PART 1: MARITIME UNION OF AUSTRALIA

CHAPTER 1

MARITIME EMPLOYEES TRAINING FUND

ON THE WATERFRONT: THE HIGH PRICE OF INDUSTRIAL PEACE

It is always a temptation to an armed and agile nation
To call upon a neighbour and to say:-
"We invaded you last night – we are quite prepared to fight,
Unless you pay us cash to go away."

And that is called asking for Dane-geld,
And the people who ask it explain
That you've only to pay 'em the Dane-geld
And then you'll get rid of the Dane!

It is always a temptation to a rich and lazy nation
To puff and look important and to say:-
"Though we know we should defeat you, we have not the time to meet you.
We will therefore pay you cash to go away."

And that is called paying the Dane-geld;
But we've proved it again and again,
That if once you have paid him the Dane-geld
You never get rid of the Dane.

A – INTRODUCTION

1. This Chapter concerns the Maritime Union of Australia (**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. The payments include payments made to the MUA, a separate entity established by officials of the MUA (ie Chris Cain, Paddy Crumlin and Rod Pickette), and a payment to a political candidate, who happened to be the Deputy State Secretary of the MUA.

2. 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.

3. The Chapter will examine four case studies. The first case study concerns the Blacktip Project and Saipem (Portugal) Commercio Maritimo, Sociedade Unipessoal, LDA (**Saipem**). The second concerns SapuraKencana Pty Ltd (**SapuraKencana**). The third concerns Dredging International (Australia) Pty Ltd (**Dredging International**). The fourth concerns Van Oord Australia Pty Ltd (**Van Oord**).

4. These four case studies reveal six categories of payment. First, there are payments to Maritime Employees Training Limited (**METL**). That is a company which provides training and facilities for the maritime industry. METL primarily functions as a Group Training Organisation and is the largest employer of Trainee seafarers in Australia.[1] Since it is a 'separate entity' established by the officers of an employee association (the MUA), it is a 'relevant entity' within the meaning of para (a) of the Terms of Reference. Secondly, there are payments to

[1] Simon Earle, witness statement, 29/9/14, para 22, Annexure B.

WA Special Purpose Fighting Fund (**WASP**). The WASP is used to pay the general day to day running expenses of the Western Australian Branch of the MUA (**MUA WA Branch**).[2] Thirdly, there are payments to the Training and Development Fund (**Training Fund**). The Training Fund was a bank account established by the Executive of the MUA WA Branch to be used for the training of members of that branch.[3] On 13 March 2014, one day after the Commission's Letters Patent were issued and 33 days after the decision to set up the Royal Commission was announced, the Training Fund was closed.[4] Fourthly, there are payments to an Occupational Health & Safety Fund established by the MUA WA Branch (**OH&S Fund**). Fifthly, there are payments to sponsor MUA conferences. Sixthly, there are payments to a political candidate by Van Oord.

B – RELATIONSHIP TO TERMS OF REFERENCE

5. At the public hearing into the MUA on 29 September 2014, the MUA took a preliminary point.[5] Liberty was given to develop it in final submissions. The MUA did so, both in writing and orally.

6. The MUA argued that any examination of the payments to itself or to the political candidate fell outside the Terms of Reference. It further argued that payments to the WASP, the Training Fund and the OH&S Fund were payments to the MUA and hence not payments to a 'relevant entity'. A 'relevant entity' is a 'separate entity'. One integer

[2] Chris Cain, witness statement, 29/9/14, para 25.

[3] Chris Cain, witness statement, 29/9/14, para 43 (first).

[4] Chris Cain, witness statement, 29/9/14, para 46(iv) (second).

[5] 29/9/14, T:8.41-9.43, 10.32-11.6.

of the definition of 'separate entity' in the Terms of Reference is that it be 'a separate legal entity from any employee association'. Counsel assisting agreed with this submission. They were correct to do so. The MUA is obviously not a legal entity which is separate from any employee association – it *is* an employee association. Those three 'funds' are not 'separate entities'. They are simply bank accounts of the MUA.[6]

7. The MUA argued, also correctly, that the payment to the political candidate is not a payment to a 'separate entit[y]'. A payment to a political candidate is not a payment to 'a fund, organisation, account or other financial arrangement' which is 'established for, or purportedly for, an industrial purpose or the welfare of members of an employee association'.[7]

8. The MUA submitted:[8]

> Hence the only way that examination of payments to the MUA or to a political candidate could fall within the Terms of Reference is if they fell within Terms of Reference (g) or (h), namely, "*breach of any law, regulation or professional standard by any officer of an employee association" to "procure an advantage" or "cause a detriment"; or a "bribe, secret commission or other unlawful payment or benefit*". (emphasis in original)

[6] Submissions of the MUA, 14/11/14, paras 18-19.

[7] Submissions of the MUA, 14/11/14, para 20.

[8] Submissions of the MUA, 14/11/14, para 21.

9. The MUA continued:[9]

> The evidence before the Commission in relation to the MUA was not evidence of any illegal or unlawful conduct that would fall within Terms of Reference (g) or (h). That is borne out by the concluding submissions of Counsel Assisting … which eschew any finding of illegal or unlawful conduct.

10. This was a perhaps inexact reference to the following paragraph of counsel assisting's submissions in chief:[10]

> It is not submitted that, on the evidence before the Commission, the conduct of Mr Cain or the MUA in respect of the negotiations considered above meets the requirements of an offence under s 338A of the *Criminal Code* (WA).

11. The MUA submitted that some of the conduct discussed fell outside the Terms of Reference. It therefore submitted that various parts of the submissions of counsel assisting should not form part of the findings in the Report.[11]

12. In reply, counsel assisting contended that payments to the WASP, the Training Fund and the OH&S Fund are within the Commission's Terms of Reference by reason of two arguments.[12]

13. The first argument was that money obtained from employers and given to the WASP, for example, had flowed from the WASP to METL.

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[9] Submissions of the MUA, 14/11/14, para 22.

[10] Submissions of Counsel Assisting, 31/10/14, para 160.

[11] Submissions of the MUA, 14/11/14, para 23.

[12] Submissions of Counsel Assisting, 25/11/14, para 5.

METL is a relevant entity. An inquiry into the circumstances in which funds were obtained from employers is reasonably incidental to an inquiry into how they ended up being paid to METL.

14. This argument rests on a combination of paras (d) and (k) of the Terms of Reference. Paragraph (d) refers to: 'The circumstances in which funds are, or have been, sought from any third parties and paid to relevant entities'. Here counsel assisting's argument is that funds have been sought by the MUA from employers and paid eventually to a relevant entity, METL. Paragraph (k) of the Terms of Reference is: 'Any matter reasonably incidental to a matter mentioned in paragraphs (a)-(j)". Counsel assisting's argument is that the payment by employers to the WASP is reasonably incidental to the eventual payment of those monies to METL.

15. The first argument may be described as a narrow one. It is narrow in the sense that if it succeeded but the second argument failed, the METL payments would be within the Terms of Reference, but not the payments to the MUA and the political candidate.

16. Counsel assisting's first argument is sound. There were three material payments to METL. They were all made on 19 February 2014 – nine days after the setting up of the Royal Commission was announced on 10 February 2014. The first two relate to invoices issued on 10 April 2012 and 9 May 2012. The third relates to an invoice dated 15 October 2012.[13] The MUA submitted that even if it were assumed that there was some impropriety in relation to the invoices, the payments to

[13] Cain MFI-1, 29/9/14, p 18.

METL were not 'reasonably incidental' to it. It relied on the temporal gaps.[14] But the expression 'reasonably incidental' does not relate only to questions of time. It refers to a relationship between two matters. Take the relationship created by the second invoice. It was dated 9 May 2012, one day after Fair Work Australia approved an Enterprise Agreement between the MUA and Dredging International.[15] The invoice of 9 May 2012 was sent to Dredging International by Chris Cain seeking payment of $200,000 as 'sponsorship of our State Conference/Committee'.[16] It is suspicious that the invoice followed so swiftly on the finalisation of the Enterprise Agreement. It is also suspicious that money, never originally intended for METL, ended up in METL's hands, but did so only a few days after the Royal Commission was announced. There is a suggestion of what some might call 'a sudden tidy up'.

17. The second argument of counsel assisting concerned payments to WASP, the Training Fund, the OH&S Fund and the political candidate. Those payments (apart from the payment to the political candidate) purported to be for sponsorship, training or occupational health and safety. The argument was that these were in fact payments to secure industrial peace with the MUA. The making of those payments falls within para (g) as being conduct by officials of the MUA which may amount to a breach of the professional standards applicable to trade union officials in order to procure an advantage for the MUA. The Letters Patent appointing the Commission 'require and authorise' inquiry into:

[14] 26/11/14, T:22.6-29.

[15] Di Giorgi MFI-1, 29/9/14, p 484.

[16] Di Giorgi MFI-1, 29/9/14, p 488.

(g) any 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 an advantage for the officer or another person or organisation; or

(ii) cause a detriment to a person or organisation …

18. Counsel assisting stressed the word 'may'. That word is also used in para (f). They submitted that the power of the Commission to inquire was not limited to conduct which eventually *is actually found* to amount to a breach. It extended beyond that to conduct which *may* amount to a breach. Hence counsel assisting contended that it was within power for the Commission to inquire into any credible allegation of conduct which 'may' be a breach of the kind described in para (g). It is possible that that submission put the power too restrictively, at least at the beginning of the inquiry, as the MUA orally conceded.[17]

19. However that may be, the fundamental contention of the MUA was that para (g) of the Terms of Reference went only to 'illegal or unlawful acts'.[18] It is true that para (h) refers to 'any bribe, secret commission or other unlawful payment or benefit'. But para (g) is not to be construed as having a similar meaning. Indeed the language of para (h) is narrow. It stands in contrast with and highlights the broader language of para (g) – 'a breach of any law, regulation or *professional standard*' (emphasis added). The MUA further submitted: 'The idea

[17] 26/11/14, T:21.7-11.

[18] 29/9/14, T:10.47-11.1; Submissions of the MUA, 14/11/14, para 22; 26/11/14, T:21.16-18.

that procuring industrial peace has occurred suggests that there was a threat of industrial war. You won't find that in any of the proposed evidence.'[19] This oral submission, made on 29 September 2014 before any evidence was called, was not repeated in the written submissions filed after the evidence had closed, nor in later oral submissions.

20. The second argument of counsel assisting is sound. The word 'may' in para (g) is important.[20] And the MUA did not endeavour to deal with the argument of counsel assisting relating to a breach of professional standards. The words 'law', 'regulation' and 'professional standard' are not to be read as ejusdem generis – as if they all belonged to a single class of 'illegal or unlawful acts'. Conduct can be a breach of the professional standards applying to trade union officials even though it is not 'illegal or unlawful'. Hence (assuming various factual requirements are made good) procurement and receipt of payments other than the payment to the political candidate were items of conduct by union officials in breach of a professional standard in order to procure an advantage for the MUA. And (on the same assumption) procurement of the payment to the political candidate was in breach of a professional standard in order to procure an advantage for the candidate.

C – CHRIS CAIN

21. The central figure is Chris Cain. Chris Cain is involved, in some way or another, with all of the activities considered below. He was one of

[19] 29/9/14, T:11.4-6.

[20] See also Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014),, Vol 1, ch 1, pp 16-21, paras 49-67.

the founders of METL. At all relevant times he was the Secretary of the MUA WA Branch. In the witness box he gave the impression of being bluff and engaging. He seemed to be a vigorous and forceful leader, strongly devoted to what he saw as the interests of the MUA and its members, and very likely to place those interests in marked priority to any other consideration.

D – UNCONTROVERSIAL FACTS

Need for training in the maritime industry

22. The relevant background facts are largely uncontroversial.[21]

23. Around 2008, officials of the MUA and some employers realised that there was a shortage of Australian seafarers to service the rapidly expanding hydrocarbon industry.[22]

24. The MUA National Council and some employers in the maritime industry made the decision to establish METL. They did so following research that illustrated a critical shortage of maritime skills and a lack of a consistent national training strategy.[23] It was predicted that there would be a need for a planned, coordinated approach to the training and certification of 'integrated ratings', particularly in connection with

[21] Submissions of Counsel Assisting, 31/10/14, paras 10-35; Submissions of the MUA, 14/11/14, para 25.

[22] Paddy Crumlin, witness statement, 29/9/14, paras 17, 19; Simon Earle, witness statement, 29/9/14, para 12.

[23] Paddy Crumlin, witness statement, 29/9/14, paras 17, 19.

maritime hydrocarbon resource extraction.[24] The expression 'integrated rating' refers to an international qualification for entry level seafarers.[25]

25. Thus METL was established in response to a genuine need to train Australians for work in the maritime industry, particularly in the oil and gas sector. Its objectives are plainly meritorious. However, the controversy examined in these case studies centres on whether the MUA has at times used improper means to raise the funds required to meet these meritorious objectives. Counsel assisting contended that METL, for example, was funded in part by a $1,000,000 contribution which Saipem made only in response to threats by the MUA that it would cause industrial trouble if Saipem did not agree to pay.

METL: establishment and objects

26. METL was registered as a not-for-profit public company limited by guarantee on 18 August 2008.[26] This took place in the middle of hard and bitter negotiations between the MUA and employers about how it was to be funded. The terms of those negotiations are in part controversial.

[24] Paddy Crumlin, witness statement, 29/9/14, para 19.

[25] Marinus Meijers, witness statement, 29/9/14, para 22.

[26] Di Giorgi MFI-1, 29/9/14, p 7.

27. Clause 2.4 of METL's Constitution provides for the objects of METL as follows:[27]

> The objects for which the Company is established are to receive donations and to appropriate such donations and any income derived from investment of donations towards:
>
> (i) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the delivery of maritime instruction, training and education to Maritime Employees necessary to equip Maritime Employees with the skills and knowledge to be qualified for and to work as Maritime Employees;
>
> (ii) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the establishment and operation of the company;
>
> (iii) expenses, fees, disbursements and other costs associated with or incidental to activities directly related to the establishment and operation of a Registered Training Organisation or Group Training Organisation.

28. It 'costs approximately $75,000 to train an Integrated Rating'.[28] Since METL began to operate, at least 156 Trainees have commenced training with METL.[29]

METL: officers and members

29. METL has two employer director positions and two employee representative director positions.[30]

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[27] Di Giorgi MFI-1, 29/9/14, pp 10-11; Simon Earle, witness statement, 29/9/14, para 9; Paddy Crumlin, witness statement, 29/9/14, para 15.

