

CHAPTER 7.4

BUILDING TRADES GROUP DRUG AND ALCOHOL COMMITTEE

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A – INTRODUCTION

1. This Chapter concerns the Building Trades Group Drug and Alcohol Committee (**BTG D&A Committee**). It also deals in part with the Construction Industry Drug and Alcohol Foundation (**CIDAF**), a registered charity.
2. In particular, it examines two matters. In general the submissions of counsel assisting about them are accepted. The points made in the collectively voluminous submissions of affected persons are dealt with in appropriate places.
3. The first matter examined is the payment of \$100,000 made in April 2006 by the Thiess-Hochtief Joint Venture carrying out the Epping to Chatswood Rail Link. The payment was made to the BTG D&A Committee. The payment was ostensibly for the purposes of drug and alcohol safety training. In fact, most of the money ended up, after round robins of payments over three years, in the ‘fighting fund’ of the Construction, Forestry, Mining and Energy Union, Construction and General Division, New South Wales Divisional Branch. (In this Chapter, the federally registered union is referred to as the **CFMEU** and the divisional branch as the **CFMEU NSW**.)

4. This Chapter considers whether the \$100,000 payment was a ‘corrupt commission’ given and solicited in breach of s 249B of the *Crimes Act* 1900 (NSW).
5. The second matter examined concerns a clause in CFMEU NSW enterprise bargaining/enterprise agreements (**EBAs**). Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting ‘with the provision of drug & alcohol rehabilitation & treatment services / safety programs for the building industry’.¹ From 2004 to 2011 inclusive, employers paid approximately \$2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was siphoned to the CFMEU NSW and deposited into its general revenue.

B – BACKGROUND

BTG D&A Committee

6. Patricia Carr was a Workers Compensation Officer employed by the Building Workers Industrial Union (**BWIU**). In around 1989 she established the BTG D&A Committee.² Trevor Sharp was invited by Patricia Carr to become a member of the committee shortly after its establishment and was from 1994 to mid-2011 the Project Co-ordinator for the BTG D&A Committee. He gave evidence that the Committee

¹ See, for example, BTG D&A MFI-6, 11/8/15, pp 340, 377, 440.

² Trevor Sharp, witness statement, 11/8/15, para 5.

was established for the purpose of attempting to address the issue of drug and alcohol safety in the workplace.³

7. The BTG D&A Committee was primarily a BWIU initiative. But it was set up as a sub-committee of the Building Trades Group of Unions (**BTG**) because it was expected that it would represent members of all building unions, not just the BWIU.⁴
8. The BTG itself was originally an industry sub-committee under the rules of the then NSW Trades and Labour Council. In the mid-1980s the rules of the Labour Council were changed. The BTG ceased to be a formal part of the structure of the Labour Council. However, the BTG, as an unincorporated association, continued to meet. It had representatives from the BWIU (which later amalgamated to form the CFMEU). It had representatives from the Electrical Trades Union (**ETU**). It had representatives from the Plumbers and Gasfitters Union (**PGU**). It had representatives from the Australian Manufacturing Workers Union (**AMWU**).⁵
9. In late 1991, the BTG D&A Committee secured a grant from the National Committee Against Drug Abuse to implement a drug and alcohol safety program to be rolled out across work sites in the construction industry.⁶ The program was called the Building Trades Group Drug and Alcohol Program (**BTG D&A Program**). The grant

³ Trevor Sharp, witness statement, 11/8/15, para 5; Trevor Sharp, 11/8/15, T:217.31-34.

⁴ Trevor Sharp, witness statement, 11/8/15, para 5.

⁵ Michael Knott, witness statement, 10/8/15, paras 5-7; Michael Knott, 10/8/15, T:46.46-47.30; Andrew Ferguson, 13/8/15, T:517.40-519.14; Tony Papa, 17/8/15, T:737.3-15.

⁶ Trevor Sharp, witness statement, 11/8/15, paras 5-6.

enabled the BTG D&A Committee to employ a Drug and Alcohol Education Officer. That person was initially Trevor Sharp. Subsequently, the BTG D&A Committee secured recurrent funding from the New South Wales Health Department for the BTG D&A Program.⁷ The monies from this grant were paid into a dedicated BTG D&A Committee account. They were used to pay the salary of the education officer and a secretary part time.⁸

10. Later, in around 1995, the BTG D&A Committee secured funding from the CERT⁹ Education and Training Fund to present drug and alcohol safety courses to apprentices in the construction industry in conjunction with TAFE NSW (**BTG Apprentice Program**). That funding allowed the BTG D&A Committee to employ a new Apprentices Education Officer.¹⁰ Subsequently, the BTG D&A Committee obtained recurrent funding from WorkCover to cover the cost of the BTG Apprentice Program.¹¹ Like the grant from the Health Department, the monies in relation to this grant were paid into a separate bank account.
11. By around 1994, Trevor Sharp had moved into a more administrative role as Project Co-ordinator. Over the years a number of employees held the positions of Drug and Alcohol Education Officer or Apprentices Education Officer. One of them was Tom Simpson.

⁷ BTG D&A MFI-25, 6/10/15.

⁸ Toni Mitchell, witness statement, 13/8/15, para 6(a).

⁹ Construction Employees Redundancy Trust.

¹⁰ Trevor Sharp, witness statement, 11/8/15, para 8; BTG D&A MFI-24, 6/10/15, p 1.

¹¹ BTG D&A MFI-24, 6/10/15.

12. From its inception until 2010, the BTG D&A Committee was an unincorporated association. In May 2010, the BTG D&A Committee was incorporated as an association under the *Associations Incorporation Act 1984* (NSW).¹²

CIDAF

13. In around 1994, the BTG D&A Committee established CIDAF.¹³ CIDAF is a not-for-profit incorporated association and a registered charity. It was established to support the BTG D&A Committee's activities financially through fundraising, to provide drug and alcohol treatment and support services to people with problems.¹⁴ Some employers were not comfortable donating to the union movement directly. But they were willing to support an organisation where they had representation on the board and could determine how their money was being spent.¹⁵ CIDAF was set up to accept donations from those employers. CIDAF was administered by a Committee of Management consisting of representatives from unions, industry and the community.
14. In June 2000, CIDAF opened 'Foundation House' as a residential and outpatient treatment facility located in premises at Callan Park, Rozelle. It still operates today.

¹² BTG D&A MFI-23, 17/8/15.

¹³ Michael Knott, witness statement, 10/8/15, paras 10-11; Trevor Sharp, witness statement, 11/8/15, para 9.

¹⁴ Trevor Sharp, witness statement, 11/8/15, para 9; Trevor Sharp, 11/8/15, T:220.16-23.

¹⁵ Trevor Sharp, 11/8/15, T:220.35-40.

C – THIESS PAYMENT: SUMMARY OF THE EVIDENCE

Introduction

15. The Thiess-Hochtief Joint Venture (**THJV**) was a joint venture between Thiess Pty Ltd (**Thiess**) and Hochtief AG Australia (**Hochtief**). In July 2002 it was awarded the contract to build the Epping to Chatswood Underground Rail Link in Sydney (**Project**). Part of the Project involved building a rail tunnel under the river at Lane Cove.¹⁶ The Project continued until February 2009.

16. In early 2003 THJV entered into the Thiess/Hochtief Epping to Chatswood Underground Rail Link CFMEU, AMWU Construction Enterprise Agreement 2003–2006 (**First EBA**).¹⁷ The First EBA expired in January 2006. It was replaced by the Thiess-Hochtief Australian Workers Union, AMWU, CFMEU, ETU Epping to Chatswood Rail Line Tunnel Fitout Construction Enterprise Agreement 2006–2008 (**Second EBA**). It came into effect on 7 February 2006. Peter Chatburn, who was the THJV Construction Director on the Project from September 2005 to September 2006, gave evidence that the negotiations for the Second EBA were difficult. The First EBA had expired mid-project. It was necessary to negotiate with

¹⁶ Steve Dixon, 12/8/15, T:380.45-46.

¹⁷ BTG D&A MFI-6, 11/8/15, pp 1-90 (amended in 2004 to become Thiess-Hochtief Epping to Chatswood Underground Rail Link CFMEU, Australian Workers Union, AMWU, Construction Enterprise Agreement 2003-2006).

four separate unions. And, according to Peter Chatburn, the employees had unrealistic expectations of what could be achieved.¹⁸

17. Steve Dixon was the CFMEU NSW's Organiser on the Project until his departure in May 2006.¹⁹ He was involved in negotiating the EBAs for the Project. He said he was a bargaining representative on behalf of CFMEU NSW members employed on site,²⁰ though his counsel cast a cloud over this evidence.²¹ Michael Deegan was the Project Director employed by Thiess from September 2005 to September 2006. He said that Steve Dixon was the effective leader of the different union representatives on the Project.²²
18. At the same time as THJV was undertaking the Project, Thiess was also undertaking another significant New South Wales infrastructure project – the Lane Cove Tunnel. This road tunnel project was undertaken by Thiess in a joint venture with John Holland.
19. On 13 April 2006, THJV paid the BTG D&A Committee \$100,000 by electronic funds transfer.²³ It was paid into an account held by the BTG D&A Committee with the Commonwealth Bank of Australia (CBA). The account was called the 'Building Trades Group of Unions

¹⁸ Peter Chatburn, witness statement, 11/8/15, para 9.

¹⁹ Peter Chatburn, 11/8/15, T:146.14-15; Steve Dixon, 12/8/15, T:350.43-47; Andrew Ferguson, 14/8/15, T:602.23-27; Michael Deegan, 6/10/15, T:895.9-28.

²⁰ Steven Dixon, 12/8/15, T:352.4-9.

²¹ Submissions of Steve Dixon, 29/10/15, paras 32-36.

²² Michael Deegan, 6/10/15, T:895.15-19.

²³ BTG D&A MFI-1, 10/8/15, p 89; BTG D&A MFI-3, 10/8/15, pp 90-91.

Drug and Alcohol – Safety Program’ (BTG D&A Safety Program Account).²⁴

20. Toni Mitchell was the administration officer for the BTG D&A Committee. She was responsible for banking. She gave evidence that the payment was highly unusual.²⁵ Apart from this payment, and bank interest, the only other deposits into the account were monthly contributions by employers pursuant to an EBA clause.

21. Over the next three years, amounts referable to the \$100,000 payment moved first from the BTG D&A Committee to the BTG, then from the BTG to the CFMEU NSW, then back to the BTG D&A Committee and then eventually back to the CFMEU NSW. Each of these transfers is depicted in Diagram 1 on the following page.

22. The evidence concerning the details and reasons for these transfers of money are summarised in the following paragraphs. That evidence is all directed towards one critical question. Why did THJV pay \$100,000 to the BTG D&A Committee?

²⁴ BTG D&A MFI-3, 10/8/15, pp 1, 2, 4, 5, 7, 90-91. The account number of the account is 06 2032 10104676.

²⁵ Toni Mitchell, 13/8/15, T:499.32-33.

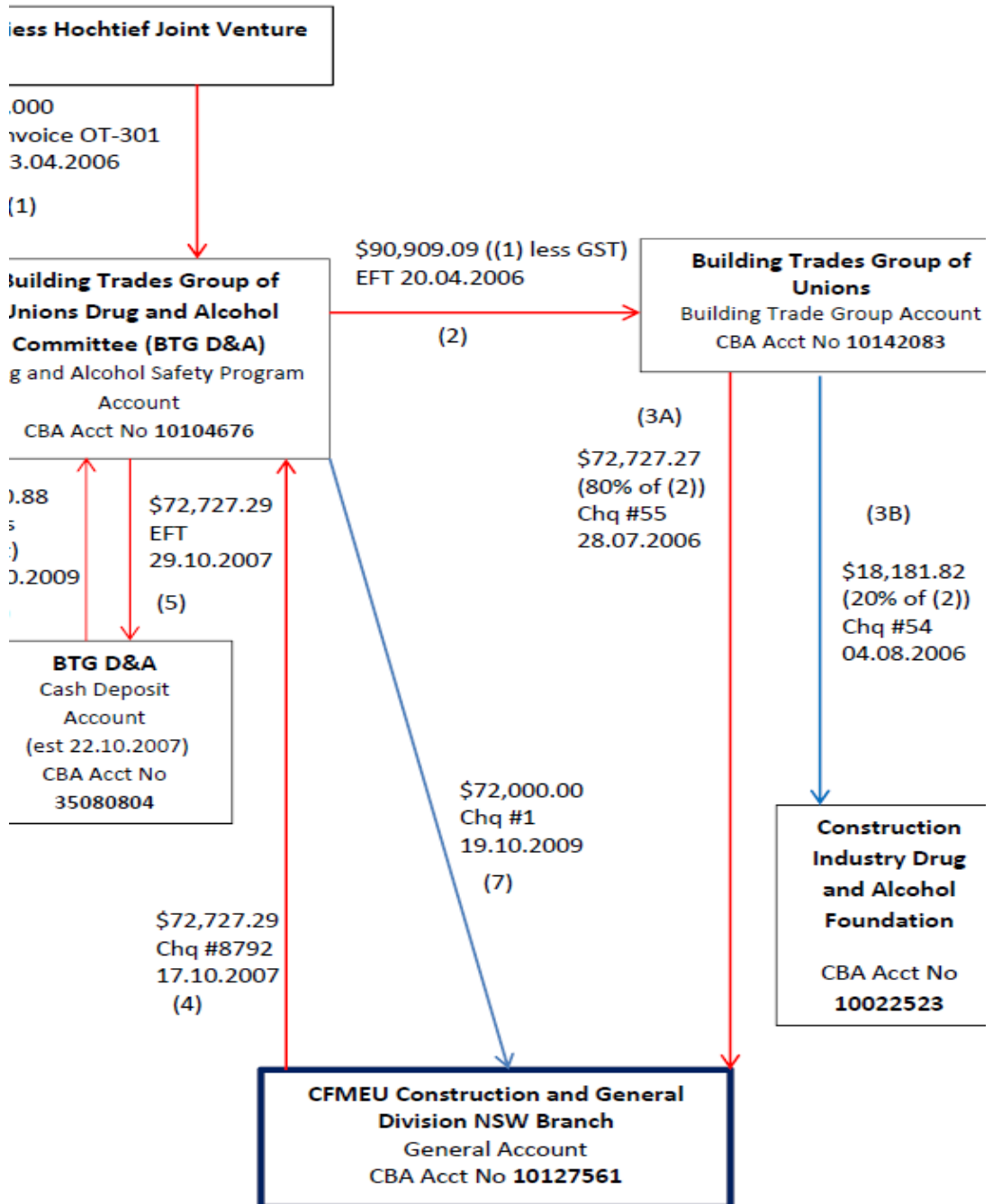


DIAGRAM 1

Background to the payment of \$100,000

23. Michael Deegan's main responsibilities on the Project were:²⁶

to resolve a significant commercial dispute with the Government, which was in the order of \$100 million, resolve safety and productivity issues on the job and to improve relations with stakeholders to ensure the successful delivery of the project.

24. Michael Deegan gave evidence that when he arrived, there were clearly safety issues on the job.²⁷ He gave a long catalogue of them.²⁸ Of one item on the long list, Michael Deegan commented that he had noticed men under the influence of drugs and alcohol on site.²⁹ He gave evidence that on one occasion he saw someone who he thought was clearly under the influence of drugs or alcohol and suggested he leave the job.³⁰ He also said that he felt that there was 'a lack of safety culture on the job in relation to drugs and alcohol.'³¹ Michael Deegan could not recall any industrial unrest other than in relation to concerns about safety.³² That evidence was contradicted to some extent by a letter written by him in September 2006 to Andrew Ferguson, then

²⁶ Michael Deegan, 6/10/15, T:890.11-17.

²⁷ Michael Deegan, 6/10/15, T:890.19-20.

²⁸ Michael Deegan, 6/10/15, T:890.28-891.39.

²⁹ Michael Deegan, 6/10/15, T:891.30-31, 892.27-29.

³⁰ Michael Deegan, 6/10/15, T:892.13-27.

³¹ Michael Deegan, 6/10/15, T:892.33-34.

³² Michael Deegan, 6/10/15, T:896.47-897.7.

Secretary of the CFMEU NSW, describing the Project as distressed ‘in every sense – financially, commercially, industrially and safety.’³³

25. Steve Dixon gave evidence that there were numerous serious safety issues on site, not just in 2005 but around 2004.³⁴ Steve Dixon and Michael Deegan referred to a fatality on site in July 2005. A subcontractor was found in a sedimentation pond on-site a number of hours after he died from a heart attack. Steve Dixon described the site as the worst site he had been on in terms of safety.³⁵
26. Peter Chatburn gave evidence that he was transferred to the role of Industrial Director because of the ‘strained industrial climate’ on the project in the aftermath of the fatality on site.³⁶ He could recall one incident of drug use on site and one instance where a worker exceeded the legal limit for alcohol.³⁷ In contrast to the other witnesses, Peter Chatburn could not recall any serious safety issues on the Project in the 12 months from September 2005 to September 2006.³⁸
27. It is likely, however, that the death of the subcontractor on site contributed to the ‘strained industrial climate’ on the Project referred to by Peter Chatburn. It is also likely that this caused tension in the relations between the various stakeholders, including THJV

³³ BTG D&A MFI-5, 11/8/15.

³⁴ Steve Dixon, 12/8/15, T:351.14-19.

³⁵ Steve Dixon, 12/8/15, T:377.14-30.

³⁶ Peter Chatburn, 11/8/15, T:145.16-25; Peter Chatburn, witness statement, 11/8/15, para 5.

³⁷ Peter Chatburn, 11/8/15, T:147.27-37.

³⁸ Peter Chatburn 11/8/15, T:158.9-13.

management and the CFMEU NSW. It was against this backdrop that THJV decided to pay \$100,000 to the BTG D&A Committee.

28. The solicitors for Michael Deegan submitted that they were ‘not aware of any evidence before the Commission which suggests that industrial action had been threatened or was in prospect in the lead up to the decision to provide drug and alcohol awareness training on site.’³⁹ This is a narrowly framed submission. Michael Deegan’s letter and Peter Chatburn’s evidence suggests that there was a strained industrial climate. To that may be added an article in *The Sydney Morning Herald* on 18 July 2015.⁴⁰ A strained industrial climate is likely to have made it difficult to negotiate the Second EBA. The solicitors for Michael Deegan also submitted that the enterprising bargaining process was completed in the relatively short period from October 2005 to January 2006; that Peter Chatburn had carriage of it; that Michael Deegan only attended an initial meeting; and that the bargaining involved four unions, not just the CFMEU. These are material factors. But from the point of view of industrial unrest, the CFMEU is likely to have been the most feared union. And it was Peter Chatburn who referred to the strained industrial climate.
29. Senior counsel for Andrew Ferguson relied on Michael Deegan’s denial of unrest.⁴¹ But Michael Deegan was a self-interested and in many ways unsatisfactory witness. Senior counsel for Andrew Ferguson also relied on Andrew Ferguson’s own evidence, but he too

³⁹ Submissions of Michael Deegan, 29/10/15, para 3.6.

⁴⁰ BTG D&A MFI-1, 10/8/15, pp 54-55.

⁴¹ Submissions of Andrew Ferguson, 29/10/15, para 22.

was self-interested.⁴² Senior counsel for Andrew Ferguson complained that the question of industrial disputation was not put to Steve Dixon.⁴³ But Steve Dixon was aware of the case against him. And, in view of the infirmities of Steve Dixon's evidence, it is not likely that any objectively useful evidence could have been obtained.

Transfer 1: Payment by THJV of \$100,000 to the BTG D&A Committee

30. The events leading up to the payment of \$100,000 by THJV to the BTG D&A Committee on 13 April 2006 are contested. It is necessary first to summarise the objective evidence and recount the evidence of the relevant witnesses. The accounts of the various witnesses overlap and conflict. It is therefore difficult to assess the evidence without also having regard to events after the payment of \$100,000 was made, at least on the CFMEU NSW side. However, where it is possible to draw conclusions about the evidence without having regard to events after the payment was made, that is done below.

Objective material

31. By 2 December 2005 THJV had apparently made the decision to engage Tom Simpson to conduct drug and alcohol training.⁴⁴ Some documents seem to contemplate that the training would commence in January 2006 or February 2006.⁴⁵ Shortly after this at a meeting of the

⁴² Submissions of Andrew Ferguson, 29/10/15, para 24.

⁴³ Submissions of Andrew Ferguson, 29/10/15, para 23.

⁴⁴ BTG D&A MFI-1, 10/8/15, p 69.

⁴⁵ BTG D&A MFI-1, 10/8/15, pp 401, 411.

THJV Management Committee on 8 December 2005, which Michael Deegan attended, the progress of the EBA negotiations was noted.⁴⁶

32. On 4 February 2006, Robert Thompson, Project Safety Officer, sent an email to various Thiess employees informing them that:⁴⁷

On 15/02/2006 THJV have invited the Drugs and Alcohol Foundation representatives from the Building Trades Group, Tom Simpson and Tony Palla [*sic, scil* Papa], to address the PSC on this very important issue as we enter into the next phase of this Project – railworking.

33. On 15 February 2006, Tom Simpson from the BTG D&A Committee gave the presentation to the Project Safety Committee or PSC.⁴⁸

34. On 10 March 2006, the weekly project note from Michael Deegan to employees on the Project stated that the BTG D&A Program would be rolled out on site. The sessions were said to be for 1 hour and would be conducted between 20 March 2006 and 5 April 2006. The note said that a schedule was being prepared which would be distributed shortly.⁴⁹

⁴⁶ BTG D&A MFI-1, 10/8/15, p 70.

⁴⁷ BTG D&A MFI-1, 10/8/15, p 73.

⁴⁸ BTG D&A MFI-1, 10/8/15, p 76.

⁴⁹ BTG D&A MFI-1, 10/8/15, p 80.

35. On 13 March 2006, the BTG D&A Committee issued tax invoice No. OT-301 to THJV for the amount of \$100,000 inclusive of GST. The invoice described the services provided by the BTG D&A as:⁵⁰

Provision of the Building Trades Group Model Drug and Alcohol Education and Awareness Training Courses and Safety Consultancy Services for the Epping to Chatswood Rail Link Project.

