

## **PART 2**

### **CHAPTER 2**

#### **TRANSPORT WORKERS' UNION (WESTERN AUSTRALIAN BRANCH)**

##### **MISAPPROPRIATION OF BRANCH FUNDS**

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## **A – INTRODUCTION**

1. This Chapter concerns the Transport Workers' Union (**the TWU**). Aspects of the general activities of the TWU were considered in the Interim Report.<sup>1</sup> This Chapter does not deal with the conduct of the TWU or its officials towards the outside world. Instead it deals with an internal phenomenon – the misappropriation of significant TWU assets by two of its most senior, respected and trusted officials.

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<sup>1</sup> Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 4.2 (union election funds), ch 6.2 (superannuation) and ch 7.2 (training funds); Vol 2, ch 10.2 (fraudulent misrepresentations to the Australian Labor Party about TWU membership).

2. The TWU is a trade union and organisation of employees registered pursuant to the provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW(RO) Act**). It has Branches constituted across the states and territories of Australia. One of them is the Western Australian Branch (**the Branch**).
3. Pursuant to Chapter 5 of the FW(RO) Act, the TWU has adopted and registered a set of rules (**the National Rules**).<sup>2</sup> The Rules cover the National Union and the State Branches.<sup>3</sup> The Branch also has a set of rules registered with the Western Australian Industrial Relations Commission (**the Branch Rules**).<sup>4</sup>
4. James McGiveron began work at the Branch in January 1985. In 1993 he was elected Branch Secretary. The term he was serving in 2012 was due to expire at the end of November 2014<sup>5</sup> but he left early. He resigned with effect from 31 December 2012. After his resignation, James McGiveron remained employed by the Branch in a position described as ‘Special Projects Officer’. On 30 May 2013, his successor purported to make that position redundant, with effect from 12 July 2013.<sup>6</sup> So ended more than 28 years of service.
5. James McGiveron also held national office in the TWU. At the TWU’s National Council in May 2012, he was elected unopposed as

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<sup>2</sup> TWU WA Rules Bundle, 11/5/15, tabs 1-3.

<sup>3</sup> TWU WA Rules Bundle, 11/5/15, tab 1: r. 16.

<sup>4</sup> TWU WA Rules Bundle, 11/5/15, tab 4.

<sup>5</sup> James McGiveron, 12/5/2015, T:149.23-32.

<sup>6</sup> Starr MFI-1, 11/5/15, pp 206-207.

the National President of the TWU. That is an honorary position.<sup>7</sup> The holder is appointed annually by and from the National Council.<sup>8</sup> James McGiveron's term as National President expired the following year, since he did not stand for re-election at the National Council in May 2013.

6. Richard Burton, too, was a very experienced official. He began work at the Branch in April 1992. In January 2012 he assumed the newly created role of Assistant Branch Secretary.<sup>9</sup> He served as Acting Branch Secretary from 9 October to 31 December 2012. On 1 January 2013, following James McGiveron's resignation, he became the Branch Secretary. He held that position until his resignation from all positions in the TWU on 12 April 2014. Tim Dawson then became the Branch Secretary.
  
7. James McGiveron at all material times until 1 January 2013 was an officer of the Branch. Richard Burton at all material times until 12 April 2014 was an officer of the Branch. Each therefore owed a number of duties to the Branch, including:
  - (a) a fiduciary duty not to act in a position where there was a real sensible possibility that his interests might conflict with his fiduciary duty to the Branch to act in good faith and for proper purposes in advancing the interests of the Branch;

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<sup>7</sup> James McGiveron, 12/5/15, T:179.24-28.

<sup>8</sup> TWU WA Rules Bundle, 11/5/15, tab 1: r. 57-58; James McGiveron, 12/5/15, T:151.10-16.

<sup>9</sup> Starr MFI-1, 11/5/15, p 280; TWU WA Rules Bundle, 11/5/15, tab 1: r. 31(2)(d) and r. 40(2)(a).

- (b) a fiduciary duty not to use his position to confer an advantage on himself or someone else to the detriment of the Branch;
- (c) an obligation under s 285 of the FW(RO) Act to exercise his powers with due diligence;
- (d) an obligation under s 286 to exercise his powers in good faith, in what he believed to be the best interests of the Branch and for proper purposes;
- (e) an obligation under s 287 not improperly to use his position to gain an advantage for himself or cause detriment to the Branch.

8. This case study centres on two events. One event was the purchase, in 2012 and 2013, by James McGiveron and Richard Burton, of two Ford F350s. The cost was about \$150,000 each. The purchase was for their use. But it was not they who paid. It was the TWU which paid. The one used by James McGiveron was actually given to him in 2013. The other event was the making of a redundancy payment to James McGiveron in July 2013 of \$373,191.23 net (\$477,294.57 gross). Those transactions were very advantageous to the two officials. And they were correspondingly harmful to the TWU. The issue is whether the involvement of either official in the transactions gave rise to breaches of any of the above duties.

## **B – THE RELEVANT EVENTS IN OUTLINE**

### **James McGiveron's plan to retire**

9. Prior to mid-2012, James McGiveron made it known that he was considering retiring as Branch Secretary.<sup>10</sup> His term as National President did not expire until May 2013.<sup>11</sup> He wished to see out that term.<sup>12</sup> Rule 57(1) of the National Rules required that the National President be either an officer of a branch or an employee in a relevant industry.

### **The events of 18 July 2012**

10. On the morning of 18 July 2012, Richard Burton visited two Perth car dealerships. He was accompanied by Glen Barron, a member of the Branch. They inspected a Ford F350.<sup>13</sup> One of those dealerships was Barbagallo Motors (**Barbagallo**). Two Ford F350s were ultimately purchased from Barbagallo.
11. The Ford F350s were quite unlike the normal cars purchased by the Branch. The Ford F350s cost about \$150,000 each. The usual cost of vehicles purchased by the Branch was about \$50,000.

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<sup>10</sup> McGiveron MFI-1, 12/5/15, para 2; Starr MFI-1, 11/5/15, pp 101-103.

<sup>11</sup> Starr MFI-1, 11/5/15, p 108; James McGiveron, 12/5/2015, T:163.34-44.

<sup>12</sup> James McGiveron, 12/5/2015, T:151.4-24, 160.33-43.

<sup>13</sup> Glen Barron, witness statement, 11/5/15, paras 6-10; Glen Barron, 11/5/2015, T:39.28-47.



12. On the evening of 18 July 2012 there was a meeting of the Branch Committee of Management (**BCOM**). The minutes record, amongst other matters, the following three events.<sup>14</sup>
13. First, James McGiveron gave a report on his role as National President and its impact on his role as Branch Secretary. He announced that he and Richard Burton would resign from their respective positions at a BCOM meeting on 26 September 2012. He also announced that Richard Burton would take over the role of Branch Secretary. He said he himself would take up a position as ‘Gas and Mining Officer’. Later this came to be called the position of ‘Special Projects Officer’.
14. Secondly, James McGiveron gave a report regarding a redundancy policy. The BCOM passed a resolution endorsing it (**the Redundancy Policy Resolution**).
15. Thirdly, the BCOM resolved that James McGiveron be ‘granted ownership of the union motor vehicle that he is driving at the time his employment ceases with the Branch’ (**the Car Resolution**). The car he was driving on 18 July 2012 was cheap and not new. The car he was driving when his employment ceased on 12 July 2013 was one of the Ford F350s – very expensive and nearly new.

### **The events of 24 July 2012**

16. On 24 July 2012, James McGiveron executed two contracts to purchase two F350s from Barbagallo. The contract produced to the

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<sup>14</sup> Starr MFI-1, 11/5/15, pp 9-13.

Commission was for the purchase of a 2013 model Ford F350 for a total price, including extras, of \$136,995. The contract required the payment of a security deposit of \$40,000 with \$96,995 remaining to be paid.<sup>15</sup>

17. On the same day, James McGiveron arranged for Debra Hodgson, an employee of the Branch, to pay \$80,000 to Barbagallo by way of deposits on the two cars.<sup>16</sup>
18. It was known at this time that the Ford F350s would not be arriving until early 2013. That is what James McGiveron told Debra Hodgson at the time of arranging for her to pay the deposit.<sup>17</sup> It is also what James McGiveron said in oral evidence.<sup>18</sup>

### **The resignations of James McGiveron and Richard Burton**

19. Although at the 18 July 2012 BCOM meeting James McGiveron foreshadowed that he and Richard Burton would resign in September 2012, the resignations did not take place until 9 October 2012. On that day a 'special' BCOM meeting took place. Amongst other matters, the minutes of that meeting record the following four events.
20. *First*, the BCOM authorised a leave of absence for James McGiveron until the end of 2012. This leave was said to have two purposes. One

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<sup>15</sup> Starr MFI-1, 11/5/15, p 228.

<sup>16</sup> Starr MFI-1, 11/5/15, p 229; Debra Hodgson, witness statement, 11/5/15, paras 12-15; DH-1 [8]-[9].

<sup>17</sup> Debra Hodgson, witness statement, 11/5/15, paras 12-13.

<sup>18</sup> James McGiveron, 12/5/15, T:139.3-29.

was to enable him to travel and continue his work on ‘achieving ... alliances’ with ‘unions across the globe’, but in particular in the United States. The other was to allow him to organise members and promote the interests of the TWU in remote mining areas of Australia.

21. *Secondly*, James McGiveron and Richard Burton resigned from their respective positions with effect from 31 December 2012.
22. *Thirdly*, Richard Burton was appointed Branch Secretary with effect from 1 January 2013. No election was necessary because James McGiveron had held office for long enough to create a casual vacancy.
23. *Fourthly*, James McGiveron was appointed Special Projects Officer. The terms and conditions were the same as applied to his then employment as Branch Secretary. The appointment was with effect from 1 January 2013. His responsibilities were described in the minutes as ‘ensuring that the TWU develops and implements the best possible strategies in the resources and mining sector of our economy, with a view to ensuring the TWU’s membership interests are maximised in the sector’.<sup>19</sup>

### **The arrival of the Ford F350s**

24. The Ford F350s arrived in March 2013. On 6 March 2013, Richard Burton and James McGiveron each signed an application to obtain licences for the Ford F350s.<sup>20</sup> Those applications stated their

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<sup>19</sup> Starr MFI-1, 11/5/15, pp 14-16.

<sup>20</sup> Burton MFI-1, 13/5/15; McGiveron MFI-5, 12/5/15.

respective names. And those applications gave their respective home addresses. Receipts for the payment of licence fees (in the amount of about \$4,500 per car) were issued to Richard Burton and James McGiveron, naming their home addresses.<sup>21</sup> Yet it was the TWU, not the officials, which owned the cars.

25. On 26 March 2013, Richard Burton signed two contracts to buy Ford F350s from Barbagallo.<sup>22</sup> These contracts were apparently required by Barbagallo to replace the previous contracts executed by James McGiveron. That requirement may have arisen because since July 2012 extras had been added to the Ford F350s (at a cost of around \$20,000 per car). The total purchase price for each Ford F350 was \$154,275, with \$114,275 outstanding. Although Richard Burton signed both contracts, one identified James McGiveron as the purchaser, and gave his home address. The other identified Richard Burton as the purchaser and gave his home address. The contracts were false documents in the sense that the officials were not the purchasers. The TWU was the purchaser.
  
26. On 2 April 2013, payment of the remaining monies owing for both vehicles (\$228,550) was electronically transferred from the Branch to Barbagallo. Debra Hodgson made the payment at the direction of Richard Burton.<sup>23</sup>

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<sup>21</sup> Starr MFI-1, 11/5/15, p 235-236.

<sup>22</sup> Starr MFI-1, 11/5/15, pp 231-232.

<sup>23</sup> Richard Burton, 13/5/15, T:212.37-43.

## **James McGiveron's redundancy**

27. James McGiveron's term as National President expired on 20 May 2013.<sup>24</sup>
28. Ten days later, Richard Burton, in his capacity as Branch Secretary, wrote two letters to James McGiveron.
29. The first letter announced that James McGiveron's position as Special Projects Officer had been made redundant, with effect from 12 July 2013. It referred to the Redundancy Policy Resolution that James McGiveron had introduced at the meeting of 18 July 2012. It attached calculations of the amount to be paid to James McGiveron under that policy: \$477,294.57 gross and \$373,191.23 net.<sup>25</sup> That amount was paid to James McGiveron in July 2013.<sup>26</sup>
30. The second letter that Richard Burton wrote to James McGiveron on 30 May 2013 referred to the Car Resolution passed by the BCOM on 18 July 2012. The letter then informed James McGiveron that in keeping with the Car Resolution he would be granted, on 12 July 2013, personal ownership of the Ford F350 currently in his possession.<sup>27</sup>
31. On 6 August 2013, the BCOM passed a resolution endorsing the payment to James McGiveron of redundancy money and the transfer to

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<sup>24</sup> Starr MFI-1, 11/5/15, p 108; James McGiveron, 12/5/15, T:163.34-44.

<sup>25</sup> Starr MFI-1, 11/5/15, pp 206-209.

<sup>26</sup> Starr MFI-1, 11/5/15, p 209.

<sup>27</sup> Starr MFI-1, 11/5/15, p 210.

him of a car identified by the number plate 1ECY 231.<sup>28</sup> That transfer purported to be made pursuant to the Car Resolution. The BCOM did not know at this time that that car was a Ford F350 as distinct from the much cheaper type of vehicle James McGiveron had been driving before March 2013.

### **The fall of Richard Burton and the fate of the Ford F350s**

32. Richard Burton retained possession of his Ford F350 until April 2014. Soon after he took possession he put personalised number plates on it. He told other BCOM members that the car was his – untruthfully. He seems to have driven it from time to time but otherwise kept it in a TWU owned storage facility. In early April 2014 the Branch's auditors required a statutory declaration stating what cars were owned by the TWU. At this time the purchase of the Ford F350s came to the attention of the President, Ray McMillan, and the rest of the Branch officials. Richard Burton resigned shortly afterwards, on 12 April 2014. His letter of resignation exuded an air of defeat. In its totality, omitting formal parts, it said:<sup>29</sup>

Due to personal reasons and my current situation, I Richard Burton would like to resign from all positions within the Transport Workers Union. These positions include WA Branch Secretary, elected Organiser and TWUSuper Fund Representative Director. Further, I wish to resign from the Branch Committee of Management and the National Committee of Management. My resignation from all mentioned positions and committees is effective immediate.

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<sup>28</sup> Starr MFI-1, 11/5/15, p 31.

<sup>29</sup> Starr MFI-1, 11/5/15, p 60.

33. A special resolution at a BCOM meeting urgently convened on the same day accepted his resignation. The minutes do not record any thanks to the ruined Secretary for his past work. Nor do they record any expression of goodwill for his future.<sup>30</sup> An extraordinary meeting of BCOM immediately after the special meeting elected Tim Dawson to fill the casual vacancy.<sup>31</sup>
34. The other BCOM members (with one exception)<sup>32</sup> were unaware that the Branch had purchased either of the F350s until April 2014.<sup>33</sup>
35. Richard Burton sold his Ford F350 shortly after April 2014. He remitted the proceeds of sale to the Branch. James McGiveron sold his Ford F350 in September 2014. He also remitted the proceeds to the Branch. But in exchange he was given ownership of one of the Branch's Mazda BT-50s, a car costing around \$50,000.

## **C – THE ISSUES IN OUTLINE**

36. The issues that arise out of the above events are, broadly, as follows.

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<sup>30</sup> Starr MFI-1, 11/5/15, p 60.

<sup>31</sup> Starr MFI-1, 11/5/15, p 61.

<sup>32</sup> Paul Aslan was aware of the existence of the F350 that was used by James McGiveron from about 30 May 2013, but unaware of the other F350 until April 2014: Paul Aslan, witness statement, 11/5/15, para 9.

<sup>33</sup> Kevin Starr, witness statement, 11/5/15, para 48; Paul Aslan, witness statement, 11/5/15, para 10; Tim Dawson, witness statement, 11/5/15, para 10; Mark Bebich, witness statement, 11/5/15, paras 10-11; Ray McMillan, witness statement, 12/5/15, para 8; Deborah Dunbar, witness statement, 12/5/15, para 8; Bruce Spaul, witness statement, 12/5/15, paras 6-7; John Davis, witness statement, 12/5/15, paras 7; Peter Elliott, witness statement, 12/5/15, paras 8-12.

37. First, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the purchase of the Ford F350s?
38. Secondly, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the passing of the Car Resolution and the transfer of ownership of one of the Ford F350s to James McGiveron?
39. Thirdly, did Richard Burton dishonestly conceal the purchase of the Ford F350s from the BCOM?
40. Fourthly, were James McGiveron and Richard Burton entitled to receive car allowances of around \$11,000 per annum?
41. Fifthly, did James McGiveron and Richard Burton breach their duties as officers of the Branch in connection with the redundancy payment made to James McGiveron?
42. This Chapter deals first with the purchase of the Ford F350s and the transfer of one of them to James McGiveron. Then it deals with car allowances. Finally it deals with the redundancy payment. It is convenient to proceed by setting out the submissions of counsel assisting, interrupting where it is necessary to consider particular criticisms which senior counsel for James McGiveron and senior counsel for the TWU made of them.



## **D – PROCEDURAL BACKGROUND**

43. First, however, it is desirable to set out the unusual way in which this case study came to the Commission.
44. The following events took place after the Branch discovered the purchase of the Ford F350s.<sup>34</sup>
45. The TWU engaged a financial management and consulting firm known as Matrix on Board to review the policies and procedures of the Branch, and to improve governance and accountability within it. In addition to other changes introduced by Tim Dawson, steps were taken to act on the Matrix on Board report.<sup>35</sup>
46. On 6 June 2014, the TWU engaged the services of the Hon Wayne R Haylen, QC, as Acting Ombudsman for the TWU, to investigate some of the matters considered in this Chapter, and other matters.<sup>36</sup> Mr Haylen is a very experienced industrial lawyer who served for 12 years as a judge of the Industrial Relations Commission of New South Wales. On 28 August 2014, Mr Haylen sent the TWU a report adverse to Richard Burton. It should be said in passing that careful, detailed and useful though that report is, the Commission has carried out an analysis of the circumstances which is independent of Mr Haylen's

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<sup>34</sup> Tim Dawson, witness statement, 11/5/15, para 24.

<sup>35</sup> Tim Dawson, 11/5/15, T:94.8-24, 95.9-38.

<sup>36</sup> Starr MFI-1, 11/5/15, p 326-331.

work. The report was not tendered to establish the truth of its conclusions.<sup>37</sup>

47. The TWU referred the matter to the Fair Work Commission.
48. On or about 10 September 2014, the TWU commenced proceedings in the Federal Court of Australia against Richard Burton. It applied for declarations that Richard Burton had contravened s 286(1) and s 287(1) of the FW(RO) Act, and an order that Richard Burton pay compensation for damage suffered as a result of the contraventions.<sup>38</sup>
49. The TWU did not start proceedings against James McGiveron.
50. Finally, the TWU referred the matter to this Commission. It made Mr Haylen's report available to the Commission, together with other materials. It cooperated fully with the Commission in relation to this particular case study. Its conduct in these respects is commendable and unique. However, it did seem to be much more critical of Richard Burton than of James McGiveron. For example, its senior counsel cross-examined the former with great force, the latter not at all. But in submissions it did not defend James McGiveron.
51. The public hearings of the Commission took three days. The TWU and James McGiveron were legally represented. So was Richard Burton, though his representative was not present for the whole three days. And the solicitors for Richard Burton informed the Commission that they were not instructed to file any submission. None was filed.

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<sup>37</sup> Kevin Starr, 11/5/15, T:14.34-40.

<sup>38</sup> Starr MFI-1, 11/5/15, pp 268-277.

## **E – THE FORD F350s**

### **Failure to obtain BCOM approval to purchase the Ford F350s**

52. The first duty of a trustee is to obey the terms of the trust.<sup>39</sup> Part of that first duty involves a duty to ascertain those terms. Similarly, part of the first duty of a fiduciary must be to ascertain the terms governing the fiduciary relationship. One category of fiduciary comprises trade union officials. Part of their first duty must be to acquaint themselves with the rules of their union. Having done that, they have a duty to comply with those rules. The National Rules of the TWU, and the Branch Rules, are very detailed and sophisticated. They appear to have been composed very carefully.
53. Counsel assisting submitted that neither James McGiveron nor Richard Burton had any authority to make purchases of the F350s without BCOM approval. He submitted that in doing so they contravened rule 75(7)(d) of the National Rules and rule 36(i) of the Branch Rules. He submitted that those rules permitted expenditure of Branch funds only with the prior authorisation of BCOM. James McGiveron thus had no authority to pay the deposit for the two cars on 24 July 2012. Neither did James McGiveron have any actual authority to enter into the contracts to purchase the cars on behalf of the Branch on 24 July 2012. That was not within any of the enumerated powers conferred on the Secretary in rule 37(3) of the National Rules or rule 12 of the Branch Rules.

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<sup>39</sup> *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [32].

54. Counsel assisting also submitted that the payment of the deposit was in breach of rule 75(7)(c) of the National Rules as it did not have a second authorisation by the Branch President, the Branch Vice-President or one Branch Trustee. The correctness of this last submission is plain. Senior counsel for James McGiveron offered no submission against it.

55. Instead, senior counsel for James McGiveron attacked the submissions that he had breached the union rules thus:<sup>40</sup>

This submission rests on the fundamental misconception that Rule [75](7)(d)] requires the “prior authorisation” by BCOM of the expenditure of branch funds. Rule [75](7)(d)] says nothing more than that “the expenditure of Branch funds may only be made by resolution” of the BCOM. That rule does not require that there be prior authorisation. Counsel Assisting’s construction of the rule would render it impractical to manage the union.

This submission assumes that there was ‘subsequent authorisation’. It is not necessary to decide on the correctness of that assumption, and it is convenient to proceed on it. It is highly questionable, however, that there could have been subsequent authorisation at any time before the BCOM became fully informed of the material facts. As the TWU submissions accepted,<sup>41</sup> it probably will not be fully informed of the facts until its members have read this Report.

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<sup>40</sup> Submissions of James McGiveron, 19/6/15, para 28.