[28] Simon Earle, witness statement, 29/9/14, Annexure B.

[29] Simon Earle, witness statement, 29/9/14, para 26.

30. METL was initially established by four people. Three of them were Paddy Crumlin, the National Secretary of the MUA,[31] Chris Cain, and Rod Pickette, an official at the MUA.[32]

31. The four people were all foundation directors and members of METL.[33]

32. At the time of the MUA hearing, there were three people on METL's Board of Directors. They were Paddy Crumlin, Chris Cain and Marinus Meijers, an employer representative and Managing Director of Van Oord.[34] There was at that time a vacancy on the METL Board of Directors for another industry representative.[35]

Contributions to METL

33. METL receives contributions from a variety of sources.

34. One source of contributions to METL is employees. Thus it receives contributions from employees who are covered by enterprise agreements in the dredging industry and have agreed to forego part of their wage increase as a contribution to training.[36] It also receives contributions from employees who are MUA members and receive

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[30] Paddy Crumlin, witness statement, 29/9/14, para 13.

[31] Paddy Crumlin, witness statement, 29/9/14, para 2.

[32] Di Giorgi MFI-1, 29/9/14, pp 1-3.

[33] Di Giorgi MFI-1, 29/9/14, p 27.

[34] Marinus Meijers, witness statement, 29/9/14, paras 17, 19.

[35] Marinus Meijers, witness statement, 29/9/14, para 19.

[36] See paras 156-157.

construction allowances for particular jobs or projects: they contribute part of that allowance to METL.[37] Paddy Crumlin gave the example of MUA members on the Gorgon project contributing $10 per day of the $200 per day construction allowance that they receive whilst working on that project.[38]

35. Another source of contributions to METL is employers. METL has generated a significant portion of its revenue by way of donations and contributions made by various companies in the maritime industry.

E – SAIPEM AND THE BLACKTIP PROJECT

Background

36. The factual background to the Blacktip Project is not controversial.

37. The Blacktip gas field is located west of Darwin. It supplies gas to the Northern Territory's domestic market.[39]

38. Saipem won the Engineering, Procurement, Installation and Construction contract for the Blacktip platform and export pipeline.[40]

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[37] Di Giorgi MFI-1, 29/9/14, p 182.

[38] Paddy Crumlin, witness statement, 29/9/14, para 34.

[39] Parliament of Western Australia, *Hansard*, Legislative Assembly, Question On Notice No. 1967 on 25 November 2009, answered on 22 February 2010 (N F Moore).

[40] Unknown author, *Saipem wins new contracts worth approximately 1 billion USD*, http://www.saipem.com/site/home/press/business/articolo5601.html, accessed 30/10/14.

39. Saipem is engaged in a variety of onshore and offshore maritime activities. It provides a full range of services including engineering, fabrication, installation and commissioning of platforms and pipelines, and other related activity.[41]

40. Saipem's principal on the Blacktip Project was ENI. ENI at the material time owned around 40% of Saipem.[42]

41. On the Saipem side, there are three key figures in the narrative. Fabio Di Giorgi was Saipem's project manager on the Blacktip Project.[43] Antoine Legrand was Saipem's Manager of Human Resources and Industrial Relations for the Blacktip Project. He reported to Fabio Di Giorgi.[44] David Lansbury, an Industrial Relations Consultant, was engaged to provide industrial relations advice to Saipem.[45] Also relevant to Saipem's decision-making processes was ENI and its Project Manager Paolo Guaita.

42. As part of the Blacktip Project, Saipem required tugs to transport pipes and other materials to a pipe-laying vessel called the Castoro Otto.[46] The pipes were to come from Indonesia.[47] In addition other equipment had to be transported to the Castoro Otto from the Australian Maritime

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[41] Fabio Di Giorgi, 29/9/14, T:13.1-7.

[42] Fabio Di Giorgi, 29/9/14, T:13.9-18; Fabio Di Giorgi, witness statement, 26/9/14, para 8.

[43] Fabio Di Giorgi, witness statement, 29/9/14, para 9.

[44] Fabio Di Giorgi, witness statement, 29/9/14, para 13.

[45] David Lansbury, affidavit, 29/9/14, para 9.

[46] Fabio Di Giorgi, 29/9/14, T:14.33-45.

[47] Fabio Di Giorgi, witness statement, 29/9/14, para 18.

Complex (**AMC**). The AMC was close to Fremantle in Western Australia.[48]

43. Approximately 9-12 support vessels were required for this purpose.[49] Saipem wanted to use foreign crewed vessels for the transport work.[50] One reason for this was a shortage of vessels and Australian crews. Another reason was that it was more economical to use foreign crews.[51]

Negotiations for the use of foreign crews

44. Counsel assisting submitted that Chris Cain and the MUA improperly exercised their industrial muscle in pursuing Chris Cain's aim of maximising Australian content by securing contributions for METL. The validity of that submission depends on the merits of the following more detailed arguments they advanced. Points of disagreement raised by the MUA and Saipem are noted and considered as they arise.

45. From August 2008, Saipem and the MUA were in discussions about Saipem's proposal to use foreign crewed tugs on the Blacktip Project.

46. Ultimately, Antoine Legrand and Chris Cain agreed on a solution whereby Saipem would provide $1,000,000 to METL. Its function was

[48] Fabio Di Giorgi, 29/9/14, T:22.20-36.

[49] Fabio Di Giorgi, 29/9/14, T:14.41-45.

[50] Fabio Di Giorgi, witness statement, 29/9/14, para 18.

[51] Fabio Di Giorgi, witness statement, 29/9/14, para 18.

to address the shortage of skilled domestic labour that caused Saipem to need foreign workers.[52]

47. How and why did the MUA and Saipem come to this agreement?

48. On 15 August 2008, Antoine Legrand and David Lansbury attended a meeting with officials of the MUA and Australian Maritime Officers' Union (**AMOU**). At that meeting, Saipem explained the need for foreign crews given the current shortage of domestic vessels and crews. The MUA rejected the use of foreign crewed vessels even though 'there was a grudging acceptance by the unions that there may well be a short supply of spot hire vessels and Australian crews'.[53]

49. In a letter dated 25 August 2008 from Paddy Crumlin to Antoine Legrand, the concept of a 'training levy contribution' was discussed, whereby employers would contribute to a specifically named industry managed maritime training company. The letter noted that METL had been established to carry out this purpose (on 18 August).[54] Below the 'training levy contribution' is variously referred to, in the evidence and otherwise, as the 'Training Levy'.

25 August 2008 meeting

50. A meeting was held in Fremantle on 25 August 2008 between MUA representatives (including Chris Cain) and Antoine Legrand. The

[52] Fabio Di Giorgi, witness statement, 29/9/14, para 20.

[53] Di Giorgi MFI-1, 29/9/14, p 270.

[54] Di Giorgi MFI-1, 29/9/14, p 272-273.

MUA reiterated concerns regarding the use by Saipem of foreign crewed tugs bringing empty barges to the AMC facility. The MUA also said that there were domestic vessels and crew members available for the Blacktip Project.[55] The MUA said there was '[n]o way that their membership will accept foreign crewed tugs on or around the Project' and that if a foreign crewed tug brought empty barges to the AMC facility it 'could create a massive issue'.[56] That plainly meant a massive issue of industrial war or peace.

28 August 2008 meeting

51. On 28 August 2008, a further meeting was held between officials from the MUA and Saipem. The purpose was to continue negotiating issues raised by the MUA with respect to foreign crewed tugs and training contributions.[57]

52. In that meeting, the MUA 'remained steadfast' in its rejection of foreign crewed vessels. The MUA also said that to resolve the issue it wanted additional contributions made to the training fund. Those contributions would be equal to the difference between the amount of bringing down a foreign tug and crew and the cost of using an Australian tug and crew. This proposition was rejected by Saipem.[58]

[55] Di Giorgi MFI-1, 29/9/14, p 274.

[56] Di Giorgi MFI-1, 29/9/14, p 274.

[57] Di Giorgi MFI-1, 29/9/14, p 278.

[58] Di Giorgi MFI-1, 29/9/14, p 279; Fabio Di Giorgi, 29/9/14, T:23.28-36.

The MUA said it was looking for a contribution of $1,830,000. On the other hand, Saipem's starting price was $200,000.[59]

53. The evidence about this meeting affords an opportunity to examine a significant controversy. Its background is the MUA's opposition to the use of foreign crews and vessels on the project.[60]

54. According to Fabio Di Giorgi, Chris Cain told him at various discussions that Australian maritime workers would not work with foreign workers.[61] He also told him that the Australian workers would 'disrupt the project' if there were foreign workers on the project.[62] Whilst Chris Cain did not expressly state the form that the disruption would take, Fabio Di Giorgi's understanding was that the workers could 'slow down the project' by either '[w]orking very slow or maybe not working at all'.[63]

55. Chris Cain's evidence was that his job was to 'maximise Australian content' on the Blacktip Project.[64]

56. The MUA submitted that any apparent contradiction between Fabio Di Giorgi's evidence of what Chris Cain said and Chris Cain's evidence of what he said could be explained by setting out Chris Cain's

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[59] Fabio Di Giorgi, 29/9/14, T:23.42-24.1; Di Giorgi MFI-1, 29/9/14, p 279.

[60] Fabio Di Giorgi, witness statement, 29/9/14, para 19.

[61] Fabio Di Giorgi, 29/9/14, T:15.32-34.

[62] Fabio Di Giorgi, 29/9/14, T:15.36-39.

[63] Fabio Di Giorgi, 29/9/14, T:15.41-47.

[64] Chris Cain, 29/9/14, T:113.42-44.

evidence more fully. The MUA referred to Chris Cain's testimony that he said at the meeting in Fremantle on 28 August 2008:[65]

> [M]y job is to maximise Australian content and there was – obviously, there was a heated discussion around that, but certainly I wouldn't have said to them in that meeting that *we* were going to disrupt the job. (emphasis added)

57. It is thus common ground between the competing streams of testimony that Chris Cain mentioned the topic of disruption, whether or not he used the actual word. It is controversial whether he suggested that it would be the MUA or the workforce which would be the cause. The MUA submitted that:[66]

> the apparent contradiction can be explained on the basis that Mr Di Giorgi's evidence was that Mr Cain said that Australian maritime employees rather than he or the MUA would disrupt the job. Obviously Australian maritime employees had the capacity to disrupt the job without any encouragement from Mr Cain or the MUA.

58. The MUA is, with respect, what is called a militant union. It is strong. It is aggressive. Chris Cain was at the time, and was seen at the time to be, a forceful, determined leader. There is not necessarily anything wrong with a union, or a union leader, with these traits. But the present point is that the MUA members would probably be more likely to respond to MUA leadership, whether towards industrial war or towards industrial peace, rather than act unilaterally. That conclusion holds even if the analysis descends from these general considerations to the detailed evidence of the specific negotiations. Fabio Di Giorgi

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[65] Chris Cain, 29/9/14, T:113.43-47.

[66] Submissions of the MUA, 14/11/14, para 27.

saw a purpose of the payment to METL as the need to 'calm down' MUA workers working on the Castoro Otto.[67] Chris Cain conceded that he may have had to calm down MUA workers on the Castoro Otto.[68] He said he told the members to work hard, deliver the project on time, and 'stop the bullshit'.[69] This evidence reveals the MUA to have played a central role in the dispute so far as it involved members of the Castoro Otto crew. The MUA was negotiating on behalf of those members to procure a contribution from Saipem to METL to alleviate their concern about foreign-crewed vessels by increasing training for Australian crew members. It would have been very unlikely for MUA members to have disrupted the job against the wishes of those acting for them, namely Chris Cain and the MUA.

59. The key question, however, is: what did Chris Cain say? The evidence of Chris Cain to which the MUA referred was given in relation to the minutes of the meeting of 28 August 2008 stating:

> [T]he MUA again made it clear that *they* would not accept foreign tugs entering AMC or Darwin and if this did happen *they* would take action to disrupt the Project supply chain and activities on the Project site.[70] (emphasis added)

60. Chris Cain denied that he said what the minutes recorded.[71] For reasons given in the next paragraph but one, there is no reason to prefer

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[67] Fabio Di Giorgi, 29/9/14, T:14.31-35.

[68] Chris Cain, 29/9/14, T:115.38-39.

[69] Chris Cain, 29/9/14, T:114.23-28.

[70] Di Giorgi MFI-1, 29/9/14, p 278.

[71] 29/9/14, T:114.2-5.

his oral evidence of events six years ago to the contemporary record in the minutes.

61. The evidence of the minutes is against the MUA submission. That is because the emphasised words in these minutes exclude any possibility that disruption would be caused by the employees acting of their own volition, with MUA officials ineffectually standing by, helplessly wringing their hands.

62. Fabio Di Giorgi's evidence in his statement was that he took part from time to time in discussions between Antoine Legrand and Chris Cain. In his statement he said that Chris Cain 'told me a number of times that Australian maritime employees would not work with foreign workers and would disrupt the Blacktip Project accordingly'.[72] Fabio Di Giorgi's oral evidence in relation to that passage was:[73]

> Q. Did anyone say to you that Australian maritime workers would not work with foreign workers?
>
> A. Yes, I heard this from Chris Cain.
>
> Q. Did he say what they might do – that is, what Australian maritime employees might do – if there were foreign workers?
>
> A. Yes. Disrupt the project.
>
> Q. How do you disrupt a project?
>
> A. You slow down the project.
>
> Q. By doing what?
>
> A. Working very slow or maybe not working at all, depending. It was not clear exactly what the definition of "disruption" was.

[72] Fabio Di Giorgi, witness statement, 26/9/14, para 22.

[73] 29/9/14, T:15.32-47.

There was no cross-examination on that evidence from either senior counsel for the MUA or any other legal representative.[74] It is neutral as to whether the cause of the disruption would be the MUA or spontaneous worker action.