36. On 14 March 2006, an email was sent to senior staff attaching the schedule of sessions. The sessions were scheduled for 1 ½ hours each. 16 sessions in March and April 2006 were planned. Attendance was recommended to all employees but was not compulsory.⁵¹
37. On 16 March 2006, Michael Deegan approved payment of the BTG D&A Committee invoice.⁵²
38. On 21 March 2006, Tom Simpson from the BTG D&A Committee began providing Drug and Alcohol Awareness sessions at the Project.
39. The Project OHS report for March 2006 records that the project-wide drug and alcohol awareness training was 75% complete and that at that time 122 persons had been trained to date.⁵³ The equivalent report for April 2006 records that the training was 100% complete, although the number of persons trained to date did not increase.⁵⁴ The following month's report indicates there was training in May 2006 with an

⁵⁰ BTG D&A MFI-1, 10/8/15, p 82.

⁵¹ BTG D&A MFI-1, 10/8/15, pp 83-87.

⁵² BTG D&A MFI-1, 10/8/15, p 82; Michael Deegan, 6/10/15, T:906.41-47.

⁵³ BTG D&A MFI-1, 10/8/15, pp 444, 450.

⁵⁴ BTG D&A MFI-1, 10/8/15, pp 454, 459.

additional 40 people trained.⁵⁵ The July 2006 Project OHS report records that drug and alcohol training concluded on the Project during July 2006 and this ‘included workers and staff from United’.⁵⁶ The report records that to date a total of 204 persons had attended the drug and alcohol awareness courses.⁵⁷ The figure does not increase in later reports.⁵⁸ These figures stand in contrast with the (claimed) figure of 1,200 workers on site. In the OHS reports, THJV accounted for the training it received from the BTG D&A Committee as an internal cost of \$45 per hour for a total cost to the business of \$13,770.⁵⁹ Unlike other safety related training provided by an external provider the external cost (i.e. \$100,000 paid to the BTG D&A Committee) was not included.

Steve Dixon’s evidence

40. Steve Dixon gave evidence that he had a problem with his memory and that some of the medication he took caused memory loss.⁶⁰
41. Steve Dixon said that there were serious issues of drug abuse on site. He said it was ‘becoming out of control’.⁶¹ He himself had not witnessed any incidences of drug abuse but had heard of them.⁶²

⁵⁵ BTG D&A MFI-1, 10/8/15, p 468.

⁵⁶ BTG D&A MFI-1, 10/8/15, p 479. United Group were contracted to do the fit-out and lining for the overhead on the railway track: Michael Deegan, 6/10/15, T:912.41-42.

⁵⁷ BTG D&A MFI-1, 10/8/15, p 481.

⁵⁸ BTG D&A MFI-1, 10/8/15, pp 487, 492, 497, 502, 507.

⁵⁹ BTG D&A MFI-1, 10/8/15, p 481.

⁶⁰ Steve Dixon, 12/8/15, T:373.4-10.

42. Steve Dixon gave evidence that he would have initiated discussions with Michael Deegan and possibly Peter Chatburn about drug and alcohol training being provided by the Drug and Alcohol Education Officers from the 'Drug and Alcohol Foundation'.⁶³ His best recollection was that this first occurred at a meeting around the end of 2005. Steve Dixon said that Michael Deegan agreed in principle to meet with the trainers and see what they had to offer. According to Steve Dixon, no figure of the cost of training was discussed at this first meeting.⁶⁴
43. Steve Dixon said that he believed that after this first meeting he telephoned Trevor Sharp. He told him that Thiess had agreed to use their education services. He asked him if he could get Tom Simpson to contact Steve Dixon. Steve Dixon said Trevor Sharp agreed that he would get Tom Simpson to call. Steve Dixon did not ask for a quote for the service in this conversation.⁶⁵
44. Steve Dixon recalled that he arranged for Tom Simpson to attend the site. After his presentation, training began on site pretty well straight after.⁶⁶
45. Steve Dixon testified that, to the best of his recollection, after the training had begun, he spoke to Michael Deegan (and he thought Peter

⁶¹ Steve Dixon, 12/8/15, T:352.29-33.

⁶² Steve Dixon, 12/8/15 T:352.35-37.

⁶³ Steve Dixon, 12/8/15, T:353.12-45.

⁶⁴ Steve Dixon, 12/8/15, T:355.5-40.

⁶⁵ Steve Dixon, 12/8/15, T:355.42-356.8.

⁶⁶ Steve Dixon, 12/8/15, T:356.36-39.

Chatburn). He raised a figure of \$100,000 as a fee for services for the provision of drug and alcohol safety training to be provided by BTG D&A Committee personnel.⁶⁷ At some point – he could not recall when – Michael Deegan agreed to the \$100,000 figure.⁶⁸ He said there was no discussion whatsoever of a donation. He said the word was never used by him, by Michael Deegan or by Trevor Sharp.⁶⁹ Steve Dixon did not ask the BTG D&A Committee for a quote for the cost of training. But he did come up with the ‘ballpark’ figure himself, although the figure might have come out of conversations with Trevor Sharp.⁷⁰ He did not estimate the number of workers on site or the number of sessions required.⁷¹ Rather he seemed to have plucked the figure of \$100,000 out of the air.⁷²

46. He said after the agreement by Michael Deegan he went to see Trevor Sharp at Foundation House at Rozelle prior to the invoice for the \$100,000 being raised.⁷³ He thought he was later told by Trevor Sharp that Thiess had paid the invoice.⁷⁴

47. Steve Dixon denied that he ever had a conversation with Michael Knott, who among other roles was the General Manager of the CFMEU NSW until 2011, about the payment.⁷⁵ He said he ‘couldn’t

⁶⁷ Steve Dixon, 12/8/15, T:357.10-358.42, 360.37-361.4.

⁶⁸ Steve Dixon, 12/8/15, T:361.15-18.

⁶⁹ Steve Dixon, 12/8/15, T:357.10-18.

⁷⁰ Steve Dixon, 12/8/15, T:359.22-40.

⁷¹ Steve Dixon, 12/8/15, T:360.3-5.

⁷² Steve Dixon, 12/8/15, T:366.40-44.

⁷³ Steve Dixon, 12/8/15, T:363.13-23.

⁷⁴ Steve Dixon, 12/8/15, T:367.29-368.8.

⁷⁵ Steve Dixon, 12/8/15, T:364.40-365.15, 368.44-45.

stand' Michael Knott and it was ridiculous to suggest he would have spoken to him.⁷⁶ He denied even speaking to Peter McClelland, then President of the CFMEU NSW, about the matter either.⁷⁷ The credibility of these denials is under challenge.

48. He could not recall being present at a conversation between Trevor Sharp and Andrew Ferguson about the \$100,000.⁷⁸ He could not recall but said he 'would have', 'must have', had a conversation with Andrew Ferguson about it. Later he said he did have a conversation but had no recollection of it.⁷⁹ Nevertheless, he knew that Andrew Ferguson had never, in Steve Dixon's presence, spoken about a donation from Thiess or any 80/20 split between the union and the BTG D&A Committee.⁸⁰ He was adamant that the payment was not a donation. He said that Trevor Sharp, Michael Deegan, Tom Simpson and, he assumed, Andrew Ferguson knew this.⁸¹
49. Steve Dixon seemed to think that the figure of \$100,000 was not very high if the BTG D&A Committee had 'done their job properly' and provided more training sessions.⁸²

⁷⁶ Steve Dixon, 12/8/15, T:365.47-366.2.

⁷⁷ Steve Dixon, 12/8/15, T:369.6-13.

⁷⁸ Steve Dixon, 12/8/15, T:366.18-22, 368.10-13.

⁷⁹ Steve Dixon, 12/8/15, T:368.38-40, 369.15-23, 370.20-371.19.

⁸⁰ Steve Dixon, 12/8/15, T:366.18-28, 368.10-25.

⁸¹ Steve Dixon, 12/8/15, T:366.42-367.1.

⁸² Steve Dixon, 12/8/15, T:366.33-38.

Michael Deegan's evidence

50. Michael Deegan gave evidence that he recalled receiving an approach from Steve Dixon. It concerned formalising some training for drugs and alcohol on the job.⁸³ He said that he and Steve Dixon had a number of discussions about drug and alcohol training and that the issue had been discussed at the first meeting of the unions and THJV management for the preparation of the Second EBA.⁸⁴ Michael Deegan thought that the discussions between himself and Steve Dixon occurred over a period of weeks, if not months, probably 'not far' after Michael Deegan had started on the job in September 2005.⁸⁵
51. Michael Deegan could not recall how the \$100,000 figure was agreed. His recollection was that it was proposed by Steve Dixon.⁸⁶ At one point in his evidence, he said he thought he asked Steve Dixon to give some costing proposals, but later said he could not recall asking Steve Dixon for any costings.⁸⁷
52. He was certain the payment was for drug and alcohol training in relation to safety, and was not intended for general safety.⁸⁸
53. Michael Deegan did not think that \$100,000 was a large amount of money for the training. He said that the plan was to train all of the

⁸³ Michael Deegan, 6/10/15, T:895.9-13.

⁸⁴ Michael Deegan, 6/10/15, T:897.12-19.

⁸⁵ Michael Deegan, 6/10/15, T:897.32-39.

⁸⁶ Michael Deegan, 6/10/15, T:898.7-11, 899.39-41.

⁸⁷ Michael Deegan, 6/10/15, T:898.9-11, 899.39-45.

⁸⁸ Michael Deegan, 6/10/15, T:899.47-900.44.

employees on the project. He thought the payment was an appropriate investment.⁸⁹ Michael Deegan denied that the payment was a donation to the union.⁹⁰ He also denied that it was a payment for industrial peace.⁹¹

Peter Chatburn's evidence

54. Peter Chatburn's evidence was to the effect that he probably first became aware of the invoice for the \$100,000 payment in around April 2006 and was not involved in its raising or approval.⁹² In cross-examination, he said that it would have been Michael Deegan's responsibility to ensure that the \$100,000 payment was not irregular.⁹³

Michael Knott's evidence

55. Michael Knott (General Manager, CFMEU NSW) gave evidence that in approximately late December 2005, Steve Dixon came to his office and there was a conversation to the following effect:⁹⁴

Dixon: I've got a donation of \$100,000 from Thiess for the union.

Knott: What do you mean you have a donation?

⁸⁹ Michael Deegan, 6/10/15, T:899.15-25, 904.5-9, 905.34-39, 908.14-28.

⁹⁰ Michael Deegan, 6/10/15, T:909.41-42.

⁹¹ Michael Deegan, 6/10/15, T:909.44-45.

⁹² Peter Chatburn, witness statement, 11/8/15, para 13; Peter Chatburn, 11/8/15, T:154.19-27.

⁹³ Peter Chatburn, 11/8/15, T:156.20-28.

⁹⁴ Michael Knott, witness statement, 10/8/15, paras 25-30; Michael Knott, 10/8/15, T:65.18-41.

Dixon: Thiess have approached me with an offer of a \$100,000 donation to the union.

Knott: That's a fucking kickback! Under no circumstances have anything to do with it. It's corruption.⁹⁵

Dixon: The AWU do it all the time. It's a donation.

Knott: We're the CFMEU not the AWU. It's a kickback, it's corruption I am directing you to have nothing to do with it.

56. After that conversation, Michael Knott said he immediately went to Andrew Ferguson's office. He recounted to Andrew Ferguson what Steve Dixon had said.⁹⁶ He gave evidence that Andrew Ferguson's immediate response was that the donation may be legitimate. The two men discussed the matter for around 15 minutes. The discussion ended with Andrew Ferguson saying he would speak to Steve Dixon about the matter. After that, Michael Knott said he had no further discussion with Steve Dixon or Andrew Ferguson. As far as he was concerned the matter was Andrew Ferguson's responsibility to deal with.⁹⁷ In cross-examination, Michael Knott said that he did not talk to anyone else about the matter after speaking with Andrew Ferguson.⁹⁸

⁹⁵ Michael Knott said he could remember this part of the conversation exactly: Michael Knott, 10/8/15, T:65.34-36.

⁹⁶ Michael Knott, witness statement, 10/8/15, para 32; Michael Knott, 10/8/15, T:66.1-67.8.

⁹⁷ Michael Knott, witness statement, 10/8/15, paras 32-34, Michael Knott, 10/8/15, T:66.43-67.8.

⁹⁸ Michael Knott, 10/8/15, T:115.18-20.

Peter McClelland's evidence

57. Peter McClelland was President of the CFMEU NSW. He testified that one day in 2005 he had a conversation with Michael Knott. Michael Knott told him that he had had a meeting with Steve Dixon in which Steve Dixon said that he had been approached by Thiess who were prepared to give a donation to the union. Peter McClelland said that Michael Knott was not happy about it and that he told him that he had reported the matter to Andrew Ferguson to deal with.⁹⁹ Peter McClelland was absolutely sure that Michael Knott mentioned a 'donation to the union'.¹⁰⁰
58. Immediately prior to the conversation, Peter McClelland had seen Steve Dixon in Michael Knott's office, had subsequently seen Michael Knott leave his office and walk towards Andrew Ferguson's office. About 15 to 20 minutes after seeing Michael Knott leave his office he came into Peter McClelland's office.¹⁰¹
59. Peter McClelland gave the following evidence about what happened next:¹⁰²

I think it was probably the following day, Andrew Ferguson came into my office and said 'Look' – Michael Knott saw him and told him about this donation that Steve Dixon had organised or was party to in a discussion with Thiess and that we need to meet with Steve Dixon and make sure that everything's aboveboard.

⁹⁹ Peter McClelland, 6/10/15, T:856.31-857.13.

¹⁰⁰ Peter McClelland, 6/10/15, T:858.8-10, 859.26-41.

¹⁰¹ Peter McClelland, 6/10/15, T:857.15-858.6.

¹⁰² Peter McClelland, 6/10/15, T:858.18-23.

60. Peter McClelland said that he agreed to meet with Steve Dixon but that no meeting occurred which he attended.¹⁰³ Peter McClelland said that he did not follow up with Andrew Ferguson about the issue. But (inferentially later) he came to an understanding through some discussion or consultation with Andrew Ferguson that 20% of the \$100,000 would go to CIDAF and the balance was to support industry safety.¹⁰⁴

Andrew Ferguson's evidence

61. Andrew Ferguson testified that the issue of the \$100,000 payment was first raised with him by Michael Knott prior to the payment being made. He was not sure of the date.¹⁰⁵

62. Andrew Ferguson recalled Michael Knott coming into his office and saying words to the effect that 'There's a proposed donation of \$100,000 to the Union from Thiess.'¹⁰⁶ Andrew Ferguson recalled Michael Knott not being comfortable about the proposed donation.¹⁰⁷ Andrew Ferguson did not think Michael Knott had enough information to assess whether the payment was legitimate.¹⁰⁸ He did not recall any specific reference by Michael Knott to Steve Dixon. He denied

¹⁰³ Peter McClelland, 6/10/15, T:858.28-859.2.

¹⁰⁴ Peter McClelland, 6/10/15, T:859.4-17.

¹⁰⁵ Andrew Ferguson, 14/8/15, T:602.4-34.

¹⁰⁶ Andrew Ferguson, 14/8/15, T:602.38-40.

¹⁰⁷ Andrew Ferguson, 14/8/15, T:602.42-43.

¹⁰⁸ Andrew Ferguson, 14/8/15, T:603.33-44.

hearing Michael Knott describe the payment as a ‘kickback’ or ‘corruption’. But he definitely recalled the word donation.¹⁰⁹ He told Michael Knott he would look into the matter.

63. Shortly after his discussion with Michael Knott, Andrew Ferguson spoke to Peter McClelland about the issue. According to Andrew Ferguson, Peter McClelland was already aware of the issue. Together they agreed to discuss the payment with Steve Dixon.¹¹⁰ Andrew Ferguson said that sometime after this he had a discussion in his office at Lidcombe with Steve Dixon and Peter McClelland. Andrew Ferguson testified that he informed Steve Dixon that Michael Knott had raised some concerns in respect to a donation from Thiess and asked for an explanation.¹¹¹

64. Andrew Ferguson’s evidence on Friday 14 August 2015 was as follows. Steve Dixon indicated that it was a donation to the union for safety purposes. In addition Thiess had a preference or desire for some drug and alcohol training to be performed. They agreed that perhaps 10–15 courses were appropriate.¹¹² Andrew Ferguson then quizzed Steve Dixon in relation to the contribution for safety and Steve Dixon informed him that Thiess were not prescriptive about the type of safety work but that the payment was for the safety work of the union.¹¹³ He specifically asked Steve Dixon ‘Are you sure this is aboveboard? Is there no issue of duress? Is it voluntary?’ He got assurances in respect

¹⁰⁹ Andrew Ferguson, 14/8/15, T:604.3-14.

¹¹⁰ Andrew Ferguson, 14/8/15, T:604.31-44.

¹¹¹ Andrew Ferguson, 14/8/15, T:605.7-34.

¹¹² Andrew Ferguson, 14/8/15, T:605.26–606.8.

¹¹³ Andrew Ferguson, 14/8/15, T:606.11-26.

of those issues.¹¹⁴ Andrew Ferguson was certain that the word ‘donation’ was used and that it was a donation to the union.¹¹⁵

65. However, when giving evidence three days later on Monday 17 August 2015, Andrew Ferguson was shown a document written by him in 2011. In it he had said that the payment was a donation to the BTG.¹¹⁶ Andrew Ferguson then gave evidence that the payment was not a donation to the union, but to the BTG.¹¹⁷

66. Andrew Ferguson had no recollection of any conversation about the payment with Steve Dixon and Trevor Sharp.¹¹⁸ He also denied any conversation with Trevor Sharp about the \$100,000 in 2006.¹¹⁹ Later, however, he gave the following evidence:¹²⁰

I remember having a discussion with Trevor Sharp in my office in relation to the proposed payment from Thiess. I outlined to him clearly that it was a donation to the union, that was the advice I had been given; that in my discussions with Mr Dixon he had advised that Thiess had requested that a number of drug and alcohol training sessions be conducted on the site and we discussed that, and based on the assessment given from Steve Dixon of 10 to 15 courses, that perhaps \$20,000 would reimburse the Drug and Alcohol Safety Committee for their costs and that the Union intended to use the balance for its BTG safety program.

¹¹⁴ Andrew Ferguson, 14/8/15, T:606.23-26.

¹¹⁵ Andrew Ferguson, 14/8/15, T:606.28-30.

¹¹⁶ BTG D&A MFI-17, 14/8/15. See para 123.

¹¹⁷ Andrew Ferguson, 17/8/15, T:664.3-36.

¹¹⁸ Andrew Ferguson, 14/8/15, T:607.43-608.24.

¹¹⁹ Andrew Ferguson, 14/8/15, T:608.18-24.

¹²⁰ Andrew Ferguson, 14/8/15, T:625.29-40.

67. Inferentially, given Andrew Ferguson's earlier denial of a conversation in 2006, any such conversation must have occurred in 2005. Andrew Ferguson denied emphatically that there was any discussion with Trevor Sharp in which Andrew Ferguson asked Trevor Sharp to use the BTG D&A Committee's account to receive the \$100,000 for which the Committee could keep 20%.¹²¹
68. Andrew Ferguson gave evidence that he was not involved with the invoicing for the \$100,000.¹²² However, a memo he wrote to Peter McClelland in 2007¹²³ indicates that he was involved in causing Tony Papa to send the invoice.

Trevor Sharp's evidence

69. Trevor Sharp said in early in 2006 he had been called by Andrew Ferguson to a meeting at the CFMEU NSW office at Lidcombe.¹²⁴ Present at the meeting were Steve Dixon and Andrew Ferguson. Trevor Sharp gave the following evidence of the gist of the conversation:¹²⁵

Ferguson: Thiess want to make [a] 100K donation.

Sharp: That's great, we could do with the money. Tell them to put it into the CIDAF gift fund and they can claim it as a tax deduction.

¹²¹ Andrew Ferguson, 14/8/15, T:608.26-609.43.

¹²² Andrew Ferguson, 14/8/15, T:606.32-35.

¹²³ BTG D&A MFI-15, 14/8.15. See para 98.

¹²⁴ Trevor Sharp, 11/8/15, T:249.23-35.

¹²⁵ Trevor Sharp, 11/8/15, T:250.8-251.6.

Ferguson: What makes you think that you are getting it all?

Sharp: Well how else do we do it?

Ferguson: We want you to put it in your account and transfer it to us in a couple of weeks.

Sharp: We can't do that, The Foundation can't do that because it's a charity and is under close scrutiny from many areas. We have financial audits and hold regular meetings. Everyone would see it go into our account and then come out again and they would start asking questions.

Ferguson: Well what about the BTG D&A accounts?

Sharp: That's possible.

Ferguson: We'll take 80% and you can have 20%.

70. Trevor Sharp said he agreed to the arrangement because Andrew Ferguson told him what to do and controlled him quite rigidly when need be.¹²⁶ He said he understood that he had no choice in the arrangement.¹²⁷ Trevor Sharp gave evidence that Andrew Ferguson gave him instructions on how to issue the 13 March 2006 invoice.¹²⁸ Trevor Sharp said that he instructed Toni Mitchell to prepare the 13 March 2006 invoice and gave her the words to use.¹²⁹ Trevor Sharp said there was no way that the BTG D&A Committee was going to provide \$100,000 of training.¹³⁰ To his mind, the invoice was 'bogus'.¹³¹

¹²⁶ Trevor Sharp, 11/8/15, T:251.5-16.

¹²⁷ Trevor Sharp, 11/8/15, T:270.27-32.

¹²⁸ Trevor Sharp, 12/8/15, T:325.45-326.2.

¹²⁹ Trevor Sharp, 11/8/15, T:253.20-41.

¹³⁰ Trevor Sharp, 11/8/15, T:265.24-27.

¹³¹ Trevor Sharp, 12/8/15, T:326.1, 329.45.

71. Trevor Sharp's evidence was that shortly after the conversation with Andrew Ferguson he told Toni Mitchell and Tom Simpson that the BTG D&A Committee needed to provide drug and alcohol training to Thiess employees up to a value of at least \$20,000.¹³²

Tony Papa's evidence

72. At the time of the payment, Tony Papa¹³³ was the Secretary of the BTG and a member of BTG D&A Committee. He gave evidence that his only knowledge about the payment was that Steve Dixon raised the payment of the \$100,000 from Thiess at an organisers' meeting. Tony Papa's evidence on this point was very vague. He not could recall the details of what was said, but could recall that Steve Dixon said that the payment from Thiess was to go to the union to assist with its safety program.¹³⁴

Preliminary observations about the evidence of the witnesses

73. There is no witness whose evidence in relation to the reason for the \$100,000 payment is not contradicted, either expressly or implicitly, by another witness. On one view, that is not surprising, given the length of time that has passed since the payment was made. However, a surprising feature of the evidence is the certainty with which parts of it

¹³² Trevor Sharp, witness statement, 11/8/15, para 20.

