ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

VOLUME 1

INTRODUCTION AND OVERVIEW

A – THE ROYAL COMMISSION: GENERAL OVERVIEW

Preamble

1. Sir Harry Gibbs was universally admired for probity. Near the end of his long life, much of which had been devoted to controversies about the meaning of the Constitution, he concluded that it did not matter much for the health of the nation what the Constitution meant, so long as one condition was satisfied. That was that the inherent decency of the Australian people continued.

2. Can one abandon any worries about the complex field of law which regulates trade union officials with that comforting reflection?

3. At the outset it may induce a sense of realism to consider a few examples from the activities of officials in six unions. One is the Australian Workers' Union (**AWU**). Another is the Construction, Forestry, Mining and Energy Union (**CFMEU**). A third is the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**). A fourth is the Health Services Union (**HSU**). A fifth is the Transport Workers Union of Australia (**TWU**). Finally, there is the National Union of Workers (**NUW**).

4. The case studies examined have revealed widespread misconduct that has taken place in every polity in Australia except for the Northern Territory. There is little that is controversial about the underlying facts. Almost all of the underlying facts have been established by

admissions to the Commission, incontrovertible documents, decisions of courts and tribunals or well-corroborated testimony. There has been financial misconduct by two AWU State Secretaries in Western Australia in the mid-nineties, Bruce Wilson and Ralph Blewitt. Bruce Wilson continued his behaviour in Victoria as State Secretary of the AWU there. A State Secretary of the AWU in Victoria in the first part of this century, Cesar Melhem, has been responsible for numerous actions favouring the interests of the union over the members which may be breaches of legal duty. Two TWU WA State Secretaries, James McGiveron and Richard Burton, in 2012-2013 depleted union funds to the extent of over $600,000 in relation to what may have been the unauthorised purchase of expensive cars and the arrangement of an unauthorised redundancy. The National Secretary of the AWU, Tony Sheldon, may have lied to the Australian Labor Party about the number of financial members that union has. In the HSU a number of State or National Secretaries (Michael Williamson, Katherine Jackson and Craig Thomson) have used union funds for their own purposes. Michael Williamson and Craig Thomson have been convicted of criminal offences in this regard. Katherine Jackson may also have committed a crime by obtaining $250,000 from an employer by false pretences. A further HSU State Secretary, Diana Asmar, has arranged for right of entry tests to be sat by persons other than the candidate.[1] In the ACT the Secretary of the CFMEU, Dean Hall, and most of his officials may have participated in a variety of forms of misconduct on building sites. Further, officials have either taken payments from employers, in the case of Halafihi Kivalu, or failed to respond satisfactorily to what he was doing or rumours of what he was doing

[1] Those findings have been confirmed in the Fair Work Commission: [2015] FWC 3359 (Wilson V-P) and [2015] FWC FB 5261 (Hatcher V-P, Hamilton DP, Johns C).

(all other officials). In the Victorian CFMEU the State Secretary, John Setka, and the Assistant State Secretary, Shaun Reardon, may have committed blackmail. In Queensland the State Secretary for the Builders' Labourers' Federation of Queensland (**BLF**), David Hanna, may have fraudulently made additions to his house. He, together with the Queensland State Secretary of the CFMEU, Michael Ravbar, together with various officials and employees participated in massive destruction of potentially relevant documents. In the CFMEU NSW the State Secretary, Brian Parker, may have committed various acts of misconduct, including procuring delivery of confidential records of a superannuation trust fund, Cbus, which should have remained in the custody of the trustee. An organiser, Darren Greenfield may have made a death threat and taken bribes. The State Secretary of the Electrical Division of Victorian CEPU, Dean Mighell, and the President, Gary Carruthers, used union funds on litigation commenced in what may have been an abuse of process. In New South Wales the state secretary of NUW NSW, Derrick Belan, his brother Nick Belan, an organiser, and their niece, an employee, Danielle O'Brien, and possibly others, may have misappropriated union funds. Other officials may have breached the law in relation to that conduct and their handling of Derrick Belan's departure from office.

5. Then there is misconduct on building sites directed to employers, contractors and government inspectors all over the country from Brisbane to Sydney to Melbourne to Adelaide, and generally carried out by more junior officials. But senior officials can be involved as well. At a blockade of a Grocon site by the CFMEU a driver of a minibus, who happened to be suffering from cancer, attempted to drive out of the blockaded area. He described how CFMEU members

surrounded his van, yelling abuse and punching the windscreen. One of them was John Setka, then Assistant State Secretary, who was found by Tracey J to have used foul and abusive language, to have punched the windscreen, and to have shouted: 'I hope you die of your cancer'.[2] Is this in the great Keir Hardie traditions of fraternal solidarity in the face of monopoly capitalism? Nor did John Setka confine his foul and abusive language to blockades. He repeatedly employed the same tactics, using words which will not be repeated here.[3]

6. There has been much perjury. Maria Butera and Lisa Zanatta, executives of Cbus, have admitted to it, and have said they will plead guilty to charges of it. Brian Parker's evidence has been referred to prosecuting authorities for consideration of whether he may have committed perjury. But a huge amount of the testimony given in hearings has been false to the knowledge of the witnesses.

7. Nor is it only union officials who have been involved. Adverse recommendations have been made about numerous executives from large commercial organisations, including Dino Strano, Peter Smoljko (a former AWU official), Julian Rzesniowiecki, Mike Gilhome, Michael Deegan, Adam Moore, Mathew McAllum, David Atkin, Maria Butera, Lisa Zanatta and Tony Sirsen. There are others whom the inquiry has revealed to have paid money to Halafihi Kivalu in the Australian Capital Territory – Elias Taleb, Medwhat Eleisawy, Tony Bassil, Jian Yu He and John Domitrovic. These persons are

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[2] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225 at [192].

[3] Royal Commission into Trade Union Governance and Corruption *Interim Report* (2014), Vol 2, ch 8.10, pp 1557-1558 [89]-[94].

contractors or developers in the Australian Capital Territory. Among the companies from which those executives came or with which they were associated are well known names – Cbus, the Thiess Group, the John Holland Group, the ACI Group, Downer EDI Engineering Power Pty Ltd, Winslow Constructors Pty Ltd and the Mirvac Group.

8. This conduct has taken place among a wide variety of unions and industries. Those responsible have ranged in seniority from the most junior levels to the most senior. Many State Secretaries have been involved. Of course what has been described is not universal. It may not even be typical. But you can look at any area of Australia. You can look at any unionised industry. You can look at any type of industrial union. You can select any period of time. You can take any rank of officeholder, from Secretaries down to very junior employees. You can search for any type of misbehaviour. You will find rich examples over the last 23 years in the Australian trade union movement.

9. These aberrations cannot be regarded as isolated. They are not the work of a few rogue unions, or a few rogue officials. The misconduct exhibits great variety. It is widespread. It is deep-seated.

10. Nor can the list be regarded as complete. It would be utterly naïve to think that what has been uncovered is anything other than the small tip of an enormous iceberg. It is inherently very hard to identify most types of misconduct by union officials. So far as it is typified by hard core corruption, there is no 'victim' to complain, and the parties to the corruption have a strong incentive to keep it secret. Whistleblowers are unlikely to be found for various reasons including a well-founded

fear of reprisals. The same is true of misconduct on building sites and other aspects of the misbehaviour that has been revealed. The very existence of a Royal Commission tends to cause a temporary reduction in misconduct. But it is clear that in many parts of the world constituted by Australian trade union officials, there is room for louts, thugs, bullies, thieves, perjurers, those who threaten violence, errant fiduciaries and organisers of boycotts.

Letters Patent

11. The Royal Commission into Trade Union Governance and Corruption was established by Letters Patent issued by the Governor General on 13 March 2014. The Letters Patent required and authorised the Commission to inquire into the matters set out in paras (a) – (k) of the Letters (the **Terms of Reference**). Pursuant to the Letters Patent delivery of this Report was required on or by 31 December 2014.

12. Subsequently equivalent Letters Patent were issued by the Governor (or Administrator) of each of the States.

13. On 30 October 2014 the Governor General amended the Letters Patent in two ways. First, the deadline for delivery of the Commissioner's report was extended to 31 December 2015. Secondly, an additional Term of Reference was included, namely (ia). The additional term required the Commission to inquire into any criminal or otherwise unlawful act or omission undertaken for the purpose of facilitating or concealing any conduct or matter mentioned in paras (g) to (i) of the Terms of Reference.

14. Again, the Governors (or Administrator) of the various States issued amended Letters Patent amended in the same way as the Commonwealth Letters Patent. Copies of the original and the amended Letters Patent are at Appendices 1-14 of this Volume of the Report.

Financial matters

15. As of 30 November 2015, expenditure for the Office of the Royal Commission (ORC), the police taskforces of NSW, Victoria and Queensland, the Attorney General's Department's financial assistance to witnesses and Commonwealth legal representation was under budget at $45,905,000. This figure does not include funds paid by the Australian Federal police in relation to the taskforces.

Hearings

16. The Commission existed for approximately 21 months. There were 189 hearing days. There were 155 days of public hearings. There were an additional 34 days of private hearings. On 12 days private hearings were conducted on the same days as public hearings. Thus in total there were 46 days of private hearings.

17. The Commission received evidence from 505 individual witnesses in public hearings. In the great majority of cases those witnesses gave evidence orally and were examined by counsel assisting or an affected party or both. In some cases, if neither counsel assisting nor an affected party had any questions, the evidence of the witness was received by tendering a witness statement. Some witnesses appeared

on several occasions for the purposes of cross-examination or for giving further evidence. That arose either because the evidence of a given witness was relevant to more than one case study or because the evidence in a given case study came out in stages during which the evidentiary picture changed. Examples of witnesses within the former category include Brian Parker and Michael Ravbar. Examples of witnesses in the latter category include Brian Parker, Maria Butera, Lisa Zanatta and David Atkin.

Other activities

18. In addition the Commission has:

(a) issued over 2000 notices to produce;

(b) conducted public hearings in Sydney, Melbourne, Brisbane, Perth and Canberra;

(c) organised an academic dialogue, attended by distinguished academics from various universities including the Australian National University, the University of Melbourne, Charles Sturt University and the University of Technology;

(d) issued on 19 May 2015 a lengthy Discussion Paper which raised 80 specific questions for consideration and debate. A large number of submissions was received from interested parties in response to the Discussion Paper. These are considered further in Volume 5 of this Report (and see Section L below);

(e) published issues papers on the funding of union elections, the protections available to whistleblowers, the duties of union officials and relevant entities;

(f) received and reviewed many thousands of documents, including accounting and financial records; and

(g) consulted numerous stakeholders including law enforcement agencies, employment and workplace relations departments and tribunals, representatives of the union movement, academics and industry and employer representatives. A list of stakeholders consulted is given in Appendix 13 to the Interim Report.[4]

Location of hearings

19. The Commission's premises were at 55 Market Street in Sydney. The majority of the Commission's hearings were held there.

20. Since the Letters Patent were issued by the Commonwealth and every State, and since the conduct examined took place all over the country, the inquiry may be said to have had a national character. In a perfect world, perhaps, there would have been more hearings outside Sydney, and hearings in States and regions in which the Commission did not sit.

[4] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, p 1801-1802.

21. However, locating suitable hearing rooms outside Sydney at short notice was often difficult. To go to them involved very considerable expense. That expense included the expense of setting up arrangements for security, organising transcription and web streaming services and facilities for media representatives, and paying for travel and accommodation of not only Commission staff but also the lawyers representing affected persons who were funded by the Commonwealth. It was more economical to hold the majority of the hearings in Sydney. In other words, it was invariably cheaper to fly non-Sydney witnesses to Sydney than to fly the Commission itself, and lawyers resident in Sydney, to other parts of Australia. To take the Australian Workers' Union – Workplace Reform Association Inc case study as an example, it was cheaper to fly witnesses from Melbourne, Adelaide and other places to Sydney than the opposite. Non-Sydney witnesses deserve praise for putting up with the inconvenience they had to suffer.

Structure of this Report

22. This Report is organised into six Volumes. This first Volume is introductory.

23. Volume 2 deals with case studies involving a number of unions excluding the CFMEU. In particular, Volume 2 includes the completion of a number of case studies heard or part heard in 2014 and an analysis of various case studies heard in 2015. A summary of the content of the second volume is in Section I below.

24. Volume 3 deals with case studies involving the CFMEU. Again it includes the completion of a number of case studies heard or part heard in 2014 and an analysis of further case studies heard in 2015. A summary of the content of the third volume is in Section J below.

25. Volume 4 largely deals with case studies involving the CFMEU and the AWU. A summary of the content of Volume 4 is in Section K below.

26. Volume 5 deals with policy and law reform. It makes a number of recommendations. A list of those recommendations is contained in Appendix 1 to this introductory Volume of the Report.

27. Appendix 2 of this introductory Volume comprises a list of all referrals which have been made.

28. Volume 6 is a confidential Report.

Terms of Reference

29. The Terms of Reference are broad. They are not confined by time or industry. They identify five particular employee associations: the AWU; the CFMEU; the CEPU; the HSU; and the TWU. But the Terms of Reference were not limited to those five unions. And in fact the inquiries conducted extended well beyond them.

30. On the other hand the Terms of Reference included important limitations protective of unions. In particular the Terms of Reference made no assumption to the effect that the role of trade unions should be

limited in any material way. The Terms of Reference contemplated that trade unions play, and will continue to play, an important role in the Australian industrial relations system.

31. Importantly neither the Terms of Reference, nor any finding in this Report, affects in any way the ability of persons freely to engage in collective bargaining; to organise representation through, and be represented by, unions; freely to associate including association by creating, promoting and carrying on unions and union activities; and to participate in democratic union elections.

32. In broad terms the Terms of Reference required the Commission to investigate two categories of issue: (1) relevant entities (also known as slush funds); and (2) certain adverse conduct on the part of union officials.

33. The first category was addressed in paras (a) – (e) of the Terms of Reference. Paragraph (a) called for inquiry into the governance arrangements of separate entities established by employee associations or their officers, which entities were defined as 'relevant entities'. Paragraph (b) identified the five unions mentioned above. Paragraph (c) directed attention to whether persons or organisations were involved in any of the activities mentioned in (b). Paragraph (d) directed attention to the circumstances in which funds are, or have been, procured from any third parties and paid to relevant entities. Paragraph (e) required examination of the extent to which persons represented by employee associations are protected from any adverse effects arising from matters associated with the existence of relevant entities, are informed of those matters, are able to influence or exercise

control over those matters, or have the opportunity to hold officers of these associations accountable for wrongdoing in relation to those matters.