63. The minutes were probably prepared at a time which was roughly contemporaneous with the meeting. There is no evidence or other reason to suppose that the person who prepared the minutes had any particular interest in pushing a particular version of what Chris Cain said or twisting what he said or misunderstanding what he said. Indeed, the person who prepared the minutes was under a positive duty to compose an accurate record of the conversations because serious business decisions might be taken on the strength of that record. Chris Cain, on the other hand, had a strong interest in defending the MUA's interests in avoiding adverse findings from the Commission. His vigorous and robust style of testifying certainly suggested that he was conscious of a duty to preserve MUA interests as he saw fit. But it did not enhance confidence in him as a witness. He did not convey the impression of being a witness who carefully searched his recollection as he sat in the witness box and endeavoured to answer succeeding questions as they arose, or who objectively endeavoured to isolate what that recollection told him and dispassionately reporting that to the hearing. That is particularly so since he had only been asked to search his recollection of the events of 2008 quite recently, at a time when it suited MUA interests for the search to lead to one particular discovery rather than another. A business record of an event on 28 August 2008

[74] 29/9/14, T:58.8-15.

composed roughly contemporaneously with that event is much more likely to be reliable than testimony given six years later based upon the memory, only recently called upon, of an understandably rather partisan witness. These considerations make it probable that the minutes of 28 August 2008 are correct. They create a safe foundation for concluding that the MUA was prepared to threaten industrial disruption pursuant to its general desire to stop foreign tugs entering AMC or Darwin. But were there threats by the MUA of industrial disruption to achieve its more specific desires in relation to the funding of METL?

2 September 2008 meeting and email

64. On 2 September 2008, a meeting was held between Chris Cain and Antoine Legrand. The contribution gap which had appeared at the 28 August 2008 meeting began to narrow. The MUA suggested a figure of around $1,000,000. Saipem were 'ready to pay only $750,000'.[75] By this stage, Saipem had already paid for the use of the foreign crewed tugs. Hence it was not 'economical' for it to change to Australian crewed tugs.[76] Counsel assisting submitted that the MUA was apparently aware of this pressure point and so was persisting with its claims that Australian tugs were available and that they should be used.[77] However, the MUA pointed out that the evidence relied on did not support the proposition that the MUA *knew* of this pressure point.[78]

[75] Di Giorgi MFI-1, 29/9/14, p 288.

[76] Fabio Di Giorgi, 29/9/14, T:24.34-25.4.

[77] Submissions of Counsel Assisting, 31/10/14, para 45.

[78] Submissions of the MUA, 14/11/14, paras 29-30.

If that evidence is considered by itself, the MUA's submission is correct.

65. On the same day, Fabio Di Giorgi received an email from Paolo Guaita, the ENI Project Manager. The email stated that Saipem was authorised by ENI to negotiate with the MUA up to $750,000 subject to a number of conditions.[79] These conditions included:[80]

> 5. MUA agrees that any funds paid by Company will be to an agreed fund which is legitimately organised and government approved and which operates transparently for the benefit of training and development opportunities in the maritime sector, and which operates under a deed or similar arrangement…
>
> …
>
> 7. MUA agrees that the funds will be paid in 2 equal instalments, one at the beginning of the Project subject to point 5 above and a final instalment at the project completion.
>
> …
>
> 9. MUA agrees that Company may withhold the final instalment if the Project is impacted negatively due to actions by MUA officials or any MUA members involved with the Project.

66. Fabio Di Giorgi understood the reference to 'impacted negatively' to be a reference to MUA officials or members disrupting the Blacktip Project with industrial unrest.[81] This appears to have been entirely correct. ENI's position thus was that unless there was industrial peace on the Blacktip Project, METL would not receive the second instalment. The MUA, however, submitted that no evidence was cited

[79] Di Giorgi MFI-1, 29/9/14, p 290.

[80] Di Giorgi MFI-1, 29/9/14, pp 290-291.

[81] Fabio Di Giorgi, 29/9/14, T:25.35-46.

for the proposition that condition 9 was ever proposed to the MUA.[82] There does appear to be no evidence to suggest it was put to the MUA in those terms at that time.

3 September 2008 meeting

67. Around this time, crew on the Castoro Otto were claiming, amongst other things, that Saipem should pay a hard-lying allowance because of a lack of air-conditioning on the vessel.[83]

68. On 3 September 2008, Chris Cain attended the Castoro Otto with Antoine Legrand. There were discussions with the MUA delegates on board. During this visit, the MUA representatives told the MUA crew to 'work hard to deliver [the] project on time and stop "the bullshit"'.[84] It is to be inferred that they felt they had the capacity to make this demand credibly and the capacity to ensure compliance with it.

11 September 2008 meeting

69. Despite what the Castoro Otto crew were told on 3 September 2008, in September and October 2008, discussions between the MUA and Saipem were becoming more heated.

70. On 11 September 2008, Chris Cain, Antoine Legrand and David Lansbury met in Fremantle to discuss the proposed contribution to

[82] Submissions of the MUA, 14/11/14, para 31.

[83] David Lansbury, affidavit, 29/9/14, para 15.

[84] Di Giorgi MFI-1, 29/9/14, p 292.

METL and the utilisation of foreign crewed tugs.[85] David Lansbury's file note of that meeting recorded that:[86]

> Training and Foreign Crewed Tugs
>
> From the start of these discussions it became clear that Cain was angry about the hold up in closing out the training levy and what he claimed was allowing foreign crewed vessels to commence operating on behalf of the Project without his knowledge or consent. Saipem pushed back on this by reminding him that Saipem had indeed informed the MUA that foreign crewed vessels were going to arrive and that agreements were made for the first two ones provided that a final agreement on training is found.
>
> After a break the meeting resumed and in what could only be described as tense [sic], especially in regard to the foreign crewed tugs on their way to Australia. These discussions got quite heated with Cain claiming that he could not trust Saipem or ENI on the training levy and that they were just spinning the MUA along so that they could get the foreign crewed vessels working. It took some time to settle the meeting down and to refocus on what need [sic] to be done to get the training question resolved.
>
> …
>
> Cain made it clear that there will be no further concessions made in regard to foreign crewed tugs until the Training Levy is agreed.

71. So the link between the MUA's stance on foreign owed tugs and its stance on the $1,000,000 Training Levy became stronger.

Was there an agreement at the 11 September 2008 meeting?

72. It is desirable now to deal with some important submissions by the MUA. They were to the effect that any alleged threats by Chris Cain, particularly on 24 October and 7 November 2008, to close down the

[85] Di Giorgi MFI-1, 29/9/14, p 294.

[86] David Lansbury, affidavit, 29/9/14, Exhibit DL-6, p 12.

Blacktip Project unless a payment of $1,000,000 to METL were made could not have been related to that payment. The ground assigned for the submission relied on a claim that the duty to make the payment had been agreed weeks earlier. The MUA submitted the relevant agreement was reached at the 11 September 2008 meeting.[87]

73. The MUA submitted that other parts of the file note of 11 September 2008 established that at that meeting, though one issue remained outstanding, Saipem agreed to pay the $1,000,000 training levy claimed by the MUA.[88] If one issue remained outstanding, there cannot have been an enforceable contract, and the record of the meeting which the MUA relied on stated that 'MUA claim is for $1 million', not that that claim had been agreed. To that may be added the fact, as counsel assisting pointed out, that David Lansbury's file note of what was said at the meeting, quoted above,[89] stated '[Chris] Cain made it clear that there will be no further concessions made in regard to foreign crewed tugs until the Training Levy is agreed'.[90] That implies that the Training Levy had not been agreed.

74. The MUA also submitted that the fact that agreement had been reached on 11 September 2008 is confirmed by a letter from Saipem to the MUA on 18 September 2008.[91] That letter, however, did not refer to any contract. It was headed 'Confidential and Without Prejudice'. It stated that '*in principle understandings*' had been reached. Payment of

[87] Submissions of the MUA, 14/11/14, paras 32-33.

[88] Submissions of the MUA, 14/11/14, paras 32-33.

[89] See para 70.

[90] Di Giorgi MFI-1, 29/9/14, p 295.

[91] Submissions of the MUA, 14/11/14, para 34.

the MUA claim was not to be made 'until these *arrangements are finalised* and in place'. The letter also said: '*A formal agreement* covering the above points can be drafted in detail in a separate document signed by Saipem and the local *and national* officers of the MUA'.[92] The words to which emphasis has been added all point against any enforceable agreement having been reached on 11 September 2008. Further, the copy of the 11 September 2008 letter relied on was only a draft sent for comment to another person who recommended a change.

75. And negotiations continued in September and October.[93] These negotiations went beyond the formal working out of an earlier contract. They revealed many points of discord. The discord did not involve one or other party seeking to depart from, or argue about the meaning of, an already agreed position. The discord instead arose out of points on which no agreement had yet been reached. Thus on 9 October 2008, David Lansbury emailed Fabio Di Giorgo, Antoine Legrand and Colin Gibson in these terms:[94]

> [I]n my view there is no way that industry will support a training business managed by only MUA Directors. I don't see MUA training going anywhere until there is equal company/employer representation on the Board.

[92] Dr Giorgi MFI-1, 29/9/14, pp 301-302.

[93] Dr Giorgi MFI-1, 29/9/14, pp 303-306, 308-310.

[94] Di Giorgi MFI-1, 29/9/14, p 303.

76. On the same day Paolo Guaita, Development Project Manager of ENI, emailed Fabio Di Giorgi and others to the following effect:[95]

> In addition we note in the letter from Paddy Crumlin addressed to yourself and dated 23 September 2008 it states the final payment to [sic] be made 1 month prior to project completion. This is not acceptable; the final payment will not be made until after the completion of the project.
>
> Company advises the Contractor that in future it needs to review the documents provided by the union and provide to the Company a draft of the response that it intends to send to the union to ensure that the requirements are met.

77. Further evidence that no agreement was reached on 11 September 2008 is to be found in a communication dated 16 October 2008 from Antoine Legrand to various executives. It was copied to Fabio Di Giorgi. It indicated that in negotiations with Paddy Crumlin, Rod Pickette, Mark Dolman and Chris Cain in Brisbane, it had been agreed that there would be an equal number of directors on the board of METL, and that the last payment would be made on the last day of the project, not one month before.[96] This establishes that no final agreement had been reached earlier. The memorandum also indicated other questions that remained outstanding.

78. The same conclusions follow from a meeting between Antoine Legrand, Chris Cain and others on 11 November 2008 recorded in an email of that date: the parties were still negotiating about how and when the money was to be paid to METL.[97]

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[95] Di Giorgi MFI-1, 29/9/14, p 306.

[96] Di Giorgi MFI-1, 29/9/14, p 310.

[97] Di Giorgi MFI-1, 29/9/14, p 354.

79. In short, the most that could be said of the 11 September 2008 meeting is, as the MUA at a later point in its submissions said, that it reflected an understanding.[98] But it was an understanding on only some issues. It was not an understanding which deprived any later threats of their coercive character.

24 October 2008 telephone call

80. The next two key events on which counsel assisting relied were telephone conversations between Chris Cain and Antoine Legrand on 24 October and 7 November 2008.

81. On 24 October 2008 Antoine Legrand sent an email to a number of his colleagues both within Saipem and ENI in which he stated:[99]

> I have just finished a 30 minutes "discussion" with Chris Cain. He was absolutely furious and completely pissed off. He spent the whole time [yelling] and screaming at Saipem/ENI. He threatened to shut down the whole job at several occasions, especially at the beginning of the phone call.
>
> …
>
> – He was demanding a meeting with ENI this afternoon, not even next week, otherwise the job will be shut down if we refuse; which I eventually managed to push back without immediate consequences on the project.

82. Chris Cain testified that he did not threaten to shut down the job at all.[100] He testified that at the time there was a mix-up with the

[98] Submissions of the MUA, 14/11/14, para 43.

[99] Di Giorgi MFI-1, 29/9/14, p 313.

payment (which he accepted in his testimony was the MUA's fault), and that this led to a heated debate. But he testified that he 'never said to Saipem that I would close the job down, ever'.[101] He continued:[102]

> He may have heard members say it and I've had to calm members down, I don't know. I went out to the Castoro Otto. Actually, I thought I'd done a good job for both sides in respect of getting that project on time. We don't always argue. We've never stopped a job. We've never had any industrial disputes, so it's just a furphy, it's a nonsense.

83. Counsel assisting submitted that the email from Antoine Legrand was a contemporaneous record of the conversation he had with Chris Cain. Antoine Legrand would appear to have no reason to fabricate the content of his discussions with Chris Cain. The threat to 'shut down the whole job' by Chris Cain was a threat to take industrial action that was not protected industrial action.[103] Chris Cain's denial of this conversation must be evaluated in the light of his self-interest, and his interest in protecting the MUA, in denying such conduct. In the context of the balance of the evidence regarding this dispute, Antoine Legrand's contemporaneous record of the conversation is to be preferred to the evidence of Chris Cain given six years later.

84. On 24 October 2008, shortly after speaking with Chris Cain, Antoine Legrand urgently contacted the cost controller at Saipem. He immediately sought to arrange a request for $1,000,000 to be paid to the training fund - $500,000 immediately and $500,000 at the end of

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[100] Chris Cain, 29/9/14, T:115.31-44.

[101] Chris Cain, 29/9/14, T:115.22-44.

[102] Chris Cain, 29/9/14, T:115.38-44.

[103] *Fair Work Act* 2009 (Cth), Part 3-3, Division 2.

the project.[104] This suggests a link, at least in his mind, between the dispute over the Training Levy and the threat to shut down the job. If there was a link of that kind in the mind of an executive so closely involved in the negotiations, it is probable that the link actually existed in reality.

7 November 2008 telephone call

85. On 7 November 2008, Antoine Legrand had a further conversation with Chris Cain. He sent an email in which he recorded the relevant part of the conversation thus:[105]

> During our phone conversation, he was of course upset by the fact "we were trying to fix things with [Paddy Crumlin]" but I reassured him that the MUA contact of Saipem is the local branch and that the Sydney discussion was an AMMA-MUA one. I explained to him as well the consideration of the escrow fund to "show the good faith of ENI" and that following legal meetings on Monday, we'll have a clearer idea on how to sort this out quickly.
>
> He understood but his reaction was mainly that "I don't give a fuck what you do with [Paddy Crumlin], I am going to shut down this job; you'll see what will happen on this rig".

86. Chris Cain was angry because he felt that Antoine Legrand had gone over his head and dealt with Paddy Crumlin, the National Secretary.[106]

87. In oral evidence, Chris Cain criticised the suggestion that he told Antoine Legrand that he was 'going to shut down this job'. He said of

[104] Di Giorgi MFI-1, 29/9/14, p 314.

[105] Di Giorgi MFI-1, 29/9/14, p 351.

[106] Di Giorgi MFI-1, 29/9/14, p 351.

it: 'that's fanciful, that's fanciful, not at all'.[107] What has just been said about comparing the email of 24 October 2008 with Chris Cain's testimony six years later applies to comparing the 7 November 2008 email with that testimony as well.