¹³³ His actual name is Anthony Papaconstuntinos. But in the evidence he is so constantly referred to as Tony Papa that, without intending disrespect, it is convenient to adopt that name in this Report.

¹³⁴ Tony Papa, 18/8/15, T:806.9-808.13.

were given. At various points in their evidence Michael Knott, Peter McClelland, Andrew Ferguson and Steve Dixon all gave very definite accounts of conversations and events which occurred almost 10 years ago. Yet they conflicted. In those circumstances, it is difficult to draw many conclusions about the competing accounts of the witnesses without considering the events subsequent to the \$100,000 payment. Michael Deegan objected to these events being used against him, since he knew nothing about them.¹³⁵ That is a reasonable submission so far as the events might be used against him directly. Counsel assisting did not submit that they could be used in that way. But the later events can cast legitimate light on what was happening on the CFMEU NSW side of the hill, and that in turn can have an indirect impact on Michael Deegan's position. The conduct of others can damage one's own position even though one knows nothing about that conduct.

74. For the following reasons at least, Steve Dixon's recollection of events was, at the very least, generally unreliable:
- (a) He admitted problems with his memory.
 - (b) The evidence of both Michael Knott and Peter McClelland was that Michael Knott had a meeting with Steve Dixon. Although Andrew Ferguson did not say that Michael Knott had met Steve Dixon his evidence strongly suggests that the meeting occurred. How else would Michael Knott have known about the proposed payment? Yet Steve Dixon gave the most emphatic denial of meeting Michael Knott. The

¹³⁵ Submissions of Michael Deegan, 29/10/15, paras 4.1-4.2.

denial should not be accepted. Indeed counsel assisting submitted that the denial was deliberately false. Unfortunately this submission of counsel assisting is correct. As counsel for Michael Knott correctly pointed out,¹³⁶ the written submissions for Steve Dixon did not attempt to explain why Steve Dixon's evidence should be preferred. Since Andrew Ferguson was told of the payment by Michael Knott, the latter can only have become aware of it because Steve Dixon told him about it. Yet in other respects Steve Dixon's written submissions did contain explanations of why his evidence should be preferred over other witnesses, including Michael Knott. Counsel for Steve Dixon went so far as to submit that Michael Knott 'clearly had deep animus towards many CFMEU officials'.¹³⁷ But there is no evidence to support the submission.

- (c) His evidence concerning his conversations with Michael Deegan was vague and general. His evidence that he came up with a figure of \$100,000 to be paid by Thiess for the payment of services out of his own head without any estimate of the number of workers or sessions required was unbelievable.
- (d) Steve Dixon cast wild aspersions on the characters of Michael Knott and Peter McClelland by twice accusing them of always being 'at the pub or smoking dope'.¹³⁸ Counsel

¹³⁶ Submissions of Michael Knott, 5/11/15, para 7.

¹³⁷ Submissions of Steve Dixon, 29/10/15, para 25.

¹³⁸ Steve Dixon, 12/8/15, T:369.6-13, 374.21-39.

assisting submitted that these should be rejected. That submission is correct. But it is necessary to go further. These allegations are inherently difficult to accept. Peter McClelland paid two visits to the witness box. On each occasion he appeared to be a business-like and efficient person. In general he seemed dedicated to advancing the interests of the CFMEU NSW as he saw them. These traits are not consistent with Steve Dixon's allegation. It seems highly unlikely that he would spend his working days befuddled by drink or drugs. Peter McClelland emphatically denied the allegations. He was not challenged in his denial by counsel for Steve Dixon or any other counsel.¹³⁹ In this respect Steve Dixon's behaviour goes beyond suggesting unreliability. It indicates a total lack of credibility – an unwillingness to limit himself to his honest recollections of what he had observed. Witnesses have considerable protection from defamation actions. The witness box is not a place for personal attacks on those whom the witness dislikes. Nor is it a place for feckless remarks thrown out to get out of some tight testimonial corner. Witnesses who behave in this fashion deserve no credit.

75. It follows that the submissions of Michael Deegan which contend that corroboration is to be found in Steve Dixon's evidence must fail.¹⁴⁰ Both Michael Deegan and Steve Dixon have a strong self-interest in

¹³⁹ Peter McClelland, 6/10/15, T:872.6-28.

¹⁴⁰ Submissions of Michael Deegan, 29/10/15, paras 3.3-3.5.

Steve Dixon's evidence being correct. It is in fact completely untrustworthy.

Transfer 2: Payment to the BTG Account

76. On 20 April 2006, one week after the transfer of \$100,000, the sum of \$90,909.09 was transferred by electronic funds transfer from the BTG D&A Safety Account. It went into a CBA account in the name of the Building Trades Group (**BTG Account**).¹⁴¹ The Quickline Transfer form approving the payment was signed by Tony Papa.¹⁴² Toni Mitchell gave evidence that it was unusual for Tony Papa to sign such a transfer.¹⁴³ That is significant evidence.
77. The Quickline Transfer form stated that the reason for the payment was:¹⁴⁴ 'Thiess Hochtief Drug & Alcohol and Safety consultancy payment – GST held for payment to the ATO'.
78. At the time of the transfer to the BTG Account, Michael Knott and Tony Papa were the only signatories on the BTG D&A Safety Account.¹⁴⁵
79. Tony Papa said that he did not prepare the form. He said that all he was asked to do was sign it. He said he was unaware of the transfer.

¹⁴¹ BTG D&A MFI-3, 10/8/15, Vol 1, p 91; BTG D&A MFI-1, 10/8/15, p 94. The account number is 06 2194 10142083.

¹⁴² BTG D&A MFI-1, 10/8/15, p 93; Tony Papa, 18/8/15, T:810.16-27.

¹⁴³ Toni Mitchell, 13/8/15, T:498.32-41.

¹⁴⁴ BTG D&A MFI-1, 10/8/15, p 93.

¹⁴⁵ BTG D&A MFI-3, 10/8/15, Vol 1, pp 4-8.

He said he knew nothing about the accounts, which were looked after by Michael Knott and Trevor Sharp.¹⁴⁶

80. Andrew Ferguson gave evidence that he had no recollection of the movement of the money from the BTG D&A Safety Account to the BTG Account.¹⁴⁷

Transfers 3A and 3B: Payments to the CFMEU NSW and CIDAF

81. On 24 July 2006, the BTG D&A Committee had sent Tax Invoice OT-317 to Tony Papa at the BTG for \$18,181.82 with the following description:¹⁴⁸ ‘Reimbursement for presentation of Drug and Alcohol Education Sessions on Thiess Hochtief Lane Cove Tunnel project’. Michael Knott gave evidence that on 25 July 2006, Tony Papa requested that Michael Knott draw up two cheque requisitions on the BTG Account.¹⁴⁹ Michael Knott said that Tony Papa gave him the details for the requisitions.¹⁵⁰ The requisition forms dated 25 July 2006 which were drawn up were for:¹⁵¹

- (a) cheque 00054 payable to the ‘Drug and Alcohol Committee’ in the amount of \$18,181.82 for ‘Thiess Hodgkiss [sic] Drug & Alcohol Education [sic] Lane Cove Tunnel Project’; and

¹⁴⁶ Tony Papa, 18/8/15, T:810.32-47.

¹⁴⁷ Andrew Ferguson, 14/8/15, T:615.17-19.

¹⁴⁸ BTG D&A MFI-1, 10/8/15, p 109.

¹⁴⁹ Michael Knott, witness statement, 10/8/15, para 35; Michael Knott, 10/8/15, T:67.10-38.

¹⁵⁰ Michael Knott, 10/8/15, T:68.33-35.

¹⁵¹ BTG D&A MFI-1, 10/8/15, pp107-8.

(b) cheque 00055 payable to the CFMEU in the amount of \$72,727.27 payable for 'Thiess Hodgkiss [sic] Safety Lane Cove Tunnel Project'.

82. Michael Knott gave evidence that at the time he was the treasurer of the BTG D&A Committee. He said he was unaware of this work performed by the Committee. He said that he telephoned Trevor Sharp to check with Trevor Sharp what work had been performed by the BTG D&A Committee, and was assured that it had been done.¹⁵²

83. After that conversation, Michael Knott drew up the requisitions and forwarded them to Andrew Ferguson for authorisation, as requested by Tony Papa.¹⁵³ Andrew Ferguson signed both requisitions approving the cheques.

84. On 28 July 2006, the sum of \$72,727.27 was debited from the BTG Account.¹⁵⁴ Cheque 000055 was deposited into the CFMEU NSW's general cheque account (**CFMEU General Account**).¹⁵⁵ A duplicate of the receipt issued by the union describes the amount as being for 'Miscellaneous BTG SAFETY CAMPAIGN'.¹⁵⁶

¹⁵² Michael Knott, witness statement, 10/8/15, paras 35-36.

¹⁵³ Michael Knott, witness statement, 10/8/15, para 37; Michael Knott, 10/8/15, T:68.13-16.

¹⁵⁴ BTG D&A MFI-1, 10/8/15, p 111.

¹⁵⁵ BTG D&A MFI-3, 10/8/15, Vol 2, pp 765, 767; BTG D&A MFI-1, 10/8/15, p 110. The account number is 06 2194 10127561.

¹⁵⁶ BTG D&A MFI-1, 10/8/15, p 110.

85. On 4 August 2006, \$18,181.82 was debited from the BTG Account¹⁵⁷ and cheque 000054 was deposited into one of CIDAF's bank accounts.¹⁵⁸
86. Tony Papa denied requesting the requisitions.¹⁵⁹ He also denied ever seeing or requesting Tax Invoice OT-317.¹⁶⁰ Andrew Ferguson said he was asked to sign the requisitions by someone but he could not recall who.¹⁶¹ He denied that he arranged the transfer to the CFMEU NSW.¹⁶²
87. If it was not Tony Papa or Andrew Ferguson who requested the transfers, who could it have been?
88. The BTG Account was established in May 2002, following a meeting of the BTG.¹⁶³ At that time the officers of the BTG were:
- (a) Tony Papa – BTG Secretary;
 - (b) Mick Doust from the ETU¹⁶⁴ – BTG President;
 - (c) Andrew Ferguson – Vice President; and

¹⁵⁷ BTG D&A MFI-1, 10/8/15, p 111.

¹⁵⁸ BTG D&A MFI-1, 10/8/15, pp 112, 113A.

¹⁵⁹ Tony Papa, 18/8/15, T:812.28-813.27.

¹⁶⁰ Tony Papa, 18/8/15, T:813.29-814.6.

¹⁶¹ Andrew Ferguson, 14/8/15, T:616.2-24.

¹⁶² Andrew Ferguson, 17/8/15, T:675.8-9.

¹⁶³ BTG D&A MFI-3, 10/8/15, Vol 2, pp 457-459.

¹⁶⁴ Andrew Ferguson, 14/8/15, T:601.29.

(d) Brian Beer from the AMWU¹⁶⁵ – Vice President.

89. Both the BTG minutes and bank records from that time show that the BTG Account's method of operation was as follows:

(a) Andrew Ferguson with either Michael Doust or Brian Beer;
or

(b) Tony Papa with either Michael Doust or Brian Beer.¹⁶⁶

90. As at July 2006, there had been no formal change of signatory on the BTG Account.¹⁶⁷ However, there is no document that suggests that Michael Doust or Brian Beer requested the transfers. In fact, the evidence suggests that the BTG Account was controlled for a considerable period by the CFMEU NSW:

(a) Over the period from November 2007 to October 2010 (when Andrew Ferguson ceased to be Secretary of the CFMEU), Andrew Ferguson and Tony Papa co-signed every cheque – 35 in all – on the BTG Account. All but two of these were payable to the CFMEU NSW.¹⁶⁸ This was not in accordance with the bank authority which required one 'CFMEU NSW person' with a 'non-CFMEU NSW person'.

¹⁶⁵ Andrew Ferguson, 14/8/15, T:601.28-29.

¹⁶⁶ BTG D&A MFI-3, 10/8/15, pp 457-459.

¹⁶⁷ BTG D&A MFI-3, 10/8/15, pp 457-459, BTG D&A MFI-35, 20/10/15; BTG D&A MFI-36, 20/11/15.

¹⁶⁸ BTG D&A MFI-3, 10/8/15, pp 576-613.

- (b) A formal change of signatory did not take place until Andrew Ferguson ceased being Secretary. In February 2011, the signatories were changed to be Tony Papa and Malcolm Tulloch, Andrew Ferguson's successor.¹⁶⁹ After Malcolm Tulloch ceased to be Secretary, the signatories were again changed to Tony Papa and Brian Parker, Malcolm Tulloch's successor.¹⁷⁰ The minutes of the meetings recording the change of signatories do not record anyone in attendance other than Tony Papa and the current CFMEU NSW secretary. They do not record any other business. They do not record any previous meetings.
- (c) Michael Knott gave evidence that the principal officers responsible for the operation, authorisation and signatories to the BTG accounts were Andrew Ferguson and Tony Papa.¹⁷¹ He said that the records of the BTG were kept at the CFMEU NSW office.¹⁷²
- (d) For his part, Tony Papa said he never exercised any decision-making role when signing the cheques on the BTG Account. He said he could have had his eyes closed.¹⁷³ He was merely asked to sign the cheques by staff in the accounts department at the CFMEU NSW.¹⁷⁴ The evidence that Tony Papa 'knew

¹⁶⁹ BTG D&A MFI-1, 10/8/15, pp 174–177, BTG D&A MFI-36, 20/10/15.

¹⁷⁰ BTG D&A MFI-1, 10/8/15, pp 260-264, BTG D&A MFI-36, 20/10/15.

¹⁷¹ Michael Knott, witness statement, 10/8/15, para 41.

¹⁷² Michael Knott, 10/8/15, T:75.11-26.

¹⁷³ Tony Papa, 18/8/15, T:792.2-13.

¹⁷⁴ Tony Papa, 18/8/15, T:793.15-21.

nothing' is difficult to accept. But, either way, it is at least consistent with CFMEU NSW control of the BTG.

91. The obvious inference is that one or both of Andrew Ferguson and Tony Papa were involved in making the decision to approve the transfers. Support for this conclusion can be found in a memo written by Andrew Ferguson to Peter McClelland on 2 October 2007.¹⁷⁵ Among other things, Andrew Ferguson wrote in that memo:¹⁷⁶

When we got the payment BTG Exec officers met & decided \$18,181.82 for drug & alcohol & \$72,727.29 for BTG for safety. As BTG did not have a safety officer they allocated this to CFMEU as we do 99% of the industry OHS work.

Transfer 4: Payment of \$72,727.29 from the CFMEU NSW

92. In September 2007 an investigation into the payment made by THJV to the BTG D&A Committee was commenced by the Australian Building and Construction Commission (ABCC).¹⁷⁷ The ABCC notes recorded that it had received a complaint that the payment made by THJV was a payment to the CFMEU NSW 'not to strike or talk about safety breaches' and 'was allegedly disguised as drug and alcohol education and training but no training took place'.¹⁷⁸
93. On 19 September 2007 Investigator Bernard Kozakiewicz contacted Trevor Sharp at the CIDAF. Trevor Sharp was not present when he

¹⁷⁵ Paragraph 98.

¹⁷⁶ BTG D&A MFI-15, 14/8/15.

¹⁷⁷ BTG D&A MFI-1, 10/8/15, pp 144–150.

¹⁷⁸ BTG D&A MFI-1, 10/8/15, p 144.

called and Bernard Kozakiewicz left a message asking Trevor Sharp to call him regarding a complaint made in connection with Invoice No. OT-301.¹⁷⁹

94. Trevor Sharp gave evidence that he immediately contacted Andrew Ferguson and told him he needed to meet him.¹⁸⁰ He said Andrew Ferguson told him not to return the investigator's calls and if the investigator got on to him to 'stonewall'.¹⁸¹
95. Andrew Ferguson said he recalled having a discussion with Trevor Sharp and possibly Peter McClelland regarding a phone call from the ABCC. His evidence was initially that he thought that the ABCC's enquiry related to an invoice in the amount of \$18,000 odd issued by the BTG D&A Committee. But on being shown the note recording the call received by the BTG D&A Committee from the ABCC he did not dispute that it related to the \$100,000 payment by THJV to the BTG D&A Committee.¹⁸² Andrew Ferguson denied telling Trevor Sharp not to speak to the ABCC investigator.¹⁸³
96. Andrew Ferguson said that he discussed the issue thoroughly with Peter McClelland. They jointly decided that, although the money had been paid correctly in terms of it being a donation to the union, it was appropriate to return the money to the BTG and await the outcome of

¹⁷⁹ BTG D&A MFI-1, 10/8/15, p 127; Toni Mitchell, witness statement, 13/8/15, para 23.

¹⁸⁰ Trevor Sharp, 11/8/15, T:254.35-40.

¹⁸¹ Trevor Sharp, witness statement, 11/8/15, para 22; Trevor Sharp, 11/8/15, T:255.3-14.

¹⁸² Andrew Ferguson, 14/8/15, T:618.27-619.39.

¹⁸³ Andrew Ferguson, 14/8/15, T:626.10-33.

the investigation.¹⁸⁴ His explanation for not corralling the money in a separate CFMEU NSW account was simply that at the end of the financial year it would have been ‘spent’.¹⁸⁵ Andrew Ferguson’s evidence on this point was somewhat confusing. The money was not paid into a separate bank account. The CFMEU NSW did not even have a dedicated general ledger account for the payment of ‘safety’ expenses.¹⁸⁶

97. Peter McClelland recalled Andrew Ferguson speaking to him in the corridor of the CFMEU NSW office at Lidcombe. He said Andrew Ferguson told him that the CFMEU NSW had received the payment from Thiess and that he had heard from Trevor Sharp that it was being investigated by the ABCC.¹⁸⁷ He said Andrew Ferguson suggested that the amount be paid back to the BTG D&A Committee¹⁸⁸ and that he agreed because he did not ‘want money in the Union’s account which may have a question mark over it.’¹⁸⁹
98. A handwritten memo written by Andrew Ferguson to Peter McClelland dated 2 October 2007 also sheds light on why the money was to be paid back. The memo reads as follows:¹⁹⁰

I finally caught up with a backlog of work today. As you are aware the ABCC have been pestering T. Sharp re a payment made to BTG D&A last

¹⁸⁴ Andrew Ferguson, 14/8/15, T:620.40-621.1.

¹⁸⁵ Andrew Ferguson, 14/8/15, T:621.6-20.

¹⁸⁶ U-Plus/Coverforce MFI-7, 15/10/15.

¹⁸⁷ Peter McClelland, 6/10/15, T:860.14-26.

¹⁸⁸ Peter McClelland, 6/10/15, T:860.25-26.

¹⁸⁹ Peter McClelland, 6/10/15, T:861.41-45.

¹⁹⁰ BTG D&A MFI-15, 14/8/15.

year. I got off M. Knott last week a copy of invoice sent for \$100,000. The invoice says for BTG Drug & Alcohol etc & safety Consultancy. I got Tony Papa to get invoice sent last year when S.Dixon told me what Thiess Hochtief had agreed. I was a bit perplexed at the time but S.D assured me etc. You know what S.D was like. Anyway I double checked this recently with S.D who now has a different story. He says really money was only for drug and alcohol not OHS. When we got the payment BTG Exec Officers met and decided \$18,181.82 for drug and Alcohol & \$72,727.29 for BTG for Safety. As BTG did not have a Safety Officer they allocated this to CFMEU as we do 99% of the industry OHS work. In any case I am not comfortable with this therefore arrange for the full amount to go to T Sharpe [sic] CFMEU pay \$72,727.29 to D+A.

99. Andrew Ferguson denied that the inference from the memo was that the money being paid to the BTG D&A Committee was to ‘go back’ for all time.¹⁹¹ At first, he had no recollection of any change of story or apparent change of story by Steve Dixon.¹⁹² Later, he said that he was absolutely convinced that what Steve Dixon was saying was not correct: Andrew Ferguson knew it was a donation and he knew it was for safety.¹⁹³
100. On 3 October 2007, Peter McClelland authorised the issue of cheque 8792 to the BTG D&A Committee in the amount of \$72,727.29.¹⁹⁴ On 17 October 2007, that cheque was deposited in the BTG D&A Safety Account¹⁹⁵ and the amount debited from the CFMEU General Account on which the cheque had been drawn.¹⁹⁶

¹⁹¹ Andrew Ferguson, 14/8/15, T:624.20-33.

¹⁹² Andrew Ferguson, 14/8/15, T:624.20-26.

¹⁹³ Andrew Ferguson, 17/8/15, T:662.3-5.

¹⁹⁴ BTG D&A MFI-15, 14/8/15.

¹⁹⁵ BTG D&A MFI-3, Vol 1, p 145.

¹⁹⁶ BTG D&A MFI-1, 10/8/15, p 129.

Transfer 5: BTG D&A Cash Deposit Account

101. On 18 October 2007, one day after \$72,727.29 had been returned from the CFMEU NSW to the BTG D&A Safety Account, Trevor Sharp sent a letter on BTG D&A Committee letterhead to the CBA asking that Andrew Ferguson be added as a signatory to the BTG D&A Safety Account.¹⁹⁷ The letter included a statement by Trevor Sharp that he ‘would appreciate it if [the change of signatories] could be recorded as soon as possible.’ The effect of the change was to replace Michael Knott with Andrew Ferguson, keeping Tony Papa as a signatory.
102. Andrew Ferguson was never a member of the BTG D&A Committee.¹⁹⁸ There is no evidence that he was ever a signatory on any of the many other BTG D&A Committee bank accounts.¹⁹⁹ Andrew Ferguson said he did not know and could not recollect why he was made a signatory of the BTG D&A Safety Account.²⁰⁰ He denied that he became a signatory to that account to ensure that he kept control of the money that he had caused to be transferred from the CFMEU NSW.²⁰¹
103. Once again, Tony Papa said he knew nothing about why the signatories were changed.²⁰²

¹⁹⁷ BTG D&A MFI-1, pp 132–139. Andrew Ferguson, 14/8/15, T:631.32-43.

¹⁹⁸ Andrew Ferguson, 13/8/15, T:523.5-6.

¹⁹⁹ BTG D&A MFI-33, 6/10/15.

²⁰⁰ Andrew Ferguson, 14/8/15, T:632.13-43; Andrew Ferguson, 17/8/15, T:659.38-660.2.

²⁰¹ Andrew Ferguson, 14/8/15, T:660.4-13.

²⁰² Tony Papa, 18/8/15, T816.39-41.