34. The second category of issue was addressed at paras (f) – (h) of the Terms of Reference, which directed attention to the conduct of union officials. Thus para (f) required the Commission to inquire into:

> [A]ny conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity.

35. Paragraph (g) required the Commission to inquire into:

> [A]ny conduct which may amount to a breach of any law, regulation or professional standard by any officer of an employee association in order to:
>
> (i) procure and advantage for the officer or another person or organisation; or
>
> (ii) cause a detriment to a person or organisation.

36. Paragraph (h) required the Commission to inquire into:

> [A]ny bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association and any other party.

37. Some have contended that the Terms of Reference are unbalanced in that they focus attention on union officials and relevant entities but not on employers. It is not for this Report to praise or attack the Terms of Reference. But it is permissible to say that the merits of this criticism, if any, lie only in the area of form, not substance. From the outset it was made clear that the inquiry would be directed to both sides of any

corrupt transaction. In other words, examination was directed to both the person who provided the benefit and the person who received it. The point was made expressly by counsel assisting in their opening statement on 9 April 2014:

> Also, if it were to transpire that the union official has received corruptly a sum of money or benefit, that is not the end of the matter. Corrupt receipt implies corrupt payment. Someone else must have been involved.

38. Consistently with this position, a number of the case studies have investigated wrongdoing on the part of specific employers and their executives. Findings have been made that quite a number of them may have engaged in criminal conduct. They have been referred to the regulatory authorities for further investigation.[5]

39. Hence there has been no exclusive focus on wrongdoing by trade union officials. Where appropriate there has been examination of both sides of the particular transactions. Where referrals of potential criminal conduct have been appropriate, they have been made, whether or not the individuals affected had been acting on the union side or the employer side.

Selection of Case Studies

40. Often a Royal Commission is established in order to inquire into the causes and effect of some specific event. In that instance the specificity of the inquiry inevitably directs or shapes to some extent the nature and content of the Commission's investigations.

[5] See Appendix 2 of this Volume.

41. This was not the case here. The Terms of Reference were not directed to any specific event or events. The Royal Commission had the task of unearthing for itself whether any unlawful or inappropriate conduct had occurred. That had to be done within a culture steeped in ideals of loyalty in which those who break ranks – and in some cases breaking ranks seemed to include cooperating with the Commission or even submitting to its compulsory processes – are reviled and ostracised. This was not true loyalty. It was only a perversion of it. But perverted or not, it nonetheless made investigation extraordinarily difficult. And it led to a prodigious amount of evidence which ranged from being less than frank to being mulishly stubborn to being blatantly mendacious. It also led to the suppression or destruction of documentary records, or extreme tardiness and uncooperativeness in producing them.

42. This posed particular challenges. In the early days heavy reliance had to be placed on inquiries suggested by whistleblowers and inquiries into matters the details of which had to a limited extent come to light already. As time went on the Commission developed its own lines of inquiry.

43. Indeed in due course it became clear that it was not possible to investigate every potential issue that had come to the Commission's attention by one means or another. Difficult judgments needed to be made about what matters would be examined further. Some matters did not progress beyond initial investigations. Some matters were investigated more thoroughly but did not proceed to public hearing. Some complaints to the Commission concerned quite old conduct. Some were at or beyond the margins of the Terms of Reference. Some were atypical and hence unsuitable for use as case studies illustrating

broader problems. The credibility of some complainants seemed too fragile to justify the expenditure which would have had to have been laid out and the inconvenience which would have had to have been endured to take an investigation to its conclusion. Several investigations were referred to appropriate authorities although no public hearing took place.

44. It is important to emphasise however that as much ground was covered and as much work was done as was reasonably possible. There was only one Commissioner, responsible among many other things for presiding at every public and private hearing and for writing the Interim and Final Reports. It would simply not have been possible to have undertaken any further investigations than in fact occurred. And even if there had been more than one Commissioner, the counsel and solicitors assisting and other members of the Commission staff could not have worked harder than they did. Nor could output have been improved by massively increasing the Commission's personnel. A multiplication of bodies can lead to a loss of focus and concentration. It does not necessarily generate greater efficiency.

The Interim Report

45. Paragraph (n) of the Terms of Reference authorises the submission of an interim report that the Commissioner considers appropriate.

46. On 15 December 2014 the Commissioner submitted an Interim Report in three volumes (one confidential).

47. The Interim Report dealt with the majority, but not all, of the case studies which had been heard or part heard during 2014. Further detail concerning the Interim Report, including the details of the case studies heard or part heard in 2014 but not dealt with in the Interim Report, is contained in section C below.

The Police Taskforce

48. In the beginning of 2015 a police Taskforce was established to assist the Commission in its work. The Taskforce was independent of the Royal Commission. It was autonomous. It made its own operational decisions. Among other things the Taskforce took a number of referrals from the Commission and thereafter investigated those matters on its own account; assisted the Commission in some of the Commission's investigations; and conducted investigations entirely separately from the Royal Commission. The investigations undertaken by the Taskforce and its regional divisions (Victoria, New South Wales and Queensland) were related to the Terms of Reference. The Taskforce was overseen by Commander Mark Ney of the Australian Federal Police (**AFP**). The Taskforce comprised in excess of 40 police officers drawn from the AFP and the police forces of New South Wales, Victoria and Queensland.

49. On 5 January 2015 the Taskforce commenced operations. While the precise numbers of officers from the AFP and the State police forces varied from time to time, in substance the AFP provided approximately 30 full time employees comprising 11 officers in Sydney, 4 officers in Brisbane, 8 officers in Melbourne and 7 officers to provide

telecommunications interception services to them across three states. In addition the AFP provided 3 ongoing staff to give support to the Taskforce in various ways.

50. The New South Wales police force committed nine full-time employees comprising of one inspector, two sergeants and six constables. The Queensland police committed four full-time employees comprising one superintendent and three constables. Victoria police committed 11 full-time employees comprising one inspector, three sergeants and seven constables.

B – THE ROYAL COMMISSION: OVERVIEW OF 2015

51. In 2015 the Commission uncovered and examined a wide range of corrupt or inappropriate conduct on the part of some union officials across a range of unions, not just the five identified by name in the Terms of Reference.

52. In very brief terms the conduct uncovered by the Commission in 2015 has included:

(a) a former lead organiser for the CFMEU ACT conceded during hearings in Canberra that he had personally received $100,000 in secret payments from employers;

(b) a former president of the CFMEU QLD received approximately $150,000 worth of free work on his home, arranged or facilitated by a senior employee of a major building company with the knowledge of his superior;

(c) serious misappropriations of members' funds were revealed in the NSW branch of the National Union of Workers, those responsible being at least the Secretary, his brother, who was an organiser and their niece, who was a junior employee;

(d) the AWU and a large cleaning company agreed to extend a WorkChoices enterprise agreement, thereby saving the company some $2,000,000 per year it would otherwise have had to pay its casual workers in penalty rates under the relevant Award. In exchange, the cleaning company paid the AWU $25,000 per year and provided lists of 100 bogus 'members' – the great majority of whom were unaware that they had been included in these lists;

(e) the CFMEU in Queensland caused a number of tonnes of documents to be removed from the CFMEU's Brisbane office and disposed of on the same day that the CFMEU received a notice to produce from the Royal Commission;

(f) the AWU and the joint venture responsible for the EastLink Tunnel project in Melbourne, Thiess John Holland, entered into an agreement pursuant to which the joint venture paid $110,000 inclusive of GST per year to the AWU for the three year life of the project, disguised by a series of false invoices;

(g) an organiser in the CFMEU NSW received $2,500 per week in secret and possibly unlawful cash payments;

(h) a company operating a mushroom farm in Victoria agreed to pay the AWU $4,000 a month for a number of months in exchange for industrial peace;

(i) a construction company in Victoria paid membership dues for its employees to the AWU, disguised for a number of years by false invoices;

(j) both the incoming Secretary and the outgoing Secretary of the WA branch of the TWU arranged the purchase of two luxury four wheel drive vehicles by the Union for their own benefit. The outgoing Secretary also received a generous redundancy payment, without the approval of the BCOM; and

(k) union officials commenced and maintained two proceedings in the Federal Court of Australia against their political rivals in what may have been an abuse of process.

Some common themes

53. Before descending into the details of the case studies it may be helpful to step back and consider some of the common themes which have emerged both in 2015 and the year before.

54. The first such common theme is the propensity for the creation of false records. This has occurred across numerous case studies. To take some examples, as noted above in the Thiess John Holland case study, an arrangement was entered into between the AWU and a Thiess John Holland joint venture pursuant to which $110,000 a year for the three

year term of the East Link project was paid by Thiess John Holland to the AWU in many cases disguised by false invoices. In the Unibuilt case study, an employee was falsely described as a research officer for a labour hire company when in fact he was working as an electoral officer for a candidate for a Parliamentary seat. In the Winslow case study a series of false invoices were sent over a number of years claiming payment for training when in truth money was being sought for the payment of membership fees.

55. Indeed, the creation of false invoices or other documents was not confined to the case studies heard in 2015. The Australian Workers' Union – Workplace Reform Association case study was in large part a story of false invoices issued by the Association and paid for by Thiess. Similarly the case study involving Katherine Jackson and the Peter Mac Institute was also one relating to the creation of false invoices.

56. Another, closely related, common theme relates to an insufficiency or absence of proper corporate records. A number of case studies saw instances in which important records had either not been completed (such as minutes of meetings) or could no longer be found. The ETU (NSW) case study is a good example of a vexing debate about whether or not particular matters had been recorded or should have been recorded.

57. In some instances there were findings that documents had been hidden or destroyed. As noted above, in this Report findings are made to the effect that the CFMEU in Queensland caused a number of tonnes of

documents to be removed from the CFMEU's Brisbane office and disposed of.

58. In modern organisations like trade unions and businesses it is utterly inappropriate and improper to maintain incomplete or false records. It is critically important to have a clear and accurate set of union records so that auditors, subsequent officials and, most importantly, the members have a transparent, permanent and accurate record of the union's day to day activities. And if the conduct of trade union officials leads to or is connected with the generation of false invoices by a business, there is a risk that later executives working in the business, its auditors, and potential buyers of the business will be seriously misled. With the best will in the world it is almost impossible months or years after the event for participants at a meeting to recall with any accuracy whether a particular decision was made or resolution passed, and if so its terms. And corporate memory can fade even faster than human memory, as employees move to different parts of organisations or leave them. The point was made succinctly in *Albrighton v Royal Prince Alfred Hospital* where Hope JA observed:[6]

> Any significant organization in our society must depend for its efficient carrying on upon proper records made by persons who have no interest other than to record as accurately as possible matters relating to the business with which they are concerned. In the every-day carrying on of the activities of the business, people would look to, and depend upon, those records, and use them on the basis that they are most probably accurate.

59. A second particular theme is that branch committees of management have often failed to take a sufficiently strong position when dealing with certain union officials. There is no doubt that some union

[6] [1980] 2 NSWLR 542 at 548-9.

officials are powerful, dominating and charismatic personalities. But the committee of management has a duty, and must develop the capacity, to stand up to such officials. Clearly, this is not always easy. Members of the committee of management are not paid for their time. They may be engaged in full time work elsewhere. They may be retired. In some cases they may not have the energy or determination or time to become fully engaged in every issue.

60. However it is critical that the committee of management not act merely as a rubber stamp. On a number of occasions in different case studies committees of management seem to have been under the thumbs of powerful and well established union officials in such a way that the committee of management simply became a cipher, listlessly and mechanically approving resolutions put before it. A good example is the TWU (WA Branch) case study. Another good example is Katherine Jackson in the HSU who seemed to be able to operate almost as she saw fit in terms of deploying branch funds for the purposes of personal travel or other expenditure despite some knowledge by the committee of management. In that respect there was a contrast with her colleagues, Michael Williamson and Craig Thomson, who operated much more furtively and secretively.

61. It is difficult to overstate the importance of a strong, efficient and focussed committee of management for the proper governance of a union. The committee of management is the body which on a monthly basis needs to be questioning, checking and, if necessary, challenging accounting records and resolutions promulgated by the officials at the unions. The committee of management is perhaps the most important safeguard for ensuring that members' money is deployed properly. A

position on a committee of management is not a position to be taken lightly. Its members must learn to use two words more. One is 'Why?' the other is 'No'.

62. A third theme revealed by some of the case studies, particularly those involving the AWU, involves the payment of large sums by employers to the union. In some cases the arrangements pursuant to which these payments were made were undocumented and their purposes were described in oral evidence only in vague terms. In the case of Cleanevent, on the other hand, 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.

63. Arrangements of this kind are highly unsatisfactory. They inhibit the ability of the union and its officials to pursue the interests of its members. The union and the officials become the servants of two groups of masters. They tend to end up, if not loving one and hating the other, at least showing favour to one, the employer, and failing energetically to advance of the position of the other, the 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 a concern for damage to reputation makes those involved uncomfortable about the arrangement being discovered.

64. That discomfort was apparent in the Cleanevent case study. 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 the fairly paltry sum of 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.

65. Recommendations as to how arrangements of this kind can be avoided in the future are contained in Volume 5 of this Report.

66. A fourth common theme relates to false inflation of membership numbers. Sometimes the false inflation is for purposes other than financial. An example arose where the TWU lied to the ALP NSW about the number of financial members it had in order to increase its voting power at Annual Conference. More commonly the goal is to treat individuals as members paid for by employers, whether or not the members want to be members, and whether they or not they are members already. Unions, like all other complex institutions of any size, need the sinews of existence – money to pay staff. The primary and perhaps the only legitimate source of money as membership fees, though there is little public awareness of how much money some unions make from other sources. The issue of membership numbers is also is a feature of the Cleanevent case study, together with the

Winslow and Miscellaneous Membership case studies. The common feature here is a focus on membership numbers rather than 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. In one case the purported 'member' had previously refused to join the union.

67. A similar focus on membership numbers was apparent in the CFMEU ACT case study. In contrast to that 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.

68. When several of these themes are taken together, a sinister picture appears to form. It is a picture of the union concerned not with its role as the instrument through which to protect the interest of its members but with self-interest. Its primary interest is in the leading group of its officials as a self-perpetuating institution. The institution comes to operate like a Venetian oligarchy or a Whig Parliament with very few electoral contests. It is an institution more concerned with gathering members than servicing them.

