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INTERIM REPORT

Volume 1

Royal Commission into Trade Union Governance
and Corruption





Royal Commission into Trade Union Governance and Corruption

15 December 2014

His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd)
Governor-General of the Commonwealth of Australia
Government House
CANBERRA ACT 2600

Your Excellency

In accordance with the Letters Patent issued to me on 13 March 2014, as amended by Letter Patent dated 30 October 2014, I have made inquiries and prepared an Interim Report of the Royal Commission into Trade Union Governance and Corruption.

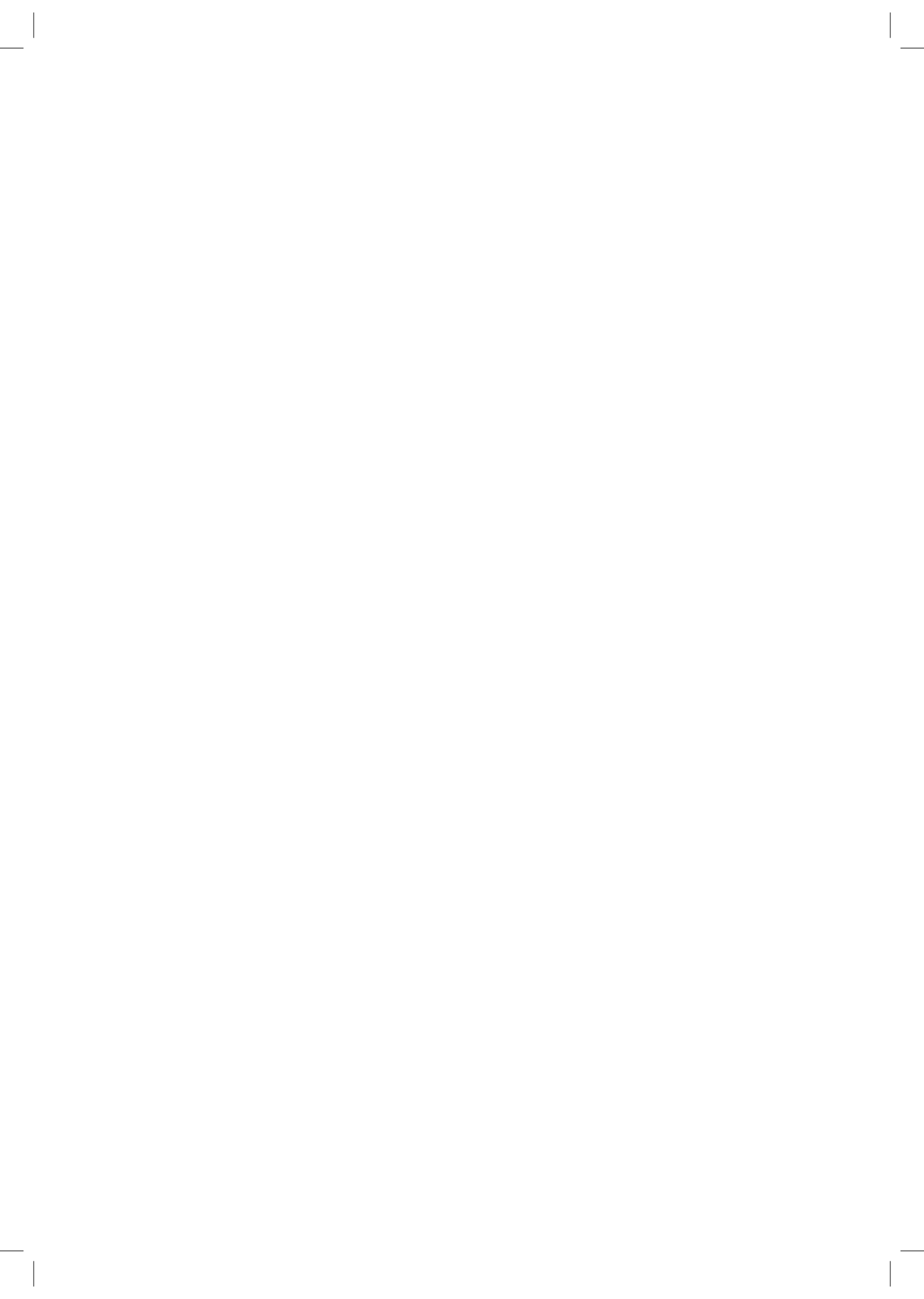
I am also submitting this report to their Excellencies the Governors of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.

In addition to this, I have also prepared a Confidential Report. It is recommended that the Confidential Report not be made public. In this regard, I have also made an order until further order, under section 6D(3) of the *Royal Commissions Act 1902* that any information in the Confidential Report that might enable a person who has given evidence before the Commission to be identified not be published.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J D Heydon'.

J D Heydon
Commissioner



PART 1: INTRODUCTION

CHAPTER 1

INTRODUCTION

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A – STRUCTURE OF THIS REPORT

1. The Royal Commission into Trade Union Governance and Corruption was established by Letters Patent issued by the Governor-General on 13 March 2014. The Letters Patent required and authorised the Commission to inquire into the matters set out in paragraphs (a) – (k) of the Letters (the **Terms of Reference**). Subsequently equivalent Letters Patent were issued by the Governor (or Administrator) of each of the States. Copies of the various Letters Patent are Appendices 1 to 8 of this Interim Report.
2. Following initial private hearing days in April 2014, public hearings began in May and continued in earnest from June to October 2014. Oral argument took place in November. To date 239 witnesses have given evidence to the Commission (of which 33 gave evidence by

witness statement or affidavit and were not required to give oral evidence). Many more potential witnesses were interviewed, but were not called because it became clear that their evidence would not advance the inquiry. The Commission has issued 687 notices to produce. Hearings have been conducted in Sydney, Melbourne, Brisbane and Perth. The Commission sat on 16 days in private hearings and on 60 days in public hearings.

3. The amount of budgeted operating expenditure up to 30 November 2014 was \$33,823,000. The amount actually spent was \$17,011,000. The amount of budgeted capital funding up to 30 November 2014 was \$5,293,000. The amount of capital funding actually spent up to 30 November 2014 was \$1,159,000.
4. A list of stakeholders consulted is given in Appendix 13.
5. On 30 October 2014 the Governor-General amended the Letters Patent by extending the deadline for delivery of the Commission's report to 31 December 2015. An additional Term of Reference was also included, namely (ia). It requires the Commission to inquire into any criminal or otherwise unlawful act or omission undertaken for the purpose of facilitating or concealing any conduct or matter mentioned in paragraphs (g) to (i) of the Terms of Reference.
6. Paragraph (n) of the Terms of Reference authorises the Commission to submit any interim report that the Commission considers appropriate.
7. The Commission's approach to date has been to consider a number of case studies which throw up conduct, or highlight specific issues, within the Terms of Reference. Not all of the case studies considered

by the Commission thus far are addressed in this Interim Report. Those which are not addressed will be dealt with in a later report.

8. Each case study considered is addressed in a separate Chapter. Some case studies are grouped together thematically in separate Parts. The Table of Contents provides a comprehensive guide to the relevant cases studies.
9. In relation to each case study, the relevant Chapter of the Interim Report summarises the evidence, addresses the submissions of counsel assisting and those submissions received from interested and affected parties (and where relevant, third parties) and sets out findings of fact and legal conclusions.
10. In addition, where appropriate, the report contains recommendations that the report be referred to the relevant authorities in order that consideration may be given to whether civil or criminal proceedings should be instituted.
11. Given that the report is an interim one and that the Commission's inquiries will be continuing next year, it is not desirable to reach final conclusions or make recommendations as to law reform. However, possible problems with the existing law and possible areas of law reform are foreshadowed where appropriate.

B – STRUCTURE OF THIS CHAPTER

12. The balance of this Chapter is divided into two sections.

13. The first section explains the approach the Commission has taken to making relevant findings of fact and reaching conclusions of law (e.g. whether a person may have contravened the law).
14. The second section contains a general summary of the balance of the Interim Report. Included in this section is a list of the recommendations made in the Interim Report concerning the referral of the report to the appropriate authorities for consideration.

C – COMMISSION’S APPROACH TO FACT FINDING AND REACHING CONCLUSIONS OF LAW

Findings of fact: standard of proof

15. A Royal Commission is not a court of law. There are no civil or criminal proceedings before it. The rules of evidence do not apply. The concept of the onus of proof does not apply. Strictly, it follows that neither the civil standard of proof nor the criminal standard of proof applies to the Commission.
16. However, the Terms of Reference clearly contemplate that the Commission will make factual findings. It is therefore necessary to apply some standard of proof. The need is reinforced by the fact that findings made by a Royal Commission may cause serious damage to the reputation of an individual, company or organisation.
17. The general approach which has been applied in previous Royal Commissions and Commissions of Inquiry¹ has been to apply the civil

¹ See the examples cited in P M Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (Lawbook Co, 2004), p 664–665.

standard of proof, namely proof on the balance of probabilities, in accordance with the principles explained by Dixon J in *Briginshaw v Briginshaw*.²

18. The relevant parts of Dixon J's reasons in that case are as follows:³

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. ... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The *seriousness of an allegation* made, the *inherent unlikelihood of an occurrence* of a given description, or the *gravity of the consequences flowing from a particular finding* are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

19. These observations reflect a perception that members of society do not ordinarily engage in conduct which is criminal or fraudulent, and that findings that a person has been guilty of such conduct should not be lightly made.⁴

20. This Interim Report rests on application of the civil standard of proof, having regard to the principles in *Briginshaw v Briginshaw*. In other words, regard has been had to the seriousness of a finding of fact, the inherent likelihood or unlikelihood of that fact and the gravity of the consequences which may flow from that finding in searching for actual persuasion that the fact exists on the balance of probabilities.

² (1938) 60 CLR 336.

³ (1938) 60 CLR 336 at 361-362 (emphasis added).

⁴ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

21. Sometimes it is expressly stated that a finding is based on the evidence before the Commission. Even where it is not expressly stated, it is implicit that each finding is based on, and only on, the evidence before the Commission and those matters which are so notorious as not to require proof or which are part of the ordinary experience of daily life.

Findings of fact: rules of evidence

22. As noted above, the rules of evidence do not apply to the Commission. However, regard has been made to those rules where appropriate. Some of them rest on fundamentally valuable principles tested by time. Those appearing have made submissions on the nature and quality of the evidence. There are four aspects of the rules of evidence which should be mentioned specifically.

23. The first concerns the ‘rule in *Browne v Dunn*’.⁵ That rule requires that as a matter of fairness, notice of an allegation should be given to a witness in cross-examination. But the rule need not be complied with if notice has come in some other way. On quite a number of occasions, in the interests of the efficient conduct of hearings, it was agreed that the rule would not be applied in a pedantic way. This left it to practitioners to determine the important points in the evidence where they considered that cross-examination was important, because it might assist in arriving at a particular conclusion.

24. The second concerns the relevance of evidence being uncontradicted. In civil proceedings, pursuant to ‘the rule in *Jones v Dunkel*’,⁶ the

⁵ (1893) 6 R 67.

⁶ (1959) 101 CLR 298.

unexplained failure by a party who could, and would be expected, to give evidence, call witnesses or tender documents may properly allow a Court more easily to accept the evidence before the Court and draw inferences from it. The reasoning does not rest on any issue concerning the onus of proof. Nor does it depend on using inferences as a substitute for evidence. Rather it rests on the simple idea that the unexplained and unexpected failure suggests that the party feared to adduce the evidence because it would not have assisted.

25. The proceedings of the Commission were not adversarial. But a principle akin to that in *Jones v Dunkel* can apply to the Commission. An unexplained failure by a person who would be expected to proffer testimony or documents contradicting other evidence before the Commission so that it might be tendered by counsel assisting may properly allow the more ready acceptance of the evidence, and may properly permit the inferences to be drawn from it to be drawn more easily.
26. The third concerns the conclusion which may properly be drawn from a failure by a person to respond to an allegation of misconduct or criminality. The general law accepts that in some situations a failure by a person to respond to a serious allegation, either by way of denial or explanation, may constitute an implicit admission.⁷ The principle rests on the common sense notion that a person who is innocent of a 'charge' would be expected to respond (often vigorously) to it.

⁷ *R v Christie* [1914] AC 545.

27. The fourth point is that it is a mistake to assume that the modern rules of evidence, at least in civil cases, are extremely restrictive. In much of Australia, the rules of evidence rest on a mixture of the common law and statutes derived from the *Evidence Act 1995* (Cth). In the rest of Australia, the rules rest on a mixture of the common law and State evidence statutes which have progressively been amended. Some legal representatives protested at the reception of hearsay evidence, for example, even though it would almost always have been admissible under the general law.

Conclusions of law

28. Several submissions were made to the effect that the Commission:
- has no power to find that a person *has* broken the law; but, rather
 - can do no more than find only that a person's conduct *may* have constituted a breach of the law.
29. These submissions were directed principally to paragraphs (f) and (g) of the Terms of Reference which read as follows:
- ‘(f) any conduct in relation to a relevant entity which may amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity;

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

30. The submissions highlighted the use of the word ‘may’ in those paragraphs.

31. The starting point for consideration of these submissions is that a Commonwealth Royal Commission is an inquiry, instituted by the Executive pursuant to s 61 of the Constitution. The inquiry operates within the boundaries determined by the legislation regulating it and its terms of reference. Prima facie the inquiry can express any views necessary or appropriate for the subject-matter of its report, provided that the subject-matter falls within the inquiry’s terms of reference. Among those views is a view as to whether a person has or has not engaged in conduct in breach of the law.

32. The observations of Griffith CJ in *Clough v Leahy*⁸ provide useful background. In that case the High Court was considering an argument to the effect a Royal Commission set up pursuant to New South Wales legislation was illegal. Griffith CJ (speaking for the Court) held:⁹

[T]he highest ground on which [counsel for the appellant] put it, and I think the highest ground on which it could be put, was this: “A public

⁸ (1904) 2 CLR 139.

⁹ (1904) 2 CLR 139 at 159.

inquiry into a question of guilt or innocence, or as to the civil rights of individuals, or as to the merits of a dispute between individuals, except with their consent, is contrary to law.” During the argument, we asked him in vain for any authority to this effect. Why is an inquiry into the question of the guilt or innocence of an individual, a mere voluntary inquiry, contrary to law? The mere fact of inquiry is not unlawful. In every criminal prosecution a preliminary inquiry takes place, although it is not public, and in the case of actions between individuals the plaintiff must enquire privately before he brings his action. Why does an inquiry into the question of guilt or innocence become unlawful by being made public?

33. The capacity of the Executive to establish a Royal Commission to inquire and report into whether crimes have been committed was confirmed in *McGuinness v Attorney-General (Vic)*¹⁰ and *Victoria v Australian Building Construction Employees’ and Builders’ Labourers’ Federation*.¹¹
34. Some have thought that a potentially more limited view was expressed in *Balog v Independent Commission Against Corruption*.¹² In that case the appellant sought an order preventing or restraining the Independent Commission Against Corruption from including in its report a statement that he had engaged in criminal conduct.
35. The relevant provisions of the *Independent Commission Against Corruption Act 1988 (NSW)* expressly regulated what the Independent Commission Against Corruption could include in its report. In particular, section 74(5) of that Act stated that a report ‘may include a statement of the Commission’s findings as to whether there is or was any evidence or sufficient evidence of warranting consideration of’ the prosecution of an offence.

¹⁰ (1940) 63 CLR 73.

¹¹ (1982) 152 CLR 25.

¹² (1990) 169 CLR 625.

36. The High Court held:¹³

Since the broad function of the Commission under s 13(1)(c) is to communicate the results of its investigations concerning corrupt conduct to appropriate authorities, it is apparent that its primary role is not that of expressing, at all events in any formal way, any conclusions which it might reach concerning criminal liability.

37. The High Court concluded as follows:¹⁴

For all of those reasons it seems to us, simply as a matter of construction, that the only finding which the Commission may properly make in a report pursuant to s 74 concerning criminal liability is that referred to in sub-s (5), namely, whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.

38. As appears from the preceding quote, the decision in *Balog's* case turned largely on the wording of the relevant legislation. The relevance, if any, of the reasoning in *Balog's* case to this Royal Commission – which is regulated in part by legislation which does not include a similar limitation as to the content of a report – is unclear.

39. Stephen Donaghue expressed the view that the principles in *Balog* do not apply in the context of a Royal Commission. Thus the learned author stated:¹⁵

Royal Commissions probably are not constrained by the *Balog* principles. The *Royal Commissions Act* does not impose any obligation to assemble admissible evidence, nor does it provide any guidance in relation to the matters to be contained in reports. There is therefore no statutory text upon which the interpretive principles set out above can operate.

¹³ (1990) 169 CLR 625 at 632.

¹⁴ (1990) 169 CLR 625 at 634.

¹⁵ *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, 2001, [7.41].

40. Royal Commissions are established, at least in part, in reliance on the prerogative power of the Crown. In the absence of legislation restricting that power, there is no reason to restrict the ambit of permissible inquiry and report. In the case of the *Royal Commissions Act 1902* (Cth) there is no such restriction, whether express or implied. The issue therefore turns on the proper construction of the Terms of Reference.
41. Dr Donaghue goes on to note that some commissions have confined themselves to giving evidence to prosecutors who consider for themselves whether a prosecution is appropriate. However he then points out:¹⁶

There have, however, been many Royal Commissions that have made findings that a prima facie case has been established, or that have recommended that prosecutions be instituted. On occasion such recommendations have been made privately, but on others they have formed part of public reports. This approach has been taken on at least one occasion since the *Balog* case was decided.

42. However, in *Brinsmead v Commissioner, Tweed Shire Council Public Inquiry*¹⁷ a view which might be thought to be narrower was expressed. The question under consideration was whether a public inquiry established under the *Local Government Act 1993* (NSW) enabled a Commissioner to make findings of improper conduct. Importantly, neither the relevant provisions of the *Local Government Act*, nor the terms of reference for the particular inquiry made any reference to the Commissioner expressing a finding on criminal or improper conduct.

¹⁶ *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, 2001, [7.41] (footnotes omitted).

¹⁷ (2007) 69 NSWLR 438.

43. At paragraph [31] of his reasons Price J held:

It is difficult to conclude, without a specific provision, that the legislature intended to confer upon the Commissioner the power to express a finding of criminal liability on evidence, which may be inadmissible in a subsequent criminal prosecution. Although the legislation does not specify the findings that might be made or oblige that admissible evidence be collected, a construction which protects the individual from the risk of damage to reputation or prejudice in criminal proceedings is to be preferred. Such a construction of the relevant legislation would not hinder or prevent the Inquiry from inquiring, reporting and providing recommendations to the Minister on the efficiency and effectiveness of the governance of the Tweed Shire Council.

44. Price J further held that the *Balog* principle extended to findings of professional misconduct. Price J concluded by finding that the Commissioner did not have the power to find that the plaintiff had engaged in criminal or professional misconduct.

45. The decision in *Brinsmead's* case was considered in *Telstra Corporation Limited v Smith*.¹⁸ Telstra was subject to the *Occupational Health and Safety Act* 1991 (Cth) (the Act). The Act was administered by Comcare. Section 41(1) of the Act provided that a Comcare investigator could conduct an investigation concerning among other things “a breach or possible breach” of the Act or the regulations. Comcare instituted an investigation under s 41. In due course the investigator prepared a report which included a conclusion to the effect that Telstra had breached s 17 of the Act.

46. Telstra brought proceedings by way of judicial review, seeking to have the report set aside. At first instance Middleton J referred to Telstra’s reliance upon the principle drawn from *Brinsmead's* case, to the effect that the statutory power to inquire and report is not in the absence of

¹⁸ (2008) 105 ALD 421.

clear words to be read as extending to a power to make a ‘finding’ of criminal guilt or other improper conduct.¹⁹ Middleton J then held:²⁰

Accepting this principle, and accepting that the findings that Telstra breached s17 is equivalent to “improper conduct”, I consider that in the context of the legislative scheme, Mr Smith could find and conclude, as he did, that Telstra breached s17 of the Act, and include that conclusion in the report. This is for the simple reason that s41 of the Act empowers an investigator to conduct an investigation concerning a breach or possible breach of the Act and the report of that investigation (in the case where the investigator concludes there to be a breach) must necessarily include his conclusion from conducting the investigation. This seems to me to be the clearest indication, without more, that an investigator is not only empowered to so conclude, but is under a duty to include in his or her report any conclusion reached as to breach or possible breach, of the Act.

47. The decision of Middleton J was upheld on appeal in *Telstra Corporation Limited v Smith*. The Full Court observed that s 41 empowered Comcare to appoint an investigator and went on:²¹

The report must include the investigator’s conclusions and the reasons for those conclusions: s 53(2)(a). It follows, where an investigation is being made into a breach of the OH&S Act, the investigator must reach a conclusion as to whether there has been such a breach and give reasons for that conclusion. The investigator cannot give a conclusion without expressing such an opinion.

48. In the present case the *Royal Commissions Act 1902* (Cth) does not include (unlike the legislation under consideration in *Balog’s* case) any limitation on what can be included in the Commission’s report. As was the position in the *Telstra* case – but unlike the position in *Brinsmead’s* case – this Commission is expressly required to inquire into and report on whether conduct in breach of the law may have occurred.

¹⁹ *Telstra Corporation Limited v Smith* (2008) 105 ALD 421 at [92].

²⁰ *Telstra Corporation Limited v Smith* (2008) 105 ALD 421 at [93].

²¹ (2009) 177 FCR 577 at [118].

49. Paragraphs (f) and (g) of the Commission's Terms of Reference expressly require the Commission to inquire into and report on any conduct in relation to a relevant entity which 'may' amount to a breach of any law, regulation or professional standard by any officer of an employee association who holds, or held, a position of responsibility in relation to the entity and on any conduct which 'may' amount to a relevant breach of any law, regulation or professional standard by any officer of an employee association.
50. In the case of paragraph (h) of the Terms of Reference the Commission is required to inquire into and report on 'any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party'. Paragraph (ia) requires the Commission to inquire into 'any criminal or otherwise unlawful act or omission undertaken for the purpose of facilitating or concealing any conduct or matter mentioned in paragraphs (g) to (i)'.
51. It is true that some other Royal Commissions have expressed their ultimate findings or recommendations in terms of whether a person 'might' have committed an offence rather than a concluded view as to whether or not such an offence has been committed. Several submissions to this Commission, for example, have relied on observations to that effect by Commissioner Owen, in the HIH Royal Commission.
52. Taking this approach can lead to tension between the factual findings that are expressed in the body of report and the final recommendation based on those findings. On the one hand, the findings of fact may include serious adverse findings in respect of certain individuals,

arrived at after considering extremely strong evidence; on the other, the final finding or recommendation is to the effect that an offence ‘might’ or ‘may’ have been committed.

53. To give an example, the report of the HIH Royal Commission includes in Chapter 15 a number of serious adverse findings in respect of various directors of HIH. Consistently with his approach mentioned above, Commissioner Owen’s final recommendations or conclusions on the basis of those findings took the following form (in summary): *If, as I have found, [the individual] engaged in [the conduct the subject of the adverse findings], then [the individual] might have contravened the law.* It must be said, with respect, that this formulation has a somewhat artificial air. If the hypothetical premise was made out – ie, at least in some cases if the individual *did* engage in the conduct as found – then the individual must also have contravened the relevant law. The uncertainty, if there was any, arose from whether or not the findings were correct, not from whether, on the assumption the findings were correct, a contravention of the law followed.
54. Given what is set out above it is difficult to see that the Commission would be precluded as a matter of law from making final findings or recommendations that a particular person has broken the law or engaged in corrupt conduct.
55. Nevertheless, at least two further matters need to be borne in mind.
56. First, at the time this Interim Report was written, the High Court had heard argument in, but not decided, *Australian Communications and*

*Media Authority v Today FM (Sydney) Pty Ltd.*²² Having regard to the argument in that case, it is likely that the High Court's reasoning or decision in this case could be relevant to this question.

57. Secondly, there are a number of matters which tend against the Commission stating conclusions that a particular person contravened the law. If civil or criminal proceedings were commenced following the conclusion of the Commission's inquiries the evidence adduced may be very different: some evidence may be inadmissible; some witnesses may not give evidence; some witnesses may give different evidence; some witnesses who did not give evidence to the Commission may choose to give evidence in a court. The evidence received by the Commission is not admissible against a natural person in later proceedings.²³ Further, in relation to criminal prosecutions, prosecuting authorities consider a number of factors and problems in deciding whether to commence proceedings that are not within the purview of a Royal Commission. Not the least of these is the need to allocate scarce resources amongst a multitude of pressing possibilities. At the end of the day the public interest in a full and unfettered inquiry and report must be weighed alongside the need for fairness to persons who are or may be affected by the content of a report.
58. Having regard to those matters, and given the submissions by affected persons that the Commission has no power to conclude that a person has engaged in conduct in contravention of the law, for the purposes of this Interim Report it is appropriate to limit the conclusions of law

²² [2014] HCA Trans 246 (11 November 2014).

²³ *Royal Commissions Act 1902* (Cth), s 6DD(1).

which are made, at least while the *Australian Communications and Media Authority* case is still under consideration.

59. Accordingly, in this Interim Report no finding is made that a particular person has engaged in conduct that **was** a breach of the law, regulation or professional standard.
60. Instead, the findings are limited to conclusions that a person has engaged in conduct that **may** have been a breach of a relevant law, regulation or professional standard.
61. This, of course, raises an obvious question. What is meant by the word **may**? In ordinary speech, it can connote a very wide range of uncertainty, ranging from the very low ('the sun may not come up tomorrow') to the very high ('the shops may be busy before Christmas').
62. Where in this Interim Report there is a finding that a person's conduct **may** have been a breach of a relevant law, regulation or professional standard, the word is used to convey the view that there is credible evidence before the Commission raising a probable presumption that a breach of law, regulation or professional standard has occurred. Shortly there will be an explanation of what this expression is intended to convey. Where appropriate, recommendations are then made that the matter be referred to the relevant Director of Public Prosecutions or appropriate regulatory authority in order that consideration may be given to the relevant person being charged with and prosecuted for the offence or proceeded against for the contravention.
63. The reasons for this approach are as follows.

64. First, adopting too low a threshold has a tendency to incriminate the innocent. It widens the class of those whose reputations are adversely, and possibly unjustly, affected. A great deal of conduct may, understood in the sense of mere possibility, amounts to a breach of a law, regulation or professional standard. Not only can the approach be unfair, but the usefulness of the report and the recommendations would also be reduced.
65. Secondly, adopting too high a threshold – such as ‘beyond reasonable doubt’ – has the vice of undermining the earlier conclusion that this Interim Report will not make statements that a person has committed a criminal offence.
66. Thirdly, the phrase ‘strong or probable presumption’ has been employed in a number of previous inquiries.²⁴ According to the House of Lords in *Armah v Government of Ghana*,²⁵ it requires the decision maker to decide whether on the whole of the evidence it is probable that the offence was committed. Here ‘probable’ means not certain, nor nearly certain, but more than merely possible. On this formulation, a finding could only be made that a breach of law, regulation or professional standard may have occurred where on credible evidence before it, it is probable, and not merely possible, that a contravention occurred. This, of course, does not amount to a finding that the contravention has occurred. Rather, it reflects, the idea consistently with *Briginshaw v Briginshaw*, that a finding that a contravention of

²⁴ See *Report of the Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria*, 1971 at p 12; *Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force*, 1978 at pp 17–18.

²⁵ [1968] AC 192.

the law, regulation or professional standard may have occurred should not lightly be made. It is an appropriate way to balance the need to avoid tarnishing the innocent with the need to avoid unfairly prejudicing others.

67. This approach has the benefit of being consistent with the form of final recommendations or findings made in other Commissions,²⁶ including Commissions since *Balog's* case.²⁷ It is also consistent with the form of final recommendation or finding urged in a number of instances in the submissions in chief of counsel assisting.²⁸ The approach may be reconsidered in due course.

D – SUMMARY OF INTERIM REPORT

68. The balance of the Interim Report is organised into the following Parts.

Part 2: The legal landscape

69. Part 2 sets the legal landscape by providing an overview in respect of the duties of officers of registered organisations, the use of union resources in elections, and financial reporting obligations on registered organisations.

²⁶ See *Report of the Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria*, 1971, at p 152.

²⁷ *Commission of Inquiry into the Relations between the CAA and Seaview Air*, September 1996, Vol 1, p 49.

²⁸ See eg Chapter 1.1, paragraphs 62, 83 and 85.

Part 3: Generic slush funds

70. Part 3 considers funds with variety of purposes. The most notorious fund, the Australian Workers' Union – Workplace Reform Association, is considered in Chapter 3.2.
71. Funds of this kind pose significant governance issues. The officials who operate those funds owe statutory and general duties to the union. On the other hand, the officials deploy their energy and sometimes their employer's resources for the benefit of the fund. This gives rise to actual or potential conflicts of interest. Often these funds have no or no adequate record keeping. Management decisions are made informally or without due process. Directors' or shareholders' meetings are not held. If they are held, minutes are not kept. Transactions are often effected by cash. When records are maintained, they are often maintained in a haphazard fashion.
72. The Australian Workers' Union – Workplace Reform Association case study concerned allegations of fraudulent and other misconduct by Bruce Wilson and Ralph Blewitt, former officials of the AWU. A recommendation is made that this Interim Report be referred to the relevant prosecuting authorities in Western Australia and Victoria to consider whether Bruce Wilson and Ralph Blewitt may have committed criminal offences. Findings are made that Julia Gillard did not commit any crime and was not aware of any criminality on the part of these union officials.
73. Industry 2020 is another generic fund. It was associated with Cesar Melhem, the former State Secretary of the Victorian branch of the

Australian Workers' Union (AWU). Industry 2020 organised lucrative fundraisers by using the name, influence and resources of the AWU. The AWU or its members received no recompense or benefit from Industry 2020's activities. The funds raised were deployed to support political causes associated with Mr Melhem, including members of the Labour Unity faction of the Australian Labor Party (to which Mr Melhem belonged) and the Asmar campaign for the HSU.

74. Other generic funds examined in Part 3 are Building Industry 2000, IR 21 and TLATA. The issues arising for consideration in relation to these funds include the fiduciary duties of union officials, conflicts of interest and corporate governance.

Part 4: Fighting funds

75. These are the most common type of relevant fund considered by the Commission so far. Commonly an election fund is maintained by a union through amounts deducted automatically from the salaries of members and paid into a designated bank account. On its face there is nothing objectionable about such a fund. A member who decides voluntarily to contribute to an election fund is free to do so.
76. However, a number of problems with such funds in practice have emerged. Often there is no or insufficient disclosure to contributors or union members as to the activities of the fund. Record keeping is commonly very limited. The voluntariness of members' decisions to contribute to a number of funds is questionable. A fund may give rise to a lopsided election or no election at all. An incumbent may have a disproportionate benefit if he or she has significant resources which are not available to his or her opponent. Candidates for election can close

their eyes to the sources, propriety and legality of funding received for their campaigns and disclaim responsibility for that funding on the basis of ignorance.

Part 5: Income protection and redundancy funds

77. Funds of this kind are significant sources of union revenue. The two funds considered in Part 5, the BERT Fund (Chapter 5.2) and the Protect scheme (Chapter 5.3), both illustrate the problems that arise when unions are too closely connected with the governance of important income protection and redundancy funds.

Part 6: Superannuation

78. The two case studies considered by the Commission in this Part vividly illustrate the difficulties which employees face in light of the current lack of choice of superannuation fund available to workers under an enterprise agreement.
79. Chapter 6.2 concerns Paul Bracegirdle's Herculean attempts to choose his own superannuation fund, rather than having his superannuation contributions made to TWUSUPER. TWUSUPER is a fund associated with the Transport Workers' Union (TWU): approximately \$2 million has flowed from TWUSUPER to the TWU over the last two financial years.
80. Chapter 6.3 concerns Katherine Cole's similar struggle. She was required to join the Labour Union Co-operative Retirement Fund (LUCRF), an industry superannuation fund associated with the National Union of Workers (NUW). Her attempts to get out of the

fund were rebuffed. Ultimately, Katherine Cole she took the drastic step of resigning her position, rather than continuing in LUCRF.

Part 7: Training funds

81. The only fund examined in this Part of the report is TEACHO, a fund associated with the TWU. Issues arising in connection with other funds, such as METL, a fund associated with the Maritime Union of Australia, will be considered in more detail next year.
82. As with many of the other funds already mentioned, the relevant arrangements in respect of TEACHO came into existence as part of the enterprise agreement bargaining process. In part the problem with TEACHO derives from a lack of clarity as to the appropriateness or efficacy of its functions. Another problem involves the fact that Toll agreed in a side deal, negotiated at the same time as its EBA with the TWU, to make payments to TEACHO provided that the TWU in return supplied reports to Toll concerning the activities of competitors. The information required for the purposes of the reports would be obtained by the TWU in pursuit of its statutory functions as a trade union. Toll sought to keep this information suppressed at the hearings of the Commission, an application which was refused. In his evidence Damian Sloan of Toll, a very impressive witness, accepted that Toll had agreed to provisions in the EBA relating to TEACHO in order to achieve industrial peace.²⁹

²⁹ Damian Sloan, 3/7/14, T:167.19-168.34.

Part 8: CFMEU

83. Part 8 is the largest part of the Interim Report. It contains a number of case studies associated with the CFMEU. Together they raise fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU.
84. Chapter 8.2 concerns Boral Ltd. Boral is a multinational company listed on the ASX. It was the victim of a 'black ban' imposed by the CFMEU. The evidence of the conduct of the CFMEU and its officers towards Boral and its customers has led to findings that blackmail and contraventions of the *Competition and Consumer Act* may have been committed.
85. Chapter 8.3 concerns Cbus, which manages employees' superannuation. Senior executives at Cbus, namely Ms Butera and Ms Zanatta, covertly provided contact information for Cbus members employed by the Lis-Con companies to Mr Brian Parker, the NSW State Secretary of the CFMEU. This was done at the request of Mr Parker, who wanted the information to cause employees of Lis-Con to be personally contacted to make trouble with their employer.
86. Chapter 8.4 deals with the question of whether, on 27 March 2013, Mr Darren Greenfield, a CFMEU official, made a death threat to Brian Fitzpatrick, another CFMEU official. The finding is that the conversation was as Mr Fitzpatrick described in his evidence.
87. Chapter 8.5 deals with the unsavoury views held and expressed by Mr Parker about another member of the Branch Committee of

Management who had been compelled to give evidence to the Commission and who, when called, gave truthful evidence.

88. Chapter 8.6 addresses two case studies relating to the unacceptable way in which the CFMEU has dealt with its records, including those which may have been relevant to the Terms of Reference.
89. Chapter 8.7 is devoted to the Universal Cranes case study. It raises similar issues to those in respect of Boral, and thus involves issues of extortion, unlawful threats and breaches of the *Competition and Consumer Act 2010* (Cth). Officials at the CFMEU in Queensland embarked on a campaign against it by banning it from sites, and threatening to continue the ban unless Universal Cranes signed the CFMEU's form of enterprise bargaining agreement.
90. The Hindmarsh case study is dealt with briefly in Chapter 8.8. There are two reasons for brevity at this stage. The first concerns the fact that there are Federal Circuit Court proceedings due to be heard shortly which raise some of the issues raised in the Commission hearings. The second is that, in relation to the remaining discrete issues, it is desirable to afford the CFMEU and its officers a further opportunity to provide submissions which they have so far chosen not to provide.
91. Chapter 8.9 concerns the treatment of FWBC Inspectors by CFMEU officers. There was evidence of intimidating, abusive and verbally violent treatment towards FWBC inspectors by members of the CFMEU. In one case the verbal violence was captured on video. It involved a CFMEU official standing in close proximity to an FWBC inspector and screaming abuse of a particularly insulting and violent kind. Other evidence, equally insulting although not captured on

video, related to the treatment of FWBC inspectors at the Barangaroo site.

92. Chapter 8.10 concerns the Pentridge Prison site and activity by the Victorian branch of the CFMEU. The activity in question included the making of abusive and threatening calls by union officials, and the application of improper pressure on subcontractors to sign the CFMEU's form of enterprise bargaining agreement and on workers to become CFMEU members.
93. Chapter 8.11, which is extremely brief, relates to allegations made by Andrew Zaf. As those allegations remain under investigation, no findings are made at this stage.
94. The final chapter in Part 8 is Chapter 8.12. It concerns relations between the Lis-Con companies and the CFMEU in Queensland.

Part 9: HSU

95. The only issue relating to the HSU considered in this Interim Report concerns the activities of the HSU Victorian No 1 Branch (now named the Health Workers' Union). A number of officials at this branch have alleged that their Right Entry Permit tests were undertaken by others on their behalf. This issue is considered and resolved in Chapter 9. As noted above, other issues concerning the HSU which have also been the subject of evidence before the Commission to date will be addressed in a future report.

Part 10: TWU

96. A number of funds associated with the TWU or its officials – namely the McLean Forum, the New Transport Workers’ Team, TWUSUPER and TEACHO – are dealt with in the Parts summarised above.
97. This Part also considers questions relating to the NSW Branch of the TWU’s electoral roll. For a number of years the NSW Branch of the TWU provided documents to the ALP which overstated the number of members of the NSW Branch eligible to vote in a ballot for an office in the union. The significance of this matter is that the TWU was exercising voting rights at ALP conferences based on an inflated number of members.

Part 11: SDA

98. This case study involves the then Secretary-Treasurer of the Queensland Branch of the Shop, Distributive, Allied and Employees’ Association terminating the employment of an organiser because – on the evidence, although this was not the stated reason – the organiser had decided to run against him at a forthcoming election.

Confidential Report

99. There is a recommendation that one volume of this Interim Report be kept confidential. On 12 December 2014 an order was made directing that any information in the Confidential Report that might enable a person named in that report who has given evidence before the Commission to be identified not be published. That recommendation and that order were made because the confidential volume deals with

threats to witnesses. It is necessary for that volume to be confidential in order to protect the physical well-being of those witnesses and their families. This is unfortunate, because the confidential volume reveals grave threats to the power and authority of the Australian state.

Recommendations for referral

100. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the Royal Commissions Act 1902 (Cth) and every other enabling power, to the:

- (a) Commonwealth Director of Public Prosecutions in order that consideration may be given to whether:
 - (i) the CFMEU should be charged with and prosecuted for cartel conduct contrary to ss 44ZZRF and 44ZZRG of the *Competition Policy Reform (Victoria) Act 1995* (Vic) (Chapter 8.2);
 - (ii) Darren Greenfield should be charged with and prosecuted for using a carriage service to make a threat and/or to menace, harass or cause offence contrary to ss 474.15 and 474.17 of the *Criminal Code* (Cth) (Chapter 8.4); and
 - (iii) each of John Perkovic, Luke Collier, Rob Kera, Brian Parker and Michael Greenfield should be charged with and prosecuted for obstruction of a Commonwealth public official contrary to s 149.1 of the *Criminal Code* (Cth) (Chapter 8.9);

- (iv) each of Diana Asmar, David Eden, Darryn Rowe, Nick Katsis, Saso Trajcevski-Uzunov and Lee Atkinson should be charged with and prosecuted for making a false statement in an application or recklessly making a false statement contrary to ss 136 and 137 of the *Criminal Code* (Cth) (Chapter 9); and
 - (v) Kimberly Kitching should be charged with and prosecuted for aiding and abetting the contraventions of each of Diana Asmar, David Eden, Darryn Rowe, Nick Katsis, Saso Trajcevski-Uzunov and Lee Atkinson (Chapter 9);
- (b) Australian Securities and Investments Commission in order that consideration may be given to whether:
- (i) Michael Ravbar should be charged with and prosecuted for breaches of his duty as an officer contrary to s 184 of the *Corporations Act 2001* (Cth), and whether a civil penalty proceeding should be commenced and carried on against Michael Ravbar for contraventions of ss 180, 181 and 182 of the *Corporations Act 2001* (Cth) (Chapter 5.2); and
 - (ii) the exemptions granted to employee redundancy funds by ASIC Class Order CO 02/314 remain appropriate (Chapter 5.2);

- (c) Fair Work Building Inspectorate in order that consideration may be given to whether proceedings should be commenced and carried on against:
- (i) each of Michael Ravbar and Peter Close for coercion to the existence, exercise or refusal to exercise a workplace right contrary to s 343 of the *Fair Work Act 2009* (Cth) (Chapter 8.7);
 - (ii) each of Michael Ravbar, Peter Close and Andrew Sutherland for taking adverse action against another person as a result of the existence, exercise or refusal to exercise a workplace right contrary to s 340 of the *Fair Work Act 2009* (Cth) (Chapter 8.7);
 - (iii) each of Anton Sucic and Ivan Dadic for taking adverse action against a person because they were not a member of an industrial association contrary to s 346 of the *Fair Work Act 2009* (Cth) (Chapter 8.10); and
 - (iv) each of John Setka and Gerard Benstead for coercion by allocating duties to a particular person contrary to s 355 of the *Fair Work Act 2009* (Cth) (Chapter 8.10);
- (d) Australian Competition and Consumer Commission in order that consideration may be given to whether proceedings should be commenced and carried on against:

- (i) the CFMEU for conspiring with others to contravene s 45E of the *Competition and Consumer Act 2010* (Cth) contrary to ss 45E and 76(1)(e) of that Act (Chapter 8.7); and
 - (ii) each of Michael Ravbar, Peter Close, Andrew Sutherland, Ben Loakes and the CFMEU for a secondary boycott for the purpose of causing substantial loss or damage contrary to s 45D of the *Competition and Consumer Act 2010* (Cth) (Chapter 8.7);
- (e) General Manager of the Fair Work Commission, or a delegate of the General Manager, in order that consideration may be given to whether a proceeding should be commenced and carried on against the TWU for a pecuniary penalty order for failing to hold records for 7 years contrary to s 231 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (Chapter 10.2);
- (f) Australian Information Commissioner in order that consideration may be given to whether the Queensland Branch of the Shop, Distributive, Allied and Employees' Association contravened National Privacy Principle 10.1 or any provision of the *Privacy Act 1988* (Cth) (Chapter 12);
- (g) New South Wales Director of Public Prosecutions in order that consideration may be given to whether Darren Greenfield should be charged with and prosecuted for common assault contrary to s 61 of the *Crimes Act 1900* (NSW) (Chapter 8.4);

- (h) South Australian Director of Public Prosecutions in order that consideration may be given to whether:
 - (i) John Perkovic should be charged with and prosecuted for assault contrary to s 20(1) of the *Criminal Law Consolidation Act 1935* (SA) (Chapter 8.9);
 - (ii) John Perkovic should be charged with and prosecuted for accosting or impeding another in a threatening manner contrary to s 20(1)(e) of the *Criminal Law Consolidation Act 1935* (SA) (Chapter 8.9); and
 - (iii) John Perkovic should be charged with and prosecuted for the common law offence of assault (Chapter 8.9);
- (i) Queensland Director of Public Prosecutions in order that consideration may be given to whether:
 - (i) each of Michael Ravbar and Peter Close be charged with and prosecuted for extortion contrary to s 415 of the *Criminal Code 1899* (Qld) (Chapter 8.7); and
 - (ii) each of Michael Ravbar and Peter Close be charged with and prosecuted for threats to cause detriment to another person contrary to s 359 of the *Criminal Code 1899* (Qld) (Chapter 8.7);

- (j) Victorian Director of Public Prosecutions in order that consideration may be given to whether:
 - (i) each of Ralph Blewitt and Bruce Wilson should be charged with and prosecuted for obtaining financial advantage by deception and conspiracy to commit an offence contrary to ss 82 and 321 of the *Crimes Act 1958* (Vic) (Chapter 3.2);
 - (ii) John Setka and Shaun Reardon should be charged with and prosecuted for blackmail contrary to s 87 of the *Crimes Act 1958* (Vic) (Chapter 8.2); and
 - (iii) Shaun Reardon should be charged with and prosecuted for being an accessory to blackmail contrary to s 323 of the *Crimes Act 1958* (Vic) (Chapter 8.2);

- (k) Western Australian Director of Public Prosecutions in order that consideration may be given to whether each of Ralph Blewitt and Bruce Wilson should be charged with and prosecuted for:
 - (i) fraudulent conduct contrary to s 409(1) of the *Criminal Code* (WA); and
 - (ii) conspiracy to commit an indictable offence contrary to s 558 of the *Criminal Code* (WA) (Chapter 3.2); and

(l) Divisional Branch Management Committee of the New South Wales branch of the Construction and General Division of the CFMEU in order that consideration may be given to whether any action should be taken against Brian Parker under r 51 of the Rules for the Construction and General Division of the CFMEU to investigate whether Mr Parker:

- (i) has engaged in gross misbehaviour;
- (ii) has grossly neglected his duty;
- (iii) has conversed in an abusive or derogatory manner towards any person;
- (iv) has made statements which impugn the character and integrity of fellow officials; or
- (v) should be removed from office (Chapter 8.4 and 8.5).

PART 2: THE LEGAL LANDSCAPE

CHAPTER 2.1

OFFICERS' DUTIES

| Subject | Paragraph |
|--|-----------|
| A – THE RELATIONSHIP BETWEEN A REGISTERED ORGANISATION, ITS PURPOSES AND ITS OFFICERS | 1 |
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|---|------------------|
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A – THE RELATIONSHIP BETWEEN THE UNION, ITS PURPOSES AND ITS OFFICERS

1. The purpose of this Chapter is to identify, by way of background, some of the more important statutory and other duties owed by officers of a registered organisation, such as a trade union, to that organisation.

Registered organisation

2. A registered organisation is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). Associations of employers or employees, or enterprise associations with a relevant

Commonwealth nexus are eligible to apply for registration. Upon registration, the registered organisation becomes a body corporate capable of suing or being sued in its registered name.

The role of the rules

3. The *Fair Work (Registered Organisations) Act 2009 (Cth)* requires a registered organisation to have rules specifying the purposes for which the organisation is formed, and the powers and duties of those holding office in the organisation and its branches: s 141(1)(a), (b).
4. A registered organisation exists to pursue the objects stated in the rules. Those appointed to hold office are invested, through those rules, with the powers and duties necessary to enable the organisation to meet those objects.
5. The relationship between a registered organisation and its officers is, therefore, one of dependence. The organisation is heavily (if not entirely) dependent upon its officers making proper decisions and taking appropriate action in the pursuit of the organisation's purposes.
6. The objects of registered organisations which are trade unions typically include:
 - (a) regulating, protecting and advancing relations between workers and employers;
 - (b) promoting the general and material welfare of members; and

(c) establishing funds for a variety of purposes, including the purposes of ensuring there are funds to enable the organisation to carry out its objectives, providing funeral and other benefits for members, assisting members' personal injury and workers' compensation claims, assisting members in relation to health insurance and to providing superannuation and retirement benefits for officers and employees of the organisation.

7. The rules of registered organisations typically make provision for different species of officer, and the powers and responsibilities of each.

A typical structure of a trade union

8. Generally speaking, large trade unions have a national executive team made up of a secretary, assistant secretary, president, vice president and various others. The organisation is then administratively and financially divided into various branches and/or divisions, and within each, there exist executive teams made up of similarly named officers.

9. In each case, the person with the ultimate power and responsibility for operating either the national organisation or each particular branch or division is usually the secretary of the organisation, branch or division. The secretaries are usually vested with broad powers in order to enable them to discharge their responsibilities.

B – FIDUCIARY RELATIONSHIP AND DUTIES OWED

The fiduciary relationship defined

10. The essential characteristic of a fiduciary relationship is one of trust and confidence. A fiduciary relationship arises where the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person, usually called the principal, in the exercise of a power or discretion which will affect the interests of the principal in a legal or practical sense. From this power or discretion comes the duty to exercise it in the interests of the principal.¹

11. Officers of a registered organisation are fiduciaries. Although general works on equity tend not to make specific reference to this, there are authorities which do.² Analogously to company directors, officers of a registered organisation owe their fiduciary duties to the registered organisation directly, rather than to the individual members of the organisation.³ Australian trade union officials not uncommonly refer to breaches of fiduciary obligation to a union.⁴

¹ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [87].

² *Allen v Townsend* (1977) 31 FLR 431 at 483; *Ludwig v Harris* (1991) 30 FCR 377 at 379.

³ *Jess v Scott* (1984) 3 FCR 263 at 287.

⁴ See, for example, Bill Ludwig's letter of 14 August 1995 to Stephen Harrison, Joint National Secretary of the AWU, on the dispute over making redundancy payments to Bruce Wilson and others. See Cambridge MFI-1, p 152.

Key proscriptive duties of a fiduciary

12. While the precise nature and extent of duties owed by a fiduciary remain the subject of some debate⁵ there is no controversy over the existence and scope of a fiduciary's fundamental proscriptive duties.
13. In this regard officers of a registered organisation must not:
 - (a) place themselves in a position where their interests, or their duties to another, may conflict with the duties owed to the organisation; or
 - (b) use their positions to confer an advantage on themselves or someone else or to act to the detriment of the organisation.⁶
14. A number of the case studies considered in this Interim Report raise for consideration the question whether officers of registered organisations may have breached their fiduciary duties through the establishment and operation of what the Letters Patent refer to as 'relevant entities'.
15. Of particular relevance in that context is what is sometimes referred to, in the field of corporate law, as the 'corporate opportunity doctrine'. The doctrine, so-called, recognises that a director or senior employee who takes up an opportunity within the scope of a company's actual or potential line of business, without the company's consent, may commit a breach of fiduciary duty and be required to account to the company

⁵ See for example *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1.

⁶ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 1.

for any profit made, or compensate it for any loss suffered. As this description makes plain, the ‘corporate opportunity doctrine’ is, in truth, not a separate doctrine but a particular application of the general proscriptive fiduciary duties noted above.

16. Whether there has been a breach of fiduciary duty by a fiduciary who pursued a particular opportunity will depend, in each case, on whether there is a sufficient connection between that opportunity, the affairs of the principal and the fiduciary’s position.⁷
17. A fiduciary’s liability to the principal party in such a case does not depend upon establishing that the fiduciary acted in bad faith. Nor does it depend upon establishing that the opportunity taken by the fiduciary was one the principal itself could have secured.⁸

Remedies

18. As a corollary of the above propositions, persons who are under a fiduciary duty must account to their principals for any benefit or gain which has been obtained in circumstances where a conflict or significant possibility of conflict existed between their fiduciary duty and their personal interest in the pursuit or possible receipt of such a benefit or gain, or which was obtained or received by use or by reason of their fiduciary positions or of opportunity or knowledge resulting

⁷ *SEA Food International v Lam* (1998) 16 ACLC 552 at 557.

⁸ *Cook v Deeks* [1916] 1 AC 554; *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110.

from them.⁹ Any such benefit or gain is held by the fiduciary as constructive trustee.¹⁰

Liability of third parties

19. A third party may also have a liability in respect of a breach by an officer of a fiduciary duty owed to a registered organisation.¹¹ In particular, a third party may be liable where:

- (a) the third party is a company which is the alter ego of the fiduciary;¹²
- (b) it receives trust property following a breach of fiduciary duty where it has sufficient knowledge of the breach;¹³
- (c) it has procured or induced the breach of fiduciary duty;¹⁴ or
- (d) it has participated in a breach of fiduciary duty of a kind which amounts to a dishonest and fraudulent design on the part of the fiduciary.¹⁵

20. The precise nature of the remedy available to the principal against the third party – that is, whether it be an entitlement to equitable

⁹ *Chan v Zacharia* (1984) 154 CLR 178 at 199.

¹⁰ *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350.

¹¹ See generally *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494.

¹² *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296.

¹³ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

¹⁴ *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494 at 509-510 [76]–[77].

¹⁵ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

compensation or instead a right to claim an account of profits or the return of property – will depend on the precise circumstances of the case. In some cases various alternative remedies will be available. If so, the principal will need to elect between the two.

Chapter 9 of the Fair Work (Registered Organisations) Act 2009 (Cth)

21. In addition to the fiduciary duties owed by an officer to a registered organisation, various duties are imposed on officers through Chapter 9 of the *Fair Work (Registered Organisations) Act 2009*.
22. Chapter 9 is divided into three Parts. The first Part is a simplified outline of the Chapter. Part 2 concerns general duties owed by officers ‘in relation to the financial management of the organisations’. Part 3 sets out a series of general duties in relation to compliance with orders and directions of the Federal Court of Australia and Fair Work Commission.
23. A notable feature of this regime is that the *Fair Work (Registered Organisations) Act 2009* (Cth) does not impose a series of general obligations owed by officers in the performance of their duties and in the exercise of their powers. Rather, the statutory duties only apply in relation to financial management (see s 283) and compliance with certain court or commission orders and directions (see s 294). This is markedly different from the regime that applies to directors of corporations set out in sections 180 to 184 of the *Corporations Act 2001* (Cth). The duties there set out are not restricted to particular fields of activity.

Duties in Part 2 of Chapter 9 – ‘financial management’

24. In relation to the regime set out in Part 2 of Chapter 9, it will be a factual question in each case whether the matter under consideration relates to the exercise of powers or duties of officers ‘related to the financial management of the organisation or branch’.
25. The term ‘financial management’ is not defined. There is no express guidance given within Part 2 of Chapter 9 as to what conduct will constitute ‘financial management of the organisation or branch’, or what particular powers or duties of an official are ‘related to’ the financial management of an organisation or branch.
26. Clearly the words ‘related to’ mean that the duties set out in Part 2 of Chapter 9 do not apply only where the officer is actually performing work related to the financial management of the organisation or branch in the exercise of his or her powers and duties as an officer of the organisation or branch. Where an officer performs an act in respect of the affairs of a third party, Part 2 of Chapter 9 may apply even though the officer is not actually performing a financial management function for the union at the time. This is because the conduct of the officer in the circumstances in which it occurred (both in terms of the act undertaken and any other action not undertaken by the officer in the circumstances) may nevertheless properly be said to relate to the exercise of powers or duties of the officer related to the financial management of the organisation.
27. As detailed below, Part 2 of Chapter 9 sets out four categories of statutory obligation owed by an officer to his or her organisation.

Section 291 confirms that the statutory duties apply in addition to, not in derogation of, other duties owed by the officer (subject to the ‘business judgment rule’ in s 285(2) in relation to an officer’s duty to act with care and diligence).

28. Those duties are expressed in terms which largely, but not completely, mirror the formulation of certain statutory duties owed by directors as set out in the *Corporations Act 2001* (Cth). As a result, the principles set out in the authorities concerning the duties in the *Corporations Act* are of some assistance in determining the precise ambit of duties owed by officers of registered organisations set out in Part 2 of Chapter 9 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

Care and diligence: s 285

29. The first statutory duty set out in Part 2 of Chapter 9 is a duty on the part of officers of a registered organisation or branch to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if he or she were the officer of an organisation or branch in the organisation’s circumstances and occupied held by, and had the same responsibilities as, the officer: s 285(1). Sub-section 285(2) sets out the ‘business judgement rule’ also found in the *Corporations Act* with respect to a director’s duty of care.

Good faith and proper purpose: s 286

30. The second statutory obligation owed by an officer of a registered organisation or branch is to exercise his or her powers and discharge

his or her duties in good faith in what he or she believes to be the best interests of the organisation, and for a proper purpose: s 286.

31. Although framed in terms of a single duty, the section in fact creates two duties in relation to the exercise of an officer's powers or the discharge of his or her duties. The first is a duty to act in what the officer believes to be the best interests of the organisation. The second is a duty to act for proper purposes.
32. As to the 'good faith' component, the duty requires the official to act honestly. The good faith duty owed by directors of a company involves, for example, exercising their powers in the interests of the company, not misusing or abusing their power, avoiding conflicts of interest and not taking advantage of their position to make secret profit.¹⁶
33. The obligation to act in good faith '*in what he or she believes to be* the best interests of the organisation' would appear to entail that the officer must subjectively believe that his or her conduct is not in the best interests of the organisation.
34. This may be contrasted with the modern law relating to company directors. Section 181(1) of the *Corporations Act 2001* (Cth) does not contain the words italicised in the previous paragraph. The better view is that s 181(1), particularly when regard is had to s 184(1) which imposes additional criminal liability for intentionally dishonest breaches of s 181(1), requires officers of corporations to exercise their

¹⁶ See, for example, *Chew v R* (1991) 4 WAR 21 at 47.

powers and discharge their duties in good faith in what are objectively the best interests of the company.¹⁷

35. In some cases, where the circumstances viewed ‘objectively’ demonstrate impropriety, it may be difficult to accept that an officer of a registered organisation was not conscious of that impropriety (although the facts of any given case may establish this was so). In this regard, the authorities establish that a claim that a person acted honestly must be assessed by reference to the surrounding circumstances.¹⁸

36. The duty on officers of a registered organisation to act for proper purposes reflects the general law.¹⁹ A ‘proper purpose’ is a purpose for which the relevant power being exercised (or duty being discharged) was conferred. The onus of establishing that a power was exercised for an improper purpose rests on the person alleging that matter.²⁰

37. In determining whether officers have exercised their powers for an improper purpose, there are two questions: (1) what are the permissible purposes for which the power was granted and (2) for what purpose or purposes was the power in fact exercised.²¹ In the context of a

¹⁷ *Ford’s Principles of Corporations Law* at [8.065]; *ASIC v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1 at [34]; *ASIC v Australian Property Custodian Holdings Ltd* [2013] FCA 1342 at [612]; cf *Re S & D International Pty Ltd (No 4)* (2010) 79 ACSR 595 at 656. Compare the law prior to the enactment of the *Corporate Law Economic Reform Program Act 1999* (Cth): see generally *Ford’s Principles of Corporations Law* at [8.065.6].

¹⁸ *Grimaldi v Chameleon Mining NL (No 2)*; *Chameleon Mining NL v Murchison Metals Ltd* (2012) 200 FCR 296.

¹⁹ See *Scott v Jess* (1984) 3 FCR 263; *Tanner v Maynes* (1985) 7 FCR 432.

²⁰ *Scott v Jess* (1984) 3 FCR 263 at 287.

²¹ See *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

registered organisation, the first question will involve consideration of the power in the context of the organisation's rules, its objects and the general relationship between officers and members.

38. In cases where corporate directors have acted partly for a proper purpose and partly for an improper purpose, the courts have asked whether the directors would have exercised the power 'but for' the impermissible purpose, and have found that an exercise of the power will be invalid if the power would not have been exercised apart from the impermissible purpose.²²

Use of position and information: ss 287 and 288

39. The third category of duty is set out in s 287 of the Act. It provides that an officer or employee of an organisation must not improperly use his or her position to gain an advantage for himself or herself or someone else, or cause detriment to an organisation or to another person.
40. The fourth category of duty, which appears in s 288 of the Act, is similar to the third, but is concerned instead with the improper use of information obtained because a person is or has been an officer or has been an employee of the organisation or branch. Information so obtained cannot be improperly used to gain an advantage for the person or someone else or to cause detriment to the organisation or someone else.

²² See *Mills v Mills* (1938) 60 CLR 150 at 186; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 167 CLR 285 at 294.

41. In relation to the third and fourth duties just noted, the following principles apply when considering whether a director of a company has breached duties of this kind:²³
- (a) It is not necessary to establish, in order to make out a breach, that an advantage has in fact been obtained by the director or someone else, or a detriment has in fact been suffered. What matters is the purpose of the director, regardless of whether that purpose is achieved.
 - (b) Whether a director has acted ‘improperly’ is to be determined ‘objectively’. That is, the director’s conduct is to be tested against the standard of conduct which a reasonable person, who had knowledge of the duties, powers and authority of the director and the circumstances of the case, would expect of a person in the position of the director. That being so, impropriety is not limited to conscious wrongdoing.
 - (c) Impropriety can be made out even if the officer believed that his or her conduct was in the best interests of the organisation.
42. There is no reason why these principles would not also apply to officers of a registered organisation.

²³ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; *R v Cook; ex parte DPP (Cth)* [1996] 2 Qd R 283; *ASIC v Adler* (2002) 41 ACSR 72; *Doyle v ASIC* (2005) 223 ALR 218.

Liability of accessories

43. A person who is ‘involved in’ a contravention by an officer of the duties in ss 286(1), 287(1) or 288(1) also contravenes the Act: ss 286(2), 287(2), 288(2). A person is involved in a contravention if, and only if, the person has (a) aided, abetted, counselled or procured the contravention, (b) induced, whether by threats or promises or otherwise, the contravention, (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention, or (d) conspired with others to affect the contravention: s 284.
44. These accessorial liability provisions in the Act closely mirror those found in other Commonwealth legislation such as the *Competition and Consumer Law Act 2010* (Cth). It has been held, in respect of those similar provisions, that a person is not liable as an accessory unless he or she has actual knowledge of the essential matters that make up the contravention (although the person need not know that his or her participation was a breach of the Act).²⁴ It may be possible to infer knowledge from a combination of suspicious circumstances and a failure to make enquiry.²⁵

Other relevant provisions

45. There are four other provisions of note:

²⁴ *Yorke v Lucas* (1985) 158 CLR 661.

²⁵ *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 5.

- (a) Section 289 provides that ratification or approval of an officer's contravention does not prevent the commencement of, or predetermine the outcome of, proceedings against the officer for a contravention. Rather, it is a matter that the Court may take into account in deciding what relief to grant in respect of the officer's conduct. In that regard, relevant considerations include how well informed the members were when ratifying or approving the contravention, and whether the members themselves were acting for proper purposes.
- (b) Broadly speaking, s 292 provides that if an officer relies, in good faith, and after making proper inquiries, on professional or expert advice, the officer's reliance on that information or advice is taken to be reasonable unless the contrary is proved.
- (c) Where it appears that a person or organisation may have committed a contravention but has acted honestly, and having regard to all the circumstances of the case, ought be excused, the Court may relieve the person or organisation either wholly or partly from a liability to which the person or organisation would otherwise be subject, or which might otherwise be imposed on the person or organisation: s 315.
- (d) Pursuant to s 316, the Court also has a power to relieve an officer, wholly or partly, for liability for any negligence, default, breach of trust or breach of duty where it appears that the officer has acted honestly having regard to all the circumstances of the case.

Duties in Part 3 of Chapter 9

46. As noted earlier, Part 3 of Chapter 9 sets out the duties of officers of a registered organisation with respect to compliance with orders and directions of the Federal Court and the Fair Work Commission.
47. These provisions are the subject of closer consideration elsewhere. They arise, for example, in relation to the behaviour of officers of the CFMEU in Queensland with respect to a Hindmarsh building site.²⁶
48. It need only be observed at this point that Part 3 of Chapter 9 contains a number of unsurprising provisions which, amongst other things, prohibit officers from knowingly or recklessly contravening an order of the Federal Court or the Fair Work Commission (s 299 of the Act), or being involved in an employee knowingly or recklessly contravening such an order (s 301 of the Act).

C – ENFORCEMENT OF DUTIES OWED BY OFFICERS OF REGISTERED ORGANISATIONS

Fiduciary duties

49. Registered organisations are bodies corporate: s 27(a). The fiduciary and general law duties owed by an officer of a registered organisation are owed to the organisation itself and not the members. Therefore the proper plaintiff in any action against an officer is the organisation.

²⁶ See Chapter 8.8.

50. Thus, the rule in *Foss v Harbottle*,²⁷ and its exceptions, would apply to claims against a registered organisation.²⁸ In contrast to the position of a company registered under the *Corporations Act* (see ss 236 and 237), there is no provision for a member to take derivative action on behalf of the organisation. Further, s 164B(2) prevents a member of an organisation who applies for an order under s 164A of the *Fair Work (Registered Organisations) Act 2009* (Cth) seeking rectification of a breach of the organisation's rules from obtaining compensation.

Duties under the Fair Work (Registered Organisations) Act 2009 (Cth)

51. Sections 285–288 of the *Fair Work (Registered Organisations) Act 2009* (Cth) are civil penalty provisions: s 305. The consequence is that the General Manager of the Fair Work Commission may apply to the Federal Court for the imposition of a pecuniary penalty for contravention of those provisions (whether by an officer of a registered organisation or by an accessory).

52. The maximum pecuniary penalty payable by a body corporate is 300 penalty units (presently \$51,000). In respect of an individual, the maximum pecuniary penalty is 60 penalty units (presently \$10,200). This may be contrasted with s 1317G(1) of the *Corporations Act* which imposes a maximum pecuniary penalty of \$200,000 for breach of the equivalent directors' duties.

²⁷ (1846) 2 Hare 461; 67 ER 189.

²⁸ See *Bailey v Krantz* (1984) 55 ALR 345 at 356; *Tanner v Darroch* (1986) 12 FCR 235 at 253.

53. The Federal Court may also order a contravener to compensate an organisation for damage suffered by the organisation which resulted from a contravention of Part 2 of Chapter 9: s 307. A compensation order may be sought by the General Manager of the Fair Work Commission or by the organisation: s 310.
54. The Federal Court may also grant, on the application of the General Manager of the Fair Work Commission, such other orders as the court considers appropriate in the circumstances, such as injunctions to restrain a contravention by an officer: s 308.
55. The remedies for breach of the provisions of Part 3 of Chapter 9 are the same as those which apply to breaches of Part 2 of Chapter 9. In particular, an individual who breaches the provisions of Part 3 (eg by disobeying an order of the Federal Court) is subject to a pecuniary penalty of no more than \$10,200.
56. The maximum penalties for breaches of Part 2 and Part 3 of Chapter 9 are remarkably small. When the time comes to make recommendations for law reform in the Final Report it will be desirable to address the statutory penalties for breach.

CHAPTER 2.2

USE OF UNION RESOURCES IN ELECTIONS

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A – INTRODUCTION

1. Section 190 of the *Fair Work (Registered Organisations) Act 2009* (Cth) provides: ‘An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part [2] for an office or position’. What is the ambit of s 190? Does it only prohibit an organisation or branch rendering assistance to one candidate over another in an election for an office or position *in that organisation or branch*? Or does it also prohibit an organisation or branch using its

property or resources to help one candidate over another candidate in a *different organisation or branch*?

2. The Fair Work Commission has apparently proceeded on the basis of the narrower construction of s 190. On 25 January 2014, *The Age* reported that the Fair Work Commission had ‘cleared the Victorian plumbers’ union of wrongdoing in its bankrolling of candidates in elections for the scandal-plagued Health Services Union in 2012’.¹

B – SIGNIFICANCE OF TEXT

3. The starting point is the text of s 190.² In terms, s 190 is not limited to candidates for office or a position *within* the organisation rendering assistance. The words ‘an election under this Part for an office or position’ are capable of embracing *any* election under Part 2 for an office or position, not just elections within the organisation or branch rendering assistance. A narrow construction of s 190 would involve reading words of limitation into the text, so that it read:

An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part [2] for an office or position *in the organisation or branch*.

4. The absence of words of limitation does not point conclusively in favour of a broad construction. A statutory provision may be

¹ Royce Millar and Ben Schneiders, ‘Fair Work Commission clears plumbers’ union in HSU election funding row’, *The Age* (25 January 2014): <http://www.theage.com.au/victoria/fair-work-commission-clears-plumbers-union-in-hsu-election-funding-row-20140124-31ecz.html#ixzz3HOZUigNX>.

² *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46–47 [47].

construed as if it contained additional words, and although the issue involves a judgment of matters of degree, a necessary but not sufficient pre-requisite is that Lord Diplock's three conditions in *Wentworth Securities Ltd v Jones*³ are satisfied.⁴ These conditions are that it must be possible to identify the precise purpose of the provision, that the Court must be satisfied that the drafter and Parliament overlooked an eventuality that must be dealt with if the provision is to achieve its purpose and the Court must be able to identify precisely the words that the legislature would have included in the provision had the deficiency been detected before the provision's enactment.

5. The question then becomes whether that approach is justified in this case. In particular, do the context in which s 190 falls to be construed and its object appearing from the statutory language justify a narrow construction?

C – THE MISCHIEF

6. The context of a statutory provision includes not only the verbal context in which the provision is found, but also the mischief which it was intended to remedy.⁵ Section 190 was introduced into the 'Registration and Accountability of Organisations' schedule of the *Workplace Relations Act 1996* (Cth) by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act*

³ [1980] AC 74 at 105.

⁴ *Taylor v Owners – Strata Plan No 11564* (2014) 88 ALJR 473 at 483 [38]–[39] per French CJ, Crennan and Bell JJ.

⁵ *CIC Insurance Ltd v Bankstown Football* (1997) 187 CLR 384 at 408; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at 405 [70] and 412 [88].

2002 (Cth). (The schedule later became the *Fair Work (Registered Organisations) Act* 2009 (Cth),⁶ and s 190, as presently in force, remains in the same terms in which it was originally enacted.) Section 190 is one of a number of provisions that comprise Part 2 ('Conduct of elections for office and other positions') of Chapter 7 ('Democratic control') of the Act. The Explanatory Memorandum to the Bill that, when enacted, inserted s 190 relevantly stated:⁷

CHAPTER 7 – DEMOCRATIC CONTROL

7.1 This Chapter deals with the conduct of elections for offices and for other positions in organisations, and for inquiries by the Federal Court into elections. It also contains rules concerning disqualification from office. All of the provisions in this Chapter reflect Divisions 4, 5 and 6 of Part IX and relevant offences in Part XI of the WR Act. *However, there are also new provisions reflecting the recommendations of the 1997 report by the Joint Standing Committee on Electoral Matters relating to industrial elections.*

...

Clause 190 – Organisation or branch must not assist one candidate over another

7.21 This clause creates a new offence in relation to the use of organisational resources. It is an offence for an organisation or branch to use, or allow to be used, its property or resources to help one candidate against another candidate in an election for office or other position conducted under this Part.

⁶ *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), Sch 22.

⁷ Explanatory Memorandum, *Workplace Relations (Registration and Accountability of Organisations) Bill* 2002 (Cth) 66, 68 (emphasis added). See also Revised Explanatory Memorandum, *Workplace Relations Amendment (Registration and Accountability of Organisations) Bill* 2002 (Cth) 71, 73.

7. One of the recommendations of the Joint Standing Committee referred to in the Explanatory Memorandum was:⁸

That the Government consult with the AEC and with peak union and employer organisations with a view to developing legislation prohibiting the use of union resources for electioneering purposes, except as permitted by the WR Act and Regulations or by model rules developed in accordance with Recommendation 4.

8. That recommendation was preceded by a discussion relating to the use of ‘organisation resources for electioneering’. The Committee referred to *Re Collins; Ex parte Hockings*.⁹ That case arose out of a challenge to a union election. The challenger claimed that there had been an ‘irregularity’ in relation to the election, basically on the ground that union resources had been used to assist one group of candidates for election over another group of candidates in that union, contrary to an implied prohibition in the rules of the union. The Court held that the deployment of union resources in that way did not constitute an ‘irregularity’ within the meaning of the *Conciliation and Arbitration Act* 1904.¹⁰ For present purposes, the steps in the Court’s reasoning leading to that conclusion are immaterial. *Re Collins* is relevant because it constituted the background to the following discussion:¹¹

5.82 In light of the decision in *Re Collins*, the Cooke Inquiry recommended that the Queensland legislation be amended to include a provision expressly prohibiting the use of union resources for election purposes. In making that recommendation, Marshall Cooke QC noted that:

⁸ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Industrial Elections* (October 1997) 88.

⁹ (1989) 167 CLR 522.

¹⁰ *Re Collins; Ex parte Hockings* (1989) 167 CLR 522 at 524, 525 and 531.

¹¹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Industrial Elections* (October 1997) 86 [5.82]–87 [5.83].

Evidence before the Inquiry and my investigations generally reveal a widespread use of union resources by incumbent officials in their re-election campaigns. Official union journals are used to promote the officials in power, sometimes subtly, sometimes not ... Opponents do not get a mention ... Union vehicles, telephones and office facilities are utilised ... All these factors give incumbent officials a very strong advantage over a rank and file challenge.

5.83 Marshall Cooke QC noted that prior to the decision in *Re Collins*, the blatant use of union resources for electioneering had:

been mildly restrained by the widely held view that the use of union resources constituted 'an irregularity in relation to an election' which could result in the election being declared null and void ...

The decision in *Re Collins* had lifted any such restraint.

9. The report then noted that the Cooke Inquiry also recommended that union resources be permitted to be used to provide certain assistance to all candidates in an election.¹² But that discussion can be put aside for present purposes.
10. As appears above, the Joint Standing Committee relevantly recommended that the 'use of union resources for electioneering purposes' be prohibited. Section 190 gives effect to the Joint Standing Committee's recommendation.¹³

D – CONSTRUCTIONAL CHOICES – THE COMPETING VIEWS

11. On one view, this background to the enactment of s 190 supports a narrow construction of the provision. That view depends on ascribing

¹² Joint Standing Committee on Electoral Matters, Parliament of Australia, *Industrial Elections* (October 1997) 87 [5.84] and following.

¹³ So much was accepted in *Re McJannett; Re Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2)* (2009) 188 IR 156 at 160 [24].

to s 190 a limited purpose – to remedy the specific mischief of incumbent union officials using (or abusing) the advantage of incumbency to entrench their positions in a union by deploying the resources of the union – against rival candidates within the union – to secure their re-election. Based on that characterisation of the mischief which s 190 was intended to remedy, s 190 ought not to be construed as addressing the circumstance of officials in one union seeking, and receiving, support from another union against rival candidates for election; it ought to be construed as directed to a different, and more specific, mischief.

12. But an alternative characterisation of the mischief towards which s 190 is directed is also open. The basic concern that apparently animated the Joint Standing Committee was the use of union resources to distort the playing field on which candidates compete for election, and thereby to undermine democratic control of unions. The use by incumbent union officials of the resources of the union to fend off rival candidates within the union is one manifestation of that concern. However, the deployment of the resources of one union to aid candidates in another union, to the detriment of those candidates' rivals, is just another manifestation of the same concern; that conduct is equally apt to distort the playing field, skewing it in favour of some and against others, and, in the process, undermining the democratic control of unions.
13. Whilst there is no specific reference in the materials to it, there is also the wider mischief at play of the squandering of members' funds on the personal interests of incumbent officials and their allies in other unions.

14. Further, the narrow construction of s 190 would create the risk of easy evasion. The officials of Union A, while debarred from spending union funds in elections of officials in Union A, could spend them in the election of factionally-aligned or allied officials in Union B, in return for the officials in Union B spending its funds on elections in Union A. Reading s 190 narrowly opens the door to incumbents in one union using the resources of their union to support the incumbents of another union in exchange for the mutual support of their colleagues. That may in some circumstances constitute a breach of an officer's fiduciary duties to the union. A broad construction of s 190 would create a further protection against the squandering of members' funds.

E – BROADER CONSTRUCTION PREFERABLE

15. Parliament could easily have inserted words of limitation to confine the reach of s 190. It did not. That is not a determinative consideration if it would better comport with the object of s 190 as derived from its language to read the provision as if it contained words of limitation. The background to the enactment of s 190 may support the narrow construction. But it does not compel it. Moreover, the narrow construction leaves the door open to conduct which would have the effect of undermining the democratic control of unions – the very opposite of what s 190 was, on any view, intended to achieve. Lord Diplock's conditions in *Wentworth Securities Ltd v Jones* are not satisfied.
16. In summary, then, the broad construction is consistent with the text of the provision, is not foreclosed by the context which informs the construction of the text, and constitutes a better fit with the object of

bolstering democratic control in unions. For these reasons, that is the clearly preferable construction. However, to put the matter beyond doubt, when the time comes to make recommendations for law reform in the Final Report, it will be desirable to amend s 190 to provide as follows:

An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another candidate in an election under this Part (*in respect of any organisation or branch*) for an office or position.

CHAPTER 2.3

FINANCIAL REPORTING OBLIGATIONS

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A – GENERAL OBLIGATIONS

Introduction

1. This chapter provides a brief outline of the key elements of the financial accounting obligations applicable to organisations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Legislative history

2. Chapter 8 of the *Fair Work (Registered Organisations) Act 2009* (Cth) was formerly Chapter 8 of the ‘Registration and Accountability of Organisations’ schedule of the *Workplace Relations Act 1996* (Cth). It deals with ‘Records and accounts’. It was inserted by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth) (the **2002 Act**). The then Minister for Employment and Workplace Relations relevantly said in his second reading speech on the Bill, which became the 2002 Act:¹

This bill provides a stronger focus on disclosure to members in ways consistent with modern accounting and auditing practices and enhances transparency and accountability in a manner broadly consistent with the Corporations Law.

3. Although in the period from its enactment to the present there have been amendments to Chapter 8, in substance the provisions of Chapter

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1836 (Tony Abbott).

8 have remained unaltered.² References in this chapter to the Act are to the Act as presently in force.

Duties of reporting unit

4. A ‘reporting unit’, which is either the whole of an organisation or a branch of an organisation (if the organisation is divided into branches),³ must ‘keep proper financial records’.⁴ Specifically, those records must ‘correctly record and explain the transactions and financial position of the reporting unit’ and be kept in such a manner as will enable both a general purpose financial report to be prepared from them and will enable the accounts of the reporting unit to be conveniently and properly audited.⁵

5. As soon as practicable after the end of a financial year, a reporting unit must cause a general purpose financial report to be prepared in accordance with the Australian Accounting Standards and the committee of management of the reporting unit must cause an ‘operating report’ to be prepared.⁶ Both reports ‘must’ comprise certain matters prescribed by the Act.⁷

² See the amendments effected by Sch 9 of the *Fair Work Amendment Act 2012* and Sch 22 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

³ *Fair Work (Registered Organisations) Act 2009* (Cth), s 242.

⁴ *Fair Work (Registered Organisations) Act 2009* (Cth), s 252.

⁵ *Fair Work (Registered Organisations) Act 2009* (Cth), s 252(1).

⁶ *Fair Work (Registered Organisations) Act 2009* (Cth), ss 253–254. See also the definition of ‘Australian Accounting Standards’ in s 6 of the Act.

⁷ *Fair Work (Registered Organisations) Act 2009* (Cth), ss 253(2), 254.

6. The general purpose financial report of a reporting unit must be audited.⁸ An auditor must prepare a report the form and content of which must be in accordance with the Australian Auditing Standards.⁹ The auditor must state in the report whether in his or her opinion the general purpose financial report is presented fairly and in accordance with specified requirements, including the Australian Accounting Standards (to the extent they are applicable).¹⁰
7. A copy of a ‘full report’ — including the auditor’s report, the general purpose financial report, and the operating report — must be provided to the members of a reporting unit.¹¹ Alternatively, a ‘concise report’ can be provided if, under the rules of a reporting unit, the committee of management of the unit resolves that a report is to be provided.¹² The Act also provides for the presentation of a full report to a general meeting of members of the reporting unit within a prescribed period.¹³
8. After the general meeting – within a prescribed period – a reporting unit must, among other things, lodge a copy of the ‘full report’ with what is now referred to as FWC, the Fair Work Commission.¹⁴ The full report is available publicly on the Fair Work Commission’s website.

⁸ *Fair Work (Registered Organisations) Act 2009* (Cth), ss 256–257.

⁹ *Fair Work (Registered Organisations) Act 2009* (Cth), s 257(7)

¹⁰ *Fair Work (Registered Organisations) Act 2009* (Cth), s 257(5).

¹¹ *Fair Work (Registered Organisations) Act 2009* (Cth), s 265.

¹² *Fair Work (Registered Organisations) Act 2009* (Cth), s 265.

¹³ *Fair Work (Registered Organisations) Act 2009* (Cth), s 266.

¹⁴ *Fair Work (Registered Organisations) Act 2009* (Cth), s 268.

B – DISCLOSURE OF LOANS, GRANTS AND DONATIONS

9. One further obligation of organisations (and hence reporting units) ought to be singled out. It is the requirement under s 237 to lodge a statement showing prescribed particulars ‘in relation to each loan, grant or donation of an amount exceeding \$1,000’ made by the organisation (or branch) in a financial year. That statement must be lodged within 90 days after the end of a financial year.¹⁵
10. Statements lodged under s 237 can be inspected at the Fair Work Commission, during office hours, by a member of the organisation responsible for lodging the statement.¹⁶

C – REFORM RECOMMENDATIONS

Section 237 statements should be made publicly available on the Fair Work Commission website

11. The requirement to attend the office of the Fair Work Commission to inspect a statement lodged under s 237 is a barrier to accessing the statements. Like financial reports, those statements should be publicly available on the Fair Work Commission website. When the time comes to make recommendations for law reform in the Final Report it will be desirable to make a recommendation to that effect.

¹⁵ *Fair Work (Registered Organisations) Act 2009* (Cth), s 237.

¹⁶ *Fair Work (Registered Organisations) Act 2009* (Cth), s 237(4).

Definition of ‘Australian Auditing Standards’

12. There also arises an issue concerning the definition of ‘Australian Auditing Standards’. As appears above, the form and content of an auditor’s report must conform to those standards. The *Fair Work (Registered Organisations) Act 2009* (Cth) defines ‘Australian Auditing Standards’ as ‘the auditing and assurance standards issued by CPA Australia and The Institute of Chartered Accountants in Australia as in force, or applicable, from time to time.’ That definition was inserted by the 2002 Act, which came into force on 12 May 2003.¹⁷ It thus predates the establishment of the Auditing and Assurance Standards Board, on 1 July 2004, by s 227A of the *Australian Securities and Investments Commission Act 2001* (Cth).¹⁸ However, by an unnecessarily circuitous route, the standards issued by the Auditing and Assurance Standards Board established by the *Australian Securities and Investments Commission Act 2001* (Cth) apply in practice. When the time comes to make recommendations for law reform in the Final Report, it will be desirable to make a recommendation that the definition of Australian Auditing Standards should be amended to refer to those standards issued by the Auditing and Assurance Standards Board.

¹⁷ *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002*, s 2.

¹⁸ *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, s 2 (together with it 18 in Sch 1).

PART 3: GENERIC FUNDS CREATED BY UNION OFFICIALS

CHAPTER 3.1

INTRODUCTION

1. For many decades hard working union members, wishing to serve a term in office for their union, have engaged in the modest task of raising money to help them win support from their peers and get elected. Raffles, barbeques and other entirely transparent fund raising ventures are undertaken. Friends, family and colleagues contribute because they want to. They know exactly what they are contributing to and why. They do not participate out of a sense of either self-preservation or self-advancement, or out of a concern as to what may happen if they decline to be involved.
2. Fund raising activities of this kind continue to this day. They are positive endeavours that are underpinned by a sense of goodwill and collaboration. They form a necessary and valuable part of the fabric of trade union culture in this country, just as similar activities are integral to many aspects of the social fabric.
3. A cause for increasing concern over the last two decades is the growth of other forms of more sophisticated, and less transparent, fund raising

activities by some trade union officials. Companies with deliberately broad and uncertain objects are established. They raise funds by unlawful or unconventional means. Those who pay money to these entities may not appreciate who or what they are really contributing to. The moneys may be raised for the personal advancement of the officials, and not for the union. Officials may seek to attract funds to themselves using the name and resources of the union, and through the exercise of the power and influence they hold as a union official.

4. In this Part 3, these issues are considered by reference to a number of particular case studies. For want of a better description, the funds that are the subject of these studies are referred to as ‘generic funds’. They demonstrate the various ways in which union officials can breach their fiduciary and statutory duties to the union through the establishment and operation of funds sitting outside of the union. They also demonstrate the serious lack of corporate governance, financial management and record keeping that can arise within funds of this kind.
5. The Australian Workers’ Union – Workplace Reform Association, the most notorious of these funds, is addressed in chapter 3.2. There, union officials established an incorporated association for the purpose of obtaining money from Thiess by deception, and then used the funds so received for their own purposes.
6. Chapter 3.3 concerns a fund raising entity called Industry 2020. It was associated with Cesar Melhem, the former State Secretary of the Victorian branch of the AWU. Cesar Melhem, through Industry 2020 Pty Limited (**Industry 2020**), organised lucrative fundraisers by using

the name, influence and resources of the AWU. Tickets were sold on the basis that support of the function would lead to ‘a good working relationship with the AWU’.¹ The AWU or its members received no recompense or benefit from Industry 2020’s activities. The funds raised were deployed, ultimately, for the advancement of Mr Melhem and his political associates.

7. Another generic fund, Building Industry 2000 Plus Limited (**Building Industry 2000**), is examined in chapter 3.4. It was established, and has been operated, by officials from the Victorian Divisional Branch of the CFMEU. Its corporate governance and financial management has been disgraceful. It now sits on cash reserves of over \$1 million, all of which has been raised by the officials in possible breach of their fiduciary duties, and in some cases, at the direct expense of CFMEU members (in the form of vending machine and merchandise sales).
8. In chapter 3.5 the Interim Report focuses on a fund called IR21 Ltd (**IR21**). It is another example of union officials breaching their duties through, amongst other things, the use of union resources and influence for the purpose of raising moneys for the fund itself rather than the union. The individuals in question were officials of the National Union of Workers.
9. The final chapter in this Part, chapter 3.6, is devoted to the Transport, Logistics, Advocacy and Training Association (**TLATA**), a generic fund operated by officers of the TWU. Again, the case study demonstrates how union officials can breach their duties to the union

¹ Melhem MFI-1, p 515.

through the establishment and operation of a fund sitting outside of the union.

CHAPTER 3.2

AUSTRALIAN WORKERS' UNION – WORKPLACE REFORM ASSOCIATION INC.

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A – BACKGROUND

Summary

1. The Australian Workers’ Union – Workplace Reform Association Inc. was an incorporated association. It was a ‘relevant entity’ within the meaning of paragraph (a) of the Terms of Reference. That is because it was an organisation established by two officials of an employee association, and was a legal entity separate from any employee association established purportedly for an industrial purpose. In fact it had no industrial purpose. Its only purpose was swindling. Between 1992 and 1995 it obtained \$421,632.60 from Thiess Contractors Pty Ltd by false pretences. The officials used the money for their own purposes. The origins, history and demise of the Association are as follows.¹
2. On 24 June 1992 the Commissioner of Corporate Affairs for Western Australia issued a certificate of incorporation pursuant to

¹ This subject generated numerous evidentiary controversies. In some of those areas there is detailed analysis in the Appendixes to this Chapter.

s 9(1) of the *Associations Incorporation Act 1987* (WA). The certificate stated:²

This is to certify that AUSTRALIAN WORKERS' UNION – WORKPLACE REFORM ASSOCIATION INC. has this day been incorporated under the *Associations Incorporation Act 1987* (WA).

3. The officials had been working for months on the task of bringing the Australian Workers' Union – Workplace Reform Association Inc. into existence. It was only a brief existence. Although it was not deregistered until 20 February 2006, its relevant life ceased in late 1995.

Bruce Wilson

4. The main progenitor of the Australian Workers' Union – Workplace Reform Association Inc. was Bruce Morton Wilson. He was born in 1956. He joined the Australian Workers' Union ('AWU') in 1978. From about that time he was active in the left wing of the Australian Labor Party – or at least he was active in opposition to those whom he saw as being in the right wing. He worked in the mining industry in Western Australia. He was elected to various official posts. For various reasons he fell into discord with those running the West Australian branch of the AWU. His particular foe was the Branch Secretary, Joe Keenan.³

² Gillard MFI-1, p 32.

³ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 7-49.

Ralph Blewitt

5. From 1987 Bruce Wilson befriended Ralph Edwyn Blewitt, who had been employed as an organiser for the West Australian branch of the AWU from 1987.⁴ Ralph Blewitt was born in 1945. His education ended when he left school at 16. He joined the Army in 1966 and served as a volunteer in Vietnam. He then lived in Victoria. He was active in the Australian Labor Party and worked as an organiser for the Timber Workers Union. He then went to Western Australia where, as an organiser for that branch of the AWU, he met Bruce Wilson.⁵

B – THE RISE OF BRUCE WILSON

The emergence of Bruce Wilson

6. In 1989 Bruce Wilson ran unsuccessfully for election as general secretary (i.e. national secretary) of the AWU. Bill Ludwig of the Queensland branch supported Bruce Wilson's desire to reform the West Australian branch of the AWU. Bruce Wilson created an 'AWU reform group' which had some success in elections for the annual convention.
7. In early 1991 Joe Keenan got his retaliation in first by procuring the West Australian branch of the AWU to dismiss Bruce Wilson from his employment as organiser. With the aid of Bill Ludwig and pursuant to a resolution of the national executive committee,

⁴ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 40-47.

⁵ Ralph Blewitt, 12/5/14, T:6.46, 98.24-41.

Bruce Wilson gained employment as a national organiser based in Western Australia. He then succeeded in ‘persuading’ Joe Keenan to retire, and in his place he was elected Branch Secretary on 2 May 1991.⁶ He had been shop steward, site convener, ‘full-time convener’, organiser, West Australian delegate to the national executive committee of the AWU and delegate to the annual convention of the AWU. He held these posts with honour and acclaim. So long as he remained a junior official, he seemed destined for greater things. By universal consent he was thought fit to lead the union – until he led it.

8. After the putsch came the purge. Without much false sentimentality Bruce Wilson removed some officials – ‘dead wood’⁷ – and replaced them with others he trusted.⁸ Bruce Wilson’s election as State Secretary meant that he automatically became a Vice-President on the national executive. That left a vacancy on the national executive, and Ralph Blewitt was elected to fill it. Ralph Blewitt also became Assistant Secretary of the West Australian branch.

9. The AWU is an old union. In 1991 it was a large one. The West Australian branch had about 15,000 members.⁹

⁶ Bruce Wilson, 12/6/14, T:408.21-31; Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 74-79.

⁷ Bruce Wilson, 12/6/14, T:408.33-42.

⁸ Ralph Blewitt, 12/5/14, T:9.13-26.

⁹ Ralph Blewitt, 12/5/14, T:7.21.

10. In about 1990 the Australian Council of Trade Unions developed a blueprint for union amalgamations. Some CFMEU officials and some ACTU officers thought that the CFMEU should become the primary industry construction union. Bruce Wilson disagreed. He conceived the idea of developing a 'National Construction Branch' within the AWU. His goal was to maintain and strengthen the AWU's position in the construction industry.¹⁰

The advent of Slater & Gordon

11. From 1989 or 1990 a firm of solicitors named Slater & Gordon had been acting for the Victorian branch of the AWU.¹¹ On the recommendation of Victorian AWU officials, in September 1991 the West Australian branch executive appointed Slater & Gordon to provide legal services for that branch. One of the solicitors in the industrial unit of the firm was Julia Eileen Gillard.¹² She had risen fast in the firm to the rank of salaried partner. She had been in practice for four years.¹³ But she had done some work related to the West Australian branch of the AWU a little earlier. In an interview on 11 September 1995 Julia Gillard told her partners, Peter Gordon and Geoff Shaw, that in 1991 Bruce Wilson 'was ... basically stalking the then WA secretary [Joe Keenan] with a view to getting him out and taking his position, and he needed some

¹⁰ Bruce Wilson, witness statement dated 6/4/14, 12/6/14, paras 87-93.

¹¹ Julia Gillard, 10/9/14, T:765.44-766.1.

¹² For some years, Julia Eileen Gillard was entitled to the appellation 'The Hon Julia Gillard', and she still is. Below she is referred to simply as 'Julia Gillard', the name which she bore for most of the period to which this Interim Report relates. No disrespect is intended by this abbreviation.

¹³ Julia Gillard, 10/9/14, T:765.12-42.

legal advice about arrangements to do with that'.¹⁴ At the request of another Slater & Gordon solicitor she stayed in Perth after conducting some litigation in order to meet and advise Bruce Wilson. Who, if anyone, was paying for this advice to the young pretender? That is unclear. But that was how she and Bruce Wilson first met in about April 1991. They commenced what they called 'a personal relationship' in late 1991.¹⁵

The relations between Bruce Wilson and Ralph Blewitt

12. By 1992 Bruce Wilson and Ralph Blewitt had worked closely together for five years. Their offices were near each other. They lived one suburb apart. They spoke to each other on most days. They became close friends.¹⁶ Bruce Wilson was the younger man. But he had the superior position.¹⁷ He had been in the West Australian branch of the AWU much longer. From 2 May 1991, he had the duties of Branch Secretary, to which were added those of Acting Secretary of the Victorian branch from July 1992. Ralph Blewitt became West Australian branch secretary in his place on 18 February 1993.¹⁸

¹⁴ Gillard MFI-1, p 133.

¹⁵ Bruce Wilson, witness statement dated 4/6/14 12/6/14, paras 82-86; Julia Gillard, witness statement 4, 10/9/14, paras 8-9; Gillard MFI-1, p 133. Bernard Murphy testified that the events transpired in the opposite order: Bernard Murphy, 9/9/14, T:587.10-12. But he was not in the best position to know.

¹⁶ Ralph Blewitt, 12/5/14, T:8.21-9.7; Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 42-46; Christine Campbell, 23/6/14, T:907.4-5.

¹⁷ Bernard Murphy, 9/9/14, T:607.13-15. On 13 June 2011 this witness became a Judge of the Federal Court of Australia. But his role in the events described below ceased in 1995. He is therefore referred to as 'Bernard Murphy'. No disrespect is intended.

¹⁸ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 97-99 and 102.