<sup>41</sup> Submissions of the TWU, 17/6/15, para 34.

56. Senior counsel for James McGiveron also quoted evidence of a general practice which was ‘consistent with an application and construction of the rule that allows expenditure to be endorsed after it has occurred’.<sup>42</sup>
57. The last point can be put on one side at the outset. The issue is not what the general practice was. The issue is what the rules mean. A general practice does not establish what the rules mean. A general practice inconsistent with the rules is immaterial unless it is demonstrated that that practice has, conformably with criteria of legality, supplanted the rules. No demonstration of this kind was attempted.
58. What, then, do the relevant rules mean? In the National Rules, the relevant provisions are as follows:

- 75(7) The funds of the Union may only be expended as follows:
- ...
- (d) Subject to paragraph (e), the expenditure of Branch funds may only be made by a resolution of the [BCOM], and is subject to sub-rules 72(3) and 73(6); and
- (e) (i) The salaries of Officers and other employees of the Union, and
- (ii) regularly recurring expenses that have been authorised by the [BCOM];
- may be paid without a specific resolution of the [BCOM].

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<sup>42</sup> Submissions of James McGiveron, 19/6/15, para 29, discussing Debra Hodgson, witness statement, 11/5/15, Annexure DH1, para 8, and Debra Hodgson, 11/5/15, T:63.42-65.11.

59. There are valid reasons for rejecting the construction of rule 75(7)(d) propounded by senior counsel for James McGiveron.
60. First, the word ‘by’ in rule 75(7)(d) suggests that the relevant resolution must precede the expenditure. The word ‘by’ implies that the resolution is the operative factor validating the payment. If the resolution came after the payment, the payment would not be ‘by’ the resolution, but ‘by’ something else. Contrary to what counsel for James McGiveron submitted, this construction does not render it impractical to manage the TWU. Considerations going to practicality of management are adequately catered for by rule 75(7)(e). Items not within rule 75(7)(e) require a prior resolution under rule 75(7)(d), and this requirement rests on criteria of prospectivity, not retrospectivity. If rule 75(7)(d) did not require a prior resolution, the legality of the expenditure would be left in limbo until a subsequent resolution was passed. And if rule 75(7)(d) did not require a prior resolution, it would be possible for a resolution seeking retrospective approval to fail, leaving the legality of the expenditure without any support and creating risks, including perhaps risks of personal liability, for those responsible for the expenditure. In short, rule 75(7)(d) contemplates antecedent permission, not subsequent absolution.
61. Further, the construction propounded by senior counsel for James McGiveron is negated by rule 75(7)(e). Rule 75(7)(e)(i) creates an exception to rule 75(7)(d) permitting ‘salaries of Officers and other employees of the Union’ to be ‘paid without a specific resolution’. And rule 75(7)(e)(ii) creates an exception to rule 75(7)(d) for certain ‘regularly recurring expenses that have been authorised by the [BCOM]’ to be ‘paid without a specific resolution’. These two

exceptional categories are quite distinct from other payments. Payment of salaries of Officers and other employees are likely to have been authorised in advance, whether by a specific resolution or not. That is either because the salaries of the relevant categories of Officers and other employees are established by contracts of employment which have been approved by BCOM or because there have been general resolutions. The payment of salaries also has a recurrent character, making it unnecessary to have a specific resolution before or even after each payment. The same is true of ‘regularly recurring expenses that have been authorised by the [BCOM]’ – they *have been* authorised in advance and they are *regularly recurring*. The existence of these exceptions in rule 75(7)(e) implies that but for the exceptions, the conduct they refer to would have fallen within rule 75(7)(d). If the exceptions deal with items that would ordinarily have been authorised in advance (rule 75(7)(e)(i)), or were expressly stated to have been authorised in advance (rule 75(7)(e)(ii)), it follows that the conduct not excised by the two exceptions will also have to be authorised in advance.

62. Counsel for James McGiveron did not deal with Branch rule 36(i), on which counsel assisting had relied. It provided:

The conditions under which funds may be disbursed on behalf of the Branch for ordinary purposes shall be as follows:-

- (i) Subject to these rules and as hereinafter provided, the Branch shall have complete control of the funds of the Branch collected by it, and disbursement for both ordinary and extraordinary purpose [sic] shall only be made *after* being passed for payment by resolutions of the [BCOM].

Provided that salaries of officers of the Branch and employees, together with regular recurring expenses or accounts which have been authorised

by the [BCOM] may be paid by cheques drawn without being so passed for payment. (emphasis added)

63. Subject to the exception created by the proviso, which is very similar to rule 75(7)(e), rule 36(i) plainly does not justify a retrospective resolution. It permits disbursement only *after* a resolution.

64. It is now necessary to assess the arguments based on National rule 75(7)(c).

65. National rule 75(7)(c) provides:

The funds of the Union may only be expended as follows:

...

(c) Payments from the account of each branch must be paid by Electronic Funds Transfer or cheque [sic] signed or authorised by:

(i) the Branch Secretary; and

(ii) either:

(A) the Branch President

(B) the Branch Vice-President, or

(C) 1 Branch Trustee ....

66. Counsel for James McGiveron submitted that the payment for the deposit of \$80,000 for the Ford F350s on 24 July 2014 ‘was made by Electronic Funds Transfer. It is only payment by cheque that must be signed and authorised’.<sup>43</sup> The better construction of rule 75(7)(c) is

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<sup>43</sup> Submissions of James McGiveron, 19/6/15, para 30.



that the words ‘signed or authorised by [the various officers]’ apply not only to payments by cheque but also to payments by Electronic Funds Transfer. The function of the rule is to create a safeguard against the fraudulent or careless loss of Branch funds by requiring consent evidenced by a signature or authorisation from the Branch Secretary and one other of the three named officials. It would be anomalous if that safeguard were only to apply to one form of transfer but not another – ie only to transfers by cheque but not transfers made by Electronic Funds Transfer.

67. Counsel assisting, by parity of reasoning with that employed against James McGiveron, submitted that Richard Burton had no authority to enter into contracts to purchase the Ford F350s on 26 March 2013 or to make the final payment of \$228,000 on 2 April 2013. That submission is correct.

### **The decision to purchase the Ford F350s**

68. Counsel assisting submitted that independently of any breach of the TWU’s rules, both James McGiveron and Richard Burton had a material personal interest in the transactions they were entering into. He began with the decision to purchase the Ford F350s.
69. Both Richard Burton and James McGiveron agreed that the decision to buy the Ford F350s was made by James McGiveron on Richard Burton’s recommendation.<sup>44</sup> Richard Burton recalled discussion about

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<sup>44</sup> Richard Burton, witness statement, 13/5/15, paras 9-13; James McGiveron, witness statement, 12/5/15, paras 8-9; James McGiveron, 12/5/15, T:117.8-15.

the Ford F350s being appropriate vehicles for the Branch to purchase for the use of organisers travelling to remote locations where no accommodation was available.<sup>45</sup> James McGiveron stated that the conversation was about the purchase of two vehicles for work in the Pilbara. One was to be for James McGiveron's use and the other for remote work in the State.<sup>46</sup>

70. There was a slight conflict in the evidence about whether that decision had been made by 18 July 2012.

71. In oral evidence James McGiveron accepted that he had had discussions about Ford 350s prior to the 18 July 2012 meeting, but denied that those discussions had included Richard Burton suggesting or recommending that the Branch could purchase Ford F350s. James McGiveron said that Richard Burton first recommended the purchase after the 18 July 2012 meeting, and that the main discussion about purchasing the vehicles occurred in the week beginning 21 July.<sup>47</sup> However 18 July 2012 was a Wednesday and so the following working week commenced on Monday 23 July 2012. If the conversation occurred in the week following the BCOM meeting but prior to 24 July 2012, it must have occurred on Monday 23 July 2012. It is unlikely that the idea of so exceptionally expensive a purchase would have been proposed to and accepted by James McGiveron in the space of less than two days.

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<sup>45</sup> Richard Burton, witness statement, 13/5/15, paras 9-13.

<sup>46</sup> McGiveron MFI-1, 12/5/15, para 15.

<sup>47</sup> James McGiveron, 12/5/15, T:117.39-41.

72. James McGiveron in his signed statement to the Hon Wayne Haylen had said that he was approached by Richard Burton about purchasing the vehicles ‘between April and December 2012’ and that following those discussions, he ordered the Ford F350s ‘in approximately April/March 2012’.<sup>48</sup> In oral evidence James McGiveron said he wished to correct the time periods just quoted to read ‘prior to 24 July 2012’.<sup>49</sup> James McGiveron accepted that when he signed the statement provided to the Hon Wayne Haylen he was satisfied it was correct and appreciated it was important to give the Hon Wayne Haylen his honest recollection of events in relation to the Ford F350s.<sup>50</sup>
73. Richard Burton’s evidence in his statement was that he had discussions with James McGiveron about the purchase by the Branch of vehicles for use in remote areas, and that he and James McGiveron agreed that F350s were appropriate.<sup>51</sup> He said he did not recall precisely when his discussion or discussions with James McGiveron took place.<sup>52</sup> In oral evidence Richard Burton said that to his recollection the discussions took place around May/June and before the 18 July 2012 meeting.<sup>53</sup> He said that during these discussions he recommended to James McGiveron that the Branch purchase the two Ford F350s. He did not think during those discussions that James McGiveron had any objection to the purchase and he understood, prior to 18 July 2012, that

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<sup>48</sup> McGiveron MFI-1, 12/5/15, paras 15-16.

<sup>49</sup> James McGiveron, 12/5/15, T:119.21-120.4.

<sup>50</sup> James McGiveron, 12/5/15, T:119.8-15.

<sup>51</sup> Richard Burton, witness statement, 13/5/15, paras 9-13.

<sup>52</sup> Richard Burton, witness statement, 13/5/15, para 10.

<sup>53</sup> Richard Burton, 13/5/15, T:221.14-20.

James McGiveron had accepted his recommendation.<sup>54</sup> He later said that he was not '100 per cent' sure that the Ford F350s were being purchased, and that he had not 'got the green light' from James McGiveron.<sup>55</sup> The substance of his evidence, however, was that there was an expectation that the purchase would proceed by the time of this meeting.

74. It is likely that by the time of the 18 July 2012 meeting both James McGiveron and Richard Burton expected the purchase would proceed. That is so for three reasons.
75. *First*, it is unlikely that Richard Burton would have visited two car dealerships on the morning of 18 July 2012 if he did not think at that time that there was a strong likelihood that the Ford F350s would be purchased. Richard Burton could never have had an intention to purchase a Ford F350 with his own money. And on no view did he have authority to purchase the Ford F350s without (at least) James McGiveron's consent.
76. *Secondly*, it is unlikely that the discussions which both Richard Burton and James McGiveron agree occurred in relation to the Ford F350s all took place in the period 18 July 2012 to 24 July 2012. It is also unlikely that they took place, as James McGiveron appeared to claim, on the one or two days before 24 July 2012.

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<sup>54</sup> Richard Burton, 13/5/15, T:221.22-37.

<sup>55</sup> Richard Burton, 13/5/15, T:222.13-25.

77. *Thirdly*, on 4 September 2014, James McGiveron wrote to Tim Dawson offering to exchange the proceeds of sale of his Ford F350 for a Mazda BT-50. James McGiveron said in that letter:<sup>56</sup>

Although there was nothing illegal about the gifting of the vehicle to me, the cost of the vehicle has played on my mind. At the time the BCOM decision was made to give me the vehicle, after 28 years of dedicated service, including 18 as Branch Secretary, I was humbled that the union thought so highly of me.

78. The ‘BCOM decision’ referred to must have been the decision of 18 July 2012. That is the resolution to which James McGiveron refers in the second paragraph of the same letter. The only other BCOM decision regarding the car was its decision of 6 August 2013.<sup>57</sup> James McGiveron was not present at this meeting. By the time of that meeting he had already been given ownership of the car, with effect from 12 July 2013, pursuant to Richard Burton’s letter of 30 May 2013.

79. In oral evidence James McGiveron initially claimed that, in referring to the ‘BCOM decision’, he was referring to the meeting of 6 August 2013.<sup>58</sup> He then suggested that he was intending to convey that he was humbled ‘by the letters I received from the Branch Secretary gifting me the vehicle’.<sup>59</sup> A little later he accepted that he was humbled by the resolution passed regarding the car on 18 July 2012, but not because he

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<sup>56</sup> McGiveron MFI-3, 12/5/15, p 2.

<sup>57</sup> Starr MFI-1, 11/5/15, p 31.

<sup>58</sup> James McGiveron, 12/5/15, T:131.35-39.

<sup>59</sup> James McGiveron, 12/5/15, T:133.1-2.

believed that the resolution would result in his obtaining a Ford F350.<sup>60</sup> This is difficult to reconcile with the terms of the passage quoted above. He was humbled ‘that the union thought so highly of me’ and stated that ‘the cost of the vehicle’ had played on his mind. A fair reading of the letter is that James McGiveron was intending to tell the BCOM that he was humbled by the resolution of 18 July 2012 because he believed the union thought highly enough of him to give him a Ford F350 – a vehicle that cost a lot of money.

80. That reading is further supported by the statement James McGiveron gave the Hon Wayne Haylen in which he said: ‘When my retirement was announced BCOM resolved that I be given an F350 as a gift in recognition of my 28 years of service to the branch.’<sup>61</sup>
81. Again, the only resolution to which James McGiveron is referring must be the BCOM meeting in which he was present on 18 July 2012.
82. Thus the better view of the evidence is that James McGiveron and Richard Burton expected, at the time of the 18 July 2012 meeting, that the purchase of the Ford F350s would proceed.
83. The submissions of counsel assisting about the decision to buy the F350s were not challenged in any way by senior counsel for James McGiveron or senior counsel for the TWU. They are sound. They are accepted.

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<sup>60</sup> James McGiveron, 12/5/15, T:133.13-27.

<sup>61</sup> McGiveron MFI-1, 12/5/15, para 17.

## **F – JAMES MCGIVERON’S FORD F350**

84. These dealings concerning James McGiveron’s Ford F350 raise two questions. Did he breach his duties as an officer of the Branch by exercising his powers as an officer for his own benefit? And did Richard Burton breach his duties as an officer of the Branch by exercising his powers as an officer for the benefit of someone else and not the Branch?
85. It is necessary to examine the position at six different points in time. The first is 18 July 2012 when the Car Resolution was proposed and passed. The second is 24 July 2012 when James McGiveron contracted to purchase the Ford F350s and arranged for the payment of deposits of \$40,000 for each Ford F350. The third is March 2013 when James McGiveron took delivery of ‘his’ Ford F350. The fourth is April 2013 when Richard Burton paid for that Ford F350. The fifth is 30 May 2013 when Richard Burton wrote to James McGiveron granting him ownership of ‘his’ Ford F350 pursuant to the Car Resolution. The sixth is 6 August 2013 when the BCOM passed a resolution to similar effect.

### **18 July 2012**

86. It is quite plain that none of the other members of the BCOM appreciated at the 18 July 2012 meeting that Ford F350s were to be purchased. Nor did they appreciate that the Car Resolution might result in the gifting to James McGiveron of a Ford F350.

87. If, as has been found, James McGiveron and Richard Burton expected at the time of the meeting that the purchase of the F350s would go ahead, then counsel assisting submitted that they were duty bound to do several things.
88. *First*, they were required to disclose the intended purchase, and its purpose, to the meeting. As discussed above, the rules in any event required a BCOM resolution prior to the purchase of the Ford F350s. Even if the rules did not require this, the fact is that a BCOM resolution was proposed – the Car Resolution. That was not a resolution approving the purchase of the Ford F350s. But it was a resolution relevant to the purchase of the Ford F350s. For that reason the disclosure of plans to purchase the F350s at the meeting was necessary. Both Richard Burton and James McGiveron claimed that one of the Ford F350s was to be allocated to James McGiveron in his capacity as Special Projects Officer.<sup>62</sup> The position as at 18 July 2012 was thus that James McGiveron and Richard Burton expected that James McGiveron would move to a Special Projects Role later in 2012 and that a Ford F350 would be purchased for him to use in that capacity. The Car Resolution therefore had the potential, at the very least, to result in a transfer to James McGiveron of a Ford F350 – a very expensive vehicle. That was a matter which it was relevant for the BCOM members to know in making their decision as to whether to pass the Car Resolution.
89. *Secondly*, in voting on the Car Resolution, James McGiveron was acting in a position where his interests and his duties conflicted. He

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<sup>62</sup> James McGiveron, witness statement, 12/5/15, para 5; McGiveron MFI-1, 12/5/15, para 15; Richard Burton, 13/5/15, T:226.3.



had an interest in the Car Resolution, over and above that known to the BCOM: namely that that Resolution had the capacity to result in the gift to him of a very expensive car, not just a gift of the ordinary type of car that he was driving at the time. He had a duty to ensure that costs were kept down and that if greater costs were to be incurred the reasons for and consequences of this were understood by the BCOM. By voting on the Resolution in those circumstances he was acting in a position of conflict. Indeed, although counsel assisting did not make this obvious point, he was in a position of conflict by even remaining in the room. The Car Resolution was moved by Bob Dunn – according to James McGiveron, a ‘great man’.<sup>63</sup> It was moved after the meeting had been told of the sudden retirement of James McGiveron and of his ‘current health situation’.<sup>64</sup> He had been a very long-serving Secretary. He had a very forceful personality. He was deeply respected by BCOM members. He was a man for whom they had much affection. The Car Resolution was moved after James McGiveron had piloted through, without notice, the Redundancy Policy Resolution, for which all Branch employees present must have been very grateful. For James McGiveron to remain in the room was to help cloud with sentimentality and emotion the minds of BCOM members who should have been allowed to think more hard-headedly about the meaning, the possible implications and the merits of the Car Resolution.

90. It is likely that James McGiveron did more than merely remain present during and vote on the Car Resolution. It is likely that in addition he formulated and recommended it. If so, the conflict just identified is

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<sup>63</sup> James McGiveron, 12/5/15, T:129.47.

<sup>64</sup> See para 196.

more acute and the breach of duty more egregious. Paul Aslan typed up the Car Resolution prior to the meeting. Paul Aslan's evidence was that he did so because he was asked to.<sup>65</sup> He said that he was asked to type up the Redundancy Policy Resolution as well, by either or both of James McGiveron and Richard Burton.<sup>66</sup> It is to be inferred that either or both of James McGiveron and Richard Burton asked him to type up the Car Resolution. Neither James McGiveron nor Richard Burton would accept that they asked Paul Aslan to type up the Car Resolution.<sup>67</sup> But there are no other likely candidates. Having regard to this evidence, and to the unsatisfactory nature of James McGiveron's evidence regarding the typing up of the Redundancy Policy Resolution,<sup>68</sup> the most probable inference is that he asked Paul Aslan to type up the Car Resolution as well. That was Richard Burton's assumption based on past practice.<sup>69</sup> This is also consistent with Ray McMillan's evidence about what 'would have' happened at the meeting.<sup>70</sup>

91. The submissions of counsel assisting recorded in the previous paragraph must be considered in the light of those of senior counsel for James McGiveron. He attacked the submission that James McGiveron was 'in any way responsible' for the Car Resolution. He pointed out that James McGiveron denied this. He said there was no evidence to

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<sup>65</sup> Paul Aslan, 11/5/2015, T:68.11-15, 69.20-42.

<sup>66</sup> See Paul Aslan, 11/5/15, T:67.18-19.

<sup>67</sup> James McGiveron, 12/5/15, T:129.6-26; Richard Burton, 13/5/15, T:231.10.

<sup>68</sup> See paras 161-199.

<sup>69</sup> Richard Burton, 13/5/15, T:231.1-232.11.

<sup>70</sup> Ray McMillan, 12/5/15, T:109.9-22.

the contrary.<sup>71</sup> However, Richard Burton did give evidence of past practice to the contrary. It may not have been direct evidence, but it was evidence. Of course, the testimony of both James McGiveron and Richard Burton is under a cloud because of their self-interest. But that cannot be said of Ray McMillan. He too gave evidence of past practice to the contrary. Further, on this and other issues the force of the available circumstantial evidence tends to outweigh self-interested testimony to the contrary. The surrounding circumstances concerning James McGiveron's knowledge and discussion with Richard Burton about the Ford F350s and his position as Secretary make it more probable that he did ask Paul Aslan to type up the Car Resolution. Once it is accepted that either Richard Burton or James McGiveron procured Paul Aslan to type up the Car Resolution, and once it is accepted that James McGiveron was deeply involved in the genesis of the Redundancy Policy Resolution, it is likely that James McGiveron procured Paul Aslan to type up the Car Resolution as well.

92. In considering these submissions of senior counsel for James McGiveron, it is desirable to refer to the process by which the minutes of BCOM meetings were created. There is in evidence a red Collins book entitled 'MINUTES BOOK 4TH FEB 2008 ONWARDS'.<sup>72</sup> This book may be described as recording the minutes in their original form as distinct from their ultimate, wholly typed up, form. For the most part the minutes in the red book were in handwriting. But in a few places in a typical meeting the minutes referred to printed documents. There were four such instances for the 18 July 2012 meeting. The first

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<sup>71</sup> Submissions of James McGiveron, 19/6/15, para 16.

<sup>72</sup> Hodgson MFI-1, 11/5/15; Starr MFI-1, 11/5/15, p 8.

two of them concerned fees, and the printed documents were stuck in the red book with sticky tape. The concluding handwritten passages of the minutes for 18 July 2012 in the red book are as follows:<sup>73</sup>

The Sec gave a report re redundacys [sic] policy.

Motion to be pasted on Book. Moved R Dunn Sec P Aslan. Carried.

R Dunn thanked.

Motion re Sec & Car. To be pasted in book.

Moved R Dunn Sec. M Bebach.

The first of these two motions was the Redundancy Policy Resolution. The second was the Car Resolution.