C – THE ROYAL COMMISSION: OVERVIEW OF 2014

69. As noted above, on 15 December 2014 the Interim Report was delivered.

70. The designation ‘Interim’ is to some extent a misnomer. In this context it denotes only that this Report was delivered pursuant to para (n) of the Terms of Reference (rather than this final Report, which is delivered at the end of the Commission’s term and the delivery of which signals the end of the Commission’s operations). The Report delivered on 15 December 2014 was not ‘Interim’ in the sense that its findings or recommendations were tentative, provisional or subject to change.

71. On the contrary, every finding contained in the Interim Report was final, unless specifically stated otherwise, or unless sufficient contrary evidence came to light. The Interim Report included a number of recommendations for referral. These recommendations were also final. The Commission made every such referral in January 2015. Nothing further remains to be done in respect of those findings and recommendations.

72. This Section will examine two topics. The first is an overview of the matters investigated during 2014. The second is an identification of those matters heard or part heard in 2014 but not addressed in the Interim Report.

Overview of the matters investigated in 2014

73. As noted above, the Commission’s Terms of Reference required it to investigate two broad categories of issue: (1) relevant entities (also known as slush funds), and (2) any unlawful or unprofessional conduct on the part of union officials.

Slush funds

74. During 2014 the Commission investigated a wide range of different union-associated funds including generic, fighting, income protection, redundancy, superannuation and training funds.

75. Generic funds are funds established by union officials for a variety of purposes. The Commission investigated five generic funds in detail during 2014: the Australian Workers' Union – Workplace Reform Association Inc, Industry 2020 Pty Ltd, Building Industry 2000 Plus Limited, IR21 Limited and the Transport, Logistics, Advocacy and Training Association.[7]

76. Often funds such as these are established, and maintained, quite separately from the union. Because of this separation the activities and accounts of the funds may not be included in the union's accounts and are not examined by the union's auditors. Also, there may not be any or adequate disclosure of the funds' activities to union members.

77. The fact that union resources are used for the benefit of such funds can mean that the officials controlling such funds are doing so while in a position of conflict between interest and duty or duty and duty. The officials are acting for the benefit of the fund, not for the benefit of the union or its members.

78. To make matters worse, the assets of the funds can be deployed by their controllers for their own personal benefit or advancement.

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[7] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, Pt 3.

79. Particular issues identified in the Interim Report as arising from these generic funds included:

(a) fundraising may be undertaken using union resources, without payment or recompense to the union;[8]

(b) fundraising may be effected using unlawful and unconventional means;[9]

(c) the assets of the funds may be deployed to advance the interests - including the political aspirations - of those who control them;[10] and

(d) frequently there is no or no adequate record keeping and proper processes are not followed.[11] For example, directors or shareholders' meetings are not held or not minuted, and transactions are effected by cash.

80. Another category of slush fund is fighting or election funds. Fighting funds are established by union officials for the purpose of paying

[8] See eg Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 331 [4], 344 [36], 373 [107], (re Industry 2020); 445 [40] (re IR21).

[9] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 74 [3].

[10] See eg the discussion of Industry 2020 in the Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 331 [4]; 363 [73], 366 [88]; 382 [137].

[11] See eg Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 74 [4], 387 [4], 394 -396 (re Building Industry 2000 Plus Ltd); 496-499 (re Transport, Logistics, Advocacy and Training Association).

expenses associated with union campaigns. Seven fighting funds were investigated by the Commission in detail during 2014.[12]

81. Many fighting funds give rise to similar governance issues as those associated with generic funds, as set out above.[13]

82. In addition, particular issues associated with fighting funds include:

(a) members contributions are not truly voluntary;[14]

(b) the funds give an unfair advantage to incumbents;[15]

(c) in numerous instances candidates benefitting from such funds closed their eyes to the sources, propriety and legality of such benefits and disclaimed responsibility for the funding of their own campaigns on the basis of ignorance;[16]

[12] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, Part 4.

[13] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 516- 517; and see 654 (Team Fund); 757 [38] (SDA Qld Fighting Fund).

[14] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 635 [13]–637 [17] (Team Fund).

[15] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 517.

[16] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 583-584 [166], 695 [53], 700-701 [69] (Our HSU); 598 [213] (FAAA elections); 739-742 (Diana Asmar).

(d) in some cases persons controlling a fund sought to regularise and correct its records years after the event and only after scrutiny from the Commission;[17]

(e) controllers of the funds can decline to return members' contributions, even when those contributions have not been spent;[18] and

(f) controllers establish funds using inappropriate structures.[19]

83. Issues arising in respect of other relevant entities included:

(a) union members having a lack of choice in relation to superannuation funds;[20]

(b) unfair and preferential treatment of union members;[21] and

(c) poor governance on the part of the management of the entities.[22]

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[17] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 653 [67] (Team Fund).

[18] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 757-760 (SDA Fighting Fund).

[19] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 673 [44] (Officers' Election Fund).

[20] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, p 939 [83].

[21] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 823-829.

[22] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 845-847.

Unlawful or unprofessional conduct

84. Turning to the second category of issues raised by the Terms of Reference, they require investigation of unlawful or unprofessional conduct on the part of union officials.

85. Some of the issues relating to this topic canvassed in the public hearings during 2014 include that union officials may have:

(a) deliberately disregarded and flouted the law;[23]

(b) used blackmail[24] and extortion[25] for the purposes of achieving industrial ends;

(c) committed other criminal offences, such as the making of death threats,[26] the issuing of false invoices and conspiracy to defraud;[27]

(d) engaged in contraventions of the boycott and cartel provisions of the *Competition and Consumer Act* 2010 (Cth);[28]

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[23] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, pp 1008, 1105.

[24] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, pp 1017, 1100-1105.

[25] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, pp 1466-1475.

[26] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.4, see in particular pp 1304-1305.

[27] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 237-251.

(e) taken action to convince senior employees of the trustee of a superannuation fund, Cbus, secretly to hand over private information of Cbus members before subsequently misusing that information to injure employers with whom the union officials saw themselves as being at war;[29]

(f) organised and engaged in industrial action in deliberate defiance of orders made by the Fair Work Commission and the Federal Circuit Court of Australia; and

(g) procured the payment of monies by companies for the purposes of obtaining industrial peace.[30]

86. Because inquiries were incomplete and continuing, the Interim Report did not express final conclusions or make recommendations as to law reform. However possible problems with the existing law and possible areas of law reform were foreshadowed where appropriate. Conclusions and recommendations as to law reform are now contained in Volume 5 of this Report, and referred to below in Section L.

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[28] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, pp 1078-1100.

[29] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.3.

[30] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, pp 974, 988.

Case studies commenced in 2014 but not addressed or concluded in the Interim Report

87. The following comments set out in more detail the case studies or groups of case studies which were heard or part heard in 2014 but were not the subject of analysis in the Interim Report.

88. One group of case studies not dealt with in the Interim Report concerned issues connected with Katherine Jackson's role in the HSU. In addition to Katherine Jackson, the Interim Report did not canvass issues affecting Craig Thomson, Peter Mylan and Michael Williamson.

89. The 2014 submissions of the lawyers for the HSU and for Katherine Jackson, as well as those of counsel assisting, were all to the effect that certain allegations against Katherine Jackson ought not to be dealt with in the Interim Report. Among other things, they said that the allegations raised in the Commission overlapped with the allegations raised in Federal Court Proceedings, namely Health Services Union v Jackson, VID 1042/2013.[31] The Interim Report accepted those submissions.[32]

90. Peter Mylan made a similar, and successful, submission to the effect that no findings should be made against him in the Interim Report in view of the existence of several proceedings between him and the

[31] See the Submissions of the HSU, 14/11/14, paras 6(a), 6(b); Submissions of Katherine Jackson, 14/11/14, para 103; Submissions of Counsel Assisting, 31/10/14, ch 1.1, para 81; ch 12.3, para 75; ch 12.4, paras 8, 58, 67.

[32] See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, pp 3-4 para 7 and Vol 2, ch 8.2, p 1067, para 152.

union.[33] As is set out further in Chapter 5.2 of Volume 2 of this Report, the civil proceedings between Peter Mylan and the HSU were settled during 2015. Criminal proceedings were on foot against Craig Thomson. In large measure most of the issues in relation to the HSU were interconnected.

91. The trials in all legal proceedings concerning Katherine Jackson, Peter Mylan, Michael Williamson, Craig Thomson and the HSU No 1 Branch have now concluded. Hence the issues concerning those persons are dealt with in Volume 2 of this Report.

92. The Interim Report did not deal with the evidence of Andrew Zaf about the conduct of officers of the Victorian Branch of the CFMEU. The reason for this was that shortly before the Interim Report was completed, material came to the Commission's attention which required investigation before a finding could be made.[34] This case study is now considered in Volume 4 of this Report.

93. The Interim Report did not deal with certain conduct alleged against Michael Ravbar, David Hanna, Jade Ingham and Chad Bragdon, who were officials of the Queensland Branch of the CFMEU. The conduct allegedly took place on the Brooklyn on Brooks Project in Fortitude Valley in Brisbane. The reason for this was that the CFMEU objected because legal proceedings were on foot against the last two officials. The factual controversies in the proceedings have now come to an end. This matter is now dealt with in Volume 4, Chapter 8.3 of this Report.

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[33] 28/11/14, T:60.34-38.

[34] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.11.

94. The Interim Report dealt at some length with the issue known as the Cbus leak to the CFMEU. A summary of this issue is set out in Section J below. At the time the Interim Report was being upheld, two of the responsible executives were in the process of volunteering to the Commission that their earlier evidence was perjured and were giving new evidence about the roles of Brian Parker and other Cbus personnel. The Interim Report did not reach any conclusion about the role of David Atkin, the Chief Executive Officer of Cbus to whom Maria Butera directly reported. This matter was further investigated in 2015 and is dealt with in Chapter Volume 3, Chapter 7.1 of this Report.

95. Another case study which was not concluded in 2014 concerned dealings between certain CFMEU officials, George Alex, and executives working for companies apparently associated with George Alex. George Alex appeared to have been the principal behind labour hire companies which supply casual labour to building contractors. These companies have features consistent with their operation as so-called 'phoenix' companies. The features of 'phoenix' companies include the following. One by one they go into liquidation. Each liquidation appears to leave workers with unpaid entitlements, and liabilities to third parties such as the Australian Taxation Office unpaid. The liquidated companies are then succeeded by a new company with a similar name destined for the same fate as its predecessors. This case study was concluded in 2015 and is dealt with in Volume 3, Chapter 7.2 of this Report.

96. This Report also deals with some other unfinished matters from 2014, including:

(a) issues relating to the Maritime Union of Australia (**MUA**). This is now dealt with in Volume 2, Chapter 1 of this Report;

(b) the Chiquita Mushrooms case study involving the AWU. This is now dealt with in Volume 4, Chapter 10.6 of this Report;

(c) the HSU Victoria No 1 Branch case study under the secretaryship of Diana Asmar. This is now dealt with in Volume 2, Chapter 5.2 of this Report.

D – THE FACT FINDING PROCESS

97. Pursuant to the Letters Patent the Commissioner was required and authorised to 'inquire into' the matters set out in the Terms of Reference. An inquiry of this kind is primarily a factual investigation. The nature of the investigation carried out by this Commission should be spelled out in more detail.

98. A Royal Commission is an administrative inquiry, initiated and authorised by Letters Patent. A Royal Commission is not a judicial inquiry.[35] The conclusions reached by a Royal Commission are expressions of opinion. They do not have legal force. They do not determine the legal rights of any affected party.

99. The Commission was assisted in this factual inquiry by counsel assisting and others. Counsel assisting are participants in the administrative inquiry being undertaken by the Commissioner.

[35] *Lockwood v Commonwealth* (1954) 90 CLR 177 at 181 per Fullagar J; see also *McGuinness v Attorney-General* (Vic) (1940) 63 CLR 73 at 84 per Latham CJ.

Counsel assisting are not advancing a case, though they may be proceeding in the light of particular hypotheses, which may change as time goes on and the evidentiary store becomes fuller. They are not adducing evidence in order to discharge an onus of proof (as to which see Section E below). Rather, counsel and for that matter solicitors assisting the Commissioner, are performing their duties. Their duty is to help the inquiry required and authorised by the Letters Patent to be carried out by the provision of legal advice and assistance. One aspect of legal assistance is to devise a blueprint or framework which assists in organising the multiplicity of facts being examined.

The difference between a Royal Commission and a criminal court

100. The features of the Royal Commission just described have important implications for the fact finding process undertaken by this Royal Commission. In particular, a Royal Commission cannot – indeed, should not – seek to replicate the kind of process that is undertaken by a criminal court when determining whether a charge has been proved.

101. The very point of a Royal Commission is that it can proceed quickly and flexibly in inquiring into as many of the facts described in the Terms of Reference as it is reasonably able within its allotted term. A Royal Commission's origins, processes and outcomes are all very different from those of a criminal court. This point is underscored by the fact that counsel assisting a Royal Commission are not under the same obligations stated in the *Legal Profession Uniform Conduct (Barristers) Rules* 2015 as a prosecutor in a criminal case.

102. The point is also made by the number of hearings days during this Commission's twenty one month term. As noted above, the Commission sat on 189 hearing days. This roughly equates to trial of in excess of nine months. It is inconceivable, at least in the 21st century, that a criminal inquiry could be initiated, proceed to a nine month trial and arrive at a final decision, all within twenty one months.

103. Public comments have been made that a police investigation of alleged wrongdoings suffices in all cases and that a Royal Commission is simply unnecessary. But the fact is that a Royal Commission can uncover behaviour, such as improper credit card usage within the National Union of Workers, in circumstances where it was unlikely that a police investigation would ever have occurred.

104. The Terms of Reference are broad. They initiated a wide-ranging inquiry, surveying to the greatest extent reasonably possible a very extensive range of issues. Undue concentration on a limited number of incidents would not have been an adequate response to the Terms of Reference.

105. Every effort was made to obtain as much evidence and to explore the facts as comprehensibly as possible. But there were nevertheless limits on the extent to which any particular issue could be investigated. As observed by Thomas J in *Carruthers v Connolly*,[36] there has to be a point beyond which inquiries may decline to go. A favourite submission of some counsel was to complain that counsel assisting had failed to call some minor player or other as a witness. The complaint

[36] *Carruthers v Connolly* [1998] 1 Qd R 339 at 369.

was almost always made for the first time in final submissions, instead of during the hearings, when it might have been possible to serve a summons on the witness, if there had been any point in it. But judgments about materiality and significance do have to be made. 'If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper … to raise every possible inquiry as to the truth of statements made … [I]n fact, mankind find it to be impossible.'[37]

The case study technique

106. A Royal Commissioner has a broad discretion in deciding how to go about the task of fact finding. The selection of method will be influenced by the terms of reference, by the subject matter, by the length of the inquiry, by the resources available to it, and other factors.