13. Ralph Blewitt claimed that he was afraid of Bruce Wilson.¹⁹ He said he feared that if he did not comply with Bruce Wilson's directions he would lose his job.²⁰ These were exaggerations.²¹ But they contain a kernel of truth. That kernel is not negated by the fact that others did not observe intimidation.²² In its nature intimidation is often carried out in private. Bruce Wilson was in a position of considerable influence over Ralph Blewitt. In the long run, Bruce Wilson had the de facto power to remove Ralph Blewitt if the latter displeased him. On becoming West Australian Secretary he had dismissed existing officials and replaced them. Short of dismissal, he could make life uncomfortable for Ralph Blewitt if he did not stay in line. And mild fear marched in step with real attraction. Ralph Blewitt saw Bruce Wilson as 'charismatic' and 'approachable'.²³ Bruce Wilson moved with men of real power in the union like Bill Ludwig. He was seen as Bill Ludwig's protégé. A Victorian AWU member, Robert Kernohan, saw the young Bruce Wilson as being 'militant and aggressive'.²⁴ Ralph Blewitt said Bruce Wilson was '[v]ery, very close' to Bill Ludwig's faction.²⁵ In October 1992 Bill Ludwig described Bruce Wilson as 'a doer. The organisation needs people like him ... For the AWU to survive we need strong willed

¹⁹ Ralph Blewitt, 12/5/14, T:75.2-8.

²⁰ Ralph Blewitt, 12/5/14, T:75.2-8.

²¹ Christine Campbell, 23/6/14, T:907.37-908.19, 909.32-34.

²² Bernard Murphy, 9/9/14, T:607.17-37; Ian Cambridge, 10/6/14, T:222.40-223.40

²³ Ralph Blewitt, 12/5/14, T:98.19.

²⁴ Robert Kernohan, witness statement, 11/6/14, para 28.

²⁵ Ralph Blewitt, 12/5/14, T:40.44.

people’.²⁶ The editor of *Industrial Relations and Management* described Bruce Wilson as ‘young, very ambitious and considered by his supporters as a strong willed “[d]oer”. In other words, leadership material.’²⁷ In Ralph Blewitt’s view, ‘Mr Wilson was being groomed by Mr Ludwig for a potential Prime Minister’s position within the ALP. He was very highly thought of at the time.’²⁸ Normally Bruce Wilson is not linked with John Curtin and Ben Chifley in the same thought, but he had achievements, ambitions, energies and skills – actual and reputed – beyond those of Ralph Blewitt, who initially aspired to be no more than an organiser.²⁹

14. Ian Cambridge, in those days a senior AWU official, said the two men were ‘close’. But he saw Ralph Blewitt as ‘not particularly intelligent’, as Bruce Wilson’s ‘gopher’, and as being in his position only because of his loyalty to Bruce Wilson.³⁰ Bruce Wilson’s secretary, Christine Campbell, said she ‘tolerated Ralph

²⁶ Robert Kernohan, witness statement, 11/6/14, annexure RJK-11.

²⁷ Robert Kernohan, witness statement, 11/6/14, annexure RJK-11.

²⁸ Ralph Blewitt, 12/5/14, T:40.45-47.

²⁹ Ralph Blewitt, 12/5/14, T:7.39-40.

³⁰ Ian Cambridge, witness statement, 27/5/14, para 25. Ian Cambridge has been a Commissioner for the Fair Work Commission since 2009. From 1996 to 2009 he was a Commissioner in the NSW Industrial Relations Commission. He enters this Interim Report in two ways. He was a senior AWU official in the 1990s (and his evidence is of considerable value in that regard). And he had dealings with Paul Bracegirdle as Commissioner in 2011: see Ch 6.2. In his capacity as a senior AWU official he is referred to as ‘Ian Cambridge’, and in his present capacity he is referred to as ‘Commissioner Cambridge’. No disrespect is intended by the former usage.

because he was, to my observation, a loyal and trusted servant of Bruce's.³¹

15. Colin Gibson, industrial relations manager of Woodside, believed that Ralph Blewitt did not 'appear to be all that competent and ... just did what Bruce told him to do'.³² He said that even after Ralph Blewitt became State Secretary, Bruce Wilson 'was still very much running the show' even though he had moved to Victoria. '[W]e felt that if you wanted anything done then it had to be done with Bruce and Ralph was simply Bruce's puppet'.³³ In oral evidence, Colin Gibson said that the relationship between Bruce Wilson and Ralph Blewitt was an 'obvious underling relationship between the boss and the servant'.³⁴ Thus in late 1992 there was a meeting between Colin Gibson, his superior (Chris Cronin), Bruce Wilson and Ralph Blewitt. Colin Gibson and Chris Cronin were offered coffee by Bruce Wilson. Colin Gibson's evidence was:³⁵

We said, "Yeah, that sounds like a pretty good idea." He then made it clear that what he was talking about was a latte, flat-white type coffee, not a go-and-make-your-own-instant type coffee, and we said, "Yep, sounds even better." There was a little [café] just around the corner from the AWU office.

16. He continued: 'With that Bruce said something to Ralph like, "Well fuck off and get the coffees." Ralph then left without

³¹ Christine Campbell, witness statement, 23/6/14, para 11.

³² Colin Gibson, witness statement, 23/6/14, para 14.

³³ Colin Gibson, witness statement, 23/6/14, para 12.

³⁴ Colin Gibson, 23/6/14, T:898.40-41.

³⁵ Colin Gibson, 23/6/14, T:898.23-29.

question and got the coffees.’³⁶ Bruce Wilson claimed that the incident happened – or ‘would have’ happened differently:³⁷

I would describe it as Gibson and Cronin would have come into the room. Ralph would have been there. I would have asked if they wanted a coffee and then Ralph would have got up and said, “I’ll get the coffee.” And typically, Ralphie would have stood there and chatted away and kept on going on and on and in the end I would have just said, “Get the fucking coffee.” It would have appealed to Ralph.

17. This does not seem very different. In any event senior counsel for Bruce Wilson did not cross-examine Colin Gibson to suggest that his version was either different or wrong and did not explain why the difference was important.³⁸ Colin Gibson’s account must be accepted.
18. Whatever the reason, the fact is that Ralph Blewitt did not show much independence from Bruce Wilson – except perhaps in dishonesty. He was generally a faithful henchman. He tried tirelessly to carry out Bruce Wilson’s wishes as best he could.

C – THE FIRST THIESS DECEPTION: THE DAWESVILLE CHANNEL PROJECT

The Thiess contract

In 1991 the Western Australian Labor government decided to embark on the Dawesville Channel Project. It involved building a channel and bridge at Dawesville, about 80 kilometres south of

³⁶ Colin Gibson, witness statement, 23/6/14, para 13.

³⁷ Bruce Wilson, 12/6/14, T:517.37-44.

³⁸ Submission on behalf of Bruce Wilson, 14/11/14, para 4.22.

Perth, to enable seawater from the Indian Ocean to enter and flush out an estuary system which would otherwise develop algal bloom.³⁹ The Western Australian State Manager for Thiess Contractors Pty Ltd was Nicholas Jukes. He negotiated with the Western Australian Department of Marine and Harbours for Thiess to obtain the contract. It was signed in December 1991.⁴⁰ According to Ralph Blewitt, Bruce Wilson also negotiated with Australian Labor Party officials and the Western Australian government to ensure this outcome.⁴¹ Since many of Thiess's employees were members of the AWU rather than the CFMEU, he had a motive to do this, and it is possible that he did.

The Wilson-Jukes agreement

20. Bruce Wilson and Nicholas Jukes of Thiess then reached an agreement that Thiess would pay for an AWU representative on a fulltime basis to attend the site of the Dawesville Channel Project and provide and arrange for training programmes for the workers. Invoices for the representative's services were to be submitted to Thiess monthly. Nicholas Jukes then left Perth to become General Manager in Queensland. Joseph Trio took over as Western Australian State Manager. In Queensland, Nicholas Jukes drafted a letter formalising his agreement with Bruce Wilson and faxed it to Perth. Joseph Trio signed it and sent it to 'the Secretary AWU

³⁹ Ralph Blewitt, 12/5/14, T:9.40-10.1; Nicholas Jukes, witness statement, 10/6/14, para 5.

⁴⁰ Nicholas Jukes, witness statement, 10/6/14, paras 5-6.

⁴¹ Ralph Blewitt, 12/5/14, T:10.6-11.25.

Workplace Reform Association’, for the attention of Ralph Blewitt.⁴² The letter was dated 16 March 1992.

21. Bruce Wilson must have possessed immense charm in 1991-1992. That charm has not wholly fled from him even now, after more than 20 years’ battering by failure and disappointment. It is a measure of that charm that the hard-bitten and experienced Thiess executives, toughened in years of struggles with equally hard-bitten union officials, proprietors and contractors, should have agreed to spend hundreds of thousands of dollars in return for so ill-defined a promise. Thiess, however, does seem to have had a sincere interest in improved worker training, and this was true of Martin Albrecht, the Managing Director, in particular.⁴³ Perhaps Thiess also had a desire to build good relations with the AWU in order to secure greater industrial peace than was thought possible with the CFMEU. These misty ideals seem to have shrouded Bruce Wilson’s deceitful side from the uncritical eyes of Thiess. For Ralph Blewitt never had any intention of providing any services to Thiess on the Dawesville site, and he rightly believed that Bruce Wilson did not have that intention either. That was because Bruce Wilson told him that no services would be provided, though there would be a system for sending invoices to Thiess periodically. Bruce Wilson instructed Ralph Blewitt that the sums invoiced, on being paid by Thiess to an address distinct from that of the AWU, would be banked in accounts separate from those of the AWU without anyone else at the AWU knowing

⁴² Nicholas Jukes, witness statement, 10/6/14, paras 9-12; Ralph Blewitt, 12/5/14, T:13.28-38; Joseph Trio, witness statement 9/9/14, para 13.

⁴³ Joseph Trio, witness statement, 9/9/14, para 7.

(other than Bruce Wilson's secretary, Christine Campbell).⁴⁴ This was done. But no services were ever rendered.

D – INCORPORATING THE ASSOCIATION

The origins of the incorporated association

22. Once Bruce Wilson had reached the agreement with Nicholas Jukes which was later formalised in the 16 March 1992 letter, a question arose. Who or what was to receive the monthly payments to be made by Thiess? Bruce Wilson accepted that he was the driving force behind the idea of setting up an incorporated association for that purpose.⁴⁵ But was Thiess ever told of this? Bruce Wilson claimed that in a meeting in Sydney between himself, Nicholas Jukes, Bill Ludwig and Martin Albrecht, someone suggested that a legal entity separate from the AWU be set up to run the training and receive the payments, and that Bill Ludwig and Martin Albrecht gave their blessing to this arrangement.⁴⁶ Nicholas Jukes, however, denied any discussion of this. He said the discussion was limited to national standards for improved training.⁴⁷ He accepted that Bruce Wilson discussed his idea of a National Construction Branch and that Thiess saw advantages in a national AWU approach to training.⁴⁸ But he denied any discussion about how to fund that enterprise. And he

⁴⁴ Ralph Blewitt, 12/5/14, T:15.1-16.25.

⁴⁵ Bruce Wilson, 12/6/14, T:420.10-12.

⁴⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14 paras 109-117.

⁴⁷ Nicholas Jukes, 10/6/14, T:275.36-276.37.

⁴⁸ Nicholas Jukes, 9/9/14, T:668.24-40.

maintained that there was no discussion about setting up the National Construction Branch as a separate vehicle. He was quite firm in these denials.⁴⁹ Nicholas Jukes' evidence about the Sydney meeting should be accepted. There is no circumstantial or other evidence supporting Bruce Wilson. Nicholas Jukes was in general a very credible witness. Bruce Wilson, unfortunately, was not.⁵⁰ Nicholas Jukes also said that the Thiess executives thought they were dealing with the AWU, not a distinct incorporated association.⁵¹ His evidence was to the effect that he may have been told at a meeting in Perth in March 1992 that the training would be supplied through an incorporated association but he at all relevant times understood or assumed that Thiess was dealing with an incorporated association that was part of or controlled by the AWU, such that any such disclosure at a meeting in March 1992 (if it in fact occurred) would have had little significance for him.⁵² However, this courteous concession does not make acceptable Bruce Wilson's evidence that at a March 1992 meeting there was disclosure of a separate incorporated association.⁵³ If his evidence about the disclosure at the first meeting in Sydney is rejected, as it must be, there is no reason to accept his evidence about the disclosure in Perth in March 1992. Joseph Trio was also at the March meeting, and his testimony gave Bruce Wilson no support. He thought that the Australian Workers' Union –

⁴⁹ Nicholas Jukes, 9/9/14, T:6 69.34-670.26.

⁵⁰ See Appendix A to this Chapter.

⁵¹ Nicholas Jukes, 10/6/14, T:276.21-40.

⁵² Nicholas Jukes, 9/9/14, T:670.41-672.36.

⁵³ Bruce Wilson, witness statement dated 4/6/14, 12/6/14 para 124.

Workplace Reform Association Inc. was part of the AWU.⁵⁴ He was not cross-examined by senior counsel for Bruce Wilson to elicit support for Bruce Wilson's evidence.⁵⁵ It may be inferred either than she had no instructions or, if she did, that she had no confidence in them.

23. Before the 16 March 1992 letter was sent some steps had been taken to set up the incorporated association. Bruce Wilson was determined to keep the incoming Thiess money separate from the AWU, and he sought information from various sources – including, he believed, Julia Gillard⁵⁶ – about how to go about it. This led him to favour an incorporated association. Ralph Blewitt said that Bruce Wilson told him that this was what he wanted,⁵⁷ that he wanted the incorporated association 'kept out of arm's reach of the AWU as a separate entity',⁵⁸ and that he 'wanted it kept confidential from the rest of the [AWU] officials and the executive'.⁵⁹ Bruce Wilson accepted that that 'may very well have been' part of the reason; the other part was the need for separation from the AWU.⁶⁰

24. Why was the incorporated association to be kept confidential? Though Bruce Wilson's testimony does not support this, Ralph

⁵⁴ Joseph Trio, witness statement, 9/9/14, paras 14.

⁵⁵ Joseph Trio, 9/9/14, T:655.34-665.8.

⁵⁶ Bruce Wilson, 12/6/14, T:410.24-25.

⁵⁷ Ralph Blewitt, 12/5/14, T:13.40.-14.2.

⁵⁸ Ralph Blewitt, 12/5/14, T:14.19-20.

⁵⁹ Ralph Blewitt, 12/5/14, T:14.23-24.

⁶⁰ Bruce Wilson, 12/6/14, T:412.45-413.7.

Blewitt said the reason was: ‘We needed to raise funds for potential election campaigns in the future and this was a vehicle to raise those funds’.⁶¹ This idea was probably passed on to Julia Gillard. For her evidence was:⁶²

I understood that it was the desire of Mr Wilson and others involved in the Association to have an association, to be a team that would run together for union elections, and to have an account into which they would bank moneys that they had fund-raised for that purpose, yes.

25. Unknown to Julia Gillard, this was not their desire. Their desire was to set up a mechanism which would enable them to milk Thiess in secrecy.
26. The precise chronology of events in the first half of 1992 is a little hazy.
27. A new post office box address was selected for the proposed incorporated association – PO Box 253, Northbridge, WA 6865. Obviously this happened before 16 March 1992, because the 16 March 1992 letter was sent to that address. In contrast, the AWU’s post office box address was PO Box 8122, Perth Business Centre.⁶³ The selection of the new address precluded mail relating to the proposed incorporated association’s affairs coming to the attention of other AWU officials, with their prying eyes and wagging tongues.

⁶¹ Ralph Blewitt, 12/5/14, T:14.44-46.

⁶² Julia Gillard, 10/9/14, T:774.34-39. See also T:771.8-12.

⁶³ Christine Campbell, witness statement, 23/6/14, para 35.

28. Before 6 March 1992, Bruce Wilson and Ralph Blewitt attempted to form an incorporated association. But this attempt was rejected on the grounds that the proffered name, ‘The Australian Workers’ Union (WA) Branch Workplace Reform Association Inc.’ sounded too much like a union.⁶⁴ The significance of that is that s 4(3) of the *Associations Incorporation Act 1987* (WA) provided that a trade union, as defined in the *Trade Unions Act 1902* (WA), is not eligible to be incorporated under the *Associations Incorporation Act*.⁶⁵ Bruce Wilson then decided that legal advice was required from Slater & Gordon.

29. This is corroborated by Julia Gillard. She testified:⁶⁶

Prior to April 1992, I was asked by Wilson about the holding of election fund moneys. At the time, to my knowledge, it was common practice within unions for union officials to establish election funds which were used to finance election campaigns. I was aware that Slater & Gordon had incorporated associations for individuals involved in running union elections and as such enabled the associations to hold election funds.

I provided advice to Wilson and Blewitt in relation to the setting up of an incorporated association. I was subsequently instructed by them to incorporate an association which became known as the Australian Workers Union Workplace Reform Association (“the association”). I understood that the purpose of the association was to support the re-election of union officials who would campaign for workplace reforms including better occupational health and safety.

30. In oral evidence she said that there were conversations to the following effect:⁶⁷

⁶⁴ Ralph Blewitt, 12/5/14, T:16.37-45.

⁶⁵ Some key provisions of that Act are set out in Appendix H to this Chapter.

⁶⁶ Julia Gillard, witness statement 4, 10/9/14 paras 12-13.

⁶⁷ Julia Gillard, 10/9/14, T:771.9-12. See also T:772.7-15, 785.4-8.

Mr Wilson raised with me wanting to have a fund in Western Australia that would support him and his team in their re-election in Western Australia and, you know, regularising arrangements amongst the team.

31. She explained the background more fully in her interview with her partners Peter Gordon and Geoff Shaw on 11 September 1995.⁶⁸

Peter Gordon asked:

Now, around about mid 1992 were you asked by Bruce or Ralph or anyone connected with the AWU to set up certain unincorporated [sic] associations to enable, to enable the union or factions within it to raise and control funds?

32. She responded in a way which vividly describes the problems of many 'slush funds':

I don't recall the date but I was asked by Bruce to, I was asked by Bruce to form, I was asked by Bruce about the holding of election fund monies. It's, it's common practice, indeed every union has what it refers to as a re-election fund, slush fund, whatever which is the funds that the leadership team, into which the leadership team puts money so that they can finance their next election campaign. It is not proper to use union resources for election campaigns so you need to finance them yourself. Some of them, you know they can cost 10,000, 20,000 dollars, they're not cheap. So the usual mechanism people used to amass that amount of money is that they require the officials who ran on their ticket to enter payroll deduction schemes where money each week or fortnight goes from their pay into a bank account which is used for re-election purposes from time to time. They also have different fund raisers, dinners and raffles and so on to amass the necessary amount of money to mount their re-election campaign. Bruce wanted to have such an account. We have at Slater & Gordon, we have incorporated associations for the purposes of holding, if you like, being the legal entity that holds such an account. The thinking behind the forming of incorporated associations is that it had been our experience that if you did it in a less formal way, you just had someone say, Fred Bloggs say oh look I'll just open a bank account and everybody can put the money into it. There the problem developed that when the leadership scheme fractured, as relatively commonly happens, you got into a very difficult dispute about who was the owner of the moneys in the bank account. So it was better to have an incorporated association, a legal

⁶⁸ Gillard MFI-1, pp 134-135.

entity into which people could participate as members, that was the holder of the account. So, I advised Bruce that we had done that in the past for unions. We had incorporated associations. I was uncertain whether the laws in Western Australia were akin to the laws in Victoria about the incorporation of associations. I subsequently checked and my recollection is that they had an almost identical [A]ct and I was then instructed to incorporate an association and did so.

33. In her testimony she said that she could not herself recall having earlier set up any incorporated association for re-election purposes.⁶⁹ Bernard Murphy, too, had never set up an incorporated association to operate a re-election fund.⁷⁰ But Julia Gillard had some involvement in operating incorporated associations. And, with the aid of Tony Lang, another solicitor in Slater & Gordon who had particular expertise in incorporated associations, she had been involved, in a personal capacity, in setting them up. These incorporated associations were Socialist Forum and Emily's List (a Labor women's association). She had also been involved in other incorporated associations and had 'a couple of precedents' in her personal precedent file.⁷¹ In oral testimony she confirmed that she checked the Western Australian Act in the light of her familiarity with the Victorian Act.⁷² There is no reason to doubt any of this evidence. Like almost all her evidence, it should be accepted.

34. Julia Gillard denied knowledge of any particular accounts operated by the Australian Workers' Union – Workplace Reform Association Inc. But she accepted that at the time she provided

⁶⁹ Julia Gillard, 10/9/14, T:772.29-35, 773:2-7.

⁷⁰ Bernard Murphy, 9/9/14, T:594.40-42.

⁷¹ Julia Gillard, 10/9/14, T:778.20-27, 779.9-780.16; Gillard MFI-1, pp 137-138.

⁷² Julia Gillard, 10/9/14, T:773. 13-27.

legal advice on the incorporation of the association she knew there was an intention to set up a bank account.⁷³ There is no reason not to accept this evidence, either. In her perception, there was to be an incorporated association intended to formalise arrangements between officials intending to run together at the next election and raise funds for the election campaign.⁷⁴ An incorporated association of that kind would probably set up a bank account into which to deposit the funds raised, in preference to putting them in a sock or keeping them under a bed.

Instructions to Julia Gillard about incorporation

35. In advising on the creation of the incorporated association, Julia Gillard viewed Bruce Wilson and Ralph Blewitt as her clients, giving instructions to her in their personal capacities.⁷⁵ She took instructions from both of them, but from Bruce Wilson more than from Ralph Blewitt, though the latter was signatory to two relevant documents with Julia Gillard's writing on them.⁷⁶
36. Some of the instructions were given at a meeting or meetings. There are differences amongst the witnesses about whether one of them was in Melbourne and about who was present. Was Bernard Murphy, the partner to whom Julia Gillard reported, present? Ralph Blewitt firmly said he was.⁷⁷ But Bruce Wilson, Bernard

⁷³ Julia Gillard, 10/9/14, T:773.29-774.33-39; Gillard MFI-1, p 134 and 137.

⁷⁴ See Julia Gillard, 10/9/14, T:785.4-8.

⁷⁵ Julia Gillard, 10/9/14, T:797.12-21. See also T:771.29-35.

⁷⁶ Julia Gillard, 10/9/14, T:778.37-779.7.

⁷⁷ Ralph Blewitt, 12/5/14, T:17.39-42.

Murphy and Julia Gillard said he was not.⁷⁸ There is no reason not to accept these denials, particularly that of Bernard Murphy, who was adamant about it. There may have been more than one meeting between Julia Gillard and Bruce Wilson, with Ralph Blewitt being present at one but not another or others. These uncertainties do not matter. It is probable that there was a meeting attended by Bruce Wilson and Julia Gillard. It is highly probable that Ralph Blewitt was at that meeting with Julia Gillard or another meeting with her. That is because the Application for Incorporation of Association and the Applicant's Certificate to Accompany Application for Incorporation, both dated 22 April 1992, bear the writing of each of them, as will be discussed below.⁷⁹ The two documents do not bear the writing of Bruce Wilson. This is probably because, as Bruce Wilson said to Ralph Blewitt, the association was going to be registered in Ralph Blewitt's name and Bruce Wilson wanted it kept at arm's length from himself.⁸⁰ That statement is confirmed by the fact that Bruce Wilson at no later stage ever revealed any connection between the Australian Workers' Union – Workplace Reform Association Inc. and himself, except in applying to open accounts with the Commonwealth Bank.

37. It is very likely that there was a meeting before 6 March 1992. That is because on that day an advertisement appeared in *The West*

⁷⁸ See Bernard Murphy, witness statement, 9/9/14, para 3.2; Bernard Murphy, 9/9/14, T:572.8-45; Julia Gillard, witness statement 4, 10/9/14, para 15; Julia Gillard, 10/9/14, T:781.11-13; Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 135.

⁷⁹ See paras 51-70.

⁸⁰ Ralph Blewitt, 12/5/14, T:19.5-28.

Australian newspaper. It announced that Ralph Blewitt intended to apply for the incorporation of The Australian Workers' Union Workplace Reform Association Inc. Ralph Blewitt placed the advertisement and Bruce Wilson drafted it, at least in part.⁸¹ It is very likely that Ralph Blewitt did this on Julia Gillard's legal advice, or possibly advice from Stephen Booth, an AWU industrial officer, because he probably would not have known otherwise that this had to be done. But beyond that Julia Gillard's precise role in relation to the advertisement is unclear. It is also likely that there was a meeting on or perhaps just before 22 April 1992, since on that day Ralph Blewitt signed the Application for Incorporation of Association and the Applicant's Certificate to Accompany Application for Incorporation, and both he and Julia Gillard placed other writing on the two documents in both blue and black.

38. It is not clear on the evidence when the Application was filled in. There are the following possibilities:
- (a) It was filled in in a meeting attended by Ralph Blewitt, Bruce Wilson and Julia Gillard on or just before 22 April 1992.
 - (b) Parts were filled in by Ralph Blewitt and parts by Julia Gillard while they were in different places, the statement being faxed or posted back and forth.

⁸¹ Ralph Blewitt, 12/5/14, T:17.2-5; Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 119.

- (c) After some parts were filled in by Julia Gillard in Bruce Wilson's presence but not Ralph Blewitt's, the form was taken by Bruce Wilson and given to Ralph Blewitt for completion.
 - (d) Parts were filled in by Julia Gillard and the rest filled in by Ralph Blewitt later.
39. Possibility (b) is unsupported by evidence and is inherently improbable. That is because it is doubtful that in 1992 either the West Australian branch of the AWU or Slater & Gordon had a fax machine capable of transmitting in colour. It is highly unlikely that the postal service was used because of delays. Possibility (c) receives some support from certain passages in Bruce Wilson's evidence.⁸² But even in these passages he says only that he cannot recall Ralph Blewitt being present; he does not deny it. Possibility (d) was one possibility raised by Julia Gillard, but she could not recollect one way or another whether that was the case or possibility (a) applied.⁸³ Possibility (a) seems the most probable. It is left open by Julia Gillard's oral testimony. It is also supported by Ralph Blewitt.⁸⁴ Ralph Blewitt also said that he inserted the date and his signature at a date later than the date of the meeting.⁸⁵ Certainly that insertion seems to have been made after the rest of the form was filled in: for the other wording of

⁸² Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 129-131; see also Bruce Wilson, 12/6/14, T:417.18-28, T:420.39-40.

⁸³ Julia Gillard, 10/9/14, T:796.10-14.

⁸⁴ Ralph Blewitt, 12/5/14, T:20.22-24.

⁸⁵ Ralph Blewitt, 12/5/14, T:22.22-27.

Ralph Blewitt on the form is on blue ink, while the date and signature are in black ink.

40. But there may well have been other meetings at which Julia Gillard gave advice to Bruce Wilson or Ralph Blewitt or both.

The legislative importance of a pre-existing association

41. The *Associations Incorporation Act 1987* (WA) assumed and in places expressly provided that an association could not be incorporated under that Act unless it already existed: see, for example, ss 4, 5, 6 and 9. It further provided, by s 6(1), that an application for incorporation of an association could not be made unless an advertisement in the prescribed form had been published, at least one month before the application was made, in a newspaper circulating in the area 'where the association *is* situated or conducts its affairs' (emphasis added).
42. The provisions of the Act requiring that there be a pre-existing unincorporated association before an application was made to have it incorporated were not mere matters of form. The statutory language rested on considerations of substantive significance. The function of this requirement was plainly to give to persons who had experience of the unsatisfactory past conduct of the association or its controllers or members an opportunity to draw this to the attention of the Commissioner for Corporate Affairs. Section 7 gave any person one month after the s 6 advertisement was published to request the Commissioner to decline to incorporate the association under the Act. The unsatisfactory past

conduct might have been dealings with the association's creditors. It might have been non-compliance with the association's rules. It might have been internal dealings with and among members. It might have related to any other aspect of the association's life up to that time. The requirements of s 6(2) that the advertisement be published at least one month but not more than three months before the application was made ensured that anything reported by persons whose experience with the association had not been satisfactory could include the most up-to-date experience. The legislation thus created a technique by which members of the public opposed to incorporation could bring information to the attention of the Commissioner for Corporate Affairs before that official made a decision to grant or refuse the application for incorporation pursuant to s 9.

The 6 March 1992 advertisement

43. It was impossible for Ralph Blewitt to comply with the requirements of s 6. There was no existing association. Since there was no association, there was no relevant area in which it was situated or conducted its affairs. However, the 6 March 1992 advertisement in *The West Australian* newspaper stated:⁸⁶

THE AUSTRALIAN WORKERS UNION (WA) BRANCH –
WORKPLACE REFORM ASSOCIATION INC.

Notice is hereby given that Ralph Blewitt of 138 Warwick Rd, Duncraig, Union Official, being duly authorised by the above Association, intends to apply to the Commissioner of Corporate Affairs on or after 8 April 1992 for the incorporation of the Australian Workers' Union Workplace Reform

⁸⁶ Blewitt MFI-1, p 56.

Association Inc. The Association is formed for the purpose of promoting and encouraging workplace reform for workers performing construction and maintenance work.

44. One curious feature of the advertisement is that the body which, it was said, had 'duly authorised' Ralph Blewitt to apply for incorporation had a different name from the body which was to be incorporated. A second curiosity is that the body with these different names did not exist. It was a lie to say that it did. Therefore it could not have duly authorised Ralph Blewitt to apply for incorporation of the association named in the body of the advertisement. That was a second lie. An important statutory safeguard for the interests of affected persons – knowledge of the pre-incorporation history of the association – was thus ignored. It was an important safeguard, because the public generally had an interest in preventing the creation of a new legal person with the ability to endanger the interests of creditors. For the creation of a new legal person as a result of dealings with a senior official of the State of Western Australia was not some mere inter partes dealing between Bruce Wilson and other persons having no general significance. It affected the public at large. The representation in the advertisement that the body existed was false. There was a third lie about the purpose of the Association. These were all lies because they were false to the knowledge of Ralph Blewitt and Bruce Wilson. They were lies to the public. The lies were later to be repeated many times in the next four months. The lies were repeated to the Commissioner for Corporate Affairs. The lies were repeated to Thiess. The lies were repeated to the Commonwealth Bank.

E – THE LETTER OF 16 MARCH 1992

The text

45. This narrative of the steps towards incorporation must be interrupted in order to examine what is the next key event. That is the letter of 16 March 1992 which had been drafted by Nicholas Jukes, signed by Joseph Trio,⁸⁷ and sent to Ralph Blewitt. It was as follows:⁸⁸

The Secretary
Australian Workers' Union
Workplace Reform Association
PO Box 253
NORTHBRIDGE WA 6865

Attention: Mr R Blewitt

Dear Ralph

RE DAWESVILLE CHANNEL PROJECT

Further to our recent discussions, I confirm our agreement that your Association, *will provide a service* to Thiess on the Dawesville Channel Project in matters relating to workplace reform, site safety and operator training.

The AMMA, Thiess and your Association share a common concern about the need to develop programs for training on mine sites throughout Western Australia and each is committed to the principle of workplace reform. Thiess will demonstrate its commitment to training and workplace reform progressively throughout its civil construction projects.

Thiess views the Dawesville Channel Project as a good “pilot project” and welcomes your involvement in it. We are certain that both Thiess and your Association will learn a great deal from this “pilot project”.

⁸⁷ Joseph Trio was Bruce Wilson’s brother-in-law. But this has no significance in relation to the Terms of Reference. There is no evidence that Joseph Trio was privy to Bruce Wilson’s misbehaviour or any other misbehaviour.

⁸⁸ Blewitt MFI-1, p 56 (emphasis added).

As discussed, we would be pleased to second on a full time basis, a representative of *your Association to co-ordinate and liaise with our senior management and site management.* The secondment should commence in January 1992 and will last for the duration of the project.

It will be *a requirement that the seconded person works site hours* which are a maximum of 54 hours per week. In addition, all travelling costs, accommodation, industrial overheads, etc. are included in the rate agreed at \$36 per hour. Accounts are to be submitted by your Association monthly and will be paid within 30 days of receipt.

We look forward to developing a more productive, skilled and committed workforce.

Yours faithfully,
THIESS CONTRACTORS PTY LIMITED

N N Jukes
General Manager
Western Australia/Northern Territory

Assumption of an existing Association

46. There are two striking aspects of this letter. The first striking aspect of this letter is that it assumed that the Association existed on 16 March 1992. In particular, it was addressed to Ralph Blewitt as Secretary. This he was not, because there was no Association. And the letter also assumes that the Association was in a position to provide, and indeed had provided, a representative to work from January. Since it did not exist it was not in a position to do so. No more had been done towards incorporation than placing the 6 March 1992 advertisement. Not even the Application for Incorporation had been lodged. That is, the letter proceeds on a false premise. The false pretences of Bruce Wilson caused Nicholas Jukes to labour under that false premise. There is a testimonial controversy between Bruce Wilson and Nicholas Jukes as to whether the former told the latter that payments were

to be made to an incorporated association separate from the AWU. Bruce Wilson's testimony that he did has been rejected.⁸⁹ But even if it were not rejected, Bruce Wilson does not say he ever told Nicholas Jukes that the incorporated association did not come into existence until 24 June 1992.

47. Nicholas Jukes gave evidence that the letter he drafted referred to the secondment commencing in January 1992 because he believed that work had already commenced. That belief was based on a telephone call in early 1992 from Bruce Wilson in which he said: 'I have recruited Colin Saunders to assist with the training at Dawesville. He's been doing preparatory work and we are incurring costs. I need you to start paying.'⁹⁰ The sad truth was different. Colin Saunders had not been recruited. No assistance was being given. No preparatory work had been undertaken. No costs were being incurred, whether by the Association or anyone else.⁹¹

48. As a result of Bruce Wilson's telephone call, said Nicholas Jukes, he felt under some pressure to draft the 16 March 1992 letter quickly and refer to the work starting in January 1992, because that was when he thought 'the AWU had commenced working on the project'.⁹² This evidence must be accepted. It supports Nicholas Jukes' other evidence to the effect that he thought the

⁸⁹ See above para 22.

⁹⁰ Nicholas Jukes, witness statement, 9/9/14, para 7.

⁹¹ See below at para 83 and Appendix D to this Chapter.

⁹² Nicholas Jukes, witness statement, 9/9/14, para 8.

Association was the AWU.⁹³ Nicholas Jukes gave evidence that he had been told by Bruce Wilson that work had commenced on the Dawesville site in January 1992.⁹⁴ He was not cross-examined on this evidence. It must be accepted.

Duty to carry out work to earn remuneration

49. The second striking aspect of the letter is its reference to a ‘requirement that the seconded person works site hours’. In that way Thiess made it plain that no obligation on its part would be enlivened in any month unless the representative of the Association had actually carried out work in that month.
50. Bruce Wilson alleged that that aspect of the letter was superseded or overridden by an earlier oral agreement between himself and Nicholas Jukes pursuant to which Thiess would make monthly payments from the outset of the Dawesville Channel Project until the end regardless of whether any work was in fact carried out. For reasons given below,⁹⁵ this was false evidence. It was very damaging to his general credibility.

⁹³ Nicholas Jukes, witness statement, 9/9/14, paras 12; Nicholas Jukes, 9/9/14, T:666.24-43, 671.9-672.36, 674.34-675.5.

⁹⁴ Nicholas Jukes, witness statement, 9/9/14, paras 7-8.

⁹⁵ See Appendix B to this Chapter.

F – THE APPLICATION AND THE CERTIFICATE

The Application: text

51. The next key events took place on or just before 23 April 1992. On that date the Application for Incorporation of Association and the Applicant's Certificate to Accompany Application for Incorporation were filed with the Commissioner for Corporate Affairs. They were printed forms, doubtless supplied by the Commissioner for Corporate Affairs, with blanks to be filled in by the applicant. The Application for Incorporation of Association was dated 22 April 1992. It provided:⁹⁶

⁹⁶ Blewitt MFI-1, p 58.

~~ADDRESS~~
A1000035
1-917188
\$75 part

FORM 1

ASSOCIATIONS INCORPORATION ACT 1987 (SECTION 5 (1))

APPLICATION FOR INCORPORATION OF ASSOCIATION A 1002262E

To the Commissioner for Corporate Affairs:

1. I, DAVID EDWIN BLEWITT
(Full Name)
of 138 WARWICK RD DUNEDIN N.Z.
(Full Address & Occupation)

being duly authorized by the Association, apply for incorporation of the Association under the name—

Australian Workers' Union - Workplace Reform Association
(Insert Name of Association)

2. The Association is formed for the purpose of—

DEVELOPMENT OF CHANGES TO WORK TO ACHIEVE SAFE
WORKPLACE.
(Insert Main Purpose)

and is considered eligible to be incorporated as an Association within the meaning of the Act by virtue of—

Section 4 (1) (e) of the Act
(Insert Provision of Section 4 (1) applicable to this Association)

3. The Association is not formed for the purpose of trading or securing a pecuniary profit to the members from the transactions of the Association.

4. The rules of the Association marked with the letter "A" annexed to my certificate as to the matters required by Section 5 (2) (b) of the Act conform to the requirements of the Act.

5. The prescribed fee is tendered herewith.

Dated the 22nd day of APRIL 1992

Signed [Signature]
Print full name in block letters DAVID EDWIN BLEWITT

LODGED BY:

LODGED WITH THE
COMMISSION ON

NAME: D Blewitt

ADDRESS: 138 WARWICK RD DUNEDIN

TELEPHONE: 2461656

NOTE: REGULATION 13 SETS OUT THE REQUIREMENTS AS TO ANNEXURES.

52. The following version may be more legible.

FORM 1

ASSOCIATIONS INCORPORATION ACT 1987 (SECTION
5(1))

**APPLICATION FOR INCORPORATION OF AN
ASSOCIATION**

To the Commissioner for Corporate Affairs:

1. I, RALPH EDWIN BLEWITT
(Full Name)
of 138 WARWICK ROAD DUNCRAIG WA
(Full Address & Occupation)

being duly authorized by the Association, apply for
incorporation of the Association under the name –

Australian Workers' Union – Workplace Reform
Association
(Insert Name of Association)

2. The Association is formed for the purpose of –

DEVELOPMENT OF CHANGES TO WORK TO
ACHIEVE SAFE WORKPLACES.
(Insert Main Purpose)

and is considered eligible to be incorporated as an
Association within the meaning of the Act by virtue of –

Section 4(1)(e) of the Act
(Insert Provision of Section 4 (1) applicable to this
Association)

3. The Association is not formed for the purpose of trading or
securing a pecuniary profit to the members from the
transactions of the Association.
4. The rules of the Association marked with the letter "A"
annexed to my certificate as to the matters required by
Section 5 (2) (b) of the Act conform to the requirements of
the Act.

5. The prescribed fee is tendered herewith.
Dated the 22ND day of APRIL 1992
Signed R E Blewitt
Print full name in block letters RALPH EDWIN BLEWITT

LODGED BY: LODGED
WITH THE

COMMISSION ON

NAME: R BLEWITT
ADDRESS: 138 WARWICK RD DUNCRAIG
TELEPHONE: 2461656.
NOTE: REGULATION 13 SETS OUT THE
REQUIREMENTS AS TO ANNEXURES.

Key omissions from Application

53. There are many false statements – an extraordinarily large number – packed into this short and superficially routine document.
54. In the first numbered paragraph, Ralph Blewitt’s name and address in blue ink were in his handwriting.⁹⁷ The line giving the Association’s name in black ink was in Julia Gillard’s handwriting and was probably written in Perth.⁹⁸ Confidence in the certificate is not enhanced at the outset by the fact that Ralph Blewitt misspelt his own name. It is probably of no significance that the name of the Association differs from that which the certificate of incorporation eventually stated. Whether or not the form called for Ralph Blewitt’s work address rather than his home address, it was not helpful for him to omit the postcode from his home address, since it was an omission potentially productive of delay

⁹⁷ Ralph Blewitt, 12/5/14, T:20.17-20; Bruce Wilson, 12/6/14, T:419.5-11; Julia Gillard, 10/9/14, T:796.4-8.

⁹⁸ Ralph Blewitt, 12/5/14, T:20.22-29; Bruce Wilson, 12/6/14, T:419.13-29; Julia Gillard, 10/9/14, T:795.39-45.

in future communications between him and the Commissioner. The same is true of the even less complete home address he gave, with his home telephone number at the bottom of the Application. Ralph Blewitt claimed that he could not recall why he gave his home address, but thought that he was instructed to give the home address by either Bruce Wilson or Julia Gillard – he could not recall which. He said no reason was given for why he should do this.⁹⁹ There seems to be no reason why Julia Gillard would have advised this, and since the employment of the home address would be consistent with Bruce Wilson’s clandestine approach, it is probable that it was he who told Ralph Blewitt to use it. Giving the home address, not the work address, is consistent with the failure to comply with the request on the form to give Ralph Blewitt’s occupation. This is a much more significant matter. The words ‘union official’ appeared in the advertisement in *The West Australian* on 6 March 1992. But they did not appear in the Application. Nor did the words ‘Assistant State Secretary, AWU’. Was that because of a fear that to give them would trigger inquiries into how close the relationship between the Association and the AWU actually was, and thereby bring to the attention of other AWU officials what Bruce Wilson and Ralph Blewitt were up to? On the probabilities, the answer is yes.

Misleading name in Application

55. Julia Gillard said the name of the Association was given to her by Bruce Wilson or Ralph Blewitt. Where a solicitor acts for one

⁹⁹ Ralph Blewitt, 12/5/14, T:21.33-22.13

client (here AWU), and the interests of that client may be affected by the conduct of another client (Bruce Wilson), for example, by the second client using the name of the first, the solicitor is in a position of conflict. The solicitor has a duty to protect the interests of the first client and also a duty to protect the interests of the second. There is a conflict of duty and duty. The appropriate course is either to withdraw from acting for both clients, or get each of them to consent to the solicitor acting for the other. Julia Gillard did not check to see whether the National Executive of the AWU had authorised the use of the name 'Australian Workers' Union'. It is also plain that she did not check whether authority had been given by any branch of the AWU. Senior counsel for Julia Gillard submitted that Julia Gillard 'was dealing with two elected AWU officials and she was entitled to assume that, if authorisation was required, it had been obtained.'¹⁰⁰ It is true that the consent of the AWU (West Australian branch) could have been inferred from the fact that the State Secretary, Bruce Wilson, had proposed the use of the AWU's name. But that consent would not have sufficed because of the obvious conflict between his duty to the AWU and his self-interest in incorporating the new Association. It would have been necessary to find consent from some organ or official of the AWU (West Australian branch) who was not in a position of conflict. Julia Gillard did not recall any reason being proffered by Bruce Wilson or Ralph Blewitt for the use of the union's name. It gave her no concern. In particular, she had no concern that the use of the union's name would be potentially misleading or generally confusing. That was so

¹⁰⁰ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 15.

despite s 8(d) of the *Associations Incorporation Act 1987* (WA), which proscribes incorporation of an association under a name which is ‘identical with or likely to be confused with the name of any other body corporate or any registered business name’.¹⁰¹ The use of the union’s name misled the Thiess witnesses into thinking that there was a connection with the AWU.¹⁰² It misled even Christine Campbell, Bruce Wilson’s secretary, into the belief that the association ‘was AWU sanctioned’.¹⁰³ Julia Gillard’s conduct in this respect must be regarded as a lapse of professional judgment, but nothing more sinister. In the events which have happened her conduct could not have led to any legal or equitable remedy.

False claim of authorisation in Application

56. Paragraph 1 was false in suggesting that Ralph Blewitt was ‘duly authorized by the Association’ to apply for its incorporation. A related falsity appears in paragraph 2 (‘*is formed*’), paragraph 3 (‘*is not formed*’) and paragraph 4 (‘the rules’ – i.e. the *existing* rules). The falsity arises from the fact that the Association did not then exist. There was therefore no general meeting of members, no governing body, and no committee of management which could have ‘duly authorized’ the application. There was no existing association which could have had any purpose, let alone

¹⁰¹ Julia Gillard, 10/9/14, T:798.25-46.

¹⁰² See Nicholas Jukes, witness statement, 10/6/14, paras 23-24; Nicholas Jukes, 10/6/14, T:274.7-19, 276.21-25; Nicholas Jukes, witness statement, 9/9/14, paras 12; Nicholas Jukes, 9/9/14, T:666.24-43; Joseph Trio, witness statement, 9/9/14, paras 14, 20, 22; Steven Schalit, witness statement, 23/6/14, paras 12-13; Steven Schalit, 23/6/14, T:904.24-29.

¹⁰³ Christine Campbell, witness statement, 23/6/14, para 32.

that stated in paragraph 2 or that denied in paragraph 3. Nor was there any existing association which could have had any rules. A similar false representation had appeared in the advertisement of 6 March 1992.

57. First the advertisement and then the Application represented that the Association already existed when it did not. Ralph Blewitt must have known that that representation of fact was false. Hence incorporation was obtained by a fraudulent misrepresentation first to the public and then to the Commissioner for Corporate Affairs. That is so even though Ralph Blewitt may not have appreciated that he was making any fraudulent misrepresentation.
58. Did Julia Gillard appreciate that this deceit was being perpetrated? She did not recollect advising that the advertisement be placed.¹⁰⁴ She did not recall giving advice as to the content of the advertisement.¹⁰⁵ She did not believe that she drafted the advertisement.¹⁰⁶ Thus she may well not have been aware of the form which the advertisement took. The evidence does not permit a finding that she was. Hence she is to be acquitted of deceit in relation to it.
59. But what of the Application? In a passage quoted above, Julia Gillard explained convincingly that to incorporate an association avoided disputes about the ownership of its funds if the members

¹⁰⁴ Julia Gillard, 10/9/14, T:783.21-784.21.

¹⁰⁵ Julia Gillard, 10/9/14, T:784.23-26.

¹⁰⁶ Julia Gillard, 10/9/14, T:784.39-46.

fell into disputation.¹⁰⁷ She also understood at the time that a further advantage in incorporation was that the incorporation of an association limited the liability of members to third party creditors.¹⁰⁸ The creditors of an unincorporated association, legislation apart, are able to sue the members with whom they dealt to the uttermost farthing of their possessions, to use Sir John Simon's grim phrase. Once that unincorporated association becomes incorporated, the rights of creditors are limited to the assets of the incorporated association. Thus incorporation can have effects radically adverse to creditors. She also understood at the time that the Act was dealing with the transformation of already existing unincorporated into incorporated associations; that is, that it did not deal with the *creation* of associations but with the legal personality which could be conferred upon already created associations.¹⁰⁹ Yet she also accepted that on her instructions at the time there was no pre-existing unincorporated association.¹¹⁰ It followed that it had none of the attributes of a functioning unincorporated association – members, a register of members, a committee managing the association, a record of officeholders, a place where it conducted its business or other activities, books of account, auditors of those books of account, and, depending on its scale of operations, employees.

60. If she knowingly permitted Ralph Blewitt to file the Application, with all its falsehoods, she would have either failed to notice or

¹⁰⁷ Julia Gillard, 10/9/14, T:785.10-786.8. See above at para 27.

¹⁰⁸ Julia Gillard, 10/9/14, T:788.24-42.

¹⁰⁹ Julia Gillard, 10/9/14, T:786-10-789.27.

¹¹⁰ Julia Gillard, 10/9/14, T:789.29-790.9, 801.22-802.10.

deliberately ignored the requirement for an association to exist before it was incorporated, and the substantive considerations underlying that requirement. If she had failed to notice these matters, she would have been careless. That is, if she had been aware of the contents of the Application, which is unclear, she does not seem to have asked herself, or Ralph Blewitt, whether there was any basis for a claim that he was ‘duly authorised’, let alone to have demanded to see minutes or other proof of authority. She saw that as a matter for Ralph Blewitt and Bruce Wilson.¹¹¹ Nor is there evidence that she asked for proof that the unincorporated association had at least five members.¹¹² Where solicitors are helping clients to make solemn statements in applications to create new legal persons having the capacity to affect third party rights, limitation of duty in that way would depend on a very narrow retainer. This is particularly so when the clients, Bruce Wilson and Ralph Blewitt, were trade union officials not much troubled by points of detail, over-inclined to cut corners and practising the precept ‘Crash through or crash’. If she deliberately ignored the matters described, she was party to Ralph Blewitt’s deceit. The more probable view is that she would have been careless, not deceitful. She had no motive to be deceitful.

61. The reasoning in the previous paragraph commenced with the words ‘If she knowingly permitted Ralph Blewitt to file the Application, with all its falsehoods’. The reasoning depended on that hypothesis. Its hypothetical character is reflected in the verbs.

¹¹¹ Julia Gillard, 10/9/14, T:802.12-16.

¹¹² Julia Gillard, 10/9/14, T:802.45-803.15.

Did she knowingly permit Ralph Blewitt to file the Application? There is insufficient evidence to support a finding that she was aware of the contents of the Application. Hence there is insufficient evidence that she did knowingly permit Ralph Blewitt to file the Application. That difficulty alone means that it is not possible to establish wrongdoing on her part in this respect.

False statement of purpose in Application

62. In paragraph 2 the statement of purpose – ‘Development of changes to work to achieve safe workplaces’ – was in blue ink in Ralph Blewitt’s handwriting.¹¹³ Ralph Blewitt said he wrote these words because someone – ‘it might have been Bruce’ – dictated them to him.¹¹⁴ Bruce Wilson could not recall who suggested the words to Ralph Blewitt, but presumed that it would have been either himself or Julia Gillard.¹¹⁵ Both Bruce Wilson and Julia Gillard denied that it was impossible for Ralph Blewitt to have come up with these words.¹¹⁶ But it does not seem probable. Since the handwriting is not Julia Gillard’s it is probable that the author of the purpose was Bruce Wilson. That is supported by the fact that Bruce Wilson vaguely recalled that he came up with a not dissimilar statement of purpose in the advertisement in *The West Australian* of 6 March 1992.¹¹⁷

¹¹³ Ralph Blewitt, 12/5/14, T:20.31-45; Bruce Wilson, 12/6/14, T:419.27-36.

¹¹⁴ Ralph Blewitt, 12/5/14, T:20.35-21.7.

¹¹⁵ Bruce Wilson, 12/6/14, T:419.38-42.

¹¹⁶ Bruce Wilson, 12/6/14, T:419.27-420.18; Julia Gillard, 10/9/14, T:796.29-33.

¹¹⁷ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 119.

63. The purpose of the Australian Workers' Union – Workplace Reform Association Inc. was perceived by Julia Gillard to be to 'formalise arrangements between a team of officials who had an intention of running together at the next election [and] enable them to fund-raise to support that re-election campaign'.¹¹⁸ There is no reason to doubt the sincerity of her perception. Ralph Blewitt more mendaciously said that he also perceived that the purpose was 'to raise funds for election purposes'.¹¹⁹ The purpose of changing 'work to achieve safe workplaces' is different from the purpose of funding re-election campaigns: the former purpose is no more than consequential on or incidental to the latter purpose. The view that the purpose of achieving safe workplaces is the same as the purpose of re-electing a ticket of officials because the officials to be re-elected have the goal of achieving that purpose would mean that any re-election fund could be described as having any purpose which the officials to be re-elected might share. Even if the purpose had been funding re-election campaigns, to state the purpose as achieving safe workplaces was not being frank with the Commissioner for Corporate Affairs. If the purpose was re-electing campaigns, 'Workplace Reform Association' was a less satisfactory title than 'Re-election Funding Association'.
64. Julia Gillard's position was stated in the following evidence. It was given immediately after her evidence that the objects of the Australian Workers' Union – Workplace Reform Association Inc.

¹¹⁸ Julia Gillard, 10/9/14, T:785.4-8, 792.10-30.

¹¹⁹ Ralph Blewitt, 12/5/14, T:21.19-22.

were to facilitate fundraising for re-election campaigns and to avoid disputes about property ownership if the team of officials who had contributed to the fund fractured.¹²⁰ She then said:¹²¹

Q. None of those matters are set out in subsection (1) of paragraph 3 of the rules, are they?

A. These objects are very broadly drawn, that's true.

Q. It is correct that none of the matters to which you've made reference are set out in paragraph 3; that's right?

A. I think the matters in paragraph 3 are broadly drawn and what we've discussed fits beneath them.

Q. Into which subparagraph do you say, or which subparagraph do you say captures the matters that we've discussed?

A. Oh, for example, Mr Stoljar, I'd say subparagraph (f).

Q. Is (f) the only one?

A. Mr Stoljar, the objects are broadly drawn about promotion of change in workplaces, the sort of things that a team of officials might well be promising in a campaign for election.

Q. Why wouldn't you say squarely what the object was: to raise funds for elections?

A. Because in the discussion we've just had, Mr Stoljar, I thought that there were other reasons for incorporating an association.

Q. That was one of them?

A. Yes, one of them - -

Q. One of them -

A. - - in accordance with supporting a team of officials or a team - I'm using the terminology "officials" which assumes people are already elected. These - in terms of this Association, I was dealing with people who were already elected, but more broadly,

¹²⁰ Julia Gillard, 10/9/14, T:792.10-30.

¹²¹ Julia Gillard, 10/9/14, T:792.32-793.42.

for such associations it could be a reform group that's seeking election or a team of officials who were seeking re-election.

Q. Why not just say what the objects were in the paragraph dealing with objects? The object was, as I think we've been discussing, to raise funds for election and to operate an account where those funds could be collected. Why not just say that?

A. Mr Stoljar, at the time I obviously thought it should be broadly drawn and go to the types of things that might be issues that officials came together to campaign on.

Q. It gives no clear understanding of what the objects of the Association in truth are, paragraph 3; that's right?

A. Well, Mr Stoljar, I wouldn't agree with that and I'd remind you that my instructions about this matter, coming from Mr Wilson and Mr Blewitt, were clear, that they were part of a team that had come together, that had taken over control of the Western Australian Branch. At some point in the future they would face an election. They obviously wanted their team to contend in that election and win in that election, so I drew the objects broadly trying to capture all matters that might be relevant to that.

65. The reference to paragraph 3(1)(f) of the rules is a reference to the rules which were annexed to the Applicant's Certificate to Accompany Application for Incorporation, namely:

The objects of the Association are –

...

(f) To support and assist union officials and union members who are contributing to the adoption of the aims of the Association and its policies.

66. Those nine answers of Julia Gillard were not satisfactory. Certainly Bernard Murphy testified that it was not clear to him on reading Rule 3(1) 'that there was an election fund built into this association'.¹²² The idea that the election purpose fell within the

¹²² Bernard Murphy, 9/9/14, T:596.33-597.8.

purpose stated in rule 3(1)(f) is a wrong idea. However, a person could honestly believe that wrong idea. The statement of objects in the rules was so broadly drawn as to obscure what she actually saw the purpose of the Association to be. Of course, unknown to her, the purposes envisaged by Bruce Wilson and Ralph Blewitt were quite different and much more sinister. Bruce Wilson set up a scheme which enabled him fraudulently to obtain funds from Thiess on the false premise that the Australian Workers' Union – Workplace Reform Association Inc. had a connection with the AWU. But Julia Gillard did not know it was fraudulent. Had she known the truth, she probably would have been shocked. She would have terminated the retainer – and not only the retainer. In 1992 she was a young woman. She had ability. She had honourable ambitions. One ambition was professional – to become a leading light in Slater & Gordon, in which she had already risen fast, and which had been growing fast. Another was political – to enter Parliament. It is notorious that she had had a long and successful career in student politics. As early as 1993 she stood for pre-selection for the seat of Melbourne – then a safe Labor seat. Only two years later she stood for the Senate. Both her professional ambitions and her political ambitions would have suffered a severe setback if she became involved in fraud. She had every reason, professional and political, to avoid being involved in fraud. Further, her counsel urged that her reputation be taken into account.¹²³ She had the reputation, merited or not, of being very left-wing. Robert Kernohan claims that William Shorten said on numerous occasions that he despised her 'because

¹²³ See Appendix G to this Chapter.

of her links to the Communist Party'.¹²⁴ People with a left-wing reputation are usually keen to preserve it by avoiding involvement in fraudulent conduct. If she had known of Bruce Wilson's and Ralph Blewitt's frauds, it would have been an act of insensate folly to have gone along with them. It is quite improbable that she committed that act of folly.

67. The reference in paragraph 2 to s 4(1)(e) of the Act in black ink is in Julia Gillard's handwriting.¹²⁵ The reference to s 4(1)(e) of the Act is a reference to the words:

Subject to this Act, an association is eligible to be incorporated under this Act if it has more than five members and is formed –

...

(e) for political purposes

68. So paragraph 2 was stating that the Australian Workers' Union – Workplace Reform Association Inc. had more than five members.¹²⁶ That statement was false. It did not have more than five members. It was never to have more than five members. And paragraph 2 also stated that the Association had been formed for political purposes. That statement, too, was false. It was not formed for political purposes. Another false statement appeared in paragraph 3. It said that the 'Association is not formed for the purpose of ... securing a pecuniary profit to the members from the

¹²⁴ Robert Kernohan, witness statement, 11/6/14, para 118.

¹²⁵ Bruce Wilson, 12/6/14, T:420.22-23; Ralph Blewitt, 12/5/14, T:21.24-31; Julia Gillard, 10/9/14, T:795.47-796.2.

¹²⁶ See Appendix C to this Chapter.

transactions of the Association'. That statement was made by reason of s 4(2) of the Act, which provides:

Notwithstanding subsection (1) an association for the purpose of trading or securing pecuniary profit to the members from the transactions of the association is not eligible to be incorporated under this Act.

69. The Association, when it came into being, was formed for the purpose of securing a pecuniary profit to Bruce Wilson in particular by the transactions of cheating Thiess repeatedly. Although there is no evidence to suggest that Julia Gillard knew this, that was the only purpose of the Australian Workers' Union – Workplace Reform Association Inc.
70. The statement in paragraph 4 that the rules referred to conformed to the requirements of the Act was also false. The rules did not conform to the requirements of the Act because the high-minded objects stated in rule 3 were not the actual objects, as Bruce Wilson and Ralph Blewitt knew. They also knew that the requirement in rule 3(2) that the property and income of the association was to be applied solely in accordance with its objects and could not be distributed to members would not be complied with.

The Certificate: text

71. The Applicant's Certificate to Accompany Application for Incorporation was as follows:¹²⁷

¹²⁷ Blewitt MFI-1, p 59.

DRAFT CERTIFICATE

ASSOCIATIONS INCORPORATION ACT, 1987

SECTION 5(2)(B)

APPLICANT'S CERTIFICATE TO ACCOMPANY

APPLICATION FOR INCORPORATION

~~A1002116x~~

~~A1002203E~~

A1002262E

I RALPH EDWIN BLEWITT..... of
(full name)
138 WARRICK RD DUNDRAIG W.A. 6028
(full address and occupation)

hereby-

- i) certify that I am the person authorised to apply for the incorporation of an Association under the name Australian Workers' Union - Workplace Reform Association
- ii) verify that the particulars set out in the accompanying Application for Incorporation of the abovenamed Association are true;
- iii) confirm that the requirements of Section 6 of the Act relating to advertisement of the application have been complied with;
Advertised on 6th MARCH 92 (insert date)
In THE WEST AUSTRALIAN (insert name of Publication)
- iv) verify that the copy of the rules of the abovenamed Association annexed hereto and marked with the letter "A" numbering ..NWE..... pages is a true copy and that these rules include provisions as to the matters set out in Schedule 1 of the Act; and
- v) verify that the Association has more than 5 members.

DATED THE 22nd DAY OF April 1992

SIGNED: [Signature]
PRINT FULL NAME IN BLOCK LETTERS RALPH EDWIN BLEWITT

LODGED WITH THE COMMISSION ON

LODGED BY: R Blewitt
NAME:
ADDRESS: 138 WARRICK RD
DUNDRAIG
TELEPHONE: 2461656

72. The following version may be more legible.

DRAFT CERTIFICATE

ASSOCIATIONS INCORPORATION ACT, 1987

SECTION 5(2)(B)

APPLICANT'S CERTIFICATE TO ACCOMPANY

APPLICATION FOR INCORPORATION

I RALPH EDWIN BLEWITT of
(full name)

138 WARWICK RD DUNCRAIG WA 6023
(full address and occupation)

hereby –

- i) certify that I am the person authorised to apply for the incorporation of an Association under the name Australian Workers' Union – Workplace Reform Association
- ii) verify that the particulars set out in the accompanying Application for Incorporation of the abovenamed Association are true;
- iii) confirm that the requirements of Section 6 of the Act relating to advertisement of the application have been complied with;

Advertised on 6th MARCH 92 (insert date)
In THE WEST AUSTRALIAN (insert name of Publication)
- iv) verify that the copy of the rules of the abovenamed Association annexed hereto and marked with the letter "A" numbering NINE pages is a true copy and that these rules include provisions as to the matters set out in Schedule 1 of the Act; and
- v) verify that the Association has more than 5 members.

DATED THE 22ND DAY OF APRIL 1992

SIGNED: R E Blewitt

PRINT FULL NAME IN BLOCK LETTERS RALPH
EDWIN BLEWITT

LODGED WITH THE COMMISSION ON LODGED
BY: R
BLEWITT
NAME:
ADDRESS
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NE:
2461656.

73. All the handwriting is Ralph Blewitt's, except for paragraph 1, which is Julia Gillard's.¹²⁸ In this document he gave his home address again – this time correctly at the top in blue but incompletely at the bottom in black. Again he did not give his occupation, despite the request that he should.

False statements in Certificate

74. Ralph Blewitt made many false statements in his Certificate. There was no association. Hence he was not authorised to apply for incorporation, contrary to paragraph (i). The verification in paragraph (ii) of paragraphs 1-4 of the Application was false for reasons given above.¹²⁹ The confirmation in paragraph (iii) that s 6 of the Act had been complied with in relation to the

¹²⁸ Ralph Blewitt, 12/5/14, T:22.35-23.8.

¹²⁹ See paras 53-70.

advertisement of 6 March 1992 was false because Ralph Blewitt had not been authorised to insert it, and because it misstated the purpose of the proposed incorporated association. The verification in paragraph (iv) of the supposed fact that the rules attached were rules of an existing association, and that they did include provisions as to the matters set out in Schedule 1 of the Act, was false. There was no existing association. And the requirement in clause 2 of Schedule 2 that there be a statement of objects or purposes was not complied with. That is because the true purpose – dishonestly obtaining money from Thiess for the personal purposes of Bruce Wilson – was not revealed. The verification in paragraph (v) of the claim that the Association then had more than five members was false. If it did not exist, it could have no members. And indeed, even if it had existed, no members existed on 22 April 1992.¹³⁰ In truth it had and never was to have more than five members.

75. The false statements in Ralph Blewitt’s Certificate must have been false to his knowledge. Ralph Blewitt claimed that he did not read the rules before lodging them.¹³¹ That could well be true. But even if it is true, it is no defence. He made the statements about the rules recklessly, indifferent as to whether they were true or false, and that is deceit as much as if he knew them to be false.¹³² It was certainly fraudulent, as well, to represent that he had satisfied himself that the rules included certain provisions if he

¹³⁰ See Appendix C to this Chapter.

¹³¹ Ralph Blewitt, 12/5/14, T:25.13.

¹³² *Derry v Peek* (1889) 14 App Cas 337.

had not even prepared himself to state that he was so satisfied by reading them.

76. It is probable that Bruce Wilson, on whose instructions Ralph Blewitt was acting, knew what statements were being made in the Certificate, and knew that they were false.

77. What of Julia Gillard? She did not know what the true purpose of the Association was to be. But she did know that there was no Association and therefore no members. The evidence is insufficient to make a finding about whether she knew what was in the Certificate. If she did, as with the false statements in the Application, the better view is that she did not turn her mind to whether the statements were false. She had no motive to deceive the Commissioner. Her conduct was affected by the hurry with which Bruce Wilson and Ralph Blewitt were behaving. Her conduct is an instance of an all too common predilection among lawyers, particularly solicitors, to humour, to trust too much, and to be too accommodating towards 'repeat clients' who are wealthy and who respond favourably to assurances that their desires can be achieved – clients like large corporations, or wealthy individuals, or government departments, or large trade unions. That is a predilection of in-house solicitors which it is very hard for them to resist. But it is very far from being limited to them. Julia Gillard's conduct in this respect does not stand alone in the evidence called before this Commission.

G – THE FALSE INVOICES BEGIN

The first invoice: text

78. The next group of key events straddled 22 April 1992. Before 22 April 1992, over the signature of Ralph Blewitt, described as ‘Secretary’, an invoice numbered 0001 was sent to Thiess demanding payment of fees for work on the ‘Dawesville Channel Project as per agreement’ for the months of January, February and March. The ‘agreement’ was that reflected in Thiess’s letter of 16 March 1992.¹³³ The letter was sent on Bruce Wilson’s instructions.¹³⁴ The invoice was received on 22 April 1992.¹³⁵ It was thus sent and received even before the Application to Incorporate the Association was received by the Commissioner for Corporate Affairs on 23 April 1992.

¹³³ Ralph Blewitt, 12/5/14, T:28.46-29.3.

¹³⁴ Ralph Blewitt, 12/5/14, T:25.40-42, 26.10-18, 30.1-15.

¹³⁵ Nick Jukes, witness statement, 9/9/14, paras 7-8.

UPPERMOUNT
EXHIBIT No. 0076


THE AUSTRALIAN WORKERS' UNION
WORKPLACE REFORM ASSOCIATION INC
P.O. BOX 253
NORTHBRIDGE, W.A. 6865.

INVOICE NUMBER: 0001

DATE DUE: 30 April 1992

| Date | Details | Amount |
|----------|--|-------------------------------|
| April 92 | <p>TO: THIESS CONTRACTORS P.O. BOX 272 SUBIACO. W.A. 6008</p> <p>Provision of AWU Workplace Reform Association Representative: Dawesville Channel Project - as per agreement</p> <ul style="list-style-type: none">* January - 248.4 hours* February - 216.0 hours* March - 237.6 hours <p>Please forward remittance to the above address.</p> | 8942.40 7776.00 8553.60 |
| | TOTAL | 25272.00 |

PAID
288902
PAID


RALPH BLEWITT
SECRETARY

The first invoice: false and misleading statements.

79. Ralph Blewitt prepared the draft of an invoice in that form after receiving Bruce Wilson's instructions, and Bruce Wilson prepared the final version.¹³⁶ Payment of the bill was authorised within Thiess on 27 April 1992.¹³⁷ The address given at the top of the page was an address selected to avoid the AWU finding out about the agreement when Thiess began to respond to Invoice 0001 and later invoices.¹³⁸ The smaller capitals of the first line of the heading ('THE AUSTRALIAN WORKERS' UNION') compared to the larger capitals of the second line of the heading ('WORKPLACE REFORM ASSOCIATION INC.>') suggested to Thiess that the document was sent by the AWU and that the Workplace Reform Association Inc. was a division of or an entity controlled by the AWU. Indeed, Thiess drew this conclusion.¹³⁹
80. The details given in the invoice for the '[p]rovision of AWU Workplace Reform Association Representative' were also misleading. For each of the three months the details included a precise but different number of hours – 248.4, 216.0 and 327.6. Two were to the first decimal point. The details also included a precise but different amount of money – \$8,942.40, \$7,776.00 and \$8,553.60. Two were to the last cent. These disarmingly precise figures had been calculated on Bruce Wilson's instructions by

¹³⁶ Ralph Blewitt, 12/5/14, T:27.12-29.25.

¹³⁷ Blewitt MFI-1, p 70.

¹³⁸ Ralph Blewitt, 12/5/14, T:28.27-34.

¹³⁹ Nicholas Jukes, witness statement, 10/6/14, para 24; Steven Schalit, witness statement, 23/6/14, paras 12-13.

Ralph Blewitt on what he called a ‘guesstimate’ of the number of hours which would have been worked had a representative been on site for a maximum of 54 hours per week, as the letter of 16 March 1992 had stated.¹⁴⁰ The figures were outright lies. There had been no ‘Association Representative’ on site. No work had been done by the ‘Association Representative’. No work could have been done by the ‘Association Representative’ because the Association did not exist and was incapable of engaging any employees or independent contractors. Ralph Blewitt admitted that he knew this when he prepared the invoice. He also said that to the best of his knowledge Bruce Wilson knew it as well.¹⁴¹ In this Ralph Blewitt was correct. Bruce Wilson admitted that no work had been done in January, February or March.¹⁴² He claimed that by agreement with Thiess no work had to be done: the mendacious character of this evidence is exposed below.¹⁴³

Why was the deception not detected?

81. The document, and its 30 successors, deceived Thiess into parting with \$308,952.60. Thiess got nothing in return. The document showed extraordinary nerve in several senses of that word. The letter of 16 March 1992 required the representative ‘to co-ordinate and liaise with [Thiess] senior management and site management’ in relation to workplace training. What would have happened if any of the Thiess personnel on the Dawesville Channel Project

¹⁴⁰ Ralph Blewitt, 12/5/14, T:26.3-28, 27-29.36.

¹⁴¹ Ralph Blewitt, 12/5/14, T:26.43-27.5.

¹⁴² Bruce Wilson, 12/6/14, T:433.25-28.

¹⁴³ See Appendix D to this Chapter.

who received and authorised payment on the invoices had inquired of their own personnel what co-ordination and liaison had taken place with a representative in the month to which any invoice related? The game would have been up. The same is true if those Thiess personnel had exposed Ralph Blewitt or Bruce Wilson to rigorous questioning for particulars of what the representative had done in the relevant month. Steven Schalit, Project Manager from October 1993, did raise a query with Ralph Blewitt about the hours in one of the invoices, but cannot remember the answer.¹⁴⁴ The crisis seems to have passed.

82. The procedure Thiess employed until September 1993 is as follows. Each invoice was received in Thiess's Perth offices. An accounts payable voucher would be raised and sent together with the invoice to the office of Brian Pulham, the Project Manager on the Dawesville site, until September 1993. His practice was to check that the hours claimed in the invoice accorded with the agreement referred to in the 16 March 1992 letter. He would then sign the voucher to authorise payment and forward it to the Thiess Perth office. That office would then send the voucher to Thiess's head office in Brisbane. That office would raise a cheque and post it to the Australian Workers' Union – Workplace Reform Association Inc. at the Northbridge post office box. From October 1993 the procedure was the same, except that Steven Schalit replaced Brian Pulham as Project Manager.¹⁴⁵ There were curious

¹⁴⁴ Steven Schalit, witness statement, 23/6/14, para 12.

¹⁴⁵ Brian Pulham, witness statement, 23/6/14, paras 10-12; Brian Pulham, 23/6/14, T:923.12-26; Steven Schalit, witness statement, 23/6/14, paras 10; Steven Schalit, 23/6/14, T:904.42-905.2.

features of the invoices. For example, in 1994, when the goose was about to cease laying its golden eggs as the Dawesville Channel Project drew near its end, Invoices 28-31 covered overlapping periods of time. The months of July, August and September were each charged for twice and paid twice.¹⁴⁶ These particular false pretences were not detected. Nor was the greater false pretence – the pretence that any work at all had ever been done.

83. The Thiess personnel thus checked the number of hours, but trustingly believed what the invoices said on the issue of whether any work at all had been done. Perhaps this was because the invoices contained the words ‘Australian Workers’ Union’, with which Thiess was working amicably enough on site, for there were no industrial issues on the project.¹⁴⁷ Indeed Steven Schalit, Project Manager from October 1993, put this down to the training agreement programme he believed was in place. At all events there never was a challenge.
84. Ralph Blewitt said that no work was ever done, and that neither he nor Bruce Wilson expected that any would be done.¹⁴⁸ Bruce Wilson admitted that no work was done in 1992¹⁴⁹ or 1994.¹⁵⁰ His admission as to 1992 was confirmed by the evidence of George Dean. He worked on the site from December 1991 to 20 January

¹⁴⁶ Jukes MFI-1, pp 63-66.

¹⁴⁷ Steven Schalit, witness statement, 23/6/14, para 15.

¹⁴⁸ Ralph Blewitt, 12/5/14, T:15.4-5 and 30-37.

¹⁴⁹ Bruce Wilson, 12/6/14, T:434.16-33.

¹⁵⁰ Bruce Wilson, 12/6/14, T:439.32-36.

1993, and served as an Assistant Shop Stewart from January 1992. The only officials he could specifically recall as visiting the site were the AWU organisers Colin Saunders and Tony Lovett. He would have expected any AWU officials who did attend to have met him.¹⁵¹ But Bruce Wilson did say that Glen Ivory, President of the West Australian Branch of the AWU, provided services in 1993.¹⁵² For reasons given below that evidence is completely false.¹⁵³

H – FURTHER STEPS TOWARDS INCORPORATION

Opening bank accounts

85. On 4 May 1992 Ralph Blewitt and Bruce Wilson signed a document with a view to opening two bank accounts with the Commonwealth Bank.¹⁵⁴ One was a cheque account (No 10002582). One was a cash management account (No 10002590). The first Thiess cheque, for \$25,272, was paid into the latter on 5 May 1992.¹⁵⁵ The document they signed opened with the claim that authority had been duly given for the course they were taking by resolution passed at a legally constituted meeting of an ‘unincorporated organisation’ called ‘AWU Workplace Reform Association Inc.’ Ralph Blewitt was described as ‘Secretary, Committee’ and Bruce Wilson as ‘Treasurer’. This was all untrue.

¹⁵¹ George Dean, witness statement, 23/5/14, paras 10-12.

¹⁵² Bruce Wilson, witness statement, 4/6/14, paras 146; Bruce Wilson, 12/6/14, T:434.4-13.

¹⁵³ See Appendix D to this Chapter.

¹⁵⁴ Blewitt MFI-1, pp 71-72;

¹⁵⁵ Blewitt MFI-1, p 73.

There was no unincorporated organisation. There had been no legally constituted meeting. There had been no resolution. Ralph Blewitt was not Secretary. Bruce Wilson was not Treasurer. There was no committee. Nor was there any approval from the federal executive or the state executive of the AWU. The document stipulated that ‘both must sign’. That is, both Ralph Blewitt and Bruce Wilson needed to sign cheques if they were to be valid.

86. Julia Gillard was not informed of or asked for advice about its purported issuing of invoices, nor about the Northbridge PO box, nor about the specific bank accounts which were opened.¹⁵⁶

The office of State Corporate Affairs raises query

87. But Julia Gillard did become involved again in the process of achieving incorporated status for the Australian Workers’ Union – Workplace Reform Association Inc. In mid-May 1992 she received a letter dated 15 May 1992 from Ray Neal, the Assistant Director of the Office of State Corporate Affairs. It said:¹⁵⁷

Australian Workers’ Union – Workplace Reform Association

Thank you for your letter of 13 May 1992 concerning the application by Mr R E Blewitt to incorporate the above association.

The explanation which you have provided in relation to the purposes of the association is accepted, however, it is believed that the matter does need to be clarified by the amendment of the association’s rules to include new rule 3A.

¹⁵⁶ Julia Gillard, 10/9/14, T:804.41-805.39.

¹⁵⁷ Gillard MFI-1, p 23.

In order to avoid any unnecessary costs and delays in this matter, the Commission is prepared to incorporate the association with the existing rules annexed to Mr Blewitt's application subject to receiving a written undertaking that the association will amend its rules to include new rule 3A within 30 days of being notified of incorporation.

88. The expression 'existing rules' indicates that Ray Neal, unlike Ralph Blewitt, Bruce Wilson and Julia Gillard, was assuming that the association to be incorporated actually existed. There is no record of any communication advising him of this divergence from reality, even though Julia Gillard at the time of giving evidence, at least, was conscious of it.¹⁵⁸
89. Ray Neal's letter reveals that before 13 May 1992 the Office of State Corporate Affairs had raised some problem about the Application of 22 April 1992. Julia Gillard sent a letter about that problem on 13 May 1992. The letter of 13 May 1992 has not been found. Bruce Wilson said he had a vague recollection that Ralph Blewitt told him in May 1992 that the Commissioner for Corporate Affairs needed an explanation about aspects of the Application. He called the Commissioner's office and asked them to write to Julia Gillard. This does not entirely fit in with the surviving documents.¹⁵⁹ Julia Gillard presumed that some inquiry was made of Ralph Blewitt about the nature of the association and about whether or not it was a trade union. She also presumed that that inquiry was referred to her.¹⁶⁰ She did not recollect the contents of her letter of 13 May 1992. But she was 'arguing the case for incorporation': arguing, on her client's instructions, that

¹⁵⁸ Julia Gillard, 10/9/14, T:811.14-812.7.

¹⁵⁹ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 133-134.

¹⁶⁰ Julia Gillard, 10/9/14, T:804.27-39.

the association was not a trade union.¹⁶¹ Although the letter of 15 May 1992 suggests that it was Julia Gillard who had sent a new rule 3A with her letter of 13 May 1992, she resisted that suggestion.¹⁶²

Julia Gillard's 21 May 1992 memorandum to Ralph Blewitt: the text

90. On 21 May 1992 Julia Gillard sent the following memorandum to Ralph Blewitt.¹⁶³

TO: RALPH BLEWITT

FROM: JULIA GILLARD

RE: AUSTRALIAN WORKERS' UNION – WORKPLACE
REFORM ASSOCIATION

DATE: 21 MAY, 1992

I have received the enclosed letter from the Office of State Corporate Affairs regarding the Association.

To finalise the Incorporation, you now need to write to Mr Ray Neal, Assistant Director, Office of State Corporate Affairs, Box W2072, GPO Perth, 6001 on Association letterhead with the letter to read as follows:-

Dear Mr Neal,

RE: AUSTRALIAN WORKERS' UNION – WORKPLACE
REFORM ASSOCIATION

I refer to your letter dated the 15th May 1992.

On behalf of the Association, I undertake that the Association will amend its rules within thirty days of being notified of its incorporation to include a new Rule 3A to read as follows:-

¹⁶¹ Julia Gillard, 10/9/14, T:806.2-808.18; Gillard MFI-1, p 137.

¹⁶² Julia Gillard, 10/9/14, T:808.20-42.

¹⁶³ Gillard MFI-1, p 24.

“The Interpretation of Objects of the Association.

The objects specified in sub Rule 3(1) must not be interpreted as meaning that the Association aims to seek to regulate the relations between workmen and employers, or between workmen and workmen, or between employers and employers, or aims to impose or have imposed by others any restrictive conditions on the conduct of any trade or business.”

I look forward to promptly receiving the notification that the Association has been incorporated.

Yours faithfully,
Ralph Blewitt
Secretary

This should finalise the incorporation but if there are any further difficulties, please give me a ring.

JULIA.

91. She saw the new rule 3A as clarifying the objects of the association sufficiently to show that it would not be operating as a trade union.¹⁶⁴ That Rule raises problems. It precludes the Association from regulating relations between workmen and employers. But, as Julia Gillard acknowledged in evidence, one of the things that an employer is supposed to do is provide a safe system of work.¹⁶⁵ The objects in rule 3(1) were dedicated to making the workplace safer. Hence they would appear to seek to regulate relations between workmen and employers. Thus how the new rule 3A might have satisfied the concerns raised by Ray Neal is unclear.

¹⁶⁴ Julia Gillard, 10/9/14, T:808.15-17, 40-42, 809.25-29.

¹⁶⁵ Julia Gillard, 10/9/14, T:809.36-38.

92. Julia Gillard was asked:¹⁶⁶

Q. How was this rule going to operate with the existing rules?

A. Consistent with what I've said, that my view, looking at these documents, is that the inquiry was about whether or not this Association would seek to do the kinds of things associated with being a trade union. Looking at this new rule 3A, that the Association aims to seek to regulate the relations between workmen and employers, that that's a formulation about, you know, seeking award regulation, or it may well have been in the days beyond the common approach to enterprise bargaining, but, you know, doing the kinds of things that trade unions do, either under State or Federal law, that is, that they participate in the regulatory system, the regulatory system of employment, things like serving a log of claims in order to create an award.

That does not answer the question.

93. Julia Gillard was asked two other important questions:¹⁶⁷

Q. Why not just write back and say, "Well, it's not going to be a trade union because it's going to raise money for elections"?

A. Mr Stoljar, sitting here, I don't know, but can I suggest to you that one thing that may be worth looking at is whether or not this is a form of words somehow associated with the state industrial relations legislation at that time. I think it's that clarification that was being sought. Should this be an association or a state registered trade union? Those words looked to me like they may have come from state regulation of some nature. Now, I don't have a direct recollection of it, but that is what, piecing together from these documents, I think I was dealing with at the time.

Q. But if the concern that had been raised with you was that the Association could be confused for a trade union, isn't the simple answer, it's set up outside the union and it's going to raise funds for election purposes and operate a bank account to hold those funds?

¹⁶⁶ Julia Gillard, 10/9/14, T:809.40-810.8.

¹⁶⁷ Julia Gillard, 10/9/14, T:810.10-32.

- A. Well, in the letter of 15 May what's being asked for by the corporate affairs people is the inclusion of a new rule.

Those two questions were not answered either.

The 21 May 1992 memorandum and its problems for Ralph Blewitt

94. Did Ralph Blewitt comply with the advice which Julia Gillard gave him on 21 May 1992? No evidence that he did has survived. The memorandum of 21 May 1992 did not tell him how to comply. Rule 24(1) provided that additional Rules could be made in accordance with the procedure set out in ss 17, 18 and 19 of the *Associations Incorporation Act*. Those sections are mired in complexity. Section 17(1) required a special resolution. What, relevantly, is a special resolution? Section 24 answers that question, but in a way which would have puzzled Ralph Blewitt if he had ever read it. He would have been equally puzzled by s 17(2) and (3).
95. Putting aside the practical difficulty that the Association never had the five members it was supposed to have had, there is no reason to suppose that Ralph Blewitt unaided could have navigated the dangers created by rule 24(1), s 24 and then s 17 without the clearest guidance. There was a further problem. Section 19 of the Act dealt with the topic of altering the objects of the incorporated association. A difficult question of judgment was whether the new rule 3A did alter the rules of the incorporated association as distinct from clarifying them. Ralph Blewitt received no guidance on these points.¹⁶⁸ Julia Gillard testified that Ralph Blewitt was

¹⁶⁸ Julia Gillard, 10/9/14, T:812.37-41.

‘obviously in possession of the rules’.¹⁶⁹ But it is unlikely that he was in possession of the Act. Even if he was, was he in possession of the training or experience to understand the Act – a sometime organiser with little experience as Assistant Secretary? Julia Gillard’s evidence was that though earlier in the year she had given advice about the requirements of an incorporated association – its need for a minimum number of members and a committee of management – by the time of her 21 May 1992 memorandum she had not ‘made further inquiries about how Mr Blewitt and Mr Wilson then went about operationalising that’.¹⁷⁰ She said that she ‘provided advice to Mr Blewitt about the resolution of [the] issue. Whether or not he accepted that advice or acted on it is entirely a matter for him.’¹⁷¹ But by what means did he know how to act on it?

96. There is an analogy with lawyers giving undertakings to a court on behalf of their clients. It is vital to ensure that the client understands what the undertaking calls for and what the consequences of breach are. An undertaking to an official does not carry contempt sanctions if broken, but it is equally vital to ensure that the person who gives it understands it, so that it will not be broken. Dealings with government officials who have power to make decisions creating new legal persons should be conducted in accordance with standards of the utmost punctiliousness. Ralph Blewitt was not the man to meet them unaided.

¹⁶⁹ Julia Gillard, 10/9/14, T:812.41.

¹⁷⁰ Julia Gillard, 10/9/14, T:814.20-23.

¹⁷¹ Julia Gillard, 10/9/14, T:813.6-8.

97. Advice by a solicitor to a man like Ralph Blewitt to give an undertaking to an important government official on an important matter was to set him on a path to challenges which he lacked the capacity to meet. To advise in that way was not to treat that official with respect. Ralph Blewitt may well have sent the letter: if he had not done so, presumably there would have been no incorporation. But it is improbable that any special resolution was ever passed. Hence it is improbable that the undertaking was ever fulfilled. Julia Gillard made no inquiry of Ralph Blewitt or Bruce Wilson about that.¹⁷²
98. Of course there is an abstract air to these points. Whatever explanation he had been given about the Rules and the Act, it would not have been attended to. In that sense the rather terse and confined memorandum of 21 May 1992 did no harm. But it was not good practice to have failed to warn Ralph Blewitt of the seriousness of giving an undertaking to government officials and not complying with it, and to have failed to spell out in detail how it was to be complied with. Julia Gillard here incurred a duty to act, however narrow her initial retainer. The conduct of those involved widened the retainer.

¹⁷² Julia Gillard, 10/9/14, T:813.20-32.

I – CRITICISMS OF JULIA GILLARD EVALUATED

Failure to send bill to AWU

99. Various possible criticisms of Julia Gillard's conduct in the course of incorporating the Australian Workers' Union – Workplace Reform Association Inc. have been considered above. It is convenient here to examine, and save as indicated earlier, reject a few other possible criticisms of her conduct during that period. One criticism of Julia Gillard has been that her failure to render a bill to the AWU for the work she did in relation to the Australian Workers' Union – Workplace Reform Association Inc. prevented the AWU from finding out about an unauthorised use of its name. However, she did not think her client was the AWU. She thought the clients were Ralph Blewitt and Bruce Wilson. And her evidence that it was common for that type of work not to be charged for is to be accepted. While she did not inquire about how Ralph Blewitt had been authorised to proceed and about whether consent had been obtained from the AWU, there is insufficient evidence to justify a finding that she knew there was no authority or consent. Her decision not to charge cannot be seen as a step designed to cover up an unauthorised use of a name.

Conflict of interest

100. Another criticism of Julia Gillard is that her personal relationship with Bruce Wilson, an officer of the AWU, was a relationship with an officer of a major client of Slater & Gordon, and this placed her in a conflict of interest. The fact that a solicitor has a

personal relationship with an officer of a client does not prevent the solicitor from acting in the private affairs of the officer unless those private affairs create a conflict, or a real sensible possibility of conflict, with those of the client. Here there was in one sense a conflict, because the ‘officer’, Bruce Wilson, wanted to use the name of the ‘client’, AWU. Earlier it was stated that in this regard there was a lapse in professional judgment on Julia Gillard’s part.¹⁷³ To that extent the criticism is justified.

Breach of duty to Slater & Gordon

101. Another criticism is that Julia Gillard was in breach of duty to Slater & Gordon by using the time for which she was paid as a salaried partner, by using Slater & Gordon’s resources and by causing Slater & Gordon or the AWU to pay disbursements, all for a private purpose of Bruce Wilson, with whom she was in a personal relationship. It is not clear that the time Julia Gillard spent was Slater & Gordon time or her own time. There is no reason why it should not have been the latter. The only resources of Slater & Gordon she may have employed were a small amount of stationery and perhaps a little typing, and the stamp on her letter of 13 May 1992 (or, if it were faxed, the cost of faxing it). *De minimis non curat lex*. There is nothing to suggest that the AWU or Slater & Gordon paid any disbursements. There is a cheque dated 26 May 1992 drawn in favour of the State Corporate Affairs Office in the sum of \$22, but it was drawn on the ‘AWU Workplace Reform Association Inc.’ account at the

¹⁷³ See above at para 55.

Commonwealth Savings Bank (No 10002582).¹⁷⁴ It may be inferred that any other disbursements were paid in that way or by either Ralph Blewitt or Bruce Wilson, not Slater & Gordon or the AWU. Hence that particular criticism lacks weight. There were of course numerous disbursements in connection with the later purchase of the Kerr Street property, but these were not paid for by the AWU or Slater & Gordon.¹⁷⁵

Breach of *Associations Incorporation Act 1987 (WA)*

102. Another possible criticism is that Julia Gillard was knowingly concerned in or a party to deceiving a public authority, the Corporate Affairs Commission of Western Australia, by the preparation and lodgement of documents which were false or misleading. Section 43 of the *Associations Incorporation Inc. 1987 (WA)* provides:

Where in a document required by or for the purposes of this Act or lodged with or submitted to the Commissioner ..., a person –

- (a) makes or authorises the making of a statement that *to the person's knowledge* is false or misleading in any material particular; or
- (b) omits or authorises the omission of any matter or thing without which the document is *to the person's knowledge* misleading in any material respect,

the person commits an offence and is liable to a fine of \$500 (emphasis added).

¹⁷⁴ Blewitt MFI-1, p 74.

¹⁷⁵ Gillard MFI-1, p 102.

103. There is no doubt that the Application and the Certificate contain little else but false and misleading statements. However, it is very doubtful whether Julia Gillard could be said to have prepared or lodged the Application and the Certificate. All she did was place two pieces of information on the Application in her handwriting. The first piece of information, ‘Australian Workers’ Union – Workplace Reform Association’ was false or misleading in two respects. One was that it suggested that the purpose of the Association was workplace reform, when it was not – but she did not know that. The other was that the name falsely suggested a connection with the AWU – but not to her perception and hence not to her knowledge. The second piece of information placed on the Application by Julia Gillard was ‘Section 4(1)(e) of the Act’. It was false or misleading, but not as far as she knew.
104. Julia Gillard did prepare and submit to the Commissioner a letter of 13 May 1992, but since it is lost it is impossible to say whether it contained any false or misleading statement or omitted something without which the document was misleading. Nor is it possible to say whether she said anything in the letter which was inconsistent with the fact that the requirements for incorporation had not been satisfied.

J – THE KERR STREET PROPERTY

Bruce Wilson moves East

105. In 1991-1992 there was war within the Victorian branch of the AWU. Robert Kernohan had alleged misappropriation of funds by

the Secretary of that branch, Robert Lesley Smith. In consequence Robert Lesley Smith stood aside and Bruce Wilson was appointed Acting Secretary with a view to restoring calm and order. On 3 July 1992 the West Australian branch executive authorised this state of affairs for three months, or longer if required.¹⁷⁶ Bruce Wilson moved to Victoria but ‘still directed the day-to-day running of the [West Australian] branch’.¹⁷⁷ His wife and two children continued to live in Perth.¹⁷⁸

Bruce Wilson wants a house

106. By late 1992 a significant amount of funds had accumulated in the Australian Workers’ Union – Workplace Reform Association Inc. bank accounts. None of them had been spent on the purpose of which Julia Gillard had been told, electioneering. Bruce Wilson told Ralph Blewitt that, at the behest of the federal executive, he would be residing more permanently in Melbourne and that he intended to buy a house there. He asked how much was in the Australian Workers’ Union – Workplace Reform Association Inc.’s account. Ralph Blewitt saw it as being entirely up to Bruce Wilson if he wanted to use the funds to buy a house, and said he acted on the instructions of Bruce Wilson at all times. In due course Bruce Wilson located a house at 85 Kerr Street, Fitzroy.¹⁷⁹

¹⁷⁶ Wilson MFI-3, p 6.

¹⁷⁷ Ralph Blewitt, 12/5/14, T:41.33-34.

¹⁷⁸ Ralph Blewitt, 12/5/14, T:39.26-28.

¹⁷⁹ Ralph Blewitt, 12/5/14, T:37.47-39.7.

Purchase in Ralph Blewitt's name

107. According to Ralph Blewitt, the property was purchased in Ralph Blewitt's name for the following reason:¹⁸⁰

Mr Wilson wanted to distance himself from the ownership of the property and his comments to me – and not precise words, but words to the effect – were that it would be best if The Australian Workers' Union, federal office, were not aware of who the owner of the property was, so as to enable him to claim a living away from home allowance whilst he was based in Melbourne, and he didn't want it to be shown that he was owning the property and asked me to put it in my name, and I said, "Yeah, righto, mate, no worries."

108. There is no reason to doubt that evidence. Even Bruce Wilson accepted that that was part of his motivation.¹⁸¹ It is another instance of AWU officials deceiving the AWU.

The power of attorney

109. On 4 February 1993 Ralph Blewitt executed a power of attorney in the presence of Julia Gillard.¹⁸² The power of attorney authorised Bruce Wilson to do anything Ralph Blewitt could lawfully do 'in relation to the purchase of property situate in the State of Victoria'.¹⁸³ What Bruce Wilson did was to use money in accounts of the Australian Workers' Union – Workplace Reform Association Inc. That money had been paid by Thiess on a consideration which had totally failed. Whether or not it can be

¹⁸⁰ Ralph Blewitt, 12/5/14, T:39.14-23.

¹⁸¹ Bruce Wilson, 12/6/14, T:459.8-24.

¹⁸² This has been a controversial proposition but it is very likely to be true. The evidence relating to it is analysed in Appendix E to this Chapter.

¹⁸³ Blewitt MFI-1, p 105.

said, strictly speaking, that Thiess strictly had proprietary rights to the money, it was money which ought to have been repaid to Thiess. It is therefore questionable whether the use of the money in connection with the power of attorney could be described as something which Ralph Blewitt could ‘lawfully’ have done.