The conversations of 24 October and 7 November 2008 evaluated

88. The MUA rejected the submissions of counsel assisting about the conversations of 24 October and 7 November 2008. The MUA said that Chris Cain's evidence was sworn testimony which had been subject to cross-examination. The MUA said that the evidence emanating from Antoine Legrand consisted only of what was recorded in unsworn emails, which had not been subject to cross-examination.[108] The MUA accepted that each email had been composed on the same day as the conversation which each recorded. But the MUA submitted that the 'emails were not in fact contemporaneous records … because they did not record the conversations as they occurred'.[109] The MUA also submitted:[110]

> it may be that Mr Legrand in these emails suggested that Mr Cain made such statements in order to further his apparent purpose in those emails to persuade [ENI] that they should act promptly.

The MUA further submitted that even if Antoine Legrand's emails correctly reflected the conversations, they also recorded that the

[107] Chris Cain, 29/9/14, T:116.18-21.

[108] Submissions of the MUA, 14/11/14, paras 38-39.

[109] Submissions of the MUA, 14/11/14, para 39.

[110] Submissions of the MUA, 14/11/14, para 39.

conversations ended calmly. The 24 October 2008 email said that at the end of Chris Cain's call, he 'was quiet and ok'.[111] The email of 7 November 2008 said: 'He did seem to be calmed down compared to yesterday.' But this emollient impression was qualified by the next words: '(No insult, not too many threats of shutting down the job) but more on the cold anger side.'[112]

89. It is true that the evidence of Chris Cain, who was available to testify, was sworn. It is also true that the evidence of Antoine Legrand, who was not available, was not. It is also true, however, that Chris Cain testified in a florid and exuberant way. He did not testify cautiously and thoughtfully. The emails of Antoine Legrand – which are business records – appear to have served the function of presenting, in a sober and considered way, for the consideration of business colleagues making decisions, what he had heard from Chris Cain. It is true that some of what Antoine Legrand recorded was not in direct speech. But some of it was. The key points appear to represent an attempt to convey the substance of what Chris Cain said in a reasonably detailed way. Since, contrary to the MUA submissions, no agreement had been reached by 24 October or 7 November 2008, it may be inferred that Chris Cain was making the threats alleged – to create a 'massive issue' and close the job down – to persuade those he was dealing with to enter the type of agreement he desired. He desired an agreement under which Saipem would pay $1,000,000 to METL on particular terms.

[111] Di Giorgi MFI-1, 29/9/14, p 313.

[112] Dr Giorgi MFI-1, 29/9/14, p 351.

90. That conclusion is reinforced by the concluding words of the 7 November 2008 email. They referred to Chris Cain's 'cold anger'. They said that it did not involve 'too many threats of shutting down the job'. These words imply that there were some threats of shutting down the job. The document does not suggest that the conversation expunged the memory of earlier threats.

91. On 11 November 2008, Antoine Legrand again informed his colleagues of his discussions with the MUA.[113] In that email, Antoine Legrand emphasised the need to resolve these matters quickly to ensure 'fewer risks' of a 'problem offshore'.[114] Fabio Di Giorgi received that email. In his understanding Antoine Legrand was talking about industrial disruption.

92. The MUA endeavoured to downplay the evidence of angry threats from Chris Cain by contending that the email of 11 November 2008 'does not suggest that Mr Cain threatened any industrial unrest' at the meeting it recorded.[115] Chris Cain may not have uttered threats on every possible occasion, but that does not negate the significance of the threats he uttered on some occasions. And even that email concluded with the statement that the sooner the money destined for METL were placed in escrow, '*the fewer risks we take to have a problem offshore*' (emphasis in original). That does not appear to be a record of what Chris Cain said. But it does appear to be a description of Antoine Legrand's state of mind as stimulated either by a threat at the meeting

[113] Di Giorgi MFI-1, 29/9/14, p 354.

[114] Di Giorgi MFI-1, 29/9/14, p 354.

[115] Submissions of the MUA, 14/11/14, para 41, discussing Di Giorgi MFI-1, 29/9/14, p 354.

or by the recollection, triggered by the experience of negotiating with Chris Cain, of threats made on earlier occasions.

93. Fabio Di Giorgi explained that because of the delays in processing the payments to METL:[116]

> the people on board [the Castoro Otto] were receiving a message from onshore that we didn't want to fund any more this training, and this was causing - could have caused an issue, IR issue.

Payments made to METL

94. Counsel assisting submitted, and it is not controversial, that payments came to be made by METL in the following way. In January 2009, Saipem entered into an escrow deed with the MUA and Blake Dawson (**Escrow Deed**).[117] Clause 2.2 of the Escrow Deed provided for the deposit by Saipem of $1,000,000 over two instalments into an account nominated by the MUA.[118] On 2 February 2009, payment of the first instalment was approved by Antoine Legrand.[119] On the same day, a cheque was sent to Blake Dawson, drawn in favour of the Blake Dawson Trust Account toward the Escrow Deposit first instalment in accordance with clause 2.2 of the Escrow Deed.[120] On 3 August 2009, a cheque was sent to Blake Dawson drawn in favour of the Blake

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[116] Fabio Di Giorgi, 29/9/14, T:40.12-19.

[117] Danilo Codazzi, witness statement, 29/9/14, para 12; Di Giorgi MFI-1, 29/9/14, pp 355-365.

[118] Di Giorgi MFI-1, 29/9/14, p 359.

[119] Danilo Codazzi, witness statement, 29/9/14, paras 13-18.

[120] Danilo Codazzi, witness statement, 29/9/14, para 14.

Dawson Trust Account toward the Escrow deposit second instalment in accordance with clause 2.2 of the Escrow Deed.[121]

Saipem's desire for industrial peace

95. It was perfectly clear to Saipem that the use of foreign crews on the Blacktip Project had the potential to 'create a massive issue'.[122] That was the warning given by Chris Cain and Ian Bray to the Saipem executives at the meeting at Fremantle on 28 August 2008.

96. Fabio Di Giorgi understood a 'massive issue' meant the '[p]ossibility of strike, possibility of worker disruption'.[123]

97. Indeed, on at least two occasions, Chris Cain explicitly threatened to shut down the Blacktip Project. Antoine Legrand considered that the 'MUA [threats] are not to be under-estimated'.[124]

98. It is notorious that large oil and gas projects are subject to significant time and cost pressures. Fabio Di Giorgi and Antoine Legrand were understandably sensitive about the costs of any delays on the Blacktip project. Fabio Di Giorgi described the possible effect of delays as follows:[125]

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[121] Danilo Codazzi, witness statement, 29/9/14, para 18.

[122] Di Giorgi MFI-1, 29/9/14, p 274.

[123] Fabio Di Giorgi, 29/9/14, T:20.23-31.

[124] Di Giorgi MFI-1, 29/9/14, p 313.

[125] Fabio Di Giorgi, 29/9/14, T:22.13-18.

> Specifically, these barges were required to load the equipment that was required offshore, so any day of delay would have caused a delay of the vessel, of the pipe layer offshore, which means the cost of the spread offshore was in the region of $1 million per day. So every day was $1 million lost.

99. Fabio Di Giorgi testified as follows about the purpose of Saipem making the payment to METL:[126]

> Q. Really, the position was you just wanted to get the Blacktip Project done as quickly and as cheaply as possible?
>
> A. Yes.
>
> Q. You didn't want to get interrupted by a lot of IR disputes and the like?
>
> A. Correct.
>
> Q. You thought that you were going to be interrupted if you didn't make this payment?
>
> A. Correct.

100. The MUA relied on the following evidence of Fabio Di Giorgi as to why he agreed to contribute $1,000,000 for industry training:[127]

> The purpose of paying for industry training was to address the skills shortage in the Australian maritime industry and calm down the workforce on the Blacktip Project by showing them that Saipem was committed to the development of the skills of the Australian maritime workforce.

101. The MUA also relied on the following oral evidence:[128]

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[126] Fabio Di Giorgi, 29/9/14, T:38.26-37.

[127] Fabio Di Giorgi, witness statement, 26/9/14, para 25.

> Q. … [Y]ou say the purpose of paying for industrial training was to address the skills shortage and calm down the workforce. The real purpose was calming down the workforce; that's right, isn't it?
>
> A. That was also a real issue of skills shortage, sure [sic].

102. That last answer is contrary to the MUA submission, because it assumes that the real purpose was calming down the workforce. The MUA also relied on the following evidence:[129]

> Q. Yes, quite so, but what you were trying to achieve by the making of that agreement was industrial peace; that's right, isn't it?
>
> A. It was to calm down the people on board the vessel.
>
> Q. And by calming them down you mean achieve industrial peace, because they're calmed down; that's right, isn't it?
>
> A. By "calm down", I intend, yes, no disruption, no disruption for the project.

103. That evidence has to be read in the light of the questions and answers which preceded it and the question and answer after it. The preceding questions and answers were:[130]

> Q. … [T]he position was you just wanted to get the Blacktip Project done as quickly and as cheaply as possible?
>
> A. Yes.
>
> Q. You didn't want to get interrupted by a lot of IR disputes and the like?

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[128] Fabio Di Giorgi, 29/9/14, T:40.30-34.

[129] Fabio Di Giorgi, 29/9/14, T:39.4-12.

[130] Fabio Di Giorgi, 29/9/14, T:38.26-39.2.

A. Correct.

Q. You thought you were going to be interrupted if you didn't make this payment?

A. Correct.

Q. The best way of achieving a prompt and quick and efficient and expeditious project was to just make the payment of $1 million; that's right, isn't it?

A. Was to maintain the words with the unions.

Q. Maintain the what?

A. Maintains [sic] the words, what we agreed, so to train people.

Q. Are you saying maintain your word?

A. The "words" means the agreement done.

104. The question and answer after it were:[131]

Q. Well, no disruption is just another way of saying industrial peace; that's right, isn't it?

A. I'm not 100 percent sure, but probably, yes.

105. The biggest threat to industrial peace was to be found in the person making the threat – namely, Chris Cain on behalf of the MUA. He had the power to disturb or maintain industrial peace.[132] And, depending on what he saw as the interests of the MUA and its members in particular sets of circumstances, he could develop a desire to exercise that power in one way or another. The suggestion that there was any greater or other threat to industrial peace than the MUA is not convincing.

[131] Fabio Di Giorgi, 29/9/14, T:39.14-16.

[132] See para 58.

106. The MUA submitted that even if, contrary to its earlier submissions, it was accepted that Chris Cain had made threats, they were of no significance. For one thing, it submitted that the 24 October and 7 November 2008 threats took place over six weeks after Saipem had already reached 'understanding' with the MUA on 11 September 2008 to make the payment.[133] The word 'understanding' is a sounder characterisation of what had happened than 'contract' or 'agreement', for the reasons given above.[134] But it was an understanding which was itself too inchoate to make the lateness of the threats inoperative. That is because there were still too many things in dispute.

107. The MUA further submitted that the threats were of no significance because Fabio Di Giorgi did not give evidence that he was influenced by Antoine Legrand's reports of those threats to make the payment to METL. To the contrary, taking the evidence of him and the other executives as a whole, the probable inference is that they were strongly influenced by the threats.

Advantages for Saipem in making the payments

108. As described above, Saipem was required to deal with ENI in order to get approval to make the contribution to METL.

[133] Submissions of the MUA, 14/11/14, para 43.

[134] See paras 72-79.

109. Counsel assisting submitted that the correspondence between ENI and Saipem reveals the true purpose of the contribution by Saipem to METL.[135]

110. As discussed above, on 24 October 2008, Chris Cain had a conversation with Antoine Legrand where at a number of points he threatened to shut down the job.[136]

111. Around this time, Antoine Legrand and Fabio Di Giorgi were preparing their proposal to ENI to request the money required to make the payments to METL. In doing so, Antoine Legrand outlined the benefits of making the $1,000,000 payment. These included, amongst other things:[137]

(a) ensuring the supply of the pipe for the Blacktip Project; and

(b) reducing the hard-lying claim from $200 to $30 per employee.

112. Fabio Di Giorgi testified that the first and probably the second of these were benefits to Saipem which flowed from paying the $1,000,000.[138]

113. On 28 October 2008, Fabio Di Giorgi wrote to ENI and recommended that ENI make the $1,000,000 contribution. The purpose of the payment was stated to be:[139]

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[135] Submissions of Counsel Assisting, 31/10/14, para 69.

[136] See paras 81-84.

[137] Di Giorgi MFI-1, 29/9/14, p 312.

[138] Fabio Di Giorgi, 29/9/14, T:32.8-15.

> This training contribution is intended to maintain the relationships established with the maritime unions and facilitate their cooperation to mitigate the risks with HSE/IR issues in relation to Blacktip Project activities…

114. The letter also spoke of 'the current pressure exerted by the maritime unions to receive this training contribution'. That 'pressure' was plainly connected with the 'IR issues'.

115. The letter clearly stated the intention behind the contribution. An email dated 29 October 2008 from Stephen Walton of ENI to Paolo Guaita expressed concern about its form. It said that the passage quoted from the 28 October 2008 email 'sounds a little too much like a bribe'.[140]

116. Paolo Guaita forwarded the comment from Stephen Walton to Fabio Di Giorgi and Antoine Legrand and added the following: 'None of us has the interest in having correspondence that could be used to configure a case of bribing when the reality is definitely clear and honest.'[141]

117. In his oral evidence, Fabio Di Giorgi says that he 'never believed that [the contribution] was a bribe'.[142]

118. In any event, on 3 November 2009, Fabio Di Giorgi issued a replacement communication to ENI in substitution for the 28 October

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[139] Di Giorgi MFI-1, 29/9/14, p 318.

[140] Di Giorgi MFI-1, 29/9/14, p 319 ('HSE' stands for 'Health Safety and Environment').

[141] Di Giorgi MFI-1, 29/9/14, p 321.

[142] Fabio Di Giorgi, 29/9/14, T:35.39-42.

2008 communication. In it he re-categorised the purpose for the payment to METL in the following terms: 'This training contribution is intended to sustain the training of new and existing Employee, in relation to future projects in Australia, at Company's [ie ENI's] benefit as well'.[143] These emollient euphemisms changed words. They did not change realities.

119. Even though Paolo Guaita was keen to avoid any possible suggestion that the payment to METL was a bribe, he does not appear genuinely to have believed that it was a payment for training.