93. A typed version of the Redundancy Policy Resolution is stuck in the red Collins book on the next page. A typed copy of the Car Resolution appears in the book at that page, but is loose and not stuck into the book. The typeface of the two documents is identical. That typeface is different from that of the two other documents stuck into the book in relation to that meeting, which concerned fees. The final form of the minutes of the 18 July 2012 meeting tended to differ from the form appearing in the red Collins book in points of detail. It was also typed in full. That is, the resolutions appearing in typed form in the red Collins book on separate sheets were inserted in the correct places as part of a coherent, integrated set of minutes. Since Paul Aslan was asked to type up both the Car Resolution and the Redundancy Policy Resolution, and since the Redundancy Policy Resolution was a topic

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<sup>73</sup> Hodgson MFI-1, 11/5/15.

specifically within the field of interest of James McGiveron, it is likely that he directed Paul Aslan to type up the Redundancy Policy Resolution, and also the Car Resolution. In addition, James McGiveron's general demeanour in testimony was unimpressive, and this is particularly true of the denial on which his counsel relied.

94. The submissions of counsel assisting continued by raising a further question. It is discussed in more detail below.<sup>74</sup> Did James McGiveron and Richard Burton not only expect at this time that a Ford F350 would be purchased and allocated to James McGiveron in his capacity as Special Projects Officer, but in addition expect that position to be made redundant? Counsel assisting submitted that they did expect the position to be made redundant. The correctness of that submission is not overly important in the present context. If that submission is sound, then James McGiveron's expected redundancy was also a matter that needed to be disclosed to the BCOM prior to any proposal to approve the Car Resolution. James McGiveron's position of conflict in one sense became more acute. The significance of his and Richard Burton's failure to draw the matter to the meeting's attention was, in one sense, more serious. But the position of Richard Burton and James McGiveron is not significantly improved if the submission is rejected. That is because the Car Resolution did not require that James McGiveron be made redundant before ownership of the car he was driving was conferred on him. All that it required was that his employment 'cease'. He could cause his employment to 'cease' without any assistance from anyone else. Thus, once he and Richard Burton had decided that a Ford F350 would be purchased and

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<sup>74</sup> See paras 238-250.

allocated to him as Special Projects Officer, and once the Car Resolution had been passed, it was in James McGiveron's power to obtain ownership of the Ford F350 at any time after its arrival. In fact the submission that James McGiveron and Richard Burton had an expectation that the former's position would be made redundant is correct, for reasons given below.<sup>75</sup>

## **24 July 2012**

95. Counsel assisting then turned to the events of 24 July 2012. That was the day when James McGiveron executed the contracts to buy the Ford F350s. It was also the day when he arranged for \$80,000 to be paid by way of deposit on the purchase prices. Counsel assisting submitted that even if James McGiveron's evidence that he did not form an intention to purchase the Ford F350s until after the meeting of 18 July 2012 were accepted, his position did not significantly improve. There remained acute conflicts between his self-interest and his duty to advance the interests of the TWU at the time when the purchase contracts were entered and the deposits were paid. He was, on behalf of the Branch, taking steps to purchase an expensive Ford F350 which, when it arrived, he would be able to claim as a gift pursuant to the Car Resolution. That made all the more significant his failure to make full disclosure to the BCOM at some stage after the 18 July 2012 meeting but prior to the time when the contract to buy that Ford F350 was made and the deposit paid. The BCOM, of course, would have had an opportunity to prevent these steps being taken had full disclosure been made.

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<sup>75</sup> See paras 161-250.

96. James McGiveron had the Car Resolution in mind when he entered into the contracts to purchase the Ford F350s on 24 July 2012. He said that he did not ‘want it to appear from the resolution of [18 July 2012] that [he] was buying these vehicles, or the vehicle, with respect to [that resolution] about the gifting of a vehicle’.<sup>76</sup> But, if James McGiveron was not in fact doing that, why did he not disclose to the BCOM members the fact that he was going to enter into the contracts and pay the deposits and explain that this had nothing to do with the resolution? Disclosure could have been made by summoning a special meeting or circulating appropriate correspondence. Either of these methods would have been the best way to dispel the appearance James McGiveron claims to have been concerned about. Indeed, why did he not disclose that he had entered the contracts and paid the deposits – a step which might have enabled the TWU to negotiate its way out of the contracts?

### **March 2013**

97. Both Richard Burton and James McGiveron took steps in March 2013 to ensure that the Ford F350 was registered in James McGiveron’s name. This was out of line with the invariable Branch practice for cars to be registered in the name of the Branch Secretary.<sup>77</sup> The invariable Branch practice was followed by Richard Burton when he came to purchase a new fleet of BT-50s.<sup>78</sup>

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<sup>76</sup> James McGiveron, 12/5/2015, T:136.43-137.3.

<sup>77</sup> Richard Burton, witness statement, 13/5/15, para 21; McGiveron MFI-1, 12/5/15, para 23.

<sup>78</sup> Burton MFI-2, 13/5/15.

98. Instead of following the invariable Branch practice, James McGiveron registered the Ford F350 in his own name, and Richard Burton executed a contract for the purchase of that Ford F350 in James McGiveron's name. Counsel assisting submitted that this suggests that James McGiveron and Richard Burton believed that James McGiveron would become redundant shortly. The point for present purposes, however, is that Richard Burton's conduct may have been in contravention of ss 285-287 of the FW(RO) Act. James McGiveron had ceased by this time to be an officer of the Branch.

### **May 2013**

99. On 30 May 2013, Richard Burton, at the same time he made James McGiveron redundant, informed him by letter that, as a result of the cessation of his employment, he would be granted ownership of the Ford F350.<sup>79</sup>

100. Counsel assisting submitted that James McGiveron's post was not truly redundant at this time and that Richard Burton did not have the power to determine that question. Below that submission is accepted.<sup>80</sup> It follows that the letters of 30 May 2013 were not sent at a time when it could be said James McGiveron's 'employment ceases' within the meaning of the Car Resolution. Richard Burton was not acting in a way justified by the Car Resolution. In purporting to grant James McGiveron ownership of the Ford F350, Richard Burton thus may have breached his duties under ss 285-287 of the FW(RO) Act.

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<sup>79</sup> Starr MFI-1, 11/5/15, p 210.

<sup>80</sup> See paras 220-259.



## **6 August 2013**

101. The minutes of the BCOM meeting of 6 August 2013 record the following resolution:<sup>81</sup>

That in accordance with the custom and practice of other Branches of the Transport Workers Union that the current Branch Secretary Jim McGiveron is granted personal ownership of the union motor vehicle that he is driving at the time his employment ceases with the Branch.

That the BCOM endorse the disposal on [sic] motor vehicle 1ECY 231.

102. With the exception of Richard Burton and Paul Aslan,<sup>82</sup> the members of the BCOM did not appreciate that they were endorsing the disposal of a Ford F350.<sup>83</sup> By failing to inform the BCOM at this meeting that the car the subject of the resolution was an Ford F350, Richard Burton may have contravened ss 285-287 of the FW(RO) Act.

### **G – RICHARD BURTON'S FORD F350**

103. Counsel assisting submitted that Richard Burton's conduct in relation to 'his' Ford F350, like his conduct in relation to James McGiveron's, was unsatisfactory in a number of respects. Counsel assisting raised the question whether Richard Burton attempted to conceal the purchase, either recklessly or dishonestly, from the Branch. He answered that question affirmatively. His submissions were as follows.

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<sup>81</sup> Starr MFI-1, 11/5/15, p 31.

<sup>82</sup> Paul Aslan, witness statement, 11/5/15, para 9.

<sup>83</sup> See footnote 33.

## **Failure to inform BCOM or Finance Committee**

104. Richard Burton failed at any point to notify the BCOM about the purchase of either Ford F350. He had numerous opportunities to do so. It was his duty to inform the BCOM not just because the rules required BCOM approval prior to the purchases, but because the cost of the Ford F350s was about three times the cost of the cars normally purchased by the Branch and because one of the vehicles had been earmarked for his use. The latter circumstance gave him a material personal interest in the purchase which required disclosure. His failure to notify the BCOM at any time may have been a breach of his fiduciary and statutory duties as an officer of the Branch.
105. Was this omission innocent? That possibility is diminished by a number of matters.
106. *First*, Richard Burton's explanation for it was unsatisfactory. He said that in the period prior to his becoming Secretary, it was not his job: 'It's got nothing to do with me'.<sup>84</sup> That is no explanation at all. His duties arose because he was an officer with a material personal interest in, and knowledge of, a proposed purchase that had not been disclosed to the BCOM. After he was appointed Acting Branch Secretary, Richard Burton's explanation was that he had no duty to tell the BCOM 'because it was a follow-up of what another Secretary had

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<sup>84</sup> Richard Burton, 13/5/15, T:276.1.

already done. It had been agreed on'.<sup>85</sup> That too, self-evidently, is no explanation at all.

107. *Secondly*, at a number of BCOM meetings resolutions were passed regarding the updating of the Branch car fleet. At the 9 October 2012 meeting, the 'BCOM [authorised] an assessment, in January 2013, of the union's fleet of vehicles with a view to updating and disposing of currently owned vehicles as deemed necessary by the Branch Secretary.'<sup>86</sup>
108. That would have been an obvious time to inform the meeting about the proposed purchase of the F350s – either to clarify that they were being purchased as part of this process, or to explain that they were not.
109. Richard Burton gave another report on the same process at the 4 December 2012 meeting but again failed to mention the Ford F350s.
110. At the 13 February 2013 BCOM meeting, the question of updating the fleet arose again. The BCOM approved a net increase in the fleet of vehicles operated by the Branch by two vehicles<sup>87</sup>. Again, this would have been an obvious time to raise the purchase of the Ford F350s. But Richard Burton chose not to. The effect of the purchase of the two vehicles was a net increase of four vehicles, two of which were of a vastly different type from the vehicles that had been sold. They were also apparently to be used for an entirely different purpose. It could not

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<sup>85</sup> Richard Burton, 13/5/15, T:277.37-39.

<sup>86</sup> Starr MFI-1, 11/5/15, p 16.

<sup>87</sup> Starr MFI-1, 11/5/15, p 23.

be said that the purchase of these vehicles was part of any ‘updating’<sup>88</sup> or ‘changeover’<sup>89</sup> of the fleet of vehicles operated by the Branch.

111. At the BCOM meeting on 23 April 2013, a resolution purportedly approving the purchase of the two Ford F350s was carried. The F350s were identified only by their number plates, as was the Branch practice. Richard Burton did not provide the BCOM with any information regarding these vehicles. That resolution was carried after Richard Burton provided a report recorded thus:<sup>90</sup> ‘The Secretary spoke about the branch fleet and that the last two vehicles purchased have now arrived.’
112. Richard Burton made similar comments regarding the vehicles at a Finance Committee meeting that occurred before the BCOM meeting on 23 April 2013.<sup>91</sup>
113. Richard Burton’s conduct at these two meetings was grossly misleading. The F350s were characterised as the ‘last’ vehicles purchased as a part of the process of updating the fleet when, in fact, they were no part of that process at all. Richard Burton must have known the BCOM members would have been led to think that the vehicles identified were Mazda BT-50s or similar, and that they cost no more than \$50,000. He must have known that the BCOM members would not have expected them to be \$150,000 vehicles.

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<sup>88</sup> Starr MFI-1, 11/5/15, p 16.

<sup>89</sup> Starr MFI-1, 11/5/15, p 19.

<sup>90</sup> Starr MFI-1, 11/5/15, p 28.

<sup>91</sup> Richard Burton, 13/5/15, T:288.34-289.4; Starr MFI-1, 11/5/15, p 88.

114. *Thirdly*, on 4 December 2012, whilst Richard Burton was Acting Branch Secretary, accounts that included a reference to an \$80,000 payment to Barbagallo were before the Finance Committee and the BCOM. Richard Burton did not draw this to the attention of the meeting. No questions were asked about the payment. There was, in addition, a discussion at this meeting about the fleet changeover. Richard Burton must have appreciated that no-one at the meeting realised that the \$80,000 payment was for Ford F350s and unrelated to the fleet changeover. His attempts to explain his conduct in oral evidence were unsatisfactory:<sup>92</sup>

Q. There was discussion at that meeting with at least Mr Starr and Mr Bebich saying, well, they had views about what kinds of cars ought to be bought, whether they should be Toyotas or Mazdas or whatever?

A. Mr Bebich did, yes.

Q. There was a Finance Committee meeting just before that at which the replacement of the fleet was also addressed?

A. There would have been, yes.

Q. By you?

A. Yes.

Q. You didn't tell either the Finance Committee or the BCOM that whatever they thought about Mazda BT-50s being the vehicle of choice, that you'd already decided to buy two Ford 350s?

A. No.

Q. Did you not think that the people who were the Branch Committee of Management, who were effectively responsible for caring for the Union members, would be interested to know that you had, as Secretary, decided to spend over \$300,000 on two cars?

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<sup>92</sup> Richard Burton, 13/5/2015, T:283:8-284:14.

- A. The Branch - the Finance Committee or Branch Committee of Management perused all these records. This is a contract that my predecessor or still the Secretary had entered into. This was in December. That was already done back in July.
- Q. However that may be --
- A. It has never been --
- Q. Were they not entitled to know?
- A. It has never been my responsibility to do that and the Secretary should have done that, not me.
- Q. But you were the Secretary?
- A. Acting Secretary in name only.
- Q. There was no other Secretary there. [James] McGiveron wasn't there?
- A. No, I understand that.
- Q. You were the person?
- A. I understand that. No.
- Q. Did you not think it was your duty to inform them?
- A. No. No, I did not.
- Q. Was it not the truth that you decided to conceal the purpose so that you could get one of the vehicles and [James] McGiveron get the other one?
- A. No.

115. *Fourthly*, there was a BCOM meeting on 26 March 2013, on the evening of the day Richard Burton applied to register one of the

F350s.<sup>93</sup> This would have been another opportune time to seek authority from the BCOM. But Richard Burton elected not to do so.

116. *Fifthly*, there was a Trustees' meeting and BCOM meeting on 23 April 2013. The accounts before that meeting omitted any mention of the payment of the balance of the purchase price of \$228,000 to Barbagallo on 2 April 2013.<sup>94</sup> This appears to have been a result of an innocent mistake by Debra Hodgson in her use of the accounting software system.<sup>95</sup> The payment of this money must have been fresh in Richard Burton's mind at this meeting. He must have known it was a highly significant matter for the Trustees to consider. Their failure to make any mention of it must have surprised him. Yet he made no mention of it. Richard Burton's explanation was that he failed to notice the absence at the time.<sup>96</sup> However, even if he did not notice the absence of the payment in the accounts, he must have noticed the failure of anyone at the meetings to comment on the amount paid. An amount of \$228,000, had it been there to be noticed, was too significant a sum not to have drawn comment. He denied thinking it strange that no-one referred to the matter.<sup>97</sup>

117. *Finally*, on 6 August 2013, the BCOM passed a resolution endorsing the transfer to James McGiveron of a car identified only by the number plate 1ECY 231.<sup>98</sup> The BCOM did not know at this time that that car

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<sup>93</sup> Starr MFI -1, 11/5/15, pp 24-26.

<sup>94</sup> Marius Van der Merwe, witness statement, 12/5/15, Annexure 7.

<sup>95</sup> Debra Hodgson, 11/5/15, T:51:17-44.

<sup>96</sup> Richard Burton, 13/5/15, T:214.15-219.6.

<sup>97</sup> Richard Burton, 13/5/15, T:215.4-7.

<sup>98</sup> Starr MFI-1, 11/5/15, p 31.

was a Ford F350. Although this was very late in the day, it was a final opportunity for Richard Burton to draw the purchase of the Ford F350 to the BCOM's attention. He did not take it.

118. Richard Burton's failure to inform the BCOM about the purchase of the Ford F350s cannot, in the circumstances described above, be described as mere oversight or mistake. He must have appreciated that the BCOM did not know about the purchase and decided to keep the members in a state of ignorance.

### **Registration of the Ford F350s**

119. Another matter that suggests Richard Burton deliberately tried to conceal the purchase of his Ford F350 is his decision to register it at his personal address.
120. Richard Burton signed an application form for the registration of one of the Ford F350s on 6 March 2013.<sup>99</sup> It is apparent from that application form that it originally contained details of the Branch's address and post office box but that these were crossed out and replaced with Richard Burton's own personal details. Richard Burton denied striking through the Branch address and replacing it with his address, but he said that he expected the application to be at his address anyway.<sup>100</sup> When asked whether he remembered at the time he affixed his signature what the form of the document was, he said: 'I was signing that the vehicle was to be registered in my name and I believed

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<sup>99</sup> Burton MFI-1, 13/5/15.

<sup>100</sup> Richard Burton, 13/5/15, T:187.21-31.



at my address'.<sup>101</sup> The striking through of the Branch address is initialled, twice, with the letters 'RB'. Richard Burton denied that these initials were his handwriting.<sup>102</sup>

121. Richard Burton initially attempted to explain the registration of the Ford F350 at his personal address on the basis that:<sup>103</sup>

I understood that's how the vehicles were registered that I'd bought. This was the first vehicle that I had received, apart from some Mazdas, and they were registered at my home address. I would give my driver's licence and those details were put down on the document.

122. Richard Burton was then asked about the registration of the Mazdas. He proceeded to give elaborate evidence about the reasons given by the dealership for not registering cars at the Branch's address.<sup>104</sup> That evidence was pure invention, like the evidence quoted above. After he gave it, he was shown the registration documents for the Mazdas.<sup>105</sup> They indicate that on 27 December 2012, he had registered a Mazda with the 'company name' of the Branch and included both his own personal address and the post office box of the Branch.<sup>106</sup> Following that, on nine occasions in January 2013, he had registered each vehicle

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<sup>101</sup> Richard Burton, 13/5/15, T:188.47-189.1

<sup>102</sup> Richard Burton, 13/5/15, T:187.33.46, 189.9-18.

<sup>103</sup> Richard Burton, 13/5/15, T:189.31-36.

<sup>104</sup> Richard Burton, 13/5/15, T:189:31-191:8, 192:24-38, 195:1-22, 287:39-288:14.

<sup>105</sup> Burton MFI-2, 13/5/15.

<sup>106</sup> Burton MFI-2, 13/5/15.

in his personal name, nominating the street address and the post office box of the Branch as the address.<sup>107</sup>

123. Richard Burton's untruthful evidence about the registration of the Mazdas renders his explanation for registering the Ford F350 at his address unacceptable. The only likely explanation is that he decided to register the Ford F350 at his home address in order to conceal the purchase from the Branch.

### **Personalised number plates**

124. A further indication that Richard Burton deliberately sought to conceal the purchase of his Ford F350 from the Branch relates to the number plates on the vehicle. Richard Burton had personalised number plates '55SB'. The number '55' referred to the year of his birth. 'SB' was an abbreviation for Shark Bay, where he owned a property.<sup>108</sup> At about the same time he took delivery of the vehicle, he arranged for the 55SB plates to be transferred from his personal Ford F250 vehicle to the Branch's Ford F350.<sup>109</sup>

125. Richard Burton denied that by placing personalised number plates on his Ford F350 he was exchanging one personal car for another.<sup>110</sup> His explanation for what he did was as follows:<sup>111</sup>

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<sup>107</sup> Burton MFI-2, 13/5/15.

<sup>108</sup> Richard Burton, 13/5/15, T:271:17-36.

<sup>109</sup> Richard Burton, 13/5/15, T:197:32-198:43; Burton MFI-3, 13/5/15.

<sup>110</sup> Richard Burton, 13/5/15, T:199:11-13.

<sup>111</sup> Richard Burton, 13/5/15, T:199:17-24.

The personal number plates were a gift to me from my family. I had my F250 for sale for some time. It was always my intention that if the car was sold, I would take those plates off. I had a buyer that was interested. I took those plates off prior. The F350 was garaged, it wasn't allotted to anybody, and I put those plates on it. It meant nothing to me except to keep the plates, otherwise I've got to hand those plates back in.

126. However Richard Burton had two other personal cars to which he could have transferred the plates. The only explanation he gave for not doing so was: 'because one's a sedan - it doesn't go out of the metro area'.<sup>112</sup> That, to say the least, is a discreditable explanation. The only available inference is that Richard Burton placed his personalised number plates on the vehicle as a matter of personal preference. The plates were signs and symbols that the vehicle was for all intents and purposes his vehicle. That had been his practice with his personally owned F250.

### **Richard Burton's use of the Ford F350**

127. There is a further aspect of Richard Burton's conduct suggestive of concealment. It concerns his actual use of the Ford F350. After it was purchased it was only ever driven by Richard Burton for non-Branch related business. He used it to travel about 10,000km.<sup>113</sup> Otherwise it was stored in a Branch-owned storage shed in a Perth suburb.<sup>114</sup>
128. According to Richard Burton, the Ford F350 was bought for the use of organisers. It was to be based in the north-west and used to tow a

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<sup>112</sup> Richard Burton, 13/5/15, T:272:28-37.

<sup>113</sup> Richard Burton, 13/5/15, T:267.47-268.29.

<sup>114</sup> Richard Burton, 13/5/15, T:245.42-246.6; 248.45-249.3.

caravan. It never did these things.<sup>115</sup> Michael Connolly, an organiser in the North-West, never had use of the Ford F350. He was never told about it.<sup>116</sup> He used a Mazda BT-50.<sup>117</sup> Richard Burton said that the vehicle was never used for that purpose because ‘circumstances changed’ and the purchase of a property in Karratha meant that an organiser no longer needed the vehicle.<sup>118</sup> He gave the following evidence:<sup>119</sup>

Q. What was wrong with Michael Connolly having an F350 for organising in that region?

A. It would have been a waste of a vehicle.

Q. You left it in a storage facility, didn't you?

A. Yes.

Q. Wasn't that a waste of a vehicle?

A. Yes.

129. If, as Richard Burton asserted, circumstances had changed, and the purchase of the property in Karratha meant that the car was no longer necessary, there is no good reason why Richard Burton proceeded to enter into a further contract for the purchase of the Ford F350 on 26 March 2013, or, alternatively, why he failed to bring the matter to the attention of the BCOM and seek to have the car sold. The more likely

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<sup>115</sup> Richard Burton, 13/5/15, T:273.37-274.5.

<sup>116</sup> Richard Burton, 13/5/15, T:274.7-19.

<sup>117</sup> Michael Connolly, 12/5/15, T:111.37-112.9.

<sup>118</sup> Richard Burton, 13/5/15, T:244.5-245.9.