Funding the purchase price

110. The purchase price for the Kerr Street property was expected to be between \$220,000 and \$250,000. It turned out to be \$230,000. How was it to be funded? The purchaser, Ralph Blewitt, was not a man of property. Nor was the intended occupier, Bruce Wilson. There is documentary evidence that on 4 March 1993 Ralph Blewitt’s gross salary was \$51,801, though he did not recall his salary being as large as that.¹⁸⁴ Bruce Wilson’s salary was about the same. Bruce Wilson was supporting a family in Perth: a wife who worked and two children of school age. His secretary lived in a property owned by him and paid rent of \$300 per week,¹⁸⁵ but it has not been shown that that property was not mortgaged. He claimed to pay Ralph Blewitt \$300 per week as rent for occupation of the Kerr Street property after he moved in.¹⁸⁶

Funding the deposit

111. The first need was to fund the deposit of 10% of the purchase price payable on exchange of contracts. On 10 February 1993 a

¹⁸⁴ Blewitt MFI-1, p 149; Ralph Blewitt, 12/5/14, T:60.5-10.

¹⁸⁵ Christine Campbell, witness statement, 23/6/14, paras 14-15.

¹⁸⁶ Bruce Wilson, witness statement, 4/6/14, para 233.

cheque in Ralph Blewitt's favour in the amount of \$25,000 was drawn on the account of the association.¹⁸⁷ Ralph Blewitt's evidence was as follows:¹⁸⁸

He [ie Bruce Wilson] wanted \$25,000. He indicated to me he had found a property; the property would auction on, whatever date it was, I think 13 or 14 February; he needed sufficient funds to pay the deposit; the house would sell for between \$220,000 and \$250,000. "I need 10% deposit. Could you send me \$25,000, please".

112. In the event things turned out a little differently. The \$25,000 cheque in Ralph Blewitt's favour dated 10 February 1993 was deposited into his and his wife's home building society account, from which a cheque was in due course drawn in the amount of \$23,000.¹⁸⁹ Ralph Blewitt said that this circuitous course was adopted at Bruce Wilson's insistence, with a view to distancing 'ourselves'. Since the house was being purchased in Ralph Blewitt's name, the deposit should come out of Ralph Blewitt's account.¹⁹⁰

113. Clearly the precise amount required to be paid by way of deposit would not be known until the auction had taken place and a total price established. Though Ralph Blewitt did not remember it this way, it would appear reasonable to infer that he signed a blank cheque drawn on his and his wife's building society account, that he forwarded it to Bruce Wilson, and that Bruce Wilson

¹⁸⁷ Blewitt MFI-1, p 118.

¹⁸⁸ Ralph Blewitt, 12/5/14, T:50.12-17.

¹⁸⁹ Blewitt MFI-1, pp 55, 122-3; Ralph Blewitt, 12/5/14, T:50.30-53.9.

¹⁹⁰ Ralph Blewitt, 12/5/14, T:53.11-24.

completed the cheque once it had been established that the deposit was \$23,000.

114. On the same day as the auction, 13 February 1993, G A Thomson & Co Pty Ltd, the auctioneers and real estate agents associated who conducted the sale, issued a receipt to Ralph Blewitt in the amount of \$23,000.¹⁹¹

Funding the balance of the purchase price

115. That left \$207,000 payable as the balance of the purchase price, together with other expenses associated with the sale. Of the funds required to complete settlement of the purchase, \$92,722.30 came from the Association, as explained below.
116. The remainder of the purchase price, being the sum of \$150,000, was advanced by way of loan from Jonathan Malcolm Rothfield, the then senior partner of Slater & Gordon, who also took as security for that loan a mortgage over the Kerr Street property. The funds of the Association which were used were not secured by mortgage. Is use of those moneys to be characterised as the creation of a debt or theft? Probably the latter.
117. The conveyancing file includes a handwritten note dated 3 March 1993. It records that Ralph Blewitt would be required to provide proof of sufficient income to demonstrate his ability to service the loan.¹⁹² Bruce Wilson engaged in most of the dealings on Ralph

¹⁹¹ Blewitt MFI-1, p 137.

¹⁹² Palmer, MFI-1, p 161.

Blewitt's behalf in relation to completion. Ralph Blewitt was ignorant of at least some of them. That is illustrated by the fact that the note includes the following in handwriting:

Attending Mr Wilson re above 4/3/93. He will let me have proof of income by fax and then original and also let me have cheque for \$500.

118. The reference to a cheque for \$500 was a reference to a valuation which Slater & Gordon wished to carry out on the Kerr Street property.
119. On 4 March 1993, Hewitt & Co, chartered accountants of Perth, wrote to Slater & Gordon as follows:¹⁹³

At the request of Mr Ralph Blewitt we confirm the following details:

Gross salary received from the Australian Workers' Union (West Australian branch)

1 July 1991 to 30 June 1992
\$47418

Current gross salary
\$51801 p.a.

Should you have any queries concerning the above please do not hesitate to phone.

120. In evidence Ralph Blewitt said that he had not contacted anyone at Hewitt & Co to suggest that they supply these details.¹⁹⁴ However, he accepted that the information which had been

¹⁹³ Blewitt, MFI-1, p 149.

¹⁹⁴ Ralph Blewitt, 12/5/14, T:60.1-3.

provided about his salary was approximately correct, except that he did not recall it being as large as that.¹⁹⁵

121. On 10 March 1993, Slater & Gordon wrote to Ralph Blewitt advising him that his loan application had been approved subject to certain conditions, and offering to lend \$150,000 on those conditions.¹⁹⁶ The offer in that letter was accepted and signed by Bruce Wilson pursuant to the Power of Attorney. Ralph Blewitt testified that he had not seen the letter of offer prior to giving evidence in the Commission.¹⁹⁷ While information concerning Ralph Blewitt's salary had been obtained, no attempt had been made to obtain information concerning other aspects of his financial affairs. No information had been obtained regarding the amount of mortgage repayments on his matrimonial home in Perth. No information had been obtained concerning his assets and liabilities. No information had been obtained concerning Mrs Blewitt's financial position.

122. On 17 March 1993, Slater & Gordon wrote to Bruce Wilson giving him information concerning the mortgage of the Kerr Street property.¹⁹⁸ Ralph Blewitt testified that he had not seen this letter, either, prior to giving evidence in the Commission.¹⁹⁹

¹⁹⁵ Ralph Blewitt, 12/5/14, T:60.5-10.

¹⁹⁶ Blewitt MFI-1, p 152.

¹⁹⁷ Ralph Blewitt, 12/5/14, T:60.33-44.

¹⁹⁸ Blewitt MFI-1, p 155.

¹⁹⁹ Ralph Blewitt, 12/5/14, T:61.26-30.

123. On 18 March 1993, Olive Brosnahan of Slater & Gordon wrote to Ralph Blewitt about the Kerr Street property.²⁰⁰ The letter requested payment of \$67,722.30 on or before Friday 19 March 1993 so that completion could take place on 22 March 1993. The letter required the payment by either bank cheque or telegraphic transfer. Ralph Blewitt testified that he did not recollect the letter. He did remember that Bruce Wilson had asked him to provide a cheque in the amount of \$67,722.30.²⁰¹ The cheque actually supplied was not a bank cheque, but cheque 802205 drawn on one of the Association's Commonwealth Bank accounts in favour of Slater & Gordon Trust Account in the sum of \$67,722.30. Ralph Blewitt applied Bruce Wilson's signature stamp to the cheque.²⁰² The Slater & Gordon trust account ledger, however, does not record the payment of \$67,722.30 as being from the Association, but from Ralph Blewitt.²⁰³ Julia Gillard was unable to shed light on why a cheque drawn on the account of the Association was recorded in the trust account ledger as moneys received from Mr Blewitt.²⁰⁴ Indeed Julia Gillard appears to have had very little to do with completing the conveyancing transaction. She denied, credibly, that Bruce Wilson ever told her that the Kerr Street property was being acquired by the Association or for union purposes.²⁰⁵

²⁰⁰ Blewitt MFI-1, p 159.

²⁰¹ Ralph Blewitt, 12/5/14, T:61.32-62.5.

²⁰² Blewitt MFI-1, p 163; Ralph Blewitt, 12/5/14, T:62.22-33.

²⁰³ Gillard MFI-1, p 123A.

²⁰⁴ Julia Gillard, 10/9/14, T:826.22-39.

²⁰⁵ Julia Gillard, 10/9/14, T:827.36-41.

124. A further amount of \$2,000 was paid to Slater & Gordon out of the Association's account after completion, on 4 April 1993. This was apparently necessitated by a mistake in preparing for settlement. A cheque was drawn on the Association's account payable to Ralph Blewitt. He paid it into the Blewitts' joint account, and then paid the \$2,000 to Slater & Gordon out of that account.²⁰⁶
125. On 22 March 1993, Bruce Wilson as Ralph Blewitt's attorney signed a transfer of the Kerr Street property as transferee.²⁰⁷
126. On the same, day, 22 March 1993, Bruce Wilson signed as Ralph Blewitt's attorney a mortgage of the Kerr Street property in favour of Jonathan Malcolm Rothfield.²⁰⁸ The amount advanced pursuant to the mortgage was \$150,000 for three years. Interest was to be charged at a higher rate of 13.75% per annum and at a lower rate of 9.75% per annum, commencing on 22 March 1993.
127. Also on 22 March 1993 the Commonwealth Bank sent a fax to Slater & Gordon for the attention of Julia Gillard.²⁰⁹ The facts related to a certificate of currency for mortgage insurance. It advised that the land was insured and that the policy had been renewed to 18 March 1994. It also advised that the interest of Jonathan Malcolm Rothfield as first mortgagee was noted. A handwritten note dated 22 March 1993 in the conveyancing file

²⁰⁶ Gillard MFI-1, pp 124-126.

²⁰⁷ Blewitt MFI-1, p 173.

²⁰⁸ Blewitt MFI-1, pp 174-175.

²⁰⁹ Palmer MFI-1, p 187.

began 'Bruce Wilson' and then read:²¹⁰ 'Certificate currency through Cth Bank. Ralph spoke to Julia Gillard. Spoke to Ralph this morning, he was chasing up Cth Bank.' Underneath that note Olive Brosnahan recorded that she left a message for Julia Gillard to call her.

128. It follows that at least \$92,722.30 of the funds paid to the Association by Thiess were used to purchase the Kerr Street property in Ralph Blewitt's name.²¹¹ That sum comprises the deposit of \$23,000, the cheque for \$67,722.30, and the cheque for \$2,000.

129. Ian Cambridge gave the following evidence:²¹²

I could not find any record of any authorisation by the AWU for Mr Wilson or Mr Blewitt to use AWU funds for [the purpose of acquiring the Kerr Street property]. The ... property has since been sold in February 1996 and the proceeds of sale were not accounted for to the AWU, nor was the AWU notified of the sale.

He did not know where the proceeds of sale went to.²¹³

130. According to Ralph Blewitt, the owner of the Kerr Street property, Bruce Wilson, the tenant, paid no rent to Ralph Blewitt.²¹⁴ Bruce Wilson denied this and said he paid \$300 per week.²¹⁵ What is certain is that nothing was paid to the Australian Workers' Union

²¹⁰ Palmer MFI-1, p 189.

²¹¹ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 333.

²¹² Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 334.

²¹³ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 336.

²¹⁴ Ralph Blewitt, 12/5/14, T:68.23-28.

²¹⁵ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 233.

– Workplace Reform Association Inc., which had put up a large part of the purchase price.

131. The mortgage entered into by Ralph Blewitt (through Bruce Wilson) for the Kerr Street property required payment of interest only. This seems to have been achieved in part by money that travelled through the Blewitts' joint account at the home building society. Ralph Blewitt testified.²¹⁶

It was indicated to me recently, on around 11 April, that the Victoria Police had some evidence that showed I paid mortgage payments for the Kerr Street property. I was very, very surprised, because I still have no recollection of having made payments for the mortgage to whoever the agent was at that time. It has now been brought to my attention by the Victoria Police that I subsequently did pay two quarterly payments for that mortgage, but I have no recollection of that occurring at the time.

132. These two payments were each of \$3,656.25. It is unclear whether other interest payments were made, and, if so, by whom, though Bruce Wilson alleged that Ralph Blewitt was making them.²¹⁷

K – CASH CHEQUES DRAWN ON THE ASSOCIATION'S ACCOUNTS

Conflicting versions as to cash cheques

133. Ralph Blewitt began writing cash cheques drawn on the accounts maintained by the Association with the Commonwealth Bank.

²¹⁶ Ralph Blewitt, 12/5/14, T:68.35-44; Blewitt MFI-4.

²¹⁷ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 233.

134. There is a conflict in the evidence between Ralph Blewitt and Bruce Wilson on how these cash cheques were deployed.

Ralph Blewitt's version

135. The largest of the cash cheques was drawn on 7 September 1993 in the sum of \$50,000.²¹⁸ Ralph Blewitt testified that he drew this cheque on Bruce Wilson's instructions and that having presented the cheque to the Commonwealth Bank he then brought the sum of \$50,000 in cash to Sydney and handed it to Bruce Wilson at a meeting at the Camperdown Travel Lodge.²¹⁹ Ralph Blewitt testified that when he handed the money to Bruce Wilson the latter indicated that it was for Bill Ludwig.²²⁰ Bruce Wilson denied this evidence.²²¹ Ralph Blewitt's evidence is uncorroborated. It is insufficient to justify any finding against Bruce Wilson on this point, let alone Bill Ludwig.
136. Ralph Blewitt drew a series of further cash cheques on the Association's Commonwealth Bank account. For example, on 12 October 1993 he drew a cash cheque in the sum of \$8,000.²²² Ralph Blewitt testified that he drew these funds and held them until he next saw Bruce Wilson. He would then hand the funds over to Bruce Wilson.

²¹⁸ Blewitt MFI-1, p 203.

²¹⁹ Ralph Blewitt, 12/5/14, T:72.1-14.

²²⁰ Ralph Blewitt, 12/5/14, T:72.16-22.

²²¹ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 190.

²²² Blewitt MFI-1, p 205.

137. The cheques that were drawn by Ralph Blewitt were sometimes drawn in very quick succession. For example, on 21 March 1994 he drew a cheque for \$6,000.²²³ On 23 March 1994 he drew a further cheque for \$5,500.²²⁴ The next day, 24 March 1994, he drew another cash cheque, for \$3,000.²²⁵ And on 29 March 1994 he drew a further cash cheque, in the sum of \$4,000.²²⁶ Bruce Wilson's signature on each of these cheques was affixed by Ralph Blewitt using Bruce Wilson's signature stamp.
138. Ralph Blewitt testified that each of these cheques was drawn at the instruction of Bruce Wilson.²²⁷ He testified that he kept the cash with him at home. He testified that he received no benefit in any financial sense from drawing the cheques.²²⁸

Bruce Wilson's version

139. Bruce Wilson denied Ralph Blewitt's version. Bruce Wilson testified that he signed a number of cheques in blank and left them with Ralph Blewitt. He said that the cheque for \$50,000 fell into that category. He testified that he understood that this cheque was intended to pay for Glen Ivory's work at the Dawesville Channel Project on behalf of the Association.

²²³ Blewit MFI-1, p 227.

²²⁴ Blewitt MFI-1, p 228.

²²⁵ Blewitt MFI-1, p 229.

²²⁶ Blewitt MFI-1, p 230.

²²⁷ Ralph Blewitt, 12/5/14, T:74.19-24.

²²⁸ Ralph Blewitt, 12/5/14, T:74.44.

140. Bruce Wilson accepted that he received some cash sums from Ralph Blewitt from the Association's funds. For example, he said that in September 1993 he received from Ralph Blewitt the sum of \$15,000 in cash, which he then handed to Glen Ivory.²²⁹ Bruce Wilson testified that on or about 12 October 1993 he received the sum of \$8,000 in cash from Ralph Blewitt. He handed that sum to shop stewards for the shop steward's committee in Port Hedland in order to resist individual workplace contracts.²³⁰ Bruce Wilson testified that in November 1993 Ralph Blewitt provided him with cash which he used to purchase office equipment for the Kerr Street property. Bruce Wilson said that he thought that this was an amount of \$8,000 referred to in cheque 802213 and that he used the funds to buy computers, a printer, a fax machine, a whiteboard and an answering machine.²³¹ Bruce Wilson also testified that on a date he did not recall Ralph Blewitt brought \$5,000 in cash to Sydney and gave it to him. He used it to pay telephone bills and the like and also to reimburse certain shop steward wages.²³² It is not possible to verify this evidence. Glen Ivory is dead. The shop stewards are untraceable and often anonymous. There are no receipts. But since Glen Ivory never did any work at the Dawesville Channel Project on behalf of the Association, those parts of Bruce Wilson's evidence concerning payments to him must be rejected. And Bruce Wilson's evidence in these areas reveals a pattern noticeable elsewhere in his testimony: to give detailed circumstantial accounts of events

²²⁹ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 190.

²³⁰ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 192.

²³¹ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 194.

²³² Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 195.

which cannot be corroborated or checked because the actors referred to are dead, abroad or untraceable. Another instance of this concerns the issue of who the members of the Association were.²³³

141. Senior counsel for Bruce Wilson called this evidence ‘clear, detailed and frank’.²³⁴ In general this is not a correct characterisation. However, Bruce Wilson’s evidence was that these withdrawals were the only ones that he could recall.²³⁵ That was ‘frank’ to the extent of leaving open the possibility of other withdrawals.

Reconciling the versions

142. The division between the witnesses, then, is this. Ralph Blewitt said that all of the cash withdrawals were made on the instructions and for the benefit of Bruce Wilson. Bruce Wilson on the other hand acknowledged receiving some cash payments which he spent on worthy purposes but said that the rest was misappropriated by Ralph Blewitt. There are serious weaknesses in the credibility of both Ralph Blewitt and Bruce Wilson.²³⁶ Since the money was raised in cash there are unlikely to be any written records relating to how the money was spent. Even if written records were made, the chances of them still being available 20 years later are very low. At all events they have not been found. In these

²³³ See Appendix C to Chapter 3.2.

²³⁴ Submission on behalf of Bruce Wilson, 14/11/14, para 4.30.

²³⁵ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 196.

²³⁶ See Appendix A to this Chapter.

circumstances it is unlikely that it will ever be possible to determine with any finality how the balance of the money in the Association's account was spent. It is probable that Bruce Wilson received payments from Ralph Blewitt in addition to those he says he can recall, but not as many as Ralph Blewitt said. It is very possible that Ralph Blewitt may have applied certain funds to his own advantage.

L – ATHOL JAMES'S RENOVATIONS IN 1993

Julia Gillard responds to an advertisement

143. From about March 1993 a Melbourne builder, Athol James, carried out building works at Julia Gillard's house at 36 St Phillip St, Abbotsford. He did this because Julia Gillard responded to an advertisement he placed in the local paper. Julia Gillard said in her interview with Peter Gordon and Geoff Shaw on 11 September 1995 that she obtained three quotes and picked the lowest one, from Athol James. Athol James initially gave a number of quotes for replacing a window in the living room with four hinged doors and making other repairs. In due course he also renovated the floors.²³⁷ Athol James was punctilious in his record keeping, issuing written quotes and invoices.

Bruce Wilson funds Athol James

²³⁷ Gillard MFI-1, p 148.

144. Athol James, in his witness statement dated 23 May 2014, gave the following evidence:²³⁸

During the work I would deal with Ms GILLARD in relation to any payment for the completed work. I would give her the invoice. *I am pretty certain* she said she would get money from Bruce and pay me in the next few days. *I am certain* she said Bruce was paying for it. *I am certain* I saw Bruce hand Ms GILLARD a large amount of cash on two occasions. Ms GILLARD said to me that as Bruce brought her the cash she would pay me by cheque. When Bruce handed Ms GILLARD the cash she would write me a cheque. I never was paid in cash and I don't know what happened with the cash Bruce handed her (emphasis added).

145. In oral evidence, Athol James described the 'large amount of cash' handed over as being on each occasion 'a wad of notes'.²³⁹ He also said in oral evidence that it was 'quite clear in my mind' that Julia Gillard told him that 'Bruce was paying for the job'.²⁴⁰ Athol James was very firm. He adhered to his evidence in cross-examination, stating that one payment was made in the passage way and the other in the lounge room.²⁴¹ He referred to '[a] very substantial amount of money'.²⁴²

146. In cross-examination Athol James insisted that he had a clear recollection of events. Indeed he explained that he had a good memory of the particular job because he regarded the Abbotsford property as having been constructed badly.²⁴³

²³⁸ Athol James, witness statement, 11/6/14, para 13.

²³⁹ Athol James, 11/6/14, T:334.6.

²⁴⁰ Athol James, 11/6/14, T:355.6-15.

²⁴¹ Athol James, 11/6/14, T:344.32-39, 346.2-12.

²⁴² Athol James, 11/6/14, T:355.25.

²⁴³ Athol James, 11/6/14, T:340.29-33.

The job was very clear in my mind because as a builder it has been over the years said to us, “They don’t build houses like they used to”. And I’ve said each time, “Yeah, it’s just as well they don’t”. And I quoted the state of the house in Abbotsford.

Julia Gillard’s denial

147. Julia Gillard denied this. In her first witness statement she said:²⁴⁴ ‘I paid Athol by cheque. I never said to Athol that Bruce Wilson was paying for his work and I did not obtain cash from Bruce Wilson for the work Athol James undertook.’

Deficiencies in Athol James’s recollection

148. Senior counsel for Julia Gillard submitted that Athol James was first asked to remember the events of 1993 in 2013. That was true.²⁴⁵ But it does not follow that he was incapable of remembering correctly the essential parts of his testimony.
149. Senior counsel for Julia Gillard submitted that it was unlikely that Julia Gillard would have given Athol James ‘detail about intimate personal financial matters such as allegedly telling him that Mr Wilson was going to pay for the work, that he would provide cash to Ms Gillard and then Ms Gillard would pay Mr James by cheque.’²⁴⁶ But stating how payment would be effected is not an ‘intimate personal financial matter’. And even if it were, Julia Gillard got on well with Athol James. In the 11 September 1995 interview she said that he ‘sort of lived at my place for a

²⁴⁴ Julia Gillard, witness statement 1, 10/6/14, para 5.

²⁴⁵ Athol James, 11/6/14, T:337.30-35.

²⁴⁶ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 21.

substantial period of time'.²⁴⁷ Counsel for Julia Gillard's submission that it was 'inherently unlikely' that Athol James was told these things is not valid.

150. Senior counsel for Julia Gillard next submitted that she paid each of Athol James's invoices by cheque. That is true.²⁴⁸ They then submitted:²⁴⁹

That evidence does not support, and tends to contradict, the evidence of Mr James that Ms Gillard received cash in his presence for the purpose of paying Mr James' accounts. More significantly, Ms Gillard is unable to go to those records to refute the claims.

151. On the last point, it may equally be said that it is not possible to go to the records to see whether they confirm the claims. That does not of itself absolve the Commission from the duty to make a finding one way or the other, if possible, on the basis of two bodies of clear but conflicting evidence. Of course it is accepted that Julia Gillard has made all possible efforts to locate the bank records. So has the Commission. Underlying this submission seems to be a suggestion that if Julia Gillard were given cash by Bruce Wilson at her home in the presence of Athol James, she could have used it to pay him at once instead of paying the cash into the bank and giving him a cheque later. That suggestion was then amplified:²⁵⁰

It is inherently unlikely that if cash was provided in his presence as alleged by Mr James for the purpose of paying for renovations, that money would

²⁴⁷ Gillard MFI-1, p 149.

²⁴⁸ Athol James, 11/6/14, T:340.8-11; Julia Gillard, 10/9/14, T:840.19.

²⁴⁹ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 6.

²⁵⁰ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 22.

have been deposited into a bank account and payment then made by cheque. Payment by cheque is far more consistent with Ms Gillard's account that she paid for all her renovations from her own money which was either derived from a bank loan or from her salary.²⁵¹ It is known that each and every payment made by Ms Gillard to Mr James was made by cheque.²⁵² Ms Gillard's evidence was that all the renovations were paid by cheque.²⁵³ If, as Mr James claims, the cash was available and Mr James was present when the cash was available, it is improbable that Ms Gillard would bank that money purely so she could pay him by cheque.

152. Julia Gillard answered this submission herself: 'I am sure that in our big wide world that there are tradespeople who take cash and don't issue receipts. It was my practice to pay by cheque.'²⁵⁴ Further, it is unlikely that Athol James would have had an invoice ready-prepared for Julia Gillard to pay out of the wads of cash that suddenly made an unexpected appearance on two occasions.
153. Then senior counsel for Julia Gillard submitted that there 'were a number of significant inconsistencies' in Athol James's evidence 'that go to the reliability of this account'.²⁵⁵
154. The first of the 'significant inconsistencies' is that Athol James first said he would not accept cash as payment,²⁵⁶ but then 'conceded that cash payments would be "good"'.²⁵⁷ When the whole passage from which the two short pieces of transcript

²⁵¹ Julia Gillard, witness statement 4, 10/9/14, para 26.

²⁵² Athol James, 11/6/14, T:340.8-11.

²⁵³ Julia Gillard, 10/9/14, T:840.23.

²⁵⁴ Julia Gillard, 10/9/14, T:843.1-3.

²⁵⁵ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 23.

²⁵⁶ Athol James, 11/6/14, T:335.35-37.

²⁵⁷ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 23(a), referring to Athol James, 11/6/14, T:336.13.

referred to by senior counsel for Julia Gillard is read, no *significant* inconsistency emerges.²⁵⁸

Q. Was it your practice to insist on payment by cheque?

A. Yes. I didn't insist on it but that's the way we always received it.

Q. So if someone had offered cash or had cash available to pay you, would you accept it?

A. No.

Q. So if someone said, "I've got \$2,000 here in cash to pay your invoice," you'd say, "I won't accept that. I insist on a cheque"; is that your evidence?

A. Well we normally didn't have any – if it was cash it'd only come off the invoice, it wouldn't be something hidden.

Q. No, I didn't suggest there was anything improper about it.

A. No.

Q. No doubt you would declare the cash received in the same way you would declare payment received by cheque?

A. That's true.

Q. But did you have some difficulty with the concept of receiving cash payment?

A. No.

Q. Would you have regarded cash payment as preferable, particularly if it was to be made immediately?

A. Oh, it would be good.

155. To say that payment by cash would have been 'good' is not inconsistent with saying that payment was always by cheque. And to say that payment by cash would have been good is not inconsistent with saying it would not have been accepted,

²⁵⁸ Athol James, 11/6/14, T:335.31-336.13.

particularly since payment by cash had apparently never been offered; even if there is an inconsistency, that latter circumstance means it is not a significant one. In this and other respects one must remember that the witness was 84 years old, giving evidence after a tiring journey from Melbourne, and talking about his practice 21 years ago.

156. The second of the ‘significant inconsistencies’ relied on by senior counsel for Julia Gillard is that in his statement to the Commission, Athol James said that he did not remember going to the Abbotsford property to quote for the job, but in his oral evidence he said he did have that recollection.²⁵⁹ Athol James’s explanation was that since preparing his statement he had seen a photograph of the house and he now recalled his first visit. He said: ‘it became clear to me when I saw the house and things come back to you after a time.’²⁶⁰ That is a satisfactory explanation, according with day-to-day human experience.

157. The third of the ‘significant inconsistencies’ is that Athol James initially stated that the five or so invoices he rendered to Julia Gillard during 1993 were posted to her,²⁶¹ but he subsequently stated that he believed that he handed Julia Gillard the invoices.²⁶² When this discrepancy was pointed out to him he said that it was

²⁵⁹ Athol James, 11/6/14, T:341.26-41.

²⁶⁰ Athol James, 11/6/14, T:341.45-46

²⁶¹ Athol James, 11/6/14, T:336.24-25.

²⁶² Athol James, 11/6/14, T:343.3-6.

one or the other and conceded: ‘I am not certain which it was’.²⁶³
This is not surprising after 21 years.

158. The submissions of senior counsel for Julia Gillard then departed from ‘significant inconsistencies’ to put the following argument.²⁶⁴

Mr James’ explanation for being able to remember the detail of events 20 years ago, namely the state of the house, provides no support for his belief that he remembered things “fairly clearly”.²⁶⁵ It does not follow that, simply because he recalls the general state of the house, this means that he would remember the details of conversations and interactions had with persons 20 years ago.

When asked about the memory of the conversation regarding the initial quotation, Mr James said he could not remember “word for word, but I remember being there”.²⁶⁶

159. It is not necessary that Athol James remember ‘word for word’. There would often be a cloud of suspicion over claims to remember 20 year old conversations ‘word for word’. It was enough that he could remember the substance. And it is common human experience that the triggering of memory by one thing – here the photograph of the house – can trigger the memory of other things – here the conversations. Judge Frank’s famous words are on point.²⁶⁷

Common experience, the work of Proust and other keenly observant literary men, and recondite psychological research, all teach us that memory of things long past can be accurately restored in all sorts of way.

²⁶³ Athol James, 11/6/14, T:343.8-11.

²⁶⁴ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 23 (d)-(e).

²⁶⁵ Athol James, 11/6/14, T:340.41.

²⁶⁶ Athol James, 11/6/14, T:342.16.

²⁶⁷ *Fanelli v United States Gypsum Co* 141 F 2d 216 (1944) at 217.

The creaking of a hinge, the whistling of a tune, the smell of seaweed, the sight of an old photograph, the taste of nutmeg, the touch of a piece of canvas, may bring vividly to the foreground [of] consciousness the recollection of events that happened years ago and which would otherwise have been forgotten ... The memory-prodder may itself lack meaning to other persons as a symbol of the past event, as everyone knows who has ever used a knot in his handkerchief as a reminder. Since the workings of the human memory still remain a major mystery after centuries of study, courts should hesitate before they glibly contrive dogmatic rules concerning the reliability of the ways of provoking it.

160. Although senior counsel for Julia Gillard did not rely on them, there were two other matters. There was some uncertainty as to whether the conversation to which Athol James had testified, which was quoted above, occurred when he had handed Julia Gillard an invoice or at some earlier point in time.²⁶⁸ Athol James frankly conceded that he could not tell the Commission precisely when cash was handed over by Bruce Wilson to Julia Gillard, nor whether the cash related to any particular invoice.²⁶⁹ His frankness about these weaknesses, if that is what they were, was a badge of credibility, not the reverse.

161. Senior counsel for Julia Gillard then turned to a different point:²⁷⁰

A further reason to doubt Mr James' evidence that Mr Wilson was paying for his work, is because the source of Mr Wilson's funds has not been identified. Mr James completed the main part of his work in 1993. His invoices for 1993 were dated from between 1 June 1993 and 23 August 1993. It is not alleged that Mr Wilson had access to cash from the Workplace Reform Association during this period.²⁷¹ No other sources for Mr Wilson's income at the time, other than his salary, have been identified.

²⁶⁸ Athol James, 11/6/14, T:344.7-12.

²⁶⁹ Athol James, 11/6/14, T:347.43-47.

²⁷⁰ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 24.

²⁷¹ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 325.

162. Senior counsel for Bruce Wilson advanced a similar analysis in more detail.²⁷² Counsel assisting answered this argument as follows:²⁷³

Cheque numbers 802203 and 802207 for the amounts of \$2,000 were drawn on the Association's cheque account in favour of R Blewitt on 23 December 1992 and 5 April 1993 respectively.²⁷⁴ On 13 May 1993, Mr Blewitt paid Slater & Gordon the amount of \$2,000 in respect of disbursements.²⁷⁵ The remaining \$2,000 remains unaccounted for.

Similarly, cheque number 802206 dated 18 March 1993 for the amount of \$6,000 was drawn on the Association's cheque account in favour of R Blewitt.²⁷⁶ This amount was received by Mr Blewitt on the same day.²⁷⁷ On 3 April 1993, the amount of \$6,000 was withdrawn from Mr Blewitt's account.²⁷⁸ This amount also remains unaccounted for.

On 10 February 1993, Mr Blewitt banked a cheque made out to him for the amount of \$25,000 drawn on the Association's cheque account.²⁷⁹ Of this amount, \$23,000 was subsequently used to pay the deposit for the purchase of the Kerr Street property. The remaining \$2,000 remains unaccounted for.

Mr Blewitt gave evidence that around this time he had a recollection of Mr Wilson coming to Perth. He said he recalled cashing a cheque and giving Mr Wilson cash.²⁸⁰ Any of the amounts referred to in the preceding paragraphs could have been provided by Ralph Blewitt to Bruce Wilson.

A further cheque for the amount of \$50,000 was drawn on the account on 7 September 1993, two weeks after Mr James' invoice for \$2,986 was issued. Mr Blewitt gave evidence that he gave this money to Mr Wilson.²⁸¹ Mr Wilson accepted that he had received \$15,000 of this

²⁷² Submission on behalf of Bruce Wilson, 14/11/14, paras 6.2-6.6.

²⁷³ Counsel Assisting's Submissions in Reply, 25/11/14, paras 45-49.

²⁷⁴ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 325.

²⁷⁵ Blewitt MFI-1, p 44.

²⁷⁶ Ian Cambridge, witness statement dated 27/05/14, 10/6/14, para 325.

²⁷⁷ Blewitt MFI-1, p55.

²⁷⁸ Blewitt MFI-1, p55.

²⁷⁹ Blewitt MFI-1, p 118.

²⁸⁰ Ralph Blewitt, 12/05/14, T:50.21-22.

²⁸¹ Ralph Blewitt, 12/05/14, T:71.19-23.

\$50,000 on this day which he said he paid to Mr Ivory but denied receiving the remainder.²⁸²

163. In view of the fact that Glen Ivory never worked at Dawesville, there would have been no reason to pay him the \$15,000. It may be inferred that Bruce Wilson retained the money.

164. The submissions of counsel assisting continued:

It is clear from the above paragraphs that there are several possible sources of money to which Mr Wilson had access and which he could have used to pay Ms Gillard in accordance with the recollection of Mr James. For example, he may have used cash given to him by Mr Blewitt which Mr Blewitt had withdrawn directly from the Association or he may have used his salary but then reimbursed himself a short time later from funds of the Association.

165. Those submissions are sound. In any event, the submissions advanced by Julia Gillard and Bruce Wilson rest on the fallacy that Athol James's invoices, paid on 2 June, 24 June and 23 August 1993, could only have been paid out of Association money, if paid out of Association money at all, by moneys derived from the Association at about those dates. That is a fallacy. Bruce Wilson was not the sort of man who would dip into the Association's funds only when there was some precise reason why he needed to. He may well have had cash on hand from earlier payments from Ralph Blewitt to him. The moneys paid to Athol James were not large sums – about \$7,000.

166. Senior counsel for Bruce Wilson relied on Bruce Wilson's evidence that he had not signed certain cheques, thereby suggesting that Ralph Blewitt had used the signature stamp for

²⁸² Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 190.

Bruce Wilson. It is unwise to rely on Bruce Wilson's evidence. Ralph Blewitt could have used the signature stamp with Bruce Wilson's consent.

167. Senior counsel for Bruce Wilson submitted that the submissions of counsel assisting, published on 31 October 2014, 'reveal' that Athol James was asked by Victoria Police to go through the process of making a statement in March 2013. She continued:²⁸³

What Victoria Police may or may not have told Mr James in the course of that process, and what might have been shown to him, is entirely unknown to Bruce Wilson or his lawyers. In the absence of such information, Mr Wilson submits it would be unfair to make any finding adverse to him on the basis of Mr James' evidence. *Had it been known at the time that Mr James was giving evidence* that he had participated in that process, it would have been possible to explore the possible effects it may have had on his recollections. But that is now impossible (emphasis added).

168. The word 'reveal' suggests that senior counsel for Bruce Wilson learned of the March 2013 police interview for the first time on or shortly after 31 October 2014. The same suggestion appears in the emphasised part of the passage quoted. The suggestion is baseless. Senior counsel for Julia Gillard, on 11 June 2014, in the presence of senior counsel for Bruce Wilson, had elicited from Athol James the fact that he had made a statement to Victoria Police in March 2013.²⁸⁴ It follows that the unfairness suggested does not exist.

169. Athol James appeared to be a very decent man and a very competent man. He was 84 but seemed to have the mental powers

²⁸³ Submission on behalf of Bruce Wilson, 14/11/14, para 6.7.

²⁸⁴ Athol James, 11/6/14, T:336.27-33.

of a significantly younger man: he had only just retired. His demeanour in the witness box was excellent. He seemed very alert and intelligent, despite the fatigue of a trip from Melbourne to Sydney and a certain weariness towards the end of his stay in the witness box, which lasted about an hour and involved questioning by three experienced senior counsel.

Assessing Athol James's testimony

170. On what basis could Athol James's evidence be rejected?
171. One possibility is that he was a liar, motivated by malice towards Julia Gillard or self-interest. The other possibility is that though not deliberately untruthful, he was unreliable on the question of receiving two wads of cash and hearing Julia Gillard say that Bruce Wilson was paying for the work.
172. There is nothing whatever to support the view that Athol James was a liar. Indeed, senior counsel for Julia Gillard and senior counsel for Bruce Wilson did not submit that he was, and they certainly never cross-examined along those lines. It is plain that he was giving evidence out of duty, not desire. As already noted, he gave a satisfactory explanation as to why his memory of the particular job was 'very clear'. Julia Gillard's description of him as 'having sort of lived' at her place for a substantial period of time suggests that they got on reasonably well. Julia Gillard very handsomely said of him that 'he did the work diligently and

well'.²⁸⁵ Senior counsel for Julia Gillard submitted that her good reputation and character should be taken into account. If it is, it will be remembered that all through her public life Julia Gillard had an enviable reputation for warmth and cordiality towards members of the public of all kinds, and she showed it to Athol James. He remembered with apparent affection and gratitude the stimulating manner in which the young Julia Gillard discussed political affairs: 'We developed a fairly close relationship and we had a lot of interesting talks with her on political matters.'²⁸⁶ In the witness box he showed her no malice. He had no reason to. It is impossible to see why a person in Athol James's position would come to the Commission and knowingly give false evidence on oath. It is also impossible to see why he would provide a statement to Victoria Police, when they asked him for one in March 2013, which was knowingly false. He had no material or other interest to be served by telling lies.

173. There is also no reason for concluding that Athol James was completely unreliable. Again, senior counsel for Julia Gillard and senior counsel for Bruce Wilson do not suggest he was completely unreliable. They suggest only that he was unreliable on the issue of whether Bruce Wilson gave Julia Gillard two wads of cash and whether she told him Bruce Wilson was paying for the work. Yet why would he not remember these connected events? One reason why he could remember is that the first event is strikingly memorable. Another reason why he would remember is that Julia

²⁸⁵ Julia Gillard, 10/9/14, T:850.17.

²⁸⁶ Athol James, 11/6/14, T:355.35-36.

Gillard's long and distinguished political career was soon to begin blooming. Sometimes witnesses can convince themselves by some obscure process that an event happened when it did not, or did not happen when it did, but this usually flows from self-interest. There was no self-interest prompting Athol James into anything of this kind. It is submitted that the points of detailed criticism mentioned above do not require the rejection of Athol James as a reliable witness. If anything, his evidence would have been less credible if he had professed to have a precise and perfectly self-consistent recollection of every detail, as if his mind had the precision of a perfectly engineered machine. He was a careful and meticulous person in business, as appears from the records he maintained. Under skilled and searching cross-examination, he gave his evidence in a clear, cautious and responsible fashion. Athol James had every opportunity to see and hear transactions involving Bruce Wilson. His memory appeared to be clear and accurate. His articulation of what he remembered made him a most compelling witness.

Assessing Julia Gillard's testimony

174. But, it might be asked, why should Julia Gillard's denials not be accepted? Why should her generally sound and credible evidence be rejected in this one instance? The best answer to those questions is a blunt one. Julia Gillard had been maintaining ever since 1995, in one way or another, that she had paid for all the repairs to her house. She did so on 11 September 1995 in the interview with Peter Gordon and Geoff Shaw. In that interview she said in a qualified way: *'I believe* all of the work was paid for

by me.’²⁸⁷ She did so again in her press conference of 23 August 2012, this time in an unqualified way: ‘I paid for the renovations on my home in St Phillip Street in Abbotsford.’²⁸⁸ She did so once more in her press conference of 26 November 2012: ‘I am confident that I paid for the renovations on my home.’²⁸⁹ She coupled that statement of confidence with the following ringing challenge: ‘If anybody has a piece of evidence that says I knowingly received money to which I was not entitled for my renovations, please feel free to get it out. If anybody’s got it, it’s only been 20 years.’²⁹⁰

175. Athol James did have that piece of evidence. Its existence was unknown in 1995 and during the 2012 press conferences. But it was not he who responded to the challenge. When the Victorian police officers traced him through Julia Gillard’s reference to him in the 11 September 1995 interview and questioned him he provided the piece of evidence which she challenged ‘anybody’ to produce. He did not volunteer it. The detectives found it by their own exertions.

176. That placed her in an unenviable position. When at the 11 September 1995 meeting, she put the matter in terms of belief, not certainty, in the passage referred to above, there was some room left to manoeuvre. On that occasion she also said: ‘I can’t categorically rule out that something at my house didn’t get paid

²⁸⁷ Gillard MFI-1, p 150 (emphasis added).

²⁸⁸ Gillard MFI-1, p 160. See also p 167.

²⁸⁹ Gillard MFI-1, p 178. See also p 181.

²⁹⁰ Gillard MFI-1, p 178.

for by the association or something at my house didn't get paid for by the union.'²⁹¹ That, too, left room for manoeuvre. But in later statements she said in effect that further consideration in the light of a thorough examination of her documents removed any doubt. One problem with this is that it ignores the real issue. The real issue is not: 'Did Julia Gillard pay those who worked on her house in full by cheque?' It is agreed on all hands that she did. The real issue is: 'What was the source of the money she used to pay them?' That latter question may well not be capable of answer by simply examining economically phrased documents from tradesmen and comparing them with impressions of what work was done. Her evidence to the Commission did confront that latter question. She answered it by saying: 'All payments made for renovations on my property were from my own money which was either derived from a loan from the bank or my salary.'²⁹² Athol James contradicted that. Julia Gillard's position at the 11 September 1995 interview was compatible with Athol James's evidence. But her later positions were not. By adopting those positions she had dug herself into an inflexible trench which she could not manoeuvre away from.

177. Julia Gillard had two available courses, both dangerous. One was to admit that her memory in 2012 was not perfect and that the tentativeness of 1995 had been the correct position. Had she followed that course, she could have said that she did not remember the incidents that Athol James testified to, that she

²⁹¹ Gillard MFI-1, p 153.

²⁹² Julia Gillard, witness statement 4, 10/9/13, para 26.

doubted that they happened, but that she could not absolutely deny them. The other was to deny completely what Athol James said. It is regrettable that matters have come to this. To take the first course would have detrimental aspects: she would have had to backtrack from earlier statements. But to take the second placed her in a direct contest of probative value with Athol James. That is always a perilous position for a witness. He said he remembered certain events. She said, not that she does not remember the events, but that they never happened. He had no interest to serve in saying what he said. He had no advantage to be gained. It was nothing to him who paid for the renovations. He was a reluctant witness. She, on the other hand, had every reason to deny what he said. What he said was fatal to the stand she took at the Prime Minister's press conferences in 2012. She could either climb down or fight. She chose to fight. Thus she said:²⁹³

- Q. You told him on a number of occasions that Mr Wilson was paying for the renovations?
- A. That's completely untrue.
- Q. Because Mr Wilson was in fact paying for the renovations - -
- A. That's just not true, Mr Stoljar.
- Q. - - that's right, isn't it?
- A. Just not true.
- Q. You also told Mr James that as Bruce brought you cash, you would be in a position to pay his bill?
- A. That's just not true.

²⁹³ Julia Gillard, 10/9/14, T:850.23-36.

178. Julia Gillard was in many ways a satisfactory witness. But the manner in which she uttered these words denying what Athol James said seemed to be excessive, forced, and asseverated. There was an element of acting in her demeanour. She delivered those words in a dramatic and angry way, but the delivery fell flat. She protested too much. She chose to fight him. It was a fight in which there could be only one winner. Unfortunately, she lost that fight. Athol James's testimony is to be accepted over hers. He was a witness of truth. His version of events was correct.
179. There is a benign explanation for Julia Gillard's testimony and there is a less benign explanation. Behind each explanation lies the fact that, unlike Athol James, she had a strong motive to see her version of events accepted.
180. The benign explanation is that the testimony proceeded from velleity. She wanted it to be the case that she had paid for all the renovation work. Over 20 years, subconsciously, she convinced herself that it was the case. So dearly cherished an outcome became inexpugnably part of her mentality. The advent of Athol James's evidence collided with the mental state she had developed. Hence she rejected it. And she necessarily also had to reject more general propositions, as when she said that she had never seen Bruce Wilson with significant amounts of cash.²⁹⁴
181. The less benign explanation is that she knew her testimony was false. It might have been knowingly false in the sense that she

²⁹⁴ Julia Gillard, 10/9/14, T:849.36-37.

remembered the key events happening, but chose to deny them. Or it might have been knowingly false in the sense that she could not remember one way or the other whether the key events happened, but chose to deny them. In each case she was telling a knowing untruth about her mental state. It is not possible to decide which it was, and it does not matter which it was. Athol James signed his statement on 23 May 2014. Julia Gillard became aware of it soon afterwards. It must have come as a great shock. She provided a draft witness statement denying the relevant allegations before he gave oral evidence on 11 June 2014. That draft witness statement preserved consistency with her earlier position that she had paid for all her own renovations. Julia Gillard was very intelligent. She was very determined. She was strong willed. She was proud. She had considerable self-perception. These factors make it very unlikely that her testimony proceeded only from some unconscious transmogrification of the truth proceeding from velleity. She knew that Athol James's testimony was inconsistent with the position she had developed over the years up to 2012. One solution was to accommodate his testimony by climbing down to the extent of reverting to her 1995 position. But a cleaner solution was absolute denial. She had strong motives to adopt the cleaner solution. It would be very hard for her to admit error in a stance she had been maintaining throughout her public life. It would be very hard to make any concessions to her numerous enemies. It would be very hard for her to complicate the simple stance of denial which she had adopted during her public life with any qualifications or exceptions – for once one retreat was made, her enemies would suspect that others might soon follow. She must have thought that

her status in public life would outweigh the word of an utterly obscure and aged man like Athol James. That mental state corresponded with a submission by her own counsel that the Commission should ‘give significant weight to Ms Gillard’s good character and reputation. The Commission has little or no evidence before it of the character or reputation of Messrs James or Hem. In the context of these proceedings there is no reason to prefer their evidence over that of Ms Gillard.’²⁹⁵ Taking together the incorrectness of her evidence, the strength of her motives, and her demeanour in giving evidence, the inference is strong that she consciously chose to adopt the clean course of flat denial.

M – THE SECOND THIESS DECEPTION: MELBOURNE WATER

The Melbourne Water contract

182. Until October 1993 all of the invoices issued by the Australian Workers’ Union – Workplace Reform Association Inc. related to work allegedly done in connection with the Dawesville Channel Project. But in that month the milking of Thiess took a new and additional form. The Australian Workers’ Union – Workplace Reform Association Inc. began issuing invoices for services allegedly provided to Thiess with respect to Melbourne Water.

183. Melbourne Water operated a system of pipes for water supply, sewerage and drainage across seven districts in Melbourne. In

²⁹⁵ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 7.

early 1993 Melbourne Water invited tenders for a contract to provide maintenance and repair of those pipes. In about June 1993 Thiess was awarded a contract to provide services in respect of three of the seven areas. The implementation of this contract called for a 'transition' of employees. The 'transition' involved Melbourne Water making approximately 800 employees redundant and Thiess then rehiring 160 of them on a new Enterprise Agreement.²⁹⁶

The Darrouzet-Wilson agreement

184. Paul Darrouzet was at that time employed by Thiess as Group Manager, Human Resources. In July or August 1993 Bruce Wilson told him that he wanted a 'consulting fee' to offset the cost of employing two additional officials to help with the 'transition'.²⁹⁷ Eventually Paul Darrouzet agreed that Thiess would enter into an agreement with (as he thought) the AWU for the provision of additional services. He did this because if he did not he feared strikes and go-slows, and he feared that the AWU might abandon the project and be replaced by the CFMEU.

We did not want that to occur as the CFMEU causes a near doubling of labour costs resulting from inbuilt inefficiencies in production such as rostered days off (RDO) and a refusal to undertake weekend work accompanied by an RDO either Friday or Monday. In our sort of business, to have CFMEU practices would have killed us.²⁹⁸

²⁹⁶ Paul Darrouzet, witness statement, 9/9/14, paras 5-6; Leigh Ainsworth, witness statement, 9/9/14, paras 4-6.

²⁹⁷ Paul Darrouzet, witness statement, 9/9/14, para 11.

²⁹⁸ Paul Darrouzet, witness statement, 9/9/14, paras 13.

185. The ‘consulting fee’ was agreed to be half the cost of an organiser – 100 hours per month for two years.²⁹⁹

Were services provided by the Association?

186. Between October 1993 and June 1994, Thiess paid \$112,680 pursuant to the agreement. Bruce Wilson testified that services were provided to Thiess by the Australian Workers’ Union – Workplace Reform Association Inc. in connection with the Melbourne water project. According to him, they were supplied by Robyn McLeod, Jim Collins and Mark Barnes, with some additional involvement by Bill Telikostoglou.³⁰⁰
187. The problem is that each of the persons to whom Bruce Wilson referred was employed by the AWU, not by the Australian Workers’ Union – Workplace Reform Association Inc. Robyn McLeod, for example, was employed by the AWU and had never heard of the Australian Workers’ Union – Workplace Reform Association Inc.³⁰¹ The late Jim Collins was an organiser employed by the AWU. Bill Telikostoglou was also an organiser employed by the AWU. And Mark Barnes likewise was an employee of the AWU.
188. There are questions about whether services of any kind were provided by anyone to the extent claimed in the invoices issued by the Australian Workers’ Union – Workplace Reform Association

²⁹⁹ Paul Darrouzet, witness statement, 9/9/14, para 15.

³⁰⁰ Bruce Wilson, 12/6/14, T:480.12-18.

³⁰¹ Robyn McLeod, witness statement, 9/9/14, para 15.

Inc. The first invoice, for example, relates to periods before the agreement was struck. But there was no basis at all for the Association invoicing Thiess for services provided by officials or employees of the AWU like Robyn McLeod to Thiess in connection with Melbourne Water. There was certainly no basis for the Association retaining the proceeds for itself, as it did.³⁰²

189. The invoices issued by the Australian Workers' Union – Workplace Reform Association Inc. with regard to Melbourne Water were in similar form to those invoices which had been issued to Thiess with regard to the Dawesville Channel Project.³⁰³ They were signed by Ralph Blewitt.³⁰⁴
190. Ralph Blewitt testified that he knew nothing about what was allegedly done by the Australian Workers' Union – Workplace Reform Association Inc. with regard to Melbourne Water. He did not recall how he received instructions from Bruce Wilson with regard to the first invoice and could only assume that he had been given those instructions by Bruce Wilson.³⁰⁵
191. As to the receipt of payment from Thiess for the invoices, Ralph Blewitt testified.³⁰⁶

³⁰² Bruce Wilson, 12/6/14, T:481.25-33.

³⁰³ Blewitt MFI-1, p 206.

³⁰⁴ Blewitt MFI-1, p 206; Ralph Blewitt, 12/5/14, T:75.18-24.

³⁰⁵ Ralph Blewitt, 12/5/14, T:76.1-2.

³⁰⁶ Ralph Blewitt, 12/5/14, T:77.44-47.

I just received cheques from Thiess Contractors and deposited them in accordance with the normal procedure. I never turned my mind to what Thiess were paying those payments for.

192. It is clear that Thiess would never have paid the invoices if it had known that the Australian Workers' Union – Workplace Reform Association Inc. was not part of the AWU. In short, as Paul Darrouzet said, Thiess had again been 'deceived'.³⁰⁷

N – MORE RENOVATIONS IN 1994

Bruce Wilson and friends demolish the bathroom

193. Major renovations were carried out on Julia Gillard's house at Abbotsford in September, October and November 1994. The clearest account of the renovations is to be found in the interview between Peter Gordon, Geoff Shaw and Julia Gillard on 11 September 1995. In that interview she stated that she had a long term plan to fix the bathroom and laundry. She went away for a holiday in late August or early September. While she was away Bruce Wilson decided that the plan to renovate should be instituted immediately. He therefore decided, without consultation with or notice to Julia Gillard, to demolish the bathroom. This he achieved with the assistance of a group of friends. Julia Gillard said that she came back from her holiday in early September to find the bathroom destroyed. With a no doubt considerable exercise of her powers of self-control and understatement, she said that this was not her 'preference'³⁰⁸ and

³⁰⁷ Paul Darrouzet, witness statement, 9/9/14, para 19.

that she therefore had no option other than to get the rest of the renovations done.

The work done

194. The work began within weeks of Julia Gillard's return from holiday. The late Jim Collins arranged for the work to be carried out using people he had come to know through his local football club. Given that Jim Collins was an organiser of the AWU, and Bruce Wilson was then the Victorian State Secretary, it may be inferred that Jim Collins made the arrangements for the work to be done at the request or direction of Bruce Wilson.³⁰⁹
195. Julia Gillard's involvement in the carrying out of these major renovations seems only to have been limited. She did not obtain any quotations. She did not participate in the selection of which people were to work on the renovations. She did not prepare any budget or apparently have any regard at all to what the work might cost. She did not enter into any building contract in writing. All this was in contrast to her careful selection from among competing quotations and her daily supervision of Athol James when he carried out work in the previous year.³¹⁰

³⁰⁸ Julia Gillard, 10/9/14, T:841.28.

³⁰⁹ Gillard MFI-1, pp 148-149.

³¹⁰ Julia Gillard, 10/9/14, T:835.38-836.41, 838.16-39, 847.30-848.24.

196. The work carried out was extensive. It included building the bathroom, completing the kitchen, tiling the kitchen floor, and plastering and replacing ceilings.³¹¹

Ralph Blewitt's evidence that he paid \$7,000 at Bruce Wilson's direction

197. Ralph Blewitt testified that in or about September or October 2004 at Bruce Wilson's direction he paid a sum of approximately \$7,000 to a tradesman working on the Abbotsford property. He said:³¹²

I arrived at the house, walked through the house to the back – the whole place was open. My recollection is Julia Gillard was in one of the rooms adjacent to the front door. She said words to the effect, “Oh, Bruce is through the back. Just go through.” I went through. I met Bruce Wilson in the kitchen/verandah area. There were three other people in attendance that day. They were just dressed in worker's-type overalls. They were doing renovations on either the verandah or the kitchen; I can't remember precisely. Mr Wilson called out to somebody. Oh, he asked me if I had the money. I said, “Yeah.” He called out to somebody, who came in. He asked me to pay him \$7,000 which I did. I counted off \$7,000, gave it to that gentlemen. He stuck it in the front pocket of his bib-and-brace overall and went back outside to join the other two workers that were there.

198. Ralph Blewitt says he gave the balance of the cash he had brought from Perth to Bruce Wilson and left the Abbotsford property soon afterwards.³¹³ He was clear that Julia Gillard, being in a front room of the house, played no part in paying \$7,000 and had no knowledge of it.³¹⁴

³¹¹ Gillard MFI-1, p 149.

³¹² Ralph Blewitt, 12/5/14, T:81.30-45.

³¹³ Ralph Blewitt, 12/5/14, T:81.47-82.4.

³¹⁴ Ralph Blewitt, 12/5/14, T:82.6-17.

199. Julia Gillard had no firsthand knowledge of this incident one way or the other because on Ralph Blewitt's account she stayed in the front of the house and did not go to the back. But she contended that the incident could not have happened for two reasons. First, she checked her 'receipts and expenditures' and satisfied herself that she had paid for all the work. Secondly, tradesmen work only on weekdays, Bruce Wilson was a busy union official, she was a busy solicitor, and hence the tradesmen, Bruce Wilson and herself could not all have been in the house simultaneously.³¹⁵ Question marks can be placed over this reasoning. Julia Gillard's receipts appear to have disappeared and are not available for perusal. The laconic way in which work can be described in documents generated by small tradesmen can make it hard to match them with a recollection of what has been done. Further, small builders can and do work on weekends. There can be weekdays in which small builders work, but solicitors and union officials do not.
200. Ralph Blewitt's evidence is not inherently improbable, but for the fact that it was he who gave it. The prevalence of large cash payments in the circles in which Ralph Blewitt and Bruce Wilson moved is confirmed by persons other than Ralph Blewitt – Bruce Wilson, Athol James and Wayne Hem. But for the reasons set out in detail below, it is difficult to accept Ralph Blewitt was a witness of truth.³¹⁶ He was often unreliable, and, by his own admission, he has been guilty of fraud. Caution has to be exercised in accepting his evidence save where it is against his

³¹⁵ Julia Gillard, 10/9/14, T:853.40-854.2.

³¹⁶ See Appendix A to this Chapter.

own interest, corroborated, or supported by contemporaneous documents. The same is true, of course, of Bruce Wilson. He has been guilty of fraud, and of quite a bit of knowingly false evidence interspersed with flashes of candour. Bruce Wilson's denials of this incident were not against his interest, nor corroborated, nor supported by contemporaneous documents.³¹⁷ It is true that Ralph Blewitt's evidence is partly against interest, because he is admitting to giving away money that should never have been taken away from Thiess and should have been restored to it. But in all the circumstances it is not possible to make a finding one way or the other about this incident.

Wayne Hem's evidence of Bruce Wilson's \$5,000 gift

201. Were any Thiess funds obtained by the Australian Workers' Union – Workplace Reform Association Inc. used in paying for the building work? It is necessary to consider the evidence of Wayne Hem, Bruce Wilson and Julia Gillard.

202. Wayne Hem was an AWU official. He worked as a librarian, research officer, records officer, archivist and file systems clerk.³¹⁸ Two parts of his evidence are relevant. One relates to a request by Bruce Wilson to him to place \$5,000 in cash in Julia Gillard's bank account. The second relates to a payment of cash by Bill Telikostoglou to a painter at Julia Gillard's house.

³¹⁷ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 205-206.

³¹⁸ Wayne Hem, witness statement, 11/6/14, para 3; Wayne Hem, 11/6/14, T:308.27-28.

203. Wayne Hem's witness statement said:³¹⁹

One morning in mid to late 1995, Bruce and Bill [Telikostoglou] came into the Drummond Street office. Bruce went to his office and Bill got a coffee. I asked Bill how was their evening because they both looked scruffy. Bill said he had been to the Casino and I asked how they went and he said not good.

Bruce then asked me to come down to his office. When I got there he asked if I would do him a favour. He took a wad of notes out of his pocket and he wrote on a piece of paper a bank account number. He handed me the cash and the piece of paper and asked me to deposit the cash into the bank account. I looked at the paper, asked him to tell whose account it was, and handed him the piece of paper back so that he could write down the details on the paper for me. He then wrote Julia GILLARD on the piece of paper and handed it back to me. I asked him what bank I had to go to. He told me the Commonwealth Bank. I asked how much money there was. He said five thousand dollars. I then verified that by counting it out in front of him. There was five thousand in cash and I told him I would be back shortly.

I went to the Commonwealth Bank in Victoria Street, Carlton and deposited the money into the bank account as requested and then returned to the office. I then gave Bruce back the bank details.

204. Wayne Hem's oral evidence was in substance similar.³²⁰

205. Senior counsel for Bruce Wilson made much of Wayne Hem's claim that when he once visited Slater & Gordon's offices to deliver some papers to Julia Gillard at Bruce Wilson's request, he said that those offices were opposite Flagstaff Gardens and gave other details.³²¹ Senior counsel for Bruce Wilson called this 'the most obvious problem with Mr Hem's evidence'. She went on:³²²

³¹⁹ Wayne Hem, witness statement, 11/6/14, paras 19-21.

³²⁰ Wayne Hem, 11/6/14, T:310.4-43.

³²¹ Wayne Hem, 11/6/14, T:324.35-327.13; Wayne Hem, witness statement, 29/5/14, para 18.

³²² Submission on behalf of Bruce Wilson, 14/11/14, para 5.3.

Slater & Gordon's offices are now in La Trobe St opposite the Flagstaff Gardens, and have been for some years. But as Ms Gillard said in her witness statement, and as was confirmed by Justice Murphy in his oral evidence,³²³ in the early 1990s, Slater & Gordon's office was in Little Bourke St, "a fair way"³²⁴ from Flagstaff Gardens, and certainly not across the road as Mr Hem swore. The most cursory inspection of a map of central Melbourne will show just how conclusively his locating the office as over the road from the gardens discredits the reliability of Mr Hem's evidence. Further, Mr Hem gave detailed and particular evidence³²⁵ about the delivery of those documents to Ms Gillard at that office and the physical layout of the office reception area. That evidence cannot be correct, as the evidence of Justice Murphy³²⁶ and Ms Gillard shows.³²⁷ Some of the differences are:

- The location of the building as referred to above, about which Mr Hem was quite unequivocal;
- His description of a reception window staffed by a receptionist, contrary to Justice Murphy's evidence;
- His description of "some sort of shop to the left";
- Ms Gillard coming out of a door beside reception not the lift, contrary to Ms Gillard's evidence;³²⁸
- No mention by Mr Hem of the need to summon attention by ringing a buzzer in the reception area, contrary to Ms Gillard's unchallenged evidence.³²⁹

206. Senior counsel for Julia Gillard made similar criticisms.³³⁰

207. Wayne Hem's visit to Slater & Gordon had nothing to do with the two important pieces of evidence he gave, relating to the \$5,000

³²³ Bernard Murphy, 9/9/14, T:567.25-36.

³²⁴ Bernard Murphy, 9/9/14, T:567.24-36.

³²⁵ Wayne Hem, 11/6/14, T:324.31-327.13.

³²⁶ Bernard Murphy, 9/9/14, T:567.38-568.2

³²⁷ Julia Gillard, witness statement 3, 10/9/14, para 3.

³²⁸ Julia Gillard, witness statement 3, 10/9/14, para 3.

³²⁹ Julia Gillard, witness statement 3, 10/9/14, para 3.

³³⁰ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(e).

and the payment handed over at Julia Gillard's house. His evidence about his visit to Slater & Gordon was evidence on a non-issue. That evidence has no significance for his veracity and reliability on the two key issues.

208. Senior counsel for Julia Gillard made numerous submissions in support of the proposition that 'Wayne Hem's evidence is inherently unlikely and contains a number of inconsistencies beyond those acknowledged by Counsel Assisting'.³³¹

209. The first submission was put thus:³³²

Mr Hem gave evidence that Mr Wilson handed him the money in notes.³³³ Mr Cambridge gave evidence that Mr Hem told him in 1996 that the previous year Mr Wilson handed him an envelope containing approximately \$5000.³³⁴ The discrepancy is a significant one. When Mr Hem was challenged about the discrepancy, he denied having ever said to Mr Cambridge that the money was contained in an envelope.³³⁵ Mr Hem's prior inconsistent statement to Mr Cambridge is relevant to both his credibility and his reliability as a witness.

210. Both Commissioner Cambridge and Wayne Hem were giving evidence in 2014 about a conversation in 1996. It is possible that Wayne Hem's recollection is correct and Commissioner Cambridge's is not. But if Commissioner Cambridge is correct and Wayne Hem is not, the discrepancy scarcely affects Wayne Hem's 'credibility', nor his reliability.

³³¹ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30.

³³² Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(a).

³³³ Wayne Hem, witness statement, 11/6/14, para 20; Wayne Hem, 11/6/14, T:310.24-25.

³³⁴ Ian Cambridge, witness statement, dated 27/5/14, 10/6/14 para 298.

³³⁵ Wayne Hem, 11/6/14, T:317.4-12.

211. The next submission was as follows:³³⁶

Mr Hem first gave evidence that Mr Wilson gave him the cash and a piece of paper with a bank account number on it. Mr Hem then asked Mr Wilson to tell him whose account it was. Mr Hem handed Mr Wilson the piece of paper back and Mr Wilson then wrote to Julia Gillard on the piece of paper and handed it back to Mr Hem.³³⁷ However, Mr Hem agreed that he told a journalist from the Australian in November 2012 something different. Mr Hem gave the following evidence:

Q. Did you tell the journalist from The Australian in November of 2012 that Mr Wilson, in answer to your question, “Is this for me?”, said, “No, I want you to put it into a bank account.” You then said, “Okay.” And he said, “Hang on, I’ll give you the bank account name and number”, and then handed you a piece of paper with the account number and name on it. Did you tell the journalist that?

A. Yes, I did tell the journalist that.³³⁸

Mr Hem’s explanation for this discrepancy was “because the journalist didn’t ask me if the paper had the name on it, or did I get Mr Wilson to put the name on it”.³³⁹ This explanation is unconvincing. That Mr Hem would be prepared to swear that the inconsistency in his versions was the fault of the journalist for not asking the correct question bears directly on his credibility and reliability as a witness.

212. The question whether the piece of paper initially had the number on it without the name, or whether both were put on together, is completely immaterial. Nor is it clear that the journalist was not in error. Again this does not affect either credibility or reliability.

213. The next submission was put thus:³⁴⁰

³³⁶ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(b).

³³⁷ Wayne Hem, witness statement, 11/6/14, para 20.

³³⁸ Wayne Hem, 11/6/14, T:318.29-37.

³³⁹ Wayne Hem, 11/6/14, T:318.39-44.

³⁴⁰ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(c).

Mr Hem said in his evidence to the Commission that the denominations of the cash provided to him by Mr Wilson were \$100 notes, \$50 notes, \$20 notes and \$10 notes. He said he could say this “with certainty”.³⁴¹ This is inconsistent with what Mr Cambridge says that he told him in June 1996. Mr Cambridge deposed that Mr Hem told him that the cash contained approximately \$5000 in \$100 and \$50 notes.³⁴² Mr Hem’s explanation for the discrepancy was that he told Mr Cambridge “it was \$100 and \$50 notes but I didn’t tell him the whole lot was \$100 and \$50 notes. Our conversation was just to Mr Cambridge, was just a general conversation about how much there was in money to put in the bank.”³⁴³ This explanation is unconvincing and strongly suggestive of recent invention.

214. This small discrepancy does not seem material after the passage of so much time. It supports the view that Wayne Hem was genuinely trying to remember – to summon up an actual recollection – as distinct from relentlessly repeating a carefully planned and rehearsed account. Further, the fact that Wayne Hem gave an account of this transaction to Ian Cambridge in 1996 provides some support for his position: it shows that the substantive aspects of his testimony were not the result of recent invention. Incidentally, senior counsel for Julia Gillard submitted that Wayne Hem’s position was only stated publicly for the first time in 2012. That depends on what is meant by ‘publicly’. The fact is that it was stated to Ian Cambridge in 1996 in a manner substantially consistent with his testimony.

215. The next submission was:³⁴⁴

Mr Hem also gave evidence that he did not know if the bank account was Julia Gillard’s private account, her business account or a Slater and Gordon account. This is revealed from the following exchange:

³⁴¹ Wayne Hem, 11/6/14, T:312.26-28.

³⁴² Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 298.

³⁴³ Wayne Hem, 11/6/14, T:316.44-47.

³⁴⁴ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(d).

Q. Did you tell the journalist from The Australian newspaper, again in November 2012, “I don’t know if it was for Julia or if the account was a private account or a Slater and Gordon account”?

A. Yes, at the time, yes.

Q. You did say that to the journalist from The Australian did you?

A. Yes, and I say that now because originally I didn’t – I knew that Julia was a solicitor, I did not know if the account was her private account, or her business account, or a Slater and Gordon account.³⁴⁵

216. This reveals no inconsistency. But it does raise the questions: What business did Bruce Wilson have putting so large a sum as \$5,000 into any of Julia Gillard’s accounts? How did this ill-paid trade union official come by it? It is not a conventional or business-like way of proceeding.

217. Whether these criticisms of Wayne Hem are taken separately or together, they do not undermine his credibility or reliability on the central issues. He was giving evidence about events that had taken place a long time ago.

218. Significantly, Bruce Wilson did not deny the transaction described by Wayne Hem. He simply said he did not remember it.

Q. You certainly don’t deny it, do you?

A. I just have no recollection of it.

Q. It might have happened, you just can’t remember one way or the other?

³⁴⁵ Wayne Hem, 11/6/14, T:319.4-15.

A. Yes.³⁴⁶

219. But the concession that it ‘might have happened’ makes the evidence more than just a statement of non-recollection. It is a little surprising that senior counsel for Bruce Wilson put so much effort into attempting to destroy a witness with whom her client was not testimonially at odds.

220. If the transaction occurred, the only source of the \$5,000 in cash would appear to have been the funds raised and held by the Australian Workers’ Union – Workplace Reform Association Inc. Thus Bruce Wilson said:³⁴⁷

Q. Mr Blewitt was the only person who, from time to time, was giving you sums of money in cash; correct; at that time?

A. Yes.

Q. You can’t point to anyone else who might have handed you the sum of \$5,000 in cash, can you?

A. No.

Q. If you did have \$5,000 in cash, it must have come from Mr Blewitt?

A. Well, the way you’re putting it, that’s what it sounds like but, as I say, I don’t recall having given Wayne Hem \$5,000.

221. It is not possible to resolve this issue by examining Julia Gillard’s bank account records. They have disappeared in the last 20 years. The following factors are significant. One key factor is that Wayne Hem has a clear recollection of this event. He was a compelling witness. He seemed to be an amicable, slightly

³⁴⁶ Bruce Wilson, 12/6/14, T:477.14-19.

³⁴⁷ Bruce Wilson, 12/6/14, T:477.31-44.

unworldly, but acute man – and as such a man, carrying on the reclusive profession of archivist, who would regard a cash payment of \$5,000 as unusual and memorable. He was on good terms with Bruce Wilson. He looked after Bruce Wilson’s son when he came from Perth to visit his father.³⁴⁸ Thus he had no animus against Bruce Wilson. Nor did he have any animus against Julia Gillard. He had no motive to lie. He had no advantage to gain from giving evidence. His unworldliness tended to cause him to narrate points of detail on the essential parts of his evidence convincingly, even though he may have erred on insignificant questions. The intensity of the tussle with cross-examiners excited him, and perhaps over-excited him, but he never appeared to dissemble or to attempt anything other than truthful answers. His demeanour was that of an honest man. He was cross-examined to suggest that he was mistaken, but not that he was fabricating evidence.

222. Another key factor is that Bruce Wilson does not deny Wayne Hem’s evidence. The written submissions advanced for Julia Gillard denied that this was ‘logically supportive’ of Wayne Hem.³⁴⁹ In a narrow sense, that is true. In a practical sense, it is beside the point. Ordinarily, Bruce Wilson took every step in his testimony which he thought necessary to protect his self-interest. His abstention from doing so on this issue strongly suggests that he did not deny Wayne Hem’s evidence because in conscience he could not do so. His non-denial in circumstances where it was

³⁴⁸ Wayne Hem, 11/6/14, T:308.43-309.21.

³⁴⁹ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 31.

strongly in his interests to offer a denial is an example of how flashes of honesty, frankness and credibility sometimes shone through his testimony. His non-contradiction of Wayne Hem leaves it the more open to accept Wayne Hem.

223. Another key factor is that Bruce Wilson was in the habit of receiving cash sums of about this amount from Ralph Blewitt from time to time as set out above.
224. Another key factor is that although Julia Gillard does not remember the sum of \$5,000 appearing in her bank account,³⁵⁰ she cannot deny it because of the absence of bank records. And often people do not study their bank statements with care. It is not open either on the evidence or by recourse to the teachings of ordinary experience to conclude that if the figure of \$5,000 had appeared in her bank statements she would have noticed. Failure to notice is not a matter of criticism.
225. In the circumstances, it is probable that the transaction observed by Wayne Hem took place. There is nothing shameful to Julia Gillard in this conclusion. At the Prime Minister's press conference of 26 November 2012, she said: 'To the best of my knowledge I do not remember \$5,000 being put in my bank account.'³⁵¹ She also said: 'I just ask you for one moment to assume that that is true, that \$5,000 was put in my bank account by a person I was then in a relationship with, who the witness involved said had had a big night out at the casino. Can you piece

³⁵⁰ Julia Gillard, 10/9/14, T:850.42-851.3.

³⁵¹ Gillard MFI-1, p 177.

together for me the personal wrongdoing involved in that? I doubt you can.’ There is much force in that last observation. People are not to be criticised for receiving tainted money unless they were aware that they had received it. It is not possible to conclude that she was aware of the receipt of the \$5,000.

Wayne Hem’s evidence of payments to tradesmen

226. The second relevant part of Wayne Hem’s evidence concerned payments made to a tradesman working at Julia Gillard’s house. His witness statement said:³⁵²

About two weeks after the Fitzroy property was finished with the renovating I attended at a house at Abbotsford with Bill the Greek. Prior to arriving at this house Bill and I were in Bill’s union car and Bill said that he had to go to this house to pay some tradesmen. I didn’t know whose house it was. When I went inside I could see that the house was being renovated. We went into the lounge room which was being painted by two painters. I had not seen the painters before. I saw Con the Builder in the kitchen and it looked like he had finished doing some tiling work.

227. Wayne Hem further testified that he saw Bill Telikostoglou hand one of the painters an envelope which he assumed contained some money.³⁵³

228. Julia Gillard responded by observing that, to the best of her recollection, the painting at her home was undertaken earlier than in mid-1995.³⁵⁴ Little would appear to turn on this time difference after so many years have passed. More significantly, Julia Gillard

³⁵² Wayne Hem, witness statement, 11/6/14, para 23.

³⁵³ Wayne Hem, witness statement, 11/6/14, para 24.

³⁵⁴ Julia Gillard, witness statement 3, 10/9/14, para 5.

then said, speaking of Wayne Hem's evidence about the painting:³⁵⁵

I have no reason to believe that payment for any section of it was made by any other person than me. I have no knowledge of Bill attending my property and purportedly paying one or more of the tradespeople as described in the statement.

229. As this indicates, Julia Gillard had no firsthand knowledge which would permit her to deny what Wayne Hem said.

Julia Gillard's testimony

230. Julia Gillard's evidence was that she paid for all renovations herself. She said:³⁵⁶ 'All payments made for renovations on my property were from my own money which was either derived from a loan from the bank and my salary.'

231. However, in the 11 September 1995 interview, which was conducted less than a year after the work was completed, Julia Gillard expressed uncertainty as to whether she had paid for all the work herself. The key passages were referred to in relation to Athol James. Thus she said:³⁵⁷

I will meet with Bob [Smith] as soon as possible for the purpose of clarifying that matter. Now I believe that that must be the source of the rumour about, that must be the factual construct behind what has become the rumour about, about the association or Bruce or the union or whoever paying for work on my house and I don't obviously given I've been fairly surprised by events to date in relation to this matter, *I can't categorically rule out that something at my house didn't get paid for by the association*

³⁵⁵ Julia Gillard, witness statement 3, 10/9/14, para 5.

³⁵⁶ Julia Gillard, witness statement 4, 10/9/14, para 26.

³⁵⁷ Gillard MFI-1, p 153.

or something at my house didn't get paid for by the union or whatever, I just, I don't feel confident saying I can categorically rule it out, but I can't see how it's happened because that really is the only bit of work that that that I would identify that I hadn't paid for (emphasis added).

232. Likewise, earlier in the interview, Julia Gillard was asked whether it was fair to say that she had paid for all the work herself. She replied that she *believed* that to be the case.³⁵⁸ That cautious answer seems to leave room for doubt.
233. The lessons of ordinary experience make it surprising that Julia Gillard was uncertain on this point in the interview. Many people have caused renovations to be carried out on their houses. Few would have difficulty, a few months later, in saying whether or not they had paid for those renovations.
234. On the other hand, the renovations being carried out for Julia Gillard were not ordinary, but unconventional. They were occasioned by Bruce Wilson's bizarre destruction of her bathroom. They seemed to be done in a hurry. They were not being conducted in an orderly fashion under the control of a single builder hired by contract for the task. Instead, Jim Collins was arranging, in an ad hoc and informal way, for the work to be done.
235. How can Julia Gillard now be sure that some of the work was not being done for nothing, or at someone else's expense? How is it that she can now categorically rule out that someone else made any payments for the renovations, despite her inability to do so at the time of the 11 September 1995 interview? She answered these questions in the following way. Since the 11 September 1995

³⁵⁸ Gillard MFI-1, p 150.

interview she had checked her records. She had considered the matter carefully. She had decided that all work had been paid for by her. Accepting that she did all these things, how reliable was her conclusion? It would be difficult even for a trained and experienced quantity surveyor to determine with precision what work might or might not have been done and what might reasonably have been charged for it. Julia Gillard, as she acknowledged, had no such training or experience.³⁵⁹

236. Rather late in the day, Julia Gillard dealt with Wayne Hem's evidence about Bill Telikostoglou's payment by saying that Wayne Hem:³⁶⁰

does not accurately describe the home in which I lived, and I can also say in relation to Mr Hem's statement that he records a series of tradespeople being there together doing jobs and those jobs were done at separate times; that is, that there was no time when that combination of tradespeople was at work in the home.

Then she was asked:³⁶¹

Q. ...You accept then, do you, that it is a possibility that Mr Telikostoglou or Mr Collins may have arranged for some painters on behalf of Mr Wilson to come to the Abbotsford property?

A. No, I don't.

Q. And may have paid them directly for work that they carried out on that property?

A. No, because that would have become apparent to me when I looked through the payments that I made for the work, that there was painting that was done that I hadn't paid for. I would also

³⁵⁹ Julia Gillard, 10/9/14, T:847.45-848.1.

³⁶⁰ Julia Gillard, 10/9/14, T:852.11-18.

³⁶¹ Julia Gillard, 10/9/14, T:852.30-853.2.

have thought that Mr Hem would be in a position to correctly describe the property. I would also have thought Mr Hem would be in a position to correctly describe the tradespeople who were at the property when he said he visited. Given Mr Hem is not in either of those positions, he has the nature of the property wrong, the layout of it wrong, he has the combination of tradespeople wrong, and I checked that I paid for the work, no, I don't think it is possible.

237. But what were the supposed errors of Wayne Hem in his descriptions of the property and the tradespeople? This thinking was not developed in any detail at all. The supposed errors were not mentioned in the relevant statement in chief which Julia Gillard supplied. Senior counsel representing her did not cross-examine Wayne Hem to suggest he had made these errors. Nor did he elicit further evidence from Julia Gillard after she had given the evidence quoted above. Senior counsel for Bruce Wilson, too, did not cross-examine Wayne Hem about the supposed errors or elicit further and more detailed evidence from Julia Gillard. Senior counsel for Bruce Wilson criticised counsel assisting for failing to extract more detail from Julia Gillard.³⁶² But it was for Julia Gillard to be more precise in her evidence if she could be. On that point her evidence was to some degree volunteered non-responsively. It was also possible and obligatory for senior counsel for Bruce Wilson to extract more detail if she thought it to be advantageous to Bruce Wilson. One reason why authorisation is granted to lawyers to represent affected parties at an inquiry is to enable them to improve the factual material before the inquiry, not merely lie by and wait to the end before criticising the conduct of counsel assisting.

³⁶² Submissions on behalf of Bruce Wilson, 14/11/14, para 5.2.

238. Thus Julia Gillard’s exposition of these supposed errors, while she was under examination by counsel assisting, was not only quite unspecific, but belated. This part of Julia Gillard’s evidence constitutes no ground for not accepting Wayne Hem. He had no chance to deal with these points.

239. Senior counsel for Julia Gillard made three criticisms of Wayne Hem’s evidence about Bill Telikostoglou.

240. The first criticism was as follows:³⁶³

Mr Hem gave evidence that Mr Wilson arranged for the backyard at Kerr St, Fitzroy to be paved and that this was done by “Con the builder, who was a Greek guy”.³⁶⁴ “Con” also did some painting inside at Kerr Street.³⁶⁵ “Con the builder” is clearly Konstantinos Spyridis. Mr Spyridis gave evidence that he did not perform any work at Kerr Street.³⁶⁶ He was challenged about this issue by Counsel Assisting and remained resolute in his position that he did not perform any work at Kerr Street.³⁶⁷ Mr Hem is clearly mistaken that there was work done by Mr Spyridis at Kerr Street. Mr Hem’s evidence that “the backyard area hadn’t been cared for and was in need of some landscaping”³⁶⁸ seems to be contrary to the valuation report obtained by Slater and Gordon prior to settlement which described the property as having “a paved and landscaped rear courtyard”³⁶⁹. If there was work performed at Kerr St, as claimed by Mr Hem, it was not performed by Mr Spyridis.

241. It would be dangerous to refuse to accept any witness merely on the ground that Konstantinos Spyridis disagreed with that witness. Both the content of his evidence and the manner in which it was

³⁶³ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 35(a).

³⁶⁴ Wayne Hem, witness statement, 11/6/14, para 22.

³⁶⁵ Wayne Hem, witness statement, 11/6/14, para 22.

³⁶⁶ Konstantinos Spyridis, witness statement, 11/6/14, para 6.

³⁶⁷ Konstantinos Spyridis, 11/6/14, T:304.31-39.

³⁶⁸ Wayne Hem, witness statement, 11/6/14, para 22.

³⁶⁹ Palmer MFI-1, p 127.

given were unsatisfactory. Further, Wayne Hem's position is supported by Robert Frederick Smith. He said that Konstantinos Spyridis told him in 1995 that he (Spyridis) carried out work on both the Kerr Street and the Abbotsford properties; that Konstantinos Spyridis described these two properties as 'union houses'; and that Konstantinos Spyridis demanded payment for that work. Konstantinos Spyridis was invited by the Commission to respond to Robert Frederick Smith's evidence. He has not taken up that invitation. Further, it is difficult to find contradictions between items of evidence which turn on vague evaluative expressions like 'cared for' and 'landscaping'.

242. The second submission advanced by senior counsel for Julia Gillard was as follows:³⁷⁰

Mr Hem gave evidence that about two weeks after the work at Kerr Street Fitzroy concluded he attended at St Phillips St, Abbotsford with Bill the Greek when the latter gave money to a painter in the lounge room. According to Mr Hem, "Con the builder" was present in the kitchen at the time performing tiling work.³⁷¹ Mr Hem's evidence in this respect is directly contradicted by Mr Spyridis. Mr Spyridis gave evidence that he did not go inside the house in Abbotsford.³⁷² Mr Spyridis did not perform tiling work in the kitchen at Abbotsford. Mr Spyridis also gave evidence that he had no knowledge of any money being paid by "Bill the Greek" to any painters at the property.³⁷³

243. Senior counsel for Bruce Wilson, too, submitted that Wayne Hem's evidence that money was handed to a painter was contradicted by Konstantinos Spyridis. That is not so. In an

³⁷⁰ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 35(b).

³⁷¹ Wayne Hem, witness statement, 11/6/14, paras 23-24.

³⁷² Konstantinos Spyridis, 11/6/14, T:301.16-18.

³⁷³ Konstantinos Spyridis, 11/6/14, T:301.29-46.

unsatisfactory passage, Konstantinos Spyridis alternated between saying he could not remember the handing over of money to the painter and saying that he did not see any payment being made.³⁷⁴ That is not a very forceful contradiction. But Konstantinos Spyridis also said that the work was done not by him but by employees, that his employees worked on the front veranda and the front picket fence,³⁷⁵ that he was rarely present, that he had nothing to do with painting work, only outside work, and that he never went through to the part of the house where the painters were.³⁷⁶ It follows that Wayne Hem was mistaken in saying ‘Con the builder’ was in the kitchen, but it also follows that Konstantinos Spyridis was thus not in a position to agree with or deny Wayne Hem’s evidence about the money. On his evidence there was no occasion on which he could have observed the incident described by Wayne Hem, since it happened, if at all, at the back inside. But paradoxically the error of Wayne Hem identified by senior counsel for Julia Gillard reduces to insignificance Konstantinos Spyridis’s failure to give evidence supporting the proposition that money was paid to a painter.

244. Julia Gillard has cast doubt on the veracity or reliability of Konstantinos Spyridis, because during the 11 September 1995 interview she stated that she requested him to replace rotting windows with new windows, and he did this so badly that she criticised him and he replaced his defective work on those

³⁷⁴ Konstantinos Spyridis, 11/6/14, T:301.20-47.

³⁷⁵ Konstantinos Spyridis, 11/6/14, T:292.8-15, 295.7-42.

³⁷⁶ Konstantinos Spyridis, 11/6/14, T:301.6-18, 305.30-34.

windows.³⁷⁷ He denied working on the windows.³⁷⁸ He accepted that she complained to him about it.³⁷⁹ He was asked: ‘Why did she complain to you if you didn’t do the work?’ He answered: ‘I don’t know.’³⁸⁰ But whether he is right or Julia Gillard is right, he had no opportunity to observe what Wayne Hem claims to have observed. Hence his failure to remember it, or denial of it, has no significance. Contrary to the submissions of senior counsel for Bruce Wilson, he cannot be said to have contradicted Wayne Hem.

245. The third submission of senior counsel for Julia Gillard was put thus:³⁸¹

Mr Hem stated in his witness statement that prior to attending at the house in St Phillips St Abbotsford, “Bill said he had to go to this house to pay some tradesmen.”³⁸² Bill the Greek told Mr Hem the payment was for painting and renovations.³⁸³ Mr Hem confirmed that the person Bill the Greek handed the money to was a painter and that this was a person he had previously recognized as having done work at Kerr Street.³⁸⁴ Given that the works Mr Hem says were performed at Kerr St concluded only two weeks prior, Mr Hem was asked whether he knew which address the payment related to. Even though he had never mentioned this previously in his statement or evidence, Mr Hem was *prepared to volunteer* that it was a payment for work done on Ms Gillard’s house.³⁸⁵ Further cross-examination revealed that Mr Hem had in fact not been told that the payment related to work done at Ms Gillard’s house, but rather just for

³⁷⁷ Gillard MFI-1, pp 152-153.

³⁷⁸ Konstantinos Spyridis, 11/6/14, T:297.2-45, 306.21-24.

³⁷⁹ Konstantinos Spyridis, 11/6/14, T:297.43-45.

³⁸⁰ Konstantinos Spyridis, 11/6/14, T:297.47-298.1.

³⁸¹ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 35(c).

³⁸² Wayne Hem, witness statement, 11/6/14, para 23.

³⁸³ Wayne Hem, 11/6/14, T:319.47-320.2.

³⁸⁴ Wayne Hem, 11/6/14, T:319.34-40.

³⁸⁵ Wayne Hem, 11/6/14, T:320.4-6.

renovations.³⁸⁶ He presumed it was for Abbotsford because the Kerr Street works had been completed.³⁸⁷ This exchange reflects very poorly on Mr Hem's credibility. He was prepared to give evidence that the payment related to Abbotsford, when that was nothing more than an *assumption* on his part (emphasis added).

246. Wayne Hem did not 'volunteer' what he said. He answered a question. Further, what is here called an 'assumption' can equally be called an inference from circumstances. The word 'inferred' was the word used by senior counsel for Julia Gillard in putting the following leading question which was answered affirmatively:³⁸⁸ 'And you have, what, inferred that that was renovations at Abbotsford rather than Kerr Street, have you?' And the inference was not improbable.

247. Finally, senior counsel for Julia Gillard submitted that even if a finding were made that Wayne Hem did witness cash being paid by Bill Telikostoglou to a painter at Abbotsford, it would not be open to find that the payment was done for work on that house. They submitted that payment was more likely to have been made for the work completed weeks earlier at Kerr Street, not the work being undertaken but not yet completed at Abbotsford.³⁸⁹ The problem with the argument is that if the painter had not been paid for the Kerr Street work, it is highly unlikely that he would have turned up at Abbotsford. He is likely to have demanded and received payment for the work done in the past before embarking

³⁸⁶ Wayne Hem, 11/6/14, T:320.45-47.

³⁸⁷ Wayne Hem, 11/6/14, T:321.1-11.

³⁸⁸ Wayne Hem, 11/6/14, T:321.2-3.

³⁸⁹ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 37.

on another job. Painters are not in a position to carry their trade debtors for any length of time.

248. The short position is that Julia Gillard returned from her holiday in early September to discover that the bathroom had been demolished without her knowledge. Within weeks persons from the AWU had arranged for tradesmen to start work effecting major repairs. It is reasonable to infer that tradesmen were coming and going on many occasions when Julia Gillard was not on the site. No doubt a large part of the payments for the work came from Julia Gillard. However, she could not rule out that some payments were being made in cash by or on behalf of Bruce Wilson. This explains her uncertainty on the topic in the interview of 11 September 1995. In these circumstances, there is no reason to reject the evidence of Wayne Hem that he arrived at Julia Gillard's house with Bill Telikostoglou and observed a payment for work being made by that gentleman.³⁹⁰

249. It is no criticism of Julia Gillard to conclude that payments of that kind were being made if she was ignorant of them – any more than it is a criticism of her that Bruce Wilson arranged for Wayne Hem to pay \$5,000 into her bank account if she was ignorant of it. There is a tension between her sensible approach to the latter manner and her approach to the former matter. In both instances, the evidence is insufficient to justify rejection of her claim that she had no relevant knowledge.

³⁹⁰ Wayne Hem, witness statement, 11/6/14, para 23-25. Bill Telikostoglou no longer lives in Australia.

O – THE QUARREL ABOUT ‘STEALING’ FUNDS

Bruce Wilson’s supposed discovery

250. Bruce Wilson contended that in about November 1994 he discovered that Ralph Blewitt had been removing funds from the Australian Workers’ Union – Workplace Reform Association Inc.’s bank accounts.³⁹¹ Bruce Wilson testified that upon discovering this he became enraged with Ralph Blewitt, grabbed him and pushed him against the wall.³⁹² This is Bruce Wilson’s explanation for what happened to the bulk of the funds in the Association’s accounts which cannot be expressly accounted for. He accused Ralph Blewitt of ‘stealing’ them.³⁹³ This is a pretty rich remark when the only person from whom the funds could be said to be stolen, speaking colloquially, was actually Thiess, from whom they should never have been extorted and to whom they should have been repaid.

Inconsistency of Bruce Wilson’s conduct with ‘discovery’

251. However, if Bruce Wilson truly believed that Ralph Blewitt had been stealing funds from the accounts of the Australian Workers’ Union – Workplace Reform Association Inc., he did not behave in a way consistent with that belief. He did not report the matter to the police. He did not even report it to senior officials at the

³⁹¹ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 228-232; Bruce Wilson, 12/6/14, T:478.14-47, 479.1-5.

³⁹² Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 233.

³⁹³ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 237.

AWU.³⁹⁴ He did not report it to the persons whom he said were members of the Association.³⁹⁵ He said he was concerned that the AWU would become ‘embarrassed’ if Ralph Blewitt’s alleged theft became public knowledge; that the National Construction Branch and the objectives of the Association would be put in jeopardy; and that he ‘felt compassionate’ about Ralph Blewitt.³⁹⁶ This is all completely unconvincing. None of it could excuse the failure to report a theft of those proportions.

252. Further, if Bruce Wilson had discovered that Ralph Blewitt had been stealing money he would thereafter have distrusted him. He did not. On the contrary, within a few weeks Bruce Wilson had set up a new account in the name of the Construction Industry Fund in respect of which, to his knowledge, Ralph Blewitt was one signatory.³⁹⁷ This aspect of Bruce Wilson’s version of events is entirely implausible. It is inconceivable that he would within a short time after discovering a serious theft have placed Ralph Blewitt in a position of trust.

The probable position

253. It may be that some of Ralph Blewitt’s use of Bruce Wilson’s signature stamp to procure funds from the accounts of the Australian Workers’ Union – Workplace Reform Association Inc.

³⁹⁴ Bruce Wilson, 12/6/14, T:479.22-23.

³⁹⁵ Bruce Wilson, 12/6/14, T:479.25-27.

³⁹⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14 paras 237-238.

³⁹⁷ Wilson MFI-2, pp 298-299; Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 276; Bruce Wilson, 12/6/14, T:490.8-34, 491.10-18.

was a secret use with a view to spending some of those funds for his own benefit. However, the real reason Bruce Wilson did not report the matter was because he knew very well that the monies in the accounts had been obtained improperly by deceit, and also because he had obtained the benefit of at least a large proportion of the funds in the account. To report Ralph Blewitt's theft would in the very short run have led to the exposure of his own theft.

P – THE FALL OF BRUCE WILSON

The AWU-FIME merger

254. The AWU amalgamated with the Federation of Industrial Manufacturing and Engineering Employees (**FIME**) on or about 1 November 1993.³⁹⁸ In late 1994, the National Executive of AWU-FIME resolved to establish the National Construction Branch and to create a single Victorian branch of AWU-FIME, consolidating what had until then been duplicate branches in Victoria of AWU and FIME.³⁹⁹ The proposed rules were certified by the Industrial Registrar on 17 February 1995.⁴⁰⁰ Bruce Wilson was elected Secretary of the National Construction Branch.⁴⁰¹ Robert

³⁹⁸ Robert Frederick Smith, witness statement, 9/9/14, para 4.

³⁹⁹ Robert Frederick Smith, witness statement, 9/9/14, para 6.

⁴⁰⁰ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 42.

⁴⁰¹ Robert Frederick Smith, witness statement, 9/9/14, para 7; Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 92.