104. On 22 October 2007, Toni Mitchell wrote to the CBA and asked that a new cash deposit account be created in the name of the BTG D&A Committee, linked to the BTG D&A Safety Account (**Cash Deposit Account**).²⁰³ Again, the letter asked that the new account application be ‘processed as soon as possible.’ The request for the new account was signed by Andrew Ferguson and Tony Papa.
105. Tony Papa said that Toni Mitchell prepared the request form, and that she must have been authorised by Trevor Sharp or Michael Knott.²⁰⁴ Tony Papa again maintained that he simply signed the document without reading its contents and did not know why the account was being set up.²⁰⁵
106. Toni Mitchell gave evidence that she was instructed to set up this account because the ‘money was going to be sitting around for a while.’²⁰⁶ She said she was told this by Trevor Sharp but didn’t know why.²⁰⁷ Trevor Sharp assumed he gave Toni Mitchell the instructions to set up the account, but he had no precise recollection of it.²⁰⁸
107. Like Tony Papa, Andrew Ferguson could not recall anything about the Cash Deposit Account.²⁰⁹

²⁰³ BTG D&A MFI-1, 10/8/15, pp 140-143.

²⁰⁴ Tony Papa, 18/8/15, T:818.22-33.

²⁰⁵ Tony Papa, 18/8/15, T:818.35-47.

²⁰⁶ Toni Mitchell, 13/8/15, T:505.1-8.

²⁰⁷ Toni Mitchell, 13/8/15, T:505.10-16.

²⁰⁸ Trevor Sharp, witness statement, 11/8/15, para 25.

²⁰⁹ Andrew Ferguson, 14/8/15, T:634.37-41, 635.23-33.

108. On 29 October 2007, \$72,727.29 was transferred from the BTG D&A Safety Account to the linked Cash Deposit Account.²¹⁰
109. On 2 April 2008 the ABCC referred their investigation to the NSW Police. Shortly thereafter the NSW Police informed the ABCC that due to a lack of evidence no action would be taken in respect of this matter. The NSW Police file was closed on 24 April 2008.²¹¹

Transfer 6: Withdrawal of \$80,230.88 from the Cash Deposit Account

110. For almost 2 years, the \$72,727.29 sat in the Cash Deposit Account. Apart from interest earned, there were no other credits to the account. Until 8 October 2009 there were no debits.²¹² On that day, the entire balance of the account, being \$80,230.88, was withdrawn from the Cash Deposit Account and transferred back to the BTG D&A Safety Account.²¹³ Tony Papa gave evidence that he knew nothing about this transfer.²¹⁴

Transfer 7: Transfer of \$72,000 back to the CFMEU NSW

111. On 9 October 2009, Tony Papa and Andrew Ferguson co-signed cheque 000001 drawn on the BTG D&A Safety Account in the amount

²¹⁰ BTG D&A MFI-3, 10/8/15, Vol 1, p 146, Vol 2, p 639.

²¹¹ BTG D&A MFI-1, 10/8/15, p 144.

²¹² See BTG D&A MFI-3, 10/8/15, Vol 2, pp 639-663.

²¹³ BTG D&A MFI-3, 10/8/15, pp 214, 663.

²¹⁴ Tony Papa, 18/8/15, T:819.37-46.

of \$72,000 in favour of the CFMEU.²¹⁵ This was the first and only cheque drawn on the account.

112. On 19 October 2009, the cheque was paid into the CFMEU General Account.²¹⁶ The receipt for the deposit of the \$72,000 describes the payment as being a donation to the ‘fighting fund’.²¹⁷

113. The cheque was the subject of a two page cheque requisition on BTG D&A Committee letterhead. The first page described the payee as the CFMEU and details of the payment as ‘Return of funds as requested’.²¹⁸ The second page included the words ‘Please advise amount of cheque’. It was signed by Tony Papa and Andrew Ferguson. Toni Mitchell said that it was not her who had written the total amount of the cheque on the requisition.²¹⁹ She said she did not recall who told her to prepare it.²²⁰

114. Tony Papa maintained that he knew nothing about this cheque, despite acknowledging that he had signed it. He said he did not draw it up and did not request it. He said he was only asked to sign because he happened to be a signatory on that account.²²¹ He acknowledged

²¹⁵ BTG D&A MFI-1, 10/8/15, p 152.

²¹⁶ BTG D&A MFI-1, 10/8/15, pp 153-154, BTG D&A MFI-3, 10/8/15, Vol 1, p 342, Vol 2, p 881.

²¹⁷ BTG D&A MFI-1, 10/8/15, p 156.

²¹⁸ BTG D&A MFI-11, 13/8/15.

²¹⁹ Toni Mitchell, 13/8/15, T:508.32-34.

²²⁰ Toni Mitchell, 13/8/15, T:508.6-9.

²²¹ Tony Papa, 18/8/15, T:820.46-822.21.

signing the cheque requisition but said that the document was drafted by Toni Mitchell and he ‘certainly didn’t give her any instructions.’²²²

115. Andrew Ferguson acknowledged that he signed the cheque but said he was not sure what the payment was made in relation to and could only assume that it was payment to the CFMEU NSW for the ‘Thiess safety money’.²²³ He denied that he and Tony Papa authorised the return of the money to the CFMEU once they had ascertained that there was going to be no further investigation.²²⁴

116. Andrew Ferguson gave evidence that on his return from long service leave he was asked to sign a requisition to pay the money to the CFMEU NSW and he signed accordingly.²²⁵ He had no understanding of where the request came from²²⁶ and did not know what had prompted the writer of the requisition to write ‘Return of funds as requested’.²²⁷ Andrew Ferguson later said that he took his long service leave in 2010.²²⁸ However, a document apparently prepared by him sent to Brian Parker in 2011 said that his long service leave was from 26 February to 4 September 2009.²²⁹

117. Andrew Ferguson gave evidence that he had no knowledge as to how the money paid to the CFMEU NSW came to be categorised as a

²²² Tony Papa, 18/8/15, T:821.30-42.

²²³ Andrew Ferguson, 14/8/15, T:641.25-46.

²²⁴ Andrew Ferguson, 17/8/15, T:675.32-35.

²²⁵ Andrew Ferguson, 14/8/15, T:639.36-42.

²²⁶ Andrew Ferguson, 14/8/15, T:640.27-29.

²²⁷ Andrew Ferguson, 14/8/15, T:641.6-11.

²²⁸ Andrew Ferguson, 14/8/15, T:640.36-641.1.

²²⁹ BTG D&A MFI-18, 17/8/15.

donation to the fighting fund. He stated that he was not involved in receipting the money despite being the Secretary of the union.²³⁰ He went on to add that his understanding was that donations to the union are often designated to the fighting fund ledger.²³¹

118. On 20 October 2009, the remaining \$8,230.88 from the Cash Deposit Account was transferred to another BTG D&A Committee account.²³²

Events in late 2011

119. In late November 2011 Michael Knott undertook an inspection of the financial records of the CFMEU NSW, including those of the BTG.²³³ Michael Knott said he did so because he had heard that a number of people were accusing him of financial impropriety and he wanted to check the books in order to say with absolute authority that the rumours were untrue.
120. Michael Knott's inspection revealed what he thought were irregularities in the BTG records that he said he was previously not aware of.²³⁴ He gave evidence that he brought these irregularities to the attention of Brian Parker, at that time the Acting Secretary of the CFMEU NSW, at a meeting on 1 December 2011.²³⁵

²³⁰ Andrew Ferguson, 14/8/15, T:642.5-35.

²³¹ Andrew Ferguson, 14/8/15, T:642.37-43.

²³² BTG D&A MFI-1, 10/8/15, p 155.

²³³ Michael Knott, witness statement, 10/8/15, paras 41-43.

²³⁴ Michael Knott, 10/8/15, T:75.37-44.

²³⁵ Michael Knott, witness statement, 10/8/15, para 43.

121. Andrew Ferguson gave evidence that he was asked to comment on a report from Michael Knott.²³⁶ Andrew Ferguson had by this stage left the union's employment. On 9 December 2011, Andrew Ferguson sent Kylie Price an email, copied to Michael Knott. The email stated:²³⁷

Brian

As requested I spoke to senior Theiss [sic] management people today and have examined the file you provided me. I have also examined my file. This matter was the subject of an ABCC and NSW Police examination several years ago. There was an individual trying to make mischief and waste police resources. The issue was thoroughly investigated and resolved to be bogus...

122. Andrew Ferguson also handwrote two notations on a print out of the email. The first was, in reference to senior Thiess management, that he had spoken with Ray Miranda. Ray Miranda gave evidence that he recalled a fairly short conversation with Andrew Ferguson but in contrast to Andrew Ferguson's recollection he recalled telling Andrew Ferguson that the money was paid to the 'Drug and Alcohol Foundation.'²³⁸

123. The second notation was more extensive:²³⁹

When Steve Dixon [was] an official he had a discussion I think with John Lee of Theiss [sic] in 2006. They resolved to donate \$100,000 (inclusive of GST) to BTG for OHS/D&A work in the industry. BTG donated \$20,000 inclusive of GST to D&A. Tom Simpson specifically did D&A training etc on a Theiss [sic] project. Balance of money used by CFMEU for OHS. Recently T.Sharpe [sic] indicated to B. Parker if he did not get a

²³⁶ Andrew Ferguson, 14/8/15, T:644.36-39.

²³⁷ BTG D&A MFI-17, 14/8/15.

²³⁸ Ray Miranda, witness statement, 6/10/15, para 9.

²³⁹ BTG D&A MFI-17, 14/8/15.

job with BTG doing D&A he would blow this issue up. This was a form of blackmail/extortion.

124. On 12 December 2011, Michael Knott sent an email to Brian Parker and Rita Mallia, respectively the incoming Secretary and President of the CFMEU NSW. He canvassed his concerns and dealt with Andrew Ferguson's response to those concerns.²⁴⁰ Michael Knott took issue with Andrew Ferguson's suggestion that the matter was 'thoroughly investigated'. Rita Mallia gave evidence that she gave a copy of Michael Knott's email to Andrew Ferguson for his comment.²⁴¹
125. Around the same time, in December 2011, Andrew Ferguson also prepared some typed notes for officials at the CFMEU NSW purporting to refute Michael Knott's account. Four of these documents containing handwritten notations were made available to the Commission. Andrew Ferguson acknowledged that the handwritten notations on these documents belonged to him.²⁴² He agreed that the four separate documents were likely to be various versions of the same document prepared by him.²⁴³
126. There are numerous substantive differences between the various drafts suggesting, at the very least, that Andrew Ferguson's recollection was uncertain to a considerable degree. For example, in two of the drafts Andrew Ferguson asserts that Peter McClelland authorised the final return of the funds from the BTG D&A Committee to the CFMEU

²⁴⁰ BTG D&A MFI-1, 10/8/15, pp 225-228.

²⁴¹ Rita Mallia, 12/8/15, T:341.23-30.

²⁴² Andrew Ferguson, 17/8/15, T:667.40-44.

²⁴³ Andrew Ferguson, 17/8/15, T:668.2-8.

NSW,²⁴⁴ when in fact it was Andrew Ferguson. Peter McClelland said he had no involvement with the BTG D&A Committee²⁴⁵ and the documentary record supports that. In one draft Andrew Ferguson said that '[a]t some point, Steve [Dixon] advised Peter McClelland and myself that Thiess had made a substantial contribution to the BTG.'²⁴⁶ This was consistent with the notation he made on the 9 December 2011 email. However, in what would appear to be a later draft of the document, he described the Thiess contribution as 'to assist the CFMEU to provide safety services to the Lane Cove Tunnel Project and our industry efforts to improve safety and more specifically in the civil sector and in tunnel safety.'²⁴⁷

D – THIESS PAYMENT: FINDINGS ON THE EVIDENCE

127. The events in question occurred a number of years ago. It is therefore necessary in assessing the evidence to give great weight to the contemporaneous documents and the objective circumstances.

²⁴⁴ BTG D&A MFI-18, 17/8/15, Documents 2 and 3.

²⁴⁵ Peter McClelland, 6/10/15, T:856.3-5.

²⁴⁶ BTG D&A MFI-18, 17/8/15, Document 1.

²⁴⁷ BTG D&A MFI-18, 17/8/15, Document 4.

Not a donation to CFMEU for safety purposes

128. The \$100,000 payment was not a donation to the CFMEU NSW for safety purposes. Andrew Ferguson's evidence that it was must be rejected for the following reasons:

- (a) If the THJV wished to make a donation to the union for some legitimate purpose such as safety programs or activities, it would naturally be expected that the payment would be made directly to the union. The fact that the payment by THJV was not made to the union directly is damning evidence against the idea that the payment was intended as a donation to the union for safety purposes or any other legitimate purpose.
- (b) Apart from Andrew Ferguson's evidence, and Tony Papa's evidence about what Steve Dixon had apparently said at an organisers' meeting, there was no evidence that the payment was a donation to the CFMEU NSW for safety purposes. Tony Papa's evidence was vague. Given his averred failure to recall almost anything, his account is not accepted. In addition the evidence of Peter McClelland and Michael Knott does not support Andrew Ferguson's account.
- (c) Andrew Ferguson himself gave inconsistent accounts about the reason the payment was made. He was, at first, very definite that it was a donation to the union for safety purposes. But later he said it was a donation to the BTG, after he was shown a document he had written in 2011 where

he had described the payment in that way. His denial of any inconsistency was fanciful and unacceptable. In one draft of notes prepared in 2011 he said that payment was a contribution to the BTG; in others it was to the CFMEU NSW for safety.

Not a payment for drug and alcohol safety training

129. The \$100,000 payment was not a legitimate payment for the provision of drug and alcohol training to THJV workers by the BTG D&A Committee.
130. A telling matter is the size of the payment. At the time Michael Deegan approved the payment of the \$100,000 on 16 March 2006, 16 sessions each of 1 ½ hours' duration were planned. That is, the sum of \$100,000 was approved to be paid for 24 hours work. That equates to an *hourly* rate of pay of \$4,166.67. By way of contrast, the *annual* salary of Tom Simpson, who was to perform the training, was in the order of \$60,000.²⁴⁸ The OHS safety report for December 2006 recorded that to date THJV had spent \$17,255 on an externally provided Senior First Aid course of 12 hours' duration and \$19,200 on an externally provided WorkCover course of 32 hours' duration.²⁴⁹ Sometimes a disparity between what actually happened and a claim that something greater was expected to happen does not disprove the sincerity with which the latter claim is made. But here the disparity is so gross as to discredit the theory that \$100,000 worth of drug and

²⁴⁸ BTG D&A MFI-30, 6/10/15.

²⁴⁹ BTG D&A MFI-1, 10/8/15, p 507.

alcohol training was to be provided. In light of all of the circumstances, Trevor Sharp's evidence that there was no way that the BTG D&A Committee was going to provide \$100,000 of training is to be accepted.

131. Steve Dixon and Michael Deegan submitted that the submission of counsel assisting in the preceding paragraph is incorrect on several grounds.²⁵⁰ Some grounds were relied on by both, some by only one. One is that the records are unreliable and the costing figures are incorrect. It is impossible to evaluate this contention since it is not said which figures are incorrect and why. Another ground is that the drug and alcohol training is incorrectly recorded as an internal cost, not an external cost. But this does not show that the records are unreliable. It suggests rather that they were deliberately incorrect, since if they had been correct, the unlikeliness that the sum of \$100,000 was paid for drug and alcohol safety training would have become apparent at once.
132. A third argument is that it was intended that the whole workforce be trained, and this would have made the cost the allegedly reasonable figure of only \$83.33 per head. However, for reasons given, it is not clear that there were 1,200 people employed by THJV on the Project; nothing like that number were ever given any form of training; and Michael Deegan's anticipations of the drug and alcohol training before approving the payment were for a small fraction of the workforce only.²⁵¹ Michael Deegan also contended that conclusions about his intention when he approved the payment from the lower numbers of

²⁵⁰ Submissions of Steve Dixon, 29/10/15, para 46; Submissions of Michael Deegan, 29/10/15, paras 3.9-3.12.

²⁵¹ See para 130.

persons who actually received the training could not be drawn, because he was not involved in the actual delivery of the training. Yet somewhat inconsistently, Michael Deegan's submissions attacked Trevor Sharp for his supposed ignorance of what work was actually done. He also submitted that it was specious to compare Tom Simpson's salary with the \$100,000 figure, in part because Steve Dixon said that Tom Simpson would not be the only provider of the training. These criticisms made by Michael Deegan must fail as being inconsistent with the objective evidence.²⁵² Further, on 16 March 2006, when Michael Deegan approved the payment of the invoice he had already sent on 10 March 2006 a note to staff indicating that the training sessions would be one hour sessions to be conducted between 20 March and 5 April 2006, and that a schedule was currently being put together. Further, on 14 March 2006 he received the schedule indicating 16 sessions of a maximum duration of one and a half hours each.²⁵³ Thus Michael Deegan could not have thought that he was paying for more than about 24 hours' work. In any event, save for Michael Deegan's evidence, there is little material to suggest that 1,200 people were employed by THJV on the Project at any one time. There is even less evidence that each of those 1,200 people would receive drug and alcohol training. The OHS reports between June 2005 and December 2006 indicate that, save for induction training, there was no other formal training undertaken by anything remotely approaching 1,200 people on the Project during that period.²⁵⁴

²⁵² See paras 31-39.

²⁵³ See paras 34, 36.

²⁵⁴ BTG D&A MFI-1, 10/8/15, pp 352, 361, 369, 377, 387, 397, 407, 417, 440, 450, 459, 468, 475, 481, 487, 492, 497, 502, 507.

133. Senior counsel for Andrew Ferguson criticised counsel assisting for not analysing the evidence of Ray Miranda. Ray Miranda gave some evidence that the \$100,000 figure was consistent with the terms of the Second EBA so far as it related to drug and alcohol training.²⁵⁵ Counsel assisting submitted that Ray Miranda's evidence was not dealt with in their submissions in chief because he was obviously mistaken.²⁵⁶

His evidence was that the \$100,000 was paid by cheque.²⁵⁷ In fact it was paid by EFT. He thought the \$100,000 went to the "Drug and Alcohol Foundation".²⁵⁸ In fact it went to the BTG D&A Committee. He said the payment was in respect of unpaid EBA contributions. However, the bank statements²⁵⁹ from the BTG D&A Safety Account show regular monthly payments from "Thiess Hochtief" consistently on or around the 14th day of the month, in accordance with the EBA clause.²⁶⁰ Moreover, the accounts payable voucher and approval of the \$100,000 payment are clearly not in respect of EBA contributions.²⁶¹

134. Those submissions are correct.

135. Another significant matter is the evidence about how the quantum of the payment was determined. Steve Dixon's evidence was to the effect that he plucked it out of the air. He did not even estimate the number of workers or the number of sessions. It is not likely that someone having Michael Deegan's position and experience would have agreed

²⁵⁵ Submissions of Andrew Ferguson, 29/10/15, paras 31-33.

²⁵⁶ Submissions of Counsel Assisting, 12/11/15, para 22.

²⁵⁷ Ray Miranda, 6/10/15, T:875.3-26.

²⁵⁸ Ray Miranda, 6/10/15, T:877.16-27.

²⁵⁹ BTG D&A MFI-3, 10/8/15, Vol 1, pp 29-228.

²⁶⁰ BTG D&A MFI-6, 11/8/15, p 76.

²⁶¹ BTG D&A MFI-1, 10/8/15, pp 81-82.

to pay a substantial amount for what was truly to be training without some proper basis for the cost. Particulars of that basis would have to have come from the BTG D&A Committee but there is no evidence to suggest that THJV ever obtained them.

136. Another factor is that on a project which apparently had many safety issues it is implausible that THJV would spend so disproportionately large an amount on drug and alcohol training as compared with other safety matters. Apart from the vague and self-serving evidence of Michael Deegan and Steve Dixon, there is nothing in the OHS reports which suggests that drug and alcohol safety issues were a problem so great as to warrant such a significant expenditure of funds. Peter Chatburn gave evidence of only two incidents on site.

137. If Michael Deegan truly believed he was approving a payment for drug and alcohol safety training he could not possibly have agreed to the amount he did unless he were grossly negligent, or entirely reckless with the joint venture's money, or desirous of wasting the joint venture's money. But Michael Deegan was brought onto the Project for the precise purpose of assisting it commercially. His extensive background and work history shows that Michael Deegan was not a person who was likely to be negligent or to waste money recklessly or deliberately. In fact, his background indicates that he was someone with considerable ability and experience in the successful delivery of a variety of construction and infrastructure projects. The possibility that Michael Deegan approved the \$100,000 payment negligently, recklessly or with a desire to waste money intentionally is rejected.

138. One of Steve Dixon's arguments for the proposition that the purpose of the payment was drug and alcohol safety training was that that was how it was described on the invoice and the accounts payable voucher.²⁶² But this is circular. One cannot establish that an alleged misdescription for an invoice is not actually a misdescription by relying on the description given.

\$100,000 payment was a disguised payment to the CFMEU NSW

139. For the above reasons, the evidence given by Andrew Ferguson, Steve Dixon and Michael Deegan about why the payment was made is rejected. Their accounts, unfortunately, were self-serving fabrications.

140. A particular protest is made by Michael Deegan about counsel assisting's submissions that that finding should be made. His solicitors complain that it was not put to him that the purpose of making the payment was to secure the assent of CFMEU NSW to the Second EBA, and that it was not put to him that he was being untruthful in his evidence.²⁶³ It is clear that Michael Deegan was aware of the case being put to him. To require counsel in the position of counsel assisting to put to a witness the proposition that a particular answer was untruthful would simply lead to an infinite regress ('Did you meet him that day?' 'No.' 'I put it to you that that last answer was a lie?' 'I deny that.' 'And I put it to you that that denial was a lie?' 'I deny that.', and so on.) The solicitors for Michael Deegan also complained

²⁶² BTG D&A MFI-1, 10/8/15, pp 81-82.