<sup>119</sup> Richard Burton, 13/5/15, T:245:38-46.

explanation is that the Ford F350 was never intended by him to be used for Branch purposes.

### **What Richard Burton told others about the Ford F350**

130. On different occasions Richard Burton suggested to Kevin Starr, Michael Connolly and Glen Barron that the Ford F350 belonged to him personally.<sup>120</sup> There is no reason to reject this evidence. It was not challenged. And, in any event, Richard Burton did not, in substance, deny having conversations in which he told these people that the Ford F350 was ‘his car’. Instead he claimed that he meant to indicate that the car was the one allocated to him to drive in his capacity as an officer of the Branch.<sup>121</sup> The explanation is unconvincing. It is especially unconvincing in circumstances where the Ford F350 had Richard Burton’s personalised number plates on it. In addition, an intention on Richard Burton’s part to convey to various people that the car was his in this way is consistent with the rest of his conduct in connection with his Ford F350. Richard Burton did deny having a similar conversation with Ray McMillan at Shark Bay.<sup>122</sup> However, there is no reason to reject the unchallenged account of the conversation described by Ray McMillan in his statement.<sup>123</sup> Richard Burton’s conduct, as described by Ray McMillan, is consistent with his conduct in relation to Kevin Starr, Michael Connolly and Glen Barron. The four witnesses corroborate each other.

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<sup>120</sup> Kevin Starr, witness statement, 11/5/15, para 49; Glen Barron, witness statement, 11/5/15, paras 7, 11; Michael Connolly, witness statement, 11/5/15, paras 8-11.

<sup>121</sup> Richard Burton, 13/5/15, T:199.36-200.15, 202.10-203.10.

<sup>122</sup> Richard Burton, 13/5/15, T:200.17-44.

<sup>123</sup> Ray McMillan, witness statement, 12/5/15, para 13.

131. Richard Burton also misrepresented the position to the auditors during the audit of the 2012 accounts. When asked about the \$80,000 deposit, Richard Burton told Marius Van der Merwe on 26 March 2013 that the purchase of the F350s was ‘part of the ... replacement of the fleet’.<sup>124</sup> This was a false statement. It can only have been designed to prevent the auditors investigating the purchase further. It is apparent from Marius Van der Merwe’s evidence, however, that this misleading statement did not have any significant operative effect. Marius Van der Merwe made a mental note to follow up the completion of purchase in the 2013 audit. When he did so, he was dissatisfied. Ultimately he required a statutory declaration to be executed.<sup>125</sup> This in turn led to Ray McMillan discovering the purchase.<sup>126</sup>
132. Richard Burton initially said he had no recollection of the conversation with the auditor. But then he said that the conversation took place at the beginning of 2013 and was considering expenditure from the previous financial year. He emphasised that that was a time when he was not the Secretary.<sup>127</sup> He later denied that a conversation in those terms took place. However there is no reason to reject the evidence of Marius Van der Merwe, who was not required for cross-examination. The conduct of Richard Burton as described by Marius Van der Merwe is consistent with his other conduct.<sup>128</sup>

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<sup>124</sup> Marius Van der Merwe, witness statement, 12/5/15, paras 26-27.

<sup>125</sup> Marius Van der Merwe, witness statement 12/5/15, paras 29-46.

<sup>126</sup> Ray McMillan, witness statement, 12/5/15, para 15, RM-1 [3] – [4].

<sup>127</sup> Richard Burton, 13/5/15, T:203.46-204.41.

<sup>128</sup> Richard Burton, 13/5/15, T:288.16-32.

### **Other possible explanations for the above conduct**

133. The nature and extent of the above conduct strongly suggests that Richard Burton deliberately attempted to conceal the purchase of the Ford F350 from the Branch, with a view to treating it as his own. But are there any circumstances that point in another direction?
134. One such circumstance is that Richard Burton disclosed the purchase to Debra Hodgson when he asked her to make the payment of \$228,000. There is no indication in the evidence that Debra Hodgson's error in leaving the \$228,000 payment out of the accounts to be presented to the 23 April 2013 meetings was brought about by Richard Burton. Further, he enlisted Debra Hodgson's assistance in transferring personalised number plates to the Ford F350.<sup>129</sup>
135. It is not easy to assess the significance of the above conduct. In one sense Richard Burton had little choice but to inform Debra Hodgson of the \$228,000 payment. If he had not done so, she would inevitably have noticed the withdrawal of the funds when preparing the accounts for the next meeting. What would Richard Burton have done if Debra Hodgson had not made a mistake and he had been asked by the Finance Committee or BCOM to explain the \$228,000 payment? It is probable that he would have attempted to explain away the purchase as part of the updating of the Branch fleet. That is exactly what he in fact did at the same meeting by describing the purchase of the Ford F350s by reference to their number plates and without reference to their make or cost.

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<sup>129</sup> Debra Hodgson, 11/5/15, T:54.20-55.17.

136. The above conduct does not, however, counsel assisting submitted, sufficiently militate against the other aspects of Richard Burton's conduct identified above.
137. It is more than usually important to be cautious about the submissions of counsel assisting in relation to issues affecting only Richard Burton summarised in the preceding paragraphs.<sup>130</sup> That is because Richard Burton filed no submissions. It is also because it was not in the interests of James McGiveron and the TWU to refute the submissions of counsel assisting against Richard Burton. Indeed, the TWU positively supported many of those submissions.<sup>131</sup> However, the submissions of counsel assisting are correct. Richard Burton deliberately and dishonestly concealed the purchase of his Ford F350 from the BCOM. In so doing he may have breached his fiduciary and statutory duties as an officer of the Branch.

## **H – CONCLUSIONS REGARDING CONDUCT OF JAMES MCGIVERON AND RICHARD BURTON IN RELATION TO THE FORD F350S**

138. On 18 July 2012, James McGiveron may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by proposing and voting on the Car Resolution.<sup>132</sup>

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<sup>130</sup> See paras 101-136.

<sup>131</sup> Submissions of the TWU, 17/6/15, paras 7-15.

<sup>132</sup> See paras 68-94.



139. On 24 July 2012, James McGiveron may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to entering into contracts for the purchase of the Ford F350s and instructing Debra Hodgson to make a payment of \$80,000 by way of deposit on those cars.<sup>133</sup>
140. Richard Burton may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and his statutory duties under ss 285-287 of the FW(RO) Act by failing to disclose to the BCOM the proposed purchase of the F350s and its purpose.<sup>134</sup>
141. Richard Burton may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to entering into contracts for the purchase of the Ford F350s and instructing Debra Hodgson to make a payment of \$228,000 to Barbagallo to complete the purchase of the Ford F350s.<sup>135</sup>

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<sup>133</sup> See paras 95-96.

<sup>134</sup> See paras 103-137.

<sup>135</sup> See paras 103-137.

142. Richard Burton may have breached the National Rules and Branch Rules, may have breached his fiduciary duty not to act in a position of conflict between his duty to advance James McGiveron's interests and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and may have contravened ss 285-287 of the FW(RO) Act by failing to seek BCOM approval prior to notifying James McGiveron that he had been granted ownership of a Ford F350 in May 2013.<sup>136</sup>

143. Richard Burton dishonestly concealed the purchase of his Ford F350 from the BCOM. In so doing he may have breached his fiduciary duty not to act in a position of conflict between his self-interest and his duty to act in good faith and for proper purposes in advancing the interests of the Branch, and his statutory duties under ss 286 and 287 of the FW(RO) Act.<sup>137</sup>

## **I – THE CAR ALLOWANCES PAID TO RICHARD BURTON AND JAMES MCGIVERON**

144. At the time of their employment with the Branch, Richard Burton and James McGiveron each received a car allowance of \$225 per week.<sup>138</sup> By 2012, they were the only persons in the Branch receiving that

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<sup>136</sup> See paras 103-137.

<sup>137</sup> See paras 103-137.

<sup>138</sup> Hodgson MFI-4, 11/5/15; Burton MFI-5, 13/5/15.

allowance.<sup>139</sup> Counsel assisting put the following submissions on the subject of these car allowances.

145. Car allowances appear to have been paid to employees and/or officials of the Branch from around 2000. At the BCOM meeting of 19 February 2004, the BCOM noted that five Branch employees were receiving motor vehicle allowances: ‘to cover costs associated with the provision of their own motor vehicles’.<sup>140</sup> It was resolved that all employees currently in receipt of the motor vehicle allowance could claim reimbursement for ‘vehicle maintenance, replacement tyres and any repairs that are required due to the nature of *work* being performed at the time’ (emphasis added).<sup>141</sup>
146. The above resolution suggests that the cars for which allowance was claimed needed to be involved in Branch ‘work’. It also suggests that the purpose of the policy was to avoid the Branch having to purchase and maintain fleet vehicles.
147. There appears never to have been any written policy regarding the allowance. Was there an unwritten policy? Different versions were given in evidence. James McGiveron’s position was that there was a category of employees (which by 2012 comprised only him and Richard Burton) who were entitled to a car allowance if the employees in question used their own cars for work purposes at least some of the

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<sup>139</sup> James McGiveron, witness statement, 12/5/15, para 23; McGiveron MFI-1, 12/5/15, para 26.

<sup>140</sup> Starr MFI-1, 11/5/15, p 3.

<sup>141</sup> Starr MFI-1, 11/5/15, p 3.

time, even if they also used Branch cars for work purposes.<sup>142</sup> As James McGiveron accepted in oral evidence, this policy allowed for the payment of the car allowance even if an employee predominantly used Union cars and not personal cars for work purposes.<sup>143</sup>

148. In his statement, Richard Burton denied that any car allowance policy existed. In his view, he was given a car allowance as part of his remuneration package and received it regardless of the extent to which he used his car for work purposes.<sup>144</sup> In oral evidence, Richard Burton gave a different version of the policy, and said that the allowance was paid to him on the basis that he used his own car to perform union work.<sup>145</sup>

149. Richard Burton's position in oral evidence was similar to the evidence of Tim Dawson. Tim Dawson stated that the policy that existed required officials or employees to choose between using their own personal vehicles and receiving the allowance, or using Branch owned vehicles, including for incidental personal use.<sup>146</sup>

150. The Statement of Claim filed by the TWU against Richard Burton in the Federal Court alleged that Richard Burton was not entitled to a car allowance. It does not however make a choice between two possibilities. One is that, although there was a car allowance policy, Richard Burton fell outside it. The other is that no person was entitled

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<sup>142</sup> James McGiveron, witness statement, 12/5/15, para 23 (as amended), James McGiveron, 12/5/15, T:174.30-175.11.

<sup>143</sup> James McGiveron, 12/5/15, T:174.30-175:11.

<sup>144</sup> Richard Burton, witness statement, 13/5/15, paras 34-35.

<sup>145</sup> Richard Burton, 13/5/15, T:267.14-37.

<sup>146</sup> Tim Dawson, witness statement, 11/5/15, para 20.

to a car allowance.<sup>147</sup> The Branch has not commenced proceedings against James McGiveron to recover the payment of the car allowance paid to him. The explanation for that is not apparent, at least so far as the position after the arrival of the F350s is concerned.

151. Because of these divergent accounts of the car allowance policy, it is impossible to determine whether James McGiveron or Richard Burton had an entitlement to the car allowance before receiving the Ford F350 motor vehicles.

152. James McGiveron conceded that the allowance should not have continued to be paid to him after he received his Ford F350,<sup>148</sup> although on the version of the policy in Richard Burton's statement that concession was wrongly made. Richard Burton did not accept that he had no entitlement to the allowance after he received his Ford F350.<sup>149</sup> Because of the conflicting accounts given as to the nature of the policy, the evidence does not permit any firm conclusion to be drawn as to whether Richard Burton was correct to take that position.

153. Counsel assisting concluded that this state of affairs was highly unsatisfactory. Car allowances had been paid for approximately 14 years (until Richard Burton left the Branch in 2014). A significant amount of members' money was paid out under undocumented arrangements about which there was no clear understanding or consensus. The lack of any written policy (and of any written contracts of employment) was not in the best financial interests of the Branch.

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<sup>147</sup> Starr MFI-1, 11/5/15, pp 274-275, paras 40-43.

<sup>148</sup> James McGiveron, 12/5/15, T:174.20-24.

<sup>149</sup> Richard Burton, 13/5/15, T:267.39-42.

154. Neither James McGiveron nor the TWU put any submissions to the contrary of those put by counsel assisting. Counsel assisting is plainly correct.

#### **J – THE REDUNDANCY PAYMENT MADE TO JAMES MCGIVERON**

155. On 11 July 2013 James McGiveron received a payment of \$373,191.23 net (\$477,294 gross). The payment was purportedly made pursuant to the Redundancy Policy Resolution at the meeting of 18 July 2012. In that meeting James McGiveron announced his intention to step into the job that, ultimately, was made redundant. Were the events that led to this payment merely, from James McGiveron’s point of view, happy coincidences? Was the payment just one more example of how life in his last year at the TWU always turned out to his financial advantage? Or was the payment ultimately received by James McGiveron the result of some breach of duty on his and Richard Burton’s part?

156. Counsel assisting examined those issues by considering the events that gave rise to the redundancy payment separately, in chronological order. He rightly observed that the significance of any one event cannot be appreciated in isolation, and that it is necessary to have regard to the ‘united force’<sup>150</sup> of the evidence.

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<sup>150</sup> *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279. Counsel assisting’s reference to this case can be reinforced: *R v Hillier* (2007) 228 CLR 618.

## **The Redundancy Policy**

157. The minutes of the 18 July 2012 BCOM meeting record that James McGiveron gave a report to the BCOM regarding a redundancy policy.<sup>151</sup> It would appear that this policy was one formulated prior to the meeting for the purpose of seeking the BCOM's approval. It was something distinct from any existing policy. It is the recollection of most of the BCOM members that prior to 18 July 2012, there had been no redundancy policy at all.<sup>152</sup>
158. What did James McGiveron report to the BCOM on the subject of redundancy? The minutes of 18 July 2012 do not make this clear. Ray McMillan recalled discussion that the policy proposed to the BCOM was a 'standard policy'.<sup>153</sup> Mark Bebich also described the policy as a 'standard redundancy policy'.<sup>154</sup> Paul Aslan said that James McGiveron advised the meeting that a 'review' had been conducted and the proposed policy was formulated based on that review.<sup>155</sup> James McGiveron said in his statement that the BCOM 'felt that' the redundancy policy 'should reflect an industry standard redundancy policy'.<sup>156</sup>

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<sup>151</sup> Starr MFI-1, 11/5/15, p 13.

<sup>152</sup> Richard Burton, 13/5/15, T:233.43-234.20; Paul Aslan, witness statement, 11/5/15, para 14; Tim Dawson, witness statement, 11/5/15, para 14; James McGiveron, witness statement, 12/5/15, para 13.

<sup>153</sup> Ray McMillan, witness statement, 12/5/15, para 18.

<sup>154</sup> Mark Bebich, witness statement, 11/5/15, para 14.

<sup>155</sup> Paul Aslan, witness statement, 11/5/15, para 14.

<sup>156</sup> James McGiveron, witness statement, 12/5/15, para 14.

159. Following the report from James McGiveron, the BCOM passed the Redundancy Policy Resolution. Its terms were set out in a document prepared before the meeting by Paul Aslan at the direction of James McGiveron in circumstances described further below.<sup>157</sup> Following the meeting the document prepared by Paul Aslan was stuck into the minute book in the manner described above.<sup>158</sup> Thus, James McGiveron's proposal was adopted verbatim by the BCOM.

160. The terms of the policy approved by the BCOM were as follows (the Redundancy Policy):<sup>159</sup>

1. The redundant employee will be paid three weeks pay, inclusive of allowances, for each year of continuous service, calculated to completed half years.
2. Redundant employees will receive a payment equal to 50% of their accumulated unused sick leave on termination, taxed at the appropriate rate.
3. Long Service will be paid on a pro-rata basis for completed years of service where an employee has completed at least 5 years' service.

The notice to be provided to redundant employees will be 4 weeks' notice (plus one extra week if the employee is over 45 years of age). Payment in lieu at the discretion of the Branch Secretary'.

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<sup>157</sup> See paras 161-199.

<sup>158</sup> Hodgson MFI-1, 11/5/15; Starr MFI-1, 11/5/15, p 8. See paras 92-93.

<sup>159</sup> Starr MFI-1, 11/5/15, p 13.



## **A need for a Redundancy Policy?**

161. Counsel assisting advanced the following submissions. As at 18 July 2012, there was no need for the Branch to introduce a redundancy policy. Certainly there was not a need for a redundancy policy which was more pressing than the need for a policy covering other entitlements for persons working at the Branch. The following matters support those conclusions.

- (a) At this time there was no proposal to make anyone redundant.<sup>160</sup>
- (b) Prior to 18 July 2012, according to Debra Hodgson, only one person had previously been made redundant.<sup>161</sup> At that time Tim Dawson was unaware of any previous redundancies in the Branch's history.<sup>162</sup>
- (c) A redundancy policy was unlikely to have any practical application outside clerical and administrative staff.<sup>163</sup> Most of the important work done at the Branch was done by elected officials. The only elected officials whose positions could be made redundant (without a change in the rules) were organisers. An organiser would only be made redundant if the Branch's finances were poor and there was no work for

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<sup>160</sup> James McGiveron, 12/5/15, T:144:3-8.

<sup>161</sup> Debra Hodgson, 11/5/15, T:59.21-46.

<sup>162</sup> Tim Dawson, 11/5/15, T:90.23-30.

<sup>163</sup> Richard Burton, 13/5/15, T:240.21-34.

the organiser.<sup>164</sup> There was no suggestion that that situation was thought likely to occur at this time.

- (d) Employees of the Branch already had entitlements in the event of a redundancy. In particular, the Branch had a severance policy that would apply upon redundancy for employees of greater than 10 years' standing. The entitlement was two weeks' pay for every completed year of employment.<sup>165</sup> Further, the *Fair Work Act 2009* (Cth) (**FW Act**) provided a minimum standard for redundancy pay that applied to all employees (in certain circumstances).<sup>166</sup> Relevantly, it provided for the payment of up to 16 weeks' ordinary salary. It is possible that the redundancy provisions of the '*Transport Workers' Union Consolidated Salaries Determination 2006*',<sup>167</sup> which applied at least at some point in time to Federal Office employees, may also have covered employees of the Branch. Clause 6 conferred an entitlement to three weeks' per completed year up to a cap of 52 weeks. That Salaries Determination was provided to the Branch's auditors as part of the 2012 audit. Thus it would appear to have been used, at least, for determining salaries of Branch employees.<sup>168</sup>

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<sup>164</sup> Richard Burton, 13/5/15, T:239.31-34.

<sup>165</sup> Starr MFI-1, 11/5/15, p 5; James McGiveron, 12/5/15, T:145.32-146.10.

<sup>166</sup> Sections 61, 119-123.

<sup>167</sup> Starr MFI-1, 11/5/15, pp 133-143.

<sup>168</sup> Debra Hodgson, 11/5/15, T:57.13-58.37.

(e) There were at this time no written policies about employment (other than the severance policy) in existence, such as parental leave policies, and no written contracts of employment.<sup>169</sup>

162. In his statement, James McGiveron chose not to explain whether or why there was a need for a redundancy policy. In oral evidence, he gave this explanation:<sup>170</sup>

Well, we didn't have any policies on just about anything. Fair Works, or whatever it was called at the time, we were entering into a period where we had to have a policy for anything. This was a policy that I believed was for the benefit and security of the employees of the Branch.

163. James McGiveron later in his oral evidence said that in July 2012 '[w]e had a ... pile of policies from other branches that were being looked at for implementation. In the time frame, I believe that had to be done by June of 2013'.<sup>171</sup>

164. These explanations are unsatisfactory.

165. To the extent that James McGiveron was suggesting that it was a requirement of the Fair Work Commission or the FW(RO) Act that the Branch have a redundancy policy, that was not the case. The National Employment Standards in Part 2.2 of the FW(RO) Act made provision for minimum redundancy entitlements that applied in the absence of more favourable entitlements. The Branch was obliged to comply with

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<sup>169</sup> James McGiveron, 12/5/15, T:144.10-28.

<sup>170</sup> James McGiveron, 12/5/15, T:144.31-36.

<sup>171</sup> James McGiveron, 12/5/15, T:144.46-145.2.

those standards, but did not need to have a policy. No other witness suggested that the Fair Work Commission required the Branch to have any kind of employment policy.

166. To the extent that James McGiveron was suggesting that he formulated the Redundancy Policy because the Branch required written policies in general, his evidence raises more questions than it answers. If he perceived this general need, why did he only formulate a policy regarding redundancy? Any need for a policy about redundancy must have been one which was the least pressing at the time: compare, for example, the need for written contracts of employment or for a written car allowance policy. As indicated above, there were no redundancies under contemplation, there were in any event instruments that conferred entitlements on a redundancy and, as a practical matter, the question of redundancy could only arise in relation to clerical and administrative staff.

167. The explanation proffered in oral evidence by James McGiveron does not explain why he chose to formulate and propose the Redundancy Policy and not any other policy. And it does not explain why he chose to do so at that time. One inference available is that he did so because he was at this time about to move to a position that could be made redundant, and a new policy about redundancy was likely to confer a significant benefit on him.

## **The formulation of the Redundancy Policy**

168. The origins of James McGiveron's witness statement lay in an invitation by the Commission to give a statement on various topics. One was the formulation of the Redundancy Policy.<sup>172</sup> He chose to address that topic in the following way. First, he said: 'Prior to 2012, the Union did not have a formal redundancy policy.' Then he said: 'The Union's BCOM felt that the Union should implement a redundancy policy for the employees of the Union, and that that redundancy policy should reflect an industry standard policy.'<sup>173</sup>
169. One might infer from this evidence that James McGiveron had no role in crafting the terms of the Redundancy Policy, and that it sprang from BCOM, or unnamed members of BCOM, or at least some source other than him. However it is plain that that was not the position. Paul Aslan's evidence was that prior to the meeting he was asked to prepare a motion in regard to a redundancy policy that he understood James McGiveron and Richard Burton had decided upon after a review which they had conducted before the meeting of 18 July 2012.<sup>174</sup> He identified that motion as the motion that appears on p 9 of the Annexures to Kevin Starr's statement.<sup>175</sup> It is identical with the typed document attached to the handwritten version of the minutes.<sup>176</sup> He could not recall whether it was Richard Burton or James McGiveron,

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<sup>172</sup> McGiveron MFI-7, 13/5/15.