Frederick Smith, formally joint Secretary of FIME, was elected Secretary of the now unified Victorian branch of AWU-FIME.⁴⁰²

The discovery of secret accounts

255. Upon taking over as Secretary of the National Construction Branch, Bruce Wilson apparently established a number of accounts with the Commonwealth Bank. One of these was the AWU Members' Welfare Account (account number 300810009828). Bruce Wilson obtained sums from a number of companies which were then paid into that account. He thereafter used the monies in that account for various purposes. In particular he provided a cheque in the sum of \$6,500 to Bob Kernohan.⁴⁰³
256. In early to mid-July 1995 Robert Frederick Smith had a meeting with Peter Collins of the Commonwealth Bank. The solicitor for the Victorian branch of AWU-FIME, John Cain of Maurice Blackburn, also attended this meeting. Robert Frederick Smith's testimony was that to his surprise at this meeting Peter Collins revealed to him a number of accounts seemingly connected with the AWU, including one in which a sum of approximately \$157,000 had been deposited.⁴⁰⁴

⁴⁰² Robert Frederick Smith, witness statement, 9/9/14, paras 4-8; Ian Cambridge, witness statement dated 27/5/14, 10/6/14, paras 92 and 93. It is desirable to stress that Robert Frederick Smith who was previously Secretary of FIME is not the Robert Lesley Smith who was previously Secretary of the Victorian branch of the AWU.

⁴⁰³ Robert Kernohan, witness statement, 11/6/14, paras 94-95.

⁴⁰⁴ Robert Frederick Smith, witness statement, 9/9/14, para 11.

257. Robert Frederick Smith was immediately concerned that a serious breach of the union's rules had occurred. The accounts which Peter Collins revealed to him were not audited and did not appear to have been included in the union's financial statements. Robert Frederick Smith took immediate steps to freeze the accounts. On 14 July 1995, John Cain wrote to Peter Collins at the Commonwealth Bank requesting that all authorities to operate the accounts previously given by Bruce Wilson be withdrawn and that the accounts be frozen until such time as new authorities had been lodged.⁴⁰⁵
258. On 25 July 1995 Robert Frederick Smith wrote to Stephen Harrison and Ian Cambridge in their capacities as joint Secretaries of the AWU seeking to facilitate a meeting with the National Executive to deal with the money in the accounts.⁴⁰⁶
259. On 27 July 1995 Ian Cambridge and Arthur Harper (National Vice President of AWU) issued a circular letter to members of the National Executive stating that the matters raised by Robert Frederick Smith required proper investigation and a thorough financial audit. The letter suggested that it was appropriate that the National Executive should resolve to commence the relevant audit process as a matter of urgency. The letter also noted that this matter would be included on the agenda for a forthcoming finance committee meeting to be held on Wednesday 2 August 1995.⁴⁰⁷

⁴⁰⁵ Robert Frederick Smith, witness statement, 9/9/14, Annexure A.

⁴⁰⁶ Robert Frederick Smith, witness statement, 9/9/14, Annexure B.

⁴⁰⁷ Cambridge MFI-1, pp 117-119.

260. On 2 August 1995 the foreshadowed meeting of the AWU-FIME Finance Committee took place. Those attending included Robert Frederick Smith, Bruce Wilson and Ian Cambridge. Things became ‘pretty heated’. Robert Frederick Smith was concerned that Bruce Wilson had been misappropriating funds for his own personal benefit and pointed this out robustly. He told Bruce Wilson that he was ‘going to the slammer’.⁴⁰⁸
261. On 7 August 1995 Ian Cambridge travelled to Brisbane and had a meeting at the AWU office with Bill Ludwig, Stephen Harrison and Robert Frederick Smith. Robert Frederick Smith said that at this meeting he insisted that unless he had Bruce Wilson’s resignation that day, he was going to the police.⁴⁰⁹
262. At about this time a serious divergence of views arose in the leadership of AWU-FIME. On the one hand, Robert Frederick Smith, Stephen Harrison and others appeared to have decided that the appropriate course was to make Bruce Wilson and others redundant. Ian Cambridge and others vigorously resisted this course.

Slater & Gordon breaks with Bruce Wilson and the AWU

263. By this time Bruce Wilson had decided to seek legal advice. He approached Slater & Gordon. In the first instance he had discussions with Julia Gillard. She referred him to Bernard

⁴⁰⁸ Robert Frederick Smith, witness statement, 9/9/14, paras 18-21; Robert Frederick Smith, 9/9/14, T:678.20-35; Ian Cambridge, witness statement dated 27/5/14, 10/6/14, paras 123-151.

⁴⁰⁹ Robert Frederick Smith, witness statement, 14/8/14, paras 23-24.

Murphy. On 8 August 1995 Bernard Murphy and Bruce Wilson had a conference. Bruce Wilson claims legal professional privilege over the matters communicated in that conference. Bernard Murphy says he ceased to act for Bruce Wilson in respect of the allegations made against him by Robert Frederick Smith immediately after the conference.⁴¹⁰

264. On 14 August 1995 Bernard Murphy sent a letter to Bruce Wilson setting out his instructions given in the 8 August 1995 conference and confirming that Slater & Gordon would no longer act for him.⁴¹¹ Bruce Wilson claims legal professional privilege over this letter. Bernard Murphy thereafter did not do any further work for either Bruce Wilson or the AWU.

The redundancy packages

265. On 14 August 1995 Stephen Harrison and Barry Cochran (National Vice President) issued a circular letter to members of the National Executive which included a resolution authorising payment of a redundancy package to Bruce Wilson and others.⁴¹²
266. On 14 August 1995 Ian Cambridge issued his own circular letter to members of the National Executive opposing the payment. In that letter he raised serious concerns about what he described as ‘the extraordinarily hasty attempts by Joint National Secretary Steve Harrison and others’ to pursue the postal ballot. He

⁴¹⁰ Bernard Murphy, witness statement, 9/9/14, para 5.5-5.7.

⁴¹¹ Bernard Murphy, witness statement, 9/9/14, para 5.8.

⁴¹² Cambridge MFI-1, pp 146-148.

indicated that the matters relating to the payment of redundancies were complex and required a thorough investigation. He said that payment of redundancies without proper investigation, consideration and debate was a misuse of union funds:

These hasty and ill-conceived actions are unfortunately consistent with a series of improper decisions which have not only exposed serious mismanagement of the Union but which continue to publicly damage the organisation. I believe that the recent history of hasty “quick fix” decisions which amount to little more than using members’ money to seek to obtain some political advantage must stop.⁴¹³

267. On 15 August 1995 the President of the Queensland branch of the AWU, Bill Ludwig, wrote a letter stating his agreement with Ian Cambridge’s letter of the same day and urging that the National Executive vote against the payment of the redundancy package.⁴¹⁴
268. On 16 August 1995 Ian Cambridge sent a further circular letter to members of the National Executive. Again he urged that the National Executive refuse the redundancy package at least until a proper investigation had taken place. He pointed out that once an officer had taken a redundancy he or she would not be under an obligation to comply with directions to provide information regarding his or her conduct and that the ability of the union properly to investigate what had occurred would be ‘significantly impeded’.⁴¹⁵
269. Despite this opposition, on 17 August 1995 Stephen Harrison issued a circular letter to members of the National Executive

⁴¹³ Cambridge MFI-1, pp 149-150.

⁴¹⁴ Cambridge MFI-1, pp 151.

⁴¹⁵ Cambridge MFI-1, p 154.

containing the results of the postal ballot and advising that the payment of a redundancy package had been approved.⁴¹⁶

Refunding money to contributing companies

270. By this stage another aspect had emerged. As mentioned above, one account held a sum of approximately \$157,000. This money had been obtained from a number of cheques having been drawn in favour of the AWU, which cheques had then been deposited by Bruce Wilson into the account rather than the union's central fund.
271. By mid-August 1995, Robert Frederick Smith, Stephen Harrison and others had resolved not only to pay Bruce Wilson a redundancy package but, at the same time, to refund the money in the account to the various companies who had originally paid it to the AWU. This required the cooperation of Bruce Wilson because as at mid-August 1995 he remained one of the signatories on the account. He was therefore needed to sign the refund cheques drawn on the account.
272. The decision to refund this money is highly questionable. Either the money in the account *was* union money or it *was not*. If it *was* union money it belonged to the members and there was no proper basis for refunding it to the persons who had paid it in the first place. If it was *not* union money then very serious questions arose as to the circumstances in which Bruce Wilson had procured those sums to be paid to the AWU and then deposited them into the

⁴¹⁶ Cambridge MFI-1, p 179.

account. Those questions would not be answered simply by paying the money back with no investigation or audit.

273. In mid-July 1995, Robert Frederick Smith had been concerned that the monies in the account were union monies. By mid-August 1995 he had changed his mind. His explanation for this change of heart was as follows:⁴¹⁷

Well, I'd formed the view that it was money inappropriately obtained by Wilson who was – let's call a spade a spade. It was "go away money". It was "keep the peace money". It was bribe money by the companies and Wilson admitted that to us at the Executive. He said yes, we were naïve if we didn't understand that's the way it worked in construction. Well, I plead guilty. We were naïve.

Division over the redundancy payments

274. Paying redundancies to Bruce Wilson and others associated with the National Construction Branch (including Ralph Blewitt) was highly questionable. The National Construction Branch had been established only relatively recently and at considerable expense to the union. The positions of Bruce Wilson and others do not appear to have been 'redundant' in any conventional sense. Robert Frederick Smith testified that he had a 'very, very low opinion of Mr Wilson and his *modus operandi*. I wanted him out'.⁴¹⁸ He said that he still wished to pursue Bruce Wilson

⁴¹⁷ Robert Frederick Smith, 9/9/14, T:694.6-15.

⁴¹⁸ Robert Frederick Smith, 9/9/14, T:685.10-12.

legally.⁴¹⁹ He described a redundancy payment as ‘the most convenient vehicle to remove him’.⁴²⁰

275. At the same time however Robert Frederick Smith accepted that Bruce Wilson and others were resigning and that their positions had not become redundant ‘in a legal sense’.⁴²¹ He also accepted that it would be difficult in a practical sense to recover the redundancy payments once they had been made and Bruce Wilson had left the union.⁴²²

276. On 17 August 1995 there was a meeting at the Victoria Street branch of the Commonwealth Bank. It was attended by Robert Frederick Smith, John Cain, Peter Collins and Bruce Wilson. By this stage the AWU had drawn cheques on its State Bank of NSW account to pay the redundancies. For his part Bruce Wilson had drawn and signed the various cheques to refund the monies in the account.⁴²³

277. There seems to have been some concern on the part of Peter Collins, the manager of the Commonwealth Bank, about these transactions. John Cain drafted a letter dated 17 August 1995, doubtless on instructions which referred to the accounts which had been frozen, identified certain other accounts, and then stated:⁴²⁴

⁴¹⁹ Robert Frederick Smith, 9/9/14, T:686.1-7.

⁴²⁰ Robert Frederick Smith, 9/9/14, T:687.18.

⁴²¹ Robert Frederick Smith, 9/9/14, T:685.39-43.

⁴²² Robert Frederick Smith, 9/9/14, T:686.9-12.

⁴²³ Robert Smith, witness statement, 9/9/14, para 33.

⁴²⁴ Cambridge MFI-1, p 163.

‘The AWU has no interest in any other Accounts held at the Victoria St Branch of the Commonwealth Bank.’

278. Given that no investigation had taken place at that stage, and given that Ian Cambridge had expressed serious concerns about the arrangements that were being entered into and the need for an audit, it is difficult to see how this statement could have been made.

279. At the meeting at the Commonwealth Bank on 17 August 1995 the following redundancy cheques were handed over:⁴²⁵

| <u>Recipient</u> | <u>Amount</u> |
|--------------------|---------------|
| Ralph Blewitt | \$30,249.00 |
| Jim Collins | \$26,346.00 |
| Bill Telikostoglou | \$16,218.00 |
| Marie Murray | \$16,342.00 |
| Bruce Wilson | \$55,204.00 |
| Mark Barnes | \$11,479.00 |

280. On the back of the cheques is written in hand ‘please pay cash’. There is a signature of the late Jim Collins. The recipients of the redundancies cashed their cheques on the same afternoon. Their

⁴²⁵ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, paras 222-223.

probable reason is that they wished to obtain their funds as quickly as possible.⁴²⁶

281. Ian Cambridge then continued his efforts to recover the funds that had been paid out. A number of the companies who had received the refund cheques wrote back to the AWU indicating that as far as they were concerned the monies had been properly paid by them in the first place.⁴²⁷
282. By early September 1995 Bernard Murphy had become aware of the Australian Workers' Union – Workplace Reform Association Inc. He had also become aware of concerns being aired by some of the partners of Slater & Gordon about Julia Gillard's involvement in the conveyance of the Kerr Street property. In his oral testimony he referred to questions 'swirling around Slater & Gordon at that point'.⁴²⁸ He said the concern which had been aired with him by other partners of Slater & Gordon 'was that Julia Gillard had created an association which might have been set up corruptly and might have involved corrupt moneys and it involved the firm in a conveyance involving those moneys.'⁴²⁹

⁴²⁶ Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 223.

⁴²⁷ Cambridge MFI-3, p 680-681 (letter from Woodside Offshore Petroleum Pty Ltd); Cambridge MFI-3, p 643 (letter from Thiess Contractors Pty Ltd); Cambridge MFI-3, p 665 (letter from Hunter Industrial Management Services); Cambridge MFI-3, p 671 (letter from John Holland Construction & Engineering Pty Ltd).

⁴²⁸ Bernard Murphy, 9/9/14, T:575.25-26.

⁴²⁹ Bernard Murphy, 9/9/14, T:574.5-15.

Complaints by tradesmen about not being paid

283. Robert Frederick Smith testified that at about this time, September 1995, Konstantinos Spyridis turned up unexpectedly at the AWU office in Spencer Street Melbourne and asked for a meeting with him. At that meeting Konstantinos Spyridis demanded money for work he had done for ‘the union houses’ (emphasis added). He identified these houses as houses in Kerr Street and Abbotsford. According to Robert Frederick Smith, Konstantinos Spyridis said that Bruce Wilson had been paying him and that he was owed \$17,000.⁴³⁰ It is significant that Konstantinos Spyridis referred to these houses as ‘union houses’.
284. Robert Kernohan testified that in approximately September 1995 he heard a commotion at the reception area of the Spencer Street AWU branch office. Three tradesmen were shouting out words to the effect: ‘we want to be paid we haven’t been paid’. Just as he was leaving the reception area he observed Terry Muscat coming in.⁴³¹ Terry Muscat was an official at the Victorian branch of the AWU who worked closely with Robert Frederick Smith.⁴³²
285. Robert Kernohan testified that he went to another meeting elsewhere and when he returned he went to see Terry Muscat in

⁴³⁰ Robert Smith, witness statement, 9/9/14, para 44.

⁴³¹ Robert Kernohan, witness statement, 28/5/14, paras 114-115.

⁴³² Robert Kernohan, witness statement, 28/5/14, para 102.

order to find out what the yelling was about. Robert Kernohan testified:⁴³³

Terry MUSCAT said to me that WILSON was up to a lot more than [sic] operating dodgy bank accounts. He had authorised in the name of the AWU house renovations to a private property which was Julia GILLARD'S, the girlfriend of Bruce WILSON, and that they haven't been paid.

286. In her interview of 11 September 1995 with Peter Gordon and Geoff Shaw, Julia Gillard referred to Konstantinos Spyridis going to the AWU and demanding payment from Robert Frederick Smith. She said that Konstantinos Spyridis was seeking payment of an invoice which he had recently delivered to her house.⁴³⁴

The end game

287. Subsequently to the 11 September 1995 interview, Slater & Gordon did not disclose to the AWU the existence of the Australian Workers' Union – Workplace Reform Association Inc. Both Bernard Murphy and Julia Gillard left Slater & Gordon at about this time.
288. In March 1996, Bruce Wilson caused the Kerr Street property to be sold. Ralph Blewitt contended that he does not know where the net proceeds of the sale went and that he himself received none of the proceeds. However, Ralph Blewitt certainly knew that the Kerr Street property was being sold. On 23 February 1996 he

⁴³³ Robert Kernohan, witness statement, 11/6/14, para 117.

⁴³⁴ Gillard MFI-1, p 152.

signed the transfer for the sale of the property for a consideration of \$233,000.⁴³⁵

289. In approximately mid 1996 the AWU through Ian Cambridge discovered the existence of the Australian Workers' Union – Workplace Reform Association Inc. In due course proceedings were commenced against a number of persons seeking recovery of funds and also recovery of the redundancy payments. Among those persons was Robert Kernohan who was joined on the basis of the \$6,500 he had received from the AWU Members' Welfare Account as reimbursement for election expenses incurred by him.⁴³⁶

290. Robert Kernohan was appalled by what he had discovered on receipt of the court documents served on him. In particular he was appalled by the fact that redundancy payments had been made to Bruce Wilson and others. He told William Richard Shorten, Ashley Cox and Sam Beechey that: 'it was a bloody disgrace that they received redundancy payments whilst they were internally investigated for fraud.'⁴³⁷

291. Robert Kernohan's evidence continued:⁴³⁸

I told them that there was also ... a house ... sold two weeks after WILSON received the redundancy payment. I also told them that until I was served with these documents, I knew nothing and that there was an

⁴³⁵ Blewitt MFI-1, p 295.

⁴³⁶ Robert Kernohan, witness statement, 11/6/14, para 130.

⁴³⁷ Robert Kernohan, witness statement, 11/6/14, para 132.

⁴³⁸ Robert Kernohan, witness statement, 11/6/14, paras 133-137.

enormous effort of covering these things up. I told them that there as a court order about getting the redundancy payments back and nothing had been done about it.

SHORTEN cut me off, not in a nasty way, and he said words like, “Bob think of your future. There’s been a payout, we are all just moving on.” I said to SHORTEN, “what sweep it under the carpet like everyone else seems to have?” SHORTEN put his hand on my shoulder and responded, “Bob think of your future.” He said, “If you pursue this, a lot of good people will get hurt and you will be on your own. Look Bob, you’ve been lined up to take a safe labor seat of Milton in the Victorian parliament.”

That was the truth, I was lined up for the seat because it was common knowledge amongst my peers and Senior Ministers of the ALP such as Robert RAY and factional operators such as Stephen CONROY, Bill SHORTEN, Christopher HAYES and David [FEENEY] that that was going to happen.

During the meeting Ashley COX and Sam BEACHEY [sic] looked stunned and they didn’t comment at all, they just remained silent.

I walked away shaking my head. I felt devastated and I couldn’t believe what I heard Bill SHORTEN say in front of Ashley COX and Sam BEACHEY. I knew right then when I walked away that I’m not going to go into the Victorian parliament because it would have had that caveat on it. By that I mean a condition that if I was going to be pre-selected for Melton, I would need to do what everyone else was [doing] and that’s covering it up.

292. At that time William Shorten was a junior official in the AWU. While Robert Kernohan’s testimony is not wholly favourable to William Shorten, it is not unsympathetic. In the early 1990s Robert Kernohan regarded William Shorten, who had acted as campaign manager for him, as a friend.⁴³⁹ Robert Kernohan’s account portrays William Shorten as courteous, kindly and well meaning.

⁴³⁹ Robert Kernohan, witness statement, 11/6/14, para 41.

293. William Shorten, who is the now the Leader of the Opposition in Federal Parliament, provided the Commission with an affidavit in which he said:⁴⁴⁰

I have no recollection of attending a meeting or having a conversation with Mr Kernohan at the AWU office in 1996, either in the presence of Messrs Cox and Beeches [sic], or at all, about the matters to which Mr Kernohan has referred. I do not believe that I made any comments of the kind ... attributed to me by Mr Kernohan in those paragraphs.

294. This stops short of an absolute denial. If it had been an absolute denial, it would have been necessary for William Shorten to be cross-examined on the difference between his version and Robert Kernohan's. William Shorten's position is that while he does not remember what he says, and while he does not believe he said what is alleged, he does not deny saying it. Samuel Beeches has sworn an affidavit dated 21 November 2014 which is annexed to a written submission of that date filed on behalf of William Shorten. The affidavit states that: '[t]o the best of my recollection' the discussion did not take place. The affidavit also states: 'I do not believe' that the discussion took place.⁴⁴¹ This too stops short of an absolute denial. The solicitors for William Shorten, in their clear and responsible submissions on his behalf, rely on McLelland CJ in Eq's well-known warning about the fallibility of human memory in relation to conversations.⁴⁴² They point to the length of time which has passed. They submit that it is necessary for the Commission to be 'reasonably satisfied' that the conversation took place before finding that it did, and they submit

⁴⁴⁰ William Richard Shorten, affidavit, 7/11/14, para 4.

⁴⁴¹ Samuel Peter Beechey, affidavit, 21/11/14, paras 3-4.

⁴⁴² *Watson v Foxman* (1995) 48 NSWLR 315 at 319.

that it should not be so satisfied.⁴⁴³ Over the last two decades William Shorten has had many cares, borne many burdens and performed many different roles while ascending the greasy pole. It is accordingly not surprising that that his position is as stated above. He had no reason to remember the conversation alleged. Nor has Samuel Beeches. Robert Kernohan, on the other hand, was in a state of outrage at the time, and has remained very upset by the experience. His whole subsequent career has been adversely affected by a series of incidents of which the incident narrated is one. He has had every reason to remember the event. He is therefore much likelier to have remembered the event. He has nothing to gain from his testimony. On the probabilities it is likely that the incident took place as Robert Kernohan narrates it. It is a sad illustration of the difficulties facing those who want to complain about the status quo in the world of trade union officials, even polite and well-intentioned ones. From then on Robert Kernohan, after going to the police about fraud allegations within the AWU, began to experience being treated with silence, being elbowed or nudged in corridors, receiving abusive anonymous telephone calls, having his office trashed, receiving hate mail and other unpleasant experiences.

295. After receiving his redundancy payment in August 1995, Bruce Wilson returned to Perth and opened a café called ‘Rhumbarallas’. The active life of the Australian Workers’ Union – Workplace Reform Association Inc., such as it was, came to an end.

⁴⁴³ Submissions for William Richard Shorten, 21/11/14, para 4.

Q – RECOMMENDATIONS

Criminal Code (WA) s 409

296. The initial question concerns the possible explanation of s 409(1) of the *Criminal Code (WA)* to the conduct of Ralph Blewitt and Bruce Wilson in issuing the Association's invoices to Thiess.

297. Section 409(1) of the *Criminal Code (WA)* as in force in 1992-1994⁴⁴⁴ provided:

Any person who, with intent to defraud, by deceit or any fraudulent means –

- (a) obtains property from any person;
- (b) induces any person to deliver property to another person;
- (c) gains a benefit, pecuniary or otherwise, for any person;
- (d) causes a detriment, pecuniary or otherwise, to any persons;
- (e) induces any person to do any act that the person is lawfully entitled to abstain from doing; or
- (f) induces any person to abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime and is liable to imprisonment for 7 years.

298. Section 409(2) as in force in 1992-1994 provided that if the value of the property obtained or benefit gained was more than \$4000

⁴⁴⁴ See *Criminal Code Act Compilation Act 1913 (WA)*, reprinted under the *Reprints Act 1984 (WA)* as at 31 May 1999.

the charge was not be dealt with summarily. But the total of the sums involved in the present case and each monthly sum greatly exceeded that amount. It follows that if the elements of s 409(1) are established the offence is indictable and a prosecution may be commenced at any time.⁴⁴⁵ It is probable that each invoice represents a separate offence if the elements of the offence are made out.

Evidence relevant to *Criminal Code* (WA) s 409

299. The first question arising under s 409(1) is whether Ralph Blewitt and Bruce Wilson may have acted ‘with intent to defraud’. As noted by King CJ in the *R v Kastratovic*,⁴⁴⁶ the expression ‘with intent to defraud’ is a familiar element of many statutory offences. In the context of section 409(1), in *Mathews v R*, Burchett AUJ (with whom Malcolm CJ and Steytler J agreed) held:⁴⁴⁷

But s 409(1) itself contains a mental element, which may involve a question whether an accused person has a belief in the existence of a state of things, by virtue of the words “with intent to defraud”. Also, perhaps, by virtue of the words “by...any fraudulent means”. Fraud wears many disguises and the shapes it may take are multiple. It is therefore necessary, in any case of fraud, to analyse the facts in order to identify the aspect of them which is alleged to reveal a fraud. If there is a fraud, there must have been an intent to defraud. That intent may be revealed by knowledge, such as knowledge that a bank account being drawn upon is devoid of funds. However, since *Derry v Peek*,⁴⁴⁸ it has been established that an intent to defraud is not to be equated with carelessness; so even an unreasonable belief fortified by enquiries, that the account is good for the cheques drawn on it, will suffice to repel a suggestion of intent to defraud.

⁴⁴⁵ See *Criminal Code* (WA), s 3.

⁴⁴⁶ (1985) 42 SASR 59 at 61.

⁴⁴⁷ (2001) 24 WAR 438 at 443.

⁴⁴⁸ (1889) 14 App Cas 337.

300. Ralph Blewitt may have acted with the requisite intent to defraud in the present case. He gave the following testimony:⁴⁴⁹

Q. But the invoices suggested in their terms that the association had provided a representative to carry out workplace safety reform work at the Dawesville Channel project; correct?

A. Yes.

Q. And that representation was false?

A. It never occurred.

Q. It was false?

A. Yes.

Q. And you knew that at the time?

A. Yes.

Q. So you accept, do you, that you were, by sending these invoices making a false representation to Thiess to the effect that the association was providing Thiess with services at the Dawesville Channel Project?

A. Correct.

301. Evidence of that kind is also relevant to whether Ralph Blewitt may have acted ‘by deceit or any fraudulent means’. It is true that by reason of s 6DD of the *Royal Commissions Act 1902* (Cth) Ralph Blewitt’s evidence to the Commission cannot be admitted against him in criminal proceedings. However, Ralph Blewitt cooperated with the Commission in giving his evidence. He had previously cooperated with the Victorian Police. Thus it would appear at this stage likely that he would give similar evidence voluntarily in a criminal court.

⁴⁴⁹ Ralph Blewitt, 12/5/14, T:34.33-35.5.

302. Bruce Wilson did not make admissions of the kind made by Ralph Blewitt. However, he too may have acted with the requisite intent to deceive.
303. Bruce Wilson was the driving force behind the Association. Given his dominance over Ralph Blewitt, it may be inferred that he was also the driving force behind the Association's illegal activities. He called himself Treasurer of the Association. He knew of the obligations of the Treasurer under rule 19 of the Rules. He was party to the arrangements pursuant to which the secretive Northbridge PO box was created; the name of the AWU was used without approval; the home address and telephone number of Ralph Blewitt were given on the Application rather than the address of the office of the West Australian branch of the AWU; Ralph Blewitt's occupation was not disclosed in the Application despite its having been requested; and invoice letterhead was designed which suggested that the Association was part of the AWU.
304. On his own evidence Bruce Wilson concealed from Julia Gillard the true purpose of the Association and concocted a false story as to the reasons for the purchase of the Kerr Street property. He concealed his and Ralph Blewitt's conduct from the other officials of the West Australian branch of the AWU (for example by putting the Kerr Street property in the name of Ralph Blewitt).
305. More importantly, Bruce Wilson may have procured, or least knew of, the issuing of invoices by the Association which deceitfully represented that work had been done when in fact it

had not. The invoices were dishonest on their face. They claimed money related to certain hours worked when, to the knowledge of Ralph Blewitt and Bruce Wilson, no hours at all had been worked. For the reasons set out above Bruce Wilson's evidence in relation to a purported oral agreement independent of the letter of 16 March 1992 should also be rejected.⁴⁵⁰

306. Lastly, each of Ralph Blewitt and Bruce Wilson may have engaged in the above activities to gain benefits for himself, for each other, and for the Association. It follows that at least s 409(1)(c) is satisfied.
307. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Western Australian Director of Public Prosecutions in order that consideration may be given to whether each of Ralph Blewitt and Bruce Wilson should be charged with and prosecuted for fraudulent conduct contrary to s 409(1) of the *Criminal Code* (WA).
308. It has been submitted that they may also be guilty of the crime of submitting a false document to a public official, the Commissioner for Corporate Affairs, with the intention of deceiving that official, being a person responsible for a public duty, with doing something the official would not have done but for the document, namely incorporating the Australian Workers' Union – Workplace Reform

⁴⁵⁰ See above para 50 and Appendix B to this Chapter.

Association Inc.⁴⁵¹ The document is said to be the Rules. The Rules represented that the Association would have the purpose of providing benefits to workers. It is submitted that that was false, because the purpose was to raise funds to support the re-election of Bruce Wilson and other officials. That aspect of the submission cannot be accepted. That is because it has been found above that re-electing officials was not the purpose; swindling Thiess was. Subject to that point, if the recommendation relating to s 409 of the *Criminal Code* (WA) is acted on, the Western Australian regulatory authorities will be considering factual terrain which is similar to that underlying the question of whether this crime may have been committed. On that basis it is recommended that this Interim Report be referred to the Western Australian regulatory authorities in order that consideration may be given to the prosecution of Ralph Blewitt and Bruce Wilson for the crime under discussion. It is recommended also that this Interim Report be referred to the Western Australian regulatory authorities in order that consideration may be given to the prosecution of Ralph Blewitt and Bruce Wilson for a different form of the crime, centring not on the purpose issue but on false representations that before incorporation there was in existence an unincorporated association.

Conspiracy

309. Section 558 of the *Criminal Code* (WA) provides that any person who conspires with another to commit an indictable offence is

⁴⁵¹ See submission of Richard Thomas, 12/11/14, citing *Welham v Director of Public Prosecutions* [1961] AC 103.

guilty of a crime. In the present case the indictable offence is the crime under s 409(1) set out above. In other words, may Ralph Blewitt have conspired with Bruce Wilson, with intent to defraud by deceit or any fraudulent means to gain a benefit, pecuniary or otherwise, for himself, Bruce Wilson or the Association?

310. The essential aspect of conspiracy is the agreement between the person accused and at least one other.⁴⁵² The conspiracy is complete when the agreement is made.⁴⁵³ There need not be any overt acts.⁴⁵⁴

311. There has been some suggestion in the authorities that an accused should not be charged both with the crime of conspiracy and with the substantive offence.⁴⁵⁵ In some cases, by reason of the complexity of the underlying facts, a charge of conspiracy has been seen as a more practical and expeditious way to proceed than a charge of the substantive offence. In *R v Symonds*, Fenton Atkinson J held:⁴⁵⁶

As a preliminary it is to be noted that the ever-mounting intricacy of the legislation imposing taxes has been followed by ever-increasing ingenuity on the part of numbers of persons conspiring together fraudulently to evade the taxation. Such are the complexities of these fraudulent schemes and the devices used in them that only too often the only way that the interests of justice can be served is by presenting to a jury with the aid of schedules an overall picture of the scheme and charging a conspiracy to cheat and defraud. Obviously every effort should be made to present instead to the jury a relatively small series of substantive offences – but

⁴⁵² *R v Darby* (1982) 148 CLR 668; *R v Trudgeon* (1988) 39 A Crim R 252 at 254.

⁴⁵³ *R v Rogerson and Ors* (1992) 174 CLR 268 at 279.

⁴⁵⁴ *Lipohar v R* (1999) 200 CLR 485 at 540 [140], 560 [189] and [190].

⁴⁵⁵ See *R v Hoar* (1981) 148 CLR 32.

⁴⁵⁶ [1969] 1 QB 685 at 689-690 (and see *Caratti v R* (2000) 22 WAR 527 at 577 [344].

that cannot always be done and this case is one of those where only a conspiracy charge can provide for the protection of the interests of the community when once the legislature produces intricate laws.

312. In the present instance the agreement – the conspiracy – relates to the agreement between Ralph Blewitt and Bruce Wilson to establish the Association and, thereafter, to issue invoices to Thiess for work that was never carried out.
313. The only direct evidence of the agreement is contained in the testimony of Ralph Blewitt. His testimony is generally problematic, for reasons discussed above.⁴⁵⁷ However, Bruce Wilson accepted that he was the driving force behind the establishment of the Association.⁴⁵⁸ It is reasonable to infer from the facts relating to the setting up of the Association and the means by which it procured payments from Thiess that a conversation along the lines of the one deposed to by Ralph Blewitt in fact took place and that is what led to the establishment of the Association. In that event it may be possible to find the conspiracy.
314. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Western Australian Director of Public Prosecutions in order that consideration may be given to whether each of Ralph Blewitt and Bruce Wilson should be charged with and prosecuted for

⁴⁵⁷ See Appendix A to this Chapter.

⁴⁵⁸ See para 22.

conspiracy to commit an indictable offence contrary to s 558 of the *Criminal Code* (WA).

315. It is also recommended that this Interim Report be referred to the Western Australian regulatory authorities in order that consideration may be given to the prosecution of Ralph Blewitt and Bruce Wilson for conspiracy to submit a false document.

Crimes Act 1958 (Vic) ss 82 and 321

316. The conduct engaged in by Ralph Blewitt and Bruce Wilson in respect of the invoices issued by the Association for work supposedly done on the Melbourne Water project took place in Victoria.
317. The Melbourne Water project was located in Victoria. At that time Bruce Wilson was based in Victoria. The relevant arrangements with Thiess were entered into in Victoria. Bruce Wilson was calling himself the Treasurer of the Association when he caused invoices to be issued in respect of the Melbourne Water project.
318. In these circumstances similar offences to those set out above may have been committed in Victoria at least in respect of the Melbourne Water project. Section 82 of the *Crimes Act 1958 (Vic)* is in similar terms to s 409 of the *Criminal Code* (WA) and s 321 of the *Crimes Act 1958 (Vic)* is in similar terms to s 558 of the *Criminal Code* (WA) in relation to conspiracy. For the same

reasons as those set out above, the elements of the Victorian offences are also satisfied.

319. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Victorian Director of Public Prosecutions in order that consideration may be given to whether each of Ralph Blewitt and Bruce Wilson should be charged with and prosecuted for obtaining financial advantage by deception and conspiracy to commit an offence contrary to ss 82 and 321 of the *Crimes Act* 1958 (Vic) (Chapter 3.2);

Associations Incorporation Act 1987 (WA) ss 42 and 43

320. Breaches of the *Associations Incorporation Act* 1987 (WA), ss 42 and 43, are punishable only by a \$500 fine. On that ground alone it may not be worth laying charges. There may also be limitation questions. However, for completeness it is also recommended that this Interim Report be referred to the Western Australian regulatory authorities in order that consideration may be given to the prosecution of Ralph Blewitt under s 43 for his role in preparing the Application and the Certificate dated 22 April 1992 and inserting numerous details which to his knowledge may have been false or misleading.⁴⁵⁹

321. There are probably numerous respects in which the Association failed to comply with its obligations under the Act. It probably

⁴⁵⁹ See Appendix I for s 43. See above at paras 47-61 and 64-66 for the false and misleading statements.

had no accounting records (cf s 25), no register of members (cf s 27), and no record of officeholders (cf s 29). If Ralph Blewitt and Bruce Wilson can be described as members of the committee of the Association, which in a de facto sense they probably were, they failed to take all reasonable steps to secure compliance by the Association with those obligations. It is recommended that this Interim Report be referred to the Western Australian regulatory authorities in order that consideration may be given to the prosecution of Ralph Blewitt and Bruce Wilson under s 42 of the Act for that failure.

Julia Gillard and the criminal law

322. Julia Gillard gave advice about the incorporation of the Association. However that does not of itself suggest any criminal conduct on her part. The use of an incorporated association to further criminal conduct does not establish any criminal conduct on the part of a solicitor who advised on its incorporation. To establish criminal guilt it is necessary to prove that the solicitor knew when giving the advice that the client intended to cause the incorporated association to pursue a criminal purpose.
323. There is no evidence that Julia Gillard knew when she was giving advice to her clients, Bruce Wilson and Ralph Blewitt, in relation to the incorporation of the Association that they were proposing to use the Association for a criminal purpose or that they would do so. This criminal purpose was what defrauded Thiess in part. Julia Gillard did not know it was criminal. Her actual belief that

the purpose was a re-election purpose means that she did not act with intent to defraud, by deceit or any fraudulent means.

324. Julia Gillard testified that she had no discussions with Bruce Wilson concerning the Association.⁴⁶⁰ She said that she did not know that any invoices were sent. Still less did she approve them. She also said that Bruce Wilson never suggested that the Kerr Street property was acquired for union purposes or for the Association.⁴⁶¹ Bruce Wilson said that he had no discussions with Julia Gillard concerning how the Association would raise funds. He also said that she never asked.⁴⁶² It is perhaps a little surprising that during the remaining two and a half years of her personal relationship with Bruce Wilson, Julia Gillard did not inquire into how Bruce Wilson's 'Workplace Reform Association' was going. It was, after all, his favoured child. She had helped it into the world. But Bruce Wilson was undoubtedly a very secretive man. As indicated,⁴⁶³ Julia Gillard was asked a question relating to the spring of 1995 and movements of money into or out of the Association's account: 'Did you raise it with Mr Wilson just in your personal capacity to say, "What on earth is going on?"' She replied: 'Subsequent to these events I had a discussion with Mr Wilson where he was evasive and I formed the view that I had not been fully in the picture about the nature of his conduct, and I took steps to end our relationship.'⁴⁶⁴ Whatever inquiries Julia

⁴⁶⁰ Julia Gillard, 10/9/14, T:814.38-815.8.

⁴⁶¹ Julia Gillard, 10/9/14, T:827.36-42.

⁴⁶² Bruce Wilson, 12/6/14, T:418.8-9.

⁴⁶³ See Appendix A to this Chapter, para 366.

⁴⁶⁴ Julia Gillard, 10/9/14, T:857.23-28.

Gillard did make earlier, it is likely that Bruce Wilson would have kept her in the dark. And whatever inquiries she might have made, it is equally likely that he would have kept her in the dark.

325. On behalf of Ralph Blewitt it has been submitted that Julia Gillard be charged with aiding and abetting, or conspiracy with, Ralph Blewitt and Bruce Wilson to submit a false document to the Commissioner of Corporate Affairs.⁴⁶⁵ That submission is rejected so far as the crime allegedly committed by Ralph Blewitt and Bruce Wilson concerns the purposes of the Association. Julia Gillard believed that the purpose was to fund the re-election of officials. She also believed that was within Rule 3(1)(f).⁴⁶⁶ It is questionable whether it is, but there is insufficient evidence to find that that was not her honest belief. Hence the representation in the Rules that the Association could have the purpose of providing benefits to workers, while false, was not false to her knowledge.

326. So far as the crime allegedly committed by Ralph Blewitt and Bruce Wilson concerns a false representation that there was an unincorporated association in existence at the time application was made for the incorporation, there is insufficient evidence to establish that she *knowingly* permitted Ralph Blewitt to file the Application in the manner he did⁴⁶⁷ and to establish that she knew what was in the Certificate.⁴⁶⁸

⁴⁶⁵ Submission of Richard Thomas of, 12/11/14.

⁴⁶⁶ Julia Gillard, 10/9/14, T:793.28-42.

⁴⁶⁷ See above paras 59-61.

⁴⁶⁸ See above para 77.

327. It has also been submitted that Julia Gillard has committed an offence against s 43 of the *Associations Incorporation Act* 1987(WA). The submission stated:⁴⁶⁹

Given that the object of the Association, as described by Ms Gillard herself, was to hold a union “slush fund” for the benefit of certain officials, it is clear that the objects of the Association were false. As required by paragraph 3(2) of the Schedule 1 to the Act the objects of the Association provided that “... no part of the property or income may be paid or otherwise distributed, directly or indirectly, to members....” That contradicted the real purpose of the Association. The application, made by Mr Blewitt but prepared by Ms Gillard, falsely certified that the Association was eligible for incorporation under section [4(i)(e)] of the Act.

328. There is no paragraph 3(2) in Schedule 1 to the Act. It is thought that the submission is in truth referring to Rule 3(2) of the Association’s Rules in accordance with paragraph 2 of Schedule 1. Rule 3(2) provides:

The property and income of the Association must be applied solely in accordance with the objects of the Association and no part of that property or income may be paid or otherwise distributed, directly or indirectly, to members, **except in good faith in the promotion of those objects** (emphasis added).

329. Julia Gillard thought that a re-election fund fell within Rule 3(1)(f) which provided that one of the objects was: ‘To support and assist union officials and union members who are contributing to the adoption of the aims of the Association and its policies’. Assuming she is correct, even though a re-election fund may involve payment of the Association’s funds to members, that is not inconsistent with Rule 3(2) so long as the expenditure was

⁴⁶⁹ Submission of Terence O’Connor AM QC, 2/11/14.

applied in good faith in the promotion of re-election. Hence it is not open to prosecute Julia Gillard on the basis suggested.

330. Nor would it be open to prosecute her on the ground that the real object of the Association was none of those stated, but the object of swindling Thiess. The relevant statement would have to be false or misleading to Julia Gillard's *knowledge*. She had no knowledge of the disparity between the stated objects and the real objects.

331. Nor would it be open to prosecute her on the ground that what she thought the object was – a re-election fund – did not fall within Rule 3(1). There is insufficient evidence to conclude that she did not believe it did, and hence she lacked the relevant guilty knowledge.

Julia Gillard's role as solicitor: the submissions of counsel assisting

332. Counsel assisting submitted that while not criminal, some aspects of Julia Gillard's professional conduct of the matter as a solicitor appear questionable. The submissions were broadly to the following effect.

333. What was the scope of Julia Gillard's retainer? She stated: 'I was obviously trying to give [Bruce Wilson and Ralph Blewitt] the benefit of my professional expertise.'⁴⁷⁰ She testified that she provided legal advice 'on the incorporation of an association'.⁴⁷¹

⁴⁷⁰ Julia Gillard, 10/9/14, T:781.46.

⁴⁷¹ Julia Gillard, 10/9/14, T:770.24-28, 772.5, 775.7-9.

However Julia Gillard was also apparently retained to carry out certain incidental tasks such as assisting in completing the Application and arguing the case for incorporation through correspondence to the Commissioner of Corporate Affairs in May 1992. According to evidence given by Bruce Wilson,⁴⁷² she appeared in person to argue the ‘case’ in Perth at some stage.

334. Julia Gillard said it was not part of her retainer to ensure that there was compliance with requirements for incorporation such as Association membership of at least five and a functioning Committee of Management. Julia Gillard testified that she explained those requirements to Bruce Wilson and Ralph Blewitt and thereafter left it to them to ensure that the requirements were fulfilled.⁴⁷³ Julia Gillard referred at times to the Association being ‘a team of officials’⁴⁷⁴ or to a combination or group of people,⁴⁷⁵ but she never found out who those people were. For example, she never made any inquiry as to whether there was a register of members,⁴⁷⁶ despite that being required by both the Rules⁴⁷⁷ she drafted and by s 27 of the *Associations Incorporation Act 1987* (WA).

335. It is of course possible for a solicitor and a client to enter into retainer agreement pursuant to which the solicitor will be

⁴⁷² Bruce Wilson, 12/6/14, T:424.21-24, 518.22-36; Bruce Wilson, witness statement, 4/6/14, para 138. Cf Julia Gillard, witness statement 4, para 14.

⁴⁷³ Julia Gillard, 10/9/14, T:794.28-47, 795.1-24.

⁴⁷⁴ Julia Gillard, 10/9/14, T:774.34-37, 785.1-8, 800.35.

⁴⁷⁵ Julia Gillard, 10/9/14, T:801.33-47.

⁴⁷⁶ Julia Gillard, 10/9/14, T:795.19-22.

⁴⁷⁷ Gillard MFI-1, p 11, r 13.

responsible for certain tasks and will otherwise disclaim responsibility for any others. In that event, however, it is common for the retainer to be carefully documented so that both sides know where they stood. Here there was no written retainer agreement at all.⁴⁷⁸

336. Indeed the evidence generally supports the inference that the arrangements between Julia Gillard and her clients were casual and haphazard, not precise and detailed. Apart from the absence of any written retainer, Julia Gillard did not keep file notes. She did not keep any record of the instructions she received from, nor the advice which she testified that she provided to, Bruce Wilson and Ralph Blewitt. In fact she tended to refer to advice she ‘would have’ given, rather than the advice she actually gave.⁴⁷⁹

337. Julia Gillard did not open a file on the Slater & Gordon computer system (which if nothing else would have assisted in keeping the relevant records intact).⁴⁸⁰ This compounded the problem caused by a lack of other records. She did not consult with or seek the assistance of any other practitioner in the firm in respect of the incorporation, including Tony Lang, who had experience in incorporated associations, nor this respect, nor Bernard Murphy, the more senior partner to whom she reported. This informality may have sprung from the fact that she was in a personal relationship with the main person from whom she took instructions.

⁴⁷⁸ Julia Gillard, 10/9/14, T:780.18-21.

⁴⁷⁹ Julia Gillard, 10/9/14, T:794.42-47, 802.12-14, 803.1-10.

⁴⁸⁰ See Appendix F to this Chapter.

338. Despite the fact that the Victorian branch of the AWU was a client of Slater & Gordon, she did not check, or even seek instructions, as to whether the AWU had authorised the establishment of the Association or the use of its name.⁴⁸¹ Julia Gillard seemed to accept that her failure to check that the use of the AWU's name was authorised by the AWU was a deficiency when she said: 'Obviously, if one got to do the whole thing again you would do things differently, given what I know now that I did not know at the time'.⁴⁸²
339. Julia Gillard drafted the proposed new Rule 3A for Ralph Blewitt and a letter for him to send to the Commissioner of Corporate Affairs undertaking to introduce the new Rule 3A within 30 days of incorporation. However, she gave Ralph Blewitt no advice about how to insert the new Rule 3A into the Rules – a task involving the comprehension of complicated statutory language. It seems that she did not even discuss this issue with either Bruce Wilson or Ralph Blewitt. If she had, she would have discovered that there were no members (despite the Commissioner of Corporate Affairs having been told that there were) so there could be no special resolution: at that point something of a crisis in the solicitor-client relationship would have blown up.
340. Nor did Julia Gillard take any steps to ensure that Ralph Blewitt's undertaking to the Commissioner, if he gave it, was complied with. It probably never was. The wording of the suggested Rule

⁴⁸¹ Julia Gillard, 10/9/14, T:797.28-30, 799.13-34.

⁴⁸² Julia Gillard, 10/9/14, T:799.19-21.

3A was problematic. Julia Gillard was probably more concerned with achieving a swift result for her clients than in ensuring that the substantive requirements had been satisfied.

341. The fact is that Bruce Wilson and Ralph Blewitt, having set up the Association without complying with the statutory requirements, used it to perpetrate fraud for years. If Julia Gillard or Slater & Gordon had insisted on even some of the substantive requirements for incorporation being satisfied it would have been more difficult for Bruce Wilson and Ralph Blewitt to perpetrate these frauds. Even if they had succeeded in proceeding as they did, when the Association and its activities started to come to light in 1995 the history would have been clearer and better documented and the problem would have been easier to resolve.
342. The only two people who could have controverted Julia Gillard's evidence concerning the nature of the retainer were Bruce Wilson and Ralph Blewitt. Julia Gillard gave her oral testimony on 10 September 2014. Each of Bruce Wilson and Ralph Blewitt were represented on that day by experienced legal practitioners. Neither sought to challenge Julia Gillard's account of the arrangements between her and her clients. This must have been done on instructions. Since Julia Gillard's evidence was unchallenged on this topic, it must be inferred that the retainer was in substance as described by her.

Julia Gillard's role as solicitor: conclusions

343. The submissions of counsel assisting were opposed by senior counsel for Julia Gillard. They ought not to be accepted in their totality, at least in respect of Julia Gillard's conduct as a solicitor prior to 21 May 1992. But in two respects they are correct. Senior counsel for Julia Gillard submitted that Julia Gillard's conduct did not make it easier for Bruce Wilson or Ralph Blewitt to commit fraud, because they 'could have taken the elementary step of incorporating an entity or registering a business to achieve their aims by a variety of other means.'⁴⁸³ If Julia Gillard had interrogated Bruce Wilson and Ralph Blewitt closely about whether the Association existed, who its members were and how they had given authority to make the Application, a central pillar of Bruce Wilson's plan would have begun crumbling. It was important to him that there be no members, because the more members there were, the more likely the AWU were to hear about it. If the step of 'registering a business' had been taken, that would have left the payee on cheques as Bruce Wilson or Ralph Blewitt or both: this would have triggered suspicions in the Thiess executives, who thought they were entering legal relations with a trade union, not two of its officials personally. And if, after hearing Julia Gillard's interrogation, Bruce Wilson and Ralph Blewitt had asked her to suggest some technique other than the use of an incorporated association, there was a real chance that her suspicions might have been aroused and that she might have withdrawn her assistance. However, that failure to interrogate

⁴⁸³ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 16.

Ralph Blewitt and Bruce Wilson was not itself a breach of the duties created by the retainer.

344. The second respect in which counsel assisting's submissions are to be upheld relates to the use of the AWU's name. Earlier it was concluded that Julia Gillard's conduct in this respect was nothing more sinister than a lapse of professional judgment.⁴⁸⁴
345. But these are the only criticisms to be made of Julia Gillard's conduct as a solicitor at least so far as work done under her initial, and narrow, retainer before 21 May 1992. A solicitor is entitled, generally speaking, to rely on the precise terms of a retainer and not be held liable for adverse consequences which flow from a failure to do things that are outside the retainer. The contrary position could be onerous for the solicitor. And it could be vexatious for the client the solicitor, to avoid future liability, did things which the client did not want to be done.
346. First, there is a minor factual difficulty. Bruce Wilson's evidence that Julia Gillard appeared in Perth to argue the 'case' before the Commissioner's officials is uncertain and doubtful. It has to be rejected. It is implausible, because officials like the Commissioner tend not to proceed by way of public hearing. It is likely that Bruce Wilson has confused this with some litigation in which Julia Gillard was appearing. Her denial of the evidence must be accepted.

⁴⁸⁴ See above para 55.

347. Secondly, some allowance should be made for the fact that professional customs have probably changed since 1992. Now, for various reasons, it is much commoner for written retainers to be employed in even the simplest matters, for elaborate file notes to be made and for other formal steps to be taken. The informality which Julia Gillard employed in 1992 is not open to criticism, particularly in relation to a simple transaction for the gentleman she was having a personal relationship with and his friend. To do so would be to judge the 1992 conduct in hindsight, using the stricter standards of 2014.
348. Thirdly, Julia Gillard did not create a file in the computer system at Slater & Gordon, but she did create a file in the more traditional sense. It is not her fault that, with much else, it has disappeared with the passing years. This issue is dealt with in more detail below.⁴⁸⁵
349. Fourthly, the failure of Julia Gillard to seek advice from Tony Lang or Bernard Murphy does not seem culpable. Given Julia Gillard's experience, position in the firm and ability, she was more than capable of carrying out the straightforward work required by the narrow retainer.
350. Fifthly, the narrowness of Julia Gillard's initial retainer meant that she owed no duty to Bruce Wilson and Ralph Blewitt to ensure that they had actually fulfilled all the requirements for a valid application to be made.

⁴⁸⁵ See Appendix F to this Chapter.

351. But matters changed on 21 May 1992. Counsel Assisting and senior counsel for Julia Gillard were at odds over whether the proposed Rule 3A would have overcome the difficulty it was directed to. The former contended that an association seeking to achieve workplace reform and safer workplaces must involve seeking to regulate relations between workmen and employers, and Rule 3A contradicted that.⁴⁸⁶ The latter contended that an association of that kind does not seek to ‘regulate’ the relations between workmen and employers in the way a trade union does. The submission of counsel assisting is preferable. However, that would ultimately be a matter for the addressee of the letter Julia Gillard drafted for Ralph Blewitt, namely Ray Neal.

352. The real problem with the 21 May 1992 letter lies not in what it said, but in what it did not say.⁴⁸⁷ Once Julia Gillard became involved in the problem raised by the Office of State Corporate Affairs (either by Bruce Wilson’s intervention or in some other way) the original narrow retainer became widened by conduct.⁴⁸⁸ The conduct comprised some request from Bruce Wilson and Ralph Blewitt and Julia Gillard’s accession to it. The conduct included her role in ‘arguing the case for ... incorporation’, to use the words in the 11 September 1995 interview.⁴⁸⁹ Now her task was not simply advising on what formal steps were required in order to set up the Association. It was to advise that a particular course of conduct be implemented by a person who could not

⁴⁸⁶ See paras 91-93 above.

⁴⁸⁷ See paras 95-98 above.

⁴⁸⁸ See para 98 above.

⁴⁸⁹ Gillard MFI-1, p 137.

possibly have carried it out without the most specific guidance. It is one thing to say that the narrow retainer involved no duty to make inquiries or advise on carrying out very simple tasks. It is another to say that no duty to advise on carrying out complex tasks arose from the wider retainer. Her conduct was not a breach of contract, because there was no contract. It was a breach of her duty of care. But it is not actionable because no damage flowed to Bruce Wilson and Ralph Blewitt.

Julia Gillard as recipient of Association money

353. Julia Gillard was the recipient of certain funds from Bruce Wilson as described in the evidence of Athol James and Wayne Hem. The skimpy nature of the available evidence does not make it possible to infer on the balance of probabilities that Julia Gillard was aware that she had received the \$5,000 which Wayne Hem put into her bank account on Bruce Wilson's instructions. That is even truer of the events which Wayne Hem observed at her house. The position is different in relation to the wads of bank notes observed by Athol James. Julia Gillard was at least aware of facts, had she turned her mind to them, which would have indicated that the source of those bank notes cannot have been the low union salary of Bruce Wilson of about \$50,000. He was a man who was supporting a wife and two children in Perth, his own household in Melbourne, such as it was, and his relationship with Julia Gillard in Melbourne. He was not shown to have had any income from property exceeding the cost of mortgage repayments. The source of the wads of bank notes must have been some fund which Bruce Wilson had no right to but did control. That is, she must have

been aware of facts, which, had she turned her mind to them, would have revealed that Bruce Wilson was making payments to her in the presence of Athol James using money which he had no right to use for that purpose because his duty was to repay it to Thiess. Once it is accepted that the three payments were made – the \$5,000, the two wads of cash, and the Telikostoglou payment – it is for those who say that they did not come from the Australian Workers' Union – Workplace Reform Association Inc. or the Welfare Association account to establish that. Any doubt about the source of the payments cannot annihilate the reliability of Wayne Hem's and Athol James's testimony. Senior counsel for Julia Gillard submitted that the sums claimed in Athol James's invoices were not substantial (totalling about \$7,000) and 'there is no reason to believe that, had Wilson given cash to Ms Gillard, it would have come from any particular source'.⁴⁹⁰ If this is suggesting that the probable source is the only legitimate one, Bruce Wilson's salary, it is unconvincing. To a person earning approximately \$50,000 per annum the payment of \$7,000 over a period of four months is quite a lot. Whether the wads of cash moved from the Australian Workers' Union – Workplace Reform Association Inc. accounts or the Welfare Association account to Julia Gillard to return to Athol James in the form of a cheque, or whether Bruce Wilson's salary was used to generate the wads of cash and Bruce Wilson later repaid himself from those accounts, does not matter. It is quite improbable that the source was legitimate, i.e. the salary.

⁴⁹⁰ Outline of submissions on behalf of Ms Julia Gillard, 17/11/14, para 28.

354. This conclusion is supported by some important evidence of Bruce Wilson. It was as follows:⁴⁹¹

Q. Mr Blewitt was the only person who, from time to time, was giving you sums of money in cash; correct; at that time?

A. Yes.

Q. You can't point to anyone else who might have handed you the sum of \$5,000 in cash, can you?

A. No.

Q. If you did have \$5,000 in cash, it must have come from Mr Blewitt?

A. Well, the way you're putting it, that's what it sounds like but, as I say, I don't recall having given Wayne Hem \$5,000.

355. Bruce Wilson is thereby excluding the possibility that the \$5,000 came from rent on the house occupied by his secretary in Perth, or from his wife, or from any other non-tainted source.

356. Contrary to the submission of senior counsel for Julia Gillard under consideration, there is 'reason to believe' that any cash given by Bruce Wilson to Julia Gillard would have come from a particular source – Ralph Blewitt. The only source of cash available to Ralph Blewitt was the Australian Workers' Union – Workplace Reform Association Inc. or the Welfare Association accounts.

⁴⁹¹ Bruce Wilson, 12/6/14, T:477.31-44.

APPENDIX A TO CHAPTER 3.2

ISSUES OF CREDIT AND RELIABILITY

A – RALPH BLEWITT

357. Ralph Blewitt admitted that he had engaged in systematic and deliberate fraud over a long period. Hence his evidence must be approached with great caution. If he showed a willingness to lie and act deceitfully towards the public, the Commissioner for Corporate Affairs, Thiess, the AWU, and perhaps even Bruce Wilson, how can one be sure that he was not being deceitful again in his evidence to the Commission?
358. He showed some hostility to Bruce Wilson. The feeling was mutual. But he showed little animus against Julia Gillard, at least in his testimony as distinct from the submissions presented on his behalf.⁴⁹² For example, he seemed careful to deny overhearing advice which she gave during a meeting he claimed to have taken place in Melbourne.⁴⁹³ He seemed astute to deny that she had any knowledge of the payment by him of \$7,000 in cash to a workman

⁴⁹² These call for her to be prosecuted for aiding and abetting Bruce Wilson and Ralph Blewitt to submit a false document to a public official, the Commissioner of Corporate Affairs, with the intention of inducing that public official to act upon the document as if it were authentic: Submission of Richard Thomas, 12/11/14, para 3. This is an unusual stand to be taken in submissions on behalf of Ralph Blewitt.

⁴⁹³ See Chapter 3.2 para 36; Ralph Blewitt, 12/5/14, T:19.39-20.6.

at her house.⁴⁹⁴ The principal aspect of his evidence which was adverse to her related to the Power of Attorney,⁴⁹⁵ and he may not have appreciated how damaging that evidence would have been if his recollection had been accurate, for he did not live in a purist world where a witness to a signature is actually supposed to be present when the signature is affixed.

359. Ralph Blewitt was an unreliable witness even when he seemed to be sincere. He has lived a varied life as a soldier of fortune, and an unsuccessful one. His vicissitudes seem to have caused him to age quickly. His health did not seem good. In a number of instances his recollection was unreliable. Senior counsel for Bruce Wilson launched a massive attack on Ralph Blewitt's credibility and reliability. The attack on credibility, though not without substance, is exaggerated. The attack on reliability has very great force. It is unnecessary to descend to much detail about this. A good instance is his evidence about the execution of the Power of Attorney.⁴⁹⁶ Another is his evidence about the presence of Bernard Murphy at a meeting.⁴⁹⁷ Another example involves his evidence that he had no or very limited knowledge of, or involvement in, the mortgage of the Kerr Street property. It is very difficult to reconcile that evidence with the fact that he provided various items of information, and a personal cheque for \$500,⁴⁹⁸ in connection with that sale and also paid at least two

⁴⁹⁴ Ralph Blewitt, 12/5/14, T:82.14-17.

⁴⁹⁵ See Appendix E to Chapter 3.2.

⁴⁹⁶ See Appendix E to Chapter 3.2.

⁴⁹⁷ See Chapter 3.2 para 36 above.

⁴⁹⁸ Blewitt MFI-1, pp 150-151.

instalments of interest from the Blewitts' Home Building Society account.⁴⁹⁹

360. But Ralph Blewitt did seem to be afflicted by shame and remorse for his conduct two decades ago. He wept from time to time. In many instances he seemed to be attempting to put his recollection of events fairly and fully in his testimony. He spoke candidly about circumstances adverse to himself, including circumstances where he acted with conscious impropriety or engaged in what may be criminal conduct. While he frequently contended that he acted on the instruction of Bruce Wilson, he was also frank about evidence which to some extent did not support this. For example, as noted above, he identified numerous cheques on which he himself had inserted an imprint of Bruce Wilson's signature stamp, rather than have Bruce Wilson sign the cheque himself.⁵⁰⁰
361. Unlike almost every other witness but Brian Parker, Ralph Blewitt gave his evidence entirely in an oral form. The standard method by which witnesses testified before the Commission in the first instance was to verify a written statement on oath or affirmation. That written statement was almost always prepared with the aid of lawyers. The written statement technique often improves the clarity of evidence, though it can be harmful to veracity, and can prevent the real personality of the witness coming through. Each statement would then be supplemented by oral evidence from the witness. Ralph Blewitt now lives in Malaysia, and gave his

⁴⁹⁹ Ralph Blewitt, 12/5/14, T:68.30-70.3.

⁵⁰⁰ See Chapter 3.2 para 137.

evidence orally during a fleeting and unexpected trip to Australia. It is true that he had obviously brooded over the events of the early 1990s for years. It is also true that just before he gave evidence he had been questioned by Victoria Police for some hours. Assisting stern-faced detectives with their inquiries can be a valuable way of summoning up remembrance of things past. But neither Commission staff nor his own lawyers had the opportunity to obtain a statement or even prepare him properly. In short, he was at the opposite extreme from thoroughly prepared witnesses like Julia Gillard and other lawyers who testified. This accounts for some of his unreliability on points of detail. He had not been immersed in the documents or in the statements of other witnesses with a view to refreshing his memory.

362. Nevertheless, Ralph Blewitt's evidence needs to be approached with great caution unless it is against his own interests (as it very often was) or is corroborated, or is consistent with the surrounding circumstances. Unsatisfactory though his evidence often was, it was fortunate that he returned to Australia voluntarily to give it. For his evidence would have placed some restraint on the inventive powers of Bruce Wilson.
363. Senior counsel for Bruce Wilson complained that Bruce Wilson was 'unfairly' treated because she had been allowed a morning's preparation to cross-examine Ralph Blewitt.⁵⁰¹ The creation of this Commission was promised before the 2013 election. It was announced on 10 February 2014. The Letters Patent were issued

⁵⁰¹ Submission on behalf of Bruce Wilson, 14/11/14, para 4.14.

on 13 March 2014. It was obvious that the Australian Workers' Union – Workplace Reform Association Inc. could be one of the topics examined. Senior counsel for Bruce Wilson had a few days' notice of Ralph Blewitt's entry into the witness box – as much as counsel assisting did – and was present during the day on which senior counsel assisting examined him. And, as senior counsel for Bruce Wilson admitted in her submissions, the matters of which Ralph Blewitt testified 'have been well traversed in the public media over many years past Mr Blewitt has been eager to promulgate in the broadcast and internet media his view of the events which occurred in a way most adverse to Mr Wilson and Ms Gillard.'⁵⁰² Ralph Blewitt's testimony could not have been a surprise to either Bruce Wilson or his counsel. Finally, the complaint does not identify any central factual issue which senior counsel for Bruce Wilson now wishes to raise but was precluded from raising because of lack of preparation time. She does refer to Bruce Wilson's claim in his first statement that Ralph Blewitt may have used Association money to fund renovations to his house and to gamble. The submission proceeds: 'Since the Commission has not sought to recall Mr Blewitt, it has not been possible to put these matters to him.'⁵⁰³ These matters, if correct, were well-known to Bruce Wilson at the time Ralph Blewitt gave evidence.

⁵⁰² Submission on behalf of Bruce Wilson, 14/11/14, para 4.5.

⁵⁰³ Submission on behalf of Bruce Wilson, 14/11/14, para 4.32 note 80.

B – BRUCE WILSON

364. Bruce Wilson did not make broad ranging admissions of the kind made by Ralph Blewitt. Counsel assisting correctly submitted that frequently Bruce Wilson gave his answers in an apparently straightforward way. Whether they were always truthful answers is another question. He made some admissions against interest. On occasion he also declined to take the easy way out. Thus he said that he did not remember giving Wayne Hem \$5,000 in cash and asking him to bank it in Julia Gillard's account, when it would have been easy to advance a lying denial. Like Ralph Blewitt, he seemed reluctant to launch any testimonial attacks on Julia Gillard. Thus he supported her against Athol James: but that was testimony in his own self-interest.
365. Bruce Wilson has been trodden down by the passing years. There was a potential Prime Minister associated with the Australian Workers' Union – Workplace Reform Association Inc., but it turned out not to be him. He has failed in union politics, in business and generally. Many people involved in this Commission have come down in the world since the days of their youth and the days of their glory. Bruce Wilson is one of those who have fallen furthest. Yet he retains a raffish charm. He had rascality, but it was engaging rascality. In his earlier career he could get 'nasty'.⁵⁰⁴ But he did not show this side of himself in the witness box.

⁵⁰⁴ Robert Kernohan, witness statement, 11/6/14, para 75. This witness statement, apart from its significance for the Australian Workers' Union – Workplace Reform Association

366. For those reasons his credibility is difficult to assess. However, his evidence suffered from serious deficiencies. He should not be accepted as a witness of truth. His conduct revealed that his was not a straightforward or open character. He was a devious, shifty, deceitful, subtle, sly and furtive man who played his cards very close to his chest, except when they were pulled out of his sleeve. One powerful piece of evidence given by Julia Gillard concerned events just after the difficulties with the Australian Workers' Union – Workplace Reform Association Inc.'s accounts and just before her interview of 11 September 1995.⁵⁰⁵

Q. Did you raise it with Mr Wilson just in your personal capacity to say, "What on earth is going on?"

A. Subsequent to these events I had a discussion with Mr Wilson where he was evasive and I formed the view that I had not been fully in the picture about the nature of his conduct, and I took steps to end our relationship.

367. The word 'evasive' has a great ring of truth. Some instances of Bruce Wilson's false evidence are as follows.

368. First, Bruce Wilson suggested in evidence that the late Glen Ivory was involved with the Australian Workers' Union – Workplace Reform Association Inc. – as a member, as regularly in attendance at meetings of the members, and as a person carrying out work at the Dawesville project on behalf of the Association for which he was paid in cash.⁵⁰⁶ This evidence was critical to Bruce Wilson's

Inc. case study, is a rich account of many irregularities in the Victorian branch of the AWU which are outside the scope of that study.

⁵⁰⁵ Julia Gillard, 10/9/14, T:857.23-28.

⁵⁰⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 146, 188-190; Bruce Wilson, 12/6/14, T:454.25-455.18.

much-repeated contention that work was done by the Association, at least in 1993. That evidence is rejected for reasons given below.⁵⁰⁷

369. Secondly, Bruce Wilson's account of an oral agreement pursuant to which Thiess agreed to pay the Association for the full three years regardless of whether the Association was in fact doing any work was an important element of his position. It was his explanation for why the Australian Workers' Union – Workplace Reform Association Inc. did not behave fraudulently even though it rendered invoices during 1992 and 1994 without any work having been done. That evidence has been rejected for reasons given elsewhere.⁵⁰⁸

370. Thirdly, Bruce Wilson asserted that Robyn McLeod was providing services to Thiess on behalf of the Australian Workers' Union – Workplace Reform Association Inc. But she denied that she had ever done any work for anyone other than the AWU and disclaimed any knowledge of the Australian Workers' Union – Workplace Reform Association Inc.⁵⁰⁹ Senior counsel for Bruce Wilson submitted that Robyn McLeod was in fact performing services for Thiess⁵¹⁰ and that Thiess was satisfied with them.⁵¹¹ She then submitted: 'It is harsh judgment on Mr Wilson's credit to accuse him of deceit because Ms McLeod did not recall the

⁵⁰⁷ See Appendix D to Chapter 3.2.

⁵⁰⁸ See Appendix B to Chapter 3.2.

⁵⁰⁹ Robyn McLeod, witness statement, 9/9/14, paras 15, 16 and 18.

⁵¹⁰ Paul Darrouzet, 9/9/14, T:624.34-625.5.

⁵¹¹ Paul Darrouzet, 9/9/14, T:631.8-29.

Workplace Reform Association 20 years after the event.’⁵¹² But the central point is not Robyn McLeod’s failure to ‘recall’. She did not say she could not recall it. She said: ‘I was not aware’ of it.⁵¹³ Senior counsel for Bruce Wilson never examined Robyn McLeod to suggest some regrettable failure to recall. She never attempted to shake Robyn McLeod’s palpably correct evidence that from March 1993 to September 1994 she worked for the AWU and no-one else.⁵¹⁴ In view of this submission it is unfortunately necessary to stress the sad fact that it was deceitful for Bruce Wilson to get the work done by AWU personnel without the AWU being reimbursed by the Australian Workers’ Union – Workplace Reform Association Inc.⁵¹⁵

371. Fourthly, Bruce Wilson claimed that the Kerr Street property was utilised extensively for union purposes.⁵¹⁶ But Wayne Hem’s evidence is inconsistent with this.⁵¹⁷ So is that of Ian Cambridge.⁵¹⁸ Their evidence is to be preferred to his.

372. The stakes were high for Bruce Wilson. His testimony was often shaped by the need to react to particular unexpected forensic crises. Hence it tended to stagger along with the aid of recent

⁵¹² Submission on behalf of Bruce Wilson, 14/11/14, para 4.8.

⁵¹³ Robyn McLeod, witness statement, 9/9/14, para 15.

⁵¹⁴ Robyn McLeod, 9/9/14, T:645.9-653.16.

⁵¹⁵ See para 192 above.

⁵¹⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 159-164, 184-186; Bruce Wilson, 12/6/14, T:466.45-467.39.

⁵¹⁷ Wayne Hem, 11/6/14, T:309.28-310.2, 327.15-329.30.

⁵¹⁸ Ian Cambridge, 10/6/14, T:248.39-249.30; Ian Cambridge, witness statement dated 27/5/14, 10/6/14, para 338.

inventions, afterthoughts and sudden improvisations. One leading example is his contention that he entered an oral agreement with Nicholas Jukes that Thiess was obliged to keep paying even though no work was done.⁵¹⁹

C – JULIA GILLARD

373. How credible was Julia Gillard? The conduct of Julia Gillard in relation to the Australian Workers' Union – Workplace Reform Association Inc. has been debated for nearly 20 years. As noted above,⁵²⁰ as early as September 1995 Robert Kernohan was told by Terry Muscat that Bruce Wilson 'had authorised in the name of the AWU house renovations to a private property which was Julia GILLARD'S, the girlfriend of Bruce WILSON and that they haven't been paid.'⁵²¹ Bernard Murphy said that by August-September 1995 rumours were circulating that some of Julia Gillard's home renovations had been paid by the AWU.⁵²² On 12 October 1995 in the Victorian Parliament a Minister raised the question whether funds of the Australian Workers' Union – Workplace Reform Association Inc. had been used to improve Julia Gillard's house.⁵²³ Ever since that time her role in relation to the Australian Workers' Union – Workplace Reform Association Inc. has been discussed quite frequently in the media. She had to

⁵¹⁹ See Appendix B to Chapter 3.2.

⁵²⁰ Chapter 3.2 para 269.

⁵²¹ Robert Kernohan, witness statement, 11/6/14, para 117.

⁵²² Bernard Murphy, witness statement, 9/9/14, para 3.4.

⁵²³ Victorian Parliamentary Debates, Legislative Assembly, vol 426, 12/10/95, 657.

deal with the matter in two major Prime Ministerial press conferences in 2012.

374. Both before and after the 11 September 1995 meeting, and before the Prime Ministerial press conferences, she said, obviously correctly, that she had tried to assemble all relevant documents and in effect search her recollection thoroughly. There can be no criticism of her for taking this understandable course. But it did have certain consequences.
375. She testified after all the other witnesses relevant to the Australian Workers' Union – Workplace Reform Association Inc. She was very well versed in the evidence they had given – particularly witnesses affecting her position like Ralph Blewitt, Bruce Wilson, Wayne Hem, Athol James and Bernard Murphy. She was very well versed in her own prior statements at the 11 September 1995 conference and later Prime Ministerial conferences.
376. For much of her oral testimony she was what judges call 'a very good witness'. She attended closely to the questions and in general answered them fully without over-elaboration. There was occasional evasiveness, or non-responsiveness, or irritability. But overall she revealed the quickness and intelligence which took her to the second place in the state. The key parts of her evidence were the product of many months, in a sense nearly 20 years, of thought about the issues – the product, too, of iron willpower which drove her very able mind into the most intense and thorough preparation. All this – her intense degree of preparation, her familiarity with the materials, her acuteness, her powerful

instinct for self-preservation – made it hard to judge her credibility. Normally cross-examination of a non-expert witness is a contest between a professional expert who is familiar with every detail of the case and a relatively unwary member of the public who is not. But Julia Gillard had 20 years’ knowledge of the case and immense determination to vindicate her position. She was, so to speak, a professional expert on her own case. If just allowances are made, all important parts of her evidence fall into two categories. One category is those parts which can be accepted positively. The other category is those parts which have not been demonstrated to be incorrect. That is subject to two qualifications. The first qualification concerned her denial of Athol James’s evidence.⁵²⁴ His evidence is to be preferred. The second qualification concerned what she said about Wayne Hem’s denial of Bill Telikostoglou paying cash to a workman at her house. That has every badge of an injudicious afterthought.⁵²⁵

377. Criticisms have been made of aspects of what she did in helping to incorporate the Australian Workers’ Union – Workplace Reform Association Inc. But the criticisms do not turn on non-acceptance of her evidence. They turn on inferences from non-controversial evidence, and comparisons between the standards she had to meet and the way she met them.

⁵²⁴ Chapter 3.2 paras 170-173.

⁵²⁵ Chapter 3.2 paras 226-249.

APPENDIX B TO CHAPTER 3.2

ORAL AGREEMENT THAT NO WORK NEED BE DONE

378. In the course of his oral evidence on 12 June 2014, Bruce Wilson made the following statements. He stated that by March 1992 not a lot of work was being done but that Nicholas Jukes knew this.⁵²⁶ Then he suggested an entitlement to receive the fees even though no work was being done because Thiess had failed to provide any training facilities on site.⁵²⁷ Then he suggested, apparently, that he had agreed with Nicholas Jukes that Thiess would pay the monthly fees from the commencement date of the project to the final date of the project. He said that the duty to pay the fees was akin to the duty a client keeping a barrister on retainer had to pay the fees, whether or not any work actually was done.⁵²⁸ Bruce Wilson did not demur to the suggestion that his point was that Thiess had agreed to pay the fees regardless of whether work was done or not.⁵²⁹ He repeated that statement of position again.⁵³⁰ Bruce Wilson's evidence on this point must be completely rejected.

⁵²⁶ Bruce Wilson, 12/6/14, T:415.42-416.12.

⁵²⁷ Bruce Wilson, 12/6/14, T:433.40-434.2.

⁵²⁸ Bruce Wilson, 12/6/14, T:434.35-435.7.

⁵²⁹ Bruce Wilson, 12/6/14, T:436.38-43.

⁵³⁰ Bruce Wilson, 12/6/14, T:439.38-42.

379. First, it is improbable that the 16 March 1992 letter, drafted by Nicholas Jukes, would have been sent in those terms if Nicholas Jukes had reached an earlier oral agreement to the contrary.
380. Secondly, neither Ralph Blewitt nor Bruce Wilson nor anyone else from the AWU or the Australian Workers' Union – Workplace Reform Association Inc. wrote to Thiess after receiving the 16 March 1992 letter to complain that it failed to include the alleged earlier oral agreement.
381. Thirdly, the invoices sent by the Australian Workers' Union – Workplace Reform Association Inc. expressly refer to the letter of 16 March 1992, not some earlier oral agreement.
382. Fourthly, Bruce Wilson never suggested any oral agreement in either of his two witness statements (dated 4 June 2014 and 6 June 2014, only days before his oral evidence on 12 June 2014).
383. Fifthly, his senior counsel did not cross-examine Nicholas Jukes to suggest an earlier oral agreement existed during his first appearance in the witness box on 10 June 2014, just after the two witness statements had been prepared but just before Bruce Wilson's oral evidence.
384. Sixthly, Nicholas Jukes prepared a further witness statement dated 15 August 2014. It said:⁵³¹

⁵³¹ Nicholas Jukes, Witness statement, 9/9/14, para 11.

I deny that there was some oral agreement between me and Wilson pursuant to which Thiess was to pay the AWU-WRA for the whole three year period (including the period January, February, March 1992) regardless of whether the AWU-WRA did any work.

385. Nicholas Jukes said that the 16 March 1992 letter reflected his discussions with Bruce Wilson, and that he intended the letter to record the agreement between Thiess and the AWU.⁵³² On 9 September 2014, Nicholas Jukes was again cross-examined by senior counsel for Bruce Wilson, but not on those assertions in his further witness statement. This suggests either an absence of instructions, or, if they were given, a lack of faith in them.
386. Seventhly, the invoices which were sent to Thiess from April 1992 on alleged that work had been carried out (even though none had). Why should the invoices take that form when, on Bruce Wilson's theory, the fees were payable even if no work was done?
387. Eighthly, it is inherently unlikely that Thiess would have promised to pay hundreds of thousands of dollars for nothing. Those who ran Thiess had a duty not to make gifts. They had a duty to the company and its shareholders to get some advantage in return for any payments Thiess made. Inherent in Bruce Wilson's theory, taken with Ralph Blewitt's evidence that Bruce Wilson lobbied the Western Australian government to ensure that Thiess got the contract, is the possibility that the money paid supposedly for training was in fact a payoff to Bruce Wilson for his assistance as a lobbyist. That is a sinister possibility. There is no evidence to

⁵³² Nicholas Jukes, Witness statement, 9/9/14, para 13.

support it. It must be rejected. Rejection of it entails rejection of Bruce Wilson's theory.

388. Finally, as is explained elsewhere,⁵³³ in many respects Bruce Wilson was not a witness of credit. It would be unwise to accept his evidence unless it were against self-interest, or corroborated, or inherently probable. His theory that Thiess was obliged to pay even if no work was done fell into none of these categories.

⁵³³ See Appendix A to this Chapter.

APPENDIX C TO CHAPTER 3.2

MEMBERSHIP OF THE AUSTRALIAN WORKERS' UNION – WORKPLACE REFORM ASSOCIATION INC.

389. Ralph Blewitt⁵³⁴ and Bruce Wilson⁵³⁵ gave evidence that the Australian Workers' Union – Workplace Reform Association Inc. had no members on 22 April 1992.
390. Did it ever have members? Bruce Wilson claimed that it later acquired members. Apart from himself and Ralph Blewitt, they were Glen Ivory, Jim Collins, Mark Barnes and Bill Telikostoglou.⁵³⁶ He said they each signed a document evidencing their agreement. Glen Ivory is dead, but his police statement contradicts Bruce Wilson's evidence.⁵³⁷ Jim Collins is dead, but as a Victorian branch President, he seems an implausible candidate for membership of a West Australian based incorporated association. So is Mark Barnes, an organiser in Victoria. And so

⁵³⁴ Ralph Blewitt, 12/5/14, T:23.47-24.2.

⁵³⁵ Bruce Wilson, 12/6/14, T:423.7-16.

⁵³⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 141; Bruce Wilson, 12/6/14, T:429.8-430.34.

⁵³⁷ See Appendix D to Chapter 3.2.

is Bill Telikostoglou, who was also based in Melbourne.⁵³⁸ There is no surviving documentary record of membership.

391. The probabilities are that there never were any members. For that there is one compelling reason. The existence of members would have interfered with Bruce Wilson's desire to keep the Association and its doings secret from the AWU. And the process of appointing members would have had elements of formality which were alien to the nature and habits of Bruce Wilson and Ralph Blewitt.

⁵³⁸ Bruce Wilson, 12/6/14, T:426.28-428.15.

APPENDIX D TO CHAPTER 3.2

GLEN IVORY AND DAWESVILLE

392. Did Glen Ivory provide services at Dawesville in 1993?
393. Even though Bruce Wilson was based in Melbourne in 1993 and never went near the Dawesville Project site, and though he was vague about what Glen Ivory actually did,⁵³⁹ he purported to give quite a lot of circumstantial detail about his conversations with Glen Ivory. He even went so far as to suggest that in 1993 Glen Ivory ceased to be paid by the AWU and began to be paid by the Australian Workers' Union – Workplace Reform Association Inc.⁵⁴⁰ The advantage for Bruce Wilson in relying on Glen Ivory was that Glen Ivory was dead. The difficulty for Bruce Wilson was that before Glen Ivory died, he made a statement on 20 November 1997, at a time when the relevant events were relatively fresh in his memory, to Western Australian police officers. The existence of this statement was unknown to Bruce Wilson and he was confronted with the statement without notice.⁵⁴¹ Glen Ivory denied any knowledge of the Australian

⁵³⁹ Bruce Wilson, 12/6/14, T:441.9-15.

⁵⁴⁰ Bruce Wilson, 12/6/14, T:439.44-440.43.

⁵⁴¹ Bruce Wilson, 12/6/14, T:441.32-442.18; Wilson MFI-3.

Workers' Union – Workplace Reform Association Inc. or of accounts opened in its name. He denied any knowledge of the agreement reflected in the 16 March 1992 letter. It followed that he had provided no services on behalf of that Association in 1993.

394. Bruce Wilson testified that the phraseology of Glen Ivory's statement suggested that it was prepared by someone other than Glen Ivory, and that other person was lying. There is no reason for thinking that the statement was not Glen Ivory's. It is common for a document prepared by a professional for a witness or potential witness – a statutory declaration, an affidavit, a witness statement, a police statement – to be cast in language more stilted than the maker, unaided, would have employed. That does not mean that the document is not the maker's document. Glen Ivory's statement should be taken at face value. Glen Ivory had no motive to be dishonest. Glen Ivory acknowledged in the statement his knowledge of the fact that he would be guilty of a crime if he included anything in the statement which he knew to be false or did not believe. There is no reason to suppose that Glen Ivory's recollection was either inaccurate or unduly patchy.

395. So the inference to be drawn from Glen Ivory's statement is that he never did any work in 1993 on the Dawesville Project site and that none was done. That inference is supported by the testimony of Tony Lovett. He was an organiser employed by the AWU between January 1992 and October 1993. As part of his duties he visited Dawesville between one and three times per week in that period. He knew Glen Ivory. He never saw Glen Ivory at

Dawesville. He was not aware of Glen Ivory doing any work at Dawesville.⁵⁴²

396. Tony Lovett was cross-examined to suggest that sometimes he might only visit the Dawesville site for 20 minutes in one week. He denied that, giving details of what he did.⁵⁴³ He was also cross-examined to suggest that he would not necessarily visit a particular training facility, and hence could not have known whether Glen Ivory was there conducting training. He denied this on the ground that he was good at his job and that if Glen Ivory had been there 'the boys would have told me'.⁵⁴⁴ To attempt to shake these assertions would have been a doomed enterprise, and no attempt was made. Of course it is possible that on any particular day Tony Lovett might not have encountered Glen Ivory even though the latter was on some part of the site not visited by Tony Lovett. But it is extremely unlikely that in circumstances where, if the invoices had been honest, Glen Ivory would have been on site all the time, a good organiser visiting the site for non-trivial periods once, twice or three times a week over 21 months, would not be aware that the President of the AWU (West Australian Branch) was not also on site, carrying out the coordination and liaison services between site management and AWU members to which the 16 March 1992 letter referred.

⁵⁴² Tony Lovett, 23/6/14, T:913.28-914.18; Tony Lovett, witness statement, 23/6/14, paras 3 and 5-8.

⁵⁴³ Tony Lovett, 23/6/14, T:914.46-915.25.

⁵⁴⁴ Tony Lovett, 23/6/14, T:915.27-916.1.

397. Similar conclusions follow from the evidence of Colin Saunders. He attended the Dawesville site 'at least once a week and definitely once a fortnight'.⁵⁴⁵ He would attend the site office and inform them of his presence. Each visit lasted 4-6 hours. He was involved in worker training. He knew Glen Ivory but never saw him on site: as far as he knew it was not Glen Ivory's responsibility to be there.⁵⁴⁶ In cross-examination he accepted that Glen Ivory could have been there, but if he had been, the AWU members would probably have told him.⁵⁴⁷ The improbability of both Glen Ivory and Colin Saunders being on site without the latter knowing is very high.

398. Brian Pulham was the Project Manager of the Dawesville Channel Project until September 1993. He authorised payment of the invoices by checking the hours claimed against the 16 March 1992 letter and thus was familiar with the Australian Workers' Union – Workplace Reform Association Inc. He did not recall seeing Glen Ivory on site. He did not recall seeing Bruce Wilson or Ralph Blewitt on site. He did see Tony Lovett and Colin Saunders, whom he recognised as AWU organisers, on site. He assumed that one or both of them were the Australian Workers' Union – Workplace Reform Association Inc.'s representative.⁵⁴⁸ He was cross-examined to suggest that there was no particular reason why he would know who the representative conducting the training

⁵⁴⁵ Colin Saunders, witness statement, 23/6/14, para 8.

⁵⁴⁶ Colin Saunders, witness statement, 23/6/14, paras 7-13; Colin Saunders, 23/6/14, T:917.38-918.42.

⁵⁴⁷ Colin Saunders, 23/6/14, T:920.23-43.

⁵⁴⁸ Brian Pulham, witness statement, 23/6/14, paras 8, 10-11, 17-19; Brian Pulham, 23/6/14, T:923.46-924.33.

pursuant to the 16 March 1992 letter was. In answer he said:⁵⁴⁹ ‘Before October 1993 it would be normal for the representative to come and see me when he visited the site, so I would expect to have known if Glen Ivory was on the site in that capacity prior to October 1993.’ He conceded that he did not walk around the site all the time every day and establish that Glen Ivory was not there. But that evidence, taken with the evidence of Tony Lovett and Colin Saunders, suggests that the improbability of Glen Ivory having visited the site is extreme.

399. Another factor pointing against Bruce Wilson’s testimony that Glen Ivory had provided services to Thiess on behalf of the Australian Workers’ Union – Workplace Reform Association Inc. is that there is no surviving record of this – no retainer agreement, no record of work done, no demand for payment, no receipt for payment. Admittedly, if Bruce Wilson’s claim to have paid Glen Ivory in cash is sound, there would be no bank records. But payment in cash would itself have been an unusual thing to do. Even though more than 20 years have passed, it is strange that not one document survived.

400. Despite the body of evidence just analysed, senior counsel for Bruce Wilson made an ambitious submission:⁵⁵⁰

On the evidence of both parties to the agreement, work was done for Thiess ... at the Dawesville Channel ... None of the divergences in the evidence, much less any of Ralph Blewitt’s evidence, should lead the

⁵⁴⁹ Brian Pulham, 23/6/14, T:925.17-33.

⁵⁵⁰ Submission on behalf of Bruce Wilson, 14/11/14, para 4.12.

Commission to hold Mr Wilson guilty of [deceit] in maintaining that work was done, as apparently urged by Counsel Assisting.

401. The word ‘deceit’ has been inserted into the above passage: it appears that it was omitted by oversight.
402. There were two parties to the agreement. On the Australian Workers’ Union – Workplace Reform Association Inc. side:
- Ralph Blewitt said he never intended to provide services and Bruce Wilson told him none would be provided;⁵⁵¹
 - Bruce Wilson said there were no services provided in 1992⁵⁵² and 1994;⁵⁵³ and
 - Bruce Wilson said services were provided in 1993 by Glen Ivory,⁵⁵⁴ but this was incorrect.⁵⁵⁵
403. Senior counsel for Bruce Wilson mentioned the Glen Ivory controversy in passing, but offered no argument against rejecting Bruce Wilson’s evidence on the point save that it was unfair to rely on the police statement of the now deceased Glen Ivory.⁵⁵⁶ This is hard to understand: Glen Ivory’s statement would be admissible even if the Commission were bound by the rules of evidence.

⁵⁵¹ Ralph Blewitt, 12/5/14, T:15.4-5 and 30-37.

⁵⁵² Bruce Wilson, 12/6/14, T:434.16-33 and 439.22-23.

⁵⁵³ Bruce Wilson, 12/6/14, T:439.32-33.

⁵⁵⁴ Bruce Wilson, 12/6/14, T:434.4-9, 435.9-439.27.

⁵⁵⁵ See Appendix D to Chapter 3.2.

⁵⁵⁶ Submission on behalf of Bruce Wilson, 14/11/14, para 4.7 and 4.13..

404. In relation to the Thiess side, senior counsel for Bruce Wilson relied on four references to Nicholas Jukes' evidence.⁵⁵⁷ These references do not demonstrate that Nicholas Jukes was saying that services *were* provided. Rather he said that he *believed* they were provided because of what he was told by Bruce Wilson and others, and they were paid for on the strength of that belief. That does not establish that services *were in fact* provided. The services supposedly rendered to Thiess by the Australian Workers' Union – Workplace Reform Association Inc. were paid for on the authority of Brian Pulham.⁵⁵⁸ He 'assumed' the services were provided by Tony Lovett and Colin Saunders as Australian Workers' Union – Workplace Reform Association Inc. representatives. Tony Lovett said he never provided training.⁵⁵⁹ Colin Saunders said some training was provided, but that the Australian Workers' Union – Workplace Reform Association Inc. invoices did not relate to it and he had never heard of that body.⁵⁶⁰ None of this renders false Bruce Wilson's clear admissions that services were not provided in 1992 and 1994. The finding of deceit against Bruce Wilson on these issues does not rest solely on Ralph Blewitt's evidence. It rests very largely on the evidence of Bruce Wilson himself and also on the evidence of independent and credible witnesses from the AWU and Thiess. It is appreciated that representing Bruce Wilson is no easy task, but misleading submissions of this kind which did not deal with the evidence just

⁵⁵⁷ Nicholas Jukes, witness statement, 10/6/14, paras 1-15; T:277.33-278.1, 667.32-35, 675.7-38.

⁵⁵⁸ Brian Pulham, witness statement, 23/6/14, para 19.

⁵⁵⁹ Tony Lovett, witness statement, 23/6/14, paras 10-11.

⁵⁶⁰ Colin Saunders, witness statement, 23/6/14, paras 20-22.

referred to do no service to his interests. In this regard senior counsel for Bruce Wilson saw fit to attack Nicholas Jukes' credibility.⁵⁶¹ That attack must be rejected.

⁵⁶¹ Submission on behalf of Bruce Wilson, 14/11/14, paras 4.9-4.11.

APPENDIX E TO CHAPTER 3.2

POWER OF ATTORNEY

405. Taken at face value, the Power of Attorney dated 4 February 1993 suggests that Ralph Blewitt signed it on that day in the presence of Julia Gillard.
406. However, Ralph Blewitt gave evidence that Julia Gillard was not present when he signed the Power of Attorney, and that only he and Bruce Wilson were there. Ralph Blewitt gave evidence that it was not signed on 4 February 1993, but in the week commencing 14 February 1993, which was a Sunday. He also gave evidence that it was signed in the Perth office of the AWU.⁵⁶² He fixed the date by what he saw as a significant event.⁵⁶³ Bruce Wilson returned to Perth in that week to address the West Australian branch and, in particular, to explain why he was now staying in Victoria and handing over the role of Branch Secretary to Ralph Blewitt.
407. In contrast, Bruce Wilson's testimony was that he denied signing the Power of Attorney in Perth in the week commencing 14 February 1993. He said he had the Power of Attorney before bidding in the auction for 85 Kerr Street, Fitzroy, on Saturday 13

⁵⁶² Ralph Blewitt, 12/5/14, T:41.6-19.

⁵⁶³ Ralph Blewitt, 12/5/14, T:41.21-44.

February 1993. He said he showed or gave the Power of Attorney to the person he gave the deposit cheque to, i.e. the vendor's agent.⁵⁶⁴ He said that he and Ralph Blewitt were in Melbourne on 3 February 1993. He remembered the date because it was his sister's 40th birthday, and he was not in Perth to celebrate it – a proposition not disputed by his brother-in-law Joseph Trio who was at the birthday party in Perth.⁵⁶⁵ He said that Ralph Blewitt dined at a Thai restaurant with Julia Gillard and himself. His witness statement continued thus:⁵⁶⁶

167. ... During the night there was some discussion about the Kerr St property and BLEWITT knew he would not be in Melbourne at the time of the auction. BLEWITT mentioned to GILLARD that he was planning on bidding on a house in a week or so. I was going to attend the auction for him. I think GILLARD mentioned that I couldn't just go and bid on his behalf, and that I would need a Power of Attorney to do so. I recall I asked GILLARD what I had to do and she said it was fairly simple and that she could do it in the morning for me before BLEWITT went back to Perth.

...

169. On 4 February 1993, I drove GILLARD to work, as I sometimes did. GILLARD said that she would get the Power of Attorney document prepared while I went to pick up BLEWITT. I picked up BLEWITT from where he was staying, possibly the Ibis Hotel, and we drove back to SLATER AND GORDON.

170. I don't recall whether I went to SLATER AND GORDON or whether BLEWITT went in by himself. I then drove BLEWITT to the airport as he was leaving to go to Perth that morning. It was clear from our conversation that BLEWITT had signed the Power of Attorney. I can't recall the specifics of what was said, but I was aware that the Power of Attorney had been signed. I can't remember whether I received the Power of Attorney from BLEWITT or from GILLARD. I think that GILLARD would have provided the Power of Attorney to me.

⁵⁶⁴ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, para 173.