²⁶³ Submissions of Michael Deegan, 29/10/15, paras 3.2, 3.7(c). This submission was also put by Steve Dixon: Submissions of Steve Dixon, 29/10/15, para 20.

that in assessing the veracity of his evidence, counsel assisting had had no regard to his long history in senior safety-related roles, his experience in dealing with serious workplace incidents, his commitment to workplace safety and his general standing. This submission about Michael Deegan's record was put even more strongly by his ally Steve Dixon: 'Deegan is a person of considerable responsibility and integrity. He has served State and Federal, ALP and Coalition governments in numerous senior positions.'²⁶⁴ It was submitted that these matters were relevant both to credibility as a witness and to the unlikelihood of Michael Deegan engaging in criminal conduct.²⁶⁵

141. These are certainly material matters. Unfortunately, in relation to the THJV payment, they have insufficient weight. The force of circumstance points against them. So did Michael Deegan's demeanour as a witness. It was quite unimpressive. He tended to give very long answers. Sometimes they were self-serving and non-responsive.²⁶⁶ He was very eager to present himself as totally dedicated to safety. He is one of a long line of witnesses in the building industry, and indeed some other industries, who seem to think that anything may be forgiven as long as one desires greater safety at work. Yet every decent human being has those emotions. In seeking support from Steve Dixon – and there were numerous points of similarity and reciprocity between their two sets of written submissions – he allied himself with an even less satisfactory witness. The vices of

²⁶⁴ Submissions of Steve Dixon, 29/10/15, para 21.

²⁶⁵ Submissions of Michael Deegan, 29/10/15, paras 4.5, 4.6.

²⁶⁶ For example, Michael Deegan, 6/10/15, T:894.7-26.

an alliance must be accepted along with its hoped-for gains. It is not wise to manacle oneself to a corpse.

142. It must also be remembered that it is the qualities which Michael Deegan's solicitors rely on which give him a strong degree of self-interest in denying the inferences that flow from the surrounding circumstances. That is because those qualities have given him a reputation he did not want to lose.

143. The solicitors for Michael Deegan also submitted that the analysis of what the true purpose of the payment was should be based on those directly involved in reaching agreement, not on 'hearsay accounts of others who had no such involvement'.²⁶⁷ This is a reference to the evidence of Michael Knott, Peter McClelland and Andrew Ferguson. There is prima facie force in the submission, at least at a theoretical level. But the 'hearsay' evidence of those who dealt with Steve Dixon on the CFMEU NSW side of the hill, depending on what can be concluded from it, is capable of establishing what Steve Dixon said; and what he said can be the basis of inferences about what had been said on the THJV side of the hill. The reasoning of counsel assisting is not illegitimate.

144. Senior counsel for Andrew Ferguson complained that the finding which counsel assisting seeks about the motive of the payment which THJV made was not put to him.²⁶⁸ Andrew Ferguson was questioned for a long time. Even if no direct questions had been put to him on the point, there is no doubt that he understood the possibility of counsel

²⁶⁷ Submissions of Michael Deegan, 29/10/15, para 3.5.

²⁶⁸ Submissions of Andrew Ferguson, 29/10/15, paras 26-30.

assisting seeking the finding under discussion. But the submission is rendered utterly empty by the fact that the relevant finding was put to him.²⁶⁹

Q. I further suggest that you knew that the payment of \$100,000 made by Thiess had no legitimate purpose?

A. Definitely not the case.

Q. And you knew that the \$100,000 payment by Thiess was intended to ensure industrial peace between Thiess and the Union in relation to the Epping to Chatswood project which had had a poor safety record?

A. Part of your question has got some merit about the safety problems on the job, so is it possible to break up the question?

Q. I suggest that the purpose of the payment to your understanding, that is the \$100,000 by Thiess to the Union, was in order to ensure industrial peace on the project?

A. Definitely not the case.

145. Senior counsel for Andrew Ferguson criticised counsel assisting's submission that the accounts of Andrew Ferguson, Steve Dixon and Michael Deegan were self-serving fabrications. He relied on what was said by Gibbs J in *Steinberg v Federal Commissioner of Taxation*:²⁷⁰ 'The fact that a witness is disbelieved does not prove the opposite to what is asserted.' This citation was preliminary to an attempt by senior counsel for Andrew Ferguson to downplay or discount Michael Knott's evidence about his protests when he heard of the \$100,000 payment.²⁷¹ There is no justification for that course. And it must be remembered that Gibbs J also said that there may be circumstances in which an

²⁶⁹ Andrew Ferguson, 17/8/15, T:675.37-676.5.

²⁷⁰ (1975) 134 CLR 640 at 694.

²⁷¹ See para 55.

inference can be drawn from the falsity of a witness's story that the truth would be harmful to the witness. That is certainly true of Steve Dixon. It is true of Michael Deegan, who had to explain away a highly suspicious payment. And it is true of Andrew Ferguson, who had to explain away the artificial and contrived round robins of the years after the highly suspicious payment had been received. While in general the mere fact of disbelief in a witness's evidence does not render the opposite of what the witness says true, Michael Deegan, Steve Dixon and Andrew Ferguson gave extremely precise accounts. Their accounts were about matters central to the issues. They were not on peripheral matters. They seemed not to accept any possibility that they might be mistaken. Yet they were wrong. Each had a strong motive to lie – exculpation. Appropriate inferences are available.

146. An example of Andrew Ferguson's difficulties is his evidence²⁷² that Steve Dixon told him that Thiess had offered a donation of \$100,000 to the union for safety purposes. Andrew Ferguson submitted:²⁷³

- a. first, it is inherently credible: the answers attributed to Mr Dixon are, for example, consistent with the evidence about the level of drug use on the project;
- b. secondly, the evidence is consistent with Mr Dixon's evidence, to the extent that the latter recalled reporting to Mr Ferguson about the offer of payment;²⁷⁴
- c. thirdly, and most importantly, Mr Ferguson's evidence is consistent with – and corroborated by – his note to Mr McClelland of 2 October 2007 and his handwritten annotations to an email of 10 December 2011.

²⁷² Andrew Ferguson, 14/8/15 T:605.36-606.26.

²⁷³ Submissions of Andrew Ferguson, 29/10/15, para 57.

²⁷⁴ Steve Dixon, 12/8/15, T:368.36-40.

147. It is dangerous for Andrew Ferguson to appeal to Steve Dixon as a testimonial ally. Never reinforce failure. And never seek reinforcements from failure. The appeal is unsuccessful. But in any event, Steve Dixon said the payment was *not* a donation, while in the passage referred to Andrew Ferguson said it was. Another problem is that Andrew Ferguson gave other versions of the conversation.²⁷⁵ Yet another problem is that the evidence is not credible in view of the terms of the invoice sent to THJV. Finally, Andrew Ferguson's memorandum to Peter McClelland is completely inconsistent with Andrew Ferguson's account. In the memorandum he refers to getting the \$100,000 invoice sent.²⁷⁶ But if the payment was a donation to the union for safety purposes, the invoice would not have had GST included, and it would have been sent to the union.
148. A related submission of Andrew Ferguson's was that Trevor Sharp was hostile to Andrew Ferguson and gave 'wrong' evidence 'deployed to discredit Mr Ferguson'. The 'wrong' evidence seemed to be a statement that he did not contact an investigator from the ABCC. This was said to be part of conduct blaming Andrew Ferguson for muzzling him, when in fact a record made by the investigator 'records no hesitation on his part in communicating with the investigator'.²⁷⁷ In fact the record shows no such thing. What it does show is that the

²⁷⁵ The version referred to is summarised in para 64. For other versions, see paras 65, 126, 128(c).

²⁷⁶ See para 98.

²⁷⁷ Submissions of Andrew Ferguson, 29/10/15, paras 68-69.

investigator contacted Trevor Sharp, not the other way round.²⁷⁸
Hence Trevor Sharp's 'wrong' evidence was true.

149. In these circumstances it is unnecessary and undesirable to embark on a line-by-line refutation of the criticisms which senior counsel for Andrew Ferguson made of Trevor Sharp.²⁷⁹

150. Senior counsel for Andrew Ferguson undertook the task of defending his conduct in relation to the round robins of 2006 and after. It was said he did not exercise day-to-day control of the union's finances; had to rely on the variable nature of what Steve Dixon told him; therefore did not have a completely consistent recollection; and acted with propriety in ensuring that the funds were paid to the BTG D&A Safety Account pending the outcome of the ABCC investigation. In considering these submissions it is necessary to bear in mind that sometimes Andrew Ferguson prays in aid Steve Dixon's testimony as credible, but sometimes he criticises it. It must also be remembered that Andrew Ferguson seemed to be a very able man and a very well prepared witness. He examined most documents shown to him very thoroughly before answering questions about them. There is nothing to criticise in any of these things, but it cannot be said that he was some testimonial neophyte or innocent. The truth is that the round robins have not been adequately explained, and they are damning.

151. The finding which must be made is that Michael Deegan intended to make a payment of \$100,000 to benefit the CFMEU NSW. But for the purposes of disguising that fact, Andrew Ferguson procured the

²⁷⁸ See Trevor Sharp, 12/8/15, T:278.21-280.17.

²⁷⁹ Submissions of Andrew Ferguson, 29/10/15, paras 70-76.

payment to be made under a false invoice to the BRG D&A Committee which would then, via an intermediate siphoning account, transfer 80% of the money to the CFMEU NSW. Steve Dixon, Trevor Sharp, Tony Papa and Michael Deegan knew the essential matters of fact in that conduct. The following factors support that conclusion:

- (a) Trevor Sharp's evidence of the conversation with Andrew Ferguson and Steve Dixon strongly supports the finding. Against interest, Trevor Sharp freely described the invoice which he sent as 'bogus'.²⁸⁰ Senior counsel for Andrew Ferguson said that Trevor Sharp's hostility to Andrew Ferguson was so great that in fact the description was in Trevor Sharp's interest.²⁸¹ That submission is rejected. So is Andrew Ferguson's account of the conversation. Steve Dixon's statement about what would have happened, even though he could not remember any meeting, is also rejected.
- (b) Michael Knott's evidence of what Steve Dixon said in the meeting between the two, and the events following that meeting, also support the finding. Steve Dixon had arranged for a \$100,000 donation for the union. Subsequently, after discussions between Andrew Ferguson and Steve Dixon the payment was made to the BTG D&A Committee.
- (c) Andrew Ferguson's oral denial that he was involved in the invoice sent to THJV should also be rejected. His 2007 memo to Peter McClelland is a much more nearly

²⁸⁰ Trevor Sharp, 12/8/15, T:326.1, 329.45.

²⁸¹ Submissions of Andrew Ferguson, 29/10/15, para 73.

contemporaneous record. It is also against interest. It establishes that he was involved in causing it to be sent. Trevor Sharp's evidence was consistent with Andrew Ferguson causing the invoice to be sent. Even if one were to accept Andrew Ferguson's account that the payment was a donation to the union for safety purposes (which it was not), Andrew Ferguson must have known that the invoice was false.

- (d) The events surrounding the 'return' of the money which the CFMEU NSW received strongly implicate Andrew Ferguson. The fact that one day after \$72,727.29 was paid out of the CFMEU General Account Andrew Ferguson became a signatory on the BTG D&A Safety Account (even though he was never a member or involved with the BTG D&A Committee or a signatory on any other relevant account) points to the conclusion that, contrary to the memo he prepared for Peter McClelland, Andrew Ferguson was not concerned to return the money to the BTG D&A Committee. Rather, he wanted it to appear as if the money had been returned but at the same time keep control of the funds which had always been intended to be the union's.
- (e) The scheme was clandestine in its nature. The BTG Account was used to receive the funds from the BTG D&A Committee. After a time the funds were distributed to the CFMEU and CIDAF. At this time, the BTG Account operated almost exclusively as an account to siphon money received from the BTG D&A Safety Program Account to the

CFMEU General Account. If one puts aside the very occasional small credit or debit, the BTG Account had no other purpose or function.

- (f) The finding that Andrew Ferguson arranged affairs in that way is supported not only by Trevor Sharp's evidence, but also the fact that Andrew Ferguson was the Secretary of the union, the fact that the scheme operated to benefit the union, and the fact that on both Michael Knott and Peter McClelland's accounts Andrew Ferguson was the person to deal with Steve Dixon about the issue.
- (g) Tony Papa was an integral part of the scheme. He was a signatory on both the BTG D&A Safety Account and the BTG Account. Apart from the initial payment by Thiess (Transfer 1) and the transfer out of the CFMEU General Account (Transfer 4) he was involved in all of the transfers identified above. The evidence that he 'knew nothing' is quite implausible. At the very least, he willingly carried out Andrew Ferguson's instructions as to the transfers. In all the circumstances rejection of his evidence means that his denials of liability in truth create a basis for inferring that he actually did have knowledge.
- (h) For the reasons outlined above, Michael Deegan must have known that the \$100,000 invoice he approved was false. The \$100,000 payment was intended to benefit THJV in ways other than drug and alcohol training.

152. The want of truthful evidence from Steve Dixon and Michael Deegan makes it necessary to focus on the surrounding circumstances and objective facts.
153. There is no evidence that there was any kind of duress in making the payment. But the probable inference from the circumstances is that Michael Deegan believed and intended that the payment would advance the THJV's interests in some way. The payment was probably negotiated in late 2005. At that time negotiations for the Second EBA were underway. Those negotiations were difficult. The industrial climate was strained, partly as a result of the death of a worker on site. The Project was also in some financial difficulty. Hence it could ill afford delays caused by industrial action either generally or in relation to safety.
154. The solicitors for Michael Deegan advocated a different approach to the timing issue. They objected to the proposition that the payment was negotiated in late 2005 and the proposition that by 2 December 2005 THJV had made a decision to engage Tom Simpson to conduct the drug and alcohol training.²⁸² Submissions to similar effect were made by Steve Dixon²⁸³ and Andrew Ferguson.²⁸⁴ The critics submit that counsel assisting has selected late 2005 so as to achieve conformity with the voting on the Second EBA on 13 December 2005 and the antecedent agreement to that end in late November 2005.

²⁸² Submissions of Michael Deegan, 29/10/15, paras 3.13-3.14.

²⁸³ Submissions of Steve Dixon, 29/10/15, para 59.

²⁸⁴ Submissions of Mr Ferguson, 29/10/15, paras 42-43.

155. The argument of Michael Deegan was as follows:²⁸⁵

- (a) the only evidence cited by Counsel Assisting ... is the minutes of the meeting of the Safety and HR Communication Meeting held on Friday 2 December 2005 which state ... that Tom Simpson is to conduct drug and alcohol training;
- (b) as is clear from the minutes, Mr Deegan did not attend the 2 December 2005 meeting;
- (c) the Commission has not called any person who attended the 2 December 2005 meeting to give evidence regarding the decision made during the meeting about the training and, in particular, whether senior management approval for the training had been obtained at that time;⁷
- (d) Mr Simpson did not meet with the Project Safety Committee until 15 February 2006, that is, more than two months after the 2 December 2005 meeting;
- (e) it was not until 10 March 2006 that Mr Deegan sent out a weekly project note informing employees about the rollout of the drug and alcohol awareness training on the Project. That note stated that “[i]n the coming weeks, THJV will be launching an Alcohol & Drugs Awareness Program on-site”; and
- (f) there is no reference to the drug and alcohol training contained in the minutes of the THJV Management Committee minutes prior to 12 April 2006.

156. The argument continued:²⁸⁶

[These] matters ... strongly suggest that the decision to run the training was not made until February 2006. This is consistent with the evidence given by Mr Dixon that during a meeting with Mr Deegan at around the end of 2005, Mr Deegan agreed in principle to meet with the trainers to see what they had to offer, and that no figure of the cost of training was discussed at that meeting. It also aligns with Mr Deegan’s recollection that the discussions he had with Mr Dixon about the training occurred over a period of weeks, if not months, after he started work on the Project.

²⁸⁵ Submissions of Michael Deegan, 29/10/15, para 3.14.

²⁸⁶ Submissions of Michael Deegan, 29/10/15, para 3.15.

157. Steve Dixon's argument was put thus:²⁸⁷

- (a) Knott says Dixon advised him of the payment in late December 2005;
- (b) Sharp says he was called to a meeting and advised of the payment in early 2006;
- (c) Dixon says he reached agreement on the payment after the training had commenced, which was in February 2006;
- (d) Ferguson said he became aware of the payment four weeks to two months before the invoice was raised. The invoice was raised on 13 April 2006;
- (e) Deegan says the approach from Dixon occurred in 2006 (it is noteworthy that Counsel Assisting did not directly ask Deegan when the payment was proposed or agreed to);
- (f) there is no documentary reference to the amount of the payment prior to March 2006.

It was not put to any witness that the payment was solicited, agreed to or made prior to the terms of the Second EBA being finalised in November 2005.

158. In passing it may be noted that if counsel for Steve Dixon were discontented with the questioning of counsel assisting, it was open to him to fill the gap by asking his own questions of Michael Deegan. He asked none.

159. Andrew Ferguson's argument was:²⁸⁸

Mr Chatburn claimed that he negotiated the agreement between October 2005 and January 2006; the EBA was signed on 9 January 2006 and

²⁸⁷ Submissions of Steve Dixon, 29/10/15, paras 59-60.

²⁸⁸ Submissions of Mr Ferguson, 29/10/15, para 42.

ratified by the Australian Industrial Relations Commission on 7 February 2006. The payment of \$100,000 was made approximately two months after the latter date. The gap of two months does not suggest that the payment was made in consideration of the finalisation of the EBA. The more anodyne explanation comes from the contemporaneous records – namely that Mr Simpson gave his address to the Project Safety Committee on 15 February 2006. The payment fits the chronology of services being performed by Mr Simpson.

160. The dating suggested by counsel assisting is preferable for the following reasons. By 2 December 2005, THJV had already apparently decided to engage Tom Simpson from the BTG D&A Committee. There are THJV documents which contemplate that training would begin in January or February 2006.²⁸⁹ It may be inferred that the payment was discussed prior to this time. Steve Dixon's evidence was that the first conversation concerning 'drug and alcohol training' occurred in late 2005.²⁹⁰ Admittedly his evidence is in general of very limited value. He also said that the amount of the payment was not determined until after the training commenced.²⁹¹ That is inherently unlikely: why would THJV buy a pig in a poke? Contrary to Steve Dixon's submissions,²⁹² Michael Deegan's evidence was consistent with the discussions concerning 'drug and alcohol training' beginning shortly after September 2005 over a period of weeks or months.²⁹³ There is an inference that the payment had been negotiated in the latter months of 2005. The evidence of Michael Knott was that in approximately late December 2005, Steve Dixon had

²⁸⁹ See para 31.

²⁹⁰ See para 42.

²⁹¹ See para 45.

²⁹² Submissions of Steve Dixon, 29/10/15, para 59(e).

²⁹³ See para 50.

already arranged the donation.²⁹⁴ Peter McClelland dated the relevant events, definitely, as being in 2005.²⁹⁵ Andrew Ferguson was vague about when the payment occurred. He said he learned of it several months before the payment occurred.²⁹⁶ It is to be inferred that he had a conversation about the payment in 2005.²⁹⁷ The evidence of Trevor Sharp was that early in 2006, the \$100,000 donation from Thiess had already been arranged.²⁹⁸ Hence the evidence supports the conclusion that the payment was arranged and negotiated in late 2005. It had probably been arranged prior to December that year.

161. The most likely reasons for the \$100,000 payment by THJV were to seek to avoid the prospect of industrial action arising from safety issues and to seek to ensure Steve Dixon's agreement in relation to the negotiations concerning the Second EBA.

²⁹⁴ See para 55.

²⁹⁵ See para 57.

²⁹⁶ Andrew Ferguson, 14/8/15, T:602.4-20.

²⁹⁷ See paras 66-67.

²⁹⁸ See para 69.

E – THIESS PAYMENT: LEGAL ISSUES

Corrupt commissions

162. In 1987, s 249B of the *Crimes Act* 1900 (NSW) was introduced. It deals with ‘corrupt commissions’. The section provides:

- (1) If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit:
 - (a) as an inducement or reward for or otherwise on account of:
 - (i) doing or not doing something, or having done or not having done something, or
 - (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

in relation to the affairs or business of the agent’s principal, or
 - (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent’s principal,

the agent is liable to imprisonment for 7 years.
- (2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit:
 - (a) as an inducement or reward for or otherwise on account of the agent’s:
 - (i) doing or not doing something, or having done or not having done something, or

- (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,

in relation to the affairs or business of the agent's principal, or

- (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,

the firstmentioned person is liable to imprisonment for 7 years.

- (3) For the purposes of subsection (1), where a benefit is received or solicited by anyone with the consent or at the request of an agent, the agent shall be deemed to have received or solicited the benefit.

163. Section 249A defines 'agent' to include 'any person ... acting for or on behalf of, any other person (who in this case is referred to in this Part as the person's principal) in any capacity'.

164. The effect of s 249F is, relevantly, that any person who aids, abets, counsels, procures, solicits or incites the commission of an offence against s 249B commits an offence punishable by imprisonment for 7 years.

165. A union official entitled to act on behalf of workers in negotiating terms and conditions of employment is an 'agent' of those workers for the purposes of the statute. The negotiations of the workers' terms and conditions of employment is in relation to their affairs.²⁹⁹

166. In s 249B(1)(b) and (2)(b) the expression 'would in any way tend to influence' invites attention to whether the benefit would objectively

²⁹⁹ *R v Gallagher* [1986] VR 219 at 225-226.

have that tendency, regardless of whether it in fact influences the agent.³⁰⁰

167. In relation to the offence under s 249B(1)(b), a number of Victorian decisions have held that an agent acts ‘corruptly’ within the meaning of the statute if ‘he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal’s affairs’.³⁰¹ On this view, it is not necessary for the agent to have an actual intention to be influenced by the payment.³⁰² The New South Wales Court of Criminal Appeal has, however, qualified the Victorian approach, holding that it is necessary to establish that the benefit is corrupt according to standards of conduct generally held.³⁰³ A payment or receipt without the knowledge of the principal for one of the proscribed purposes would generally be regarded as corrupt according to such standards.³⁰⁴

168. Accordingly, in relation to the offence against s 249B(2)(b), the elements of the offence are as follows:³⁰⁵

- (a) the accused must give or offer a benefit to the agent or another person with the consent or at the request of the agent;

³⁰⁰ *Mehajer v R* [2014] NSWCCA 167 at [100].

³⁰¹ *R v Dillon and Riach* [1982] VR 434 at 436; *R v Gallagher* [1986] VR 219 at 231; *R v Jamieson* [1988] VR 879 at 883. See also *R v Nuttall* [2011] 1 Qd R 270 at [36].

³⁰² *R v Dillon and Riach* [1982] VR 434 at 436; *Mehajer v R* [2014] NSWCCA 167 at [101].

³⁰³ *Mehajer v R* [2014] NSWCCA 167 at [59]-[63].

³⁰⁴ *Mehajer v R* [2014] NSWCCA 167 at [59]-[63].

³⁰⁵ *Mehajer v R* [2014] NSWCCA 167 at [67].