<sup>173</sup> James McGiveron, witness statement, 12/5/15, paras 13-14.

<sup>174</sup> Paul Aslan, 11/5/15, T:1-19.

<sup>175</sup> Paul Aslan, 11/5/15, T:68.7-9.

<sup>176</sup> Hodgson MFI-1, 11/5/15.

or both, who asked him to type up the motion.<sup>177</sup> Richard Burton credibly denied having anything to do with asking Paul Aslan to type up the motion.<sup>178</sup>

170. James McGiveron's oral evidence on this topic was unsatisfactory. He initially claimed that Paul Aslan typed up the resolution because he gave Paul Aslan the National Foods EBA<sup>179</sup> and left it to him to formulate a policy based on the redundancy provisions in that agreement.<sup>180</sup> 'I asked him to look at the document and to type up a resolution taking into account the conditions of that particular agreement.'<sup>181</sup> He said that he did not tell Paul Aslan to type out the redundancy clause verbatim, but 'to have a look at the redundancy clause, put something together that we could consider.'<sup>182</sup> This was an attempt to suggest that Paul Aslan had some responsibility for crafting the terms of the Redundancy Policy, as distinct from just typing out something that James McGiveron had asked him to. James McGiveron could give no satisfactory explanation for why this did not appear in this statement. He said only that it 'was a brief statement'.<sup>183</sup> However James McGiveron later accepted that he did not leave it to Paul Aslan to work out what the Redundancy Policy should be, but instead that he told Paul Aslan what it should be.<sup>184</sup> Still later in his evidence he

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<sup>177</sup> Paul Aslan, 11/5/15, T:67.18-19.

<sup>178</sup> Richard Burton, 13/5/15, T:231.4-31.

<sup>179</sup> Dawson MFI-1, 11/5/15.

<sup>180</sup> James McGiveron, 12/5/15, T:120.33-121.12, 121.39-42.

<sup>181</sup> James McGiveron, 12/5/15, T:120.41-43.

<sup>182</sup> James McGiveron, 12/5/15, T:121.9-12.

<sup>183</sup> James McGiveron, 12/5/15, T:121.44-122.29.

<sup>184</sup> James McGiveron, 12/5/15, T:122.45-123.1.

changed tack again and appeared to suggest, for the first time, that he got the Redundancy Policy from the Branch's 'industrial section'.<sup>185</sup>

171. The most likely conclusion on the evidence is that James McGiveron crafted the policy himself, and that he was unwilling to be frank about that.
172. How did James McGiveron arrive at the terms of the Redundancy Policy?
173. James McGiveron claimed to have looked at the terms of a National Foods EBA<sup>186</sup> prior to the 18 July 2012 meeting.<sup>187</sup> His initial explanation was that he gave Paul Aslan the National Foods EBA and that he did so '[b]ecause the conditions were what I believed to be good conditions after the Union had negotiated and should be applied to staff at the Branch'.<sup>188</sup> Later in his evidence, however, his explanation for giving Paul Aslan the National Foods EBA was: 'this was the one that I decided to give [Paul] Aslan at that time to go through so if we ever had any criticism of the redundancy policy, we could point out something that was far greater'.<sup>189</sup> Thus, on this version, the National Foods EBA was merely a justification for the generous terms of the Redundancy Policy.

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<sup>185</sup> James McGiveron, 12/5/15, T:128.34-42.

<sup>186</sup> Dawson MFI-1, 11/5/15. It was negotiated in 2007 with a nominal expiry date of 2010, but its redundancy provisions were similar to those of its successor. See submissions of James McGiveron, 19/6/15, para 25.

<sup>187</sup> James McGiveron, 12/5/15, T:123.17-19.

<sup>188</sup> James McGiveron, 12/5/15, T:121.15-17.

<sup>189</sup> James McGiveron, 12/5/15, T:124.1-4.

174. The latter explanation is more likely. A comparison of the redundancy provisions of the National Foods EBA and the Redundancy Policy shows more differences than similarities. In particular:

- (a) the National Foods EBA provides for the payment of 4 weeks per year capped at 104 weeks whilst the Redundancy Policy provides for the payment of 3 weeks per year without any cap;
- (b) the National Foods EBA provides for an additional cap in that payments are limited to the number of weeks up until normal retirement age but the Redundancy Policy contains no such cap;
- (c) the National Foods EBA does not provide for the payment of allowances in addition to normal pay, whilst the Redundancy Policy includes allowances;
- (d) the National Foods EBA contains a provision entitling a redundant employee to 'Outplacement and financial support' to the value of \$1,500 whilst the Redundancy Policy contains no such term.

The only similarities between the two policies are the inclusion of entitlements to long service leave and sick leave (see cl 39(g)(v), (vi) and compare clauses (2) and (3)).

175. James McGiveron could not explain why, in light of some of the above differences, he thought it appropriate to provide the document to Paul



Aslan as a model for the Redundancy Policy. He was asked about the difference between 4 weeks per year capped at 104 weeks and 3 weeks per year uncapped. He said he thought 4 weeks per year was ‘a bit rich’ on the basis that ‘I was Branch Secretary at the time. I believed that four weeks was not a norm that applied to members in general in the workplace’. When asked why if that was so he thought it appropriate to give to Paul Aslan, he gave the explanation already quoted: ‘Because this was the one that I decided to give to [Paul] Aslan at that time to go through so if we ever had any criticism of a redundancy policy, we could point out something that was far greater’.<sup>190</sup>

176. James McGiveron was then asked about the cap in the National Foods EBA in relation to normal retirement age, and why he did not ask Paul Aslan to include it. He answered: ‘Well, with respect to [the cap] that is against the law. There is no legal retirement age, I can say, for Western Australia’.<sup>191</sup> He was then asked why, if it was against the law, he gave it to Paul Aslan as a basis for formulating a redundancy policy. He answered: ‘Because this is the one I chose to give [Paul] Aslan’.<sup>192</sup>

177. There are a number of observations to be made about James McGiveron’s evidence regarding the National Foods EBA.

178. *First*, James McGiveron offered no satisfactory explanation for how the terms of the National Foods EBA were useful as a model for

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<sup>190</sup> James McGiveron, 12/5/15, T:123.15-124.4.

<sup>191</sup> James McGiveron, 12/5/15, T:124.28-30.

<sup>192</sup> James McGiveron, 12/5/15, T:124.32-35.

determining the terms of the Redundancy Policy. They were not adopted verbatim. If, to be included in the Redundancy Policy, the terms of the National Foods EBA had to be changed in so many significant ways, why use them at all?

179. *Secondly*, it is difficult to see why, in any event, it could have been appropriate simply to pluck out a redundancy provision from an EBA and apply it to the Branch. The terms of employment in an EBA are negotiated together, in light of the nature of employment in question and the needs of the employer and employees. No doubt an employer, in deciding whether to agree to a redundancy clause of the nature of the one contained in the National Foods EBA, would give careful consideration to its potential exposure. An employer with few long standing employees might have less qualms about agreeing to a generous redundancy clause than one with many long standing employees. Other considerations would no doubt be relevant. What was appropriate from the point of view of one employment relationship may not be appropriate for another. James McGiveron did not explain why the employment relationship for National Foods was analogous to the employment relationship for the Branch.
180. *Thirdly*, James McGiveron appeared only to have been concerned with provisions that were generous so far as employees are concerned. In formulating the Redundancy Policy, he ought to have been acting in the best interests of the Branch and thus ought to have been concerned, in addition, to identify and consider the merits of provisions that were generous so far as the employer was concerned.

181. *Fourthly*, the National Foods EBA required the payment of 4 weeks per annum up to 104 weeks, but prevented payment for more years than those remaining until the employee's normal retirement age. The cap, if included in the Redundancy Policy, thus would have imposed a very significant limit on James McGiveron's entitlements. Although James McGiveron said that there was no legal retirement age in Western Australia,<sup>193</sup> rule 17 of the Branch rules provided that a person over 65 might not nominate for a fully paid position at the Branch and a person over 68 might not occupy such a position. James McGiveron said in oral evidence that this cap in relation to retirement age was 'against the law'.<sup>194</sup> It is hard to conceive that he could have believed this in July 2012, and he did not in terms say so.<sup>195</sup> The EBA, after all, had been negotiated by Tim Dawson and presumably approved by James McGiveron. In addition, the cap in relation to retirement age mirrored one contained in the Award applying to administrative and clerical employees of the Branch.<sup>196</sup> In claiming that the cap was illegal, James McGiveron appears to have taken his cue from his counsel's reference, during the examination of Tim Dawson, to a 2014 decision of Buchanan J that a cap of this kind in a different EBA was of no effect as a result of being discriminatory.<sup>197</sup> The applicability of that decision to clause 39(g)(iii) of the National Foods EBA is not

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<sup>193</sup> James McGiveron, 12/5/15, T:124.29-30.

<sup>194</sup> James McGiveron, 12/5/15, T:124.28.

<sup>195</sup> James McGiveron, 12/5/15, T:124.13-35.

<sup>196</sup> See Starr MFI-1, 11/5/15, p 176 cl 29(3)(c).

<sup>197</sup> *Centennial Northern Mining Services Pty Ltd v CFMEU (No 2)* [2015] FCA 136 at [52].

straightforward. But it is not necessary to determine the question here.<sup>198</sup>

182. As at July 2012 there were enterprise agreements which the Branch had recently negotiated, and others which were being negotiated. One might think that, if the provisions of EBAs were to be used as a touchstone for redundancy policy, recourse would have been had to these EBAs. That is particularly so if, as James McGiveron claimed in his statement, it was thought that the policy should reflect ‘an industry standard’.<sup>199</sup>

183. James McGiveron, however, did not claim to have embarked on such a process. It is apparent from some of the EBAs executed by or on behalf of the Branch at around this time that their redundancy provisions are significantly less favourable (for persons in James McGiveron’s position) than the terms of the Redundancy Policy. In particular:

(a) On 18 November 2011, James McGiveron signed a single Enterprise Agreement applicable to employees of Centrel Pty Ltd.<sup>200</sup> The Branch was the bargaining representative on behalf of the employees bound by that Agreement. Clause 17 of that Agreement sets out the entitlements to be paid on

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<sup>198</sup> Counsel assisting pointed out that one difficulty is that, if Buchanan J’s reasoning applied to clause 39(g)(iii), then there would be a question as to what was the ‘term’ of the EBA which is taken to be of no effect under clause 56. On one view it would be all of cl 39(g): the imposition of a limitation in connection with retirement was likely an integral part of the acceptance by National Foods of the 104 week cap. Counsel assisting correctly said that it is unnecessary to debate the point here.

<sup>199</sup> James McGiveron, witness statement, 12/5/15, para 14.

<sup>200</sup> McGiveron MFI-2, 12/5/15, tab 6, p 33.

redundancy. Those entitlements, in summary, were two weeks ordinary pay per year to completed half years subject to a cap of 26 weeks. Unlike the Redundancy Policy there was no provision for sick leave or the inclusion of allowances over and above ordinary pay.

- (b) On 11 September 2012 James McGiveron signed a single Enterprise Agreement applicable to employees of Skywest Airlines.<sup>201</sup> The National Union was the bargaining representative of the employees bound under that Agreement. Clause 21 of that Agreement set out the entitlements to be paid on redundancy. Those entitlements, in summary, were capped at 12 weeks' pay at ordinary time for employees of 10 or more years. Unlike the Redundancy Policy there was no provision for sick leave or the inclusion of allowances over and above ordinary pay.
- (c) The national union also executed an enterprise agreement with Nalco Australia in October 2012.<sup>202</sup> Richard Burton, as Assistant Secretary, signed that agreement on behalf of the Branch. The redundancy payments in that agreement were capped at 52 weeks' pay (see clause 24(g)). There was no provision for payment of sick leave entitlements.
- (d) The national union executed an enterprise agreement with Elgas Ltd in February 2011.<sup>203</sup> The Branch did not execute

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<sup>201</sup> McGiveron MFI-2, 12/5/15, tab 5, p 17.

<sup>202</sup> McGiveron MFI-2, 12/5/15, tab 4.

<sup>203</sup> McGiveron MFI-2, 12/5/15, tab 3.

the agreement, although it applied to workers in Western Australia. The redundancy provisions in that agreement were capped at 46 weeks' pay (see clause 21). There was no provision for the payment of sick leave entitlements.

- (e) The national union executed an enterprise agreement with Serco Australia Pty Ltd in June 2011.<sup>204</sup> Richard Burton executed the agreement on behalf of the Branch. The redundancy provisions in that agreement were capped at 16 weeks (clause 12). There was no provision for the payment of sick leave entitlements.
  
- (f) In his oral evidence, James McGiveron said that he 'had a look at a number of EBAs' and 'would have looked at some of the majors' such as Toll Holdings. But he was unable to identify either any particular EBA or any particular redundancy provision specifically.<sup>205</sup> It may be that James McGiveron was referring to the Toll Group and Transport Workers Union Fair Work Agreement 2011-2013.<sup>206</sup> That agreement was executed by representatives of the National Union on 15 August 2011. Clause 26 of that agreement provided for a redundancy payment of 3 weeks' base rate of pay per year up to a maximum of 52 weeks. It is thus unlikely that James McGiveron had any regard to this EBA in July 2012. If he did have regard to it, it is not apparent why he rejected it as a model for the Branch's policy.

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<sup>204</sup> McGiveron MFI-2, 12/5/15, tab 2.

<sup>205</sup> James McGiveron, 12/5/15, T:124.37-125.10.

<sup>206</sup> [2011] FWAA 6210.

(g) Although not an EBA, the 2006 Salaries Determination contained a redundancy clause that provided for an entitlement in substantially the same terms as the entitlement under the Toll Holdings EBA.<sup>207</sup> That Determination was applicable to federal office employees. James McGiveron did not give consideration to these provisions and did not think it appropriate to draw the policy to the attention of the BCOM.<sup>208</sup>

184. There are three significant differences between the redundancy provisions of the above EBAs and the Redundancy Policy. All are differences that were to the benefit of a person in James McGiveron's position. First in the Redundancy Policy there was no cap on the number of weeks' salary to be paid out. Secondly, the Redundancy Policy included sick leave entitlements. Thirdly, only the Redundancy Policy expressly included allowances over and above ordinary salary in the salary entitlements to be paid out on a redundancy.

185. There was nothing obviously inadequate about the redundancy provisions in the above EBAs. Some were probably more favourable for employees than others, although in determining whether the provisions were 'more favourable' it is necessary take into account the fact that they formed just a part of the overall conditions of employment. Also, the extent to which the redundancy clauses in these agreements could have been appropriate for the Branch is a matter that would need to be determined by taking into account differences in the

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<sup>207</sup> Starr MFI-1, 11/5/15, p 135, clause 6.

<sup>208</sup> James McGiveron, 12/5/15, T:146.36-147.19.

respective types of employment and its conditions. Nonetheless, anyone who claimed to embark on a disinterested formulation of a policy for the Branch that was thought to reflect ‘industry standards’, and who believed that redundancy provisions in other EBAs were a useful reference point in determining those standards, would have given some consideration to these, and no doubt other, EBAs. James McGiveron did not.

186. It is necessary to note that Tim Dawson in his oral evidence referred to two other EBAs which he said contained redundancy provisions more favourable than the Redundancy Policy.<sup>209</sup> The first was a policy in a Linfox EBA executed in 2014.<sup>210</sup> That provided for 3 weeks per year up to 52 weeks with no payment of allowances or sick leave and thus was not more favourable than 3 weeks per year without any cap. The second was a Qantas EBA which provided for a redundancy payment of three weeks per year of service up to five years’ service and four weeks per year of service thereafter to a maximum of 95 weeks, excluding allowances and with no sick leave entitlement. Whether that policy would have been more or less favourable to an employee would depend upon the employee’s length of service.

187. Counsel assisting therefore submitted that the following conclusions are to be drawn from the evidence regarding the formulation of the Redundancy Policy:

- (a) There was no need for a redundancy policy to be formulated on 18 July 2012 or indeed at all.

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<sup>209</sup> Tim Dawson, 11/5/15, T:87.36-88.6.

<sup>210</sup> AG2014/3548.



- (b) James McGiveron formulated the Redundancy Policy himself, at a time when he would soon cease to be Branch Secretary and would become an employee whose position could be made redundant.
- (c) There was no attempt to formulate any other employment policies at this time, notwithstanding that there were no written contracts of employment and, apart from a severance policy, no other written policies of employment.
- (d) The terms of the Redundancy Policy were favourable (for someone in James McGiveron's position) as compared with the provisions of other EBAs recently executed by the Branch and Union, and with the redundancy policy applicable to federal office employees.
- (e) In formulating the Redundancy Policy, James McGiveron had no regard to the provisions of those other EBAs (with the possible exception of the Toll Holdings EBA which, if taken into account at all, was inexplicably rejected as a model for the Branch).
- (f) To the extent that James McGiveron adopted any other EBA or other policy as a model for the formulation of the Redundancy Policy, it was the terms of redundancy provisions which were not adopted verbatim. Instead a cap that would have reduced the entitlements of a person of James McGiveron's age was deleted.

188. The most probable inference to be drawn is that James McGiveron formulated the Redundancy Policy to serve his own interests (and not the interests of the Branch) in anticipation of his being made redundant.
189. What other possible explanations are there for James McGiveron's formulation of the Redundancy Policy? It would have been logically possible for someone in James McGiveron's position, acting in the best interests of the Branch and on a wholly disinterested basis, to have believed the Branch needed a redundancy policy and to have taken steps towards formulating one. One can imagine such a person proceeding on the basis that it was in the interests of members for the union to attract and retain staff with a high level of competence. Part of attracting and retaining such staff, one could fairly say, is the ability to offer conditions of employment that are sufficiently attractive. Having a redundancy policy that entitles staff to a redundancy payment above the minimum provided under the FW(RO) Act would, one could also fairly say, be a component of such conditions of employment. The significance of a redundancy policy in this regard should not be overstated. Redundancy entitlements are but one component in an overall salary package and the most important work at the Branch was done by elected officials whose positions could not be, or were highly unlikely to be, made redundant. Nonetheless, the situation just outlined is conceivable.
190. But, whilst conceivable, that situation is not remotely probable on the evidence. First, James McGiveron was not prepared to give any substantive testimonial account of how he came to formulate the Redundancy Policy. That is impossible to understand if the above

scenario in fact obtained. Secondly, there was no particular need for the Redundancy Policy to be formulated in isolation, as distinct from preparing a complete set of written conditions and policies of employment. A person acting on a wholly disinterested basis would have embarked on a broader approach. Thirdly, a person acting on a wholly disinterested basis, and purporting to formulate what was thought to reflect an 'industry standard', would have embarked on a wide ranging review of policies in the industry at the time. James McGiveron did not embark on anything like a wide ranging survey of policies in the industry at the time.

191. Fourthly, a disinterested person in James McGiveron's position would have obtained independent advice. He did not. Independent advice was obviously necessary because any policy formulated would have the potential to benefit a person in James McGiveron's position and the employee members of the BCOM, who would have to approve the policy. James McGiveron's situation was very unlike what was involved when an official was negotiating a redundancy provision in an EBA. In that situation (all things being equal) the greater the benefits in a redundancy clause, the better the result for members. In formulating the Redundancy Policy, in contrast, a balance needed to be struck. On the one hand, it was in members' interests that as little of their money as possible was paid out to a union employee upon a redundancy. On the other hand, it was in their interests that the union attract and retain quality employees and, if necessary, a redundancy policy that fostered that. James McGiveron was in no position to balance these competing considerations.

192. It is now desirable to turn to the arguments put against counsel assisting in relation to the need for and formulation of the Redundancy Policy.
193. The TWU left questions about the timing of the decision to implement the Redundancy Policy Resolution to James McGiveron and Richard Burton. It submitted only that there was nothing improper in itself in adopting a redundancy policy. That is correct. But the TWU went on: ‘There was no reason for the members of the BCOM to think that there was anything suspicious in the adoption of a redundancy policy.’<sup>211</sup> That submission is rejected. A serious proposal, having long-term implications for both the welfare of the employees and the financial stability of the TWU, ought not to have been put to the BCOM meeting without prior notice and, ideally, some responsible memorandum based on expert advice, particularly since all employees present were in a position of conflict. A reasonable member of BCOM would have requested more time in order to ponder the implications of the Secretary leaving a job which could not become redundant and taking up one which could, particularly since the next event at the meeting meant that James McGiveron’s departure from the employment of the TWU would trigger an obligation to grant him personal ownership of the motor vehicle he was then driving. Even if the last point creates too onerous a standard and rests too much on hindsight, it ought to be said that what happened on 18 July 2012 is typical of how the governance of unions can go awry. The Secretaries of unions tend to be more intelligent or experienced or forceful than some BCOM members. As a result there is a pattern of Secretaries tending to

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<sup>211</sup> Submissions of the TWU, 17/6/15, para 29.

dominate their BCOMs. If BCOM business were conducted with more notice of important proposals, documents explaining the pros and cons of the more complex decisions, and adequate time for reflection, it might enable the more timorous spirits to make up their minds free of the potentially rather overbearing influence of the senior officials.

194. Senior counsel for James McGiveron attacked the contention of counsel assisting that there was no particular reason for introducing a redundancy policy on 18 July 2012. First, it was said that ‘redundancy payments are a standard condition at workplaces in Australia’. This was said to make ‘it irrelevant that there was no impending redundancy and that there had been none or only one previous redundancy’. Secondly, it was said that the severance policy did ‘not necessarily apply to an involuntary termination’ like redundancy. Thirdly, it was said that the FW Act standards established only a minimum safety net, did not represent industry standards, and were to ‘be built on at the workplace’. Fourthly, an absence of written policies other than for severance was said to be immaterial, but it was also said that the existence of a severance policy was ‘more relevant than policies in relation to other conditions of employment’. Fifthly, the absence of written contracts of employment was irrelevant, because ‘they are not necessary in Australian employment and are not the norm’.<sup>212</sup>
195. Particular criticism can be made of particular elements of these arguments. Thus, for example, to take the second argument, whether or not a severance policy *necessarily* applies to redundancy is immaterial to the TWU severance policy which applied to ‘termination

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<sup>212</sup> Submissions of James McGiveron, 19/6/15, para 24.

of employment’ – ie termination for any reason.<sup>213</sup> And, for example, to take the fifth point, the proposition that written contracts of employment are ‘not the norm’ is a highly controversial one. They may not be compulsory but they are very common and they reflect good practice.