⁵⁶⁵ Joseph Trio, 9/9/14, T:664.27-665.8.

⁵⁶⁶ Bruce Wilson, witness statement dated 4/6/14, 12/6/14, paras 167 and 169-170.

408. But in the witness box Julia Gillard did not remember dining with Ralph Blewitt ‘and others’ on 3 February 1993.⁵⁶⁷ On the other hand, Julia Gillard stated her practice thus: ‘I would only witness a document if the signatory was in my presence.’⁵⁶⁸ That accords with the sound practice of solicitors. Solicitors appreciate the importance of that practice as a means of preventing forgery, and as a technique for ensuring that evidence can later be given about the mental condition of the person signing. Yet Ralph Blewitt’s evidence, if correct, would mean that Julia Gillard had purported to witness the affixing of a signature she had not in fact observed being affixed. Many would regard that as a serious departure from sound practice. It is not a risk she is likely to have run.

409. In fact Ralph Blewitt was in error. Julia Gillard’s conduct in relation to the Power of Attorney is not open to criticism.

410. In 1993, 4 February fell on a Thursday. It is clear that Ralph Blewitt was in Melbourne, not Perth, at least on the evening of 3-4 February. That is because on that evening he attended a dinner at the Patee Thai Restaurant in Fitzroy. He did not remember it. But he did pay \$80 for that dinner using his MasterCard personal credit card (\$75.90 plus \$4.10 tip).⁵⁶⁹

411. In due course Ralph Blewitt made a claim for reimbursement of expenses associated with his trip to Melbourne from the West Australian branch of the AWU. In support of his claim, Ralph

⁵⁶⁷ Julia Gillard, 10/9/14, T:816.26-28.

⁵⁶⁸ Julia Gillard, 10/9/14, T:816.7-8.

⁵⁶⁹ Blewitt MFI-1, p 107.

Blewitt provided a note in which he had described the dinner in Fitzroy on the evening of 3 February 1993 as ‘Slater & Gordon dinner’.⁵⁷⁰

412. By the following day, 4 February 1993, Ralph Blewitt was back in Perth. He testified that on that day he submitted a claim for reimbursement from the AWU of certain expenses paid by him in connection with federal executive meetings. On that day he received a receipt in relation to those expenses bearing the date 4 February.⁵⁷¹

413. The second document reveals that at 5.57am on 5 February 1993, Ralph Blewitt parked his car at Perth domestic airport.⁵⁷² Ralph Blewitt flew out. He returned to the car park at Perth domestic airport and picked up his vehicle at 9.10pm. The fact that Ralph Blewitt parked his car at Perth airport at 5.57am on 5 February suggests that he had returned to Perth on 4 February 1993. It is not possible, using conventional airline services, to be in Perth by 5.57am on 5 February if one was in Melbourne on 4 February unless one left on 4 February and arrived in Perth on the same day.

414. Hence Ralph Blewitt probably took a flight from Melbourne to Perth some time on 4 February 1993. He said he took the first flight, but a later flight is possible. He then spent the balance of the day at his office at the West Australian branch of the AWU in Perth. During the course of that day he lodged his claim for

⁵⁷⁰ Blewitt MFI-1, p 113; Ralph Blewitt, 12/5/14, T:42.45-43.21.

⁵⁷¹ Blewitt MFI-1, p 114; Ralph Blewitt, 12/5/14, T:45.28-46.10.

⁵⁷² Blewitt MFI-1, p 111; Ralph Blewitt, 12/5/14, T:44.33-45.17.

expenses dated 4 February 1993. In the course of that day he lodged his claim for expenses dated 4 February 1993. He then went home and returned to Perth airport early the following morning.⁵⁷³

415. Bruce Wilson gave evidence that he picked Ralph Blewitt up on the morning of 4 February 1993 and drove him to Slater & Gordon for the purposes of executing the power of attorney. Then he drove him to the airport.

416. On that evidence, and if Ralph Blewitt did not leave Melbourne until after Slater & Gordon had opened for business, there was an opportunity for Julia Gillard to have witnessed Ralph Blewitt's signature to the Power of Attorney on 4 February 1993.

417. But what of Ralph Blewitt's positive claim that the Power of Attorney was only witnessed after the auction of 85 Kerr Street on Saturday 13 February 1993? That is quite improbable. He said that Bruce Wilson:⁵⁷⁴

had mentioned to me on the phone that if we wanted to do a power of attorney, "It would be easier if I do the documents over here than you flying backwards and forwards. Give me a power of attorney." He arrived the week commencing immediately the day after the auction, and either on the Monday, Tuesday or Wednesday of that week, whilst he was in Perth, he came into the office and said: "Here's that power of attorney", and I just signed it and gave it back to him and thought nothing more of it.

418. The problem with this evidence is that when a would-be purchaser of property at auction intends to bid through an attorney, it is

⁵⁷³ Ralph Blewitt, 12/5/14, T:44.33-46.23.

⁵⁷⁴ Ralph Blewitt, 12/5/14, T:41.36-44.

highly probable that the auctioneer would wish to be satisfied that the bidder was authorised by the would-be purchaser to bid, and to enter the contract.

419. On Saturday 13 February 1993 the auction of the Kerr Street property took place. Bruce Wilson and Julia Gillard attended the auction. Bruce Wilson bid on the property and was successful. A contract for sale of land was entered into between Harry Julian Onsmann and Nikki D'Emden (as vendors) and Ralph Blewitt (as purchaser) for the price of \$230,000. The purchaser's solicitor was identified on the contract as Slater & Gordon of 562 Little Bourke Street, Melbourne. Opposite the word 'Purchaser' is the signature of Bruce Wilson, and below that line appear the words 'Ralph Blewitt as per Power of Attorney'.⁵⁷⁵

420. It is probable that Bruce Wilson and Julia Gillard had the original Power of Attorney at the auction on 13 February 1993. The vendors under the contract of sale exchanged contracts with Bruce Wilson. Bruce Wilson was not, himself, the purchaser of the property. Ralph Blewitt was the purchaser. It is highly unlikely that the vendors would have exchanged unless Bruce Wilson, who was there, had a Power of Attorney for the purchaser, Ralph Blewitt, who was not there. In the unlikely event that the vendors exchanged on the basis of a contract signed by Bruce Wilson without some proof of his authority to do so, one would have expected detailed correspondence on the issue of authority

⁵⁷⁵ Gillard MFI-1, p 63.

immediately following the auction. There is no such correspondence.

421. Hence Bruce Wilson and Julia Gillard had the executed Power of Attorney with them at the auction on 13 February 1993. When, then, was it executed? It would appear reasonable to infer that it was executed, not in the week beginning 14 February, but at some point leading up to 13 February. The likeliest date is 4 February 1993. That was the day when Ralph Blewitt was last in Melbourne. It is the date the document bears. This conclusion is also consistent with Julia Gillard's evidence as to her practice as a solicitor, namely that she would not have witnessed Ralph Blewitt's signature without having seen him sign the Power of Attorney. In 1993 Julia Gillard no doubt had high and honourable legal ambitions and was experiencing the early lure of honourable political ambitions. Julia Gillard had no reason to take any risk about destroying either her legal career or her political career by departing from her usual practice.
422. The conclusion that the Power of Attorney was signed by Ralph Blewitt in Julia Gillard's presence on 4 February 1993 is supported by the subsequent contemporaneous records. They centre on Olive Brosnahan, the person within Slater & Gordon responsible for the conveyancing. On 16 February 1993, Olive Brosnahan had a telephone conversation with 'Elisha\Julia'.⁵⁷⁶ 'Julia' is Julia Gillard. Elisha was Julia Gillard's then secretary.

⁵⁷⁶ Gillard MFI-1, p 79.

The note then records: 'We need P/A or certified copy'.⁵⁷⁷ This suggests that Slater & Gordon did not at that time have the original Power of Attorney. The word 'Heidi' also appears on the note.

423. On 17 February 1993, Olive Brosnahan received a telephone call from Heidi of G A Thomson & Co Pty Ltd, which had auctioned the property. Olive Brosnahan's note reads: 'Will let me have original P/A – she will need certified copy'.⁵⁷⁸

424. This note suggests that G A Thomson & Co Pty Ltd was in possession of the original Power of Attorney. It is to be inferred that G A Thomson & Co Pty Ltd had obtained possession of the original Power of Attorney at the auction of 13 February 1993. The note suggests that Heidi of G A Thomson & Co Pty Ltd would send the original Power of Attorney to Olive Brosnahan.

425. On 22 February 1993, Olive Brosnahan wrote to G A Thomson & Co Pty Ltd stating:⁵⁷⁹

We acknowledge receipt of signed Contract of Sale, Section 32 Statement and Power of Attorney.

We now enclose certified copy of Power of Attorney for your records.

426. Hence by 22 February 1993 Slater & Gordon had received the original Power of Attorney from Heidi at G A Thomson & Co Pty Ltd and on the same day Olive Brosnahan had forwarded a

⁵⁷⁷ Gillard MFI-1, p 79.

⁵⁷⁸ Palmer MFI-1, p 297.

⁵⁷⁹ Olivia Palmer, witness statement, 10/6/14, para 214; Palmer MFI-1, p 235.

certified copy of the Power of Attorney to G A Thomson & Co Pty Ltd for its records. This step is consistent with the telephone conversation between Olive Brosnahan and Heidi on 17 February 1993.

427. In summary, the position is as follows. It is probable that the Power of Attorney was executed by Ralph Blewitt in the presence of Julia Gillard on 4 February 1993. That is consistent with the ordinary practice of a competent solicitor. And it is consistent with Julia Gillard's credible evidence of her own practice. Bruce Wilson and Julia Gillard took the original Power of Attorney to the auction on 13 February 1993, before the day in the week beginning 14 February 1993 when Ralph Blewitt says he signed it. After the auction Bruce Wilson and Julia Gillard provided it to the vendors. By 22 February 1993, Slater & Gordon was in possession of the Power of Attorney. This is confirmed by Olive Brosnahan's letter of 22 February 1993. Olive Brosnahan procured the creation of a certified copy of the Power of Attorney. She forwarded that certified copy to G A Thomson & Co Pty Ltd on 22 February 1993. It follows that Ralph Blewitt's evidence that he signed the Power of Attorney in Perth in the week beginning 14 February 1993 is incorrect. The implication of rejecting this aspect of Ralph Blewitt's evidence for his general reliability was considered above.⁵⁸⁰

⁵⁸⁰ Appendix A to Chapter 3.2.

APPENDIX F TO CHAPTER 3.2

OPENING A FILE

428. There has been criticism of Julia Gillard in relation to the opening of a file about her work on the Australian Workers' Union – Workplace Reform Association Inc. In one sense she did open one. In another sense she did not. She opened one in the sense that she collated the documents, placed them in a manila folder and procured that the folder be held in one of the filing cabinets that were on the ground floor at Slater & Gordon, where the industrial unit, of which she was part, worked. But she did not open a file on the Slater & Gordon computer system.⁵⁸¹ She said that other files in the filing cabinet were not placed in the system. She said that it was common in those days for Slater & Gordon – a firm heavily reliant on plaintiff personal injury work – to attract that work by performing some, but not all, of the industrial work without fees for trade unions and trade union officials. That has been a very common practice among solicitors who act for trade unions. She said that the relevant factors in deciding whether to open a file were the size of the work and whether disbursements would be raised. She did much more substantial work without opening a file on the system. On 11 September 1995 she informed her partners, Peter Gordon and Geoff Shaw, that with hindsight it might have been better to have opened a file on the system, and

⁵⁸¹ Julia Gillard, 10/9/14, T:776.9-29.

that appeared to be her position in the witness box as well. In 1995 she had no specific recollection of asking herself whether she should or should not open a file in the system.⁵⁸²

429. The equity partner to whom she reported, Bernard Murphy, testified that a file would be opened on the computer system if the relevant solicitor was going to incur disbursements, send a bill or carry out substantial work. He said that incorporating an entity and engaging in negotiations with a Government department fell with the rubric 'substantial work'. Julia Gillard, of course, had done that. But he said there was no written procedure. Individuals followed their own practices. He said that the Chief Executive Officer did not keep an eye on work that was being done across the firm. He said that he had never seen any use of a system of monitoring what files had been opened. He did not think that the partnership had regarded it as a safeguard to monitor what files were opened and what files had not been opened.⁵⁸³

430. In the eyes of some of Julia Gillard's critics, the significance of this issue turns on whether she tried to conceal the work she had done in relation to the incorporation of the Australian Workers' Union – Workplace Reform Association Inc. from her partners. While criticisms have been made of that work above, there is no evidence that she regarded it as a matter to be hidden from her partners. Bruce Wilson and Ralph Blewitt were a tiresome couple and in some respects an odd couple. They were not paying her.

⁵⁸² Julia Gillard, 10/9/14, T:776.34-777.47; Gillard MFI-1, pp 137 and 151.

⁵⁸³ Bernard Murphy, 9/9/14, T:570.21-572.10.

They were sloppy and un-lawyerly. Her main goal seems to have been to do what they wanted as quickly and economically as possible. She was not aware of the role of the Australian Workers' Union – Workplace Reform Association Inc. as a vehicle for massive deception and swindling of Thiess. Bernard Murphy's testimony suggests that at least in his practice a file would have been opened. Julia Gillard in both 1995 and 2014 seemed to accept that it might have been better to do so. But there is insufficient evidence to justify a conclusion that her failure to do so was motivated by a desire for secrecy. There is also insufficient evidence to conclude that if she had opened a file any conflict of interest, or other conflict, would be revealed. Her duty was to set up an incorporated association with the purpose of operating a re-election fund. That purpose does not sit very well with the actual purposes stated in Rule 3(1) of the Rules, but the evidence does not support a conclusion that she set out one set of purposes in Rule 3(1) knowing that the re-election fund purpose fell outside them. Even less does the evidence support a conclusion that she knew the incorporated association was to be a vehicle for the swindling of Thiess. Save in respect to the use of the AWU's name, she had no interest which was in conflict with her duty. Her interest in helping Bruce Wilson and her desire to help him did not conflict.

APPENDIX G TO CHAPTER 3.2

APPROACHES TO FACT FINDING

A – THE DIFFICULTIES CAUSED BY LAPSE OF TIME

431. Counsel assisting and senior counsel for Julia Gillard put certain submissions about the appropriate approach to fact finding. Some of these submissions are truisms, but they should be borne in mind.

432. Counsel assisting submitted that the relevant events took place a long time ago.

A lapse of time of this kind gives rise to particular forensic problems. Memories fade. It is no longer possible to locate or retrieve documents. For example, it was not possible for the Commission to obtain account records from the relevant banks. Issues of this kind mean that the process of fact finding involves a greater deal of inference than would otherwise be the case.⁵⁸⁴

433. For their part, senior counsel for Julia Gillard endorsed those observations. They went on:⁵⁸⁵

Memories do not merely fade. False reconstructions of events, both intentional and unwitting, occur in ways and for reasons that are unknowable. Documents are unavailable which would definitively conclude an issue. On the other hand, documents which do exist can nonetheless mislead.

⁵⁸⁴ Submissions of counsel assisting, 31/10/14, Chapter 3.2, para 7.

⁵⁸⁵ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 3.

434. From these premises senior counsel for Julia Gillard drew the following conclusions:

The lapse of time coupled with the absence of documents, most pertinently bank account records, leaves the Commission in a position where a level of reasonable satisfaction as to certain matters is unattainable. The problems of proof ... do not however warrant less safe inferences being drawn. They have the result that in relation to certain allegations, no inference can be safely drawn and no finding safely made.

435. That is true, but whether or not it is unsafe to draw an inference on a particular issue depends, obviously, on the nature of the issue and the nature of the evidence. It would be wrong too readily to treat the difficulty of fact-finding as a reason to abdicate responsibility for the task. And to do so would make it difficult to make findings in favour of particular persons as well as against them.

B – GOOD CHARACTER AND REPUTATION

436. Senior counsel for Julia Gillard put the following submission:⁵⁸⁶

The Commission should give significant weight to Ms Gillard's good character and reputation. The Commission has little or no evidence before it of the character or reputation of Messrs James or Hem. In the context of these proceedings there is no reason to prefer their evidence over that of Ms Gillard.

437. This is a mystifying submission. It is a dangerous submission. And, if it were correct, it would be a very troubling submission.
438. The submission is mystifying for several reasons. It is clear that it is offered primarily to bolster Julia Gillard's credibility. At least

⁵⁸⁶ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 7.

in relation to the incidents to which Athol James testified, the submission does not go to an issue. Thus the submission *is not* put to suggest directly that Julia Gillard was not the type of person who would accept cash from Bruce Wilson, nor the type of person who would use that cash to fund payments by cheque to Athol James. It *is* put to suggest that Julia Gillard is more likely to be believable as a witness than Athol James – more likely to be sincerely endeavouring to recollect past events and sincerely endeavouring to communicate them to the Commission. But is it put to suggest that, assuming that both Julia Gillard and Athol James are sincerely endeavouring to do these things, she is more intrinsically *reliable* than he is? It is not clear that evidence of ‘good character and reputation’ is ordinarily usable for that purpose. Yet at least in relation to Athol James, the contest seems to be framed by senior counsel for Julia Gillard (and indeed senior counsel for Bruce Wilson) as a contest of reliability, not sincerity. No attack is made on Athol James, in either cross-examination or submission, to suggest that he was knowingly motivated by malice or self-interest. Hence the first difficulty in the submission is that it completely misses the point as it arises in the present context. If Julia Gillard accepts the sincerity of Athol James, as her counsel’s submissions appear to, an examination of his character and reputation is irrelevant. That must mean that the submission is relevant only to *her* sincerity.

439. It is true that Wayne Hem escapes less lightly than Athol James. In four places senior counsel for Julia Gillard attack Wayne Hem’s

‘credibility’.⁵⁸⁷ In one place Wayne Hem is attacked for recent invention.⁵⁸⁸ And once it is said of him, pejoratively, that he ‘was prepared to volunteer’ some evidence.⁵⁸⁹ No groundwork for these attacks was laid by direct questioning of Wayne Hem about unwillingness to tell the truth in answer to questions – which is what a lack of credibility is. No questions were directed to his supposed motives for this non-credible evidence – whether it be malice to Julia Gillard, self-interest, or some desire to big-note himself. Why these attacks are made on Wayne Hem is obscure. The testimonial contest between Julia Gillard and Athol James concerns events of which they had firsthand knowledge – for either Bruce Wilson did certain things and Julia Gillard said certain things in Athol James’s presence, or they did not. But that is not so of Wayne Hem. What he testified to was outside Julia Gillard’s personal knowledge. Julia Gillard was not present when Bruce Wilson gave her \$5,000, if he did. She was not present when money was paid to a tradesman by Bill Telikostoglou, if he did. At a Prime Ministerial press conference on 26 November 2012, Julia Gillard challenged the journalists to point to ‘personal wrongdoing’ by her in relation to the \$5,000 incident. If she was ignorant of it, as she was, neither they nor anyone could conclude that there was personal wrongdoing. On the same reasoning, if she was ignorant of Bill Telikostoglou’s payment, as she was, there was no ‘personal wrongdoing’ on her part. Why then have her counsel gone to such trouble to attack Wayne Hem’s ‘good

⁵⁸⁷ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, paras 30(a), 30(b), 35(c) and 36.

⁵⁸⁸ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 30(d).

⁵⁸⁹ Outline of Submissions on behalf of Ms Julia Gillard, 17/11/14, para 35(c).

reputation and character’? Counsel assisting did not suggest guilty knowledge on her part, and a finding of guilty knowledge is not open.

440. The next difficulty is that the word ‘character’ is ambiguous. As L H Hoffmann has said:⁵⁹⁰

In modern usage, character means a disposition to behave in a particular way. “He has a bad character” usually means that he is given to wicked acts, and if one were asked to justify such a statement one would usually refer to incidents of past bad conduct by the person in question. There is, however, an older meaning of character, namely a person’s reputation. In *The School for Scandal*, for example, the word is constantly used in this way. When the hypocrite Joseph Surface is discovered trying to seduce Lady Teazle, he says that his character is ruined, which shows that until one is found out there may be a divergence between one’s character in this sense and one’s “real” character or disposition.

441. In what sense is the submission using the word ‘character’? Only to mean reputation? Or to mean ‘disposition’? They are radically different conceptions. The ‘reputation’ of a witness is the opinion in which that witness is held by the ‘neighbourhood’ generally, or some relevant circle, whether the opinion is correct or not. The ‘disposition’ of a witness is the tendency or propensity of that witness to behave in a particular way. ‘Disposition’ is connected with the question: ‘Is that particular witness the kind of person who would do that kind of thing?’
442. An inquiry into ‘disposition’ can be answered after examining particular instances of the witness’s past behaviour which may have been quite unknown before the hearing at which the witness’s evidence is being considered began. But a ‘reputation’

⁵⁹⁰ *The South African Law of Evidence* (Butterworths, Durban, 1970, 2nd ed) p 31.

inquiry, though also directed to what a person's disposition is, depends only on what people generally think about a witness, irrespective of whether their view is correct.

443. The distinction is illustrated by a passage in which James Fitzjames Stephen was using 'character' to mean 'reputation':⁵⁹¹

A witness may with perfect truth swear that a man who, to his knowledge, has been a receiver of stolen goods for years, has an excellent character for honesty if he has the good luck to conceal his crimes from his neighbours.

444. That passage, incidentally, exposes the unsatisfactoriness of reputation evidence as a guide to disposition.

445. A trier of fact who examines either the reputation or the disposition of a witness from the point of view of assessing credibility is attempting to assess the likelihood that the witness is endeavouring sincerely to tell the truth. Where credibility is in dispute, the reputation which is looked for is a reputation for sincerity in telling the truth. The same is true of the disposition which is looked for. No doubt the core elements of a bad disposition in that regard would be convictions for perjury, or convictions for dishonesty. But other convictions, or instances of bad conduct, might be material if they demonstrated that the witness had so little regard for the conventional standards of society (by reason of frequently infringing the laws against violence, for example) that it would be unlikely that the witness would have regard for the conventional standards of society calling for sincerity in testimony when giving evidence. Common

⁵⁹¹ *Digest of the Law of Evidence* (12th ed, 1936) p 201.

instances of ‘good character’ in the sense of disposition are to be found in evidence about the witness’s status, meritorious career and praiseworthy past.

446. To a limited extent good character can be established by the introductory questions addressed to witnesses about what they do. Thus Julia Gillard was asked: ‘Can you tell the Commission your occupation?’ She answered:⁵⁹²

There’s a list. I am of course a former Prime Minister and do a number of things associated with that. I am an author. I am the Chair of the Global Partnership for Education. I am a non-resident Distinguished Senior Fellow at the Brookings Institution in Washington. I am an Honorary Professor at the University of Adelaide.

447. This was a perfectly responsive and satisfactory answer. But at once it inevitably called up in the minds of those listening to it other things. For it is notorious that Julia Gillard entered the House of Representatives in 1998, became Shadow Minister for Immigration and Population and then Reconciliation and Indigenous Affairs. It is also notorious that she then became Shadow Minister for Health, Deputy Leader and Shadow Minister for Employment and Industrial Relations and Social Conditions. And it is also notorious that from 2007 to 2010 she was Deputy Prime Minister and Minister for Education, Minister for Employment and Industrial Relations and Minister for Social Inclusion; that she served as Acting Prime Minister many times; that from 2010 to 2013 she was Prime Minister; and that she was the first female Deputy Prime Minister and the first female Prime Minister.

⁵⁹² Julia Gillard, 10/9/14, T:763.47-764.6.

448. But beyond her statement of occupation and the notorious things it brought to mind there was no investigation of her reputation, or of her character, in any sense. Nor was there any investigation of the character and reputation of Athol James and Wayne Hem beyond their evidence about their occupations.
449. The submission offered on behalf of Julia Gillard is dangerous as well as mystifying. Julia Gillard was a public figure in Australian life for quite a number of years. Indeed, she remains one. A successful public figure, particularly a successful politician, inevitably attracts enemies. Enemies start rumours or conduct denigratory campaigns. Eventually rumours and denigratory campaigns, even if quite unjust, become the stuff of reputation. The enterprise of searching for which rumours and campaigns were soundly based and which were calumnies could be very dangerous for Julia Gillard. But it was not embarked on. It would have been a vast collateral inquiry taking the Commission way beyond its Terms of Reference.
450. A further problem raised by the submission is that though there is virtually no evidence of Julia Gillard's good reputation and character beyond that which is to be inferred from her status as a former Prime Minister and from the other aspects of her career which are notorious, she is given the accolade of having a 'good' reputation and character. But for Athol James and Wayne Hem there is no such accolade. The submission assumes in relation to them (but not her) that it was necessary to introduce evidence of good character or reputation, since the 'Commission has little or no evidence before it' about those things. That is not the way the

law proceeds. As witnesses enter the box, it is assumed that they are of good reputation and character. Their behaviour in the box may invalidate that assumption. The assumption may also be invalidated by evidence of bad reputation or character. It may be strengthened by proof of good reputation or character. But the submission takes it for granted that witnesses are not to be approached as *prima facie* meriting belief unless evidence has been called to establish their good reputation and character. It is flatly contrary to our traditions to take that for granted. While the Australian legal system is doubtless open to improvement in various ways, it is not the case that some classes of witness enter the box with a favourable aura not shared by other classes.

451. In a contest between a famous politician and two hitherto quite unknown people, the submission appeals to what is said to be the 'good character and reputation' of the former and the lack of evidence about the character and reputation of the latter. That is so even though the Commission has little or no *evidence* before it of the character and reputation of the famous politician either.

452. The submission under consideration, in the terms in which it was put, should be rejected. The preferable course is to concentrate on the evidence about the facts in issue, while bearing in mind the good character and reputation not only of Julia Gillard but also of Athol James and Wayne Hem. For there is no reason not to assume that all three are of good character and reputation. There is no reason to adopt some presumption in favour of her and against them. If some such presumption were adopted, it would always be the case that the powerful, the celebrated and the

successful will have undue advantages over the weak, the obscure and those of moderate achievement. Then would be the time to ask the question: 'Little man, what now?' It is a strange submission to be advanced on behalf of a former politician belonging to the Australian Labor Party tradition – a tradition of social democracy.

APPENDIX H TO CHAPTER 3.2

TENDER FOR DAWESVILLE CHANNEL PROJECT

453. Mr Michael Smith made a submission concerning the circumstances in which the contract to carry out the Dawesville Channel Project was awarded to Thiess and, in particular, whether there was a public tender for the project.
454. The submission collects a number of extracts from Hansard and other documents. It appears from the documents in the submission that the then state Labor Government in Western Australia intended until approximately late 1991 to award the Dawesville Channel Project by way of competitive tender, but, on or about 25 November 1991, Cabinet decided that the project would be awarded to Thiess without a tender. A contract between the Western Australian State Government and Thiess was subsequently signed in December 1991.
455. The submission suggests that this Commission should investigate what it describes as ‘Bruce Wilson’s overt influence on the WA Labor Government and his threat to unseat the then Premier Carmen Laurence if she did not do his bidding’. Presumably, although this is not spelt out clearly in the submission, the suggestion is that Bruce Wilson in late 1991 somehow persuaded or facilitated Cabinet to abandon the intended public tender in favour of Thiess. Even if this occurred, it would only be relevant

to this Commission's Terms of Reference if it involved some wrongdoing on the part of Bruce Wilson in his capacity as a union official, not some other capacity. While the submission is again not entirely clear, the suggestion seems to be that once Thiess was awarded the Dawesville Channel Project it made the payments to the Australian Workers' Union – Workplace Reform Association as some sort of payback to Bruce Wilson – the submission suggests that Thiess may have been paying Bruce Wilson 'secret commissions'.

456. None of this is supported by any evidence. Indeed, it is contrary to the sworn evidence of a number of Thiess witnesses. If this Commission were to take this line of inquiry further it would involve embarking on a major investigation of events which took place in Western Australia some 23 years ago. It would involve the Commission in a 'fishing expedition' in the mere hope that some material be uncovered supportive of the theories advanced.
457. In the event that any person is able to obtain any evidence of any specific wrongdoing the Commission would consider its position further. However, at this stage the Commission does not propose to investigate this matter further.

APPENDIX I TO CHAPTER 3.2

OTHER SUBMISSIONS

458. There are two submissions made in an undated document ‘Submission from Michael Smith on Ms Gillard’s AWUWRA evidence, in particular the claim that Slater & Gordon had incorporated associations in the past for the purpose of raising and holding payroll deduction election funds for union officials’. Since these submissions are not dealt with in Chapter 3.2, it is desirable to mention them briefly here. One is that an adverse finding should be made about Julia Gillard’s evidence set out at paragraphs 27-28 of Chapter 3.2. The reasons for this submission are that there is no evidence in support of her evidence and ‘substantial evidence against it’. But there is no evidence against her rather limited testimony. Her non-testimonial statement at the 11 September 1995 interview about the practice of Slater & Gordon in creating incorporated associations as re-election funds was more expansive. But the submission under consideration does not point to evidence against it. It is not contradicted by the fact that neither she nor Bernard Murphy had created an incorporated association of that kind, for others may have done so. The submission also points to a Victorian register which is said to have ‘no record of any incorporated association with the words “union” and “election”’. The evidentiary weight of that statement depends on examining the objects clause of each incorporated association.

An incorporated association could have the purposes of securing the re-election of officials but avoid the word 'union' for obvious reasons. What is more, it would be strange if Julia Gillard were telling her partners untrue things in circumstances where they could easily find out about the untruth. The fact that no other evidence exists to support her statement is not a reason for making an adverse finding about it.

459. The second submission is that to set up an incorporated association for the purpose of re-electing officials contravened s 4(2) of the *Incorporated Associations Act* 1987 (WA). That would depend on whether the purpose was to spend money paying the re-election *expenses* of candidates or to spend it on paying sums in the nature of *salaries* to the candidates. The former purpose would not involve 'securing pecuniary profit to the members'. The second purpose may.

APPENDIX J TO CHAPTER 3.2

SELECTED PARTS OF THE ASSOCIATIONS INCORPORATION ACT 1987 (WA)

460. Interpretation

3 (1) In this Act, unless the contrary intention appears –

...

“special resolution” means a resolution of an association passed in accordance with section 24.

Eligibility for incorporation

4 (1) Subject to this Act, an association is eligible to be incorporated under this Act if it has more than 5 members and is formed –

- (a) for a religious, educational, charitable or benevolent purpose;
- (b) for the purpose of promoting or encouraging literature, science or the arts;
- (c) for the purpose of sport, recreation or amusement;
- (d) for the purpose of establishing, carrying on, or improving a community, social or cultural centre, or promoting the interests of a local community;
- (e) for political purposes; or
- (f) for any other purpose approved by the Commissioner.

(2) Notwithstanding subsection (1), an association for the purpose of trading or securing pecuniary profit to the members from the transactions of the association is not eligible to be incorporated under this Act.

(3) Notwithstanding subsection (1), a trade union, as defined in the *Trade Unions Act 1902*, is not eligible to be incorporated under this Act.

...

Application for incorporation

5 (1) An application for the incorporation of an association must be made to the Commissioner in the prescribed manner and form by a person duly authorized by the association to apply for incorporation.

(2) An application for incorporation must be accompanied by –

- (a) a copy of the rules of the association conforming to the requirements of this Act; and
- (b) a certificate given by the applicant –
 - (i) certifying that he is authorized by the association to apply for registration;
 - (ii) verifying the particulars contained in the application;
 - (iii) confirming that the requirements of section 6 have been complied with;
 - (iv) verifying that the copy of the rules of the association accompanying the application is a true copy and that the rules include provisions as to the matters set out in Schedule 1; and
 - (v) verifying that the association has more than 5 members.

Advertisement of intended application

6 (1) An applicant for incorporation must cause an advertisement in the prescribed form to be published once in a newspaper circulating in the area where the association is situated or conducts its affairs.

(2) The advertisement required by subsection (1) must be published not less than one month nor more than 3 months before the application for incorporation is made to the Commissioner.

Request for refusal of incorporation

7 (1) Any person may, within one month after the publication of the advertisement referred to in section 6, request the Commissioner to decline to incorporate the association under this Act and such a request must include the reasons for the request.

(2) If the Commissioner refuses a request made under subsection (1), the person who made the request may, within 14 days of receiving notice of the refusal –

(a) request the Minister to review the decision of the Commissioner; and

(b) make representations in writing to the Minister in support of the application.

(3) The Minister's decision on a review under this section shall be final and the Commissioner shall give effect to it accordingly.

Name of association

8 (1) The Commissioner shall not incorporate an association under this Act by a name that in the opinion of the Commissioner is –

- (a) offensive or undesirable;
 - (b) likely to mislead the public as to the object or purpose of the association;
 - (c) identical with the name by which an association in existence is already incorporated under this Act or the repealed Act or which resembles any such name in a manner likely to mislead the public; or
 - (d) identical with or likely to be confused with the name of any other body corporate or any registered business name.
- (2) If the Commissioner refused to incorporate an association under this Act by a name that in his opinion is not appropriate having regard to subsection (1), the applicant for incorporation may, within one month of receiving notice of the refusal –
- (a) request the Minister to review the decision of the Commissioner; and
 - (b) make representations in writing to the Minister in support of the application.
- (3) The Minister's decision on a review shall be final and the Commissioner shall give effect to it accordingly.

Incorporation of association

- 9 (1) If upon an application duly made in accordance with this Part the Commissioner is of the opinion –
- (a) that the association is eligible to be incorporated under this Act;
 - (b) that the rules of the association lodged with the Commissioner conform to the requirements of this Act;
 - (c) that the name of the association is appropriate having regard to section 8; and

- (d) that the time during which any request might be made under section 7 has expired and any request made under that section has been finally refused,

the Commissioner shall, subject to subsection (2), incorporate the association by the issue to the association of a certificate of incorporation.

- (2) The Commissioner shall not incorporate an association under this Act if in his opinion –
 - (a) it is more appropriate for the activities of the association to be carried on by a body corporate incorporated under some other law; or
 - (b) the incorporation of the association is against the public interest.
- (3) If the Commissioner refuses an application for incorporation under subsection (2), the applicant for incorporation may, within one month of receiving notice of the refusal –
 - (a) request the Minister to review the decision of the Commissioner; and
 - (b) make representation in writing to the Minister in support of the application.
- (4) The Minister's decision on a review under this section shall be final and the Commissioner shall give effect to it accordingly.

PART III – CONSEQUENCES OF INCORPORATION

Effect of incorporation

- 10. Upon incorporation of an association under this Act –
 - (a) the association becomes a body corporate with perpetual succession and a common seal;
 - (b) the corporate name of the association is the name of the association as stated in the certificate of incorporation,

concluding with the word “Incorporated” or the abbreviation “Inc.”;

- (c) all rights and liabilities (whether certain or contingent) exercisable against members or officers of the association in their capacity as such immediately before the incorporation of the association become rights and liabilities of and exercisable against the incorporated association, but this paragraph shall not be construed so as to relieve or release any person in respect of liabilities incurred by or on behalf of the association prior to incorporation; and
- (d) the association may sue or be sued in its corporate name.

Vesting of property in incorporated associations

11 (1) Upon incorporation of an association under this Act all real and personal property held by any person for or on behalf of the association shall be vested in and held by the incorporated association subject to any trusts that may affect that property.

- (2) The Registrar of Titles shall –
 - (a) upon the application of an incorporated association in which any estate or interest in land has been vested by virtue of this section; and
 - (b) upon production of such duplicate instruments of title and other documents as the Registrar of Titles may require,register the vesting of that estate or interest in the association.

Liability of officers, trustees and members

12 (1) An officer, trustee, or a member of an incorporated association is not by reason only of his being such an officer, trustee or member liable in respect of the liabilities of the association.

(2) Subsection (1) does not apply in respect of liabilities incurred by or on behalf of the association prior to incorporation.

Powers of incorporated associations

13 (1) Subject to this Act and to its rules, an incorporated association may do all things necessary or convenient for carrying out its objects and purposes, and in particular, may —

(a) acquire, hold, deal with, and dispose of any real or personal property; and

(b) open and operate bank accounts; and

(c) invest its money —

(i) in any security in which trust moneys may be invested; or

(ii) in any other manner authorized by the rules of the association;

(d) borrow money upon such terms and conditions as the association thinks fit; and

(e) give such security for the discharge of liabilities incurred by the association as the association thinks fit; and

(f) appoint agents to transact any business of the association on its behalf; and

(g) enter into any other contract it considers necessary or desirable.

(2) An incorporated association may, unless its rules otherwise provide, act as trustee and accept and hold real and personal property upon trust, but an incorporated association does not

have power to do any act or thing as a trustee that, if done otherwise than as a trustee, would contravene this Act or the rules of the association.

Manner in which contracts may be made

14 (1) Contracts may be made by or on behalf of an incorporated association as follows –

- (a) a contract which, if made between natural persons, would be required to be in writing under seal may be made by the incorporated association under its common seal; and
- (b) a contract which, if made between natural persons, would be required to be in writing signed by the parties may be made on behalf of the association in writing by any person acting under its express or implied authority; and
- (c) a contract which, if made between natural persons, would be valid although not in writing signed by the parties may be made orally on behalf of the association by any person acting under its express or implied authority.

(2) A contract may be varied or rescinded by or on behalf of an incorporated association in the same manner as it is authorised to be made.

Limitation of doctrine of *ultra vires*

15 (1) A contract made with an incorporated association is not invalid by reason of any deficiency in the legal capacity of the association to enter into, or carry out, the contract unless the person contracting with the association has actual notice of the deficiency.

(2) An incorporated association that enters into a contract that would, but for the provisions of subsection (1), be invalid is empowered to carry out the contract.

(3) This section does not prejudice an action by a member of an incorporated association to restrain the association from entering into a transaction that lies beyond the powers conferred on the association by this Act or its rules.

PART IV – RULES OF INCORPORATED ASSOCIATIONS

Rules of association

16. The rules of an association do not conform to the requirements of this Act unless they include provision in respect of each of the matters that are specified in Schedule 1 and the rules are otherwise consistent with this Act.

Addition and alteration of rules

17 (1) Subject to sections 18 and 19, an incorporated association may alter its rules by special resolution but not otherwise.

(2) Within one month of the passing of a special resolution altering its rules, or such further time as the Commissioner may in a particular case allow, an incorporated association shall lodge with the Commissioner notice of the special resolution setting out particulars of the alteration together with a certificate given by a member of the committee certifying that the resolution was duly passed as a special resolution and that the rules of the association as so altered conform to the requirements of this Act.

(3) An alteration of the rules of an incorporated association does not take effect until subsection (2) is complied with.

...

Alteration of objects of incorporated association

19 (1) An alteration of the rules of an incorporated association having effect to alter the objects or purposes of the association does not take effect until section 17 is complied with and the approval of the Commissioner is given to the alteration of the objects or purposes.

(2) The Commissioner may direct that notice of a proposed change of the objects or purposes of an incorporated association be published in accordance with his directions as a pre requisite to his approval of the change.

(3) If the Commissioner refuses to approve an alteration of the objects and purposes of an incorporated association under subsection (1), the incorporated association may, within one month of receiving notice of the refusal –

- (a) request the Minister to review the decision of the Commissioner; and
 - (b) make representations in writing to the Minister in support of the application.
- (4) The Minister's decision on a review under this section shall be final and the Commissioner shall give effect to it accordingly.

...

Special Resolution

24 (1) For the purposes of this Act, a resolution is a special resolution if it is passed by a majority of not less than three fourths of the members of the association who are entitled under the rules of the association to vote and vote in person or, where proxies or postal votes are allowed by the rules of the association by proxy or postal vote, at a general meeting of which notice specifying the intention to propose the resolution as a special resolution was given in accordance with those rules.

(2) At a meeting at which a resolution proposed as a special resolution is submitted, a declaration by the person presiding that the resolution has been passed as a special resolution shall be

evidence of the fact unless, during the meeting at which the resolution is submitted, a poll is demanded in accordance with the rules of the association or, if the rules do not make provision as to the manner in which a poll may be demanded, by at least 3 members of the association present in person or, where proxies are allowed, by proxy.

(3) A declaration by the person presiding as to the result of a poll taken under subsection (2) is evidence of the matter so declared.

Accounting records to be kept

25. An incorporated association shall –

- (a) keep such accounting records as correctly record and explain the financial transactions and financial position of the association; and
- (b) keep its accounting records in such manner as will enable true and fair accounts of the association to be prepared from time to time; and
- (c) keep its accounting records in such manner as will enable true and fair accounts of the association to be conveniently and properly audited.

...

Register of members

27. An incorporated association shall keep and maintain in an up to date condition a register of the members of the association and their postal or residential addresses and, upon the request of a member of the association, shall make the register available for the inspection of the member and the member may make a copy of or take an extract from the register but shall have no right to remove the register for that purpose.

...

Record of office holders

29. An incorporated association shall maintain a record of —

- (a) the names and residential or postal addresses of the persons who hold the offices of the association provided for by the rules of the association, including all offices held by the persons who constitute the committee of the association and persons who are authorised to use the common seal of the association; and
- (b) the names and residential or postal addresses of any persons who are appointed or act as trustees on behalf of the association,

and the incorporated association shall, upon the request of a member of the association, make available the record for the inspection of the member and the member may make a copy of or take an extract from the record but shall have no right to remove the record for that purpose.

...

Responsibility of committee members

42. If a member of the committee of an incorporated association fails to take all reasonable steps to secure compliance by the association with its obligations under this Act, the member commits an offence and is liable to a fine of \$500.

False or misleading statements

43. Where in a document required by or for the purposes of this Act or lodged with or submitted to the Commissioner or in a document submitted to a meeting of members of an incorporated association, a person —

- (a) makes or authorises the making of a statement that to the person's knowledge is false or misleading in any material particular; or
- (b) omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in any material respect,

the person commits an offence and is liable to a fine of \$500.

CHAPTER 3.3

INDUSTRY 2020 PTY LTD

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A – SUMMARY

1. This chapter deals with Industry 2020 Pty Ltd (**Industry 2020**).
2. Industry 2020 no longer exists. It was deregistered on 17 December 2013 following a members’ voluntary winding up.

3. The company was owned and controlled by officers of the Victorian Branch of the Australian Workers' Union (**AWU**), principally Cesar Melhem, the former State Secretary.

4. In summary Industry 2020 raised money by holding fundraising events attended by employers, officials from other unions, and other participants in the building industry, trading off the fact that its directors were senior officials of the AWU and using the name, influence and resources of the AWU:
 - (a) Industry 2020 and its directors did not account to the AWU for any of the money raised, and did not meet any of the AWU's expenses.

 - (b) Instead, the money was used principally to advance the political aspirations of members of the Labor Unity faction of the Australian Labor Party (**ALP**) in Victoria to which Cesar Melhem belonged. This ultimately benefited Cesar Melhem, in that it raised his profile within the ALP and facilitated his subsequent entry into Victorian Parliament. Some of the money raised by Industry 2020 was also used to pay for expensive restaurant meals and luxurious overseas conference travel for Mr Melhem and other AWU officials. Another portion of the funds was transferred to facilitate payments to striking workers from another union (**CEPU**).

5. In these circumstances, counsel assisting submitted that Cesar Melhem may have breached fiduciary and statutory duties owed to the AWU.

6. The balance of this chapter is in two parts. The first part, (sections B – H) sets out the relevant facts, which to a significant degree are not in dispute. The second part (section I) analyses the competing submissions of counsel assisting and Cesar Melhem concerning possible breaches of the law arising from the facts.

B – CORPORATE HISTORY AND STRUCTURE

The creation of the company

7. The company was registered as a public company limited by guarantee on 6 June 2008.¹
8. Cesar Melhem, then Secretary of the Victorian Branch of the AWU, instigated the establishment of the company.
9. Cesar Melhem was elected as a full time organiser with the Federated Ironworkers Association of Australia (**FIA**) in 1990. In 1993, when the FIA amalgamated with the AWU, he continued on as a union official for the AWU in Victoria. Subsequently, in 2001, he was elected as Assistant Secretary of the Victorian Branch of the AWU. In 2006 he won office as State Secretary. He continued to occupy that position until he was appointed as the member for the Western Metropolitan region in the Legislative Council of the Victorian Parliament on 9 May 2013.²

¹ Melhem MFI-1, p 2.

² Cesar Melhem, 15/9/14, T:4.24-5.18.

10. The other two directors of Industry 2020 as at the date of its incorporation were Frank Leo and Richard Gray. Frank Leo was the Assistant Secretary of the Victorian Branch of the AWU through the relevant period. Richard Gray was another senior elected official of the AWU.³ They resigned as directors on 1 June 2012. Thereafter Cesar Melhem continued as the sole director of Industry 2020.

11. A few matters relating to the establishment of Industry 2020 may be noted:
 - (a) the first record in relation to the company is an email dated 13 May 2008 from Ainslie Gowan to Cesar Melhem.⁴ Ainslie Gowan was an AWU employee. She held the position of Communications Officer. She was never employed by Industry 2020. In that email she raised various matters relating to the creation of the company. She did so in terms which suggested she had already devoted some time to those matters;

 - (b) Cesar Melhem retained Maurice Blackburn Lawyers, the AWU's lawyers, to provide him with advice in relation to the establishment of Industry 2020;

 - (c) Cesar Melhem had a meeting with lawyers from Maurice Blackburn on 21 May 2008. They discussed the creation of Industry 2020. Cesar Melhem spoke about a plan for the company to hold a function in August 2008 to which

³ Cesar Melhem, 15/9/14, T:5.20-39.

⁴ Melhem MFI-1, p 6.

employers and others would be invited at a cost of \$500 per head.⁵ The notes also record Cesar Melhem instructed Maurice Blackburn that from the funds of Industry 2020 ‘political donations will be made to other unions and/or politicians’;

- (d) a further meeting with Maurice Blackburn was held on 30 May 2008. This was attended by Cesar Melhem, Frank Leo and Ainslie Gowan. Similar statements were made;⁶
- (e) various further communications between Ainslie Gowan, Maurice Blackburn and Cesar Melhem then took place;⁷
- (f) on 18 June 2008 Maurice Blackburn wrote to Cesar Melhem in relation to Industry 2020 providing advice in relation to a range of matters concerning the affairs of the company;⁸
- (g) a Maurice Blackburn file note of 19 September 2008 stated that Industry 2020 was partly a fund for ‘political’ purposes;⁹
- (h) Maurice Blackburn provided another written advice to Mr Melhem on 6 November 2008.¹⁰ That advice observed that Industry 2020 raised funds by organising fundraising

⁵ Melhem MFI-I, p 8.

⁶ Melhem MFI-1, p 9.

⁷ Melhem MFI-1, pp 13-15.

⁸ Melhem MFI-1, p 17.

⁹ Melhem MFI-1, p 24.

¹⁰ Melhem MFI-1, p 26-30.

activities and collecting contributions from supporters of the current AWU executive. The money would be used to pay for the election and re-election campaign expenses of the current union executive and to make political donations.

12. Thus although Cesar Melhem, Frank Leo and Ainslie Gowan were all employed by the AWU and paid out of members' funds to devote their energies to AWU business, each spent some time working on the establishment of Industry 2020.
13. Further, although Cesar Melhem intended to use Industry 2020 to raise funds for union elections and political donations, this was not revealed in any meaningful way in the company's constitution. The objects of the company, as set out in clause 2.4 of the constitution,¹¹ were:
 - (a) To promote the expression of moderate and progressive social policies and industrial relations in Australia.
 - (b) To provide a forum for the development, advancement and debate of socially useful and fair public policies.
 - (c) To advance the interest of workers generally.
 - (d) To subscribe to, become a member of and co-operate with any other association or organisation, whether incorporated or not, whose objects are altogether or in part similar to those of the company.

¹¹ Melhem MFI-1, tab 3.

The objects neither expressly nor by necessary implication include fundraising for union elections and political donations. To say that the act of giving financial support to candidates for election and the act of making political donations will assist persons who will promote objects (a) – (d) and are thus within those objects is shaky reasoning.

14. Maurice Blackburn clearly spent some considerable time preparing advices for Cesar Melhem and working on the establishment of Industry 2020. But Cesar Melhem refused to pay for those services. In this regard:

- (a) in an email to the Maurice Blackburn board of 20 May 2010,¹² it was reported that various members of staff from Maurice Blackburn had met Cesar Melhem and Richard Gray following a complaint made by Cesar Melhem that the firm had done ‘nothing for the AWU’, and following a refusal on Cesar Melhem’s part to pay the firm’s account in respect of the establishment of Industry 2020;
- (b) that email described the meeting with Cesar Melhem as ‘a disaster’. It was reported that he ‘flew off the handle within five minutes and stormed out saying he was going to Slaters.’ Those attending from Maurice Blackburn complained about the fact that in circumstances where they had been retained to do a job, given a quote, received a signed cost agreement confirming that quote, had done the work and sent a bill, it was not very helpful for Cesar Melhem to have sent them a

¹² Melhem MFI-1, p 136.

fax of the bill some two years later with the words 'NOT PAYING' scrawled on it. In response to this complaint, Cesar Melhem threw a 'tantrum';

- (c) on the same day, 20 May 2010, Cesar Melhem wrote to the CEO of Maurice Blackburn expressing disappointment that the meeting had not resolved the issues.¹³ He stated that there were 'concerns raised by some AWU members' in relation to the union's referral arrangement with the firm and that 'after serious consideration of these matters, the union has decided to review the commercial relationship between the AWU Victorian Branch and Maurice Blackburn' and that the union intended to call for tenders for legal services;

- (d) an internal email at Maurice Blackburn of 25 May 2010¹⁴ records that, following this meeting, there were a number of conversations with Cesar Melhem. During them he told Maurice Blackburn that he did not think that the firm 'got it' and that the fact Maurice Blackburn had billed him for the Industry 2020 work 'meant that we didn't get what we were all supposed to be working for – the broader interest of the labour movement'. The email later records that the firm had ultimately decided to waive their fee in respect of the Industry 2020 matter;

¹³ Melhem MFI-1, p 134.

¹⁴ Melhem MFI-1, p 135.

(e) a few days later, on 31 May 2010, Maurice Blackburn wrote to Cesar Melhem¹⁵ indicating that they were pleased to have been able to resolve the matter, confirming previous advice that the firm was happy to waive the fees that had been charged for establishing Industry 2020, and expressing delight that the AWU had now decided to place a six month moratorium on its decision to tender for legal work.

15. These documents speak for themselves. Cesar Melhem expected AWU's solicitors not to insist on payment for the work they had done in establishing his separate entity. He expected privileges of this kind by virtue of the fact that he was State Secretary of the AWU, and when they were not extended to him, he used the threat of withdrawing the union's work from the firm to get his way.

16. In his evidence to the Commission, Cesar Melhem said that he had been led to believe that there would be no fee rendered for setting up the fund, and his behaviour could be explained on this basis.¹⁶ However that evidence is inconsistent with the records which establish that the work was the subject of a signed cost agreement. The documents do not contain a single reference to Cesar Melhem having alleged that Maurice Blackburn had agreed to do the work for nothing. Cesar Melhem's evidence on this topic cannot be accepted.

¹⁵ Melhem MFI-1, p 137.

¹⁶ Cesar Melhem 15/9/14, T:19.18.

Conversion to private company

17. In or around March 2009, Cesar Melhem explored with Maurice Blackburn the possibility of changing the structure of Industry 2020 from a company limited by guarantee to a proprietary company.
18. He did so after his accountant had advised him that there was no point keeping the company as one limited by guarantee because the income of the company was being taxed at 30% and there was no opportunity to obtain income tax exempt status.¹⁷ The accountant may have been struggling to keep up with the administration and reporting requirements for public companies.
19. Cesar Melhem told Maurice Blackburn the main purpose of the fund had been to help him with his re-election within the AWU, and that since he had been re-elected without opposition for a further four year term, he did not have much use for the money in the company in the meantime.¹⁸
20. On 16 October 2009 various special resolutions were passed to change the company to a proprietary company limited by shares and to adopt a new constitution.¹⁹ Cesar Melhem signed the necessary forms to submit to ASIC on the same day.²⁰

¹⁷ Melhem MFI-1, p 66.

¹⁸ Melhem MFI-1, p 66.

¹⁹ Melhem MFI-1, p 72.

²⁰ Melhem MFI-1, p 74.

21. However those forms were not lodged with ASIC at that time. The decision to change the company structure appears to have been deferred due to the advent of the *Corporations Amendment (Corporate Reporting Reform) Bill 2010* (Cth), the intent of which was to exempt small companies limited by guarantee from reporting and auditing requirements.
22. In or around November 2011, however, Cesar Melhem decided to proceed with the conversion, and on 16 December 2011 Maurice Blackburn lodged with ASIC the forms that had been signed in 2009.²¹

C – BANK ACCOUNTS

23. Industry 2020 operated three banking facilities, namely:
- (a) a cheque account with the Commonwealth Bank of Australia (CBA);²²
 - (b) an online saver account with the CBA;²³ and
 - (c) CBA MasterCard in Cesar Melhem’s name.²⁴

²¹ Melhem MFI-1, p73

²² Melhem MFI-1, tab 17

²³ Melhem MFI-1, tab 18

²⁴ Melhem MFI-1, tab 19

D – COMPANY’S FINANCIAL REPORTS

24. Industry 2020’s financial reports²⁵ reveal the following financial performance of the company:

| | 30 June 2009 | 30 June 2010 | 30 June 2011 | 30 June 2012 | 14 May 2013 |
|------------------------------------|-------------------------|-------------------------|-------------------------|-------------------------|------------------------|
| Revenue | \$254,305 | \$3,652 | \$6,818 | \$123,551 | \$168,194 |
| Profit/(loss) after tax | \$110,837 | (\$83,282) | (\$20,553) | \$41,910 | \$48,913 |
| Net assets (cash) | \$110,837 | \$27,555 | \$7,002 | \$48,937 | \$0 |

E – HOW THE COMPANY MADE ITS MONEY

General

25. Industry 2020 generated revenue by organising a number of one-off fundraising events.
26. The first fundraiser was a lunch function held at Flemington racecourse in August 2008. The funds raised from this event account for the revenue figure of approximately \$250,000 that appears in the 30 June 2009 financial statements.²⁶
27. In the two financial years following this event there was very little recorded fundraising activity.

²⁵ Melhem MFI-1, tabs 8-11, 15.

²⁶ Melhem MFI-1, tab 8 p 200.

28. However, the financial report for the year ended 30 June 2012²⁷ and the general ledger for the period 1 July 2012 to 10 May 2013²⁸ reveal that fund raising activity substantially increased during the latter half of 2012. Expensive tickets were sold to events at the Hellenic Museum and Federation Square in Melbourne, resulting in a very substantial influx of cash into the company.

The ‘Gillard lunch’ on 8 August 2008

29. On 8 August 2008 Industry 2020 held a lunch time function at Flemington Racecourse.
30. The invitation to the event described the lunch and gave the event the title of ‘Industry 2020 Lunch’.²⁹ Those invited were informed that, if they paid to attend the function, they would hear the Hon. Julia Gillard (described as the Deputy Prime Minister and Minister for Employment & Workplace Relations) speak. The invitation also noted there would be a performance from Vince Sorrenti.
31. Tickets to the event were priced at \$550 per person or \$5,000 for a table of 10, and the invitation stated that payment was to be by cheque payable to ‘Industry 2020’.
32. Some of the marketing and preparation for the event occurred prior to the incorporation of Industry 2020. For example, the company’s cheque account was opened on or around 2 May 2008, and a number of

²⁷ Melhem MFI-1, tab 11.

²⁸ Melhem MFI-1 tab 15.

²⁹ Melhem MFI-1, p 467.

tax invoices were issued to purchasers of tickets in the period from 20 May 2008 to 2 June 2008.³⁰

33. Although there are references to Industry 2020 in the documents and invoices were issued in its name, the event was put forward by Cesar Melhem and others as an AWU event.
34. Tickets were sold by AWU officers and other employees. Cesar Melhem confirmed that AWU organisers were enlisted to sell tickets to companies with whom they had dealings.³¹ One of the documents produced to the Commission identifies, in respect of each company that bought tickets, the 'seller' of those tickets. The named sellers are Cesar Melhem, Frank Leo, Richard Gray, 'Liam', 'Rod L', 'Dave H', 'Craig', 'Terry', 'John S', 'Brian', 'Gavin', 'JP', 'Kahu' and 'Paul'.³² These were all AWU officials. There is an email of 10 July 2008 to Ainslie Gowan from Michael Borowick, Assistant Secretary and National Executive member of the AWU describing his telephone inquiries to seven other officials including Colin Heath and Mick Chopping about how ticket sales were going to the companies and other groups they had approached.³³
35. Documents reveal that Ainslie Gowan was heavily involved in the process of preparing for the event and invoicing purchasers for ticket

³⁰ Melhem MFI-1, pp 471-479.

³¹ Cesar Melhem, 15/9/14, T:29.26-28.

³² Melhem MFI-1, p 468.

³³ Melhem MFI-1, p 513.

prices.³⁴ She sent out invoices. Her name and AWU title appeared as the contact person on the bottom of one of the planning documents.³⁵

36. Cesar Melhem tried to downplay the amount of time and effort AWU staff put in as ‘incidental and minor’.³⁶ But he agreed that getting a few hundred people to come to the functions ‘involved quite a deal of organising and selling’ – ‘a bit of an organising effort’. He said there was ‘external assistance’, but part of the organising effort came from AWU staff.³⁷ The AWU was not paid any sum for having its employees, including Ainslie Gowan, Claire Raimondo and the AWU organisers, carry out work for the benefit of Industry 2020.³⁸
37. The purchasers of the tickets to the event were, for the most part, companies with whom the AWU had dealings in an industrial context. They were companies that employed AWU members, and would have considered it important to maintain a good working relationship with the AWU.
38. The companies who were invited and attended included, for example, John Holland Construction, Thiess, Orica, Grocon, OneSteel, Exxon Mobil Refinery, ACI Glass, IUS Holdings Pty Ltd, Continental Pty Ltd, Huntsman Chemical Company, Alstom Limited, Skilled Group

³⁴ Melhem MFI -1, p 513.

³⁵ Melhem MFI-1, p 521.

³⁶ Cesar Melhem, 15/9/14, T:30.26-31.12

³⁷ Cesar Melhem, 15/9/14, T:30.10-17.

³⁸ Cesar Melhem, 15/9/14, T:39.13.

Limited and Qenos Pty Ltd. Each paid sums of between \$1,650 and \$11,550 to attend.³⁹

39. Those attending the lunch also included representatives from a number of other unions, including the HSU Victoria Number 1 branch and the CEPU Plumbing Division in Victoria.
40. The script that was prepared for Cesar Melhem's introduction speech for the day began 'On behalf of the officials of the Australian Workers' Union Victoria Branch, it is my great pleasure to welcome each and every one of you here today'.⁴⁰ It contained various other references to the AWU, AWU members and AWU identities, in particular 'our much-loved former secretary Bill Shorten'.
41. Cesar Melhem said in his evidence that this script was only a draft (yet another piece of work undertaken by Ainslie Gowan)⁴¹ and that he did not follow the draft.⁴² But he did not say in his evidence that he did not welcome guests on behalf of the officials of the AWU Victorian Branch. Given his position at the time, the identity of the guests and the text of the draft script, it is likely that he did welcome guests in this way.
42. Copies of running sheets for the event⁴³ provided that Cesar Melhem, in his capacity as AWU State Secretary, would introduce the Hon. Julia

³⁹ Melhem MFI-1, pp 468-470.

⁴⁰ Melhem MFI-1, p 522.

⁴¹ Cesar Melhem, 15/9/14, T:37.23.

⁴² Cesar Melhem, 15/9/14, T:37.35.

⁴³ Melhem MFI-1, p 520, 525.

Gillard, and that either the AWU National Secretary (Paul Howes) or the former AWU National Secretary and Member for Maribyrnong (Bill Shorten) would thank her for her speech.

43. Thus the occasion was sold and presented as an AWU event. AWU organisers were selling tickets to the employers they dealt with, for a function that was being hosted by Cesar Melhem, the State Secretary of the AWU.
44. Although many of those invited accepted the advances made upon them by union representatives to purchase tickets, some did not. For example, an email from one of those invited to his colleagues contained the following statement:⁴⁴

I received this AWU fundraiser from Dick Gray yesterday **who reminded me of how Visy's support of these things leads to such a good working relationship with the AWU.** Has anyone else been fortunate enough to be 'invited' to this ground breaking event?

Steve, FYI – Visy has supported AWU events like this in the past but for mine there is little to no value in this one other than political. **(emphasis added)**

45. The email is a telling contemporaneous indicator of the real marketing undercurrent which drove the success of the event. Cesar Melhem was trading off his position in the AWU and the relationships between the AWU and employers with whom the union dealt. The email reveals that Visy felt under some pressure to attend an event it did not wish to attend. Contrary to what Cesar Melhem submitted,⁴⁵ the inference may be drawn that others viewed the event in the same way and that

⁴⁴ Melhem MFI-1, p 515.

⁴⁵ Submissions on behalf of Cesar Melhem, 14/11/14, para 4.3.

Richard Gray had represented that to support the event would help create a good working relationship with the AWU. And from the fact that Richard Gray said this it may be inferred the fact that he was authorised to say it. Cesar Melhem's denial was based on explanations he claimed to give to those who were invited about the purpose of the event and about its having nothing to do with the AWU.⁴⁶ But his testimony about the content, occasion and time of these explanations was extraordinarily vague. It was also uncorroborated. The best place to have put explanations was on the invitations, and they were silent.

46. The published invitation to this event did not state that it would be run for a profit. It did not state that the purpose of the event was to raise money for Cesar Melhem to use for the purposes of funding his next election campaign within the AWU. Many of those attending would have had no idea that this was the purpose of the function.

The Hellenic Museum Lunch

47. On 12 August 2011, Industry 2020 held a function at the Hellenic Museum, 280 William Street, Melbourne.
48. A written invitation was sent to guests. It commenced as follows:⁴⁷

CESAR MELHEM

INVITES YOU TO ATTEND THE FOLLOWING LUNCHEON

INDUSTRY 2020 FINANCE LUNCHEON

⁴⁶ Cesar Melhem, 15/914, T:31.30-39, 32.7-20, 33.36-34.14.

⁴⁷ Melhem MFI-1, p 543.

49. The invitation stated that the Hon. Bill Shorten (then Assistant Treasurer, Minister for Financial Services and Superannuation) would speak about superannuation changes, carbon tax and key budget outcomes. It is true that the invitation does not refer to Cesar Melhem's post as AWU State Secretary and it does not refer to the Hon. Bill Shorten's earlier tenure of that office. But these were notorious facts. Neither man would have been where he was but for his success in and stature with the AWU.

50. Tickets to the event were priced at \$5,500 per person.

51. Each of those invited received the invitation as an attachment to an email from Cesar Melhem. That email was sent by Cesar Melhem from his AWU email address, included AWU branding, gave his AWU contact details and referred to him as the Secretary of The Australian Workers' Union – Victorian Branch.⁴⁸

52. Each email stated:

Please find attached a special invitation to attend a small, intimate luncheon I will be hosting on Friday 12 August with special guest speaker, the Hon. Bill Shorten.

The attached invitation has details regarding this event and information on how to book a place.

I would be delighted if you were available to attend this event conducted by Industry 2020 and I look forward to hearing from you.

Yours in unity,

CESAR MELHEM

⁴⁸ Melhem MFI-1, p 548.

Secretary

The Australian Workers' Union – Victorian Branch.

53. Both the invitation and a draft of that email were sent by Claire Raimondo to Cesar Melhem on 15 June 2011.⁴⁹ Claire Raimondo was the Office Relations Manager in the Victorian Branch of the AWU. She asked Cesar Melhem whether the drafts were okay, and stated that if they were, 'Helen' (presumably another AWU employee) would personalise them. Cesar Melhem responded favourably, and there was a further email exchange between them on the subject.⁵⁰
54. Those invited to the event included employers such as Boral, Downer Engineering, Grocon, Linfox, Thiess, Visy and Onesteel. Other unions were also invited, including the HSU, CEPU Plumbing Victorian Branch and the TWU.⁵¹ Most of them accepted,⁵² generally by responding directly to Cesar Melhem.⁵³
55. As with the previous event, the invitation did not state that the event was a fund raiser, that the event would not raise funds for the AWU, and that the event was instead designed to raise money that would be spent at the discretion of Cesar Melhem on union and other political electioneering. The email from Cesar Melhem through which the invitation was conveyed was no more revealing in these regards.

⁴⁹ Melhem MFI-1, p 546-7.

⁵⁰ Melhem MFI-1, p 545-7.

⁵¹ Melhem MFI-1, p 576-77.

⁵² Melhem MFI-1, p 544.

⁵³ For example Melhem MFI-1, p 578.

56. The AWU was not reimbursed for any of the time spent by AWU staff, including Cesar Melhem and Claire Raimondo, in preparing for this event.

Federation Square Lunch

57. On 20 November 2012 Industry 2020 held a lunch time function at Zinc @ Federation Square, Melbourne.
58. Prior to the event, and in August 2012, guests were sent an email by Cesar Melhem in which Cesar Melhem said:⁵⁴

Please find attached a Save the Date for an Industry2020 event that I am hosting on the 20th of November. Further details to come in early September. Please contact me if you would like to pre-order a table, or if you have any questions.

Your Sincerely

Cesar Melhem

59. The save the date card sent with the email included the following:⁵⁵

On behalf of Industry 2020

CESAR MELHEM

will be hosting a business luncheon on 20th of November 2012

60. The subsequent invitation sent to guests was titled 'Industry 2020 Exclusive Invitation Only Event. Cesar Melhem on behalf of Industry

⁵⁴ Melhem MFI-1, p 597.

⁵⁵ Melhem MFI-1, p 598.

2020 has great pleasure in inviting you to attend the Industrial Business Luncheon'. It invited guests to hear the Hon. Bill Shorten, Minister for Employment & Workplace Relations and Minister for Financial Services & Superannuation, speak about changes in superannuation changes, and the *Fair Work Act*. Cesar Melhem's name again featured prominently on the document, in bold and capitals. Tickets were priced at \$750 per person and \$5,500 per table.⁵⁶

61. Representatives of various employers were invited to attend the function. Ultimately companies including Boral, John Holland Group, Abigroup and Qantas accepted the invitations and paid sums of \$5,500 to attend.⁵⁷
62. The Federation Square lunch was largely presented to participants as an AWU event. Copies of the 'Draft Running Sheet' and 'Event information Sheet' were produced to the Commission.⁵⁸ The running sheets again refer to speeches by Paul Howes, in his capacity as AWU National Secretary, in relation to AWU national issues and by Cesar Melhem in his capacity as AWU State Secretary.
63. As with the previous events the invitation and other written communications with those invited did not reveal that the event was a fund raiser, that it was not intended to raise funds for the AWU, and the purpose of the function was to raise funds that would be spent at the discretion of Cesar Melhem on union and other political electioneering. And as with the previous events, the AWU was not

⁵⁶ Melhem MFI-1, p 599.

⁵⁷ Melhem MFI-1, pp 600-601.

⁵⁸ Melhem MFI-1, pp 610-611.

reimbursed for any of the time spent by AWU staff, including Cesar Melhem and Claire Raimondo, in preparing for the event.

F – HOW THE COMPANY SPENT ITS MONEY

64. The documents produced to the Commission by Cesar Melhem demonstrate that the company spent its money in a variety of ways over time.

Political donations

65. Cesar Melhem, through Industry 2020, made a large number of political donations.

66. The term ‘political donations’, in this context, includes both:

- (a) donations to politicians and political groups at the Federal and State political levels; and
- (b) donations to those vying for power within other trade unions.

67. There is a close relationship between those two endeavours, for reasons which are already well known. Amongst other things:

- (a) there exist a number of factions within ALP politics (for example the right wing Labor Unity faction of the ALP to which Cesar Melhem belongs);⁵⁹

⁵⁹ Cesar Melhem 15/9/14, T:43.33.

- (b) a large number of ALP politicians and trade union officials subscribe to one or other of the various factions;
- (c) in this way, there exist various pools of politically like-minded individuals within a given State, and each pool will be made up of, amongst others, a certain number of politicians, administrators and trade union officials;
- (d) senior officials of trade unions are able to exercise a degree of influence over the affairs of the ALP, including in their own State. Delegates from trade unions attend ALP conferences and participate in debate and voting on various matters, including pre-selection of candidates for parliamentary elections;
- (e) the greater number of unions that are controlled by officials from the same faction, the more likely it is that the State branch of the ALP will be dominated by politicians from that faction;
- (f) there is a long history of trade union officials entering the political arena.

Donations to politicians and political groups

68. Cesar Melhem, through Industry 2020, paid considerable sums of money to Labor Unity. He also paid considerable sums to support the election campaigns of particular ALP candidates who were members of that faction.

69. Those payments are detailed in the following table:

| Date | Amount | Description | Page of Melhem MFI 1 |
|-------------|---------------|--|-----------------------------|
| 22/01/09 | \$1,000 | Payment to the Labor Unity faction of the ALP. This was a cash donation made to the faction. ⁶⁰ | 633-634 |
| 6/06/09 | \$2,700 | Payment made for an ALP fundraiser. | 635 |
| 30/06/09 | \$2,000 | A cash payment was made to Noah Carroll, the ALP State Secretary Campaign Manager and one of Cesar Melhem's political and factional allies. ⁶¹ The payment was made to support an ALP campaign for the seat of Maribyrnong. That seat is located in the Western Metropolitan Region of Victoria, which Labor Unity dominated. | 636 |
| 16/12/09 | \$1,550 | The payment was made in respect of a fund raising event for Natalie Hutchins, an ALP candidate for Keilor (a seat that sits in the Labor Unity dominated Western Metropolitan Region). The | 637-638 |

⁶⁰ Cesar Melhem, 15/9/14, T:44.14.

⁶¹ Cesar Melhem, 15/9/14, T:45.33-35; Melhem MFI-1, p 801.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|---------|---|----------------------------|
| | | breakfast itself was hosted by Cesar Melhem in his capacity as State Secretary of the AWU. The payment was again made by way of cash cheque. | |
| 19/05/10 | \$5,000 | Payment in support of the ALP campaign for the Federal seat of McEwen. | 642 |
| 27/05/10 | \$3,500 | Cash cheque. This was for a fundraiser for David Asmar, ALP politician and husband of Diane Asmar, a Victorian HSU official. Cesar Melhem said that David Asmar asked him for a cash cheque for a fundraiser he was conducting in his area, and Cesar Melhem obliged. ⁶² | 643-644 |
| 21/04/11 | \$2,000 | Payment made for fundraising activities of the ALP. | 303 |
| 8/08/11 | \$3,000 | Payment made to Labor Unity. | 281 |
| 26/09/11 | \$1,500 | Payment made for ALP fundraising lunch. | 281 |
| 3/05/12 | \$5,000 | Cesar Melhem wrote a cash cheque | 281 |

⁶² Cesar Melhem, 15/9/14, T:47.12-25.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|---------|---|----------------------|
| | | in this sum. The cash was to be used to pay for an ALP function at the Cairnlea Soccer Club. ⁶³ | |
| 28/09/12 | \$3,000 | Cesar Melhem wrote a cash cheque to provide funding for a Labor Unity council election. Cesar Melhem said it was provided to Mehmet Tillem, the secretary of the Labor Unity faction. ⁶⁴ | 648-650 |

Donations to HSU elections

70. Significant sums of money were also paid by Industry 2020 to support Diana Asmar's election campaigns for office within the HSU Victoria No 1 Branch⁶⁵ in 2009 and 2012.
71. David Asmar is an ALP staffer who was the beneficiary of Cesar Melhem's political donations (see above). Diana Asmar, his wife, is a HSU official who ran for office in 2009 and failed, but then ran successfully in 2012. The Asmars are politically aligned with Cesar Melhem in the Labor Unity faction.

⁶³ Cesar Melhem, 15/9/14 (Part 2), T:49.20-32.

⁶⁴ Cesar Melhem, 15/9/14, T:47.29-30.

⁶⁵ Cesar Melhem, 15/9/14, T:48.33-37.

72. The relevant contributions are set out in the following table. As a number of entries indicate, there is conflicting evidence as to what Diana Asmar told Cesar Melhem in relation to some of the donations (which remains unresolved) and on some occasions it appears that the cash Cesar Melhem gave to Diana Asmar was not spent on HSU electioneering, contrary to Cesar Melhem's understanding.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|---------|--|----------------------|
| 18/09/09 | \$5,000 | Cesar Melhem wrote cheque No. 21 payable to David Asmar, which he said was to meet the cost of services provided by Marillion Communications to Diana Asmar. These services were the subject of an invoice subsequently issued by this company on 20 October 2009. ⁶⁶ Cesar Melhem understood that this company performed work on Diana Asmar's HSU campaign. ⁶⁷ | 336,659-660, 833 |
| 18/09/09 | \$5,000 | Cesar Melhem's records for the company indicate that this sum was paid by cheque No. 21 in respect of an invoice dated 9 October 2009 from John Armitage of Message | 336, 655, 660 |

⁶⁶ Melhem MFI-1, p 659.

⁶⁷ Cesar Melhem, 15/9/14, T:50.9-30.

| Date | Amount | Description | Page of Melhem MFI 1 |
|---------|---------|--|----------------------|
| | | Efficiency. Cesar Melhem said this consultant provided services to assist Diana Asmar in the 2009 HSU election. ⁶⁸ However the bank statements record only one payment of \$5,000 on this date, and that was cheque No.21 drawn in favour of David Asmar referred to in the previous entry in this table (which was in respect of costs incurred by Diana Asmar through the use of Marillion Communications). It is not clear whether Industry 2020 actually paid any money in relation to the John Armitage invoice of 9 October 2009. | |
| 5/10/09 | \$5,000 | Cesar Melhem wrote cash cheque No. 22 which, according to handwritten annotations on the company's bank account, was to pay for services provided by Marillion Communications. The cheque was given to David Asmar. ⁶⁹ | 662, 834 |

⁶⁸ Cesar Melhem, 15/9/14 (Part 2), T:44.9-34.

⁶⁹ Cesar Melhem, 15/9/14, T:55.31-33.

| Date | Amount | Description | Page of Melhem MFI 1 |
|---------|---------|--|----------------------|
| 8/10/09 | \$7,500 | Cesar Melhem withdrew this sum in cash from the Industry 2020 account and handed the cash to David Asmar, in order to provide financial assistance in respect of Diana Asmar's 2009 HSU election campaign. ⁷⁰ The funds were said to be required in order to meet the cost of consultancy services provided to Diana Asmar by Marillion Communications. Marillion Communications issued an undated invoice for \$25,000 to Industry 2020. This payment of \$7,500 was the first of three payments totalling \$27,000 paid in respect of this invoice. | 336, 661-662 |
| 8/10/09 | \$7,500 | Cesar Melhem's records for the company indicate that this sum was withdrawn in cash from the company's account and paid in respect of an invoice dated the following day, 9 October 2009, from John Armitage of Message | 336, 655, 660 |

⁷⁰ Cesar Melhem, 15/9/14, T:55.20-23.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|---------|---|----------------------|
| | | Efficiency. Cesar Melhem said this consultant provided services to assist Diana Asmar in the 2009 HSU election. ⁷¹ However other records for the company indicate that this payment was not in respect of this account, but instead was to enable a cash payment to be made to David Asmar for the purposes of paying Marillion Consulting (see the previous entry in this table). The company's records are therefore confused and conflict with each other. Because the payment was effected in cash it has not been possible to determine how the money was actually spent. It is not clear whether Industry 2020 actually paid any money in relation to the John Armitage invoice of 9 October 2009. | |
| 29/10/09 | \$9,500 | This is the second payment in respect of the Marillion Communications invoice referred to earlier in this table (under the date entry 8/10/09), | 337, 661-662 |

⁷¹ Cesar Melhem, 15/9/14 (Part 2), T:44.9-34.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|----------|---|----------------------|
| | | and payment was effected by Cesar Melhem to David Asmar in the same way. ⁷² | |
| 22/12/09 | \$10,000 | This is the third payment in respect of the Marillion Communications invoice referred to earlier in this table (under the date entry 8/10/09), and payment was effected by Cesar Melhem to David Asmar in the same way. ⁷³ | 337, 661-2 |
| 8/03/12 | \$24,000 | Cesar Melhem wrote a cheque in favour of David Asmar. The payment was to cover part of a tax invoice issued by Holding Redlich for legal services provided by that firm to Diana Asmar in respect of issues arising out of the HSU elections in late 2009. ⁷⁴ Cesar Melhem said in his evidence that David Asmar and Diana Asmar told him that the money was going to be | 665, 844 |

⁷² Cesar Melhem, 15/9/14, T:55.16-18.

⁷³ Cesar Melhem, 15/9/14, T:55.7-14.

⁷⁴ Cesar Melhem, 15/9/14, T:56.1-14.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|---------|--|----------------------|
| | | used to pay the Holding Redlich invoice. ⁷⁵ According to an affidavit provided by David Asmar to the Commission, this cheque was for Diana Asmar personally and had nothing to do with the HSU campaign. ⁷⁶ | |
| 21/08/12 | \$1,000 | Cesar Melhem wrote a cheque in favour of Nathan Murphy in this sum. Mr Murphy was then an employee of the AWU, and is a well-known and highly publicised figure in the Labor Unity faction. ⁷⁷ In 2012 he was assisting Diana Asmar with her HSU campaign, and had asked Cesar Melhem for funds to meet campaign costs. ⁷⁸ | 668,846 |
| 30/08/12 | \$2,000 | Payment to Diana Asmar. Banking records indicate Cesar Melhem | 352, 669 |

⁷⁵ Cesar Melhem, 15/9/14 (Part 2), T:47.34-44.

⁷⁶ David Asmar, affidavit 29/5/14, para 15.

⁷⁷ Cesar Melhem, 15/9/14, T:49.42-50.7.

⁷⁸ Cesar Melhem, 15/9/14, T:49.20.

| Date | Amount | Description | Page of Melhem MFI 1 |
|----------|----------|---|----------------------|
| | | understood this was to meet HSU election costs. ⁷⁹ According to David Asmar, he told Cesar Melhem he needed some money but did not mention the HSU campaign, and David Asmar used the money to pay rent. ⁸⁰ | |
| 12/09/12 | \$10,000 | A cheque was made out and provided to Mr Murphy in order to assist Diana Asmar. | 670-671, 847 |

Effect of donations for political and union electioneering

73. Donations of the kind described above assisted Cesar Melhem to become a person of notoriety and influence within the Labor Unity faction and the ALP in Victoria. As the above table demonstrates, the money held by Industry 2020 was regularly handed over by Cesar Melhem in cash, thus reinforcing the perception of him as a benevolent supporter. Using funds raised and held by Industry 2020, Cesar Melhem made it known to powerful persons within Labour Unity and the ALP in Victoria that he was someone who had conferred substantial favours on faction members and had helped them secure election to parliamentary or union office.

⁷⁹ David Asmar, affidavit 29/5/14, para 13.

⁸⁰ David Asmar, affidavit 29/5/14, para 13.

74. By the time Cesar Melham's name came to be considered by the ALP for selection for the Legislative Council seat for the Western Metropolitan Region of Victoria, he was someone who the ALP (and in particular Labor Unity members such as David Asmar, Noah Carroll and Mehmet Tillem) would have regarded as a generous benefactor, deserving of considerable recognition and thanks.
75. In this context, the circumstances surrounding the selection of Cesar Melhem for the seat in Legislative Council for the Western Metropolitan Region of Victoria are revealing. A number of persons involved in the decisions which led to Cesar Melhem's selection were persons with whom he had dealt (or who he had assisted) in the provision of financial favours through Industry 2020.
76. The sequence of events was as follows.
77. On the evening of 1 May 2013 there was a Special Administrative Committee meeting of the Victorian Branch of the ALP.⁸¹
78. In attendance at the meeting were Noah Carroll (the State Secretary Campaign Director to whom Cesar Melham had handed significant amounts of cash for the purposes of funding Labor Unity activities and candidates), David Asmar's proxy (Kimberley Kitching) and Mehmet Tillem (Labor Unity secretary to whom a cash cheque had previously been provided for Labor Unity business).
79. At this meeting a motion was put and carried to the effect that the usual processes for pre-selection set out in the Rules of the Victorian Branch

⁸¹ Melhem MFI-1, p 798.

of the ALP not be followed in relation to filling the vacant seat in Legislative Council for the Western Metropolitan Region. Instead, it was proposed that the National Executive be requested to give effect to an endorsement process under which nominations could be submitted by 5pm on 3 May 2013, with the candidate for the seat to be selected from the nominees on 6 May 2013. The minutes record that the seat needed to be filled quickly and in advance of a joint sitting of Parliament on 8 May 2013.

80. On 2 May 2013 Cesar Melhem's political ally, Noah Carroll, sent off the results of this meeting to the National Executive, and later the same day he received back confirmation of the National Executive's decision to proceed as planned.⁸²
81. The result was the issue of an announcement, at 12.21pm on 2 May 2013, of the fact that nominations had opened for pre-selection for the seat, and that nominations would close at 5pm on the following day.⁸³
82. There was very little time for any nominee to prepare the necessary paperwork for nomination.
83. That fact did not cause Cesar Melhem any difficulty. On that same day, 2 May 2013, he had already completed his paperwork, which included the signatures of 11 persons nominating him.⁸⁴

⁸² Melhem MFI-1, p 801.

⁸³ Melhem MFI-1, p 803.

⁸⁴ Melhem MFI-1, p 797.

84. Cesar Melhem admitted that it took him a couple of days to get those signatures on the nomination form. He was, therefore, well aware of what was going to be proposed at the 2 May 2013 special executive meeting. He had begun preparing his nomination form well before that meeting took place,⁸⁵ and in anticipation of the outcome of that meeting.
85. There is no suggestion that anyone other than Cesar Melhem was given an insight into the process that was to be followed, or any real opportunity to prepare nomination forms in time to be able to submit them by the closing time of 5pm on 3 May 2013. This privilege was afforded to Cesar Melhem alone.
86. When the time for the submission of nominations expired, Cesar Melhem's nomination was the only one received.⁸⁶
87. Shortly after receipt of that nomination, Noah Carroll wrote to the leader of the opposition noting that, as the Victorian Labor Parliamentary Leader, he wished to confirm that the ALP had recently endorsed Cesar Melhem as the nominee for the vacant seat.⁸⁷
88. Cesar Melhem's entry into Parliament was truly charmed. It could not sensibly be contended that his history of financial support to the ALP and Labor Unity causes did not have some role to play in the decision that was taken to afford Cesar Melhem such a privileged path to office.

⁸⁵ Cesar Melhem, 15/9/14 (Part 2), T:55.18-28.

⁸⁶ Melhem MFI-1, p 812.

⁸⁷ Melhem MFI-1, p 813.

Personal expenses

89. The books and records of Industry 2020 disclose that various sums of money were paid to meet the personal expenses of directors of the company, and specifically, to meet the cost of various lunches and dinners for sums that most members of the AWU would regard as extravagant. These expenses include in particular:

- (a) dinner for the directors at Scusa Mi restaurant on 30 January 2010 in the sum of \$1,225;⁸⁸
- (b) dinner with Frank Leo on 3 September 2011 costing \$1,125;⁸⁹
- (c) dinner with Frank Leo on 4 September 2011 at a cost of \$456.75;⁹⁰
- (d) lunch with Frank Leo at Crown Towers on 5 January 2010 in the sum of \$360.⁹¹

Conferences and overseas purchases

90. There are a significant number of entries in the accounts of Industry 2020 relating to expenses incurred in attending conferences.

91. The first entry concerns a payment made to Frank Leo by the company on 16 February 2009 in the sum of \$5,000.⁹² A payment authorisation

⁸⁸ Melhem MFI-1, p 295, 422.

⁸⁹ Melhem MFI-1, p 281, 443.

⁹⁰ Melhem MFI-1, p 281, 443.

⁹¹ Melhem MFI-1, p 421.

and confirmation slip records that the payment was for ‘expenses to attend IMF conference Geneva and London’⁹³. Consistent with this, on 16 February 2009 the directors resolved to repay Frank Leo an amount of \$5,000 to enable him to attend an International Metalworkers’ conference.⁹⁴

92. The next entry concerns a payment of \$3,740 made on 6 February 2011 to the Convent Gallery at Dalesford in Victoria. It is described as being in respect of a Labor Unity conference.⁹⁵
93. A further entry is in respect of a payment of \$976.43 paid to the Mansion Hotel and Spa in Werribee on 29 May 2011. Handwritten notations on the company records suggest that this was for a ‘conference dinner’.⁹⁶
94. The company’s general ledger for the financial year ended 30 June 2012 then records a total of a further \$17,569.83 having been expended on conferences.⁹⁷
95. In this regard, handwritten annotations on the general ledger identify two separate conferences.

⁹² Melhem MFI-1, p 696.

⁹³ Melhem MFI-1, p 697.

⁹⁴ Melhem MFI-1, p 175.

⁹⁵ Melhem MFI-1, p 303.

⁹⁶ Melhem MFI-1, p 699.

⁹⁷ Melhem MFI-1, p 281.

96. The first conference is described as ‘Singapore conference’. Four items are recorded. They are:
- (a) Terry Lee’s airfare in the sum of \$4,866. Terry Lee was a Victorian AWU organiser;
 - (b) Habanos Singapore in the sum of \$842.78. Habanos is a company that sells ‘fine cigars’;
 - (c) the Novotel in Singapore in the sum of \$1,936.82; and
 - (d) Cesar Melhem in the sum of \$6,195.
97. In a later part of the same general ledger, under the heading ‘Entertainment expenses’, a payment to the Grand Hyatt in Singapore in the sum of \$975.13 is recorded. Handwritten notes on the ledger identify this as being a Singapore conference expense.
98. The second conference described on the ledger is the International Metalworkers’ Conference. Various individual payments totalling a little in excess of \$3,000 are recorded, and described merely as ‘expense for IMF conference’.
99. On 17 April 2013, Cesar Melhem reimbursed the sum of \$4,932 in relation to ‘personal expenses for the IMF conference June/July 2012’.⁹⁸

⁹⁸Melhem MFI-1, p 700.

100. None of the other expenses referred to above appear to have been the subject of any reimbursement.
101. An analysis of the reimbursement of \$4,932 demonstrates that the following items of expense were the subject of the reimbursement:

| Date | Amount | Description | Page of Melhem MFI 1 |
|-------------|---------------|---|-------------------------------------|
| 18/06/12 | \$3.59 | Intl Transaction Fee DNK | 453 |
| 20/06/12 | \$156.21 | Tivoli As Koebenhavn V DNK 929.56 DANISH KRONE | 453 |
| 20/06/12 | \$3.91 | Intl Transaction Fee DNK | 453 |
| 20/06/12 | \$3.83 | Interest charged on purchases | 453 |
| 23/06/12 | \$1,080.82 | Dixon Travel Adds Kastrup DNK 6409.00 DANISH KRONE | 454 |
| 23/06/12 | \$27.02 | Intl Transaction Fee DNK | 454 |
| 23/06/12 | \$297.55 | L Echiquier Sedan FRA 237.00 EURO NATL CURR U | 454 |
| 23/06/12 | \$7.44 | Intl Transaction Fee FRA | 454 |
| 23/06/12 | \$16.47 | Skype 44870835190 GBR | 454 |
| 26/06/12 | \$99.97 | Café Georges V Paris FRA 80.00EURO NATL CURR U | 455 |
| 26/06/12 | \$2.50 | Intl Transaction Fee FRA | 455 |
| 27/06/12 | \$136.67 | Le Grand Louvre3 Paris FRA 109.90EURO NATL CURR U | 455 |
| 26/06/12 | \$137.54 | Hippo Wagram Paris FRA | 455 |

| Date | Amount | Description | Page of Melhem MFI 1 |
|-------------|---------------|---|-------------------------------------|
| | | 110.60EURO NATL CURR U | |
| 27/06/12 | \$3.42 | Intl Transaction Fee FRA | 455 |
| 26/06/12 | \$3.44 | Intl Transaction Fee FRA | 455 |
| 28/06/12 | \$414.59 | Cesar Etoile Paris FRA 333.00 EURO NATL CURR U | 455 |
| 28/06/12 | \$10.36 | Intl Transaction Fee FRA | 455 |
| 29/06/12 | \$492.30 | Cdg 2f2 Virgin Poissy CH De FRA | 455 |
| 30/06/12 | \$753.57 | Sultan Ibrahim Jounieh Jounieh LBN 770.00US DOLLAR | 455 |
| 2/07/12 | \$685.07 | Access Car Rental/Zouk Beirut LBN 700.00US DOLLAR | 455 |
| 30/06/12 | \$18.84 | Intl Transaction Fee LBN | 455 |
| 2/07/12 | \$17.13 | Intl Transaction Fee LBN | 455 |
| 9/07/12 | \$198.79 | Navajo Joe's London GBR 130.00POUND STERLING | 455 |
| 9/07/12 | \$4.97 | Intl Transaction Fee GBR | 455 |
| 10/07/12 | \$356.17 | Citadines 070 London GBR | 455 |

102. As that analysis shows, it was not correct for Cesar Melhem to assert, as he did when giving evidence, that he reimbursed Industry 2020 for

the cost of the Habanos cigars that were purchased and given to Terry Lee, another AWU official.⁹⁹

103. The international travel and other conference expenses that Cesar Melhem and others enjoyed out of the funds of Industry 2020, and which were not the subject of any reimbursement, totalled \$27,286.26.

Other expenses

104. The records of Industry 2020 reveal that its funds were spent in a variety of other ways. For example, one was meeting one half of the costs of an AWU organisers' conference at a cost of \$10,762.20.¹⁰⁰ Another was paying for gifts to be presented to the FIA to mark a significant milestone.¹⁰¹ Another was a payment of \$4,500 to IR 21 Limited¹⁰² (another relevant entity dealt with in Chapter 3.5).

G – DISTRIBUTION OF FUNDS ON WINDING UP

105. In May 2013, shortly prior to departing from the AWU and taking up a seat in Victorian Parliament, Mr Melhem wound up Industry 2020.
106. At that point Industry 2020 had substantial cash reserves (in excess of \$100,000).¹⁰³

⁹⁹ Cesar Melhem, 15/9/14 (Part 2), T:48.45-49.14.

¹⁰⁰ Melhem MFI-1, p 674.

¹⁰¹ Melhem MFI-1, p 694.

¹⁰² Melhem MFI-1, p 693-4.

¹⁰³ Melhem MFI-1, p 320.

107. None of those funds were transferred to the AWU on the winding up of Industry 2020.
108. Instead, the funds were divided between three associations - the Labor Community Alliance Association Inc, the Progressive Social Campaigns Club Inc and the Victorian Office Social Club Inc. There is no evidence that Frank Leo was involved in these decisions, having ceased to be a director.
109. The Labor Community Alliance Association is controlled by Kirsten Psaila, a significant figure in the Labor Unity faction and an ALP candidate for Western Metropolitan Region at the 2014 Victorian State election.¹⁰⁴ The objects of this Association are almost identical to those of Industry 2020.¹⁰⁵ The signatories to the Association's accounts are Kirsten Psaila and Marlene Kairouz.¹⁰⁶ Marlene Kairouz was one of the people who nominated Cesar Melhem for election to the Victorian Legislative Council.¹⁰⁷
110. The Progressive Social Campaigns Club Inc is affiliated with four officers from the CEPU, including in particular Earl Setches, the Victorian and National Secretary of the Plumbing Division of the CEPU. This association was established for the purpose of receiving a distribution on the winding up of Industry 2020.¹⁰⁸ Almost as soon as the money was received from Industry 2020, Earl Setches made

¹⁰⁴ Melhem MFI-1, p 884-5.

¹⁰⁵ Melhem MFI-1, p 888.

¹⁰⁶ Melhem MFI-1, p 886.

¹⁰⁷ Melhem MFI-1, p 797.

¹⁰⁸ Setches, 15/9/14 (Part 2), T:62.21-31.

arrangements for it to be withdrawn in cash and paid to striking workers to assist them in circumstances where they were not being paid.¹⁰⁹ Earl Setches had told Cesar Melhem that this was how the money would be spent.¹¹⁰

111. The Victorian Office Social Club was established for the purpose of receiving funds from Industry 2020 in May 2013. Records obtained by the Commission would appear to indicate that the association used the money so received to make a number of charitable donations. Mr Ben Davis was signatory to this club's accounts and was also one of the people who nominated Cesar Melhem for election to the Victorian Upper House.¹¹¹

H – MEMBER AWARENESS

112. There is no evidence that AWU members were made aware of the fact that Cesar Melhem, Richard Gray and Frank Leo operated Industry 2020 as they did. There does not appear to have been any adequate disclosure to AWU members of the existence and function of Industry 2020.

I – ASSESSMENT OF THE CONDUCT OF OFFICIALS

113. Counsel assisting submitted that in the light of the facts set out above a question arose. Was there evidence that the officers of Industry 2020

¹⁰⁹ Setches, 15/9/14 (Part 2), T:63-66.

