union’s capacity to represent the interests of its members. Such payments are not substantively different, in this respect, from many of the other improper payments considered in AWU case studies. Indeed, the descriptions given at times to other payments bear resemblance to payments for paid education. For example, the fee payable under the Cleanevent Side Letter was perceived, at least at one point in negotiations, to amount to about 1% of the payroll of the company.⁴⁰ That is the same formula as appears in the Potters EBA and which, according to a speech given by Bill Shorten to the Industrial Relations

⁴⁰ See for example, Cleanevent MFI-1, 19/10/15, p 175.

Society Annual Dinner at Newcastle,⁴¹ represented about 5c per hour per employee. Similarly, the description on the invoices for some of the payments made in the Thiess case study was ‘services’. This is how Cesar Melhem and Mike Gilhome at times characterised the payments considered in the next chapter in the ACI case study and also how Cesar Melhem said he thought of the payments made by Cleanevent. All of these payments share a common capacity to compromise the union. The payments of membership fees in the Winslow case study had the same effect. Ben Davis’ statement that the Winslow payments ‘profoundly weaken us in the workplace’⁴² is applicable also to the payments for paid education considered in the following two chapters of this Report.

31. Cesar Melhem made three points in response to counsel assisting’s submissions, set out above. In substance they are really submissions dealing with the particular case studies but it is convenient to deal with them here.
32. The first was that it was not improper to endeavour to set up a training fund or training organisation, and that the fact that this did not ultimately occur does not make the endeavour improper. Moreover, to the extent that the payments are characterised as donations, that is not improper either, because there is no evidence that the funds were used other than for legitimate industrial purposes.
33. The submission rather assumes that the payments in question were made for the purposes of assisting in establishing a training fund. That

⁴¹ Shorten MFI-1, 8/7/15, p 215.

⁴² Ben Davis, 4/6/15, T:625.44-626.12.

assumption, as will be seen, is incorrect. It is true that, looked upon in the abstract, a donation to a union might not be improper. But, as counsel assisting submitted, it all depends upon the context in which the donation is made. A donation in the middle of negotiations for an enterprise agreement is highly likely to be improper. That is what occurred in the ACI and Chiquita case studies – and, in substance, also in the Cleanevent and Thiess case studies. Cesar Melhem’s submission about the use to which the money might be put is irrelevant. Donations, by definition, can be put to any use. Some donations are improper, some are not. All depends upon context.

34. Cesar Melhem’s second point was that a conflict of interest did not arise in relation to acceptance of payments for paid education leave, because there was no relevant distinction between the interests of the union and its members. This submission is considered in more detail in the ACI case study. The short answer is that there is a relevant distinction in the particular contexts in which the payments in question were requested. Cesar Melhem also made the point that he did not benefit personally from any improper payment. That point may be accepted. But, because the payments were sought for the benefit of another (the AWU), it is no answer to the question of whether he breached his duties or committed offences under s 176 of the *Crimes Act 1958* (Vic).
35. Cesar Melhem’s third point was that the payments cannot be described as improper simply because they were not disclosed to the members. That also is so. But that is not the only reason the payments are described as improper. It is a reason. Cesar Melhem said that it is unclear why the payments should have been disclosed. One reason is

that they were requested and made in circumstances where fiduciaries were acting in a position of conflict. A more basic reason is that the payments were sought and made in circumstances where the AWU and its officials were purportedly representing the interests of some of their members. The submission assumed, falsely, that these payments have no capacity to influence the union and its officials in the performance of services to those members.

CHAPTER 10.5

ACI

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A – INTRODUCTION

1. This case study explores payments made to the AWU over a number of years by ACI Operations Pty Ltd (**ACI**). Two categories of payments are considered.
2. Three payments, each of about \$160,000 (inclusive of GST), were made by ACI to the AWU between 2003 and 2005. The invoices issued by the AWU for those amounts described the payments as ‘paid education leave.’ This is the first category of payment.
3. The second category involves five payments paid by ACI to the AWU in the amount of \$5,400 (inclusive of GST) each between 2008 and

2012. The payments were made pursuant to invoices described as being for '12 Membership Yearly fees'.

B – THE ACI GLASS BUSINESS IN VICTORIA

4. ACI Glass Packaging was a business owned and operated by ACI. ACI was for many years the sole producer of glass containers in Australia and New Zealand. ACI was acquired by Owens-Illinois Inc as part of a global takeover of the glass and packaging firm BTR plc, in about 1998. Prior to that time, ACI was a subsidiary of BTR Nylex.¹
5. ACI had headquarters in Hawthorn. It had a glass packaging plant in Spotswood, Victoria.² It also operated glass packaging plants in Adelaide, Sydney and Brisbane. Until 2008, ACI operated a glass mould factory at Box Hill in Victoria.³
6. The Spotswood plant employed about 400-500 workers in the mid-1990s.⁴ The workforce was totally unionised and the major union for glass workers was the AWU.⁵ By arrangement between the AWU and glass manufacturers when the Australian Glass Workers' Union was amalgamated into the AWU, there was a dedicated Glass and

¹ Gilhome MFI-1, 14/10/15, p 5.36-39.

² Gilhome MFI-1, 14/10/15, pp 7.39-44, 8.10-14.

³ Gilhome MFI-1, 14/10/15, p 9.11-13.

⁴ Gilhome MFI-1, 14/10/15, pp 9.29-10.3.

⁵ Gilhome MFI-1, 14/10/15, pp 10.1-15, 12.7-9.

Container Industry Branch of the AWU.⁶ That branch ceased operation on 31 August 2004.⁷

7. In general terms, the glass plant operated a production line. The production line had what was called a 'hot end' and a 'cold end'. The hot end was where machines formed the glass containers that were made. The cold end was where the products produced by the machines were inspected, surface treated and packaged.
8. In around the mid-1990s, ACI began a process of 'broadbanding' at the Spotswood plant. Greg Savage was the plant manager at Spotswood from 2001 to 2009. He explained broadbanding in the following terms:⁸

A key component of broadbanding was the fact that production workers could be trained to work on both the hot end (where the Job Change Crew changed bottle types on the machines forming the containers) and cold end (where the products were inspected, surface treated and packaged) off the production line. This gave O-I [ACI] increased flexibility in deploying production workers to where they were needed most depending on what orders were required. This resulted in the Job Change crews being able to change the production machine settings in as little as 2 hours.

9. The advantages of the broadbanding process to ACI were increased flexibility in deploying production workers and greater efficiencies.⁹ It also enabled ACI to decrease the ETU's influence at the Spotswood plant by decreasing the job change role of electricians.¹⁰

⁶ Gilhome MFI-1, 14/10/15, pp 10.25-42,11.9-11.

⁷ AWU MFI-16, 6/11/15, p 35.

⁸ Greg Savage, witness statement, 15/10/15, para 29.

⁹ Greg Savage, witness statement, 15/10/15, paras 29-34.

¹⁰ Greg Savage, witness statement, 15/10/15, para 32.

Broadbanding, whilst resulting in a more efficient use of production workers, also resulted in redundancies.¹¹

10. The broadbanding process was a gradual one. It commenced in the mid-1990s and carried through until the mid-2000s. Provisions dealing with broadbanding were included in EBAs entered into in relation to the Spotswood plant from 1996 through to 2006.
11. Broadbanding, as the above description indicates, required extensive training. That training was provided by ACI itself.¹² Zbigniew Kaminski was a worker at the Spotswood plant and an AWU shop steward. He gave evidence that training in relation to broadbanding was provided by the Spotswood plant manager. Initially that was Tony Krznar. Later it was Min Lee.¹³ Prema Chippendale, another glass worker and AWU delegate gave similar evidence.¹⁴
12. There was significant industrial unrest at Spotswood and other ACI plants in the mid1990s.¹⁵ Most of the unrest involved unions other than the AWU: ACI had a better relationship with the AWU than it did with other unions. The Spotswood plant was subject to numerous bans, stoppages and demarcation disputes between the AWU and

¹¹ Greg Savage, witness statement, 15/10/15, paras 41-44.

¹² Paul Vine, witness statement, 22/10/15, para 21; Mike Gilhome, 14/10/15, T:352.28-43; Gilhome MFI-1, 14/10/15, p 25.9-19.

¹³ Zbigniew Kaminski, witness statement, 15/10/15, paras 33-34.

¹⁴ Prema Chippendale, witness statement, 15/10/15, paras 29-33.

¹⁵ Greg Savage, witness statement, 15/10/15, paras 11-15; Zbigniew Kaminski, witness statement, 15/10/15, paras 25-32; Prema Chippendale, witness statement, 15/10/15, para 15.

AMWU.¹⁶ There was significant industrial action in 2003 at ACI's Box Hill plant, involving predominately the AMWU.¹⁷

13. Provision was made for the implementation of the broadbanding process referred to above in a series of industrial agreements between ACI and the AWU. The first of these was entered into in 1996.¹⁸ Similar provisions were contained in agreements entered into in 1999,¹⁹ 2001,²⁰ 2003²¹ and 2006.²²
14. All of the above agreements provided for paid union training leave for delegates, allowing 10 days' paid training leave per shop steward. That was capable of being pooled to allow for a single shop steward to take a longer period of leave based on the entitlements of other shop stewards of the same union, to a maximum of four weeks per year.²³ The paid training leave provisions did not comprehend any payments to the union. Rather, they operated to require ACI to continue to pay

¹⁶ Gilhome MFI-1, 14/10/15, p 17.18-37.

¹⁷ Paul Vine, witness statement, 22/10/15, paras 22-28.

¹⁸ Shorten MFI-12, 9/7/15, pp 83: see p 86 (cl 7(a)), 91, 93-96, 107 (Attachment D).

¹⁹ Shorten MFI-12, 9/7/15, pp 314, 318-319 (cll 7(a), 7(g)), 324-325 (cl 15), 335 (Appendix A), 340-353 (Attachments A-C). The 1999 EBA also provided for payment of workers to attend training and meetings with appropriate penalties for out of shift training, see pp 374-376.

²⁰ Shorten MFI-12, 9/7/15, pp 108, 112-113 (cll 7(a), (g)), 118-119 (cl 15), 129 (Appendix A), 133-147 (Attachments A-C). The 2001 EBA also contained similar provisions regarding payment for training and meetings (see pp 168-169).

²¹ Shorten MFI-12, 9/7/15, pp 188, 190-191 (cll 7.1, 7.7), 194-195 (cl 15), 203 (Appendix A), 205-214 (Attachments A-C). The 2003 EBA also contained similar provisions regarding payment for training and meetings (see pp 234-235).

²² Shorten MFI-12, 9/7/15, pp 250, 252 (cll 7.1, 7.6), 257 (cl 20), 264 (Appendix A), 266-281 (Attachment A). The 2006 EBA also contained similar provisions regarding payment for training and meetings (see pp 288-289, Attachment D).

²³ Shorten MFI-12, 9/7/15, pp 98, 101.

delegates whilst on training leave. The provision did not operate in favour of AWU members generally. It benefited only shop stewards.

15. As stated, the broadbanding process resulted in some redundancies. On 22 December 2003 a specific industrial agreement to deal with redundancies was certified. The agreement was between ACI, the AMWU, AWU and CEPU.²⁴ It applied at each of the ACI glass plants at Spotswood, Penrith, South Brisbane, West Croydon, and Canning Vale.²⁵ It provided inter alia for four weeks' severance pay on top of four weeks' pay per year of continuous service and a retrenchment payment.²⁶ It provided for consultation obligations before any redundancies were confirmed.²⁷
16. It is convenient to turn to the first category of payments made by ACI, namely the three payments of approximately \$160,000 made in the years 2003 – 2005.

C – PAID EDUCATION LEAVE PAYMENTS FROM 2003 TO 2005

17. A significant amount of time was spent investigating the purpose for these payments. If the payments had been the subject of an arrangement reduced to writing, the investigation might have been straightforward. But the arrangement to make the payments, whatever it was, was not recorded in writing either by the AWU or by ACI. The task might have been straightforward if the two persons centrally

²⁴ Shorten MFI-12, 9/7/15, p 244.

²⁵ Shorten MFI-12, 9/7/15, p 245 cl 3.

²⁶ Shorten MFI-12, 9/7/15, p 247 cl 9.

²⁷ Shorten MFI-12, 9/7/15, p 248.

involved, Cesar Melhem (Victorian State Secretary) and Mike Gilhome (for ACI), had given a frank account of it to the Commission. But, for reasons that are explained below, they did not.

18. In the above circumstances, extensive efforts were made to examine documentary evidence in connection with the payments. What follows is an analysis of that evidence and an analysis of the oral evidence of Mike Gilhome and Cesar Melhem. The central questions are whether, having regard to the seriousness of the conduct involved, the evidence indicates that the payments may have involved breaches of fiduciary duty and/or offences under s 176 of the *Crimes Act* 1958 (Vic). Various conclusions about those duties, and about the operation of that section, have been drawn in Chapter 10.2.

Payments and Invoices

19. The first payment made was of \$159,500 (inclusive of GST). It was made on 1 August 2003.²⁸ This payment was made pursuant to two invoices. The first, tax invoice 002790, was issued by the AWU on 26 June 2003 in the amount of \$79,750.00 inclusive of GST.²⁹ The second invoice was issued by the AWU on 9 July 2003, for an identical amount.³⁰

²⁸ Shorten MFI-12, 9/7/15, pp 10-11.

²⁹ Shorten MFI-12, 9/7/15, p 10.

³⁰ Shorten MFI-12, 9/7/15, p 11.

20. The first invoice was issued pursuant to a request in an email from Michael Chen, financial controller at the AWU,³¹ to Kris Bondin, an accountant at the AWU,³² on 26 May 2003.³³ The email asked simply for an invoice to ACI, attention Mike Gilhome, for \$72,500 plus GST. There is a handwritten note on the email stating 'paid education' and 'Paid Education Leave'. Michael Chen did not know whose handwriting it was. He could not shed any light on the circumstances in which the email or invoice were created.³⁴
21. The second payment was of \$160,160 (inclusive of GST). It was made on 2 July 2004.³⁵ The relevant invoice is dated 2 June 2004 (invoice 006248).³⁶ It contains the description:
- Paid Education leave
- \$0.1 per hour x 35 x 52 weeks x 800 people
22. The genesis of this description appears to be a note in Cesar Melhem's handwriting marked 'private and confidential'. The note contained the above formula and the total amount and address details for the invoice.³⁷ Michael Chen prepared an invoice requisition form on the basis of this note. Cesar Melhem signed it.³⁸

³¹ Michael Chen, witness statement, 21/10/15, para 5.

³² Michael Chen, witness statement, 21/10/15, para 28.

³³ Shorten MFI-12, 9/7/15, p 7.

³⁴ Michael Chen, witness statement, 21/10/15, para 28.

³⁵ Shorten MFI-12, 9/7/15, p 23.

³⁶ Shorten MFI-12, 9/7/15, p 23.

³⁷ Shorten MFI-12, 9/7/15, p 22.

³⁸ Shorten MFI-12, 9/7/15, p 24.

23. The third payment, also of \$160,160 (inclusive of GST), was made on 16 June 2005 pursuant to an invoice dated 24 May 2005 (invoice 010167).³⁹ That invoice contained the same formula, save that '800 people' was replaced with '800 member'. No invoice requisition was produced to the Commission in relation to this invoice.
24. The formula (contained in the invoices pursuant to which the second and third payments were made) was described by Peter Robinson (ACI CEO) as a 'nonsense formula'.⁴⁰ Counsel assisting submitted that this was an appropriate description. That characterisation was disputed by some affected parties in submissions.
25. This formula calculated the sum payable by reference to 800 'people' and 800 'members'. In his private hearing, as will be seen, Mike Gilhome could not explain the formula. In his public hearing, Mike Gilhome said the formula was a reference to the number of members of the Glass and Container Industry Branch (which, as referred to below, was about 1,800).⁴¹ Cesar Melhem asserted that the figure of 800 on these invoices was a reference to the number of employees employed by ACI nationally.⁴² However that could not have been correct. The evidence from ACI about employee numbers and union membership in the period 2002-2005 was as follows:⁴³

³⁹ Shorten MFI-12, 9/7/15, p 36.

⁴⁰ Peter Robinson, 14/10/15, T:329.35.

⁴¹ Mike Gilhome, 14/10/15, T:359.25-33.

⁴² Cesar Melhem, ACI Glass witness statement, 22/10/15, para 7.

⁴³ Valerie Lester, witness statement, 6/11/15, paras 4-6.

- (a) the number of employees nationally ranged from 1498 to 1466;
- (b) the number of employees at Spotswood ranged from 376 to 365; and
- (c) the number of employees nationally who were AWU members ranged from 667 to 604.

26. None of the efforts of Mike Gilhome or Cesar Melhem in evidence or in submissions to defend the formula was persuasive. Both claimed in submissions that 800 was an approximation for the actual number of ACI employees nationally who were AWU members. However, that is not in any sense a good explanation. If the payments really were for paid education, why approximate? The exact numbers were readily available. Exact numbers of employees were used on invoices issued by the AWU in the only two cases in which paid education was sought under EBAs (Potters and Ausreo).⁴⁴ If an approximate figure was to be used, why chose 800? The actual figure was closer to 500, 600 and 700. Why approximate the number of members employed nationally, as distinct from at the facility with which the EBA was concerned, namely Spotswood? There are no good answers to any of these questions. The formula was not an approximation of this kind.

27. Counsel assisting's submissions are accepted. There is no sensible explanation for the formula on these invoices. That there was no

⁴⁴ See for example Shorten MFI-1, 8/7/15, pp 57, 59, 63, 70, 71, 74A, 74C, 134, 135, 136, 142.

sensible explanation is one indication that these were not payments for paid education, at least in any meaningful sense.

Connection between payments and EBA

28. It is clear that the arrangement to make the payments was struck at a time when EBA negotiations were ongoing. The EBA entered into by the AWU and ACI in 2001 had a nominal expiry date of 30 June 2003.⁴⁵ By clause 13, negotiations for a new EBA were required to commence four months prior to that expiry date, that is, by the end of February 2003.⁴⁶ The EBA entered into in 2003 commenced on 1 July 2003, was signed on 22 September 2003, and was certified on 6 October 2003 (**2003 EBA**).⁴⁷
29. The first record of an instruction to issue an invoice in relation to the payments (referred to below) is dated 26 May 2003.⁴⁸ The first payment was made on 1 August 2003. The attachments to the 2003 EBA dealing with broadbanding were signed by ACI on 25 August 2003.⁴⁹ That the payments were connected with negotiations for the 2003 EBA is, counsel assisting submitted, an inference that is inescapable. The three payments were made by ACI on invoices issued at around the time of the anniversary of the commencement of

⁴⁵ Shorten MFI-12, 9/7/15, p 111, cl 5.

⁴⁶ Shorten MFI-12, 9/7/15, p 117, cl 13.

⁴⁷ Shorten MFI-12, 9/7/15, pp 190, cl 5, pp 188, 202.

⁴⁸ Shorten MFI-12, 9/7/15, p 7.

⁴⁹ Shorten MFI-12, 9/7/15, pp 205-207.

each year of the 2003 EBA (that is, 1 July 2003). The payments stopped when a new EBA was negotiated.

30. In the above circumstance, it is perhaps not surprising that there was no substantial dissent from the proposition that the arrangement to make the payments was struck during EBA negotiations. Cesar Melhem appeared to embrace it in so far as he asserted in evidence and in submissions that a claim was made for paid education in the AWU's log of claims.⁵⁰ Bill Shorten accepted that the arrangement was struck during the course of EBA negotiations.⁵¹ Mike Gilhome in submissions did not contest the proposition, although his position in evidence, at least at one point, was that although the arrangement was struck at the time of EBA negotiations, it had nothing to do with those negotiations.⁵²
31. The arrangement, however, was not included in the 2003 EBA. It was not documented at all. The oral evidence given by Cesar Melhem and Mike Gilhome about it was, for the reasons given below, unsatisfactory. It cannot be accepted. Before considering that evidence, it is convenient to consider such evidence as there was about the arrangement in the records produced by ACI.

⁵⁰ Cesar Melhem, 22/10/15, T:958.32-959.9.

⁵¹ Bill Shorten, 9/7/15, T:156.6-9.

⁵² Gilhome MFI-1, 14/10/15, pp 38.36-37.3.

ACI accounting records

32. ACI's records in relation to these payments are scant. That may in part be due to the fact that the payments took place more than 7 years ago and the operation of a document retention (ie document destruction) policy. However it may also reflect the fact that very little was known within ACI about the payments and that there were very few if any records of their nature and purpose.
33. In substance, the ACI records indicate the following:
- (a) The payments were all made by cheques drawn on an account with Westpac Banking Corporation numbered 034-002 529376, in the name of ACI Operations Pty Ltd, styled 'Packaging Corporate Account.'⁵³ This was a special account used for the making of confidential or sensitive payments.⁵⁴ Neil Cooper, then ACI's Corporate Accounting Manager, said that he would have been told to write cheques on this account, he was not sure by whom.⁵⁵
 - (b) The cheques by which the payments were made were signed by Greg Ridder, then the CFO of ACI, and Neil Cooper.⁵⁶ Neil Cooper wrote the cheques and the description on the

⁵³ Robinson MFI-2, 14/10/15, pp 94-97.

⁵⁴ Ridder MFI-1, 15/10/15, p 14.3-20; Anna Velasco, witness statement, 14/10/15, para 70; Peter Robinson, 14/10/15, p 326.42-46, 330.38-40; Cooper MFI-1, 15/10/15, p 10.30-34.

⁵⁵ Cooper MFI-1, 15/10/15, p 10.45-11.14.

⁵⁶ Ridder MFI-1, 15/10/15, p 3.20, 13.18-19, 22.33; Cooper MFI-1, 15/10/15, p 18.19-20; Shorten MFI-12, 9/7/15, p 39.

cheque butts.⁵⁷ On those cheque butts, the description of the first payment was 'paid education leave' and the description of the second and third payments was 'HR Special CC.'⁵⁸ Neil Cooper had no recollection of the circumstances in which he came to write these descriptions. He said that he would have written 'paid education leave' on the first cheque butt because of what was written on the invoices.⁵⁹ He said that the description 'HR Special CC' on the second and third cheque butts would have been the result of someone telling him that that was the cost centre to which the payments were to be allocated.⁶⁰

- (c) Expenses at this time at ACI were allocated to different cost centres. Brendan Mitchell was at this time the person solely in charge of the HR Special Cost Centre.⁶¹ However, he had no knowledge of the payments and ultimately they were not allocated to this cost centre. Mike Gilhome did not have a cost centre.⁶² The CEO also had a cost centre. It was to this cost centre that all payments were allocated.⁶³

⁵⁷ Cooper MFI-1, 15/10/15, p 4.32-5.10, 18.16-38, 21.14-27.

⁵⁸ Velasco MFI-1, 14/10/15, p 3.

⁵⁹ Cooper MFI-1, 15/10/15, p 5.2-10.

⁶⁰ Cooper MFI-1, 15/10/15, p 18.30-19.7, 21.18-27.

⁶¹ Brendan Mitchell, 14/10/15, p 342.26-33.

⁶² Peter Robinson, 14/10/15, p 332.38-40.

⁶³ Shorten MFI-12, 9/7/15, pp 393-401. See Cooper MFI-1, 15/10/15, p 21.43-22.6 where Neil Cooper confirmed that the reference to 'OIAP Regional President' in connection with the 2005 payment was to the same cost centre. In other words, the label of the CEO's cost centre changed in that year.

(d) The first and second payments were recorded in the ACI ledgers as 'Professional Fees Consulting'. The third payment was recorded as 'Training'.⁶⁴ No witness was able to explain how these entries came to be recorded. According to Neil Cooper, the entries would have been made by someone in the Finance Department, and on the basis of information of some kind provided by him. However he was not able to say what that information was. He gave evidence to the effect that it may have been supplemented or corrected by others.⁶⁵

34. Two points of significance emerge out of ACI's records. The first is that the only reference to 'paid education' in those records is on one cheque butt filled out by Neil Cooper.⁶⁶ But Neil Cooper, in all probability, was repeating either what appeared on the first two invoices or something he had been told by Mike Gilhome.⁶⁷ The rest of ACI's records contain a variety of the descriptions of the payments. Those descriptions are likely to have emanated from what Mike Gilhome told Peter Robinson, Neil Cooper, or both.

35. The second point of significance to emerge out of ACI's records is that the payments were made from an account established for the purposes of making confidential or sensitive payments. If in truth the payments were for 'paid education leave' in the sense described by Cesar Melhem, Bill Shorten and, at times Mike Gilhome, there was no good reason for them to have been made out of this account.

⁶⁴ Shorten MFI-12, 9/7/12, pp 393-401.

⁶⁵ Cooper MFI-1, 15/10/15, p 12.27-13.29.

⁶⁶ Velasco MFI-1, 14/10/15, p 3.

⁶⁷ Cooper MFI-1, 15/10/15, p 7.15-30.

36. There was evidence given by ACI witnesses on the topic of who within ACI approved the payments. The issue was whether, in addition to Mike Gilhome, Peter Robinson knew about them and approved them. Mike Gilhome claimed that he discussed them with Peter Robinson, and that Peter Robinson approved them. Peter Robinson denied that he did. As the above discussion has indicated, the payments were allocated to Peter Robinson's cost centre.
37. There was a lengthy debate about this topic in submissions. Counsel assisting and Peter Robinson submitted his evidence was to be preferred, Mike Gilhome and Cesar Melhem denied this. Ultimately not very much turns on the issue. It was clear that in giving his oral evidence Peter Robinson, even if he once knew about the payments, now can shed no light on them. He was not withholding any genuine recollection about the payments from the Commission. For the reasons given below, the same cannot be said with any confidence about Mike Gilhome.
38. In these circumstances, the only relevance of the issue is that, if Mike Gilhome concealed the existence or the true nature of the payments from Peter Robinson at the time, that would be a powerful indication that the payments were corrupt in nature. It would be strong evidence of conscious impropriety. However, the evidence before the Commission is not sufficient to make such a serious finding. Nor is the evidence sufficient to support a finding that Peter Robinson knew about the payments at the time.
39. It does not follow from the absence of a finding that Mike Gilhome deliberately concealed the payments from Peter Robinson that the

payments were not corrupt. There was other evidence. That evidence includes the ACI records themselves. That two of the payments were described in its accounts as for ‘Professional fees – consulting’ and another ‘Training’ itself indicates that the relevant people in the ACI accounting department were given no clear or consistent account of the payments, which were made from a special account for confidential transactions.

What became of the funds?

40. The treatment of the payments in the hands of the AWU gives some indication as to their purpose. As will become apparent, Cesar Melhem’s position was that the purpose of the payments was to assist the AWU in providing training, or in establishing a training centre and also to assist in reimbursing the AWU for some of the expenses it incurred as a result of Cesar Melhem’s work in connection with ACI. The way in which the AWU actually dealt with the payments, however, does not support this position.
41. All of the amounts the subject of the invoices in question were entered into the Paid Education Income ledger of the Victorian Branch’s general ledger. Entries were made in this ledger on an accruals basis, upon the issue of an invoice.⁶⁸ Thus, for example, the invoice of 2 June 2004 (invoice 006248)⁶⁹ was recorded in the Paid Education Income ledger for the 2004 financial year, despite being paid on 2 July 2004.

⁶⁸ Shorten MFI-12, 9/7/15, pp 305-307.

⁶⁹ Shorten MFI-12, 9/7/15, p 23.

42. The first payment of \$145,000 plus GST made by ACI was deposited into a general bank account maintained by the Victorian Branch of the AWU for a variety of purposes.⁷⁰ In this regard it was no different from, for example, membership fees or a payment by an employer for training actually provided by the AWU. The monies were not earmarked for any particular purpose.
43. The second and third payments were deposited into the Victorian Branch of the AWU's Long Service Leave account.⁷¹ Both amounts were deposited in the 2004-2005 financial year. The only significant transfer of money out of that account in that year was a transfer of \$350,000 on 3 June 2005 to a National Special Purpose Account 'to be transferred to AWU Loan with Members Equity', which was reversed on 30 June 2005.⁷² The 2005-2006 general ledger records two transactions with the same description, one in the sum of \$350,000 on 7 July 2005 and one in the sum of \$240,000 on 25 November 2005.⁷³
44. Monies in the Long Service Leave account were used to discharge part of the indebtedness of the National Office to Members Equity Bank, and ultimately treated as loans by the Victorian Branch to the National Office.⁷⁴ The loan from Members Equity Bank was made in connection with renovations to the premises occupied by the Victorian Branch at Spencer Street, Melbourne.⁷⁵ The accounts of the Victorian

⁷⁰ Robinson MFI-2, 14/10/15, p 98.

⁷¹ Shorten MFI-12, 9/7/15, pp 312-313.

⁷² Shorten MFI-12, 9/7/15, pp 312-313.

⁷³ Robinson MFI-2, 14/10/15, pp 105-106.

⁷⁴ Robinson MFI-2, 14/10/15, pp 107, 120.

⁷⁵ Robinson MFI-2, 14/10/15, p 120; Michael Chen, 21/10/15, T:821.25-26.

Branch of the AWU and the National Office do not record any repayments of the loan from the Victorian Branch since November 2005. The balance of the loan accounts as between the two entities has remained constant since financial year 2006-2007.

45. Thus, in substance, two of the three payments were paid into an account from which monies were then lent to the National Office to assist it in discharging a loan taken out to assist in renovating union property. That had nothing to do with education leave.
46. Cesar Melhem gave evidence that reducing the balance of the National Office loan made commercial sense, because the Long Service Leave account was not an interest bearing one.⁷⁶ Michael Chen's evidence was that it was permissible to use monies in the Long Service Leave Account so long as the balance was sufficient to meet long service leave liabilities. All of this may be accepted. However the way in which the monies paid by ACI were actually treated by the AWU undermines the proposition that they were 'for' anything in particular: they were treated as though they were payments to the union to be dealt with as the union pleased.

The evidence of Mike Gilhome concerning the payments

47. All of the invoices were marked to the attention of Mike Gilhome. Mike Gilhome gave evidence before the Commission twice: once in private hearing and once in public. It was indicated above that he was an unsatisfactory witness. This section explains why. In substance it

⁷⁶ Cesar Melhem, 22/10/15, T:970.37-971.32.

accepts many of the submissions made by counsel assisting about his credit. It is a fair summary of his and Cesar Melhem's evidence that both were giving accounts of how the payments could be justified, or why the AWU in some sense deserved the payments, rather than accounts of the purpose of the payments.

48. At neither his public hearing nor his private hearing did Mike Gilhome proffer any sensible explanation for the payments. At his public hearing, on at least 10 occasions he said words to the effect that in making the payments he was 'supporting their training so they would support ours'.⁷⁷ This was his summary of his own position as to the purpose the payments. However it was a description that he never gave in his evidence in private hearing.⁷⁸ At his private hearing, the closest Mike Gilhome came to adopting this position was to say:

'...look, we supported the Vic Branch of the AWU across the board, like a lot of companies did. And in terms of the broadbanding and the training and what have you, I would say that that related to that, to help them out, maybe. I don't know'.

49. This inconsistency reflects poorly on Mike Gilhome's credit. Further, neither description withstands scrutiny. The description in private hearing, quoted above, amounts to no more than the vague proposition that the payments were related to broadbanding. The description given repeatedly in public hearing, that the arrangement was about mutual support for training, upon analysis is without any discernible substance.

⁷⁷ See for example, Mike Gilhome, 14/10/15, T:366.25-26, 358.20-30, 362.16-17, 365.10-13, 367.14-21, 382.31-43; 15/10/15, T:393.22-36, 401.8-11, 408.19-21, 413.35-38.

⁷⁸ Gilhome MFI-1, 14/10/15, p 36.46-37.4.

50. What support did the AWU give for ACI's training? There was no obligation of that kind in the 2003 EBA. There was no dispute that the substantial training that was required for the implementation of the broadbanding process was provided by ACI internally or by other providers.⁷⁹ OH&S training for delegates was provided by the AWU, but this was invoiced and paid for separately. Production was requested from the AWU of documents recording any communications relating to membership, training, 'paid education' or any other services provided by the AWU to a number of companies, including ACI, in the period 2000 to date.⁸⁰ A substantial amount of documents were produced regarding OH&S training to ACI delegates. The nature of the training provided is documented in some detail.⁸¹ So are the payments for it. But no other type of training or services is documented in the period during which the invoices were paid.
51. Thus, if the AWU did give 'support' for the broadbanding process, it was not documented in any way. Having regard to the large amounts of money involved, that is almost inconceivable. The 'support' did not involve actual training. What could it have involved, then, over and above the services that unions ordinarily provide to members?
52. Mike Gilhome referred on a number of occasions to expenses incurred by the AWU in connection with 'implementing' broadbanding in ACI plants in Australia.⁸² However he could give no clear explanation as to

⁷⁹ Paul Vine, witness statement, 22/10/15, para 21; Mike Gilhome, 14/10/15, T:352.28-43; Gilhome MFI-1, 14/10/15, p 25.9-19.

⁸⁰ AWU MFI-2, 23/10/15, pp 181-187.

⁸¹ See, for example, Robinson MFI-2, 14/10/15, pp 166-238.

⁸² See, for example, Gilhome MFI-1, 14/10/15, p 32.29-33.31, 36.46-37.8, 42.23-26; Mike Gilhome, 14/10/15, T:363.29-364.27.

what this involved. He gave the following answer to a question from Cesar Melhem's counsel about Cesar Melhem's role in the changes necessitated by broadbanding:⁸³

Well, he was critical to it because he had the capacity to grow with the experience and understand what career paths were necessary. He had the capacity to coordinate with all his senior delegates, I suppose, across the country when we were talking about the definitions that we were writing and understand that. He had the capacity to argue that we should be looking at the full impact of technology in terms of manning and that's why we did a manning - we would have done one anyhow, and he became integral to the whole process and, of course, he enjoyed, as far as I could see, the full confidence of all the stewards, particularly at Spotswood, but across the board because they would ring him with particular queries because they'd sort of say to me from time to time, "I've got to talk to Cesar about that", you know, that's how I know; so he was pretty integral to the whole thing.

53. These generalised assertions explain nothing. Their substance can be reduced to the proposition that Cesar Melhem understood broadbanding and spoke to delegates and had their confidence. It is impossible to understand how a union could legitimately seek over \$500,000 for that, and impossible to understand how an employer could legitimately pay.
54. It seems clear that AWU officials, including Cesar Melhem, were engaged in what might be called the ordinary activities of union officials on a site such as Spotswood. Evidence was given on this topic by persons actually working at Spotswood at the time. This evidence gives a much more reliable and specific indication of the type of activities actually undertaken by AWU officials. It was apparent from that evidence that the AWU convened EBA meetings and spoke to the workers in an endeavour to persuade them to enter into the EBA

⁸³ Mike Gilhome, 15/10/15, T:389.10-25.

that had been agreed by ACI and the AWU.⁸⁴ Some employees complained about the broadbanding process. Although it resulted in higher wages, it required the same amount of work to be done by fewer people. This resulted in dissatisfaction from time to time.⁸⁵ Greg Savage gave evidence that he asked Cesar Melhem and Ricky Krishnan for assistance in ensuring AWU members complied with the EBA – that is, presumably, in ensuring that they were prepared to take on the additional and different work that broadbanding required of them.⁸⁶ Cesar Melhem on occasions addressed the workers about such concerns – according to Prema Chippendale, to tell them that nothing could be done about it.⁸⁷ Greg Savage also gave evidence that he ‘engaged with’ Cesar Melhem and Ricky Krishnan about the redundancies that resulted from the broadbanding process.⁸⁸ Greg Savage said that they were both aware of the cost pressures affecting ACI and were ‘pragmatic’ about the redundancy process. He worked primarily with Ricky Krishnan in organising voluntary redundancies and would deal with Cesar Melhem if there was a particular issue or dispute which required a higher level of authority.⁸⁹

55. The above activities are all activities that union officials are paid by their union to provide to members. If this was the ‘support’ that the AWU was providing ‘support’ for the broadbanding process, it is difficult to avoid the conclusion that it was through providing the

⁸⁴ Zbigniew Kaminski, witness statement, 15/10/15, paras 35-36.

⁸⁵ Prema Chippendale, witness statement, 15/10/15, para 24.

⁸⁶ Greg Savage, witness statement, 15/10/15, paras 35-36.

⁸⁷ Prema Chippendale, witness statement, 15/10/15, paras 25-26.

⁸⁸ It was quite clear that redundancies did result: see for example Mike Gilhome, 14/10/15, T:351.37-352.8.

⁸⁹ Greg Savage, witness statement, 15/10/15, paras 41-46.

services that it ordinarily provides to its members, but in a way that assisted ACI. A union that is paid \$145,000 per year by an employer to provide the very services that it is supposed to be providing anyway to its members is in a hopelessly compromised position.

56. Counsel assisting submitted that Mike Gilhome's claims about the 'support' that ACI received from the AWU are to be understood as support in 'selling' the broadbanding process to the workers and preventing or avoiding industrial unrest which had the potential to arise out of such a process. It is likely that Mike Gilhome had something of this nature in mind. That Mike Gilhome viewed the payments as in the nature of bargaining chips is suggested by the following evidence:⁹⁰

- Q. Were you seeking industrial peace, is that the explanation?
- A. No. We had a very good relationship. The AWU and before that the AGWU always had a good relationships [sic] with ACI.
- Q. But did you see this as a method of continuing that good relationship?
- A. No, I saw it as a method of us being able to argue, "We've supported your training so you continue to support ours". If, for instance, Cesar said, "Look, I'm now an Assistant Secretary and I can't do this particular thing", or someone more particularly at a higher level said, "Oh look, we want to pull him out and put someone else in as a co-ordinator", I wanted to get some argument so that we could say, "Well, we've supported you so you've got to support to see this through with us." And the thing is that I wasn't far wrong because he became an Assistant Secretary whilst I was still there, I think he became the State Secretary just before I left, or a bit before I left, and they did roll up the branches a bit before I left. We were able to cement a lot of what we needed to do and the delegates were able to understand what was going on.

⁹⁰ Mike Gilhome, 14/10/15, T:367.5-33.

Q. That's the explanation you want to give if I was to ask the question, "What were you getting for you nearly half a million dollars that was spent"?

A. Yeah.

57. Despite denying, whilst giving the above evidence, that the payments were a method of continuing a good relationship with the AWU, Mike Gilhome, towards the conclusion of his evidence the next day, accepted that the payments facilitated the continuation of a good relationship with the AWU.⁹¹

58. Mike Gilhome referred on a number of occasions to the payments being connected with some form of recompense for expenses incurred by the AWU in providing services to members of ACI.⁹² Mike Gilhome referred in his public hearing to those expenses as having been incurred over a four to five year period.⁹³ Counsel assisting submitted that this was no more than an attempt, after the event, to justify the payments. That was generally true of Mike Gilhome's evidence and true in the present context. He did not suggest that there was any discernible correlation between the quantum of such expenses and the amounts the subject of the invoices in question.⁹⁴ ACI never asked and the AWU never provided any form of reconciliation of what the expenses in question were.⁹⁵

⁹¹ Mike Gilhome, 15/10/15, T:414.30-43.

⁹² Mike Gilhome, 14/10/15, T:363.29-364.27; Gilhome MFI-1, 14/10/15, p 32.29-33.42.

⁹³ Mike Gilhome, 14/10/15, T:364.31-37.

⁹⁴ See for example Gilhome MFI-1, 14/10/15, p 32.12-33.42.

⁹⁵ Mike Gilhome, 14/10/15, T:364.39-365.5.

59. The above analysis deals with the ‘support’ said by Mike Gilhome to have been given by the AWU to ACI. What support, according to Mike Gilhome, was ACI providing to AWU’s training? The answer is: no support other than a gift of \$145,000 per annum. Mike Gilhome gave some evidence in this connection that reflected poorly on his credit. On the first day of his evidence at the public hearing, Mike Gilhome was examined by counsel for Cesar Melhem. It was put to him that Cesar Melhem was very keen to set up a training facility at the AWU. Mike Gilhome initially responded that he was aware that they were looking for facilities and training of their people as a major policy thing but was not aware of all the specific detail. He then agreed with the suggestion that he knew that the AWU wanted to expand their training base and set up a facility.⁹⁶ It was then put to Mike Gilhome that he was paying money to the AWU to ‘...support the potential establishment of that training facility and those training programs...’. Mike Gilhome answered ‘Yes, absolutely, yes’.⁹⁷ Later in his examination by counsel for Cesar Melhem, when asked whether he ‘...understood that what was being asked of you was to contribute to that training levy, or he says “leave”, to assist the Union to develop itself as a training facility...’ Mike Gilhome, twice, agreed.⁹⁸
60. This was the first time in Mike Gilhome’s evidence that he had suggested that the monies were paid for the development of a ‘training facility’. In private hearing, he gave the following evidence:⁹⁹

⁹⁶ Mike Gilhome, 14/10/15, T:381.19-33.

⁹⁷ Mike Gilhome, 14/10/15, T:381.43-46.

⁹⁸ Mike Gilhome, 15/10/15, T:392.7-14.

⁹⁹ Gilhome MFI-1, 14/10/15, p 39.5-40.7.

- Q. But why did you pay this money on 1 August 2003, Mr Gilhome?
- A. I don't know.
- Q. Well, that just is not a credible answer, is it?
- A. Well, it's so long ago. I mean - -
- Q. Well, it may be a long time ago, but this is a very large sum of money, isn't it, Mr Gilhome?
- A. Well, it's not large in terms of, as I say, what we were dealing with in terms of all our expenses with broadbanding and the like.
- Q. I'm not interested in those matters, Mr Gilhome. I'm interested in what you were paying the union. It was an extraordinarily large sum to pay the union, isn't it?
- A. Yes.
- Q. And the only inference that one can reasonably draw, I suggest to you, is that it was to achieve some result in relation to the EBA that was being negotiated?
- A. No, it wasn't.
- Q. Well, you say that - -
- A. No, it wasn't.
- Q. - - but you can't explain - -
- A. No, I can't, but I can tell you it definitely wasn't.
- Q. Well, what was it for, then?
- A. I don't know.
- Q. What were you getting for your money?
- A. I don't know.
- Q. What were you getting for your money, Mr Gilhome?
- A. We weren't - it had nothing to do with the EBA negotiations.
- Q. What were you getting for your money, for your \$160,000?

A. Well, we would have been helping the Union maybe, you know, as I say, defray expenses.

Q. What expenses?

A. I've just told you. You know, they were – they – Cesar Melhem was doing a hell of a lot of work for us, and the AWU State Branch were doing it, so maybe I've agreed to pay them some money to offset the cost of that. I don't know. That's the only thing I can think of.

61. This evidence is contrary to the propositions to which he agreed in answer to questions from counsel for Cesar Melhem. The appropriate inference to draw from his readiness to agree to those propositions is that he was agreeing with them because he perceived that, coming as they did from Cesar Melhem's counsel, they would assist him and not because it was his honest evidence.

62. There were other reasons for concerns about Mike Gilhome's evidence. In his private hearing, Mike Gilhome was shown the first two invoices sent by the AWU. He gave evidence that he did not understand the reference to 'paid education leave' on these invoices. His evidence included the following exchange:¹⁰⁰

Q. What do you mean, you "would have thought"?

A. I don't understand – as I said to your investigator, I don't understand what the wording is.

Q. What don't you understand? What bits of it don't you understand?

A. The "paid education leave".

Q. You're not familiar with that expression?

¹⁰⁰ Gilhome MFI-1, 14/10/15, p 36.21-37.38.

A. I'm familiar with it. I'm familiar with it, but I - I don't know what it means there.

Q. Well, why did you authorise it to be paid, then?

A. I don't know.

63. Upon being shown the third invoice, dated 2 June 2004, Mike Gilhome was asked why it was described as paid education leave. Mike Gilhome answered 'I don't know'.¹⁰¹ Upon being shown the fourth and final invoice, Mike Gilhome was asked about the reference to '800 member'. Mike Gilhome accepted that ACI did not employ anything like 800 AWU members at Spotswood, and that the description was false to the extent that it was intended to reflect such members.¹⁰²

64. This evidence was inconsistent with the answers Mike Gilhome gave to the questions from counsel for Cesar Melhem concerning the AWU's plans for a training facility, referred to above. It was also inconsistent with answers he gave to questions from counsel assisting in public hearing. When taken to the first invoice issued by AWU, and asked what the reference to 'paid education leave' referred to, Mike Gilhome answered:¹⁰³

Well, I understood it to be referring to a levy of delegate training or Union training, AWU training, that we had agreed we would pay.

¹⁰¹ Gilhome MFI-1, 14/10/15, p 42.14-29.

¹⁰² Gilhome MFI-1, 14/10/15, p 45.5-19.

¹⁰³ Mike Gilhome, 14/10/15, T:356.6-16.

65. Later in his evidence at the public hearing, Mike Gilhome was asked how he understood the paid education leave in that invoice had been calculated. He answered:¹⁰⁴

I didn't know but I thought it was just a levy on the basis of the Containers Branch Membership.

66. Mike Gilhome claimed that this was something that he recalled since his private hearing. He said:¹⁰⁵

Well, I remember – what I remember was I was a bit befuddled [at the private hearing] about the – I was thinking in terms of Spotswood and I knew they had 250, 300 people, and this had a lot more, it was 800-odd people in the invoice that I'm talking about, and I remembered that that would have been, this is subsequently, would have been the Containers Branch thing. I just didn't put the two together, that's all.

67. Counsel for Cesar Melhem sought to elicit further evidence from Mike Gilhome about his approach to the private hearing. Mike Gilhome gave evidence that he was 'told very little' about the private hearing and that 'I was told to come – that the Commissioner and Mr Stoljar wanted to have a chat to me'.¹⁰⁶ He later gave this evidence:¹⁰⁷

Q. Did you know that your private hearing was about ACI?

A. Yes.

Q. What else did you know about your private hearing before you came?

A. That the Commissioner and Mr Stoljar wanted to have a chat to me, that's the way it was - -

¹⁰⁴ Mike Gilhome, 14/10/15, T:359.25-29.

¹⁰⁵ Mike Gilhome, 14/10/15, T:360.38-44.

¹⁰⁶ Mike Gilhome, 15/10/15, T:396.19-22.

¹⁰⁷ Mike Gilhome, 15/10/15, T:397.21-40.

Q. That was it?

A. That's what I was told. I didn't even - to be honest, I didn't know I was going to be in a witness box. I was naive perhaps about that but I didn't realise that.

Q. Nobody said, "We want you to come to a hearing", they said, "Come and have a chat"?

A. They said the Commissioner and Mr Stoljar would like to have a chat to me.

Q. Okay. It had been something like nine or 10 years?

A. At least nine years, yes.

68. Mike Gilhome's evidence that he thought he was coming to the Commission for a chat was false and given in an attempt to explain the recent introduction in his evidence of the Container Branch. Mike Gilhome received on 1 July 2015 a summons to give evidence in the Commission.¹⁰⁸ The summons stated that Mike Gilhome was required '...to appear before the Commission at the hearing to be held at Hearing Room ... to give evidence in relation to the matters into which the Commission is inquiring'.¹⁰⁹ That made it quite plain that the purpose of his coming to the Commission was much more than merely having an informal chat.

69. Further, Mike Gilhome accepted that he knew, prior to the private hearing, that he was going to be giving evidence in relation to ACI, and in relation to the question of paid education leave, and that he received communications from Commission staff in the weeks leading up to 1 July 2015.¹¹⁰ It is apparent from the transcript of his private hearing

¹⁰⁸ Gilhome MFI-2, 15/10/15.

¹⁰⁹ Gilhome MFI-2, 15/10/15.

¹¹⁰ Mike Gilhome, 15/10/15, T:415.7-37.

that prior to that hearing he had spoken to ‘people’ from the Commission and to persons he described as ‘investigators’ from the Commission and that he had been shown the ‘documentation’ – one would infer, including, at least, the invoices in question - about which he was asked questions.¹¹¹ Mike Gilhome gave this evidence because he anticipated that those questions would provide him with a way to explain the inconsistencies between his evidence at private hearing and his evidence at public hearing.

70. Mike Gilhome’s submissions¹¹² tried to explain many of the unsatisfactory features of his evidence by noting that he was unrepresented. The explanation is not a good one. The problems with his evidence were not of such a kind as might have been prevented had he been represented. For example, they were not problems that involved giving lengthy non-responsive answers to questions (although often legal representation does not prevent this either). The problems were as follows. There were inconsistencies between his evidence in public and private hearing.¹¹³ There were inconsistencies within the evidence given at public hearing.¹¹⁴ There were recent inventions in answers to leading questions put by Cesar Melhem’s counsel that he perceived would assist him.¹¹⁵ There was false evidence about the circumstances in which he gave evidence at private hearing.¹¹⁶

¹¹¹ Gilhome MFI-1, 14/10/15, pp 31.43-44, 33.39-42.

¹¹² Submissions of Mike Gilhome, 23/11/15, paras 22-24.

¹¹³ See Submissions of Counsel Assisting, ch 5, para 45, 58-61.

¹¹⁴ See Submissions of Counsel Assisting, ch 5, para 53.

¹¹⁵ See Submissions of Counsel Assisting, ch 5, paras 55-57.

¹¹⁶ See Submissions of Counsel Assisting, ch 5, paras 63-66.

71. The proposition that the reference to ‘800’ on the third and fourth invoices was a reference to the number of members in the Glass and Container Branch cannot be correct. It was not, indeed, defended by Mike Gilhome’s submissions. The 2004 Annual Return submitted in the AWU National Office indicated that as at 1 January 2004, the number of members of the Glass and Container Industry Branch of the AWU was 1,800.¹¹⁷ The Glass and Container Industry Branch ceased operation on 31 August 2004.¹¹⁸ Thus, the reference to 800 members on the invoice of 24 May 2005¹¹⁹ cannot be explained by the number of members of the Glass and Container Industry Branch.
72. Counsel assisting submitted that the following conclusions should be drawn.
73. *First*, Mike Gilhome did not believe, at the time he entered into the arrangement with Cesar Melhem or at the time payments were made pursuant to it, that the payments were for ‘paid education leave’ or training of any kind.
74. *Secondly*, Mike Gilhome was unwilling to give a truthful account of the arrangement that he struck with Cesar Melhem, or of the payments made pursuant to it.
75. *Thirdly*, that Mike Gilhome was unwilling to give such a truthful account because, to his knowledge, the purpose of the arrangement was improper. It was improper because Mike Gilhome entered into the

¹¹⁷ AWU MFI-15, 6/11/15, p 4.

¹¹⁸ AWU MFI-16, 6/11/15, p 35.

¹¹⁹ Shorten MFI-12, 9/7/15, p 36.

arrangements and made the payment for the purpose of obtaining for ACI more favourable treatment from the AWU in relation to ACI's dealings with its employees than ACI would otherwise receive.

76. As to the first of those matters, Mike Gilhome did not claim in terms that the payments were for paid education, although his explanations for the payment would fall within the very broad reach of what 'paid education' encompasses. His explanations have been rejected. The first of the above submissions of counsel assisting should be accepted.
77. The second submission is also accepted. The various defects in Mike Gilhome's evidence cannot be explained by lapse of time or poor memory.
78. The various features of the payments that rendered the payments obviously improper are canvassed below. The submission that the payments were made to obtain favourable treatment can be accepted on the basis of the passage from Mike Gilhome's evidence quoted above which indicates that he saw them as in the nature of bargaining chips. These matters, together with acceptance of the first and second submissions, above, compel the acceptance of counsel assisting's third submission.

The evidence of Cesar Melhem concerning the payments

79. Prior to his giving evidence on 22 October 2015, Cesar Melhem was invited to provide a statement dealing with a number of matters including:¹²⁰

The circumstances concerning the invoices issued by the AWU to [ACI in 2003-2005]... In particular, whether, in 2004-2006, there was an agreement or arrangement whereby ACI would pay the AWU about \$160,000 a year for three years.

80. Cesar Melhem took up that invitation. However, his account in his witness statement was sparse. The only account that he gave of the arrangement he had with Mike Gilhome was to say:¹²¹

When Mr Gilhome says he thought the payments were to reimburse my expenses, he is partly right, but some of the funds were also devoted to the broader and more long term aim of establishing the AWU as a significant provider of training.

81. In oral evidence Cesar Melhem offered the following description of the circumstances in which the arrangement was struck:¹²²

...[There were] discussions with Mr Gilhome in relation to what the company was trying to achieve in their broadbanding classification structure and all the resources we were putting in, what we are trying to achieve as a Union, and broadly in relation to training and providing this training provider, et cetera, so that's the discussions we had. And then Gilhome at a point in time then agreed and said "We think the company can support the AWU in relation to these objectives", which is the training, and that's where they've agreed to the payment.

¹²⁰ AWU MFI-2, 23/10/15, p 131.

¹²¹ Cesar Melhem, ACI Glass witness statement, 22/10/15, para 8.

¹²² Cesar Melhem, 22/10/15, T:960.12-24.

82. When asked what, as he understood it, Mike Gilhome or ACI was getting for their money, Cesar Melhem responded:¹²³

Well, supporting the AWU objective in relation to these training initiatives the AWU was doing. For example, we have a number of ACI employees who went out to do Certificate IV in Health and Safety paid by the AWU and a number of them did postgraduate diploma by Sydney University around that time as well. So they were supporting a concept of training as we supported their concept to make workplace changes, and so forth. So basically they supported what we were trying to do and it was part of the relationship we had with ACI.

83. The proposition that any ACI employees had their Certificate IV in Health and Safety paid for by the AWU was not suggested in evidence by any other witness (including Greg Savage (the ACI Spotswood plant manager), Zbigniew Kaminski (an AWU shop steward at the time) and Prema Chippendale (an OHS officer at the time)). It was not a proposition contained in Cesar Melhem's witness statement. Nor was it a proposition suggested to any witness by Cesar Melhem's counsel. In answer to Notice to Produce Documents No 1331, referred to above, no documents were produced by the AWU indicating that any such service was provided to ACI employees.¹²⁴ The AWU was asked¹²⁵, after Cesar Melhem gave this evidence, to produce documents recording the names of persons who received the certificate IV training referred to in the ledgers¹²⁶ of the Victorian Branch. None was recorded in the AWU's register of members as an ACI employee. This aspect of Cesar Melhem's evidence is rejected. It is another example of the unsatisfactory nature of the evidence he gave.

¹²³ Cesar Melhem, 22/10/15, T:960.47-961.11.

¹²⁴ AWU MFI-2, 23/10/15, pp 181-187.

¹²⁵ AWU MFI-19, 6/11/15.

¹²⁶ AWU MFI-5, 6/11/15.

84. There were yet other such examples. His evidence that the figure of 800 in the formula on the ACI invoices referred to the number of ACI employees has been discussed above. Two further examples were given in the previous Chapter: his assertion that the AWU on average spent about \$500,000 or \$600,000 on training¹²⁷ and his assertion that AWU spent far more on training than it ever received, whether through paid education or invoicing for services.¹²⁸
85. Putting aside Cesar Melhem's claims that ACI employees attended level IV occupational health and safety training paid for by the AWU, the only part of his answer that identified something that ACI got for its money was his statement that the AWU '...supported their concept to make workplace changes and so forth'.¹²⁹ This evidence is of a similar nature to the evidence of Mike Gilhome's references to 'support'. The only sensible way to understand such 'support' is as providing the 'services' identified above in connection with the discussion of Mike Gilhome's evidence. The services provided by way of 'support' to ACI were the very services that the AWU was obliged to provide to its members. They included EBA negotiations, dealing with employee dissatisfaction regarding the process entailed by broadbanding and redundancies. The AWU was not actually training ACI employees. The only 'support' required by ACI from it was to persuade employees to accept and implement the changes involved in broadbanding without industrial unrest.

¹²⁷ Cesar Melhem, 22/10/15, T:971.8-10.

¹²⁸ Cesar Melhem, 22/10/15, T:976.19-27.

¹²⁹ Cesar Melhem, 22/10/15, T:961.8-9.