196. The fundamental difficulty in the submissions advanced for James McGiveron is that they do not grapple with counsel assisting’s query: why was the Redundancy Policy introduced on 18 July 2012, not earlier and not later, bearing in mind the particular circumstances as they stood on that day? Behind that question lie other questions. Why was the Redundancy Policy question not flagged at earlier meetings? Why was no explanatory document circulated in advance? Why was it sprung on the meeting without notice? From the point of view of all officials and employees other than the Secretary there was no urgent or clement need to introduce a redundancy policy. The submissions advanced on behalf of James McGiveron invite the reader to ignore the fact that at the meeting the Secretary had referred to ‘his current health situation’,<sup>214</sup> to the fact that he was going to a new job and to the fact that he would resign the Secretaryship in September. Now the Secretaryship of the Branch was never going to become redundant so long as the Branch survived. But that was not true of the new job, extraordinarily nebulous as its terms were. Was it a coincidence that a Redundancy Policy was introduced without notice at the very same BCOM meeting which was informed of the Secretary’s decision to

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<sup>213</sup> Starr MFI-1, 11/5/15, p 5.

<sup>214</sup> James McGiveron gave evidence that it was actually his personal situation that was causing difficulties: James McGiveron, 12/5/15, T:161.37-42. But if the minutes are correct, the message conveyed to the meeting concerned his health situation.

give up a job which could not be made redundant and move to a new job which could, particularly since the Secretary had served for two decades and had been alluding to ill health? Was it a coincidence that the Car Resolution was introduced without notice and passed at a time when the car to which, in James McGiveron's case, it applied was not the modest car he had been driving, but the luxury car he was to begin driving in 2013? Was it a coincidence that the new car was gifted to James McGiveron only about three months after he took possession of it? Even if each of these events taken by itself could be seen as a coincidence, was their concurrence in time only a coincidence?

197. Senior counsel for James McGiveron made other criticisms of counsel assisting's arguments. They centre on the differences between the Redundancy Policy and particular EBAs. Senior counsel for James McGiveron said the differences were irrelevant; that the Redundancy Policy was broadly connected with industry standards; and that there was no need to conduct a survey or seek independent advice. It was submitted that there was no need to replicate a clear discriminatory age cap on redundancy payments: while the Branch Rules provided for retirement at 65, the National Rules did not, and the age cap and the Branch Rules 'is not relevant to the federal entity in which, on our instructions, the finances [are] held.'<sup>215</sup>
198. The submission relying on the 'instructions' given by James McGiveron must be rejected. 'Instructions' are weightless unless they rest on some material evidentiary or constructional consideration. These 'instructions' lack support in the evidence and in the Rules.

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<sup>215</sup> Submissions of James McGiveron, 19/6/15, para 25.

Rule 75(4) of the National Rules provided that all money held in the name of a Branch was to be property of the federal union. It does not follow from this that Branch Rules on redundancy lose their applicability. The underlying problem remains. Redundancy provisions are far from being the only significant aspect in a contract of employment, but they have some importance. Why should the Redundancy Policy have been adopted in haste without prior notice to BCOM unless it had something to do with the personal position of an employee who was shortly moving from a position which could not be made redundant to one which could?

199. A further factor should be stressed. James McGiveron was in general not a satisfactory witness. He was certainly not satisfactory on the question of why and how the Redundancy Policy came to be adopted.<sup>216</sup> Thus James McGiveron's oral evidence on the origins of the Redundancy Policy was much fuller than what appeared in his statement to the Commission. He explained this divergence by saying that the statement was 'brief'. That is true. The question was: 'Why?' That was not answered.<sup>217</sup> It would be wearisome to multiply examples of his deficiencies. However, among them are the numerous self-contradictions in his testimony to which counsel assisting pointed. To that might be added a tendency to circularity in response. Thus, on being asked why he chose to give the National Foods EBA to Paul Aslan, he said only: 'Because this is the one I chose to give Mr Aslan.'<sup>218</sup> Another instance was James McGiveron's failure to accept that independent advice ought to have been obtained from, for

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<sup>216</sup> See paras 168-171 and James McGiveron, 12/5/15, T:120.27-129.26.

<sup>217</sup> James McGiveron, 12/5/15, T:122.21-35.

<sup>218</sup> James McGiveron, 12/5/15, T:124.32-35.



example, the Hon Francis Marks.<sup>219</sup> He repeatedly and unsatisfactorily refused either to accept that aspects of his conduct involved a conflict of interest or that he should not have been present during the presentation of and voting on the Redundancy Policy Resolution and the Car Resolution on 18 July 2012.<sup>220</sup> For those reasons the arguments advanced by senior counsel for James McGiveron do not invalidate the contentions of counsel assisting. The conclusions of counsel assisting are adopted. In anticipation of his being made redundant, James McGiveron devised the Redundancy Policy to serve his own interests over those of the Branch.

## **K – THE POSITION OF SPECIAL PROJECTS OFFICER**

### **Submissions of counsel assisting**

200. The submissions of counsel assisting continued along lines which may be set out and elaborated as follows. Rule 57(1) of the National Union did not permit James McGiveron to remain as National President unless he also either held an office with the Branch or was ‘either Employed or engaged or seeking to be Employed or engaged in work which would make that person Eligible’.<sup>221</sup> In consequence of the definitions of ‘Employed’ and ‘Eligible’, rule 57(1) required employment in particular industries.<sup>222</sup>

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<sup>219</sup> James McGiveron, 12/5/15, T:141.34-41.

<sup>220</sup> See para 276.

<sup>221</sup> TWU WA Rules Bundle, 11/5/15, National Rules r 57(1).

<sup>222</sup> TWU WA Rules Bundle, 11/5/15, National Rules r 92 and Annexures A and B.

201. The employment of James McGiveron as Special Projects Officer was thus very much in his interests. It enabled him to keep drawing the same salary (together with allowances) that he drew as Secretary. It enabled him to retain the honorary role of National President until the expiry of his term. It also, of course, moved him to a position that was capable of being made redundant. It therefore put him within reach of the generous Redundancy Policy that he had formulated.
202. James McGiveron suggested to the BCOM at the 9 October 2012 meeting that he be appointed Special Projects Officer.<sup>223</sup> He ultimately accepted that one reason he proposed that he take up the role of Special Projects Officer was to enable himself to remain as National President after his resignation as Branch Secretary.<sup>224</sup> James McGiveron must be taken to have participated in the resolution appointing him Special Projects Officer, since the minutes do not record his abstention or opposition.<sup>225</sup>
203. Was the Special Projects Officer role anything more than a device to enable James McGiveron to remain, in effect, as a paid National President? ‘No’, said counsel assisting, for the following reasons.
204. *First*, the position was made redundant shortly after he ceased being National President. For the reasons set out below,<sup>226</sup> the asserted reason for making the position redundant is implausible. The fact that

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<sup>223</sup> James McGiveron, 12/5/15, T:160.31.

<sup>224</sup> James McGiveron, 12/5/15, T:157.12-28.

<sup>225</sup> Starr MFI-1, 11/5/15, p 16.

<sup>226</sup> See paras 220-250.

an event happens need not, but can, support a conclusion that it was always intended to happen.

205. *Secondly*, the descriptions of the position are vague. In the 18 July 2012 BCOM minutes it is described as ‘Gas and Mining Officer’.<sup>227</sup> In the 9 October 2012 BCOM minutes it is described as ‘Special Projects Officer’.<sup>228</sup> The only content given to the rights and obligations that James McGiveron was to have in that role is the statement in the latter minutes that that employment was to be on the same terms and conditions as James McGiveron’s employment as Branch Secretary but ‘with full responsibility for ensuring that the TWU develops and implements the best possible strategies in the resources and mining sector of our economy, with a view to ensuring the TWU’s membership interests are maximised in the sector’.
206. At times in the oral evidence, both Richard Burton and James McGiveron appeared to seek to confine the scope of the Special Projects role to the James Price Point project in Browse Basin. James McGiveron said that that was what he was ‘focusing on’.<sup>229</sup> He then said that the position was ‘solely concerned with new projects’.<sup>230</sup> He then accepted that the role extended beyond new projects to advancing the union’s interests in Australia’s oil, gas and mining industries.<sup>231</sup> James McGiveron had no clear and consistent concept of what the role involved.

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<sup>227</sup> Starr MFI-1, 11/5/15, p 10.

<sup>228</sup> Starr MFI-1, 11/5/15, p 16.

<sup>229</sup> James McGiveron, 12/5/15, T:170.38.

<sup>230</sup> James McGiveron, 12/5/15, T:170.42-43.

<sup>231</sup> James McGiveron, 12/5/15, T:171.5-11.

207. *Thirdly*, Richard Burton told Marius Van der Merwe during the audit process on 26 March 2013 that James McGiveron was ‘going to retire later this year’. He said that James McGiveron was ‘staying on to act as support for me for 12 months’.<sup>232</sup>
208. James McGiveron does not appear to have performed any work, or any significant work, in his capacity as Special Projects Officer. James McGiveron and Richard Burton had been asked to address in their statements the question of what work James McGiveron did in this role. Neither did.
209. James McGiveron’s evidence was as follows:

[18] The plan was that I would wind down my State secretary responsibilities and provide Burton with support, mentoring and guidance before the end of the year, and in the new year I would step up work on the Special Projects.

[19] *Unfortunately* in August 2012, the Olympic Dam expansion was shelved, and then in April 2013 the James Price Point development was shelved.

[20] After Woodside made the decision on James Price Point, Burton called me to a meeting and advised me that he was considering making the SPO position redundant. When the position was ultimately made redundant, I was paid a redundancy. (emphasis added)

The inference from this evidence is that James McGiveron was at one point contemplating doing work as Special Projects Officer, but ultimately did not do any. That is supported by the word ‘Unfortunately’ at the beginning of paragraph 19. It is also supported by the absence of any claim in his statement that any work was done.

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<sup>232</sup> Marius Van der Merwe, witness statement, 12/5/15, para 70.

210. In his oral evidence, however, James McGiveron claimed that in fact he did do work in this capacity.<sup>233</sup> He claimed to have ‘covered’ or ‘mapped’ ‘industrial agreements, particularly about the Browse Point’.<sup>234</sup> He claims to have done work ‘by gathering information’.<sup>235</sup> James McGiveron could not explain why these matters did not appear in his statement. One possible conclusion is that he did not do any of these things. Another is that he did them, but that they were insignificant in scale: so insignificant that they were not worth including in his statement, and so insignificant that their non-inclusion did not render the statement misleading.
211. Richard Burton, too, was asked to address the question of what work James McGiveron did in his role as Special Projects Officer. Like James McGiveron, Richard Burton did not refer in his statement to any work being done.<sup>236</sup> Also like James McGiveron, Richard Burton attempted in oral evidence to take a different position. Richard Burton went so far as to suggest that James McGiveron had travelled in that capacity – something even James McGiveron did not claim to have done. Richard Burton said he thought that James McGiveron went up to the north-west in his capacity as Special Projects Officer,<sup>237</sup> that he went to a project in Queensland and that he went to another in South Australia.<sup>238</sup> Richard Burton's evidence cannot be accepted on this point. It transpired that the South Australian project he referred to was

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<sup>233</sup> James McGiveron, 12/5/15, T:149.38-150.31.

<sup>234</sup> James McGiveron, 12/5/15, T:150.12-13.

<sup>235</sup> James McGiveron, 12/5/15, T:150.31.

<sup>236</sup> Richard Burton, witness statement, 13/5/15, paras 26-29.

<sup>237</sup> Richard Burton, 13/5/15, T:251.37-45.

<sup>238</sup> Richard Burton, 13/5/15, T:257.45-258.4.

the Olympic Dam project, which had been shelved in August 2012. He could not name the project in Queensland.<sup>239</sup> According to Michael Connolly, in 2012 and 2013 the only other people who went up to the North-West were Richard Burton and Glen Barron, on one occasion in October 2013 after James McGiveron's job had ceased.<sup>240</sup>

212. The Branch was required to produce all travel records relating to James McGiveron's travel during the period he was Special Projects Officer.<sup>241</sup> No documents were produced recording any travel claims for work done as Special Projects Officer, although a number of claims were made for travel in his capacity as National President.<sup>242</sup>

213. The absence of these documents is consistent with the failure of any witness statement to describe work of that description. It also points to the unsatisfactory nature of the oral evidence given by James McGiveron and Richard Burton on the topic. The most likely

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<sup>239</sup> Richard Burton, 13/5/15, T:258.6-23.

<sup>240</sup> Michael Connolly, 12/5/15, T:111.19-35.

<sup>241</sup> Counsel assisting relied on the following. Notice to produce 762 sought, amongst other things, 'All documents recording claims for travel expenses made by [James] McGiveron in his capacity as SPO', 'All documents recording any consideration or approval of claims by [James] McGiveron in his capacity as SPO for travel expenses' and 'All logs for any car driven by [James] McGiveron in his capacity as SPO', with SPO defined as meaning the role held by Mr James McGiveron for the period 1 January 2013 to 30 June 2014 described variously as 'Special Projects Officer', 'Oil and Gas Special Projects Officer' and 'Gas and Mining Officer. Notice to produce 852 sought, amongst other things: 'Documents recording the payment of any travel expenses (including airfares, vehicle, petrol, accommodation, food expenses) incurred by James McGiveron in relation to travel in the period 1 October 2012 – 6 August 2013 (including payments made before or after this period)' and 'documents identifying the nature of any travel expenses (including airfares, vehicle, petrol, accommodation, food expenses) incurred by James McGiveron in relation to travel in the period 1 October 2012-6 August 2013'. Neither the Notices to Produce nor the extent of production in answer to them are in evidence, but the TWU, James McGiveron and Richard Burton did not take any objection to the submission based on that point.

<sup>242</sup> See Starr MFI-1, 11/5/15, pp 211-218.

inference is that no or no significant work was done. That no or no significant work was done, together with the other matters set out above, suggests that the role was never genuinely conceived as anything other than a mechanism to allow James McGiveron to remain as National President. Once his presidential term ended, the *raison d'être* of the National Projects Officer role ceased as well. That conclusion is also supported by the circumstances in which Richard Burton purported to make the role redundant.<sup>243</sup>

214. There is evidence to support a slightly different conclusion, namely that the Special Projects Role was genuine, but was regarded as being co-extensive with James McGiveron's term as National President. In 2011 the National Conference passed a motion (moved by James McGiveron) recognising the strategic importance of new projects in the resources industry and planning to undertake work in that area.<sup>244</sup> The minutes of the 18 July 2012 BCOM meeting record that James McGiveron reported that the NCOM had asked him to take an interest in the gas and mining sector.<sup>245</sup> It is consistent with both these references that the role of Special Projects Officer had its origin in national office policy. Appointing James McGiveron as Special Projects Officer during his term as National President could have been a way to further work of the kind addressed at the 2011 National Conference: both because employment of some kind was necessary under the rules after his resignation as Branch Secretary and because, if significant work were to be done, this would be a way to remunerate him for it.

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<sup>243</sup> See paras 220-250.

<sup>244</sup> Starr MFI-1, 11/5/15, pp 128-9.

<sup>245</sup> James McGiveron, witness statement, 12/5/15, para 17; Starr MFI-1, 11/5/15, p 10.

215. Richard Burton's evidence at times suggested such an arrangement. He said in oral evidence said that the National President's role and the Special Projects role went 'hand in hand'.<sup>246</sup> He said that the Special Projects role 'was a combination of both. You know, if you're rolling out the President of the National TWU, it carries a bit of weight on projects [than] as being an organiser'.<sup>247</sup> He also said 'Special Projects Officer was not only for the West Australian Branch but also for the National Office. That's his role as that President'.<sup>248</sup>
216. On this approach, the role was a genuine one but not one which was capable of being made redundant in May 2013. James McGiveron's employment was, in effect, for a fixed period and was always expected to terminate at that time.
217. The TWU pointed out that there is no evidence of any decision of the National Committee of Management linking the roles. On that ground the TWU submitted that any connection between the Special Projects Officer position and James McGiveron's role as National President could only have rested on a private conversation between James McGiveron and Richard Burton.<sup>249</sup> That is probably correct. The evidence of Richard Burton referred to above does support a private understanding to that effect, but insufficiently to justify a positive finding.

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<sup>246</sup> Richard Burton, 13/5/15, T:263.35.

<sup>247</sup> Richard Burton, 13/5/15, T:263.24-27.

<sup>248</sup> Richard Burton, 13/5/15, T:263.7-9.

<sup>249</sup> Submissions of the TWU, 17/6/15, para 23.



## Submissions of James McGiveron

218. The TWU declined to offer any submissions on the question of what work James McGiveron undertook as Special Projects Officer.<sup>250</sup> However, senior counsel for James McGiveron made one specific criticism of counsel assisting's submissions on the Special Projects Officer question. That criticism was directed to the proposition that James McGiveron did no, or no significant, work as Special Projects Officer. Senior counsel for James McGiveron relied on evidence he had elicited to the effect that two or three days a week James McGiveron did the following work at an office at the Branch. He '*researched* agreements, allowances, historical data'. He '*had liaisons* with the Kimberley Land Council that we'd signed off on with respect to the Woodside project'. He '*was gathering information all prepared* to hit the ground running some time in April'. In March 2013 he was instructed to work from home. At the end of March the Ford 350 arrived, and he '*went to Dongara where there was supposed* to be a major methane fracking gas find'.<sup>251</sup> With respect, this sounds like pointless, fruitless and unsuccessful 'work'. James McGiveron did not say that his research, liaisons, preparation and trip to Dongara led to anything. He made no reports of any kind to BCOM.<sup>252</sup> He made no written reports to Richard Burton on what the outcome of his work was.<sup>253</sup> James McGiveron said that in his 28 years it was not the

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<sup>250</sup> Submissions of the TWU, 17/6/15, para 22.

<sup>251</sup> James McGiveron, 12/5/15, T:178.2-41. Emphasis has been added to the previous four sentences.

<sup>252</sup> James McGiveron, 12/5/15, T:162.9-16.

<sup>253</sup> James McGiveron, 12/5/15, T:178.43-47.

practice for organisers to make written reports to the Branch Secretary.<sup>254</sup> But his substantive status was much more than that of an organiser. In fact Richard Burton specifically denied that he was only an organiser.<sup>255</sup> The ‘work’ he did had the air of being only a makeweight. It was not ‘work’ which justified payment at anything like the level of the Secretary’s salary. So far as it was work, it was work which was either insignificant work or little more than insignificant. What useful work James McGiveron did do appears to have been work as National President.

219. The conclusion is that the role of Special Projects Officer, both as contemplated in 2012 and as it turned out, may have involved the consumption of time, but it involved no or very little significant work. It was a mechanism to permit James McGiveron to serve as National President. It was not a continuing position which was capable of becoming redundant in May 2013. Rather it was simply a position which was co-terminous with James McGiveron’s presidential term. In substance if not in form, it automatically came to an end when the presidential term came to an end.

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<sup>254</sup> James McGiveron, 12/5/15, T:178.43-47.

<sup>255</sup> Richard Burton, 13/5/15, T:263.24-27.

## **L – THE DECISION TO MAKE THE SPECIAL PROJECTS OFFICER REDUNDANT**

### **The reason given for the redundancy**

220. Counsel assisting continued as follows. Richard Burton made James McGiveron redundant with effect from 12 July 2013, by letter dated 30 May 2013. The explanation given in that letter for making the position redundant was as follows:<sup>256</sup>

The decision has been taken in light of the clearly evident downturn in the industries concerned and the shelving of large resource projects such as Woodside's Browse Basin project which had been expected to go ahead at the time of your appointment.

221. The reference to 'Woodside's Browse Basin project' was a reference to the proposal to expand the James Price Point project, one of a number of resource projects in the Browse Basin area.

222. There are several matters to note about the explanation.

223. *First*, if there had been a 'clearly evident downturn' in the industries concerned, that would not have been a reason to make the position of Special Projects Officer redundant. So far as that position had any job description, it was to ensure that the TWU developed and implemented the best possible strategies in the resources sector with a view to maximising the TWU's membership interests in that sector. That was a necessary and desirable goal for the TWU to achieve, and it was

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<sup>256</sup> Starr MFI-1, 11/5/15, pp 206-7.

achievable, whether or not there had been a downturn in the resources industry.

224. *Secondly*, the proposition that there had been a ‘clearly evident downturn’ ought not be accepted, at least in so far as it concerned the North West of Western Australia, where the Browse Basin is located. Paul Aslan is recorded as telling the Quarterly General Meeting of the Branch:<sup>257</sup> ‘The resources industry is still going gangbusters in the North West as is our recruiting.’

225. Paul Aslan believed that was a true statement at the time.<sup>258</sup> Tim Dawson, Kevin Starr and Michael Connolly were present at the same meeting. Michael Connolly and Tim Dawson organised in the North West.<sup>259</sup>

226. *Thirdly*, Notices to Produce were served on the Branch seeking documents recording any consideration of the question as to whether the Special Projects Officer role should be made redundant. No documents were produced. That suggests that it is unlikely that Richard Burton embarked on any serious assessment of the question. It is also consistent with the fact that he did not consult the BCOM on the question.<sup>260</sup>

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<sup>257</sup> Starr MFI-2, 11/5/15.

<sup>258</sup> Paul Aslan, 11/5/15, T:71.17-42.

<sup>259</sup> Michael Connolly, 12/5/15, T:111.9-17; Tim Dawson, 11/5/15, T:80.26.

<sup>260</sup> This submission of counsel assisting is not supported by evidence of either the notices to produce or the answer to them. However, the TWU, James McGiveron and Richard Burton did not take any point against counsel assisting in this respect.