107. A Royal Commission investigating a single issue – such as the cause of an accident or natural disaster – might take a different approach to fact finding from a Commission such as this one, which was required to undertake a very broad-ranging inquiry. In particular such an event-based Commission might be able to investigate the facts relating to the particular issue in greater detail than a broad ranging inquiry is able to do.

108. The technique adopted by this Royal Commission to the fact finding process involved consideration of a wide range of case studies. A case study was selected for investigation at public hearing on the basis that

[37] *Attorney-General v Hitchcock* (1847) 1 Ex Ch 91 at 105; 154 ER 38 at 44 per Rolfe B.

it revealed issues or conduct falling within the Terms of Reference. Other factors could come into play; for example, to the extent possible systemic rather than idiosyncratic issues were given preference.

109. As many case studies as possible have been investigated. There was a clear public interest in proceeding in this way. Because inquiry was made into as many facts as reasonably possible consistently with meeting the requirements of natural justice, the final recommendations have as sure and as broad a footing as possible.

110. The case study approach is labour intensive. As much evidence as was reasonably possible was collected by the Commission for each case study. The evidence was both oral and documentary. The latter was often elicited through notices to produce. The preparation, presentation and testing of this evidence placed enormous burdens on counsel assisting, the solicitors and Commission staff.

111. The procedures for the preparation of evidence varied according to factors such as the progress of the investigation, the extent to which notices to produce had been complied with, the availability of the relevant witnesses, and the resources or time available to the Commission in the light of other work or investigations that were underway. There were no rigid rules. Procedures had to be adapted to meet the contingencies of the case. The following brief comments describe in very general terms some of the procedures employed for evidence gathering.

112. In many (but not all) instances Commission staff wrote to a witness in advance of the public hearing setting out a list of topics likely to be the

subject of the hearing and inviting the witness to provide a statement of his or her evidence in respect of those topics. In some cases, particularly if the witness had left, or had no association with, or was the object of hostility from, the relevant union, documents were supplied or made available to the witness to assist with the preparation of the statement; in other cases, for example if the witness was currently a union official and had access to the relevant records of the union, this was less of an issue.

113. In the majority of cases witnesses complied with the request to provide a witness statement in advance of the hearing. The many witnesses who took the time to provide such statements and thereby help the work of the inquiry are warmly thanked. In some instances Commission staff assisted the witnesses with the preparation of statements, particularly if the witness was unrepresented. The use of witness statements greatly improved the efficiency of the public hearings. It meant that evidence could be received by the Commission in whole or in part through the statement, rather than having to take the witness through every detail in oral evidence. It also put affected parties on notice of the likely issues and evidence to be given.

114. In some instances a witness would simply be called and asked to give oral evidence on particular topics. This might happen if issues were still evolving. It might happen if the witness had declined for whatever reason to provide a witness statement. It might happen if there was insufficient time. In nearly every case documents were provided or made available to the witness in advance, through the Electronic Court Book or otherwise, although in some instances even this was not possible or appropriate.

115. As goes without saying, affected persons were also free to gather and present evidence. They were able to decide what to put in their statements. To the extent documents were available to them they were able to seek to have those documents tendered, or to request that documents in the possession of the Commission be tendered, or to request that notices to produce be issued in order to enable them to be tendered. Following the witness's examination by counsel assisting the witness could be cross-examined by counsel for affected persons who were adverse to the witness, provided certain conditions precedent were satisfied. As is always the case, one of the objects of cross examination was to elicit further evidence or to undermine evidence already given by the witness. After a witness had been called and examined by counsel assisting any affected person who sought to do so had an opportunity to cross examine that witness. Few limits were placed on cross examination, save in some instances of undue repetitiveness. After that the witness could be examined by his or her own counsel, at which time liberal opportunity was afforded to the witness to amplify or correct matters in respect of which evidence had been given, or for that matter to raise new matters.

116. While strictly speaking it was the sole responsibility of counsel assisting to tender any documents or call witnesses, in practical terms counsel assisting rarely if ever declined a request for particular documents to be tendered or particular witnesses to be called, and the evidence was mostly adduced as a matter of course.

117. The case study technique has another great ancillary benefit, additional to those identified above. It ensures that the Commission's reasoning process is exposed for review and consideration. Evidence was

adduced in a public forum and live-streamed via the Internet. To the extent that that evidence was documentary, it was published on the Commission's website. Any affected person – and for that matter any interested third party however little connection that person might have with the proceedings – could view that evidence at the time it was given or review it later and make a personal firsthand assessment of the reasoning process pursuant to which findings were made on the basis of that evidence.

E – FINDINGS

118. It will be helpful to make some further comments concerning the nature of findings in this Commission.

The rules of evidence

119. It is well established that a Royal Commission is not bound by the rules of evidence, apart from rules which are more than mere rules of evidence, like legal professional privilege. Nevertheless the rules of evidence represent, as observed by Evatt J in *R v The War Pensions Entitlement Appeal Tribunal; Ex Parte Bott*,[38] 'the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth'.

120. In practice, participants in hearings often proceeded as if the rules of evidence did apply. Frequently counsel for affected persons took evidentiary objections during the hearings to the tender of material or

[38] (1933) 50 CLR 228 at 256.

to the form or conduct of the hearings or to the asking of particular questions, such as leading or confusing or double questions. Often those objections were upheld.

121. On the other hand, there is no question that much evidence was received that would not have been admissible in a tribunal governed by the strict rules of evidence. In that event submissions were often received on the question of the weight to be given to such evidence.

122. In short, while the rules of evidence were always a useful and practical guide for many questions arising in the Commission, ultimately the Commission was required to, and did, proceed in a way which met the other demands upon it, including the necessity of delivering its Report on time in accordance with the Letters Patent, provided that the requirements of due process were also met.

Standard of proof

123. As was noted in the Interim Report, the concept of onus of proof does not apply in a Royal Commission. From this it follows that, strictly speaking, neither the civil standard nor the criminal standard of proof applies either.[39]

124. Nevertheless a Commission must decide whether it is satisfied that the evidence is sufficient to establish a particular finding. As was stated in the Interim Report, on this question this Commission has adopted the

[39] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 5 [15].

same approach as has been adopted in previous Royal Commissions, namely to apply the civil standard in accordance with the principles described for courts in *Briginshaw v Briginshaw*.[40]

125. These principles relevantly require that a tribunal may conclude on the civil standard of proof that criminal or inappropriate conduct has been established if the allegation is made out to the reasonable satisfaction of the tribunal, taking into account the seriousness of the allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding.

126. The operation of the principles in *Briginshaw v Briginshaw* in part reflect a conventional perception that members of society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[41]

127. Any adverse finding in both this Report and the Interim Report has been made consistently with the above principles.

128. In other words, whether or not expressly stated, every finding in this Report and the Interim Report: (a) is based on evidence received by the Commission and those matters which are so notorious as not to require proof or which are part of the ordinary experience of daily life; and (b) has been made only after due and careful regard as to whether the evidence adduced in the Commission has sufficiently established

[40] (1938) 60 CLR 336 at 361-362.

[41] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

that finding, taking into account matters such as the seriousness of the finding, the inherent likelihood or unlikelihood of the fact the subject of the finding, the gravity of the consequences, and the perception that members of our society do not ordinarily engage in fraudulent or criminal conduct.

Findings based on evidence and submissions

129. In some ways the non-application of the rules of evidence caused a great deal of material that might not have been admitted in a court ultimately to be allowed in. This meant that the volume of materials admitted into evidence was very considerable. Similarly written submissions made by affected parties and for that matter counsel assisting were also voluminous. Affected persons frequently put on more than one set of submissions.

130. It is important to emphasise that all of the evidence received and all of the submissions made were read and considered carefully prior to making any relevant finding. Because of the constraints of time upon the Commission not every point arising in this evidence or made in submissions is expressly dealt with in this Report. Given the sheer volume of the evidence and submissions, responding to each and every point raised in submissions or evidence would have required a Report of considerably greater length than this one without any corresponding benefit. The important point to emphasise is that the fact that a point made in evidence or submissions has not been discussed in detail, or at all, does not mean that it was overlooked. On the contrary, every piece

of evidence and submission was read and considered, whether or not express reference is made to it in the reasoning in the Report.

Finding that a contravention or breach of duty 'may' have occurred

131. When the Report discusses breaches of laws or professional standards, its findings are limited to conclusions that a person has engaged in conduct that **may** have been a breach of a relevant law, regulation or professional standard.[42]

132. In this context the word 'may' is being used in a particular sense. It is not intended to suggest merely there was some vague possibility of breach. The word 'may' 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.[43]

133. The background to and reasons for the approach taken above are set out in more detail in the Interim Report.[44]

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[42] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 19 [60].

[43] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 19 [62].

[44] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 19-21, [63]-[67].

Findings of criminal conduct

134. Some previous Royal Commissions have kept findings of actual or possible criminal conduct confidential, for example by publishing such findings only in a private or confidential report. There are obvious reasons for taking this approach. An adverse finding that there may have been criminal conduct is likely to cause reputational damage and personal distress. And the limited nature of a finding of a Royal Commission has already been adverted to above.

135. However, after carefully considering this option, this Commission elected not to proceed in this way. All the Commission's findings and referrals were released publicly, both in the Interim Report and this Report. The Commissioner's confidential reports do not contain specific findings of that character.

136. The reasons for this included the following. As a general principle the proceedings of the Commission should be open and transparent. There was a public interest in exposing all of the Commission's findings to scrutiny and comment. As its very name suggests, the Commission was expressly charged with investigating corrupt or unlawful conduct. The Terms of Reference specifically required the Commission to make findings in relation to whether certain persons may have engaged in criminal conduct. For example, as noted above sub-para (h) of the Terms of Reference required the Commission to inquire into:

> [A]ny bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party.

137. The public has an interest in knowing what conclusions this Commission has reached. The case study technique enables the scrutiny of the reasoning process from evidence to ultimate finding. This would have been undermined if the results had been kept secret.

138. Further, while the Commission was deeply conscious of the fact that a finding as to possible criminal or inappropriate conduct could adversely affect a person's reputation, the fact is that a reasonable onlooker would appreciate the many important differences between finding of a Royal Commission and, for example, a determination of guilt in a criminal court.

139. Many of these have previously been identified above, but at the risk of repetition, they can be summarised. A Royal Commission is an administrative inquiry. A finding of a Royal Commissioner is an expression of opinion, not a determination of legal rights. A Royal Commission does not and cannot engage in an inquiry of the kind carried out by a criminal court. Hence a finding of this Royal Commission on breach does not rise above an opinion that the person 'may' have engaged in criminal conduct.

140. The point which can be drawn from the above observations is that a finding of a Royal Commission, even a finding in conjunction with a referral, is merely the start of a further process.

141. Assuming an adverse finding and a referral have been made, the regulatory authority will consider the referral and initiate such steps as appear appropriate. Those next steps could include further investigation. Clearly in the course of those investigations further or

more detailed evidence, including exculpatory evidence, may come to light. Of course, adverse evidence may also be uncovered. Admissions may be made. The nature of the charges could alter. Other kinds of relevant conduct may be revealed. All these factors would be taken into account by any reasonable person considering the impact of an adverse finding on an affected person's reputation.

F – MEETING THE REQUIREMENTS OF PROCEDURAL FAIRNESS

142. This Commission was required to, and did, comply with the rules of procedural fairness in the exercise of its statutory powers. It may be helpful to say something about how the requirements of procedural fairness operate in the context of a Royal Commission, then address how the requirements were met by this Commission.

143. The application of the rules of procedural fairness is not a rigid process. Due process requires the implementation of procedures that are fair and appropriate in the particular case.[45] In a Royal Commission, the most critical rule of procedural fairness is that the Commission 'cannot lawfully make any finding adverse to the interests of (a person) without first giving a (that person) the opportunity to make submissions against the making of such a finding'.[46] The procedures which were adopted by this Commission included, but went well beyond, this fundamental requirement. Those procedures included the following.

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[45] *Kioa v West* (1985) 159 CLR 550 at 584-5 per Mason J; *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 296 at 312 per Gibbs CJ.

[46] *Annetts v McCann* (1990) 170 CLR 596 at 600-601 per Mason CJ, Deane J and McHugh J.

Practice Direction 1

144. On 26 March 2014, 13 days after the Letters Patent were issued, the Commission promulgated Practice Direction 1. While further practice directions were issued during the life at the Commission, Practice Direction 1 remained the central instrument for the purposes of regulating the Commission's procedures. A copy of Practice Direction 1 is at Appendix 17 of this Report.

145. Practice Direction 1 was based on a form of practice direction promulgated by the Cole Royal Commission in 2002. The practice direction issued by the Cole Royal Commission was challenged on procedural fairness grounds by the CFMEU in particular, but that challenge was rejected by the Federal Court.[47] Thus this Commission had the benefit of promulgating and proceeding on a Practice Direction the form and content of which had already been considered by a superior Court, which had determined that it met the requirements of procedural fairness.

146. It will nevertheless be helpful to examine some of the central provisions of Practice Direction 1 in more detail.

147. One of the main purposes of Practice Direction 1 was to ensure that all persons affected by procedures in this Commission were provided with guidance as to the procedures which the Commission would adopt. Among other things, this meant that any affected person could, if appropriate, take any objection to such procedures. Practice Direction

[47] *Kingham v Cole* [2002] FCA 45; (2002) 118 FCR 289.

1, like all practice directions, was published on the Commission's website. Paragraph 2 of Practice Direction 1 was in the following terms:

> These practice directions are intended to provide guidance to all persons as to the procedures that the Commissioner will adopt in the ordinary course, and give interested persons a fair opportunity to understand the practices that the Commissioner expects to follow and be followed in the ordinary course of events.

148. Paragraph 3 of Practice Direction 1 noted:

> Where the Commissioner thinks it appropriate, he may dispense with or vary these practices and procedures, and any other practices or procedures that are subsequently published or adopted.

149. It is noteworthy that during the entire life of the Commission no person ever made a formal application to the Commissioner to vary Practice Direction 1 and pressed it to finality. No person ever made an application to vary any other practice direction issued by the Commission. No person ever sought to challenge Practice Direction 1, nor any other practice direction issued by the Commission, in the Federal Court or anywhere else.

150. Paragraph 9 of Practice Direction 1 was in the following terms:

> However a person who, in the opinion of Counsel Assisting, may be substantially and directly interested in evidence to be produced to the Commission at a hearing will, if reasonably possible and practicable, be notified in advance that it is intended to produce that evidence to the Commission.