120. In a letter dated 27 January 2009, Paolo Guaita was insistent that the final instalment of $500,000 not be paid in the case of industrial unrest.[144] The letter states that ENI: 'may withhold the final instalment if the Project is impacted negatively due to actions by MUA officials or any MUA members involved with the Project'.[145]

121. Fabio Di Giorgi wrote back the following day. He challenged this suggestion. He expressed concern that making the instalment conditional on industrial peace could lead to the MUA taking 'retaliatory IR actions offshore'.[146]

[143] Di Giorgi MFI-1, 29/9/14, p 327.

[144] Di Giorgi MFI-1, 29/9/14, p 366.

[145] Di Giorgi MFI-1, 29/9/14, p 366.

[146] Di Giorgi MFI-1, 29/9/14, p 369.

122. However, Paolo Guaita remained steadfast that the contribution should be used as leverage to achieve a successful project. In a further letter dated 30 January 2009, Paolo Guaita stated: [147]

> [ENI] again reiterates its verbal communication to [Saipem] that this contribution should be used as a leverage tool with the MUA to assist in achieving a successful project that is not impacted negatively due to actions by MUA officials or any MUA members involved with the Project.

Withholding a payment to ensure industrial peace involves the same mental state as promising to make the payment in return for a promise to maintain industrial peace.

123. The MUA submitted that whatever this correspondence revealed about the purpose of ENI and Saipem, it could not be used to infer what the purpose of the MUA or its officials was. That is because the MUA was not privy to the correspondence.[148] If that were the only consideration, strictly speaking this is correct. But the MUA went on: '[E]ven if Saipem had industrial peace as a purpose for making such a payment, this does not mean that there is evidence that the MUA sought the payment in exchange for industrial peace.'[149] The trouble is that the evidence taken as a whole suggests not only that a material purpose of ENI and Saipem for making the payment was to secure and maintain industrial peace, but also that the MUA insisted on the payment on pain of industrial war if the payment were not made.

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[147] Di Giorgi MFI-1, 29/9/14, p 371.

[148] Submissions of the MUA, 14/11/14, para 47.

[149] Submissions of the MUA, 14/11/14, para 50.

124. Paddy Crumlin gave evidence that Saipem made the payment as a way of demonstrating its commitment to Australian maritime skills development.[150] The MUA submitted that Paddy Crumlin signed the agreement, that there was no challenge to his evidence whether by cross-examination or otherwise, and that it should be accepted.[151] The problem with this submission is that Paddy Crumlin's evidence on this point was, with respect, worthless. It expressed a belief without identifying any information on which it was based, or any other sources or grounds for it. The witness could have had no knowledge of, and certainly expressed no basis for knowing, the motivations of Saipem or the relevant executives of Saipem for making payments to METL. The witness had very limited involvement in the negotiations, unlike Chris Cain.[152] It is so hard to challenge evidence of this kind in cross-examination that the absence of cross-examination lacks any significance. The best evidence of the ENI-Saipem purpose is that of their executives. It is particularly to be found in Fabio Di Giorgi's evidence that Saipem thought that the Blacktip Project was going to be interrupted if it did not make the payment to METL.[153]

125. The MUA attempted to limit the inferences to be drawn from the concern expressed by Stephen Walton of ENI that the documentation of payment of $1,000,000 by Saipem to METL 'sounds a little too much like a bribe'. The MUA presented this comment as merely relating to a particular 'proposed clause' in an agreement.[154] The

[150] Paddy Crumlin, witness statement, 25/9/14, para 31.

[151] Submissions of the MUA, 14/11/14, para 51.

[152] See Di Giorgi MFI-1, 29/9/14, pp 288, 292.

[153] Fabio Di Giorgi, 29/9/14, T:38.35-37.

[154] Submissions of the MUA, 14/11/14, paras 8, 48.

weakness in these submissions is that Stephen Walton's comment concerned the reasons for the payment generally, not simply the contractual wording. The comment was made when Fabio Di Giorgi explained the intention underlying the payment of $1,000,000 as 'to maintain the relationships established with the maritime unions and facilitate their cooperation to mitigate the risks with HSE/IR issues in relation to Blacktip Project activities …'.[155]

126. The MUA argued that no finding should be made that Chris Cain had procured the payment from Saipem to secure industrial peace, on the ground that this had never been suggested to him.[156] In his witness statement Chris Cain did not assert the contrary. He did not there discuss the circumstances in which monies had been distributed to METL by employers, though he had been asked to.[157] Hence on this point there was no positive evidence to be destroyed or qualified by cross-examination. In any event, Chris Cain was under no doubt that counsel assisting was at issue with any contention that employer payments were not made to secure industrial peace. There was no duty to put the contrary position in every possible context. It was certainly put on occasion. In relation to another case study, for example, Chris Cain was referred to Fabio Di Giorgi's evidence that a payment was made to calm down industrial unrest.[158] He denied that. In the same answer he said 'the MUA treats every employer the same' – ie whether or not industrial peace was desired. There is no difference between

[155] Di Giorgi MFI-1, 29/9/14, p 318 ('HSE' stands for 'Health Safety and Environment').

[156] Submissions of the MUA, 14/11/14, para 51.

[157] Letter dated 17/9/14, TURC to Slater & Gordon Lawyers, p 2 [3].

[158] Chris Cain, 29/9/14, T:95.15-28.

paying to calm down industrial unrest and paying to ensure industrial peace. In industrial life 'peace' is calmness and 'unrest' is not.

127. Hence, in relation not only to the Saipem-METL payment, but also the SapuraKencana case study and the Dredging International case study, the MUA submitted that it had not requested payments in return for industrial peace.[159] In fact in contexts other than the payment by Saipem to METL – ie SapuraKencana, Dredging International and Van Oord – there is evidence that the MUA did not treat every employer the same, and had requested payments in return for industrial peace. These streams of evidence operate as similar fact evidence of the disposition or tendency kind. The employers certainly thought the payments were being solicited from them in return for industrial peace. It would be an extraordinary coincidence if these employers were in truth operating under an identical misunderstanding.

Saipem's submissions

128. Saipem was in a difficult position at the hearing. Saipem did not support the MUA submissions about the MUA's objects and tactics.[160] Indeed, it plainly disliked the tactics employed by the MUA in 2008. Rather, the long and detailed Saipem submissions boil down to the contention that its purpose was only to improve employee training, and that this is supported by the various requirements with which METL had to comply.[161] Yet inevitably Saipem did find itself in the same

[159] Submissions of the MUA, 14/11/14, paras 50, 56, 62.

[160] Submissions of Saipem, 14/11/14, paras 5, 8.

[161] Submissions of Saipem, 14/11/14, paras 13-16.

position as the MUA on many points. The circumstances ineluctably pressed its arguments into the same flawed mould.

129. The Saipem submissions fail to grapple with the evidence of Fabio Di Giorgi, with the email records of Antoine Legrand, and with other contemporary documents. Saipem faced the risk of serious disruption from the MUA. Saipem strongly desired to avoid that risk. The Saipem/ENI executives were concerned to avoid what happened as being characterised as a 'bribe', and adjusted their language accordingly. But the choice of more euphemistic language could not effectively cloak the reality: that the payment was made to avoid the risk of disruption. It is clear from, for example, Paolo Guaita's emails of 27 and 30 January 2009 that Saipem's capacity to withhold the second payment was a means, and an intended means, of deterring MUA-caused industrial unrest.[162]

130. Saipem also submitted that findings in relation to it could not be affected by the other case studies because the circumstances of each were different.[163] This is not correct. But even if it were, the evidence bearing only on the Saipem case study supports the conclusions reached above.

F – SAPURAKENCANA AND THE GORGON GAS PROJECT

131. SapuraKencana, formerly known as SapuraClough Offshore Pty Ltd, is an offshore oil and gas subsea contractor. It was created as a result of

[162] See paras 120-122.

[163] Submissions of Saipem, 14/11/14, paras 22-23.

the acquisition of the marine construction division of Clough Limited by SapuraKencana Petroleum Berhad in December 2011.[164]

132. On or around 1 December 2008, Clough Projects Australia Pty Ltd and Seatrucks Pty Ltd entered into a joint venture named CSJV. CSJV tendered for the DomGas Pipeline installation works at the Gorgon Project, Western Australia for Chevron Australia Pty Ltd.[165]

133. On or around 16 December 2010, Chevron and CSJV executed a contract for the DomGas Pipeline Installation. On or around 22 November 2011, pursuant to a Deed of Novation, SC Projects Australia Pty Ltd (**SapuraClough**), a wholly owned subsidiary of SapuraKencana, was substituted for Clough Projects Australia Pty Ltd as a party to the contract with Chevron and as the party to the CSJV.[166]

134. Six barges towed by foreign crewed tugs were to transport pipe from South East Asia to Dampier. There they were to be anchored, before being towed to the pipe laying vessel by an Australian crewed tug.[167]

Issue of foreign crewed tugs

135. SapuraKencana planned to use foreign crewed tugs for several reasons. Sourcing Australian crews to operate all the tugs would have been difficult for various reasons. Only limited resources were available in

[164] Guido Bressani, witness statement, 29/9/14, para 2.

[165] Guido Bressani, witness statement, 29/9/14, para 6.

[166] Guido Bressani, witness statement, 29/9/14, para 7.

[167] Guido Bressani, witness statement, 29/9/14, para 8.

Australia. Safety and operational issues could have arisen because those crews would have been unfamiliar with the tugs. Crewing all towing tugs with Australian personnel would have added approximately $2,000,000 to the cost of pipe transportation.[168]

136. During planning for the project, the use of foreign crewed tugs was identified as a matter that could raise significant industrial relations issues with the MUA.[169] In this significant respect the position of SapuraKencana was identical with that of Saipem.

Meetings with the MUA regarding the project

137. At the time of the hearing, Guido Bressani was the current Chief Executive Officer of SapuraKencana. He had held that role from December 2011.[170] In 2011, Fabio Di Giorgi left Saipem and joined SapuraKencana.[171]

138. On 10 May 2012, Guido Bressani had a meeting with Chris Cain to discuss SapuraKencana's proposal to use foreign crewed tugs on the project. Chris Cain stated that he was unhappy about Sapura gaining commercial benefit from using foreign crewed tugs at the expense of Australian nationals and MUA members.[172] Guido Bressani then stated that his company had an interest in promoting the growth of local employment and a contractual obligation to do so. But he also

[168] Guido Bressani, witness statement, 29/9/14, paras 8-9.

[169] Guido Bressani, witness statement, 29/9/14, para 10.

[170] Guido Bressani, witness statement, 29/9/14, para 1.

[171] Fabio Di Giorgi, witness statement, 29/9/14, para 6.

[172] Guido Bressani, witness statement, 29/9/14, paras 14-15.

said that using foreign crews on certain vessels for the purpose of the project was the only economically practicable approach in implementing the proposed pipe transportation method. He asked what alternatives there were. Chris Cain responded by suggesting that SapuraKencana could contribute to the training of Australian labour to encourage wider local employment opportunities. Guido Bressani explained that SapuraKencana could not provide that training directly on any of its vessels because of a lack of available bedding for trainees, so another solution was required.[173]

Agreements to pay to METL and sponsorship

139. A further meeting was held on 14 May 2012. It was attended by, among others, Guido Bressani and Chris Cain. At that meeting it was provisionally agreed that SapuraClough would pay $308,000 for the training of four people ($77,000 each). SapuraClough also agreed to pay $50,000 as sponsorship for an MUA conference.[174]

140. This agreement was formalised in a Memorandum of Understanding between SapuraClough and the MUA. It was signed by Chris Cain on 13 July 2012.[175] The Memorandum included the following provisions:[176]

> Events such as the MUA State Conference/ State Committee and other local training programs administered by the MUA provide such local

[173] Guido Bressani, witness statement, 29/9/14, paras 16-17.

[174] Guido Bressani, witness statement, 29/9/14, paras 19-20.

[175] Di Giorgi MFI-1, 29/9/14, pp 406-407.

[176] Di Giorgi MFI-1, 29/9/14, p 406.

> training. To assist with this SapuraClough agrees to contribute an amount of $50,000AUD towards sponsorship of the MUA State Conference/ State Committee. SapuraClough also agrees to contribute to the MUA a total amount of $308,000AUD to be used to provide industry specific training to 4 individual local trainees representing a training cost of $77,000AUD per trainee.
>
> The parties also acknowledge that SapuraClough is a newly established entity and that its future in Western Australia is largely dependent on the successful completion of the Project. To accommodate this, the parties agree that this event sponsorship payment of $50,000 plus the training payment of $308,000 will be paid to the MUA as follows:
>
> a) Within 5 business days of the execution of this agreement. SapuraClough will pay an amount of $25,000 for sponsorship plus $100,000 for individual training; and
>
> b) Within 5 business days of the successful completion of SapuraClough's offshore campaign for the Project and its subsequent vessel demobilisation, the remaining $25,000 for sponsorship plus $208,000 for individual training will be paid by SapuraClough.

141. Guido Bressani acknowledged that the payments were structured in two instalments so that SapuraKencana could keep some form of leverage over the MUA.[177] Guido Bressani wanted to be in a position to withhold the second payment if relations with the MUA broke down.[178] Again there is a parallel with the Saipem case study.

142. Despite the $50,000 sponsorship elements of the Memorandum of Understanding, SapuraKencana declined to have its logo displayed at the MUA WA Branch Conference in 2012.[179] This decision revealed that it was not a genuine sponsor. Genuine sponsors want their

[177] Fabio Di Giorgi, 29/9/14, T:66.24-33.

[178] Fabio Di Giorgi, 29/9/14, T:66.35-39.

[179] Guido Bressani, 29/9/14, T:63.42-64.21.

association with the party sponsored to be publicised, not concealed. It was the decision of a corporation which shrank from any public association with the MUA but had been compelled by the MUA to pay it money.

Benefits SapuraKencana received for making the payments

143. Guido Bressani sent an email to Chris Cain on 21 June 2012. In relation to it, Guido Bressani testified about the risk of the MUA 'fabricating issues that are maybe not really there that attract the attention of our group, as opposed to … delivering a safe product to our customer.'[180] He testified that, in addition to outright disruption, MUA members were capable of causing other kinds of problems, for example, concerns about fumes on the deck or accommodation quality which, if SapuraKencana had the support of the MUA, would not have been raised.[181] The MUA argued that the email did not use the word 'disruption', and in any event, Guido Bressani never suggested that the MUA would fabricate issues.[182] With respect, that submission is, in all the circumstances, to be rejected. After an answer defining what he meant by 'fabricating issues', Guido Bressani gave the following evidence:[183]

> Q. You were hoping to get the MUA to assist in dealing with those issues by making these payments?
>
> A. That's affirmative, yes.