86. Cesar Melhem made repeated claims in evidence and submissions, that the payments were in part to defray AWU expenses incurred in connection with ‘support’ in the implementation of broadbanding.¹³⁰ However, as with Mike Gilhome’s claims to similar effect, this is difficult to accept. If the payments were for this purpose, why were they not so described on the invoices? Further, Cesar Melhem said that he did not have a breakdown of the split between amounts that were used for the purposes of education and amounts used to refund the AWU for his expenses.¹³¹ There is no discernible relationship between the quantum of those expenses and the amount of the payments. This evidence was more an attempt to justify the payments, or to show that the AWU deserved them, than it was an attempt to explain their purpose at the time.
87. Cesar Melhem made repeated claims made in evidence and submissions that the payments were in part devoted to the aim of establishing the AWU as a ‘significant provider of training’.¹³² These claims do not withstand scrutiny. As has been explained, the payments were not in fact ear-marked by the AWU as being required for any particular use. The previous Chapter noted that, at the time of the payments, the AWU was in fact providing significant training. Cesar Melhem’s evidence does not give any indication of what more was necessary for the AWU to ‘become’ a significant provider of training. The AWU has produced minutes of BCOM meetings for the Victorian Branch for the period since 1999. Beyond the proposal referred to at

¹³⁰ Cesar Melhem, 22/10/15, T:962.3-24; ACI Glass witness statement, 22/10/15, para 8.

¹³¹ Cesar Melhem, 22/10/15, T:964.19-37.

¹³² Cesar Melhem, ACI Glass witness statement, 22/10/15, para 8; See also Cesar Melhem, 22/10/15, T:958.32-36, 960.6, 960.15-20.

the meeting of 9 October 2001 (which, as discussed in the previous Chapter, Bill Shorten said was not pursued) those minutes do not refer to any proposal of the kind that Cesar Melhem raises.¹³³

88. None of Cesar Melhem's explanations in evidence or in submissions for the payments can be accepted.

The evidence of Bill Shorten concerning the payments

89. Bill Shorten was State Secretary and National Secretary at the time these payments were negotiated and made. He said that he did not think that he was personally involved in the negotiations for the 2003 EBA, and that those negotiations were principally conducted by Cesar Melhem on behalf of the AWU.¹³⁴ Bill Shorten said that he did not give instructions for the issue of the four invoices. However, he said that he might have spoken to Mike Gilhome about why a paid education levy was a good idea, and that Cesar Melhem would have told him the 'positive news' regarding the payment of amounts such as these for paid education.¹³⁵
90. Although at one point Bill Shorten accepted that there was no contractual obligation to make the payments,¹³⁶ Bill Shorten's final position appeared to be that there 'would have been' at least an oral

¹³³ As discussed in the previous Chapter, a proposal to establish a training fund at national level was made in May 2002. This proposal also was not pursued and, in any event, could not have been a proposal that the ACI payments were intended to implement. Had that been so, the invoices would have come from National Office.

¹³⁴ Bill Shorten, 9/7/15, T:145.2-46.

¹³⁵ Bill Shorten, 9/7/15, T:146.32-147.19.

¹³⁶ Bill Shorten, 9/7/15, T:149.7-10.

agreement in respect of these payments.¹³⁷ The effect of his evidence was that he was one of the persons involved in negotiating such an arrangement, although the particular detail of the agreement was something that he would not necessarily have been engaged in.¹³⁸

91. Counsel assisting submitted that the evidence does not support a finding that Bill Shorten had any substantial involvement in the arrangement struck by Mike Gilhome and Cesar Melhem. They also submitted that it was likely that at some point Bill Shorten was informed that ACI was making payments for ‘paid education’ - either because at some point Cesar Melhem told him or because, as someone with a particular interest in the concept of ‘paid education’, he noticed the significant increase in paid education revenue in the AWU accounts and made his own inquiries. It may also be that, since he and Mike Gilhome were on friendly terms, and since Bill Shorten said he might at some point have spoken to Mike Gilhome about paid education,¹³⁹ that he was told of the payments by Mike Gilhome. Bill Shorten did not dissent from these submissions. They are supported by the evidence. They are accepted.

Conclusions regarding the 2003 – 2005 payments

92. Counsel assisting submitted that the objective circumstances in which the payments were made suggest that they were not made for ‘paid

¹³⁷ Bill Shorten, 9/7/15, T:153.10-154.21.

¹³⁸ Bill Shorten, 9/7/15, T:154.6-155.11.

¹³⁹ Bill Shorten, 9/7/15, T:146.1-2, 146.37-44.

education’ unless one takes that expression that to mean a donation or gift to the union. They relied on the following circumstances.

- (a) The arrangement to make the payments was made during the course of negotiations for the 2003 EBA. The context of those EBA negotiations in one of their aspects was what ACI, to the AWU’s knowledge, regarded as the imperative to continue the broadbanding process. The context in another of its aspects also included what both parties must have anticipated were the difficulties that were likely to arise in that process (among which were employee dissatisfaction with the ‘upskilling’ and redundancies).
- (b) There was no reference in the 2003 EBA to the arrangement between Cesar Melhem and Mike Gilhome. The arrangement was not otherwise disclosed to ACI employees. Why not? No witness could explain this.¹⁴⁰ Both Cesar Melhem and Bill Shorten gave evidence to the effect that the AWU would have wanted such an arrangement included.¹⁴¹ Cesar Melhem said a claim to this effect was included in the AWU’s log of claims. But these matters merely underscore that it was very odd not to have the arrangement included in the EBA. The EBA itself used the phrase ‘paid education leave’.¹⁴² Obligations to make payments of paid education leave (albeit in much smaller amounts) were in fact recorded in EBAs entered into by Potters Industry Pty Ltd and Ausreo Pty Ltd at

¹⁴⁰ See Cesar Melhem, 22/10/15, T:965.9-21; Bill Shorten, 9/7/15, T:147.45-149.10.

¹⁴¹ See Cesar Melhem, 22/10/15, T:958.32-44; Bill Shorten, 9/7/15, T:157.27-47.

¹⁴² Shorten MFI-12, 9/7/15, p 195, cl 15.5.

around the time of the negotiation of the 2003 EBA.¹⁴³ These circumstances, counsel assisting submitted, suggest that the arrangement struck by Mike Gilhome and Cesar Melhem was not in fact one to make payments of this kind.

- (c) The payments were made in the absence of any written agreement or indeed any supporting documentation other than invoices. That payments of this size would be made in these circumstances suggests that the reasons why that the parties were not prepared to document the true basis of the arrangement was that they were concerned that it was not a legitimate one. Brendan Mitchell (General Manager of Human Resources) described the payments as ‘staggering’ and was ‘shocked’ when he learnt of them through his appearances at the Commission.¹⁴⁴ In contrast, as stated above, arrangements for the provision by the AWU of OH&S training to delegates employed at ACI, involving payments of much smaller amounts, were fairly well documented.
- (d) The first payment was of two invoices for equal amounts issued about two weeks apart – a circumstance that itself invites suspicion. No witness explained why two invoices were issued for identical amounts two weeks apart. Michael Chen said that it must have been because Cesar Melhem asked for that to occur.¹⁴⁵ Cesar Melhem and Michael Chen both suggested as a possibility that it may have something to

¹⁴³ Shorten MFI-1, 8/7/15, pp 1, 83.

¹⁴⁴ Brendan Mitchell, 14/10/15, T:339.14-19.

¹⁴⁵ Michael Chen, 21/10/15, T:816.8-19.

do with the fact that one invoice was issued late in one financial year and the other early in the next. That possibility, counsel assisting submitted, merely begged the question: why was it thought necessary or desirable to issue the invoices in separate financial years?

- (e) The descriptions on the invoices pursuant to which the second and third payments were made contained a formula, described, correctly, by Peter Robinson as a ‘nonsense formula’.¹⁴⁶ This has been considered above.
- (f) The accounting records of ACI do not suggest that the payments were treated by ACI as ‘paid education’. Those records indicate that one of two possibilities must be correct. One is that there was no clear view within ACI as to what the payments were for. The other is that there was an attempt, in which Mike Gilhome must have played a substantial or the sole role, to disguise the true nature of the payments.
- (g) The payments were made from an ACI account used for confidential or sensitive transactions. If the payments had truly been for ‘paid education leave’ there would have been no need for them to be made from such an account. There is nothing confidential or sensitive about an arrangement of this kind.
- (h) The first of the three payments was treated by the AWU as part of general revenue. The second and third payments were

¹⁴⁶ Peter Robinson, 14/10/15, T:329.35.

paid into the AWU long service leave account and used to make a loan to the National Office for the purpose of enabling national office to reduce its indebtedness in connection with a loan used to renovate premises used by the Victorian Branch. This indicates that, from the point of view of the AWU, the funds were not in any way earmarked to be used for 'paid education'.

- (i) The payments were not disclosed to AWU members employed by ACI.¹⁴⁷ There is no good explanation for such a failure if in truth Mike Gilhome and Cesar Melhem believed that the payments were legitimate.
- (j) The only documentary evidence that the payments were in fact for 'paid education leave' is what appears on the invoices. But, for the reasons identified above, these invoices are inherently suspicious. The first two are for identical amounts two weeks apart. The second and third contained formulae for which no witness could offer any satisfactory explanation. The reference to 'paid education leave' is cursory and question begging.

93. Affected parties took issue with these submissions in various ways, many of which have been dealt and rejected with in the course of the analysis of the evidence above. A number of such submissions relied upon the evidence given by either or both of Mike Gilhome and Cesar Melhem concerning the payments. That evidence, however, has (save

¹⁴⁷ Prema Chippendale, witness statement, 15/10/15, paras 36-37; Zbigniew Kaminski, witness statement, 15/10/15, paras 41-43.

where it is given against their interests) been rejected. Counsel assisting's submissions are accepted.

94. Both Cesar Melhem and Mike Gilhome submitted that the AWU at the time of the ACI payments was pursuing paid education levies in other contexts. The submission does not advance their position. The payments made by ACI were very unlike those made by Potters and Ausreo under their respective EBAs. The ACI payments were not disclosed to employees. They were not quantified in any meaningful way. There were no obligations on the AWU to do anything in particular with the money. There was no rational reason for Mike Gilhome to agree to the making by ACI of what were in effect donations of considerable magnitude unless he expected something in return. There is the additional point that, at the time the payments were negotiated, Mike Gilhome and Cesar Melhem were actually discussing 'paid education leave' in the sense in which that phrase is used in the 2003 EBA.¹⁴⁸ It is highly unlikely that at the same time they were discussing a very different concept with a similar label (which they then determined to exclude from the EBA). That, no doubt, is why Mike Gilhome at his private hearing had no understanding of the reference to 'paid education leave' on the invoices.

95. Mike Gilhome ultimately accepted that one of the reasons he made the payments was in the hope that they would facilitate a good relationship with the AWU throughout the broadbanding process.¹⁴⁹ Counsel assisting submitted that it was but a short step to conclude that he expected the facilitation of that relationship to involve giving ACI

¹⁴⁸ Mike Gilhome, 14/10/15, T:354.36-355.3.

¹⁴⁹ Mike Gilhome, 14/10/15, T:368.22-46.

more favourable treatment than would otherwise be given in relation to its dealings with its employees. They submitted that that conclusion should be drawn. That submission is supported by the above analysis of the evidence, including Mike Gilhome's claims regarding mutual 'support'. The submission is accepted. The inference to be drawn is that Mike Gilhome expected that the broadbanding process that was to be implemented under that EBA might create difficulties. These difficulties included those resulting from employee dissatisfaction with being forced to acquire new skills, with being forced to work harder and with the risk of redundancies. He made the payments in the belief that the AWU would show ACI favourable treatment in dealing with issues of this kind.

96. What was Cesar Melhem's purpose in procuring the payments? Cesar Melhem denied that he believed that ACI was entering into the arrangement to make the payments in order to get the AWU to show it favour.¹⁵⁰ This evidence, along with his other evidence on this case study (except where given against his own interests), cannot be accepted. Counsel assisting were correct to submit that Cesar Melhem was a shrewd and intelligent man, and that it would have been obvious to him that neither Mike Gilhome nor ACI would make payments of this magnitude purely out of altruistic motivations. Having regard to Cesar Melhem's and Mike Gilhome's claims about how closely involved Cesar Melhem was in ACI's business, Cesar Melhem must have known that the continuation of the broadbanding process had the potential to result in employee dissatisfaction, and that ACI, in making

¹⁵⁰ Cesar Melhem, 22/10/15, T:972.7-12.

the payments, was expecting favourable treatment from the AWU in that regard.

97. Both Cesar Melhem and Mike Gilhome, in evidence and in submissions, sought to make much of the proposition that the relationship between the AWU and ACI was a good one. Thus, it was said, there was no need for ACI to ‘buy’ industrial peace’. But, as the above analysis of the evidence has shown, there was reason for Mike Gilhome and ACI to pay to facilitate the continuation of that good relationship in circumstances where it may be tested by the implementation of the broadbanding process under the 2003 EBA.

D – CONCLUSIONS REGARDING THE CONDUCT OF THE AWU, CESAR MELHEM AND MIKE GILHOME

Fiduciary duties

98. The question of whether Cesar Melhem and the AWU owed fiduciary duties to their members who were ACI Spotswood employees has been considered in the Cleanevent case study. It was there concluded that they did.
99. It was submitted that these duties were breached because the negotiation and payment of the three amounts of \$145,000 involved an obvious conflict, or the substantial possibility of conflict, between the interests of the AWU on the one hand and the interests of AWU members who were ACI employees, on the other. As has been concluded in the Cleanevent and Thiess studies, payments of this

nature inevitably weaken the union's bargaining position. In the case of ACI, they compromised the AWU's capacity to represent the interests of its employee members when it came to difficulties regarding the implementation of the broadbanding process and/or redundancies. That was the very purpose for which Mike Gilhome made the payments.

100. Cesar Melhem's response to the suggestion that there was a conflict, in evidence and in submissions was encapsulated in the following evidence:¹⁵¹

[What] I say to that is this: I have delivered excellent working conditions and wages for the members, so that's a tick. The income to the members, their paid education leave went to the members, not to Bill Shorten, not to Cesar Melhem, went to the members. So where's the conflict? Members. Members. Where's - no-one is saying this money went to me, or to Bill Shorten, or any Union official. It went to the members. The members own the Union, for Christ's sake.

101. The proposition that there was no conflict because the 2003 EBA was a good result for the glassworkers is irrelevant to the question of whether negotiating a side deal involved a conflict of interest. It assumes, incorrectly, that the payments had no capacity to affect the capacity of the AWU to represent the interests of its members in dealings with ACI. Describing the 2003 EBA as a 'good result' also begs the question of whether it was a good result compared with the result that might have been obtained had there been no side deal that compromised the AWU's bargaining position. It was apparent, in the Cleanevent case study, that annual payments of \$25,000 significantly weakened the AWU's bargaining position. There is no reason to think that payments of much greater magnitude would not also weaken it.

¹⁵¹ Cesar Melhem, 22/10/15, T:973.3-11.

102. In the above evidence Cesar Melhem also asserted that there was no conflict of interest because, in effect, a benefit to the Union is a benefit to the members. This assumes that the interests of the AWU and ACI glassworkers who were AWU members in respect of the payments were identical. However, they were not. The interests of a union are not always identical with the interests of its members, or every class of them. The benefits to a glassworker from an increase in the AWU's revenue of \$450,000 were theoretical or remote. The glassworkers had a direct and immediate interest in being represented by the AWU, both for the purposes of obtaining an EBA on the best possible terms, and for the purposes of assistance in the course of implementing that EBA.
103. Bill Shorten's response to the suggestion that there was a conflict included Cesar Melhem's first point and also a third point: that the AWU was 'transparent' about the paid education income.¹⁵² To some extent this third point was embraced by affected parties in submissions. However the difficulties with that proposition have been explored in the previous Chapter. There was no transparency at all so far as ACI glassworkers were concerned. The third point must be rejected.
104. At one point in his evidence, Cesar Melhem suggested that the payments were analogous to donations made by companies to support community organisations. He said:¹⁵³

Companies do go and support community organisations for various projects and various activities, and they don't necessarily accept¹⁵⁴ a direct dividend. What is wrong with that concept?

¹⁵² Bill Shorten, 9/7/15, T:150.18-151.10.

¹⁵³ Cesar Melhem, 22/10/15, T:961.29-32.

105. The suggested analogy between the payments made by ACI and corporate donations to ‘community organisations’ is a false one. The payments by ACI were not charitable or eleemosynary donations to a disinterested community organisation. They were payments to a union charged with representing and promoting the interests of various persons in their dealings and relationships with ACI.
106. The result of the above analysis is that the AWU, in entering into the arrangement and seeking payments pursuant to it, acted in a position where there was an actual conflict of interest and duty or where there was a real and substantial possibility of that conflict. The AWU’s self-interest conflicted with its fiduciary duties to the ACI glassworkers. Cesar Melhem pursued the interests of the AWU in circumstances where those interests conflicted, or where there was a real and substantial possibility of conflict, with his duties to ACI glassworkers.
107. As a result, it is submitted that the AWU and Cesar Melhem may have breached fiduciary duties owed to members employed by ACI by entering into an arrangement pursuant to which ACI paid \$145,000 per year to the AWU and seeking payments pursuant to that arrangement.

Corrupt Commissions: Cesar Melhem and AWU

108. It is convenient to set out again s 176(1) of the *Crimes Act 1958* (Vic):

¹⁵⁴ No transcript corrections have been suggested to this word. It is possible that Cesar Melhem meant to say or did say ‘expect’. Substitution of that word would not make any difference to the point being made.

CRIMES ACT 1958 – SECT 176

Receipt or solicitation of secret commission by an agent an indictable offence

- (1) Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—
- (a) As an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) The receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business; or
- (2) Whosoever corruptly gives or offers to any agent any valuable consideration—
- (a) As an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
 - (b) The receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business—

shall be guilty of an indictable offence, and shall—

be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.

109. Counsel assisting submitted that each of Cesar Melhem, the AWU, and Mike Gilhome may have committed offences under s 176(1)(b). Many of the general submissions on this topic have already been dealt in the Cleanevent Chapter.
110. The payments were clearly 'valuable consideration' solicited 'for' the AWU.

111. Counsel assisting submitted that the objective requirement in s 176(1)(b) is satisfied. The receipt or expectation of payments of this kind would tend to influence Cesar Melhem and the AWU to show favour (or forbear to show disfavour) to ACI in relation to the affairs of ACI employees at Spotswood. The submission is accepted. Gifts or donations of this magnitude in this context must tend to influence the officials who seek them and the union who receives them.
112. Each of Cesar Melhem and the AWU were ‘agents’ and the ACI employees who were AWU members were ‘principals’ within the meaning of this section. As explained in relation to Cleanevent, the definition of ‘agent’ is a broad one. Both Cesar Melhem and the AWU were acting or intending to act ‘for or on behalf of’ such employees in soliciting and receiving the payments.
113. Were the payments to ACI solicited or received ‘corruptly’ within the meaning of that section? As has been explained, an agent acts ‘corruptly’ within the meaning of this section 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’.¹⁵⁵ It is not necessary for the agent to have an actual intention to be influenced by the payment.¹⁵⁶
114. Cesar Melhem denied that he believed that ACI was entering into the arrangement to make the payments in order to get the AWU to show it

¹⁵⁵ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231; *R v Jamieson* [1988] VR 879. See also *R v Nuttall* [2011] 1 Qd R 270 at [36].

¹⁵⁶ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 228, 231.

favour.¹⁵⁷ However, for the reasons given above, that evidence should not be accepted. No person of his intelligence and capabilities could have thought that payments of this magnitude, made for no consideration, would have been made without an expectation that the AWU would show favour to ACI in relation to its dealings with its employees. Further, the secretive nature of the payments, the absence of proper documentation in support of them, and the unsatisfactory evidence of Cesar Melhem and Mike Gilhome about them all support the inference that they were, to the knowledge of both parties, improper. Once the evidence of Cesar Melhem and Mike Gilhome is rejected, no contrary inference is reasonably available.

115. For the above reasons, Cesar Melhem may have committed an offence under s 176(1)(b).
116. It was submitted by counsel assisting that Cesar Melhem's conduct should be attributed to the AWU, and hence that the AWU itself also may have committed an offence. Counsel assisting drew attention to *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*.¹⁵⁸ In that case it was found that the conduct of an organiser was, on the facts of that case, not to be attributed to his union for the purposes of liability under s 170NC of the *Workplace Relations Act 1996* (Cth). The present circumstances, however, are a long way removed from those in *Hanley's* case. As counsel assisting submitted, Cesar Melhem was no mere organiser. Cesar Melhem was national co-ordinator for the Glass and Container Branch of the AWU,

¹⁵⁷ Cesar Melhem, 22/10/15, T:972.7-12.

¹⁵⁸ (2000) 100 FCR 530 at [65].

appointed by the National Executive.¹⁵⁹ He was also a Branch Assistant Secretary.¹⁶⁰ Cesar Melhem had carriage of the 2003 EBA negotiations on behalf of the AWU, reporting to Bill Shorten.¹⁶¹ Bill Shorten explained that the practice was for the Victorian Branch to help do the negotiations because the officials in the Glass and Container Branch were honorary officials, with day jobs in the glass industry.¹⁶² The 2003 EBA was not, in fact, signed by the National Secretary, but rather by the Secretary of the Glass and Container Branch of the AWU.

117. The AWU's submissions are rejected. By reason of Cesar Melhem's conduct, it too may have committed an offence under s 176(1)(b).

Corrupt Commissions: Mike Gilhome and ACI

118. Counsel assisting submitted that Mike Gilhome may have committed an offence under s 176(2)(b).
119. The only matter that requires further analysis is whether Mike Gilhome offered the payments 'corruptly' within the meaning of that section. It has already been concluded that Mike Gilhome entered into the arrangement and procured the payments pursuant to it in the belief or expectation that the AWU would show ACI favour in relation to its

¹⁵⁹ Mike Gilhome, 14/10/15, T:358.3-20; Cesar Melhem 22/10/15, T:962.14-17.

¹⁶⁰ Cesar Melhem, 15/9/14, T:4.40-43.

¹⁶¹ Bill Shorten, 9/7/15, T:145.39-46.

¹⁶² Bill Shorten, 9/7/15, T:145.20-30.

dealings with its employees. That is sufficient to answer this question in the affirmative.

120. Counsel assisting submitted that the evidence was insufficient to attribute Mike Gilhome's conduct to ACI for the purposes of s 176. It follows from the findings that have been made regarding Peter Robinson's lack of involvement in the arrangements that this submission must be accepted.

E – '12 MONTH MEMBERSHIP' PAYMENTS 2008–2013

121. There were few submissions made on this topic. Ultimately counsel assisting submitted that there was insufficient evidence to make any adverse findings. However, the facts have some interest. What follows draws largely from the submissions of counsel assisting.
122. From April 2008 to March 2014, AWU Vic rendered invoices on an annual basis in the amount of \$5,400.00 inclusive of GST:
- (a) Invoice 020626 dated 3 April 2008 for the period 1 July 2007 to 30 June 2008, recorded as being paid on 29 May 2008 by EFT to State funds.¹⁶³
 - (b) Invoice 021461 dated 19 March 2009 for the period 1 July 2008 to 30 June 2009, recorded as being paid on 11 April 2009 by EFT to State funds.¹⁶⁴

¹⁶³ Shorten MFI-12, 9/7/15, p 65.

¹⁶⁴ Shorten MFI-12, 9/7/15, p 66.

- (c) Invoice 022183 dated 22 March 2010 for the period 1 July 2009 to 30 June 2010, recorded as having been approved for payment by Brendan Mitchell.¹⁶⁵
- (d) Invoice 022856 dated 9 March 2011 for the period 1 July 2010 to 30 June 2011, recorded as having been approved for payment by Brendan Mitchell.¹⁶⁶
- (e) Invoice 023539 dated 19 March 2012 for the period 1 July 2011 to 30 June 2012, recorded as having been approved for payment by Mario Minniti.¹⁶⁷
- (f) Invoice 024237 dated 1 March 2013 for the period 1 July 2012 to 30 June 2013, recorded as being ‘ok to pay’ but not signed.¹⁶⁸
- (g) Invoice 024956 dated 4 March 2014 for the period 1 July 2013 to 30 June 2014.¹⁶⁹

123. The payments were not made pursuant to any written contract or any documented arrangement.¹⁷⁰

124. Each of the invoices bore the item code ‘PAID EDUC’, the description ‘12 Membership Yearly Fees’ and a description of each financial year.

¹⁶⁵ Shorten MFI-12, 9/7/15, p 73.

¹⁶⁶ Shorten MFI-12, 9/7/15, p 74.

¹⁶⁷ Shorten MFI-12, 9/7/15, p 76.

¹⁶⁸ Shorten MFI-12, 9/7/15, p 77.

¹⁶⁹ Robinson MFI-2, 14/10/15, p 393.

¹⁷⁰ As to ACI’s records, see Anna Velasco, witness statement, 15/10/15, para 59.

The invoices were all addressed to Mario Minniti of ACI. Mario Minniti was at this time employee relations manager. He reported to Brendan Mitchell, the director of human resources. The invoices were recorded in the AWU's ledgers as income under 'Paid Education'.

125. The SAP records of ACI/OI record payment of each of the above invoices shortly after they were issued, save for the final invoice.¹⁷¹

126. That invoice was not paid. On 7 March 2014 Mario Minniti sent an email to an address for AWU accounts, stating:¹⁷²

Please be advised that effective immediately O-I Australia will no longer be responsible for the payment of the 12 membership fees, invoice number 024965.

127. On 13 March 2014, Mei Lin sent an email to John-Paul Blandthorn, copying Ben Davis, stating the following:¹⁷³

By the way, we have invoiced \$5,400 to OI for 12 membership fees since 2010. However this year Mario Minniti said OI will no longer be responsible for this payment. Could you please find out why and try to get this invoice paid?

128. On 17 March 2014 Ben Davis responded, stating 'Please stop chasing the OI invoice.'¹⁷⁴ On 18 March 2014 AWU issued a credit note numbered 024964 in respect of invoice 024956, stating "REVERSE IT AS PER BEN DAVIS."¹⁷⁵

¹⁷¹ Velasco MFI-1, 14/10/15, pp 5, 89-90; Robinson MFI-2, 14/10/15, p 393.

¹⁷² Shorten MFI-12, 9/7/15, p 78.

¹⁷³ Shorten MFI-12, 9/7/15, p 79.

¹⁷⁴ Shorten MFI-12, 9/7/15, p 79.

¹⁷⁵ Robinson MFI-2, 14/10/15 p 394.

129. Ben Davis said that he believed these payments were for paid education leave, not membership. So much is recorded on the spreadsheet prepared by Mei Lin.¹⁷⁶ Ben Davis gave evidence that he formed the view that the payments were of this nature after interviewing John-Paul Blandthorn. Ben Davis said he also spoke to Mario Minniti about the payments, who told him they were for paid education leave.¹⁷⁷

130. The substance of Mario Minniti's evidence in his witness statement was as follows:¹⁷⁸

I thought that the invoicing arrangement was perfectly normal and that ACI must have been deducting union dues from individual employees and passing them on to the AWU. ACI had previously deducted union dues from individual employers. As a result, I approved payment of the 2011 and 2012 invoices without much thought at all. I assume that my former superior, Mr Mitchell, must have approved the invoices issued, in the period 2008 to 2010.

131. Counsel assisting submitted that Mario Minniti did not actually think either that the arrangement was 'perfectly normal', or that ACI was deducting union dues from employees and passing them on, and that he was withholding his true recollection. ACI employees were in fact paying union dues by payroll deduction.¹⁷⁹ An arrangement whereby ACI paid those fees to the union directly would have been abnormal (and, indeed, pointless).

¹⁷⁶ Lin MFI-1, 4/6/15, p 27.

¹⁷⁷ Ben Davis, 4/6/15, T:635.3-636.7.

¹⁷⁸ Mario Minniti, witness statement, 15/10/15, para 10.

¹⁷⁹ See, for example, Zbigniew Kaminski, witness statement, 15/10/15, para 12.

132. Added to the above was Mario Minniti's evidence that when he received the invoice dated 4 March 2014 he took it to Paul Vine and spoke to him about it. It is unclear why he would have done that if he regarded the arrangement as 'perfectly normal'. After the cessation of these payments, Mario Minniti said that he had no complaints from any employee that their membership fees were no longer being paid.¹⁸⁰ He said that he did not make any enquiries of anyone on that topic. All of this suggests, submitted counsel assisting, that he did not in fact think this arrangement was perfectly normal, and did not in fact believe it was one for the payment of membership fees. Counsel assisting's submissions were uncontroverted. They are accepted.
133. Mario Minniti's evidence conflicted with evidence given by other witnesses. It conflicted with Ben Davis' evidence that Mario Minniti told him in 2014 that these payments were for 'paid education'.¹⁸¹ It conflicted with Paul Vine's evidence that, when he spoke to Mario Minniti about the 4 March 2014 invoice, Mario Minniti told him that he did not know what that invoice was for.¹⁸² It conflicted with Brendan Mitchell's evidence that Mario Minniti has told him recently that he could not recall what the payments were for.¹⁸³ These are all additional reasons to be sceptical about his evidence.
134. Some of the invoices were approved by Brendan Mitchell.¹⁸⁴ Brendan Mitchell's explanation for how he came to approve them was as

¹⁸⁰ Mario Minniti, 15/10/15, T:427.46-428.5.

¹⁸¹ Ben Davis, 4/6/15, T:635.3-636.7.

¹⁸² Paul Vine, witness statement, 22/10/15, para 37.

¹⁸³ Mitchell MFI-2, 14/10/15, p 30.4-30.

¹⁸⁴ Shorten MFI-12, 9/7/15, pp 73-74.

follows. Mario Minniti was away at the time and he spoke about the invoices to a departmental HR administrative assistant. That person indicated to him that Brendan Mitchell was told by the assistant that Mario ‘customarily signed these’. On the basis of that assurance he approved them for payment.¹⁸⁵ In oral evidence, Brendan Mitchell said the following:¹⁸⁶

These payments were an arrangement that carried over from Mr Gilhome’s service with the company. My view was to continue to honour those agreements.

135. Brendan Mitchell said that he did not know what the nature of the arrangement was and that he had only subsequently found out about the payments from reading the transcripts of Royal Commission hearings.¹⁸⁷ In his private hearing, Brendan Mitchell said that he had been told by Mario Minniti in recent times that Mario Minniti could not recall what the invoices were about but that he ‘assumed it was an arrangement that had been made prior to him taking over the employee relations role’.¹⁸⁸
136. The rejection of the 2014 invoice by ACI was on the instruction of Paul Vine. Paul Vine in his witness statement said that he was presented with an invoice by Mario Minniti in or around early 2014. Paul Vine said that he asked Mario Minniti if he could give him some background information about the invoice. He said that Mario Minniti’s answer was that invoices for the same amount and

¹⁸⁵ Brendan Mitchell, 14/10/15, T:344.33-42; Mitchell MFI-2, 14/10/15, p 27.8-35.

¹⁸⁶ Brendan Mitchell, 14/10/15, T:346.10-13.

¹⁸⁷ Brendan Mitchell, 14/10/15, T:346.20-22.

¹⁸⁸ Mitchell MFI-2, 14/10/15, T:30.4-30.

description had been issued and authorised for payment in the past by Brendan Mitchell but that he could not tell him what the invoice was for. Paul Vine said that the fact that ACI could not identify the reason for the invoice caused him concern so he instructed Mario Minniti not to pay it.¹⁸⁹ As stated above, Mario Minniti would not have said this to Paul Vine if Mario Minniti in truth thought that the invoices were perfectly normal and involved the payment of membership fees.

137. Cesar Melhem's evidence was that these payments were in fact for paid education but quantified on the basis of membership fees.¹⁹⁰ Cesar Melhem said he could not remember whether the arrangement was negotiated during Mike Gilhome's days or Mario Minniti's time.¹⁹¹ Cesar Melhem was unable to explain why the arrangement with ACI moved from one pursuant to which \$160,000 per year was paid to one pursuant to which \$5,400 per year was paid. His position appeared to be 'you take what you get'.¹⁹² His evidence in this respect was unsatisfactory. The circumstances in which an arrangement to make payments from 2008 was entered into are more recent than those in 2003, and yet Cesar Melhem purported to explain the purposes of that earlier arrangement. The discrepancy between \$160,000 and \$5,400 is very large and, on Cesar Melhem's evidence, the formula for quantifying the payments is entirely different. The only other paid education leave arrangements at this time recorded in the AWU's financial records concern Potters and Ausreo and Huntsman. In all of

¹⁸⁹ Paul Vine, witness statement, 22/10/15, paras 36-38.

¹⁹⁰ Cesar Melhem, ACI Glass Witness statement, 22/10/15, para 10; Cesar Melhem, 22/10/15, T:973.28-45.

¹⁹¹ Cesar Melhem, 22/10/15, T:974.1-4.

¹⁹² Cesar Melhem, 22/10/15, T:975.40-976.11.

these circumstances, one would expect Cesar Melhem to be in a position to give a better explanation for the payments from 2008-2013 than he gave in evidence.

138. Mike Gilhome had left ACI by the time the first of these invoices was issued. Mike Gilhome claimed to be unable to shed any light on what these invoices were for.¹⁹³ The possibility that these payments were made pursuant to an arrangement struck by him is real. But there is insufficient reliable evidence to establish that the payments were made pursuant to such an arrangement.

Conclusions

139. Paul Vine's view in 2014 that the payments 'did not look right' is telling. It adds support to what is suggested by the fact that the payments were made pursuant to what the AWU accepted were false invoices and in the absence of any documented arrangement. Further support is given to that conclusion by the fact that Mario Minniti, at least, was not prepared to give a frank explanation to the Commission of what the payments were for. The position he adopted was similar to the stance adopted by Mike Gilhome in relation to the 2003 payments. Both men were in a position to give an honest account of the nature and purpose of the payments but, knowing the payments for which they were responsible were improper, they preferred to withhold that account in an attempt to protect their own interests.

¹⁹³ Mike Gilhome, 14/10/15, T:370.13-371.43, 375.44-376.2.

140. There is a question as to whether the AWU or one of its officers committed an offence under s 176(1) in procuring or soliciting the payments. John-Paul Blandthorn was the organiser responsible for ACI during the period in which these invoices were issued. The invoices were not canvassed with him in his evidence. In these circumstances, no finding is made.
141. There is a question as to whether there is a sufficient basis to conclude that the payments were made by ACI and/or Mario Minniti ‘corruptly’ within the meaning of s 176(2) of the *Crimes Act* 1958 (Vic). The evidence, including the unsatisfactory nature of Mario Minniti’s oral testimony, certainly does not exclude that possibility. Payments of this kind tend to influence unions and their officials to show favour to employees in relation to the affairs of their employees. However, there was insufficient evidence to make a finding that ACI and/or Mario Minniti had the required ‘corrupt’ intention under that section.

F – RECOMMENDATIONS

142. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 176(1)(b) of the *Crimes Act* 1958 (Vic).
143. 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 Victorian Commissioner of Police and the Director of

Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 176(1)(b) of the *Crimes Act* 1958 (Vic).

144. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Mike Gilhome in relation to possible offences under s 176(2)(b) of the *Crimes Act* 1958 (Vic).

CHAPTER 10.6

CHIQUITA MUSHROOMS

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A – INTRODUCTION

1. This case study concerns six payments of \$4,000 made to the AWU in 2003-2004 by Chiquita Mushrooms Pty Ltd (**Chiquita**). The payments were made pursuant to invoices that were described as being for ‘paid education’. The payments were made during a period in which Chiquita and the AWU were engaged in EBA negotiations.
2. Evidence was heard and submissions were received in relation to this case study in 2014. Further evidence was received in 2015. Counsel assisting put final submissions in 2015. To these some affected parties,

Frank Leo¹ and the AWU,² responded on 20 November 2015. No submissions were received from Chiquita Mushrooms.³

3. Only limited challenges were made to the factual submissions of counsel assisting. To the extent that there were challenges in respect of factual matters, they are addressed below. What follows is otherwise based on the submissions of counsel assisting.

B – EBA NEGOTIATIONS

4. Two enterprise agreements were reached in 2001 between Chiquita Mushrooms and the AWU (**EBAs**). One was the Chiquita Mushrooms (Pickers) AWU Enterprise Agreement 2001 (**2001 EBA**),⁴ covered the mushroom pickers employed to harvest mushrooms at Chiquita Mushrooms' Victorian operations. The other was the Chiquita Mushrooms Enterprise Agreement 2001.⁵ It covered ancillary services personnel and is not relevant for present purposes. Both EBAs were signed by the then Secretary of the AWU Vic on 18 June 2001⁶ and 24 November 2001,⁷ respectively.

¹ Submissions of Frank Leo, 20/11/15.

² Submissions of the AWU, 20/11/15, paras 51-55.

³ Chiquita Mushrooms has changed its name to Mushroom Exchange Pty Ltd and is now owned by Costa Group. Costa Group was notified by the Commission that their interests might be affected by the hearings regarding Chiquita in 2014 and 2015. Costa Group has not participated in either hearing.

⁴ Shorten MFI-13, 9/7/15, p 58.

⁵ Shorten MFI-13, 9/7/15, p 99C.

⁶ Shorten MFI-13, 9/7/15, p 70.

⁷ Shorten MFI-13, 9/7/15, p 99K.

5. The 2001 EBA had a nominal expiry date of 19 March 2003.⁸ Negotiations for a new EBA commenced in around October 2002.⁹ Those negotiations were protracted. Frank Leo led the negotiations on behalf of the AWU. Joseph Agostino led them on behalf of Chiquita.
6. By early March 2003, the AWU and Chiquita had not reached agreement on a new EBA but agreed to 'roll over' the 2001 EBA for a further year with 2% wage increases to allow negotiations to continue.¹⁰ As a result of those negotiations, in June 2003, an EBA was signed by the parties and approved by the Australian Industrial Relations Commission (**2003 EBA**).¹¹ The 2003 EBA was for present purposes relevantly identical to the 2001 EBA, save that it made provision for the use of labour hire workers to fill vacancies generated by departing Chiquita employees.¹²
7. EBA negotiations, meanwhile, continued through 2003 into early 2004. An agreement was concluded in July 2004 and approved by the AIRC in August 2004 (**2004 EBA**).¹³ The 2001, 2003 and 2004 EBAs were to be read and interpreted in conjunction with the *Chiquita Mushrooms Pty Ltd Victorian Production Award (the Award)*.¹⁴

⁸ Shorten MFI-13, 9/7/15, p 62.

⁹ Frank Leo, witness statement, 15/9/14, para 15.

¹⁰ Shorten MFI-13, 9/7/15, p 23.

¹¹ Shorten MFI-13, 9/7/15, pp 73-82.

¹² Shorten MFI-13, 9/7/15, p 75, cl 10.2.

¹³ Shorten MFI-13, 9/7/15, pp 85-99.

¹⁴ Shorten MFI-13, 9/7/15, pp 61, 62, 73, 74, 85, 87; From 1994 to 2002 the Award was titled *Campbell Mushrooms Pty Ltd Victorian Production Award* 1994: AWU MFI-9, 6/11/15; from 2002 the Award was titled *Chiquita Mushrooms Pty Ltd Victorian Production Award*: AWU MFI-10, 6/11/15.

8. One key issue during EBA negotiations related to restrictions on the use of labour hire. Under the 2001 EBA, Chiquita was obliged to maintain the following minimum employment levels: 240 employees at Mernda and 37 employees at Yarrambat.¹⁵ The 2001 EBA also imposed restrictions on the number of labour hire employees that Chiquita was permitted to use. Clause 22 capped the number of such workers at 100 in the 'A-side' and 40 across the remainder of Mernda. No labour hire was permitted at Yarrambat without the agreement of the AWU. The reference to 'A-side' was to an area at Mernda used to experiment with different packaging and production techniques. Clause 22 of the 2001 EBA required that any labour hire employees be paid according to the terms of the 2001 EBA.¹⁶
9. Chiquita emphasised during EBA negotiations that restrictions on the use of labour hire caused significant problems. The main reason such restrictions caused problems was Chiquita's Workcover premiums. Minutes of a meeting during EBA negotiations on 7 February 2003 record Chiquita representatives describing that problem.¹⁷ Chiquita's premiums had gone from \$1,200,000 at the time of the 2001 EBA to \$6,200,000 or 47% of its wage bill. The industry rate was 7%.
10. The reason for the extraordinary increase in those premiums was the high number of claims for injuries made by Chiquita employees. Increased labour hire would assist in solving this problem because injuries to labour hire workers would affect the premiums of the labour hire company in question, and not Chiquita. The minutes of the 7

¹⁵ Shorten MFI-13, 9/7/15, p 63, cl 10.2.

¹⁶ Shorten MFI-13, 9/7/15, p 66.

¹⁷ Shorten MFI-13, 9/7/15, p 4.

February 2003 EBA meeting record the problem being expressed by Chiquita in the following way:¹⁸

Contractors are used solely because of our **47% premium (\$6.2 million)** compared to contractors premium of **7% - That's \$20.48 an hour as distinct from \$16.40 per hour - \$4 an hour cheaper** – roughly another **\$8 thousand dollars per person per year.** (emphasis in original)

11. Joseph Agostino's evidence was that in 2001 there were approximately 150 labour hire workers picking mushrooms on the site. He said that from 2001, when Chiquita employees were injured or left, he replaced them with labour hire employees and as a result the number of labour hire workers steadily increased during the period from 2001 to about 200 in 2003.¹⁹ Joseph Agostino did not tell the AWU about this.²⁰ No doubt that was because the strategy was impermissible under the 2001 EBA, which, as discussed above, capped the number of labour hire employees at 140.²¹ The strategy was made permissible under the 2003 EBA, in the sense that vacancies arising after the commencement of that EBA could be filled through labour hire, but, subject to that, the cap of 140 remained.²²
12. The labour hire companies used by Chiquita from 2001 – 2003 were, initially, Weststaff and then later during this period Northern Labour Solutions (NLS).²³ Joseph Agostino said that he began using another

¹⁸ Shorten MFI-13, 9/7/15, p 5.

¹⁹ Joseph Agostino, second witness statement, 18/9/14, paras 5-6; Joseph Agostino, first witness statement, 18/9/14, para 15.

²⁰ Joseph Agostino, 18/9/14, T:130.34-41, 162.34-163.5.

²¹ Shorten MFI-13, 9/7/15, p 66, cl 22.

²² Shorten MFI-13, 9/7/15, p 77, cl 22.

²³ Joseph Agostino, first witness statement, 18/9/14, para 15.

company on the 'B side' in late 2002.²⁴ That company was OneForce Group Australia (**OneForce**). On 17 June 2003, Joseph Agostino wrote to the Australian Taxation Office stating that he had been informed that NLS had not been withholding the correct amount of tax from employees' wages or correctly paying superannuation contributions.²⁵ Joseph Agostino said that he wrote this letter at Frank Leo's request because Frank Leo had expressed concerns to him about NLS's practices.²⁶ Frank Leo himself wrote a similar letter on 28 August 2003.²⁷

13. The arrangement for the payment of paid education leave was struck at around this time. The evidence concerning that is discussed below.
14. On 18 December 2003 Craig Winter wrote to Joseph Agostino.²⁸ Craig Winter asserted in the letter that as a result of Chiquita's use of NLS, it was in breach of cl 22 of the 2003 EBA. It is apparent from the first sentence of the letter that it had been preceded by investigations of NLS by the AWU and discussions between Craig Winter and Frank Leo. Joseph Agostino responded to Craig Winter's letter on 22 December 2003. Amongst other matters, he indicated that from that date Chiquita would 'put a freeze on any NLS (excepting students) recruitment pending resolution of this issue.'²⁹

²⁴ Joseph Agostino, 18/9/14, T:161.31-44.

²⁵ Shorten MFI-13, 9/7/15, p 27.

²⁶ Joseph Agostino, 18/9/14, T:169.2-22.

²⁷ Shorten MFI-13, 9/7/15, p 29.

²⁸ Shorten MFI-13, 9/7/15, p 36.

²⁹ Shorten MFI-13, 9/7/15, p 37.

15. Joseph Agostino said that from this time, Chiquita scaled down its use of NLS and scaled up its use of OneForce.³⁰ Joseph Agostino was questioned closely about the time at which he commenced using OneForce, and he was adamant that it was at around this time.³¹ Stephen Little, however, said that OneForce was not used by Chiquita until the 2004 EBA had been entered into.³² Since Stephen Little relied on Joseph Agostino in relation to industrial relations matters on the site,³³ Joseph Agostino's evidence is to be preferred.
16. Joseph Agostino gave evidence that OneForce was recommended by Frank Leo on the basis that it had a good relationship with the AWU and encouraged its workers to become AWU members.³⁴ Frank Leo gave evidence that he did not nominate OneForce but simply suggested Joseph Agostino give the director of OneForce a call because the AWU wanted someone union friendly to deal with.³⁵ He said he told Joseph Agostino that the AWU would 'prefer if possible to deal with union-friendly labour hire companies'.³⁶

³⁰ Joseph Agostino, 18/9/14, T:160.17-21, 161.17-44.

³¹ Joseph Agostino, 18/9/14, T:158.18, 159.1-162.32.

³² Stephen Little, 15/9/14, T:38.2-5.

³³ Stephen Little, 15/9/14, T:41.30-34.

³⁴ Joseph Agostino, 18/9/14, T:144.36-46; Joseph Agostino, first witness statement, 18/9/14, para 26.

³⁵ Frank Leo, 15/9/14, T:24.1-9.

³⁶ Frank Leo, 15/9/14, T:25.23-34.

17. Ultimately, Chiquita and the AWU agreed to the inclusion of a clause in the 2004 EBA that required Chiquita, unless otherwise agreed by the AWU, to use OneForce as the sole provider of labour hire on the site.³⁷
18. That was a decision that provided benefits both to Chiquita and to the AWU. From Chiquita's perspective, OneForce was cheaper to use than NLS.³⁸ From the AWU's perspective, Frank Leo accepted that he preferred to deal with OneForce as a 'union-friendly' labour hire company. Frank Leo also accepted that he regarded it as likely that OneForce would encourage union membership and as a result maintain revenue to the AWU.³⁹ Joseph Agostino's evidence was that workers were paid the same by OneForce as they were by other labour hire companies, and that OneForce was cheaper for Chiquita because it charged Chiquita less for the provision of that labour.⁴⁰

C – THE PAID EDUCATION PAYMENTS

The invoices

19. The six payments of \$4,000 plus GST were made by Chiquita pursuant to invoices issued by the AWU each month from September 2003 until February 2004. Each invoice was for what was described as 'Paid Education'.⁴¹ Further invoices were issued for the period March 2004

³⁷ Shorten MFI-13, 9/7/15, p 94, cl 25.

³⁸ Joseph Agostino, first witness statement, 18/9/14, para 27.

³⁹ Frank Leo, 15/9/14, T:25.45-26.5.

⁴⁰ Joseph Agostino, second witness statement, 18/9/14, para 24.

⁴¹ Shorten MFI-13, 9/7/15, pp 107-112.

to June 2004 in similar terms.⁴² These invoices, however, were not paid. Ultimately they were reversed by a credit note in October 2004.⁴³

20. Joseph Agostino said he did not tell his employees about the arrangements.⁴⁴ Four former Chiquita employees gave evidence. All four gave evidence that they did not know of the \$4,000 payments.⁴⁵ Bill Shorten said he was sure that Frank Leo would have told the workers about the arrangement.⁴⁶
21. Counsel assisting contended that Chiquita had no contractual or other obligation to make the payments. They submitted that the fact that the arrangements were devoid of any obligation on the part of Chiquita was illustrated by the fact that Chiquita unilaterally decided to stop making the payments after six months and by the fact that Chiquita never requested and the AWU never provided reports about how the monies were expended.⁴⁷ This conclusion is challenged by Frank Leo and is addressed further below.

⁴² Shorten MFI-13, 9/7/15, pp 112A-112D.

⁴³ Shorten MFI-13, 9/7/15, p 112E.

⁴⁴ Joseph Agostino, 18/9/14, T:149.36-38; Joseph Agostino, second witness statement, 18/9/14, para 20.

⁴⁵ Sharon Dellevergini, witness statement, 21/10/15, paras 48-51; Marjorie Hodgson, witness statement, 21/10/15, paras 30-31; Marion Rogers, witness statement, 21/10/15, paras 48-49; Josephine Hodgson, 21/10/15, T:851.11-18.

⁴⁶ Bill Shorten, 9/7/15, T:176.7-13.

⁴⁷ Frank Leo, witness statement, 15/9/14, para 27.

Why were the payments made?

22. The only significant dispute on the evidence concerned why the payments were requested and made.
23. The first invoice was issued on 8 September 2003 and paid on 13 October 2003. The second invoice was issued on 6 October 2003 and paid on 21 October 2003.⁴⁸
24. The first documentary explanation for the payments came into existence after these payments. On or around 29 October 2003, Stephen Little sent a letter to Frank Leo.⁴⁹ The letter was most probably drafted by Joseph Agostino.⁵⁰ It stated:

Thank you for your letter dated August 5, 2003. I look forward to working with the AWU in developing the skills of our employees.

Chiquita Mushroom's [sic] will contribute \$4,000.00 per month from September 2003 which hopefully will enable you to subsidize [sic] training development programs and paid education leave for your members and our employees.

We will review this amount in six months with a view of increasing this contribution.

25. Frank Leo's letter of 5 August 2003 (referred to in the first line of the correspondence quoted in the paragraph above) was not produced. The letter of 29 October 2003 is a piece of contemporaneous evidence. Therefore, having regard to the lapse of time since the events in

⁴⁸ Shorten MFI-13, 9/7/15, pp 107, 108.

⁴⁹ Leo MFI-6, 15/9/14, p 1.

⁵⁰ Stephen Little, witness statement, 15/9/15, para 9; Joseph Agostino, first witness statement, 18/9/14, para 18.

question, it is a matter to which significant weight normally would be given. However, there is a distinction between the purposes for which Chiquita made the payments and the purposes for which Chiquita believed the monies would be used by the AWU. The letter does not assist in any significant way in assessing the former purpose. It does not contain any statement as to why Chiquita was prepared to pay the monies.

26. Stephen Little had the authority to commit the business to make payments of this nature. He said in his evidence that he did not have an independent recollection of the content of the letter.⁵¹ The explanation given by Stephen Little in his oral evidence for making the payments was as follows:⁵²

My recollection of the time is, we were having issues regarding the employment of new people, additional people, and their lack of willingness to join the union. It's my understanding at the time that if there wasn't some movement on our part at least, it could lead to, let's put it, lack of harmony with the workforce.

27. Stephen Little then said that the payments were intended to remedy this lack of willingness. But they were primarily for use in training, that is, OH&S training to reduce Chiquita's WorkCover bill.⁵³ In his witness statement, on the other hand, Stephen Little said that Chiquita 'wanted to work with the AWU to improve occupational health and safety and

⁵¹ Stephen Little, witness statement, 15/9/14, para 9; Stephen Little, 15/9/14, T:35.23-27.

⁵² Stephen Little, 15/9/14, T:35.33-38.

⁵³ Stephen Little, 15/9/14, T:35.1-7.

reduce its WorkCover premiums and was amenable to contributing to an AWU training fund if that would assist it to achieve this goal'.⁵⁴

28. The first answer Stephen Little gave to a direct question as to why the payments were made is telling. It is to be inferred that this was his primary reason for making the payments, notwithstanding the explanation proffered in his witness statement. That is especially so because there was not, in fact, any attempt by anyone at Chiquita to ascertain how the payments were dealt with. In fact, they were not contributed to an AWU training fund.
29. Counsel assisting submitted that, notwithstanding that ordinarily contemporaneous documents are significant, the weight to be given to the letter in assessing what Stephen Little or Chiquita believed would be done with the monies is undermined by a number of matters. First, Joseph Agostino gave evidence to the effect that these letters 'would have been' written because it was likely that Chiquita had required something in writing from the AWU so as to ensure that the money it paid could be traced for its reporting requirements.⁵⁵ Secondly, that the letter from Chiquita was something in the nature of a mere formality, and not a description of contemporaneous belief, is suggested by the fact that it was written after the first two invoices for paid education had been issued and paid. Thirdly, as a statement of belief on the part of Chiquita and Stephen Little, the letter does not go very far: it merely indicates that 'hopefully' the monies would enable

⁵⁴ Stephen Little, witness statement, 15/9/14, para 10.

⁵⁵ Joseph Agostino, 18/9/14, T:140.36-141.12.

the subsidisation of training programs for AWU members and Chiquita employees.

30. There is force in the above submissions. It is necessary, however, to consider further some of the evidence about the purpose of the payments.

31. Frank Leo's evidence as to how the above arrangement came about was as follows. He said that the arrangement arose in the context of negotiations for a new enterprise agreement⁵⁶ and at a time when the AWU sought what it called 'paid education leave' from employers during negotiations.⁵⁷

32. 'Paid education' was, in Frank Leo's words:⁵⁸

...a general contribution that the AWU sought from all employers for the purposes of developing training programs and to cover the costs of paying members and delegates who attended AWU training programs whose wages and costs for so attending were not covered by their employer.

33. Frank Leo's evidence was that Joseph Agostino was not prepared to see a term for paid education written into the enterprise agreement but was nonetheless prepared to support the concept.⁵⁹

34. Joseph Agostino gave a different account of the circumstances in which the above arrangement was made. Joseph Agostino said that the

⁵⁶ Frank Leo, 15/9/14, T:14:29-39.

⁵⁷ Frank Leo, 15/9/14, T:12.8-26.

⁵⁸ Frank Leo, witness statement, 15/9/14, para 15.

⁵⁹ Frank Leo, 15/9/14, T:15.1-11.

arrangement had nothing to do with EBA negotiations.⁶⁰ He gave evidence that the arrangement came about because Frank Leo was upset about Chiquita Mushrooms' arrangement with NLS, that is, its strategy to implement a shift from employed workers to labour hire.⁶¹ Joseph Agostino's evidence was that sometime in early to mid-2003 Frank Leo complained to him that he could not get the workers supplied by NLS to become union members and pay union dues.⁶² He gave evidence that he and Frank Leo had a conversation to the following effect:⁶³

...the conversation went like this: "These guys are no good, they won't work with us", and I said, "Well, you know, what's the problem?" And he said, "I can't get them to work with us, I can't get their people to join up." And I said, "How is that my problem?" Because whether they join or not, that's their call? He said, "Well we're missing out on revenue." I said, "And how's that my problem?" He said, "We can't conduct training." And I said - I think we spoke about a figure. I said, "Put it in a letter to us and I'll see what we can do".

35. Joseph Agostino said he made the decision to pay this money to the AWU because \$4,000 represented 'a small price to pay' to keep the union 'at bay'.⁶⁴ He explained in his first witness statement that he thought it was in Chiquita's interests to make the payments 'because I did not want production of the mushrooms to be disrupted by the

⁶⁰ Joseph Agostino, 18/9/14, second witness statement, para 16.

⁶¹ Joseph Agostino, 18/9/14, T:134.15-27.

⁶² Joseph Agostino, first witness statement, 18/9/14, para 17.

⁶³ Joseph Agostino, 18/9/14, T:134.29-40.

⁶⁴ Joseph Agostino, 18/9/14, T:135.31-136.5.

AWU'.⁶⁵ In his second witness statement he expanded on this by saying:⁶⁶

19. In my experience in the industrial relations sector, the use of independent contractors is controversial. I was very concerned that Mr Leo would discover that Chiquita was using independent contractors and agitate Chiquita's in-house employees resulting in disruption to production and jeopardise future negotiations
 20. The payment of \$4,000 to the AWU for paid education leave seemed to me a very small price to pay to avoid any disruption to production arising from the use of independent contractors...
36. Joseph Agostino sought the approval of his general manager, Stephen Little, for the payments. As Stephen Little's evidence, outlined above, indicated, he was alive to the issues that were of concern to Joseph Agostino in relation to the attitude of the AWU to the use of hire labour.
37. Counsel assisting submitted that there are a number of reasons for preferring Joseph Agostino's account over Frank Leo's.
38. *First*, it is unlikely that a company in Chiquita's position, earning about \$390,000 profit per year⁶⁷ and by all accounts in difficult financial circumstances (including significant employment-related liabilities), would have given \$24,000 to a union on the basis of some altruistic concern about improving training amongst AWU members. It is more likely that the payments were made for the purpose of obtaining a benefit for Chiquita. It is possible, accepting Stephen Little's evidence, that the motivation for committing funds for training

⁶⁵ Joseph Agostino, first witness statement, 18/9/14, para 18.

⁶⁶ Joseph Agostino, second witness statement, 18/9/14, paras 19-20.