151. The purpose of para 9 was to ensure that so far as it was reasonably possible to do so, persons with a substantial direct interest in the evidence to be produced were notified in advance so that they could take any appropriate steps to protect their position or to advance their

case. In practical terms para 9 was implemented by the solicitors assisting the Commission writing to persons potentially affected by the evidence advising them that a hearing was to take place and that evidence in which they might have a substantial and direct interest would be adduced.

152. Other steps were taken to bring the fact of hearings to the public's attention. The Commission's website published in advance information concerning the hearings which were to take place, including the union affected and the witnesses who were to be called to give evidence at such hearings. In the early days of hearings advertisements were published in the major newspapers notifying interested persons of pending hearings and in broad terms the nature of those hearings.

153. These processes ensured that any person affected by a proceeding had the opportunity to appear in person through legal representatives in order to ensure that their interests were protected.

154. Paragraphs 10-18 of Practice Direction 1 regulated the process of giving legal representatives authorisation to appear on behalf of affected persons. In practical terms most persons who appeared in the Commission did so through a legal representative and authorisation to appear was granted as a matter of course.

155. Other provisions in Practice Direction 1 dealt with the production of materials to the Commission (paras 19-25), making a claim for legal professional privilege (paras 26-29), making a claim to be excused from producing documents on the basis of self-incrimination (paras 30-

31), transcripts (paras 39-42), and giving prior notice of issues of law or procedural issues (paras 51-52).

156. The establishment and maintenance of an electronic court book (**ECB**) is dealt with at paras 32-38 of Practice Direction 1. The ECB was an important means of facilitating communications between the Commission and affected persons. Upon being granted authorisation to appear a person or his or her legal representatives was allocated a log-in code for the ECB, enabling that person to access the ECB. As soon as documents were uploaded to the ECB an email notification was automatically generated and sent to affected persons. The person or his or her legal representatives were then able to access and download the document through their log-in code. This meant that large quantities of material could be distributed to affected persons quickly, regardless of their location.

157. The procedures for calling, examining and cross-examining witnesses are dealt with in paras 43 and following of Practice Direction 1.

158. The procedures for calling and examining witnesses contemplated by Practice Direction 1 were in due course modified by Practice Direction 2, as discussed below. Subject to that, Practice Direction 1 provided as follows. At the first or initial public hearing a witness was called and examined by counsel assisting but there was no cross-examination of that witness at that time (paras 44-45). The next step was that any person wishing to test the accuracy of the evidence given at the initial hearing would put on a witness statement and submissions briefly identifying the topics in respect of which that person or his or her legal representative wished to cross-examine the first witness (para 46).

When the public hearings resumed the affected person would then cross-examine the initial witness and that person's evidence would also be received.

159. Any person wishing to challenge the evidence given at the initial hearing had an opportunity to put on evidence and present his or her case. The process of putting on evidence in a side statement in response had the further benefit of identifying with some precision what the controversial issues of fact were.

Legal representatives and due process

160. The fact that affected persons were usually represented by counsel – often senior counsel – has important implications for due process, as will now be explained.

161. The inquiries conducted by a Royal Commission are clearly not adversarial litigation in any conventional sense. Nevertheless, particularly where the Terms of Reference focus upon corrupt or inappropriate conduct, as is the case here, some adversarial aspects may arise. The observations of Sperling J in *Morgan v Independent Commission against Corruption* (unrep), 31 October 1995, Supreme Court of New South Wales, are on point:

> The relationship between the Commission and an 'affected person' is unquestionably adversarial, and no less so than in criminal proceedings. The interest of the 'affected person' is to avoid an adverse finding, whereas the interest of the Commission is to adduce the evidence relevant to the allegation and to make a finding which accords with the evidence and which may be adverse to the interest of the 'affected person'.

162. The legal representatives of affected persons have an important role. For the most part unions and affected persons retained the services of highly experienced solicitors, who in turn briefed both junior and senior counsel. These legal representatives were astute to protect the interests of those for whom they appeared.

163. It is often said that a Royal Commission has wide powers. In some respect this is correct. For example a Royal Commission can issue notices to produce. The recipients must produce the documents. It can issue summonses to persons to appear before it. Those persons are obliged to answer questions. However often, particularly when an investigation is at an early stage, a Royal Commission may be probing and sifting through a large volume of material in the hope that the proper issue is uncovered.

164. Lawyers appearing for affected persons have certain advantages. Upon receipt of a witness statement they are able to take instructions from the relevant officers or members of the union for which they appear. They can make forensic decisions as to who might put on evidence or what documents could be voluntarily produced. Plainly, there is no obligation upon them to give evidence or produce documents that may assist the Commission. On the other hand legal representatives fulfilling their role are likely to produce any evidence whether oral or documentary which could be exculpatory of the union or another affected person.

165. The granting of authorisation to appear provided affected persons with important safeguards. Their representative could cross examine adverse witnesses. They could elicit from those witnesses evidence

which may assist in the (in some ways) adversarial process which was being undertaken. They could amass other evidence which may have been of assistance to their client. They could take objections – an activity which many legal representatives of affected persons pursued with vigour. They could re-examine in order to explain or clarify evidence that had already been given. They could make applications for adjournments if that suited their particular witness. They could make application to vary practice directions although, as noted above, this was not something which was pursued in this Commission.

Submissions

166. Following the conclusion of each of the case studies the Commissioner made directions for the service of written submissions. Counsel assisting made detailed written submissions analysing both the evidence that had been adduced in the case study and the conclusions of fact and law that counsel submitted should follow. Affected persons then made written submissions responding to counsel assisting.

167. On occasion the submissions of an affected person in response to counsel assisting were adverse to another affected person. Accordingly, it was necessary to give affected persons the opportunity to respond to each other's submissions. Counsel assisting then made submissions in reply.

168. In 2014 there were also oral submissions. In 2015 all submissions were made in writing, in the interests of saving time.

Practice Direction 2 and further practice directions

169. Practice Direction 1 was followed in a number of the early hearings of the Commission. While achieving due process, a number of administrative or practical problems emerged as Practice Direction 1 was implemented. First, at the initial hearing there was no cross-examination of the witness. While counsel assisting could examine the witness, counsel assisting was not in receipt of evidence from those persons who wished to challenge the initial witness, meaning that counsel assisting was to some extent limited both in understanding what the issues in controversy were and in putting all material to the witness. Of course, this could be done at a later hearing. However, it would have been more efficient for this to have been done at the same time.

170. Next, a further practical difficulty with Practice Direction 1 was that persons were recalled to give evidence on a number of occasions. For witnesses who are minor or peripheral this did not seem necessary.

171. Because of issues of this kind, on 23 May 2014 the Commission promulgated Practice Direction 2. This varied paras 45 to 48 of Practice Direction 1 in respect of public hearings to which Practice Direction 2 applied, while otherwise preserving Practice Direction 1.

172. In essence the change in procedure contemplated by Practice Direction 2 was that written statements of evidence would be exchanged prior to calling a witness at a public hearing. Cross-examination would then take place at that hearing. This meant that the

issues in controversy were to the extent reasonably possible identified in advance of the hearing and cross-examination could take place at that hearing. Of course there were occasions on which new issues emerged or ongoing lines of inquiry needed to be pursued after the hearing, but in general terms this procedure made for a more efficient deployment of the Commission's resources, while at the same time preserving safeguards in respect of due process contained within Practice Direction 1. In particular, for example, a minor or peripheral witness would only need to be called once.

Summary of the measures taken to ensure procedural fairness

173. As appears from the forgoing, the requirements of procedural fairness were complied with through various means. They included the following:

(a) prior to the initial rounds of hearings in 2014 the Commission placed advertisements in major newspapers alerting interested persons that hearings were about to commence;

(b) the Commission published on its website notice of pending hearings, including the union affected and lists of witnesses;

(c) persons who could be affected by the evidence were identified and given notice in advance of the hearing so that they could take steps to protect their position, including by seeking authorisation to appear;

(d) to the extent reasonably possible, and where otherwise appropriate, witness statements and relevant documents were provided to affected persons in advance of the hearing through the ECB. This was particularly the case once Practice Direction 2 came into force save for a limited number of instances where disclosure in advance could have undermined the purposes of the factual inquiry sought to be undertaken;

(e) at the outset of the hearing of each case study counsel assisting delivered an opening which foreshadowed to the extent reasonably possible in the context of an ongoing inquiry the main factual and legal issues;

(f) during examination by counsel assisting all reasonable efforts were made to put to the witness the facts which could lead to an adverse finding, so as to give the witness the opportunity to reply to those facts;

(g) most witnesses were represented by counsel who were entitled to, and did, take steps to protect his or her client's interests, including the step of objecting to any questions which had been put by counsel assisting;

(h) persons who were affected were entitled to put on witness statements and to request counsel assisting to call witnesses or request them to put on statements. This was treated favourably in virtually every case;

(i) proceedings were conducted in public and were live-streamed. To this there was one exception. On a limited number of occasions evidence was taken in private. But later, in many instances but not all, either the transcript of the private hearing was tendered or was otherwise made available;

(j) transcripts of each day's proceedings were published on the Commission's website;

(k) after the conclusion of the hearing timetables were directed for the exchange of submissions. Counsel assisting made detailed written submissions which set out comprehensively the relevant facts and what counsel assisting submitted were the appropriate findings, including adverse findings; and

(l) all affected persons then had the opportunity to respond to such submissions by putting on their own submissions advancing their position and responding to any proposed adverse findings.

G – EVIDENTIARY ISSUES

174. As has already been stated, the Commission is not a Court. Nor is the Commission bound by the rules of evidence.

The rule in *Browne v Dunn*

175. A number of affected parties have complained in submissions that certain matters were not, or not sufficiently, 'put' to witnesses in the course of their examinations. In substance, the proposition underlying these submissions is that the rule in *Browne v Dunn*[48] requires that the basis upon which it is said that a witness's evidence should be rejected should be put to the witness during cross-examination, so that the witness can give his or her explanation.

176. The rule in *Browne v Dunn* was discussed in the Interim Report.[49] It was noted there that the rule need not be complied with if notice has come to a witness in another way. It was also noted that on quite a number of occasions it was agreed that in order to expedite hearings the rule would not be applied in a pedantic way.

177. In the *Final Report of the Royal Commission into the Building and Construction Industry* (**Cole Royal Commission**) arguments of this kind were rejected on the basis that the rule in *Browne v Dunn* did not apply in the context of a Royal Commission.[50] The following analysis owes much to that discussion.

178. *First*, a Royal Commission is an evolving inquiry. Issues may arise at short notice. Leads may arise and may be pursued. Counsel assisting

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[48] (1893) 6 R 67.

[49] Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 7 [23].

[50] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 2, ch 5, pp 49-51.

may not be cognisant of all the issues, let alone all the evidence, at the time of an examination. It therefore may simply not be possible for the rule in *Browne v Dunn* to be observed, or observed as strictly as might be the case in a proceeding in Court.

179. *Secondly*, in every case witnesses were put on notice of any adverse findings by the provision of detailed submissions from counsel assisting or correspondence from the Commission. Witnesses had the opportunity to put on submissions of their own. In some cases, affected persons putting on submissions also sought to adduce further witness statements.

180. *Thirdly*, this Royal Commission (like many others) was required to carry out a wide-ranging factual inquiry in a limited time. Procedures were adopted to expedite this process. One important factor arising in this context was that it was neither possible nor appropriate for counsel assisting to put exhaustively every matter to a witness. There was not the time.

181. On the other hand, the adoption of flexible procedures also had benefits flowing the other way. Witnesses could be recalled if necessary. Some gave evidence on a number of occasions. Persons adversely affected by evidence had the right to give evidence, to invite counsel assisting to call witnesses favourable to their cause, and to invite counsel assisting to tender documentary evidence. Persons affected were also at liberty to apply to have the Practice Directions amended if they felt they had been disadvantaged although, as noted above, no person pressed a formal application of this kind.

182. With two qualifications this Report expresses general agreement with the conclusions expressed in the report of the Cole Royal Commission, namely that that the rule in *Browne v Dunn* has no or limited operation in the context of a Royal Commission.

183. The first qualification is that, in fact, in a great many cases counsel assisting and counsel for other persons *did* put the substance of the adverse evidence to a witness for his or her comment, regardless of whether or not that was strictly required.

184. The second qualification is that while the rule in *Browne v Dunn* is often described as a rule of fairness to the witness it has another important implication for the fact finding process. If a witness has given evidence and not been challenged at all, at least on a particular issue, it may be difficult in a practical sense for a Commission to arrive at a finding inconsistent with the witness's evidence on that issue. In those circumstances there is no unfairness to the witness. But a failure to question can weaken the integrity of the fact-finding process. The conclusion expressed in the Cole Royal Commission was that 'a Royal Commission is entitled to reject a witness' evidence even if the witness had not been cross-examined in relation to that evidence.'[51] With respect, this may be correct as a general proposition. But a Royal Commission would generally be slow to reject sworn evidence which had not been challenged, tested, or explored unless that evidence was inconsistent with the contemporaneous documents or the objective force of circumstances.

[51] Royal Commission into the Building and Construction Industry, *Final Report* (2003), Vol 2, ch 5, p 51.

Double hearsay

185. The CFMEU has raised concerns about the Commission admitting into evidence material which was said to have been either hearsay or even 'hearsay upon hearsay'.[52]

186. The first response to this may be made by way of general observation. The CFMEU relies upon what it describes as the 'Beach Report', although it cites only some analysis from a textbook in relation to that report. Presumably the CFMEU is referring to the *Report of the Board of Inquiry into Allegations against Members of the Victoria Police Force* which was published in 1978. A number of observations should be made about this report.

187. An initial point is that the law of evidence now is different from what it was in 1978. There are now many more exceptions to the hearsay rule, contained in the Uniform Evidence legislation and elsewhere. Hearsay evidence is now routinely received in a wide variety of situations even in a court bound by the strict rules of evidence. Indeed second hand hearsay may also be received. Further, the 'Beach Report' reached conclusions to the effect that members of the Victoria Police Force *had* committed serious criminal offences, including conspiring to give false evidence and harassing, intimidating and assaulting certain persons.[53] In contrast in this Commission findings have only been made to the effect that persons '*may*' have committed offences or engaged in other unlawful or improper conduct.

[52] Submissions of the CFMEU, 5/11/15, pp 5-8, paras 24-35.

[53] See pages 50-58.

188. Secondly, the theory that there are incurable vices in admitting hearsay evidence is undercut by the even more liberal approaches which have been adopted in England. In civil cases the rule against hearsay has virtually been abolished. In criminal cases there are extensive exceptions.