[180] Guido Bressani, 29/9/14, T:65.15-22.

[181] Guido Bressani, 29/9/14, T:65.15-32.

[182] Submissions of the MUA, 14/11/14, para 53.

[183] Guido Bressani, 29/9/14, T:65.34-36.

The way in which the MUA was to 'assist' was to prevent their members from 'fabricating issues' like accommodation or fumes. So the MUA, in return for payments, were to procure a form of industrial peace. This was as much the purpose of the MUA as it was of SapuraKencana.

144. Incidentally, the evidence discussed in the previous paragraphs precludes any possibility that the industrial disruption to be feared was that spontaneously caused by MUA members on a frolic of their own as distinct from MUA officials. It also reveals yet another parallel with the Saipem case study.[184]

145. In relation to the sponsorship elements of the Memorandum of Understanding, the initial bland form of Fabio Di Giorgi's testimony was that the purpose of the sponsorship was to maintain a good relationship with the MUA.[185] However, when pressed on that testimony, Fabio Di Giorgi acknowledged that the payment was an attempt to alleviate industrial unrest – not only on the DomGas Project but 'as a long-term matter as well'.[186]

146. On 21 June 2012, Guido Bressani sent an email to Chris Cain. It referred to the need for 'a very smooth execution' with respect to the project.[187] Fabio Di Giorgi understood this as referring to a need to

[184] See para 54.

[185] Fabio Di Giorgi, 29/9/14, T:50.9-13.

[186] Fabio Di Giorgi, 29/9/14, T:50.15-19.

[187] Di Giorgi MFI-1, 29/9/14, p 399.

avoid 'industrial disruption', ie 'industrial unrest'.[188] Fabio Di Giorgi understood that the MUA could disrupt the execution of the project by finding problems or 'creating problems that maybe are not real problems'.[189] These words are reminiscent of the words of Guido Bressani, quoted above.[190] Again, the MUA submitted that Fabio Di Giorgi never suggested that the word 'disruption', which did not appear in the email, referred to the MUA engaging in finding non-existent or non-real problems.[191] But the context of the evidence – which related to the project involving work to be done by MUA members – meant that it was potential conduct of MUA members that was being referred to. The likeliest way in which MUA members might have caused disruption would have been as a result of MUA persuasion.

147. On the DomGas Project industrial relations ran very smoothly.[192] Guido Bressani agreed in the course of giving evidence that making the payments to the MUA and 'keeping a good relationship with MUA definitely contributed to [this] insofar as MUA members were concerned'.[193]

148. Chris Cain's evidence was that the MUA 'treats every employer the same'. He rejected any suggestion that SapuraKencana received any different treatment because of its sponsorship of the MUA and its

[188] Fabio Di Giorgi, 29/9/14, T:51.21-30.

[189] Fabio Di Giorgi, 29/9/14, T:51.32-37.

[190] See para 143.

[191] Submissions of the MUA, 14/11/14, para 54.

[192] Guido Bressani, 29/09/14, T:65.38-43.

[193] Guido Bressani, 29/9/14, T:66.3-6.

contributions to METL.[194] The MUA submitted that even if SapuraKencana had the purpose of securing industrial peace by the payments, the MUA had not requested the payments in exchange for industrial peace.[195] This unrealistic submission must be rejected for the same reasons as caused it to be rejected in relation to Saipem. It is to be inferred from the evidence that SapuraKencana paid to avoid industrial disruption. It is also to be inferred that despite Chris Cain's denials, the MUA both knew and intended this. It wanted the money. It knew that the money was the price of satisfying SapuraKencana's concerns.

G – DREDGING INTERNATIONAL

149. Dredging International was incorporated in 1973. It is a fully owned subsidiary within the Dredging, Environmental & Marine Engineering group of companies. Since incorporation it has undertaken approximately 15 large scale maritime projects in Australia.[196]

2009 Dredging International Agreement

150. In 2009, Dredging International concluded a two-year enterprise agreement with the MUA. That agreement is called the 'Dredeco and

[194] Chris Cain, 29/9/14, T:95.24-25.

[195] Submissions of the MUA, 14/11/14, para 56.

[196] Joris De Meulenaere, witness statement, 29/9/14, paras 2-3.

MUA Contract Propelled Dredging Enterprise Agreement 2009' (**2009 Dredging International Agreement**).[197]

151. Clause 41 of that agreement provided that Dredging International would enter into a Memorandum of Understanding with the MUA to provide contributions to an industry training fund that were 'consistent with contributions being made [by other participants in] the dredging industry in Australia'.[198]

152. The fund was at that stage known as the MET Fund. It was to have specific application in the dredging industry.[199]

153. No Memorandum of Understanding was reached with the MUA. Nor were payments in fact made by Dredging International to the MET Fund pursuant to clause 41 of the 2009 Dredging International Agreement.[200]

2012 Dredging International Agreement

154. On 8 May 2012, Fair Work Australia approved a further enterprise agreement. It is called the 'Dredging International MUA Contract

[197] Di Giorgi MFI-1, 29/9/14, pp 474-479. Dredging International was formerly known as Dredeco Pty Ltd.

[198] Di Giorgi MFI-1, 29/9/14, p 477.

[199] Joris De Meulenaere, witness statement, 29/9/14, para 13; Di Giorgi MFI-1, 29/9/14, p 477.

[200] Joris De Meulenaere, witness statement, 29/9/14, paras 17-18.

Propelled Dredging Enterprise Agreement 2012' (**2012 Dredging International Agreement**).[201]

155. Clause 9 of the 2012 Dredging International Agreement obliged to pay 1% of its payroll to METL. This amount is to increase to 4% by the fourth year of the operation of the 2012 Dredging International Agreement.[202]

156. The effect of this clause was that employees would forego some of the negotiated pay rise, and Dredging International would deduct from its employees' salaries this proportion of their pay as a compulsory contribution to METL.[203]

157. The sum of $247,552.90, representing 1% of the salaries paid to eligible employees since the commencement of the 2012 Dredging International Agreement up until 7 September 2014, has been paid to METL.[204]

158. Dredging International contributed $40,000 to METL. A payment of $20,000 was made in June 2012. A further payment of $20,000 was made in January 2013.[205]

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[201] Di Giorgi MFI-1, 29/9/14, p 484.

[202] Di Giorgi MFI-1, 29/9/14, pp 486.

[203] Joris De Meulenaere, witness statement, 29/9/14, para 22.

[204] Joris De Meulenaere, witness statement, 29/9/14, para 25.

[205] Joris De Meulenaere, witness statement, 29/9/14, para 24.

Sponsorship of State Conference

159. On 9 May 2012, Chris Cain wrote to Patrick Vermeulen, who at the time was the Human Resources Manager of Dredging International. That was one day after the 2012 Dredging International Agreement was approved by Fair Work Australia. Chris Cain thanked Dredging International for its sponsorship of the State Conference/Committee.[206]

160. Under the arrangements for that sponsorship, Dredging International agreed to pay $200,000 to the MUA for sponsorship of the MUA WA State Conferences to be held between 2012 and 2015.[207] The full $200,000 was paid, as to three of the Conferences well in advance of their dates, one week after the invoice was received, on 16 May 2012.[208]

161. Negotiations for the enterprise agreement known as the 2012 Dredging International Agreement took place shortly before the contribution was made. Chris Cain denied that the sponsorship was discussed as part of those negotiations. He said that the timing was '[v]ery coincidental' – '[j]ust [completely] coincidental'.[209]

162. Counsel assisting submitted that the negotiations between the MUA and Dredging International were completed many weeks before the 2012 Dredging International Agreement was approved by Fair Work

[206] Di Giorgi MFI-1, 29/9/14, p 488.

[207] Di Giorgi MFI-1, 29/9/14, p 489.

[208] Di Giorgi MFI-1, 29/9/14, p 489.

[209] Chris Cain, 29/9/14, T:101.16-22.

Australia.[210] They further submitted that unless an enterprise agreement is approved it does not have statutory force and leaves the employer at risk of protected industrial action. Hence they submitted that, if there was an arrangement to make a payment of sponsorship conditional on an enterprise agreement, it follows that the payment would only have been due when the agreement was approved not, for example, when the terms agreed or the proposed agreement was put to a vote. On the other hand, Dredging International submitted that the proposition in the last sentence preceded by the word 'if' was not established. That is considered below in the light of all the circumstances.[211]

Benefits received from sponsorship

163. In his statement, Joris De Meulenaere described the benefit that Dredging International received from the sponsorship as 'intangible'.[212] He testified that making contributions is a way of showing that Dredging International is not hostile towards unions, and that it is willing to work with unions.[213]

[210] Chris Cain, 29/9/14, T:119.42-120.7.

[211] See paras 169-182.

[212] Joris De Meulenaere, witness statement, 29/9/14, para 49.

[213] Joris De Meulenaere, 29/9/14, T:78.20-29.

Dredging International's payments to the Training and Development Fund and the OH&S Fund

164. Dredging International also made three separate contributions to the OH&S Fund and the Training Fund.[214]

165. These payments were made as a result of discussions between the MUA and Patrick Vermeulen. In those discussions the issue of Dredging International's non-compliance with the 2009 Dredging International Agreement were raised.[215]

166. The three payments made comprised $338,818 to the OH&S Fund in December 2012; $169,409 to the Training Fund in March 2013; and $169,409 to the Training Fund in June 2013.[216]

167. Joris De Meulenaere said that one of the benefits Dredging International received in return for these contributions was 'trained and capable Australian employees', and a workforce that is more skilled.[217]

168. In his testimony, Joris De Meulenaere denied that the real reason for the payments was to minimise industrial disruptions that might be caused by the MUA in respect of Dredging International's work. However, counsel assisting submitted that the payments were in truth made to secure industrial peace.

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[214] Joris De Meulenaere, witness statement, 29/9/14, paras 51-52.

[215] Joris De Meulenaere, witness statement, 29/9/14, para 53.

[216] Joris De Meulenaere, witness statement, 29/9/14, para 54.

[217] Joris De Meulenaere, witness statement, 29/9/14, para 60.

169. The MUA submitted that there was no evidence to the contrary of Chris Cain's claim that there was no connection between the request for $200,000 in conference sponsorship and the negotiations for an enterprise agreement.[218] The MUA also relied on Chris Cain's denial that the payments by Dredging International were motivated by a desire for industrial peace.[219] The MUA further contended that the vague evidence of Joris De Meulenaere about working together with the union,[220] on which Dredging International also relied, contradicted the idea that Dredging International was seeking to minimise industrial disruption.[221]

170. The MUA also referred to the following evidence of Joris De Meulenaere:[222]

> It is imperative for [Dredging International] to have trained and capable Australian employees within the maritime industry to man its vessels according to the flag state requirements. The company obtains a benefit from having a skilled workforce. These skills may take a number of forms including the "hard" skills of formal training and qualifications to the "softer" skills of understanding the applicable safety legislation and being able to appropriately contribute as health and safety representative on the projects that [Dredging International] is involved in.

That evidence fell into a category of evidence on which Dredging International also relied as an explanation for the overlapping conference sponsorship payments.

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[218] Submissions of the MUA, 14/11/14, para 58.

[219] Chris Cain, 29/9/14, T:109.23-27.

[220] Joris De Meulenaere, 29/9/14, T:78.20-29, 81.4-8.

[221] Submissions of the MUA, 14/11/14, paras 59-60.

[222] Joris De Meulenaere, witness statement, 29/9/14, para 60.

171. Dredging International submitted that there was no evidence to support a finding that it made any payments for the purpose of achieving industrial peace. It submitted that the contrary submission of counsel assisting was 'purely speculation'.[223] Dredging International further submitted that the credibility of Joris De Meulenaere's denial that the payments to the MUA had the purpose of minimising industrial disruption could not be rejected where there was no alternative evidence against which it was to be compared.[224] Dredging International also submitted that Joris De Meulenaere's evidence could 'be directly compared with the evidence provided by other witness*es*.'[225] (emphasis added)

172. Of this last submission it should be said that no evidence from other witness*es* was pointed to. All that was pointed to was certain evidence of one witness, Fabio Di Giorgi. He gave it in relation to Saipem. That evidence was quoted above.[226] The evidence was that he wished to get the Blacktip Project done as quickly and as cheaply as possible and did not want to be 'interrupted by a lot of IR disputes and the like'.[227]

173. This submission of Dredging International correctly treats Fabio Di Giorgi as admitting a purpose of paying to minimise industrial disruption. But it incorrectly treats Joris De Meulenaere's evidence as excluding that purpose. In this respect there is at once a split between

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[223] Submissions of Dredging International, 7/11/14, para 10.

[224] Submissions of Dredging International, 7/11/14, para 16.

[225] Submissions of Dredging International, 7/11/14, para 17.

[226] See at para 99.

[227] Fabio Di Giorgi, 29/9/14, T:38.31-37.

the MUA's stand on Fabio Di Giorgi and Dredging International's stand.

174. Another particular problem with Joris De Meulenaere's 'specific denial' of a purpose of minimising industrial disruption is that it was neither specific nor ringing. Instead it was rather tentative: 'I don't think so.'[228] Nor was that evidence firsthand. He could do no more than rely on documents relating to events in which he did not participate and about which he had made no inquiries of his predecessor, Patrick Vermeulen.

175. There is a further flaw in both the MUA and the Dredging International submissions. They erroneously assume that a payment for the purpose of being seen to have a working, as distinct from a hostile, relationship with the MUA is necessarily distinct from, inconsistent with and exclusive of a payment for industrial peace. A payment could have both purposes. The payments of May 2012, May 2013 and August 2013 did.

176. The submissions of both the MUA and Dredging International rely heavily on the uncontroversial propositions that training is valuable in the maritime industry, and that Dredging International has a real interest in it. But so far as Dredging International did pay for training, why did it pay so much for it so frequently? And why did Dredging International fund the May 2013 MUA State Conference and other conferences several times over? Because the desire of Dredging

[228] Joris De Meulenaere, 29/9/14, T:81.8.

International was to satisfy the financial importunities of the MUA quite independently of any demonstrated need for specific training.