⁶⁷ See Shorten MFI-13, 9/7/15, p 3.

purposes was that it might be effective in reducing WorkCover claims. However, this would be a long game. It is unlikely that the expenditure would be committed in the mere 'hope' that that would occur, as stated in the 29 October 2003 letter. It is unlikely to have been necessary when all of the evidence points to Chiquita having adopted the solution of reducing WorkCover liabilities by substituting labour hire employments. It is also unlikely when regard is had to the fact that Chiquita took no steps to satisfy itself that its investment was being carried out and that training was occurring. Joseph Agostino's version is a commercially logical reason for the payments having been made.

39. *Secondly*, Joseph Agostino's evidence gives an explanation for the quantification of the payments: they were designed to compensate the AWU for a loss of membership revenue that was, at least in rough terms, ascertainable. Frank Leo offered no explanation for the quantification of the payments. They were not quantified in the way that other paid education payments were:⁶⁸ that is, by reference to the number of employees of Chiquita, at a rate per employee per hour or per week (or on the basis of a percentage of payroll).
40. *Thirdly*, Joseph Agostino's evidence explains why the payments stopped after six months notwithstanding the indication in Stephen Little's letter of 29 October 2003 that Chiquita would 'review this amount in six months with a view of increasing this contribution'.⁶⁹ Joseph Agostino gave evidence that he decided to stop making the payments because since January 2004 Chiquita Mushrooms had begun

⁶⁸ See Ch 10.4 in relation to Paid Education Leave.

⁶⁹ Shorten MFI-13, 9/7/15, p 30.

using workers supplied by OneForce, a labour hire company recommended by the AWU, (instead of NLS).⁷⁰ He reasoned that if the AWU had a good working relationship with OneForce and OneForce encouraged union membership then it followed that Chiquita Mushrooms no longer needed to compensate the AWU for lost membership revenue.⁷¹ He said that the services of NLS were progressively scaled back from December 2003 and the services provided by OneForce were progressively ramped up:⁷² by the time the 2004 EBA was in place OneForce was truly in place.⁷³ Joseph Agostino said that no-one at the AWU complained about the cessation of payments.⁷⁴

41. Frank Leo denied that OneForce was ‘in the picture’ by February 2004.⁷⁵ However, there is independent confirmation to the contrary. There was concern during 2004 EBA negotiations that the inclusion of a clause that required Chiquita to use OneForce might contravene s 45E of the *Trade Practices Act* 1974 (Cth). In an email to Joseph Agostino of 7 June 2004, a solicitor employed by Chiquita’s solicitors, Mallesons Stephen Jaques, said the following:⁷⁶

Consistent with my advice in back February 2004, I remain concerned that NLS might have grounds to invoke section 45E of the Trade Practices Act by reason of, what appears to be, an understanding between Chiquita

⁷⁰ Joseph Agostino, 18/9/14, T:143.11-144.2.

⁷¹ Joseph Agostino, 18/9/14, T:143.11-17.

⁷² Joseph Agostino, 18/9/14, T:159.29-160.21.

⁷³ Joseph Agostino, 18/9/14, T:160.35-42.

⁷⁴ Joseph Agostino, 18/9/14, T:143.19-27.

⁷⁵ Frank Leo, witness statement, 15/9/14, para 26.

⁷⁶ Shorten MFI-13, 9/7/15, p 48.

Mushrooms and the AWU which has the purpose of preventing Chiquita Mushrooms from acquiring the services of NLS.

42. The above email indicates that Frank Leo and Joseph Agostino had come to an arrangement regarding the exclusive use of OneForce by Chiquita as early as February 2004. That supports Joseph Agostino's evidence and contradicts Frank Leo's.
43. The *fourth* matter that supports Joseph Agostino's evidence about the circumstances in which the payments were made is that, in fact, the AWU had a preference for OneForce over NLS. Frank Leo gave evidence that NLS did not encourage union membership and was reluctant to let the AWU talk to the pickers they engaged.⁷⁷ Thus, it is likely that, in fact, the use of NLS did contribute to declining union revenues. Frank Leo's evidence was that OneForce was a 'union friendly' labour hire contractor, and that he expected that it would encourage union membership.⁷⁸ Frank Leo accepted that, at least from mid-2014, he expected that membership revenue would be maintained through the use of OneForce.⁷⁹ Frank Leo gave evidence that he was not concerned about losing revenue from members of NLS when there were still Chiquita employees who were not members whom he could have chased to become members.⁸⁰ However this evidence, too, should be treated with caution. Ordinarily, a union official would be concerned about a loss of revenue in these circumstances (and also about chasing Chiquita employees who were not members).

⁷⁷ Frank Leo, 15/9/14, T:23.32-42.

⁷⁸ Frank Leo, 15/9/14, T:25.23-34; Frank Leo, witness statement, 15/9/14, para 31.

⁷⁹ Frank Leo, 15/9/14, T:26.3-15.

⁸⁰ Frank Leo, 15/9/14, T:15.21-24, 17.18-26.

44. Frank Leo, on the other hand, submitted that his version should be preferred and Joseph Agostino's explanation for the payments should be rejected. Frank Leo submitted that a finding should be made that the conversation deposed to by Joseph Agostino did not occur.⁸¹
45. Frank Leo's *first* point is that the negotiations for the 2004 EBA included claims by the AWU in relation to paid education leave.⁸² That claim was included in the February 2003 log of claims.⁸³ Discussion of it was noted in the minutes of the February 2003 EBA meeting.⁸⁴ He submitted, therefore, that Joseph Agostino's assertion that his discussions regarding the \$4000 payment had nothing to do with the EBA negotiations⁸⁵ should be rejected. There is no doubt that the subject of paid education leave was raised during the EBA negotiations. The first observation that may be made about this submission is that Joseph Agostino does not dispute that the payments were for paid education leave.⁸⁶ He merely said that his agreement to pay these amounts had nothing to do with the EBA negotiations. The logic of events supports Joe Agostino's evidence, if what he meant was that the discussion between him and Frank Leo did not relate to a matter that was to be included as a term of the EBA (the payments commenced in September 2003, several months after the 2003 EBA was agreed, and several months before the 2004 EBA was agreed).

⁸¹ Submissions of Frank Leo, 20/11/15, para 34.

⁸² Submissions of Frank Leo, 20/11/15, paras 27-30.

⁸³ Shorten MFI-13, 9/7/2015, p 2.

⁸⁴ Shorten MFI-13, 9/7/2015, p 8.

⁸⁵ Joseph Agostino, 18/9/14, second witness statement, para 16.

⁸⁶ Joseph Agostino, 18/9/14, second witness statement, para 20.

Ultimately the issue does not assist one way or the other as to whose version is to be preferred.

46. Frank Leo's *second* point⁸⁷ is that because Frank Leo was aware before and during EBA negotiations that Chiquita was using labour hire, it is objectively unlikely that he would have had a discussion with Joseph Agostino about the detrimental effect of the use of NLS on AWU membership along the lines claimed by Joseph Agostino.⁸⁸ As counsel assisting submitted, this is a non sequitur. That Frank Leo knew Chiquita was using labour hire is consistent with the proposition that he took the view that the use of labour hire had a detrimental effect on AWU membership. It does not make it at all unlikely that, at what Frank Leo deemed to be an appropriate point in negotiations, he had a conversation with Joseph Agostino about that topic and suggested that Chiquita make recompense for lost membership revenue.
47. Frank Leo's *third* point⁸⁹ is that Joseph Agostino's evidence is wrong on many points and thus that his evidence⁹⁰ about the Leo-Agostino discussion concerning the NLS effect on AWU membership should be treated with some caution.
48. Counsel assisting accepted that all uncorroborated evidence of events that occurred over 10 years ago should be treated with caution, including Joseph Agostino's. They made three points as to why his evidence should not be rejected in the present case:

⁸⁷ Submissions of Frank Leo, 20/11/15, paras 31 to 34.

⁸⁸ Joseph Agostino, 18/9/14, second witness statement, para 17.

⁸⁹ Submissions of Frank Leo, 20/11/15, para 34.

⁹⁰ Joseph Agostino, 18/9/14, second witness statement, para 17.

- (a) *First*, Joseph Agostino's account of the purpose of the payments is in accordance with the objective probabilities, being (a) Chiquita's perilous financial position; (b) the quantification of the payments; (c) the cessation of the payments; and (d) the fact that the AWU in fact had a preference for OneForce. In contrast, Frank Leo's account of the purpose of the payments is at odds with (a) and (b), and cannot explain (c).
- (b) *Secondly*, Joseph Agostino's account was supported by Stephen Little's oral evidence as to his understanding of the purpose of the payments. Stephen Little was not present when Joseph Agostino and Frank Leo had the conversation in question but the fact that he was given this account of the purpose of the payments by Joseph Agostino⁹¹ supports the proposition that the conversation was as described by Joseph Agostino.
- (c) *Thirdly*, Joseph Agostino's evidence was given against his own interests, and against the interests of Chiquita. His account of the purpose of the payments was a frank admission.

⁹¹ Joseph Agostino says that he consulted with Stephen Little after the conversation he deposed to: Joseph Agostino, first witness statement, 18/9/14, para 18. Stephen Little's evidence was that after receipt of Frank Leo's letter he had a discussion with Joseph Agostino: Stephen Little, witness statement, para 8; Stephen Little, 15/9/14, T:35.6-15. It can be inferred that Stephen Little's understanding of the purpose of the payment was communicated to him by Joseph Agostino, and in circumstances in which a truthful account of the purpose of making the payment would be expected. Stephen Little's evidence is for that reason not 'Delphic' as Frank Leo submitted: Submissions of Frank Leo, 20/11/15, para 35. It is contemporaneous support for what Joseph Agostino says occurred.

49. These points are supportive of Joseph Agostino's version of events. They undermine Frank Leo's.
50. Frank Leo's *fourth* point⁹² is that Joseph Agostino's reason for making the paid education payments to the AWU (that is, in order to avoid disruption by the union) should be rejected, because there is no evidence of industrial action having taken place and therefore that Joseph Agostino's evidence that he had this concern should be rejected. Submissions of like kind were made by Cesar Melhem in the ACI case study. They are unpersuasive because they confuse past or present disruption with potential disruption. Joseph Agostino's evidence was that he was concerned that the AWU would discover the extent to which Chiquita was using labour hire (in breach of the 2001 EBA) and that this might lead to disruption.⁹³ Objectively, this was a very reasonable concern to have. Unions do not ordinarily take kindly to the use of labour hire, particularly when it is use in breach of an industrial agreement.
51. Frank Leo's *fifth* point⁹⁴ is that his evidence as to the purpose of the payments was unchallenged. However, his account of the purpose of the payments was challenged. It was put to him, twice, that the true purpose of the payments was to recompense the AWU for lost membership.⁹⁵

⁹² Submissions of Frank Leo, paras 36 to 37.

⁹³ Joseph Agostino, second witness statement, 18/9/14, paras 19-20.

⁹⁴ Submissions of Frank Leo, 20/11/15, para 38.

⁹⁵ Frank Leo, 15/9/14, T:15.16-19, 19.32-34.

52. Moreover, Frank Leo's account of the purpose behind the paid education arrangement does not explain why the payments stopped. As indicated above, a credit note for these invoices was prepared on 5 October 2004. The credit note contained a notation 'Will no longer pay. As per email and Frank Leo'.⁹⁶ The email referred to has not been produced. The notation suggests that the decision to issue the credit note was Frank Leo's. Frank Leo, however, could offer no explanation for why the payments stopped. Frank Leo's evidence was, in essence, that he had nothing to do with the issuing of the credit note. He said that he did not become aware that Chiquita had stopped paying the invoices at this time. He said that no-one told him that Chiquita had stopped paying. He said that he did not make the decision to issue the credit note. He said he did not know who issued the credit note or why.⁹⁷ Frank Leo's evidence was that the Secretary of the branch had authority to write off an amount of this size.⁹⁸ Bill Shorten could not say why the credit note was issued, but looking at the notation 'as per email and Frank Leo', said that he assumed it was Frank Leo. Bill Shorten said that Frank Leo as Assistant Secretary had authority to make that decision.⁹⁹
53. There is, as counsel assisting submitted, reason to treat Frank Leo's evidence on this topic with considerable caution. The notation on the credit note indicates that the cessation of payments came to his attention at the time, and that he approved the credit note or directed it to be issued. There is no good reason to doubt that objective evidence.

⁹⁶ Shorten MFI-13, 9/7/15, p 112E.

⁹⁷ Frank Leo, 15/9/14, T:21.30-23.10; Frank Leo, witness statement, 15/9/14, para 26.

⁹⁸ Frank Leo, 15/9/14, T:23.1-3.

⁹⁹ Bill Shorten, 9/7/14, T:180.44-181.14.

The notation supports what one would ordinarily expect to have been the case: that an Assistant Secretary who makes an arrangement on behalf of the union under which the union receives significant revenue was consulted about and approved the cessation of that arrangement. It would have been understandable if Frank Leo had merely claimed that, with the passage of time, he no longer had a recollection of the circumstances in which the payments stopped. However his evidence, particularly his oral evidence, was to the effect that he denied any involvement in the decision to issue the credit note.¹⁰⁰ That denial is contrary to the objective evidence and to what would ordinarily be expected.

54. Frank Leo endeavoured in his submissions¹⁰¹ to explain the cessation of the payments on the basis that this is contemplated by the letter of 29 October 2003. Counsel assisting pointed out that this submission ignores two features of the evidence. First, although that letter stated that Chiquita would ‘review’ the payments in 6 months’ time, that review was said to be made ‘with a view of increasing this contribution’.¹⁰² Joseph Agostino’s evidence explains why the contribution was stopped and not increased: Frank Leo’s does not. Secondly, this submission does not take account of the fact that the AWU continued to invoice Chiquita after the expiry of the 6 month period. If the letter shows that the payments were to stop, why did the AWU continue to send invoices for them?

¹⁰⁰ Frank Leo, 15/9/14, T:21.37-41, 22.1-47, 23.110.

¹⁰¹ Submissions of Frank Leo, 20/11/15, para 41.

¹⁰² Leo MFI-6, 15/9/14, p 1.

55. There are other matters, not raised by Frank Leo in his submissions, that are supportive of his version. The first is that each of the invoices was made out for 'paid education.'¹⁰³ That provides at least some objective evidence that the payments were for what Frank Leo said they were for. Further objective support arises from the terms of the 29 October letter. The alternative explanation of Stephen Little, which he adhered to in his oral evidence, also supports this version.
56. However, the preponderance of the evidence indicates that Joseph Agostino's version is to be preferred. The effect of his evidence is that the letter and the invoices did not accurately represent what he had agreed to. That is corroborated by Stephen Little who was responsible for authorising the payments. These are powerful statements against interest. Moreover, they are consistent with the general circumstances, particularly the commercial realities of the situation of Chiquita at that time.
57. For the above reasons, the account of Joseph Agostino as to the circumstances in which the arrangement was reached and the purpose of the payments should be preferred.

What became of the payments?

58. There was some evidence as to what became of the payments. The effect of Joseph Agostino's evidence was that no training was provided to Chiquita as a result of the payments but that he thought the payments were to be used for training AWU members not only at

¹⁰³ Shorten MFI-13, 9/7/15, pp 107-112D.

Chiquita but at other sites.¹⁰⁴ In giving this evidence Joseph Agostino (who was in charge of training at Chiquita) was adamant that Stephen Little was incorrect in his evidence that some training occurred.¹⁰⁵ Joseph Agostino said that once whilst on AWU premises he noticed some people doing training, but that it did not involve any Chiquita employees and it was not funded by the money Chiquita provided.¹⁰⁶ Stephen Little was hesitant and uncertain in giving evidence on this topic (understandably, since Joseph Agostino was in charge of training). Joseph Agostino's evidence should be preferred to his. The effect of Frank Leo's evidence was that, beyond his belief that the monies went into general revenue, he had no idea how the money was spent.¹⁰⁷

59. That evidence further supports Joseph Agostino's version of the reason for the payments. As matters eventuated, nothing was done with the payments that was of benefit to Chiquita as far as the purpose disclosed in the 29 October 2003 letter was concerned.

D – UNFAVOURABLE 2004 EBA

60. The 2004 EBA left most Chiquita employees worse off financially than they were under the 2001 EBA.¹⁰⁸ In broad terms, this was due to two features of the 2004 EBA. First, it permitted Chiquita to decrease the

¹⁰⁴ Joseph Agostino, 18/9/14, T:139.30-140.30.

¹⁰⁵ Stephen Little, 15/9/14, T:36.23-37.6.

¹⁰⁶ Joseph Agostino, 18/9/14, T:140.7-18.

¹⁰⁷ Frank Leo, 15/9/14, T:20.16-21.4.

¹⁰⁸ For convenience, this part of these submissions will refer to the 2001 EBA only, although precisely the same points can be made about a comparison between the 2004 and 2003 EBAs. The 2003 EBA in substance extended the 2001 EBA for a further year.

number of workers employed by it and increase the number of workers employed by labour hire companies. Secondly, it permitted those labour hire workers to be paid less than Chiquita employees, and in some instances less than such employees were paid under the 2001 EBA.

61. Before exploring these two matters in more detail, it is necessary to observe that there may be situations in which, for reasons such as a deterioration in economic conditions, employees of a company are left in a worse position under one EBA than they were under its predecessor. If the later EBA is the result of the fully informed consent of those employees, then the outcome may be unfortunate but it is not inherently objectionable.
62. However, where, at the time of negotiations between the union and an employer for an EBA an arrangement is struck for the payment of money by the employer to the union, that arrangement is not disclosed to the employees, and those employees obtain no discernible benefit from that arrangement, it is hard to see an unfavourable EBA as necessarily the result of unfavourable economic conditions. Understandably, some Chiquita employees who have since found out about the arrangement have expressed dissatisfaction with it. For example, Sharon Dellevergini was a picker employed by Chiquita from 1991 to 2004 and was made redundant shortly after the 2004 EBA was approved. She gave evidence that she had no knowledge of the

payments of \$4,000 per month in 2003 and 2004. She said in her witness statement:¹⁰⁹

When I heard about it I was dumbfounded but it made sense to me considering the lack of support we received from the AWU during the redundancy process. It appeared to me during this time that the AWU was clearly doing what Chiquita wanted.

63. Secret arrangements of the kind under consideration naturally give rise to these appearances.

Redundancies and transfer to labour hire

64. Under the 2001 EBA, Chiquita was obliged to maintain the following minimum employment levels: 240 employees at Mernda and 37 employees at Yarrambat.¹¹⁰ Under the 2004 EBA, those numbers were reduced. Clause 12 of the 2004 EBA required there to be 120 Chiquita employees of which 90 were to be permanently based at Mernda and 30 'flexis' based at Yarrambat. The phrase 'flexis' referred to the fact that those workers could be called to work at Mernda.¹¹¹
65. The 2001 EBA imposed corresponding restrictions on the number of labour hire workers that Chiquita was permitted to use. Clause 22 capped the number of such workers at 100 in the 'A-side' and 40 across the remainder of Mernda.¹¹² No labour hire was permitted at

¹⁰⁹ Sharon Dellevergini, witness statement, 21/10/15, para 50.

¹¹⁰ Shorten MFI-13, 9/7/15, p 63, cl 10.2.

¹¹¹ Shorten MFI-13, 9/7/15, p 89, cl 12.

¹¹² Shorten MFI-13, 9/7/15, p 66, cl 22.

Yarrambat without the agreement of the AWU. Under the 2004 EBA, there were no corresponding restrictions.¹¹³

66. Joseph Agostino gave evidence that Chiquita utilised what were from its point of view the more favourable provisions regarding used of labour hire. His evidence was that following the 2004 EBA Chiquita employed as pickers only the minimum number of in-house staff and sourced the remainder of its labour requirements from labour hire arrangements. He said that by the end of 2004 there up to 350 contractors.¹¹⁴
67. The 2004 EBA allowed Chiquita to transfer employees from direct employment with Chiquita to employment as labour hire workers with OneForce which had a recruitment office at the Mernda site.¹¹⁵ Chiquita achieved this with the knowledge and assistance of the AWU.
68. A number of former Chiquita employees gave evidence that soon after the finalisation of the 2004 EBA they were made redundant.
69. Sharon Dellevergini gave evidence that during a meeting between Frank Leo and Chiquita staff concerning the 2004 EBA, Frank Leo said to the pickers words to the following effect:¹¹⁶

The company needs to make redundancies.

¹¹³ Shorten MFI-13, 9/7/15, p 94, cl 25.

¹¹⁴ Joseph Agostino, second witness statement, 18/9/14, para 10.

¹¹⁵ Marjorie Hodgson, witness statement, 21/10/15, para 25; Marion Rogers, witness statement, 21/10/15, para 42.

¹¹⁶ Sharon Dellevergini, witness statement, 21/10/15, para 23.

You are lucky to be getting any redundancy payment because you are employed as casuals. Casuals are not entitled to anything.

You can come back to work as agency workers.

You can keep your same jobs through One Force.

70. Approximately one week after the vote for the 2004 EBA occurred Sharon Dellevergini accepted a voluntary redundancy on the basis that she could apply for her same job through OneForce. She applied for a role through OneForce but was unsuccessful.¹¹⁷
71. Josephine Hodgson was a picker employed by Chiquita from 1988 to 2004. She gave evidence that approximately two months after the 2004 EBA was certified she was asked to attend a meeting with Joseph Agostino where he informed her that she had been selected for compulsory redundancy. At the end of this meeting Joseph Agostino introduced Josephine Hodgson to a representative of OneForce. Josephine Hodgson applied for work with OneForce but was unsuccessful.¹¹⁸
72. Marjorie Hodgson was a picker employed by Chiquita for 18 years.¹¹⁹ Marjorie Hodgson took a voluntary redundancy from Chiquita and was successful in transferring to employment with OneForce. She worked as a labour hire employee with OneForce for about 12 months.¹²⁰ Marjorie Hodgson could not recall whether Frank Leo spoke to the pickers about being transferred to OneForce but thought if she did not

¹¹⁷ Sharon Dellevergini, witness statement, 21/10/15, paras 37-41.

¹¹⁸ Josephine Hodgson, witness statement, 21/10/15, paras 3, 44-64, 70-77.

¹¹⁹ Marjorie Hodgson, 21/10/15, T:855.33-38.

¹²⁰ Marjorie Hodgson, witness statement, 21/10/15, paras 8-9.

take the redundancy and apply for a job with OneForce she would be sacked.¹²¹

73. Marion Rogers was a picker employed by Chiquita from 1991 to 2004.¹²² She took a voluntary redundancy soon after the 2004 EBA was certified.¹²³ Marion Rogers said that she was told by Joseph Agostino that if she wanted to continue working at Mernda she would have to work for OneForce. Marion Rogers gave evidence that she did not want to work for OneForce as she would be required to work for a flat hourly rate with no entitlement to bonuses.¹²⁴
74. Labour hire is insecure work. Once a Chiquita employee such as Marion Rogers was transferred from direct employment with Chiquita to a labour hire arrangement with OneForce, Chiquita was no longer required to ensure that worker was paid the federal minimum wage, award rates, leave entitlements or superannuation. The Award was a consent award which only bound Chiquita, its employees and the AWU. Chiquita merely had an obligation to the AWU under clause 25 of the 2004 EBA to ensure that workers at Chiquita were to be engaged in accordance with the 2004 EBA.¹²⁵ This is not a right that OneForce labour hire workers could have enforced themselves. Only the AWU could take steps on their behalf to ensure OneForce employees working at Chiquita were paid correctly. Once Chiquita

¹²¹ Marjorie Hodgson, witness statement, 21/10/15, paras 16, 21.

¹²² Marion Rogers, witness statement, 21/10/15, para 3.

¹²³ Marion Rogers, witness statement, 21/10/15, paras 3, 41, 45, 47.

¹²⁴ Marion Rogers, witness statement, 21/10/15, paras 42-44.

¹²⁵ Shorten MFI-13, 9/7/15, p 94.

employees were transferred to OneForce they lost the protections provided for by the Award. This is discussed further below.

Labour hire workers paid less to do more

75. As stated above, the 2001 EBA required all labour hire workers to be paid on the same terms as Chiquita employees would be paid under the EBA.¹²⁶ The 2004 EBA contained a similar clause.¹²⁷ However, there were two significant differences between the 2004 and 2001 EBAs in this regard.
76. The first was that the 2004 EBA required any labour hire workers to be supplied by OneForce Recruitment, whilst the 2001 EBA contained no such restriction. For the reasons set out above, this benefited both the AWU and Chiquita. Joseph Agostino's evidence, referred to above, was that OneForce paid employees the same rates as other labour hire companies.
77. The second difference was that the 2004 EBA made express provision for the payment of labour hire employees in some circumstances at lower rates than Chiquita employees. That is, although cl 25 of the 2004 EBA required labour hire workers to be 'engaged in accordance with the terms and conditions of the certified agreements' between the AWU and Chiquita, the terms and conditions of the 2004 EBA permitted Chiquita to pay labour hire workers at lower rates than

¹²⁶ Shorten MFI-13, 9/7/15, p 66, cl 22. See para 8.

¹²⁷ Shorten MFI-13, 9/7/15, p 94, cl 25.

Chiquita employees. In particular, rates for labour hire workers were lower in two respects.

78. First, the rates labour hire workers were entitled to for weekend work were lower. Under the 2001 EBA, first preference for weekend work was given to Chiquita employees.¹²⁸ Under the 2001 EBA all Chiquita workers (whether employees or labour hire staff) working on weekends were entitled to Award rates.¹²⁹ Under the Award, workers were entitled to the following penalty rates:¹³⁰

- (a) Saturdays up until 12pm at time and a half (cl 26);
- (b) Saturdays after 12pm at double time (cl 28.2.2);
- (c) Sundays at double time (cl 27); and
- (d) Public holidays at double time and a half (cl 32.3).

79. These weekend and public holiday penalty rate entitlements had been provided for by the Award since at least 1994.¹³¹

80. Under the 2004 EBA, however, the AWU and Chiquita agreed to introduce a weekend crew employed by a labour hire company.¹³²

¹²⁸ Shorten MFI-13, 9/7/15, p 64, cl 12.

¹²⁹ Shorten MFI-13, 9/7/15, p 62, cl 6; *Workplace Relations Act* 1996 (Cth), s 170LY (as in force as at 1 August 2001).

¹³⁰ *Chiquita Mushrooms Pty Ltd Victorian Production Award*: AWU MFI-10, 6/11/15, pp 21-22, 33.

¹³¹ *Campbell Mushrooms Pty Ltd Victorian Production Award 1994*: AWU MFI-9, 6/11/15.

¹³² Shorten MFI-13, 9/7/15, p 89, cl 11.

These workers were paid at \$18.50 per hour, with 4% increases per annum. In addition, no piece rate was payable on weekends.¹³³

81. Under the 2004 EBA Chiquita employees simply could not work on weekends unless more than 80 workers were required. In that event, first preference was to employ Chiquita employees.¹³⁴ At least in 2004, the likelihood of this occurring appeared to be remote. The 'EBA Newsletter' sent to Chiquita employees dated 7 July 2004 refers to this clause but proceeds on the basis that no more than 80 persons will work on weekends.¹³⁵

82. Under the 2004 EBA all workers employed directly by Chiquita who worked on weekends were entitled to Award rates.¹³⁶ Therefore under the 2004 EBA from 31 May 2004 to 19 March 2005, an experienced picker employed directly by Chiquita was entitled to:¹³⁷

- (a) Saturdays up until 12pm at \$22.17 per hour (\$14.78 x 1.5);
- (b) Saturdays after 12pm at \$29.56 per hour (\$14.78 x 2);
- (c) Sundays at \$29.56 per hour (\$14.78 x 2) ; and
- (d) Public holidays at \$36.95 (\$14.78 x 2.5).

¹³³ Shorten MFI-13, 9/7/15, p 89; Joseph Agostino, second witness statement, 18/9/14, para 11.

¹³⁴ Shorten MFI-13, 9/7/15, p 89.

¹³⁵ Shorten MFI-13, 9/7/15, p 57.

¹³⁶ Shorten MFI-13, 9/7/15, p 62, cl 6; *Workplace Relations Act* 1996 (Cth), s 170LY (as in force as at 10 August 2004).

¹³⁷ Shorten MFI-13, 9/7/15, p 88.

83. The need to avoid paying weekend penalty rates was a matter of some significance to Chiquita. It was emphasised by Chiquita during EBA negotiations. Minutes of negotiations that took place on 7 February 2003 record: '[M]ushrooms is a 7 day operation but we can't afford to operate fully over weekends (like our competitors) because of penalty rates'.¹³⁸ Similar concerns were expressed at other meetings.¹³⁹
84. The second respect in which the terms and conditions for labour hire workers were less favourable than Chiquita employees was the piece rate payable for pre-pack button mushrooms. Under the 2001 agreement, the rate from 19 March 2002 was \$3.08 per 2kg box for all workers and a limit of 10 pre-packs per day per worker was imposed.¹⁴⁰ Under the 2004 agreement, the same rate was applicable for Chiquita employees with a limit of 15 pre-packs per day.¹⁴¹ In contrast, labour hire workers were to be paid at half that rate (that is, at 77c per kilo) but there were no limits to the number of pre-packs they could be required to pick.¹⁴²
85. The importance to Chiquita of pre-packs was emphasised during the negotiations for the 2003 EBA. Minutes of negotiations that took place on 7 February 2003 record that '[d]emand for prepacks is growing by 30% throughout Australia'.¹⁴³ Minutes of a meeting of 25 November 2003 record a discussion about pre-packs which begins with

¹³⁸ Shorten MFI-13, 9/7/15, p 5.

¹³⁹ Shorten MFI-13, 9/7/15, pp 10-11, 32.

¹⁴⁰ Shorten MFI-13, 9/7/15, p 63, cll 8, 9.

¹⁴¹ Shorten MFI-13, 9/7/15, p 88, cll 8, 10.

¹⁴² Shorten MFI-13, 9/7/15, pp 88, 90, cll 10, 14.

¹⁴³ Shorten MFI-13, 9/7/15, p 3.

Chiquita expressing the view that '[o]ur future is in prepacks' and the AWU expressing a concern that '[w]e will not be able to sell a reduction or halving of the button prepack rate'.¹⁴⁴ Similar concerns were expressed at other meetings.¹⁴⁵ Frank Leo gave evidence to the following effect:¹⁴⁶

...one of the issues, main issues I had at that time was the picking of pre-packs and that was their main area of making money and our members were adamant they weren't going to pick more than 15 a day, and the only way to do any better than that was to allow labour hire.

86. Frank Leo took issue in his submissions with the notion that Chiquita workers were financially worse off under the 2004 EBA.¹⁴⁷ He said that the terms of the 2004 EBA effected guaranteed hours, guaranteed income, a bonus and provisions designed to improve workplace safety. These points do not address the practical financial impact on Chiquita workers who faced redundancy and, if re-employed by OneForce, a significant reduction in the pay conditions they enjoyed under the 2004 EBA.

E – OH&S AND THE 2004 EBA

87. A number of witnesses claimed that the 2004 EBA resulted in an improvement in working conditions for pickers. There are significant reasons to doubt such claims. It is not obligatory for an EBA to result in an improvement in working conditions any more than it is obligatory

¹⁴⁴ Shorten MFI-13, 9/7/15, p 35.

¹⁴⁵ Shorten MFI-13, 9/7/15, p 32.

¹⁴⁶ Frank Leo, 15/9/14, T:28.10-14.

¹⁴⁷ Submissions of Frank Leo, 20/11/15, paras 48-50.

for it to improve wages. Further, as Frank Leo said in his evidence,¹⁴⁸ it is not obligatory to include in an EBA particular matters dealing with OH&S issues. Indeed often it will be the case that, entirely appropriately, such matters are dealt with outside an EBA. It is necessary to deal with the issue for present purposes because the proposition that the 2004 EBA improved OH&S on the site was advanced to bolster claims that the paid education arrangement did not result in an unfavourable EBA.¹⁴⁹

The Piece Rate System

88. There was some evidence that the ‘piece rate’ system of pay under the 2001 EBA exacerbated OH&S issues. In summary, the piece rate system of remuneration encouraged workers to pick mushrooms at a faster rate. The detail of the ‘piece rate’ system was as follows. Under the 2001 EBA, pickers were paid at an hourly rate together with a ‘bonus’. In broad terms, mushrooms picked were packaged in two different ways: in 4kg boxes and in 2kg ‘pre-pack’ boxes or trays. A ‘bonus’ was payable under the 2001 EBA for each 4kg box of mushrooms packed per hour in excess of four boxes.¹⁵⁰ There was no cap on the number of 4kg boxes that could be packed.

89. Pre-packs were boxes or trays with about 10 punnets on them. The punnets were filled with mushrooms and, ultimately, sold in that form. Pre-packs were more difficult to pack because only the best quality

¹⁴⁸ Frank Leo, witness statement, 15/9/14, para 14.

¹⁴⁹ See, for example, Submissions of Frank Leo, 20/11/15, paras 49-51.

¹⁵⁰ Shorten MFI-13, 9/7/15, p 63, cl 8.

mushrooms could be used and because of the shape of the pre-packs.¹⁵¹ A bonus of \$3.08 per 2kg 'pre-pack' box was payable but there was a cap of 10 pre-packs per day per employee.¹⁵² It would appear that pickers preferred to pick boxes to pre-packs, and that the cap of 10 pre-packs per day was designed to prevent Chiquita from requiring employees to pick more than that amount, rather than to stop employees from picking more than that amount.

90. For some pickers, the 'bonus' rate was a significant component of pickers' remuneration. Sharon Dellevergini gave evidence that on average she would pick 10 boxes per hour, and thus that the bonus rate formed a large portion of her wages.¹⁵³ Marion Rogers gave evidence that she did not want to work for OneForce after the 2004 EBA because workers were paid at a flat hourly rate without bonuses.¹⁵⁴ In contrast, Marjorie Hodgson said that bonuses did not form a large part of her wages, in contrast to the position with some other pickers, because she was not a fast picker.¹⁵⁵

OH&S issues identified in the evidence

91. Joseph Agostino's view was that the piece rate system contributed to workplace injuries. He gave evidence that, notwithstanding a variety

¹⁵¹ Sharon Dellevergini, 21/10/15, T:836.26-35; Marion Rogers, witness statement, 21/10/15, para 34; Marion Rogers, 21/10/15, T:865.38-47, 866.1-15.

¹⁵² Shorten MFI-13, 9/7/15, p 63, cl 9.

¹⁵³ Sharon Dellevergini, witness statement, 21/10/15, para 8.

¹⁵⁴ Marion Rogers, witness statement, 21/10/15, para 44.

¹⁵⁵ Marjorie Hodgson, witness statement, 21/10/15, para 29.

of safety initiatives introduced by Chiquita, workers were prepared to sacrifice their health for financial gain.¹⁵⁶

92. The mushroom pickers who gave evidence (including Marion Rogers, a health and safety representative from 1994 until the time she accepted a voluntary redundancy in August 2004) had quite different views from Joseph Agostino about the cause of high injury rates. Their view was that the main cause of injuries was the fact that mushroom beds had to be lifted and stacked on trolleys which were difficult to push around.¹⁵⁷ They also, to a lesser extent, identified the general repetitive nature of the work as a factor.¹⁵⁸

93. Frank Leo had a different view again on this issue. He identified a range of safety issues that in his view contributed to injuries on the site. They included trolley collapses, irregular maintenance on trolleys, workers picking for more than seven days in a row, and over-pinned mushroom beds.¹⁵⁹ An over-pinned mushroom bed was one with too many mushroom spores, making it harder to pick mushrooms. Over-pinning appears to have been the focus of attention from the AWU during this period, at least in relation to OH&S. Bans were issued by the AWU on the picking of mushrooms in over-pinned beds in 2002 and proceedings were commenced in the Australian Industrial Relations Commission. Extensive work was done by the AWU in

¹⁵⁶ Joseph Agostino, first witness statement, 18/9/14, para 13; Joseph Agostino, 18/9/14, T:130.1-16.

¹⁵⁷ Sharon Dellevergini, witness statement, 21/10/15, paras 14-21; Josephine Hodgson, witness statement, 21/10/15, paras 20-25; Marion Rogers, witness statement, 21/10/15, paras 10-23; Marion Rogers, 21/10/15, T:868.40-47, 869.1-21.

¹⁵⁸ Sharon Dellevergini, 21/10/15, T:838.28-31; Josephine Hodgson, 21/10/15, T:847.13-27; Marjorie Hodgson, 21/10/15, T:857.11-24.

¹⁵⁹ Frank Leo, witness statement, 15/9/14, para 13.

identifying the problems with over-pinning and attempting, in consultation with Chiquita, to develop a definition of over-pinned boxes.¹⁶⁰ Over-pinning was described by the AWU's National OH&S Officer in correspondence to the AIRC in September 2002, as 'the central feature' in causing injuries at the site.¹⁶¹

OH&S under the 2004 EBA

94. Frank Leo's evidence was that, generally, OH&S issues were not addressed in the 2004 EBA.¹⁶² Consistently with that, none of the significant factors referred to by the mushroom pickers who gave evidence or by Frank Leo (such as the trolley system and over-pinning) was addressed in the 2004 EBA.
95. The only factor identified as a contributor to increased injuries that was addressed in the EBA was the 'piece rate' system. There were only two respects in which the imposition of a cap on bonuses for boxes of mushrooms might have decreased the injury rate. First, as explained above, under the 2001 EBA, workers were paid a bonus rate for every box picked in excess of 4 boxes per hour. There was no cap on the number of boxes that could be picked per hour. The 2004 EBA imposed a cap of eight boxes per hour.¹⁶³ The significance of this modification should not be overstated. Sharon Dellevergini's evidence

¹⁶⁰ See generally, Frank Leo, witness statement, 15/9/14, pp 14-39.

¹⁶¹ Frank Leo, witness statement, 15/9/14, p 19.

¹⁶² Frank Leo, witness statement, 15/9/14, para 14.

¹⁶³ Shorten MFI-13, 9/7/15, p 88, cl 9.

was that she picked on average ten boxes per hour,¹⁶⁴ and for some workers, like Marjorie Hodgson, the bonus was not significant.¹⁶⁵

96. The second modification to the piece rate system which might have assisted in decreasing the injury rate was the abolition of bonus rates on weekends.¹⁶⁶ However, as discussed above, only labour hire employees were permitted to work on weekends. This modification therefore did not assist in improving safe working conditions for Chiquita employees, except insofar as they were not exposed to unsafe working conditions by dint of not being at work for those days.

Conclusion on OH&S

97. Some witnesses claim that the 2004 EBA resulted in a significant reduction in workplace injuries. Joseph Agostino, for example, made such claims in his second witness statement.¹⁶⁷ Bill Shorten said that the 2004 EBA ‘was aimed at providing greater safety for the workforce’, and that ‘what drove the ‘04 agreement was improving the safety of the workforce’.¹⁶⁸ Frank Leo’s evidence only went so high as to suggest that certain clauses of the 2004 EBA were ‘aimed at’ reducing injuries.¹⁶⁹ There is good reason to be sceptical about claims that any such aim was achieved.

¹⁶⁴ Sharon Dellevergini, witness statement, 21/10/15, para 8.

¹⁶⁵ Marjorie Hodgson, witness statement, 21/10/15, para 29.

¹⁶⁶ Shorten MFI-13, 9/7/15, p 89, cl 11.

¹⁶⁷ Joseph Agostino, second witness statement, 18/9/14, paras 11, 13.

¹⁶⁸ Bill Shorten, 9/7/15, T:182.12-14, 182.32-34.

¹⁶⁹ Frank Leo, witness statement, 15/9/14, paras 21-22.

98. Many of Frank Leo's submissions¹⁷⁰ are devoted to establishing that he was concerned about safety on the Chiquita site. He said that so far as he was concerned the primary issues that needed addressing in the new EBA were issues regarding occupational health and safety, and that the 2004 EBA contained provisions that achieved this outcome.
99. There is no controversy that generally Frank Leo is and was concerned about worker safety. Was that concern a motivating factor when it came to negotiating the EBA? Frank Leo identified eight occupational health and safety problems that Chiquita had.¹⁷¹ He said: 'In my experience, these were not items that were addressed in an EBA because these matter[s] did not concern the conditions of employment, rather they were occupational health and safety issues'. He went on to say that he addressed such issues '[t]o the extent that I could'.¹⁷² He explained that 'to the extent that it could' the 2004 EBA included clauses aimed at having the effect of reducing injuries at Chiquita. He identified two matters: clause 9 (capping the piece rate at 8 boxes per hour and 64 per day) and clause 11 (capping work for employees at 6 consecutive days or 38 hours per week).¹⁷³ The latter restriction did not apply to labour hire.
100. Thus, Frank Leo's evidence was that, primarily, safety was a matter to be addressed outside the EBA. Only one of the eight matters he identified as a safety concern was in fact dealt with in the EBA (the piece rate system). It cannot be said in these circumstances that

¹⁷⁰ Submissions of Frank Leo, 20/11/15, paras 6-23, 51.

¹⁷¹ Submissions of Frank Leo, 20/11/15, para 13.

¹⁷² Submissions of Frank Leo, 20/11/15, para 14.

¹⁷³ Submissions of Frank Leo, 20/11/15, para 21.

concerns about safety were his or the AWU's primary motivation in EBA negotiations.

101. In his submissions Frank Leo relied on the evidence of Joseph Agostino to the effect that the 2004 Agreement resulted in a significant reduction in workplace injuries, and WorkCover premiums, due to the abovementioned changes.¹⁷⁴ What that evidence does not disclose is the extent to which the reduction in injuries, and the reduction in WorkCover premiums, was due to the significant reduction in Chiquita's employee numbers as a result of its redundancies.
102. In truth, what drove the 2004 EBA was the adverse effect on Chiquita's business of its high Workcover premiums. The solution the parties arrived at was to shift the burden of unsafe work practices to an AWU approved labour hire company. The solution was not a good result for workers in any sense. Sometimes a combination of factors such as economic conditions will mean that an EBA produces less favourable conditions for employees than its predecessor. But this was a bad result that was arrived at in circumstances where Chiquita and the AWU had entered into a secret side agreement for the payments of \$24,000.

F – CONCLUSIONS REGARDING CONDUCT OF AWU AND CHIQUITA

103. Substantially the same issues arise in relation to these payments as arise in the ACI case study.

¹⁷⁴ Submissions of Frank Leo, 20/11/15, para 51; Joseph Agostino, second witness statement, 18/9/14, paras 11, 13.

Breach of fiduciary duty

104. For the reasons given in Chapters 10.2 (Cleavevent) and 10.5 (ACI), Frank Leo and the AWU, in the context of EBA negotiations with Chiquita, owed fiduciary duties to those of its members who were Chiquita employees.
105. In entering into the arrangement for the payment of ‘paid education’, Frank Leo and the AWU may have been acting in a position of actual conflict or a position where there was a substantial possibility of such conflict.
106. The payments conferred a direct benefit on the AWU. They were contrary to the interests of Chiquita employees because they weakened the AWU’s bargaining position in EBA negotiations. The payments were not disclosed to Chiquita employees.
107. Frank Leo in his submissions¹⁷⁵ and the AWU in its submissions¹⁷⁶ denied that fiduciary duties were owed in the present case. They denied that there was any conflict between the interests of the workers and the AWU. The reasons for those submissions have been addressed in Chapter 10.2 (Cleavevent) and are rejected for the same reasons. Two matters arising from the submissions of Frank Leo call for further comment:

¹⁷⁵ Submissions of Frank Leo, 20/11/15, paras 53-55.

¹⁷⁶ Submissions of the AWU, 20/11/15, paras 52-53.

- (a) *First*, he said that there could be no conflict because paid education leave was sought in the log of claims and evidently obtained by the arrangement the subject of the invoices.¹⁷⁷ That point falls away in light of the finding above that the payments were not in fact sought or paid for that purpose, but for an entirely different purpose, namely (from Frank Leo's perspective) to compensate for lost membership, and (from Chiquita's perspective) to avoid industrial disputes.
- (b) *Secondly*, he said that the timing of the payments told against any conflict because the payments ceased in February 2004, well before the 2004 EBA was agreed.¹⁷⁸ Leaving aside whether it is necessary for there to be strict temporal proximity between the payment and the agreement for a possibility of conflict to arise, the submission is simply wrong on the facts: payments were recorded by the AWU as having been received up to 1 June 2004, about 6 weeks before the 2004 EBA was signed by Chiquita.¹⁷⁹

108. For the above reasons, Frank Leo and the AWU may have breached their fiduciary duties to Chiquita employees who were AWU members.

¹⁷⁷ Submissions of Frank Leo, 20/11/15, para 54.

¹⁷⁸ Submissions of Frank Leo, 20/11/15, para 55.

¹⁷⁹ Shorten MFI-13, 9/7/15, pp 99, 112D, 308.

Corrupt Commissions

109. Counsel assisting submitted that at the time the arrangement to make the payments was negotiated, the AWU and Frank Leo were acting as ‘agents’ of Chiquita employees within the meaning of s 175(1) of the *Crimes Act* 1958 (Vic). Their submissions as to whether an offence under s 176 of the Act may have been committed are as follows.
110. The arrangement, and the payments pursuant to it, were such as to tend to influence the AWU and Frank Leo to show favour to Chiquita in relation to the affairs of its employees. Gratuitous payments of substantial amounts to a union by an employer inevitably tend to produce that influence.
111. Were the payments made ‘corruptly’? The issue is whether Chiquita intended the payments to influence Frank Leo and the AWU to show Chiquita favour in relation to the affairs of Chiquita’s employees, and whether Frank Leo believed Joseph Agostino had that intention.¹⁸⁰
112. So far as Chiquita is concerned, the decision to make the payments was ultimately Stephen Little’s. However, for the reasons outlined above, his purposes were essentially the same as Joseph Agostino’s, that is, to avoid the industrial unrest that it was thought would be likely to arise if the AWU discovered the extent of Chiquita’s use of independent contractors. A purpose of this kind entails an expectation or belief that the payments would cause the AWU to show favour to Chiquita in its relations with its employees. Chiquita’s use of labour hire in 2003

¹⁸⁰ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231.

exceeded the number of labour hire workers permitted under the 2001 EBA, and, when it came into force, the 2003 EBA. If discovered, that would have been a legitimate reason for complaint by Chiquita employees and by the AWU on their behalf. Chiquita's purpose in making the payments was to keep the AWU 'at bay' in this regard, in circumstances where Frank Leo was raising complaints about the use of labour hire. This, counsel assisting submitted, is sufficient to warrant a finding that he made or offered the payments 'corruptly' within the meaning of s 176(2)(b).

113. Frank Leo submitted¹⁸¹ that Chiquita had a contractual obligation to make the payments that arose out of the 29 October 2003 letter. There are at least the following difficulties with that proposition. First, even if that letter is regarded as a promise to pay made with the intention to enter into legal relations (a matter that is doubtful), there was no consideration for it expressed to flow from the AWU. Secondly, the letter was sent after the first two invoices had been sent and paid. This suggests that the payments were made without any obligation. It also suggests that the letter was, as Joseph Agostino suggested, something in the nature of a formality to enable Chiquita to trace the payments for reporting purposes.¹⁸² Thirdly, the proposition, even if correct, does not offer Frank Leo or the AWU any significant assistance. If Chiquita had an enforceable obligation to make the payments the practical reality was nonetheless that it obtained nothing for them in return. In these circumstances, the existence of a contractual obligation does not militate against a finding that the payments were corrupt.

¹⁸¹ Submissions of Frank Leo, 20/11/15, paras 39-40.

¹⁸² Joseph Agostino, 18/9/14, T:140.43-141.12.

114. Frank Leo also submitted¹⁸³ that, assuming the payments were for the purpose of buying industrial harmony, the fact that Frank Leo ultimately negotiated an outcome that saw (a) the engagement of a ‘union friendly’ labour hire firm; and (b) an entitlement in Chiquita to retain another labour hire firm with the AWU’s consent, shows that the payments could not have been intended to buy his influence. There are a number of problems with this submission. The first is that it reasons from the outcome of the negotiations rather than the intention of the payments. The second is that it assumes (wrongly, for the reasons outlined in the Cleanevent case study)¹⁸⁴ that actual influence is a necessary element of the offence.
115. So far as Frank Leo and the AWU are concerned, if Joseph Agostino’s account of the circumstances in which the payments is accepted, it follows that Frank Leo must have believed that in making the payments Chiquita was intending the payments to influence Frank Leo and the AWU to show favour to Chiquita in relation to Chiquita’s claim to use more labour hire. The payments, on Joseph Agostino’s evidence, arose out of Frank Leo’s complaint that the AWU was losing revenue as a result of the use of a labour hire company that was not ‘union friendly’. Frank Leo could not have thought that a company in such an evidently difficult financial position would have made the payments out of some altruistic purpose. Frank Leo did not claim that he took any steps to disclose the arrangement to members who were Chiquita employees. He claimed in his submissions¹⁸⁵ that there was

¹⁸³ Submissions of Frank Leo, 20/11/15, paras 58.

¹⁸⁴ See ch 10.2.

¹⁸⁵ Submissions of Frank Leo, 20/11/15, para 59.

nothing secretive about the arrangements. But the evidence as to the knowledge of the Chiquita workers suggests otherwise.

116. For the above reasons, applying the reasoning outlined in Chapter 10.2 in relation to Cleanevent, the evidence suggests that:

- (a) Chiquita offered the payments ‘corruptly’ within the meaning of s 176(2)(b) and may have contravened that section.
- (b) Frank Leo procured the payments ‘corruptly’ within the meaning of s 176(1)(b) and may have contravened that section.

117. It remains to consider whether the AWU may have contravened that section. As in the case of Cesar Melhem and ACI, Frank Leo did not procure the payments for his personal benefit. They were benefits to the AWU and received and adopted by it. Frank Leo was at all relevant times Assistant Secretary and for the reasons set out in Chapter 10.2 in relation to Cleanevent, that is sufficient for his conduct to be attributed to the AWU on the basis that he was acting as its ‘directing mind and will’. Bill Shorten described him as the ‘principal representative representing members at Chiquita’.¹⁸⁶ The arrangement Frank Leo negotiated with Joseph Agostino was an arrangement negotiated by the AWU. His state of mind in negotiating it should be attributed to the AWU.

118. Accordingly the AWU may have contravened s 176(1)(b).

¹⁸⁶ Bill Shorten, 9/7/15, T:167.44-46.

G – RECOMMENDATIONS

119. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Chiquita Mushrooms Pty Ltd in relation to possible offences under s 176(2)(b) of the *Crimes Act* 1958 (Vic).
120. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Frank Leo in relation to possible offences under s 176(1)(b) of the *Crimes Act* 1958 (Vic).
121. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 176(1)(b) of the *Crimes Act* 1958 (Vic).

CHAPTER 10.7

UNIBUILT

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A – OVERVIEW

1. This Chapter deals with contributions by, first, a company or companies associated with Ted Lockyer, and secondly, the AWU, of personnel employed to work on the campaign of Bill Shorten for the 2007 Federal Election.
2. Prior to his election to the Federal seat of Maribyrnong and throughout the election campaign, Bill Shorten was the National Secretary of the AWU. The relevant people employed to work on his campaign were Lance Wilson and Fiona Ward.
3. Counsel assisting's submissions do not press for adverse findings against Bill Shorten, Ted Lockyer or the AWU. Counsel assisting did submit that some adverse findings should be made in relation to the conduct of Cesar Melhem in causing the AWU to assume the responsibility for Lance Wilson's employment.
4. In these circumstances it is not surprising that only Cesar Melhem has contested the facts and conclusions put forward by counsel assisting. His submissions are addressed where relevant in the balance of this Chapter. Otherwise, the conclusions of counsel assisting are undisputed, are correct and are accepted in what follows.

B – TED LOCKYER’S GROUP OF COMPANIES

5. Ted Lockyer is retired. Previously, he conducted a business of providing labour services. That business was conducted through a variety of companies.
6. Unibuilt was incorporated on 25 August 2004.¹ Ted Lockyer was the sole director of Unibuilt from 1 January 2006. Unibuilt was placed into liquidation on the application of the Deputy Commissioner of Taxation on 7 October 2010.² It is still in the process of being wound up. The liquidator’s final report indicates a variety of actions were contemplated by the liquidator for the purpose of pursuing funds for creditors. It is apparent that the liquidator took the view that Unibuilt traded whilst insolvent from at least 30 June 2008. A letter of demand was issued to Ted Lockyer in an attempt to recover the amount of \$630,391.87.³
7. Ted Lockyer also has been the principal of a number of other companies. One such company was Unibilt Pty Ltd (**Unibilt**). Unibilt was incorporated on 31 January 2003 and was then named E.A. Lockyer Pty Ltd.⁴ On 3 September 2006 E.A. Lockyer Pty Ltd changed its name to Unibilt. Ted Lockyer was the sole director of

¹ Lockyer MFI-1, 16/10/15, p 1.

² Lockyer MFI-1, 16/10/15, p 83.

³ Lockyer MFI-1, 16/10/15, p 86.

⁴ Lockyer MFI-1, 16/10/15, pp 8-9.

Unibuilt from 31 January 2003 until its deregistration on 18 November 2012. Karen Lockyer was the sole shareholder.⁵

8. Ted Lockyer also was the principal of Maintenance Resource Engineering Pty Ltd (**MRE**). MRE was incorporated on 22 June 1994.⁶ Ted Lockyer was the sole director of MRE from 2002 until its deregistration in November 2012.

9. Ted Lockyer had a close relationship with the AWU.⁷ An example of that was a proposal sent by Unibuilt on 22 September 2004, shortly after its incorporation, to the Shell Refinery for the provision of scaffolding and crane hire services.⁸ In the proposal to Shell Refinery, Unibuilt said the following:⁹

Unibuilt has had an Enterprise agreement design [sic] with the co-operation of the Australian Workers Union who has a vested interest in ensuring the continuing operation and investment in the *Shell Corio Refinery*. We anticipate having our agreement certified over the next 4 weeks (see copy attached). The management of *Unibuilt* has a strong relationship with the Australian Workers Union, which has enabled us to have a very flexible Enterprise Agreement as well as direct access to both the State secretary and the Federal secretary who have given us their full support.

10. It is obvious that Ted Lockyer was referring to Bill Shorten in that letter. In private hearing Ted Lockyer, however, claimed that he did

⁵ Lockyer MFI-1, 16/10/15, p 11.

⁶ Lockyer MFI-1, 16/10/15, p 13.

⁷ Bill Shorten described his relationship with Ted Lockyer as them being 'well acquainted': Bill Shorten, 8/7/15, T:5.29-31. Bill Shorten said that by early 2007 Ted Locker had been dealing with the Union for a long time, and had been dealing with Bill Shorten and other officials over quite a few years: Bill Shorten, 8/7/15, T:21.31-40.

⁸ Lockyer MFI-1, 16/10/15, pp 343-344.

⁹ Lockyer MFI-1, 16/10/15, p 343.

not know who the State Secretary and Federal Secretary were.¹⁰ He sought to underplay the extent of his relationship by claiming that these references were ‘a bit of literary licence’.¹¹ In public hearing, he ultimately conceded that this was one way in which he sought to sell Unibuilt to customers.¹²

11. It would appear that the enterprise agreement referred to in the above proposal was the agreement signed on 17 January 2005 by the AWU and Unibuilt.¹³ It was signed on behalf of the AWU by Cesar Melhem. The agreement was certified on 27 January 2005. The agreement had a nominal expiry date of 30 November 2007.¹⁴

C – EMPLOYMENT OF LANCE WILSON

12. In early 2006 Bill Shorten was preselected as the Australian Labor Party candidate for the seat of Maribyrnong. On 2 August 2006, Bill Shorten resigned as secretary of the Victorian Branch of the AWU and Cesar Melhem replaced him. By at least some point in late 2006 or early 2007, Bill Shorten had begun preparations for campaigning for the Federal Election that was anticipated to be held in November 2007.
13. Both Bill Shorten and Ted Lockyer gave evidence that at some point in late 2006 or early 2007 Bill Shorten asked Ted Lockyer if he would be willing to pay to employ someone to support his campaign for

¹⁰ Lockyer MFI-2, 16/10/15, p 11.27-40.

¹¹ Lockyer MFI-2, 16/10/15, p 12.13-23.

¹² Ted Lockyer, 16/10/15, T:515.8-10.

¹³ Shorten MFI-1, 8/7/15, pp 248-249.

¹⁴ Shorten MFI-1, 8/7/15, p 225.