189. Thirdly, the CFMEU does not identify any actual occasion upon which counsel assisting has submitted that hearsay upon hearsay evidence should be relied upon as the basis for an adverse finding.

190. Fourthly, on 20 July 2015 it was indicated that certain evidence which the CFMEU objected to would be admitted subject to objection in the course of final address. It was suggested that much evidence which might be objectionable if tendered in litigation would in the end turn out not to be relied on by counsel assisting in final address. Only then would a debate on admissibility have concrete importance. Underlying these propositions was the assumption that it would be a waste of time to debate admissibility until it was clear whether or not the evidence objected to did have importance. The CFMEU reserved its right to put submissions against the reasons enunciated for that course. It was given leave to put on written submissions by 'early August'[54] or 'within a week or two after we leave Canberra'.[55] In the event no written submissions were put on within either of those deadlines.

[54] 20/7/15, T:395.21.

[55] 20/7/15, T:396.40-41.

H – THIS COMMISSION AND THE UNIONS

191. Some endeavoured to paint this Commission as an attack on unions. It was not. This point has been made repeatedly.

192. Thus, at a hearing of the Commission on 9 April 2014 it was observed that the Terms of Reference 'rest on certain assumptions which are not hostile to trade unions'. The observations proceeded:

> The Terms of Reference do not assume that it is desirable to abolish trade unions. They do not assume that it is desirable to curb their role to the point of insignificance. Instead they assume that it is worth inquiring into how well and how lawfully that role is performed.

193. Unions and their officials were then invited to offer evidence to the Commission themselves:[56]

> Unions and their officials are invited to offer evidence to the Commission to the effect that they have created no "relevant entities". If they have, they are invited to offer evidence that they have structures or rules or understandings in place which prevent relevant entities causing any harm to unions or others or breaching any law, regulation or professional standard. And they are invited to offer evidence that they have structures, rules or understandings in place which prevent any of the conduct impliedly criticised by the Terms of Reference from taking place.

194. Generally speaking this invitation was not taken up.

195. The important role that unions occupy in Australian industrial relations was acknowledged in 2015. For example, on 23 April 2015 counsel assisting pointed out that it needs to be recognised that unions provide many important benefits to their members.

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[56] 23/4/15, T:22.1-11.

196. Counsel assisting continued:[57]

> Among other things, unions seek better, safer and fairer working conditions for their members and, for that matter, for other workers who are not union members but enjoy the same benefits.
>
> Unions can recover wages or other entitlements when employers fail to pay them. They investigate and remedy safety issues in the workplace, an important matter calling for constant vigilance.

197. Counsel assisting was at pains to emphasise that the task of this Commission in complying with the Terms of Reference should not focus entirely on problematic issues that may have been uncovered. Rather any such problem areas need to be considered in a broader context. That context included the important benefits provided by unions to their members as summarised above. Counsel assisting went on to consider the role of unions in a variety of different contexts.

198. On that occasion counsel assisting further stated:[58]

> The problem is not with union members. It is not with unions themselves, which play an important part in the industrial relations system and have done so for a long time.
>
> It is a problem with some union officials.
>
> Indeed, the evidence and findings of the Commission to date can be distilled into a least this proposition: some union leaders disregard their legal obligations and duties.

199. These points were publically reiterated by counsel assisting in a statement made on 19 May 2015, at the time of launching the Commission's Discussion Paper.

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[57] 23/4/15, T:22.2-11.

[58] See 23/4/15, T:34.27-36.

200. Unfortunately, the union movement in the main did not endeavour to enter constructive debate with the Commission.

The ACTU

201. An example is the ACTU. As noted above, in 2014 the Commission released a number of issues papers for discussion and debate. The Commission received a number of responses to these issues papers from various parties. However on 13 June 2014 the ACTU wrote to the Commission announcing that it would not be responding to three issues papers released by the Commission.

202. Then, on 19 May 2015 the Commission released the Discussion Paper. The Discussion Paper called for responses by 21 August 2015, allowing interested persons some three months to prepare their submissions.

203. Following the refusal in 2014 by the ACTU to participate in debate on the issues papers, the Commission was keen to do what it could to enlist the ACTU's aid in the policy debate in 2015. Any policy debate of that kind about law reform would obviously have been greatly assisted by input from so knowledgeable an institution as the ACTU.

204. Accordingly on 19 May 2015, the day on which the Commission released its policy paper, a letter was written to Ms Ged Kearney, President of the ACTU, enclosing a copy of the Discussion Paper. The letter to Ms Kearney included the following:

> This letter is written in the hope that the Australian Council of Trade Unions will be able to respond to the attached *Discussion Paper: Options for Law Reform*. It is being released today. The Australian Council of Trade Unions possesses the fullest knowledge of the affairs, problems and future directions of Australian trade unions. It is appreciated that the Council may not agree with many of the possibilities raised for discussion. But the whole point of the exercise is to elicit opinions from those with experience and expertise.
>
> I look forward to a submission from the Council by the closing date Friday 21 August 2015.

205. No response to that letter to Ms Kearney was received. There was not even a formal acknowledgment of receipt. The ACTU simply appeared to ignore the letter. The ACTU did not involve itself in the process in any way. It failed to supply any submissions in response to the Discussion Paper by the due date or at all. It refused to engage in a constructive way with any debate.

206. Despite that, an attempt has been made to understand the point of view of the ACTU by examining many submissions which the ACTU has made to other public inquiries on topics similar to at least some of those raised in the Discussion Paper. Thus to the extent possible the views of the ACTU have been taken into account and considered despite its refusal to contribute positively to the process.

207. Next, the ACTU (and others) have accused this Commission of leaking material to the media. This allegation cannot be sustained. It did not happen.

208. The first and most prominent occasion on which this accusation was made was at a hearing in Melbourne on 8 July 2014. Senior Counsel for the CFMEU made without any notice a serious accusation of the release of confidential material to the media. The CFMEU then

submitted a large amount of material to the AFP seeking that it investigate whether or not a leak had occurred from the Commission. The AFP undertook an investigation. It concluded that no leak had occurred.

209. On two occasions material was released by the Commission on an embargoed basis to representatives of all of the main media organisations. The two items of material so released were: (1) counsel assisting's opening of 23 April 2015; and (2) the Commission's Discussion Paper of 19 May 2015. Each related solely to policy or law reform matters. Neither contained confidential or sensitive evidentiary material. Each was released to representatives of all of the main media organisations. In each case, the purpose was to enable these representatives to absorb a large amount of material (particularly in respect of the Discussion Paper) shortly in advance of its public release. It was hoped by that means to enhance public debate and commentary. The Commission did not observe any practice pursuant to which confidential evidentiary material was released to the media in advance of its public tender or pursuant to which members of the media received background briefings concerning the content of public hearings in advance of those hearings. When evidentiary material was tendered it was uploaded to the Commission's website and the media and for that matter any other interested person was free to download it.

Legal representatives for parties

210. The conduct of legal representatives other than the various counsel who acted as counsel assisting calls for some comment. The

traditional customs of the Australian bars depended on the theory that particular points of view could be argued with vigour, so long as personal courtesies between counsel were observed. Perhaps the etiquette of the Australian bars has changed in the past 15 years. Or perhaps it is thought that in a Royal Commission counsel may utter any defamations – sometimes oral, sometimes in written final address – they feel like expressing at the expense of counsel assisting. Or perhaps it is thought that those representing trade unions or their officials have some particular licence not conferred in other circumstances in this respect. It would be wearisome to give illustrations of the offending behaviour. But the fact is that many counsel engaged in personal attacks on counsel assisting to varying extents. This was totally unwarranted. Most of the hearings were conducted by two senior counsel assisting, Mr J Stoljar SC and Ms S McNaughton SC. Lest the close reader of submissions be misled, it is desirable to stress that it would be difficult to think of calmer, fairer and more courteous practitioners. There is no respect in which their professional conduct was open to the ill-founded criticism it received.

211. It is now desirable to turn, with some relief, to a more substantive point. Counsel for affected persons frequently inserted in their submissions that counsel assisting were pursuing a particular 'case theory'. In this context, the term 'case theory' often seemed to be a pejorative one. It was used to hint at some sinister intent, although the intent was never spelt out in any clear or explicit way. Fundamentally, the suggestion seemed to be that counsel assisting was pursuing a 'case theory' to the exclusion of any other evidence and was thereby, in some ill-defined way, 'biased'.

212. The first point to be made in response to such suggestions is that they proceed upon a fundamental misconception. There is nothing inappropriate about counsel assisting in a commission of inquiry having a theory of the case. On the contrary, it is the *duty* of counsel assisting to have a theory of the case, if by that expression is meant a hypothesis or conception of where the evidence might lead. Counsel assisting who did not have some theory of the case would be doing nothing more than aimlessly asking questions in the hope that some interesting evidence would emerge. And it would not be possible to put affected persons on notice of where the investigations were going. A similar argument was recently considered by McDougall J concerning the Independent Commission Against Corruption of New South Wales in relation to which the following was stated:[59]

> [I]t would be quite extraordinary if a body having the powerful and important investigative and reporting functions of the Commission were to launch an investigation, and as part of that inquiry conduct lengthy public inquiries (with all the risk to reputation and pocket involved), without having at least a "case theory" that the subject matter of the investigation involved corrupt conduct within the remit of the Commission to consider, and that the persons to be examined at the public inquiry might reasonably be suspected of having been engaged in that corrupt conduct.
>
> […]
>
> In truth, if the "case theory" allegations are to go anywhere, it must be on the basis that the Commissioner was so firmly wedded to the case theory that she was, or had become, incapable of bringing an independent evaluative mind to all the evidence gathered, and of considering whether, on the basis of all that evidence, the case theory could be maintained.

213. Moreover, in a circumstance in which there was conflicting evidence on particular points, in the absence of some 'case theory' counsel assisting would not be in a position to do their duty to assist the

[59] *McCloy v Latham* [2015] NSWSC 1879 at [16] and [18].

Commissioner to arrive at or reject a conclusion by considering the points favouring it and the points contradicting it. Rather, counsel assisting would simply present all viewpoints from all parties and leave it to the Commissioner to try and work out from the mass of material what the appropriate outcome or finding might be. Counsel assisting has to formulate some working framework for what has gone on, some structure by which the evidence can be ordered. That is one of the ways they can assist the Commission.

214. The necessity for some form of case theory was amply demonstrated in a number of the case studies that have been heard by this Commission. An example is the Cbus leaks. The Commission received, through a whistle blower, information to the effect that two senior female employees of Cbus had leaked certain material to the CFMEU. That information could be designated a 'case theory'. When initially examined on this issue on 7 July 2014 the two relevant employees of Cbus indignantly denied any involvement. Their demeanour during that examination might be described as hostile and scornful. Counsel assisting persisted with the 'case theory'. It was not until 3 October 2014, after extraordinarily meticulous and expensive inquiries had been completed, that the general accuracy of the 'case theory' was finally revealed, and admitted by one of the employees. It was not until 10 December 2014 that the other admitted it. Even now it is not entirely clear how far Cbus and the CFMEU admit it, though in part at least they do.

215. So far as the role of counsel assisting is concerned, the only difficulty about proceeding on the basis of a 'case theory' is if counsel propounding the theory are so fixed on it that they become unwilling or

unable to call other evidence before the Commission unless it accords with the working theory. However, this did not happen in this Commission. Indeed, somewhat ironically counsel assisting were also on occasion criticised by affected persons for departing from what had previously been an apparent view of the case by reason of evidence emerging during the course of the case study. In litigation counsel may be criticised for departing from their 'case' as expressed in pleadings or in their client's evidence. That is not a just criticism of counsel assisting in a Royal Commission. In an investigative process there can be no criticism for counsel assisting or the person who has to reach conclusions about the facts shifting from what had earlier seemed to be an appropriate view of the facts any more than there could be criticism for deploying some case theory. There were many occasions on which counsel assisting moved from what had initially seemed to be the case; arrived at the view that no submission in favour of an adverse finding should be made; or made submissions based on evidence that had been adduced during the course of hearings which counsel assisting did not know of in advance. There is nothing at all wrong with this.

I – VOLUME TWO OF THIS REPORT

216. This Volume addresses case studies involving the MUA, the TWU, the Electrical Trades Union of NSW (**ETU NSW**), the CEPU, the NUW, New South Wales Branch (**NUW NSW**) and the HSU.

Part one: the MUA

217. Chapter 1 concerns the MUA. In particular it concerns payments totalling $3,200,000 by a number of employers in the maritime industry at the direction or request of the MUA or its officials. These include payments made to the MUA, payments made to a separate entity established by officials of the MUA and also a payment to a political candidate, who happens to be the Deputy State Secretary of the MUA, Western Australia Branch.

218. The Chapter concludes that the payments were not made by employers completely voluntarily for legitimate purposes. They were made to secure industrial peace from, or to keep favour with, the MUA. In some cases they had to be made repeatedly.

Part two: TWU (WA)

219. Chapter 2 centres on two events concerning the TWU (WA). One was the purchase, in 2012 and 2013, by the outgoing and the incoming Secretaries of the Western Australian branch of the TWU, of two Ford F350s. The cost was about $150,000 each. The purchase was for their use. But it was not they who paid. It was the TWU which paid. The other event was the making of a significant redundancy payment to the outgoing Secretary in July 2013.

220. These various transactions were very advantageous to the two officials, and they were correspondingly harmful to the TWU. The Report has concluded that the involvement of these officials in these transactions

may have given rise to breaches of a number of duties. The matter has been referred to the Fair Work Commission for consideration as to whether there have been breaches of the *Fair Work Act* 2009 (Cth).

Part three: CEPU

221. Chapter 3.1 involves the ETU (NSW). It deals with 3 main issues.

222. The first issue concerns a loan for $500,000 made in December 2010 by the ETU NSW (**ETU Loan**) to the Australian Labor Party (**ALP NSW**). The conclusions reached in relation to this first issue include the following:

(a) the ETU loan was made in breach of the rules of the ETU NSW because neither the State Council of the ETU NSW nor its Executive gave prior approval to it;

(b) Commissioner Bernard Riordan was not in breach of his duties to the ETU NSW in relation to the ETU loan;

(c) Paul Sinclair, Assistant Secretary of the ETU NSW, may have been victimised by his colleagues for giving evidence to the Royal Commission, which they seem to have perceived to have been unsatisfactory. In one sense this is the most disturbing aspect of the whole case study.

223. Secondly, two sets of Federal Court proceedings initiated and carried on by union officials may have been an abuse of process, because they

were brought for the purposes of advancing political interests and not for the purposes of vindicating legal rights.