¹¹⁰ Setches, 15/9/14 (Part 2), T:66.18-20.

¹¹¹ Melhem MFI-1, pp 797, 901.

had engaged in any wrongdoing? Counsel submitted that that question should be answered in the affirmative for the following reasons.

Breach of fiduciary duty

114. Industry 2020 is a fund raising organisation.
115. The objects of the AWU plainly extend to and permit the raising of funds by it and the donation of funds by it. For example, under the rules of this registered organisation, its objects include:
- (11) To establish a fund for the assistance and support of trade unionists and to carry out these objects.
...
 - (14) To pay affiliation fees to and assist financially or otherwise any bona fide labor or trade union organisation or association.
...
 - (16) To raise money including by contributions, levies, investments and commercial endeavours for the purpose of carrying out the objects of the Union.
...
 - (20) To contribute financially and otherwise to political objects, so as to bring about the election of Federal, State and Territory Labor Governments.
116. The directors of Industry 2020 were elected by the members of the AWU to hold office within the Victorian Branch of the union and to exercise their powers and perform their duties for the union.
117. It was by virtue of their status as AWU officers that Cesar Melhem and the other Industry 2020 directors had the opportunity to attract custom

to the company and raise funds. In order to raise money they deliberately targeted the custom of the employers with whom the AWU dealt, appreciating that an invitation which bore the name of the State Secretary was one that would not lightly be rejected by those employers.

118. Not only did Cesar Melhem and the other directors have an opportunity to attract funds by virtue of their positions with the AWU, but they went further. They used the AWU's name and staff in the promotion, presentation and organisation of the various fund raising events.
119. Those funds were then used by Cesar Melhem to advance his own political interests and aspirations. He was a strong supporter of Labor Unity, and had a personal desire to support that faction of the ALP in Victoria, both at the State political level and in the other union elections (in particular the HSU). He used the funds raised through Industry 2020 to satisfy this desire. In the process he advanced his own reputation within Labor Unity and ALP circles, and developed an environment in which he was more likely to receive favourable treatment in those circles. This is what occurred, as evidenced by the way in which he came to be selected for the seat he took up in Victoria's Parliament in May 2013.
120. In addition, some funds of Industry 2020 were used by Cesar Melhem to pay for a number of expensive restaurant meals for Cesar Melhem, to finance luxury overseas conference travel for Cesar Melhem and other AWU officials, and to facilitate payments to striking CEPU members who were not being paid their salaries due to the industrial action they were taking.

121. In these circumstances, each relevant officer of the Victorian Branch of the AWU (and in particular Cesar Melhem) used their position as an officer of the Victorian Branch of the AWU to gain an advantage for Industry 2020 and themselves (as directors of that company able to decide how the money earned by Industry 2020 was to be spent) to the detriment of the AWU.
122. By accepting and continuing to hold positions as directors of Industry 2020 in circumstances where they were officers of the AWU, they were each in a position of substantial conflict. The duties they owed to Industry 2020 to advance its financial position conflicted with their duties to the AWU to do likewise for it. Further, their interest in raising money in the name of Industry 2020 for their own benefit and the benefit of their political associates was in conflict with the duty they owed to the AWU to raise money in its name and deal with such funds in accordance with the union's rules.
123. Having regard to the high degree of the trust and confidence vested in Cesar Melhem, and the fact he used his AWU position and influence to benefit himself and his political associates, the breaches by him of the fiduciary duties owed to the AWU were significant.

Breaches of statutory duties

124. The union officers' conduct in deciding to host the events as Industry 2020 events rather than AWU events was conduct 'in relation to the financial management' of the AWU within the meaning of that expression in s 283 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

125. In this regard, each officer had the power and duty to ensure that the opportunity was taken by the AWU. The opportunities were available to the union. They were financial opportunities. And it was possible for the officers of the union to manage the opportunities for the benefit of the union. The conduct of the individuals with respect to these opportunities was, therefore, conduct in relation to the financial management of the union.
126. For the same reasons as given above in relation to the breach of fiduciary duty, Cesar Melhem and others improperly used their positions as union officers to gain an advantage for Industry 2020 and themselves to the detriment of the AWU and its membership. In so doing they contravened s 287 of the *Fair Work (Registered Organisations) Act*.
127. In addition, the success of the Industry 2020 events depended upon Cesar Melhem and others using information that they had obtained because they were officers and employees of Victorian Branch (in terms of the identity of persons likely to be willing to sponsor or participate in the fund raising events) in order to gain an advantage for Industry 2020 and themselves to the detriment of the AWU and its members in contravention of s 288 of the *Fair Work (Registered Organisations) Act*.
128. As observed earlier,¹¹² the question of whether an officer has acted ‘improperly’ is to be tested against the standard of conduct which a reasonable person, who had knowledge of the duties, powers and

¹¹² Chapter 2.1, para 41.

authority of the officer and the circumstances of the case, would expect of a person in the position of the officer.

129. Applying that test here, a reasonable person with knowledge of the highly dependent nature of the relationship between a union and its officials, and the vulnerability of the union and its membership to abuse of that relationship by officials, would regard the taking of the commercial opportunities described above otherwise than for the benefit of the AWU as improper. A reasonable person would regard the official as duty bound to undertake such activities for the AWU, not for some other entity and, ultimately, for themselves.

Cesar Melhem's arguments: fiduciary duty

130. It was for those reasons that counsel assisting contended that the conduct of Cesar Melhem was in breach of his fiduciary duties to the AWU and a breach of ss 287 and 288 of the *Fair Work (Registered Organisations) Act 2009* (Cth). Counsel assisting also submitted that the other directors and other AWU officials were in the same position. That latter aspect of the submissions should be rejected. It is plain that the moving force on the Board was Cesar Melhem, and also that the other AWU officials obeyed his orders without any knowledge of what his plans for the money raised were and probably without any appreciation of the way in which he passed off Industry 2020 as the AWU. The other directors and officials were not given notice during the hearing of the submissions eventually made against them. Hence it is not just to make findings against them.

131. Cesar Melhem argued that there had been no breach of fiduciary duty. He argued that since s 109 of the *Fair Work Act 2009* (Cth) prohibits the use of union money to help a candidate in an election for office, it was permissible for money which was not union money to be used for that purpose. He argued that the money which Industry 2020 raised was not AWU money. He argued that he and Industry 2020 were entirely at liberty to raise money for the purposes for which Industry 2020 existed, including funding union elections. He argued that union officials were permitted to pursue their own interests, and seeking election or re-election was one of those interests. Finally, he submitted that ‘the fundraising activities of Industry 2020 did not involve the use or diversion of any union-directed benefit or opportunity that came to Mr Melhem by virtue of his position as AWU state secretary. Rather, Industry 2020 initiated and created its own opportunities for fund-raising. Mr Melhem and others were entitled to direct at least some of their energies to these, and other interests.’¹¹³

132. The flaw in these submissions emerges from the last sentence. Cesar Melhem could lawfully direct some of his energies to fund-raising provided he did not do this by presenting himself as doing it as an AWU official, by causing others to do as AWU officials, by using the time and energies of AWU employees to sell tickets, send out invitations, prepare drafts and chase late payers, being employees who were paid by the AWU for their Industry 2020 work, by engaging well-known AWU identities (for example, Paul Howes) or ex-AWU identities (for example William Shorten) to attract interest and hence funds, and by relying on relationships between the AWU and those

¹¹³ Submissions on behalf of Cesar Melhem, 14/11/14, para 3.8.

persons who were invited to the fundraising events. But in fact Cesar Melhem did all these things. He agreed he was ‘the public face of the AWU at that time ... in Victoria’.¹¹⁴ Industry 2020 was an unknown company. It had no drawing power independently of the drawing power of Cesar Melhem and the drawing power he could build up by using AWU goodwill. Cesar Melhem submitted that the evidence showed that he did not believe the supposed ‘Industry 2020’ events were provided as AWU events, and did not intend this.¹¹⁵ His evidence to this effect is not to be accepted. The reason why it is not to be accepted is that even if Cesar Melhem could have shared his AWU persona, he knew that the inevitable effect of his promotion of and participation in the events would have been to build up an association in the minds of guests and would-be guests with each event with the AWU.

133. Cesar Melhem then put the following submission:¹¹⁶

Even if there existed evidence sufficient to find that Mr Melhem used his position as AWU state secretary to raise money for Industry 2020, it does not follow that he has breached any fiduciary duty. At its speculative highest, it may point to an equitable entitlement on the part of the union to an account of profits, but it does not mean there may have been a breach of any law.

134. But a plaintiff cannot obtain an account of profits unless there has been a breach of some law.

¹¹⁴ Cesar Melhem, 15/9/14, T:31.41-42.

¹¹⁵ Cesar Melhem, 15/9/14, T:40.42-41.5; Submissions on behalf of Cesar Melhem, 14/11/14, Appendix1 clear copy of Melhem MFI-1, p 192.

¹¹⁶ Submissions on behalf of Cesar Melhem, 14/11/14, para 4.5.

135. For these reasons the evidence establishes that Cesar Melhem may have breached his fiduciary duties to the AWU.

136. On the fiduciary duty issues one distinct point remains to be addressed. Cesar Melhem argued that no finding should be made adversely to him in relation to his entry into Parliament. He said that the submissions of counsel assisting impugned a process undertaken by people other than Cesar Melhem.

[T]he conclusions that are urged ... would necessarily involve adverse findings against persons other than Mr Melhem, including persons who have not been given notice of the proposed findings.

That narrative should not be accepted, and no finding should be made in circumstances where the Commission did not conduct any inquiry or take evidence about the pre-selection process.¹¹⁷

137. This argument is flawed. It is not necessary to make adverse findings against persons other than Cesar Melhem. Cesar Melhem seems to have operated like some political boss in the *République des Camarades*, dispensing pourboires and largesse to pals who might later repay the favours. Matters ought to have been better documented, but in relation to his entry into Parliament it is not necessary to find that anyone committed unlawful conduct, or even, by political standards, impropriety, even Cesar Melhem. The question is whether his speedy pre-selection was at least partly due to the generosity of contributions in the preceding years using Industry 2020 funds accrued by using the name and resources of the AWU. The answer, on the balance of probabilities, is that it was.

¹¹⁷ Submissions on behalf of Cesar Melhem, 14/11/14, paras 6.1-6.2.

Cesar Melhem's arguments: statutory contraventions

138. Cesar Melhem then argued that his conduct was not conduct 'in relation to the financial management' of the AWU within the meaning of the s 283 of the *Fair Work (Registered Organisations) Act 2009* (Cth). Hence, he argued, ss 287 and 288 could not apply. He submitted that a decision about how to raise funds did not relate to the management of funds. In support of that point it might be said that what Cesar Melhem did was not to mismanage the AWU's affairs financially, but to conduct the affairs of Industry 2020 so as to gain an advantage from the name and resources of the AWU. It is not necessary to decide whether this argument of Cesar Melhem is correct. It creates a sufficient doubt to make it desirable not to draw any conclusion one way or the other about s 283. The argument also may suggest that legislative reform of s 283 may be desirable. Hence no finding adverse to Cesar Melhem that there may have been a contravention of s 287 or s 288 is made.

CHAPTER 3.4

BUILDING INDUSTRY 2000 PLUS LTD

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A – INTRODUCTION

1. Building Industry 2000 Plus Ltd (**BI 2000**) was incorporated in 2000 and has been controlled by senior officers of the Victorian Branch of the Construction and General Division of the CFMEU.
2. The company holds a number of annual functions. Their success largely depends upon employers in the construction industry paying substantial sums of money to attend those functions. In addition, the

company makes money through the sale of soft drinks, snack foods and merchandise to CFMEU members and other workers. Neither the employers who pay to attend functions, nor the workers who buy soft drinks and other products, appreciate that they are contributing towards the financial success of BI 2000.

3. The company was initially established to raise funds for union electioneering. But it does not appear that the company's funds have ever been applied for this purpose. The financial records of the company are so poor that it is difficult to gain a clear picture as to how the company's money has been spent over time. The company has made a profit from year to year and has accumulated large cash resources (now in excess of \$1 million). Relative to the volume of cash accumulated over time, the use of its net profits has been very modest. On average less than \$11,000 per year has been spent over the last 5 years for various charitable purposes, though it has spent \$226,006 in that way since its inception.
4. The governance of the company and its finances has been abysmal. There are no records of directors' meetings. Financial records have been retained in a haphazard manner. The company's accounts were not properly prepared or reviewed or audited for some years. Numerous provisions of the *Corporations Act 2001 (Cth)* and the company's constitution appear to have been breached. Officers of the CFMEU have, through their positions as directors of BI 2000, taken advantage of opportunities available to the CFMEU, not for the advantage of the CFMEU, but for the advantage of BI 2000. In doing so they may have acted (and continue to act) in breach of their fiduciary duties owed to the CFMEU and are liable to the CFMEU. BI

2000 is the alter ego of the CFMEU officers who may have breached their fiduciary duties in this way. It has been the direct recipient of the funds raised in consequence of the breaches of those fiduciary duties. As a result, BI 2000 holds those funds on constructive trust. It is liable to account for those funds to the CFMEU. BI 2000 makes a substantial amount of its money at the expense of the CFMEU's members (in the form of soft drink, snack food and merchandising sales). There is no, or no sufficient, disclosure of this fact to members. Moneys raised by BI 2000 are held by it outside the financial and management regulations to which the moneys would be subject were they held by the CFMEU. This has permitted BI 2000 to display poor financial and management controls. Directors of BI 2000 are not accountable to members of the CFMEU despite the exploitation by BI 2000 of commercial opportunities available to the CFMEU.

5. The findings of fact below are based substantially on the submissions of counsel assisting. Subject to certain matters dealt with below, counsel assisting's submissions on the primary facts was not challenged.

B – THE COMPANY'S INCORPORATION, STRUCTURE AND CONSTITUTION

6. BI 2000 is a corporation whose liability is limited by guarantee. According to the register maintained by ASIC, the company falls within a subclass described as 'unlisted public company – non-profit company'.¹

¹ Oliver MFI-1, pp 1-6A.

7. The company was incorporated on 24 July 2000 by Bill Oliver, Martin Kingham and Albert Littler. They became directors on that day.
8. These men were senior officers of the CFMEU at that time. Bill Oliver held the position of Victorian Branch Secretary for many years, leaving that post in 2012. Albert Littler was National Assistant President for a period up to his retirement in 2009.² Martin Kingham was a former Victorian Branch Secretary and then Divisional Assistant Secretary until 2010.³
9. Martin Kingham and Albert Littler each ceased to hold the position of director of the company on 18 January 2011. By that point, each had retired from the offices he held with the CFMEU. They were replaced on the BI 2000 board by John Setka (Secretary of the Victorian Branch of the CFMEU and a member of the National Executive Committee of the CFMEU), Ralph Edwards (President of the Victorian Branch) and Tom Watson (former officer of the Victorian Branch).⁴ Bill Oliver continued to be a director of BI 2000 up to at least January 2013.
10. The registered office of the company is 500 Swanston Street, Melbourne. This is the address of the Victorian Divisional Branch of the CFMEU.
11. Clause 4 of BI 2000's constitution provides that the company is a public company limited by guarantee. Clause 5 provides that it must

² Oliver MFI-1, pp 275-276.

³ <http://www.cfmeu.asn.au/your-union/farewell-thanks>

⁴ Oliver MFI-1, p 2.

have at least one member, and the company ‘must not be carried on for the purpose of profit or gain of any Member.’⁵

12. An organisational search of the ASIC register⁶ does not reveal the identity of the members of the company. A copy of the application for registration of the company⁷ discloses that the members of the company at the time of incorporation were Bill Oliver, Martin Kingham and Albert Littler. The documents subsequently filed with ASIC in respect of the company do not reveal any change in that membership.
13. The objects of the company set forth in clause 7 of the constitution are:⁸
 - (a) assisting any member of the CFMEU or other trade union to campaign for and be elected to a position in any trade union, local government, State or Federal election;
 - (b) financially supporting any associations, charities, clubs, political parties or other organisation associated with the trade union movement;
 - (c) promoting and supporting the aims, objects and activities of any trade union or similar organisation;
 - (d) promoting and supporting the aims, objects and activities of the Australian Labor Party, Australian Democrats or any

⁵ Oliver MFI-1, p 16.

⁶ Oliver MFI-1, pp 1-6.

⁷ Oliver MFI-1, pp 7-9.

⁸ Oliver MFI-1, p 17.

other political party or organisation, or any group endorsed by or associated with the Australian Labor Party which is supportive of the labour or trade union movement or their philosophies;

- (e) acting in conjunction with any trade union or other organisation for the purposes of carrying out the objects of the company;
- (f) advancing and lending money to any trade union, political party, group, association or other organisation as may be determined by the directors of the company;
- (g) promoting the welfare of trade union members;
- (h) assisting any person in need who is or has been a member of any trade union, the widows, children and immediate relatives dependent on them;
- (i) issuing appeals and collecting money and goods and organising concerts, functions, raffles, exhibitions, games of chance, sport events, entertainments or fund raising activities of any kind for the purpose of raising funds for carrying out the objects of the company;
- (j) soliciting and receiving voluntary contributions and using those contributions and any income from them for the purpose of carrying out the objects of the company; and
- (k) pursuing any of the objects of the company set out in clause 7 and exercising any of the powers of the company set out in

clause 8 in undertaking any action in furtherance of those objects powers.

14. Bill Oliver accepted that the company was established for the purpose of raising money to fund the election campaigns of CFMEU Victorian officials, including himself and the other members of the company.⁹ This is the first object of the company noted above.
15. However, as already noted, the company could not be operated for the gain or benefit of Bill Oliver and the other members. In this regard, the very establishment and operation of BI 2000 was misconceived. Bill Oliver said that he had never even turned his mind to this issue of whether the primary purpose of the company was something permitted by the company's own constitution.¹⁰ This evidences a lack of regard for proper corporate governance from the very outset.
16. Extensive powers are granted to the company by cl 8 of the Constitution. They are generally of a kind found in the constitution of most corporations. However there is a limitation on those powers. The company:

shall not support with its funds any activity or endeavour to impose on or procure to be observed by its members or any regulations or restrictions which, if an object of the Company, would make it a trade union in the meaning of the *Workplace Relations Act 1996*.

17. The company's Constitution also contains some familiar governance provisions. Among other things, it provides that:

⁹ Bill Oliver, 16/9/14, T:9.18-10.41.

¹⁰ Bill Oliver, 16/9/14, T:9.18-10.41.

- (a) the business of the company is to be managed by the directors, who may exercise all of the powers of the company except any powers that the law or the constitution requires the company to exercise in general meeting (cl 23, misnumbered cl 1);
- (b) subject to various stated exceptions, a director who has a material personal interest in a matter being considered at a meeting of directors must not vote on the matter or be present while the matter is being considered (cl 28);
- (c) the directors may pass a resolution without a meeting if all directors entitled to vote have signed a document containing a statement that they are in favour of the resolution (cl 30);
- (d) a directors' meeting may be called by a director giving reasonable notice to the other directors (cl 31);
- (e) the company must keep minute books in which it records, within one month, proceedings and resolutions of directors' meetings, and resolutions passed by directors without a meeting (cl 75);
- (f) the company must ensure that the minutes of the meeting are signed by the chair of the meeting or the chair of the next meeting a reasonable time after the meeting, and must ensure that the minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed (cl 75).

C – BASIC GOVERNANCE ISSUES

18. The management of BI 2000 has been in a deplorable state of disarray for some considerable time.
19. Notices to produce¹¹ were issued to the company and its auditors requiring it, and them, to produce, among other things:
- (a) papers, minutes and agendas for any meeting of the directors of the company and any resolutions of directors;
 - (b) the company's accounting books; and
 - (c) statements of account in respect of the company's bank accounts.
20. The company did produce some documents. But it produced no minutes of board meetings. And it produced only a small number of disorganised bank account statements. These were telling initial indications of the company's lack of governance.
21. Who have been the directors? Over what period? The answer is unclear. Bill Oliver is recorded in the ASIC register as one of the directors of the company.¹² At one point he gave evidence that he remains a director of the company.¹³ However shortly after giving that evidence, he stated that he thought he had resigned in early January 2013, but the paperwork was never lodged. He said he filled out a

¹¹ Oliver MFI-1, pp 33-55.

¹² Oliver MFI-1, p 2.

¹³ Bill Oliver, 16/9/14, T:6.11.

resignation form but did not know what happened to it, other than that it had been given to an accountant to lodge.¹⁴

22. The directors of the company were obliged to keep a directors' minute book in order to record the events at directors' meetings.¹⁵ But the directors never bothered to keep one.¹⁶ This may have caused the company to breach s251A of the *Corporations Act 2001* (Cth), which obliges the company to keep appropriate minutes of meetings and resolutions.
23. Directors' meetings were not conducted with any degree of formality. Bill Oliver said that they would be held in the corridor, or over a cup of coffee, 'in a lift' or 'in the pub'. No notes would be taken.¹⁷ Bill Oliver seemed to think 'mental notes' would suffice.¹⁸
24. Correspondence from the company's auditor indicated that as at 8 April 2014 the directors had failed to ensure that the financial statements of the company had been completed for the financial years ended 30 June 2011, 2012 or 2013, in that they had not prepared a statement of cash flows for the company for any of those periods. This contravened the requirements of AASB 101, and thus may have constituted a breach of s296 of the *Corporations Act*. The consequential failure to produce financial statements may have been a breach by the company of s285A of the *Corporations Act*.

¹⁴ Bill Oliver, 16/9/14, T:6.16-30.

¹⁵ Oliver MFI-1, p 30, cl 75.

¹⁶ Bill Oliver, 16/9/24, T:13.14-16.

¹⁷ Bill Oliver, 16/9/14, T:12-13.

¹⁸ Bill Oliver, 16/9/14, T:13.41.

25. The auditor also indicated that, in the absence of completed financial statements, the audit/review engagements for those years were on hold.¹⁹ The failure to conduct a review or audit of the financial statements each year constituted another breach by BI 2000 of s 285A of the *Corporations Act*.
26. The above possible breaches of the *Corporations Act* by BI 2000 may have been the product of the negligence of its directors in the administration of the company's affairs. Bill Oliver, who had been a director of the company throughout at least two and a half of those financial years (and many more before that), said he was not even sure who, on behalf of the company, was responsible for providing instructions to the auditor. He said that he himself had never spoken with the auditor.²⁰ No explanation for the lack of compliance with corporate record keeping and auditing has been proffered.
27. These feckless acts and omissions by the BI 2000 directors have been alarming. It is a bad state of affairs for a company holding over \$1 million in assets.

D – HOW THE COMPANY RAISES MONEY

28. BI 2000 generates income from six principal sources.²¹ It has had a long and successful history of doing so. Those sources are:
- (a) the 'Grand Final Breakfast' event, an annual fundraising activity;

¹⁹ Oliver MFI-1, pp 57-58.

²⁰ Bill Oliver, 16/9/14, T:19.27-34.

²¹ Oliver MFI-1, pp 73-174.

- (b) the 'golf day', another annual fundraising activity;
- (c) the 'race day', another annual fundraising activity;
- (d) commissions from sales to CFMEU members of products from vending machines;
- (e) the sales of merchandise to the CFMEU; and
- (f) interest earned on investments made with funds so raised.

29. The documents obtained by the Commission demonstrate that, for at least the last four financial years, these various activities have together generated annual revenues of between about \$230,000 and \$327,000 (with the volume of revenues increasing each year).²²

Grand Final Breakfast

30. The Grand Final Breakfast event is a breakfast function held at a public venue on the morning of the day of the AFL grand final in Melbourne. Normally over 600 people attend.

31. According to the profit and loss statement for the company for the year ended 30 June 2013,²³ that event generated revenue of \$90,873 in that year alone. Similar amounts were raised in earlier years (eg. \$101,109 in the financial year ended 30 June 2012; \$99,705 in the financial year ended 30 June 2011; and \$70,871 in the preceding financial year).²⁴

²² Oliver MFI-1, pp 118, 128-144.

²³ Oliver, MFI -1, p 118.

²⁴ Oliver MFI-1, pp 82, 93, 103.

32. The function is paid for and organised by BI 2000. But there is no doubt that it is presented under the banner of the Victorian Branch of the Construction Division of the CFMEU. It is well understood that that Branch is the host. The name of the union is used heavily for the purposes of promoting the event. The persons who are the faces of BI 2000 are the most senior figures in the Victorian Branch.
33. The Grand Final Breakfast is referred to on the CFMEU website.²⁵ A page devoted to the retirement of Albert Littler from the National Executive in 2009 described him as having been a ‘legendary fund raiser’. The page also states that ‘the annual AFL Grand Final Breakfast, which has been going for 11 years and draws 620 people, is just one of his achievements.’ The fact that the funds are raised not by and for the CFMEU, but instead by and for BI 2000, is not mentioned. The letters of invitation that are sent out each year begin by stating that BI 2000 ‘together with the CFMEU are again organising this year’s Grand Final Breakfast’.²⁶ The fliers and order form for tickets that are sent out each year state that the event is being presented by BI 2000 ‘together with CFMEU’.²⁷ The tickets state that the function is presented by BI 2000 and ‘CFMEU Construction Division’.²⁸ The published programmes state that the event is from BI 2000 ‘together with CFMEU’ and others. They record that the thank you address is given by CFMEU officials (typically Bill Oliver).²⁹

²⁵ Oliver MFI-1, p 275A.

²⁶ Oliver MFI-1, p 277.

²⁷ Oliver MFI-1, p 278.

²⁸ Oliver MFI-1, p 280.

²⁹ Oliver MFI-1, p 281.

34. Suppliers for the event frequently bill the CFMEU for services provided (although BI 2000 receives and pays those bills).³⁰ That supports the view that the event is generally considered a CFMEU function.
35. John Setka, the Secretary of the Victorian branch, sent out correspondence on CFMEU letterhead and signed by him as 'State Secretary CFMEU – C&G Division' thanking sponsors for agreeing to sponsor the event.³¹
36. Those who are invited to attend this event well know and understand that it is being run, ultimately, by the senior executives of the Victorian Branch. Not only is the CFMEU name prominent on all the promotional literature, but those invited are either employers in the construction industry who have to deal with the CFMEU on work sites, or representatives from other trade unions. All of the individuals from the employers and other unions know who they are, in substance, dealing with. It is the CFMEU and its officers.
37. In this regard, the employers who are invited include major companies such as Baulderstone Hornibrook and Brookfield Multiplex, along with a large number of smaller sub-contractors.³² The list of those attending from other unions is also extensive. The Plumbers Division of the CEPU, the Electrical Division of the CEPU, the ASU, the Maritime Union, the AMWU and other unions all participate.

³⁰ Oliver MFI-1, p 342.

³¹ Oliver MFI-1, p 356.

³² Oliver MFI-1, pp 284-285.

38. BI 2000 is able to attract custom to this event precisely because its directors are senior officers of the Victorian Branch of the CFMEU.
39. Those invited are told, repeatedly, that ‘the beneficiary’ of the event is the Doxa Youth Foundation (**Doxa**), a charity that gives special attention to the needs of disadvantaged young people. This statement is misleading. The primary financial beneficiary of the event is BI 2000. It retains all of the profits from ticket sales. All Doxa receives is the proceeds of a raffle. So, for example, the 2011 Grand Final Breakfast generated a profit of about \$30,000 for BI 2000,³³ and it retained the whole of that sum. Separately, a raffle was held during that Grand Final Breakfast and the amount raised (\$4,700)³⁴ was donated to Doxa.
40. Bill Oliver did not tell any invitee or sponsor for the Grand Final Breakfast that the real beneficiary of the event was BI 2000.³⁵

The golf day

41. The annual golf day also generates significant revenue, although on a smaller scale (eg. \$49,000 for the year ended 30 June 2013, \$27,545 for the year ended 30 June 2012, \$30,091 for the year ended 30 June 2011 and \$59,285 for the year ended 30 June 2010).³⁶
42. As with the Grand Final Breakfast, no real attempt is made to disguise the fact that the golf day is, in substance, being promoted by the senior officials of the Victorian Branch of the CFMEU. In 2011 the Secretary

³³ Oliver MFI-1, p 307-308.

³⁴ Letter from Slater & Gordon dated 16 October 2014.

³⁵ Bill Oliver, 16/9/2014, T:40.42-41.3.

³⁶ Oliver MFI-1, pp 82, 93, 103, 118.

of the Victorian Branch of the CFMEU wrote, on CFMEU letterhead and in his capacity as State Secretary, to various people inviting them to participate in the golf day and act as one of the sponsors.³⁷ Each sponsor paid \$2,000 and received, in return, signage rights at a particular hole on the course for the day. Most of the sponsors were employers in the construction industry, such as Baulderstone, Brookfield Multiplex, Westfield Design and Construction, a range of sub-contractors, and a number of other entities with close associations with the CFMEU, such as Cbus and Slater & Gordon.³⁸ The registration forms for those wishing to attend and play golf on the day state 'CFMEU together with Building Industry 2000 Plus Ltd presents' the golf day.³⁹ The programmes for the event said that a CFMEU official, Bill Oliver, would welcome those attending the dinner immediately following the golf day.⁴⁰

43. The golf day conducted in 2013 earned income from sponsors totalling \$75,450. The expenses were \$23,539.52, resulting in a profit of \$51,910.48.⁴¹
44. As with the Grand Final Breakfast, BI 2000 attracts custom to this event primarily because its directors are senior officers of the Victorian Branch of the CFMEU.

³⁷ Oliver MFI-1, p 382.

³⁸ Oliver MFI-1, p 387.

³⁹ Oliver MFI-1, p 384.

⁴⁰ Oliver MFI-1, p386.

⁴¹ Oliver MFI-1, pp 439-440.

The race day

45. The annual race day made profits of \$41,136 for the year ended June 2013, \$59,598 for the year ended June 2012, \$63,410 for the year ended 2011 and \$49,229 in the year preceding that.⁴²
46. The day appears to serve two purposes. First, it operates as a BI 2000 fundraiser: various unions and other parties act as financial sponsors, in return for having a race on the day's card named after them and a catered lunch. Secondly, the race day is advertised to the CFMEU membership who receive free family admission for the day.
47. Like the Grand Final Breakfasts and the golf days, the race day is promoted as a CFMEU event.
48. The terms of the agreement with the Moonee Valley Racing Club for the 2011 race day event reveal a very substantial blurring of the line between the CFMEU and BI 2000.⁴³ The agreement identifies the counterparty as 'CFMEU Building Industry 2000'. But in the execution clause, Bill Oliver, both State Secretary of the Victorian Branch of the union and director of BI 2000, signed for neither. Instead he signed for that non-existent entity. The schedule to the agreement identifies the event as the 'CFMEU Race Day'.
49. It is clear that BI 2000 owes its financial success to the fact that its directors are officers of the CFMEU. They are able to arrange functions and attract attendance by reason of their positions as officers of the CFMEU.

⁴² Oliver MFI-1, pp 82, 93, 103, 118.

⁴³ Oliver MFI-1, p 441-445.

Vending machines

50. The documents gathered by the Commission establish that BI 2000 has contracts or arrangements with a number of companies that supply drink and snack food vending machines to building sites.⁴⁴ The workers on the sites, being CFMEU members, purchase products from those machines.
51. BI 2000 has contracts conferring upon the vending machine companies the exclusive right to install and operate the machines on sites controlled by the CFMEU and sell products through the machines for particular prices. In return, they pay a commission to BI 2000 equal to a percentage of the revenues from the products sold through the machines.⁴⁵
52. These documents provide yet another illustration of the blurry line that exists between BI 2000 and the CFMEU. One contract contemplates BI 2000 entering into the contract as agent for the CFMEU. Another identifies the customer as CFMEU, and Bill Oliver signed as secretary.
53. One of the principal vending machine companies with whom BI 2000 transacts business is Coca-Cola Amatil (Aust) Pty Ltd. The commission paid by that company to BI 2000 was 20% of sales.⁴⁶
54. Substantial revenues are raised this way. The draft profit and loss statement for the year ended 30 June 2013,⁴⁷ for example, records the receipt of revenues totalling \$122,331. Receipts for the previous year

⁴⁴ Bill Oliver, 16/9/2014, T:51.37-41.

⁴⁵ Oliver MFI-1, p 512.

⁴⁶ Oliver MFI-1, p 512.

⁴⁷ Oliver MFI-1, p 118.

in respect of this activity totalled \$65,177. Similar revenues were generated in the years prior to that.⁴⁸

55. Three points may be noted in relation to the arrangements between BI 2000 and the vending machine companies.
56. First, BI 2000 does not incur any expense in order to earn the commission through the vending machines.⁴⁹ Every cent of commission represents profit.
57. Secondly, BI 2000 has no right in, control over or interest of any kind in any of the work sites on which the vending machines are located. It is the CFMEU which has the relationship with the sites,⁵⁰ in that its members are working in those locations. The opportunity to place vending machines on these sites exists solely because of that relationship between the CFMEU and the sites. Indeed it is important to note that, in an agreement executed by Coca-Cola and BI 2000 in relation to the vending machines on 22 April 2008, BI 2000 was expressly referred to as the agent of the CFMEU.⁵¹ A subsequent agreement dated 1 September 2011 is stated to be between Coca-Cola and the CFMEU directly, and is signed by Bill Oliver as secretary of the union.⁵² It is not surprising that the remittance advices from Coca-Cola and others are often addressed to the CFMEU, not BI 2000.⁵³
58. Thirdly, a substantial proportion of the price paid by workers to purchase food and drink from the machines goes to BI 2000 by way of

⁴⁸ Oliver MFI-1, pp 82, 93, 103.

⁴⁹ Bill Oliver, 16/9/2014, T:53.5.

⁵⁰ Bill Oliver, 16/9/2014, T:52.1-8.

⁵¹ Oliver MFI-1, p 512.

⁵² Oliver MFI-1, p 516.

⁵³ Oliver MFI-1, p 536.

commission (20%). If BI 2000 was to waive that commission, workers would be able to purchase that food and drink for a substantially lower price than would be the case if BI 2000 did not insist upon the payment of commission. Alternatively BI 2000 could have donated any commission earned back to the CFMEU for the benefit of its members.

59. There is no evidence to suggest that the workers on these sites who purchase food or drink, and in particular CFMEU members, have any idea that, at the end of the day, a substantial portion of the price they pay for the products they consume goes into the coffers of a company controlled by union officers.

Merchandise

60. A new source of income appears to have emerged for BI 2000. Since about August 2013, BI 2000 has been purchasing merchandise from various clothing and accessory suppliers and on-selling this merchandise to the CFMEU. The CFMEU sells the stock and then remits the revenue, minus a 10% commission/handling fee, to BI 2000. BI 2000 then issues a tax invoice to the CFMEU for the amount of the remittance.⁵⁴ It would appear that prior to August 2013, this stock was sold by the CFMEU to members directly and all profit made would presumably have flowed to members.⁵⁵
61. In some cases the merchandise is sold for a massive mark-up – 100% or more. In other cases the mark up is more modest. The net overall effect is that both BI 2000 and the CFMEU are making substantial profits at the expense of members and workers through the sale of

⁵⁴ Oliver MFI-1 Volume 3, pp 77-89; Ralph Edwards, 16/9/2014, T:63-64.

⁵⁵ Oliver MFI-1, volume 3, p 10.

CFMEU merchandise. Most members would have little or no idea that the funds raised through the sales of this merchandise are not paid to and used by the CFMEU for the benefit of members, but are instead placed into the hands of a separate company with whom the members have no relationship and the objects of which are different from those of the CFMEU.

Interest

62. As a consequence of its various fundraising and other activities, the company has generated substantial financial assets – in excess of \$1 million. According to the draft financial statements for the year ended 30 June 2013,⁵⁶ the company held almost \$500,000 in a range of bank accounts, together with a term deposit investment worth \$542,418. The position in the preceding years is substantially the same.
63. Hence interest is a not insignificant form of revenue. It contributes between about \$20,000 and \$30,000 each year.⁵⁷

E – USE OF CFMEU STAFF TO ORGANISE BI 2000 AFFAIRS

64. It is clear that the directors of BI 2000 have, over the years, made extensive use of the resources of the CFMEU in order to manage the businesses of BI 2000.
65. Maree Picton, Nicki Makris and other staff in the CFMEU office distributed flyers and other promotional material for the various BI

⁵⁶ Oliver MFI-1, pp 105-120.

⁵⁷ Oliver MFI-1, p 118.

2000 fund raising events.⁵⁸ They collected payments from those attending, banked the proceeds into BI 2000's bank account, organised various events, and liaised with vending machine operators and merchandise suppliers.⁵⁹

66. Maree Picton retired from the CFMEU in about 2010. She has been retained since then by BI 2000 to assist in organising its functions, carrying out work of the same kind that she previously did for BI 2000 whilst employed by the CFMEU.⁶⁰
67. In the 2011 calendar year Maree Picton spent over 100 hours providing services of this kind. Since she was performing services in 2011 of the same kind as she had previously performed while still employed at the CFMEU, she devoted a not insubstantial portion of time to BI 2000 affairs as a CFMEU employee.

F – UNCERTAINTY AS TO REVENUE FIGURES – AUDIT QUALIFICATIONS

68. The company's auditor has said:⁶¹
- (a) he had issued qualified audit reports to the company for each of the financial years 2005-6, 2006-7, 2007-8 and 2008-9, the qualification arising due to the fact that it was 'impractical to establish adequate controls on cash collection'. The audit

⁵⁸ Bill Oliver, 16/9/2014, T:28.23.

⁵⁹ Bill Oliver, 16/9/2014, T:29.44, 43, 47, 49-51, 54.

⁶⁰ Bill Oliver, 16/9/2014, T:63.6.

⁶¹ Oliver MFI-1, pp 56-58.

report to the company in respect of the 2008-2009 financial year⁶² to take an example, contained the following statement:

Cash receipt is a significant source of revenue for [the company]. [The company] has determined that it is impractical to establish control over the collection of cash prior to entry into its financial records. Accordingly, as the evidence available to us regarding revenue from this source was limited, our audit procedures with respect to cash receipts had to be restricted to the amounts recorded in the financial records. We are therefore unable to express an opinion whether cash received by [the company] is complete.

- (b) no audit had been conducted, and none was required, for the 2009-2010 financial year;
- (c) his audit engagement for each of the following years (which was required) was 'on hold due to financial report per Corporations Act 2001 is required to disclose Statement of Cash Flows. Current status is awaiting re-signed copy of financial report with Statement of Cash Flow'. He added that in respect of each of those years 'Review Report may be qualified due to there being no practical procedures to establish adequate controls on cash collection'.

69. Thus the auditor has raised questions as to the accuracy of the revenue (and thus profit) figures disclosed in the financial reports and other records of the company. These statements recognise the possibility that revenues (and profits) were higher than has been recorded, and that cash received in respect of company events has not found its way into the coffers of the company. The force of these questions, however, is much diminished by the evidence of the person who

⁶² Oliver MFI-1, pp 71-72.

conducted the audit, Geoffrey Parker. He said that the qualification was 'a standard form pro forma'. He could not say that cash was a significant source of income for BI 2000. And he said he might have to amend the qualification in future.⁶³

70. However, other evidence raises a question whether there is cash which is not accounted for.

71. Counsel assisting took as an example the Grand Final Breakfast held on 29 September 2012. At it:

- (a) there were 55 tables, each sitting 10;
- (b) 6 of those tables were occupied by sponsors, who in return for paying particular sums of money, received not only a right to a table, but also a right to be promoted as a sponsor of the event. Those sponsors paid a total of \$48,000;
- (c) a table of 10 for 'corporate' guests cost \$2,200. There were 20 of these tables, and as such \$44,000 raised through sales of corporate tables;
- (d) a table of 10 for guests from various unions cost \$1,200. There were 22 of these tables, and as such \$26,400 was raised through sales of union tables;
- (e) \$1,140 was raised through the sales of individual seats at tables;

⁶³ Geoffrey Parker, 16/9/14, T:76.6-26.

- (f) the 'head table' was occupied by CFMEU Victorian Branch officials of various ranks along with their partners, including Bill Oliver, John Setka, and Ralph Edwards. David Noonan, National Secretary, also attended. None of these individuals paid;
- (g) everyone else who buys a ticket to events such as this pays the purchase price;⁶⁴
- (h) as a result, the total revenue for the event was \$119,540.

72. This does not correspond with the revenue figure set out in BI 2000's financial statements. According to its profit and loss statement for the year ended 30 June 2013 (being the financial year in which the 2012 grand final event occurred), total revenues for the event were \$90,873.⁶⁵ This is a discrepancy of \$28,667, in excess of 30%.

73. Counsel for BI 2000 did not dispute the above analysis apart from pointing out a problem with GST.⁶⁶ The company's financial statements do not include GST.⁶⁷ The ticket payments do include GST. This accounts for \$9,087.30 of the \$28,667 discrepancy. Counsel for BI 2000 also suggested that the discrepancy arose because spreadsheets relating to the 2012 Grand Final Breakfast revealed that some guests had not paid.⁶⁸ It was submitted that these guests were 'certain corporates, charities (ie Doxa) or union attendees'.⁶⁹ Counsel complained that Bill Oliver had not been asked questions about the

⁶⁴ Bill Oliver, 16/9/2014, T:31.28.

⁶⁵ Oliver MFI-1, p 118.

⁶⁶ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 49.

⁶⁷ Oliver MFI-1, p 114.

⁶⁸ Oliver MFI-1, pp 333-334.

⁶⁹ Submission on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 51.

spreadsheets and that Maree Picton had not been called. With all respect, it would have been a waste of time asking Bill Oliver, whose breezy joviality in the witness box did not conceal a complete lack of contact with detail and a strong desire to change the subject whenever a question of detail came up. Nor was it demonstrated that the documents were those of Maree Picton. Further, the significance of the spreadsheets is diminished by the fact that the monies not paid were much greater than the deficit to which counsel assisting pointed. In part this is accounted for by the fact that the spreadsheets date from 13 September; the actual Breakfast was on 29 September. That is, the spreadsheets do not purport to record the up-to-date position in relation to non-payment. The real possibility remains, however, that by reason of the lack of controls over the recording and banking of receipts, there are not insubstantial volumes of revenue generated from the company's activities which are not accounted for. But it is not possible to make a specific finding either way.

G – HOW THE COMPANY SPENDS ITS MONEY

The reported position

74. The company reports a net operating profit each financial year.
75. For the last several years, the reported net profit position has been as follows:⁷⁰

| | |
|-------------------------|-----------|
| Year-ended 30 June 2013 | \$37,240 |
| Year-ended 30 June 2012 | \$105,940 |
| Year-ended 30 June 2011 | \$112,488 |

⁷⁰ Oliver MFI-1, pp 128, 144, 158.

Year-ended 30 June 2010 \$50,033

76. There are a relatively small number of significant expenses recorded in the financial statements of the company which represent, in large measure, the difference between the company's revenue and net profit position.
77. The two most substantial categories of expense are those described as 'Marketing & Promotional Expenses' and 'Donations'.
78. 'Marketing & Promotional Expenses' are in excess of \$100,000 each year (\$172,895 in the draft 2012-2013 financial statement).⁷¹ These expenses appear to relate to the hosting of the various fund raising events earlier referred to.

Motor vehicle

79. On 31 May 2013 the company acquired a 2009 Holden utility from Rhys Ferguson for \$40,500.⁷²
80. Subsequent to purchase of the vehicle, BI 2000 purchased the personalised numberplate 'CFMEU 6', and also had certain work performed on the car, including the installation of signage, graphics and the supply and fit of LED lighting.⁷³ The numberplate and works together cost nearly \$4,500.
81. Apparently this utility is now used for the purpose of selling the merchandise referred to above.

⁷¹ Oliver MFI-1, pp 82, 93, 103, 118.

⁷² Oliver MFI-1, pp 551-556.

⁷³ Oliver MFI-1, pp 558-567.

Donations

82. On 16 September 2014 evidence was led in relation to a number of donations made by BI 2000.⁷⁴ The CFMEU indicated it would provide materials in relation to all donations made. Those materials were subsequently provided.

83. The documents produced to the Commission by the CFMEU⁷⁵ indicate that in the last five years BI 2000 made the following charitable donations (excluding Doxa which is dealt with above):⁷⁶

| | |
|-------------------------|----------|
| Year-ended 30 June 2013 | \$21,206 |
| Year-ended 30 June 2012 | \$1,950 |
| Year-ended 30 June 2011 | \$Nil |
| Year-ended 30 June 2010 | \$29,000 |
| Year-ended 30 June 2009 | \$1,750 |

84. The sum total of all of these donations over the past four financial years represents an expenditure of about 5% of the average net cash assets of the company throughout that period (that is, about \$52,000 out of a sum in excess of \$1 million). It is, however, proper to acknowledge, as counsel for BI 2000 was right to point out, that since its inception BI 2000 has made charitable donations totalling \$226,006.⁷⁷

85. These figures do not necessarily correspond to BI 2000's financial statements produced to the commission. For example, the profit and

⁷⁴ Ralph Edwards, 16/9/2014, T:69.15-27.

⁷⁵ Letter from Slater & Gordon dated 16 October 2014.

⁷⁶ Paragraph 39.

⁷⁷ Submission on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 52.

loss statements for the year ended 30 June 2010⁷⁸ and 30 June 2011⁷⁹ include a line item for donations of \$43,480 and \$25,000 respectively. This discrepancy further illustrates the unsatisfactory state of BI 2000's financial record keeping and reporting.

H – MEMBERS' BENEFITS AND AWARENESS

86. There is no evidence to indicate that any member of the CFMEU is aware of the fact that BI 2000 operates these profit making ventures such that there exists a sum in excess of \$1 million available to be spent by senior officers of the Victorian Branch in accordance with the terms of the company's constitution.

I – ASSESSMENT OF THE CONDUCT OF OFFICIALS

87. Have the union officers who established and directed BI 2000 engaged in wrongdoing?⁸⁰
88. That question is answered in the affirmative. They have acted in breach of fiduciary duty. That is 'a breach of any law' within the meaning of paragraph (g) of the Terms of Reference.

Breaches of fiduciary duty: counsel assisting's submissions

89. BI 2000 is a fund raising organisation. In chief counsel assisting advanced the following submissions. The objects of the CFMEU also

⁷⁸ Oliver MFI-1, p 82.

⁷⁹ Oliver MFI-1, p 93.

⁸⁰ See Chapters 2.1 and 2.3 above.

plainly extend to and permit the raising of funds by it. For example, under its rules,⁸¹ its objects include:

- (a) establishing a fund for the assistance and support of trade unionists (cl 4.4);
- (b) to establish a funeral and other benefits funds (cl 4.5);
- (c) to raise money for the purpose of carrying on the objects of the union (cl 4.13).

90. The objects of the CFMEU in respect of which it may raise money include, amongst other things, to improving, protecting and fostering the best interests of the union and its members (cl 4.1), and rendering legal and other assistance to members and the advancement of members intellectually, morally and socially (cl 4.14).

91. Each of the directors of BI 2000 are (or in the case of Bill Oliver, were) elected by the members of the CFMEU to hold office within the Victorian Branch of the union and to exercise their powers and perform their duties for the union.

92. It was by virtue of their status as CFMEU officers, and the standing, power and influence those positions gave them in the construction community, that they had the opportunity to attract custom to the profitable BI 2000 fund raising events referred to above.

93. Their position as CFMEU officers enabled them to use the name and logo of the CFMEU to promote the events in question, and direct

⁸¹ Oliver MFI-1, pp 175-274.

CFMEU staff to assist in the organisation of the events and the collection and banking of money. Yet the money raised went not to the CFMEU, but to BI 2000.

94. Further, it was their position within the CFMEU, and the CFMEU's own position in relation to the presence of members on particular work sites, that gave these same CFMEU officers the ability to negotiate the deals on behalf of BI 2000 (not the CFMEU) with the vending machine operators described above. Again, all the money was earned by BI 2000, not the CFMEU.
95. In these circumstances, each relevant officer of the Victorian Branch of the CFMEU – that is, John Setka, Ralph Edwards, Mark Oliver, Martin Kingham and Albert Littler – has used his position as an officer of the Victorian Branch of the CFMEU to gain an advantage for BI 2000 (and himself as directors of that company able to decide how the money earned by BI 2000 is to be spent) to the detriment of the CFMEU.
96. By accepting and continuing to hold positions as directors of BI 2000 in circumstances where they were officers of the CFMEU, they were each in a position of conflict. The duties they owed to BI 2000 conflicted with their duties to the CFMEU. Their interest in sending the money in the direction of BI 2000 (where it would be less regulated and more freely dealt with by them) was in conflict with the interests of the CFMEU in receiving and closely regulating the same money in accordance with the union's rules.
97. All of the monies raised by BI 2000 could have been raised by the CFMEU for the benefit of its members. Yet they were not. Instead the

opportunity was directed to BI 2000 and the funds were deposited into the bank account of BI 2000.

98. All of the monies raised by BI 2000 from vending machine commissions could have been earned by CFMEU directly. Alternatively, the CFMEU could have dealt with the vending machine operators on terms which enabled members working on site to save money when purchasing food and drink from the machines. Neither opportunity was taken for the CFMEU and its membership. Instead the opportunity was directed to BI 2000, who made money at the expense of the CFMEU and its members.
99. Having regard to the high degree of the trust and confidence vested in John Setka and the other officers of CFMEU, the use of their position and influence for the benefit of an entity other than the CFMEU, and their behaviour in taking fund raising and other opportunities available to the CFMEU and directing it to BI 2000 instead, constituted and continues to constitute a serious breach by them of the fiduciary duties owed to the CFMEU.
100. BI 2000 is the alter ego of the CFMEU officers who breached their fiduciary duties in this way. It has been the direct recipient of the funds raised in consequence of the breaches of those fiduciary duties. As a result, on application of the legal principles described in Chapter 2.1 of these submissions, BI 2000 holds those funds on constructive trust and is liable to account for those funds to the CFMEU.
101. It is no answer on the part of any of the directors to say that some of the objects of BI 2000 are similar to those of the CFMEU, or that the CFMEU may ultimately derive some indirect or ultimate benefit from

some part of the operations of BI 2000. Nor is it any answer to say that some of the money raised was spent for noble purposes, as Ralph Edwards, a CFMEU official described.⁸² Nor would it be an answer to say that BI 2000 exists in some small part for a noble purpose which cannot be achieved by the CFMEU (even if that were theoretically the case).

102. This is because it is in the interests of the CFMEU and its members to receive, directly, the whole of the profits derived from opportunities of the kind presently being exploited by the union's officers through BI 2000. It is in the interests of the CFMEU and its members to have those profits closely managed, regulated and audited within the union's structure. It is not in CFMEU's interests for some other enterprise, plainly more sloppily run, to be able to receive and deal with the money. The members have elected the officers of the union to achieve *these* objectives, not others. There is no good reason for the existence of BI 2000 if its objects are entirely aligned with those of the CFMEU itself. It is not in the CFMEU's interests for it to exist and operate. If the objects of BI 2000 are different from those of the CFMEU, the officers of the CFMEU who control it cannot, consistently with their fiduciary duties owed to the union, use BI 2000 to pursue the revenue raising opportunities described above. They are all opportunities available to the CFMEU, and its officers are bound to ensure those opportunities are taken by the union, not some other entity. It is not open to the CFMEU or BI 2000 to contend that these approaches are hyper-pedantic. The members of the CFMEU and those who set up BI 2000 have elected to create these distinct corporate structures. They cannot place themselves above or outside the bodies of law which

⁸² Ralph Edwards, 16/9/14, T:69.20-70.34.

regulate distinct corporate structures. If they see advantages in the courses they have pursued, they must put up with the accompanying disadvantages.

Breaches of statutory duties: counsel assisting's submissions

103. Counsel assisting argued that the union officers' conduct in deciding to host the events as BI 2000 events rather than CFMEU events was conduct 'in relation to the financial management' of the CFMEU within the meaning of that expression in s 283 of the *Fair Work (Registered Organisations) Act 2009* (Cth). So was their conduct in using the CFMEU relationship with work sites for the benefit of BI 2000 rather than the CFMEU.
104. In this regard, each officer had the power and duty to ensure that the opportunity was taken by the CFMEU. The opportunities were available to the union. They were financial opportunities. And the officers of the union could manage them for the benefit of the union. The conduct of the individuals with respect to these opportunities was, therefore, conduct in relation to the financial management of the union.
105. For the same reasons as given above in relation to the breach of fiduciary duty, John Setka and others improperly used their positions as union officers to gain an advantage for BI 2000 and themselves to the detriment of the CFMEU and its membership. In so doing they contravened s 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
106. In addition, the success of the BI 2000 events depended upon John Setka and others using information that they had obtained because they

were officers and employees of Victorian Branch (in terms of the identity of persons likely to be willing to sponsor or participate in the fund raising events, and in terms of information as to the location of particular CFMEU worksites for vending machines) in order to gain an advantage for BI 2000 and themselves to the detriment of the CFMEU and its members in contravention of s 288 of the *Fair Work (Registered Organisations) Act*.

107. The question of whether an officer has acted ‘improperly’ is to be tested against the standard of conduct which a reasonable person, who had knowledge of the duties, powers and authority of the officer and the circumstances of the case, would expect of a person in the position of the officer. There is no doubt that a reasonable person, with knowledge of the highly dependent nature of the relationship between a union and its officials, and the vulnerability of the union and its membership to abuse of that relationship by officials, would regard the taking of the commercial opportunities described above otherwise than for the benefit of the CFMEU as improper. Any reasonable person would regard the official as duty bound to undertake such activities for the CFMEU, not for some other entity whose objects were not identical and whose corporate and financial governance was considerably more relaxed and far more open to abuse.

Breaches of statutory duties: no finding

108. It is convenient to dispose of the statutory arguments immediately. Though counsel for BI 2000 did not so submit, the weak part of those arguments lies at the first step. It may be that the misconduct of BI 2000 (through CFMEU officials) which damaged the CFMEU cannot be characterised as being conduct ‘in relation to the financial

management' of the CFMEU. It is not necessary to reach a conclusion on this point. It is preferable to leave that to an occasion on which it is necessary to do so. It is therefore preferable not to make a finding one way or the other on whether the CFMEU officers have contravened ss 287 and 288.

Breach of fiduciary duty: the submissions of counsel for BI 2000

109. The CFMEU did not advance many submissions to the contrary of the facts and conclusions set out above, which largely adopted the submissions of counsel assisting. This is not surprising, in view of the fact that the submissions of counsel assisting were strongly protective of the CFMEU. And no submissions were advanced by John Setka, Martin Kingham or Albert Littler. However, a set of detailed submissions was supplied by counsel for BI 2000, Bill Oliver, Ralph Edwards and Tom Watson. These submissions expressly (and very properly) admit 'a number of failings of record keeping identified by Counsel Assisting'.⁸³ The submissions blame the BI 2000 accountant, Jim Leventakis, while accepting that this does not excuse the directors.⁸⁴ It certainly does not. It did not take the arcane specialist skills of an accountant to perceive that the affairs of BI 2000 were chronically in a shambles.

110. Counsel for BI 2000 argued that there would be no breach of fiduciary duty if the principal, the CFMEU, had given informed consent to the activities of BI 2000. Counsel for BI 2000 raised questions about which the relevant organ was through which the CFMEU's consent

⁸³ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 41.

⁸⁴ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, paras 42-45.

would be expressed. Counsel for BI 2000 submitted that counsel assisting had failed to investigate the matter.

111. No-one would know better than counsel for BI 2000 which the relevant organ of the CFMEU was, since those counsel also appeared in relation to many other issues for the CFMEU. They selected the Divisional Branch Executive Committee of the Victoria-Tasmania Branch. They argued that six of the eight members of that Committee attended the 2012 Grand Final Breakfast. They said there was no evidence that there had ever been a suggestion from an official of the CFMEU that it, not BI 2000, should have been undertaking the activities undertaken by BI 2000.
112. Finally, counsel for BI 2000 submitted that it 'is not for BI 2000 or its directors to have called evidence as to [informed consent]. There is no onus on them to do this.'⁸⁵

Breach of fiduciary duty: response of counsel assisting

113. Counsel assisting responded to those submissions of BI 2000 along the following lines. There is no evidence that any attempt was ever made by any of the directors of BI 2000 to seek or obtain informed consent from the CFMEU to the establishment and operation of BI 2000. Bill Oliver did not suggest in any of the answers he gave to counsel assisting about BI 2000 taking opportunities available to the CFMEU that he had done so on the basis of informed consent from the CFMEU. Having heard the lines of examination of counsel assisting, Bill Oliver's counsel did not ask him whether he had acted with the

⁸⁵ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 11.

informed consent of the CFMEU. This surely would have been done had there been any basis for doing so. Bill Oliver and the other directors have not been deprived of any opportunity to adduce additional material of probative value. If there were any such material, it could have been tendered after the oral hearing, even in the course of final submissions. Indeed even the written submissions do not take this opportunity. They do not suggest that informed consent was given. Instead they merely raise the theoretical possibility of informed consent.

114. Further, not only was informed consent not obtained, there is no evidence that Bill Oliver and other relevant CFMEU officials ever considered seeking the CFMEU's consent. Had that consent been sought, the CFMEU officials not associated with BI 2000 could never properly have consented to what has occurred. If they had consented, a deplorable state of affairs would have arisen. The CFMEU would have deliberately permitted its own officers to prefer the interests of BI 2000 over those of the CFMEU and its members by consenting to the diversion of fundraising opportunities worth over \$1,000,000 away from the legislatively controlled environment of the union's accounts and into a poorly managed enterprise the objects of which are not the same as those of the CFMEU. For example, it cannot be an object of the CFMEU to fund the union election campaign of an individual. It is thus not surprising that the CFMEU, for its part, has not contended that it acted with disregard for its members' interests in this way.

Breach of fiduciary duty: resolution

115. The submissions of counsel assisting in reply are correct. It is only necessary to add that the BI 2000 submissions, particularly the last,

show how misconceived the approach of BI 2000 and its directors is. Equity looks with hostility on errant fiduciaries. The requirement of informed consent is a strict one. Where one organisation is a principal and another is a fiduciary, and the decision making bodies in each organisation share common members, those who are members of the fiduciary's decision-making body cannot participate in the decision by the principal's decision-making body to consent or not. Further, much more formality is required than the BI 2000 submissions allow. Acts like attending the 2012 Grand Final Breakfast – in fact organised by BI 2000 but appearing to be a CFMEU function – cannot evidence informed consent unless the precise issue is present to the mind of those attending.

116. What of the submission by counsel for BI 2000 that 'six of the eight members of the Divisional Branch Executive Committee of the Victoria-Tasmania Branch attended the' 2012 Grand Final Breakfast? The submissions did not name either the eight members of the Committee or the six who had attended the Breakfast, and seemed coy about doing so. A footnote stated:⁸⁶

See the list of office bearers of the Victoria branch as at 1 January 2012 on the FWC website. The office bearers who comprised the Divisional Branch Executive Committee were specified in CFMEU Construction and General Rule 42A as it was at that date – also on the FWC website.

117. Tortuous searches in compliance with these instructions revealed who the eight members were. The six who attended were John Setka, Bill Oliver, Ralph Edwards, Tom Watson, Elias Spervovasilis and Frank O'Grady. This explains the coyness of counsel. The first four of those named were at the time of the Breakfast directors of BI 2000. Even if

⁸⁶ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 14 note 2.

attendance at the Breakfast could ever constitute informed consent, those gentlemen were incapable of giving it.

118. Counsel for BI 2000 also argued that the CFMEU would not have been interested in the opportunities taken by BI 2000 – for example, the loss making merchandise lines.⁸⁷ And they argued that it was necessary to establish that the CFMEU would have taken up those opportunities. This fails at both legal and factual levels. It is not necessary in law to establish that the opportunities would have been taken up. And as a matter of fact some of the opportunities would have been attractive to the CFMEU.
119. Finally, counsel for BI 2000 criticised the lack of analysis by counsel assisting to demonstrate that the funds held by BI 2000 are held on constructive trust for the CFMEU, and also submitted that it was not the role of a Royal Commission to make findings about the matter.⁸⁸ But it is not the duty of counsel assisting to offer any elaborate analysis in support of so obvious a conclusion. And there is no reason why a Royal Commission appointed pursuant to the executive power of the Commonwealth and operating under the *Royal Commissions Act 1902* (Cth) cannot state what it sees as the actual legal relationships created by reason of probable misconduct by persons whose dealings are within the Terms of Reference.

⁸⁷ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, paras 18-19, 31.

⁸⁸ Submissions on behalf of Building Industry 2000 Plus Ltd, 14/11/14, para 40.

CHAPTER 3.5

IR 21 LIMITED

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A – INTRODUCTION

1. This Chapter deals with IR 21 Ltd (**IR 21**).
2. IR 21 is a company associated with the National Union of Workers (**NUW**). It is principally controlled by Charles Donnelly, who was until recently the General Secretary of the NUW.
3. IR 21 raises money by holding annual educational seminars. They are attended by employers, officials from the NUW and other unions and participants in various industries including the food services, manufacturing, dairy, cheese, pharmaceutical and oil industries.
4. The submissions of counsel assisting, set out below, subject to one qualification, must be accepted. The principal concerns they express in relation to the operations of IR 21 are as follows. IR 21 made its money by, first, trading off the fact that its Secretary, the face and driving force of the company, was the most senior official in the NUW, and secondly, using the name, influence and resources of the NUW. IR 21's directors did not account to the NUW for any of the money so raised and did not meet any of the NUW's expenses. The bulk of the money is retained by the company. Hence the company now holds cash and shares in excess of \$1 million. In these circumstances, Charles Donnelly used his position as National Secretary of the NUW to raise money for his own gain and for the advancement of politically like-minded associates, rather than for the benefit of the NUW and its members. In doing so he may have acted in breach of the fiduciary duties he owed to the NUW.

B – CORPORATE HISTORY AND STRUCTURE

The creation of the company

5. IR 21 was registered as a company limited by guarantee on 24 September 2003.¹
6. The establishment of the company was instigated by Charles Donnelly, then General Secretary of the NUW, and Martin Pakula, then Assistant State Secretary of the Victorian Branch of the NUW.²
7. Charles Donnelly was the most senior officer in the NUW. He held the position of General Secretary from 2004³ until June 2014.⁴ On 30 June 2014 he resigned from his positions as General Secretary of the NUW and Secretary of IR 21⁵ to take up the position of CEO of the Labour Union Co-operative Retirement Fund (**LUCRF**), an industry superannuation fund associated with the NUW.⁶ He replaced Greg Sword as the CEO of LUCRF. Greg Sword had been Charles Donnelly's predecessor as General Secretary of the NUW.⁷ This is a not untypical *cursus honorum*.

¹ Donnelly MFI-1, pp 1, 19.

² Donnelly MFI-1, pp 32, 97.

³ Charles Donnelly, 11/9/14, T:28.29-31.

⁴ Charles Donnelly, 11/9/14, T:28.40-42.

⁵ Charles Donnelly, 11/9/14, T:28.44-29.1.

⁶ LUCRFSuper website, *Our People LUCRFSuper*, <https://www.lucrf.com.au/about/our-people> accessed 23/10/14.

⁷ Donnelly MFI-1, p 67.

8. Martin Pakula also had a not untypical *cursus honorum*, though a different one. In 2006 he became a member of the Victorian Legislative Council for Western Region. In 2013 he resigned from that position to contest and win the Legislative Assembly seat of Lyndhurst.⁸

9. Charles Donnelly and Martin Pakula were employed by the NUW. They were paid out of NUW members' funds to devote their energies to NUW business. But each spent some time working on the establishment of IR 21. It was Charles Donnelly's idea to set up IR 21 in 2003 as a fund to assist the election of NUW officials, the Australian Labor Party (**ALP**), individual union members and other unions.⁹ He said he was the 'primary driver'.¹⁰ In passing, it may be noted that so far as the fund was directed to the election of NUW officials, it has proved superfluous. The NUW in its submissions said that there had not been a contested election of officers within the NUW since the incorporation of IR 21.¹¹

10. The Directors of the company on its incorporation were Ross Inglis, Charles Power and John Pilsbury.¹² John Pilsbury was a member of the NUW Branch Committee of Management and an Organiser with the Victorian Branch from 1991 to 2005.¹³ Charles Power is a partner at

⁸ Donnelly MFI-1, pp 96-98.

⁹ Charles Donnelly, 11/9/14, T:29.31-37.

¹⁰ Charles Donnelly, 11/9/14, T:30.5-6.

¹¹ Submission in response to counsel assisting's submissions in relation to IR21 Ltd – Chapter 3.5, para 45 (Below this submission, provided on behalf of IR 21, Charles Donnelly and Charles Power, will be called the 'NUW submissions'.)

¹² Donnelly MFI-1, p 3.

¹³ Donnelly MFI-1, p 36.

Holding Redlich.¹⁴ Ross Inglis is a Senior Legal Executive at Ryan Carlisle Thomas Lawyers.¹⁵ They resolved to appoint Charles Donnelly as the company's Secretary.¹⁶

11. On 21 November 2013, John Pilsbury resigned from the position of director of the company.¹⁷ By that point, he had also retired from the office he held with the NUW. He was replaced on the IR 21 board by former Victorian MLA and former NUW Assistant Branch Secretary, Esmond Curnow.¹⁸
12. The registered office of the company is Holding Redlich, Level 8, 555 Bourke Street, Melbourne Victoria 3000.¹⁹

Governance

13. The objects of the company are set out in clause 6 of the constitution.²⁰ They are wide-ranging:
 - (a) assisting any member of the NUW or any other trade union to campaign for and be elected to a position in any trade union, local government, state or federal election;

¹⁴ Donnelly MFI-1, p 34.

¹⁵ Donnelly MFI-1, p 35.

¹⁶ Donnelly MFI-1, p 3.

¹⁷ Donnelly MFI-1, pp 1A, 27.

¹⁸ Donnelly MFI-1, p 37.

¹⁹ Donnelly MFI-1, p 1.

²⁰ Donnelly MFI-1, p 107.

- (b) financially supporting any association, charities, clubs, political parties or other organisation associated with the trade union movement;
- (c) promoting or supporting the aims, objects and activities of any trade union or similar organisation;
- (d) promoting and supporting the aims, objects and activities of the ALP or any other political party or organisation, or any group endorsed by or associated with the ALP or which is supportive of the labour and trade union movement or their philosophies;
- (e) acting in conjunction with any trade union or other organisation for the purposes of carrying out the objects of the company;
- (f) advancing and lending money to any trade union, political party, group, association or other organisation as may be determined by the directors of the company;
- (g) promoting the welfare of trade union members;
- (h) assisting any person in need who is or has been a member of any trade union, the widows, children and immediate relatives dependent on them;
- (i) issuing appeals and collecting money and goods and organising concerts, functions, raffles, exhibitions, games of

chance, sport events, entertainments or fund raising activities of any kind for the purpose of raising funds for carrying out the objects of the company;

- (j) soliciting and receiving voluntary contributions and using those contributions and any income from them for the purpose of carrying out the objects of the company; and
- (k) pursuing any of the objects of the company set out in clause 7 and exercising any of the powers of the company set out in clause 8 in undertaking any action in furtherance of those objects powers.

14. Clauses 3 and 4 of the company's constitution make it clear that the company is a public company limited by guarantee and the company 'must not be operated for the purpose of profit or gain of any Member'.²¹ The members of the company are Ross Inglis, Charles Power and John Pilsbury.²²

15. The company's powers are described in clause 7 of the Constitution as being those set out in s 124 of the *Corporations Act 2001 (Cth)*.²³

16. Amongst other things, the company's constitution provides that:

- (a) the business of the company is to be managed by the directors, who may exercise all of the powers of the company

²¹ Donnelly MFI-1, p 106.

²² Donnelly MFI-1, p 26.

²³ Donnelly MFI-1, p 107.

except any powers that the law or the constitution requires the company to exercise in general meeting (cl 25);

- (b) subject to s 191 of the *Corporations Act* 2001, a director who has a material personal interest in a matter being considered at a meeting of directors must not vote on the matter or be present while the matter is being considered (cl 21);
- (c) the directors may pass a resolution without a meeting if all directors entitled to vote have signed a document containing a statement that they are in favour of the resolution (cl 29);
- (d) a directors' meeting may be called by a director giving reasonable notice to the other directors (cl 30);
- (e) the company must keep minute books in which it records, within one month, proceedings and resolutions of directors' and members' meetings, and resolutions passed by directors and members without a meeting (cl 54);
- (f) the company must ensure that the minutes of the meeting are signed by the chair of the meeting or the chair of the next meeting a reasonable time after the meeting, and must ensure that the minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed (cl 54).

17. Charles Donnelly gave evidence that the directors of IR 21 would meet once, or occasionally twice, a year and on occasion by telephone.²⁴ He said minutes were kept of those meetings.²⁵ But minutes for several years, if they ever existed, were absent from the documents produced to the Commission.²⁶ Charles Power gave evidence that meetings took place annually. He said there may have been occasions where minutes were not actually prepared because their preparation was ‘fairly ad hoc.’²⁷

C – COMPANY’S FINANCIAL REPORTS

18. IR 21’s financial reports reveal the following facts:²⁸

| Year | Revenue | Profit after tax | Net assets (predominantly cash) |
|---------------------|----------------|-------------------------|--|
| 30 June 2004 | \$196,864 | \$59,461 | \$59,461 |
| 30 June 2005 | \$241,641 | \$128,528 | \$187,989 |
| 30 June 2006 | \$282,477 | \$127,436 | \$315,425 |
| 30 June 2007 | \$296,827 | \$167,892 | \$483,317 |
| 30 June 2008 | \$358,545 | \$77,198 | \$560,515 |
| 30 June 2009 | \$283,318 | (\$58,844) | \$501,671 |
| 30 June 2010 | \$275,519 | \$144,634 | \$646,307 |
| 30 June 2011 | \$251,003 | \$141,492 | \$787,799 |
| 30 June 2012 | \$276,593 | \$130,720 | \$918,520 |

²⁴ Charles Donnelly, 11/9/14, T:33.6-16.

²⁵ Charles Donnelly, 11/9/14, T:68.21-23.

²⁶ Charles Donnelly, 11/9/14, T:33.22-32.

²⁷ Charles Power, 11/9/14, T:68.12-23.

²⁸ Donnelly MFI-1, pp 128, 129, 144, 145, 160, 161, 177, 178, 195, 196, 213, 214, 231, 232, 250, 251, 266, 267, 281, 282.

| | | | |
|---------------------|-----------|-----------|-------------|
| 30 June 2013 | \$261,135 | \$184,534 | \$1,103,054 |
|---------------------|-----------|-----------|-------------|

19. IR 21's financial reports are audited each year by Eddy Partners Accountants. They have not identified any irregularities, nor indeed qualified their audit report, over the life of the company.

D – HOW DID THE COMPANY RAISE MONEY?

Introduction

20. IR 21 generates the majority of its income from running an annual educational seminar with prominent speakers from both industry and politics. It has had a long and successful history of doing so.
21. For example, in 2004 the event was a three and a half hour luncheon at the Hilton on the Park in East Melbourne on the topic 'Industrial Relations: The Future Revealed'.²⁹ The keynote speakers were the Hon Steve Bracks MP, then Premier of Victoria, Heather Ridout, then Chief Executive Officer of the Australian Industry Group and Greg Combet, then Secretary of the ACTU. Tickets were \$425 per person or \$3,800 for a table of 10.³⁰ By 2013, the cost of the tickets had increased to \$500 per person or \$4,750 per table of 10.³¹
22. In the years since, the keynote speakers at the annual luncheon seminars hosted by IR 21 have included the Hon Kevin Rudd,³² Paul

²⁹ Donnelly MFI-1, pp 394-395.

³⁰ Donnelly MFI-1, pp 394-395.

³¹ Donnelly MFI-1, pp 1291.

³² Donnelly MFI-1, p 528.

Moore of Pacific Brands Holdings,³³ the Hon Julia Gillard,³⁴ Elmo de Alwis of Sigma Pharmaceuticals,³⁵ the Hon Nicola Roxon,³⁶ Dr Tim Oldham of Pacific Hospira Inc,³⁷ the Hon Craig Emerson,³⁸ Kerry Smith of PFD Foods,³⁹ the Hon Bill Shorten,⁴⁰ Michael Byrne of Linfox⁴¹ and the Hon Wayne Swan.⁴²

23. The seminars generally attracted an attendance of between 500 and 700. These included representatives of many companies which have entered into enterprise agreements with the NUW. They also included representatives of many professional service firms associated with the NUW or its related entity LUCRF Super. More than 50 representatives of the NUW regularly attended. LUCRF Super regularly purchased 30 tickets to each annual function.

24. The seminars held in the period 2003 to 2013 were as follows:⁴³

- a) 5 December 2003 Innovation in the Workplace
- b) 3 December 2004 Industrial Relations: The Future

³³ Donnelly MFI-1, p 528.

³⁴ Donnelly MFI-1, p 687.

³⁵ Donnelly MFI-1, p 687.

³⁶ Donnelly MFI-1, p 784.

³⁷ Donnelly MFI-1, p 784.

³⁸ Donnelly MFI-1, p 871.

³⁹ Donnelly MFI-1, p 871.

⁴⁰ Donnelly MFI-1, p 948.

⁴¹ Donnelly MFI-1, p 948.

⁴² Donnelly MFI-1, pp 1222-1223.

⁴³ Donnelly MFI-1, pp B, 394, 528, 585, 687, 688, 784, 785, 871, 872, 948, 949, 1053, 1054, 1222, 1223, 1292.

Revealed

- c) 7 October 2005 The Industrial Tightrope from Brunswick to Beijing
- d) 1 August 2006 Treasurer John Brumby on future directions for the State of Victoria
- e) 17 November 2006 Workplace Laws – Workplace Skills: A Balancing Act
- f) 23 November 2007 Fair and Productive Workplaces: Reforming Australia’s Industrial Relations
- g) 21 November 2008 Healthy Workers, Healthy Workplaces
- h) 20 November 2009 Getting our bearings after the global financial tsunami
- i) 19 November 2010 Where to now for super?
- j) 18 November 2011 How did dealing with climate change and putting a price on carbon become so difficult?
- k) 16 November 2012 Wayne Swan on Australia in the Asian century
- l) 22 November 2013 Bill Shorten looks to the future

25. In addition to the educational seminars referred to above, IR 21 has, on occasion, hosted smaller functions as well.⁴⁴

Association with the NUW

26. Although there are references to IR 21 in the documentation and invoices issued in its name, the events were in truth understood and marketed as ‘NUW events’. But that revenue from the events was diverted to IR 21.

27. Charles Donnelly, who at almost all material times was the General Secretary of the NUW, was the driving force behind the educational seminars. The seminars were organised by NUW staff in the course of their employment with the NUW. Suppliers and service providers referred to the seminars variously as the ‘NUW luncheon’ or ‘IR 21 National Union of Workers function’. More than 50 tickets to the seminars were purchased by NUW National Office, Victorian Branch and Central Branch (General Branch). These tickets were used by NUW officials or simply donated back to IR 21.

The seminars were organised by NUW staff

28. IR 21 employs no staff.⁴⁵ Charles Donnelly gave evidence that he primarily organised the 2005 function.⁴⁶ He said:

We had a firm develop the pamphlet to promote the function. That would be the main thing; make sure the bookings and payments for where the

⁴⁴ Donnelly MFI-1, pp 517, 680.

⁴⁵ Charles Donnelly, 11/9/14, T:36.43-45.

⁴⁶ Charles Donnelly, 11/9/14, T:36.32-38.

venue is paid, those sort of things; inviting the guest speakers.⁴⁷ (emphasis added)

29. To the extent Charles Donnelly organised the seminars he had much assistance from staff employed by the NUW.⁴⁸ By 'we' Charles Donnelly was referring to the NUW and its staff.
30. For some years from 2004 Antonia Parkes was employed by the NUW as the National Industrial Officer.⁴⁹ She was not employed by IR 21.⁵⁰ During this period she organised various IR 21 seminars. There are numerous examples of her involvement in liaising with the venue, suppliers and IR 21's auditors in respect of IR 21's activities.
31. Charles Donnelly grudgingly accepted that Antonia Parkes 'may have been assisting in some way' but denied the suggestion that she was organising the 2005 function.⁵¹ He described her as only a 'contact point'.⁵² The documentary evidence is to the contrary. Take the 2005 function as an example. All correspondence from the Hilton on the Park was directed to Antonia Parkes. The security deposit invoice was addressed to her.⁵³ She arranged to pay the security deposit receipt.⁵⁴ The event order setting out the arrangements for the event was addressed to her.⁵⁵ She is described in the event order as the 'contact

⁴⁷ Charles Donnelly, 11/9/14, T:37.8-11.

⁴⁸ Charles Donnelly, 11/9/14, T:36.47-37.3.

⁴⁹ Charles Donnelly, 11/9/14, T:40.34-40.

⁵⁰ Charles Donnelly, 11/9/14, T:48.3-6.

⁵¹ Charles Donnelly, 11/9/14, T:47.41-43.

⁵² Charles Donnelly, 11/9/14, T:47.41-48.1.

⁵³ Donnelly MFI-1, p 569.

⁵⁴ Donnelly MFI-1, p 557.

⁵⁵ Donnelly MFI-1, pp 568-574.

on the day'.⁵⁶ The final tax invoice from the Hilton on the Park to the IR 21 function was directed to her attention.⁵⁷

32. Charles Donnelly was taken to each of the documents referred to above. He maintained that Antonia Parkes was merely assisting in the organisation of the function.⁵⁸ He went on to say that her role was not necessarily replicated in the years that followed.⁵⁹
33. Charles Donnelly gave the impression of being a dogged man. He may well have been a very honest and very effective union official. But he took his doggedness too far testimonially. It led him into evidence which is not worthy of belief. It should not be believed. That is true not only of his evidence about Antonia Parkes but of his evidence on several other topics. The NUW described his evidence as 'frank'.⁶⁰ Up to a point that is true. But his frankness was not intense enough to enable him to face up to reality. It is obvious that Antonia Parkes was organising the functions in 2005 and for the years thereafter until she left the employ of the NUW. At that point another NUW staff member replaced her and performed the same role. For example, in April 2006 Antonia Parkes sent a facsimile to Vince Sorrenti arranging to book him to appear at the 2006 function later that year.⁶¹ The facsimile is instructive because it details not just the role of Antonia Parkes in

⁵⁶ Donnelly MFI-1, p 572.

⁵⁷ Donnelly MFI-1, p 584.

⁵⁸ Charles Donnelly, 11/9/14, T:47-49.

⁵⁹ Charles Donnelly, 11/9/14, T:49.35-38.

⁶⁰ NUW submissions, 14/11/14, para 13.

⁶¹ Donnelly MFI-1, p 626.

organising the function but that of Charles Donnelly himself. The email says:

Further to your email communication with Charlie Donnelly, we would like to book you as MC ... Should you require any further information, please contact Antonia ... [on a certain number] ... or A Parkes [at her NUW email address].

34. Charles Donnelly again maintained that Antonia Parkes simply 'helped with the organisation of it'.⁶²
35. IR 21 did not reimburse the union for the costs of services provided by Antonia Parkes and other NUW staff. Charles Donnelly was taken to a report prepared in respect of the 2006 function, which identified the costs of running the function.⁶³ No costs in respect of wages are identified in the report. Charles Donnelly accepted that the wages paid to people assisting to organise the IR 21 seminars came from the NUW.⁶⁴ He said:

The last board meeting of IR21 did discuss, in terms of the work as I seen it, organising the function. My PA did quite a bit of the work and the bookkeeper kept a ledger of the money coming in and we did discuss whether the NUW should be invoicing IR21 for the work, this sort of work, if you like. It is something the board turned its mind to, but the union wasn't in the practice of issuing invoices for that.⁶⁵

36. By 2012, Antonia Parkes had left the employ of the NUW.⁶⁶ Rachel Baker replaced her. She was Charles Donnelly's personal assistant.⁶⁷

⁶² Charles Donnelly, 11/9/14, T:50.14.

⁶³ Donnelly MFI-1, pp 587-589; Charles Donnelly, 11/9/14, T: 51.10-17.

⁶⁴ Charles Donnelly, 11/9/14, T:51.10-17.

⁶⁵ Charles Donnelly, 11/9/14, T:51.25-32.

⁶⁶ Charles Donnelly, 11/9/14, T:54.39-43.

⁶⁷ Charles Donnelly, 11/9/14, T:54.46.

Rachel Baker took over Antonia Parkes's role as the principal contact point for the IR 21 seminars.⁶⁸ She received the invoices from Crown Palladium, where the seminar was now held, which referred to the seminar as the 'NUW Luncheon'.⁶⁹ She organised the post seminar drinks.⁷⁰

37. The various suppliers whom Antonia Parkes and Rachel Baker dealt with regarded the IR 21 function as an NUW function. An invoice prepared by 'Staging Connections' is marked the 'Customer Contact Rachel Baker' in respect of the 'Customer National Union of Workers'.⁷¹
38. A Client Engagement Agreement for the MC describes the client as 'IR 21 National Union of Workers'.⁷² In this case the contact is listed as Tim Kennedy. Tim Kennedy was employed by the NUW at that time as the Assistant Secretary. He replaced Charles Donnelly as the General Secretary in June 2014.⁷³ Charles Donnelly signed the Client Engagement Agreement.⁷⁴
39. Charles Donnelly himself sent an email to a potential guest.⁷⁵ The email stated:

⁶⁸ Charles Donnelly, 11/9/14, T:55.7-9.

⁶⁹ Donnelly MFI-1, p 1224.

⁷⁰ Donnelly MFI-1, pp 1246-1249.

⁷¹ Donnelly MFI-1, p 1234.

⁷² Donnelly MFI-1, p 1244.

⁷³ Donnelly MFI-1, p 43.

⁷⁴ Donnelly MFI-1, p 1244-1245.

⁷⁵ Donnelly MFI-1, p 1250.

Please find attached an invitation to the NUW's major annual event (the NUW is the trustee owner of LUCRF Super) on Friday 16 November 2012 at Crown Palladium.

This year's seminar, Australian in the Asian Century, will feature an address by Deputy Prime Minister and Treasurer Wayne Swan...

Because it is an important event for the NUW, it is likely to attract many trade union leaders, super trustees, fund managers and company leaders and will be a fantastic networking opportunity.

It would be greatly appreciated if Palisade Investment Partners [sic] representatives could attend.

40. Despite the obvious references to this being an NUW event, Charles Donnelly maintained in his oral evidence to the Commission that this was an IR 21 event. He said that he was using his personal relationship to encourage the person, to whom the email was sent, to attend rather than the goodwill and reputation of the NUW to procure his attendance.⁷⁶ Charles Donnelly's evidence cannot be accepted. The event was run by, and used the resources of, the NUW. NUW staff even arranged for the payment of invoices out of IR 21's accounts. The only thing the NUW did not do was record any part of the revenue its resources and relationships generated from these events.
41. Charles Donnelly resisted any suggestion that the profits of the event should go to the NUW. He said that IR 21 paid the expenses associated with the function therefore it should reap the rewards.⁷⁷ His only concession was that it would have been appropriate for the union to invoice IR 21 for its resources.⁷⁸

⁷⁶ Charles Donnelly, 11/9/14, T:56.17-57.12.

⁷⁷ Charles Donnelly, 11/9/14, T:57.17-21.

⁷⁸ Charles Donnelly, 11/9/14, T:57.23-31.

42. Officials of the NUW, other than Charles Donnelly, approved IR 21's expenditure.⁷⁹ Paul Richardson was the co-signer of cheques.⁸⁰ He was the Assistant National Secretary.⁸¹ Other NUW officials operated IR 21's bank account, referring to the payment so authorised as 'NUW National Union'.⁸² Despite this overwhelming evidence to the contrary, Charles Donnelly still maintained that the function was run by IR 21.⁸³
43. Officials from the NUW habitually chased up payment of outstanding IR 21 invoices. In an email exchange with Cassie Cotter of Eddy Partners, Rachel Baker, though wearing her nominal IR 21 cap (despite not being an employee of that company), informed Cassie Cotter that Paul Richardson, 'is going to contact Qantas and chase up payment'.⁸⁴ In a further email during the same exchange Rachel Baker informed Cassie Cotter that Paul Richardson is 'the Industrial Officer that deals with Qantas and he is confident that this money will be recovered.'⁸⁵ Charles Donnelly gave evidence that it was rare for Industrial Officers to chase up money but that they would do it if they had been the person who invited the company.⁸⁶ It can be inferred that industrial officers invited companies they dealt with to attend IR 21 functions.

⁷⁹ Donnelly MFI-1, p 1293.

⁸⁰ Charles Donnelly, 11/9/14, T:57.46.

⁸¹ Charles Donnelly, 11/9/14, T:57.41.

⁸² Donnelly MFI-1, p 1295.

⁸³ Charles Donnelly, 11/9/14, T:58.26.

⁸⁴ Donnelly MFI-1, p 1370.

⁸⁵ Donnelly MFI-1, p 1370.

⁸⁶ Charles Donnelly, 11/9/14, T:60.30-36.

44. It is obvious from the auditors' correspondence that they too were accustomed to dealing with the NUW in relation to IR 21. A file note prepared by CNC (presumably Cassie Cotter) includes the note 'National Office run IR 21 Ltd – ie Rachel but I can speak to either Rachel or Narele.'⁸⁷ Charles Donnelly was questioned about this note but said, unconvincingly, that IR 21 runs IR 21.⁸⁸ In actuality he, the General Secretary of the NUW, ran IR 21.

The seminars were generously supported by the NUW

45. The NUW has been a generous benefactor to IR 21. The NUW purchased enormous volumes of tickets to attend IR 21 functions. IR 21 would issue invoices to the NUW – National Office, Central Branch⁸⁹ and Victorian Branch.⁹⁰ Each of these invoices would be marked to the attention of an NUW official. In the case of the National Office, the official to whom the invoice was addressed was Charles Donnelly himself.⁹¹

46. It was accepted by Charles Donnelly that these invoices were then paid and IR 21 received the money.⁹² Indeed, it appears from the

⁸⁷ Donnelly MFI-1, p 1368.

⁸⁸ Charles Donnelly, 11/9/14, T:59.42-44.

⁸⁹ Donnelly MFI-1, p 582.

⁹⁰ Donnelly MFI-1, p 583.

⁹¹ Donnelly MFI-1, p 581.

⁹² Charles Donnelly, 11/9/14, T:46.24-34.

documents,⁹³ and was accepted by Charles Donnelly, that the NUW may have paid for him to attend IR 21's functions.⁹⁴

47. It was put to Charles Donnelly that the amounts paid simply reflected donations to IR 21, because no-one was sent by those entities to fill the seats. Charles Donnelly accepted that it appeared that way from the paperwork but denied that these were simply donations.⁹⁵
48. The documents contradict this testimony. For example in 2005, the NUW Central, National and Victorian branches each donated a series of seats or tables to IR 21.⁹⁶ The list of those attending suggests that where these donations were made nobody was recorded as having attended the event because no table number is provided for the attendee to sit at.⁹⁷ Charles Donnelly accepted that this was the inference to be drawn from the document,⁹⁸ but maintained that this would not have been the case.⁹⁹ He said he was 'confident we would have had officials fill those positions.'¹⁰⁰ It was accepted that the union would pay for the tables whether people attended or not.¹⁰¹

⁹³ Donnelly MFI-1, p 541.

⁹⁴ Charles Donnelly, 11/9/14, T:53.17-20.

⁹⁵ Charles Donnelly, 11/9/14, T:46.41-47.3.

⁹⁶ Donnelly MFI-1, p 541.

⁹⁷ Charles Donnelly, 11/9/14, T:45.4-8.

⁹⁸ Charles Donnelly, 11/9/14, T:45.4-8.

⁹⁹ Charles Donnelly, 11/9/14, T:45.10-13.

¹⁰⁰ Charles Donnelly, 11/9/14, T:44.6-7.

¹⁰¹ Charles Donnelly, 11/9/14, T:46.3-7.

49. It was put to Charles Donnelly that the practical effect of this was that the NUW was essentially giving union money to IR 21.¹⁰² But he said that this effect was unintended and that the NUW had no practice of funnelling money into IR 21.¹⁰³ This evidence cannot be accepted.

Companies associated with Charles Donnelly and the NUW supported the seminars

50. Since at least 2005, the events have been well patronised by the companies of which Charles Donnelly is (or was) a director and the Council of which he was deputy chairman.

51. Until recently, Charles Donnelly was also the chairman of LUCRF,¹⁰⁴ deputy chairman and a director of the Transport & Logistics Industry Skills Council Limited¹⁰⁵ and a director, or recently resigned director, of the following companies:

- (a) LUCRF Pty Ltd as trustee for LUCRF;¹⁰⁶
- (b) Labour Union Investment and Property Services Pty Ltd (formerly Labour Union Insurance (Brokers) Pty Ltd);¹⁰⁷
- (c) Newskills Limited;¹⁰⁸

¹⁰² Charles Donnelly, 11/9/14, T:43.9-12.

¹⁰³ Charles Donnelly, 11/9/14, T:43.22-24.

¹⁰⁴ Donnelly MFI-1, p 67.

¹⁰⁵ Donnelly MFI-1, pp 40, 46.

¹⁰⁶ Donnelly MFI-1, p 56.

¹⁰⁷ Donnelly MFI-1, p 83.

(d) Industrial Printing and Publishing Pty Ltd;¹⁰⁹ and

(e) Publicity Works Pty Ltd.¹¹⁰

52. Each of the companies above is associated with NUW. They made significant purchases of tickets.

53. Many of the tables purchased by the companies above were ‘donated’ back to IR 21. Each of Newskills and Labour Union Insurance (Brokers) Pty Ltd (as it then was) donated tables to the 2005 function.¹¹¹

54. Charles Donnelly gave evidence that Labour Union Insurance (Brokers) Pty Ltd was owned by the NUW and that he was a director of it at that time.¹¹² He said that the decision to donate a table was made by the CEO but acknowledged that he did not disagree with the decision.¹¹³ Similarly in 2010, LUCRF, the industry superannuation fund associated with the NUW, donated a table to IR 21.¹¹⁴

55. The task of designing the pamphlet for the 2005 function was contracted out to Publicity Works.¹¹⁵ Charles Donnelly was a director

¹⁰⁸ Donnelly MFI-1, p 69A.

¹⁰⁹ Donnelly MFI-1, p 76A.

¹¹⁰ Donnelly MFI-1, p 91A.

¹¹¹ Donnelly MFI-1, pp 530-550.

¹¹² Charles Donnelly, 11/9/14, T:42.28-39.

¹¹³ Charles Donnelly, 11/9/14 T:42.41-47.

¹¹⁴ Donnelly MFI-1, p 954.

¹¹⁵ Charles Donnelly, 11/9/14, T:37.13-20.

of Publicity Works and the National Union of Workers was a shareholder.¹¹⁶

The functions are attended by the companies NUW had dealings with in an industrial context

56. The purchasers of the tickets to the event were, for the most part, companies with whom the NUW had dealings in an industrial context. They were companies that employed NUW members, had negotiated enterprise bargaining agreements with the NUW and would have considered it important to maintain a good working relationship with the NUW.¹¹⁷ Charles Donnelly gave evidence that ‘most of our major companies attended.’¹¹⁸

57. Charles Donnelly was taken to an email from the Assistant Victorian Branch Secretary of the NUW in which he asked Ross Inglis of Ryan Carlisle Thomas Lawyers for his continued support of the fund raiser.¹¹⁹ Ross Inglis is a director of IR 21. Charles Donnelly was asked whether NUW staff would email persons they hoped would be interested in taking a table. His response was that companies were prompted to attend by NUW delegates.¹²⁰ He said the function would have over 200 NUW delegates at it.¹²¹

¹¹⁶ Donnelly MFI-1, p 91A; Charles Donnelly, 11/9/14, T:37.22-26.

¹¹⁷ Charles Donnelly, 11/9/14, T:38.12-13.

¹¹⁸ Charles Donnelly, 11/9/14, T:54.21.

¹¹⁹ Donnelly MFI-1, p 1021.

¹²⁰ Charles Donnelly, 11/9/14, T:54.23-32.

¹²¹ Charles Donnelly, 11/9/14, T:54.27-32.

58. The events attracted major companies and smaller companies operating in the industries over which the NUW had coverage. They include: Mobil, Dairy Farmers, John Sands, OneSteel, Cadbury Schweppes, GlaxoSmithKline, Goodman Fielder, Qantas, Toll Holdings, GrainCorp, SmorgonSteel, Metcash, Mobil Oil, Kraft, Linfox, Nestle, Pacific Brands, Visy, Safeway, Coles Myer and Tenix. Smaller companies attending included Adecco, Murray Goulburn Cooperative Co Limited, Bulla Dairy Products, Jalna Dairy Foods, South Pacific Tyres, Tasman Group Services, Gippsland Environmental Services, Ridley AgriProducts and the Warrnambool Cheese & Butter Factory Co. Ltd.
59. Many of the companies referred to above donated tables. Thus in respect of the 2004 educational seminar, Qantas appeared to donate a table of 10 to the NUW.¹²² The NUW filled this table, and tables donated by other companies,¹²³ with representatives of the NUW¹²⁴ and the Australian Council of Trade Unions (ACTU).¹²⁵ Charles Donnelly acknowledged that some of the companies who donated tables had enterprise agreements with the NUW.¹²⁶
60. Similarly, according to the list of those attending produced to the Commission in respect of the 2005 educational seminar, each of Bell

¹²² Donnelly MFI-1, pp 396-411. Charles Donnelly, 11/9/14, T:38.15-39.8.