Parliament and Ted Lockyer agreed.¹⁵ The conversation occurred at the AWU's offices in Spencer Street. That was the place that Bill Shorten and Ted Lockyer tended to meet.¹⁶ Neither Ted Lockyer nor Bill Shorten was able to give any clear indication what Ted Lockyer was doing at the AWU's offices on this day. Bill Shorten's evidence was that he did not think it was to discuss an EBA.¹⁷ Ted Lockyer was unable to proffer any explanation as to why he was at the AWU's offices on that day. But he denied that he could have been discussing an EBA.¹⁸ In his private hearing he said he could have been talking to Cesar Melhem or one of the organisers about 'what work was happening'.¹⁹

14. At some point after the above conversation, in February 2007, Bill Shorten, Ted Lockyer, and Lance Wilson had a meeting at a café in Errol Street, North Melbourne. At that meeting, it was agreed that Unibuilt would pay Lance Wilson to work as Bill Shorten's campaign manager.
15. On 19 February 2007, Michael Chen of the AWU emailed to Ted Lockyer a proposed contract between Unibuilt and Lance Wilson.²⁰ It was in the form of a letter from Unibuilt to Lance Wilson. It began:

I am pleased to offer you the position of Research Officer with Unibuilt Pty Ltd. You will be employed in accordance with the conditions of

¹⁵ Bill Shorten, 8/7/15, T:22.3-9; Ted Lockyer, 8/7/15, T:494.7-15.

¹⁶ Bill Shorten, 8/7/15, T:21.25-29.

¹⁷ Bill Shorten, 8/7/15, T:22.30-23.18.

¹⁸ Ted Lockyer, 8/7/15, T:494.17-39.

¹⁹ Lockyer MFI-2, 16/10/15, p 22.19-22.

²⁰ Lockyer MFI-1, 16/10/15, pp 154-157; Shorten MFI-3, 8/7/15.

employment listed below. Please return the signed original to my office as soon as possible ...

16. The letter proceeded to set out details of Lance Wilson's salary and entitlements. The description of Lance Wilson's employment in the contract was false. Lance Wilson did not occupy the position of 'research officer' with Unibuilt. Unibuilt was a labour hire company with no need of a research officer. In truth, Lance Wilson was operating at all times under the direction of Bill Shorten as Bill Shorten's campaign officer.²¹ He did not do any work for Ted Lockyer or Unibuilt.²² Lance Wilson said that he never met or spoke to Ted Lockyer again.²³

17. Bill Shorten accepted that the term 'research officer' in the document was incorrect and that Lance Wilson was a 'campaign resource'.²⁴ Whether Bill Shorten ultimately accepted that Lance Wilson was not employed by Unibuilt is less clear. He gave the following evidence:²⁵

Q. It is not just a question of terminology, is it? He wasn't working for Unibuilt at all?

A. He was employed by Unibuilt and donated to work on my campaign.

Q. He had nothing to do with Unibuilt did he? Other than his meeting with Mr Lockyer that you attended, he simply worked on your campaign and his wages were paid for by Unibuilt?

A. It was a donation by Unibuilt of a person to work on my campaign, that's correct.

²¹ Wilson MFI-1, 16/10/15, T:18.25-32.

²² Lockyer MFI-2, 16/10/15, p 29.1-6.

²³ Wilson MFI-1, 16/10/15, T:16.35-44.

²⁴ Bill Shorten, 8/7/15, T:20.47-21.2.

²⁵ Bill Shorten, 8/7/15, T:21.5-15.

18. Ted Lockyer said he never signed the contract although he proceeded on the basis of it.²⁶ The document was drafted by Michael Chen in the AWU's offices on the instructions of Bill Shorten.²⁷ Michael Chen sent the contract to Ted Lockyer on 19 February 2007 by email. The email began 'Bill asked me to email you this letter of offer'.²⁸ Bill Shorten said he did not remember whether he had looked at the letter after Michael Chen had prepared it.²⁹
19. Bill Shorten did not recall what instructions he gave to Michael Chen. However, when asked if he told Michael Chen to describe Lance Wilson's position as research officer with Unibuilt, Bill Shorten said 'no, I'm not sure that I would have said that. He was a campaign resource, and that is how I would have described it'.³⁰ Bill Shorten's ultimate position on the instructions he gave Michael Chen is encapsulated by the following evidence:³¹
- I would have asked Michael Chen could he please provide a draft document, 'Mr Lockyer from Unibuilt is going to employ someone who is going to work on my campaign', but beyond that I have to say, I don't micromanage every detail of every administrative arrangement.
20. Michael Chen said he had no particular memory of Lance Wilson's employment arrangements.³²

²⁶ Ted Lockyer, 16/10/15, T:490.40-491.9.

²⁷ Bill Shorten, 8/7/15, T:13.25-14.9; Shorten MFI-3, 8/7/15.

²⁸ Shorten MFI-3, 8/7/15.

²⁹ Bill Shorten, 8/7/15, T:20.25-33.

³⁰ Bill Shorten, 8/7/15, T:14.34-15.33.

³¹ Bill Shorten, 8/7/15, T:16.16-21.

³² Michael Chen, witness statement, 21/10/15, para 42.

21. Lance Wilson was paid \$748 per fortnight by MRE from 28 February 2007 until 17 May 2007. The reason Lance Wilson was paid by MRE and not Unibilt during this period is obscure. Ted Lockyer said it was because ‘when I transfer money to pay people, unless I specifically said it was coming from a particular company account, it would automatically go out as MRE because that was the original account that was at that bank’.³³

D – INTERPOSITION OF AWU

22. On 16 May 2007, Ted Lockyer, on Unibilt letterhead, sent a letter to Cesar Melhem.³⁴ The letter began:

As per our agreement, Lance Wilson will be contracted to Unibilt as of 17 May 2007. Unibilt agrees to pay you weekly for work completed by Lance...

23. The description of Lance Wilson’s position, again, was false. The letter proceeded to set out details of Lance Wilson’s salary and entitlements.
24. At his private hearing, Ted Lockyer said, a number of times, that he did not recall why the arrangement for paying Lance Wilson changed in May 2007.³⁵ In public hearing, however, he said that the arrangement changed because he (or his companies) were having cash flow problems.³⁶ When it was put to him that he did not give this explanation at his private hearing, Ted Lockyer responded ‘maybe you

³³ Ted Lockyer, 16/10/15, T:492.47-493.32; Lockyer MFI-2, 16/10/15, p 30.17-33.

³⁴ Shorten MFI-1, 8/7/15, p 161.

³⁵ Lockyer MFI-2, 16/10/15, pp 30.46-31.22.

³⁶ Ted Lockyer, 16/10/15, T:499.34-38, 501.7-13.

didn't ask me the question'. Actually, however, the question was asked, and asked more than once.³⁷

25. Cesar Melhem gave evidence after Ted Lockyer. He endeavoured to add to Ted Lockyer's account of the reason for the change by claiming that he 'definitely was aware of complaint about Mr Wilson wasn't getting paid regularly'.³⁸ Cesar Melhem said that he spoke to Ted Lockyer a couple of weeks or months before he gave evidence. He said he did not recall whether he spoke to Ted Lockyer about the circumstances in which Lance Wilson came to be employed by the AWU in 2007. He said that he did not remember exactly how he came to be talking to Ted Lockyer but that he thought Ted Lockyer was doing some consultancy work for a cement company around Cesar Melhem's office.³⁹ Ted Lockyer's evidence, both on 18 August 2015 and 16 October 2015, was that he was retired.⁴⁰
26. Counsel assisting submitted that this evidence should not be accepted. They submitted that the evidence of Cesar Melhem in the above paragraph told against his credit. They also submitted that Ted Lockyer's different accounts of the reasons for the 16 May 2007 letter at public and private hearing told against his credit. The reasons for pressing these conclusions are twofold:

³⁷ Lockyer MFI-2, 16/10/15, p 30.46-31.22.

³⁸ Cesar Melhem, 22/10/15, T:984.28-34.

³⁹ Cesar Melhem, 22/10/15, T:985.13-986.2.

⁴⁰ Ted Lockyer, 16/10/15, T:485.34-35; Lockyer MFI-2, 16/10/15, p 2.28-29.

- (a) Lance Wilson's bank statements during the period that he was 'employed' directly by Unibuilt⁴¹ indicate that he was paid during that time regularly and without delay; and
- (b) Lance Wilson never suggested at his private hearing that this was a reason for the change in the arrangement: the substance of his evidence was that he did not know why the change occurred.⁴²

27. Cesar Melhem contended that counsel assisting's submissions as to both of the above matters should be rejected. He submitted that his evidence and that of Ted Lockyer should be preferred. As to the first matter, Cesar Melhem asserted that the payments of Lance Wilson's wages were not in fact regular because there was a two week gap between payments between 21 March and 4 April 2007.⁴³ As to the second matter, Cesar Melhem said that it was not put to him that Lance Wilson did not know the reason for the change in arrangements. Cesar Melhem said that this renders any conclusions as to Lance Wilson's evidence unsafe.

28. Counsel assisting addressed the possibility that, although Lance Wilson's wages were paid regularly by Unibuilt (or MRE), Ted Lockyer was in fact having cashflow problems at this time. In fact, Unibuilt (or MRE or Unibilt) ceased paying the AWU later in 2007. Further, as stated above, the liquidator of Unibuilt was of the view that it was insolvent from at least 30 June 2008. The creation of the

⁴¹ Melhem MFI-3, 22/10/15.

⁴² Wilson MFI-1, 16/10/15, p 13.27-14.16.

⁴³ Melhem MFI-3, 22/10/15, pp 8-11.

‘Unibilt’ name on 3 September 2006, and the use of the Unibilt letterhead on the letter of 16 May 2007, suggests the possibility that at around this time Ted Lockyer contemplated that Unibuilt would be wound up but its business carried on by Unibilt through a phoenix type arrangement.

29. Lance Wilson said that he had never seen the 16 May 2007 letter before being shown it by the Commission.⁴⁴ He said that he did become aware that in around May 2007 that Unibuilt stopped paying his wages and those wages started being paid by the AWU.⁴⁵ Lance Wilson was asked why he went onto the books of the AWU Victorian Branch. He said he was not sure. He said he did not ask anyone why. He said that he was told, by either Bill Shorten or Rob Acton, that he was going to be put on the Union’s books with the same pay and that he agreed to this.⁴⁶
30. Bill Shorten said that he did not see the letter of 16 May 2007 until he was provided with documents by the Commission.⁴⁷ Bill Shorten said that he did not know why the letter was sent and that his understanding was that Unibuilt would be paying for Lance Wilson’s employment in his campaign. He said that he could not recall whether he was aware of the change in these arrangements at this time. His position appeared to be that in substance nothing changed from his point of view: Lance

⁴⁴ Wilson MFI-1, 16/10/15, p 11.37-38.

⁴⁵ Wilson MFI-1, 16/10/15, p 13.29-33.

⁴⁶ Wilson MFI-1, 16/10/15, p 10.22-36.

⁴⁷ Bill Shorten, 8/7/15, T:27.12-28.

Wilson remained his campaign director and his wages were paid, in effect, by Unibuilt.⁴⁸

31. From May 2007, Lance Wilson's wages were paid by the AWU Vic Branch. In turn, the AWU Vic Branch sent invoices to Unibuilt for the amount of those wages. The invoices sent by the AWU and paid by Unibuilt are described in the following table:⁴⁹

| Date | Description | Tax Invoice No. | Amount | Cheque No. |
|--------------|--|--------------------|--------------------|---------------|
| 31/05/07 | The work was completed by Lance Wilson in May 2007 – 91.20 hours @ \$34.90 (incl GST) | 018428 | \$3,182.88 | 000111 |
| 27/06/07 | The work was completed by Lance Wilson in June 2007 – 144.40 hours @ \$34.90 (incl GST) | 018652 | \$5039.56 | 000121 |
| 31/07/07 | The work was completed by Lance Wilson in July 2007 – 197.60 hours @ \$34.90 (incl GST) | 019003 | \$6,896.24 | 000130 |
| 31/08/07 | The work was completed by Lance Wilson in August 2007 – 152.0 hours @ \$34.90 (incl GST) | 019266 | \$5,304.80 | 000140 |
| 30/09/07 | The work was completed by Lance Wilson in September 2007 – 152.00 hours @ \$34.90 (incl GST) | 019575 | \$5,304.80 | 000170 |
| TOTAL | | | \$32,359.60 | |

E – CESSATION OF PAYMENTS

32. The last two invoices issued by the AWU were not paid by Unibuilt. Those were an invoice for \$6,631 dated 31 October 2007⁵⁰ and an invoice for \$6,100.52 dated 30 November 2007.⁵¹ Ted Lockyer was sent a reminder email seeking payment of these invoices on 3 April

⁴⁸ Bill Shorten, 8/7/15, T:27.32-28.45.

⁴⁹ Lockyer MFI-1, 16/10/15, pp 195-196, 199, 201, 205, 207, 212, 214, 219-220; Shorten MFI-1, 8/7/15, pp 286-291.

⁵⁰ Shorten MFI-1, 8/7/15, p 293.

⁵¹ Shorten MFI-1, 8/7/15, p 294.

2008 and 11 September 2008.⁵² On 1 October 2008, Cesar Melhem sent an email to Mei Lin with the subject Unibilt and stating ‘can you advise Peter Trod ale (sic; scil. Troedel) to write [sic] the Unibilt debt’.⁵³ This resulted in two credit notes being issued for the two invoices just referred to.⁵⁴

33. Ted Lockyer said initially that he stopped making the payments because ‘I had a cash flow issue’.⁵⁵ He said however that at this time he was frustrated and that:⁵⁶

At that time I had achieved nothing, at the end of the day, and I was dumb enough to think that maybe there would be something at the end of the day, but I never went in there with the object of Bill providing me with something.

34. When he was asked what he was hoping to achieve, Ted Lockyer said:⁵⁷

When you go to talk to a customer, if you can say to the customer- a potential customer, rather – that you’ve got a good relationship with a trade union, in Victoria, because the trade unions are particularly strong, then that would give you an edge in talking to the customer.

Ted Lockyer went on to say:⁵⁸

I didn’t want Bill in particular to do something. It would be that I could say to them, “You can talk to the AWU, and they will tell you that they don’t have a problem in working with me.”

⁵² Shorten MFI-1, 8/7/15, p 302.

⁵³ Shorten MFI-1, 8/7/15, p 304.

⁵⁴ Shorten MFI-1, 8/7/15, pp 305-306.

⁵⁵ Lockyer MFI-2, 16/10/15, p 25.7.

⁵⁶ Lockyer MFI-2, 16/10/15, p 25.19-23.

⁵⁷ Lockyer MFI-2, 16/10/15, p 25.27-32.

⁵⁸ Lockyer MFI-2, 16/10/15, p 25.35-38.

35. On 24 June 2008, Bill Shorten's office sent an email to Ted Lockyer asking Ted Lockyer to sponsor him on Bill Shorten's trek along the Kokoda Trail. All funds raised were to go to a charity in Melbourne. Ted Lockyer on the same day forwarded the email to Cesar Melhem and Bob Smith, the former AWU Vic Secretary, with these comments:⁵⁹

MMMMMMMMMMMMMMMMMMMM

He does not know when to give up.

HAHAHAHAHAHAHAHAHAHA

36. Ted Lockyer was shown this email and asked whether he was annoyed with Bill Shorten. Ted Lockyer answered:⁶⁰

No, I was just- I felt that I'd probably donated enough to Bill...I just felt that Bill had had enough of donations from me and there were other- yes, Bill had enough donations from me.

37. Counsel assisting submitted that it may be concluded from a number of Ted Lockyer's answers that position he took, in short, was that he was not winning work in Victoria, and making the payments was no longer worth his while.⁶¹ That submission, in substance, is correct.

F – PURPOSE OF THE ARRANGEMENTS

38. The evidence of both Bill Shorten and Ted Lockyer was to the effect that the payments by Ted Lockyer's companies of Lance Wilson's wages, either directly or through the AWU, were donations to Bill

⁵⁹ Shorten MFI-1, 8/7/15, p 299.

⁶⁰ Lockyer MFI-2, 16/10/15, pp 32.44-33.3.

⁶¹ Lockyer MFI-2, 16/10/15, pp 26,5-10, 33.28-32.

Shorten or the Maribyrnong campaign.⁶² This must be correct, at least in the sense that the payments were not made pursuant to any contractual obligation and Bill Shorten was under no obligation to provide anything in return.

39. However, counsel assisting submitted that there are a number of curiosities if, in truth, what was involved was a mere donation. The *first* is that the arrangement was documented in the ways that it was. If, in truth, the arrangement was that Lance Wilson was to be employed by Bill Shorten but paid by Ted Lockyer or one of his companies, it would have been a simple matter to document it in those terms. Instead, false documents were created describing purported employment relationships that did not in truth exist. There was no witness who could, or if he could, would explain why this was thought necessary or desirable. Nor does the evidence permit any definite finding to be made as to why the arrangements were set up in this way.
40. A *second* curiosity, related to the first, is that it was thought necessary to change the arrangement by interposing the AWU, and drafting a further false document to accommodate that. If the nature of the arrangement did not change, why was this change in documentation thought necessary or desirable?
41. Counsel assisting submitted that the only realistic possibility raised on the evidence is that it was thought at some point necessary to protect Lance Wilson from financial difficulties it was anticipated that Ted Lockyer's companies might have. The difficulty in making that

⁶² Bill Shorten, 8/7/15, T:5.33-40, 6.38-7.2, 12.17, 12.45-13.4, 15.4-11, 15.40-41, 22.11-28, 28.19-21; Lockyer MFI-2, 16/10/15, pp 21.28-41, 23.3-6.

finding, however, is that the two persons in a position to give an explanation for the change, Ted Lockyer and Cesar Melhem, were fundamentally unreliable witnesses. If one rejects their evidence, the objective circumstances do not permit any sufficiently definite conclusion to be drawn on this issue.

42. A *third* curiosity identified by counsel assisting was this. If the payments by Ted Lockyer's companies were in truth donations, it is curious that Ted Lockyer did not record any of the payments as donations in the accounts of Unibuilt. Ted Lockyer said that he did not intend to account for these payments as donations but rather that he would just 'write it off as an expense'.⁶³ The profit and loss statement generated by Ted Lockyer's MYOB system recorded \$2,700 in gifts and donations in the 2006 and 2007 financial year. That amount is less than the amount paid to Lance Wilson. The profit and loss statement for their next financial year recorded an amount of \$120 by way of gifts and donations. That, again, is well under the amount paid to Lance Wilson.

43. If the payments were donations, there is a *fourth* curiosity. Bill Shorten did not disclose the payments to Lance Wilson as donations. Bill Shorten said that this failure to disclose came to his attention in the few days before he gave evidence at the Commission.⁶⁴ Bill Shorten's candidate return for the 2007 Election was signed by him on 6 March 2008. It was drafted by Lance Wilson. It identified the total of gifts or donations received in the relevant period as nil.⁶⁵ On 6 July 2015, Bill

⁶³ Lockyer MFI-2, 16/10/15, p 28.20-35.

⁶⁴ Bill Shorten, 8/7/15, T:39.18-28.

⁶⁵ Shorten MFI-4, 8/7/15, p 2.

Shorten wrote to the acting secretary of the Victorian Branch of the Australian Labor Party requesting that branch to amend its financial disclosures for the 2007 Federal Election. The requested amendments were in connection with the payments made to Lance Wilson and also some payments made to Fiona Ward (dealt with below).⁶⁶

44. Bill Shorten said that the letter was written from two sources of information. One was Lance Wilson's group certificates. The other was material provided to him by the Royal Commission.⁶⁷ The letter is dated 6 July 2015, the day that the Commission provided to Bill Shorten's legal representatives the bundle of documents containing material regarding Unibuilt and Lance Wilson. Bill Shorten said however, that he had known about the incorrect disclosure for 'a matter of weeks, maybe months' prior to 6 July 2015.⁶⁸ How did Bill Shorten come to know of the incomplete disclosure? Why did it take until 6 July 2015 to send a letter to the Victorian Branch of the ALP correcting that disclosure? The answers to these questions were not clear from his evidence. He denied that he was waiting to see whether anything regarding the employment of Lance Wilson would emerge in the Royal Commission before making the disclosure.⁶⁹

45. The above matters, however, do not establish that Bill Shorten promised Ted Lockyer something in return for making the payments. There is no evidence of conduct of that kind.

⁶⁶ Shorten MFI-7, 8/7/15.

⁶⁷ Bill Shorten, 8/7/15, T:68.5-33.

⁶⁸ Bill Shorten, 8/7/15, T:69.22-27.

⁶⁹ Bill Shorten, 8/7/15, T:71.36-73.9.

46. It is plain, however, that Ted Lockyer hoped for a return on the monies that he caused to be spent on Lance Wilson's wages. That is apparent from a number of matters.
47. *First*, his evidence suggesting that he stopped making the payments because he was not winning work in Victoria and making the payments was no longer worth his while.
48. *Secondly*, the amounts paid were significant for companies facing the difficulties which Ted Lockyer's were. It is inherently unlikely that he would make the payments without an expectation that they would result in a return.
49. *Thirdly*, the connection between the payments and Ted Lockyer's hope that his companies would receive a benefit is apparent from some of the correspondence in evidence. A week after he sent Cesar Melhem the letter of 16 May 2007 varying Lance Wilson's employment arrangements, Ted Lockyer sent Cesar Melhem an email regarding a proposed EBA for Unibilt for the 'Pilkington Repair Project'.⁷⁰ The temporal proximity of the two pieces of correspondence suggests that they were connected.
50. Further, it will be recalled that the Unibuilt EBA was due to expire in November 2007. On 4 October 2007, Ted Lockyer sent Cesar Melhem a further draft collective agreement (for Unibilt) regarding a project at 'Tumet' (sic). In the email attaching the proposed agreement, Ted Lockyer asked Cesar Melhem to arrange for the EBA to be signed off. In the same email, he noted that he had not paid the July and August

⁷⁰ Shorten MFI-1, 8/7/15, p 262.

accounts for Lance Wilson, and said that he would be in a position to bring them up to date in a short time.⁷¹ The connection between paying Lance Wilson's wages and maintaining good relations with the AWU is, counsel assisting submitted, obvious.

51. *Fourthly*, the existence of a good relationship with the AWU was one of the claims made by Ted Lockyer's companies when seeking to promote themselves to potential clients. One example was quoted in section B of this Chapter. There were other similar examples in evidence.⁷² Notwithstanding Ted Lockyer's attempts to distance himself from the statements in some of these documents, the evidence was that he approved them.⁷³

G – EMPLOYMENT OF FIONA WARD

Contractual arrangements

52. Bill Shorten's letter of 6 July 2015 referred to a donation of \$11,774.67 for 'campaign support' provided by the AWU.⁷⁴ This is a reference to the salary of Fiona Ward.
53. Fiona Ward worked part time for Bill Shorten during the electoral campaign.⁷⁵ She did so pursuant to a contract signed by her on 16 January 2007 and by Bill Shorten on behalf of the AWU National

⁷¹ Shorten MFI-1, 8/7/15, p 292.

⁷² Lockyer MFI-1, 16/10/15, pp 351, 374-377, 463.

⁷³ Ted Lockyer, 16/10/15, T:515.12-518.43.

⁷⁴ Shorten MFI-7, 8/7/15.

⁷⁵ Bill Shorten, 8/7/15, T:17.1-6, Shorten MFI-2, 8/7/15.

Office.⁷⁶ The contract specified that she was to be offered ‘the part time position of Campaign Officer with the AWU National Office’. It specified that she was to ‘be responsible to the National Secretary of the union or his/her delegated person’. The Job Description was specified to be:

- Tasks as directed by the National Secretary
- Focus on community and political campaigning as per National Executive decisions.

54. The term of employment was specified to be from 15 January 2007 to the next Federal election. Fiona Ward was engaged to work two days a week at a salary of \$50,000, ‘pro-rata at \$20,000’. Provision was made for the payment of superannuation at 15% and reimbursement of up to \$250 per month for mobile phone costs.

55. Fiona Ward said that Bill Shorten offered her the position.⁷⁷ She said that she dealt with Michael Chen in relation to the paperwork: Michael Chen handed her the contract and she signed it.⁷⁸ The contract is in similar terms and style to the contract prepared by Michael Chen in connection with Lance Wilson.

56. Fiona Ward gave evidence that at that time Bill Shorten offered her the position he indicated to her that she would be working on the ‘Labor for Maribyrnong’ campaign but employed by the AWU. Her

⁷⁶ Ward MFI-2, 21/10/15, pp 1-2.

⁷⁷ Ward MFI-1, 16/10/15, p 10.18-20.

⁷⁸ Ward MFI-1, 16/10/15, p 12.39-45.

understanding of the arrangement was that she was seconded to Bill Shorten's campaign from the AWU.⁷⁹

57. Fiona Ward said that she worked initially from home and then, when it opened, from Bill Shorten's campaign office in Moonee Ponds.⁸⁰ She said she did 'not regularly' have any contact with anyone else from the AWU.⁸¹ She saw herself as working for Bill Shorten.⁸² She said that her role did not encompass providing any services to the AWU.⁸³ When asked what she did on a daily basis as campaign officer, she said: 'I worked on the Labor for Maribyrnong campaign, and so I performed a range of functions that supported the campaign.'⁸⁴
58. Fiona Ward was paid a gross amount of \$19,694.99 by the AWU National Office over the period 23 January 2007 to 20 November 2007, being \$7,920.32 in the 2006-2007 financial year and \$11,774.67 in the 2007-2008 year.⁸⁵

Resolutions of the National Executive

59. Bill Shorten in oral evidence suggested that the National Secretary of the AWU had authority to commit resources to political

⁷⁹ Ward MFI-1, 16/10/15, pp 5.16-18, 10.40-11.21.

⁸⁰ Ward MFI-1, 16/10/15, pp 4.41-5.10.

⁸¹ Ward MFI-1, 16/10/15, p 6.13-15.

⁸² Ward MFI-1, 16/10/15, p 6.17-19.

⁸³ Ward MFI-1, 16/10/15, p 7.15-17.

⁸⁴ Ward MFI-1, 16/10/15, p 5.15-22.

⁸⁵ Ward MFI-2, 22/10/15, pp 25-26.

campaigning.⁸⁶ An examination of the rules does not bear out that claim. As National Secretary, Bill Shorten had the power to appoint, control and dismiss National Office staff.⁸⁷ That power also lay in the National Executive.⁸⁸ Donations, however, required the approval of the National Executive under rule 57 of the AWU rules then in force.⁸⁹ Bill Shorten could not, as a fiduciary,⁹⁰ participate in any decision to engage or allocate staff to work on his own campaign without the fully informed consent of the National Executive. So to participate would involve acting in a position of conflict between self-interest and his duties to the union.

60. Following his oral evidence, Bill Shorten was asked, through his solicitors, to indicate the basis on which the arrangements in respect of Fiona Ward were authorised. Bill Shorten indicated, through his solicitors, that the arrangements in respect of Fiona Ward were discussed with the Executive of the National Branch of the AWU who authorised those arrangements. Through his solicitors, he gave the following more detailed explanation:⁹¹

1. AWU National Executive support for Mr Shorten's electoral campaign was first informally discussed by the National Executive in January 2006 when the National Executive unanimously endorsed and supported his decision to nominate for Federal Parliament. Those informal discussions took place with the National Executive members at the time.

⁸⁶ Bill Shorten, 8/7/15, T:74.22-24.

⁸⁷ AWU MFI-2, 23/10/15, p 85 (r 32(3)(b)).

⁸⁸ AWU MFI-2, 23/10/15, p 79 (r 25(1)(c)).

⁸⁹ AWU MFI-2, 23/10/15, p 111 (r 57).

⁹⁰ As to which, see Chapters 10.2 and 10.3.

⁹¹ AWU MFI-2, 23/10/15, pp 133-134.

2. On 23 October 2006 the National Administrative Committee, a sub-committee of the National Executive, noted that a Clerk will be hired for 20 hours per week in the new year (2007) to help organise the campaign against the Howard Government and elect the ALP. Mr Shorten believes the Clerk employed in the new year was Fiona Ward to assist Mr Shorten on his electoral campaign.
 3. The persons present at the National Administrative Committee meeting of 23 October 2006 are named in the Minutes of the National Administrative Committee.
 4. On 22 November 2006 the National Executive formally received the Minutes of the National Administrative Committee meeting of 23 October 2006. See agenda item 7.2 in the Minutes of the meeting of the National Executive of the AWU of 22-23 November 2006. The persons present are named in the Minutes of the Meeting of the National Executive of the AWU of 22-23 November 2006.
 5. I note that on 16 February 2007 the National executive also formally resolved to provide financial support to the Federal election campaign of the ALP (see MFI 11 Tab 2 page 175).
61. It would seem from the minutes referred to that no formal decision of the National Executive was made concerning the engagement of Fiona Ward or her allocation to Bill Shorten's campaign, in the sense that no resolution was passed and minuted. That is what the rules required to occur in the event that a donation was made. As indicated above, Bill Shorten's fiduciary position would have required that he not participate in any such resolution on that question.

62. In so far as the National Administrative Committee considered the engagement of a further staff member on 23 October 2006, the minutes of that Committee meeting record that the following report was given by Bill Shorten:⁹²

National Office Staffing Update

The National Secretary gave a report on changes to staffing in the National Office and reported that Sam Wood had been transferred to the Victorian Branch, that Ainslie Gowan has resigned and will be replaced by Cath Sullivan who current [sic] works at Channel Seven's Sunrise Program. Rod Currie has been hired as a new National Industrial Officer and that a Clerk will be hired for 20 hours per week in the new year to help organise the campaign against the Howard Government

63. A proper construction of this minute is that Bill Shorten is reporting to the Administrative Committee a decision he has made or proposes to make in his capacity as National Secretary in the exercise of his power to appoint, control and dismiss National Office Staff.⁹³ Approval for that course could not, in any event, have been given by the Administrative Committee.
64. On the other hand the minutes of the above Administrative Committee were tabled at the National Executive Meeting of 22 November 2006. A motion was moved that 'The report be received'.⁹⁴ It appears then that in substance the National Executive knew, and approved, as at 22 November 2006, that the National Secretary proposed to hire a part time person to assist with or work on the Federal election campaign. This was the meeting of the National Executive immediately prior to the engagement of Fiona Ward.

⁹² AWU MFI-2, 23/10/15, p 138-139.

⁹³ AWU MFI-2, 23/10/15, p 85 (r 32(3)(b)).

⁹⁴ AWU MFI-2, 23/10/15, p 146.

65. At a meeting of the National Executive on 16 February 2007, Bill Shorten moved that the principles for the Federal Election 2007 be:⁹⁵

1. Each branch nominates an election contact.
2. Identify members who live in target seats – telephone.
3. Identify undecided voters – telephone.
4. Follow up and support marginal seats.
5. Register members not enrolled.
6. Conduct a series of worksite meetings.
7. Utilise The Worker, coordinated meetings and financial resources. Branches and National Office to help provide strategic assistance to the election.

66. The motion was carried. Although the motion refers to ‘financial resources’, it could not be said to authorise any particular expenditure. This meeting was the first meeting after Fiona Ward’s contract of employment had been entered into.

67. The only member of the National Executive other than Bill Shorten asked about this issue was Paul Howes. Paul Howes, through his solicitors, said that he had no independent recollection of any specific discussion at the AWU National Executive regarding the appointment of Fiona Ward.⁹⁶ The only record of any discussion or authorisation in that regard to which Paul Howes, through his solicitors, pointed, were the minutes of the Administrative Committee Meeting of 23 October 2006 and the National Executive Committee of 22 and 23 November 2006.

⁹⁵ Shorten MFI-11, 9/7/15, p 175.

⁹⁶ AWU MFI-2, 30/10/15, p 135.

68. Absent a formal resolution, Bill Shorten would have needed the fully informed consent of the National Executive before engaging the services of Fiona Ward, at least if she was going to work on his campaign. Bill Shorten's evidence as set about above was that her engagement was discussed at National Executive level. Counsel assisting submit that, given the limited evidence on this topic, it would not be appropriate for a finding to be made to the contrary. That is correct. The limited character of the evidence leaves it unclear whether the discussion was fully informed and whether Bill Shorten abstained from participation. The limited character of the evidence thus makes it necessary to give Bill Shorten the benefit of the doubt.

H – EVALUATING THE CONDUCT OF AWU OFFICIALS

69. The assessment of the conduct of Bill Shorten and Cesar Melhem in respect of the arrangements regarding Lance Wilson and Fiona Ward falls within paragraphs (g), (h) and (k) of the terms of reference. The following analysis considers Bill Shorten's conduct in connection with the arrangements regarding Lance Wilson; Cesar Melhem's involvement in those matters; and disclosure under the *Commonwealth Electoral Act* 1918 (Cth).

Arrangements regarding Lance Wilson

70. It is plain that Bill Shorten and the Australian Labor Party obtained an advantage from the arrangements through which the payment of Lance Wilson's wages was funded by Ted Lockyer's companies. It is plain also that the arrangement was procured by Bill Shorten. He asked Ted

Lockyer to make the payments. The question is whether there may have been anything improper or unlawful about that. Counsel assisting submitted that the evidence does not establish that there was. For the reasons that follow, that submission is accepted.

71. The starting point is that the relevant parts of the terms of reference centre on duties owed by union officials in their capacity as union officials. A union official could act improperly if he or she used his or her position in order to obtain or procure a benefit for himself or a third party.
72. Does the evidence establish that Bill Shorten (as distinct from Ted Lockyer) was involved in conduct amounting to an abuse of a union official's position? It is true that Bill Shorten asked Ted Lockyer to make the payments at a time when Ted Lockyer was at the AWU's offices. The letter of employment for Lance Wilson was drawn up by one of the AWU's employees, Michael Chen. But these pieces of evidence do not establish that Bill Shorten in any relevant sense used his position as an officer of the AWU to procure the payments. Nor was this a situation akin to diversion of corporate opportunity: it was not a situation where, for example, someone was interested in donating to money to the AWU but was persuaded instead to donate that money to the electoral campaign of an officer.
73. There was a connection between Bill Shorten's position as AWU Secretary and Ted Lockyer's preparedness to make the payments. For the reasons set out above it is likely that Ted Lockyer only agreed to make the payments because he hoped that it would profit him and his companies in the long term. Among things he hoped that they would

build goodwill with the AWU and facilitate or improve his prospects of obtaining work, whether through obtaining an EBA or otherwise. But, as counsel assisting submitted, the evidence of the interactions between Bill Shorten and Ted Lockyer does not suggest that Bill Shorten encouraged these hopes on the part of Ted Lockyer or made any suggestion to the effect that Ted Lockyer's hopes would be realised.

74. Another matter to consider is whether there was a real and substantial possibility that Bill Shorten would be involved in EBA negotiations with Ted Lockyer. There was evidence that as at 23 May 2007, negotiations between Ted Lockyer and Cesar Melhem about an EBA in relation to the Pilkington Repair Project were in their final stages.⁹⁷ It is apparent from a draft of that EBA that it was an agreement confined to a project in Victoria and that it was anticipated that it would be concluded with the Victorian Branch of the AWU.⁹⁸ There is no evidence that Bill Shorten was in fact involved in the negotiation of the Pilkington EBA. By 2006 Bill Shorten had ceased to be secretary of the Victorian branch, but he remained national secretary until he won the election in 2007. His evidence was that as National Secretary in 2007 he was not involved in negotiating Victorian Branch EBAs.⁹⁹ Accordingly, counsel assisting submitted that the negotiations between Ted Lockyer and the AWU regarding this EBA do not establish a real and substantial possibility of conflict of interest and duty.

75. There was also evidence that negotiations for the existing Unibuilt EBA were due to commence by August 2007. That EBA applied to

⁹⁷ Shorten MFI-1, 8/7/15, p 262.

⁹⁸ Shorten MFI-1, 8/7/15, pp 264, 284.

⁹⁹ Bill Shorten, 8/7/15, T:22.35-36.

any sites on which Unibuilt worked in Australia.¹⁰⁰ It was, in that sense, a national agreement. It was signed on behalf of the AWU by Cesar Melhem. There was evidence that Unibuilt performed and sought work in other states. There was a possibility that, if negotiations for the renewal of this EBA commenced, the National Secretary of the AWU might be involved at some point. Bill Shorten suggested in his evidence that a statutory declaration in connection with the EBA may have been lodged when it was first negotiated.¹⁰¹ However, there is no evidence that negotiations were on foot at the time at which Bill Shorten made the arrangements in respect of Lance Wilson (in late 2006 – February 2007). Had such negotiations commenced, and had the involvement of the National Secretary been required, Bill Shorten's fiduciary duty would have required him to declare a conflict and remove himself from them. There is no suggestion, however, that the need for that ever arose. In October 2007 Ted Lockyer sent an email to Cesar Melhem proposing an EBA for Unibilt.¹⁰² However, there is no suggestion that Bill Shorten was involved in any negotiations that might have taken place.

76. Yet another matter to be considered is whether the creation of the material documenting Lance Wilson's employment arrangements involved the commission of an offence. For the reasons given, the letter of offer sent to Lance Wilson and the letter from Unibilt to the AWU contained false descriptions of the arrangements that were in fact entered into. Nonetheless, counsel assisting submitted, the evidence does not establish that this involved any offence. The

¹⁰⁰ Shorten MFI-1, 8/7/15, p 225.

¹⁰¹ Bill Shorten, 8/7/15, T:9.17-19.

¹⁰² Shorten MFI-1, 8/7/15, p 292.

documents were not ‘record[s] or document[s] made or required for any accounting purpose’ within the meaning of s 83 of the *Crimes Act* 1958 (Vic).¹⁰³ The documents, although false, were not ‘false documents’ within the meaning of s 83A(6) of that Act. There is no suggestion that the documents were used for the purposes of gaining any advantage contrary to provisions such as s 82 of the *Crimes Act* 1958 (Vic).

77. There are questions, considered below, as to whether the interposition of the AWU in May 2007 and the subsequent failure to pursue monies owed by Unibuilt/Unibilt to the AWU were in the best interests of the AWU. The evidence does not, however, establish that Bill Shorten had any involvement in those matters.

The conduct of Cesar Melhem

78. The two issues that arise in relation to Cesar Melhem’s conduct concern: (a) his decision to allow the Victorian Branch of the AWU to be interposed in the arrangements involving Lance Wilson in May 2007; and (b) his decision to issue a credit note in respect of the debt owed by Unibilt/Unibuilt to the AWU.
79. Counsel assisting submitted that Cesar Melhem in engaging in the above conduct, may have contravened rule 57 of the AWU rules. That rule provides, in effect, that donations can only be made by resolution of the National Executive.

¹⁰³ See, for example, *R v Jenkins* (2002) 6 VR 81 at [38].

80. By agreeing to the interposition of the Victorian Branch of the AWU in May 2007, Cesar Melhem shifted the risk of Unibuilt/Unibilt's failure from Lance Wilson (and Bill Shorten) to the Victorian Branch of the AWU. On Cesar Melhem's own evidence, he did that in circumstances where Lance Wilson or Michael Chen had complained that Lance Wilson was not being paid promptly by Ted Lockyer.¹⁰⁴ Cesar Melhem gave evidence that, however, he was not concerned about any shifting of risk to the AWU. He said:¹⁰⁵

Oh, there's no risk at all because I was even happy to pay Mr Wilson whether – whether MRE or – I think that's Maintenance Resource or Unibuilt, whatever, paid their wages or not. That was not a concern for me. I would have been happy to even pay Mr Wilson from the AWU account to assist Mr Shorten in his campaign. That is quite right within the AWU rules, so that wasn't an issue for me at all. That wasn't an issue whether the company reimbursed the AWU or not. That's something I didn't really care about.

81. Counsel assisting submits that Cesar Melhem's construction of the rules is incorrect. Under the AWU rules, Cesar Melhem had the power to '[a]ppoint, control and dismiss the clerical, research, accountancy and other staff of the Branch...'¹⁰⁶ Lance Wilson, however, was not in any meaningful sense 'staff of the Branch'. And, even if he were, Cesar Melhem had no power to 'donate' Lance Wilson's services to Bill Shorten without a resolution of the National Executive to approve that donation under rule 57.¹⁰⁷

82. Cesar Melhem disagreed with that construction of the AWU rules. He said that it did not have regard to the relevant objects clause, being

¹⁰⁴ Cesar Melhem, 22/10/15, T:984.4-17.

¹⁰⁵ Cesar Melhem, 22/10/15, T:988.47-989.9.

¹⁰⁶ AWU MFI-2, 23/10/15, p 97 (r 39(1)(b)).

¹⁰⁷ AWU MFI-2, 23/10/15, p 111 (r 57).

AWU rule 4(20). That rule provides that the objects of the Union include to use all lawful means ‘to contribute financially and otherwise to political objects, so as to bring about the election of Federal and State Labor Governments.’¹⁰⁸

83. The difficulty with the submission of Cesar Melhem is that it inverts the structure of the AWU Rules. The objects of an organisation can be carried out only in accordance with its rules.¹⁰⁹ If a rule is clear, the objects clause of an organisation cannot be permitted to give a meaning wider (or narrower) than that clear meaning. Rule 57, which proscribes the making of loans, grant or donations other than with the approval of the National Executive on being satisfied of the matters set out in the rule, is a clear rule. Its meaning is not affected by the objects clause.¹¹⁰

84. Counsel assisting submitted that the interposition of the AWU, however, caused no immediate loss to the union. That occurred following Ted Lockyer’s refusal to pay the last two invoices sent by the AWU. The result of his refusal to pay, and Cesar Melhem’s decision to write off the debt, is that the risk assumed by the AWU in May 2007 came home. It was the AWU, and not Unibuilt, which ‘donated’ the money the subject of these two invoices to Bill Shorten’s campaign.

¹⁰⁸ AWU MFI-2, 23/10/15, p 25.

¹⁰⁹ *Short v Wellings* (1951) 72 CAR 84 at 87.

¹¹⁰ Indeed, if that was the case it would be contrary to the requirement in s 149(1) of the FW(RO) Act and thereby contravene s 142(1)(a) of the Act.

85. As counsel assisting submitted, it is a moot point whether the AWU made a 'donation' within the meaning of rule 57 at the time of its interposition in the arrangements in May 2007, or at the time that the Unibuilt debt was written off. At whatever time the donation was made, Cesar Melhem had no authority to make it.
86. Cesar Melhem submitted that a conclusion that he contravened the rules could not be safely reached because:
- (a) There is no evidence as to whether there was such a resolution of the National Executive; and
 - (b) It was never put to Cesar Melhem that there was no such resolution.
87. The latter point can be dealt with shortly. Cesar Melhem did not, in his submissions given in response to those of counsel assisting, identify any such resolution being passed. As to the former point, the resolutions of the National Executive over the course of 2007 are in evidence.¹¹¹ There was a resolution passed at the 11 May 2007 National Executive meeting that a \$1.50 per member levy be paid by all Branches to the National Office by 30 June 2008 for use by approval of the National Officers to support ALP Candidates in the 2007 Federal Election.¹¹² No other resolutions pertaining to donations in relation to the 2007 election campaign were recorded in the minutes of the National Executive for that year.

¹¹¹ Shorten MFI-11, 9/7/15, pp 172-238.

¹¹² Shorten MFI-11, 9/7/15, p 187.

88. Two observations may be made in relation to the 11 May 2007 minute. First, the resolution obviously does not relate to any authorisation of donations to be made by the AWU Vic Branch in relation to the services of Lance Wilson. The resolution relates to dedication of moneys from the Branches to the National Office for expenditure. Secondly, the delegation by the National Executive to the National Officers of the discretion to expend the levy funds (if validly made in accordance with rule 57, a matter which it is unnecessary to determine) does not include Cesar Melhem, who was not a National Officer.
89. As a result, counsel assisting's submission is accepted. Cesar Melhem may have contravened rule 57 of the AWU rules.

Disclosure under the *Commonwealth Electoral Act 1918* (Cth)

90. The payments made by the AWU and by Ted Lockyer's companies to Lance Wilson and the payments by the AWU to Fiona Ward were benefits that required disclosure under Part XX of the *Commonwealth Electoral Act 1918* (Cth). Because the benefits were greater than \$10,000, disclosure was required by Unibuilt (or one of the Lockyer companies) and by the AWU under Division 4 of that Part. The donations also were required to be disclosed by either or both of Bill Shorten and the ALP. The view that has been taken by Bill Shorten, apparently in line with the general practice of the ALP, is that disclosure is required by the ALP only.
91. Counsel assisting submitted that the evidence does not establish that the above arrangements were entered into for the purpose of avoiding

disclosure requirements under the *Commonwealth Electoral Act* 1918 (Cth). Further, Bill Shorten has taken steps to correct the fact that no disclosure was made. The limitation period for the prosecutions of any offences has expired.¹¹³ In these circumstances, no finding is made.

¹¹³ *Commonwealth Electoral Act* 1918 (Cth), s 315(11).

CHAPTER 10.8

WINSLOW CONSTRUCTORS

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A – INTRODUCTION

1. Winslow Constructors Pty Ltd (**Winslow**) is a civil construction company. It is part of a group of companies known as the Winslow Group that has been operating for about 30 years. Winslow’s principal business concerns greenfields subdivisions.¹
2. Other companies in the Winslow Group operate in other areas of the civil construction industry. For example, Winslow Infrastructure Pty Ltd operates in the infrastructure area.
3. This Chapter concerns a long standing arrangement between the AWU and Winslow for the payment of membership fees by Winslow for certain employees. Issues considered in this Chapter include whether the arrangement resulted in false invoicing, inflation of AWU membership numbers and the conferment by the AWU on Winslow of more favourable treatment than it gave to at least one of Winslow’s competitors.

¹ Dino Strano, 3/6/15, T:534.9, 534.19-20.

4. In the main, the basic facts are established by documents and are not contested. There is a dispute as to what conclusions should be drawn from these facts, and about what various persons understood at different times. Submissions were made by the AWU, Winslow, and Cesar Melhem. What follows is based on the submissions of counsel assisting. The particular submissions of affected parties have been discussed at appropriate places.

B – ARRANGEMENT FOR THE PAYMENT OF MEMBERSHIP CONTRIBUTIONS

5. Since the mid-1990s, Winslow and the AWU have had an arrangement whereby Winslow pays to the AWU membership fees for all of Winslow's permanent employees of more than one year's standing (other than administrative staff and management).²
6. Dino Strano is the managing director of Winslow and has been involved in the Winslow Group for 30 years. He gave oral evidence at the Commission. Dino Strano said that the arrangement for membership was only in place in respect of Winslow (as distinct from other entities in the Winslow Group) because other entities had EBAs which required the payment of higher wages and different conditions. He said that as a result 'we don't feel like we need to pay that benefit because the employees are better rewarded and it's their responsibility'.³

² Dino Strano, 3/6/15, T:533.13-31, 534.29-43; Peter Smoljko, 4/6/15, T:568.4-12.

³ Dino Strano, 3/6/15, T:534.17-27.

7. According to Dino Strano, the reason behind the arrangement was that in the 1990s the CFMEU was a very hard union to deal with and he wanted Winslow to be associated with the AWU.⁴ Dino Strano said that this arrangement ‘evolved’ out of dealings with Craig Winter and Don Henderson, and subsequently Bill Shorten, Peter Smoljko, Cesar Melhem and various other organisers.⁵ According to Peter Smoljko, the arrangement was in place in 1998 when he became the organiser for Winslow.⁶
8. The arrangement worked in the following way. Each twelve months (or, on occasions, each six months) Winslow would send a list of its eligible employees to the AWU. The AWU would then cross check this list against its own records and (sometimes after further discussion with Winslow) then send the company an invoice for the membership fees for the employees in question. In evidence before the Commission are invoices for the period 2004 to 2013. Until March 2008, the invoices were expressed to be for the payment of membership fees for particular periods for particular numbers of members.⁷

C – FALSE INVOICING

9. On 19 March 2008, the AWU sent an invoice to Winslow, attention Peter Smoljko, for ‘OH&S Training & Workplace Inspections’. The invoice was for a total amount of \$9,945. That amount was expressed

⁴ Dino Strano, 3/6/15, T:551.26-552.9.

⁵ Dino Strano, 3/6/15, T:552.11-18.

⁶ Peter Smoljko, 4/6/15, T:569.3-9.

⁷ See for example, Melhem MFI-7, 2/6/15, pp 8, 33, 37, 51.

to be calculated by multiplying \$106.36 plus GST by 85 members.⁸ Counsel assisting submitted that in truth, the invoice was for membership fees. From this time, a number of invoices sent by the AWU and paid by Winslow purported to be invoices for training fees of one kind or another when in fact, counsel assisting submitted, they were for membership fees.⁹

10. The internal accounting system used by the AWU at all relevant times contained general ledgers. One of the general ledger categories was membership income.¹⁰ All of the money paid by Winslow pursuant to these invoices was recorded in the AWU general ledgers under this category.
11. From 21 January 2010, the invoices issued by the AWU to Winslow, in addition to containing a description that referred to training of some kind, contained an 'Item Code' described as 'Membership'.¹¹ The practice at the AWU was that any invoices with an item code 'membership', were entered into the membership income ledger. The membership income ledger was operated on an accruals basis, so that upon the issue of any invoice coded 'Membership', an entry was made in the ledgers in respect of that invoice.
12. Counsel assisting submitted that there is no doubt that the invoices issued from 19 March 2008 were false invoices. This was accepted by

⁸ Melhem MFI-7, 2/6/15, p 53.

⁹ Melhem MFI-7, 2/6/15, pp 61, 70, 73, 75, 77, 81, 85.

¹⁰ See for example Melhem MFI-8, 2/6/15, pp 89, 110, 136, 155, 177, 194A, 212A, 231A, 255A.

¹¹ Melhem MFI-7, 2/6/15, pp 70, 75, 77, 81, 85.

Dino Strano¹² and Peter Smoljko.¹³ This evidence was against interest, and thereby of considerable weight. Further, the present secretary of the AWU, Ben Davis, caused amended invoices to be issued to Winslow in 2015, in recognition of the fact that the references to training on the invoices issued from 2009 were false.¹⁴

13. Cesar Melhem was willing to concede that some of the invoices might have had a 'wrong description'.¹⁵ However, he also contended that the AWU did provide training for Winslow and that some of the invoices could have been for that also.¹⁶ Cesar Melhem submitted¹⁷ that there is no sound basis for concluding that no training was provided to Winslow employees. He asserted that the evidence of the Winslow witnesses was clearly speculation, and the consequence of suggestions put to them by counsel assisting (but the witnesses referred to were not witnesses giving evidence in relation to Winslow). Cesar Melhem submitted also that, because it is clear that the AWU provided training to employers generally, one would not conclude that it was not provided to Winslow.
14. These submissions are all unpersuasive. They are at odds with the contemporaneous evidence of how the amounts on the invoices were calculated. They are at odds with the careful exchange of membership

¹² Dino Strano, 3/6/15, T:537.44-46, 539.34-40, 543.10-20, 546.47-547.8, 548.42-549.5, 549.22-25.

¹³ Peter Smoljko, 4/6/15, T:575.3-47, 577.22-578.7, 579.35-580.9, 582.21-583.25, 583.37-584.34, 586.37-44, 588.37-589.17.

¹⁴ See Lin MFI-1, 4/6/15, p 26; Melhem MFI-7, 2/6/15, p 118.

¹⁵ Cesar Melhem, 2/6/15, T:352.29-30.

¹⁶ Cesar Melhem, 2/6/15, T:352.38-353.6, 357.41-47, 359.1-24.

¹⁷ Submissions of Cesar Melhem (Winslow), 20/11/15, para 2.

numbers as between Winslow and the AWU prior to the finalisation of the invoices.

15. A notice to produce was served on Winslow seeking records of training undertaken by the AWU during the relevant period.¹⁸ No records were produced. Peter Smoljko's evidence was that no OH&S or red card training or workplace inspections had been carried out during the periods 1 January to 30 June 2008 and 1 July 2008 to 30 June 2009, or for the balance of 2009.¹⁹ The evidence of Peter Smoljko and Dino Strano's was that no OH&S, red card or EEO training had been provided by the AWU to Winslow in the financial year 2010/2011, 2011/2012, and the period leading up to 6 March 2013.²⁰ They were not challenged on this by Cesar Melhem's counsel. It was open to Cesar Melhem to seek any documents or put forward any evidence after the public hearings in June that he thought necessary to shed further light on his evidence. He did not do so in relation to the present point.²¹
16. On about 10 April 2014 Mei Lin prepared a spreadsheet at the request of Ben Davis.²² She was instructed to compile a spreadsheet of all invoices where the item code did not match the description.²³ She compiled the spreadsheet by reviewing various invoices for training and comparing them with how they were treated in the AWU ledger

¹⁸ Melhem MFI-7, 2/6/15, p 90.

¹⁹ Peter Smoljko, 4/6/15, T:573.3-6, 575.43-47, 578.5-7.

²⁰ Dino Strano, 3/6/15, T:544.37-43, 547.5-8, 549.2-5; Peter Smoljko, 4/6/15, T:583.17-25, 589.9-13, 590.24-28.

²¹ The Commissioner, 4/6/15, T:654.39-47, 655.1-3, 656.35-36.

²² Lin MFI-1, 4/6/15, pp 26-28; Mei Lin, 4/6/15, T:617.3-4.

²³ Ben Davis, 4/6/15, T:632.42-47, 633.1.

accounts.²⁴ In one instance she checked with the AWU training department whether there were any records of training having occurred as referred to in the invoices.²⁵ The spreadsheet records the invoices referred to above. In respect of each of the invoices in the spreadsheet issued to Winslow, Mei Lin recorded 'no training, Membership.'

17. The evidence overwhelmingly indicates that the invoices in question were not related to the provision of training.

Cesar Melhem's role in the creation of false invoices

18. Counsel assisting submitted that the invoices were issued on the instructions of Cesar Melhem. Examples were given of three particular invoices. The first two were sent on 12 May 2011. Those invoices were issued in the following circumstances. On 7 April 2011, Cesar Melhem sent an email to Peter Smoljko stating:²⁶

As discussed today can you send me an up to date employees list for Winslow Constructors for 2010/2011 financial year so we can send an invoice re training cost as discussed, I have discussed this with Dino a few weeks ago.

19. No employees list for the 2010/2011 financial year has been produced. However, lists were produced in relation to some other years. The exchange of lists appears to have been the procedure adopted by Winslow and the AWU for reaching agreement on which employees Winslow was to pay membership fees for.

²⁴ Mei Lin, 4/6/15, T:618.6-9.

²⁵ Mei Lin, 4/6/15, T:619.21-32.

²⁶ Melhem MFI-7, 2/6/15, p 211.

20. Peter Smoljko forwarded Cesar Melhem's email to Dino Strano on 8 April 2011 with the comment 'we will discuss this next week'.²⁷ It would seem that Dino Strano and Cesar Melhem had lunch on 10 May 2011.²⁸ On 12 May 2011, Mei Lin sent to Peter Smoljko, in an email copied to Cesar Melhem²⁹, two invoices: one for 'Providing OHS Training in Financial Year 2010/2011' in an amount including GST of \$38,857.50, and another for 'Providing Red Card Training in Financial Year 2010/2011' in the same amount.³⁰ Both invoices were coded 'membership'. Mei Lin was the financial controller of the AWU from 2007.
21. It is plain that these are the invoices contemplated by Cesar Melhem's email of 7 April 2011. That is, they are invoices which, though described as being for training, were in fact for the payment of membership fees. Counsel assisting submitted that Cesar Melhem, when he sent the above email to Peter Smoljko, must have intended that invoices with false descriptions be issued. Peter Smoljko accepted that Cesar Melhem was telling him in the above email that Cesar Melhem was going to send him a false invoice.³¹
22. When asked about these invoices and this email, Cesar Melhem's position appeared to be that he did not recall them but that training was carried out within Winslow and that these invoices could be in relation

²⁷ Melhem MFI-7, 2/6/15, p 211.

²⁸ Melhem MFI-7, 2/6/15, p 210.

²⁹ Melhem MFI-7, 2/6/15, pp 206-207.

³⁰ Melhem MFI-7, 2/6/15, pp 208-209.

³¹ Peter Smoljko, 4/6/15, T:584.28-34.

to such training as well as membership.³² Counsel assisting submitted that that is inconsistent with all of the other evidence and should be rejected. There is, in addition, the consideration that invoices in identical amounts for purportedly different services were issued. That further indicates that the services described were not the true subject of the invoice.