- (b) the benefit must be one which objectively speaking would tend to influence the agent to show favour or disfavour in the principal's affairs or business;
- (c) the benefit must be provided by the accused intending, knowing or believing that it would tend to influence the agent to show favour or disfavour; and
- (d) the provision of the benefit must be corrupt according to normally received standards of conduct.

Analysis

169. In the present case, Steve Dixon was a bargaining representative for the CFMEU NSW members on the site and was, consistently with authority, an 'agent' within the meaning of s 249B. Relevantly, his principals were the CFMEU NSW members at the Project he was representing in enterprise bargaining negotiations.
170. The argument of counsel assisting just recorded was attacked by Andrew Ferguson³⁰⁶ and Steve Dixon.³⁰⁷ Andrew Ferguson's submissions on this point proceeded largely by slab quotation from cases and statutes, but it boils down to the following argument. The Second EBA was executed by the CFMEU NSW. It was a party to it. The employers of THJV covered by the agreement also constituted a party. But there is no evidence that CFMEU NSW in fact acted for the

³⁰⁶ Submissions of Andrew Ferguson, 29/10/15, paras 9-14.

³⁰⁷ Submissions of Steve Dixon, 29/10/15, paras 31-40.

employees. Hence Steve Dixon was the agent of the CFMEU NSW, but no more. Hence there could be no breach of s 249B for the reasons given by Burchett J in *R v Turner*.³⁰⁸ Steve Dixon's submissions were to similar effect. The central point of those submissions was that a union does not act as an agent of its members when negotiating an enterprise agreement.

171. In point of law, however, the word 'agent' in s 249B is not limited to a person who at common law is an agent. It includes any person employed, or acting on behalf of another, or someone purporting or intending to do so: see s 249A. Despite the assertion of senior counsel for Andrew Ferguson to the contrary, *R v Gallagher*³⁰⁹ is authority for the proposition that a union official may be both an 'agent' of the union and an 'agent' for members of the union or some sub-set of them for the purposes of the section. It is also authority for the proposition that a union official negotiating an agreement with an employer may, as a matter of law, be said to be an agent on behalf of members on whose behalf he or she is negotiating. Senior counsel for Andrew Ferguson strongly stressed that no secret commission was established in *R v Turner*.³¹⁰ However, critically, in that case the indictment alleged that the union official was an agent of the union. The case is not an authority directly applicable to circumstances where the union official is an agent of the members.

³⁰⁸ (2001) 25 WAR 258.

³⁰⁹ [1986] VR 219 at 225-226.

³¹⁰ Submissions of Andrew Ferguson, 29/1015, paras 5-7, 13-14.

172. Counsel for Steve Dixon cited *Ryan v Textile Clothing & Footwear Union of Australia*³¹¹ in support of the proposition that ‘[a] union does not act as an agent of its members when negotiating an enterprise agreement’.³¹² In fact the case merely supports the proposition that when a union negotiates a common law contract which is not a certified agreement, it will usually as a matter of contract law negotiate as principal.³¹³ The case says nothing about whether a union official is an ‘agent’ within the meaning of the statute.

173. The submissions under consideration also face a factual difficulty. Steve Dixon gave the following evidence:³¹⁴

Q. Were you involved in EBA negotiations?

A. Yes, I was.

Q. What was your role in EBA negotiations?

A. I was a bargaining representative on behalf of Union members employed on site.

174. Counsel for Steve Dixon argued that the meaning of the phrase used by his client was undefined and that he was not asked to identify it. (Counsel assisting did not ask him; nor, incidentally, did his own counsel.) He submitted that it had the meaning given in the *Fair Work Act 2009* (Cth) to ‘bargaining representative’. It is, however, unlikely that Steve Dixon was intending to convey the same meaning as that as

³¹¹ [1996] 2 VR 235.

³¹² Submissions of Steve Dixon, 29/10/15, para 38.

³¹³ [1996] 2 VR 235 at 238, 272.

³¹⁴ Steve Dixon, 12/8/15, T:352.4-9.

a statutory phrase first introduced in 2009 to describe his role in 2005.³¹⁵ The better view is that Steve Dixon was using the phrase ‘bargaining representative’ in its natural and ordinary sense. His evidence shows that he saw himself as acting on behalf of the union members on the site. Hence he was an agent within the meaning of ss 249A and 249B.

175. In light of the conclusions above,³¹⁶ and particularly having regard to the circumstances of ongoing and difficult enterprise bargaining negotiations between THJV and union representatives including Steve Dixon, it is probable that the disguised payment of \$100,000 to the BTG D&A Committee, 80% of which was to end up in the CFMEU General Account:

- (a) would objectively tend to influence Steve Dixon to show favour to the THJV; and
- (b) was actually intended by Michael Deegan to influence Steve Dixon to show favour to the THJV.

176. It is also probable that Steve Dixon understood that Michael Deegan agreed to make the \$100,000 payment for the desired purpose of Steve Dixon showing favour towards the THJV. The inference arises from the absence of any other satisfactory explanation. Steve Dixon did deny that he would have involved himself in a payment designed to introduce an inappropriate outcome.³¹⁷ But unfortunately Steve

³¹⁵ The term bargaining agent was introduced in March 2006.

³¹⁶ Paras 128-161.

³¹⁷ Steve Dixon, 12/8/15, T:381.35-43.

Dixon's general credibility is so poor as to compel rejection of that particular piece of evidence, to suggest that the payment had no legitimate purpose, and to suggest that Steve Dixon knew that. And even if that particular piece of evidence by Steve Dixon were to be accepted, as noted above, for the purposes of an offence against s 249B(1)(b) it does not matter whether Steve Dixon had any intention to show favour. There is a strong inference that Michael Deegan authorised the payment in the hope of influencing Steve Dixon.

Additional submissions for Steve Dixon

177. Counsel for Steve Dixon made a large number of submissions with which it has been difficult to deal conveniently at particular points in counsel assisting's submissions. Hence they are collected here.
178. The first of these submissions was said to be based on procedural fairness. It was said that counsel assisting never put to Steve Dixon except in the most oblique way the proposition that he solicited a corrupt commission to avoid the prospect of industrial action arising from safety issues and to ensure his consent to the Second EBA. Steve Dixon submitted that had that allegation been put to him he would have given many explanations about the benefits of the Second EBA.³¹⁸ Steve Dixon's position in evidence was that the \$100,000 payment was a payment for legitimate services. He denied it was anything else. He denied it was a donation. He said that if he had been at a meeting in which anyone said it was a donation he would have objected. He said that the people involved in the payment knew it was

³¹⁸ Submissions of Steve Dixon, 29/10/15, paras 13-14, 64-65.

not a donation.³¹⁹ He denied that the payment was ‘a payment not to strike or talk about safety breaches’. He said it was ‘offensive’ to suggest ‘that the payment was designed to produce an outcome that was inappropriate’.³²⁰ He denied the suggestion that his evidence about the quantum of the payment was ‘simply not true’.³²¹ He denied the suggestion that it was incredible that \$100,000 was paid simply for training purposes.³²² In the face of all these denials, what further questioning of Steve Dixon could usefully have been undertaken? It must have been clear to him that counsel assisting might be going to allege that the \$100,000 payment was a donation to the CFMEU NSW for some purpose other than a legitimate payment for services rendered. The absolute nature of the position he had adopted made any more detailed exploration of why his position was tenable or untenable superfluous. Further, Steve Dixon’s submissions are advanced as if he were unrepresented and not permitted to be represented. If his own counsel had wished to conduct a demonstration of how the terms of the Second EBA supported his position or nullified that which might be taken up by counsel assisting, that could easily have been done. But it was not.

179. In any event, the evidence which Steve Dixon could have been ‘likely’ to have given about the objective merits of the Second EBA and his personal view of it is irrelevant. Counsel assisting did not submit that Steve Dixon in fact intended to provide favours to THJV. Any such

³¹⁹ Steve Dixon, 12/8/15, T:357.10-18, 364.40-367.1

³²⁰ Steve Dixon, 12/8/15, T:381.33-43.

³²¹ Steve Dixon, 12/8/15, T:359.39-360.10.

³²² Steve Dixon, 12/8/15, T:373.47-374.4.

subjective intention is irrelevant.³²³ Hence Steve Dixon's opinion that the deal was good for the union is not germane to the inquiry. So far as Steve Dixon referred to matters of objective benefit, it might readily be accepted that a mid-project EBA on a distressed government project would result in an increase in worker entitlements.

180. Steve Dixon made a specific complaint about the failure of counsel assisting to question him about the alleged motivation for the \$100,000 payment lying in avoiding industrial action based on safety issues. The complaint was:³²⁴

[I]n terms of industrial action associated with safety, such implication is unfair on Dixon as it was never put to him. Dixon indicated that he believed that the "turnaround in safety was as a result of what Thiess management did following the fatality". Consistent with that observation, had it been put to him he would likely have observed that:

- (a) The key improvement to safety on the site arose because of changes in the management of THJV, including particularly the appointment of Deegan who placed a much higher priority on safety;
- (b) There was a reduction in safety issues on the site over the period of Deegan's tenure. Such an observation is supported by the OH&S documents.³²⁵

181. But his own counsel actually did ask Steve Dixon why he said it was 'rubbish' to say that the payment was a payment not to strike or talk about safety breaches.³²⁶ The matters put in the quoted submission did

³²³ See paras 167-168.

³²⁴ Submissions of Steve Dixon, 29/10/15, para 68, some footnotes omitted.

³²⁵ Footnote in original; Compare OHS&R performance at BTG D&A MFI-1, 10/8/15, pp 358 (in respect of July 2005) and 496 (in respect of September 2006). There is a reduction in all categories across the period.

³²⁶ Steve Dixon, 12/8/15, T:381.34.

not figure in Steve Dixon's answer,³²⁷ though they had figured earlier in his evidence.³²⁸ This makes the submission appear very contrived. The detail of the point is another matter on which counsel for Steve Dixon could have questioned him if he had thought it profitable to do so. In truth it could not have been profitable. Evidence of improvements in the *fact of safety* after a payment does not help to establish whether that payment was motivated by a desire to avoid *industrial action based on claims about safety*. The OHS&R reports relied on do not refer to any safety incidents which are drug or alcohol related.

182. Steve Dixon made another 'unfairness' submission.³²⁹

It was also surprising that the content of Knott's evidence subject to suppression orders was not provided to Dixon (or apparently the other witnesses). The existence of that evidence only became public in some cross examination of Sharp. That evidence may have made available submissions as to the credit of Knott as well as assisting in determining lines of further cross examination.

183. If counsel for Steve Dixon had wanted access to the relevant evidence – i.e. evidence taken in confidential hearings – he had only to ask. Affected parties in other case studies have done this with success. Had senior counsel assisting refused to tender the material, counsel for Steve Dixon might have had some theoretical ground of complaint, depending on all the circumstances there arising. But the issue never arose.

³²⁷ Steve Dixon, 12/8/15, T:381.33-43.

³²⁸ Steve Dixon, 12/8/15, T:351.27-35, 378.38-379.40.

³²⁹ Submissions of Steve Dixon, 29/10/15, para 15.

184. Counsel for Steve Dixon made many laudatory submissions about his client's evidence – that it was honest, consistent with contemporary documents, corroborated by Michael Deegan, frank and honest. He also made many attacks on the credibility of other witnesses (save for Michael Deegan). Thus Michael Knott and Trevor Sharp were strongly attacked. Michael Knott thus suffered the usual fate of someone who blows a whistle about behaviour in a union – ostracism by his former colleagues and a belting from the lawyers acting for interests associated with the union. The unfortunate fact is that Steve Dixon was a very bad witness, and it was an error for him to have held himself out as credible in the way he did. He threw stones, but he lives in a very fragile glasshouse.

Tony Papa and Trevor Sharp

185. The elaborate actions and structures implemented to disguise the \$100,000 support the view that the payment was 'corrupt' according to ordinary standards of conduct. Andrew Ferguson played a central role in arranging that conduct. Each of Tony Papa and Trevor Sharp were parties to its implementation.

186. Those submissions of counsel assisting are to be accepted. Trevor Sharp and Tony Papa met the submissions by arguing that no finding should be made that they may have contravened s 249F.³³⁰ Tony Papa submitted that it was necessary to show that the accused was present at the time when the offence is committed. That may have been so at

³³⁰ Submissions of Trevor Sharp, 5/11/15, paras 2-6; Submissions of Anthony Papaconstuntinos, 29/10/15, paras 3-15.

common law. It is not so in relation to s 249F. Assuming that the commission of a principal offence can be established, to demonstrate that a person is liable for ‘aiding, abetting, counselling or procuring’ it is necessary to show that the accused accessory knew all the essential factual matters which must be established to show the offence by the principal offender; and the accessory intentionally assisted or encouraged the commission of the principal offence. Both Tony Papa and Trevor Sharp were involved in sending the \$100,000 invoice. The sending of the invoice was part of the conduct concerning the making and receipt of the corrupt commission.³³¹ Trevor Sharp’s evidence is that he did so under the direction of Andrew Ferguson. On this point, he is credible. Andrew Ferguson did appear to be efficient, determined and ruthless with subordinates when necessary. It may also be accepted that Trevor Sharp was not happy about sending the ‘bogus’ invoice. In one sense he had no choice. But it could not be found that he acted under duress, and only that finding might exculpate him if other criteria of criminal responsibility are met.

187. Trevor Sharp’s knowledge is established by his evidence about the conversation with Andrew Ferguson and Steve Dixon.³³² He gave evidence that he thought Steve Dixon would have said that he was the one who would organise the donation on site.³³³ That is evidence that he thought the payment was improper.³³⁴ He also viewed the invoice he sent as ‘bogus’.³³⁵ This evidence supports the inference that Trevor

³³¹ See paras 70, 98.

³³² See para 69.

³³³ Trevor Sharp, 12/8/15, T:328.9-12.

³³⁴ Trevor Sharp, 11/8/15, T:271.21-46.

³³⁵ Trevor Sharp, 12/8/15, T:326.1, 329.45.

Sharp knew the payment was not legitimate and was made with a proscribed purpose.

188. Tony Papa's knowledge should be inferred from the fact that he was, on the fairly contemporaneous account of Andrew Ferguson, involved in sending the \$100,000 invoice to THJV. It is to be inferred that he, as a member of the BTG D&A Committee sending the false invoice, would have been aware of the reason for the invoice. Tony Papa's knowledge is also to be inferred from the fact, contrary to his denials, that he was intimately involved with the affairs of the BTG and the BTG D&A, and from the transfers of funds, particularly the transfer which occurred on 20 April 2006, one week after the \$100,000 payment from the THJV was made. These facts, in combination with Tony Papa's involvement with the invoice, suggests that he was aware of the reasons for the payment.
189. The solicitors for Tony Papa submitted that he was not a decision-maker; he signed documents when asked to but did not make inquiries; he was only an organiser out in the field, an underling instantly compliant with the wishes of his boss, Andrew Ferguson.³³⁶ But even underlings who obey orders can be liable for aiding and abetting. And there are strong reasons for rejecting Tony Papa's claims that he could not remember why he signed so many documents or what was said. When those claims are taken with various adamant denials it is right to conclude that he was determined to say anything, true to his knowledge or untrue to his knowledge, which distanced him from criticism. In view of his very close involvement in CFMEU affairs at quite a senior

³³⁶ Submissions of Tony Papa, 29/10/15, para 13.

level over a long period of time, the converse of what he said is to be inferred. These lies support the conclusion that he knew why the \$100,000 payment was made.

190. Accordingly:

- (a) Steve Dixon may have committed an offence against s 249B(1)(b) of the *Crimes Act 1900* (NSW) by soliciting a corrupt commission;
- (b) Michael Deegan may have committed an offence against s 249B(2)(b) of the *Crimes Act 1900* (NSW) by giving a corrupt commission; and
- (c) Andrew Ferguson, Tony Papa and Trevor Sharp may have committed an offence against s 249F of the *Crimes Act 1900* (NSW) by aiding, abetting, counselling or procuring Steve Dixon's possible offence.

191. Pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Steve Dixon in relation to a possible offence under s 249B(1)(b) of the *Crimes Act 1900* (NSW).

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

referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Michael Deegan in relation to a possible offence under s 249B(2)(b) of the *Crimes Act* 1900 (NSW).

193. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Andrew Ferguson in relation to a possible offence under s 249F of the *Crimes Act* 1900 (NSW).

194. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Tony Papa in relation to a possible offence under s 249F of the *Crimes Act* 1900 (NSW).

195. Pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, this Report and all relevant materials have been referred to the New South Wales Commissioner of Police and the Director of Public Prosecutions of New South Wales so that consideration can be given to commencing proceedings against Trevor Sharp in relation to a possible offence under s 249F of the *Crimes Act* 1900 (NSW).

196. There is insufficient evidentiary material available to decide whether THJV may have committed an offence.

F – SIPHONING OF EBA FUNDS: OVERVIEW

197. From 2004 to 2012 funds paid into the BTG D&A Safety Program Account pursuant to a standard form clause in CFMEU NSW EBAs (**EBA levy clause**). They were then transferred to the CFMEU NSW. This part of the Chapter concerns the circumstances in which this took place.
198. The discussion is divided into two sections. The first section explains the basic arrangements and structures by which the CFMEU NSW received funds from the EBA levy clause. The second section examines whether there was anything illegal or improper in the CFMEU NSW receiving the money that it did.

G – SIPHONING OF EBA FUNDS: SUMMARY OF EVIDENCE

Evolution of EBA levy clause

199. For many years, one of the principal sources of funding of CIDAF (sometimes called in the evidence ‘the Foundation’ or ‘Foundation House’) was contributions paid by employers pursuant to the EBA levy clause. On a trip to Canada in 1996 Trevor Sharp learned about a drug and alcohol rehabilitation facility in Vancouver which was funded by levying a charge per worker on employers through industrial agreements. Trevor Sharp raised the idea with Andrew Ferguson.

Sometime later the CFMEU NSW asked employers to pay a one-off fee to the BTG D&A Committee to support its activities.³³⁷

200. In around 1998 or 1999, the EBA levy clause took a form which required an employer company to pay a service fee of \$250.00 to the BTG D&A Committee for the presentation of its workplace training courses; provision of assessment and referral/counselling services; and, if necessary, for the treatment of employees for drug and alcohol addictions.³³⁸ In addition the sum of 40 cents per week of the redundancy contribution for each employee was to be reallocated from ACIRT to CIDAF.³³⁹
201. Later the amount to be paid to the CIDAF increased from 40 cents to \$1 per week per employee. However, the clause in this form did not work as intended because employers were making the contribution directly to ACIRT. It proved impossible under the rules of ACIRT to extract money once it had been received into the members' account.³⁴⁰
202. There were various later versions of the EBA levy clause. Some provided for direct payment of \$1 to CIDAF.³⁴¹ There were a number

³³⁷ Trevor Sharp, witness statement, 11/8/15, para 10.

³³⁸ See BTG D&A MFI-6, 11/8/15, p 165, clause 4(d).

³³⁹ See BTG D&A MFI-6, 11/8/15, p 165, clause 4(e). ACIRT is the Australian Construction Industry Redundancy Trust.

³⁴⁰ Trevor Sharp, 11/8/15, T:225.34-38, 227.37-228.6; Andrew Ferguson, 13/8/15, T:525.4-15.

³⁴¹ See BTG D&A MFI-6, 11/8/15, p 236.

of CFMEU NSW negotiated agreements in 2003 which contained the following clause:³⁴²

Employees may elect on a company basis to have \$1.00 per week of their ACIRT contribution paid to an organisation of their choice e.g. Construction Industry Drug & Alcohol Foundation.

203. However, it would seem that in around early 2003 and certainly by 2004, many agreements began to include the following standard clause:³⁴³

The Company will contribute \$1.00 per week per Employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program, to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry.
(BTG D&A Clause)

204. Andrew Ferguson gave evidence that the CFMEU NSW effected a fundamental change in the wording of the EBA to ensure that the BTG D&A Committee receive the funds rather than the CIDAF directly. He said that this change had been brought about in recognition of the CFMEU NSW's contribution to the establishment of Foundation House and a recognition of a changed priority in that more needed to be done on the issue of workplace safety, while at the same time continuing the work of the BTG D&A Committee.³⁴⁴

205. The evidence suggests that sometime in early 2005, the BTG D&A Clause was amended to require a \$2 per week contribution, but was otherwise unaltered.³⁴⁵ A clause in this form was the standard form of

³⁴² BTG D&A MFI-12, 14/8/15.

³⁴³ BTG D&A MFI-6, 11/8/15, p 340.

³⁴⁴ Andrew Ferguson, 13/8/15, T:525.39-526.5.

³⁴⁵ An example of the clause can be found at BTG D&A MFI-6, 11/8/15, p 440.

clause until the beginning of 2012 when the CFMEU NSW altered the standard clause to require a \$3 donation per week per employee to CIDAF.³⁴⁶

BTG D&A Safety Program Account

206. On its face the BTG D&A Clause was not particularly clear in two respects. One will be examined later.³⁴⁷ The other arises in this way. The clause specified that the monies were to be paid to an administrator ‘nominated by the Building Trade Group (BTG) of Unions Drug & Alcohol/Safety Program’. However, a ‘program’ is not a person. Who exactly was to nominate the administrator?

207. Andrew Ferguson at least thought it was ‘crystal clear’ that the administrator was appointed as the collector of the ‘Building Trades Group of Unions Drug and Alcohol Committee’.³⁴⁸ Whether it was ‘crystal clear’ or not, in practice the evidence indicates that what occurred was as follows:

- (a) The BTG D&A Committee established a separate bank account – the BTG D&A Safety Account – in December 2002 to receive EBA levy contributions. The account was closed in June 2013.

³⁴⁶ BTG D&A MFI-6, 11/8/15, pp 486, 536.

³⁴⁷ See paras 242-248.

³⁴⁸ Andrew Ferguson, 13/8/15, T:533.39–534.4.

- (b) Each month monies were deposited in or transferred into the BTG D&A Safety Account.³⁴⁹
- (c) Some payments were transferred directly to the BTG D&A Safety Account by employers. However, a substantial amount was collected by a company called Laytins Mayfair. It was operated by Steve Parker. According to Trevor Sharp, he was the ‘independent administrator’ referred to in the clause.³⁵⁰ In consideration for collecting the contributions from employers, it was agreed that Laytins Mayfair was entitled to a 10% commission plus costs. The financial records for the BTG D&A Committee show Laytins Mayfair’s fee was paid from the previous months’ contributions, which were all banked to the BTG D&A Safety Account. The bank statements for the BTG D&A Safety Account do not record regular payments to Laytins Mayfair prior to January 2006.³⁵¹
- (d) Apart from the Thiess Payment discussed above, the only payments into the BTG D&A Safety Account were the EBA levy contributions.³⁵²

³⁴⁹ Toni Mitchell, witness statement, 13/8/15, para 9. See BTG D&A MFI-3, 10/8/15, Vols 1-2 for the banking records beginning in 2004. A summary of the transactions can be found in BTG MFI-14, 14/8/15, pp 1–11.