177. The truth is that Joris De Meulenaere was unable to proffer an explanation for why Dredging International made payments and how they specifically advanced the interests of Dredging International.[229] He was unable, for example, to explain why it was that one year after paying $200,000 for sponsoring MUA State Conferences from 2012 to 2015, three-quarters of it in advance, the MUA was able on 25 March 2013 to demand, and receive, a further $169,409 for, inter alia, 'State and National MUA Conferences'. Nor did he explain why a further $169,109 was demanded on 4 June 2013 and paid three months later for, inter alia, the same purpose. Indeed his oral testimony on the matter varied from being obstructive to being positively evasive.[230] He was not the responsible officer at the time. He did make inquiries of his predecessor, Patrick Vermeulen, on one occasion on 11 September 2014, just before providing his witness statement of 24 September 2014.[231] But his inquiries had failed to reveal any satisfactory explanation for the payments, save that they were made for the purposes mentioned by the MUA in correspondence referring to State Conferences. Thus part of Joris De Meulenaere's testimony about the 25 March 2013 letter was as follows:[232]

> Q. … It says:
>
> … *[we] would like to thank you* …

[229] Joris De Meulenaere, 29/9/14, T:81.4-8.

[230] Di Giorgi MFI-1, pp 488-9; Joris De Meulenaere, 29/9/14, T:75.47-83.21.

[231] Joris De Meulenaere, witness statement, 24/9/14, para 11.

[232] Joris De Meulenaere, 29/9/14, T:79.34-82.21.

Support for training and development will assist us in the delivery and convening and/or attendance of our members and officials at the following events …

The first is "State and National MUA conferences". Do you see that?

A. Yes.

Q. You'd already agreed and had paid $200,000 in 2012 for the state conferences, hadn't you?

A. Yes, but, again, I don't know why it has been agreed or why it has been said as such in this letter.

Q. Have you asked anybody?

A. No.

Q. You're the Human Resources Manager, aren't you?

A. That's correct.

Q. You have been for the last year?

A. That's correct.

Q. You've taken over from Mr Vermeulen?

A. That's correct.

Q. This is your responsibility?

A. Correct.

Q. So have you wondered why you were being charged in excess of $300,000 for, among other things, state and national MUA conferences when Dredging International had already paid $200,000 for the state conferences?

A. This letter was not sent to me; it was sent to Mr Vermeulen and I only found this letter when I was asked to provide evidence.

Q. Ever since then, have you wondered about it at all? What's going on, Mr De Meulenaere? It seems as if there's money flooding out of this company to this union, and no-one can tell us why?

A. It is my understanding that the payments have been made for the purposes that are described in the letters.

Q. The letter says "state and national MUA conferences". That's what it says on 25 March 2013. If we come to 4 June 2013, it says exactly the same thing, "state and national MUA conferences". Item 1, there's another $169,000; is that right?

A. That's correct, yes.

Q. In both cases, you had already paid, one year before, approximately, $200,000 for this very same thing, the state conference?

A. Correct.

Q. And you haven't asked anybody about it; no-one has raised that as a concern with you?

A. It hasn't been raised to me, no.

Q. That's because the real reason for the payment is to minimise any industrial disruptions that might be caused by the MUA in respect of Dredging International's work; that's right, isn't it?

A. I don't think so.

Q. You don't care, really, what they do with the money once they've received it, because that's the true purpose of the payments; that's right, isn't it?

A. The purpose of the payments is, as far as I'm aware, for the purposes that are set out in the correspondence that I have received, or that DI has received.

Q. We've just discussed that, haven't we, Mr De Meulenaere, and what's abundantly clear is that this really sheds no light whatsoever on what this money was used for? What do you say is the true purpose of Dredging International paying this money?

A. Excuse me?

Q. What is the true purpose of Dredging International paying this money? What do you say it is?

A. I can only base my opinion on the documentation that I have, and it is used for the purposes that are mentioned in the letter.

Q. You can't shed any light on why, when the letters refer to the state conference – the two letters, 25 March and 4 June, both refer to the state conference – the fact that you'd already paid $200,000 for the state conference a year before, you just say you've got no idea?

A. The letters were sent to Mr Vermeulen and, as I said, I was not involved.

Q. No, but you are now.

A. That's correct.

Q. You're the man now, aren't you, who has responsibility for all this, Mr De Meulenaere?

A. That's correct.

Q. You were his deputy at the time?

A. Yes, that's correct.

Q. And you were reporting to him?

A. I was reporting to him.

Q. Didn't you discuss it?

A. I was not involved in any discussion with the union at that time.

Q. Did you get back to the MUA, or anyone there, to your knowledge, and say, "Why are you charging us twice?"

A. I was not involved in the discussions.

Q. You're the man now making decisions, I take it?

A. Correct.

Q. Would you now pay for an MUA state conference, given these letters you've been looking at?

A. I will have a discussion with the union what the purpose of the money is.

Q. You'll have a discussion?

A. Yes.

178. To describe the behaviour of the witness in these passages as 'paltering with the cross-examiner' is to pay him a compliment. The witness's evidence should be rejected. It should be inferred that the converse of what he asserted is true. His positive evidence of Dredging International's purposes had a Pollyanna-like, Panglossian quality.

179. The submissions of both Dredging International and the MUA do not face up to the extremely suspicious and damaging circumstances that the payments of $200,000 in May 2012 in 'sponsorship' for the MUA State Conferences in 2012-2015, and the payment of $338,818 in two tranches in March 2013 and August 2013 for, inter alia, 'State … MUA Conferences' involved payments as 'sponsorship' over less than 15 months, involved paying twice over for the 2013 MUA State Conference, and involved paying more than once for other conferences. It is true that Joris De Meulenaere was not the person who agreed to the payments on behalf of Dredging International. It was his predecessor, Patrick Vermeulen, who was. Despite having the opportunity to question Patrick Vermeulen at any time, he only did so once. On that occasion he apparently failed to ask any meaningful questions which might illuminate the true character of those payments. He could not give any explanation for why Dredging International had given the MUA multiple sponsorships for the same thing. That ignorance is surprising. This was not a case of Patrick Vermeulen merely committing the company to pay a third party to train Dredging International's own workforce. It was a case of paying large sums of money to the MUA over a short period of time purportedly for 'sponsorship' in the absence of any terms and conditions attached to the payments. Joris De Meulenaere's evidence exposed Dredging

International's lack of interest in monitoring the MUA's use of the money, or in monitoring any training outcomes obtained in return for the vast sums in 'sponsorship' which were paid.

180. Another question is this. Why did Dredging International commit $200,000 to the MUA in sponsorship the day after the 2012 Dredging International Agreement was approved by the Fair Work Commission? Joris De Meulenaere was in a position to ask Patrick Vermeulen that question.[233] He apparently did not do that. He said that he did not know whether payment of $200,000 in sponsorship was conditional on the approval of the 2012 Dredging International Agreement.[234] He said that he understood, based on his discussions with Patrick Vermeulen, that 'the payments for the sponsorship of the state conference/state committee were made at the request of the MUA.' But he also said: 'I do not know who on the part of the MUA made this request or why [Dredging International] agreed to make the payments.'[235]

181. It must be concluded that the payment by Dredging International of the first $200,000 was conditional on or connected to the approval of the enterprise agreement. That is because of the timing of the $200,000 payment. It is also because of the failures by Joris De Meulenaere to inquire of his predecessor, Patrick Vermeulen. Those failures are the more sinister in view of the Commission's specific interest in these payments, stated in its letter of 19 September 2014, which led to Joris De Meulenaere's statement of 24 September 2014. One of these

[233] Joris De Meulenaere, witness statement, 29/9/14, para 11.

[234] Joris De Meulenaere, 29/9/14, T:76.32-36.

[235] Joris De Meulenaere, witness statement, 29/9/14, para 41.

failures was Joris De Meulenaere's failure to inquire of Patrick Vermeulen about the true purposes of the $200,000 payment and the reason for its timing. Another failure to inquire was Joris De Meulenaere's failure to ask why the subsequent commitment of $338,818 in sponsorship of the MUA was made less than 12 months later. The conclusion that the payment of the $200,000 was connected with the approval of the enterprise agreement is also supported by another instance of the MUA seeking sponsorship from companies at or around the time of enterprise agreement negotiations with them.[236]

182. The totality of the evidence thus suggests that Dredging International, in response to requests from the MUA for large sums of 'sponsorship' of the MUA, simply acceded to the requests in order to pacify the MUA and avoid any disruptions to the operations of Dredging International. That is a payment for industrial peace. The circumstances established by the evidence preclude acceptance of the evidence of Chris Cain and Joris De Meulenaere upon which the MUA and Dredging International relied.

H – VAN OORD

183. Van Oord is an international contractor for dredging, marine engineering and offshore energy projects.

[236] Marinus Meijers, 29/9/14, T:86.16-87.4 (concerning the Van Oord payments).

2009 Van Oord Agreement

184. On 16 February 2010, Fair Work Australia approved an enterprise bargaining agreement. It was the 'Van Oord Australia Pty Ltd and The Maritime Union of Australia Contract Propelled Dredging Union Collective Agreement 2009' (**2009 Van Oord Agreement**).[237]

185. Clause 11.16 of the 2009 Van Oord Agreement was headed 'Training Fund'. It provided that Van Oord agreed to make contributions to a fund being set up by the MUA for the training of employees in the industry. It also provided that Van Oord agreed to conclude a Memorandum of Understanding with the MUA in relation to the level and frequency of contributions to the fund.[238]

186. As was the case with Dredging International under the 2009 Dredging International Agreement, Van Oord did not make any contributions under the 2009 Van Oord Agreement, because no Memorandum of Understanding was concluded pursuant to it.[239]

[237] Di Giorgi MFI-1, 29/9/14, pp 530-533; Marinus Meijers, witness statement, 29/9/14, para 28.

[238] Di Giorgi MFI-1, 29/9/14, p 532.

[239] Marinus Meijers, witness statement, 29/9/14, para 31.

2011 Agreement

187. The 2009 Van Oord Agreement expired on 30 June 2011. In around February 2011 negotiations for a replacement agreement commenced.[240]

188. On 22 December 2011, Fair Work Australia approved a new enterprise bargaining agreement. It was called the 'Van Oord Australia Contract Propelled Dredging MUA Enterprise Agreement 2011' (**2011 Agreement**).[241]

189. Clause 11.4 of the 2011 Agreement provided as follows: [242]

> The Employer will effect a contribution to a Registered Training Organisation. That contribution will commence at 1% and increase by 1% per annum for each year of the EBA to a total not exceeding 4%, which shall be deducted from the Employee salary as described in clause 14. The Union will inform the Employer by letter of the details of the Registered Training Organisation.

190. As at 24 September 2014, the total value of the contributions made by Van Oord to METL was in excess of $1,200,000.[243]

191. Over this period Van Oord made payments to METL in two different ways. One comprised regular payments to a total of $635,698.78. These were amounts deducted from the wages of Van Oord employees

[240] Marinus Meijers, witness statement, 29/9/14, para 32.

[241] Marinus Meijers, witness statement, 29/9/14, para 46; Di Giorgi MFI-1, 29/9/14, pp 534-540.

[242] Di Giorgi MFI-1, 29/9/14, p 538.

[243] Marinus Meijers, witness statement, 29/9/14, para 83.

in accordance with clause 11.4 of the 2011 Agreement.[244] The other comprised one-off payments. The most significant of these were $100,000 in January 2012;[245] $192,500 in February 2013;[246] $250,000 in November 2013;[247] $25,000 in December 2013;[248] $25,000 in January 2014;[249] and $68,578 in January 2014.[250]

Van Oord's contributions to the Training Fund and the WASP

192. Van Oord paid $56,200 to WASP on 7 December 2012. It paid $56,200 to the Training Fund on 11 February 2013. It paid $56,200 to WASP on 14 June 2013.[251]

Sponsorship of the MUA State Conference

193. Marinus Meijers testified that after the negotiations for the 2011 Agreement were complete, and the MUA and Van Oord had agreed on the heads of agreement, Chris Cain said to him: 'Martin, we also have state conferences, and everybody is sponsoring that, so you should also'.[252] Marinus Meijers understood that by 'everybody', Chris Cain was referring to the other major dredging companies, namely Dredging

[244] Marinus Meijers, witness statement, 29/9/14, para 55.

[245] Marinus Meijers, witness statement, 29/9/14, para 56(a).

[246] Marinus Meijers, witness statement, 29/9/14, para 56(b).

[247] Marinus Meijers, witness statement, 29/9/14, para 56(e).

[248] Marinus Meijers, witness statement, 29/9/14, para 94(e).

[249] Marinus Meijers, witness statement, 29/9/14, para 94(e).

[250] Marinus Meijers, witness statement, 29/9/14, para 56(c).

[251] Marinus Meijers, witness statement, 29/9/14, para 94; Cain MFI-1, 29/9/14, p 18.

[252] Marinus Meijers, 29/9/14, T:86:27-28.

International, Jan De Nul and Boskalis.[253] Chris Cain then told Marinus Meijers that the others were putting in 'X times for $50,000'.[254] But Marinus Meijers agreed to contribute only $30,000, which he thought was reasonable.[255]

194. Van Oord's sponsorship of MUA State Conferences took the following forms: $10,000 in January 2011 to sponsor the 2011 MUA WA Branch Conference; $30,000 in April 2012 to sponsor the 2012 MUA WA Branch Conference; and $30,000 in February 2013 to sponsor the 2013 MUA WA Branch Conference. Van Oord also paid $500 in July 2014 to sponsor a Picnic Day Function in Darwin.[256]

195. Marinus Meijers testified that '[t]here is no rationale' for sponsoring the conferences.[257] Marinus Meijers likened the payments to charitable sponsorships, such as Van Oord's support of the memorial of the Dufyken, a Dutch sailing vessel which came to Australia, and its promotion of the Dutch language to school children. [258]

196. Marinus Meijers's characterisation of Van Oord's payment to the MUA as being akin to the sponsorship of these community causes is not a credible explanation for Van Oord's motives in making these payments to the MUA.

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[253] Marinus Meijers, 29/9/14, T:86:35-36.

[254] Marinus Meijers, 29/9/14, T:86.41-42.

[255] Marinus Meijers, 29/9/14, T:86:45-46.

[256] Marinus Meijers, witness statement, 29/9/14, para 101.

[257] Marinus Meijers, 29/9/14, T:87:29-31.

[258] Marinus Meijers, 29/9/14, T:87:11-31.