23. Cesar Melhem's email to Peter Smoljko demonstrates, counsel assisting submitted, that Cesar Melhem knew and approved of the practice of issuing false invoices, and that that was a matter he had discussed with Peter Smoljko.
24. The second invoice that demonstrates Cesar Melhem's role in the creation of false invoices is dated 21 January 2010. Mei Lin said that she prepared invoices addressed to Winslow from 21 January 2010 until 6 March 2013. Mei Lin claimed that she prepared the descriptions in these invoices on the basis of instructions provided by Angela Leo, Cesar Melhem, or Cesar Melhem's assistant, Rebecca Eagles.³³
25. Angela Leo's evidence was that neither she nor the membership department of which she was head was involved in drafting the terms of invoices of this kind.³⁴ There is reason to doubt that evidence, at least in so far as it concerns the Winslow invoice dated 21 January 2010.

³² Cesar Melhem, 2/6/15, T:357.18-358.46.

³³ Mei Lin, witness statement, 4/6/15, paras 18-26.

³⁴ Angela Leo, witness statement, 21/10/15, para 13.

26. That invoice initially was issued for an amount of \$45,396 inclusive of GST.³⁵ That invoice was drafted as a result of two emails from Angela Leo on the same day. The first was an email to Jelica Addamo. It stated:³⁶

Can you please organise an invoice to be sent to Peter Smolko [sic] for a 12 month period but instead of stating Membership, it is to be for Training / Red Card – Health and Safety – Consulting.

When invoice is generated, can you please scan a copy of it to Cesar please.

27. Shortly after sending this email, Angela Leo sent another email to Mei Lin copied to Jelica Addamo. The email read as follows:

Hi Mei,

Can you please organise an invoice for Winslow as per Cesar' [sic] request below. This is to be sent to Peter Smolko [sic] and a copy scanned to Cesar.

The amount is to be for: \$45,396.00 being 12 months membership for 97 members. Invoice is to be made out for Training/Red Card/OHS etc not Membership.

When money comes in, it will be divided evenly against all members at Winslow as membership payments.

28. Ben Davis, on the basis of his experience at the AWU, said that the request to scan a copy of the invoice to Cesar Melhem 'would have been' made because Cesar Melhem asked to see it.³⁷ Angela Leo's evidence was that she could not recall the circumstances of this email, but assumed that she had been directed to organise that invoice by

³⁵ Lin MFI-1, 4/6/15, p 2.

³⁶ Lin MFI-1, 4/6/15, p 3.

³⁷ Ben Davis, 4/6/15, T:643.26-31.

Cesar Melhem.³⁸ Her assumption appeared to be based on her evidence that at this time she was not familiar with ‘Company Paid’ (that is the AWU practice, in relation to some companies, of invoicing employers for membership fees of their employees).³⁹ Angela Leo said that the person responsible for Company Paid was Jelica Addamo. Jelica Addamo’s evidence was that she assumed that Angela Leo’s email to Mei Lin was prompted by her (Jelica Addamo) telling Angela Leo that Jelica Addamo was not the person responsible for sending such invoices.⁴⁰

29. If the evidence of Angela Leo and Jelica Addamo is accepted, then, according to Mei Lin, the instruction to issue the invoice came either from Cesar Melhem or his assistant, Rebecca Eagles. Even if it was Rebecca Eagles, it is safe to infer from the nature of her position and the fact that Cesar Melhem was to receive a copy of the invoice that she was acting on Cesar Melhem’s instructions. The evidence of Angela Leo and Jelica Addamo is corroborated by the terms of Angela Leo’s email to Mei Lin. That email states that the invoice is to be issued ‘as per Cesar’s request’. That indicates that Cesar Melhem instructed Angela Leo to arrange for the issue of an invoice in the terms described in that email. The very terms of the email (‘[i]nvoice is to be made out for Training ... not Membership’) indicate that Cesar Melhem must have known that he was giving an instruction to issue a false invoice.

³⁸ Angela Leo, witness statement, 21/10/15, para 28.

³⁹ Angela Leo, 21/10/15, T:792.18-28, 793.7-19.

⁴⁰ Jelica Addamo, witness statement, 21/10/15, para 18.

30. There is further evidence of Cesar Melhem's role in the creation of this invoice. A credit note was issued in respect of the invoice issued on the day of this email. The credit note is in the same terms as the invoice, however, beneath the description red card training and OHS training in 2009-2010, there appears 'REVERSE IT AS PER CESAR MELHEM' together with handwritten words 'only pay six months membership first'.⁴¹ It is apparent from the credit note that, again, Cesar Melhem was intimately involved in the creation of these invoices.
31. As a result of that credit note being issued, a further invoice was issued, also dated 21 January 2010, with the same false description, but for an amount of \$23,166 inclusive of GST.⁴² That invoice was paid by Winslow.
32. All of the above matters indicate, without any real doubt, that Cesar Melhem caused the above invoice to be created and issued, knowing that it was false.
33. Cesar Melhem's evidence was that he could not recall whether he did or did not give Angela Leo instructions to prepare this invoice.⁴³ It is not entirely clear whether Cesar Melhem accepted that this and other similar invoices were false. He seemed to suggest at times that they were not false because at some point training of some kind was carried out.⁴⁴ However he also said at another point that the invoices were

⁴¹ Lin MFI-1, 4/6/15, p 1.

⁴² Melhem MFI-7, 2/6/15, p 70.

⁴³ Cesar Melhem, 22/10/15, T:1003.42-44, 1005.28-32.

⁴⁴ Cesar Melhem, 22/10/15, T:1004.24-37, 1005.1-26.

‘incorrectly described’ and that he advised Ben Davis to correct them.⁴⁵ Ben Davis did not give evidence that Cesar Melhem was involved in the process of correcting these invoices.⁴⁶ Nothing to that effect was put to Ben Davis by counsel for Cesar Melhem. There is no evidence at all to support the proposition. It cannot be accepted.

34. Cesar Melhem submitted that this is an unfair basis on which to draw any inference against him because of his complaints that he had no access to the documents of the AWU.⁴⁷ That submission is unpersuasive when it is to be recalled that, after giving his evidence on 1 June 2015, it was made plain to Cesar Melhem that it was open to him to put on a statement or seek further documents. He in fact did put on further statements in relation to different topics. But he did not seek to adduce any further evidence on the present topic.

35. Cesar Melhem also stated that his involvement should be questioned due to the fact that the invoices continued to be issued by Ben Davis after Cesar Melhem left the AWU.⁴⁸ That is a highly unpersuasive submission. On no view can it excuse what occurred prior to Ben Davis’ time as Secretary. But, in any event, Ben Davis expressed his discomfort with the arrangement of Winslow paying for membership fees from about 2007 or 2008 when he commenced as organiser for Winslow. But he was directed by Cesar Melhem to continue the practice.⁴⁹ Cesar Melhem left the AWU in May 2013. One single

⁴⁵ Cesar Melhem, 22/10/15, T:1004.37-45.

⁴⁶ Cf. Ben Davis, 4/6/15, T:632.4-34, 644.20-645.46.

⁴⁷ Submissions of Cesar Melhem, 20/11/15, ch 8, para 3.

⁴⁸ Submissions of Cesar Melhem, 20/11/15, ch 8, para 4.

⁴⁹ Ben Davis, 4/6/15, T:626.14-35.

invoice was issued after that time, dated 14 March 2014. Ben Davis gave evidence that he did not know about the practice of invoicing for training until this invoice was drawn to his attention by Mei Lin. That invoice was reversed.⁵⁰

36. Counsel assisting urge a finding that the appropriate inference to draw is that the same practice was followed in relation to all of the invoices from March 2008 as was followed in relation to the invoices of 21 January 2010 and the two invoices dated 12 May 2011. That is, that the falsity of all of these invoices was the result of a deliberate decision by Mei Lin, acting on the instructions of Cesar Melhem, and that Cesar Melhem had knowledge of their falsity at the time they were issued and paid. Michael Chen's evidence was that generally item descriptions on invoices were drawn from the terms of invoice request forms.⁵¹

37. Counsel assisting's submissions are accepted. There is no reason to think that the process for the issuing of the other false invoices was any different from the process involved in the issuing of the three false invoices discussed in detail above. Having regard to this evidence, to the evidence in relation to the particular invoices discussed above, and to the close relationship between Cesar Melhem and Winslow representatives discussed below, it is likely that the practice in relation to all of the invoices during this period was the same.

⁵⁰ Ben Davis, 4/6/15, T:628.17-29; Melhem MFI-7, 2/6/15, p 87.

⁵¹ Michael Chen, witness statement, 21/10/15, para 12.

Why were false invoices sent and paid?

38. No witness gave any explanation as to why the false invoices were created. Peter Smoljko said that he had no idea why the invoicing practice had changed.⁵² He said that no one had discussed this change with him.⁵³ Peter Smoljko accepted that various invoices that he received and for which he authorised payment were false to his knowledge at the time.⁵⁴ Dino Strano also could give no explanation for why it was that false invoices commenced to be provided in 2008.⁵⁵ Cesar Melhem, as stated above, endeavoured to contend that the invoices were not false.
39. The possibility that the false invoices were just accidental can be dismissed. They were produced as part of a course of conduct extending over a long period. The persons who engaged in it were very capable and intelligent men. Dino Strano described Winslow's process in ensuring that the numbers of employees and amounts on the invoices were correct as 'pretty meticulous'.⁵⁶ This process must have revealed the falsity of the invoices. It was not suggested in submissions by any affected party that the false invoices were the result of some kind of accident or clerical mistake.

⁵² Peter Smoljko, 4/6/15, T:573.40-46, 574.1-2.

⁵³ Peter Smoljko, 4/6/15, T:578.27-34.

⁵⁴ Peter Smoljko, 4/6/15, T:574.35-47, 575.1-47, 577.22-47, 578.1-7, 579.43-47, 580.1-2 582.21-47, 583.1-25, 588.44-47, 589.1-17, 590.7-31.

⁵⁵ Dino Strano, 3/6/15, T:538.21-27, 540.26-38.

⁵⁶ Dino Strano, 3/6/15, T:538.29-38.

40. One possible reason for the creation of the false invoices was suggested by counsel assisting. Each false invoice was described as a 'tax invoice'. Expenses incurred by a company in the course of business in connection with red card training and/or OHS training would, ordinarily, be tax deductible.⁵⁷ Expenses incurred in providing training to workers are properly described as losses or outgoings incurred in gaining or producing assessable income, and/or necessarily incurred in carrying on a business. Counsel assisting submitted that payment of membership fees on behalf of employees is not so easily characterised. Was the purpose of issuing the false invoices, or one part of it, to enable Winslow to claim a tax deduction for training?
41. In fact, tax deductions were claimed for the payments. Dino Strano denied that he gave the people working in Winslow's accounts department any instructions to claim deductions in respect of the false invoice.⁵⁸ However, no specific instructions would have been required having regard to what is apparent on the face of the invoices. Absent any instruction to the contrary, a person working in the Winslow accounts department would be entitled to think (and would have no reason to think otherwise) that the invoices were in fact for training and to treat them in Winslow's accounts accordingly.
42. That is what seems to have happened. Dino Strano said in oral evidence that Winslow did not claim a deduction for training expenses but rather recorded them as membership in its accounts.⁵⁹ Material provided through Winslow's legal representatives subsequent to his

⁵⁷ See *Income Tax Assessment Act 1997* (Cth), s 8-1.

⁵⁸ Dino Strano, 3/6/15, T:545.22-36.

⁵⁹ Dino Strano, 3/6/15, T:538.8-15.

hearing indicates that in fact the membership payments from 2008-2013 were recorded in Winslow's accounts as training expenses.⁶⁰ These expenses were then claimed as tax deductions. It would appear that what was presented to the ATO was a lump sum amount said to be a deductible expense, without any precise identification of the particular components of that amount. Thus, it would appear, the payments were claimed and, presumably, allowed by the ATO, as deductible tax expenses but not specifically as expenses for training.

43. There was a debate in submissions about whether payments of union fees were tax deductible. Winslow submitted that they were. It would not follow from acceptance of this submission that the purpose of the false invoices was not to assist in claiming a tax deduction. Neither Winslow nor its witnesses offered any explanation for the false invoices. It is quite conceivable that a view might have been taken that there was sufficient doubt about whether union membership fees were deductible to make it desirable that invoices should be created suggesting the payments were for training. The evidence does not establish that this was the case. But a finding that union membership fees are, as a matter of law, tax deductible would not exclude that possibility.
44. The evidence is not, in any event, sufficient to compel acceptance of Winslow's argument that the payments of membership fees that it made were payments 'necessarily incurred' in the course of carrying on Winslow's business within the meaning of s 8-1(1)(b) of the *Income Tax Assessment Act 1997* (Cth). What is required under either limb of

⁶⁰ AWU MFI-2, 23/10/15, p 130.

s 8-1 of the ITAA is a connection between the expense and ‘the particular process of derivation of income’, or a demonstration that the expense is ‘reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of the business ends of the business’.⁶¹ That is an objective test.⁶² Neither the evidence nor Winslow’s submissions explains the connection between business and expense in the present case. If the connection was gaining favourable treatment from the AWU (and, as set out below, Winslow was treated very well by the AWU) then that raises questions about whether the payments were corrupt commissions. In other circumstances, possibly, an arrangement of this kind might be justified on the basis that it was thought that it would lead to a more productive workforce. But, as will be seen, it is doubtful how many workers knew they were members: most of the workers for whom membership fees were paid did not complete membership applications.⁶³

45. Ultimately counsel assisting’s submission was that, in the absence of any credible explanation for the false invoices, it must be inferred that both the AWU and Winslow believed that they were obtaining an advantage out of the false invoices. That submission is accepted. In fact, both parties did benefit. The AWU obtained money (and the ‘Membership’ Code on each invoice ensured that, notwithstanding the falsity of the invoice, this money was treated as membership income). Winslow obtained accounting records which formed the basis of its claim for tax deductible expenses.

⁶¹ See *Spriggs v Commission of Taxation* (2009) 239 CLR 1 at [58] and [75].

⁶² *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 49 FLR 183 at 208 per Deane and Fisher JJ.

⁶³ See the discussion in Submissions of Counsel Assisting, 6/11/15, ch 8, paras 56-60.

Possible false accounting offences

46. It is convenient to set out, again, the terms of s 83 of the *Crimes Act* 1958 (Vic):

False Accounting

- (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another-
 - (a) Destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
 - (b) In furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in material particular-

He is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

- (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

47. It is apparent that the invoices issued by the AWU to Winslow from March 2008 were records or documents made or required for any accounting purpose within the meaning of s 83(1)(a). It is also apparent that whoever prepared the invoices, and whoever concurred in their preparation, falsified them within the meaning of s 83(1)(a). That follows from the terms of s 83(2).
48. The principal question is whether the persons who prepared the invoices (or concurred in their preparation) did so 'dishonestly, with a

view to gain for himself or another' within the meaning of s 83(1). That is the principal focus of the submissions of Cesar Melhem and Winslow. Some consideration of the case law regarding this section appears in the Thiess John Holland case study in Chapter 10.3 above.

Cesar Melhem and AWU

49. Counsel assisting submitted that Cesar Melhem acted dishonestly within the meaning of this section because, knowing that no training had been or would be provided to Winslow, he caused the invoices to be issued claiming payment for such training. He did so with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.
50. Cesar Melhem complained that it was not put to him that he acted dishonestly in relation to the invoices.⁶⁴ However, procedural fairness did not require that precise question to be put. That is because it was put to him, more than once, that various of the invoices in question were false to his knowledge at the time.⁶⁵ It was also put to him that for years there was a deliberate process of falsification of invoices.⁶⁶ He was given ample opportunity to explain the invoices, both in evidence and in submissions. This was more than sufficient.
51. The submission that there was dishonesty because the relevant people at Winslow knew that no training in fact had been provided, and were

⁶⁴ Submissions of Cesar Melhem, 20/11/15, para 5.

⁶⁵ See, for example, Cesar Melhem, 2/6/15, T:352.22-25; 354.14-17; Cesar Melhem, 22/10/15, T:1005.24-32.

⁶⁶ Cesar Melhem, 22/10/15, T:1007.25-44.

not themselves deceived by the invoices has been considered and rejected in the context of the Thiess John Holland case study in Chapter 10.3 above. Section 83 does not require proof of deception (in contrast, for example, to s 82 of the *Crimes Act 1958* (Vic). What is required is dishonesty and causing a document to be created making a claim for payment on a false basis may be sufficient for that purpose.

52. The evidence regarding Cesar Melhem's role in the creation and issue of the false invoices has already been reviewed. As stated, that evidence indicates not only that the invoices were false, but that they were issued on Cesar Melhem's instruction in circumstances where he knew they were false. The question of the purpose of the invoices has also been considered. The only rational possibility is that Cesar Melhem caused the invoices to be issued with a view to making a gain for the AWU.
53. In these circumstances, Cesar Melhem may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation of the false Winslow invoices.
54. Section 84 of the *Crimes Act 1958* (Vic) makes it plain that offences under s 83 can be committed by bodies corporate. For reasons already explained in the Cleanevent case study in Chapter 10.2 above, Cesar Melhem's conduct is to be attributed to the AWU such that the AWU itself may have committed an offence under s 83.

55. Both Peter Smoljko and Dino Strano authorised payment of the invoices, at least from 2009. Peter Smoljko accepted that he authorised the payment of invoices that were false to his knowledge at the time. That is, the invoices dated 1 June 2009;⁶⁷ 21 January 2010;⁶⁸ 10 June 2010;⁶⁹ 1 June 2011;⁷⁰ 14 May 2012;⁷¹ and 6 March 2013.⁷²
56. Dino Strano wrote the cheques paying these invoices on behalf of Winslow, and his initials appear on the invoices dated 1 June 2011, 1 June 2011 and 14 May 2012. Drafts of the invoices dated 10 June 2010 and 6 March 2013 were emailed directly to him by the AWU.⁷³ Dino Strano would not accept that he realised at the time of receiving these invoices that they were false. On some occasions, he said that he could not recall what his state of mind was.⁷⁴ On other occasions, he appeared to seek to take refuge in the fact that the invoices, at least from 2010, had an item code 'membership'.⁷⁵

⁶⁷ Peter Smoljko, 4/6/15, T:575.3-47.

⁶⁸ Peter Smoljko, 4/6/15, T:577.22-578.7.

⁶⁹ Peter Smoljko, 4/6/15, T:579.35-580.2.

⁷⁰ Peter Smoljko, 4/6/15, T:582.21-583.25.

⁷¹ Peter Smoljko, 4/6/15, T:588.44-589.17.

⁷² Peter Smoljko, 4/6/15, T:590.7-31.

⁷³ Melhem MFI-7, 2/6/15, pp 72, 83.

⁷⁴ See for example, Dino Strano, 3/6/15, T:543.6-44.

⁷⁵ See for example, Dino Strano, 3/6/15, T:544.45-545.2, 547.10-13.

57. This evidence cannot be accepted. Winslow did not submit that it should be.⁷⁶ The falseness of the invoices must have been apparent to Dino Strano at the time that he authorised their payment. As has already been observed, he was a very capable and intelligent man and he described Winslow's process in ensuring that the numbers of employees and amounts on the invoices were correct as 'pretty meticulous'.⁷⁷ He must have known the invoices were false when he approved them and paid them.
58. Counsel assisting submitted that Peter Smoljko and Dino Strano, and through them Winslow, may have made use of false accounting records within the meaning of s 83(1)(b) dishonestly with a view to a gain for Winslow and/or the AWU. Their use of the invoices was dishonest because it was done in circumstances where they knew the descriptions on the invoices to be false. They used the false invoices, with a view to causing a gain for Winslow by causing them to be passed on, in the way described by Dino Strano,⁷⁸ to Winslow's accounts team with the result that training expenses were recorded in Winslow's accounts and tax deductions claimed. Secondly, it was submitted, they used the false invoices with a view to causing a gain to the AWU by paying the AWU in circumstances where they knew that, due to their falsity, the AWU had no entitlement to be paid on those invoices.
59. Winslow responded in a number of ways.

⁷⁶ Cf. Submissions of Winslow Constructors, 20/11/15, paras 4-7.

⁷⁷ Dino Strano, 3/6/15, T:538.29-38.

⁷⁸ Dino Strano, 3/6/15, T:545.38-45.

60. Winslow argued that the payments were deductible expenses within the meaning of s 8-1 of the *Income Tax Assessment Act 1997* (Cth). This submission has been considered and rejected above. It may also be observed that it would not follow from acceptance of the submission that no offence was committed under s 83. One difficulty is that s 83 does not require that Winslow in fact made a gain from the false invoices. The question (relevantly) is whether Winslow, Dino Strano and/or Peter Smoljko made use of the false invoices dishonestly ‘with a view to’ a gain for Winslow. In other words, the question is whether there was a purpose or intention of obtaining a gain, regardless of whether that purpose was in fact achieved. As observed above, it is inconceivable that Dino Strano and Peter Smoljko would have received the invoices (and in many cases argued with the AWU about the amounts stated on them), approved and paid them, and passed them on to Winslow’s internal accounting staff unless they were doing so with a view to making a gain for Winslow.
61. Another reason the above submission does not assist Winslow is that it is no answer to the proposition that the invoices were used with a view to making a gain for the AWU. The AWU had no entitlement to be paid for training. Yet, knowing this, Peter Smoljko and Dino Strano caused Winslow to pay for training.
62. Nor would acceptance of the above submission have the result that the requirement in s 83(1)(b) that a person ‘[i]n furnishing information for any purpose produces or makes use of’ the false invoice would not be met. That requirement was clearly satisfied in the present case because the invoices were provided by Dino Strano and Peter Smoljko to Winslow’s internal accountants who prepared Winslow’s general

ledgers.⁷⁹ It is also apparent that this had further consequences. It may be inferred that Winslow's financial reports were prepared by external accountants. It may also be inferred that Winslow's tax returns also were prepared by external accountants. It is hard to see how Winslow's external advisers could have found out about the true nature of the payments if its internal accountants did not know and if the invoices themselves disguised the position.

63. Winslow complained that it was not put to Dino Strano or Peter Smoljko that they had the requisite belief that the invoices were to be used with a view to making a gain for the AWU or Winslow, and submitted that the evidence does not establish that that they were used with such a view. The evidentiary position has been dealt with above. For the reasons already given, the evidence does establish those matters. The question of the purpose and use of the invoices was canvassed sufficiently with Dino Strano and Peter Smoljko. In particular:

- (a) Dino Strano was shown invoice 022110⁸⁰ and asked whether Winslow claimed a tax deduction for expenses in connection with red card and OHS training. He answered by claiming 'we have it as membership in our accounts'.⁸¹ As indicated above, this answer was incorrect.

⁷⁹ See Dino Strano, 3/6/15, T:542.1-34, T:545.27-42.

⁸⁰ Melhem MFI-7, 2/6/15, p 70.

⁸¹ Dino Strano, 3/6/15, T:538.8-15.

- (b) Dino Strano was asked whether he could offer any explanation for why the AWU was sending the false invoices. He could not.⁸²
- (c) Dino Strano was asked whether he could offer any explanation for why Winslow was paying the false invoices. He answered: '[b]ecause they were memberships and we've been paying them since the 1990s and that's the practice in our business'.⁸³ This, of course, was no explanation at all.
- (d) Dino Strano was asked whether his accounts people claimed the amounts on two of the false invoices⁸⁴ as a deduction. He said that he did not know. He was asked how his accounts people would have known not to claim the amounts on those invoices as deductions. He said 'I'm not across that sort of detail'. He denied instructing his accounts people to claim the amounts as deductions.⁸⁵
- (e) Peter Smoljko was asked whether he was able to shed any light on whether the amount paid by Winslow in respect of invoice 022110 was claimed as a deduction. He said he had no knowledge.⁸⁶

⁸² Dino Strano, 3/6/15, T:540.26-38.

⁸³ Dino Strano, 3/6/15, T:540.40-44

⁸⁴ Melhem MFI-7, 2/6/15, p 77-78.

⁸⁵ Dino Strano, 3/6/15, T:545.22-36.

⁸⁶ Peter Smoljko, 4/6/15, T:578.36-40.

(f) Peter Smoljko was asked whether Winslow had a practice of claiming tax deductions for expenses incurred by it in connection with OH&S training. He said ‘That would have been an accounts function. I have no idea how they would have handled it’.⁸⁷ He went on to say that he had no knowledge of whether the amount on the invoice dated 19 March 2008 was claimed as a tax deduction and denied having any discussions with anyone from Winslow or the AWU about that matter.⁸⁸

64. The substance of the evidence of Peter Smoljko and Dino Strano was thus that they did not know why the invoices were false and did not know what effect their falsity had within Winslow – save that Dino Strano claimed, incorrectly, that the amounts on the invoices were recorded as membership in Winslow’s accounts. The issue is whether the evidence is sufficient to warrant findings that the various elements of s 83 may have been satisfied or whether, instead, to make no finding.

65. It is sufficient. Dino Strano and Peter Smoljko knowingly made use of false invoices (by passing them on to their internal accounts staff) and in doing so must have had a view to making a gain for Winslow. They must also have paid the invoices with a view to making a gain for the AWU because they knew at the time that the invoices falsely claimed payment for training. The requirement of dishonesty is satisfied by knowledge of the falsity of the invoices.

⁸⁷ Peter Smoljko, 4/6/15, T:573.13-33.

⁸⁸ Peter Smoljko, 4/6/15, T:573.22-33.

66. Accordingly, Dino Strano and Peter Smoljko both may have contravened s 83 of the *Crimes Act* 1958 (Vic).
67. Counsel assisting submitted that their conduct should be attributed to Winslow. That submission does not appear to be contradicted. It is correct. Thus Winslow, too, may have contravened s 83 of the *Crimes Act* 1958 (Vic).
68. It is appropriate also to refer the material in this Chapter for consideration by the Commissioner for Taxation.

Possible contraventions of the *Fair Work (Registered Organisations) Act* 2009 (Cth)

69. Counsel assisting also submitted that the conduct of Cesar Melhem in relation to the creation of these invoices fell short of the standards to be expected of a person in his position. The submission was that, for the same reasons identified as supporting a possible offence under s 83 of the *Crimes Act* 1958 (Vic), Cesar Melhem's conduct, in so far as it occurred after the commencement of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**), may have amounted to a contravention of his obligations under ss 285, 286 and 287 of that Act.
70. It follows from the findings made above in connection with s 83 that the above submissions must be accepted. The possible application of s 285 (due diligence) and s 286 (good faith and proper purpose) is self-evident. Section 287 (use of position) may have been contravened because, for the reasons identified above, the false invoices were used

to gain an advantage for the AWU, namely, an increase in revenue and, ultimately, membership numbers.

71. Cesar Melhem submits that the defence under s 285(2) may have application.⁸⁹ That subsection has the effect that there is no contravention of s 285 if the officer in question makes, in substance, a bona fide business judgment that his or her conduct is in the best interests of the organisation. There are two fatal difficulties to the application of that defence in the present context. First, Cesar Melhem's position in evidence was, for the most part, that the invoices were not false. He cannot at the same time say credibly that he made a conscious decision to allow false invoices to be issued, believing that to be in the best interests of the AWU. Secondly, the concluding words of s 285(2) have the effect of excluding a belief that conduct is in the best interests of the organisation if the belief 'is one that no reasonable person in his or her position would hold'. Any belief that the issue of the false invoices was in the best interests of the AWU would fall into that category. Accordingly, Cesar Melhem's submission is rejected.

D – MEMBERSHIP ISSUES

72. The above arrangements resulted in falsely inflated membership numbers. The relevant provisions of the AWU rules and their effects have been considered in the Cleanevent cast study, in Chapter 10.2.

⁸⁹ Submissions of Cesar Melhem, 20/11/15, ch 1, para 75.

Membership numbers falsely inflated

73. The effect of rules 9 and 10 of the AWU Rules is that a person only becomes a member of the AWU after, amongst other things, he or she makes a membership contribution payment. As discussed in the Cleanevent case study in Chapter 10.2, there are difficulties with a person becoming a member by virtue of a payment made by his or her employer. Quite apart from difficulties of that kind, the membership arrangement between the AWU and Winslow inflated membership numbers for two reasons.
74. *First*, amounts less than the required amounts under rules 9 and 10 of the AWU rules were paid by way of membership contributions. It is apparent on the face of at least two Winslow invoices that the rates charged by the AWU to Winslow per member were less than those prescribed by the AWU National Executive. For example, the invoice sent on 10 June 2010 for \$44,401.50 inclusive of GST was for 115 members at a rate of \$386.10,⁹⁰ however the prescribed rates for adults in fulltime employment at this time were \$450 per person.
75. Thus, in the case of the 115 persons referred to in the invoice of 10 June 2010, those persons would not have become members at all if the payment was applied as their first membership contribution. In the case of those persons who were already members, the effect of the payment depends upon the operation of rule 15(3). That rule provides

⁹⁰ Melhem MFI-7, 2/6/15, p 75.

that a member is deemed to have resigned if he or she has not paid the annual contribution for a continuous period of 24 months.⁹¹

76. The *second* reason membership numbers were inflated was that the requirement under rule 9 of the AWU rules to obtain from the employees signed membership applications was largely ignored. Angela Leo, who has been Team Leader of the Membership department since 30 September 2009, gave evidence that it was the practice of the membership department, in relation to Company Paid membership, to enter names into the membership roll on the basis of lists provided by the company to the AWU, even if persons on the list had not filled out membership applications.⁹²

77. The Commission has performed an analysis of the membership status of 38 named employees provided by Winslow to the AWU on 28 May 2012.⁹³ This list was sent by Peter Smoljko to Cesar Melhem. On the same day, Cesar Melhem forwarded the list to Angela Leo stating ‘Add as new members company paid’.⁹⁴ There are 38 names on the list. Of those 38 names all but two⁹⁵ are recorded as having joined the AWU as members on 29 May 2012.

⁹¹ AWU MFI-2, 23/10/15, p 69.

⁹² Angela Leo, 21/10/15, T:785.33-44, 796.37-41.

⁹³ See the list at Melhem MFI-7, 2/6/15, p 193.

⁹⁴ Melhem MFI-7, 2/6/15, p 192.

⁹⁵ Michael Allan, recorded as having joined on 17 March 2011 (and for whom a membership form has been produced dated 15 February 2011, lodged whilst he was an employee of Alcoa); and Pierre Loverdos, recorded as having joined on 16 July 2010, and for whom a membership form has been produced dated 14 July 2010, completed whilst he an employee of ‘Hoare Bros’.

78. The list appears to relate to the invoice of 14 May 2012, for \$74,218.18. The invoice cannot have related to only the 38 persons named on the list: if that were the case, the membership fees charged would have been \$1,953.11 per person. It would thus seem that the 38 persons were those of Winslow's employees who had passed their probationary period since the date of the last invoice.
79. Membership application forms have been produced in relation to only 10 of the 38 names. Of those 10 application forms, 3 were submitted when the person in question was employed by a company other than Winslow.⁹⁶ The remaining seven application forms were dated either 3 July 2012 or 10 July 2012.
80. A similar analysis has been performed by the Commission in respect of a list of 254 full names prepared by Winslow on 10 April 2013.⁹⁷ A list, presumably the list of 254, was provided by Peter Smoljko to the AWU on or around 1 July 2013.⁹⁸ That is apparent from the email from Peter Smojko to Andrea Richardson of 6 March 2013 with a complete list of Winslow Constructors employees in an order of service.⁹⁹ Membership application forms have been produced for only

⁹⁶ Two of the three are Michael Allan and Pierre Loverdos: see the footnote above. Two application forms were produced for the third, Daniel Ernesti, one dated 1 July 2011 whilst he was an employee of Downer and one dated 30 June 2008 whilst he was an employee of 'Skilled'.

⁹⁷ The list appears at Melhem MFI-7, 2/6/15, pp 160-165.

⁹⁸ Melhem MFI-7, 2/6/15, p 137.

⁹⁹ Melhem MFI-7, 2/6/15, p 158.

60 of those 254 names. Of those 60 persons, 15 of the application forms were provided whilst they were not employed by Winslow.¹⁰⁰

81. Thus, as with the arrangement with Cleanevent, the arrangement with Winslow has resulted in a significant number of persons becoming recorded as members of the AWU when in truth they are not members under the rules, and in circumstances where they may well not have known whether or not they were members.
82. There was no dissent in submissions from the proposition that membership numbers were falsely inflated. Counsel assisting submitted, as they did in relation to the Cleanevent case study, that the consequence is that the AWU may have contravened s 230(2) of the FW(RO) Act in that the AWU Vic Branch entered in the register of its members names of persons who were not members, namely, at least, the Winslow employees referred to above for whom there was no membership application.
83. The AWU's contention that the conduct of Cesar Melhem should not be attributed to it for the purposes of this section has been considered and rejected in the Cleanevent case study in Chapter 10.3.
84. It follows that Counsel assisting's submission is accepted: the AWU may have contravened s 230 of the FW(RO) Act.

¹⁰⁰ AWU MFI-6, 6/11/15, pp 3-7.

E – UNSATISFACTORY ASPECTS OF THE RELATIONSHIP BETWEEN THE AWU AND WINSLOW

85. Ben Davis, the current State Secretary of the AWU Victoria said in evidence that he is uncomfortable with arrangements of the kind that the AWU and Winslow had because ‘I think employers paying membership dues on that scale profoundly weaken us in the workplace’. Ben Davis amplified that to include reducing the union’s bargaining power when bargaining with the employer in question on a particular EBA.¹⁰¹ In the ACT CFMEU case study in hearings in Canberra, the NSW Branch secretary of the CEPU, David Broadley, agreed with these sentiments.

86. David Broadley accepted that payments of union dues by employers inhibit the ability of the Union to negotiate on behalf of workers because the union ‘can’t go in as hard’.¹⁰² As noted previously in the Cleanevent case study in Chapter 10.2, David Broadley made an additional point which amounts to the proposition that those payments undermine the concept of voluntary association. He said:¹⁰³

...it’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...

87. The correctness of the views of Ben Davis and David Broadley is borne out by an examination of some of the dealings between Winslow and the AWU. These matters set out below also make a nonsense of

¹⁰¹ Ben Davis, 4/6/15, T:625.44-626.12.

¹⁰² David Broadley, 23/7/15, T:945.25-31.

¹⁰³ David Broadley, 23/7/15, T:945.3-46.

any suggestion that Winslow did not make any gain out of the membership arrangement with the AWU. What follows draws largely from the submissions of counsel assisting. There was little if any dispute about the facts, although on occasion there was debate about what inferences should be drawn from them.

Disclosure to Winslow of material obtained during collective bargaining with a competitor

88. One of Winslow's competitors was BMD Constructions Pty Ltd (**BMD**) was. Like Winslow, BMD entered into EBAs with the AWU. In contrast to Winslow, BMD had a workforce with approximately 50% or less union members.
89. BMD and the AWU entered into a collective agreement in 2007 which had a nominal expiry date of 30 September 2010.¹⁰⁴ BMD and the AWU negotiated a further EBA in 2010. That agreement was executed by the AWU and BMD on 8 October 2010 and approved by Fair Work Australia on 2 February 2011 (**2010 BMD EBA**).¹⁰⁵ On 28 September 2010, Cesar Melhem sent Peter Smoljko three emails in fairly quick succession. The first two emails forwarded to Peter Smoljko copies of the EBA that had been or was about to be agreed between the AWU and BMD and a copy of a notice to BMD employees updating them on

¹⁰⁴ BMD Bundle, 29/5/15, p 2, cl 3.

¹⁰⁵ BMD Bundle, 29/5/15, pp 17, 43-44.

the EBA negotiations.¹⁰⁶ The third email, sent minutes later, attached what Cesar Melhem described as 'Final EBA'.¹⁰⁷

90. Peter Smoljko forwarded to Dino Strano Cesar Melhem's third email. In his email to Dino Strano, Peter Smoljko stated:¹⁰⁸

Cesar has finally delivered, here is the BMD EBA!!

P.S He had to use the excel spreadsheet that I developed for you to help drive this outcome!

91. Peter Smoljko also forwarded to Dino Strano the second of Cesar Melhem's emails, with the comment 'this should bring a smile to your face!'¹⁰⁹

92. Dino Strano did not share Peter Smoljko's enthusiasm. He said in an email in reply:¹¹⁰

You don't know me well enough. Replace smile with **horror** because this will make BMD less competitive and for a short time advantage us, but you're smart enough to know what's hurtling towards us in 18 months and it could wipe out all our competitive advantage and give all our competitors who the AWU does not cover the biggest boost of all time. Ready yourself for battle and lets develop a strategy on how we will preserve our ability to stay competitive and provide continuity for all our people. (emphasis in original)

93. Peter Smoljko forwarded his comments to Dino Strano along with the second of Cesar Melhem's emails, to Rohan Davidson, the General Manager of Winslow. Rohan Davidson responded to Peter Smoljko's

¹⁰⁶ Melhem MFI-7, 2/6/15, pp 221-226, 261.

¹⁰⁷ Melhem MFI-7, 2/6/15, p 227.

¹⁰⁸ Melhem MFI-7, 2/6/15, p 227.

¹⁰⁹ Melhem MFI-7, 2/6/15, p 221.

¹¹⁰ Melhem MFI-7, 2/6/15, p 221.

email asking ‘Peter, from this info, can you please work up what their labour rate would be on a project valued at \$10m’.¹¹¹

94. As previously indicated, the EBA between BMD and the AWU was not signed until 8 October 2010, and was not approved by the Fair Work Commission until 2 February 2011. Andrew Marcos, the Director Human Resources and Administration at BMD, said that he did not authorise Cesar Melhem to provide any of the material regarding the BMD EBA process to Winslow.¹¹² He did not know, until he heard Cesar Melhem’s evidence at the Commission, that this material in fact had been provided.¹¹³ Andrew Marcos said that to his knowledge Cesar Melhem had never provided BMD with materials of this kind in relation to negotiations at Winslow or any of BMD’s other competitors were conducting.¹¹⁴
95. Jeff Gallus, BMD General Manager, gave evidence that he had never received an EBA or a competitor’s EBA in the whole time he had been in the industry. He said that only way he had ever received a competitor’s EBA was from downloading it from the Fair Work website after it had become a certified document.¹¹⁵
96. The evidence of Andrew Marcos and Jeff Gallus is accepted. It is contrary to Cesar Melhem’s claim that BMD ‘would have received material from me about what we’re doing with Winslow. So it’s not

¹¹¹ Melhem MFI-7, 2/6/15, p 218.

¹¹² Andrew Marcos, 2/6/15, T:409.25-41.

¹¹³ Andrew Marcos, 2/6/15, T:409.43-410.28.

¹¹⁴ Andrew Marcos, 2/6/15, T:410.39-46.

¹¹⁵ Jeff Gallus, 2/6/15, T:417.32-41.

uncommon. So it's not secret information. We share.'¹¹⁶ The evidence of Andrew Marcos is also contrary to the general thrust of Cesar Melhem's attempt to defend his conduct. That may fairly be described as a claim that it was part of his job to ensure that there was 'a level playing field' and 'similar outcomes' to members in the industry.¹¹⁷ Once an enterprise agreement has been approved by the Fair Work Commission it becomes publicly available information. Before that time however, the information is not publicly available. Dino Strano accepted that the provision of this information in advance gave Winslow a competitive advantage.¹¹⁸ The importance of the information to Winslow is demonstrated by Rohan Davidson's email to Peter Smoljko. It gave Winslow approximately four months advance notice of what BMD's labour costs would be under its new enterprise agreement. It thus gave Winslow an unfair competitive advantage against BMD in pricing any tenders in that four month period.

97. Counsel assisting submit that the Commission should find that disclosure of the BMD EBA material by the AWU to Winslow may have constituted a contravention by the AWU of its obligations to bargain in good faith, and in particular the requirement in s 228(1)(e) of the *Fair Work Act* (2009) (Cth) to refrain from capricious or unfair conduct that undermines collective bargaining. Neither the AWU nor Cesar Melhem responds to the submission. It is correct but it is now too late for any consequences to flow from the contravention.

¹¹⁶ Cesar Melhem, 2/6/15, T:369.20-25.

¹¹⁷ Cesar Melhem, 2/6/15, T:368.39-369.18.

¹¹⁸ Dino Strano, 3/6/15, T:555.29-33.

Comparison of Winslow and BMD EBAs

98. Cesar Melhem's claim that he was delivering a 'level playing field' is belied by the palpable excitement in Peter Smoljko's email to Dino Strano of 28 September 2010. That email strongly suggests that the 'outcome' in the new BMD EBA was something that Cesar Melhem was providing to Winslow. Peter Smoljko told Dino Strano in this email that 'Cesar has finally delivered' and said that Cesar Melhem used a spreadsheet that Peter Smoljko developed to 'help drive this outcome'. It is submitted that the 'outcome' was a set of wages and conditions that gave Winslow a competitive advantage over BMD.
99. A comparison of the wage rates in the 2010 BMD EBA with the rates in the Winslow EBA in force at the time suggests that the 'outcome' of the BMD EBA negotiations was indeed a good one for Winslow. That is apparent from the following matters:
- (a) At the time of the disclosure in September 2010, Winslow employees in Victoria were covered by the Winslow Constructors AWU Agreement 2009-2012 (2009 Winslow EBA) which commenced on 20 November 2009 and had a nominal expiry date of 30 June 2012.¹¹⁹ It was signed by Cesar Melhem on behalf of the AWU and Dino Strano on behalf of Winslow.¹²⁰

¹¹⁹ AWU MFI-11, 6/11/15.

¹²⁰ AWU MFI-11, 6/11/15, p 24.

- (b) The 2009 Winslow EBA and the new BMD EBA can be compared by using the most junior classification under each agreement as an example. Under the 2009 Winslow EBA, a 'new entrant to the industry' is classified as 'TCW' or 'Trainee Construction worker'.¹²¹ Under the 2010 BMD EBA, a new entrant to the industry is classified as 'Level 1' which is defined as 'An employee who has not previously worked within the Industry Classifications defined herein.'¹²²
- (c) At the time the disclosure was made in September 2010, the 2010 BMD EBA provided a new entrant to the industry in Victoria with an hourly rate of \$20.95 per hour. This increased by 2% to \$21.36 from 1 April 2011.¹²³
- (d) At the same time, the 2009 Winslow EBA provided a new entrant to the industry in Victoria with an hourly rate of \$16.19. This increased to \$16.67 from 1 July 2011.¹²⁴
- (e) A comparison of the position for a more senior employee produces similar results. Under the 2010 BMD EBA a backhoe operator is classified as a 'Level 5' and in September 2010 was entitled to \$24.67 per hour increasing by 2% to \$25.16 from 1 April 2011. Under the 2009 Winslow EBA a backhoe operator is classified as 'PO2' and in September

¹²¹ AWU MFI-11, 6/11/15, p 14.

¹²² BMD Bundle, 29/5/15, p 26.

¹²³ BMD Bundle, 29/5/15, pp 27-28.

¹²⁴ AWU MFI-11, 6/11/15, p 14.

2010 was entitled to \$20.51 increasing to \$21.13 from 1 July 2011.¹²⁵

100. Peter Smoljko said that the Excel spreadsheet that he referred to in his email was a document that compared Winslow's rates to other enterprise agreements in the industry.¹²⁶ Peter Smoljko did not accept that he meant to tell Dino Strano that Cesar Melhem had delivered in the sense that he had driven up what BMD had to pay its workforce. He said:¹²⁷

No, he had delivered an enterprise agreement. That's what that would have been about, because you can drive up rates without certifying the agreement. You don't need to do it through an agreement.

101. This explanation is belied by the exclamation marks used by Peter Smoljko in his email, and his other comments to Dino Strano. This indicates that he was obviously pleased, not merely by the fact of there being an EBA, but with what was in that EBA. The only thing conceivably exciting about what was in the EBA from Winslow's point of view was the labour rates and conditions contained in it.
102. Different rates of pay in different EBAs may be explained by different conditions of employment, different company circumstances and different timing of EBA negotiations. However the result of the two agreements was that Winslow employees were paid significantly less than employees of one of its competitors. Looked at another way, a company with what for practical purposes can be described as a 100%

¹²⁵ BMD Bundle, 29/5/15, pp 27-28; AWU MFI-11, 6/11/15, p 14.

¹²⁶ Peter Smoljko, 4/6/15, T:594.45-595.6.

¹²⁷ Peter Smoljko, 4/6/15, T:596.29-32.

unionised work force obtained an EBA with lower pay rates than a company with a workforce of approximately 50% AWU members.

103. Because there was no detailed evidence concerning the 2009 Winslow and 2010 BMD EBA negotiations, counsel assisting submitted that it is not appropriate to make any finding on the question of whether the course of the Winslow negotiations was influenced by the membership arrangement between the AWU and the company. However the possibility that they were so influenced cannot be excluded in the face of arrangements which inevitably weaken the bargaining position of a union. That was the substance of the concern expressed in oral evidence by Ben Davis and David Broadley.
104. Cesar Melhem did not, in his submissions, address these factual matters. He did submit that there is no objective evidence to support the proposition that the AWU's bargaining power was weakened by the payments, or that the workers experienced any detriment as a result of receipt of the payments. Rather, Cesar Melhem asserted that the comparison between the terms negotiated for Winslow workers when compared to BMD workers shows that the Winslow workers benefited.¹²⁸ The evidence referred to does not make good that proposition:¹²⁹

Okay, Winslow Constructors - we have two sets of EBAs with them. One standard enterprise agreement, which is covering the subdivision work, would be similar to the BMD agreement, minus the schedule 2, which I've referred to yesterday.

...

¹²⁸ Submissions of Cesar Melhem, 20/11/15, para 7.

¹²⁹ Cesar Melhem, 2/6/15, T:365.7-24.

Schedule 2, which is the - had the major project element. The reason for that is because over the years we've negotiated a site-specific major project agreement for every single project I know of that Winslow have tendered for, and you will find in the records that there will be certified agreements separately with Winslow Constructors to cover major projects because they've got higher terms and conditions of employment, similar to BMD and other companies who perform major project work.

105. These general assertions are not borne out by the reactions of the Winslow representatives to the 2010 BMD EBA. It is obvious from the exchanges between Dino Strano, Peter Stoljko and Rohan Davidson that the differences between the BMD and Winslow EBAs were, at least in the short term, sufficient to confer a significant competitive advantage on Winslow, indicating that there must have been a reasonable portion of work to which the lower rates available to Winslow applied, and in respect of which Winslow competed with BMD.
106. Winslow submits that the evidence before the Commission is that Winslow did not seek the BMD EBA material from the AWU, and that there is no evidence that Winslow used or obtained any advantage from the receipt of that information.¹³⁰ No submission is made by counsel assisting that a finding should be made against Winslow in this regard. However Winslow's submission cannot be accepted. The evidence outlined above supports a conclusion that Winslow personnel both sought and used the material supplied by Cesar Melhem and that it obtained an advantage at least by reason of the early disclosure of that material.

¹³⁰ Submissions of Winslow, 20/11/15, para 23.

F – CONCLUSIONS

107. The conclusions arising from the above evidence are as follows:

- (a) Cesar Melhem may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation and issue of the false Winslow invoices.
- (b) The AWU may have committed offences under s 83 in respect of the creation and issue of the false Winslow invoices.
- (c) Dino Strano may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation, issue and use of the false invoices.
- (d) Peter Smoljko may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation, issue and use of the false invoices.
- (e) Winslow may have committed offences under s 83 of the *Crimes Act 1958* (Vic) in respect of the creation, issue and use of the false invoices.
- (f) Cesar Melhem may have contravened ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth) in respect of the creation and issue of the false invoices.

(g) The Australian Workers' Union may have contravened s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

108. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
109. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
110. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Dino Strano in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
111. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to

the commencement of a prosecution of Peter Smoljko in relation to possible offences under s 83 of the *Crimes Act 1958* (Vic).

112. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Winslow Constructors Pty Ltd in relation to possible offences under s 83 of the *Crimes Act 1958* (Vic).
113. 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 can be given to the General Manager commencing proceedings against Cesar Melhem for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
114. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to a possible contravention of s 230 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
115. 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 Commissioner for Taxation for consideration of whether tax deductions were properly available in respect of the payments made pursuant to the false invoices.

CHAPTER 10.9

MISCELLANEOUS MEMBERSHIP ISSUES

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A – INTRODUCTION

1. The arrangement between the AWU and Winslow Constructors discussed in the previous Chapter was one of a number of arrangements pursuant to which the employer or another entity paid membership dues for members, rather than the members themselves. This Chapter considers similar arrangements entered into by the AWU with BMD Constructions Pty Ltd, the Australian Netball Players Association, the Australian Jockeys' Association, Geotechnical Engineering Pty Ltd and A J Lucas Pty Ltd.
2. It is likely that there were further arrangements of this kind not dealt with in the evidence before the Commission: Peter Smoljko, for

example, gave evidence of the existence of similar arrangements in respect of Warwick Constructions and Ciccone Constructions.¹

3. No submissions were put forward by affected persons challenging the essential facts outlined in submissions by counsel assisting. What follows is based largely on the submissions of counsel assisting. The particular submissions of the AWU and its officials have been discussed at appropriate places.

B – BMD CONSTRUCTIONS

4. There is a company carrying on business in the civil construction sector named BMD Constructions Pty Ltd (**BMD**). BMD commenced business in 1979 as an urban developer doing subdivisional work. That is, it cleared land to be subdivided, it built roads and installed services before handing the land back to a developer. BMD continues to do that work but its business has since expanded to involve major urban development, and in particular building roads for state governments.²

2007 Invoice

5. On about 28 November 2007, the AWU issued BMD with tax invoice no. 020328 for “*OH&S inspection at various work sites in Victoria*”

¹ Peter Smoljko, 4/6/15, T:568.18-39.

² Andrew Marcos, 2/6/15, T:408.33-409.18; Jeff Gallus, witness statement, 2/6/15, para 4.

for the amount of \$14,300 (**2007 invoice**).³ The invoice was coded OHS COURSE.

6. The invoice was made out to Andy Marcos, a director of BMD. Andy Marcos said that he could he could not recall seeing the invoice and did not recall authorising its payment.⁴ Jeff Gallus at this time was the Construction Manager for BMD in Victoria. In that capacity had overall responsibility for BMD's Victorian sites.⁵ He said that he was not aware of any OHS inspections or OHS courses conducted by the AWU for any BMD sites in Victoria between 2007 and 2010. He said that BMD conducted its own OHS inspections. He said that OHS inspections were also conducted by the Officer of Federal Safety Commissioner.⁶ Cesar Melhem said that he did not have personal knowledge of whether an OHS inspection was done.⁷ That no inspection was in fact conducted is apparent from a spreadsheet prepared in April 2014 by Mei Lin on the instructions of Ben Davis. Mei Lin was instructed to identify in respect of several invoices whether the description in the invoice accorded with the treatment of the payment in the AWU's general ledger. The entry in that spreadsheet in relation to this invoice says 'no training'.⁸
7. The invoice was issued shortly after the conclusion of negotiations between BMD and the AWU for a collective agreement in relation to

³ BMD Bundle, 29/5/15, p 57.

⁴ Andy Marcos, 2/6/15, T:406.46-47.

⁵ Jeff Gallus, 2/6/15, T:413.21-25, 414.12-15.

⁶ Jeff Gallus, witness statement, 2/6/15, paras 18-19.

⁷ Cesar Melhem, 1/6/15, T:282.20-24.

⁸ Mei Lin MFI-1, 4/6/15, p 27; Mai Lin, 4/6/15, T:618.1-9.

BMD's Victorian operations (2007 EBA).⁹ The 2007 EBA commenced on 2 May 2008.¹⁰ The 2007 EBA did not indicate on its face on what day the parties agreed to it.

8. Date stamps on copies of tax invoice no. 020328 indicate that it was paid by cheque by BMD on 18 December 2007 and that that payment was processed by the AWU on 2 January 2008.¹¹ On 1 and 2 January 2008, 44 employees of BMD were added to the AWU's membership roll.¹² Of the 44 employees, 13 submitted membership applications on dates well after they were entered onto the membership register. This is discussed further below.
9. One of those employees added to the AWU membership roll on 2 January 2008 was David Brick. David Brick's membership status, as at 31 December 2014, is recorded as 'suspended'. He is recorded as having joined on 2 January 2008 and as having 'last paid' on 30 September 2009.¹³ David Brick provided a statement for the Commission. He commenced employment at BMD at the end of 2007. He said that so far as he is aware, he has never been a member of the AWU.¹⁴ Nor was he aware of any arrangement under which BMD paid monies to the AWU on his behalf for union membership.¹⁵

⁹ BMD bundle, 29/5/15, pp 1-16E.

¹⁰ 29/5/15, T:178.12.

¹¹ BMD bundle, 29/5/15, pp 55, 57.

¹² BMD bundle, 29/5/15, p 355.

¹³ BMD bundle, 29/5/15, p 355 (2nd last entry).

¹⁴ David Brick, witness statement, 29/5/15, para 5.

¹⁵ David Brick, witness statement, 29/5/15, para 12.

2010 Invoice

10. The 2007 EBA had a nominal expiry date of 30 September 2010. A further EBA was executed by the AWU and BMD on 8 October 2010.¹⁶ Negotiations regarding that EBA were on foot by at least June 2010 because on 8 June 2010 Matthew Smith sent an email to Cesar Melhem and Kahu Tapara (an AWU organiser) which was copied to Jeff Gallus in which he commented that a meeting room had been booked to discuss the proposed EBA.¹⁷ Matthew Smith was then Area Manager (later Senior Superintendent) for BMD in Victoria.
11. Matthew Smith provided a statement in which he said that he was heavily involved in the 2010 EBA negotiations. Matthew Smith said that he recalled during the negotiations that Cesar Melhem was very eager to increase the AWU's membership. According to Jeff Gallus, Cesar Melhem and Kahu Tapara during negotiations said that they wanted the entire BMD workforce to be AWU members, and that BMD facilitated meetings between the AWU and BMD employees on two or three occasions during EBA negotiations.¹⁸ At that time, to Matthew Smith's knowledge, less than half of BMD's workforce were AWU members.¹⁹
12. On 8 June 2010 a meeting was arranged to take place on 11 June 2010 between Jeff Gallus and Matthew Smith on behalf of BMD and Cesar

¹⁶ BMD bundle, 29/5/15, p 43.

¹⁷ BMD bundle, 29/5/15, p 59.

¹⁸ Jeff Gallus, witness statement, 2/6/15, para 16.

¹⁹ Matthew Smith, witness statement, 29/5/15, para 9.

Melhem and Kahu Tapara on behalf of the AWU to discuss the EBA.²⁰ On 9 June 2010 an invoice was created internally within the AWU, addressed to BMD, for an amount of \$13,500 plus GST.²¹ The item code in the invoice was 'Membership' and the description 'Providing OHS Training and carrying Safety Audit for various work sites in Victoria'. The AWU produced a handwritten note that was evidently a written instruction for the preparation of this invoice.²² The note stated 'providing OH&S Training and carry safety audit for various work sites'. It indicated that the amount of \$13,500 was the result of multiplying \$450 by 30. The AWU adult annual membership fee at that time was \$450.²³ Cesar Melhem accepted that the note was written by him, and that he provided it to either Mei Lin or Duc Vu in the accounts department.²⁴

13. During the course of these negotiations Cesar Melhem asked Matthew Smith for a list of all its Victorian employees ostensibly so Cesar Melhem could arrange for those employees to vote on the 2010 EBA.²⁵ On 10 June 2010, Matthew Smith sent by email a list of 41 employees to Cesar Melhem and Kahu Tapara.²⁶ The list was said to be 'of our current labour force here in Vic'.²⁷

²⁰ BMD bundle, 29/5/15, p 59.

²¹ Melhem MFI-4, 1/6/15, p 2.

²² Melhem MFI-4, 1/6/15, p 3.

²³ BMD bundle, 29/5/15, p 360.

²⁴ Cesar Melhem, 1/6/15, T:287.35-288.46.

²⁵ Matthew Smith, witness statement, 29/5/15, para 10; Cesar Melhem, 1/6/15, T:290.19-40.

²⁶ BMD bundle, 29/5/15, pp 60-61.

²⁷ BMD bundle, 29/5/15, p 60.