¹²³ Donnelly MFI-1, pp 405-406; Charles Donnelly, 11/9/14, T:39.14-20.

¹²⁴ Donnelly MFI-1, pp 405-406; Charles Donnelly, 11/9/14, T:38.37-39.8.

¹²⁵ Charles Donnelly, 11/9/14, T:38.19-35.

¹²⁶ Charles Donnelly, 11/9/14, T:40.9-12.

Asset Management, the Australian Workers' Union (AWU), Excel Logistics and Kwik Lok donated a table.¹²⁷

Attendance by other unions

61. The documents produced to the Commission demonstrate that, historically, the events have been well attended by various unions. Like the companies discussed earlier, the unions were significant purchasers of tickets. They included the AWU, the HSU, the SDA, the TWU, the CFMEU C & G Division, and the AMWU.

Other function revenue

62. On 21 March 2005, IR 21 also hosted an intimate dinner at Langton's Restaurant and Wine Bar with the Hon. John Brumby MP, who was the then Treasurer in the Victorian Government. The dinner cost \$1,100 per person.¹²⁸ A handwritten note from Langton's enclosing the tax invoices describes the function as the 'Bill Bolitho function (IR 21)'.¹²⁹ Bill Bolitho was a former NUW Organiser.
63. In attendance were Ryan Carlisle Thomas Lawyers, Brickwood Holdings Pty Ltd, Bell Potter Securities Limited, NUW (Charlie Donnelly and Tim Kennedy), Adecco, Newskills, Qenos, Hawker Britton, Holding Redlich, Iluka Resources Ltd, Olex Australia Pty Ltd,

¹²⁷ Donnelly MFI-1, pp 530-550.

¹²⁸ Donnelly MFI-1, p 510.

¹²⁹ Donnelly MFI-1, pp 505-507.

John Connolly & Partners Pty Ltd, Australian Power & Energy Limited and Forest Industries Employment and Training Services.¹³⁰

64. From the cash book receipts it is apparent that at least the NUW General and Central Branches purchased tickets to this event as well.¹³¹

65. On 1 August 2006, IR 21 held a dinner seminar ‘Treasurer John Brumby on future directions for the State of Victoria’ at The Point Restaurant, Aquatic Drive, Albert Lake. This seminar cost \$1,250 per person.¹³² Companies who attended included National Foods Ltd, Adecco and Nestle.¹³³

E – HOW THE COMPANY SPENDS ITS MONEY

The reported position

66. The profits generated by IR 21 from these events are substantial. IR 21 receives between \$200,000 and \$350,000 of income each year from its educational seminar fundraisers. It incurs between \$50,000 and \$100,000 in expenses each year to run those functions.¹³⁴ The substantial profit IR 21 receives on these events is part of the reason for its healthy balance sheet. The expenditure by IR 21 falls into five broad categories:

(a) expenditure for its fundraising events;

¹³⁰ Donnelly MFI-1, pp 415, 508-526.

¹³¹ Donnelly MFI-1, p 415.

¹³² Donnelly MFI-1, p 680.

¹³³ Donnelly MFI-1, pp 680, 683, 685.

¹³⁴ Donnelly MFI-1, pp 128, 144, 160, 177, 195, 213, 231, 250, 266, 281.

- (b) campaign expenses;
- (c) legal expenses;
- (d) consultancy fees; and
- (e) political donations.

67. As a consequence of its various fundraising and other activities, the company has generated substantial financial assets – in excess of \$1 million.¹³⁵ According to the financial statements for the year ended 30 June 2013, the company held \$170,000 in a term deposit and had a significant share portfolio worth \$417,853.¹³⁶ The picture painted in the financial statements for the preceding years is substantially the same albeit with more money in the term deposit than in shares.

68. Income from the investments contributed between \$17,000 and \$40,000 each year for the past five years to IR 21’s bottom line.¹³⁷

69. A spread sheet entitled “*IR 21 – Non Administrative Payments – 24.9.03 to 31.12.13*”¹³⁸ summarises the various donations, campaign expenses and consultancy fees which are discussed in more detail below as being:

| | | |
|-----|---------------------|----------|
| (a) | “Political” – Union | \$23,362 |
|-----|---------------------|----------|

¹³⁵ Donnelly MFI-1, p 282.

¹³⁶ Donnelly MFI-1, p 282.

¹³⁷ Donnelly MFI-1, pp 213, 231, 250, 266, 281.

¹³⁸ Donnelly MFI-1, p 1354.

- (b) “Political” – ALP \$30,500
- (c) Other – Union Objects \$128,756

Education seminar fundraising expenses

70. Education seminar fundraising expenses were in excess of approximately \$50,000 each year as set out below:¹³⁹

| Year | Expenses |
|--------------|----------|
| 30 June 2004 | \$53,258 |
| 30 June 2005 | \$49,771 |
| 30 June 2006 | \$60,091 |
| 30 June 2007 | \$89,509 |
| 30 June 2008 | \$97,941 |
| 30 June 2009 | \$93,653 |
| 30 June 2010 | \$83,433 |
| 30 June 2011 | \$83,103 |
| 30 June 2012 | \$79,762 |
| 30 June 2013 | \$77,866 |

Campaign expenses

71. In 2006, IR 21 paid \$10,762 in campaign expenses.¹⁴⁰ The breakdown of these expenses is set out in ‘Cashbook - payments for the year ended

¹³⁹ Donnelly MFI-1, pp 128, 144, 160, 177, 195, 213, 231, 250, 266, 281.

¹⁴⁰ Donnelly MFI-1, p 160.

2006'.¹⁴¹ These appear to relate to the campaign for Martin Pakula to enter the Victorian Legislative Council.

72. In 2009, IR 21 paid out \$93,068 in campaign expenses.¹⁴² These expenses (GST exclusive) appear to relate to the preparation of campaign material for a re-structure of the branches of the NUW. It was prepared by Publicity Works.¹⁴³ That campaign material made a feature of Charles Donnelly.

Legal expenses

73. In July 2004, IR 21 paid Ryan Carlisle Thomas Lawyers (the law firm that employs Ross Inglis, one of IR 21's directors) \$28,750 in relation to a matter described as 'Sword – defamation costs.' This expense is set out in the 'Cashbook - payments for the year ended 30 June 2005'.¹⁴⁴
74. Greg Sword was Charles Donnelly's predecessor as General Secretary of the NUW.¹⁴⁵ He went on to become the CEO of LUCRF after resigning in 2014.¹⁴⁶
75. Charles Donnelly gave evidence that Greg Sword was the defendant in defamation proceedings brought by Rob McCubbin who was the

¹⁴¹ Donnelly MFI-1, pp 310-312.

¹⁴² Donnelly MFI-1, p 213.

¹⁴³ Donnelly MFI-1, pp 787, 827, 847-871.

¹⁴⁴ Donnelly MFI-1, p 304.

¹⁴⁵ Charles Donnelly, 11/9/14, T:63.10-11.

¹⁴⁶ Donnelly MFI-1, p 67.

Assistant Secretary of the HSU Victorian Branch.¹⁴⁷ IR 21 paid his legal costs of those proceedings.¹⁴⁸ He said it was another ‘legacy issue’ in that he was addressing issues from the past and would have made a recommendation that it was best that IR 21 make the payment of Greg Sword’s legal costs.¹⁴⁹

76. The ‘Cashbook – payments for the year ended 30 June 2005’ record a payment of \$11,000 on 22 September 2004 that is described as ‘Cash - Sword’.¹⁵⁰ Charles Donnelly was not able to recall for what purpose this payment was made.¹⁵¹ It may be that this was the payment to Ian Jones described below but recorded in error.
77. There was an invoice issued by Ian Jones to IR 21 dated 22 September 2004 for \$11,000 for consulting fees in relation to ‘Workplace Relations in the New Millennium 2000’ and ‘Workplace Relations in the New Millennium 2001.’¹⁵² Ian Jones was the then National Vehicle Division Secretary of the Australian Manufacturing Workers’ Union (AMWU).¹⁵³ The invoices do not relate to IR 21 events (the company having only been registered in 2003). It seems that Ian Jones had arranged for each of Ford, Holden Toyota and Workplace Training Options to pay for a table at an event hosted by another entity like IR

¹⁴⁷ Charles Donnelly, 11/9/14, T:63.13-22.

¹⁴⁸ Charles Donnelly, 11/9/14, T:63.6-8.

¹⁴⁹ Charles Donnelly, 11/9/14, T:63.25-32.

¹⁵⁰ Donnelly MFI-1, p 304.

¹⁵¹ Charles Donnelly, 11/9/14, T:64.2-4.

¹⁵² Donnelly MFI-1, pp 1355-1357.

¹⁵³ Charles Donnelly, 11/9/14, T:61.14.

21 at a time when Greg Sword had been in charge of the NUW.¹⁵⁴ Ian Jones sought payment of the profit arising from their purchase and IR 21 paid him those amounts.¹⁵⁵ Charles Donnelly gave evidence that while Ian Jones did not perform any work for IR 21, he regarded this as yet another ‘legacy issue’.¹⁵⁶ He said that his predecessor Greg Sword had approached him regarding the participation of Ian Jones in a previous fundraising event which occurred in 2000-2001 and he had to make a judgement call.¹⁵⁷

78. The financial report for the year ending June 2008 contains legal expenses of \$4,350.¹⁵⁸ This amount appears to be made up of \$4,030.70 and \$319.45 which are recorded in the general ledger for that year.¹⁵⁹ The sum of \$4,030.70 appears to be made up of two components. The first is \$3,975 paid by IR 21 pursuant to a tax invoice on file issued by Steven J Moore of the Victorian Bar in relation to *Jonathan Ring v National Union of Workers*. The second is a fee of \$55.70 paid to the Australian Government – Australian Industrial Registry, reimbursing Jonathan Ring for the payment of \$55.70.¹⁶⁰ The documents produced do not explain why IR 21 paid these fees, nor why the NUW did not reimburse IR 21 for those

¹⁵⁴ Charles Donnelly, 11/9/14, T:61.16-18.

¹⁵⁵ Charles Donnelly, 11/9/14, T:61.24-29.

¹⁵⁶ Charles Donnelly, 11/9/14, T:61.2-6.

¹⁵⁷ Charles Donnelly, 11/9/14, T:61.32-39.

¹⁵⁸ Donnelly MFI-1, p 195.

¹⁵⁹ Donnelly MFI-1, p 323.

¹⁶⁰ Donnelly MFI-1, pp 1364-1367.

costs.¹⁶¹ Further, none of the documents produced explain why IR 21 was paying legal costs arising from proceedings involving the NUW.

79. The amount of \$319.45 appears to be in respect of an invoice issued by Holding Redlich for drafting the IR 21 board minutes for that year and researching what an associated entity is and whether financial contributions fall under the definition.¹⁶²

Consultancy

80. The 2010 general ledger discloses consulting fees of \$20,000.¹⁶³ These fees appear to relate to fees generated by John Armitage Message Efficiency.¹⁶⁴ An email from Narele Williams of the NUW to IR 21's auditors says 'I spoke to Charlie about this invoice and he said it was for marketing services to promote IR 21'.¹⁶⁵ There is nothing in the documents produced to the Commission by IR 21 which indicates what work John Armitage performed for these fees.

Donations

81. Set out below is a list of the recorded donations made by IR 21 over the years 2006 – 2013:¹⁶⁶

¹⁶¹ Donnelly MFI-1, p 1370.

¹⁶² Donnelly MFI-1, p 1360.

¹⁶³ Donnelly MFI-1, p 337.

¹⁶⁴ Donnelly MFI-1, pp 1372-1373.

¹⁶⁵ Donnelly MFI-1, p 1374.

¹⁶⁶ Donnelly MFI-1, pp 160, 177, 195, 213, 231, 250, 266, 281.

| Year | Expenses |
|--------------|-----------------|
| 30 June 2006 | \$10,000 |
| 30 June 2007 | \$10,000 |
| 30 June 2008 | \$7,700 |
| 30 June 2009 | \$2,000 |
| 30 June 2010 | \$4,800 |
| 30 June 2011 | \$5,800 |
| 30 June 2012 | \$11,600 |
| 30 June 2013 | \$1,750 |

82. IR 21 issued cheques to pay for many of the donations referred to above. The signatories to IR 21's cheque account appear to have been Timothy Kennedy (current General Secretary of the NUW), Charles Donnelly,¹⁶⁷ and Paul Richardson.¹⁶⁸ It would appear that none of IR 21's directors are signatories to its accounts.

83. The 2006 general ledger records a donation of \$10,000.¹⁶⁹ No invoice or receipt has been produced for this payment. However, there is a memo from John Allan, the then Federal Secretary of the Transport Workers' Union of Australia, to Charlie Donnelly informing him that \$10,000 needs to be transferred to the 'Federal Officers Fund'.¹⁷⁰ This memorandum refers to an attached memo, dated 2 September 2003, from John Allan to Charles Donnelly's predecessor at the NUW, Greg Sword. That memorandum suggests the payment was in fact a means

¹⁶⁷ Donnelly MFI-1, p 1400.

¹⁶⁸ Donnelly MFI-1, p 1404.

¹⁶⁹ Donnelly MFI-1, p 306.

¹⁷⁰ Donnelly MFI-1, p 1377.

of funnelling money from a relevant entity previously associated with the Transport Workers' Union (TWU) – namely Transport 2020 – to IR 21 and then back to a different relevant entity associated with the TWU.¹⁷¹ According to handwritten notations on the memo to Charles Donnelly, the amount of \$10,000 was paid by cheque number 90 on 1 June 2006.¹⁷²

84. The 2007 general ledger records a donation of \$10,000.¹⁷³ The invoice for this donation indicates that IR 21 made a donation of \$10,000 to the ALP in relation to the campaign for the federal seat of Charlton.¹⁷⁴ Greg Combet was the Federal member for Charlton from 2007 to 2013. He was also the speaker at the 17 November 2006 IR 21 function.¹⁷⁵ There is an additional payment of \$3,400 paid to 'ALP Western Metro (Pakula) A/C' recorded in the cashbook receipts on 9 August 2006.¹⁷⁶ It can be inferred that this was a donation to the campaign of the former NUW alumni Martin Pakula. There is no explanation as to why this amount was not recorded in the donations part of the general ledger for 2007.
85. The 2008 general ledger records a donation of \$7,700.¹⁷⁷ The invoices for these donations indicate that IR 21 made donations of:

¹⁷¹ Donnelly MFI-1, p 1378.

¹⁷² Donnelly MFI-1, p 1377.

¹⁷³ Donnelly MFI-1, p 314.

¹⁷⁴ Donnelly MFI-1, p 1379.

¹⁷⁵ Donnelly MFI-1, p 586.

¹⁷⁶ Donnelly MFI-1, p 318.

¹⁷⁷ Donnelly MFI-1, p 322.

- (a) \$5,000 to the ALP in respect of Rodney Cocks, the ALP candidate for the seat of La Trobe;¹⁷⁸ and
- (b) \$2,700 to the 'Derrick Belan Team.'¹⁷⁹

86. Bernie Shaw, the executive assistant to the National Secretary/National Campaign Director ALP sought payment from Charles Donnelly. He in turn instructed Rachel Baker, Personal Assistant, NUW to 'make out a cheque for \$5,000 from IR21'.¹⁸⁰ The ALP issued a tax invoice to the NUW following payment of the \$5,000.¹⁸¹ Rodney Cocks was unsuccessful in his campaign to represent the electorate of La Trobe.
87. The Derrick Belan Team invited Charles Donnelly to a luncheon it arranged. Charles Donnelly in his capacity as General Secretary of the NUW was listed as the contact and one of those attending the Derrick Belan Team function.¹⁸² The cashbook payment document for 2007 includes the following notation 'did not attend just donated'.¹⁸³
88. The 2009 general ledger records a donation of \$2,000.¹⁸⁴ There is a letter from Jaala Pulford, the MP for Western Victoria, to Charlie Donnelly inviting him to a luncheon on 6 August 2008 at a cost of

¹⁷⁸ Donnelly MFI-1, pp 1382-1389.

¹⁷⁹ Donnelly MFI-1, pp 1390-1392.

¹⁸⁰ Donnelly MFI-1, p 1383.

¹⁸¹ Donnelly MFI-1, p 1386.

¹⁸² Donnelly MFI-1, p 1392.

¹⁸³ Donnelly MFI-1, p 327.

¹⁸⁴ Donnelly MFI-1, p 331.

\$1,000 per person.¹⁸⁵ The IR 21 expense form includes the following handwritten notation ‘Donation – didn’t attend.’¹⁸⁶

89. The 2010 general ledger records a donation of \$4,800.¹⁸⁷ This appears to refer to an invitation to a dinner held on 22 April 2010 with Martin Pakula as the guest speaker.¹⁸⁸ On the invitation there is a handwritten notation referring to ‘Ab Hinc’. Ab Hinc is a fund associated with Marlene Kairouz.
90. The 2011 general ledger records a donation of \$5,800.¹⁸⁹ IR 21 made donations of:
- (a) \$4,800 which appears to have been a donation to the Labor Unions Forum in respect of a dinner featuring Tim Holding, Shadow Treasurer and Shadow Minister for Industry, held on 27 April 2011;¹⁹⁰ and
 - (b) \$1,000 which appears to have been a donation to a Southern Cross Fund Fundraiser.¹⁹¹
91. The 2012 general ledger records a donation of \$11,600¹⁹² made up as follows:

¹⁸⁵ Donnelly MFI-1, p 1394.

¹⁸⁶ Donnelly MFI-1, p 1393.

¹⁸⁷ Donnelly MFI-1, p 337.

¹⁸⁸ Donnelly MFI-1, p 1395.

¹⁸⁹ Donnelly MFI-1, p 343.

¹⁹⁰ Donnelly MFI-1, p 1397.

¹⁹¹ Donnelly MFI-1, p 975.

- (a) \$5,000 which was a donation to the 'Australian Labor Party (Port Adelaide Campaign)' c/o Dave Garland;¹⁹³
- (b) \$2,000 which was a donation to the ALP Central MEC.¹⁹⁴ The non-Administrative Payments document records this as the Brisbane Council Crowther Fundraiser;¹⁹⁵ and
- (c) \$4,600 which was the cost of a table of 10 at a Labor Unions Forum Lunch featuring Tim Lyons on 14 June 2012.¹⁹⁶ The cheque for this event appears to have been signed by Paul Richardson, the Assistant Secretary, NUW.¹⁹⁷

92. On 11 April 2013, IR 21 also made two other donations. The first was a donation of \$1,500 to Lyndhurst SECC. The purchase was said to be for fifty \$30 fundraising raffle tickets.¹⁹⁸ Lyndhurst is the seat of the former NUW alumnus Martin Pakula. The second was a donation of \$500 to Mario Royeca (Communication Workers' Union) divisional vice-president fundraiser barbeque, drinks and raffle. The note on the invitation says: 'Hi Tim if you could arrange cash it would be good Thanks Ray'.¹⁹⁹ The reference to Tim is probably a reference to Tim Kennedy, Charles Donnelly's successor as Secretary of the NUW.

¹⁹² Donnelly MFI-1, p 353.

¹⁹³ Donnelly MFI-1, pp 1399-1400.

¹⁹⁴ Donnelly MFI-1, pp 1401-1402.

¹⁹⁵ Donnelly MFI-1, p 1354.

¹⁹⁶ Donnelly MFI-1, p 1403.

¹⁹⁷ Donnelly MFI-1, p 1404.

¹⁹⁸ Donnelly MFI-1, p 1405.

¹⁹⁹ Donnelly MFI-1, p 1407.

93. A further donation of \$5,000 to the ALP National Secretariat in respect of the ‘Shorten Leadership Campaign’ on 26 September 2013 is recorded, in the spreadsheet entitled ‘IR 21 – Non Administrative Payments – 24.9.03 to 31.12.13.’²⁰⁰
94. On 12 April 2013, the NUW Victoria Branch caused \$184,293.96 to be placed into the account of IR 21.²⁰¹ Charles Donnelly gave evidence that this was the officers’ election fund that was transferred across for investment purposes to earn a better return.²⁰²

F – MEMBER AWARENESS

95. There is no evidence that NUW members were made aware of the fact that Charles Donnelly operated IR 21 as he did. There does not appear to have been any disclosure, let alone adequate disclosure, to NUW members of the existence and function of IR 21.

G – ASSESSMENT OF THE CONDUCT OF OFFICIALS

96. In light of the facts set out above and the duties of union officers earlier described and other relevant laws, consideration has been given to whether the officers of IR 21 have engaged in any wrongdoing, and if so, the extent to which the existing laws provide members with protection and a means of redress.

²⁰⁰ Donnelly MFI-1, p 1354.

²⁰¹ Donnelly MFI-1, pp 1408, 1414.

²⁰² Charles Donnelly, 11/9/14, T:64.28-35.

Breaches of fiduciary duty

97. IR 21 is a fundraising organisation.
98. The objects of the NUW also plainly extend to, and permit, the raising of funds by it and the donation of funds by it. For example, under the rules of this registered organisation, its objects include:
- (2) To authorise the National Council and/or Branches to raise funds by contributions, entrance fees, levies, fines, interest from loans and on money lent, interest on bank deposits and/or interest on Commonwealth bonds, debentures, or shares, as may be determined by National Council and/or Branch Committee of management from time to time.
 - (16) To establish a fund or funds for mutual assistance and support for the carrying out of these objects and to foster co-operation where practicable.
 - (17) To raise funds by levy for the attainment of these objects.
 - (22) To pay affiliation fees to assist financially or otherwise any bona fide Labour or Trade Union organisation or association.
99. The objects of the NUW in respect of which it may raise money include, amongst other things, objects consistent with at least some of those of IR 21.
100. Two of the directors of IR 21 were members of the legal profession. The third director and the Secretary were elected by the members of the NUW to hold office and to exercise their powers and perform their duties for the union.
101. It was by virtue of Charles Donnelly's status as General Secretary of the NUW, and the standing, power and influence those positions gave

him, that the directors had the opportunity to attract custom to the profitable IR 21 fundraising events referred to above.

102. In these circumstances, Charles Donnelly used his position as an officer of the NUW to gain an advantage for IR 21 to the detriment of the NUW.
103. All of the monies raised by IR 21 could have been raised by the NUW for the benefit of its members. Yet they were not. Instead the opportunity was directed to IR 21 and the funds were directed into the bank account of that company.
104. It would seem that the activities of IR 21 came at a significant cost to the members of the NUW. The National Office, Central Branch and Victorian Branch of the NUW have all contributed to financing IR 21, since its inception, by buying on average 70 tickets to IR 21's functions.
105. It is no answer to say that the objects of IR 21 are similar to those of the NUW. Nor is it an answer to say that the NUW may ultimately derive some indirect or ultimate benefit from some part of the operations of IR 21.

Conflict of duties

106. Charles Donnelly accepted that he had both a duty to act in the best interests of IR 21 and an obligation to act in the best interests of the union and its members.²⁰³ Likewise he accepted that there was a sharp

²⁰³ Charles Donnelly, 11/9/14, T:52.16-23.

conflict between those two roles because, on the one hand, he wanted to maximise revenue to IR 21 by eliminating costs²⁰⁴ and on the other hand the union was supplying without charge the services of persons organising these elaborate functions on a yearly basis.²⁰⁵ However, while he acknowledged that on reflection the union should have been invoicing IR 21 for its services, he did not agree, somewhat inconsistently, that there was an obvious conflict of interest. He would accept only that ‘things could have been done differently’.²⁰⁶ Charles Power acknowledged that consideration had only been given to this issue in the last year or so.²⁰⁷

107. Charles Donnelly agreed that as Secretary of the NUW he owed a duty to maximise the revenue for members.²⁰⁸ However he denied the suggestion that he was not acting in the best interest of the NUW in his promotion of IR 21.²⁰⁹ Similarly, he denied the suggestion that he was deploying union resources for the benefit of IR 21²¹⁰ and that he used his position as an officer of the NUW to benefit an entity other than the union.²¹¹
108. Charles Power gave evidence that he was aware that IR 21 did not pay the NUW for the services the NUW provided to it during the period

²⁰⁴ Charles Donnelly, 11/9/14, T:52.25-28.

²⁰⁵ Charles Donnelly, 11/9/14, T:52.30-33.

²⁰⁶ Charles Donnelly, 11/9/14, T:52.34-40.

²⁰⁷ Charles Power, 11/9/14, T:70.38-41.

²⁰⁸ Charles Donnelly, 11/9/14, T:64.42-47.

²⁰⁹ Charles Donnelly, 11/9/14, T:65.13-16.

²¹⁰ Charles Donnelly, 11/9/14, T:65.18-20.

²¹¹ Charles Donnelly, 11/9/14, T:65.26-28.

2003 to 2013.²¹² He even referred to the functions as ‘these fundraisers for the NUW’ before changing his evidence to say that the company of which he is a director was deliberately organised to avoid the intermingling of union moneys with that of the fund.²¹³ He acknowledged that the NUW was devoting considerable resources for the benefit of IR 21.²¹⁴

109. Charles Donnelly gave evidence that the information he used to promote the interests of IR 21 was publicly available information and he simply invited companies along.²¹⁵ The documents reveal that the practice of Charles Donnelly and other organisers at the NUW was far more involved than he was prepared to admit.

Shadow director

110. Charles Donnelly gave evidence that it was he, not the directors, who was in control of the day to day management of the company’s affairs including the organisation of functions, the issuing of invoices, the collection of payment, the consideration as to what functions should be held.²¹⁶ He described the directors as a ‘source of help’ in organising the events,²¹⁷ apparently as people to bounce ideas off. He agreed that

²¹² Charles Power, 11/9/14, T:68.34- 37.

²¹³ Charles Power, 11/9/14, T:69.4-12.

²¹⁴ Charles Power, 11/9/14, T:70.21-28.

²¹⁵ Charles Donnelly, 11/9/14, T:65.31-43.

²¹⁶ Charles Donnelly, 11/9/14, T:34.44-35.1.

²¹⁷ Charles Donnelly, 11/9/14, T:35.3-12.

he regularly spoke to the directors about administrative arrangements in relation to guest speakers and themes and matters of that nature.²¹⁸

111. It was put to Charles Donnelly that the directors were not doing much on a day to day basis. His only response was to say ‘They were acting as directors. They were doing what they were required – what the rules required of them.’²¹⁹ Charles Power gave evidence that he was aware of the planning process associated with functions and was requested to invite people to the functions. But he admitted that he was not aware of the day to day operational aspects of the company and had not taken part in that.²²⁰ He gave evidence that this was undertaken by Charles Donnelly and others at the NUW.²²¹
112. Charles Donnelly gave evidence that it was he who would present the audit report to the directors of IR 21 at meetings held once, occasionally twice, a year.²²²
113. It seems the directors had little knowledge or control over the operation of the company. For example, when the auditors had questions in relation to the company’s records those queries were answered by Charles Donnelly. Likewise, it seems that officials of the NUW simply directed cheques to be drawn from the accounts of IR 21 at will.²²³ No directors were copied to these emails. The simple fact is that there is

²¹⁸ Charles Donnelly, 11/9/14, T:66.29-32.

²¹⁹ Charles Donnelly, 11/9/14, T:52.11-14.

²²⁰ Charles McLean Power, 11/9/14, T:68.25-32.

²²¹ Charles McLean Power, 11/9/14, T:72.20-27.

²²² Charles Donnelly, 11/9/14, T:33.10-16.

²²³ Donnelly MFI-1, p 1400.

very little evidence to indicate that the directors did much at all in the discharge of their duties. Charles Donnelly was in a position of hopeless conflict for a period approaching ten years. Yet his evidence was to the effect that the first time he recalled the board discussing the issue was at the last meeting.²²⁴ It is clear that the NUW failed to levy charges for the work it performed in organising the functions throughout the entirety of the period 2004 to 2013.²²⁵

The NUW submissions on breach of fiduciary duty

114. The NUW submissions contended that there was no breach of fiduciary duty.
115. Those submissions said many times that all funds spent by IR 21 were spent within its purposes. That may be accepted. But it is irrelevant to the question whether any breach of fiduciary duty took place in the raising, as distinct from the expenditure, of those funds.
116. The NUW submissions said that the company maintained excellent records.²²⁶ That is not true for minutes of directors' meetings – for some do not exist and the rest were suspiciously brief and formulaic. Sometimes, of course, there was nothing to record, for no directors' meetings were held at all in the years 2004-2005 and 2009-2010.²²⁷ The submission that the company maintained excellent records is also not true of various mysterious payments discussed above.

²²⁴ Charles Donnelly, 11/9/14, T:52.42-47.

²²⁵ Charles Donnelly, 11/9/14, T:53.10-15.

²²⁶ NUW submissions, 14/11/14, para 8.

²²⁷ Donnelly MFI-1, pp 141, 228.

117. The NUW submissions said that the board of IR 21 was involved in its governance but delegated the day-to-day organisation of the seminars to Charles Donnelly. Indeed his role was so great that counsel assisting were right to characterise him as a shadow director. It is true that the affairs of a company like IR 21 did not require the directors to spend a substantial amount of time in managing them.²²⁸ But in reality the board's contact with the affairs of IR 21 was perfunctory even in relation to that not very onerous standard. In particular, a board with two solicitors on it ought to have perceived the intense conflicts between Charles Donnelly's duties to the NUW and his duties (as a shadow director) to IR 21 much sooner than they did, in 2013.²²⁹ In supine fashion the directors allowed Charles Donnelly to run the only business of IR 21 – fundraising – often pursuant to express delegation.²³⁰

118. Then the NUW submissions said that the relevant opportunity which Charles Donnelly and other NUW officials perceived and exploited was the opportunity to raise funds for re-election purposes. That opportunity was not available to the NUW because the law forbids union funds being used in union election campaigns.²³¹ This takes too narrow an approach. The opportunity was the opportunity to raise funds generally. There was nothing wrong with setting up IR 21 to exploit that opportunity so long as it did not involve the exploitation of NUW resources. The problem was that Charles Donnelly exploited the opportunity using NUW resources like its staff, its name, its goodwill

²²⁸ NUW submissions, 14/11/14, para 36.

²²⁹ Charles Donnelly, 11/9/14, T:51.30-36.

²³⁰ Donnelly MFI-1, pp 291-293.

²³¹ *Fair Work (Registered Organisations) Act 2007* (Cth) s 190.

among those it dealt with, and its money spent on tickets. Although no re-election campaigns actually took place in the relevant period, there was never any effective disclosure of the fact that the money raised at the seminars using NUW resources could be used to secure the re-election of officials, even though those attending would have been likely to think they were supporting the NUW, which was forbidden to pursue that purpose.

119. The NUW submissions rely on the fact that the auditors of IR 21 have never identified any irregularities and have not qualified their audit report. These facts have no significance. The auditors did not know the factual matters set out above which were uncovered only after much detailed work by the staff of the Commission.
120. Hence the NUW's arguments against the view that there was no breach of fiduciary duty cannot prevail. There may have been a breach.

Breaches of statutory duties

121. At this point it is necessary to consider some submissions of counsel assisting about which judgment should be suspended.
122. IR 21 is different from several other entities the Commission has looked at in that it had two independent directors on its board together with a representative of the NUW.
123. Despite this, counsel assisting submit, Charles Donnelly's conduct in deciding to present the events as IR 21 events rather than NUW events was conduct 'in relation to the financial management' of the NUW

within the meaning of that expression in s 283 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

124. In this regard, Charles Donnelly had the power and duty to ensure that the opportunity was taken by the NUW. The opportunities were available to the union. They were financial opportunities. And they were capable of being managed by the officers of the union for the benefit of the union. The conduct of the individuals with respect to these opportunities was, therefore, conduct in relation to the financial management of the union.
125. For the same reasons as given in relation to the breach of fiduciary duty counsel assisting submit, Charles Donnelly and others improperly used their positions as union officers to gain an advantage for IR 21 and themselves to the detriment of the NUW and its membership. In so doing they contravened s 287 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
126. In addition, counsel assisting submit the success of the IR 21 events depended upon Charles Donnelly and others using information that they had obtained because they were officers and employees of NUW (in terms of the identity of persons likely to be willing to sponsor or participate in the fund raising events) in order to gain an advantage for IR 21 and themselves to the detriment of the NUW and its members in contravention of s 288 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
127. The NUW submissions attack these arguments on various grounds which it is not necessary to consider. That is because there is a

significant question, not raised by the NUW submissions, of whether the behaviour of IR 21 in advancing its interests at the expense of the NUW's can be described as conduct 'in relation to the financial management' of the NUW. It is not desirable to resolve that question on this occasion. Hence no finding is made that Charles Donnelly or anyone else contravened s 287 or s 288 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

Solicitors

128. It is regrettable that two experienced solicitors were involved in this state of affairs. Of these two solicitors only Charles Power gave evidence. It is true that hindsight can make problems noticeable and soluble which are not so easily perceived at an earlier stage. But Charles Power's consciousness of the difficulties created in law by the existence and behaviour of IR 21 seemed surprisingly limited. The submission by counsel assisting to this effect was not answered by the NUW submissions. Thus Charles Power did not agree that there was a conflict between the interests of NUW and the interests of IR 21.²³² He spoke in euphemistic terms of 'steps [having been] taken to ensure that the resource burden associated with the operations of IR 21 were not so unduly resting on the union'.²³³ But those steps were ineffectual. They did not face up to the central difficulty: that NUW paid much of the prices to be paid for the profits made from the seminars, and *none* of those profits went to the NUW. Charles Power 'absolutely' disagreed with the proposition that there was 'a real problem ... with fundraisers

²³² Charles Power, 11/9/14, T:70.3.

²³³ Charles Power, 11/9/14, T:70.5-28.

being organised in substance by the union but profits from those fundraisers being directed into a separate entity such as IR 21'.²³⁴ He also disagreed with the proposition that 'the practical problem is that the resources of the union are created using members' money, but members don't see the benefit of the monies realised by the functions'.²³⁵ One good reason for having solicitors on the boards of companies which are their clients (eg IR 21) or connected with their clients (eg the NUW) is that they can warn against breaches of the law which lay people might not readily identify. The evidence does not suggest that this function was performed in relation to IR 21 until 2013. Even then it was performed only inconclusively.

²³⁴ Charles Power, 11/9/14, T:70.43-47.

²³⁵ Charles Power, 11/9/14, T:71.2-6.

CHAPTER 3.6

THE TRANSPORT, LOGISTICS, ADVOCACY AND TRAINING ASSOCIATION

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A – FACTS

1. This chapter concerns a relevant entity associated with the TWU and its officers in Victoria. It is known as the Transport, Logistics, Advocacy and Training Association (**the Association**). The following findings are made, based substantially on the submissions of counsel assisting to the following effect. Apart from specific matters dealt with below, counsel assisting's contentions concerning the primary facts, were unchallenged.

Structure of the Association

2. The Association is an incorporated association that was registered on 27 May 2010.¹
3. Its purposes are:
 - (a) to promote greater awareness and understanding of the critical role of transport logistics in building Australia's future;
 - (b) to support the training and development of transport workers with the view to assisting their development as active representatives of the industry and their fellow workers;
 - (c) to conduct conferences, seminars and events to pursue these goals; and

¹ TWU VicTas Tender Bundle, pp 136-137.

(d) to raise funds to meet any or all of these objectives.²

4. Wayne Mader was the first President of the Association. He is the current Branch secretary of the TWU Victoria Tasmania Branch. Howard Smith was appointed Vice-President. Bill Baarini was appointed Secretary. John Halloran was appointed Treasurer.³ Bill Baarini was also appointed as the Association's Public Officer.⁴ He was a publicity officer with the TWU Victoria Tasmania Branch up until 16 May 2012. He is currently the legal officer of the Victorian TWU.
5. With effect from 14 May 2012, John Halloran resigned as Treasurer of the Association.⁵ John Berger was appointed to fill this position, effective immediately.⁶
6. Bill Baarini ceased being Secretary of the Association on 17 October 2013.⁷ He was replaced by Christopher Fennell, the Trustee of the Victoria and Tasmania Branch of the TWU.⁸
7. No documents were produced to the Commission that identified the members of the Association.⁹

² TWU VicTas Tender Bundle, pp 138-139.

³ TWU VicTas Tender Bundle, pp 138-139.

⁴ TWU VicTas Tender Bundle, pp 138-139.

⁵ TWU VicTas Tender Bundle, pp 151-152. Mr Halloran was a publicity officer with the TWU Victoria Tasmania Branch up until 16 May 2012.

⁶ TWU VicTas Tender Bundle, pp 151-152.

⁷ TWU VicTas Tender Bundle, pp 136-137.

⁸ TWU VicTas Tender Bundle, pp 164-165.

Revenue

8. The documents produced to the Commission demonstrate that the Association has generated its revenue through organising functions.¹⁰ To date the Association has held two functions, one in 2010 and the other in 2012.

2010 luncheon seminar

9. The first event was a function on 27 July 2010 at Moonee Valley Racing Club Inc titled 'Transport Logistics and Australia's Future'.¹¹ The then Federal Treasurer, the Hon Wayne Swan, was the guest speaker.¹² Tickets were \$500 per person, or \$5,000 for a table of ten.¹³
10. The flyer for the event directed guests to pay their attendance money by cheque or money order to the Association or by direct payment into the Association's Business Transaction Account.¹⁴
11. The flyer stated the event was 'sponsored' by the Association.¹⁵ The point of the function was to engage in fundraising for the Association.

⁹ See Notice to Produce No. 134.

¹⁰ TWU VicTas Tender Bundle, pp 133-134.

¹¹ Wayne Mader, witness statement, 15/8/14, para 32(a); TWU VicTas Tender Bundle, pp 184-191.

¹² Shane Dyson, affidavit, 14/8/14, para 10.

¹³ Wayne Mader, witness statement, 15/8/14, para 32(a); TWU VicTas Tender Bundle, p 184.

¹⁴ TWU VicTas Tender Bundle, p 184.

¹⁵ TWU VicTas Tender Bundle, p 184.

It generated approximately \$93,550 in revenue for the Association.¹⁶ The expenses incurred were borne by the TWU Team Fund in an amount of \$14,224.18.¹⁷ The net revenue received by the Association was \$79,325.82.

12. Purchasers of tickets to the event were drawn from:

- (a) companies that dealt with the TWU;
- (b) other unions;
- (c) the McLean Forum; and
- (d) lawyers for the TWU.

13. They included the following:¹⁸

| Name of company or employer association | Name of union or relevant entity | Other | Amount |
|--|---|-------------------|---------------|
| CDC Victoria | | | \$5,000 |
| | AWU Victoria | | \$5,000 |
| Ventura Bus Line | | | \$5,000 |
| | NUW | | \$5,000 |
| | | Maurice Blackburn | \$5,000 |

¹⁶ TWU VicTas Tender Bundle, pp 179-181, 134-135. It may also have generated \$5,000 from the HSU and \$5,000 from Australian Air Express. These amounts were received in 2011: it is not clear whether they relate to the 27 July 2010 lunch.

¹⁷ Team Fund MFI-1, p 1.

¹⁸ TWU VicTas Tender Bundle, p 133.

| | | | |
|--------------------------------|---------------------------|---------------------------|----------|
| | | Maurice Blackburn Lawyers | \$5,000 |
| | Rail, Train and Bus Union | | \$5,000 |
| Grenda Corporation | | | \$5,000 |
| Qantas | | | \$5,000 |
| | SDA | | \$5,000 |
| LC Dyson Bus Services | | | \$5,000 |
| Barro Group P/L | | | \$4,500 |
| Star Track Express | | | \$2,000 |
| Calleja Transport | | | \$1,000 |
| Victoria Transport Association | | | \$5,000 |
| McLean Forum | | | \$20,000 |
| Murray Goulburn | | | \$5,000 |
| Linfox | | | \$5,000 |
| | HSU | | \$5,000 |
| Australian Air Express | | | \$5,000 |

NOTE: The last two payments (HSU and Australian Air Express) are not included in the \$93,550 as they were received in 2011.

14. The set-up costs for the seminar were paid out of the 'Team Fund'.¹⁹ That is a separate entity. The evidence explained the reason for this as being a mix-up in the accounts held by the Association.²⁰

¹⁹ Wayne Mader, 19/8/14, T:45.34-38; TWU VicTas Tender Bundle, pp 33, 36-40.

²⁰ John Halloran, 19/8/14, T:102.34-40.

15. To at least one guest, the luncheon did not appear to be a fundraising event. Shane Dyson, Director of the Dyson Group of Companies, assumed that the amount paid by the company to attend the function was to 'cover the cost of the lunch and to pay the speaker'.²¹ He did not know if any profit was raised by the luncheon, and if it was, how such profit was spent.²² The TWU submitted:²³

Mr Dyson was not made available for cross-examination. How he could not understand that a payment of \$5,000 for a table of ten not to be [sic] a fundraising function is unclear and was not tested.

16. Shayne Dyson's affidavit was received into evidence without objection even though counsel assisting indicated that he was not available for cross-examination.²⁴ If the TWU had regarded it as important to challenge Shane Dyson's evidence, arrangements could have been made for him to be cross-examined at some stage in the period of over three months between his affidavit and the delivery of this Interim Report. The Commission was given no indication that this was desired. No doubt his reasoning was flawed in part, for it is highly unlikely that the speaker, the Hon Wayne Swan, would have charged a fee. The fact remains that the circumstances led him to an erroneous and uncorrected assumption. It may be noted that this 2010 event, held at Moonee Valley Racing Club Inc,²⁵ is distinct from another event addressed by the Hon Wayne Swan which may or may not have taken place at Circular Quay, Sydney, in 2010.

²¹ Shayne Dyson, affidavit, 14/8/14, para 9.

²² Shayne Dyson, affidavit, 14/8/14, para 9.

²³ Written submissions on behalf of the Transport Workers' Union of Australia, 14/1/14, para 249.

²⁴ John Halloran, 19/8/14, T:109.18-29.

²⁵ Exhibit SD-1 to the affidavit of Shane Dyson, 14/8/14.

2012 function

17. On 28 September 2012, the Association held another function at the Moonee Valley Racing Club Inc.²⁶
18. The event was titled ‘Transport and the Economy’ and tickets were \$500 per person, or \$5,000 for a table of ten.²⁷ 160 guests attended the function.²⁸ As with the 2010 function, the purchasers of tickets were substantially drawn from companies with whom the Branch and its officers had dealings in the course of their duties as officials of the Branch. The table below records the names of entities who purchased tickets as recorded in the bank records of the Association:²⁹

| Name of company or employer association | Name of union or related entity | Amount |
|---|---------------------------------|---------|
| | NUW Vic Branch | \$5,000 |
| Ventura Bus Line | | \$1,500 |
| | TWU WA Branch | \$1,000 |
| Ventura Bus Line | | \$3,500 |
| Victorian Transport Association | | \$5,000 |
| Ray Wyatt Transport | | \$1,000 |
| CDC Victoria | | \$1,000 |
| LC Dyson Bus Services | | \$1,000 |
| | RTBU National | \$2,000 |

²⁶ TWU VicTas Tender Bundle, p 198; Wayne Mader, witness statement, 15/8/14, para 32(b).

²⁷ Wayne Mader, witness statement, 15/8/14, para 32(b).

²⁸ TWU VicTas Tender Bundle, p 198.

²⁹ TWU VicTas Tender Bundle, pp 133-134.

| | | |
|------------------------|------------------|----------|
| Star Track Express | | \$5,000 |
| Linfox | | \$1,000 |
| Australian Air Express | | \$2,500 |
| | CEPU Vic | \$5,000 |
| Murray Goulburn | | \$500 |
| | AWU Vic | \$5,000 |
| | McLean Forum Ltd | \$10,000 |
| Toll | | \$5,000 |

19. The revenue raised by the function accounts for a considerable portion of the Association's total income of \$56,500 for the year ending 31 December 2012.³⁰ (The figure of \$56,500 includes \$5,000 received from the AWU and banked on 4 January 2013, but does not include the McLean Forum Ltd or Toll payments, in the previous table, because they were received later in 2013).

Other expenditure

20. The documents produced to the Commission show that aside from expenditure associated with the two functions that it has held, the Association has had few other items of expenditure. Two are significant and unusual.

³⁰ TWU VicTas Tender Bundle, pp 133-134, 153-154.

McLean Forum payment

21. On 1 October 2012, the Association drew a \$10,000 cheque payable to the 'McLean Foundation' for 'NSW 2010 Industrial Seminar'.³¹
22. This cheque was presented on 11 December 2012.³² Wayne Mader said the reason for the delay in payment was that the Association simply 'forgot to pay it'.³³
23. On the oral evidence of Wayne Mader, this payment was made in relation to a function in New South Wales held in 2010 by the McLean Forum Ltd (**McLean Forum**). He said that the Association attended it.³⁴
24. Wayne Mader described the event as being 'an industrial type luncheon/dinner'³⁵ for 'the McLean Foundation New South Wales Elections'.³⁶
25. There is no record in the books of the McLean Forum that it held a function in 2010.³⁷ The McLean Forum's records do record the receipt, on 9 December 2010, of \$10,000 from Combined Communications Network Pty Limited and \$5,000 from Maurice

³¹ TWU VicTas Tender Bundle, p 235.

³² TWU VicTas Tender Bundle, p 212.

³³ Wayne Mader, 19/8/14, T:81.38.

³⁴ Wayne Mader, 19/8/14, T:81.32-34.

³⁵ Wayne Mader, 19/8/14, T:83.40-41.

³⁶ Wayne Mader, 19/8/14, T:84.1-2.

³⁷ For further information on the McLean Forum Ltd, see Chapter 4.2.

Blackburn Lawyers³⁸ which give the invoice description 'Lunch with Wayne Swan (Toni)'.³⁹ Three months later, on 25 March 2011, Maurice Blackburn Lawyers paid a further \$20,000 to the McLean Forum.⁴⁰ The invoice description for that payment recorded on Maurice Blackburn's remittance slip was 'Lunch with Wayne Swan (NM)'.⁴¹ There are three curious aspects of these payments.

26. First, other than the payments from Combined Communications Network Pty Limited and Maurice Blackburn, there were no payments made to the McLean Forum for 'functions' (however loosely described) in 2010. Nor were any expenses for the hosting of any functions recorded in the books of the McLean Forum for 2010. That would suggest no function was held. There is no documentary evidence that the Association's payment of \$10,000 to the McLean Forum in 2012 related to a function held by the McLean Forum in 2010. However, Tony Sheldon testified that a function took place in 2010 at Circular Quay which the Hon Wayne Swan addressed.⁴²
27. Secondly, apart from the remittance slip of Maurice Blackburn in March 2011 for a 'lunch with Wayne Swan', there is no other evidence to support the suggestion that a luncheon was held in 2011. If there was a lunch, only Maurice Blackburn appears to have paid.⁴³ Again, the McLean Forum's accounts record no expenditure associated with

³⁸ TWU McLean Forum Tender Bundle Vol 1, p 180-181.

³⁹ TWU McLean Forum Tender Bundle Vol 1, p 181.

⁴⁰ TWU McLean Forum Tender Bundle Vol 1, p 177.

⁴¹ TWU McLean Forum Tender Bundle Vol 1, p 178.

⁴² Anthony Sheldon, witness statement, 20/8/14, para 28.

⁴³ TWU McLean Forum Tender Bundle Vol 1, p 170.

hosting such an event (such as paying for a venue or for luncheon expenses).⁴⁴ The TWU submitted:⁴⁵

There is no mystery to the fact that no payments appear to have been made to the McLean Forum in relation to the function. Mr Sheldon gave evidence that, aside from Maurice Blackburn, other attendees did not make promised contributions and the event was not successful from a fundraising perspective.⁴⁶

28. If Tony Sheldon's memory is to be relied on, this event took place in 2010, not 2011. And the TWU's submission does not explain why there was no record of payments for a venue or for luncheon expenses.
29. Thirdly, one explanation of these curious payments is that the McLean Forum, which paid the Association \$20,000 on 8 September 2010⁴⁷ for the Association's hosting of a luncheon seminar with Wayne Swan, sought and obtained funding from Maurice Blackburn to cover those costs. If so, then it would seem the McLean Forum made a profit of \$15,000 (having recovered \$10,000 from Combined Communications Network Pty Limited in December 2010 and \$25,000 from Maurice Blackburn) on 9 December 2010 and 25 March 2011 from purchasing tables to the Association's 2010 Luncheon Seminar. The TWU submitted:⁴⁸ 'There is no basis to the speculation of Counsel Assisting in relation to the funding of this function.' But the scandalous inadequacy of the records left counsel assisting with no alternative but

⁴⁴ TWU McLean Forum Tender Bundle Vol 1, p 170.

⁴⁵ Written submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 251.

⁴⁶ Anthony Sheldon, witness statement, 20/8/14, para 28.

⁴⁷ TWU VicTas Tender Bundle, p 133.

⁴⁸ Written submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 251.

to speculate. What is not speculative is counsel assisting's submission that whatever may be the true position concerning the activities of the McLean Forum, no adequate explanation has been given by officers of the Association as to the purpose and legitimacy of the Association's \$10,000 payment to the McLean Forum in 2012.

Donation to Tony Sheldon's ALP campaign

30. In 2011 Tony Sheldon unsuccessfully ran for the position of President of the ALP.
31. Wayne Mader gave evidence that the Association agreed to contribute to Mr Sheldon's campaign.⁴⁹
32. On 14 October 2011, the Association drew a cheque payable to cash described on the cheque butt as 'mailing costs for Tony Sheldon's election campaign for ALP Federal President'.⁵⁰ This cheque was cashed on 14 October 2011.⁵¹
33. Wayne Mader justified this expenditure on the basis that '[h]aving Tony Sheldon occupy the position of ALP Federal President would raise the profile of the transport industry and of issues of concern to transport workers.'⁵² While this is probably true, it is strange that the records of the Association do not disclose any communication of this payment to contributors.

⁴⁹ Wayne Mader, witness statement, 15/8/14, para 34.

⁵⁰ TWU VicTas Tender Bundle, p 227.

⁵¹ TWU VicTas Tender Bundle, p 143.

⁵² Wayne Mader, witness statement, 15/8/14, para 34.

TWU Team Fund

34. Monies were taken out of the TWU Team Fund to cover costs incurred by the Association on two occasions.
35. On Wayne Mader's evidence, the signatories and the members of the TWU Team Fund allegedly paid for these expenses as 'the Association did not have any funds' at the time.⁵³
36. On the first occasion, a cheque dated 16 August 2010 for the amount of \$12,263 was drawn by the TWU Team Fund and paid to cash.⁵⁴ On the evidence of Wayne Mader, this cash was used to pay various costs associated with the event, such as the airfare of one of the guest speakers, the costs of sending out the invites, the cost of some printing material, a mobile phone and some small gifts for the guest speakers.⁵⁵
37. No records, invoices or the like were retained by the operators of the TWU Team Fund in relation to these payments.⁵⁶
38. The second cheque drawn by the TWU Team Fund was dated 24 August 2010 and was for the sum of \$13,665.18.⁵⁷ This cheque was made out to Moonee Valley Racing Club and was paid in relation to venue costs.⁵⁸ However, this payment was subsequently reversed.

⁵³ Wayne Mader, 19/8/14, T:57.29-31.

⁵⁴ TWU VicTas Tender Bundle, pp 36, 38.

⁵⁵ Wayne Mader, 19/8/14, T:60.33-38, 79.15-21.

⁵⁶ Wayne Mader, 19/8/14, T:61:13-14.

⁵⁷ TWU VicTas Tender Bundle, pp 36, 40.

⁵⁸ TWU VicTas Tender Bundle, p 40; Wayne Mader, 19/8/14, T:60.25.

39. The payment was then made by John Halloran out of his personal account.⁵⁹ On 4 October 2010, the TWU Team Fund (not the Association which was hosting the event and earning the revenue generated from it) reimbursed John Halloran \$13,674.18⁶⁰ for this expense.⁶¹
40. At the beginning of August 2010, the Association had a total of \$55,550 in its Business Transaction Account.⁶² The Association had the funds to pay for the expenses but for no explicable reason, the officers of the TWU used the TWU Team Fund.
41. On 30 June 2014, a cheque dated 24 June 2014 (endorsed by Wayne Mader and John Berger) was deposited into the TWU's TWU Team Fund.⁶³ The cheque was for \$14,224.18.⁶⁴
42. When giving oral evidence to the Commission, Wayne Mader could not recall the precise makeup of this payment.⁶⁵ He has subsequently produced an Invoice dated 27 June 2014 to the Association from the TWU Team Fund.⁶⁶ This payment was in the form of a refund for monies paid by the TWU Team Fund for expenses that the Association

⁵⁹ John Halloran, 19/8/14, T:103.1.

⁶⁰ The difference between \$13,665.18 and \$13,674.18 could not be explained by John Halloran: John Halloran, 19/8/14, T:104.11-12.

⁶¹ TWU VicTas Tender Bundle, p 49.

⁶² TWU VicTas Tender Bundle, p 133.

⁶³ TWU VicTas Tender Bundle, p 61. For further information on the TWU Team Fund, see Chapter 4.4.

⁶⁴ TWU VicTas Tender Bundle, p 222.

⁶⁵ Wayne Mader, 19/8/14, T:72.35-36; T:73.1-46.

⁶⁶ In response to Notice to Produce No. 466 dated 22 August 2014.

incurred in organising its 2010 Moonee Valley function – namely one payment of \$550 and the other the aforementioned \$13,674.18.⁶⁷

43. The fact that this invoice was raised almost four years after funds of the TWU Team Fund were used for the purposes of funding the activities of the Association, and that it is dated two days after the Commission issued Notice to Produce No. 172 to the TWU Victoria Tasmania branch in respect of the TWU Team Fund⁶⁸ is no coincidence. The only reason the TWU Team Fund was reimbursed for the payments it had made on the Association's behalf was because of apprehended scrutiny by the Royal Commission.

Function expenses

44. The TWU's TWU Team Fund paid for all expenses incurred by the Association in relation to its 2010 function. These expenses have been dealt with above.
45. In relation to the 2012 event, the Association incurred various costs in relation to matters such as venue hire, the production of invitations and entertainment.⁶⁹
46. On 12 September 2012, the Association drew a cheque for the sum of \$82.50 payable to 'Kordown Printing' for 'invite cards'.⁷⁰ This cheque was cashed on 12 September 2012.⁷¹

⁶⁷ Team Fund MFI-1, p 1.

⁶⁸ TWU VicTas Tender Bundle, pp 265-272.

⁶⁹ TWU VicTas Tender Bundle, p 134.

47. On 17 September 2012, Worobe Pty Ltd issued an invoice to the Association for 'spot @ Mooney Valley Lunch Event' (\$7,000) and '50% of return business class airfare' (\$575.45).⁷² In response to this invoice, the Association drew a cheque in favour of Worobe Pty Ltd on this day for \$8,333.⁷³ The cheque was presented on 18 September 2012.⁷⁴
48. The Association received two invoices from Moonee Valley Racing Club Inc. The first was issued in August 2012, and related to the deposit of \$3,002.⁷⁵ This deposit was paid by a cheque from the Association dated 2 August 2012.⁷⁶
49. The second Moonee Valley Racing Club Inc invoice was issued to the Association on 26 September 2012.⁷⁷ The balance owing from the event, being \$10,522 was paid by a cheque drawn by the Association on 26 September 2012.⁷⁸
50. The Association has incurred no other costs in relation to the functions it has held.

⁷⁰ TWU VicTas Tender Bundle, p 232.

⁷¹ TWU VicTas Tender Bundle, p 210.

⁷² TWU VicTas Tender Bundle, p 197.

⁷³ TWU VicTas Tender Bundle, p 197.

⁷⁴ TWU VicTas Tender Bundle, p 210.

⁷⁵ TWU VicTas Tender Bundle, p 201.

⁷⁶ TWU VicTas Tender Bundle, p 229.

⁷⁷ TWU VicTas Tender Bundle, p 198.

⁷⁸ TWU VicTas Tender Bundle, p 234.

B – RECORD KEEPING DEFICIENCIES

51. Prior to 26 November 2012, s 30A of the *Associations Incorporation Act* 1981 (Vic) governed the keeping of accounting records.
52. Section 30A provided:
- An incorporated associated must maintain adequate and accurate accounting records of the financial transactions of the incorporated association.
- Penalty: 5 penalty units.
53. ‘Accounting records’ was defined in s 3(1) to include all invoices, receipts, orders for the payment of money and other documents of prime entry as well as any working papers and other documents that are necessary to explain the methods and calculation by which accounts are made up.
54. On 26 November 2012, the *Associations Incorporation Act* 1981 (Vic) was repealed. Section 89 of the *Associations Incorporation Reform Act* 2012 (Vic) now requires an incorporated association correctly to record and explain its transactions and financial position and performance to enable true and fair financial statements to be prepared.
55. It was Wayne Mader’s evidence that there were no records kept in respect of the TWU Team Fund’s payment of expenses on behalf of the Association in 2010.⁷⁹ These amounts were eventually paid back

⁷⁹ Wayne Mader, 19/8/14, T:61.3-38.

to the TWU Team Fund, but only in June 2014 and under the scrutiny of the Royal Commission.⁸⁰

56. In addition, the Association did not have any supporting documentation in respect of the New South Wales Industrial seminar in 2010 held by the McLean Forum Ltd apart from the cheque butt produced.⁸¹

57. It is of significant concern that large expenditure items (such as a \$10,000 payment to the McLean Forum) are not properly supported by invoices from the receiving entity or any other adequate and transparent account of the circumstances in which the money was paid. For example, in respect to the payment to the McLean Forum, Wayne Mader could not recall:

(a) when the function occurred;⁸² or

(b) who the guest speakers were at the function.⁸³

58. Wayne Mader said that the function was to support the elections in 2010 in respect of the TWU of New South Wales even though no contested elections were held that year and the money was only paid to the McLean Forum by cheque drawn in October 2012 but not banked

⁸⁰ See para 42.

⁸¹ TWU VicTas Tender Bundle, p 235.

⁸² Wayne Mader, 19/8/14, T:83.37.

⁸³ Wayne Mader, 19/8/14, T:83.44-45.

until December.⁸⁴ The McLean Forum's accounts show no expenditure in relation to an industrial seminar in 2010.⁸⁵

59. The money paid to the McLean Forum was not to pay for attendance at any industrial seminar, held by that entity. The reason for the payment remains unexplained.

60. The TWU submitted:⁸⁶

[The criticisms of counsel assisting] are based upon the alleged absence of documentation in relation to the contribution to the McLean Forum function made in 2010. One instance of less than satisfactory record-keeping (if that be what it is) would not justify any finding that the [Association] had failed to comply with the general obligation to maintain records under what was s 30A of the *Associations Incorporation Act 1981* (Vic).

61. The failings amount to significantly more than one instance. Counsel assisting was right to submit that in addition to failing to provide any adequate explanation of a number of transactions of the Association, the officers of the Association may have failed to comply with s 30A of the *Associations Incorporations Act 1981* (Vic) and s 89 of the *Associations Incorporation Reform Act 2012* (Vic). Had they done so, it would have been much easier for these transactions to be understood.

62. Further, since the commencement of the *Associations Incorporation Reform Act 2012* (Vic), the committee of what that Act identifies as a 'tier one association' (as the Association is),⁸⁷ must cause financial

⁸⁴ Wayne Mader, 19/8/14, T:84.1-2, 7.

⁸⁵ See Chapter 4.2 of this Interim Report in relation to McLean Forum Ltd.

⁸⁶ Written submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 253.

⁸⁷ *Associations Incorporation Reform Act 2012* (Vic) s 90(z).

statements for a year to be prepared as soon as practicable after the end of each financial year of the association.⁸⁸

63. The financial statements must give a true and fair view of the financial position and performance of the association during and at the end of its last financial year.⁸⁹
64. Those statements are to be submitted to an annual general meeting of the association.⁹⁰ Certificates are required in a prescribed form certifying that the financial statements give a true and fair view of the association's position and performance.⁹¹ The minutes must reflect compliance with these requirements.⁹² Finally, the Secretary of an incorporated association must lodge with the Registrar a copy of the financial statement prepared for that year.⁹³
65. The Association has complied with these requirements. But the level of detail provided in the financial reports is questionable. The Association is run informally and without regard for the requirements of the Act or good governance.

⁸⁸ *Associations Incorporation Reform Act 2012* (Vic) s 92.

⁸⁹ *Associations Incorporation Reform Act 2012* (Vic) s 92(z).

⁹⁰ *Associations Incorporation Reform Act 2012* (Vic) s 94.

⁹¹ *Associations Incorporation Reform Act 2012* (Vic) s 94(2).

⁹² *Associations Incorporation Reform Act 2012* (Vic) s 94(4).

⁹³ *Associations Incorporation Reform Act 2012* (Vic) s 102.

C – RATIONALE FOR THE ASSOCIATION

66. The Association has been controlled by officers of the Victoria/Tasmania Branch of the TWU, principally Wayne Mader, John Berger and John Halloran.
67. The Association has raised its money by holding events (not disclosed as fundraisers) attended by employers, officials from other unions, and participants in the transport industry.
68. The Association's fundraising activities appear to have been conducted without any expenditure by the Association (or any other entity on its behalf) for labour costs of organising these events. It appears that the logistics and contacts were provided by, or sourced by, the Association's officers at no cost. It cannot be a coincidence that those attending constituted a roll-call of companies and officials with whom Wayne Mader, as Secretary of the TWU Branch, had frequent contact and ongoing relationships. There is no reason to think that the very same events could not have been put on for the benefit of the TWU itself, with the result that the profits generated went to the union and were transparently accounted for in the books of the union.
69. The Association's objectives are on all fours with that of the TWU. It is run by senior officers of the TWU. It appears to use the contacts and industry connections of TWU staff and officers to put on an event. And its governance and accountability processes are woefully deficient. In all these circumstances the Association features as yet another case study explored by the Commission which has no

rationale, or only a questionable rationale, as a separate entity of the union. But it uses the union's resources and opportunities for the benefit of the union's officers. It is a separate fund – apparently to be used in the interests of the union. But its revenue and expenditure is entirely removed from the control of the union and the accountability restrictions and disclosure obligations that apply to union funds.

PART 4: FIGHTING FUNDS AND THE FUNDING OF UNION ELECTIONS

CHAPTER 4.1

INTRODUCTION

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| B – CASE STUDIES CONSIDERED | 7 |
| C – SUMMARY OF KEY CONCERNS | 9 |

1. Some relevant entities have the primary purpose of funding the election campaigns of candidates standing for office in a registered organisation. These kinds of relevant entities are usually referred to as ‘fighting funds’ or ‘election funds’.

A – RATIONALE AND FORM

2. Undoubtedly, election campaigns may be necessary for contested elections of any sort. Election campaigns ordinarily require some measure of funding.

3. A substantial purpose of an election fund is to ensure that a group of candidates, or a ‘preferred’ candidate or group of candidates, has access to sufficient funds to ensure that an election campaign is adequately resourced.
4. Relevant entities of these kinds have evolved in the context of the prohibition against the use of a registered organisation’s property or resources in the elections held for positions of office in a registered organisation.¹
5. Election funds take many legal forms. Common legal relationships or structures include: a trust, an incorporated association, an unincorporated association, or a company.
6. In addition to these more conventional arrangements, many ‘election funds’ appear to consist simply of a bank account with one or more signatories, no constituent documents, and no clear understanding, amongst contributors or signatories, as to the legal arrangements governing contributions and expenditures. The problems of this type of structure were graphically described by Julia Gillard to two of her partners at Slater & Gordon on 11 September 1995.²

B – CASE STUDIES CONSIDERED

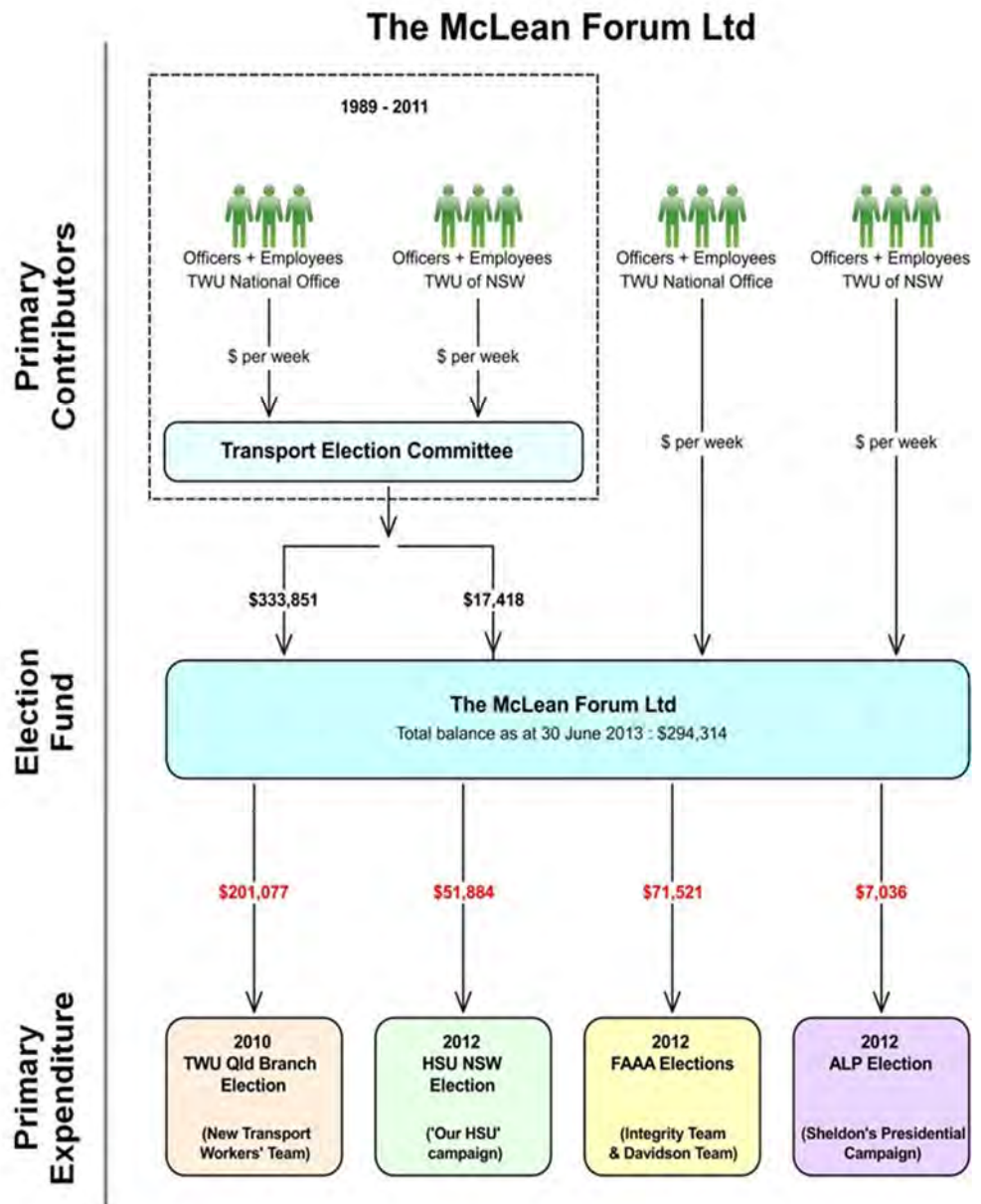
7. Eight election funds were selected by counsel assisting for the public hearings of the Commission. The case studies were selected to provide the public with a representative selection of the nature of election

¹ *Fair Work (Registered Organisations) Act 2009* (Cth), s 190. See Chapter 2.2 above.

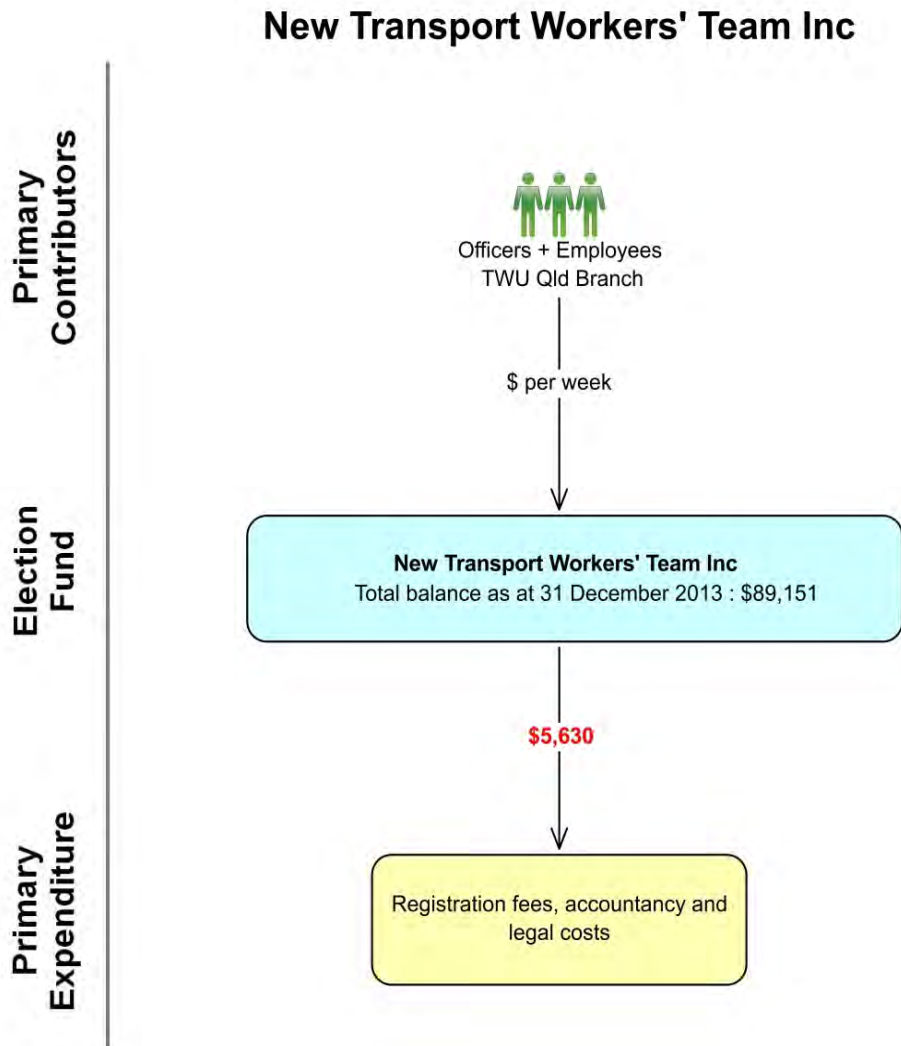
² See Chapter 3.2 para 27.

funds, the purposes to which they are put, and the legal and policy issues associated with their activities. Below is a list of those case studies and a diagram summarising the primary contributors and expenditure of each.

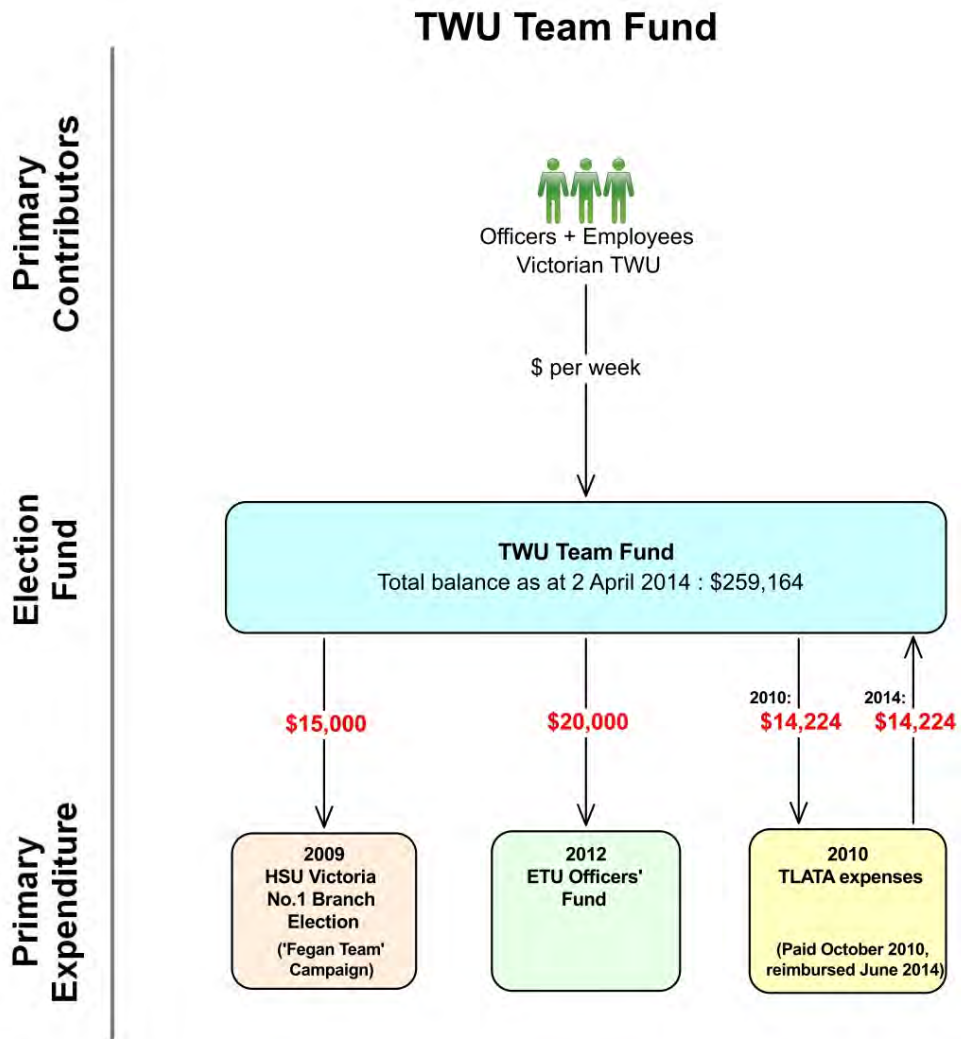
- (a) The McLean Forum Ltd, a company associated with officers of the TWU National Office and the TWU NSW.



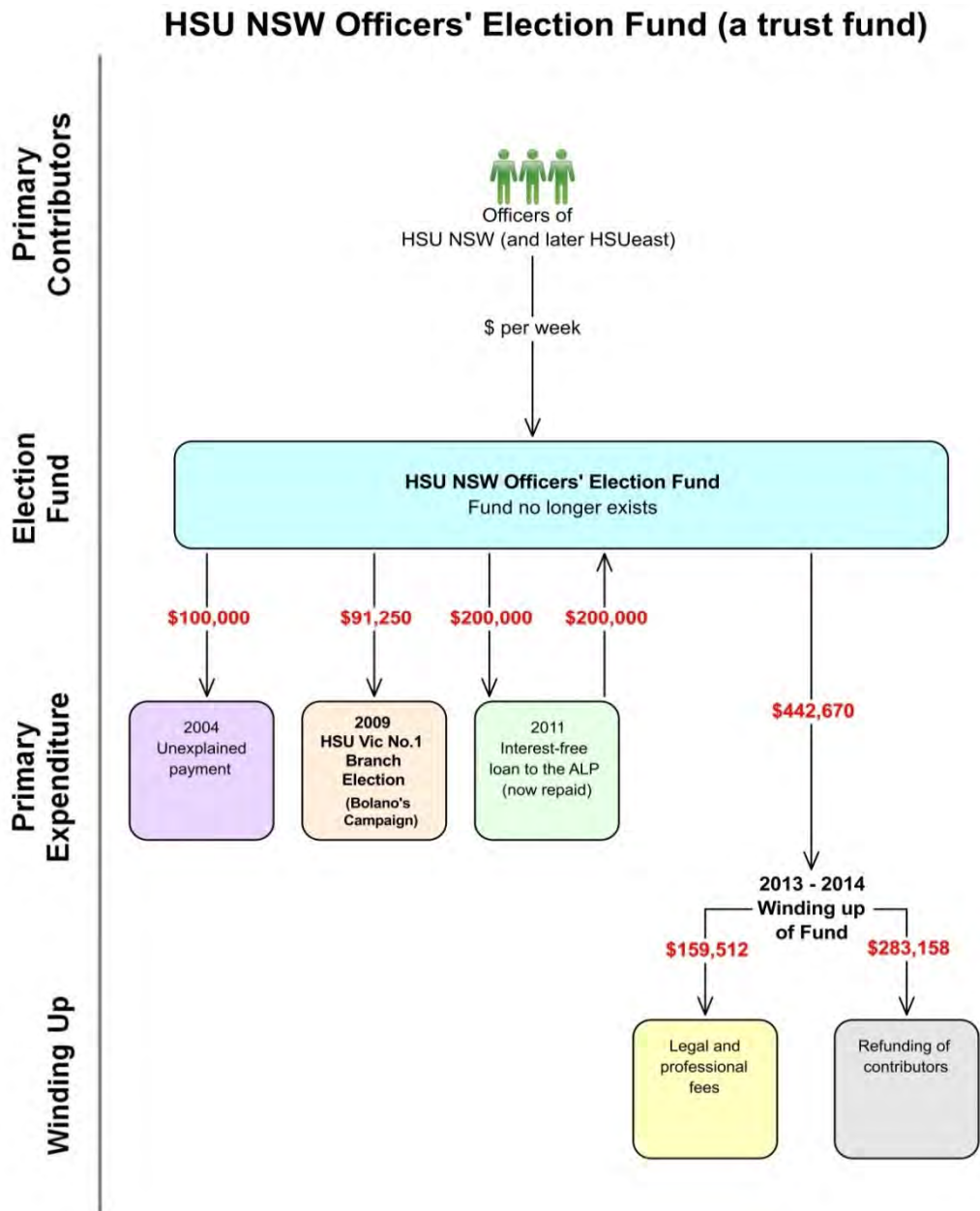
- (b) The New Transport Workers' Team Inc, an incorporated association with officers of the TWU Queensland.



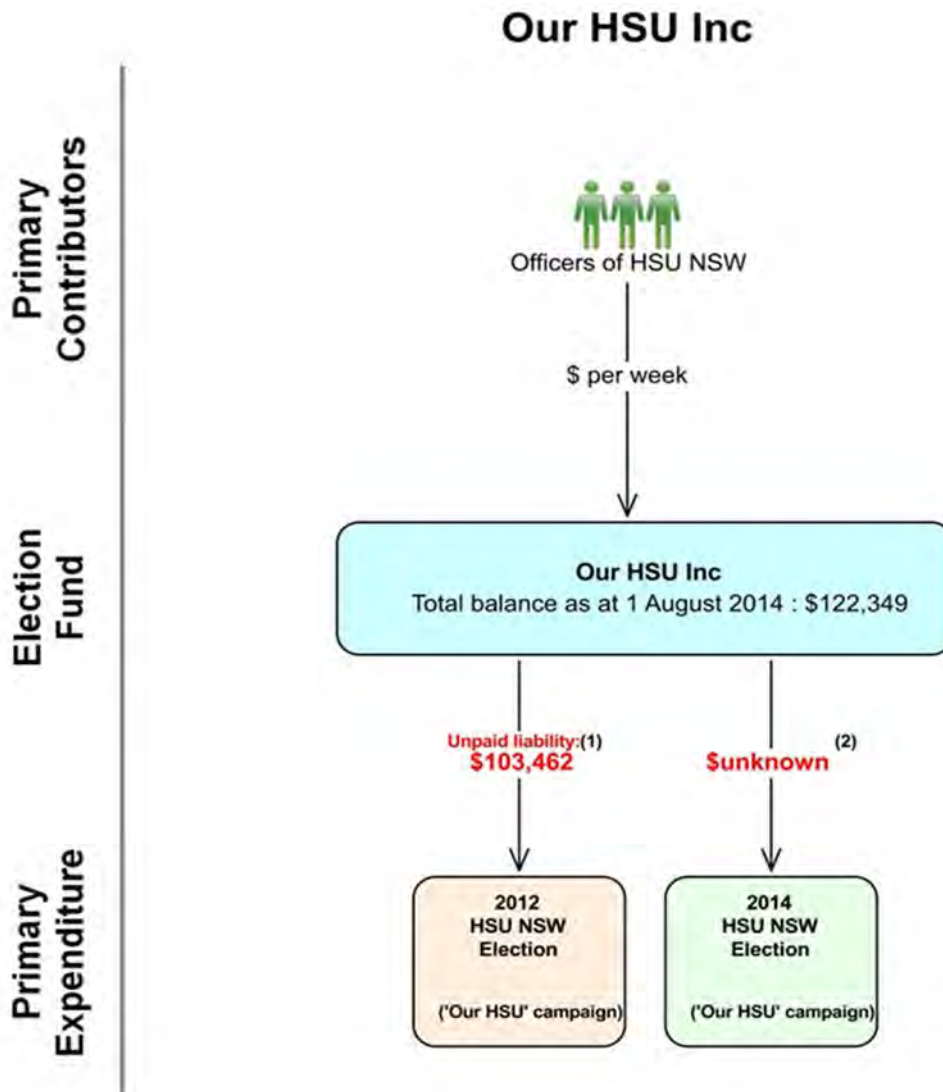
- (c) The 'Team Fund', a bank account associated with officers of the Victorian TWU.



- (d) The HSU Officers' Election fund, a trust associated with officials of the HSUNSW and in particular its long-term leader, Michael Williamson.



- (e) Our HSU Inc, an incorporated association established by the incumbent Secretary of HSU NSW, Gerard Hayes, and associated with his ticket.

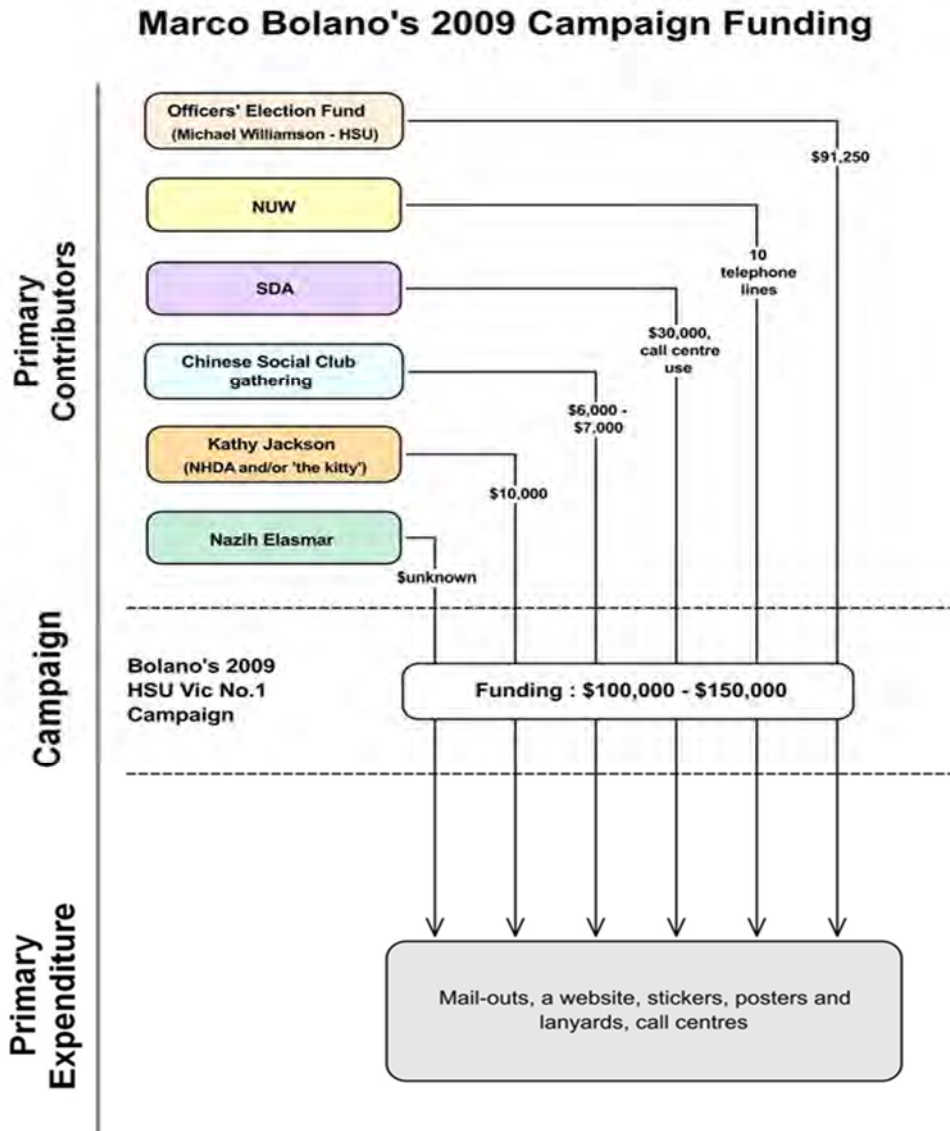


(1) Unpaid debt - debt due to Jeffries Printing (NSW) Pty Ltd for 2012 HSU NSW Election

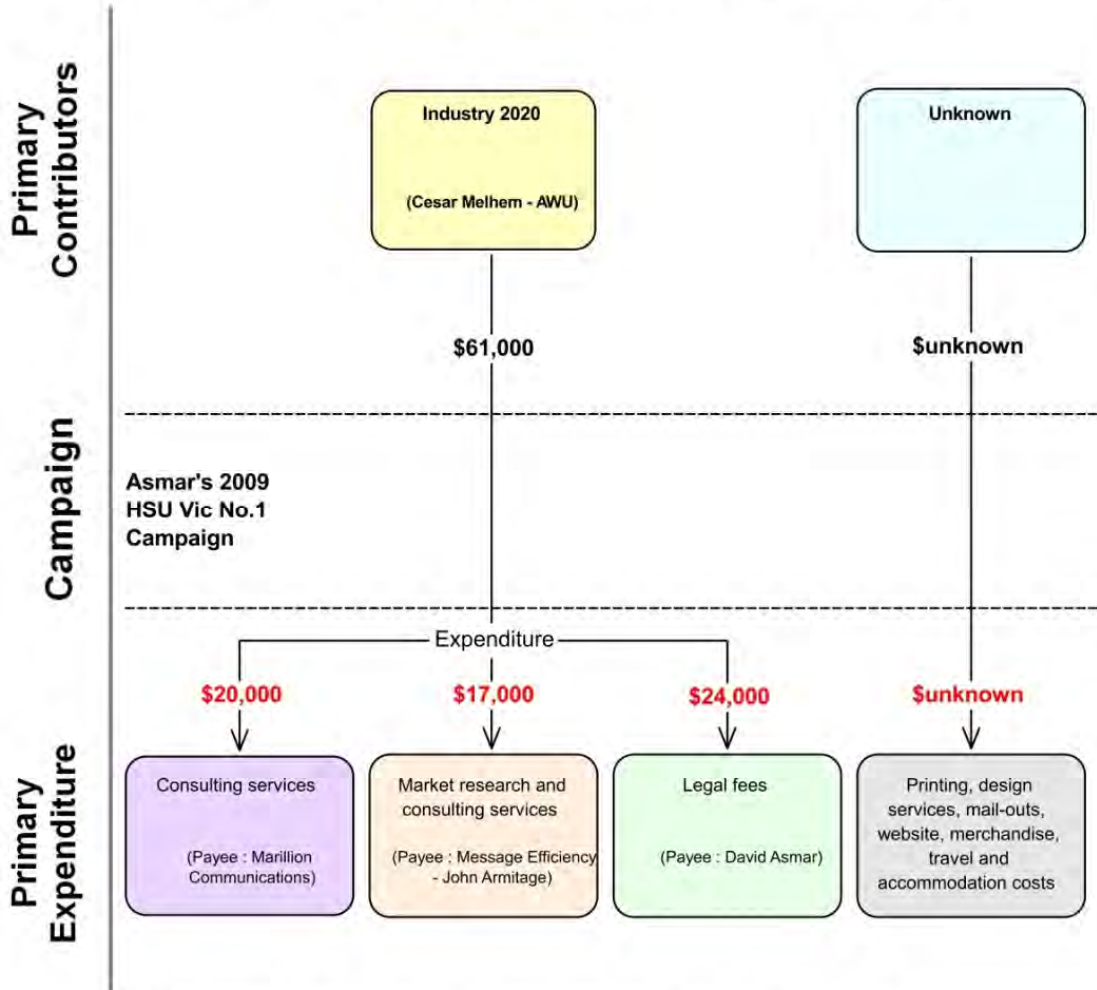
(2) Expenses were incurred in connection with the 2014 HSU NSW Elections.

The quantum of that expenditure, and the quantum of any unpaid debts arising from that campaign, are not known.

- (f) The funding of Marco Bolano's election campaigns in the 2009 and 2012 Victoria No 1 Branch of the HSU elections and the funding of Diana Asmar's election campaigns in the 2009 and 2012 Victoria No 1 Branch of the HSU elections.

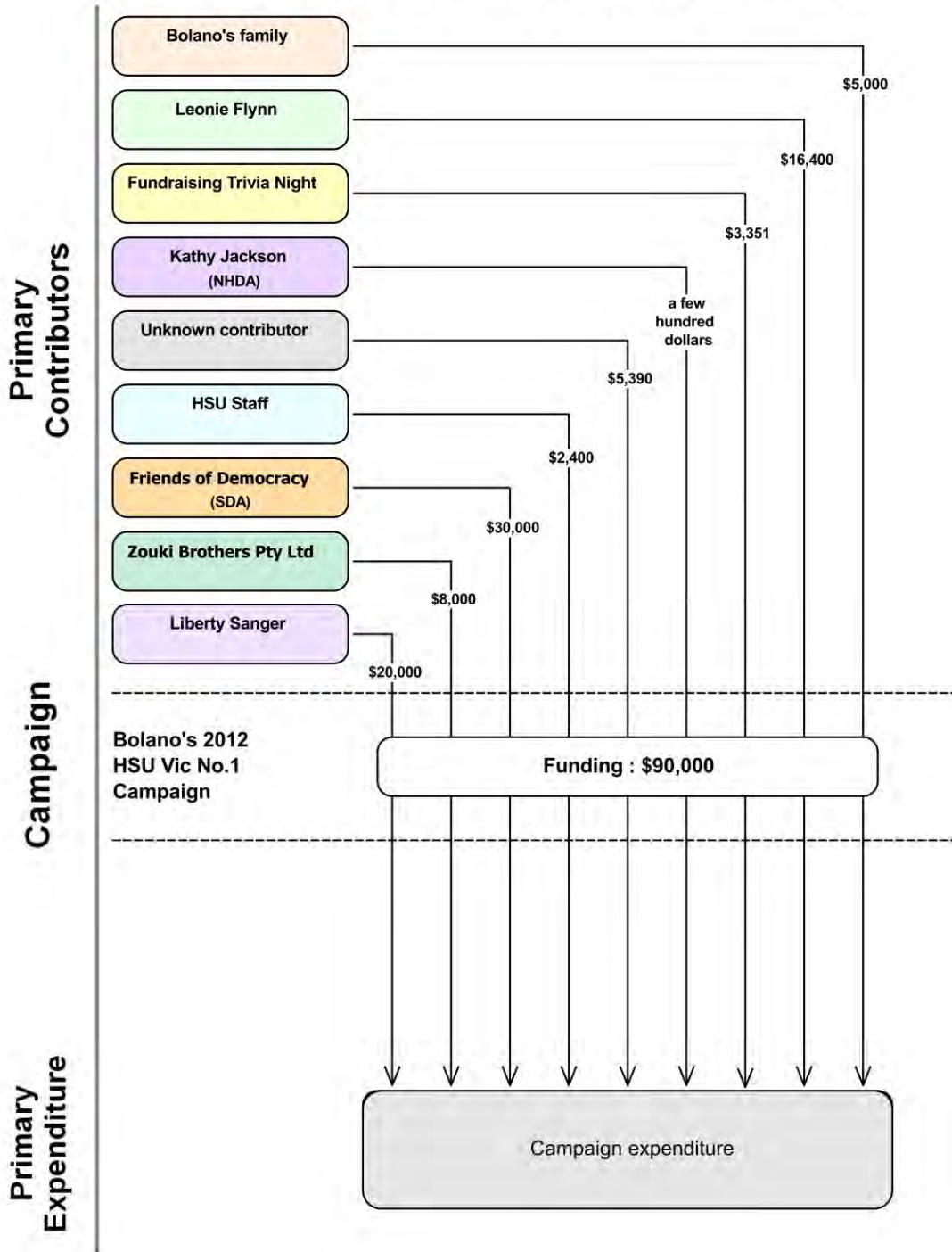


Diana Asmar's 2009 Campaign Funding

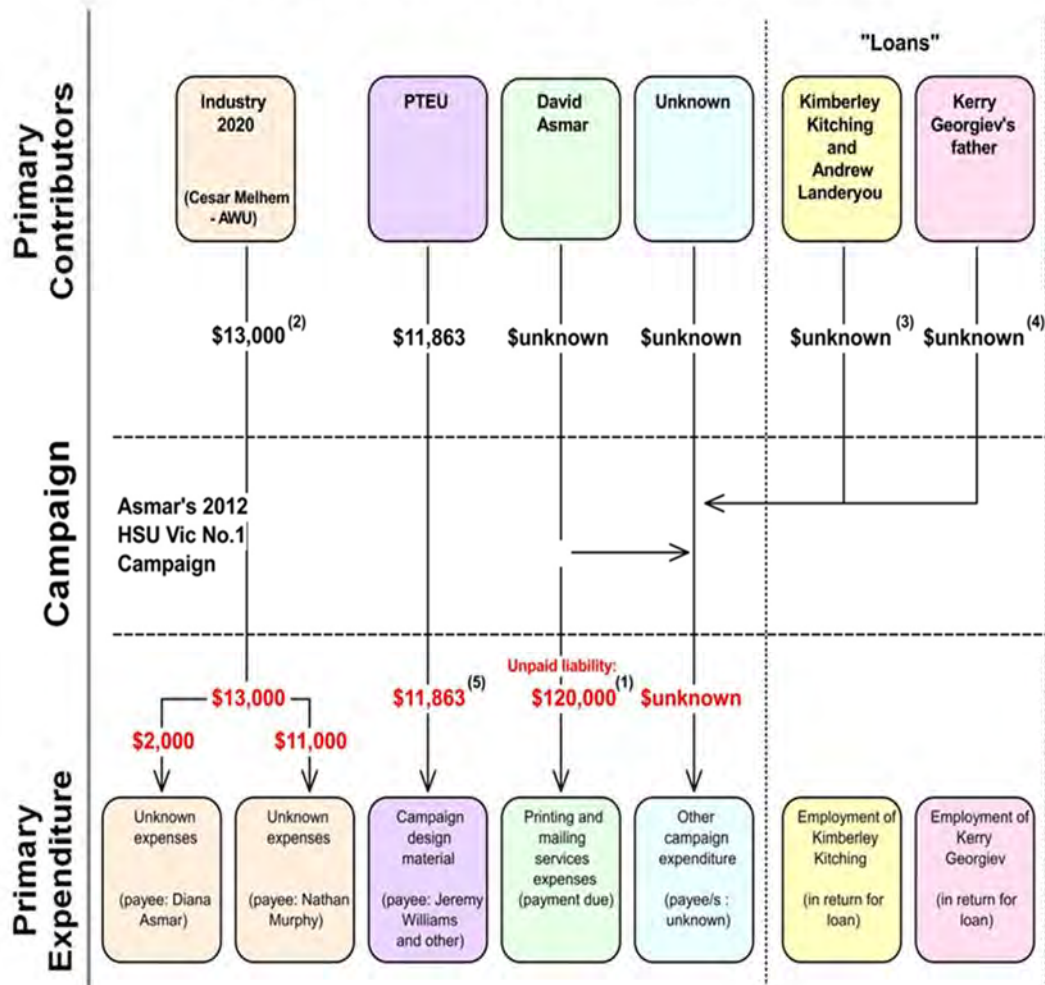


Note: This diagram indicates legal entities making contributions. Where an entity is associated with a particular union official, that person is named in parentheses together with the associated union.