224. Thirdly, there is an analysis of the ETU officers fund which reveals two governance problems.

225. Chapter 3.2 addresses the activities of the Australian Capital Territory sub branch of the New South Wales branch of the Plumbing Division of the CEPU (**ACT CEPU**). The main issue arising in Chapter 3.2 is: did a number of visits by a CEPU official to building sites in the ACT involve abuses of rights of entry conferred by the *Work Health and Safety Act* 2011 (ACT)? For the reasons set out in Chapter 3.2 a finding is made that the answer to the question may be affirmative.

Part four: NUW NSW

226. Chapter 4 is about a number of matters concerning the NUW NSW. One of the issues considered by the Chapter is the misuse of union credit cards. Until the Commission commenced its inquiries Derrick Belan was the Secretary of the NUW NSW, having succeeded his father who had held the position since 1983. Derrick Belan resigned in October 2015, shortly after his niece, Danielle O'Brien, departed the employment of the union amid concerns about credit card misuse. The Chapter also concerns the use of a fund known as a 'Campaign Fund', which was for a time operated by way of a bank account in the name of 'The Derrick Belan Team'. The Chapter is also concerned with payments by the NUW NSW to Paul Gibson, a former state parliamentarian. The Chapter also discusses a Deed of Release and

Settlement between Derrick Belan, and the NUW NSW. Finally, the chapter concerns governance issues which flow from the problems which emerged from these issues.

227. The findings are that a number of offences may have been committed in relation to the misuse of union credit cards by Danielle O'Brien, Nick Belan and Derrick Belan, and appropriate referrals have been made. The issue as to whether Wayne Meaney, the successor as Secretary of the NUW NSW, may have used union credit cards inappropriately has been referred for investigation to the appropriate authorities.

228. In relation to the arrangement with Paul Gibson, Derrick Belan may have contravened ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) and s 268 of the *Industrial Relations Act* 1996 (NSW). The matter has been referred to the appropriate authorities.

229. In relation to the negotiation of the severance terms with Derrick Belan, both Derrick Belan and Wayne Meaney (as the signatory to the Deed on behalf the NUW NSW) may have contravened ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) and s 268 of the *Industrial Relations Act* 1996 (NSW). The matter has been referred to the appropriate authorities.

230. The significant failures of governance within the NUW NSW in recent years lead to the conclusion that Derrick Belan, Wayne Meaney and Marilyn Issanchon may have contravened s 285 of the *Fair Work*

(Registered Organisations) Act 2009 (Cth). The matter has been referred to the General Manager of the Fair Work Commission.

Part five: HSU

231. Chapter 5.1 concerns the Peter MacCallum Cancer Centre (**Peter Mac**). As its name suggests, Peter Mac is an institution which conducts research into cancer. It fell into an industrial dispute with its employees. The industrial dispute arose from alleged breaches of various industrial instruments leading to a substantial underpayment of research technologists employed by Peter Mac. The dispute was settled in 2003.

232. Katherine Jackson was at that time the secretary of the HSU Victoria No.3 Branch. She played a key role in the settlement of the industrial dispute. As part of that settlement, in a Deed of Release, she negotiated a payment to the HSU of up to $250,000 to cover legal and 'other' expenses the HSU had supposedly incurred in the course of resolving the dispute, and 'future expenses' it supposedly expected to incur in connection to implementing the settlement. Peter Mac agreed to pay up to that amount upon presentation of an 'itemised statement'.

233. Katherine Jackson fraudulently misrepresented the expenses the HSU had incurred to procure payment of the maximum amount of $250,000 from Peter Mac. To the same end she fraudulently misrepresented the expenses which the HSU expected to incur in future.

234. The Commission has referred Katherine Jackson to the regulatory authorities for consideration as to whether her conduct in this regard may have amounted to a criminal offence.

235. Chapter 5.2 discusses many of the difficulties and tribulations the HSU has undergone over the last few years. Many of those difficulties centre around three senior figures in the union: Michael Williamson, Craig Thomson and Katherine Jackson.

236. Michael Williamson pleaded guilty to charges of defrauding the HSU and the New South Wales Union by the provision of false invoices in the amount of $938,000. Craig Thomson was convicted on criminal charges concerning misuse of HSU funds for personal expenses. In separate civil proceedings he was found to have misused HSU funds for a number of services. Katherine Jackson was ordered by the Federal Court of Australia to pay compensation to the HSU of $1,403,338. Her activities are in part also the subject of a continuing criminal investigation.

237. This misappropriation and deceit flourished in a culture then pervasive at the HSU. Senior management operated with a sense of complete entitlement in respect of the use of members' money. They lacked any scruple and they operated without proper control or supervision.

238. This chapter also includes as Appendix G a discussion of Peter Mylan who was Acting General Secretary of HSU East from 22 September 2011 until 21 June 2012. Peter Mylan may have breached his duties under the FW(RO) Act and may also have breached s 267 of the *Industrial Relations Act* 1996 (NSW) and s 192H of the *Crimes Act*

1900 (NSW). This Report and any other relevant materials have been referred to the appropriate regulatory authorities for consideration whether proceedings against Peter Mylan should be instituted for the above possible contraventions.

J – VOLUME THREE OF THIS REPORT

239. All of the case studies in Volume 3 relate to the CFMEU.

Part six: CFMEU ACT

Halafihi Kivalu

240. Chapter 6.1 is an introductory chapter. Chapter 6.2 deals with Halafihi Kivalu. He was formerly a senior official and long-term employee of the CFMEU ACT. During the course of hearings in Canberra in July 2014, Halafihi Kivalu conceded receiving approximately $100,000 from two employers. He contends that these payments were gifts. After he gave that evidence other employers came forward and made allegations concerning payments that they had made to Halafihi Kivalu. Following the hearings Halafihi Kivalu was charged. The matter is presently before the ACT courts. Accordingly no conclusions have been expressed in this Report concerning the lawfulness of Halafihi Kivalu's conduct.

Pressure to enter enterprise agreements

241. Chapter 6.3 analyses a number of case studies involving the CFMEU ACT. The case studies in Chapter 6.3 examine some of the ways in which the CFMEU has significant influence over which companies obtain work in Canberra. They focus on the question of whether the CFMEU exercises or purports to exercise rights of entry under Work Health & Safety legislation for the purposes of applying industrial pressure to participants in the industry.

Membership issues

242. Chapter 6.4 deals with membership issues. It concerns instances of CFMEU officials applying pressure to employers to ensure that their employees were CFMEU members.

Anti-competitive conduct

243. Chapter 6.5 examines potentially anti-competitive conduct by CFMEU officials with particular reference to the cartel provisions in the *Competition and Consumer Act* 2010 (Cth). At the conclusion of the hearings in Canberra in July 2015 the Australian Competition and Consumer Commission (**ACCC**) announced that it had commenced making inquiries into cartel conduct in the building industry in the ACT. A joint agency agreement has been entered into between the ACCC and the Trade Union Royal Commission Taskforce.

244. Counsel assisting submitted that the evidence reveals an industry with a number of features that operate to reduce competition substantially. Those features included: CFMEU pattern EBAs, an expectation on the part of CFMEU EBA contractors that the CFMEU will stop contractors without a CFMEU EBA from working in the commercial construction industry and a willingness on the part of CFMEU officials to satisfy that expectation.

245. There was evidence, also, of cartel conduct and of attempts by CFMEU officials induce it. It is with that conduct that this Chapter is principally concerned. One simple example in the evidence concerned a bricklayer, referred to in the evidence as Charlie. Charlie was charging a builder $4 per block. This was less than bricklayers with EBAs who were charging at least $6 per block. A 'compliant' EBA bricklayer found out that Charlie was working on a particular site and told a CFMEU organiser named Johnny Lomax. He asked Johnny Lomax, in effect, to stop Charlie from working. Johnny Lomax promptly located Charlie and went to see him. In substance, he told Charlie that he could not charge $4 per block and that he needed to get an EBA and price properly if he wanted to do any work in Canberra. Johnny Lomax enlisted the help of another EBA bricklayer to help Charlie price for the next job. Johnny Lomax reported back to the original complainant bricklayer who indicated that he would be content if Charlie complied with Johnny Lomax's request.

246. In light of the ongoing ACCC investigation, and the possibility that further or other factual material might emerge, no findings are made in Chapter 6.5 about whether there may have been contraventions of provisions of the *Competition and Consumer Act* 2010 (Cth).

Creative Safety Initiatives

247. Chapter 6.6 deals with the Creative Safety Initiatives Trust. The Report finds that there have been significant failures of governance by the directors of the trustee of that trust and of Construction Charitable Works Ltd (**CCW**), a registered charity. CCW's funds have been diverted for non-charitable purposes, for the benefit of the CFMEU ACT. By causing or allowing the diversion to occur some of the directors may have breached their duties to CCW. This issue has been referred to the Australian Charities and Not-for-Profits Commission so that it can give consideration to revoking CCW's registration as a charity.

248. Further, the CFMEU ACT includes various clauses in its pattern enterprise agreement that provide a disguise to financial benefit to the union. The inclusion of those clauses has created an environment in which there are inherent conflicts of interest between union officials and the workers they represent and a substantial systemic risk of breaches of fiduciary duty. Owing to uncertainty in the law, no finding is made concerning whether or not the CFMEU ACT may have engaged in third line forcing or exclusive dealing contrary to the *Competition and Consumer Act* 2010 (Cth). However, the Report and the materials obtained by the Commission have been referred to the Australian Federal Police and the ACT Gaming and Racing Commission to investigate the commission of possible criminal offences against the *Criminal Code* (ACT) and s 65 of the *Taxation Administration Act* 1999 (ACT) in relation to matters concerning the *Gaming Machine Act* 2004 (ACT).

Part seven: CFMEU NSW

Cbus leak

249. Chapter 7.1 deals with the Cbus leak, a matter initially considered in 2014, but not finalised. Cbus is the name of a superannuation trust fund. On 29 July 2013 a senior Cbus executive travelled from Melbourne to the CFMEU NSW offices at Lidcombe in Sydney. She did so with the knowledge and participation of a more senior executive. Her purpose was to deliver some spreadsheets containing personal confidential information about the employees of two companies. The ultimate recipient of the spreadsheets was to be the State Secretary of the CFMEU NSW, Construction and General Division. An official of the CFMEU then used the information to contact some of the employees with the view to making them disgruntled with their employers.

250. The case study is important because the release of confidential personal information by Cbus to an outside party, the CFMEU, was wrong. The release was wrong in many ways. The release was a breach of trust by the trustee. The release contravened the Cbus Trust Deed, cl 6.4. The release was the result of officers of the Trustee having procured a breach of trust. The release was a breach of contractual duties owed to the employees of the two companies. The release was a breach of the *Privacy Act* 1988 (Cth), s 16A. The release was a breach of various contractual duties created by the contracts of employment under which the executives were engaged.

251. The executives of Cbus conducted themselves as they did at the behest of the CFMEU. This was a completely inappropriate use of power by the CFMEU. The episode is also important because of the reaction of the Cbus interests and the CFMEU as the details about what had happened trickled out. On 1 August 2013 the solicitors for the two companies began to complain about leaked personal information to both the CFMEU and Cbus. On 11 May 2014 and on succeeding days articles in the Fairfax press described revelations by the official of the CFMEU who had contacted the employees about his role in what had happened. The responses of Cbus and the CFMEU have involved wilful blindness. They have involved massive mendacity to the point of perjury. Those traits were revealed before both the Commission began and in the course of its inquiries and hearings. Cbus has made almost grovelling acknowledgements that the executives were at fault. But these acknowledgements took a long time to emerge – until November 2014. The acknowledgement by the CFMEU that its officials were at fault has taken even longer – until September 2015.

252. Issues concerning the giving of false evidence by two of the executives and possible contraventions of s 6H of the *Royal Commissions Act* 1902 (Cth) are now with the Commonwealth Director of Public Prosecutions and in the Victorian Court system. They are not the subject of further consideration. However it has been concluded that David Atkin, the Chief Executive Officer of Cbus, was involved in the leak in the manner described in Chapter 7.1 and may have contravened s 182 of the *Corporations Act* 2001 (Cth). A number of conclusions concerning cultural problems within Cbus are also expressed.

Payments to organisers

253. Chapter 7.2 deals with the affairs of George Alex, Brian Parker and Darren Greenfield. Again this was a case study touched upon but not finalised in 2014. The principal issue addressed in Chapter 7.2 is whether cash payments were made to an organiser with the CFMEU NSW for favouring businesses associated with George Alex and Joseph Antoun. The evidence demonstrates that those payments were made to Darren Greenfield. During 2013 regular cash withdrawals of $2,500 were made from a bank account operated a scaffolding business called 'Elite'. These payments were referred to within Elite as 'Union payments'. A substantial body of documentary evidence, principally text messages between George Alex and others, demonstrates that cash payments in the amount of $2,500 were made by George Alex and Joseph Antoun to Darren Greenfield.

Donations and EBAs

254. Chapter 7.3 deals with donations and EBAs. The central issue in this chapter is whether the CFMEU NSW improperly obtained donations from various companies. It has been found that a number of persons including persons within the CFMEU NSW may have committed criminal offences against the *Charitable Fundraising Act* 1991 (NSW). This Report and all relevant materials have been referred to the Minister ministering the *Charitable Fundraising Act* 1991 (NSW) in order that consideration be given to conducting an inquiry pursuing to Division 1 of Part 3 of that Act into *all* of the CFMEU NSW's practices concerning charitable fundraising.

Building Trades Group & Alcohol Committee

255. Chapter 7.4 deals with the Building Trades Group Drug & Alcohol Committee (**BTG D&A Committee**). The first matter examined is the payment of $100,000 made in April 2006 by Thiess-Hochtief Joint Venture which carried out the Epping to Chatswood Rail Link. The payment was made to the BTG D&A Committee. The payment was ostensibly for the purposes of drug and alcohol safety training. In fact, most of the money ended up, after round robins of payments over three years, in the 'fighting fund' of the CFMEU NSW. Findings are made to the effect that the $100,000 payment may have been a 'corrupt commission' given and solicited in breach of s 249B of the *Crimes Act* 1900 (NSW), and that there may have been aiding and abetting of those possible offenses. Appropriate referrals have been made.

256. The second matter examined in this chapter relates to a clause in the CFMEU NSW enterprise bargaining agreements. Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting 'with the provision of drug and alcohol rehabilitation and treatment service/safety programs for the building industry'. From 2004 to 2011 inclusive, employers paid approximately $2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was syphoned to the CFMEU NSW and deposited in its general revenue.