14. It is apparent that Cesar Melhem, shortly after receiving the list of employees, caused the invoice dated 9 June 2010 for \$13,500 to be reversed by a credit note²⁸ and replaced with an invoice for the amount of \$18,000 plus GST. On 10 June 2010 (after Matthew Smith's email had been sent) an invoice for the latter amount was sent by Rebecca Eagles to Andy Marcos (copied to Cesar Melhem).²⁹ The email from Rebecca Eagles stated:³⁰

As per your recent discussion with Cesar Melhem please find attached an invoice for OHS training.

The breakdown is as follows: 40 members x \$450.00 + GST = \$19,800.00

15. In referring to 40, and not 41, members, Rebecca Eagles perhaps miscounted the number of names on Matthew Smith's list. Rebecca Eagles attached to her email tax invoice no. 022302 for "Providing OHS Training and carrying Safety Audit for various work sites in Victoria" for the sum of \$19,800 (**2010 invoice**). As with the 2007 invoice the 2010 invoice was made out to Andy Marcos. It is evident from the spreadsheet prepared by Mei Lin in 2014, referred to above³¹ that no training was provided; rather the description for the entry is 'no training, membership'.³²

²⁸ Melhem MFI-4, 1/6/15, p 1.

²⁹ BMD bundle, 29/5/15, pp 4-65.

³⁰ BMD bundle, 29/5/15, p 64.

³¹ See para 6.

³² Mei Lin MFI-1, 4/6/15, p 27.

16. On 31 August 2010, BMD paid the 2010 invoice by electronic funds transfer.³³ This income was accounted for as 'Membership Income' in AWU's 2010-2011 general ledger of accounts.
17. An analysis of information contained on the AWU membership register concerning the 41 names on the list provided on 10 June 2010³⁴ reveals the following.
18. *First*, some of the 41 names on the list had completed membership application forms and were making membership payments to the AWU by payroll deduction. One such BMD employee was Leo Sargent. Leo Sargent joined the AWU on around 16 June 2010 by submitting a membership application. He paid his membership fees by payroll deduction.³⁵ To demonstrate this, Leo Sargent attached a pay advice to his statement which notes a deduction for 'AWU Union Fees – Victoria' (sic).³⁶ Leo Sargent further states that he is not aware of any arrangement under which BMD paid monies to the AWU on his behalf for membership fees.³⁷
19. Leo Sargent was not the only person in this category. It is apparent from a review of the AWU membership applications and employee

³³ BMD bundle, 29/5/15, pp 71-72.

³⁴ BMD bundle, 29/5/15, pp 353-354.

³⁵ Leo Sargent, witness statement, 29/5/15, paras 5-7.

³⁶ Leo Sargent, witness statement, 29/5/15, LS-1.

³⁷ Leo Sargent, witness statement, 29/5/15, para 8.

payslips that 22 of the 41 persons on the list provided payroll deduction authorisations.³⁸

20. BMD produced payslips for employees included on the 41 name list who submitted membership applications before or during 2010. These payslips demonstrate that BMD was making payroll deductions for membership of the Victorian Branch of the AWU for 24 of those 41 employees before or soon after the list was provided to AWU.³⁹
21. *Secondly*, some of the 41 persons on the list, so far as they were aware, were not members at all. David Brick was in that category.⁴⁰ So was Panagiotis Maroudas, who also provided a statement to the Commission. Panagiotis Maroudas commenced as a BMD employee in November 2008.⁴¹ He said that during 2010 he attended a meeting of BMD employees working on a site in Victoria with Kahu Tapara. He said, in substance, that Kahu Tapara discussed becoming an AWU member with him, that he told Kahu Tapara that he did not want to be a member and that Kahu Tapara accepted this.⁴²
22. Panagiotis Maroudas said that so far as he was aware, he has never been a member of the AWU.⁴³ The AWU membership roll, as at 31 December 2014, recorded Panagiotis Maroudas as having joined the

³⁸ BMD bundle, 29/5/15, pp 353-54.

³⁹ AWU MFI-7, 6/11/15.

⁴⁰ See para 9.

⁴¹ Panagiotis Maroudas, witness statement, 29/5/15, para 2.

⁴² Panagiotis Maroudas, witness statement, 29/5/15, para 7.

⁴³ Panagiotis Maroudas, witness statement, 29/5/15, para 5.

union on 8 September 2010, as having ‘last paid’ on 30 September 2010 and as having a membership status of ‘suspended’.⁴⁴

23. There appear to have been others in the same category. The AWU has been able to produce membership forms for only 24 of the 41 employees.⁴⁵
24. *Thirdly*, it would seem that a number of the persons were added to the membership roll a significant time prior to providing membership application forms to the AWU. For example, of the 41 names provided, 18 are recorded on the AWU membership roll as having become members of the AWU on 1 or 2 January 2008. Of these 18, the AWU produced:⁴⁶
- (a) 2 membership applications dated May 2008;
 - (b) 9 membership applications dated 11 June 2010;
 - (c) 1 membership application dated 29 September 2010; and
 - (d) 1 membership application dated 20 July 2011.
25. It is apparent, from the fact that the members referred to above subsequently submitted membership applications, that these 13 employees were not genuine AWU members for the period between

⁴⁴ BMD bundle, 29/5/15, p 354.

⁴⁵ BMD bundle, 29/5/15, pp 353-54.

⁴⁶ BMD bundle, 29/5/15, p 353.

January 2008 and the date they submitted their membership applications.

26. The evidence of Angela Leo (AWU Administration Support Officer) was that she could recall nothing about BMD.⁴⁷

Conclusions

27. It follows from the above analysis of membership numbers that as a result of the payment on 31 August 2010, AWU membership numbers in relation to BMD employees were falsely inflated. As a consequence, counsel assisting submitted that the AWU may have contravened s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). The AWU disputed that submission, on substantially the same grounds as it disputed a similar submission made in connection with Cleanevent. One basic but fatal difficulty with the AWU submission is that Cesar Melhem, under the rules, was responsible for ensuring that the Branch kept a correct membership register (rule 39(1)(h)). Further, he was also responsible under the rules for the staff that maintained that register. The arrangement was struck by him on behalf of the Branch. The AWU submission is rejected. There is no reason not to attribute his conduct to the AWU. There is the further difficulty that s 230 imposes an obligation on the AWU itself. There is no doubt that the membership records were falsely inflated by reason of the BMD arrangement, such that that obligation was breached.

⁴⁷ Angela Leo, witness statement, 21/10/15, para 12.

28. It is necessary to consider whether offences may have been committed under s 83 of the *Crimes Act 1958* (Vic) (false accounting records). It is sufficient to focus on the 2010 invoice. Cesar Melhem denied that the invoice was false. He said that the invoice was in fact about training and safety audits.⁴⁸ He adhered to the position in submissions. However the above review of the evidence indicates that this position cannot be accepted as correct. The circumstances inexorably point to the conclusion that at the time he issued the instruction to issue the invoice, Cesar Melhem must have known that it was not for the purpose stated on it. The sequence of events pursuant to which the invoice was issued is telling. First, a handwritten note was prepared by Cesar Melhem for the issue of the invoice on the basis that BMD had 30 employees and \$450 each should be charged for them. The amount of \$450 per person corresponds exactly to the amount of membership dues payable at this time.⁴⁹ Secondly, an invoice was created on the basis as directed by Cesar Melhem. Thirdly, the next day Cesar Melhem received from Matthew Smith a list of 41 BMD employees. Fourthly, shortly thereafter, on the same day, Cesar Melhem caused the invoice to be reversed by a credit note and replaced by a further invoice which changed the number of employees to 40. If the invoice had in fact been concerned with training, Cesar Melhem would not have caused it to be altered merely because he received a list of BMD's employees from Matthew Smith. As stated above, no training in fact was ever provided.

⁴⁸ Cesar Melhem, 1/6/15, T:292.37-293.18.

⁴⁹ BMD bundle, 27/5/15, p 360.

29. Cesar Melhem also submitted (inconsistently with the above submission) that, because the invoices were issued in circumstances where BMD knew no training had been provided, Cesar Melhem could not have been acting dishonestly for the purpose of s 83(1). He relied on his submissions as to the requirements of dishonesty for the purposes of s 83.⁵⁰ Submissions of this kind were addressed, and rejected, in Chapter 10.3 relating to Thiess John Holland Chapter. This submission is rejected for the substantially the same reasons as given in Chapter 10.3.
30. Cesar Melhem also asserted in this context that his evidence to the effect that the increase in membership numbers did not have any effect on the Vic Branch's influence on the National Executive was unchallenged, and therefore the Branch did not enjoy any benefit from the arrangement.⁵¹ That submission was rejected in Chapter 10.2 concerning the Cleanevent case study.
31. Cesar Melhem says that the allegation of dishonesty was not put to him. This is incorrect. It was put to Cesar Melhem that he was seeking to increase membership numbers through an arrangement with BMD whereby it purportedly paid \$18,000 for training but the AWU credited that amount to membership. He denied it.⁵² It was put to him, twice, that the AJ Lucas invoice (addressed below in section E) was for membership, not training. He denied it. He was asked to give an explanation as to why the AJ Lucas invoice had the item code

⁵⁰ Submissions of Cesar Melhem, 20/11/15, Miscellaneous Membership Issues, para 1.

⁵¹ Submissions of Cesar Melhem, 20/11/15, Legal Issues, paras 69-71.

⁵² Cesar Melhem, 1/6/15, T:299.30-37.

‘Membership’ if it was for training. He said could not answer that.⁵³ More generally, it was put to him that he was seeking to inflate membership numbers at the AWU, and also put to him that he was seeking to inflate membership numbers at the AWU for the purposes of increasing the influence of the Branch at National Level. He denied these propositions.⁵⁴ These circumstances reveal that the matter was raised more than sufficiently with him in examination.

32. For the foregoing reasons, Cesar Melhem’s attempts to defend his conduct are not accepted. He acted dishonestly within the meaning of section 83(1) because, knowing that no training had been provided to BMD, he caused the 2010 invoice to be issued claiming payment for such training. He did so with a view to producing a gain for the AWU in the sense that the purpose of the invoices was to procure payments of money to the AWU.
33. Accordingly, he may have committed an offence under that section.
34. For the same reasons as set out above in connection with s 83(1) of the *Crimes Act* 1958 (Vic), Cesar Melhem’s conduct may have amounted to a contravention of his obligations under ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).
35. The above analysis does not deal with the question of what in fact the 2010 invoice was for, and why it was paid by BMD. None of the

⁵³ Cesar Melhem, 1/6/15, T:263.25-46.

⁵⁴ Cesar Melhem, 1/6/15, T:264.1-10.

BMD witnesses was able to shed any light on the question.⁵⁵ It is not necessary to make a definite finding, but it is convenient to note briefly one possibility. There was a close relationship between the invoice and EBA negotiations. The 2010 invoice was paid on 31 August 2010. Negotiations for the 2010 EBA were finalised in September 2010.⁵⁶ As indicated above, the 2010 invoice was created the day prior to a meeting between BMD and the AWU to discuss the EBA. This sequence of events suggests the possibility that the invoice was in truth a payment made by BMD to facilitate EBA negotiations and utilised by the AWU for the purposes of increasing membership revenue. There is, however, insufficient evidence of this to form the basis of findings for possible offences under s 176 of the *Crimes Act 1958* (Cth).

C – AUSTRALIAN JOCKEYS’ ASSOCIATION/VICTORIAN JOCKEYS’ ASSOCIATION

36. The Australian Jockeys’ Association (**AJA**) is the national peak body representing the interests of all jockeys in Australia. Its primary function is to:⁵⁷

- (a) promote educational, industrial health and safety interests for jockeys; and

⁵⁵ Andy Marcos, witness statement, 2/6/15, paras 15-19; Andy Marcos, 2/6/15, T:407.18–408.13; Jeff Gallus, 2/6/15, T:415.13-41; Matthew Smith, witness statement, 29/5/15, paras 11-13.

⁵⁶ BMD bundle, 29/5/15, p 311; Jeff Gallus, witness statement, 2/6/15, para 14.

⁵⁷ Australian Jockeys’ Association, About Us, <http://www.australianjockeys.org/>, accessed 6/11/15.

- (b) negotiate for and develop Australia wide protection, including insurance (particularly Public Liability), superannuation and a pension fund, on behalf of all jockeys.

37. The AJA was incorporated in 2005 and has a board which consist of Chairman Ross Inglis, Chief Executive Officer Paul Innes OAM and General Manager Des O'Keefe. Des O'Keefe is also the Executive Officer of the Victorian Jockeys' Association. Two representatives from each state form the remainder of the Committee.⁵⁸

Invoices issued by the AWU

38. During the period 2011-2014 the AWU issued the following invoices:⁵⁹

| | Description | Tax Invoice No. | Amount | Payment date |
|----------|---|------------------------|---------------|---------------------|
| 16/06/10 | Victorian Jockeys' Association Consultancy on Riding Fee Negotiations | 022318 | \$7,500 | 22/06/10 |
| 30/05/11 | Services provided to Victorian Jockeys throughout racing season 2011/12 | 022981 | \$7,500 | 08/06/11 |
| 16/04/12 | Services provided to Victorian Jockeys | 023574 | \$8,250 | 01/05/12 |

⁵⁸ Paul Innes, witness statement, 2/6/15, paras 1-2, 4; Des O'Keefe, witness statement, 2/6/15, paras 4, 6.

⁵⁹ The invoices appear, respectively at Melhem MFI-3, 1/6/15, pp 14, 23, 33, 40, 41. The invoice of 27 June 2013 was preceded by the issue of an invoice for \$16,500 which was reversed pursuant to a credit note: see Melhem MFI-3, 1/6/15, pp 38, 39.

| | | | | |
|----------|--|--------|---------|----------|
| 27/06/13 | Services provided to Victorian Jockeys | 024441 | \$8,250 | 28/06/13 |
| 14/03/14 | Services provided to Victorian Jockeys | 024961 | \$8,250 | 18/03/14 |

39. The entries in the above table in the ‘Description’ column are the respective descriptions that appeared on the invoices. All of the above invoices were coded ‘MEMBERSHIP’. All were recorded in the AWU ledgers against the ‘Membership Contributions’ account.⁶⁰
40. Tax invoice 022318 dated 16 June 2010 was issued by the AWU to Victorian Jockeys’ Association. The other invoices were issued to the AJA. All invoices were paid by the AJA.
41. The circumstances in which the invoices came to be issued were described by Paul Innes in his witness statement in the following terms:⁶¹

At the 2009 Annual General Meeting of the AJA there was discussion about the AJA making a contribution to the AWU to recognise the continued support provided by the AWU to some State jockey associations particularly in Victoria and Tasmania. As a result of those discussions, it was agreed that the AJA would make payments to the AWU in recognition of that continuing support. Payments were made by the AJA to the AWU Victorian Branch on behalf of the Victorian Jockey’s Association (“VJA”) in 2010 and every year since then up to and including 2014.

42. Paul Innes was not required for cross-examination. His account is borne out by the email communications between AJA board members received into evidence by the Commission.⁶² It is apparent from those

⁶⁰ Melhem MFI-3, 1/6/15, pp 43B-43G.

⁶¹ Paul Innes, witness statement, 2/6/15, para 6.

⁶² Melhem MFI-3, 1/6/15, pp 6-11.

email communications that the support and assistance Paul Innes described as having been provided to the AJA was provided largely by John-Paul Blandthorn. For example, those communications include an email from Ross Inglis to Paul Innes (copied to Des O’Keefe and Bob Whyburn) on 11 June 2010 stating:

I think we should put in \$7500 to the AWU this year for the following reasons:

1. John-Paul Blandthorn gives up his time to assist Des/VJA with riding fee negotiations
2. He is an active member of the VJA Executive
3. He is well regarded by Michael Duffy and Rob Hulls;
4. JP’s sister is the Chief of Staff for the Victorian Minister for Sport
5. JP has a good rapport with the Federal Minister for Sport
6. The AWU are very supportive of the jockeys in this state
7. \$7500 equates roughly to \$50 per rider in this state. JP’s contribution to the riding fee and other negotiations gets the riders a few grand each year so \$50 approx. per member seems appropriate.

Whilst I appreciate that much of the above is personalised JP is himself highly regarded and quite influential in the AWU nationally.

43. Paul Innes’ description of the arrangement is consistent also with John-Paul Blandthorn’s evidence in his witness statement.⁶³ John-Paul Blandthorn has been a director of the VJA since January 2007.⁶⁴ John-Paul Blandthorn described the payment of the invoices as having its genesis in the fact that the AJA offers a director’s fee to non-riding directors of about \$7,500 per annum. John-Paul Blandthorn declined

⁶³ John-Paul Blandthorn, witness statement, 3/6/15, para 25.

⁶⁴ John-Paul Blandthorn, witness statement, 3/6/15, para 24.

to accept that fee. At some point, according to John-Paul Blandthorn, Cesar Melhem found out about this and suggested that the fee should be paid to the AWU in recognition of the time John-Paul Blandthorn spent on working for jockeys' conditions. John-Paul Blandthorn agreed.⁶⁵

44. It is plain that, from the point of view of the AJA, the payments had nothing to do with membership. Paul Innes in his witness statement said that in the time that he has been Chief Executive Officer of the AJA (since 2005) he is not aware of any jockey in Victoria or elsewhere in Australia becoming a member of the AWU and that there have been no discussions between the AWU and the AJA regarding membership of jockeys in the AWU that he is aware of.⁶⁶

45. Des O'Keefe in his witness statement said:⁶⁷

I am not aware of any Victorian jockey joining the AWU in the time that I have been the Executive Officer of the VJA. There were no formal discussions with the AWU regarding jockeys becoming members of the AWU but I believe I do recall having an informal discussion with Cesar Melhem from the AWU about the possibility of jockeys in Victorian becoming members of the AWU. The position that I took was that I was not supportive of jockeys applying to belong to the AWU as jockeys in Victoria pay a membership contribution to the VJA and have access to the services of the AJA. To my recollection, there was never any discussion about the possibility of jockeys becoming members of the Victorian Branch of the AWU at any meeting of the VJA that I attended.

⁶⁵ John-Paul Blandthorn, witness statement, 3/6/15, paras 26-27.

⁶⁶ Paul Innes, witness statement, 2/6/15, para 10.

⁶⁷ Des O'Keefe, witness statement, 2/6/15, para 8.

46. Des O’Keefe also was not required for cross-examination. His evidence should be accepted. It is consistent with John-Paul Blandthorn’s account in his witness statement, where he said:⁶⁸

To the best of my recollection, there were a small number of jockeys who were also members of the AWU, but I certainly did not encourage jockeys to become members of the AWU as I did not consider that the AWU properly covered jockeys in Victoria and the Victoria Jockey’s [sic] Association more than adequately protected the interests of its members.

Inflated membership numbers

47. The AWU produced ‘Batch Reports’ from their membership software system. A Batch Report appears to be a report of how money paid to the AWU on a particular day in respect of membership is allocated as between members. There were no Batch Reports produced in respect of the invoice dated 16 June 2010. The Batch Report in respect of the invoice dated 30 May 2011 indicates that, on the date of payment of that invoice, the sum of \$7,500 was allocated as membership fees amongst a list of names of a number⁶⁹ of jockeys, at an amount of \$61 per jockey.⁷⁰ For reasons that are not apparent, for many of the jockeys the amount of \$61 is allocated in two separate sums. So, for example, the first two entries in the report record that a sum of \$61.00 was allocated to Peter Mertens and a sum of \$52.33 allocated to Neville Wilson. That is the only allocation to Peter Mertens but a

⁶⁸ John-Paul Blandthorn, witness statement, 3/6/15, para 29.

⁶⁹ Melhem MFI-3, 1/6/15, pp 24-30. The number of names on the list is 241, but numerous names appear more than once. For the reasons set out in this paragraph, there appear to have been about 123 individuals on the list.

⁷⁰ Melhem MFI-3, 1/6/15, pp 24-30.

further sum of \$8.67 is allocated to Neville Wilson later in the report, making the total allocated to him \$61.00.⁷¹

48. There is a similar Batch Report in respect of the invoice dated 16 April 2012. That invoice was paid on 1 May 2012, and the Batch Report indicates that the amount of \$8,250 (\$7,500 plus GST) was allocated as amongst numerous jockeys on that day. In most cases, the amount allocated per jockey is \$67.00.⁷²
49. There is a question as to how the names of the jockeys in question came to be recorded on the AWU membership roll. The AWU was asked to produce membership applications in respect of the names on the list. Only one membership application was produced: an undated application to the Tasmanian Branch of the Australian Workers' Union. An analysis of the membership roll as at 31 December 2014 indicates that 164 members of the AJA were listed as having been members. All but one of those are recorded as "archived" on 18 June 2014. The roll indicates that 159 of the 164 were added as members on 23 December 2008.⁷³
50. The addition of the names of various jockeys to the AWU membership ledgers appears to have come about by the provision of a list of members of the VJA to Cesar Melhem by John-Paul Blandthorn. John-Paul Blandthorn said that he recalls Cesar Melhem asking him for a list of such names, but could not recall one way or the other whether

⁷¹ See Melhem MFI-3, 1/6/15, pp 24, 27.

⁷² Melhem MFI-3, 1/6/15, pp 34-37.

⁷³ AWU MFI-18, 6/11/15.

he provided such a list.⁷⁴ Cesar Melhem said that at some point John-Paul Blandthorn advised him that jockeys wished to join the AWU and that an agreement had been reached for the jockeys' membership to be paid either by the VJA or AJA. According to Cesar Melhem it was in this context that Cesar Melhem asked for, and John-Paul Blandthorn provided, a list of jockeys' names.⁷⁵

51. In oral evidence, John-Paul Blandthorn described the fees that were paid to the AWU by the AJA pursuant to the above invoices as fees for the services he provided.⁷⁶ When it was put to him by counsel for Cesar Melhem that, in addition, the invoices were fees for AWU membership for jockeys, John-Paul Blandthorn said 'I can't be sure of that'.⁷⁷ He said that he did not recall either way whether he told Cesar Melhem that the jockeys wanted to become members of the AWU.⁷⁸ He said that he had never encouraged jockeys to become members, although he knew of at least one jockey that wanted to be a member of the AWU and was certain there were others.⁷⁹
52. An extract for the AWU Branch Report for 2007-2009 was tendered during the examination of John-Paul Blandthorn. The extract has a picture of a jockey flanked by John-Paul Blandthorn and Des O'Keefe.

⁷⁴ John-Paul Blandthorn, witness statement, 3/6/15, para 29; John-Paul Blandthorn, 3/6/15, T:482.44-483.1.

⁷⁵ Cesar Melhem, witness statement, 1/6/15, para 8; Cesar Melhem, 1/6/15, T:244.4-13, 250.1-251.34.

⁷⁶ John-Paul Blandthorn, 3/6/15, T:526.2-15.

⁷⁷ John-Paul Blandthorn, 3/6/15, T:526.17-19.

⁷⁸ John-Paul Blandthorn, 3/6/15, T:526.21-26.

⁷⁹ John-Paul Blandthorn, 3/6/15, T:526.28-41.

Above the picture is a heading 'AWU Welcomes 168 Jockey members into the Branch'. The extract states:⁸⁰

After the successful completion of WorkSafe's safety taskforce into the horse racing industry, the AWU is pleased that 168 Jockeys have come on board as AWU members.

AWU Victorian Organiser John-Paul Blandthorn established the WorkSafe Safety Taskforce in 2005 with the purpose of researching and eliminating potential safety hazards within the racing industry. With the increased AWU membership within the racing industry, John-Paul looks forward to further improving health and safety issues and ensuring better conditions for employees working within the racing industry.

53. The front page of the Report has a picture of Cesar Melhem and states that the Report is authorised by him. John-Paul Blandthorn said that he recalled having his picture taken, but did not recall the publication.⁸¹ He did not deny being aware of it at the time. He said that it did surprise him 'a little bit' to see that the AWU had announced to the world that there were 168 members who were jockeys.⁸²

Conclusions

54. In truth, none of the jockeys became members of the AWU. As indicated above, membership application forms have been produced for almost none of the jockeys in question. That is consistent with the evidence of Paul Innes and Des O'Keefe that they had no knowledge of any jockeys becoming members. It is a sufficient basis to conclude that they did not become members.

⁸⁰ Blandthorn MFI-2, 3/6/15, p 2.

⁸¹ John-Paul Blandthorn, 3/6/15, T:527.47-528.5, 528.25-28.

⁸² John-Paul Blandthorn, 3/6/15, T:528.4-35.

55. The same conclusion can be reached by a different method. The amount of the membership contribution allocated to each of the jockeys in the 'Batch Reports' was well beneath the amount required to be paid under rules 9 and 10 of the AWU rules (see the discussion above in Chapters 10.2 and 10.8 in connection with Cleanevent and Winslow). It is apparent that the AWU National Executive at some point resolved that the amount payable for members of the AJA would be \$125 from 1 July 2011.⁸³ Prior to that time, there does not appear to have been any specific rate for AJA members, and thus the ordinary rate for adults would apply. The payments actually made on behalf of AJA members were all less than \$125 in any event. The result of that is that, on any view, none of the jockeys became members of the AWU.
56. As a result, counsel assisting submitted that the AWU may have contravened s 230(2) of the *Fair Work (Registered Organisations) Act* 2009 (Cth).
57. The AWU contended that this submission should not be accepted, for the same reasons as stated above in connection with BMD.⁸⁴ The reasons for rejecting the AWU submission in relation to BMD apply here as well. In particular, Cesar Melhem was, at the time that the AJA members were added to the register, the AWU Vic Branch Secretary. He caused John-Paul Blandthorn to obtain a list of members in about December 2008. It is to be inferred that Cesar Melhem caused the names of the jockeys to be entered onto the AWU membership register

⁸³ See BMD bundle, 27/5/15, pp 359.

⁸⁴ Submissions of the AWU, 20/11/15, paras 61-62.

and for the payments received by the AJA to be allocated against those members in subsequent years.

58. John-Paul Blandthorn relied on the evidence in his witness statement, without addressing the further evidence outlined above, and suggested that there is no evidence suggesting that he knew anything of the fact that members of the Jockeys' Associations were included in the register of members of the AWU.⁸⁵ There is evidence available that makes it difficult to accept that proposition. Principally, it lies in the following facts. He obtained a list of members of the AJA at Cesar Melham's request. He was featured in the AWU Branch Report as being responsible for the AJA members within the AWU. His relationship with the AJA was obviously close. However, it is not necessary to make any specific finding in this regard.

D – AUSTRALIAN NETBALL PLAYERS' ASSOCIATION INC

Introduction

59. On 31 August 2005 the Australian Industrial Relations Commission approved the alteration of the AWU's rules to enable it to cover "All persons engaged as professional netball players participating in the Commonwealth Bank Trophy (or equivalent) and/or for Netball Australia as an Australian Squad member".⁸⁶

⁸⁵ Submissions of John-Paul Blandthorn, 20/11/15, para 43.

⁸⁶ Melhem MFI-3, 1/6/15, pp 45-48.

60. There is an unincorporated association known as the Australian Netball Players' Association (**ANPA**). Its precise role is not clear from the evidence. It would appear that there are netball associations in each state of which various netballers are members (such as, for example, Netball Victoria and Netball South Australia). Some of those members also become members of the ANPA. Payment for that membership is made by the state association in question upon receipt of invoices issued by the ANPA. That is apparent on the face of various invoices issued by the ANPA to those state associations.⁸⁷ A press release issued by the AWU on 13 February 2005 suggested that it is only the elite netballers (or some of them) from the state associations playing for teams in the national league that become members of the ANPA.⁸⁸
61. An unincorporated association extract from the Department of Consumer Affairs, Victoria, records John-Paul Blandthorn as the sole public officer of the ANPA, having commenced in that role on 1 July 2005. The same extract indicates that the registered address for the ANPA has, since 1 June 2006, been the offices of the AWU.⁸⁹ John-Paul Blandthorn said that the ANPA has a board made up of himself and a player from each team.⁹⁰

⁸⁷ Melhem MFI-3, 1/6/15, pp 64, 66, 68, 70, 72.

⁸⁸ Melhem MFI-3, 1/6/15, p 44.

⁸⁹ Melhem MFI-3, 1/6/15, p 59.

⁹⁰ John-Paul Blandthorn, 3/6/15, T:484.11-13.

Arrangement between the AWU and ANPA

62. John-Paul Blandthorn said that in about 2006 the ANPA entered into an arrangement with the AWU whereby the AWU would provide management services to the ANPA, ANPA members would also become members of the AWU, and the AWU would receive a portion of the fees paid by netballers to the ANPA for membership of the ANPA.⁹¹ According to John-Paul Blandthorn the arrangement was negotiated by ‘athletes’ on behalf of the ANPA and by him on behalf of the AWU.⁹² The arrangement was never reduced to writing.
63. What, if anything, did the arrangement require of the AWU? This is quite unclear. It may be that all that was required was that John-Paul Blandthorn continue to perform his duties as sole public officer of the ANPA. The arrangement terminated when John-Paul Blandthorn left the AWU in 2014.⁹³ In financial terms, what appears to have occurred is that John-Paul Blandthorn, on behalf of the ANPA, issued invoices to the state association for fees for those members of the state associations who wished to join the ANPA.⁹⁴ The AWU then issued an invoice to the ANPA, attention John-Paul Blandthorn, for ‘Membership fees’ for the year in question.⁹⁵

⁹¹ John-Paul Blandthorn, witness statement, 3/6/15, para 30.

⁹² John-Paul Blandthorn, 3/6/15, T:484.15-36.

⁹³ John-Paul Blandthorn, 3/6/15, T:487.44-488.32.

⁹⁴ Melhem MFI-3, 1/6/15, pp 64, 66, 68, 70, 72.

⁹⁵ Melhem MFI-3, 1/6/15, pp 61, 84.

64. The relationship between the fees paid to the ANPA and the fees paid to the AWU is unclear. There are in evidence only the invoices issued by the ANPA for the 2011 year. They are issued to five different state associations. Each is for \$2,400 (inclusive of GST), representing a fee of \$200 per player for 12 named players. It would seem that no invoice was issued by the AWU to the ANPA in the 2011 financial year. Instead, on 16 May 2012, an invoice was issued for \$13,000 plus GST, representing \$6,000 for the 2010/2011 financial year and \$7,000 for the 2011/2012 financial year. It would seem from an AWU credit note and handwriting contained on it that \$7,000 plus GST was paid, and that the \$6,000 fee for the 2010/2011 financial year was waived.⁹⁶
65. John-Paul Blandthorn said that his understanding was that the netballers who became members of the ANPA did not fill out any membership application forms to become members of the AWU.⁹⁷ Cesar Melhem did not recall whether any such forms were provided.⁹⁸ The Commission has sought production of AWU membership application forms in respect of ANPA members listed on the invoices. No membership forms were produced. An analysis of the AWU membership roll indicates that all of the 81 members of the ANPA who were recorded as AWU members were ‘archived’ on 18 June 2014.⁹⁹ With six exceptions those persons were added to the AWU roll on either 1 January 2008 or 6 January 2009.

⁹⁶ Melhem MFI-3, 1/6/15, p 88 (reversing the invoice on p 74).

⁹⁷ John-Paul Blandthorn, 3/6/15, T:486.28-32.

⁹⁸ Cesar Melhem, 1/6/15, T:279.5-11.

⁹⁹ AWU MFI-17, 6/11/15.

66. As set out above, the ANPA paid \$7,700 pursuant to an invoice issued on 16 May 2012 for \$13,000 plus GST. That payment was made on 30 June 2012. A 'Batch Report' in respect of that payment has been produced. It indicates that on the day of the payment the monies were allocated as membership contributions amongst 77 netballers in the amount of \$100 each.¹⁰⁰
67. On 15 April 2013, the AWU issued an invoice to the ANPA for \$12,000 described as being for "Membership fees for Financial Year 2012/2103".¹⁰¹ It is apparent from the date stamp on that invoice that an amount of \$6,000 was paid by ANPA on 24 September 2013. A 'Batch Report' produced to the Commission indicates that this amount was allocated amongst 58 netballers at amounts of either \$103 or \$104 per person.¹⁰²
68. From 1 July 2011 fees for members of the Netballer Players' Association (sic) were set by the AWU National Executive at \$125. That increased to \$200 from 1 July 2013. The fees allocated in both of the above Batch Reports were less than either figure. Prior to 1 July 2011, no specific rate was set for netballers and thus ordinary rates applied.

¹⁰⁰ Melhem MFI-3, 1/6/15, pp 77-79.

¹⁰¹ Melhem MFI-3, 1/6/15, p 84.

¹⁰² Melhem MFI-3, 1/6/15, pp 86-87.

Conclusions

69. Were the netballers ever members of the AWU? Clearly they were not. No membership applications were completed and the required membership contributions were not made. Thus, the requirements of rules 9 and 10 of the AWU rules were never satisfied. As a consequence, the AWU may have contravened s 230(2) of the *Fair Work (Registered Organisations) Act* 2009 (Cth).
70. The AWU contends that this submission should not be accepted, for the same reasons as stated above.¹⁰³ The reasons given above for rejecting the AWU contention apply here as well. Again, Cesar Melhem was the Branch Secretary at the time that the ANPA members were added to the AWU membership register, and on the occasions that the money received from the ANPA was allocated between those members.
71. John-Paul Blandthorn submitted that his evidence as to the arrangements between the AWU and the ANPA ought to be accepted, and that there was nothing untoward about such arrangements.¹⁰⁴ No reasons are given for why that is so. For the reasons set out in this Chapter, it cannot be concluded that there is nothing untoward about the arrangements.

¹⁰³ Submissions of the AWU, 20/11/15, paras 67-68.

¹⁰⁴ Submissions of John-Paul Blandthorn, 20/11/15, para 44.

E – AJ LUCAS

72. An invoice sent by the AWU to AJ Lucas is another example of the same kind of false invoicing procedure that was adopted in relation to Winslow and BMD. The following submissions of counsel assisting are accepted.
73. On 23 March 2009, the AWU sent AJ Lucas (attention Kevin Lester) an invoice for \$23,400 (inclusive of GST).¹⁰⁵ The invoice was in the same format as invoices issued to Winslow from 2010¹⁰⁶ and the 2007 and 2010 BMD invoices.¹⁰⁷ The description in the invoice was ‘delivering induction training for the Mortlake Project’. The item code was ‘membership’. The GST exclusive amount (\$21,272.73) was expressed to be calculated by a rate of \$234.00 multiplied by a quantity of 100.¹⁰⁸
74. After some prompting by the AWU, the invoice was paid by AJ Lucas on 30 June 2009.¹⁰⁹ Like the Winslow and BMD invoices, this invoice was entered into the membership income ledger.¹¹⁰
75. The invoice appears to have been drafted on the basis of a handwritten note prepared by Cesar Melhem.¹¹¹ The handwritten note has Kevin Lester’s details and address at the top followed by the words ‘invoice

¹⁰⁵ Melhem MFI-3, 1/6/15, p 137-138.

¹⁰⁶ See Chapter 10.8.

¹⁰⁷ See also paras 5-26.

¹⁰⁸ Melhem MFI-3, 1/6/15, p 136.

¹⁰⁹ Melhem MFI-3, 1/6/15, p 143.

¹¹⁰ Melhem MFI-3, 1/6/15, p 143B.

¹¹¹ Melhem MFI-3, 1/6/15, p 143A.

four equals 100 x 6 monthly membership’. Beneath that appears the words ‘delivering induction training for the Mortlake Project’.

76. At this time, the normal cost of a six month union membership was \$234.¹¹² Cesar Melhem accepted that it was more than likely that he gave this handwritten note to someone in the accounts department in order to prepare an invoice.¹¹³

77. Cesar Melhem did not accept that the invoice was false. He said that as far as he was aware it was an invoice for training. When asked why if the invoice was for training he wrote his handwritten note by reference to monthly memberships. Cesar Melhem responded:¹¹⁴

The only – I understand that would be that - it would have been 100 people that delivered the training, per 100 people, and a figure of \$234, which is equivalent to the six monthly membership. That would have been the logic and that is not unusual to – for delivery the training.

There is no logic in this.

78. When it was pointed out to Cesar Melhem that the item code on the invoice was membership, Cesar Melhem said ‘it could be put there in error. I can’t really answer that’.¹¹⁵

79. If, as Cesar Melhem asserted, training was in fact provided and paid for but treated by the AWU as membership income, then the AWU has falsified its membership income and hence its membership numbers.

¹¹² Cesar Melhem, 1/6/15, T:258.5-6; BMD bundle, 29/5/15, p 360.

¹¹³ Cesar Melhem, 1/6/15, T:258.15-18.

¹¹⁴ Cesar Melhem, 1/6/15, T:261.14-18.

¹¹⁵ Cesar Melhem, 1/6/15, T:261.42-262.8.

By far the more likely conclusion is that no training was provided and the invoice was a false accounting record. That was the outcome of the investigation undertaken by Ben Davis and Mei Lin in 2014.¹¹⁶

80. This is another instance in which Cesar Melhem may have committed an offence under s 83 of the *Crimes Act* 1958 (Vic). That Cesar Melhem knew that a false invoice was going to be issued is apparent from his handwritten note which refers at the same time to ‘100 x 6 monthly membership’ and ‘delivering induction training for the Mortlake Project’. Cesar Melham’s submissions to the contrary have, in substance, already been considered and rejected. The circumstances are not relevantly distinguishable from his conduct in relation to the 2010 BMD invoice and the Winslow invoices.
81. It does not follow that, because the invoice was not for training, it was in fact for membership. The evidence does not deal with that issue.

F – GEOTECHNICAL ENGINEERING

82. Lee Buntman is a legal officer at the AWU. In early 2013, he provided equal opportunity training for Geotechnical Engineering Pty Ltd (**Geotechnical**). The training consisted of presenting a Powerpoint presentation that Lee Buntman had previously presented to AWU officials a few months earlier. The training took about one hour.¹¹⁷ The presentation occurred at Geotechnical’s premises. Lee Buntman had to drive to those premises. But he did not need overnight

¹¹⁶ Mei Lin MFI-1, 4/6/15, p 26.

¹¹⁷ The matters in this paragraph are apparent from the email chain at Melhem MFI-3, 1/6/15, pp 151-154, 187-235.

accommodation to deliver the presentation. He advised Cesar Melhem of this fact in an email dated 5 March 2013:¹¹⁸

Hi Cesar,

I have 20 March 2013 available to do that training if that's ok with Geotech, no need for overnight accommodation I'm happy to drive it.

83. Cesar Melhem forwarded that email to Bede Noonan, a director of Geotechnical, on the same day. He asked him to confirm the date for the training.
84. An account of the training provided, together with a description of the 'feedback' appears in an email from a Geotechnical representative of 21 March 2013. It is apparent from that email that the presentation lasted for 60 minutes and was provided to 18 employees.¹¹⁹ The email also indicates that the presentation was delivered by Lee Buntman in conjunction with the Geotechnical HR manager, Dene Macleod.
85. On the day after the presentation, a Geotechnical representative sent to Lee Buntman a list of names of persons who attended the presentation.¹²⁰ The list contained 19 names - and not merely the 18 who attended the presentation - because it included Dene Macleod.
86. The AWU appears to have sent Geotechnical an invoice for the training prior to its occurrence on 5 March 2013. The invoice bears the description 'EEO Training for Geotech Employees at the ESSO Gasplant Gippsland'. The amount of the invoice is \$15,600 exclusive

¹¹⁸ Melhem MFI-3, 1/6/15, pp 153, 157.

¹¹⁹ Melhem MFI-3, 1/6/15, p 277.

¹²⁰ Melhem MFI-3, 1/6/15, p 275.

of GST. The item code on the invoice is 'MEMBERSHIP'.¹²¹ The amount of the invoice is recorded in the membership income ledger of the AWU.¹²²

87. The invoice was paid on 22 March 2013.¹²³ On the same day, the 18 persons who attended the presentation, and whose names were on the list in the email sent to Lee Buntman on 22 March 2013, were added to the AWU membership roll.¹²⁴ There is no evidence of membership forms being completed for those members on that date. The obvious and appropriate inference to draw from the above is that these 18 individuals were added to the AWU membership roll without their consent. AWU membership numbers and membership revenue, again, were falsely inflated and, as a result, the AWU may have contravened s 230(2) of the *Fair Work (Registered Organisations) Act* 2009 (Cth).
88. The AWU contends that this submission should not be accepted, for the same reasons as stated above.¹²⁵ That contention is rejected for the reasons given earlier. It is evident that Cesar Melhem was involved in arranging for the training to occur. The inference is available that he would have directed the arrangements for the invoice to be issued and the names of the employees to be added to the AWU membership roll. There is no reason for Lee Buntman, as a legal officer, to be involved in such matters.

¹²¹ Melhem MFI-3, 1/6/15, p 329.

¹²² Melhem MFI-3, 1/6/15, p 330.

¹²³ Melhem MFI-3, 1/6/15, p 329.

¹²⁴ Melhem MFI-3, 1/6/15, p 331.

¹²⁵ Submissions of the AWU, 20/11/15, paras 70-71.

G – RECOMMENDATIONS

89. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning BMD Constructions Pty Ltd.
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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic) concerning BMD Constructions Pty Ltd.
91. Pursuant to s 6P of the *Royal Commissions Act* 1902 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 can be given to the General Manager commencing proceedings against Cesar Melhem for pecuniary penalty orders in relation to possible contraventions of ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning BMD Constructions Pty Ltd.

92. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning the Australian Jockeys' Association.
93. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning the Australian Netball Players Association.
94. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic) concerning A J Lucas Pty Ltd.
95. 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 can be given to the General Manager commencing proceedings against the Australian Workers' Union for pecuniary penalty orders in relation to possible contraventions of s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) concerning Geotechnical Engineering Pty Ltd.

CHAPTER 10.10

DOWNER EDI

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A – INTRODUCTION

1. This case study concerns Downer EDI Engineering Power Pty Ltd (**Downer**). Downer paid an invoice issued by the Victorian Branch of the Australian Workers Union (**AWU**) on 2 October 2012 (although dated 18 September 2012). The invoice was for \$25,000 plus GST. It was described as being for ‘Provide Occupational Health and Safety Training for 8 delegates and 8 OH&S representatives for 5 days on the Yolla project.’¹
2. This case study raises a number of issues. First, whether the invoice, was false. If it was false, then further issues arise. These include whether various individuals were involved in its creation with knowledge of its falsity and whether any person or entity may have contravened s 83 of the *Crimes Act* 1958 (Vic).

B – SOME UNCONTESTED FACTS

3. The background facts were in substance not contested. The following outline of them is drawn largely from the submissions of counsel assisting.
4. In 2011 and 2012 Downer was engaged in a refurbishment project (**the project**). The project was being carried out at the Yolla offshore gas platform, in Bass Straight.² The Yolla platform was owned by Origin Energy Ltd and AWE Limited. It was operated by Origin.³ The

¹ Anthony Sirsen, witness statement, 2/6/15, para 44.

² Anthony Sirsen, witness statement, 2/6/15, paras 7, 11-13.

³ Anthony Sirsen, witness statement, 2/6/15, para 8.

platform piped gas back to Lang Lang where it was processed for domestic use.⁴ The refurbishment project involved demolition of some existing parts of the platform and installation of new processing and accommodation modules.⁵ The workers engaged on the project were transported to the platform by helicopter from Essendon airport, working 12-hour shifts, over 14 days.⁶

5. Prior to the commencement of the project Downer endeavoured to negotiate a project agreement with three unions, the AWU, AMWU and ETU.⁷ The participants in the negotiations for Downer were Bill McGuire, Executive GM Industrial Relations, who took the lead in negotiations, and Anthony Sirsen, Project Sponsor.⁸ The negotiators for the unions were Terry Lee for AWU, Peter Mooney for ETU and Steve Dodd for AMWU.⁹
6. The negotiations produced two agreements:
 - (a) The Yolla Mid-Life Enhancement Multi-Enterprise (Employers, AMWU, AWU, ETU) Greenfields Agreement approved by Fair Work Australia on 19 August 2011 (**2011 EBA**).¹⁰

⁴ Anthony Sirsen, 2/6/15, T:309.1-7.

⁵ Anthony Sirsen, 2/6/15, T:309.10-15.

⁶ Anthony Sirsen, 2/6/15, T:309.34-43.

⁷ Anthony Sirsen, witness statement, 2/6/15, para 16.

⁸ Anthony Sirsen, witness statement, 2/6/15, paras 7, 15.

⁹ Anthony Sirsen, witness statement, 2/6/15, para 18.

¹⁰ Anthony Sirsen, witness statement, 2/6/15, para 17.

- (b) A memorandum of understanding between the employers and unions was executed on or about 29 July 2011 (**MOU**). The purpose of the MOU was to consolidate all agreements reached between the Parties in relation to the employment of construction personnel for the Project subject to the 2011 EBA.¹¹
7. Clause 10 of the MOU provided for training allowances.¹² It provided that employees required by Downer to attend training (including safety training) were entitled to a flat rate of \$487.60 for each training day, increasing by 6% from 1 July 2012, as well as travel and meal allowances for interstate employees.
8. Work commenced on the project in about December 2011.¹³
9. The demobilisation of labour on the project commenced in August 2012.¹⁴ Downer made a number of positions redundant during this process. In doing so, Downer communicated to the AWU and other unions at a meeting on 2 May 2012 that there would be a rolling reduction in manning levels for the project. Between that meeting and early July 2012, Downer made 35 workers on the project redundant.¹⁵
10. Anthony Sirsen's evidence was that redundancy decisions were based on a review conducted by Downer which focussed on the skills and

¹¹ Anthony Sirsen, witness statement, 2/6/15, paras 19-20; Sirsen MFI-1, 2/6/15, p 2.

¹² Sirsen MFI-1, 2/6/15, p 4.

¹³ Anthony Sirsen, 2/6/15, T:310.8.

¹⁴ Anthony Sirsen, witness statement, 2/6/15, paras 12, 22.

¹⁵ Sirsen MFI-1, 2/6/15, p 11.

competencies of the workers.¹⁶ He described that process as the application of a ‘skills matrix’, involving assessment of safety attitudes, ability to work unsupervised, time-keeping, ability to work within a team, and the like. The assessment was undertaken by direct supervisors and verified by superintendents on the project.¹⁷ For reasons given below, Anthony Sirsen was in some respects not a satisfactory witness, but there is no reason to doubt this aspect of his evidence. There was no contest about it and it is supported by some of the correspondence tendered during the hearing.

11. As at 6 July 2012, Downer had selected a number of employees for redundancy, including Jamie Spencer.¹⁸ The AWU organiser then responsible for the project was Terry Lee. Terry Lee disputed the entitlement of Downer to make Jamie Spencer (amongst others) redundant. On 8 July 2012 Downer agreed to review the process pursuant to which Jamie Spencer and others had been selected for redundancy.¹⁹
12. Following the above review, on about 2 August 2012 Jamie Spencer, Predrag Susa and other employees were made redundant. Jamie Spencer and Predrag Susa were both AWU delegates, and otherwise had worked as a rigger-scaffolder and rigger respectively.²⁰

¹⁶ Anthony Sirsen, witness statement, 2/6/15, para 22.

¹⁷ Anthony Sirsen, 2/6/15, T:311.22-41.

¹⁸ Sirsen MFI-1, 2/6/15, p 11; Anthony Sirsen, 2/6/15, T:312.21-37.

¹⁹ Sirsen MFI-1, 2/6/15, p 12.

²⁰ Sirsen MFI-1, 2/6/15, pp 11-12; Anthony Sirsen, 2/6/15, T:312.21-37; Anthony Sirsen, witness statement, 2/6/15, paras 23-24; James Spencer, witness statement, 15/10/15, paras 2-6; Predrag Susa, 15/10/15, paras 6, 8, 21.

13. On Monday 6 August 2012 and Tuesday 7 August 2012, a picket was established at Essendon Heliport, from where the workers at the Yolla platform were transported to their shifts.²¹ The effect of the picket was that employees unwilling to cross the line could not be transported to work on the platform for their 14-day shifts.²²
14. The picket was organised by Terry Lee, with the assistance of Jamie Spencer and Predrag Susa. Terry Lee had ceased his employment as an AWU organiser prior to the picket, on 31 July 2012.²³ Downer representatives knew, at the time of the picket, that Terry Lee was no longer an AWU organiser.²⁴ They believed that the picket was not supported by the AWU.
15. Bill McGuire gave evidence that he contacted Cesar Melhem on the day of the picket. He said that Cesar Melhem seemed genuinely surprised that there was a picket.²⁵ An email sent by Simon French, who reported to Bill McGuire, to Downer employees on 6 August 2012 recorded Bill McGuire's impression of Cesar Melhem's reaction and described Terry Lee as a 'former AWU organiser'.²⁶
16. On 6 August 2012, Downer made an urgent application to Fair Work Australia for orders under s 418 of the *Fair Work Act* 2009 (Cth) (**FW Act**) in substance requiring the employees to return to work. The

²¹ Anthony Sirsen, witness statement, 2/6/15, para 25; Anthony Sirsen, 2/6/15, T:309.32-37.

²² Anthony Sirsen, witness statement, 2/6/15, para 27.

²³ Terrence Lee, 15/10/15, T:440.47.

²⁴ Anthony Sirsen, 23/10/15, T:1017.40-41; William McGuire, 16/10/15, T:465.36-41.

²⁵ William McGuire, 16/10/15, T:466.16-28.

²⁶ Downer MFI-1, 15/10/15, p 22.

respondents to that application were the employees and subcontractors who did not return to work that day, Terry Lee, Jamie Spencer and Predrag Susa.²⁷ After the establishment of the second picket on 7 August 2012, a second application to similar effect was filed on that day. Terry Lee, Jamie Spencer and Predrag Susa were also respondents to this application, together with the employees and subcontractors who failed to board the helicopter transport on that day.²⁸

17. The first application was heard on the morning of 8 August 2012. A legal representative for the AWU, the AMWU and the ETU appeared at the hearing. But there was no appearance for any of the respondents. The Commissioner was told, without opposition from counsel for the unions, that Terry Lee was not an officer of the AWU any longer, and by counsel for the unions, that the picket was not authorised by any of them.²⁹
18. Following brief oral submissions, Fair Work Australia made an order, expressly on the basis that the picket was not supported or endorsed by the AWU, AMWU or CEPU, directing the employee respondents to cease industrial action and enter the Essendon Heliport and board the flight for the platform.³⁰ An order in the same terms was made on the

²⁷ AWU MFI-8, 6/11/15.

²⁸ Downer MFI-1, 15/10/15, pp 28-33.

²⁹ Downer MFI-1, 15/10/15, pp 44-45.

³⁰ Downer MFI-1, 15/10/15, pp 47-50.

hearing of the second application against 10 further employees on 9 August 2012.³¹

19. It would seem that no orders on either day (other than orders for substituted service) were made against Terry Lee, Predrag Susa or Jamie Spencer.
20. The next helicopter transport was due to leave on Friday 10 August 2012.³² Bill McGuire, on 9 August 2012, arranged a meeting between Downer representatives and representatives of the ETU and AMWU for the morning of 10 August 2012.³³ By this time, it was known that none of the unions supported the picket, and that all of the employees had been ordered by Fair Work Australia to return to work. The purpose of the meeting was to ensure that that occurred on the 10th. It is not clear why Cesar Melhem was not invited to this meeting, although nothing relevantly turns on that issue.³⁴

C – THE MEETING ON 10 AUGUST 2012

21. Anthony Sirsen, who had been on leave from 6 August 2012 until 9 August 2012, did not attend the meeting organised by Bill McGuire. Instead, he arranged a meeting on 10 August 2012 with Terry Lee at the Essendon Heliport, at about 5:30am.³⁵ Anthony Sirsen had dealt

³¹ Downer MFI-1, 15/10/15, pp 57-6, 57-9.

³² McGuire MFI-1, 16/10/15, p 11.11-16.

³³ William McGuire, 16/10/15, T:465.11-30; Anthony Sirsen, witness statement, 2/6/15, para 31.

³⁴ Bill McGuire's explanation appears at William McGuire, 16/10/15, T:465.32-466.37.

³⁵ Anthony Sirsen, witness statement, 2/6/15, paras 29, 32.

with Terry Lee on a number of occasions since about 2001-2002 and knew him reasonably well.³⁶

22. Anthony Sirsen's purpose in arranging the meeting was to convince Terry Lee to have the picket removed. He was concerned that Downer was not replenishing the workers on the platform and the workers were therefore being required to work past their 14-day shifts. He was also concerned about loss of production and costs consequences for late completion of the project, up to as much as \$1 million per day.³⁷
23. What occurred at this meeting was the subject of dispute.
24. Anthony Sirsen's account of the meeting (which took place with Terry Lee, Predrag Susa and Jamie Spencer) is as follows:³⁸

At this meeting Terry Lee said words to the effect that the picket was related to the redundancies of Predrag Susa and Jamie Spencer who were two of the AWU employee representatives on the Project. I said words to the effect to Terry Lee that the only appropriate course of action was for the employees' representative, the AWU, to notify FWA of a dispute and to have it properly determined and that if the picket was not disbursed Downer would have no option but to seek an injunction from the Federal Court. Terry Lee responded with words to the effect that Predrag Susa and Jamie Spencer were employee representatives and should be the last to leave the Project. He added that Downer had not met its obligations under the MOU in relation to employee occupational health and safety (OHS) training and that it was not right for Downer to dismiss employees on the basis of not having the appropriate skills in circumstances where Downer had not provided them with appropriate training.

Terry Lee said words to the effect that all delegates should receive OHS training. He sought agreement from me for Downer to pay OHS training

³⁶ Anthony Sirsen, 2/6/15, T:320.8-40.

³⁷ Anthony Sirsen, 2/6/15, T:316.29-42.

³⁸ Anthony Sirsen, witness statement, 2/6/15, paras 33-35; Anthony Sirsen, 2/6/15, T:317.37-319.19.

for all 32 delegates and OHS representatives (and deputies) on the Project. The 32 included representatives from all unions on the Project. Based on the rates in clause 10 of the MOU, this would have cost more than \$100,000.

In response to Terry Lee's request, I said words to the effect that this was not possible (because of the effect on manning) but that subject to obtaining approval from Origin (as Downer's contract was cost reimbursable and the training would ultimately be paid by Origin), Downer would provide funding for the training of 8 OHS representatives/delegates over a 5 day period.

25. Anthony Sirsen's evidence was that Terry Lee then spoke with Predrag Susa and Jamie Spencer, returned to Anthony Sirsen and told him that the AWU would accept the training of 8 representatives.³⁹
26. According to Anthony Sirsen, there was no discussion of the identity of the eight representatives who would receive training in accordance with this arrangement and no discussion of the precise figure that would be paid. His intention was that Predrag Susa and Jamie Spencer were to be made redundant and would not be receiving any training.⁴⁰ He said he did not discuss with Terry Lee whether any of the payment would go to Predrag Susa or Jamie Spencer.⁴¹
27. The picketers left the heliport at about 7 am on 10 August 2012.⁴²
28. Anthony Sirsen returned to Downer's offices. About an hour later, those who attended the meeting organised by Bill McGuire arrived at the heliport and supervised the employees' disembarkation.

³⁹ Anthony Sirsen, witness statement, 2/6/15, para 36.

⁴⁰ Anthony Sirsen, 2/6/15, T:319.21-36, 321.4-8.

⁴¹ Anthony Sirsen, 2/6/15, T:324.28-30.

⁴² Anthony Sirsen, witness statement, 2/6/15, paras 36-37; Anthony Sirsen, 2/6/15, T:319.15-19.

29. Terry Lee, Jamie Spencer and Predrag Susa all gave evidence. They agreed that the meeting took place but gave a different account of it.⁴³
30. Each said that the meeting took place in Anthony Sirsen's car. In substance, all three witnesses said that the discussion in the car was about 'what it would take to fix' the dispute about Jamie Spencer's and Predrag Susa's redundancy. The evidence of all three witnesses was that a suggestion was made that Predrag Susa and Jamie Spencer be paid for the two week swing that they had been about to commence when they were made redundant. The approximate amount that each would earn on that swing was about \$12,500. However none of these witnesses suggested that this dollar figure was mentioned. These witnesses gave evidence that Anthony Sirsen asked whether a payment of this nature would 'fix the issue'; that the three then got out of the car and discussed it and decided to accept it; and that they returned to convey that to Anthony Sirsen. The other protesters were then told that the dispute was settled and the picket disbursed.
31. Downer EDI and Tony Sirsen were represented at the Royal Commission hearings by Downer EDI's in house solicitor. Nonetheless no person from Downer attended on the day that Terry Lee, Predrag Susa and Jamie Spencer gave evidence. A submission was made by Downer⁴⁴ that it had no opportunity to cross-examine Terry Lee, Predrag Susa or Jamie Spencer. The submission is rejected. Downer was advised on 25 September 2015 that a hearing in relation

⁴³ Terrence Lee, witness statement, 15/10/15, paras 15-16; Terrence Lee, 15/10/15, T:433.18-437.7; James Spencer, witness statement, 15/10/15, paras 23-24; James Spencer, 15/10/15, T:453.19-456.10; Predrag Susa, witness statement, 15/10/15, paras 29-30; Predrag Susa, 15/10/15, T:444.1-447.29.