227. *Fourthly*, the demise of the James Price Point project, although described in the letter as a mere example of the downturn, is in fact the only project that Richard Burton or James McGiveron could point to as indicating the downturn in the industry to which the letter referred. That was peculiar in light of Richard Burton's suggestions in oral evidence – admittedly non-credible – that James McGiveron visited projects in Queensland and South Australia.<sup>261</sup> It was also peculiar in another way. Richard Burton appeared to accept in oral evidence that there were other projects up and running at this time. However, he suggested that these were projects covered by Michael Connolly. If so, they were not within the scope of James McGiveron's role.<sup>262</sup> However the James Price Point expansion project, being in Broome, was also in this area.<sup>263</sup> Thus, it is unlikely that the shelving of the James Price Point project had anything to do with making James McGiveron redundant. It appears to have been seized on by Richard Burton as a convenient explanation or pretext for that decision.

228. The *fifth* matter to note about the letter is that Richard Burton did not wish to adopt it in his statement as the explanation for making James McGiveron redundant. He was invited to explain in his statement the circumstances in which James McGiveron was made redundant.<sup>264</sup> He gave no explanation.<sup>265</sup>

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<sup>261</sup> See para 211.

<sup>262</sup> Richard Burton, 13/5/15, T:263.47-264.15.

<sup>263</sup> Richard Burton, 13/5/15, T:264.14.

<sup>264</sup> Burton MFI-4, 13/5/15.

<sup>265</sup> Richard Burton, witness statement, 13/5/15, paras 26-29.

229. In oral evidence he suggested that the redundancy was as much to do with James McGiveron's poor performance as with any downturn. He said that the claimed downturn was only 'part of' the reason for making James McGiveron redundant. The other part was:<sup>266</sup>

He just wasn't delivering. He wasn't delivering to the Branch. He wasn't performing what I expected him to perform to get us into areas that we could start organising, to give us that foothold of him being the President, being a long-term Secretary; it just was not – we just weren't getting any advantages out of it .... [T]hat position was created to ... increase our membership, increase our presence, and it just wasn't occurring.

230. He went on to say:<sup>267</sup>

We were starting to get good value out of the north-west organiser by having that house there [in Karratha], which allowed him more time on the ground and more time in the area. If I compared the two, one was a shining light and the other one wasn't.

231. In any event, it is fundamental that to terminate the employment of an employee because of unsatisfactory performance is not to make the employee's position redundant. The employee goes, but the post remains. This evidence does not sit well with Richard Burton's claim that there was a downturn in the industry which necessitated James McGiveron's redundancy. The downturn evidently did not affect Michael Connolly's work. Indeed at one point Richard Burton accepted that there was plenty of work to be done by the union in advancing its interests in the oil, gas and mining industries.<sup>268</sup> Richard

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<sup>266</sup> Richard Burton, 13/5/15, T:261.4-20.

<sup>267</sup> Richard Burton, 13/5/15, T:262.30-34.

<sup>268</sup> Richard Burton, 13/5/15, T:262.41-46.

Burton's only explanation for not referring to this in his letter of 30 May 2013 was 'Jim McGiveron's been around a long time and I didn't want to put words in there about that he is just not being able to perform that job'.<sup>269</sup> The true position is that Richard Burton, in oral evidence, was inventing an additional reason for James McGiveron's redundancy because he knew that the reason given in the 30 May 2013 letter was false.

232. Richard Burton's claim that James McGiveron's poor performance was a reason for the redundancy is also unacceptable for the following reason. Richard Burton's position earlier in his evidence had been that it was not possible for James McGiveron to perform as Special Projects Officer in a BT-50 a vehicle and that he needed a Ford F350 to be Special Projects Officer.<sup>270</sup> However, James McGiveron had only obtained his Ford F350 in late March 2013. Richard Burton had decided to make James McGiveron redundant a week or a fortnight prior to 18 May 2013.<sup>271</sup> Expecting 'delivery' of matters such as an increase in membership numbers after so brief a time in possession of a supposedly essential tool of the position would have been entirely unrealistic. This was one of many unsatisfactory aspects of Richard Burton's evidence.

233. There were other unsatisfactory aspects of Richard Burton's evidence in this regard. He claimed in oral evidence to have consulted other members of the BCOM prior to making James McGiveron

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<sup>269</sup> Richard Burton, 13/5/15, T:262.24-26.

<sup>270</sup> Richard Burton, 13/5/15, T:250.30-251.42.

<sup>271</sup> Richard Burton, 13/5/15, T:306.4-28.

redundant.<sup>272</sup> No such claim had been made in his statement. None of the members of the BCOM recalled being consulted.<sup>273</sup> Nor is there any record in the minutes of any such consultation. He later accepted in cross-examination by senior counsel for the TWU that he did not inform the BCOM until after the event.<sup>274</sup> Notices to produce were issued to the Branch seeking, amongst other things: ‘Any Document recording communications regarding the making of [the position of SPO, as defined] redundant’,<sup>275</sup> and ‘All documents recording any consideration of whether to make [James] McGiveron’s position as SPO [as defined] redundant’.<sup>276</sup> No documents were produced in response to those notices.<sup>277</sup>

234. James McGiveron in his statement suggested that the decision was made in light of the decision to shelve the James Price Point project.<sup>278</sup> His oral evidence, however, was initially that Richard Burton’s ‘main problem’ was James McGiveron ‘being around was like a shadow over his shoulder and that had been probably the situation for a fair bit prior to having the meeting in May’.<sup>279</sup> He subsequently moved away from this and said that his being a shadow was merely ‘one of the

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<sup>272</sup> Richard Burton, 13/5/15, T:265.7-266.5.

<sup>273</sup> For example, see Kevin Starr, witness statement, 11/5/15, para 61; Paul Aslan, witness statement, 11/5/15, para 16; Tim Dawson, witness statement, 11/5/15, paras 16-17; Mark Bebach, witness statement, 11/5/15, para 16; Ray McMillan, witness statement, 12/5/15, para 20; John Davis, witness statement, para 15; Bruce Spraul, witness statement, para 12; Peter Elliot, witness statement, para 14; Deborah Dunbar, witness statement, 12/5/15, para 16.

<sup>274</sup> Richard Burton, 13/5/15, T:295.2-18.

<sup>275</sup> Notice to produce 852.

<sup>276</sup> Notice to produce 762.

<sup>277</sup> These matters are not in evidence, but there was no objection to counsel assisting’s reliance on them.

<sup>278</sup> James McGiveron, witness statement, 12/5/15, para 20.

<sup>279</sup> James McGiveron, 12/5/15, T:164.29-32.



reasons<sup>280</sup> and that the ‘main reason’ was that Woodside pulled out of the James Price Point project.<sup>281</sup> He accepted, however, that he thought that what Richard Burton was really doing was using the redundancy as an excuse to remove him from the Branch’s affairs.<sup>282</sup>

235. James McGiveron, whilst initially seeking to confine his role as Special Projects Officer to ‘new projects’ with a focus on Browse Basin,<sup>283</sup> later accepted that the role extended beyond new projects to advancing the union’s interests in Australia’s oil, gas and mining industries.<sup>284</sup> However he said that so far as he was concerned, he was unable to continue work as Special Projects Officer after the shelving of the Browse Basin Project. When it was pointed out that his role extended beyond this he said: ‘My responsibility is to work as directed by the Branch Secretary’.<sup>285</sup> He thus was unable to give any coherent account of the reasons for his redundancy.

236. In one sense, of course, the question of whether and if so why to make James McGiveron redundant was a matter for Richard Burton and the BCOM. James McGiveron had ceased to be an officer of the Branch by this time. He was only an employee. However, James McGiveron was no ordinary employee. He was at that time National President and had been Branch Secretary for 18 years. One would have expected,

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<sup>280</sup> James McGiveron, 12/5/15, T:167.25.

<sup>281</sup> James McGiveron, 12/5/15, T:168.7-8.

<sup>282</sup> James McGiveron, 12/5/15, T:169.21-33.

<sup>283</sup> James McGiveron, 12/5/15, T:170.35-43.

<sup>284</sup> James McGiveron, 12/5/15, T:171.5-11.

<sup>285</sup> James McGiveron, 12/5/15, T:171.34-35.

had there been a genuine reason for his redundancy, for that to have been communicated to him, and for him to have understood it.

237. The conclusion to draw from the above analysis is that James McGiveron's position was not made redundant for the reasons set out in Richard Burton's letter of 30 May 2013.

### **The true explanation for the redundancy**

238. Counsel assisting then asked: 'What was the true explanation for the redundancy?' Other explanations thrown up by the evidence are: (a) that Richard Burton wanted to be rid of James McGiveron because he cast a shadow over him in his new role as secretary; or (b) that the position had always been one which Richard Burton and James McGiveron expected would terminate once James McGiveron had ceased to be National President, or shortly thereafter.

239. The evidence regarding possibility (a) was referred to above.<sup>286</sup> It arises because of what was put forward in the oral evidence of James McGiveron, but rejected by Richard Burton. There is no objective evidence either way.

240. It is necessary to deal further with the evidence regarding possibility (b). This possibility was rejected by both James McGiveron and Richard Burton in oral evidence. However this possibility naturally suggests itself because of the timing of the redundancy, the need for the creation of the position in order for James McGiveron to remain as

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<sup>286</sup> See para 234.

National President, and the absence of any reasonable explanation as to the reasons for the redundancy by those who one would have expected to be in a position to give such an explanation. This possibility is also supported by Richard Burton's oral evidence regarding the connection between the Special Projects Officer role and the role of National President, and by Richard Burton's statement to Marius Van der Merwe that James McGiveron was going to retire later in 2013.<sup>287</sup>

241. There is, in addition, the following matter that supports this possibility. Both Richard Burton and James McGiveron took steps in March 2013 to ensure that one of the Ford F350s was registered in James McGiveron's name. The Branch practice was for cars to be registered in the name of the Branch Secretary. That is what James McGiveron did during his time as Secretary.<sup>288</sup> And that is what Richard Burton did when he came to purchase a new fleet of BT-50s.<sup>289</sup>
242. The departure of James McGiveron and Richard Burton from this practice in relation to James McGiveron's Ford F350 indicates that both men expected at this time that that vehicle would become James McGiveron's in the near future.
243. Neither James McGiveron nor Richard Burton gave satisfactory evidence on this topic. James McGiveron said in oral evidence that it did not occur to him at all at the time of delivery of the Ford F350 that one day the car would be his, and that he did not know that the vehicle

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<sup>287</sup> See para 207.

<sup>288</sup> McGiveron MFI-1, 12/5/15, para 23.

<sup>289</sup> Burton MFI-2, 13/5/15.

was registered in his name.<sup>290</sup> He was then shown a licence application signed by him on 6 March 2013.<sup>291</sup> He recognised his signature on it but said he could not recall signing it.<sup>292</sup> That application was for the F350 to be registered in his name, at his address. A receipt for the payment of the registration fee was sent to James McGiveron's address shortly afterwards.<sup>293</sup> The application for registration indicates that, contrary to his earlier oral evidence, James McGiveron must have known, at the time he took delivery of the Ford F350, that it was registered in his name. It also indicates that James McGiveron expected at the time of signing the document that that car would become his own in the near future, and that he believed Richard Burton shared that expectation. There is no other reasonably plausible explanation for not registering the Ford F350 in the name of the Branch Secretary.

244. Richard Burton, on 26 March 2013, signed two contracts for the purchase of the Ford F350s. One he signed with James McGiveron's name and contact details on it, but without any contact details for Richard Burton or the Branch.<sup>294</sup> This is consistent only with an expectation on his part that the Ford F350 the subject of that contract would be registered in James McGiveron's name. It is also consistent only with his believing that James McGiveron had the same expectation. Richard Burton's explanation in oral evidence for signing

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<sup>290</sup> James McGiveron, 12/5/15, T:172.2-27.

<sup>291</sup> McGiveron MFI-5, 12/5/15.

<sup>292</sup> James McGiveron, 12/5/15, T:172.29-36.

<sup>293</sup> Starr MFI-1, 11/5/15, p 236.

<sup>294</sup> Starr MFI-1, 11/5/15, p 231.

the contract was that he was just re-signing the contracts that James McGiveron had executed in 2012. He said:<sup>295</sup>

I assume this is the contract from 2012 and I'm re-signing it by – I'm rebinding ourselves to it all by 2013. His name up top there, he was the original person to purchase the vehicles. I've come down now and signed that yes, we're still – you know, the Union is still committed .... It didn't faze me at all because as far as I'm concerned, I'm just continuing on with the contract that was done in 2012.

245. The above explanation is implausible. Richard Burton was signing fresh contracts. It was up to him to ensure that his name as Branch secretary, together with Branch details, appeared on both contracts. The explanation is also belied by the fact that on 26 March 2013, Richard Burton executed a second contract, for the purchase of the other Ford F350. This contract had his own name and details at the top.<sup>296</sup> But if Richard Burton had really believed he was just 'rebinding' the union to something James McGiveron had already done, he would have ensured that both contracts had James McGiveron's name and personal details on them.
246. As Branch Secretary, Richard Burton ought to have ensured that James McGiveron's Ford F350 was registered as a Branch vehicle. That is what he had done with the Mazda BT-50s earlier in the year. Instead, Richard Burton took no steps at all to ensure that the Ford F350 was registered as a Branch vehicle. That was because he took the view that the Ford F350 was to become James McGiveron's in the very near future.

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<sup>295</sup> Richard Burton, 13/5/15, T:252.17-35.

<sup>296</sup> Starr MFI-1, 11/5/15, p 232.

247. So Richard Burton and James McGiveron had an expectation in March 2013 that one of the Ford F350s would become James McGiveron's. That supports an inference that they had the same expectation at an earlier time. Neither witness sought to explain the registration of the Ford F350 in James McGiveron's name on the basis that things had changed between July 2012 and March 2013 so that, by the time it came to register the Ford F350, it was anticipated that the Special Projects Officer position would be made redundant. The shelving of the Browse Basin Project, to which they both pointed as a reason for James McGiveron's redundancy, did not occur until April 2013. Further, according to Richard Burton at least, James McGiveron could not properly commence work as Special Projects Officer until the car had arrived. If so, Richard Burton could not have begun a serious assessment of the need for James McGiveron's role until after this time.

248. Thus, counsel assisting submitted, the most likely conclusion on the evidence is that Richard Burton purported to make the position redundant because it was always expected that the role would terminate at about the time James McGiveron ceased to be National President. That is not necessarily inconsistent with possibility (a), namely that Richard Burton wanted to terminate the role because he believed James McGiveron was casting a shadow over him in his new role as Secretary. It may be that the arrangements not only came to pass as expected but suited Richard Burton's personal purposes at that time.

249. On any view, however, the role was not redundant. It was, in substance, a position for a fixed period that terminated at the end of that period.
250. Senior counsel for James McGiveron criticised counsel assisting's submissions in the following respects. He pointed out that James McGiveron rejected counsel assisting's proposition that the Special Projects Officer post was only to last as long as he was National President.<sup>297</sup> He also contended that while parts of Richard Burton's evidence supported counsel assisting's proposition, other parts contradicted it.<sup>298</sup> However, the problem is that in many respects both James McGiveron and Richard Burton were not credible witnesses. They both had strong interests – for example, in seeking to protect their reputations by minimising any suggestion of impropriety arising out of the dealings with the Ford F350s and the redundancy affair. Veracity had to take a second place to the vindication of those interests. One aspect of their lack of credibility was self-contradiction. The best guide to the truth in this case study is to be found in concentration on the surrounding circumstances and in employing inferential reasoning from those circumstances. There is no error in that inferential reasoning.

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<sup>297</sup> James McGiveron, 12/5/15, T:162.40-163.1, 164.3-11.

<sup>298</sup> Submissions of James McGiveron, 19/6/15, para 19.

## **The consequences of making the position redundant**

251. Counsel assisting submitted, without being controverted, that the consequences for James McGiveron of being made redundant (rather than simply having his employment terminated) were significant.
252. On 11 July 2013 James McGiveron was paid \$373,191.23 net (\$477,294.57 gross).<sup>299</sup> This amount included annual and long service leave entitlements that he would have received in any event. The component exclusively attributable to the Redundancy Policy was \$304,895.8 net (\$348,396.15 gross).
253. As the redundancy calculations performed by the Branch reveal, treatment of the payment as a redundancy payment, and not merely a payment on termination, had favourable taxation implications. The sum of \$138,718 was tax free, and \$180,000 of his payout was taxed at a rate of 16.5% (rather than 46.5%).<sup>300</sup> Only \$29,678.15 was taxed at a rate of 46.5%.
254. Had James McGiveron's employment terminated otherwise than by reason of redundancy, he would have received severance pay of two weeks' pay for each year of service under the 2011 Branch policy.<sup>301</sup> This would have entitled him to a gross payment of two weeks' pay for his approximately 28 years of service to the Union: \$159,010.88.<sup>302</sup>

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<sup>299</sup> Starr MFI-1, 11/5/15, p 208.

<sup>300</sup> Starr MFI-1, 11/5/15, p 209.

<sup>301</sup> Starr MFI-1, 11/5/15, p 205.

<sup>302</sup> Starr MFI-1, 11/5/15, p 209 (\$2839.48 x 2 x 28).



Taxed at 46.5%, that would have resulted in a net payment of \$85,070.88 – some \$219,824 less than the net payment that resulted from the application of the Redundancy Policy.<sup>303</sup>

255. Senior counsel for the TWU submitted that no criticism could be made of Debra Hodgson or Paul Aslan in implementing the financial consequences of James McGiveron's redundancy in accordance with the directions of the Secretary, Richard Burton, and the Redundancy Policy Resolution.<sup>304</sup> No criticism was made by counsel assisting. Nor, on the evidence, could any be made. Debra Hodgson and Paul Aslan had insufficient notice of circumstances casting doubt on the Redundancy Policy Resolution or the mode in which Richard Burton purported to make James McGiveron redundant.

### **Richard Burton's conduct**

256. Counsel assisting submitted that Richard Burton had no authority to make James McGiveron redundant. Decisions of this kind were not within the enumerated powers of the Branch Secretary in rule 37(3) of the National Rules.<sup>305</sup> As discussed above,<sup>306</sup> although at one point in oral evidence Richard Burton claimed to have consulted the BCOM prior to writing to James McGiveron on 30 May 2013, it is plain he did not do so. Nor, for reasons elaborated in connection with the purchase

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<sup>303</sup> Important issues arise from the question of whether it was right to treat James McGiveron's job as redundant because of this favourable tax treatment employees receive on redundancy. See also the 'redundancy' payment to Fihi Kivalu on his departure from employment with the CFMEU (ACT) Branch: Vol 3, ch 6.2.

<sup>304</sup> Submissions of the TWU, 17/6/15, para 28.

<sup>305</sup> cf. TWU WA Rules Bundle, National Rules, r 37(3).

<sup>306</sup> See para 233.

of the Ford F350s, did Richard Burton have any power, absent prior BCOM approval, to make or procure the payment of some \$373,191.23 to James McGiveron on 11 July 2013 or authorise the disposal to him of one of the Ford F350s.

257. The TWU submitted that Richard Burton did have power to determine that the Special Projects Officer position was redundant. He was the Secretary. The Secretary is the Chief Executive Officer of the Branch by reason of rule 37(2) of the National Rules. The specific powers and functions of the Secretary set out in rule 37(3) are preceded by the word ‘includes’ and are therefore not exhaustive. The role of Chief Executive Officer includes dealing with staffing matters including redundancy. In any event, specific power could be found in rule 37(3)(k) (‘being in charge of the management of the Branch Office’). It could also be found in rule 37(3)(l) (‘being in charge of those employees who work in the Branch Office’).<sup>307</sup> The TWU submission must be rejected. Rule 37(3)(k) and (l) refer only to the day-to-day management and supervision of the Branch office. The powers conferred on the Secretary by rule 12 of the Branch Rules are also very limited. Is it implicit in the very nature of that office, without express words, what authority its holder has to deal with staff matters including redundancy? That conclusion is probably not open in view of the great detail with which rule 37(3) is replete. In any event whatever implicit authority there is is subject to express provisions in the National Rules. Rule 75(7)(d) of the National Rules required a resolution of BCOM for the expenditure of Branch funds, as did rule 36(i) of the Branch Rules. The exceptions in rule 75(7)(e) and the proviso to rule 36(i)

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<sup>307</sup> Submissions of the TWU, 17/6/15, para 27.

respectively do not apply. Rendering James McGiveron redundant was an act which involved expenditure. That expenditure could not be made without a BCOM resolution in advance of the actual payment on 12 July, and the event giving rise to the duty to pay it on 30 May 2013, namely the letter making James McGiveron redundant.<sup>308</sup> There was a BCOM resolution on 6 August 2013 endorsing the application of Redundancy Policy Resolution to James McGiveron, but that was after the event. The better view is that references to ‘expenditure’ in the National Rules and ‘disbursement’ in the Branch Rules include conduct creating a legal entitlement to be paid money, not merely its actual payment.

258. Even if the reasoning just set out is not correct, Richard Burton’s behaviour was outside his powers. Making an employee redundant is a matter of judgment, and sometimes a matter of discretion (for example, where there is a choice to be made as to which of several employees are to have their posts declared redundant). Making James McGiveron redundant was a very expensive decision, not only for the tax authorities but also for the TWU. It was the type of decision which Richard Burton ought not to have made without a prior BCOM resolution.

259. Hence the taking by Richard Burton of the above steps without authority from the BCOM may have been a straightforward breach of the Rules. It may have been a contravention of ss 285 and 286 of the FW(RO) Act. In addition, as explained above, his failure to consult the BCOM indicates that he failed to give serious consideration to the

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<sup>308</sup> See para 220.

question of whether the position was truly redundant: Richard Burton seems almost automatically to have assumed the position was redundant once James McGiveron's term as National President had expired.