³⁵⁰ Trevor Sharp, 11/8/15, T:228.7-28.

³⁵¹ BTG D&A MFI-3, 10/8/15, pp 29-80.

³⁵² See BTG D&A MFI-3, 10/8/15, Vol 1, pp 29–338 covering the period from 2004 onwards. A summary of the transactions can be found in BTG MFI-14, 14/8/15, pp 1–11.

- (e) Each month the contributions made from the previous month were distributed to entities other than the BTG D&A Committee. At no time was any money paid to the BTG D&A Committee.³⁵³
208. Under the BTG D&A clause, the monies were contributed by employers to be used only for a specific purpose, namely ‘to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’.
209. Counsel assisting submitted that the arrangement was an express trust, being either:
- (a) a trust for a charitable purpose (the relief of sickness or a beneficial purpose to a section of the community within the spirit and intendment of the Preamble to the *Charitable Uses Act 1601 (UK)*); or
 - (b) a so-called ‘Quistclose trust’.

Pursuant to that trust, the members of the BTG D&A Committee held the funds in the BTG D&A Safety Account on trust, such funds to be applied for the purpose of assisting ‘with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’. In *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)*,³⁵⁴ Gibbs ACJ explained that the decision

³⁵³ Toni Mitchell, witness statement, 13/8/15, para 10; See BTG D&A MFI-3, 10/8/15, Vols 1 and 2. A summary of the transactions can be found at BTG MFI-14, 14/8/15, pp 1–11.

³⁵⁴ (1978) 141 CLR 335 at 353.

in *Barclays Bank Ltd v Quistclose Investments Ltd*³⁵⁵ was authority for the following proposition:

... [W]here money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

A strong attack on counsel assisting's submissions in this respect is examined below.³⁵⁶

Application of money from the BTG D&A Safety Account

210. The bank and financial records of various entities reveals funds from the BTG D&A Safety Account from July 2004 to January 2012 inclusive were applied as follows:³⁵⁷

- (a) From July 2004 to August 2005, a total of \$505,634 in EBA levy contributions was received and \$489,123 was distributed. Approximately 50.2% was paid to the CIDAF and 48.8% was paid directly to the CFMEU General Account.
- (b) From September 2005 to January 2012, a total of \$2,173,013 in EBA levy contributions was received and \$2,217,303 was

³⁵⁵ [1970] AC 567.

³⁵⁶ See paras 238-241.

³⁵⁷ BTG D&A MFI-14, 14/8/15, Diagrams. For a more detailed summary see BTG D&A MFI-14, 14/8/15, pp 1-11.

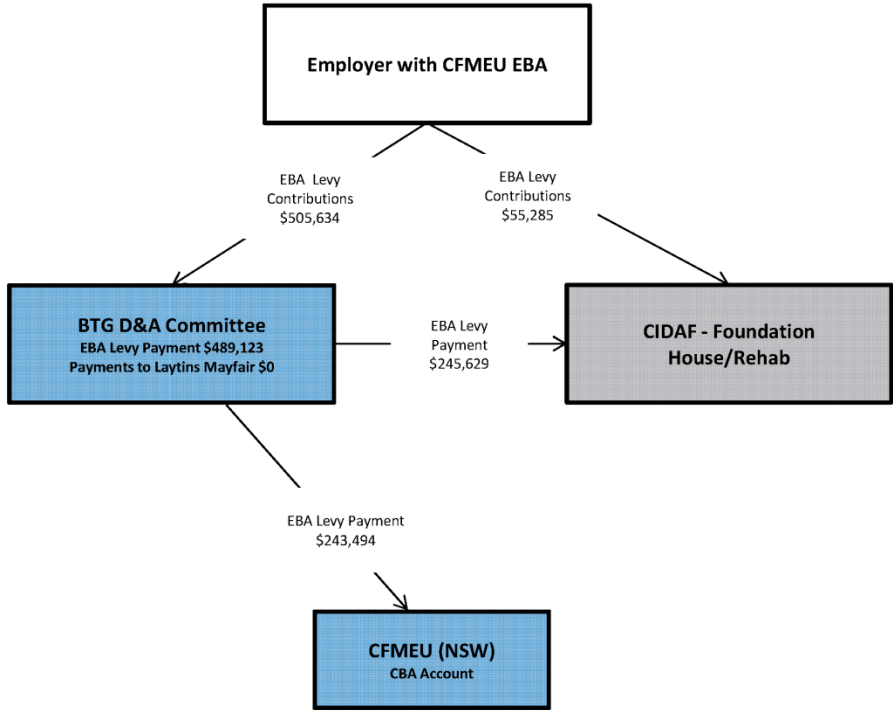
distributed. Of the amount distributed, \$233,461 was paid in agreed commission and fees to Laytins Mayfair. Of the balance distributed, 50% was distributed to CIDAF and the remaining 50% was paid to the BTG Account. Every dollar transferred to the BTG Account was subsequently transferred to the CFMEU General Account. During this time, CIDAF continued to receive some direct EBA levy contributions under earlier EBA levy clauses, but the bulk of its funding was received from the BTG D&A Committee.

- (c) From February 2012 onwards, after issues had been raised by board members of the CIDAF concerning CIDAF's funding,³⁵⁸ the EBA levy clause was altered to nominate CIDAF once again as the direct recipient of the EBA levy contributions. From February 2012 to March 2013, the BTG D&A Safety Account continued to receive some funds which were remitted entirely to the CIDAF. By March 2013, the BTG D&A Safety Account had a nil balance and it was closed in June 2013.

211. The funds flow across the three periods is illustrated in the three diagrams on the following pages.

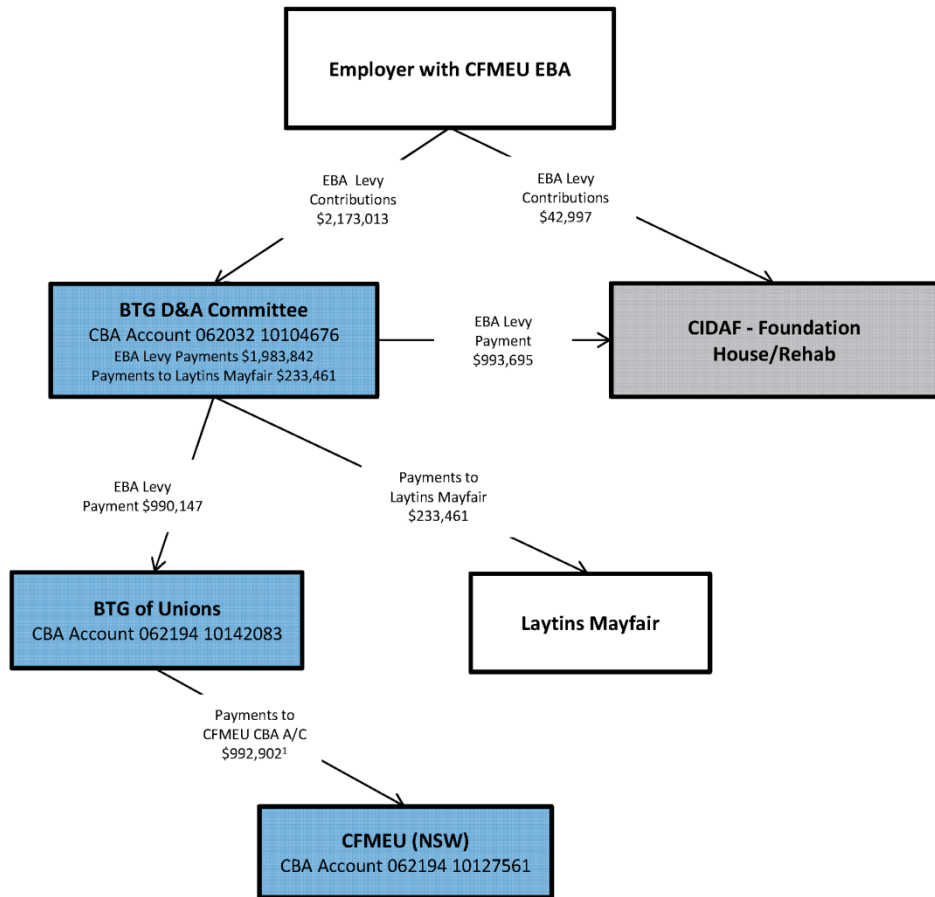
³⁵⁸ See paras 215-227.

BTG Drug & Alcohol Committee
Flow of EBA Levy Contributions July 2004 - August 2005



BTG Drug & Alcohol Committee

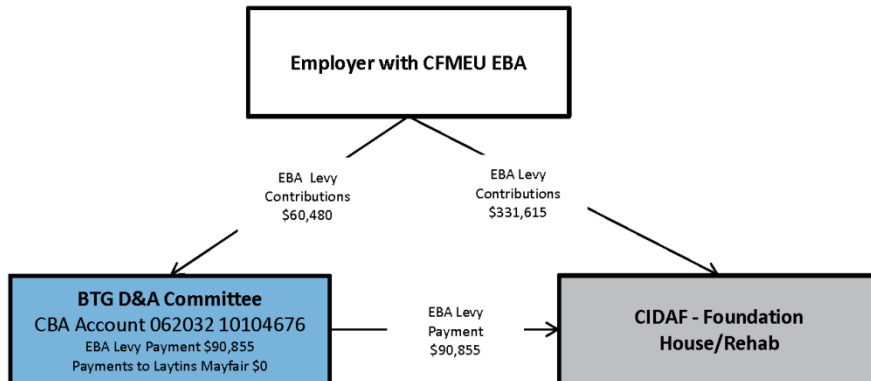
Flow of EBA Levy Contributions September 2005 to January 2012



Notes

1. The difference between the amount received by the BTG of \$990,147 and the amount remitted by the BTG to the CFMEU of \$992,902 (difference of \$2,755) is due to:
 - 1) Cheque 00089 for \$17,584.94 from BTG to CFMEU on 22 October 2008 exceeded the corresponding levy payment to BTG of \$14,812 on 9 October 2008 by \$2,773; and
 - 2) Cheque 000090 for \$18,379.56 from BTG to CFMEU is \$18 less than the corresponding levy payment to BTG in transaction EFT1111 for \$18,397.56.

BTG Drug & Alcohol Committee
Flow of EBA Levy Contributions February 2012 to March 2013



CFMEU NSW/BTG D&A Committee arrangements: evidence

212. In what circumstances did the CFMEU NSW come to receive distributions from the BTG D&A Safety Account? On this there was a degree of dispute between Trevor Sharp and Andrew Ferguson.
213. According to Trevor Sharp, sometime in 2004 he saw a new EBA levy clause which the CFMEU NSW had changed without his knowledge.³⁵⁹ The amended EBA clause was along the following lines:³⁶⁰ 'Employees may elect on a company basis to have \$1.00 per week of the ACIRT contribution paid to an organisation of their choice eg. Construction Industry Drug & Alcohol Foundation'.

³⁵⁹ Trevor Sharp, 11/8/15, T:238.3-11.

³⁶⁰ BTG D&A MFI-6, 11/8/15, p 411.

214. Trevor Sharp gave evidence that the clause prompted him to go and see Andrew Ferguson immediately because he was worried that the change in wording would result in the flow of funds to CIDAF ceasing.³⁶¹ Trevor Sharp said they had a conversation in which Andrew Ferguson told him that the CFMEU NSW would be increasing the contribution to \$2.00 and would be taking half of that \$2.00.³⁶² He thought that Andrew Ferguson had mentioned that the CFMEU NSW intended to use their half of the money for ‘safety purposes’.³⁶³
215. Trevor Sharp’s evidence was that Andrew Ferguson instructed him to keep quiet about the arrangements because employers would not be happy if they realised they were funding the union.³⁶⁴ Trevor Sharp said that at the end of the conversation with Andrew Ferguson whilst at the doorway to Andrew Ferguson’s office, Brian Fitzpatrick, an organiser for the CFMEU NSW, joined the conversation and said:³⁶⁵ ‘[G]ive them 25% or better still give ‘em nothing. They are our EBAs and we should decide where the money goes to’.
216. Trevor Sharp recalled that Andrew Ferguson’s response was: ‘No, we can’t do that. We need them to hide behind.’³⁶⁶ Following the meeting Trevor Sharp sent Andrew Ferguson a letter confirming the arrangement reached during the conversation. The letter, on BTG

³⁶¹ Trevor Sharp, 11/8/15, T:239.2-13.

³⁶² Trevor Sharp, 11/8/15, T:239.29–230.10.

³⁶³ Trevor Sharp, 11/8/15, T:240.12-19.

³⁶⁴ Trevor Sharp, witness statement, 11/8/15, para 16; Trevor Sharp, 11/8/15, T:240.25-35.

³⁶⁵ Trevor Sharp, witness statement, 11/8/15, para 16.

³⁶⁶ Trevor Sharp, 11/8/15, T:241.12-14.

D&A Committee letterhead, was dated 25 February 2005. It included the following:³⁶⁷

Following our meeting today I wish to confirm the following details regarding the clause referring to companies “contributing \$2 per week per employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug and Alcohol/Safety Program to assist with the provision of drug & alcohol rehabilitation & treatment services/safety programs for the building and construction industry” in Enterprise Bargaining Agreements and Deed [sic] of Agreements.

Further to that meeting it is agreed that

1. Where possible and practicable the CFMEU will insert the above mentioned clause into all Enterprise Bargaining Agreements or Deed of Agreements which are negotiated by the union.
2. The BTG Drug and Alcohol Program will administer, manage and make all necessary financial transfers to the CFMEU monthly, providing the CFMEU with all necessary documentation involved in the process.
3. All income derived from the above mentioned process will be divided as follows:
 - Both the CFMEU and the BTG Drug and Alcohol Program shall receive an equal share (50%) of the first \$40,000 raised per month.
 - The CFMEU shall receive 60% and the BTG Drug and Alcohol Program shall receive 40% of all income raised in excess of \$40,000 per month.

...

As discussed in our meeting, it is agreed that if you have not responded to this document within 14 days from the date of writing, this agreement shall be in place effective immediately and be adhered to for the full duration of any agreements negotiated by the CFMEU.

³⁶⁷ BTG D&A MFI-1, 10/8/15, p 50.

217. So much for Trevor Sharp's version. Andrew Ferguson said he thought he would have had more than one conversation with Trevor Sharp about where the money from the EBA levy clause should be going, but he could only recollect one about the time the standard contribution increased from \$1 to \$2 in early 2005.³⁶⁸ He said he indicated to Trevor Sharp that the CFMEU NSW was changing the standard clause to make provision for \$2 per employee and the union's proposal was that 50% of the money be allocated to the Committee for the purposes of drug and alcohol work and 50% for the CFMEU NSW to assist with safety programs.³⁶⁹ Andrew Ferguson denied that he told Trevor Sharp to keep the arrangement quiet.³⁷⁰
218. For some reason Andrew Ferguson treated counsel assisting as having supported Trevor Sharp's version on this point. Whether counsel assisting did or did not support Trevor Sharp does not matter. The principal point of collision between the two versions concerned that denial by Andrew Ferguson that he told Trevor Sharp to keep the arrangement quiet. Andrew Ferguson submitted that there were good reasons for accepting his denial. The main reason given by Andrew Ferguson in support of his denial is that he agreed to inform the CFMEU NSW's Committee of Management,³⁷¹ and that precluded any attempt at secrecy. That evidence is not implausible. Let it be assumed that Andrew Ferguson is accepted in that respect. His argument then evolved into a larger argument that he and Trevor Sharp agreed to disclose the grant to the Drug and Alcohol Safety Committee

³⁶⁸ Andrew Ferguson, 13/8/15, T:528.21-35.

³⁶⁹ Andrew Ferguson, 13/8/15, T:528.40-529.1.

³⁷⁰ Andrew Ferguson, 14/8/15, T:546.6-14.

³⁷¹ Andrew Ferguson, 14/8/15, T:548.34-40.

and Foundation House. From this it was submitted that this meant the involvement of employers' representatives. That led into the submission, recorded above, that in other ways employers could have found out that money was going to the CFMEU.³⁷² But even if that is so, and the later stages of the argument are rather speculative, it would not excuse any breach of trust involved.³⁷³

219. Andrew Ferguson did not think the clause was misleading although he conceded it did not refer to the CFMEU NSW receiving funds.³⁷⁴ He said that if an employer had asked during negotiations, they would have been told how the money was split up.³⁷⁵ He also thought a reasonable employer might have an understanding that the money might be contributed to the union.³⁷⁶

CFMEU NSW/BTG D&A Committee arrangement: industry knowledge

220. What did employers and other industry participants know about the 'split' of the funds? There was considerable evidence from members of the Committee of Management of CIDAF about what they knew in 2011 about the arrangements. The context of that evidence was that in early 2011, the Committee of Management began to be concerned about the ongoing viability of Foundation House. It began to consider more closely the sources of CIDAF's funds. It is unnecessary to set

³⁷² Andrew Ferguson, 14/8/15, T:554.15-25.

³⁷³ Submissions of Andrew Ferguson, 29/10/15, paras 102-113.

³⁷⁴ Andrew Ferguson, 14/8/15, T:552.27-42.

³⁷⁵ Andrew Ferguson, 14/8/15, T:553.40-554.13.

³⁷⁶ Andrew Ferguson, 14/8/15, T:554.18-25.

out the full details of the evidence. For present purposes, the important point is that until near the end of 2011 and the early part of 2012 a number of the committee members had a view that all of the EBA levy contributions were being paid to CIDAF.³⁷⁷

221. Significantly, Brian Seidler who was and is the Executive Director of the Master Builders Association of New South Wales (**MBA**) gave evidence that in the middle of 2011 he thought, and believed members of his association thought, that the monies being paid pursuant to the BTG D&A Clause were simply being paid directly to the Foundation.³⁷⁸ Brian Seidler gave evidence that he asked Tony Papa whether there was something called the BTG Safety Program and asked to see the CFMEU NSW's clause. He also asked why the money deposited by Laytins Mayfair did not come directly to Foundation House.³⁷⁹
222. Tony Papa, however, gave evidence that Brian Seidler knew that 50% of the EBA levy contributions were being paid to the CFMEU NSW and that if he said otherwise he was 'not telling the truth'.³⁸⁰ This answer does his credit no good. Tony Papa did not tell Brian Seidler about it himself. Nor was he present when anyone told him. However, he thought it was common knowledge and Brian Seidler must have known. Tony Papa also said that the other board members knew. But

³⁷⁷ Kaye Bellear, 10/8/15, T:41.30-42.6; Brian Seidler, 10/8/15, T:11.8-20 and Colin Huntley, 11/8/15, T:179.3-7.

³⁷⁸ Brian Seidler, witness statement, 10/8/15, para 31.

³⁷⁹ BTG D&A MFI-1, 10/8/15, pp 222-223; Brian Seidler, 10/8/15, T:14.33-42.

³⁸⁰ Tony Papa, 18/8/15, T:773.37-41.

he could offer no cogent explanation as to why he thought that, despite extensive questioning seeking detail.³⁸¹

223. Tony Papa's evidence in respect of Brian Seidler was exposed as false by correspondence between the MBA and the CFMEU NSW from December 2011 to June 2012 which is summarised below.³⁸² Brian Seidler's account that he did not know that 50% of the EBA levy contributions was being paid to the CFMEU NSW is accepted in preference to Tony Papa's.
224. On 12 December 2011, Brian Seidler sent a letter to Brian Parker, who had just become State Secretary for the Construction and General Division of the CFMEU NSW. Brian Seidler, on behalf of the MBA, requested 'full disclosure' from the CFMEU NSW about the distribution of the contributions.³⁸³
225. On 25 January 2012, the union responded in a letter. It was drafted principally by Andrew Ferguson.³⁸⁴ The letter explained that the EBA levy clauses made no reference to CIDAF. The only explanation about the distribution of the contributions was that the 'contributions raised have assisted the BTG to make a significant contribution to improving drug and alcohol and safety awareness.' It made no reference to the fact that the CFMEU NSW received approximately 50% of the contributions from the BTG D&A Committee. Notwithstanding this Andrew Ferguson maintained that the letter was transparent about

³⁸¹ Tony Papa, 18/8/15, T:776.6-780.36.

³⁸² Paras 219-227.

³⁸³ BTG D&A MFI-1, 10/8/15, pp 229-230; Brian Seidler, 10/8/15, T:17.3-11.

³⁸⁴ BTG D&A MFI-1, 10/8/15, pp 267-268; Andrew Ferguson, 14/8/15, T:564.12-27.

where the levy money was going.³⁸⁵ This was clearly not so. Andrew Ferguson's unwillingness to accept the obvious fact that there had not been 'full disclosure' must weigh heavily against accepting Andrew Ferguson's evidence generally unless it is against interest or corroborated or confirmed by contemporary documents or supported by the probabilities.

226. On 5 March 2012 Brian Seidler, together with three other members of the Committee of Management of CIDAF, resigned from the Committee.³⁸⁶ Brian Seidler resigned because the Committee had been struggling to find out where funds from the industry had gone so that they would be appropriately paid to CIDAF.³⁸⁷

227. On 7 March 2012, Brian Seidler on behalf of the MBA sent a further letter to the CFMEU NSW. The letter contained the following:³⁸⁸

For its part, Master Builders acknowledges that some years ago the union amended its wording on this matter in their enterprise bargaining agreements. However, at no time did the union communicate its intention to divert the vast bulk of the monies subsequently paid, away from the Construction Industry Drug and Alcohol Foundation (CIDAF). Clearly, the major focus of the clause remained on providing assistance and services to the industry on drug and alcohol rehabilitation. Therefore, it was not the expectation of Master Builders and its members who concluded enterprise bargaining agreements with the union that the bulk of such monies would be siphoned off to fund other unknown purposes or causes.

... Again we request a detailed explanation of where the monies paid by industry to the Building Trades Group has [sic] or [have] been spent.

³⁸⁵ Andrew Ferguson, 14/8/15, T:570.27-572.20.

³⁸⁶ BTG D&A MFI-1, 10/8/15, pp 283-287.

³⁸⁷ Brian Seidler, 10/8/15, T:30.9-32.

³⁸⁸ BTG D&A MFI-1, 10/8/15, pp 289-290.