⁴⁴ Submissions of Downer EDI, 20/11/15, para 17.

to this case study would be conducted on 15 October 2015. On 2 October 2015 Downer was provided with a witness list which named, inter alia, Jamie Spencer and Predrag Susa. The statements of Terry Lee, Jamie Spencer and Predrag Susa were uploaded onto the electronic court book on 14 October 2015, shortly after they were received by the Commission. They were emailed directly to Downer's representative on the morning of 15 October 2015. At no point did Downer make any application to cross-examine Jamie Spencer, Predrag Susa or Terry Lee, make any application to have the matter adjourned, or make any complaint that it did not have sufficient time to make a decision about these possibilities. The legal representative for Downer did attend on the day that Tony Sirsen gave evidence. He commenced an attempt to examine Tony Sirsen about the general credit of Terry Lee. It was pointed out to him that Terry Lee had not been cross-examined to this effect. He abandoned the attempt. No request was made to recall Terry Lee.

32. Counsel assisting put Tony Sirsen's evidence to each of Terry Lee, Jamie Spencer and Predrag Susa and asked them to comment on it. Each was adamant that there was no discussion on 10 August 2012 about training. They adhered to evidence to this effect in their witness statements.⁴⁵ Predrag Susa and Jamie Spencer had in fact received training earlier in the life of the project.⁴⁶

⁴⁵ Terrence Lee, witness statement, 15/10/15, para 18; Terrence Lee, 15/10/15, T:434.32-435.30, 436.37-437.7; James Spencer, witness statement, 15/10/15, para 25; James Spencer, 15/10/15, T:454.4-455.5.

⁴⁶ Terrence Lee, 15/10/15, T:435.1-6; Predrag Susa, 15/10/15, T:445.14-24; James Spencer, 15/10/15, T:454.11-19.

33. Should the evidence of Terry Lee, Predrag Susa and Jamie Spencer be preferred to that of Anthony Sirsen? There are several matters that make it inherently unlikely that any of the four persons involved believed that an agreement was reached to pay for training.
34. First, Predrag Susa and Jamie Spencer were no longer on the project. They had been made redundant. Before being made redundant they had been trained, and there is no suggestion that they were not paid for doing that training. Their complaint was not that training had not been provided to them or to anyone else on the Project. Their complaint was that their employment had been wrongfully terminated. The point of the picket was to make the same complaint. Why, then, would an agreement about training have satisfied Predrag Susa and Jamie Spencer and caused the picket to disband? Downer submitted that perhaps Terry Lee, Predrag Susa and Jamie Spencer agreed to one thing with Tony Sirsen and then told the picketers something else. But why, in the above circumstances, would they have agreed with Tony Sirsen that training be provided? The proposition is fanciful.
35. Secondly, Anthony Sirsen's evidence was that the dispute about training was over Downer's obligation under clause 10 of the MOU.⁴⁷ However, even to a non-lawyer, it is obvious that that clause does not require Downer to provide training. Clause 10 provides that if Downer requires employees to attend training, it must pay those employees while they are being trained. It does not require that training be provided. It requires only that if training is provided it must be paid for. Nor does it require payment of any money to the AWU. It

⁴⁷ Sirsen MFI-1, 2/6/15, p 4.

requires payment to the employees in question. It is not possible to accept that a person in Tony Sirsen's position could actually have thought that Downer was liable to provide training under this clause.

36. And, even if money was owed under clause 10, Terry Lee was not in a position to demand payment of it. To Anthony Sirsen's knowledge, he was no longer employed by the AWU at this time. Jamie Spencer and Predrag Susa had already been trained. They were not owed money pursuant to the clause.
37. Consistently with the above matters, no training was requested by Anthony Sirsen. His evidence was that he was unaware of any training ever having been provided.⁴⁸ The AWU's internal investigations performed this year (referred to below) indicate that no training was provided. No training could have been necessary. The project was in a demobilisation stage and reached practical completion in October 2012.⁴⁹ All of these matters strongly suggest that the arrangement reached on 10 August 2012 had nothing to do with training.
38. Downer submitted that the fact that an invoice was issued for 'Occupational Health and Safety Training' supported the proposition that the discussion on 10 August 2012 was about a payment for that service. That is to assume the correctness of a controversial statement in a questionable document. It assumes the correctness of the very matter in dispute. It also ignores the fact that in March 2015, in circumstances discussed below, the AWU after investigations determined that the invoice was a false one, and that the payment was

⁴⁸ Anthony Sirsen, witness statement, 2/6/15, para 46.

⁴⁹ Anthony Sirsen, witness statement, 2/6/15, para 13.

not for training. That is the considered position of the entity supposedly responsible for providing the training. As will be seen, the monies paid by Downer to the AWU pursuant to the invoice were paid immediately by the AWU to Predrag Susa and Jamie Spencer.

39. The above deals with the objective circumstances. They are all one way. It stretches credulity to think that, in these circumstances, the picket was resolved on the basis that a payment was to be made for training.
40. There are further reasons to reject Anthony Sirsen's evidence. He gave evidence that he obtained approval for the payment of a 'training expense' from the Origin contract representative for the project, Joe McCormick, at about 8am on 10 August 2012.⁵⁰ The Origin contract representative was Joe McCormick. Joe McCormick in his witness statement denied having a discussion with Anthony Sirsen in which he requested that Origin approve OHS training that was in any way connected with the ending of the picket. Joe McCormick said that in the conversation he had with Anthony Sirsen about the ending of the picket on the morning of 10 August, Anthony Sirsen told him that he had shown Terry Lee a show cause notice issued by Origin to Downer in connection with the picket and that that was an important factor in bringing the picket to an end.⁵¹ Joe McCormick also gave evidence that it was not necessary for Downer to seek Origin's approval before engaging a training provider. He said that a search of Origin's files did not reveal a copy of the invoice ultimately paid by Downer for

⁵⁰ Anthony Sirsen, witness statement, 2/6/15, para 38; Anthony Sirsen, 2/6/15, T:319.44-47, 320.2-6.

⁵¹ Joe McCormick, witness statement, 23/10/15, paras 14-16.

‘training’ or any indication that that invoice was reimbursed by Origin.⁵²

41. Joe McCormick provided a witness statement to the Commission and was not required for cross-examination by Downer. Downer said nothing about his evidence in its submissions. There is no reason to reject it.
42. There is the following additional consideration. Fair Work Building and Construction began investigating the picket soon after 6 August 2012. Anthony Sirsen was interviewed by Fair Work Building and Construction representatives on 27 August 2012. In the Fair Work Building and Construction interview, Anthony Sirsen gave the following account of the meeting on 10 August 2012:⁵³

When I got to the helipad probably at about, say, quarter to, 10 to 6, there was – there was a couple of people standing around and there as Terry Lee and Predrag Susa and Jamie Spencer, who obviously was expecting me because I had called at 5:30 and said I’m on my way. So I just – I just – they were standing around as well, so I just went up to them and had a conversation. Yeah. “What was this about? You know, there’s a better way of doing this. You know, why – why are you – why are we – why are we taking this action when you guys are aware of the fact that this job is now coming to an end? And if you think Jamie Spencer and Predrag Susa was unduly [sic] treated, then there’s a process to follow”. **That was the conversation.** (emphasis added)

43. Anthony Sirsen gave other similar accounts of this conversation during the interview.⁵⁴ At one point he said:⁵⁵

⁵² Joe McCormick, witness statement, 23/10/15, paras 22-25.

⁵³ Sirsen MFI-1, 23/10/15, p 19.35-47.

⁵⁴ Sirsen MFI-1, 23/10/15, p 15.42-16.22, 23.5-18.

⁵⁵ Sirsen MFI-1, 23/10/15, p 22.11-15.

the only thing that's come out of that – that – the sequence of events for that week [*that is, the week ending 10 August 2012*] was an adverse action claim by the AWU, which is listed as a conference in the Fair Work Australia this Wednesday'

44. At no point in the interview did Anthony Sirsen say anything to the effect that there was any discussion or agreement about training on this day. His accounts of the meeting on the 10 August 2012, and in particular the two quoted passages above, suggest that all that occurred was that he told Terry Lee, Predrag Susa and Jamie Spencer that they should take proceedings in Fair Work Australia if they wanted to pursue the dispute about wrongful termination, and that they accepted his advice and disbanded the picket. This account is inconsistent with the evidence that Anthony Sirsen gave to the Royal Commission. It is also inconsistent with Terry Lee's, Predrag Susa's and Jamie Spencer's evidence to the Royal Commission.
45. The Fair Work Building and Construction interview was a formal one. Preliminary questions put to Anthony Sirsen at the interview included warnings that anything he said might be used against him in court and that knowingly to provide false or misleading information was a criminal offence.⁵⁶ These differences between Anthony Sirsen's evidence to the Commission and the account he gave to Fair Work Building and Construction make it impossible to have any confidence in Anthony Sirsen's uncorroborated account of what occurred on 10 August 2012.
46. Downer submits, however, that Anthony Sirsen's evidence is corroborated by Bill McGuire. Anthony Sirsen and Bill McGuire both

⁵⁶ Sirsen MFI-1, 23/10/15, p 3.30-43.

gave evidence that shortly after the meeting on 10 August, Anthony Sirsen told Bill McGuire that an agreement had been reached to pay for the training of 8 employees for five days. If he said that, it was a prior consistent statement – consistent with his evidence to the Royal Commission. But corroboration must come from a source independent of Anthony Sirsen. It is not to be found in Bill McGuire’s evidence of what Anthony Sirsen said, or what Anthony Sirsen himself said. There is no independent evidence confirming Anthony Sirsen’s evidence. Bill McGuire was not at the meeting and had no involvement in the payment of the invoice. It is not necessary to make any finding as to whether, in fact, Anthony Sirsen told Bill McGuire that an agreement had been reached about training. Anthony Sirsen was prepared to misrepresent what occurred on 10 August 2012 to Fair Work Building and Construction or to this Commission, or both. It would thus not be surprising if he misrepresented the position to Bill McGuire. In these circumstances, even if the conversation between Anthony Sirsen and Bill McGuire occurred as they claimed, it does not offer independent support for Anthony Sirsen’s account.

47. All of the above matters strongly support acceptance of the accounts of the meeting of 10 August 2012 given by Terry Lee, Predrag Susa and Jamie Spencer. However, there is one matter that requires further consideration. That is the commencement of proceedings in Fair Work Australia by the AWU on behalf of Predrag Susa and Jamie Spencer. That also was relied upon by Downer as a matter supporting Anthony Sirsen’s account.

D – FAIR WORK AUSTRALIA APPLICATIONS

48. Applications were filed by AWU in Fair Work Australia on 17 August 2012 seeking resolution of a general protections dispute in respect of Predrag Susa and Jamie Spencer.⁵⁷ The applications alleged that the termination of the employees was due to their activities as a Health and Safety Representative (in the case of Predrag Susa) and as site delegates on the project.⁵⁸ The AWU, and not Predrag Susa or Jamie Spencer, was the named applicant, as permitted under s 365 of the *Fair Work Act* 2009 (Cth).
49. Downer submitted that the commencement of these proceedings makes it unlikely that there was any agreement reached on 10 August 2012 about paying Jamie Spencer and Predrag Susa. If there was an agreement, Downer submitted, why were the proceedings commenced?
50. At first blush, the submission has some substance. However, upon analysis, the proceedings are not inconsistent with the accounts of Terry Lee, Predrag Susa and Jamie Spencer of what occurred on 10 August 2012.
51. It is convenient to begin by noting that under s 366 of the *Fair Work Act* 2009 (Cth), applications in respect of general protections disputes involving a dismissal were required to be filed within 21 days after the dismissal took effect. Thus, any general protections dispute in respect of the terminations of Predrag Susa and Jamie Spencer had to be commenced by about 23 August 2012. No money had been paid to

⁵⁷ Downer MFI-1, 15/10/15, pp 80-89.

⁵⁸ Sirsen MFI-1, 2/6/15, pp 15-16, 19.

Predrag Susa or Jamie Spencer by this time, and the evidence does not suggest that any proposal was made to pay the money by this time. This is one possible explanation for the commencement of proceedings.

52. The evidence as to why the proceedings were commenced was not entirely satisfactory. The applications were signed by Craig Winter on behalf of the AWU. Craig Winter said that he brought the applications on the instructions of Cesar Melhem. He said that he was instructed to put the matters that appeared in the applications by Cesar Melhem, and that he did not recall any dealings with Jeff Sharp, Terry Lee, Predrag Susa, or Jamie Spencer.⁵⁹ He claimed that at the time the proceedings were commenced, he knew nothing about the picket and nothing about any agreement to terminate it.⁶⁰ He tried to give the impression that his was a purely mechanical role. Craig Winter was an unsatisfactory witness for the reasons explained in connection with the Cleanevent case study.⁶¹ Not much can be drawn from his evidence on the present issue.

53. None of Terry Lee, Predrag Susa and Jamie Spencer knew precisely how the proceedings came to be commenced. Terry Lee said that after he had reached an agreement with Anthony Sirsen on 10 August 2012, Anthony Sirsen said to him that he would have to work out how to make the payments to Predrag Susa and Jamie Spencer. Terry Lee said that he told Anthony Sirsen that he would have to work that out with

⁵⁹ Craig Winter, 20/10/15, T:706.42-707.19, 708.19-25.

⁶⁰ Craig Winter, 20/10/15, T:707.33-708.13.

⁶¹ See Ch 10.2, para 50.

the union.⁶² Terry Lee gave evidence that he definitely remembered telling Jeff Sharp on 10 August 2015 that the dispute had been resolved⁶³ and that he could not recall talking to Cesar Melhem about it. Terry Lee said that he did not tell anyone at the union that the matter had been resolved on the basis that eight OH&S representatives would be trained.⁶⁴ Otherwise, Terry Lee said that he was not able to shed any light about the commencement of these proceedings, and that he had no role in their institution.⁶⁵

54. Predrag Susa said that he could not recall whether he told anyone at the AWU that he wanted proceedings commenced, but that there was discussion at some point that there was going to be proceedings. He could not recall when that discussion was.⁶⁶ Predrag Susa said that at one point he spoke to Jeff Sharp (who replaced Terry Lee as the AWU organiser responsible for the job) about the picket but could not recall if he spoke about an application to the Fair Work Commission. He said that at the time of the picket, he did not know whether or not the AWU had made an application to Fair Work Australia about his dismissal, but he assumed that an application would be made.⁶⁷
55. Jamie Spencer said that he spoke to Jeff Sharp shortly after he had been notified of his termination (that is, on 5 August 2012). According

⁶² Terrence Lee, witness statement, 15/10/15, para 17.

⁶³ Terrence Lee, 15/10/15, T:440.35-40.

⁶⁴ Terrence Lee, 15/10/15, T:441.20-28.

⁶⁵ Terrence Lee, 15/10/15, T:438.13-31.

⁶⁶ Predrag Susa, 15/10/15, T:448.15-23.

⁶⁷ Predrag Susa, witness statement, 15/10/15, paras 25, 27.

to Jamie Spencer, Jeff Sharp said that he would go ahead and get an unfair dismissal claim lodged.⁶⁸

56. Jeff Sharp gave evidence that he was informed on 10 August 2012, either by Terry Lee, Jamie Spencer or Predrag Susa, that an agreement had been reached on the basis that Jamie Spencer and Predrag Susa would be paid for a two week swing. He said that he had no recollection of the circumstances in which the general protections applications were filed and no knowledge either of the issue of the invoice to Anthony Sirsen.⁶⁹ Jeff Sharp did say that it was possible that one of Jamie Spencer or Predrag Susa asked him to arrange for the commencement of the proceedings and that it was possible that he may have spoken to someone in the AWU office about it. However he said that he could not recall either circumstance.
57. Cesar Melhem said that he would have rung Jeff Sharp and asked him how the dispute had been resolved and that Jeff Sharp told him that it had been resolved on the basis that Predrag Susa and Jamie Spencer were paid for one swing. He could not recall exactly when this occurred.⁷⁰ Cesar Melhem said that the applications would have needed his approval and that he assumed he had approved them.⁷¹ The substance of Cesar Melhem's explanation for the commencement of the proceedings was that there was some doubt about whether Downer

⁶⁸ James Spencer, witness statement, 15/10/15, paras 15, 17.

⁶⁹ Jeffrey Sharp, witness statement, 22/10/15, paras 5-7.

⁷⁰ Cesar Melhem, 22/10/15, T:992.12-36.

⁷¹ Cesar Melhem, 22/10/15, T:992.38-44.

was going to honour the agreement to pay Predrag Susa and Jamie Spencer.⁷²

58. There are significant difficulties in relying on Cesar Melhem's uncorroborated evidence. However his explanation gains some support from the evidence of Predrag Susa and Terry Lee. Predrag Susa said that on 10 August 2012 Anthony Sirsen indicated that there may be a delay in payment as a result of investigations that he said were under way at that time by the Fair Work Building and Construction into the picket.⁷³ Jamie Spencer's evidence was that he had a discussion to this effect with Terry Lee about a week after the meeting on the 10 August.⁷⁴ Terry Lee said that he and Anthony Sirsen had a discussion. In that discussion, Anthony Sirsen told him that he was going to work out a way to pay the money so that Downer could get reimbursed by Origin. Terry Lee said that he told Anthony Sirsen to work that out with the AWU.⁷⁵ Anthony Sirsen denied there was any discussion to this effect.⁷⁶ However, as discussed below, Anthony Sirsen also gave evidence that he did in fact seek reimbursement from Origin. Fair Work Building and Construction was in fact investigating. Anthony Sirsen did not tell Fair Work Building and Construction about the arrangement on 10 August 2012 when he was interviewed by them. These circumstances lend support to the evidence of Predrag Susa and Terry Lee.

⁷² Cesar Melhem, 22/10/15, T:993.1-7, 994.8-37.

⁷³ Predrag Susa, witness statement, 15/10/15, para 30.

⁷⁴ James Spencer, witness statement, 15/10/15, para 27.

⁷⁵ Terrence Lee, witness statement, 15/10/15, para 17.

⁷⁶ Anthony Sirsen, 23/10/15, T:1032.4-42.

59. The above evidence gives a different complexion to the commencement of the proceedings. It suggests the fact that proceedings were commenced is not inconsistent with the accounts given by Terry Lee, Predrag Susa and Jamie Spencer of the meeting of 10 August 2012.
60. Nor is the conduct of the proceedings after commencement inconsistent with those accounts. In substance, not very much at all occurred. The only step taken in the proceedings occurred on 10 September 2012, when Craig Winter sent an email to the chambers of Commissioner Blair at Fair Work Australia. The email was copied to Bill McGuire and to the solicitors for the AWU.⁷⁷ The email attached a letter dated 24 August 2012.⁷⁸ The discrepancy between the date of the letter and the date of the email was not explained in the evidence. The letter requested an adjournment of both of the applications on the basis that ‘the parties have been making progress in trying to resolve these two matters’. The letter stated ‘the AWU will advise you on the outcome of our discussions shortly.’
61. It seems unlikely that any discussions of any substance occurred. Downer and the AWU were asked to produce documents which would shed light on the issue. The only document produced was the letter of Craig Winter dated 24 August 2012.
62. The oral evidence did not elicit any further details of any discussions. Craig Winter’s evidence was that the discussions that he referred to

⁷⁷ Downer MFI-1, 15/10/15, p 119.

⁷⁸ Downer MFI-1, 15/10/15, p 120.

were discussions that Cesar Melhem told him were going on.⁷⁹ Cesar Melhem assumed the reference was to discussions involving Terry Lee and Craig Winter.⁸⁰ Bill McGuire had carried on the proceedings on behalf of Downer. His evidence was that he ‘may have spoken to Craig Winter’ but that he did not remember either way. He claimed that he ‘would have vigorously defended the position of the termination of these two employees’. However, he could not say what if anything he actually did in that regard and ultimately accepted that it could have been the position that in fact he did nothing.⁸¹

63. No witness could shed any light on the termination of the proceedings. Craig Winter’s evidence was that he did not even know if the proceedings did come to an end. He said that he did not recall filing a notice of discontinuance and that he did not obtain any understanding himself about any settlement that was reached. He said that his role in the proceedings was confined to following instructions to lodge two general protection matters and seek to have them adjourned when he was requested to do so.⁸² Craig Winter said that he had no knowledge about the arrangement in relation to the payment of the \$25,000 until he heard about it in the Royal Commission.⁸³ Bill McGuire, who had carriage of the proceedings for Downer, was unable to give any account of how they had terminated. The substance of his evidence was that the AWU accepted his position that the claims had no merit.

⁷⁹ Craig Winter, 20/10/15, T:709.1-29.

⁸⁰ Cesar Melhem, 2/6/15, T:332.8-28.

⁸¹ William McGuire, 16/10/15, T:473.22-474.46.

⁸² Craig Winter, 20/10/15, T:709.11-29.

⁸³ Craig Winter, 20/10/15, T:710.24-28.

He suggested that the AWU must have put an end to them in some way.⁸⁴

64. No further correspondence was sent to Fair Work Australia after Craig Winter's letter of 24 August 2012. On 5 February 2013, Fair Work Australia by email sought clarification as to the status of the matter.⁸⁵ Anthony Sirsen on the same day forwarded that email to Bill McGuire and Simon French and asked them to 'close the communicate with Craig and advise him to notify Commissioner Blair that this issue is now resolved'.⁸⁶
65. The likely position is that there were no negotiations at all during the course of the proceedings and that the parties simply forgot about them.
66. The above analysis indicates that the commencement of the general protections disputes on 17 August 2012 is not inconsistent with Terry Lee's, Predrag Susa's and Jamie Spencer's account of the meeting of 10 August 2012. It is sufficient to make a finding to that effect. Counsel assisting canvassed the possibility that the proceedings might have been an abuse of process, commenced for the purposes of avoiding the scrutiny of Fair Work Building and Construction but did not submit that any finding should be made to that effect. The other possibility is that the proceedings were commenced as a result of a delay in payment and to ensure that the claims were not statute barred.

⁸⁴ McGuire MFI-1, 16/10/15, p 19.45-21.20.

⁸⁵ Downer MFI-1, 15/10/15, pp 297-298.

⁸⁶ Downer MFI-1, 15/10/15, pp 294.

67. If the commencement of the proceedings is not inconsistent with Terry Lee's Predrag Susa's and Jamie Spencer's account of the meeting of 10 August 2012, there is no reason to reject that account. It is accepted. It accords with the objective circumstances and the evidence of Tony Sirsen was unsatisfactory in any event. The substance of what was agreed on 10 August 2012 was to pay Jamie Spencer and Predrag Susa for two swings or approximately \$12,500 each.
68. The next issue is how an invoice for 'training' came to be issued by the AWU.

E – INVOICE AND PAYMENT

69. On 18 September 2012 Mei Lin sent an email to Anthony Sirsen, copying Cesar Melhem, and attaching an invoice numbered 023931 in the amount of \$27,500.00.⁸⁷ The invoice description was 'Provide Occupational Health and Safety Training.'
70. Anthony Sirsen gave evidence, corroborated by an email referred to below, that he called Duc Vu on about 2 October 2012 and asked that the invoice be amended to 'to accurately reflect the specific OHS training that was to be provided'.⁸⁸ On Anthony Sirsen's evidence that was training for 8 persons for 5 days.⁸⁹ The invoice, however was amended to include the words '...for 8 delegates and 8 OH&S

⁸⁷ Sirsen MFI-1, 2/6/15, pp 24-25.

⁸⁸ Anthony Sirsen, witness statement, 2/6/15, para 44.

⁸⁹ Anthony Sirsen, 2/6/15, T:321.45-322.10.

representatives for 5 days on the Yolla project.’⁹⁰ This discrepancy was not explained in the evidence.

71. Duc Vu sent the amended invoice, bearing the same number, to Anthony Sirsen on the same day.⁹¹
72. Duc Vu then sent an email to Cesar Melhem on 2 October 2012 confirming that the request had been made and that he had amended the invoice accordingly. Cesar Melhem responded on the same day, stating ‘ok’.⁹²
73. Duc Vu followed up with an email sent to Cesar Melhem on 4 October 2012, stating ‘Tony told Mei yesterday that payment will be paid this Friday.’⁹³
74. The AWU obtained Predrag Susa’s and Jamie Spencer’s bank account details at around this time.⁹⁴ Jamie Spencer sent an email to Cesar Melhem with his details on 4 October 2012, which concluded ‘thank you Cesar’.⁹⁵ On 8 October 2012 Duc Vu sent an email to Cesar Melhem stating ‘Downer have paid.’⁹⁶

⁹⁰ Anthony Sirsen, witness statement, 2/6/15, para 44.

⁹¹ Sirsen MFI-1, 2/6/15, pp 27-28.

⁹² Sirsen MFI-1, 2/6/15, p 26.

⁹³ Downer MFI-1, 15/10/15, p 233-1.

⁹⁴ Downer MFI-1, 15/10/15, p 233-2.

⁹⁵ Downer MFI-1, 15/10/15, p 233-4.

⁹⁶ Melhem MFI-5, 2/6/15.

75. Cesar Melhem responded on the same day stating ‘Can you pay the guys today 50/50 each.’⁹⁷
76. Anthony Sirsen approved payment of the invoice on behalf of Downer. He knew that training had not, at that stage, been provided.⁹⁸ However his evidence was that he approved payment of the invoice on the understanding that training would be provided.⁹⁹ In fact no training ever was provided and Anthony Sirsen did not claim that he followed up to check. He noted at the time he approved payment that the invoice appeared to refer to training for 16 workers, but approved it on the basis that the invoice appeared to be in the range of the rate for training for 8 persons as provided for in the MOU.¹⁰⁰
77. The General Ledger for the AWU records two payments from the account ‘Lost time & Exp’ in the amount of \$12,500 each, dated 8 October 2012. The payment references are described as ‘LOST TIME – JAMES SPENCER For lost time’ and ‘LOST TIME – PREDRAG SUSA for lost time.’¹⁰¹
78. On about 5 March 2015, Downer received a letter from the Victorian secretary of the AWU, addressed to Bill McGuire.¹⁰² The letter stated:

Re: Invoice 023931

⁹⁷ Melham MFI-5, 2/6/15.

⁹⁸ Anthony Sirsen, 2/6/15, T:323.15.

⁹⁹ Anthony Sirsen, witness statement, 2/6/15, para 45.

¹⁰⁰ Anthony Sirsen, 2/6/15, T:323.1-4.

¹⁰¹ Melham MFI-6, 2/6/15.

¹⁰² Sirsen MFI-1, 2/6/15, p 30.

On 18 September 2012 we sent you one invoice for the settlement of employees' claims. However after reviewing our accounts, some mistakes on the original invoice have been picked up. We have amended the description for the above invoice.

79. The letter enclosed an invoice, numbered 023931 and dated 18 September 2012, in the amount of \$27,500.00 but with the amended description 'settlement of employees' claims.' The item code on the invoice was changed from the original and amended invoices from 'OHS COURSE' to 'OHS.'¹⁰³ Anthony Sirsen provided this amended invoice to Bill McGuire, who said he decided, because of the age of the invoice and because the project had been completed, to do nothing about it.¹⁰⁴
80. Ben Davis' evidence was that he directed the amendment of the invoice on 27 February 2015 on the basis that the AWU had 'invoiced for training as settlement.'¹⁰⁵ He said in evidence:¹⁰⁶

You referred earlier in the week in evidence to EDI Downer, the \$25,000 that they paid to us to settle two general protections disputes that we lodged on behalf of our shop steward and our occ health and safety rep, and that was described as "Training" - I am given to understand at the request of the company. But it shouldn't have been. It wasn't. It was the settlement of two general protections claims. Hence, when we reissued the invoice, we said, "Settlement of employee claims".

81. Cesar Melhem was shown during his evidence on 2 June 2015 the letter from Ben Davis dated 5 March 2015 and gave the impression from his answers that that was the first time he had appreciated that the

¹⁰³ Sirsen MFI-1, 2/6/15, p 31.

¹⁰⁴ Anthony Sirsen, witness statement, 2/6/15, para 50.

¹⁰⁵ Melhem MFI-7, 2/6/15, p 97.

¹⁰⁶ Ben Davis, 4/6/15, T:642.2-11.

invoices had been amended.¹⁰⁷ However in giving evidence on 22 October 2015 Cesar Melhem claimed for himself a role in the amendment of this invoice in late 2014 or early 2015.¹⁰⁸ Ben Davis did not suggest Cesar Melhem had anything to do with the amendment of the invoice, and no suggestion of this kind was made to him by counsel for Cesar Melhem. This is a further example of the unsatisfactory nature of Cesar Melhem's evidence.

F – CONCLUSIONS

False invoice

82. The invoice created by Mei Lin, and as amended by Duc Vu, was false. It had nothing to do with training. It was for the payment of Predrag Susa and Jamie Spencer.
83. Counsel assisting submitted that each of Anthony Sirsen, Cesar Melhem and the AWU may have committed offences under s 83 of the *Crimes Act* 1958 (Vic) as a result. It is necessary to consider their circumstances individually.

Tony Sirsen

84. The first issue is whether Tony Sirsen 'concur[red] in making' the invoice within the meaning of s 83(2). Downer submitted that there is no evidence to support the proposition that he had any involvement in

¹⁰⁷ Cesar Melhem, 2/6/15, T:337.16-18; T:341.4-18.

¹⁰⁸ Cesar Melhem, 22/10/15, T:996.20-25.

the invoice other than to request its amendment. His request for the amendment of the invoice, however, is sufficient. Once it is accepted, as it must be, that to Tony Sirsen's knowledge the payment was not for training, it follows that in requesting the amendment and accepting the amended invoice he was concurring in the making of a false invoice.

85. The next issue is whether he requested and accepted the amendment dishonestly, with a view to a gain for himself or another or with intent to cause loss to another. Counsel assisting relied on Tony Sirsen's own evidence, which they said was to the effect that the purpose of seeking an amendment of the invoice was to procure payment from Origin. Downer disputed that this was the effect of Tony Sirsen's evidence. The evidence was as follows:¹⁰⁹

Q. That amended invoice is on page 28, 023931?

A. Yes

Q. The purpose of this invoice, I suggest to you, was to procure payment by Origin through the process we have discussed of this particular invoice; is that right?

A. Yes.

86. The reference to the 'process we have discussed' was to the following evidence:¹¹⁰

Q. He [Joe McCormick] also says that he has looked through Origin's hardcopy files for the Downer invoices and that they don't have them. Do you say you passed them on?

A. Yes. Well, the cost of training plus the cost of the reimbursement on the hours worked on the project, we were invoicing Origin

¹⁰⁹ Tony Sirsen, 23/10/15, T:1040.13-19.

¹¹⁰ Tony Sirsen, 23/10/15, T:1033.29-1034.38.

weekly, yeah. It was passed on to our accounts people that actually prepare invoices and that's where I left it.

Q. Did you have any agreement on the 10th about – actually, just before I leave that, can I come back to that for a moment. What, you say you passed it on to your accounts people, what, expecting that it would be included in the weekly invoice to Origin?

A. Yeah

Q. And was it?

A. I don't know.

Q. Who at your accounts did you pass it to?

A. It was – we had – we had a – we had a financial controller on the project and we had back-office account support. It was passed on to the financial controller on project.

Q. The financial controller on the project, who was that?

A. It was – well, controllers, we had a number.

Q. Who were they?

A. You want names?

Q. Yes.

A. Peter Lowe was one of them. Carmel – Carmel was another. Yeah, we had quite a few financial controllers so it went in that group of people – went to that group of people, someone in that group of people.

Q. You forwarded the invoice that you got from the AWU to your financial controller or controllers and, so far as you know, they invoiced Origin for it?

A. As far as I know, yeah.

...

Q. Why were you seeking reimbursement from Origin for training when you didn't even know whether it had been done or not?

A. Just – just – well, it was – it was part – it was just part of the invoice flow and the costs incurred on the project.

87. It is quite clear from this evidence that Tony Sirsen accepted that the purpose of the amended invoice was to procure payment from Origin. If that was his purpose, it follows inexorably that in seeking the amendment he was acting dishonestly, for the purpose of causing loss to another. The same conclusion can be arrived at by other means: if at the time he requested the amendment he knew that the payment was not for training, then he must have known that Downer had no obligation to make the payment, and that the AWU had no entitlement to it.
88. In the above circumstances, Tony Sirsen may have contravened s 83 of the *Crimes Act* 1958 (Vic).

Cesar Melhem

89. The first issue is whether Cesar Melhem concurred in the making of a false invoice. Cesar Melhem approved the issue of the amended invoice.
90. Mei Lin's email of 18 September 2012, attaching an invoice for 'Occupational Health and Safety Training' was copied to Cesar Melhem.¹¹¹ When asked about this documents on 2 June 2015, Cesar Melhem accepted that he looked at the invoice attached to Mei Lin's email of 18 September 2012 and noted that it said 'Provide Occupational Health and Safety Training'.¹¹² On 22 October 2015

¹¹¹ Sirsen MFI-1, 2/6/15, p 24.

¹¹² Cesar Melhem, 2/6/15, T:335.22-24, 342.33-38.

Cesar Melhem said, in substance, that he did not read this email or the invoice attached to it.¹¹³

91. Cesar Melhem claimed in his evidence on both occasions that he did not approve the amended invoice. However this evidence cannot be accepted. The email sent by Duc Vu in his email of 2 October 2012¹¹⁴ regarding the proposed amendments was sent only to Cesar Melhem. The email proceeds on the basis that Cesar Melhem is familiar with its subject matter. It refers to Anthony Sirsen as 'Tony', and refers to 'the invoice' without providing details of what the invoice concerns. The proposed amendments to the invoice are in bold. Cesar Melhem did not ignore the email or overlook it or arrange for someone else to respond to it. He responded 10 minutes later with 'Ok'. Two days later, on 4 October 2015, Duc Vu sent another email to Cesar Melhem stating 'Tony told Mei yesterday that payment will be paid this Friday'.¹¹⁵ There is no suggestion that Cesar Melhem needed clarification to understand what this email was about.
92. Cesar Melhem submits that there is nothing to suggest that, at the time of approving the amended invoice, he had any awareness that it was false. However, there were a number of matters that indicated that Cesar Melhem knew it was false:

¹¹³ Cesar Melhem, 22/10/15, T:995.19-996.33, 999.39-47.

¹¹⁴ Sirsen MFI-1, 2/6/15, p 26.

¹¹⁵ Downer MFI-1, 15/10/15, pp 233-1.

- (a) On 4 October 2012, Jamie Spencer sent him an email with his account details that concluded ‘thank you Cesar’¹¹⁶.
 - (b) Cesar Melhem signed payment requisition forms to pay Jamie Spencer and Predrag Susa between 5 and 8 October 2012.¹¹⁷
 - (c) On 8 October 2012 Duc Vu sent Cesar Melhem an email stating ‘Downer have paid’, to which Cesar Melhem responded ‘Can you pay the guys today 50/50’.¹¹⁸
93. There is nothing to suggest that between 2 October 2012, when Cesar Melhem approved the email and 4 or 8 October, his awareness of the purpose of the invoice changed. Had it changed, he would have changed the invoice immediately. He did not.
94. The above matters point inescapably to the conclusion that Cesar Melhem approved the amended invoice on 2 October 2012, knowing it to be false, and knowing that the true purpose of the invoice was to procure payment for Jamie Spencer and Predrag Susa. He thus concurred in the making of false accounting record within the meaning of s 83 of the *Crimes Act* 1958 (Vic).
95. The next issue for the purposes is whether he did so dishonestly, with a view to a gain for another or with intent to cause loss to another. The evidence does not establish that Cesar Melhem knew that the invoice was going to be used by Anthony Sirsen to claim the monies from

¹¹⁶ Downer MFI-1, 15/10/15, p 233-4.

¹¹⁷ Downer MFI-1, 15/10/15, pp 233-3, 233-5.

¹¹⁸ Melhem MFI-5, 2/6/15.

Origin. However, Cesar Melhem knew that the invoice requested payment for training when Downer had no obligation to pay for training. He intended to obtain payment for Predrag Susa and Jamie Spencer. That is sufficient.

96. It is convenient to deal at this point with an argument advanced by the AWU. The AWU submitted that there could have been no contravention of s 83 because, as a result of the agreement reached on 10 August 2012, there was an existing agreement to pay the funds in any event. However, this submission makes false assumptions about what occurred on 10 August 2012. Bill McGuire's position, which is to be attributed on this point to Downer, was that Downer had no liability at all to Predrag Susa or Jamie Spencer. He was not prepared to pay any money to settle the general protections proceedings.¹¹⁹ Nor can it be said that Downer had agreed to pay \$25,000 to the AWU on any other basis. The position on the findings that have been made is that Anthony Sirsen agreed with Terry Lee, Predrag Susa and Jamie Spencer that Predrag Susa and Jamie Spencer would be paid about \$12,500 each. On one view of the evidence, Anthony Sirsen misled Bill McGuire into thinking an agreement had been reached about training. But it is quite clear that no agreement ever was reached about training and thus that there was no obligation to pay for training. No training was ever delivered or intended to be delivered.

97. The matter can also be looked at from the perspective of the AWU. On 10 August 2012, Terry Lee was no longer an AWU organiser. The

¹¹⁹ McGuire MFI-1, 16/10/15, p 19.45-21.20; William McGuire, 16/10/15, T:473.6-20-474.46.

agreement he made on 10 August 2012 could not have been an agreement on behalf of the AWU and he did not claim that it was.

98. The AWU's submission must be rejected. It follows that Cesar Melhem may have contravened s 83.

AWU

99. The AWU contested the proposition that Cesar Melhem's conduct and state of mind is to be attributed to it. However, for the reasons explained in the Cleanevent case study, this submission is rejected. Even on the AWU's argument, the proposition cannot be correct: the issuing of Branch invoices and obtaining payment for them were matters within the scope of Cesar Melhem's actual authority under the AWU rules.

Abuse of process?

100. It is necessary to refer to one final matter. As noted above, Ben Davis' evidence was that the \$25,000 payment was for the settlement of the general protections applications. There are difficulties with that proposition. One is that those applications were not terminated at the time the payment was made in October 2012: the parties did nothing about the proceedings at all until February 2013. Because of the absence of any apparent connection between the termination of the proceedings and the making of the payment it is more accurate to say that the payment was made pursuant to the agreement reached by

Anthony Sirsen with Terry Lee, Jamie Spencer and Predrag Susa on 10 August 2012.

101. As indicated earlier, it is possible that the general protections applications were an abuse of process in that they were commenced for the purposes of attempting to make legitimate what was in fact a payment obtained by coercive conduct of some kind during the picket. There are, however, other possibilities. Counsel assisting submitted that the evidence is insufficient to support a finding to that effect. That submission is accepted.

G – RECOMMENDATIONS

102. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Tony Sirsen in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
103. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of Cesar Melhem in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).
104. 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 Victorian Commissioner of Police and the Director of Public Prosecutions of Victoria so that consideration can be given to the commencement of a prosecution of the Australian Workers' Union in relation to possible offences under s 83 of the *Crimes Act* 1958 (Vic).

PART 11: INCOLINK

CHAPTER 11

INCOLINK

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A – INTRODUCTION

1. This Chapter is concerned with a number of entities associated with the Redundancy Payment Central Fund Limited (**Incolink**). These entities are ‘relevant entities’ within the definition of paragraph (a) of the Terms of Reference. To a substantial degree, the Chapter is based on the submissions of counsel assisting, which were largely unchallenged. Unlike the other case studies examined, the Incolink case study was conducted ‘on the papers’ without a public hearing.
2. Incolink operates a number of redundancy funds, portable sick leave schemes and income protection insurance schemes for construction industry employees principally in Victoria and Tasmania. Incolink is also the manager of a training fund and dispute resolution body for the construction and building industry in Victoria.

3. As at 30 June 2015, Incolink managed in excess of \$714m in investment assets (in its various redundancy funds). Worker entitlements amounted to \$577m.¹
4. Incolink is a public company limited by guarantee.² It was established in 1989 as a joint enterprise between The Master Builders Association of Victoria (**MBAV**) and a number of unions. Incolink's current directors are:
 - (a) Michael O'Neill. Michael O'Neill is an independent non-voting director.
 - (b) Earl Setches. Earl Setches is the National Secretary of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) Plumbing Division.
 - (c) Bill Oliver. Bill Oliver is the past State Secretary of the Construction, Forestry, Mining and Energy Union (**CFMEU**) Construction and General Division, Victoria-Tasmania Divisional Branch (**CFMEU Vic**).
 - (d) Elias Spervovasilis. Elias Spervovasilis is an Assistant Secretary of the CFMEU Vic.

¹ Incolink MFI-23, 19/11/15, p 3.

² Incolink MFI-11, 19/11/15, p 1.

- (e) Thomas ‘Brian’ Boyd. Brian Boyd is the immediate past Secretary of the Victorian Trades Hall Council and Convenor of the Building Industry Group of Unions.
 - (f) Hedley Davis. Hedley Davis is the immediate past-President of the MBAV.
 - (g) Brian Welch. Brian Welch is the immediate past-Executive Director of the MBAV.
 - (h) Robert Whitwell. Robert Whitwell is a past-President of the MBAV.
 - (i) David Newnham. David Newnham is a past-President of the MBAV.
5. The ‘independent chair’ of the Incolink board is Tommy Watson. Tommy Watson is formerly an Assistant Secretary of the CFMEU Vic.
6. The Chapter considers two main issues raised by counsel assisting in submissions.
7. The first is whether certain Incolink funds which have been endorsed by the Commissioner of Taxation as ‘approved worker entitlement funds’ under the *Fringe Benefits Tax Assessment Act* 1986 (Cth) are entitled to endorsement. It is concluded that they are not. The significance of this issue is that to be an ‘approved worker entitlement fund’ the income of the fund cannot be paid to unions and employer organisations. In fact, substantial amounts are paid from Incolink’s

‘approved worker entitlement funds’ to other funds that are not approved and those funds then pay many millions of dollars to unions and employer organisations.

8. The second is the treatment of forfeited benefits by Incolink and whether that treatment is consistent with Incolink’s obligations under the *Unclaimed Money Act* 2008 (Vic). Over the last five years, Incolink has forfeited more than \$33 million in worker entitlements. It is concluded that Incolink’s current practices give rise to a systemic and substantial risk of non-compliance with the *Unclaimed Money Act* 2008 (Vic).

B – BASIC OVERVIEW OF INCOLINK ENTITIES

Redundancy funds and portable sick leave schemes

9. Incolink is the trustee of the following redundancy funds and portable sick leave schemes:
 - (a) The Redundancy Payment Central Fund (**Fund 1**).³ The parties to the most recent amendment to the trust deed for Fund 1 are Incolink, The Master Builders Association of Victoria (**MBAV**), the Australian Workers’ Union (**AWU**), the CFMEU Vic and the CEPU.

³ Incolink MFI-1, 19/11/15.

- (b) The Redundancy Payment Approved Worker Entitlement Fund 1 (**Fund 4**).⁴ This fund was established in 2004. The parties to the trust deed establishing this trust are Incolink, the MBAV, the CFMEU and the CEPU. Fund 4 is intended to operate as an ‘approved worker entitlement fund’ under s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth).
- (c) The Construction Industry Complying Portable Sick Leave Pay Scheme (**PSL1**).⁵ Incolink, as trustee of Fund 1, established a sick leave scheme in 1997 by deed poll. Subsequently, Incolink varied the terms of the scheme so that the fund could operate as an ‘approved worker entitlement fund’ under s 58PB of the *Fringe Benefits Tax Assessment Act* 1986 (Cth).
- (d) The Redundancy Payment Central Fund 2 (**Fund 2**).⁶ The parties to this trust deed, which has been amended on numerous occasions, are Incolink, the CFMEU and the Australian Manufacturing Workers’ Union (**AMWU**).
- (e) The Redundancy Payment Approved Worker Entitlement Fund 2 (**Fund 5**).⁷ This fund was established in 2004. The parties to this trust deed are Incolink, the CFMEU and the AMWU. Fund 5 is intended to operate as an ‘approved

⁴ Incolink MFI-2, 19/11/15.

⁵ Incolink MFI-4, 19/11/15.

⁶ Incolink MFI-5, 19/11/15.

⁷ Incolink MFI-6, 19/11/15.

worker entitlement fund' under s 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

- (f) The Metal and Engineering Construction and Contracting Industries Complying Portable Sick Leave Pay Scheme (**PSL2**).⁸ Incolink, as trustee of Fund 2, established a sick leave scheme in 1998 by deed poll. Subsequently, Incolink varied the terms so that the fund could operate as an 'approved worker entitlement fund' under s 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

10. As may be apparent from the descriptions and the identities of the parties to the various trust deeds, the funds are linked together.

- (a) Fund 1, Fund 4 and PSL1 are linked, with PSL1 providing portable sick leave cover for workers covered by Fund 1 or Fund 4. Prior to the establishment of Fund 4, employers paid, pursuant to obligations under enterprise agreements, redundancy contributions of behalf of workers to Fund 1 only. However, for at least the last five years, employers have paid redundancy contributions into Fund 4 only. Fund 1 still, however, receives levies paid in respect of apprentices. Employers separately pay sick leave contributions into PSL1 pursuant to obligations under enterprise agreements.
- (b) Fund 2, Fund 5 and PSL2 are also linked and operate in a similar way.

⁸ Incolink MFI-8, 19/11/15.

11. The flow of funds between the various Incolink entities is extremely complex and convoluted. In very broad terms:
- (a) Each of the redundancy funds (i.e. Funds 1, 2, 4 and 5) pay worker benefits and entitlements, as well as incurring ordinary expenditure in administering the funds.
 - (b) Fund 1 and Fund 2 also make administration or service grants to other Incolink entities.⁹
 - (c) Fund 4 and Fund 5 effectively distribute their income after expenses each year to Fund 1 and Fund 2 respectively as ‘distributable capital’.¹⁰
 - (d) Fund 1 also makes annual grants to a training fund, which monies are then distributed to the MBAV and the CFMEU Vic.¹¹
 - (e) Fund 1 and Fund 2 also make substantial ‘grants’ of many millions of dollars each year to various unions and industry parties. The two largest recipients of funds are the MBAV and the CFMEU Vic. These grants are paid out of the operating profit of Funds 1 and 2, which includes the ‘distributable capital’ from Funds 4 and 5, and in years when forfeitures are processed those forfeitures. A summary of the

⁹ See paras 30-32.

¹⁰ See paras 38-48.

¹¹ See paras 21-29.

grants made from 2011–2015 is found in Appendix A to this Chapter.

Insurance schemes

12. In addition to being the trustee of the various redundancy schemes and portable sick leave schemes, Incolink is the administrator of a number of insurance schemes. These may be grouped under two main categories:
 - (a) Personal Accident Leisure Time Insurance Scheme; and
 - (b) Income Protection and Trauma insurance cover (**IPT Scheme**).
13. The Personal Accident Leisure Time Insurance Scheme provides benefits to:
 - (a) eligible workers who have suffered an accident, resulting in an injury, outside of working hours, which prevents the worker from working;¹² and
 - (b) eligible workers who have suffered an accident, resulting in an injury which prevents the worker from working, whilst in direct travel to and from work and which does not involve a motor vehicle.

¹² Incolink MFI-24, 19/11/15, p 31; Incolink MFI-25, 19/11/15, p 21.

14. Where an employer pays redundancy contributions into one of Incolink's redundancy funds on behalf of an employee, that employee is eligible for insurance cover under the Personal Accident Leisure Time Insurance Scheme. This cover does not require a separate contribution. However, if there are any gaps in redundancy contribution payments there is no insurance cover for that period. Redundancy contributions must be current at the time of injury for a claim to be considered.
15. This insurance policy is arranged by Windsor Management Insurance Brokers (**Windsor**), through QBE Insurance (Australia) Limited, and distributed by Incolink.
16. The IPT Scheme includes the following cover:
 - (a) Leisure Time Illness;
 - (b) WorkCover Top-Up;
 - (c) Transport Accident Commission (TAC) Top-Up; and
 - (d) Workplace Death & Capital Benefits.
17. This insurance policy is arranged by Windsor through QBE Insurance (Australia) Limited and distributed by IPT Agency Co. Ltd (**IPTA**) and IPT Agency Co. (No. 2) Ltd (**IPTA2**). The ultimate holding company of IPTA and IPTA2 is Incolink.

18. In addition to redundancy contributions, employers pay separate IPT contributions on behalf of each employee. The standard IPT contribution rate is \$17.05 per week (including GST), but the contribution rate can vary under some enterprise agreements.¹³
19. These contributions are collected by Incolink as trustee for Fund 4 and Fund 5, into Fund 4 and Fund 5 respectively, and subsequently paid to IPTA and IPTA2. IPTA receives the standard premium contributions and IPTA2 received the varied premium contributions.
20. Each month Incolink provides Windsor with a calculation of the relevant IPT premium. Windsor raises invoices for the premiums and forwards the invoices to Incolink for processing and payment. Incolink pays Windsor the invoiced amounts. Windsor then makes the premium payment to QBE.

Training Fund

21. Incolink is also the manager of the Victorian Building and Construction Industry Fund (**Training Fund**).
22. In 2006, the MBAV and the CFMEU Vic established the Victorian Building and Construction Industry Training Fund Pty Ltd (**VBCITF**) to act as the trustee of the Training Fund. The CFMEU and MBAV are equal shareholders in VBCITF. The current directors of VBCITF are Brian Welch, Robert Whitwell, Bill Oliver, Hedley Davis, Elias Spervovasilis and Ralph Edwards, President of CFMEU Vic.

¹³ Incolink MFI-24, 19/11/15, p 33.

23. Pursuant to provisions in CFMEU Vic enterprise agreements, employers are required to make weekly contributions per employee to the Training Fund. Employers who make contributions to the Training Fund are described as ‘Members’ of the fund.
24. Under the trust deed governing the Training Fund, the trustee has a discretion to appoint the income and capital among the ‘Beneficiaries’ which are:¹⁴
- (a) any charitable or educational institution or fund which is approved as an institution or fund by the trustee whose objects are likely to benefit Members, their employees (called ‘Workers’) or apprentices or their interests or the interests of the building and construction industry in Victoria;
 - (b) the trustee of a re-settled trust; and
 - (c) the ‘Industry Parties’ which are the MBAV, the CFMEU Vic and the CFMEU Federated Engine Drivers and Fireman’s Association, Victorian Division Branch (which has now ceased to exist and the members distributed between the CFMEU Vic and the CFMEU Forestry Furnishing and Products Division Victorian Branch).
25. However, under cl 13.1 of the trust deed, unless all Industry Parties agree, all amounts distributed to the Industry Parties must be distributed 50% to the MBAV and 50% to the CFMEU Vic.

¹⁴ Incolink MFI-9, 19/11/15, p 4, 5, 7.

26. VBCITF has also entered into a 'Management Agreement'¹⁵ and 'Retention of Contributions Agreement'¹⁶ with Incolink in its capacity as trustee of Fund 1. Under those agreements:
- (a) VBCITF has engaged Incolink to manage the Training Fund and collect training contributions from employers. In return, Incolink is entitled to receive \$0.50 per Worker per week.¹⁷ (This compares to the \$4.95 per Worker per week that Members are required to contribute to the Training Fund.)
 - (b) Incolink may from time to time make grants to VBCITF.
 - (c) If at a time when Incolink receives contributions to the Training Fund from employers (ignoring the \$0.50 per Worker per week that Incolink is entitled to retain), it has already made grants to VBCIF which exceed the amount of the contributions, then Incolink may retain the contributions it collects up to the total amount of grants made. After that limit is exceeded, Incolink must pay the contributions to VBCITF.
27. In practice, what appears to occur is the following:
- (a) Each year MBAV and the CFMEU Vic make grant applications to the Training Fund.

¹⁵ Incolink MFI-9A, 19/11/15.

¹⁶ Incolink MFI-9B, 19/11/15.

¹⁷ Incolink MFI-9A, 19/11/15, p 22, item 3; Incolink MFI-9B, 19/11/15, p 5, cl 3.3.

- (b) VBCITF, as trustee of the Training Fund, in turn makes a combined grant application to Incolink as trustee of Fund 1. VBCITF approves the grants to MBAV and the CFMEU Vic conditionally on Incolink approving the grant to VBCITF.
- (c) Incolink approves the grant to VBCITF. The grant money is paid to VBCITF which then makes payments to the MBAV and the CFMEU Vic.
- (d) Incolink receives employer contributions on behalf of the Training Fund and pays them to VBCITF as trustee of the Training Fund. From those contributions, VBCITF then pays back the agreed management fee to Incolink as trustee of Fund 1. In addition, VBCITF refunds the amount of the training contributions received (less its very minor operating expenses) up to a maximum of the grant received by VBCITF from Incolink.

28. Counsel assisting submitted that the Training Fund appears to do nothing except to act as a bank account. Incolink criticised this statement. Incolink submitted that it ignored the background and legal basis for the establishment and operation of the Training Fund.¹⁸ It is true that legally the Training Fund is considerably more than a bank account. However, it appears in practice to operate as little more than a bank account.

¹⁸ Submissions of Incolink, 20/11/15, para 6.

29. The table below sets out the grants made by the Training Fund to the MBAV and the CFMEU Vic from 2011–2015.¹⁹

| VBCITF Cash Paid in Grants to Beneficiaries | | | | | | |
|---|--------------|-------------|--------------|-------------|--------------|--------------|
| Year ended 30 June | 2011 | 2012 | 2013 | 2014 | 2015 | Total |
| CFMEU | \$5,954,000 | \$3,991,000 | \$5,773,500 | \$3,484,400 | \$6,756,645 | \$25,959,545 |
| MBAV | \$5,434,000 | \$5,268,500 | \$5,058,000 | \$5,870,738 | \$6,166,545 | \$27,797,783 |
| Total grants | \$11,388,000 | \$9,259,500 | \$10,831,500 | \$9,355,138 | \$12,923,190 | \$53,757,328 |

Building Industry Disputes Panel

30. Incolink is also the manager of the Victorian Building Industry Disputes Panel Foundation Pty Ltd (**VBIDP**). VBIDP is a dispute resolution body that is specified in a number of enterprise agreements.
31. VBIDP (originally the Building Industry Disputes Board Foundation Pty Ltd) was formed in 2004 as a joint endeavour between the MBAV and the CFMEU Vic. VBIDP is the trustee of the Building Industry Disputes Board Foundation Trust. Under that trust, VBIDP must hold all of the trust funds and income for the purpose of meeting all costs incurred in the administration or conduct of the trust, and the remainder of the income and capital must then be paid or applied to Incolink.²⁰
32. VBIDP is largely funded through annual administration grants from Incolink (in its capacity as trustee of Fund 1). As noted above,

¹⁹ See Appendix 1.

²⁰ Incolink MFI-10, 19/11/15, p 6, cl 4.

Incolink also manages and administers the activities of VBIDP as trustee, for which VBIDP pays Incolink a service fee.

C – ISSUES

33. The first issue is whether certain Incolink funds which have been endorsed by the Commissioner of Taxation as ‘approved worker entitlement funds’ under the *Fringe Benefits Tax Assessment Act* 1986 (Cth) are entitled to endorsement.

34. The second issue is the treatment of forfeited benefits by Incolink.

D – APPROVED WORKER ENTITLEMENT FUNDS

Background

35. Employer contributions to a redundancy fund may be ‘fringe benefits’.²¹ If so, unless an exemption applies, the employer paying the contributions would be liable to pay Fringe Benefits Tax (**FBT**). At the same time when a worker receives a payment from the fund, for example because the worker is made redundant, that payment may be taxed in the worker’s hands as ordinary income or as an eligible/employment termination payment. To avoid the possibility of double taxation, in 2003 legislation²² was introduced amending the *Fringe Benefits Tax Assessment Act* 1986 (Cth) and providing that

²¹ Although at least in some circumstances the contributions may be not be fringe benefits: *FCT v Indoороopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 (FC).