Committee to Defend Trade Union Rights

257. Chapter 7.5 deals with the Committee to Defend Trade Union Rights Pty Ltd (**CTDTUR**). The CTDTUR is the corporate trustee of the Defend Trade Union Rights Trust (**the Trust**). On 26 September 2005, the CFMEU NSW transferred $7,000,000 out of its general operating funds into the Trust. Apart from de minimis contributions, the CFMEU NSW has been the only contributor to the Trust. Furthermore, the overwhelming majority of distributions made from the Trust have been to the CFMEU NSW. For all practical purposes, the CFMEU NSW retains control over the Trust and its assets.

258. In this chapter, findings are made to the effect that the Trust may have been established, and the transfer of $7,000,000 to the Trust on 26 September 2005 may have been made, to defraud future creditors, including potentially the Commonwealth of Australia, contrary to s 37A of the *Conveyancing Act* 1919 (NSW). Findings are also made that in supporting the establishment of the Trust and the said transfer a number of senior official of the CFMEU NSW may have breached their duties to the union to act for a proper purpose.

U-Plus/Coverforce

259. Chapter 7.6 deals with U-Plus and Coverforce. Since 2003 the CFMEU NSW has included an income protection insurance clause in its standard enterprise agreement, the effect of which is to provide a very substantial financial benefit to the union. From 2003 to 2009 the financial benefit to the union was over $230,000 per annum. From

2010 to June 2013, the financial benefit to the union was over $680,000 per annum. From July 2013 to May 2015, the financial benefit to the union was approximately $810,000 per annum.

260. The CFMEU does not routinely, if at all, disclose that financial benefit to employees on whose behalf it acts in enterprise negotiations. The inclusion of the standard clause has created an environment in which there are inherent conflicts of interest between union officials and the workers they represent and a substantial systemic risk of breach of fiduciary duty.

261. In addition, the CFMEU may since 2003 have contravened s 911A of the *Corporations Act* 2001 (Cth), a criminal offence. This report and all relevant materials have been referred to the Australian Securities and Investments Commission to give consideration to whether a civil or criminal proceeding should be commenced against the union.

K – VOLUME FOUR OF THIS REPORT

Part eight: CFMEU Queensland

Cornubia House

262. Chapter 8.1 deals with the Cornubia House case study. This involves an allegation that in 2013 the then Secretary of the BLF QLD (which was also a branch of the federal CFMEU), David Hanna, had received free materials and services in 2013 for the purposes of the construction of his home worth in the order of $150,000.

263. The findings are that David Hanna, as 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 (for whom they worked) in relation to the BLF's affairs. David Hanna may have committed an offence under s 442B of the *Criminal Code* 1899 (Qld). Appropriate referrals have been made.

264. 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. Mathew McAllum and Adam Moore may have committed an offence under s 442BA of the *Criminal Code* 1899 (Qld). Appropriate referrals have been made.

Document destruction

265. Chapter 8.2 concerns the important issue of document destruction. The essential facts were these. At approximately 12.50pm AEST 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 evening of 1 April 2014, a large quantity of documents – several tonnes at least – 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.

266. It was found that primary responsibility for the destruction of documents fell on Michael Ravbar, the Secretary of the CFMEU QLD. He gave the operative orders. But David Hanna had to share the responsibility. The conduct of Michael Ravbar and David Hanna was done with an intention to conceal the removal and destruction of documents which they believed were or could be relevant to the conduct of the Commission's future proceedings. However in light of an ongoing police investigation no findings of possible criminal conduct were made.

Hindmarsh

267. Chapter 8.3 deals with the Brooklyn on Brooks Project involving Hindmarsh builders. This was another case study initially examined in 2014 but not concluded. Following a further round of submissions findings in respect of this case study were made.

268. 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. By so acting, they may have breached ss 297, 300 and 302 of the *Fair Work (Registered Organisations) Act*

2009 (Cth). In addition, they may have acted in contempt of the order of the Federal Circuit Court. Appropriate referrals have been made.

269. The Report also finds that 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. 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.

Part nine: CFMEU Vic

Andrew Zaf

270. Chapter 9 deals with the Andrew Zaf case study. It concerned 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 it 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.

271. In the light of the further material, counsel assisting contended that no positive submission based on Andrew Zaf's evidence could now be maintained. No findings adverse to persons affected by the substance of Andrew Zaf's submission were open without informing affected

persons of the possibility of departure from what counsel assisting urged so they might deal with the possibility. That did not happen. No adverse findings were made.

Part ten: AWU

Cleanevent

272. Chapter 10.1 is introductory. Chapter 10.2 involves Cleanevent Australia Pty Ltd. There are a number of issues raised by the Cleanevent case study. The first is whether the AWU and Cleanevent agreed to extend an enterprise agreement made under the WorkChoices regime, thereby saving the company some $2,000,000 per year it would otherwise have had to pay its casual workers in penalty rates under the Award. In exchange Cleanevent paid the AWU $25,000 per year and provided lists of '100 purported members'.

273. The findings are that Cesar Melhem, then State Assistant Secretary, and the AWU may have committed an offence against s 176(1)(a) and (b) of the *Crimes Act* 1958 (Vic) by soliciting a corrupt commission.

274. Cesar Melhem also 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).

275. Cesar Melhem also 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.

276. In relation to the payments which were recorded as membership income in the financial statements of AWU Vic, 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.

277. In relation to the inflation of membership numbers 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. As such the AWU may have contravened s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

278. These matters have been referred to the appropriate authorities.

Thiess John Holland

279. Chapter 11.3 relates to Thiess John Holland (**TJH**). This joint venture was responsible for the construction of the Eastlink Tunnel project in Melbourne in 2005. The first issue is whether the AWU and the joint venture entered into an agreement pursuant to which the joint venture paid $100,000 a year to the AWU, disguised by false invoices.

280. The following findings are made:

(a) 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;

(b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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; and

(g) the agreement was implemented by payment of invoices issued by the AWU, many of which were false invoices.

281. Further, 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.

282. Accordingly, Cesar Melhem and Julian Rzesniowiecki may have contravened s 83 of the *Crimes Act* 1958 (Vic). Cesar Melhem, Julian Rzesniowiecki, the AWU and John Holland Pty Ltd may have contravened s 176 of the *Crimes Act* 1958 (Vic). Cesar Melhem, Julian Rzesiowiecki and the AWU may have contravened s 83 of the *Crimes Act* 1958. Appropriate referrals have been made.

Paid education and ACI

283. Chapter 10.4 deals with the topic of paid education generally. Chapter 10.5 addresses this topic in more detail through the ACI case study. There is no controversy that ACI paid three instalments of $160,000 to the AWU for what was described as 'paid education leave'. It is difficult to understand however what precisely the ACI received in exchange for these three payments.

284. The findings are that payments of this magnitude, made for no consideration, would not 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. Accordingly, Cesar Melhem, and the AWU may have committed an offence under s 176(1)(b) of the *Crimes Act* 1958 (Vic). Mike Gilhome may have committed an offence under s 176(2)(b) of the *Crimes Act* 1958 (Vic). These matters have been referred to the appropriate authorities.

Chiquita Mushrooms

285. Chapter 10.6 deals with a case study about Chiquita Mushrooms Pty Ltd (**Chiquita**). The issue is whether the Chiquita mushroom farm agreed to pay the AWU $4,000 a month in exchange for industrial peace. It arose in a context in which the manager of the mushroom

farm was shifting the workers from its workforce from employees to labour hire.

286. The findings are that the payments conferred a direct benefit on the AWU. They were contrary to the interests of the employees of Chiquita because they weakened the AWU's bargaining position in EBA negotiations. The payments were not disclosed to Chiquita employees. Frank Leo and the AWU may have breached their fiduciary duties to Chiquita employees who were AWU members.

287. The arrangement, and the payments pursuant to it, tended to influence the AWU and Frank Leo to show favour to Chiquita in relation to the affairs of its employees. Accordingly, Chiquita offered the payments 'corruptly' within the meaning of s 176(2)(b) and may have contravened that section, and Frank Leo and the AWU procured the payments 'corruptly' within the meaning of s 176(1)(b) and may have contravened that section. Appropriate referrals have been made.

Unibuilt

288. Chapter 10.7 deals with Unibuilt. It concerns 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.

289. Prior to and during the campaign for his election to the Federal seat of Maribyrnong, Bill Shorten was the National Secretary of the AWU. The relevant people employed to work on his campaign were Lance

Wilson and Fiona Ward. Counsel assisting did not press for adverse findings against Bill Shorten, Ted Lockyer or the AWU and none are made. 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.

290. 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. The finding is that Cesar Melhem in engaging in this conduct, may have contravened rule 57 of the AWU rules. These matters have been referred to the appropriate authorities.

Winslow Constructors

291. Chapter 10.8 deals with Winslow Constructors. It 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. The facts were largely not contested. Rather the dispute concerned what should be drawn from the facts.

292. The findings are that Cesar Melhem, the AWU, Dino Strano, and 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. It is also found that 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. In addition, the AWU may have contravened s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). These matters have been referred to the appropriate authorities. In addition, a referral has been made to the Commissioner of Taxation for consideration of whether tax deductions were properly available in respect of the payments made pursuant to the false invoices.

Miscellaneous membership issues

293. Chapter 10.9 deals with miscellaneous membership issues including those involving the Australian Netballers' Association, the Australian Jockeys' Association and other companies such as BMD Constructions. It considers similar arrangements to those in the previous Chapter. In this Chapter, the arrangements considered were those 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.

294. In relation to BMD, the findings are that AWU membership numbers in relation to BMD employees were falsely inflated. Accordingly, the AWU may have contravened s 230 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). Further, Cesar Melhem may have

contravened section 83(1) of the *Crimes Act* 1958 (Vic) 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. He also may have contravened his obligations under ss 285, 286 and 287 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). These matters have been referred to the appropriate authorities.

295. In relation to the Australian Jockeys' Association, the findings are that none of the jockeys in question became members of the AWU even though their names were recorded on the AWU membership roll and AWU invoices were issued in relation to Victorian jockeys and were paid by that Association. The AWU may have contravened s 230(2) of the *Fair Work (Registered Organisations) Act* 2009 (Cth). These matters have been referred to the appropriate authorities.

296. Similarly, in relation to the Australian Netball Players Association, the findings are that no netballers were ever members of the AWU. 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 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). These matters have been referred to the appropriate authorities.

297. In relation to AJ Lucas, involving another instance of a false invoice similar to the procedure adopted in relation to Winslow and BMD,

Cesar Melhem may have committed an offence under s 83 of the *Crimes Act* 1958 (Vic). An appropriate referral has been made.

298. In relation to Geotechnical Engineering, 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 of the *Fair Work (Registered Organisations) Act* 2009 (Cth). An appropriate referral has been made.

299. Chapter 10.10 deals with Downer EDI. It again involves the issuing of what appears to be a false invoice by the AWU.

300. The findings are that the invoice in question was false, and that Tony Sirsen, Cesar Melhem and the AWU may have contravened s 83 of the *Crimes Act* 1958 (Vic).

Part eleven: Incolink

301. Chapter 11 considers two main issues raised by counsel assisting in submissions. 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 union and employer organisations.

302. 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).

Part twelve: Industry 2020

303. Chapter 12 of the Report reviews the Industry 2020 case study which was dealt with in the Interim Report. One issue the Commission has been considering is what Industry 2020 funds were used for, including significant funds supplied to David Asmar.

304. In 2014, David Asmar was not available to give evidence as he was overseas. In 2015 further attempts were made to resume and complete these investigations, in part by having David Asmar give evidence at a public hearing. However, he departed Australia after having been served with the summons and was scheduled to return the day after the day on which he was required to appear. The date for his public hearing was changed, but the Commission was ultimately advised that David Asmar was in Lebanon and would not be in Australia for the re-scheduled date for medical reasons. Accordingly, the examination could not proceed.

L – VOLUME FIVE OF THIS REPORT

305. Volume Five of this Final Report deals with policy and law reform issues. It is divided into the following chapters:

Chapter 1 Introduction

Chapter 2 Regulation of Unions

Chapter 3 Regulation of Union Officials

Chapter 4 Corrupting Benefits

Chapter 5 Regulation of Relevant Entities

Chapter 6 Enterprise Agreements

Chapter 7 Competition Issues

Chapter 8 Building and Construction

Chapter 9 Rights of Entry

Chapter 10 Reform of the *Royal Commissions Act* 1902 (Cth)

306. Each Chapter deals with a number of issues, or problems, with the existing law on the same broad theme. Following identification of the issue or problem there is consideration of possible solutions having careful regard to submissions received:

(a) in response to the Discussion Paper;

(b) in response to the Issues Papers; and

(c) from affected parties in relation to particular case studies.

307. Careful regard has also been had to the public submissions made to, issues papers released by, and the draft and final reports of a number of other inquiries which have been, or are being conducted, into issues that overlap with or complement matters arising out of the Commission's inquiries. These inquiries include:

(a) the Competition Policy Review;[60]

(b) the Financial System Inquiry;[61]

(c) the Productivity Commission Inquiry into the Workplace Relations Framework;[62] and

(d) a number of Senate committee and other parliamentary committee enquiries into proposed legislation in the industrial relations area.

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[60] Competition Policy Review, *Final Report* (March 2015).

[61] Financial System Inquiry, *Final Report* (December 2014).

[62] The Australian Government Productivity Commission Inquiry into the Workplace Relations Framework Inquiry Report was handed to the Australian Government on 30 November 2015. At the time of writing this report, that Inquiry Report had not been released by the Government.

308. Following analysis of the various arguments, and close consideration of various options, there are recommendations for reform.

309. A list of recommendations can be found at Appendix 1 to this Volume.

M – CONCLUSION

310. Lastly, acknowledgment and thanks are due to the many lawyers and non-lawyers who have worked at the Commission over its term. There were seven barristers appointed as counsel assisting: Mr J Stoljar SC, Ms S McNaughton SC, Mr M Elliott, Mr R Scruby, Ms C Gleeson, Ms F Roughley and Mr T Prince. The team of solicitors assisting from MinterEllison was led by Mr J Beaton. The Office of the Royal Commission included chief executive officers Ms J Fitzgerald (2014) and Ms S Innes-Brown (2015), and general counsel Mr B Steenson. For reasons of space not all of the staff and solicitors have been named. All worked tirelessly. From the first day of its existence the Commission operated under tight deadlines and an enormous volume of material was gathered, assessed and prepared for hearings. The contents of both the Interim Report and this Report are a testament to their hard work and commitment.