## **M – CONCLUSIONS REGARDING CONDUCT OF JAMES MCGIVERON AND RICHARD BURTON IN RELATION TO THE REDUNDANCY PAYMENT**

### **Conclusions in outline**

260. Above the Report records a substantial acceptance of the arguments of counsel assisting. The following conclusions flow from that acceptance.
261. On 12 July 2013 James McGiveron received what was in effect a termination package to the cost of the Branch of over \$600,000. About that the members of the BCOM knew nothing (with the possible exception of Paul Aslan, who typed the letters of 30 May 2013). That is an extraordinary state of affairs. The BCOM did not know about the purchase of the Ford F350 at all. The BCOM did not know that it had been given to James McGiveron. The BCOM did not know that he had been made 'redundant', until well after the event. The BCOM did not know that the 'redundancy' had resulted in a gross payment by the Branch of \$477,294.57.
262. Both James McGiveron and Richard Burton denied that they had any expectation in July 2012 that James McGiveron would be made

redundant after he ceased to be National President. In other words, they denied anticipating at that time what occurred some 10 months later. However, the various aspects of their conduct in the period over that 10 months that led to the making of the redundancy payment and the gifting of the Ford F350 make it difficult to avoid the conclusion that James McGiveron's redundancy was pre-ordained. In particular:

- (a) In July 2012 there was no particular need for a Branch redundancy policy, yet James McGiveron decided to formulate and recommend to the BCOM one with terms that would be very beneficial to a person in his position. He did so at the same meeting at which he announced his intention to retire from a position that could not be made redundant and move to a position that could be made redundant.
- (b) Shortly after the passing of a resolution which would confer ownership on him of the car he was driving at the time of the termination of his employment, James McGiveron entered into a contract for the purchase of the Ford F350 that, in fact, he was driving at the time of being made redundant.
- (c) James McGiveron and Richard Burton appreciated that it was necessary to invent the position that was made redundant in order to enable James McGiveron to remain as National President.
- (d) No significant work seems to have been done by James McGiveron as Special Projects Officer over and above any

work he did as National President. The role was a device to enable James McGiveron to remain as National President.

- (e) When James McGiveron's Ford F350 arrived in March 2013 it was assumed by him and Richard Burton that the car should be registered in his name, without any reference to the Branch. Senior counsel for James McGiveron contended that the proposition that James McGiveron assumed that the vehicle would be registered in his name was unsupported by evidence.<sup>309</sup> But there is actually a lot of evidence for that proposition.<sup>310</sup> James McGiveron must have known that the car was registered in his name, contrary to past practice. He took no steps to alter the registration.
- (f) James McGiveron was in fact purportedly made redundant shortly after his term as National President concluded.
- (g) The reason given by Richard Burton in his letter of 30 May 2013 for making James McGiveron redundant was a mere pretext. The absence of any documents recording any consideration or communications regarding James McGiveron's redundancy suggests that Richard Burton did not embark on any serious consideration of whether to make the role redundant at this time.
- (h) James McGiveron tamely acquiesced in Richard Burton's decision to make him redundant despite Richard Burton's

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<sup>309</sup> Submissions of James McGiveron, 19/6/15, para 21.

<sup>310</sup> See paras 243, 247.

lack of power to make it. Senior counsel for James McGiveron disputed that proposition.<sup>311</sup> He pointed to James McGiveron's evidence that he asked that Richard Burton be allowed to stay until the end of the year.<sup>312</sup> But someone in James McGiveron's position who was really resisting the departure would have protested to the BCOM or to the officials with whom he had been working for many years. In the witness box he revealed himself to be a forceful and independent-minded man. His popularity among the union officials had been revealed by the Car Resolution on 18 July 2012. His force of personality had been revealed by his capacity to obtain consent (in substance) for all his future plans and secure the passage both of the Redundancy Policy Resolution and the Car Resolution on that date. Yet James McGiveron never attempted to resist Richard Burton. The meekness of his reaction suggests he was very happy about what had happened, and that he had expected it to happen.

- (i) Neither James McGiveron nor Richard Burton offered any credible explanation for the above events or for their coincidence.

263. This is a situation where the 'known coincidence of circumstances [is] prone to give each individual circumstance greater significance than it would have had by itself'.<sup>313</sup> The 'united force of all of the

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<sup>311</sup> Submissions of James McGiveron, 19/6/15, para 17.

<sup>312</sup> James McGiveron, 12/5/15, T:164.17-32.

<sup>313</sup> *Seeley International Pty Ltd v Jeffrey* [2013] VSCA 288 at [43].

circumstances put together'<sup>314</sup> suggests that what occurred on 30 May 2013 was what both James McGiveron and Richard Burton had been expecting to occur since July 2012.

264. What other explanations suggest themselves on the evidence? James McGiveron and Richard Burton took the position that it was only at the time of the shelving of the James Price Point Project that the possibility of a redundancy became apparent. That can be rejected. The shelving of that Project could not have been a sufficient reason to make the position redundant.<sup>315</sup> Further, this explanation is inconsistent with the registration in March 2013, prior to the James Price Point project being shelved, of one of the Ford F350s in James McGiveron's name. Nor does this position explain how or why James McGiveron thought it necessary to formulate and recommend a redundancy policy in July 2012.

265. There is another possibility. It is suggested in the evidence of James McGiveron (but rejected by Richard Burton). It is that in fact no-one at any time thought the position was redundant but rather Richard Burton used redundancy as a pretext for removing James McGiveron because the latter was casting a shadow over him in his new role as Branch Secretary. This explanation, also, does not account for the registration of James McGiveron's Ford F350 or for the formulation by James McGiveron of the Redundancy Policy. Nor does it account for the timing of the decision to make James McGiveron redundant. Why did the shadow that was cast only become a problem a week or so after

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<sup>314</sup> *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279 (quoted in *Seeley International Pty Ltd v Jeffrey* [2013] VSCA 288 at [46]).

<sup>315</sup> See paras 223-227.



James McGiveron ceased to be National President? In addition, if this possibility is correct, then the position was not truly redundant and James McGiveron was not entitled to a payment under the Redundancy Policy.

266. If James McGiveron expected the position to be made redundant, that was a matter of critical importance. It ought to have been made known to the BCOM at the time of the motion regarding the Redundancy Policy at the 18 July 2012 meeting. And it ought to have been made known to the BCOM at the time of the appointment of James McGiveron as Special Projects Officer at the 16 October 2012 meeting. These decisions made by the BCOM created a situation which soon resulted in the expenditure of over \$600,000 in Branch funds: the BCOM ought to have been fully appraised of that at the time of the decisions in question. James McGiveron, in recommending and participating in these decisions, was in a position of acute and undisclosed conflict. As a result, he may have breached his fiduciary duties and may have contravened ss 285, 286 and 287 of the FW(RO) Act by formulating, proposing and voting on the Redundancy Policy; and may have breached his fiduciary duties and may have contravened ss 286 and 287 of the FW(RO) Act by recommending and voting on the proposal to appoint him Special Projects Officer at the 16 October 2012 meeting.
267. Richard Burton also had a material personal interest in the resolutions proposed because they facilitated his becoming Secretary. Whilst that may have been known to some or all of the members of the BCOM, Richard Burton ought to have appreciated that the expected redundancy of James McGiveron, and its financial consequences, was

material to both of these resolutions and ought to have been disclosed. In failing to make that disclosure Richard Burton may have breached his fiduciary duties not to act in a position of conflict and contravened ss 285 and 287 of the FW(RO) Act.

268. In addition, James McGiveron could not be said to have been truly redundant. His role as Special Projects Officer, to the extent it was genuine at all, was in truth one which terminated at the end of its term. Richard Burton may have breached his fiduciary duties and may have contravened ss 285, 286 and 287 of the FW(RO) Act by purporting, without BCOM approval, to make James McGiveron redundant on 30 May 2013 and procuring the payment to him of \$373,191.23 on 11 July 2013. Although James McGiveron was not an officer of the Branch at this time, he must have known that his role was not redundant. He may therefore have participated in Richard Burton's possible contraventions within the meaning of ss 286(2) and 287(2) of the FW(RO) Act.

### **Submissions of James McGiveron**

269. Senior counsel for James McGiveron submitted that 'there is no evidence whatsoever of any collusion' between James McGiveron and Richard Burton which would justify the last proposition.<sup>316</sup> However, the course of events redounded to the advantage of both gentlemen. One became Secretary and obtained a free luxury car. The other was able to enjoy some soft months after ceasing to be Secretary but on a Secretary's pay, to leave the employment of the TWU on very

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<sup>316</sup> Submissions of James McGiveron, 19/6/15, para 26.

generous ‘redundancy’ terms and to obtain a free luxury car. These results were only achieved by such means as the Redundancy Policy Resolution, the Car Resolution, the early retirement of James McGiveron from the Secretaryship and the letters of 30 May 2013 from Richard Burton to James McGiveron. It would strain credulity to conclude that all these events, involving possible statutory contraventions by Richard Burton, happened without the willing and knowing participation in them, so far as was necessary, of James McGiveron.

270. The same point answers the submission of senior counsel for James McGiveron that counsel assisting erred in relying on Richard Burton’s intentions and actions in 2013 as being relevant to James McGiveron’s intentions in 2012.<sup>317</sup> It also answers a similar submission that ‘evidence of expectation and events in 2013 [cannot] support intention or purpose prior to October 2012.’<sup>318</sup> A person’s anterior intention can be proved by that person’s subsequent acts. The subsequent existence of the state of mind can justify an inference that state of mind previously existed.<sup>319</sup> Of course the inference need not necessarily be drawn. It is possible that the events between July 2012 and July 2013 have an innocent explanation or can be explained as a series of coincidences. The better view is that those events came to pass because James McGiveron and Richard Burton intended them to. Had their intentions not been disturbed by the auditor’s inquiries, the former

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<sup>317</sup> Submissions of James McGiveron, 19/6/15, para 26.

<sup>318</sup> Submissions of James McGiveron, 19/6/15, para 12.

<sup>319</sup> *Astway Pty Ltd v Council of the City of the Gold Coast* (2008) 159 LGERA 335 at [43]-[45].

would have been a very significant beneficiary and the latter quite a significant beneficiary of the misapplied TWU assets.

271. It is convenient to deal here with various other points made by senior counsel for James McGiveron.

272. He submitted that the BCOM endorsed the Redundancy Policy on 18 July 2012, the \$80,000 deposit payment on 4 December 2012, the redundancy package and the gifting of the Ford F350 to James McGiveron on 6 August 2013, and the giving of the replacement vehicle to James McGiveron when he handed over the proceeds of sale of his Ford F350 to the Union on some date on or after September 2014.<sup>320</sup> He also submitted that the Finance Committee approved the \$80,000 payment on 4 December 2012.<sup>321</sup> But none of these instances of consent except possibly the approval of the gifting of the replacement vehicle on or after September 2014 – very late in the day, after the Haylen Report – could be described as fully informed consent. And the replacement vehicle episode was in effect a method of giving restitution to the Union and ensuring that the damage it had suffered in relation to the Ford F350 was to some extent compensated: if there were to be a Car Resolution, the replacement vehicle was the type of car within its contemplation.

273. Senior counsel for James McGiveron also contended that counsel assisting had failed to put James McGiveron on notice of possible findings that he may have been in breach of fiduciary and statutory duty, whether by opening submission or cross-examination. Appeal

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<sup>320</sup> Submissions of James McGiveron, 19/6/15, para 27.

<sup>321</sup> Submissions of James McGiveron, 19/6/15, paras 27-29.

was made to the rule in *Browne v Dunn*.<sup>322</sup> It was also said that counsel assisting had not put to James McGiveron the pattern of facts now relied on as being incapable of explanation as coincidences. And it was said that reliance on the Branch Rules caused surprise: ‘for all intents and purposes the finances of the [Branch] are not and were not at the relevant times found in the state registered union but this matter was not addressed in evidence because [counsel assisting] did not raise it as an issue’.<sup>323</sup>

274. It is convenient to deal with the Rules point first. The question of which Rules apply is a question of construction. The rule in *Browne v Dunn* does not apply to questions of construction. Neither the submissions of counsel assisting nor the findings made above turn on any difference between the National Rules and the Branch Rules.

275. So far as the argument in relation to the inferences from the pattern of factual circumstances is concerned, the rule in *Browne v Dunn* does not require that type of inferential reasoning to be put: it concerns primary facts. In any event it must have been plain to James McGiveron that the questions of counsel assisting were directed to establishing adverse inferences from a constellation of inexplicable circumstances.

276. So far as the argument about fiduciary and statutory breaches is concerned, James McGiveron was questioned in the following respects. He was asked whether he accepted that at the BCOM meeting of 18 July 2012, he should have told the meeting that he and

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<sup>322</sup> (1893) 6 R 67. See Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 1, p 7, para 23.

<sup>323</sup> Submissions of James McGiveron, 19/6/15, paras 3-5.

Richard Burton were considering purchasing two Ford F350s. He denied this.<sup>324</sup> He was asked whether he accepted that he should have told the BCOM meeting of 18 July 2012 that the Car Resolution would have the likely result of him being gifted a Ford F350. He denied this.<sup>325</sup> He was asked whether he accepted that he should have left the meeting while the BCOM was considering the Car Resolution. He denied this.<sup>326</sup> He was asked whether he accepted that when he authorised Debra Hodgson to pay the deposit, he was preferring his own interests to the interests of the members. He denied this.<sup>327</sup> He was asked whether he accepted that before he signed the contracts with Barbagallo, he should have sought BCOM approval. He denied this.<sup>328</sup> He was asked whether he accepted that he should have obtained BCOM approval before paying the \$80,000 deposit. He denied this.<sup>329</sup> He was asked if he accepted that he proposed the Redundancy Policy with a view to ensuring that if he were made redundant, he would receive a significant payment of money from the Branch. He denied this.<sup>330</sup> He was asked whether he accepted that he ought to have excused himself from the meeting while the Redundancy Policy Resolution was being considered. He denied this.<sup>331</sup> He was asked if he accepted that it was inappropriate of him to propose the Redundancy Policy at all at the 18 July 2012 BCOM meeting. He

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<sup>324</sup> James McGiveron, 12/5/15, T:133.38-42.

<sup>325</sup> James McGiveron, 12/5/15, T:133.44-47.

<sup>326</sup> James McGiveron, 12/5/15, T:134.2-4.

<sup>327</sup> James McGiveron, 12/5/15, T:138.13-16.

<sup>328</sup> James McGiveron, 12/5/15, T:138.18-21.

<sup>329</sup> James McGiveron, 12/5/15, T:136.26-28.

<sup>330</sup> James McGiveron, 12/5/15, T:143.14-17.

<sup>331</sup> James McGiveron, 12/5/15, T:143.14-17.

denied this.<sup>332</sup> He was asked whether he accepted that in voting on the Redundancy Policy Resolution, he was preferring his own interests to the interests of the members. He denied this.<sup>333</sup> He was asked to agree that he had not given any serious consideration as to whether the Redundancy Policy Resolution was in the best interests of the Branch. He denies this in saying that he thought it was, and that it was also in the best interests of the employees of the Branch.<sup>334</sup> He was asked whether he proposed the Redundancy Policy Resolution because he thought it was in his interests. He denied this.<sup>335</sup> He was asked whether he accepted that he should have excused himself from the meeting during consideration of the resolution to appoint him Special Projects Officer. He denied this.<sup>336</sup> Counsel assisting, instead of being accused of having failed to question James McGiveron adequately, might have been thought to overemphasise the obvious points he put to him. The questions might not have referred specifically to ‘fiduciary duty’ or to the terms of the statutory provisions. But they did refer to the key conceptions underlying those rules of law. It is not appropriate for counsel assisting to debate with lay witnesses the content of rules of law and their specific application to the evidence of the witnesses. Further, counsel assisting in his opening put plainly all the material facts from which, if they were established, inferences of possible breaches of the law could be drawn.<sup>337</sup> Incidentally, all these denials, indicative of a type of moral obliviousness or blindness as they are,

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<sup>332</sup> James McGiveron, 12/5/15, T:143.23-25.

<sup>333</sup> James McGiveron, 12/5/15, T:143.30-32.

<sup>334</sup> James McGiveron, 12/5/15, T:143.39.44.

<sup>335</sup> James McGiveron, 12/5/15, T:143.46-147.1.

<sup>336</sup> James McGiveron, 12/5/15, T:161.6-10.

<sup>337</sup> 11/5/15, T:2.3-7.2.

were terribly damaging to James McGiveron's credit, and to any claim that he was a man who accurately perceived what professional standards apply to trade union officials in his position.

277. The submission on behalf of James McGiveron that his legal representatives had not conducted themselves at the hearing on the basis that they were dealing with allegations of breaches of fiduciary and statutory duty was not coupled with a submission that they would have called further evidence had they thought they were dealing with those allegations. Counsel assisting, in his written submissions in reply, invited James McGiveron to indicate within a fortnight whether, in order to meet the allegations made against him by the written submissions of counsel assisting, he wished to be recalled so as to answer any allegations alleged not to have been put to him and whether he wished further evidence to be tendered (including evidence tendered through other recalled witnesses), and, if so, what. (None of these procedures would have been at James McGiveron's expense.) Counsel assisting also indicated that he would be proceeding on the basis that if James McGiveron had been asked whether he breached his duties in the terms alleged by counsel assisting, he would have denied it. Counsel assisting's invitation was not accepted.
278. There is no basis for any complaints by James McGiveron that either the rule in *Browne v Dunn* was breached, or, if it was, that any irreparable harm has been caused.
279. Finally, senior counsel submitted on behalf of James McGiveron that counsel assisting was not proceeding in accordance with the correct



standard of proof – that associated with *Briginshaw v Briginshaw*.<sup>338</sup> Senior counsel pointed out that ss 286 and 287 were penalty provisions – as was s 285 – and the *Briginshaw v Briginshaw* standard had been applied in relation to penalty provisions.<sup>339</sup> Both the submissions of counsel assisting and the findings made above were made in conformity with *Briginshaw v Briginshaw*.

### **Submissions of the TWU**

280. Senior counsel for the TWU submitted:<sup>340</sup>

The case study reveals specific instances of questionable conduct by two former officials of the WA Branch which, once discovered, were investigated promptly, decisively and appropriately by the TWU. The Commission should acknowledge the steps taken by the TWU [to] investigate and act upon the issues raised in the case study and the demonstrated commitment of the TWU in ensuring high standards of conduct by its officers and proper use of union funds. This outcome occurred under the current regime of statutory regulation applying to trade unions.

281. The TWU certainly deserves commendation in that regard in relation to its investigation of the purchase of the Ford F350s. Its conduct, compared with other unions in the case studies examined in this Report and the Interim Report, is highly unusual and very creditable.

282. The position is a little different in relation to James McGiveron's redundancy. The Hon Wayne Haylen's attention was directed to the

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<sup>338</sup> (1938) 60 CLR 336.

<sup>339</sup> *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25 at [63]. See submissions of James McGiveron, 19/6/15, paras 6-9.

<sup>340</sup> Submissions of the TWU, 17/6/15, para 6.

question of James McGiveron's redundancy only to a limited extent. It was directed to an allegation, said to have been made by Richard Burton, that James McGiveron received a payment of \$700,000 on his retirement.<sup>341</sup> The Haylen Report found that the payment was not \$700,000 but rather an amount calculated in accordance with the Redundancy Policy. The Hon Wayne Haylen was not asked to, and did not, investigate in which the Redundancy Policy was formulated or the circumstances in which James McGiveron was made redundant. Most of the material considered during the Commission on this issue was not before the Hon Wayne Haylen. No criticism of the Hon Wayne Haylen is intended in saying this. Nor is any criticism of the TWU intended, for the underlying facts would not have been easy to assemble in a short period of time.

283. The TWU indicated that it would consider any findings of the Commission about the redundancy payment.<sup>342</sup> That is an entirely appropriate and understandable position to take in view of the fact that this issue was not investigated or determined by the Hon Wayne Haylen. It is regrettable, however, that the position stated by senior counsel for the TWU is at odds with the following claim made on 22 June 2015 about this case study by the National Secretary of the TWU, Tony Sheldon:<sup>343</sup> 'Not one single piece of information heard by the royal commission was new.' That false statement jars with the thoughtful submissions advanced by senior counsel for the TWU. On questions related to both cars and the Redundancy Policy, the Commission was able to unearth a great deal of information which it

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<sup>341</sup> Starr MFI-1, 11/5/15, p 330.

<sup>342</sup> Submissions of the TWU, 17/6/15, para 34.

<sup>343</sup> Letter to the Editor, *Australian Financial Review*, 22/6/15.

had not been possible for the TWU and the Hon Wayne Haylen to assemble. It is deplorable that the TWU's otherwise commendable and responsible conduct should have been marred in this way.<sup>344</sup>

## **N – RECOMMENDATION**

284. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing proceedings against James McGiveron for pecuniary penalty orders in relation to possible contraventions of ss 285-287 of the FW(RO) Act.

285. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the General Manager of the Fair Work Commission so that consideration can be given to the General Manager commencing

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<sup>344</sup> Tony Sheldon's statement is as inaccurate as the other point made in his letter: 'The Australian Competition and Consumer Commission found the royal commission was wrong to allege an agreement between Toll and the TWU to set up a fund on training, safety, auditing and education was anti-competitive'. The Interim Report made no allegation of this kind. All that it did was to note that the ACCC had announced on 21 October 2014 that it was conducting an investigation, and state that this was an appropriate course: Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 1, ch 7.2, p 998, para 55. It is unfortunately necessary also to draw attention to a false statement in the following part of a letter to the Editor of *The Australian*, published on 26 November 2015: 'The Transport Workers Union was forced to spend time and resources answering questions at the Commission. We have been vindicated at every turn.' Quite apart from the findings made against the Transport Workers' Union in this Chapter, of which Tony Sheldon would have been ignorant at the time of writing his letter, it is not true that as at 26 November 2015 the Transport Workers' Union and its officials 'have been vindicated at every turn'. See the criticisms made in the Interim Report (Vol 1, ch 4.2, 4.4, 6.2 and in particular 10.2 concerning the deceitful membership numbers supplied by the Transport Workers' Union to the Australian Labor Party with a view to boosting the Transport Workers' Union delegate strength at New South Wales State Labor Conferences, and Tony Sheldon's knowingly false evidence on that subject).

proceedings against Richard Burton for pecuniary penalty orders in relation to possible contraventions of ss 285-287 of the FW(RO) Act.