228. On 19 June 2012, the CFMEU NSW responded to Brian Seidler's letter.³⁸⁹ The letter indicated that the BTG D&A Committee contribution had helped support the following:

- (a) a full time occupational health and safety coordinator;
- (b) publication of the BTG Safety Handbook;
- (c) the hosting of monthly industry Brian Miller Safety Forums;
- (d) the promotion of the CIDAF through the work of the Drug and Alcohol Committee Officer, formerly a position held by Tom Simpson;
- (e) the promotion of the CIDAF through the placement of vending machines on building sites;
- (f) the promotion of an annual golf day which ran for several years; and
- (g) the cost of electricity, phones and the other services at Foundation House.

229. The letter also noted that BTG D&A Committee had helped pay the wages of Nita Nunes and thereby effectively subsidised the CIDAF. Significantly, the letter did not say that 50% of the EBA levy contributions were paid to the CFMEU NSW.

³⁸⁹ BTG D&A MFI-1, 10/8/15, pp 299-300

230. It was Rita Mallia who had drafted the letter. She gave evidence that the information contained in the letter was supplied to her by Andrew Ferguson and Tony Papa.³⁹⁰ She said she understood that the portion of the EBA levy clause that did not go to Foundation House was used to support the initiatives referred to above.³⁹¹ She said that not all these initiatives were funded by the CFMEU NSW but rather were funded in combination with the BTG D&A Committee.³⁹²
231. Andrew Ferguson denied that he was the source of many of the specific points made in the letter.³⁹³ He gave evidence that he was not sure that the EBA levy contributions assisted with the publication of the BTG Safety Handbook.³⁹⁴ He said any costs associated with hosting the Safety Forum would have been incidental.³⁹⁵ He said that although he thought the golf day was valid he would not have raised it himself.³⁹⁶ However, Rita Mallia did email a draft of the letter to Andrew Ferguson asking for comment to which Andrew Ferguson replied 'No great'.³⁹⁷
232. Andrew Ferguson also said that if he had drafted the letter he would 'have raised many, many other issues.'³⁹⁸ He described them in a speech – long and perhaps well-prepared. He gave evidence that he

³⁹⁰ Rita Mallia, 12/8/15, T:398.12-46; 13/8/15, T:434.17-21, 437.27-30.

³⁹¹ Rita Mallia, 13/8/15, T:435.13-436.38.

³⁹² Rita Mallia, 13/8/15, T:436.25-438.42.

³⁹³ Andrew Ferguson, 14/8/15, T:577.34-37.

³⁹⁴ Andrew Ferguson, 14/8/15, T:579.31-33.

³⁹⁵ Andrew Ferguson, 14/8/15, T:579.44-46.

³⁹⁶ Andrew Ferguson, 14/8/15, T:580.4-6.

³⁹⁷ BTG D&A MFI-13, 14/8/15.

³⁹⁸ Andrew Ferguson, 14/8/15, T:578.27-33.

would have included in it reference to the fact that the union used the money to engage two safety officers – Dick Whitehead and Rick Rech – and at different points of time there were other organisers employed who had safety roles.³⁹⁹ He also identified other safety matters including:

- (a) 2 or 3 courses conducted by WorkCover New South Wales in relation to workplace safety involving 10 weeks of training 1 day per week for all officials;⁴⁰⁰
- (b) the production by Dick Whitehead and Rick Rech of a fortnightly safety alert and the provision of safety information by Dick Whitehead on a web page he operated;⁴⁰¹
- (c) the publication by the BTG of a ‘Safety Rectification Notice’ where union officials could detail safety breaches identified on site;⁴⁰²
- (d) the publication by the BTG of a number of posters and leaflets;⁴⁰³
- (e) a union program to stop WorkCover’s decision to close down an internal unit inside WorkCover concerned with tunnel safety;⁴⁰⁴

³⁹⁹ Andrew Ferguson, 14/8/15, T:582.22-38.

⁴⁰⁰ Andrew Ferguson, 14/8/15, T:584.39-585.13.

⁴⁰¹ Andrew Ferguson, 14/8/18, T:585.15-37.

⁴⁰² Andrew Ferguson, 14/8/15, T:585.39-586.11.

⁴⁰³ Andrew Ferguson, 14/8/15, T:586.20-43.

- (f) a campaign to improve asbestos licensing;⁴⁰⁵
- (g) a variety of training programs for officials in relation to legislative requirements for safety;⁴⁰⁶
- (h) time spent by organisers on safety issues, which Andrew Ferguson estimated at about 40% of their time;⁴⁰⁷ and
- (i) publication of a variety of CFMEU NSW posters, leaflets and stickers.⁴⁰⁸

H – SIPHONING OF EBA FUNDS: FINDINGS

Relevant legal principles

233. The members of the BTG D&A Committee held the funds in the BTG D&A Safety Account on trust to be applied for a specific purpose, namely to ‘assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’.⁴⁰⁹
234. Application of funds not for that purpose, but for other purposes, would constitute a breach of trust with possible civil consequences for the trustees or any persons procuring a breach of trust. Apart from the

⁴⁰⁴ Andrew Ferguson, 14/8/15, T:586.45-587.1.

⁴⁰⁵ Andrew Ferguson, 14/8/15, T:587.3-18.

⁴⁰⁶ Andrew Ferguson, 14/8/15, T:587.20-38.

⁴⁰⁷ Andrew Ferguson, 14/8/15, T:587.40-588.6.

⁴⁰⁸ Andrew Ferguson, 14/8/15, T:588.8-34.

⁴⁰⁹ Paragraph 198.

possible civil consequences, in certain circumstances a breach of trust or an inducement to commit a breach of trust will constitute a criminal offence.⁴¹⁰

235. In addition, if particular employers were caused by officials of the CFMEU NSW to believe that they were contributing to the CIDAF, whereas in fact 50% of their contributions were being paid to the CFMEU NSW, then the union officials might be liable for the criminal offence of obtaining a benefit by a false pretence or by deception.⁴¹¹

Conclusions

236. The monies paid to the CFMEU NSW were contributed ‘to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry’. Those monies were not applied or used solely for that purpose. The better reading of that condition is that the monies were to be applied by the BTG D&A Committee for drug and alcohol rehabilitation services or drug and alcohol safety programs for the building industry. On that interpretation the monies contributed could not be used for general safety purposes.

237. However, regardless of the interpretation adopted, the simple fact is that the contributions received by the CFMEU NSW were paid into the

⁴¹⁰ See *Crimes Act 1900* (NSW), s 172 (trustees fraudulently disposing of property, repealed in 2009), s 192E (fraud).

⁴¹¹ See *Crimes Act 1900* (NSW), ss 178BB, 179, 180 (repealed 2009), s 192E, Part 9.

CFMEU General Account,⁴¹² i.e. into the general trading account of the CFMEU NSW. The union did not have a safety program or safety expense account in its ledgers. Hence it is not possible to say that the funds paid were specifically appropriated for expenditure on safety. The evidence of Andrew Ferguson and Rita Mallia is too vague to support the view that it was. Even if they were right about the safety programs which the CFMEU NSW funded, it has not been demonstrated that the EBA levy monies funded them as distinct from non-safety activities of the CFMEU.

238. The conclusion that the monies paid to the union went towards general expenditure is in part supported by the union's 13 June 2012 letter to the MBA. It arguably deliberately misstated the true position in a number of respects. An examination of the BTG D&A Safety Program Account statements from 2004 onwards shows that not a single dollar of the EBA levy contributions was used by the BTG D&A Committee in that period for the wages of Tom Simpson, or for the wages of Nita Nunes, or for electricity, or for phones, or for any other thing. The BTG D&A Committee did not benefit from any of the EBA levy contributions. Some items listed did not result in *any* expenditure by the CFMEU NSW (e.g. the BTG Handbook, the golf day which was organised by Tom Simpson, a BTG D&A Committee employee,⁴¹³ or the placement of vending machines). Other items listed resulted only in very limited expenditure by the CFMEU NSW (e.g. the hosting of the Safety Forum). The only substantive expenditure identified in the

⁴¹² Andrew Ferguson, 14/8/15, T:629.23-35; see also the CFMEU General Account statements at BTG D&A MFI-3, 10/8/15, Vol 2, pp 672-930 and the summary of transactions at BTG D&A MFI-14, 14/8/15, pp 12-15.

⁴¹³ Trevor Sharp, 11/8/15, T:235.31-40.

letter solely concerning safety was the employment of a full-time safety coordinator. Payroll records show that Dick Whitehead was employed from 2004–2008 and Rick Rech from 2009–2011, with salaries of no more than \$56,205 and \$76,267 respectively.⁴¹⁴ For most years from 2004–2011, each of those amounts was less than half of the payments received in a given year by the CFMEU NSW.⁴¹⁵ If the union really had spent the money on safety programs, rather than simply the wages of organisers and conducting ordinary union activity, it would be expected that the union could, and would, have prepared a more detailed and accurate response.

239. The additional programs which Andrew Ferguson recited in evidence at considerable length consisted largely of things which are the core business of unions e.g. the cost of the salaries of organisers, the cost of posters and promotional material, the cost of training delegates and organisers. His list reinforced the proposition that the money received from the BTG D&A had been used in the ordinary running of the CFMEU NSW.
240. Significantly, in the years 2004 to 2012 the CFMEU NSW accounted for the EBA levy money it received from the BTG D&A Committee as the ‘BTG Apprentices and Safety Program.’⁴¹⁶ Trevor Sharp gave evidence that the BTG D&A obtained government funding (not funding from the CFMEU NSW) to present the ‘Drug and Alcohol Safety in the Workplace Training to apprentices in TAFE colleges.’⁴¹⁷

⁴¹⁴ BTG D&A MFI-29, 6/10/15; BTG D&A MFI-31, 6/10/15.

⁴¹⁵ BTG D&A MFI-4, 10/8/15, pp 24, 73, 122, 167, 203, 237, 269, 308.

⁴¹⁶ BTG D&A MFI-4, 10/8/15, pp 24, 73, 122, 167, 203, 237, 269, 308.

⁴¹⁷ Trevor Sharp, 11/8/15, T:219.22-25.

He said this role was performed by a number of people over the years that he recruited.⁴¹⁸

241. The arrangement entered into between Trevor Sharp, on behalf of the BTG D&A Committee and Andrew Ferguson, on behalf of the CFMEU NSW, concerning the distribution of funds to the union was thus in breach of trust.

242. At this point it is convenient to consider three attacks made on the above reasoning. *First*, it was said there was no trust. *Secondly*, it was said that even if there was, the construction of it put forward was wrong. *Thirdly*, it was said that even if there were a trust and the construction were correct, Andrew Ferguson was not involved in any breach of it.

243. Was there a trust? The CFMEU did not concede that the Committee held funds under a trust.⁴¹⁹ But Andrew Ferguson went further. He argued against that proposition at length.⁴²⁰ To some extent the argument seemed to be that Gibbs ACJ's proposition was wrong. Thus there are suggestions that Gibbs ACJ misunderstood either the argument advanced to him or the argument advanced in *Barclays Bank Ltd v Quistclose Investments Ltd*.⁴²¹ Andrew Ferguson relied on statements in an intermediate appellate court.⁴²² Andrew Ferguson also relied on other authorities not from ultimate appellate courts to

⁴¹⁸ Trevor Sharp, 11/8/15, T:219.27-47-220.7.

⁴¹⁹ Submissions of the CFMEU, 29/10/15, paras 16-17.

⁴²⁰ Submissions of Andrew Ferguson, 29/10/15, paras 94-101.

⁴²¹ [1970] AC 567.

⁴²² *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 at [43], [49].

distinguish the present facts. At the best of times these criticisms of Gibbs ACJ would be very risky. The position is worsened by the fact that Gibbs ACJ was stating the majority position of the High Court of Australia. His statement has been followed in many cases.⁴²³

244. To some extent Andrew Ferguson's argument was that principles of trust law are not readily invoked in commercial transactions. But sometimes they can be.

245. To some extent Andrew Ferguson's argument is that here 'there exists no matter that converts a payment for a purpose into an express trust. The payment made by the employers was unaccompanied by any offer to repay the contributions if the purpose failed and there was no holding out that the monies would be paid into a separate, discrete account.'⁴²⁴ In order to invoke *Barclays Bank Ltd v Quistclose Investments Ltd* it is not necessary that any offer to repay the contributions if the purpose fails be found: the operation of trust law ensures that the contributions will revert to those who provided them if the purpose fails. The monies were in fact paid into a separate account. The important factor is that the EBA levy clause makes it clear that the monies were not to be the BTG D&A Committee's to dispose of as they wished. They were not to be part of the BTG D&A Committee's general assets. The monies were to be used only for a particular purpose. Hence the monies were held on trust.

⁴²³ See the cases cited in *Compass Resources Ltd v Sherman* (2010) 42 WAR 1 at [58], [62]-[64].

⁴²⁴ Submissions of Andrew Ferguson, 29/10/15, para 99.

246. Andrew Ferguson submitted that there was no charitable trust.⁴²⁵ One ground for the submission was the commercial context. As already indicated, this point is far from conclusive. The other ground was that the principal objects of the BTG D&A Committee were not charitable. But that does not prevent the members of the BTG D&A Committee or some component of it holding particular property on a charitable trust. For present purposes, it does not matter whether the trust was a *Quistclose* trust or a charitable trust.

247. The second criticism of counsel assisting creates a controversy as to what the purpose was. One aspect of Andrew Ferguson's construction of the BTG D&A clause is important. The clause provided:

The company will contribute \$1.00 per week per Employee to an administrator nominated by the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program, to assist with the provision of drug & alcohol rehabilitation services/safety programs for the building industry.

248. Andrew Ferguson contended that the clause allowed funds to be used for *either* the provision of drug and alcohol rehabilitation services *or* safety programs.⁴²⁶ This was supported by the CFMEU.⁴²⁷

249. The issue of construction was seen by the CFMEU NSW as important. It is certainly important to the issue of breach. The CFMEU NSW argued that it was lawful to spend 50% of the funds on Foundation House and 50% on the CFMEU NSW. Foundation House provided

⁴²⁵ Submissions of Andrew Ferguson, 29/10/15, para 101.

⁴²⁶ Submissions of Andrew Ferguson, 29/10/15, paras 90-93; Andrew Ferguson, 13/8/15, T:528.3-7.

⁴²⁷ Submissions of the CFMEU, 29/10/15, p 89, para 8.

drug and alcohol services. And the CFMEU NSW provided safety programs. In this regard the CFMEU seized on what it called a ‘concession’ by counsel assisting that the CFMEU NSW ‘runs safety programs as part of its core business’.⁴²⁸ But it does not provide ‘drug and alcohol rehabilitation ... safety programs’ as part of its core business. Hence the issue is: what do the words ‘drug and alcohol’ govern? Only ‘rehabilitation services’? Or ‘safety programs’ as well?

250. The submissions of Andrew Ferguson were as follows:⁴²⁹

[T]he BTG D&A clause contemplates two uses for the contributions – including “safety programs for the building industry”. On the true construction of the clause, this object is in addition to, and distinct from, the provision of “drug & alcohol rehabilitation services”. Grammatically, the two concepts are separated by a slash (*solidus*), which is conventionally used [sic] the word substitute for “or”, which indicates a choice (often mutually-exclusive) is present. In truth what it separates are discrete: there is no reason to think that the former qualified the latter, particularly having regard to the Union’s long-held concern with industrial safety.

251. Andrew Ferguson then referred to authorities favouring a generous construction of industrial instruments.⁴³⁰ Andrew Ferguson’s submissions continued:⁴³¹

The construction of the BTG D&A clause has significance on two levels. Its true construction bears on the question of whether a breach has occurred. However, a construction that was open to the reader (even if not correct) would absolve him from liability as an accessory to a breach of trust. There was nothing inherently implausible about Mr Ferguson’s

⁴²⁸ Submissions of the CFMEU, 29/10/15, p 91, para 18.

⁴²⁹ Submissions of Andrew Ferguson, 29/10/15, para 90.

⁴³⁰ *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 at [19]-[22] and cases cited therein.

⁴³¹ Submissions of Andrew Ferguson, 29/10/15, para 93.

construction of the clause as authorising the use of the contributions for safety programs *simpliciter*.

252. The latter level of submission will be mentioned below. Assuming the correctness of the suggested approach to construction, Andrew Ferguson's arguments about the first level must be rejected. The 'slash (*solidus*)' argument only begs the question. Given that the two concepts are separated by the slash, the question is: what is the second concept? The 'slash (*solidus*)' argument, hyper-pedantic as it is, does not resolve the problem created by the fact that the provision is capable of being read Andrew Ferguson's way or counsel assisting's way. Counsel assisting's way limits the purpose to (a) the provision of drug and alcohol rehabilitation services and (b) drug and alcohol safety programs. Counsel assisting's construction is preferable. The recipient of the monies was the BTG D&A Committee. It was not involved in general safety programs, only in drug and alcohol safety programs. There are doubtless hundreds of ways in which safety in the building industry, or anywhere else, can be imperilled otherwise than by the abuse of drugs and alcohol. Whether or not one calls the distinction between the two as 'bright line', it is perfectly easy conceptually and practically to draw it.⁴³²

253. It follows that it was a breach of trust for part of the funds contributed to be given to the CFMEU. That is because even if safety programs for the building industry are part of the CFMEU's 'core business', it is not the case that drug and alcohol safety programs for the building industry are part of the CFMEU's core business. Andrew Ferguson, in his very

⁴³² Submissions of the CFMEU, 29/10/15, pp 90-91, paras 12-19.

long and seemingly well-rehearsed answers about what Rita Mallia's letter of 19 June 2012 had left out,⁴³³ did not say that they were. And Rita Mallia's account of how the monies coming to the CFMEU NSW were spent on safety programs and on support for safety in the building industry did not involve any drug and alcohol safety programs.⁴³⁴ The submissions of counsel assisting on this point⁴³⁵ were not contradicted by the CFMEU NSW or Andrew Ferguson.

254. The third criticism of counsel assisting's submissions was that Andrew Ferguson could not have been in breach of trust. He was not the trustee. Various candidates were confusingly promulgated by Andrew Ferguson as candidates for the trusteeship – the 'administrator nominated', 'the Building Trades Group (BTG) of Unions Drug & Alcohol/Safety Program', 'Laytins Mayfair'. But counsel assisting's submissions did not suggest that Andrew Ferguson was in breach of trust. They submitted that the members of the BTG D&A Committee (through Trevor Sharp) was in breach of trust in entering the letter agreement of 25 February 2005. That gave the CFMEU half the first \$40,000 raised per month under the relevant EBA clause, and 60% thereafter. There was no requirement that the CFMEU NSW only spend the money on the two purposes of the trust. Andrew Ferguson submitted:⁴³⁶

He was not a member of BTG D&A Committee and he did not participate in any of the decisions that implemented the agreement manifested in the letter of 25 February 2005.

⁴³³ See para 227.

⁴³⁴ Rita Mallia, 12/8/15, T:392.19-27.

⁴³⁵ See paras 232-236.

⁴³⁶ Submissions of Andrew Ferguson, 29/10/15, para 87.

Andrew Ferguson relied on the following evidence he gave:⁴³⁷

Q. Are you saying that you had no knowledge of what the BTG component of that division was going to be used for?

A. Well, the clause makes no reference to Foundation House. I'm aware that the Building Trades Group of Unions Drug and Alcohol/Safety Committee had discretion about where they spent their money, and I'm also aware that money went to Foundation House. I'm not in a position to verify that 100 percent of the money went to Foundation House. I don't know that detail.

255. Counsel assisting's submissions in reply disavowed having contended in submissions in chief that Andrew Ferguson was personally liable for assisting in a breach of trust. However, Andrew Ferguson took a different view and devoted some space to refuting the submission supposedly not made. He knew what the terms of the trust were. He knew what the 25 February 2005 letter said. His evidence quoted above, and his submission, overlooks the fundamental point that whether or not the letter itself was in breach of trust, it contemplated and triggered breaches of trust, and Andrew Ferguson was in agreement with that letter. He did not respond within 14 days of its date, with the result that he and the CFMEU NSW would be bound at least in honour, if not in contract.⁴³⁸ Thus the evidence of Andrew Ferguson which is relied on is beside the point. It overlooks the fact that Andrew Ferguson knew he had agreed to future expenditures going in particular directions. So far as the direction of the CFMEU

⁴³⁷ Submissions of Andrew Ferguson, 29/10/15, para 88, referring to Andrew Ferguson, 14/8/15, T:23-31.

⁴³⁸ See *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037.

NSW share was concerned, it was not a direction that conformed with the relevant clause.

256. Andrew Ferguson also argued that he could not be liable for participation in a breach of trust for the following reason. If he believed in ‘a construction that was open to [him] (even if not correct)’ he would not be liable as an accessory to a breach of trust.⁴³⁹ This is a highly contentious submission. The orthodox approach to secondary participation in wrongdoing is that the secondary participant must know the facts which made the conduct wrongdoing. But is it necessary that the alleged secondary participant appreciate that those facts *were* wrongdoing? Or is it sufficient that the facts which the secondary participant does know, correctly appreciated, amounted to a breach of trust? It is not necessary to resolve these questions here. That is because it is not proposed to make a finding that Andrew Ferguson and through him the CFMEU NSW were secondary participants to a breach of trust. The dangers in the course which was taken have been sufficiently pointed out.

257. The CFMEU NSW’s possible involvement in a breach of trust by the BTG D&A Committee was a critical part of a general scheme by the union to obtain funds from employers who, generally at least, believed the money was being used solely for particular purposes. The union’s correspondence at the end of 2011 and the beginning of 2012 contradicts any suggestion that employers in the industry were generally aware that 50% of the contributions made were being paid to the union. It also contradicts Andrew Ferguson’s evidence that

⁴³⁹ Submissions of Andrew Ferguson, 29/10/15, para 93.

employers would have been told the true destination of the funds if only they had asked. If it was general knowledge, why did the union not simply say so in its responses to the MBA? If the union was not trying to keep the arrangement a secret, why did it not provide the 'full disclosure' requested?

258. At a high level of generality, the conduct of the CFMEU NSW may be seen as a general scheme to obtain money from employers by deception. However, in order to assess whether the union or any officers of the union may have committed the offence of fraud, or obtaining a benefit by a false pretence, it would be necessary to call evidence from each individual employer who gave money pursuant to the clause. In the absence of that material, it could not be concluded that the conduct of the union in question constitutes a criminal offence. That question must be left open.
259. However, a finding is made that Andrew Ferguson's conduct fell short of the professional standards to be expected from a trade union official.