²² *Taxation Laws Amendment Act (No 4)* 2003 (Cth).

employers' contributions to an 'approved worker entitlement fund' were exempt benefits.²³

36. Section 58PB(2) of the *Fringe Benefits Tax Assessment Act 1986* (Cth) provides that a fund is an 'approved worker entitlement fund' if:

- (a) the fund has been endorsed by the Commissioner of Taxation under s 58PB(3); or
- (b) the entity operating the fund has been endorsed by the Commissioner of Taxation for operation of that fund under s 58PB(3A).

37. A fund is entitled to be endorsed by the Commissioner of Taxation if it satisfies certain criteria under s 58PB(4) and has applied for endorsement. The relevant parts of the section read as follows:

- (4) A fund is entitled to be endorsed as an approved worker entitlement fund if:
 - (a) the management of the fund (including the management of the investments of the fund) is carried out at arm's length from the contributors to the fund and their associates; and
 - (b) under the fund's constituting documents:
 - (i) no more than 5% of the total assets of the fund are to be invested in an entity controlled by a contributor or an associate of a contributor; and
 - (ii) the assets of the fund are not to be used to provide or facilitate any form of financial assistance, including a loan, to a contributor, a person in respect of whom contributions are

²³ *Fringe Benefits Tax Assessment Act 1986* (Cth), s 58PA.

made or an associate of a contributor or an associate of a person in respect of whom contributions are made; and

(c) under the fund's constituting documents, payments from contributions to the fund are to be made only for the following purposes:

- (i) to pay worker entitlements to persons in respect of whom contributions are made, or to death benefits dependants (within the meaning of the *Income Tax Assessment Act 1997*) or legal personal representatives (within the meaning of that Act) of those persons;
- (ii) to make investments to generate income from the assets of the fund;
- (iii) to reimburse contributors who have paid entitlements directly to persons in respect of whom contributions are made;
- (iv) to return contributions to contributors;
- (v) to pay, for the benefit of a person in respect of whom contributions are made, an employment termination payment (within the meaning of the *Income Tax Assessment Act 1997*) into a complying superannuation fund (within the meaning of section 45 of the *Superannuation Industry (Supervision) Act 1993*), a complying approved deposit fund (within the meaning of section 47 of the *Superannuation Industry (Supervision) Act 1993*) or a retirement savings account (within the meaning of the *Retirement Savings Accounts Act 1997*);
- (vi) to transfer contributions to another approved worker entitlement fund;
- (vii) to pay the reasonable administrative expenses of the fund;
- (viii) to pay amounts to a contributor's external administrator that would otherwise be payable as mentioned in subparagraph (iii) or (iv) to the contributor;

- (ix) to pay interest on, or to repay, money lent to the fund; and
- (d) under the fund's constituting documents, payments from the income of the fund are to be made only for the following purposes:
 - (i) a purpose mentioned in subparagraphs (c)(ii) to (ix);
 - (ii) to make payments to contributors to the fund;
 - (iii) to make payments to other persons where the payment is specified in subsection (5); and
- (e) under the fund's constituting documents:
 - (i) an account must be kept for each person in respect of whom contributions to the fund are made; and
 - (ii) the account must be kept in a manner that enables entitlements in respect of the person to be calculated; and
- (f) the fund, or the entity that operates the fund, has an ABN.

...

- (5) A payment made by a fund to a person in the following circumstances is specified for the purposes of subparagraph (4)(d)(iii):
 - (a) a contribution has been made to the fund in respect of the person; and
 - (b) the contribution would be an exempt benefit under section 58PA if the fund were an approved worker entitlement fund; and
 - (c) either:
 - (i) the payment is of a worker entitlement the contribution for which would be an exempt benefit under section 58PA if the fund were an approved worker entitlement fund; or

- (ii) the payment is of some kind other than a worker entitlement.

Operation of Fund 4, Fund 5, PSL1 and PSL2

38. Each of Fund 4, Fund 5, PSL1 and PSL2 (**Incolink's Approved Worker Entitlement Funds**) have been endorsed as 'approved' worker entitlement funds' by the Commissioner of Taxation.²⁴
39. The trust deed for each of Incolink's Approved Worker Entitlement Funds includes a concept of 'Distributable Capital'. Distributable capital is defined in the trust deeds to mean 'so much of the Trust Fund as does not comprise Contributions or Net Income at that time'.²⁵ The definition of Net Income excludes 'the net income of the Trust Fund for any prior Accounting Period'.²⁶
40. In effect, the trust deeds draw a distinction between income generated in the current Accounting Period and income generated in previous Accounting Periods.
41. The trust deeds give the trustee the power to determine in respect of all or any part of the Net Income for an Accounting Period (that is, the net income for that year) whether to pay, apply or set aside the Net

²⁴ Incolink MFI-15, 19/11/15; Incolink MFI-16, 19/11/15; Incolink MFI-17, 19/11/15; Incolink MFI-18, 19/11/15.

²⁵ Incolink MFI-2, 19/11/15, p 6, cl 1.1(18); Incolink MFI-6, 19/11/15, p 8, cl 1.1(22); Incolink MFI-4, 19/11/15, p 6, cl 1.1(19); Incolink MFI-8, 19/11/15, p 9, cl 1.1(19).

²⁶ Incolink MFI-2, 19/11/15, pp 7-8, cll 1.1(27), 1.1(37); Incolink MFI-6, 19/11/15, pp 9-10, cll 1.1(34), 1.1(43); Incolink MFI-4, 19/11/15, pp 7-8, cll 1.1(27), 1.1(40); Incolink MFI-8, 19/11/15, pp 10-12, cll 1.1(26), 1.1(39).

Income, or accumulate it.²⁷ The income accumulated from previous years is moved into the Distributable Capital account.

42. The trust deeds also permit the trustee to pay out the Distributable Capital to an Industry Party/Beneficiary (for example the MBAV or one of the relevant unions), or to use all or part of it in exercise of any of the trustee's powers. By way of example, an extract of the relevant clause from the Fund 4 trust deed is below:²⁸

16. Advancement of Distributable Capital and Benefits

16.1 The Trustee may:

- (1) determine that any real or personal property for the time being forming part of the Distributable Capital of the Trust Fund or that any part of the Distributable Capital of the Trust Fund is held for the benefit of an Industry Party absolutely;
- (2) transfer the whole or any part of the Distributable Capital of the Trust Fund or pay out of the Distributable Capital of the Trust Fund any sum to an Industry Party for that Industry Party's own use and benefit in such manner as the Trustee thinks fit and, for that purpose, may raise the sum out of the Distributable Capital of the Trust Fund in such manner as the Trustee thinks fit.

- 16.2 The Trustee may appropriate any part of the Trust Fund or any asset of the Trust Fund in specie or in the actual condition or state of investment of that asset in or towards the satisfaction of the whole or any part of any sum which the Trustee may determine to pay or apply to or for the benefit of an Industry Party under clause 16.1.

...

²⁷ Incolink MFI-2, 19/11/15, p 28, cl 17; Incolink MFI-6, 19/11/15, p 31, cl 18; Incolink MFI-4, 19/11/15, p 25, cl 17; Incolink MFI-8, 19/11/15, p 28, cl 17.

²⁸ Incolink MFI-2, 19/11/15, p 27. See also Incolink MFI-6, 19/11/15, p 30, cl 17; Incolink MFI-4, 19/11/15, p 24, cl 16; Incolink MFI-8, 19/11/15, p 27, cl 16.

16.6 The Trustee may use all or part of the Distributable Capital in or towards the exercise by the Trustee of any of its powers.

...

43. The powers of the trustee, in respect of each of the Incolink Approved Worker Entitlement Funds, are set out in both the body of the relevant deed and in a schedule annexed to the deed. Below, by way of example, are extracts from the trust deed for Fund 4 that set out the relevant powers:

Clause 22

22.2 Particular Powers

- (1) Without limiting the general power contained in clause 22.1 the Trustee has the particular powers referred to in Part 1 of Schedule 1.
- (2) In addition to the other powers conferred on the Trustee under this Deed of Trust and the powers conferred on trustees by law, the Trustee also has the powers relating to:
 - (a) insurance; and
 - (b) undertaking activities in the best interests of the Industry in Victoria, referred to in Part 2 of Schedule 1.

...

Schedule 1

2. Undertaking Activities in the Best Interests of the Industry

For the purposes of clause 22.2(2)(b), the Trustee has the following powers:

- (1) to determine, projects and activities which are considered to be beneficial to the interests of the Industry in Victoria having regard to the interests of Members and Workers or beneficial to the interests of Members or Workers;
- (2) to undertake and conduct projects and activities of the kind specified in Item 1, and to make any payments (including

donations) or incur expenses or liabilities or otherwise to apply such funds as it may have available in or towards projects and activities of the kind specified in Item 1 or to assist in the conduct of those projects or activities; and

- (3) to make payments (including donations) and to dispose of any real or personal property of the Trust Fund to a person which is complying with Item 1 or to enable the person to do so (without seeing or being bound to see to their application).

44. Thus, the trust deed for each of Fund 4, Fund 5, PSL1 and PSL2 allows the trustee to accumulate income, transfer it to a Distributable Capital Account and then distribute the money including to unions and the MBAV.

45. On 14 March 2012, the board of Incolink, as trustee of Fund 4, passed resolutions:²⁹

- (a) to accumulate all of the Net Income of the Fund (**Accumulated Distributable Capital**) for that year and future years; and
- (b) to transfer the Accumulated Distributable Capital for that year and future years to Fund 1, for the purpose of undertaking activities in the best interest of the building and construction industry including meeting part of the costs incurred in providing various member services.

²⁹ Incolink MFI-3, 19/11/15.

46. Similarly, on 14 March 2012, the board of Incolink, as trustee of Fund 5, passed resolutions:³⁰

- (a) To accumulate the Accumulated Distributable Capital for that year and future years; and
- (b) To transfer the Accumulated Distributable Capital to Fund 2, for the purpose of undertaking activities in the best interest of the building and construction industry including meeting part of the costs incurred in providing various member services.

47. Thus, in effect:

- (a) Each year all of the income of that year for each of Funds 4 and 5 is accumulated.
- (b) The following year the accumulated income, which is now treated as capital, is transferred from Funds 4 and 5 to Funds 1 and 2 respectively.
- (c) Funds 1 and 2 are not approved worker entitlement funds, and hence there is no legislative restriction on the use of any monies paid into the funds.

48. The consequence is that from 14 March 2012 onwards no income of Funds 4 and 5, apart from that income used in the payment of reasonable administrative expenses, is ever used for any of the purposes listed in s 58PB(4)(d). In essence, the profit of the funds is

³⁰ Incolink MFI-7, 19/11/15.

siphoned off to Funds 1 and 2 where it can be distributed to industry parties.

Should the endorsement for Fund 4, Fund 5, PSL1 and PSL2 be revoked?

49. Pursuant to s 426-55 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth), endorsement of a fund as an ‘approved worker entitlement fund’ may be revoked by the Commissioner of Taxation if at any time after endorsement the entity endorsed was not entitled to endorsement.
50. The Commission raised with Incolink in correspondence the question how the trust deeds for Fund 4, Fund 5, PSL1 and PSL2 satisfied s 58PB(4)(d) of the *Fringe Benefits Tax Assessment Act* 1986 (Cth). That paragraph limits the purposes for which ‘payments *from* the income of the fund are to be made’ (emphasis added). That paragraph does not draw a distinction between income of the fund in the current year and income of the fund generated in previous years and retained by the fund. Given that the trust deeds explicitly allow each of Fund 4, Fund 5, PSL1 and PSL2 to make payments from the income generated in previous years for purposes other than those stated in sub-paragraph (4)(d), it would seem that none of the trust deeds comply with the legislation.
51. However, in its response, Incolink submitted that:³¹

...it is clear that the reference to income in section 58PB(4)(d) is only to current year income and that the section does not restrict the use to which

³¹ Incolink MFI-71, 19/11/15, p 2 [2.3].

prior year income on which tax has been paid (the balance of which becomes capital) can be put.

52. On that approach, s 58PB(4)(d) should be construed as if it read:

(d) under the fund's constituting documents, payments from the current year income of the fund are to be made only for the following purposes ...

53. Counsel assisting correctly submitted that in assessing this construction, it must be borne in mind that '[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.'³²

54. In correspondence, Incolink relied on the following matters to support its construction:³³

(a) A Senate Economics Legislation Committee Report into the provisions of the *Taxation Laws Amendment Bill (No 4) 2003*, which became the Act that introduced s 58PB, which referred to advice from Treasury concerning s 58PB(4) that stated:³⁴

The fund may retain net income, pay tax on it (being undistributed net income) and apply the balance as it wishes, subject to the deed governing the fund. The Bill does not place any restrictions on how the trustee applies these funds.

³² *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey, approved on numerous occasions including, for example, *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319; *Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue* (2014) 85 NSWLR 443; *Minister for Immigration and Border Protection v Han* (2015) 231 FCR 113.

³³ Incolink MFI-71, 19/11/15.

³⁴ Incolink MFI-71, 19/11/15, pp 2 [2.5], 10.

- (b) Correspondence from the ATO to solicitors on behalf of Incolink in 2003 also adopted Treasury's view.³⁵
- (c) Correspondence from the ATO in 2014 confirmed that its position remained unchanged, although in earlier correspondence in 2013 with Incolink's representatives it appears that at least some officials within the ATO were adopting the construction that s 58PB(4)(d) applies to both current and prior year income.³⁶

55. Counsel assisting submitted, correctly, that none of these matters support Incolink's construction. It is clear law that the subjective statements of Ministers, or members of Parliament, or officials or drafters about what legislation means are irrelevant in the sense that they cannot displace the meaning which is to be given to the text applying the ordinary principles of construction.³⁷ The fact that Treasury thought s 58PB(4) meant something and that interpretation has been adopted by the ATO, on both occasions with apparently no supporting reasons, does not advance Incolink's argument. The fact that in 2013 the ATO had an apparent change of heart, albeit temporarily, suggests that there is little principled reasoning supporting its current approach. Nor is Incolink's argument advanced by the fact,

³⁵ Incolink MFI-71, 19/11/15, pp 2 [2.8], 46.

³⁶ Incolink MFI-71, 19/11/15, pp 2 [2.9], 60, 53-59.

³⁷ See, eg, *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514; *Harrison v Melhem* (2008) 72 NSWLR 380 (CA); *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252.

not referred to by Incolink in its correspondence, that the Minister with carriage of the bill in the Senate also accepted Treasury's view.³⁸

56. Whilst it may be accepted that where a statutory provision is ambiguous, consideration of antecedent parliamentary materials may be used in seeking to identify the mischief the provision was intended to remedy, those materials cannot overcome the clear effect of a provision.

57. In correspondence on behalf of Incolink with the ATO in 2014, further reasons were advanced in support of the construction advanced by Incolink:³⁹

- (a) 'Income of the fund' in s 58PB(4)(d) should take its meaning from trust law.
- (b) As a matter of trust law, once income has been accumulated by virtue of the terms of the trust deed, the income becomes the capital of the trust and ceases itself to be income of the fund.
- (c) Accordingly 'income of the fund' means 'current year income of the trust fund'.

58. In written submissions, counsel assisting advanced a number of reasons why it was submitted those arguments cannot be sustained.

³⁸ Commonwealth, *Parliamentary Debates (Hansard)*, Senate, 26 June 2003, p 12764; see also p 12762.

³⁹ Incolink MFI-71, 19/11/15, pp 54-57.

Incolink did not respond to those submissions. For the reasons below, counsel assisting's submissions are accepted.

59. Counsel assisting's first point was that s 58PB is not concerned with trusts. It is concerned with approved worker entitlement *funds*. Accordingly, there is no reason why an approved worker entitlement fund need be a trust. Therefore there is no reason why income of the fund should be limited by trust law concepts. The trust law concept of income is invoked by the expression 'income of the trust estate'. That is the expression that has long been used in the *Income Tax Assessment Act 1936* (Cth).⁴⁰ That expression does not appear in s 58PB.
60. *Secondly*, both paragraphs (4)(c) and (4)(d) limit payments 'from' contributions to the fund and the income of the fund respectively to only specific purposes. The use of the word 'from' indicates that there must be a nexus or connection between the payment and either 'contributions to the fund' or 'income of the fund'. What kind of nexus is required must depend on the context. Clearly, paragraphs (4)(c) and (4)(d) ensure that the fund as a whole is only used for particular purposes.⁴¹ Counsel assisting identified two examples that demonstrate that consistency with this function can only be achieved if the provisions restrict payments out of the fund which are traceable from or referable to contributions or income.
- (a) Section 58PB(4)(c)(ii) permits payments from contributions in order to make investments to generate income from the

⁴⁰ *Income Tax Assessment Act 1936* (Cth), s 96.

⁴¹ A view which is confirmed by the explanatory memorandum to the *Taxation Laws Amendment Bill (No 4) 2003* (Cth) at para 7.29.

assets of the fund. Thus, contributions from members could be pooled to acquire a term deposit, real property or other investment. Unless the restriction imposed by s 58PB(4)(c) applies to payments which are traceable from or referable to contributions, the fund could simply liquidate the investment acquired using contributions and make payments out of the liquidated amount for purposes other than those specified in s 58PB(4)(c). This would allow the fund, through the use of artifice, to defeat the purpose of s 58PB(4)(c).

- (b) Similar reasoning applies in respect of payments out of income of the fund. Unless the word 'from' in s 58PB(4)(d) is understood as including 'traceable from or referable to', then the fund could simply use income to acquire an investment, liquidate the investment and then distribute the proceeds for a purpose other than those specified.

Once 'from' is properly understood in ss 58PB(4)(c) and (4)(d) as including traceable from or referable to, it is clear that payments referable to prior year income must still be subject to the limitations imposed by paragraph (4)(d).

- 61. The above reasoning explains why it is wrong in this particular statutory context to refer to the 'capital' of the fund as if it was a third category separate from 'contributions' and 'income'. The statute contemplates that the fund will (a) obtain contributions and (b) generate income. The contributions and income will be used in the administration of the fund and will together form the whole of the

fund. The statutory restrictions on payment imposed are intended to apply to the whole of the fund, not only some part of it.

62. Finally, if ‘income of the fund’ in s 58PB(4)(d) is construed to mean ‘*current year* income of the fund’, as Incolink in effect contends, there is little, if any, purpose to the provision. As has occurred with Funds 4 and 5, a fund can arrange its affairs so that it never makes any payment out of current year income (save for reasonable administrative expenses). The legislation protects worker entitlements and ensures some minimum governance and payment standards for the fund (see sub-paragraphs (4)(a), (4)(b), (4)(e), (4)(f)). It is an erroneous construction of that legislation which would restrict only payments out of current year income. It is true that if the fund which is a trust retains the income it will pay income tax on the income. But that is simply a consequence of ordinary tax law principles. It does not provide any reason why Parliament would have enacted s 58PB(4)(d).
63. For the reasons given above, the Commissioner of Taxation was and is wrong in his interpretation of s 58PB(4)(d). On the proper interpretation of the enactment, none of Fund 4, Fund 5, PSL1 and PSL2 are currently or were ever entitled to be endorsed as ‘approved worker entitlement funds’.
64. Counsel assisting submitted that notwithstanding the above conclusion, it was not appropriate that there be a recommendation for referral to the Commissioner of Taxation given Incolink’s reliance on the Commissioner’s long-standing approach to the interpretation of the section. That submission is acceded to. Possible legislative reform of s 58PB is addressed in Volume 5 of this Report.

E – FORFEITURES

65. The trust deeds for Fund 1,⁴² Fund 2,⁴³ Fund 4⁴⁴ and Fund 5⁴⁵ allow a credit in a worker's account to be forfeited to the fund, and subsequently distributed to the relevant Industry Parties/Beneficiaries.
66. Under each of the trust deeds, the benefits are forfeited if:⁴⁶
- (a) two years have passed from the date an employer last made a contribution in respect of a worker;
 - (b) the Trustee is unable to locate the worker, having taken reasonable and necessary steps to locate the worker (including posting a letter to the last known address of the worker); and
 - (c) the Trustee resolves that the worker cannot be located.
67. Incolink's Finance Policies and Procedures Manual (**Manual**) indicates that forfeiture letters are only sent to workers with known addresses

⁴² Incolink MFI-1, 19/11/15, p 40, cl 6AA. The forfeited funds are divided equally between the MBAV the unions, being the AWU, the CFMEU and the CEPU.

⁴³ Incolink MFI-5, 19/11/15, p 19, cl 12. The forfeited funds are divided equally between the AMWU and CFMEU Federated Engine Drivers and Fireman's Association, Victorian Division Branch (which has now ceased to exist).

⁴⁴ Incolink MFI-2, 19/11/15, p 25, cl 11. The forfeited funds form part of the Distributable Capital of the fund, except for amounts forfeited after 30 June 2014 which must be kept in a separate account which may only be used for the purposes specified in s 58PB(4) of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

⁴⁵ Incolink MFI-6, 19/11/15, p 28, cl 12. The forfeited funds form part of the Distributable Capital of the fund, except for amounts forfeited after 30 June 2014 which must be kept in a separate account which may only be used for the purposes specified in s 58PB(4) of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

⁴⁶ Incolink MFI-1, 19/11/15, p 40, cl 6AA; Incolink MFI-5, 19/11/15, p 19, cl 12; Incolink MFI-2, 19/11/15, p 25, cl 11; Incolink MFI-6, 19/11/15, p 28, cl 12.

and balances of \$5 or more. The letter sent to workers indicates that they have 30 days to respond or the funds will be forfeited. According to the Manual, Incolink typically allows workers another week to respond. There does not appear to be any attempt to contact workers whose addresses are not known. The Manual does not specify that inquiries should be made with the worker's last known employer to ascertain details concerning the worker and his or her circumstances.

68. The amounts forfeited are substantial. The table below sets out the amounts forfeited by Incolink from 2011–2015 based on records produced to the Commission by Incolink. There is a 'practice' by which amounts forfeited may be 'reinstated' by Incolink. It sets out amounts reinstated pursuant to that practice.

| Year ended 30 June | 2011 | 2012 | 2013 | 2014 | 2015 | Total |
|-------------------------|--------------------|--------------------|--------------------|---------------------|--------------------|---------------------|
| Forfeitures | - | \$8,895,058 | - | \$22,877,781 | \$6,915,999 | \$38,688,838 |
| Fund 1 - Reinstatements | \$(182,013) | \$(237,624) | \$(257,394) | \$(1,119,827) | \$(1,740,215) | \$(3,537,073) |
| Fund 2 - Reinstatements | \$(35,832) | \$(40,440) | \$(66,379) | (406,488) | \$(790,342) | \$(1,339,481) |
| Net Forfeitures | \$(217,846) | \$8,616,994 | \$(323,772) | \$21,351,467 | \$4,385,442 | \$33,812,285 |

69. Over that 5 year period almost \$38.7 million was forfeited with approximately \$4.9 million 'reinstated', giving a net forfeiture over the 5 years of \$33.8 million. In comparison to the total amount forfeited, the amount 'reinstated' is approximately 12.6%. The annual average amount forfeited over the period is in excess of \$6.7 million per annum.
70. The effect of these provisions permitting forfeitures is that potentially very significant benefits to workers can be forfeited after a relatively

short period of time. This may be contrasted, for example, with the detailed provisions dealing with unclaimed superannuation monies⁴⁷ and unclaimed bank accounts.⁴⁸

71. The Commission raised in correspondence with Incolink how its forfeiture procedures were consistent with the requirements imposed on businesses under the *Unclaimed Money Act 2008* (Vic).⁴⁹
72. The *Unclaimed Money Act 2008* (Vic) requires any person carrying on business in Victoria that holds any ‘unclaimed money’ to establish a register of unclaimed moneys, and after holding such money for a year to transfer the money to the Registrar of Unclaimed Monies.⁵⁰ A business that fails, without reasonable excuse, to keep the register or pay money to the Registrar of Unclaimed Monies, commits an offence.⁵¹ If a body corporate commits an offence against s 17, an officer of the body corporate also commits an offence if the officer, relevantly, permitted the commission of the offence by the body corporate.⁵² If a body corporate commits an offence against s 18, an officer of the body corporate also commits an offence if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate.⁵³

⁴⁷ *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth), Part 3.

⁴⁸ *Banking Act 1959* (Cth), s 69.

⁴⁹ Incolink MFI-70, 19/11/15, p 7 [8].

⁵⁰ *Unclaimed Money Act 2008* (Vic), ss 11-12.

⁵¹ *Unclaimed Money Act 2008* (Vic), ss 17-18.

⁵² *Unclaimed Money Act 2008* (Vic), s 26A.

⁵³ *Unclaimed Money Act 2008* (Vic), s 26B.

73. Section 3 relevantly defines ‘unclaimed money’ to include
- (a) principal, interest, dividends, bonuses, profits, salaries, wages and any other sums of money that are legally payable to the owner and that have remained unpaid for not less than 12 months after that money become payable.
74. ‘Owner’ means the ‘person entitled to any unclaimed money including ... the person’s executors, administrators or assignees’. Section 3(3)(a) provides that for the purposes of the definition of ‘owner’ and paragraph (a) of the definition of ‘unclaimed money’ in subsection (1) in determining if a person is entitled to money or if money is legally payable to the owner, no account is taken of whether or not the owner is ‘required to take any action by way of demand or otherwise to claim or recover the money’.
75. There are various circumstances in which a worker is legally entitled to a payment from one of the redundancy funds operated by Incolink. For example:
- (a) A worker whose employment is terminated for any reason, is entitled to be paid by the trustee of the fund a quantifiable amount, after providing a written request to the Trustee, provided the worker is still out of work at the time of making the request.⁵⁴

⁵⁴ Incolink MFI-1, 19/11/15, p 25, cl 3DD.1; Incolink MFI-5, 19/11/15, p 10, cl 6.1; Incolink MFI-2, 19/11/15, p 18, cl 9.1; Incolink MFI-6, 19/11/15, p 21, cl 10.1.

- (b) A worker who retires and is aged over 55 is entitled to be paid the balance of his or her worker account.⁵⁵
- (c) Where a worker has elected to convert his or her account to a ‘Genuine Redundancy Account’, if the worker reaches 66 years and the trustee has received a written request on the prescribed form within 30 days of the worker’s 66th birthday or such later time as the trustee allows, the trustee must pay the worker an amount equal to the amount standing to the worker’s credit in his or her Genuine Redundancy Account.⁵⁶

76. In correspondence with the Commission, Incolink argued that in these three (and other) examples, there is no unclaimed money. In these three examples this was relevantly because:

- (a) Incolink ‘simply does not know’ whether a worker’s employment has been terminated and that the worker is still out of work. ‘The fact that redundancy contributions have ceased to be made on behalf of the Worker is not conclusive’;⁵⁷
- (b) Incolink ‘simply does not know’ if a worker has retired;⁵⁸ and

⁵⁵ Incolink MFI-1, 19/11/15, p 25, cl 3DD.4; Incolink MFI-5, 19/11/15, p 11, cl 6.4; Incolink MFI-2, 19/11/15, p 19, cl 9.4; Incolink MFI-6, 19/11/15, p 22, cl 10.5.

⁵⁶ Incolink MFI-1, 19/11/15, p 31, cl 3DDA.11; Incolink MFI-5, 19/11/15, p 44 (sch 1 cl 2.5); Incolink MFI-2, 19/11/15, p 23, cl 9A.6; Incolink MFI-6, 19/11/15, p 26, cl 10A.6.

⁵⁷ Incolink MFI-71, 19/11/15, p 6 [6.9(1)].

⁵⁸ Incolink MFI-71, 19/11/15, p 7 [6.9(5)].

(c) Incolink ‘does not know with certainty a [w]orker’s date of birth’. There is a possibility that the date of birth information held by Incolink could be wrong.⁵⁹

77. Incolink also relied on the decision of Finkelstein J in *In the Matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in liq)*.⁶⁰

78. In that case, Finkelstein J was concerned with a Friendly Society carrying on a life insurance business in Australia. The Society maintained a funeral fund paying death and endowment benefits. Over time the Society had lost contact with many members and a substantial unclaimed balance had accumulated. The liquidator of the Friendly Society sought directions as to what to do with the money. After making considerable inquiries — including searching telephone directories, speaking with other members, conducting searches at the Office of the Registrar of Births, Death and Marriages, conducting searches at the Probate Office of the Supreme Court of Victoria and conducting searches at the Public Record Office Victoria, placing advertisements in a local newspapers and undertaking searches of the electoral rolls — there was an *ex parte* hearing before Finkelstein J on what should occur with the monies. His Honour concluded that the unclaimed money provisions in the *Life Insurance Act 1995* (Cth) did not apply because:⁶¹

⁵⁹ Incolink MFI-71, 19/11/15, p 8 [6.10(6)].

⁶⁰ [2008] FCA 1537.

⁶¹ *In the Matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in liq)* [2008] FCA 1537 at [12].

It will be seen that money is ‘unclaimed money’ only if a policy holder has a legal entitlement to be paid that money. In this case, however, it is impossible to say whether a missing member is entitled to a benefit. This is because the missing member or his spouse may still be alive. Accordingly, one simply does not know whether the criterion for ‘unclaimed money’ has been satisfied.

79. The *Life Insurance Act* 1995 (Cth) does not contain a provision equivalent to s 3(3)(a) of the *Unclaimed Money Act* 2008 (Vic).
80. His Honour also went to say that the same reasoning would also deny that the money was unclaimed money under the *Unclaimed Moneys Act* 1962 (Vic), if that legislation applied:⁶²

As I have noted, one does not know whether any untraceable member had died before the transfer and date and hence it cannot be said that there was an obligation to pay any part of the fund to any member.

81. Incolink’s submission was that, despite the terms of s 3(3)(a) of the *Unclaimed Money Act* 2008 (Vic), money would not become ‘unclaimed money’ at least until a worker made a claim on the fund and satisfied Incolink, as trustee, that the necessary conditions for an entitlement to payment had been met, and the worker subsequently could not be located.⁶³ No such circumstances had arisen in practice and accordingly Incolink has never treated any amounts as ‘unclaimed money’. As far as Incolink was aware, other redundancy funds with forfeiture provisions in their trust deeds operate on a similar basis to Incolink.

⁶² *In the Matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in liq)* [2008] FCA 1537 at [15].

⁶³ Incolink MFI-71, 19/11/15, p 9 [6.15].

82. Counsel assisting submitted that the ‘fundamental flaw’ in Incolink’s submissions was that whether money is ‘unclaimed money’ is an objective question. It is not a subjective matter turning on Incolink’s actual knowledge. The obligations imposed on a business by ss 11 and 12 of the *Unclaimed Money Act* 2008 (Vic) do not depend on the business having actual knowledge that the money is unclaimed money. If it did, the whole Act would be almost pointless: businesses could easily deny that they knew that they held unclaimed money.
83. Counsel assisting further submitted that a business’s knowledge will be relevant to whether it has a ‘reasonable excuse’ for failing to comply with the obligations imposed by ss 11 and 12, and thus a defence to the offence provisions created by ss 17 and 18. But, absence of knowledge alone would not be a ‘*reasonable* excuse’ if the business failed to take reasonable inquiries in the circumstances. The Act specifically contemplates that a business may make inquiries in locating an owner of unclaimed money, by allowing the business to deduct out of unclaimed money an amount in respect of reasonable expenses: s 11(3).
84. Incolink filed written submissions responding to these arguments.⁶⁴ It appeared to accept that the question whether money was ‘unclaimed money’ was an objective question. But it also submitted that if Incolink did not have the knowledge that money was ‘unclaimed money’ then it could not be unclaimed money. It also submitted that if the intention of the Act was to impose an obligation on business to undertake inquiries to determine whether money was or was not

⁶⁴ Submissions of Incolink, 20/11/15, para 11.

‘unclaimed money’, one would have expected the obligation to be clearly stated. It also drew attention to the fact that the Act did not permit a business to deduct its reasonable expenses of locating an owner in respect of money that is ultimately determined not to be unclaimed money. However, as counsel assisting point out in reply, there is no need for the *Unclaimed Money Act* 2008 (Vic) to allow a business to deduct reasonable expenses of locating an owner in respect of money that is ultimately determined not to be unclaimed money. Incolink is entitled under the various trust deeds to defray its costs. The statutory provision is only required where the money is unclaimed and Incolink would be otherwise restricted in its dealing with the money.

85. In short, Incolink submitted that:⁶⁵

The Act is directed towards monies that clearly are or are not legally payable, without further inquiry, and not to complex entitlement provisions of the kind found in redundancy trust arrangements, such as those of Incolink.

86. The approach of Finkelstein J in *In the Matter of the Grand United Order of Free Gardeners Friendly Society Ltd (in liq)* is inconsistent with Incolink’s submission. In that case, *after extensive inquiries had been made*, the court could not be satisfied that any missing member was objectively entitled to a benefit under a life insurance policy. Hence it could not be satisfied that there was any ‘unclaimed money’ within the meaning of the *Life Insurance Act* 1995 (Cth).⁶⁶ The

⁶⁵ Submissions of Incolink, 20/11/15, para 11(b).

⁶⁶ See para 78.

significance of the case is that if the extensive inquiries had demonstrated that money was owing under a particular policy, the money owing would have been 'unclaimed money'. The fact that the company would not have known that the money was unclaimed money before making the inquiries would not have altered the result.

87. The same applies here. If a worker is objectively entitled to be paid a sum of money from one of Incolink's funds, ignoring any action that the worker must take to claim that money, and that entitlement subsists for 12 months, then that money is 'unclaimed money' in Incolink's hands irrespective of Incolink's knowledge. An example would arise if the worker has retired and is over the age of 55, or the worker has elected to convert his or her account to a genuine redundancy account and is over the age of 66.
88. Incolink submitted that this was circular because if Incolink does not have information to determine whether a benefit is payable, it cannot be determined that the benefit is objectively payable.⁶⁷ There is no circularity once it is accepted that the question is not whether Incolink knows the money is payable but whether it is objectively payable. The Act does not operate only in respect of money which the payer knows or believes to be payable.
89. It is true that this result places Incolink in a position of risk of contravention of the Act if it decides, as it has thus far decided, not to undertake even the most basic of inquiries to determine whether money is legally payable. But if it undertakes proper inquiries, it will have the

⁶⁷ Submissions of Incolink, 20/11/15, para 11(c).

benefit of the ‘reasonable excuse’ defence in the legislation. Further, contrary to Incolink’s submissions,⁶⁸ if Incolink remits money to the Registrar of Unclaimed Moneys that it is satisfied is unclaimed money, it will not breach its obligation as trustee.⁶⁹

90. As counsel assisting correctly submitted, Incolink’s current forfeiture procedures as set out in the Manual give rise to a significant and systemic risk of non-compliance with the *Unclaimed Money Act* 2008 (Vic), particularly having regard to the very large amount of money forfeited:

- (a) In some circumstances, Incolink will already have information that will indicate with an extremely high degree of probability that a worker is entitled to receive money, for example when particular workers reach 66 years of age. The suggestion that Incolink does not know ‘for certain’ that the information it has about a worker’s date of birth is accurate is both irrelevant and specious.
- (b) In other circumstances, Incolink will be on notice that there is a fairly high chance that a worker is entitled to receive money, for example when a worker retires after reaching 55 years, or if a worker is terminated and is out of work. Whilst it is true that Incolink will not know for certain, without making inquiries, whether a worker has retired after reaching 55 years or has been terminated and is out of work, the fact that contributions are no longer being received in respect of

⁶⁸ Submissions of Incolink, 20/11/15, para 11(d).

⁶⁹ *Unclaimed Money Act* 2008 (Vic), s 97.

an employee would put a reasonable person on notice of the possibility. Counsel assisting submitted that in many cases, one would expect that fairly routine inquiries with the worker's last known employer would resolve any uncertainty. Incolink asserted that having regard to the transient nature of employment in the building industry these inquiries 'would in most cases prove fruitless'.⁷⁰ Whilst it may be accepted that employment in the industry is transient, Incolink's assertion is very difficult to accept.

91. Incolink's treatment of forfeited monies raises a broader policy question about the treatment of forfeited benefits in relation to redundancy funds. Should the Commonwealth enact a legislative regime specifically dealing with the issue? That question is addressed in Volume 5 of this Report.

⁷⁰ Submissions of Incolink, 20/11/15, para 13.

APPENDIX A

INCOLINK GROUP ENTITIES - SUMMARY OF GRANT LIABILITIES (EXTERNAL)

| Grant Liabilities | FY11 | FY12 | FY13 | FY14 | FY15 | Total | Average |
|-------------------|-----------------|-----------------|-----------------|-----------------|-----------------|------------------|-----------------|
| AMWU | \$ - | \$ 568,125.00 | \$ 780,225.00 | \$ 614,430.00 | \$ 320,001.00 | \$ 2,282,781.00 | \$ 456,556.20 |
| AWU | \$ 157,500.00 | \$ 428,850.00 | \$ 588,954.00 | \$ 618,415.00 | \$ 649,336.00 | \$ 2,443,055.00 | \$ 488,611.00 |
| CEPU | \$ 210,000.00 | \$ 294,800.00 | \$ 421,200.00 | \$ 126,000.00 | \$ 210,000.00 | \$ 1,262,000.00 | \$ 252,400.00 |
| CFMEU | \$ 6,486,229.00 | \$ 6,095,288.34 | \$ 6,773,949.00 | \$ 7,056,000.00 | \$ 7,670,507.00 | \$ 34,081,973.34 | \$ 6,816,394.67 |
| CFMEU PICNIC | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 500,000.00 | \$ 100,000.00 |
| CFMEU/FFPD | \$ 72,683.00 | \$ 96,300.00 | \$ 132,250.00 | \$ 138,865.00 | \$ 157,962.00 | \$ 598,060.00 | \$ 119,612.00 |
| AMCA | \$ 108,645.52 | \$ 64,400.00 | \$ 109,450.00 | \$ 65,700.00 | \$ 110,000.00 | \$ 458,195.52 | \$ 91,639.10 |
| CCF | \$ 535,800.00 | \$ 529,475.00 | \$ 329,143.00 | \$ 345,650.00 | \$ 348,900.00 | \$ 2,088,968.00 | \$ 417,793.60 |
| CICA | - | - | - | - | - | - | - |
| FAV | \$ 62,300.00 | \$ 96,300.00 | \$ 132,250.00 | \$ 138,860.00 | \$ 157,962.00 | \$ 587,672.00 | \$ 117,534.40 |
| GUCWC | - | - | - | - | - | - | - |
| MBAV | \$ 6,079,329.00 | \$ 5,262,130.00 | \$ 6,474,209.00 | \$ 6,057,000.00 | \$ 7,148,148.00 | \$ 31,020,816.00 | \$ 6,204,163.20 |
| MPA | - | - | - | \$ 5,000.00 | - | \$ 5,000.00 | \$ 1,000.00 |
| MPMSAA | \$ 422,400.00 | \$ 211,200.00 | \$ 211,200.00 | - | - | \$ 844,800.00 | \$ 168,960.00 |
| PJTF | \$ 5,985,455.50 | \$ 1,021,364.00 | \$ 3,565,310.00 | \$ 3,743,580.00 | \$ 3,930,759.00 | \$ 18,246,468.50 | \$ 3,649,293.70 |
| Prostate Cancer | \$ 47,708.00 | - | - | - | - | \$ 47,708.00 | \$ 9,541.60 |
| SCI | - | - | - | \$ 85,500.00 | - | \$ 85,500.00 | \$ 17,100.00 |
| Unidentified | - | - | - | \$ 1,872,008.00 | \$ 435,300.00 | \$ 2,307,308.00 | \$ 461,461.60 |
| VCA | \$ 110,500.00 | \$ 88,750.00 | \$ 155,530.00 | \$ 163,300.00 | \$ 171,470.00 | \$ 689,550.00 | \$ 137,910.00 |
| Total | \$20,378,550.02 | \$14,856,982.34 | \$19,773,670.00 | \$21,130,308.00 | \$21,410,345.00 | \$97,549,855.36 | \$19,509,971.07 |

INCOLINK GROUP ENTITIES - SUMMARY OF GRANT PAYMENTS (EXTERNAL)

| Grant Payments | FY11 | FY12 | FY13 | FY14 | FY15 | Total | Average |
|-----------------|------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|
| AMWU | \$ 719,602.01 | \$ 460,175.14 | \$ 813,800.00 | \$ 647,430.00 | \$ 378,796.00 | \$ 3,019,803.15 | \$ 603,960.63 |
| AWU | \$ 514,500.00 | \$ 390,900.00 | \$ 614,154.00 | \$ 612,765.00 | \$ 642,876.00 | \$ 2,775,195.00 | \$ 555,039.00 |
| CEPU | \$ 239,200.00 | \$ 252,400.00 | \$ 379,400.00 | \$ 547,200.00 | \$ 423,660.00 | \$ 1,841,860.00 | \$ 368,372.00 |
| CFMEU | \$ 6,672,039.00 | \$ 5,099,583.37 | \$ 7,105,803.00 | \$ 7,511,654.00 | \$ 8,159,782.00 | \$ 34,548,861.37 | \$ 6,909,772.27 |
| CFMEU PICNIC | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 500,000.00 | \$ 100,000.00 |
| CFMEU/FFPD | \$ 98,483.00 | \$ 88,200.00 | \$ 137,900.00 | \$ 82,815.00 | \$ 177,282.00 | \$ 584,680.00 | \$ 116,936.00 |
| AMCA | \$ 92,700.00 | \$ 42,800.00 | \$ 86,250.00 | \$ 197,300.00 | \$ 111,030.00 | \$ 530,080.00 | \$ 106,016.00 |
| CCF | \$ 549,178.27 | \$ 445,774.98 | \$ 457,136.41 | \$ 342,450.00 | \$ 343,736.00 | \$ 2,138,275.66 | \$ 427,655.13 |
| CICA | - | - | - | - | \$ 137,180.00 | \$ 137,180.00 | \$ 27,436.00 |
| FAV | \$ 116,300.00 | \$ 84,900.00 | \$ 137,900.00 | \$ 137,810.00 | \$ 153,868.00 | \$ 630,778.00 | \$ 126,155.60 |
| GUCWC | \$ 2,727.27 | - | - | - | - | \$ 2,727.27 | \$ 545.45 |
| MBAV | \$ 6,593,649.64 | \$ 5,513,875.99 | \$ 5,852,739.00 | \$ 7,002,042.10 | \$ 7,007,043.00 | \$ 31,969,349.73 | \$ 6,393,869.95 |
| MPA | - | - | - | \$ 34,200.00 | \$ 56,300.00 | \$ 90,500.00 | \$ 18,100.00 |
| MPMSAA | \$ 267,600.00 | \$ 169,000.00 | \$ 211,200.00 | \$ 211,200.00 | \$ 170,130.00 | \$ 1,029,130.00 | \$ 205,826.00 |
| PJTF | \$ 5,818,363.00 | \$ 1,619,909.00 | \$ 2,852,248.00 | \$ 4,082,284.00 | \$ 3,912,041.00 | \$ 18,284,845.00 | \$ 3,656,969.00 |
| Prostate Cancer | \$ 50.00 | - | - | - | - | \$ 50.00 | \$ 10.00 |
| SCI | - | - | - | - | - | - | - |
| Unidentified | - | - | - | - | - | - | - |
| VCA | \$ 186,618.00 | \$ 68,186.00 | \$ 130,524.00 | \$ 160,500.00 | \$ 65,000.00 | \$ 610,828.00 | \$ 122,165.60 |
| Total | \$21,971,010.19 | \$14,335,704.48 | \$18,879,054.41 | \$21,669,650.10 | \$21,838,724.00 | \$98,694,143.18 | \$19,738,828.64 |

FUND 1 - SUMMARY OF GRANT LIABILITIES

| Grant Liabilities | FY11 | FY12 | FY13 | FY14 | FY15 |
|-------------------|------------------------|-----------------------|------------------------|------------------------|------------------------|
| AMWU | - | - | - | - | - |
| AWU | - | - | - | - | - |
| CEPU | \$ 210,000.00 | \$ 294,800.00 | \$ 421,200.00 | \$ 126,000.00 | \$ 210,000.00 |
| CFMEU | \$ 4,105,329.00 | \$ 3,174,963.34 | \$ 6,272,337.00 | \$ 6,529,300.00 | \$ 7,117,473.00 |
| CFMEU PICNIC | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 |
| CFMEU/FFPD | - | - | - | - | - |
| AMCA | \$ 108,645.52 | \$ 64,400.00 | \$ 109,450.00 | \$ 65,700.00 | \$ 110,000.00 |
| CCF | - | - | - | - | - |
| CICA | - | - | - | - | - |
| FAV | - | - | - | - | - |
| GUCWC | - | - | - | - | - |
| MBAV | \$ 6,079,329.00 | \$ 2,707,130.00 | \$ 6,474,209.00 | \$ 6,030,600.00 | \$ 7,112,948.00 |
| MPA | - | - | - | 5,000.00 | - |
| MPMSAA | \$ 422,400.00 | \$ 211,200.00 | \$ 211,200.00 | - | - |
| PJTF | \$ 5,985,455.50 | \$ 1,021,364.00 | \$ 3,565,310.00 | \$ 3,743,580.00 | \$ 3,930,759.00 |
| Prostate Cancer | \$ 47,708.00 | - | - | - | - |
| SCI | - | - | - | 85,500.00 | - |
| Unidentified | - | - | - | 1,872,008.00 | 435,300.00 |
| VCA | - | - | - | - | - |
| Total | \$17,058,867.02 | \$7,573,857.34 | \$17,153,706.00 | \$18,557,688.00 | \$19,016,480.00 |

FUND 1 - SUMMARY OF GRANT PAYMENTS

| Grant Payments | FY11 | FY12 | FY13 | FY14 | FY15 |
|-----------------|------------------------|-----------------------|------------------------|------------------------|------------------------|
| AMWU | - | - | - | - | - |
| AWU | - | - | - | - | - |
| CEPU | \$ 239,200.00 | \$ 252,400.00 | \$ 379,400.00 | \$ 547,200.00 | \$ 423,660.00 |
| CFMEU | \$ 4,058,059.00 | \$ 2,235,433.36 | \$ 6,582,666.00 | \$ 7,094,704.00 | \$ 7,548,468.00 |
| CFMEU PICNIC | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 | \$ 100,000.00 |
| CFMEU/FFPD | - | - | - | - | - |
| AMCA | \$ 92,700.00 | \$ 42,800.00 | \$ 86,250.00 | \$ 197,300.00 | \$ 111,030.00 |
| CCF | - | - | - | - | - |
| CICA | - | - | - | - | - |
| FAV | - | - | - | - | - |
| GUCWC | \$ 2,727.27 | - | - | - | - |
| MBAV | \$ 6,593,649.64 | \$ 2,958,875.99 | \$ 5,852,739.00 | \$ 6,962,442.10 | \$ 6,980,643.00 |
| MPA | - | - | - | 34,200.00 | 56,300.00 |
| MPMSAA | \$ 267,600.00 | \$ 169,000.00 | \$ 211,200.00 | \$ 211,200.00 | \$ 170,130.00 |
| PJTF | \$ 5,818,363.00 | \$ 1,619,909.00 | \$ 2,852,248.00 | \$ 4,082,284.00 | \$ 3,912,041.00 |
| Prostate Cancer | \$ 50.00 | - | - | - | - |
| SCI | - | - | - | - | - |
| Unidentified | - | - | - | - | - |
| VCA | - | - | - | - | - |
| Total | \$17,172,348.91 | \$7,378,418.35 | \$16,064,503.00 | \$19,229,330.10 | \$19,302,272.00 |

FUND 2 - SUMMARY OF GRANT LIABILITIES AND PAYMENTS - FY11 to FY15

| Grant Liabilities | FY11 | FY12 | FY13 | FY14 | FY15 |
|--------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| AMWU | - | \$ 568,125.00 | \$ 780,225.00 | \$ 614,430.00 | \$ 320,001.00 |
| AWU | \$ 157,500.00 | \$ 428,850.00 | \$ 588,954.00 | \$ 618,415.00 | \$ 649,336.00 |
| CFMEU | \$ 196,900.00 | \$ 365,325.00 | \$ 501,612.00 | \$ 526,700.00 | \$ 553,034.00 |
| CFMEU/FFPD | \$ 72,683.00 | \$ 96,300.00 | \$ 132,250.00 | \$ 138,865.00 | \$ 157,962.00 |
| CCF | \$ 535,800.00 | \$ 529,475.00 | \$ 329,143.00 | \$ 345,650.00 | \$ 348,900.00 |
| CICA | - | - | - | - | - |
| FAV | \$ 62,300.00 | \$ 96,300.00 | \$ 132,250.00 | \$ 138,860.00 | \$ 157,962.00 |
| VCA | \$ 110,500.00 | \$ 88,750.00 | \$ 155,530.00 | \$ 163,300.00 | \$ 171,470.00 |
| Total | \$1,135,683.00 | \$2,173,125.00 | \$2,619,964.00 | \$2,546,220.00 | \$2,358,665.00 |

| Grant Payments | FY11 | FY12 | FY13 | FY14 | FY15 |
|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| AMWU | \$ 719,602.01 | \$ 460,175.14 | \$ 813,800.00 | \$ 647,430.00 | \$ 378,796.00 |
| AWU | \$ 514,500.00 | \$ 390,900.00 | \$ 614,154.00 | \$ 612,765.00 | \$ 642,876.00 |
| CFMEU | \$ 429,980.00 | \$ 309,150.01 | \$ 523,137.00 | \$ 416,950.00 | \$ 611,314.00 |
| CFMEU/FFPD | \$ 98,483.00 | \$ 88,200.00 | \$ 137,900.00 | \$ 82,815.00 | \$ 177,282.00 |
| CCF | \$ 549,178.27 | \$ 445,774.98 | \$ 457,136.41 | \$ 342,450.00 | \$ 343,736.00 |
| CICA | - | - | - | - | \$ 137,180.00 |
| FAV | \$ 116,300.00 | \$ 84,900.00 | \$ 137,900.00 | \$ 137,810.00 | \$ 153,868.00 |
| VCA | \$ 186,618.00 | \$ 68,186.00 | \$ 130,524.00 | \$ 160,500.00 | \$ 65,000.00 |
| Total | \$2,614,661.28 | \$1,847,286.13 | \$2,814,551.41 | \$2,400,720.00 | \$2,510,052.00 |

VICTORIAN BUILDING AND CONSTRUCTION INDUSTRY TRAINING FUND - SUMMARY OF GRANT LIABILITIES AND PAYMENTS

| Grant Liabilities | FY11 | FY12 | FY13 | FY14 | FY15 |
|-------------------|-----------------------|-----------------------|---------------|---------------|---------------|
| CFMEU | \$ 2,184,000.00 | \$ 2,555,000.00 | - | - | - |
| MBAV | - | \$ 2,555,000.00 | - | - | - |
| Total | \$2,184,000.00 | \$5,110,000.00 | \$0.00 | \$0.00 | \$0.00 |

| Grant Payments - Total | FY11 | FY12 | FY13 | FY14 | FY15 |
|------------------------|-----------------------|-----------------------|---------------|---------------|---------------|
| CFMEU | \$ 2,184,000.00 | \$ 2,555,000.00 | - | - | - |
| MBAV | - | \$ 2,555,000.00 | - | - | - |
| Total | \$2,184,000.00 | \$5,110,000.00 | \$0.00 | \$0.00 | \$0.00 |

VICTORIAN BUILDING INDUSTRY DISPUTES BOARD FOUNDATION TRUST - SUMMARY OF GRANT LIABILITIES AND PAYMENTS

| Grant Liabilities | FY11 | FY12 | FY13 | FY14 | FY15 |
|-------------------|---------------|---------------|---------------|--------------------|--------------------|
| MBAV | | | | 26,400.00 | 35,200.00 |
| Total | \$0.00 | \$0.00 | \$0.00 | \$26,400.00 | \$35,200.00 |

| Grant Payments | FY11 | FY12 | FY13 | FY14 | FY15 |
|----------------|------|------|------|--------------------|--------------------|
| MBAV | | | | 39,600.00 | 26,400.00 |
| Total | | | | \$39,600.00 | \$26,400.00 |

| LEGEND | Notes |
|--------------|--|
| AMCA | Air Conditioning and Mechanical Contractors' Association |
| AMWU | Australian Manufacturing workers' Union |
| AWU | Australian Workers Union |
| CEPU | Communications Electrical Plumbing Union |
| CFMEU | Construction Forestry Mining and Energy Union |
| CFMEU/FFPD | CFMEU Forestry & Furnishing Products Division |
| CFMEU PICNIC | Construction Forestry Mining and Energy Union |
| CCF | Civil Contractors Federation |
| CICA | Crane Industry Council of Australia |
| FAV | Floor Covering Association of Victoria |
| GUCWC | Greenville Utilities (assumed) |
| MBAV | Master Builders Association of Victoria |
| MPA | Master Painters Association |
| MPMSAA | Master Plumbers and Mechanical Services Association |
| PJTf | Plumbing Joint Training Fund |
| SCI | Surface Coatings Industry |
| VCA | Victorian Crane Association |

PART 12: INDUSTRY 2020

CHAPTER 12

INDUSTRY 2020, HSU NO 1 BRANCH ELECTIONS AND DAVID ASMAR

1. In 2014 the Commission held hearings into a number of relevant entities, including generic funds and fighting funds. A summary of the Commission's activities in 2014 is contained in Volume 1 of this Report.
2. In particular, Chapter 3.3 of the Interim Report examined Industry 2020 Pty Ltd (**Industry 2020**). As appears in the Interim Report, Industry 2020 was owned and controlled by officers of the Victorian Branch of the Australian Workers Union (**AWU**). It raised money by holding fundraising events attended by employers, officials from other unions, and other participants in the building industry, trading off the fact that its directors were senior officials of the AWU and using the name, influence and resources of the AWU.
3. Chapter 4.7 of the Interim Report examined the funding of the HSU No 1 Branch Election campaigns in 2009 and 2012.

4. These two investigations were connected in the following way: David Asmar is the husband of Diana Asmar and was her campaign manager in the HSU No 1 Branch elections; David Asmar is also associated with Cesar Melhem and appears to have been the recipient of significant funds from Industry 2020.
5. One issue the Commission has been considering is what Industry 2020 funds were used for, including those funds supplied to David Asmar.
6. As was noted in the Interim Report, David Asmar did not give evidence at a public hearing in 2014, which inhibited the ability to make concluded findings on some issues related to this matter.¹
7. In 2014 Commission staff tried to make arrangements for David Asmar to give evidence in a public hearing in October 2014. However at that time the Commission was advised by David Asmar's solicitor that he had travelled to Lebanon, and was therefore not available to give evidence.
8. In 2015 further attempts were made to resume and complete these investigations, in part by having David Asmar give evidence at a public hearing.
9. In particular, on 15 September 2015, Commission staff were advised by David Asmar's solicitor that he did not have instructions to accept service of a summons on David Asmar. Consequently David Asmar had to be served personally.

¹ Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 4.7, paras 99-100.

10. On 18 September David Asmar arranged to depart Australian for Lebanon, after making a series of changes to his travel arrangements. When he endeavoured to pass through customs at Melbourne Airport he was served with the summons by Australian Federal Police officers.
11. The summons required David Asmar to appear at the Commission to give evidence at a public hearing on 21 October 2015.
12. After receiving the summons, David Asmar departed Australia by boarding a flight to Lebanon. At that stage David Asmar was scheduled to return to Australia on 27 October 2015, a date after the date on which he was required to appear in the Commission pursuant to the summons.
13. On 19 and 20 October 2015 Commission staff and David Asmar's solicitor exchanged communications concerning his compliance with the summons.
14. These communications culminated in the date for David Asmar's public hearing being further fixed for 5 November 2015.
15. On Monday 2 November 2015 the Commission was advised that David Asmar was still in Lebanon and for medical reasons would not be in Australia on 5 November. A medical certificate was attached his solicitor's communications. On Wednesday 25 November 2015 the Commission was advised that David Asmar was still in Lebanon and his solicitor provided a further medical certificate.

16. The practical result of all this was that it was not be possible to proceed with or complete David Asmar's public examination.
17. The purpose of these observations is to put on public record the reason why a public examination which was foreshadowed in the Interim Report did not proceed and why this issue has not been finalised.