197. The only benefit Marinus Meijers was able to point to was getting people in the same place to talk about the maritime industry.[259] Indeed, Van Oord declined the MUA's offer for banner and advertising rights at the conference.[260] Van Oord's behaviour in this respect is like that of SapuraKencana.[261] It is not the behaviour of a genuine sponsor voluntarily supporting an event. Rather it is the behaviour of a corporation simply being compelled to pay money for a cause with which it has no sympathy.

198. In short, no explanation was given on behalf of Van Oord about what its purpose was in sponsoring MUA conferences. The MUA's conduct in relation to Van Oord is part of a pattern suggesting that the purpose was to secure industrial peace.

Hasluck election campaign

199. In the 2013 federal election, Adrian Evans was federal Labor candidate for the seat of Hasluck. He was Deputy Secretary of the MUA WA Branch.[262] Chris Cain was his fundraising Director. In or about May 2013 Chris Cain approached Herm Pol, a senior employee at Van Oord, about the possibility of Van Oord providing sponsorship to Adrian Evans's campaign.[263]

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[259] Marinus Meijers, 29/9/14, T:87.33-37.

[260] Marinus Meijers, witness statement, 29/9/14, para 103.

[261] See para 142.

[262] Marinus Meijers, 29/9/14, T:88.19-22.

[263] Marinus Meijers, witness statement, 29/9/14, para 108.

200. Marinus Meijers testified that the request from Chris Cain for Van Oord's sponsorship was made after a discussion between Herm Pol and Chris Cain about the manning levels for a vessel on a new project.[264]

201. Chris Cain testified as follows. He denied that he had 'sought' that Van Oord make a contribution to Adrian Evans' campaign expenses.[265] Then he agreed that he 'asked' Van Oord to make a contribution.[266] Then he accepted that the request was made immediately following a discussion with Herm Pol but could not remember if it was about manning levels.[267]

202. Chris Cain did agree that he had a conversation with Herm Pol. Chris Cain testified:[268]

> What I did say to Mr Pol was, "Adrian Evans is running for the seat of Hasluck. Do you want to support him?" Now, you know, that's up to them if they support him or not. Like I'd go the unions and ask them for support, you know, I wasn't - it was neither here nor there to me.

203. On 3 May 2013, Adrian Evans sent Herm Pol a letter thanking him for committing to contribute $30,000 to the Hasluck Australian Labor

[264] Marinus Meijers, 29/9/14, T:88.38-89.1.

[265] Chris Cain, 29/9/14, T:116.27-29.

[266] Chris Cain, 29/9/14, T:116.31-36.

[267] Chris Cain, 29/9/14, T:116.38-42.

[268] Chris Cain, 29/9/14, T:117.3-7.

Party campaign.[269] He copied in Chris Cain using Chris Cain's MUA email address.[270]

204. On 14 May 2013, Van Oord actually made the payment of $30,000 to the Hasluck Election Campaign Fund.[271]

205. The MUA submitted that there was no connection between that payment and any workplace issue.[272] The MUA relied on the evidence of Chris Cain and Marinus Meijers. The evidence of Chris Cain, quoted above,[273] was contradictory and unsatisfactory. The evidence of Marinus Meijers on which the MUA relied was:

> The donation was made without any discussion of favours or support for Van Oord Australia's objectives in Australia. There was no expectation or promise exchanged by anyone in favour of Van Oord Australia for payment of the donation.

206. However, the MUA did not deal with the following evidence. According to Marinus Meijers, Herm Pol was approached by Chris Cain after a meeting on 'manning levels'. Chris Cain accepted that there was a meeting, although he could not remember whether it was about manning levels. The expression 'manning levels' is one which 'refers to the skills and qualifications of the members of the crew on a vessel. For example, how many officers, engineers, deck hands, cooks,

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[269] Di Giorgi MFI-1, 29/9/14, p 605.

[270] Di Giorgi MFI-1, 29/9/14, p 605.

[271] Marinus Meijers, witness statement, 29/9/14, para 107.

[272] Submissions of the MUA, 14/11/14, para 73(iv).

[273] See para 201.

stewards, welders are on the vessel.'[274] Hence manning levels involve workplace issues. Thus there was a direct temporal connection between a meeting on workplace issues, Chris Cain's request for a contribution to the campaign of a Deputy State Secretary of the MUA for election to federal parliament, and the agreement of Van Oord, through Herm Pol, to contribute $30,000. Further, it is an extraordinary thing for a multinational company like Van Oord to do. This is strongly supported by the following evidence of Marinus Meijers:[275]

> 109. When I asked Mr Pol if he had promised any donation to the fundraising campaign of Mr Evans, he said he promised the amount of AUD$30,000.
>
> 110. I had my doubts to donate money to a political party.
>
> 111. I made it clear to Mr Pol it should not happen again.
>
> 112. Mr Pol had already promised the donation and it is my culture that once a promise is made it must be carried out.
>
> 113. In hindsight, I did not think the donation was appropriate and I should not have honoured Mr Pol's promise to donate $30,000 to Mr Evans for his political campaign.
>
> 114. Van Oord Australia does not support donations to political parties as a general rule.

207. The MUA also submitted that there was no evidence that Van Oord made the payments to secure industrial peace or that Chris Cain asked for them as the price of industrial peace. It used to be common to see a sign: 'Do not ask for credit as a refusal sometimes offends.' When a trade union official with Chris Cain's forceful manner requests a

[274] Marinus Meijers, witness statement, 29/9/14, para 73.

[275] Marinus Meijers, witness statement, 29/9/14, paras 109-114.

contribution from an employer's representative, it would be a foolish representative who did not appreciate that refusal would offend and that consequences would flow from that.

I – FINDINGS

208. Counsel assisting submitted that the above case studies demonstrated that it is a common practice in the maritime industry for businesses simply to accede to requests for payments from the MUA, regardless of the nature of the request. It appears to be enough that a payment will keep the MUA on side. The MUA protested at counsel assisting's failure to cite evidence for the submission. But at the outset it must be said that the correctness of counsel assisting's submission is supported by the particular circumstances of each case study.

209. This is so whether the payments made by companies are characterised as contributions to 'METL', contributions to other training programs, sponsorship money, or political donations.

210. Whilst the payments may be characterised in these ways, counsel assisting submitted that, in many cases, the true motivation for the payments is to make industrial peace with the MUA. Counsel assisting correctly relied on two factors which support this analysis. One factor is the ease with which projects can be disrupted. Fabio Di Giorgi gave evidence that a training contribution made in connection with the Blacktip Project was made so that the MUA would calm down its members, and stop them from raising fictitious industrial

issues.[276] Guido Bressani conceded that payments in connection with the DomGas Project were made for the purpose of maintaining leverage over the MUA – so that 'if … relations broke down and there was a lot of industrial unrest', he wanted to be in a position to say: 'Well, we're not going to pay you that second tranche'.[277] Another factor is the high costs of disruptions. Fabio Di Giorgi quantified the damages that Saipem would be likely to incur from delays from industrial disruption as being in the region of $1,000,000 per day.[278] In the face of such risks companies are likely to seek to ensure that projects run smoothly by making donations to or at the request of a union.

211. The MUA complained that the only evidence references given by counsel assisting concerned the Blacktip Project and the DomGas Project. However, both factors are similar for all case studies. The detailed circumstances of all case studies even apart from the Blacktip and DomGas Projects support the submissions.

212. There is a third factor common to all case studies. That is that even if in a general way arguments could be devised to support the view that some of the payments could be viewed as explicable, understandable or even positively justifiable, the circumstances in which they were made, and the lack of safeguards controlling how the money was to be used, tend to dilute those arguments to insignificance.

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[276] Fabio Di Giorgi, 29/9/14, T:33.31-40.

[277] Guido Bressani, 29/9/14, T:66.31-39.

[278] Fabio Di Giorgi, 29/9/14, T:22.9-18.

213. A further factor is Chris Cain. He wields considerable power. He has the power to 'shut down a job'. He has the power to agitate crews to fabricate issues or to identify and exploit issues that would not otherwise have been exploited. Equally, if he desires to exercise it, he has the power to pull grumbling crews into line and assist with the smooth running of a project. It would be totally unrealistic to proceed either on the basis that Chris Cain did not have abilities in these respects, or on the basis that employers were unaware of this. The MUA submitted that these matters were never raised in negotiations, except in relation to Saipem in a manner Chris Cain denied.[279] However, that denial has not been accepted.[280] The MUA submitted that counsel assisting's submissions 'that the MUA could or would agitate crews or fabricate issues is without any basis in the evidence whatsoever'.[281] There is in fact evidence of this kind.[282]

214. Were the requests from the MUA for sponsorship requests for genuine sponsorship? It is worth noting that in 2012 alone, the MUA WA Branch received $200,000 from Dredging International, $50,000 from SapuraKencana, and $30,000 from Van Oord for sponsorship of its conferences.

215. Chris Cain's evidence was that the companies contributed to the conferences because they saw the benefits in doing so.[283] However, the representatives of these companies giving evidence before the

[279] Submissions of the MUA, 14/11/14, para 70.

[280] See paras 80-87.

[281] Submissions of the MUA, 14/11/14, para 70.

[282] See paras 54-64.

[283] Chris Cain, 29/9/14, T:102.2-3.

Commission were unable to articulate clearly any benefits. Indeed, neither SapuraKencana nor Van Oord wanted to display their support by having their logos on show or giving other indications of connection with the MUA at the conference.

216. The MUA submitted that the genuineness of the payments, considered in the light of the fact that they were for conference sponsorships, could not be affected by their size, by the incapacity of the employer witnesses to explain what benefits there were, or by the failure of employers to take up their rights to display banners, advertisements, or logos at the MUA conferences they had supposedly 'sponsored'.[284] The MUA also submitted in effect that even if the payments were not genuine, that was irrelevant to whether they were motivated by a desire to achieve industrial peace.[285]

217. The size of payments is relevant to whether the payments were genuine payments for the sponsorship of a conference, because the greater they are in amount, the less is each payment necessary to ensure the success of the conference. The incapacity of the employers to explain what benefits they saw supports the view that they saw no sponsorship advantages. The failure of SapuraKencana and Van Oord to take up their rights as sponsors suggests that far from perceiving advantages in being seen as a supporter of the MUA, they saw only disadvantages. If, as is probable, the payments were not genuinely for sponsorship, the only other possibility is that they were to secure industrial peace.

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[284] Marinus Meijers, witness statement, 29/9/14, para 103.

[285] Submissions of the MUA, 14/11/14, paras 70-71.

218. Counsel assisting submitted that in evaluating whether or not the payments and contributions are genuine it was useful to consider the timing of the discussions and payments received by the MUA and METL. Counsel assisting took various examples.

219. The first was Saipem's agreement to pay $1,000,000 to METL. Counsel assisting submitted that the MUA had cornered Saipem in relation to its proposed use of foreign tugs and was facing a loss of $1,000,000 for every day lost. The MUA said that no evidence had been cited for Saipem being 'cornered', and that the timing of the payment was merely coincidental with the dispute between the MUA and Saipem over foreign crews. That submission is quite unconvincing. It does not take into account the findings above about Chris Cain's behaviour.

220. Counsel assisting's next example was Dredging International. The day after it had its enterprise agreement approved by the Fair Work Commission it received an invoice for a $200,000 sponsorship payment of the MUA WA Branch conference. The MUA submitted that this too was a fallacy. It rested on 'unwarranted speculation that at some time in the past there could have been an arrangement between Dredging International and the MUA for payment made conditional on the approval of the enterprise agreement by the Fair Work Commission many weeks after the agreement had been negotiated.'[286] But there is no fallacy. The enterprise agreement was a thing writ in water until the Fair Work Commission had approved it. No doubt the time of agreement between the employer and the union was an important time.

[286] Submissions of the MUA, 14/11/14, para 73(ii).

But so is the time of approval by the Fair Work Commission: it is crucial. The close connection in time between the approval by the Fair Work Commission and the invoice was not a coincidence.

221. Counsel assisting's next example concerned Van Oord. Immediately after concluding negotiations for an enterprise agreement with the MUA, Chris Cain sought a sponsorship for $50,000 per annum. The MUA submitted that it was speculative to suggest any connection.[287] To the contrary, the connection of dates is highly suggestive.

222. Counsel assisting took another Van Oord example. Immediately after a discussion over manning levels, Chris Cain requested a contribution to the electoral campaign of the MUA's Deputy State Secretary. The MUA's submissions about the lack of connection were rejected above.[288]

223. Finally, counsel assisting referred to SapuraKencana. There was evidence that it was aware that 'its future in Western Australia is largely dependent on the successful completion of the Project' and was after a 'smooth execution'. On that basis it decided to pay $358,000 between the MUA and METL.[289] The MUA submitted that whatever SapuraKencana's purpose, there was no evidence that the MUA had

[287] Submissions of the MUA, 14/11/14, para 73(iii).

[288] See paras 205-207.

[289] See paras 137-148.

requested the payment in exchange for industrial peace.[290] This argument was rejected above.[291]

224. For those reasons counsel assisting's submissions that there is a pattern common to all the case studies of payments to secure industrial peace are sound.

J – LEGAL ISSUES

225. Counsel assisting declined to submit that, on the evidence before the Commission, the conduct of Chris Cain or the MUA in respect of the negotiations considered above met the requirements of an offence under s 338A of the *Criminal Code* (WA). Whether it did is one question. Whether, even if it did, a prosecution would have sufficient prospects of success is another. Because of the decision of counsel assisting to decline to make submissions about s 338A, it is not desirable to consider whether the requirements of s 338A were met, even on the balance of probabilities. It is therefore not appropriate to refer the matter to the Western Australian Director of Public Prosecutions in order that consideration be given to a prosecution for that offence. It would be prudent, however, for the MUA to bear s 338A in mind in deciding what conduct to pursue in future.

K – PROFESSIONAL STANDARDS

226. However, even if s 338A does not apply, it will generally be a breach of the professional standards applicable to officials of the MUA to

[290] Submissions of the MUA, 14/11/14, para 73(v).

[291] See para 148.

threaten industrial action against a business, expressly, by implication or by conduct, with a view to procuring financial contributions from that business to the MUA or to others. That conduct tends to evade the legislation and other laws preventing certain types of industrial action. And generally that conduct is insufficiently related to an attempt to improve the terms and conditions of MUA members. That is the case with the conduct examined in the case studies considered in this Chapter.

227. It has been announced that the CFMEU and the MUA are to merge. The characteristics which the MUA will bring to the merged entity will be supplementary, not complementary.