Marco Bolano's 2012 Campaign Funding



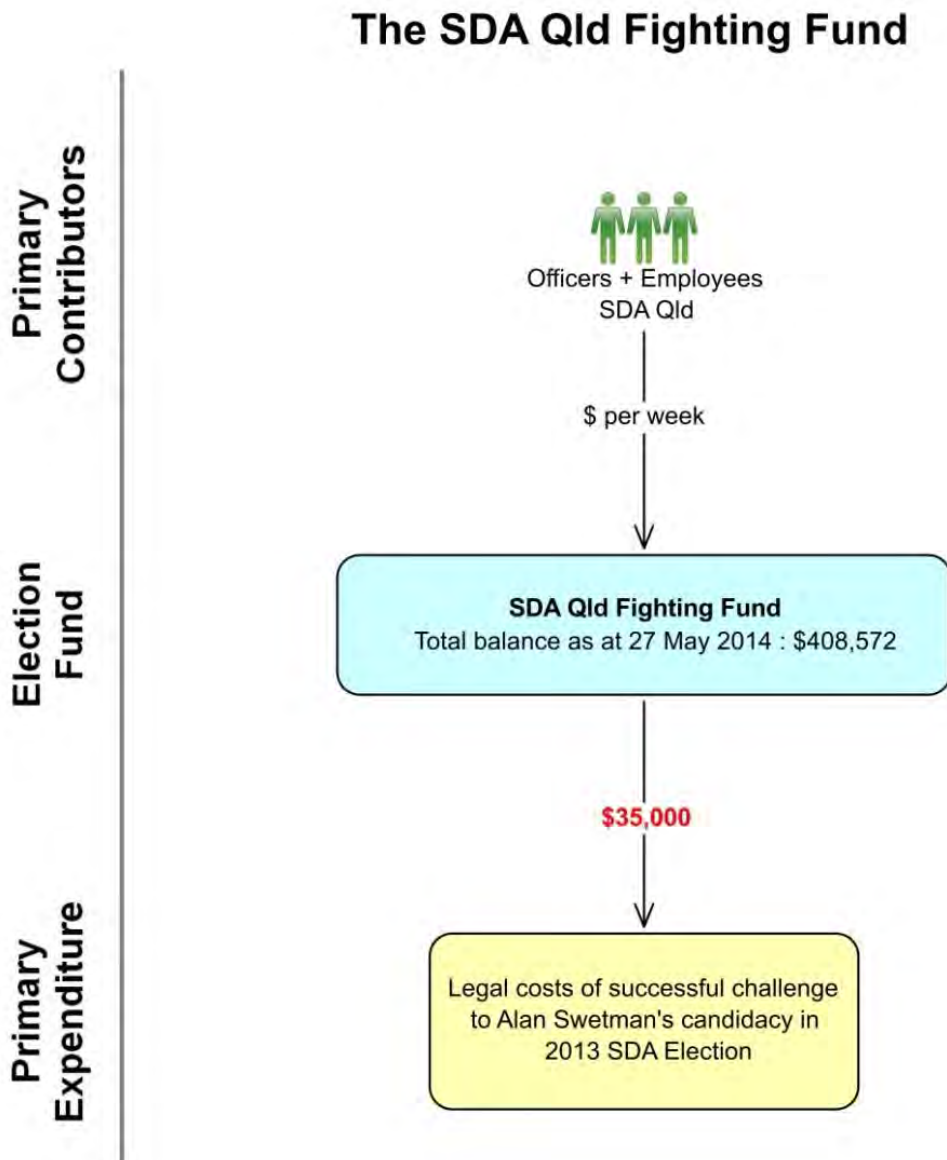
Diana Asmar's 2012 Campaign Funding



Note: This diagram indicates legal entities making contributions. Where an entity is associated with a particular union official, that person is named in parentheses together with the associated union.

- (1) Unpaid debt - debt due from David Asmar to Total Print Management Pty Ltd pursuant to a settlement deed.
- (2) Allegation of Cesar Melhem; supported by Robert McCubbin; denied by Diana Asmar
- (3) Allegation of Robert McCubbin, Sandra Porter, Jayne Govan; denied by Kimberley Kitching and Diana Asmar
- (4) Allegation of Robert McCubbin, Jayne Govan; denied by Kerry Georgiev and Diana Asmar
- (5) Asmar MFI-1, p 42.

- (g) The 'Fighting Fund', a bank account associated with the highest officers of the SDA Queensland.



8. Each of these case studies is the subject of separate consideration in the following chapters.

C – SUMMARY OF KEY CONCERNS

9. There are five key areas of concern about the current use and operation of election funds identified thus far:
 - (a) The first area of concern is that these funds typically operate with a large measure of secrecy. They are characterised by minimal, if any, disclosure of the activities of the fund to contributors. Further, in the case studies considered, there was no disclosure of any kind of the election funds' activities to voters participating in an election where one or more of the candidates was or were in receipt of funds from the election fund. Voters could reasonably be expected to be interested in knowing, and in certain instances alarmed by, the fact that a particular candidate might be receiving substantial funding from an election fund connected to officials in another union. Further, in none of the case studies considered by the Commission was the existence or quantum of contributions made by election funds declared to voters during the campaign, if at all. Nor was there disclosure of any kind of the election fund's activities to members of the union with which the election fund is associated.
 - (b) The second area of concern is that election funds appear to be characterised by deficient or non-existent record-keeping. Few keep records of a kind that disclose the true nature and extent of the fund's activities to a reviewer.

- (c) The third area of concern is that it is often questionable whether contributors' decisions to contribute are voluntary. A related issue is the legal uncertainty surrounding the status of contributions and the consequent difficulties experienced by contributors who attempt, and frequently fail, to obtain a refund of their contributions.
 - (d) The fourth area of concern is that these funds give a disproportionate advantage to incumbents, over and above the benefit of incumbency itself.
 - (e) The fifth area of concern arises from the surprisingly common practice of candidates standing for election wilfully to abstain from learning the sources, propriety, and legality of funding received for their campaigns and to plead ignorance and lack of responsibility for the conduct of their campaign, including as to its expenditure and debts incurred.
10. When the time comes for making recommendations in the Final Report it will be desirable to address solutions to these problems.

CHAPTER 4.2

THE MCLEAN FORUM LTD

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A – OVERVIEW

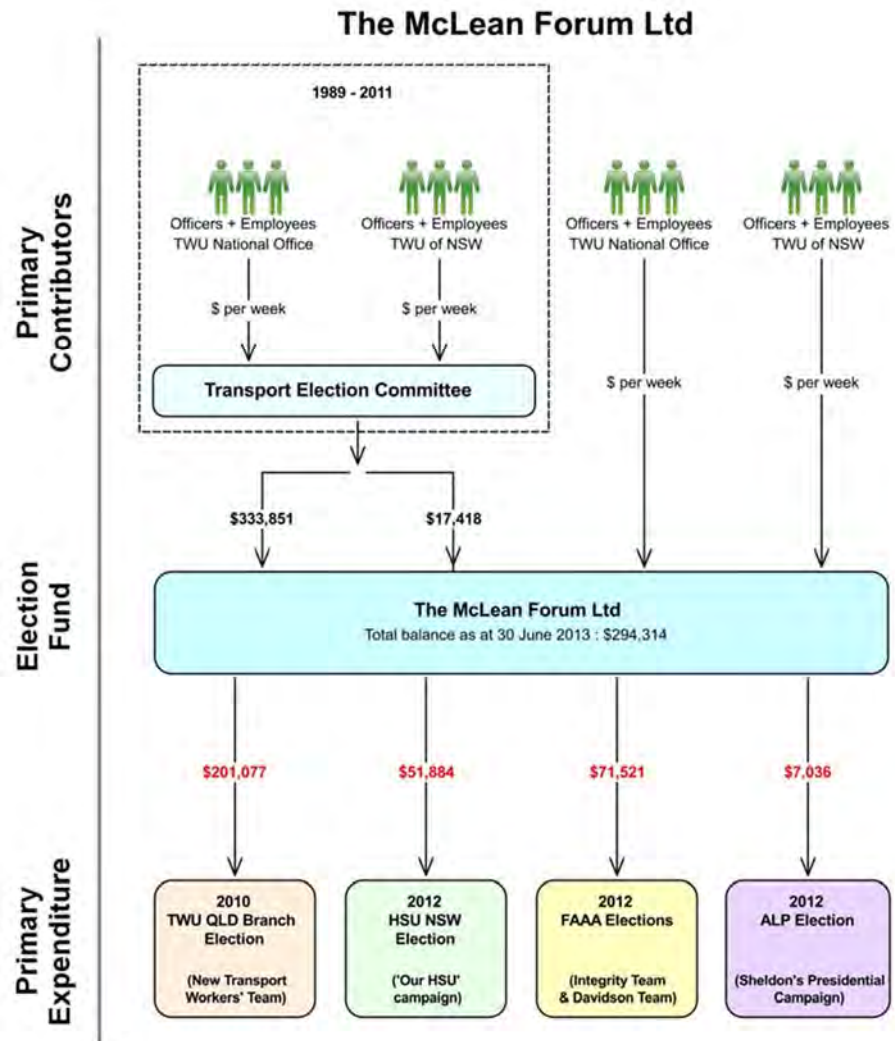
1. This chapter concerns two relevant entities associated with the Transport Workers’ Union of Australia (**TWU**) and the Transport Workers’ Union of New South Wales (**TWU of NSW**), namely the Transport Election Committee and the McLean Forum Ltd (**McLean Forum**). It is based on the written submissions of counsel assisting. Save as indicated, those submissions are accepted.
2. The Transport Election Committee and the McLean Forum are relevant entities associated primarily with officials of the National Office of the TWU and the TWU of NSW. The Transport Election Committee was established in 1989 and ceased to exist in 2010. It was the predecessor to the McLean Forum.
3. The McLean Forum has three directors. All of them are TWU officials. One is Tony Sheldon (National Secretary of the TWU). The second is Wayne Forno (NSW State Secretary). The third is

Scott Connolly (formerly National Airlines Official of the TWU, and now Queensland Assistant State Secretary). From 2010 Daniel Mookhey, a former Chief of Staff of the TWU and the TWU of NSW, was involved for some time in most of the McLean Forum's activities.

4. Prior to the announcement of the Royal Commission on 10 February 2014 there had been substantial press publicity about the funding by the McLean Forum of candidates in three elections, namely:
 - (a) the 2010 elections for the Queensland branch of the TWU;
 - (b) the 2012 elections for the Flight Attendants' Association of Australia; and
 - (c) the 2012 elections for the Health Services Union of NSW.
5. At the time of those elections, the role of the McLean Forum in the relevant campaigns was not publicly disclosed nor widely known. When reports of its activities emerged in the media, the McLean Forum became a relevant entity widely associated with the shadowy role that 'slush funds' play in union elections and the lack of transparency and accountability with which they operate.

6. The Commission's inquiries into the Transport Election Committee and the McLean Forum have concentrated on the following questions:
 - (a) the nature of the entity and the adequacy of its governance processes;
 - (b) the source of the entity's income;
 - (c) the nature of its expenditure; and
 - (d) the transparency of its operations to voters in the relevant elections in which it played a substantial part, to contributors to the McLean Forum, and to members of the unions with which it is associated, namely the TWU and the TWU of NSW.

7. The following diagram summarises the primary contributors to and expenditure of the McLean Forum.¹



8. The evidence of the McLean Forum's activities substantiated a

¹ For the figure of \$333,851 see TWU McLean Forum Tender Bundle, 20/8/14, pp 13, 16. For the figure of \$17,418 see TWU McLean Forum Tender Bundle, 20/8/14, pp 19, 176. For the figure of \$294,314 see TWU McLean Forum Tender Bundle, 20/8/14, p 140.

number of key problems identified as part of the Commission's broader inquiries into election funds generally. These included:

- (a) the lack of transparency regarding the governance and expenditure of 'fighting funds' such as the McLean Forum (including the extent to which its activities are known to the contributors to the funds or members of employee associations associated with the funds);
- (b) the appropriateness of a trade union causing to be included in employment contracts of its employees and officials a requirement for a contribution to entities in which officials of the trade union have an interest;
- (c) the appropriateness of fighting funds created by officers of a branch of a union being used to support one candidate over another candidate in the election of another branch of the union, or in an election in a separate union in a separate industry; and
- (d) a general lack of disclosure and transparency regarding the funding of, and support given to, candidates seeking positions during trade union elections.

B – THE TRANSPORT ELECTION COMMITTEE

9. The Transport Election Committee was formed on 14 July 1989 at a meeting of certain members of the TWU of NSW.² The meeting was chaired by Tony Sheldon. Other persons present included a number of officials of the TWU of NSW, including John McLean, John Allen, Steve Hutchins and Nimrod Nyols.³

10. It was agreed at the meeting to create a fund associated with the Transport Election Committee. A President, Secretary and Assistant Secretary were appointed to the Committee and power was conferred on these officers to ‘carry out the functions and make decisions on expenditure of funds’.⁴

11. A bank account was created in the name of the Transport Election Committee.⁵ The meeting resolved that officials and members of the TWU of NSW would need to contribute to the fund in order to remain members of the Committee. The following ongoing contributions were required:⁶
 - (a) senior full-time officials who were members of the Transport Election Committee were to pay \$25 per week;

² TWU McLean Forum Tender Bundle, 20/8/14, pp 1-3.

³ TWU McLean Forum Tender Bundle, 20/8/14, p 1.

⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 2.

⁵ TWU McLean Forum Tender Bundle, 20/8/14, p 4.

⁶ TWU McLean Forum Tender Bundle, 20/8/14, p 3.

- (b) full-time officials who were members of the Transport Election Committee employed as organisers or union representatives were to pay \$20 per week; and
 - (c) other union employees who were members of the Transport Election Committee were to pay \$15-20 per week.
12. It appears that over time the amounts contributed by way of direct debit varied.⁷ Tony Sheldon gave evidence that the contributors to the fund included organisers, industrial staff and elected officials of the TWU of NSW and the NSW Branch of the TWU.⁸ Additionally, the Transport Election Committee held fundraisers from time to time at which a 'broad spectrum of people would attend including politicians, delegates, officials of friendly unions and employers'.⁹ The Transport Election Committee also raised funds using occasional raffles, as well as receiving donations from delegates and members.¹⁰
13. Actual or threatened legal proceedings may have played some part in the decision to establish the Transport Election Committee.¹¹ Its name supports an inference that it was established to accumulate funds to be used in the election campaigns of its members for positions of office in the TWU of

⁷ TWU McLean Forum Tender Bundle, 20/8/14, p 14.

⁸ Anthony Sheldon, witness statement, 20/8/14, para 17.

⁹ Anthony Sheldon, witness statement, 20/8/14, para 20.

¹⁰ Anthony Sheldon, witness statement, 20/8/14, para 20.

¹¹ TWU McLean Forum Tender Bundle, 20/8/14, p 3.

NSW. There are, however, no other contemporaneous documents in evidence recording the objects and purpose of the Transport Election Committee or the rules governing it.

14. Regular contributions to the Transport Election Committee's bank account, and an absence of significant expenditure, ensured that by 19 March 2010, 21 years after the Transport Election Committee was established, it had approximately \$330,000 in its sole transaction account.¹²
15. On 19 March 2010 a purported meeting of the Transport Election Committee resolved to cease operations of the Transport Election Committee and transfer all funds into the McLean Forum 'which has the same objectives and mission as the TEC'.¹³ The funds held in the Transport Election Committee account as at that date were paid into the McLean Forum's account on 2 June 2013.¹⁴ The Transport Election Committee's account was finally closed on 1 September 2011.¹⁵
16. The decision to close the Transport Election Committee's accounts and cease its operations was purportedly made by Tony Sheldon, Wayne Forno and Scott Connolly (who as noted above

¹² TWU McLean Forum Tender Bundle, 20/8/14, p 13.

¹³ TWU McLean Forum Tender Bundle, 20/8/14, p 13.

¹⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 16.

¹⁵ TWU McLean Forum Tender Bundle, 20/8/14, p 19.

are directors of the McLean Forum).¹⁶ Garth Mulholland, Daniel Mookhey and Michael Kaine were all observers at that meeting.¹⁷

17. Unlike the meeting of 14 July 1989 which established the Transport Election Committee, only three members of the Transport Election Committee were present at the meeting of 19 March 2010. A bank account form around this time records the signatories to the Transport Election Committee's account as Tony Sheldon, Wayne Forno and Scott Connolly.¹⁸ In that form each has described himself as a 'Director' of the Transport Election Committee.¹⁹ That description would appear to have been erroneous: the Transport Election Committee was not a company and did not have a board of directors.
18. There is, however, a more serious problem with the role played by Wayne Forno and Scott Connolly at the purported meeting of 19 March 2010.
19. On 7 October 2014 the Commission issued a Notice to Produce to Tony Sheldon (who was President of the Transport Election Committee at all relevant times), seeking:²⁰

- (2) All Documents recording appointments of Anthony Sheldon, Wayne Forno and Scott Connolly to any position

¹⁶ TWU McLean Forum Tender Bundle, 20/8/14, p 13.

¹⁷ TWU McLean Forum Tender Bundle, 20/8/14, p 13.

¹⁸ TWU McLean Forum Tender Bundle, 20/8/14, p 9.

¹⁹ TWU McLean Forum Tender Bundle, 20/8/14, p 9. At p 10 Tony Sheldon is separately recorded as the 'Chairperson' of the Transport Election Committee.

²⁰ TWU McLean Forum Tender Bundle, 8/12/14, pp 1-6.

in respect of the TEC (other than the minutes of the meeting on 14 July 1989).

- (3) Any notice or report given to members of the TEC in respect of the meeting held and resolution passed on 19 March 2010.

20. On 14 October 2014, Maurice Blackburn Lawyers wrote to the Commission on behalf of Tony Sheldon, stating:²¹

3. For the sake of completeness we note the following:

- (a) Apart from the minutes of the meeting on 14 July 1989, no document was created that would be captured by categories 1 and/or 2.
- (b) No document was created that would be captured by category 3.

21. Therefore Wayne Forno and Scott Connolly did not hold any position in the Transport Election Committee. It follows that they were not entitled to exercise any power to authorise expenditure of the Transport Election Committee's funds, let alone the almost complete depletion of its funds by transferring approximately \$330,000 to a company of which they were directors. The TWU submitted that the absence of a document did not establish that Wayne Forno and Scott Connolly did not hold office in the Transport Election Committee. It submitted that there was no requirement for a document to be prepared showing that they held office in the Transport Election Committee, since it was not incorporated.²² That fact does not excuse the poor recordkeeping which the TWU submission relies

²¹ TWU McLean Forum Tender Bundle, 8/12/14, pp 7-8.

²² Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 190.

on. Even an informal unincorporated association like the Transport Election Committee would have depended on records about basic matters such as those who held office. Contrary to the TWU submission, there is documentary evidence that a President, Secretary and Assistant Secretary were elected at the first meeting of the Transport Election Committee.²³ The absence of any equivalent document for Wayne Forno and Scott Connolly does suggest that they were not elected. The TWU criticised counsel assisting for not asking Wayne Forno and Scott Connolly about this, but did not back the submission up by any indication that they would have given evidence defeating the point being made by counsel assisting. Counsel for the TWU did not ask those witnesses questions on this subject either.

22. Further, the letter from Maurice Blackburn indicates that none of Tony Sheldon, Wayne Forno and Scott Connolly disclosed to members of (and hence contributors to) the Transport Election Committee, their intention to hold the meeting or to transfer the assets of the Transport Election Committee to the McLean Forum. Nor did they give to members notice of the resolution ultimately passed.
23. The minute of the meeting records few details. What were the circumstances in which the meeting was held? What was the reason for the closure of the Transport Election Committee? What was the reason for the decision that its funds be directed to the McLean Forum? Why were they not instead returned to

²³ TWU McLean Forum Tender Bundle, 20/8/14, p 2.

contributors or applied to any other purpose or fund? The minute merely records that:²⁴

- (a) there was ‘a general discussion about closing the TEC and transferring the funds to the McLean Forum’;
- (b) ‘the TEC had already ceased receiving contributions from TWU Officials who voted in an officials’ meeting to have further contributions directed to the McLean Forum’; and
- (c) The ‘McLean Forum has the same objectives and mission as the TEC’.

24. The Commission did not receive any document setting out the objects or rules of the Transport Election Committee which would disclose whether it did in fact have ‘the same objectives and mission as the TEC’. Tony Sheldon described the two relevant entities as having ‘similar’ purposes.²⁵ The McLean Forum’s articles of association contain a wide objects clause extending to the promotion of ‘moderate and progressive social policies and industrial relations in Australia’, the provision of a ‘forum for the development, advancement and debate of socially useful and fair public policies’ and the advancement of the

²⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 13.

²⁵ Anthony Sheldon, witness statement, 20/8/14, para 21.

‘interests of workers in the transport industry and of workers generally’.²⁶

25. In seeking to explain the decision to merge the funds, Tony Sheldon remarked that ‘we brought the functions together because it just seemed a little bit unruly to have two organisations receiving funding’.²⁷ He explained it as a process of rationalisation.²⁸
26. Daniel Mookhey claimed that the decision to merge the funds may have been made to improve the governance of the Transport Election Committee.²⁹

[W]hilst that arrangement [pertaining to the Transport Election Committee] may well have been reflective of govern[ance] standards of the 1980s, it wasn't necessarily reflective of the govern[ance] standards and expectations that were held at the time [that the later decision was made to roll the funds into the McLean Forum].

27. Scott Connolly gave evidence that the McLean Forum undertook ‘no substantial activities until 2010’³⁰ despite being incorporated 15 years earlier. Does the timing of the transfer of the Transport Election Committee funds to the McLean Forum just before it became active after 15 years of dormancy suggest that the transfer was merely a matter of rationalisation or governance considerations? Or was it more opportunistic? Whatever the

²⁶ TWU McLean Forum Tender Bundle, 20/8/14, p 22.

²⁷ Anthony Sheldon, 21/8/14, T:77.22-24.

²⁸ Anthony Sheldon, witness statement, 20/8/14, para 21.

²⁹ Daniel Mookhey, 20/8/14, T:11.38-44.

³⁰ Scott Connolly, witness statement, 18/8/14, para 43.

answer to that question, there is no doubt that the decision by Tony Sheldon, Wayne Forno and Scott Connolly to close the Transport Election Committee and transfer its funds into the McLean Forum provided a significant injection of cash into the McLean Forum immediately before it started incurring significant expenses in conjunction with elections for positions of office in the Queensland Branch of the Transport Workers' Union. The Commission has seen no records which indicate the disclosure of that purpose to members of the Transport Election Committee immediately before their contributions were diverted into the bank account of the McLean Forum.

C – THE MCLEAN FORUM

Establishment of the McLean Forum

28. The McLean Forum was incorporated on 7 July 1995 by officers of the TWU of NSW.³¹ The McLean Forum was named after John McLean, a founding member of the Transport Election Committee and a long-term Secretary of the TWU of NSW.³²
29. The McLean Forum is an unlisted non-profit company limited by guarantee.³³ Tony Sheldon has been a director of the McLean Forum since its incorporation, and Wayne Forno since 1998 and

³¹ TWU McLean Forum Tender Bundle, 20/8/14, p 40.

³² Anthony Sheldon, 21/8/14, T:77.7-10.

³³ TWU McLean Forum Tender Bundle, 20/8/14, p 40.

Scott Connolly since 2002.³⁴ Since 2002 Scott Connolly has been the officer primarily responsible for compliance by the McLean Forum with accounting and regulatory requirements.³⁵

30. As noted above, the objects of the McLean Forum are very broad. They include:³⁶

- (a) To promote the expression of moderate and progressive social policies and industrial relations in Australia.
- (b) To provide a forum for the development, advancement and debate of socially useful and fair public policies.
- (c) To advance the interest of workers in the transport industry and of workers generally.
- (d) The relief of distress among the families and dependents of transport workers.
- ...
- (w) To make donations for patriotic or charitable purposes.

Contributions to the McLean Forum

31. Funding for the McLean Forum has come from employee contributions and fundraisers.³⁷ Apart from the injection of funds from the Transport Election Committee, by far the largest category comprises the direct deposits made into the McLean Forum's bank accounts of deductions from the salaries of officers

³⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 41.

³⁵ Scott Connolly, witness statement, 18/8/14, para 41.

³⁶ TWU McLean Forum Tender Bundle, 20/8/14, p 22, 24.

³⁷ Anthony Sheldon, witness statement, 20/8/14, para 27.

and employees of the TWU of NSW and the National Office of the TWU.

32. The grant of authority to the TWU of NSW and the National Office of the TWU to make salary deductions from employees' pay into the Transport Election Committee or McLean Forum bank accounts appears to have been, at least for a period, a standard condition of offers of employment made to prospective staff. For example, the 2011 pro forma letter of offer used by the TWU of NSW stated:³⁸

Campaign Fund

As part of your continued employment you are required to contribute to a campaign fund at the current rate of \$15/27/32 per week. This fund has been set up to be used at the discretion of the current NSW State Secretary, or an appointed representative, to promote job security for our team. (NB: Signing of the acceptance at the foot of this letter constitutes written authority for the Union to deduct that amount from your weekly pay and acknowledgment that the deduction is for your benefit.)

33. There are other examples of contracts in which this condition of employment had been included in the letter of offer sent to prospective employees by Wayne Forno.³⁹ Those documents had been supplied to the auditors by Garth Mulholland who, on 12 April 2011, had emailed the auditors with the statement:⁴⁰

The TWU will not allow for the transfers to occur without the consent of the staff member so the requirement to contribute [to the McLean Forum] is included in Letters of Offer and for long

³⁸ TWU McLean Forum Tender Bundle, 20/8/14, p 161.

³⁹ TWU McLean Forum Tender Bundle, 31/10/2014, p 1-4, 5-8, 9-12.

⁴⁰ TWU McLean Forum Tender Bundle, 31/10/14, p 13.

standing staff we recently went through the process of updating their contracts.

34. That implies that the purpose for which monies standing to the credit of the fund may be applied is limited to the promotion of 'job security' for the current leadership team. That constraint is not evident in the terms of the McLean Forum's articles of association. Nor is it consistent with the ways that the McLean Forum's funds have in fact been expended (as set out below).
35. The terms of employment offered by the National Office of the TWU to Tom Pacey in July 2010 adopted slightly different wording to the counterpart pro forma letter of offer from the TWU of NSW:⁴¹

As part of your employment you are required to contribute \$28.00 per week to a campaign fund. This fund has been set up to be used at the discretion of the National Secretary, or an appointed representative.

36. Tony Sheldon testified that the requirement for contributions was a loose arrangement that was not enforced and is no longer included in job contracts:⁴²

There was a loose arrangement about people putting money in, then there was a period that we put it in job contracts; there's a period now for a number of years where we haven't put it in job contracts. The reality was when we put it in job contracts that some just didn't pay and they were great staff. So, for whatever variety of reasons that people didn't pay, it wasn't an obligation that we actually enforced even though it was arguably a breach of their contract, employment contract, so we just moved to a voluntary system because in actual fact, in effect, that's what was happening.

⁴¹ TWU McLean Forum Tender Bundle, 20/8/14, p 542.

⁴² Anthony Sheldon, 21/8/14, T:77.47-78.10.

37. Tony Sheldon did not say how recently the TWU of NSW and the National Office of the TWU had changed its policy. Nor did he suggest that job contracts had been rewritten so as to delete the clause relating to the Campaign Fund.
38. Further, there is no evidence that TWU employees knew of a policy of not enforcing contract conditions requiring employees of the TWU of NSW and the National Office to pay money into the 'campaign fund'. Rather, the evidence suggested that contributors did not, and do not, have an understanding of the identity or nature of the entity to which their contributions were or are directed, or how their contributions have been or are being used.
39. For example, Tom Pacey, who was employed by Tony Sheldon as a National Executive Officer at the National Office of the TWU in July 2010,⁴³ indicated that he did not know what the 'campaign fund' referred to in his contract was other than that he 'understood it to be a campaign fund'.⁴⁴ The TWU submitted that Tom Pacey's evidence went only to his knowledge of the McLean Forum when he commenced employment and did not go to his knowledge of subsequent expenditure by it.⁴⁵ That is not so. His evidence applied to all periods of time.⁴⁶

⁴³ Thomas Pacey, 20/8/14, T:70.24-29.

⁴⁴ Thomas Pacey, 20/8/14, T:72.1-7.

⁴⁵ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 195.

⁴⁶ Thomas Pacey, 20/8/14, T:71.36-72.17.

40. Tony Sheldon was asked repeatedly whether contributors to the fund were told precisely how their contributions were being spent.⁴⁷ He failed to answer that question. He attempted to evade it by saying that expenditure by the McLean Forum, including expenditure on his personal campaign to be President of the ALP, was:⁴⁸

within the authority that had been conferred on the executive team to make these sorts of decisions and also in very clear understanding that those people who are contributing to the funds are contributing to what the leadership team believe in about making sure that we have a voice.

41. Tony Sheldon stated that contributors to the McLean Forum never expressed displeasure at the way their contributions were spent.⁴⁹ He also said that in circumstances where individuals have left employment with the TWU and asked for their contributions back that 'we've paid the money back'.⁵⁰

42. Notice to Produce No. 14 issued to the Proper Officer of the McLean Forum sought 'all Accounting Books', all 'Financial reports', meeting agendas, board papers and minutes of meeting in the period since 1 July 2006 to 31 March 2014.⁵¹ None of the records produced by the McLean Forum to the Commission contain any record of a decision to repay a contributor. Nor do the records of the McLean Forum recording expenditure contain

⁴⁷ Anthony Sheldon, 21/8/14, T:90.43-92.21, Anthony Sheldon, 21/8/14, T:93.6-93.46.

⁴⁸ Anthony Sheldon, 21/8/14, T:95.39-44.

⁴⁹ Anthony Sheldon, 21/8/14, T:91.42-92.2.

⁵⁰ Anthony Sheldon, 21/8/14, T:91.42-92.2.

⁵¹ TWU McLean Forum Tender Bundle, 31/10/2014, p 15-20.

a receipt for such a payment. In any event, in circumstances where there are no records of any reports being made to contributors as to the expenditure of the McLean Forum's monies, it must be found that at least in the last eight years the directors have not formally resolved to communicate, or approved the text of any communication, to contributors.

Expenditure of the McLean Forum's funds: general

43. Since June 2010, the principal expenditure of the McLean Forum has related to four elections:
- (a) the 2010 elections for the Queensland branch of the TWU and associated State-registered entity;
 - (b) the 2012 elections for the NSW branch of the HSU and associated State-registered entity;
 - (c) the 2012 elections for the international and domestic divisions of the Flight Attendants' Association of Australia (**FAAA**);
 - (d) Tony Sheldon's own campaign for presidency of the ALP.
44. Ordinarily, fighting funds are set up and run by incumbent officials primarily for the purpose of funding campaigns that may be necessary for those incumbent officials to mount to defeat any challenge to them at a future election of the same union (or their

branch of that union). However, the McLean Forum has applied its funds almost exclusively to the benefit of the campaigns of persons who were not and never had been contributors to the Transport Election Committee or the McLean Forum.

45. Before addressing the specific items of expenditure, factual matters of a general nature should be noted.
46. The condition in the employment contracts of employees of the National Office describes the McLean Forum (without mentioning its name) as a campaign fund that 'has been set up to be used at the discretion of the National Secretary, or an appointed representative'.⁵² The clause in the contract for employees of the TWU of NSW describes it as a campaign fund (again without mentioning its name) that has been set up 'to be used at the discretion of the current NSW State Secretary, or an appointed representative, to promote job security for our team'.⁵³
47. Tony Sheldon denied he was able to spend the McLean Forum funds as he saw fit. He argued that 'it had to be within the terms of the memorandum'.⁵⁴ That is a far broader authority than the terms of the TWU NSW employment contract describe. It is beyond the authorisation implied in the National Office contract of employment, for that authorises deductions to a 'campaign' fund, not a fund to be used for broader objects.

⁵² TWU McLean Forum Tender Bundle, 20/8/14, p 542.

⁵³ TWU McLean Forum Tender Bundle, 20/8/14, p 161.

⁵⁴ Anthony Sheldon, 21/8/14, T:93.15-6.

48. Further the limitation to which Tony Sheldon referred is so permissive as to be of little practical effort. The articles of association of the McLean Forum are drafted in broad terms. The articles of association do not explicitly permit funding election campaigns in respect to other unions. But they are open to the construction, proffered by Tony Sheldon, that that activity falls within the object of advancing the interests of transport workers and the union movement.⁵⁵

49. The records of the company say little about the extent to which any contributors (other than the directors and Mr Mookhey) are given information on the McLean Forum's activities and proposed expenditure. For example, in respect to the McLean Forum's substantial financial commitments to candidates in the 2012 HSU NSW elections and the 2012 FAAA elections Tony Sheldon explained:⁵⁶

[The] decision for the McLean Forum to become involved in the elections within the HSU and FAAA began with informal discussions involving Wayne Forno, Scott Connolly and myself about dealing with issues surrounding the elections, and when a common view was formed, the decision to become involved was formalised by the passing of a resolution at a board meeting.

50. There is no evidence that these decisions followed or led to any consultation with TWU members or the contributors to the McLean Forum. In this regard the McLean Forum is a 'forum' in only the loosest sense.

⁵⁵ Anthony Sheldon, witness statement, 20/8/14, para 31.

⁵⁶ Anthony Sheldon, witness statement, 20/8/14, para 33.

51. The disclosure was in essence non-existent. Tony Sheldon was asked questions about this. He evaded those questions. Ultimately he said:⁵⁷

There are discussions, there have been generally, with McLean Forum participants about the decision-making process that members have trusted that we make the right decision about what political decisions we make...

52. No adequate, let alone formal and upfront, disclosure of the McLean Forum's expenditure or activities has been given to contributors to the McLean Forum. The directors – Tony Sheldon, Wayne Forno and Scott Connolly – have seen themselves at liberty to spend as they see fit, subject only to the very loose constraints of the McLean Forum's memorandum of association.

The 2010 Queensland Branch elections: general

53. This part of the Interim Report deals with the McLean Forum's substantial financial and logistical support to the 'New Transport Workers' Team' led by Peter Biagini in the 2010 TWU Queensland Branch elections.
54. It also deals with the conduct of Peter Biagini's team after its successful campaign, specifically the creation of a new position of Assistant State Secretary in the Queensland Branch and the instalment of Scott Connolly (a director of the McLean Forum) to that position.

⁵⁷ Anthony Sheldon, 21/8/14, T:91.31-5.

Scott Connolly and the Queensland Branch

55. Prior to the 2010 elections, the Queensland Branch had been led by Hughie Williams who had held the position of Secretary for 18 years.
56. Scott Connolly gave evidence that in 2006, Hughie Williams started to prepare Scott Connolly for leadership of the Queensland Branch.⁵⁸ Scott Connolly's evidence was that he was under the impression that he was to be Hughie Williams' successor as Secretary. Scott Connolly moved to Queensland to take up a position as an official.⁵⁹
57. Scott Connolly later fell out with Hughie Williams and towards the end of 2009, Hughie Williams and the Queensland Branch President asked Scott Connolly to leave the Branch or take a \$30,000 pay cut.⁶⁰ Scott Connolly resigned and took up the position of National Airlines Official at the TWU National Office in Sydney.⁶¹

⁵⁸ Scott Connolly, witness statement, 18/8/14, para 13.

⁵⁹ Scott Connolly, witness statement, 18/8/14, para 14-5.

⁶⁰ Scott Connolly, witness statement, 18/8/14, para 16.

⁶¹ Scott Connolly, witness statement, 18/8/14, para 17.

Establishment of the New Transport Workers' Team

58. Several witnesses gave evidence about general concerns surrounding the performance of the Queensland Branch under Hughie Williams in the lead-up to the 2010 elections.
59. Peter Biagini referred to a stagnation of membership numbers during the mid-2000s in the Queensland Branch, particularly as a result of Hughie Williams' controlling behaviour.⁶² Peter Biagini also stated that he became aware of concerns regarding 'how the union was being run, its lack of direction, and allegations of a lack of leadership'.⁶³ Peter Biagini further noted that Hughie Williams appeared to be planning for his son to take over the role of Branch Secretary when he retired.⁶⁴
60. Scott Connolly said that by 2009 he had become 'increasingly concerned about direction and leadership of the Queensland Branch'.⁶⁵ He expressed these concerns to other TWU officials, including Tony Sheldon.
61. Tony Sheldon appears to have shared Scott Connolly's concerns. Tony Sheldon described Hughie Williams as becoming a liability to the TWU. He also referred to Hughie Williams' lack of consistency, his memory lapses and his failure to follow through on commitments.

⁶² Peter Biagini, witness statement, 20/8/14, para 14.

⁶³ Peter Biagini, witness statement, 20/8/14, para 16.

⁶⁴ Peter Biagini, witness statement, 20/8/14, para 17.

⁶⁵ Scott Connolly, witness statement, 18/8/14, para 20.

62. At some point in 2009 or 2010 it was suggested that Scott Connolly should run for Queensland Branch Secretary in the 2010 elections. Scott Connolly's evidence was that he did not want to run because he had just started a family but mentioned to other officials that Peter Biagini was considering running and that he should be supported instead.
63. From about March 2010 a campaign strategy was developed for the New Transport Workers' Team.⁶⁶ The New Transport Workers' Team was established around August 2010 and at the start was a modestly funded campaign with limited resources.⁶⁷ However, this changed with the involvement of the McLean Forum.

The McLean Forum decides to support Peter Biagini

64. The first approach to develop an alliance between the McLean Forum and the New Transport Workers' Team appears to have been made by Scott Connolly. Peter Biagini recalls that in about late 2009 or early 2010, he received an offer of assistance from Scott Connolly.⁶⁸ Peter Biagini explained the offer was for financial resources and assistance from people from the National Office and elsewhere in the TWU.⁶⁹

⁶⁶ Scott Connolly, witness statement, 18/8/14, para 26

⁶⁷ Scott Connolly, witness statement, 18/8/14, para 28-29.

⁶⁸ Peter Biagini, witness statement, 20/8/14, para 30-1.

⁶⁹ Peter Biagini, 21/8/14, T:55.11.

65. At some point Peter Biagini accepted the offer of the McLean Forum's assistance and agreed to allow Scott Connolly to join his ticket to challenge for a position on the Queensland Branch Committee of Management.⁷⁰ Peter Biagini claimed there was no quid pro quo in return for funding support from the McLean Forum.⁷¹
66. On 8 July 2010, the Board of Directors of the McLean Forum approved expenditure to support Peter Biagini's New Transport Workers' Team.⁷² It was agreed that Daniel Mookhey would coordinate the New Transport Workers' Team's campaign.⁷³ It was also agreed that Scott Connolly, Daniel Mookhey and Garth Mulholland would be authorised to incur expenses on behalf of the McLean Forum.
67. This meeting occurred just a month after more than \$330,000 from the Transport Election Committee was transferred into the McLean Forum's bank account. As described earlier, the cheque had in fact been signed on 19 March 2010. That coincides with the month in which Scott Connolly commenced providing strategic support to the New Transport Workers' Team's campaign.⁷⁴ It was because of that cash injection that the McLean Forum was well resourced and in a position to fund, apparently exclusively, the New Transport Workers' Team's campaign.

⁷⁰ Scott Connolly, witness statement, 18/8/14, para 24.

⁷¹ Peter Biagini, 21/8/2014, T:58.2.

⁷² TWU McLean Forum Tender Bundle, 20/8/14, pp 150-1.

⁷³ Daniel Mookhey, 20/8/14, T:13.29-32.

⁷⁴ Scott Connolly, witness statement, 18/8/14, para 26.

68. Daniel Mookhey claimed that in about August 2010 and September 2010, two meetings of the McLean Forum were held to discuss strategies for upcoming elections and that contributors were informed that the fund would be supporting the New Transport Workers' Team.⁷⁵ No documents have been provided to the Commission corroborating this claim. Any meeting held was not the subject of any minute or record of the McLean Forum. Further, Daniel Mookhey's evidence is contradicted by Tom Pacey. He was employed by the TWU in July 2010. His contract of employment required him to contribute to a 'campaign fund' (being the McLean Forum). He had no knowledge about what it was or did.⁷⁶ In reality, in 2010 no disclosure was made to contributors of the commitment of McLean Forum funds to support the New Transport Workers' Team.

Use of resources to assist the New Transport Workers' Team: general

69. This section considers the support provided by the TWU National Office and TWU of NSW to the New Transport Workers' Team campaign.

70. Section 190 of the *Fair Work (Registered Organisations) Act* 2009 (Cth) provides that:

An organisation or branch commits an offence if it uses, or allows to be used, its property or resources to help a candidate against another

⁷⁵ Daniel Mookhey, witness statement, 18/8/14, para 14.

⁷⁶ See paragraph 39 above.

candidate in an election under this Part for an office or other position.

71. The purposes of this provision are at least twofold:
- (a) to prevent incumbents from depleting the assets of the union for use on election campaigns for their own personal benefit or the benefit of others; and
 - (b) to prevent an incumbent, who has control of union property and resources, from obtaining an unfair electioneering advantage.
72. The establishment and maintenance by union officials of election funds in the nature of the McLean Forum, is in large part directed at sidestepping the operation of s 190. Similarly, practices such as union employees taking paid or unpaid leave to work on union campaigns as ‘volunteers’, and ‘volunteers’ creating separate email accounts for work on union elections, appear to have arisen in order to attempt compliance, at least on paper, with s 190.

TWU support for the New Transport Workers' Team

73. Daniel Mookhey acknowledged that the elected officers of the TWU made a decision to throw their weight behind the New Transport Workers' Team.⁷⁷ However, his evidence was that 'no payment or in-kind assistance' was provided by the TWU or the TWU of NSW to support the New Transport Workers' Team.⁷⁸ Daniel Mookhey's evidence on this point is to be rejected.
74. Daniel Mookhey said that the following people from the TWU and the TWU of NSW were involved in the campaign:⁷⁹
- (a) Mr. Scott Connolly - he was an employee of the TWUA. He was a candidate standing for the NTWT. He was on leave.
 - (b) Mr. Tom Pacey - he was an employee of the TWUA. He was on leave.
 - (c) Mr. Seth Tenkate and Mr Josh Genner - they were employees of the TWU. They engaged in the after-hours calling of electors described above. Mr Genner also assisted with organising those calls.
 - (d) Mr Michael Wong - he was an employee of the TWU NSW. He was a campaign volunteer in the campaign's later stages. He too, as I understand it, was on leave.
 - (e) A few NSW and National Officials - I was aware that some NSW and National Officials had responded to a call for volunteers, and engaged in the after hour phoning of electors mentioned earlier in my statement. I do not recall the specific people.

⁷⁷ Daniel Mookhey, 20/8/14, T:23.46-24.3.

⁷⁸ Daniel Mookhey, witness statement, 18/8/14, para 17.

⁷⁹ Daniel Mookhey, witness statement, 18/8/14, para 12.

75. In addition to the TWU employees mentioned by Daniel Mookhey, Tom Pacey said that the following people worked on the Queensland campaign:⁸⁰

Q. In addition to the assistance provided by McLean Forum in the TWU National Office, did any other entities provide donations or assistance to the Biagini campaign in Queensland?

A. When I was up in Brisbane, the HSU had one of their employees come up. I'm unsure of the nature of their arrangements in terms of if it was annual leave or whatever.

Q. Was her name Ms Angela Humphries?

A. Correct, yes. There were a number of people from New South Wales Labor that had come up: Pat Cook - Patrick Cook, Amber Setchell, Michael Buckland all came up.

Yes, that's it. And then in Victoria, Xavier Williams.

76. Stephen Donnelly, who at the time was employed by Senator David Feeney, also worked on the campaign.⁸¹ Stephen Donnelly was a former employee of the TWU.⁸²

Daniel Mookhey's role in the campaign

77. From March 2009 to June 2011, which covered the campaign period for the 2010 TWU Queensland election, Mr Mookhey was the Chief of Staff of the TWU.⁸³

⁸⁰ Thomas Pacey, 20/8/14, T:78.47-79.19.

⁸¹ Daniel Mookhey, 20/8/14, T:23.5-12.

⁸² Daniel Mookhey, 20/8/14, T:23.30-44.

⁸³ Daniel Mookhey, witness statement, 18/8/14, para 5.

78. On 8 July 2010 the McLean Forum resolved that Daniel Mookhey would co-ordinate the New Transport Workers' Team's campaign.⁸⁴

79. Daniel Mookhey's evidence was that the co-ordinator role evolved into a liaison role.⁸⁵ In his witness statement, he said that:⁸⁶

During the NTWT campaign, I liaised between McLean with the NTWT. Most of my liaison duties involved paying campaign suppliers, arranging payment of expenses and reimbursement of volunteers and other sundry expenses incurred by the NTWT during this campaign.

80. According to Daniel Mookhey, the coordination function was assumed by the New Transport Workers' Team directly.⁸⁷ In oral evidence, he said that:⁸⁸

The three people who were principally responsible I believe were Mr Connolly, a gentleman by the name of Mr Donnelly, and Mr Pacey and Mr Biagini, of course, as the leader of that team.

81. Despite Daniel Mookhey's insistence that his role 'evolved', it appears that he continued to play a significant role in the campaign. This is unsurprising given he continued to manage the McLean Forum's expenditure.⁸⁹

⁸⁴ TWU McLean Forum Tender Bundle, 20/08/14, p 150. See para 67 above.

⁸⁵ Daniel Mookhey, 20/8/14, T:13.43-14.4.

⁸⁶ Daniel Mookhey, witness statement, 18/8/14, para 15.

⁸⁷ Daniel Mookhey, 20/8/14, T:18.8-9.

⁸⁸ Daniel Mookhey, 20/8/14, T:18.14-17.

⁸⁹ Scott Connolly, witness statement, 18/8/14, para 33.

82. Tom Pacey, who was responsible for the day to day operations of the campaign,⁹⁰ received advice and recommendations from Daniel Mookhey.⁹¹ Indeed, on his own evidence, Daniel Mookhey ‘had regular conversations with Mr Pacey’ and ‘semi-regular conversations with Mr Connolly’ during the campaign.⁹²

Scott Connolly’s role in the campaign

83. As described in paragraph 57 above, at the time of the Queensland campaign Scott Connolly was employed by the TWU as the National Airlines Official.⁹³ It is important to note that although Scott Connolly had taken on a national role with the TWU in early 2010, he continued to reside in Brisbane - away from the National Office.⁹⁴

84. Scott Connolly commenced parental leave in early October 2010.⁹⁵ At around the same time, he nominated for a position on the Queensland Branch Committee of Management on the New Transport Workers’ Team Ticket.⁹⁶

⁹⁰ Scott Connolly, witness statement, 18/8/14, para 33.

⁹¹ Thomas Pacey, 20/8/14, T:72.30-44.

⁹² Daniel Mookhey, 20/8/14, T:22.39-40.

⁹³ Scott Connolly, witness statement, 18/8/14, para 17.

⁹⁴ Scott Connolly, 21/8/14, T:21.4-10.

⁹⁵ Scott Connolly, witness statement, 18/8/14, para 31.

⁹⁶ Scott Connolly, witness statement, 18/8/14, para 31.

85. Scott Connolly had daily conversations with Tom Pacey and Stephen Donnelly about the campaign.⁹⁷ Tom Pacey reported to Scott Connolly.⁹⁸

Arrangements for Tom Pacey

86. Tom Pacey joined the TWU as the National Executive Officer in July 2010.⁹⁹ Tony Sheldon appears to have hand-picked Tom Pacey after hearing ‘around the Labor traps’ that he was a good campaigner.¹⁰⁰ Prior to Tom Pacey joining the TWU, Tony Sheldon told Tom Pacey that he wanted him to work on the New Transport Workers’ Team campaign in Queensland.¹⁰¹
87. Tom Pacey commenced work on the Queensland campaign soon after joining the TWU.¹⁰² His evidence was that when he commenced, the majority of his time was spent working on what he called ‘TWU business’ – as distinct from Queensland campaign business.¹⁰³ However, even during this time, Tom Pacey’s work in July and August included what he described as establishing the framework for the campaign.¹⁰⁴

⁹⁷ Scott Connolly, witness statement, 18/8/14, para 33.

⁹⁸ Thomas Pacey, 20/8/14, T:76.2-7.

⁹⁹ Thomas Pacey, 20/8/14, T:70:24-25.

¹⁰⁰ Thomas Pacey, 20/8/14, T:70:31-36.

¹⁰¹ Thomas Pacey, 20/8/14, T:87:28-37.

¹⁰² Thomas Pacey, 20/8/14, T:72:26-28.

¹⁰³ Thomas Pacey, 20/8/14, T:88.10-12.

¹⁰⁴ Thomas Pacey, 20/8/14, T:74.9-16.

88. Tom Pacey's evidence was that the TWU National Office was assisting with the campaign run by the New Transport Workers' Team.¹⁰⁵ Daniel Mookhey and Tom Pacey took a trip to Melbourne in late July or August to speak with pollsters about the Queensland campaign.¹⁰⁶ Daniel Mookhey advised Tom Pacey to use a personal email account when working on the campaign.¹⁰⁷
89. In September 2010, Tom Pacey moved to Brisbane to work on the campaign. He lived in a house paid for by the McLean Forum.¹⁰⁸ This marked the commencement of the campaign proper.¹⁰⁹
90. Tom Pacey was in Queensland for eight weeks.¹¹⁰ During that period he was on a combination of annual leave from the TWU and leave without pay.¹¹¹ Documents produced to the Commission show that Tom Pacey received \$17,873.78 in salary and reimbursements from the McLean Forum.¹¹² Tom Pacey was unable to explain why there was a reference to 'salary' in the McLean Forum documents as the only salary he received at that

¹⁰⁵ Thomas Pacey, 20/8/14, T:72.46-73.2.

¹⁰⁶ Thomas Pacey, 20/8/14, T:73:7-19.

¹⁰⁷ Thomas Pacey, 20/8/14, T:74.34 – 75.1.

¹⁰⁸ Thomas Pacey, 20/8/14, T:73.33-35; Daniel Mookhey, 20/8/14, T:30.30-32.

¹⁰⁹ Thomas Pacey, 20/8/14, T:74.13-16.

¹¹⁰ Thomas Pacey, 20/8/14, T:77.24-25.

¹¹¹ Thomas Pacey, 20/8/14, T:77.24-32.

¹¹² TWU McLean Forum Tender Bundle, 20/8/14, pp 256-260.

time was from the TWU.¹¹³ Tom Pacey did receive a \$4,000 'honorary' at the end of the campaign.¹¹⁴

Arrangements for Michael Wong

91. Michael Wong was one of the first to join the campaign team for the New Transport Workers' Team in Queensland.¹¹⁵ Daniel Mookhey arranged for Michael Wong to work on the campaign.¹¹⁶ Michael Wong worked on the campaign until 26 November 2010.¹¹⁷
92. At the time of the campaign Michael Wong was employed as a Communications Officer with the TWU of NSW.¹¹⁸ Michael Wong said that he was 'notionally on annual leave' whilst he was working on the campaign in Queensland.¹¹⁹ Opinions may differ about the credibility of some parts of Michael Wong's evidence, but not that part. It is confirmed by the business records of the TWU.
93. After the New Transport Workers' Team was elected, Michael Wong decided to remain in Queensland and work for the

¹¹³ Thomas Pacey, 20/8/14, T:78.5-9.

¹¹⁴ Thomas Pacey, 20/8/14, T:89.4-25.

¹¹⁵ Thomas Pacey, 20/8/14, T:74.4-7.

¹¹⁶ Michael Wong, 20/8/14, T:101.22-26.

¹¹⁷ Wong MFI-1, p 1.

¹¹⁸ Wong MFI-1, p 5.

¹¹⁹ Michael Wong, 20/8/14, T:96.20-23.

Queensland Branch.¹²⁰ Accordingly, on 1 December 2010, he resigned his employment with the TWU of NSW.¹²¹ His employment with the TWU of NSW ceased on 10 December 2010.¹²² He commenced employment with the Queensland Branch in early January 2011.¹²³

94. The arrangements for Michael Wong's annual leave whilst working on the campaign were as follows:

- (a) on 1 October 2010, he completed an application for annual leave for the period 25 October 2010 until 19 November – this amounts to 20 days.¹²⁴ The application was signed by two people identified as 'Senior Official/Supervisor/Manager';¹²⁵
- (b) his application for annual leave also records that he was 'Paid A/L ... w/ending 26/11/10';¹²⁶
- (c) on 7 January 2011, calculations were performed to re-credit at least part of the annual leave taken by him whilst he was working on the New Transport Workers' Team campaign. The effect of the re-crediting was that his annual leave balance went from negative 7.05 days

¹²⁰ Michael Wong, 20/8/14, T:102.1-5.

¹²¹ Wong MFI-1, p 9.

¹²² Wong MFI-1, p 5.

¹²³ Michael Wong, 20/8/14, T:97.18-20.

¹²⁴ Wong MFI-1, p 1.

¹²⁵ Wong MFI-1, p 1.

¹²⁶ Wong MFI-1, p 1.

to positive 10.00 days.¹²⁷ The notes prepared for these calculations show:¹²⁸

| | |
|--------------------------------------|---------------|
| Annual Leave Adjustment | |
| Closing Balance 10/12/10 negative | (7.05) |
| Add back 114 hours 15 days | 15.00 |
| Paid 1/11/2010 – 19/11/2010 | |
| Add back 38 hours 5 days | 5.00 |
| 19/11/10 – 25/11/10 | |
| Add back 15 hours 2 days | <u>2.00</u> |
| <hr/> | |
| | 14.95 |
| Less loading allowance | |
| \$1005.00: 4.95 days | <u>(4.95)</u> |
| <hr/> | |
| | 10.00 days |
| Please pay on next pay run | |
| [signed] 7/1/11 | |

95. Daniel Mookhey made an artificial distinction between the support given by, on the one hand, the McLean Forum and ‘volunteers’ such as Daniel Mookhey and, on the other, Tom Pacey and the resources of the TWU and the TWU of NSW.

¹²⁷ Wong MFI-1, p 2.

¹²⁸ Wong MFI-1, p 2.

96. The true position is that the elected officials of the TWU decided to throw their weight behind the New Transport Workers' Team. In doing so, they engaged the full weight of the TWU National Office and the TWU of NSW which included:

- (a) allowing Scott Connolly to remain in Brisbane whilst he was performing a national role for the TWU;
- (b) employing impressive young campaigners, such as Tom Pacey, and immediately putting them on annual or unpaid leave to work on the campaign; and
- (c) suggesting that employees take 'leave' to 'volunteer' on the campaign.

97. The TWU submitted that Tom Pacey went up to Queensland as a volunteer and that it was not something he was recruited to do.¹²⁹ The submission does not deal with Tom Pacey's evidence that, before he began working for the TWU, he came to have an understanding that Tony Sheldon wanted him to work on the Queensland campaign.¹³⁰

98. The re-crediting of annual leave to Michael Wong raises particular issues.

¹²⁹ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 206(b).

¹³⁰ Thomas Pacey, 20/8/14, T:87.28-37.

99. The evidence set out above shows that on Michael Wong's departure, the records of the TWU of NSW were amended. Acceptance of that evidence does not depend on any opinion which might be formed about Michael Wong's credibility. On the face of the documents, the October paperwork suggested that Michael Wong was on annual leave while 'volunteering' on the campaign. That suggestion was inaccurate. Michael Wong was not on holidays or on leave. He was working as directed by his employer, the TWU of NSW. That is the conclusion which follows from the final reconciliation of his entitlements. That reconciliation reflects a deliberate decision. The maker of the statements in that business record was asserting that the correct position was as stated in the final reconciliation. That correct position was that he had worked on the New Transport Workers' Team campaign in his work time and as part of his duties as an employee of the TWU of NSW.
100. Section 192H of the *Crimes Act* 1900 (NSW) provided at the relevant time that:

(1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly makes or publishes, or concurs in making or publishing, a statement (whether or not in writing) that to his or her knowledge is or may be false or misleading in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) In this section:

"creditor" of an organisation includes a person who has entered into a security for the benefit of the organisation.

"officer" of an organisation includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation.

"organisation" means any body corporate or unincorporated association.

101. The signed forms recording or authorising Michael Wong's leave are in evidence.¹³¹ The persons who signed these forms have not at this stage given evidence as to the circumstances in which this occurred. Accordingly, no finding is now made as to whether criminal conduct was engaged in in connection with these events.
102. What about civil contraventions? Michael Wong appears to have been an employee of the State-registered TWU of NSW, not the NSW branch of the federally-registered union.¹³²
103. Accordingly, the duties and liabilities of officials were governed by ss 267-271 of the *Industrial Relations Act 1996* (NSW).
104. Section 267 of the *Industrial Relations Act 1996* (NSW) provided at all relevant times:

An officer of a state organisation must not, with intent to deceive or defraud the organisation or the members of the organisation or for any other fraudulent purpose, act dishonestly in the exercise of any of the powers or the discharge of any of the duties of his or her office.

Maximum penalty: 100 penalty units

105. For the reasons given in relation to s 192H, no finding is now made which would support a recommendation that an inspector

¹³¹ Wong MFI-1, p 1.

¹³² Wong MFI-1, p 5.

consider laying proceedings against those officers who authorised Michael Wong's annual leave forms, and any other officer involved in that conduct, for contravention of s 267.

106. Division 3 of Part 3-6 of the *Fair Work Act 2009* (Cth) places obligations on national system employers in respect of employee records. The TWU of NSW is a 'national system employer' for the purposes of the *Fair Work Act 2009* (Cth).¹³³
107. Section 535(1) of the *Fair Work Act 2009* (Cth) requires that an employer must keep records of the kind prescribed by the regulations in relation to each of its employees. Section 535(1) is a civil remedy provision under s 539(2) of the *Fair Work Act 2009* (Cth). At all relevant times, the *Fair Work Regulations 2009* (Cth) provided that:

FAIR WORK REGULATIONS 2009 - REG 3.36

Records--leave

(1) For subsection 535(1) of the Act, if an employee is entitled to leave, a kind of employee record that the employer must make and keep is a record that sets out:

- (a) any leave that the employee takes; and
- (b) the balance (if any) of the employee's entitlement to that leave from time to time.

...

FAIR WORK REGULATIONS 2009 - REG 3.44

Records--accuracy

¹³³ *Fair Work Act 2009* (Cth), ss 14, 30D.

(1) An employer must ensure that a record that the employer is required to keep under the Act or these Regulations is not false or misleading to the employer's knowledge.

(2) An employer must correct a record that the employer is required to keep under the Act or these Regulations as soon as the employer becomes aware that it contains an error.

...

(6) A person must not make use of an entry in an employee record made and kept by an employer for this Subdivision if the person does so knowing that the entry is false or misleading.

108. For reasons given in relation to s 192H, no finding is now made which would support a recommendation that the Fair Work Ombudsman consider civil proceedings against the relevant officers of the TWU of NSW for contravention of reg 3.44 and consider the making of an application to the Federal Court of Australia for the imposition of pecuniary penalties against the relevant officers and the TWU of NSW.

McLean Forum's financial support for the New Transport Workers' Team

109. The McLean Forum spent \$201,077.14 on the 2010 New Transport Workers' Team's election campaign.¹³⁴

110. The McLean Forum paid the following expenses for the New Transport Workers' Team:¹³⁵

- (a) mail and printing;

¹³⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 182A.

¹³⁵ Daniel Mookhey, witness statement, 18/8/14, para 16.

- (b) logistic expenses including phones, rental cars, rental computers and flights;
 - (c) accommodation and living expenses for non-Queensland based volunteers; and
 - (d) honoraria (gratuitous payments in lieu of salaries) to some New Transport Worker Team candidates and campaign volunteers.
111. The McLean Forum also paid for a phone bank and serviced offices used by the Sydney-based volunteers assisting the New Transport Workers' Team.¹³⁶
112. Much of the McLean Forum's expenditure was paid as reimbursements for expenses incurred by others on the election campaign. For example, Daniel Mookhey was reimbursed by the McLean Forum for \$9,000 of expenses he incurred using his personal credit card.¹³⁷ Other reimbursements to Daniel Mookhey included a \$12,060 payment for other expenses he incurred.¹³⁸
113. The McLean Forum paid significant honoraria to some of the TWU employees contributing to the New Transport Workers' Team's campaign. Daniel Mookhey described the purpose of honoraria as being to provide volunteers with an allowance to be

¹³⁶ Daniel Mookhey, witness statement, 18/8/14, para 10.

¹³⁷ Daniel Mookhey, 20/8/14, T:30.30- 31.4.

¹³⁸ TWU McLean Forum Tender Bundle, 20/8/14, pp 182A, 211, 212.

able to meet the costs associated with their volunteer activities.¹³⁹ However, these honoraria appear to go beyond merely covering expenses. They appear to come very close to being at least partial de facto salaries in lieu of TWU salary payments for these ‘volunteers’.

114. One payment of \$10,518 was made to Tom Pacey expressly for ‘salary and reimbursements’.¹⁴⁰ Tom Pacey also recalled a payment of \$4,000 that he received as a gift from Daniel Mookhey with no further explanation as to why it was paid.¹⁴¹
115. The provision of such significant ‘honoraria’ by the McLean Forum enabled the New Transport Workers’ Team to obtain the assistance of experienced trade union officials or other ‘volunteers’ to work full-time in support of the campaign.
116. Given the extent of its monetary and strategic contribution, it is surprising that Peter Biagini, the leader of the New Transport Workers’ Team, apparently had no knowledge that it was the McLean Forum specifically that was largely funding his campaign. Peter Biagini stated:¹⁴²

I understood that the funding provided to assist the NTWT campaign came from a campaign fund. I now know that the monies came from a fund run by officials of the national office and TWU of NSW known as the McLean Forum.

¹³⁹ Daniel Mookhey, 20/8/14, T:31.41-44.

¹⁴⁰ TWU McLean Forum Tender Bundle, 20/8/14, pp 182A, 259, 260.

¹⁴¹ Thomas Pacey, 20/8/14, T:89.20-1.

¹⁴² Peter Biagini, witness statement, 20/8/14, para 35.

117. He further said that, until hearing the oral evidence in the Commission's hearings he had no knowledge of the 'dollar amount' spent by the McLean Forum on his campaign.¹⁴³ He said he had 'no real idea' before the Commission's hearings even as to the range of the likely value of the contribution, save that it was a 'reasonable amount'.¹⁴⁴

118. The New Transport Workers' Team never disclosed to members of the TWU Queensland Branch that it was being supported by the McLean Forum. Nor did it disclose that it was being bankrolled by a fighting fund operated by officials from the National Office and the TWU of NSW. Scott Connolly explained that:¹⁴⁵

As a candidate on the BCOM the ticket was very clear in where its funds were from, and they were from friends and supporters. We weren't explicit in reference to the McLean Forum, but 'friends and supporters' of the New Transport Workers' Team is how we dealt with where we were funded from.

119. This approach was not at all transparent. Members eligible to vote in the 2010 TWU Queensland elections were not informed of who was really behind Peter Biagini's campaign. Apparently almost all members of the NSW branch of the TWU were unaware of what their officials (in conjunction with officials from the National Office) were doing through the vehicle of the McLean Forum.

¹⁴³ Peter Biagini, 21/8/14, T:55.40-41.

¹⁴⁴ Peter Biagini, 21/8/14, T:55.45-47.

¹⁴⁵ Scott Connolly, 21/8/14, T:19.41-6.

120. There is no doubt that the McLean Forum's support gave the New Transport Workers' Team a significant advantage over the team led by the incumbent, Hughie Williams. The McLean Forum gave Peter Biagini access to significant resources, (including a full-time campaign team, call centre and professional printing services), which would have rivalled the best resourced union election campaigns.
121. If Peter Biagini was indeed unaware of the source of his campaign funding, he did not appear to be overly concerned to satisfy himself of the propriety and legality of the funds. Peter Biagini knew that the funding for his campaign was being arranged by senior union officials.¹⁴⁶ But he appears not to have made many, if any, enquiries to satisfy himself and his ticket that the support he was receiving 'from the south'¹⁴⁷ was not in breach of s 190 of the *Fair Work (Registered Organisations) Act* 2009 (Cth).

The Assistant State Secretary Position

122. The New Transport Workers' Team was successful in the 2010 Queensland Branch election, defeating the incumbent Hughie Williams. Peter Biagini was elected State Secretary and among the other successful candidates of the New Transport Workers' Team ticket, Scott Connolly was elected to the Queensland Branch Committee of Management.

¹⁴⁶ Peter Biagini, 21/8/14, T:57.9-15.

¹⁴⁷ Peter Biagini, 21/8/14, T:55.12.

123. Just two months later, on 25 January 2011, the Queensland Branch Committee of Management passed a resolution that directed Peter Biagini to investigate and report on the creation of a new Assistant State Secretary position.¹⁴⁸
124. In May 2011, the TWU Federal Council passed a motion to enable the creation of Assistant Secretary positions for the Queensland and Western Australia branches.¹⁴⁹
125. On 24 May 2011, Scott Connolly provided a presentation to the Queensland Branch Committee of Management on the Federal Council's decision and sought that the decision be endorsed.¹⁵⁰ The report was subsequently endorsed.¹⁵¹
126. On 27 May 2011, Tony Sheldon wrote to the Fair Work Commission to apply for certification of a proposed rule change to enable the creation of the Assistant Secretary positions in Queensland and Western Australia.¹⁵²
127. On 11 August 2011, Michael Kaine (Assistant Secretary of the TWU) emailed Scott Connolly instructions on the process to be followed by BCOM to finalise the position.¹⁵³ One obvious step it did not include was the process for calling nominations. This

¹⁴⁸ Scott Connolly, witness statement, 18/8/14, para 51.

¹⁴⁹ Scott Connolly, witness statement, 18/8/14, para 52.

¹⁵⁰ Scott Connolly, witness statement, 18/8/14, para 53.

¹⁵¹ Scott Connolly, witness statement, 18/8/14, SC2.

¹⁵² Scott Connolly, witness statement, 18/8/14, para 55.

¹⁵³ TWU McLean Forum Tender Bundle, 20/8/14, pp 388-9.

may be what Michael Kaine was referring to, in his further email to Scott Connolly on 29 August 2011 as ‘another step – I will call you.’¹⁵⁴ Scott Connolly was not able to recall whether this was so.¹⁵⁵

128. On 27 September 2011, the Queensland Branch Committee of Management further discussed the creation of the Assistant State Secretary position.¹⁵⁶ It was agreed that steps would be taken to formalise the new position.
129. On 27 September 2011, a BCOM meeting was held. The minutes record the following:¹⁵⁷

QLD Assistant Secretary Position

... The position of Executive Officer was discussed and it was clarified that the intention of the Branch Officers is for the formal Assistant State Secretaries [sic] position to replace the current Executive Officers [sic] Position.

130. At that time Scott Connolly was the Executive Officer.¹⁵⁸ He was put forward by the TWU to the General Manager of the Fair Work Commission as the contact person within the branch for the

¹⁵⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 388.

¹⁵⁵ Scott Connolly, 21/8/14, T:29.37.

¹⁵⁶ Scott Connolly, witness statement, 18/8/14, para 56, SC3.

¹⁵⁷ TWU McLean Forum Tender Bundle, 20/8/14, p 394.

¹⁵⁸ Scott Connolly, 21/8/14, T:30.34.

election,¹⁵⁹ despite at that time being a person who intended to run as a candidate for that position.¹⁶⁰

131. The Assistant State Secretary position was duly created and an election was held to fill it.¹⁶¹ The only voters were members of BCOM, being Scott Connolly's running-mates and recipients of the McLean Forum's largesse in the 2010 elections. Scott Connolly nominated for the position and no one else applied.¹⁶² Scott Connolly was elected to the position on 29 November 2011.¹⁶³
132. Scott Connolly's remuneration as Assistant State Secretary was set at approximately \$96,000 plus 19 per cent superannuation and the use of a car and mobile phone.¹⁶⁴ This contrasted with his salary at the Queensland Branch under Hughie Williams in 2009. At that time, two years earlier, his salary had been about \$80,000¹⁶⁵ (a salary point which mirrored his former salary as Secretary of the ACT sub-branch) and Hughie Williams had suggested he take a \$30,000 pay cut.

¹⁵⁹ TWU McLean Forum Tender Bundle, 20/8/14, pp 396-397.

¹⁶⁰ Scott Connolly, 21/8/14, T:30.44-5.

¹⁶¹ Peter Biagini, witness statement, 21/8/14, para 42.

¹⁶² Scott Connolly, 21/8/2014, T:32.35-9.

¹⁶³ Peter Biagini, witness statement, 21/8/14, para 43.

¹⁶⁴ McLean Forum Tender Bundle, 20/08/14, p 402.

¹⁶⁵ Scott Connolly, witness statement, 18/8/14, para 16.

133. Scott Connolly denied¹⁶⁶ that he was really the ‘architect of the creation of this position from the point of view of the Queensland Branch’.
134. He also denied that the plan all along was that, in return for the massive funding Peter Biagini’s ticket received from the McLean Forum for its campaign, the position of Assistant State Secretary would be created for him.¹⁶⁷ Peter Biagini also said that the idea of a Branch Assistant Secretary was not a new one and had been canvassed since about 2008.¹⁶⁸
135. This testimony must be assessed against the following facts:
- (a) Scott Connolly was first groomed for the position of Queensland State Secretary by Hughie Williams in 2006.¹⁶⁹ He was urged to run in the 2010 elections for Secretary, but refused only for the personal reason that he had just started a family.¹⁷⁰
 - (b) Upon being successful in the election in late 2010, the new Queensland Branch Committee of Management moved rapidly to create a new Assistant State Secretary position. Indeed, commencing the process to create the

¹⁶⁶ Scott Connolly, 21/8/14, T:31.34.

¹⁶⁷ Scott Connolly, 21/8/2014, T:27.37-40.

¹⁶⁸ Peter Biagini, witness statement, 20/8/14, para 36.

¹⁶⁹ Scott Connolly, witness statement, 18/8/14, para 13.

¹⁷⁰ Scott Connolly, witness statement, 18/8/14, para 23.

Assistant State Secretary position was one of the Committee's first actions.¹⁷¹

- (c) One inference from the documents is that Scott Connolly was intimately involved in the plan from the start and was the contact person for the elections. Another inference is that the whole rationale was to re-fashion his role as 'Executive Officer' to an elected position of 'Assistant Secretary' which would be second in rank in the branch (and associated state union).

- (d) The position of Assistant State Secretary is a transitional role to prepare the next Secretary. Scott Connolly said that the Committee of Management intended that the position would ensure 'proper transition mechanisms are put in place for the future'.¹⁷² Tony Sheldon also noted that the role was designed to help improve succession planning within the union.¹⁷³ These euphemisms should be understood as elliptical references to grooming a chosen heir. The comments also assume that it is for the incumbents to decide their successors. And they assume that steps ought to be taken by incumbent officials to prevent any real or effective challenge to the 'team' at the next election.

¹⁷¹ Scott Connolly, witness statement, 18/8/14, para 51.

¹⁷² Scott Connolly, witness statement, 18/8/14, SC1.

¹⁷³ Anthony Sheldon, witness statement, 21/8/14, para 52.

- (e) Although an election was held as a formality, Scott Connolly ran unopposed.¹⁷⁴ And the election was a poll of the members of BCOM – the same persons who had been elected as part of the New Transport Workers’ Team ticket with the backing of Scott Connolly’s McLean Forum.

136. A strong prima facie case exists that there was at least an informal agreement, arrangement, or understanding between Scott Connolly, the McLean Forum and Peter Biagini that in return for support from the McLean Forum, Scott Connolly would be installed as the second-in-charge of the TWU Queensland in a newly created position of Assistant State Secretary. But on the present state of the evidence it is not possible to say whether that is so, on the balance of probabilities. In short, the evidence does not permit a distinct finding one way or the other to be made on that issue or the related issue of whether there were other parties to the agreement, arrangement or understanding as well.

Conflicts of Interest

137. As explained earlier,¹⁷⁵ the McLean Forum’s funds derived from contributions made over many years to the Transport Election Committee and the McLean Forum by officers and employees of the TWU NSW and the National Office. Scott Connolly could

¹⁷⁴ Scott Connolly, 21/8/2014, T:32.35-9.

¹⁷⁵ See above, para 32ff.

not see any conflict between his duty as a director of the McLean Forum and his interest in enjoying receipt of its funds as a candidate in the 2010 TWU Queensland Elections.¹⁷⁶ He saw no apparent need to:

- (a) disclose, to the contributors to the Transport Election Committee, at the time of withdrawing the Transport Election Committee funds in April 2010 (or at all) his intention to use those funds for his own ticket's election campaign in a separate branch of the union;
- (b) refrain from voting at the director's meeting at which the McLean Forum resolved to fund (his) New Transport Workers' Team campaign, or abstain from accepting authority on behalf of the McLean Forum to spend the McLean Forum's funds on that campaign.

This is consistent with Scott Connolly's complete lack of appreciation of the conflicts involved in his conduct.

- 138. The McLean Forum has been promoted to employees and officials of the TWU of NSW as a re-election fund for the job security of the 'team'.
- 139. The use of the McLean Forum to obtain the election of a rival ticket to Hughie Williams in Queensland had nothing to do with the job security of officials in NSW and the National Office, save

¹⁷⁶ Scott Connolly, 21/8/14, T:37.40-3.

for that of Scott Connolly himself. The fact and extent of the McLean Forum's support was not disclosed to the contributors to the Transport Election Committee. It was not disclosed to the contributors to the McLean Forum. It was not disclosed to TWU Queensland members voting during the 2010 election.¹⁷⁷ The directors of the McLean Forum appear not to have even considered, let alone been at all troubled by, the complete absence of disclosure despite the unusual circumstances.

2012 HSU NSW Elections

140. The discussion turns to the McLean Forum's involvement in, and support to the 'Our HSU' campaign of Gerard Hayes and Andrew Lillicrap in the 2012 HSU NSW election against the teams led by Robert Hull and Katrina Hart. Broader issues relating to the 'Our HSU' campaign and the 2012 HSU NSW elections are dealt with separately in Chapter 4.6. These findings focus on the support provided by the McLean Forum to Gerard Hayes and Andrew Lillicrap.

The McLean Forum decides to support 'Our HSU'

141. On 3 April 2012, Fair Work Australia put out a media release saying that its investigation into matters concerning Craig

¹⁷⁷ Peter Biagini, 21/8/14, T:58.25-8.

Thomson was complete and that it had found 181 contraventions by Craig Thomson and other HSU officials of their duties.¹⁷⁸

142. Gerard Hayes said that on or about 4 April 2012, he received a phone call from Tony Sheldon who told him that his branch was about to be suspended from the Australian Council of Trade Unions as a fallout from allegations regarding Michael Williamson.¹⁷⁹ Tony Sheldon denied this evidence¹⁸⁰ but admitted that his memory was not very clear as to the sequence of events.¹⁸¹ Gerard Hayes' evidence was that Tony Sheldon and Gerard Hayes had another phone conversation that day during which Tony Sheldon asked if they could have a meeting.¹⁸²
143. Gerard Hayes said he and Andrew Lillicrap then met with Tony Sheldon and Wayne Forno at the Pavilion Hotel in Sydney.¹⁸³ Scott Connolly and Daniel Mookhey were not present,¹⁸⁴ although Daniel Mookhey may have appeared at the tail end of the discussion. Tony Sheldon could not recall the location of the meeting or who else was present. According to Gerard Hayes, Tony Sheldon made it clear that if Gerard Hayes was willing to

¹⁷⁸ Chris Brown, witness statement, 27/8/14, para 326.

¹⁷⁹ Gerard Hayes, 26/8/14, T:619.1-4.

¹⁸⁰ Anthony Sheldon, 21/8/14, T:88.14.

¹⁸¹ Anthony Sheldon, 21/8/14, T:87.41-88.6.

¹⁸² Gerard Hayes, 26/8/14, T:619.8-13.

¹⁸³ Gerard Hayes, 26/8/14, T:619.12-15.

¹⁸⁴ Gerard Hayes, 26/8/14, T:619.43-7, 620.2-3.

stand against Michael Williamson and his supporters in an election, Tony Sheldon would be willing to support him.¹⁸⁵

144. The evidence of Gerard Hayes ought be accepted given the content of contemporaneous documents which support its accuracy and, to the extent Tony Sheldon's evidence conflicts with it, given Tony Sheldon's own acknowledgement that he had difficulties of memory concerning these events. It can be inferred from the circumstances and what followed that Gerard Hayes agreed at this point to commit to standing in future elections for the HSU NSW Branch and associated State entity with Tony Sheldon's commitment of support.
145. Later on 4 April 2012, the directors of the McLean Forum met, including Scott Connolly. Daniel Mookhey, who had by then left his employment at the TWU, was also present. He recalled that Tony Sheldon advised him that the McLean Forum would be supporting Gerard Hayes.¹⁸⁶
146. The McLean Forum formally passed a resolution to assist Gerard Hayes and Andrew Lillicrap and to authorise Daniel Mookhey to incur expenses on the McLean Forum's behalf.¹⁸⁷ Daniel Mookhey volunteered to assist in coordinating the 'Our HSU' campaign.¹⁸⁸

¹⁸⁵ Gerard Hayes, witness statement, 14/8/14, para 23.

¹⁸⁶ Daniel Mookhey, witness statement, 18/8/14, para 21.

¹⁸⁷ TWU McLean Forum Tender Bundle, 18/8/14, pp 153-4.

¹⁸⁸ Daniel Mookhey, witness statement, 18/8/14, para 18.

Why the McLean Forum supported ‘Our HSU’

147. Tony Sheldon argued it was important to support the right candidate in the HSU NSW elections as the HSU had members who are transport workers and there were issues involving reform of the union movement generally (with respect to Mr Williamson).¹⁸⁹

148. Tony Sheldon stated that:¹⁹⁰

Our responsibility as trade union leaders and as movement leaders and as people within our union, we have a responsibility to clean this mess up which was in that union.

149. It was well known at that point that Michael Williamson stood accused of very serious wrongdoing. As described elsewhere, those accusations had been public for some time, although supporters of Michael Williamson did not cease dealing with him until many months after Strike Force Carnarvon commenced. It is not clear what motivated the sudden change in support for Michael Williamson by Tony Sheldon and others at the TWU.

150. Tony Sheldon said that the HSU of NSW under Michael Williamson had previously been an ally. But ‘it became apparent ... that Mr Williamson was not acting in the best interests of his members or the movement’.¹⁹¹ The difficulty with that evidence is that the action of Tony Sheldon and others was not soon after

¹⁸⁹ Anthony Sheldon, witness statement, 20/8/14, para 31.

¹⁹⁰ Anthony Sheldon, 21/8/14, T:85.41-4.

¹⁹¹ Anthony Sheldon, witness statement, 20/8/14, para 42.

the surfacing of serious allegations against Michael Williamson. Nor was there any change in the public statements made by the NSW Police commencing its investigation into Michael Williamson that coincided with the activities of Tony Sheldon and the McLean Forum in April 2012. Finally, there had not been at this time any proposal within the HSU to hold elections in 2012 for the HSU East Branch and associated state union. No witness associated with the McLean Forum gave a credible explanation as to why, in April 2012, it was making a resolution to support a person in an election that had not even been mooted within the HSU or amongst the HSU's officials.

151. The day after Tony Sheldon's meeting with Gerard Hayes and the resolution of the McLean Forum to support Gerard Hayes in any election, the executive of the Australian Council of Trade Unions (ACTU) met and voted to suspend the HSU from the ACTU. The media release stated:¹⁹²

In making this decision, the ACTU Executive is acting in the interests of and to give encouragement to the officials, delegates and members of the HSU who are dedicated to a strong democratic and accountable union.

152. Tony Sheldon did not give a sufficient explanation of why the McLean forum supported the 'Our HSU' team rather than any other team.

¹⁹² Unknown author, *ACTU Executive endorses recommendation to suspend Health Services Union*, <http://www.actu.org.au/Media/Mediareleases/ACTUExecutiveendorsesrecommendationtosuspendHealthServicesUnion.aspx>, accessed 5/12/14.

153. His evidence was that:¹⁹³

... there was discussions that took place with a number of unions, both in different factual groupings within the broad movement, about Gerard Hayes as being an appropriate candidate. We had a great deal of confidence in Gerard. He had been involved in our Safe Rates Campaign, he was an ex-ambulance driver, we were confident that he was going to be a strident union leader if he was able to win that election.

154. With whom did these discussions occur? Tony Sheldon said:¹⁹⁴

Probably with half the trade union movement, but specific discussions that come to memory is with United Voice, with the Australian Workers' Union, with people across the political movement...

155. The most surprising feature of this evidence is that it shows Tony Sheldon, before choosing to anoint Gerard Hayes as his preferred candidate, does not appear to have consulted with any member of the HSU other than perhaps Gerard Hayes. The decision to back Gerard Hayes was also taken before an election was announced or scheduled as even a possibility within the HSU and before any other possible candidates had come forward. It discloses a desire on the part of Tony Sheldon and the McLean Forum to clean out corruption from the HSU East Branch. But Gerard Hayes was not the only candidate who could have done that.

156. In his evidence Tony Sheldon attempted to justify, retrospectively, the decision on the basis of concerns about other tickets.¹⁹⁵ However those tickets and leaders had not identified

¹⁹³ Anthony Sheldon, 21/8/14, T:89.1-9.

¹⁹⁴ Anthony Sheldon, 21/8/14, T:89.19-25.

¹⁹⁵ Anthony Sheldon, 21/8/14, T:89.37-8, Anthony Sheldon, 21/8/14, T:90.5-10.

themselves as possible candidates when the McLean Forum passed its resolution to fund a campaign led by Mr Hayes.

157. The interest of Tony Sheldon and the McLean Forum's in the HSU was not merely an altruistic concern with cleaning up the HSU. The real motivating factors appear to have been primarily political. What precise political considerations were in play is difficult to say. The failure of those running the McLean Forum to consult any members of the HSU, other than (perhaps) Gerard Hayes, prevents a conclusion that their actions were truly concerned with the wishes of the HSU membership.
158. When asked about any disclosure by himself or the McLean Forum to members of the TWU or contributors to the McLean Forum as to the use of the McLean Forum's funds to back Gerard Hayes, Tony Sheldon attempted to avoid the questions.¹⁹⁶
159. In any event, the contributors to the McLean Forum and members of the TWU never had a chance to debate whether the TWU should be involved in an HSU election, and, if it were to be involved, whom the McLean Forum would support.
160. No disclosure was made to either TWU members or McLean Forum contributors generally of the nature and size of the McLean Forum's involvement in Gerard Hayes's campaign. And no disclosure was made to them of the nature and extent of the

¹⁹⁶ Anthony Sheldon, 21/8/14, T:90.43-92.6.

involvement of Tony Sheldon and Wayne Forno – the Secretaries of the TWU nationally and the TWU of NSW respectively.

The McLean Forum’s expenditure on the ‘Our HSU’ campaign

161. In addition to liaising between the ‘Our HSU’ ticket and the McLean Forum regarding funding and expenditure, Daniel Mookhey was also the campaign director for the ‘Our HSU’ campaign.¹⁹⁷
162. The McLean Forum’s total contribution to the ‘Our HSU’ campaign totalled \$51,884.47.¹⁹⁸ In addition to providing funding for expenses such as a commercial call centre and phones for volunteers, the McLean Forum also made ‘honoraria’ payments to Gerard Hayes and Andrew Lillicrap.¹⁹⁹
163. The following payments made to Gerard Hayes and Andrew Lillicrap were marked as ‘expenses and honoraria’:²⁰⁰

| Date | Payee | Amount |
|-------------|------------------|---------------|
| 3/7/2012 | Gerard Hayes | \$10,000 |
| 21/9/2012 | Gerard Hayes | \$7,623 |
| 21/9/2012 | Andrew Lillicrap | \$6,687 |
| 7/11/2012 | Andrew Lillicrap | \$5,000 |

¹⁹⁷ Gerard Hayes, witness statement, 14/8/14, paras 44-45.

¹⁹⁸ TWU McLean Forum Tender Bundle, 20/8/14, p 182B.

¹⁹⁹ Daniel Mookhey, witness statement, 18/8/14, para 22.

²⁰⁰ TWU McLean Forum Tender Bundle, 20/8/14, p 182B.

164. The honoraria were calculated to be the equivalent of pay of about \$1,000 a week.²⁰¹ Gerard Hayes initially claimed that he did not receive money from the McLean Forum to spend as he wished and that the money remained in the control and possession of the McLean Forum and was paid out for invoices accordingly.²⁰² However, under examination Gerard Hayes later admitted this was incorrect and he did have control and possession of a significant amount of money provided by the McLean Forum.²⁰³
165. Gerard Hayes stated that he was not aware of the McLean Forum ‘prior to on or about 4 April 2012’.²⁰⁴ According to Gerard Hayes, Tony Sheldon did not go into the details of finances when he offered Gerard Hayes support if he chose to run in the HSU NSW election.²⁰⁵
166. It would appear that Gerard Hayes did not make any real inquiries about the source of the McLean Forum’s contributions or the propriety or legality of it funding his election campaign.²⁰⁶ Gerard Hayes did not lack an opportunity to do so. He could have asked Tony Sheldon or Daniel Mookhey. He also received campaign contributions stamped with the name ‘McLean

²⁰¹ Gerard Hayes, 26/8/14, T.632.24-6.

²⁰² Gerard Hayes, witness statement, 26/8/14, para 27.

²⁰³ Gerard Hayes, 26/8/14, T.633.13-8.

²⁰⁴ Gerard Hayes, witness statement, 14/8/14, para 21.

²⁰⁵ Gerard Hayes, witness statement, 14/8/14, para 23.

²⁰⁶ Gerard Hayes, 26/8/14, T.620.8-9.

Forum'.²⁰⁷ There is no evidence that Gerard Hayes made any inquiries as to the nature of that entity or from where it derived its financial resources.

167. The McLean Forum did not inform people outside of the 'Our HSU' campaign about its support. In seeking to defend the decision not to disclose to TWU members the involvement of the McLean Forum in assisting the Hayes ticket, Tony Sheldon argued that 'The TWU and the McLean Forum are two separate organisations'.²⁰⁸ Tony Sheldon also referred to the fact 'that there is authority for us to make decisions as a leadership group'.²⁰⁹

168. This was further evidence of how the centralised control and lack of transparency and lack of democratic decision-making processes around the McLean Forum created a situation in which contributors to the McLean Forum had no real capacity to monitor or understand the use to which their contributions were put or the extent to which the expenditure complied with the terms upon which they had made their contributions to the McLean Forum and the Transport Election Committee had been made.

²⁰⁷ Gerard Hayes, witness statement, 14/8/14, annexure GH1.

²⁰⁸ Anthony Sheldon, 21/8/14, T:91.15-6.

²⁰⁹ Anthony Sheldon, 21/8/14, T:91.30-1.

2012 Flight Attendants' Association Elections: general

169. The Flight Attendants' Association of Australia is an employee association registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The FAAA is comprised of two divisions, the National Division and the International Division. Each Division has a separate Divisional Council. Elections for both divisions were held in April 2012.
170. The McLean Forum was involved in supporting tickets in each of the 2012 elections of the International Division and the National Division of the FAAA:
- (a) in the International Division, the McLean Forum supported the Integrity Team led by Len Morrison and Greg Broome that challenged the 'Your FAAA' team led by the incumbent, Michael Mijatov; and
 - (b) in the Domestic Division, the McLean Forum supported the incumbent Davidson Team led by Jo-Ann Davidson against the challenging 'Change Is In the Air' team that was led by Neil Rao and included Chris Worthy.
171. The following sections of this chapter deal with the support provided by the McLean Forum to the Integrity Team and the Davidson Team. In both elections, the teams supported by the McLean Forum received financial support of a kind and in an amount to which other teams did not have access. This resulted

in the Integrity Team and the Davidson Team having a significant campaign advantage over their opponents.

2012 Flight Attendants' Association Election: International Division

172. Michael Mijatov was elected as the Secretary of the International Division in 2004 and re-elected in 2008. Michael Mijatov sought re-election in the 2012 election and ran under the 'Your FAAA' ticket.
173. The 'Your FAAA' team ran on a minimal budget. Most candidates under the 'Your FAAA' ticket contributed \$300 each for campaign expenses, totalling \$2,700.²¹⁰ The nominees for the three most senior positions, Michael Mijatov, Lee Lam (campaigning for President) and Steven Reed (campaigning for Assistant Secretary) made additional contributions of \$1,011 each.²¹¹ The total of contributions received by the 'Your FAAA' campaign was \$5,733.²¹²
174. The expenses for the 'Your FAAA' campaign totalled \$5,729.78 and an additional \$30 to establish a website.²¹³
175. On or around 6 September 2012, the directors of the McLean Forum passed a resolution to assist the Integrity Team to contest the International Division election and to assist the Davidson

²¹⁰ Michael Mijatov, witness statement, 8/8/14, para 13.

²¹¹ Michael Mijatov, witness statement, 8/8/14, para 14.

²¹² Michael Mijatov, witness statement, 8/8/14, para 15.

²¹³ Michael Mijatov, witness statement, 8/8/14, para 17-8.

Team to contest the Domestic Division election.²¹⁴ The resolution did not give a reason for supporting these teams, except a vague reference to an intent to ‘further the interests of aviation workers and encourage democratic governance of the FAAA’.²¹⁵ Once again, Daniel Mookhey was authorised to incur expenses on behalf of the McLean Forum.

176. However, given that the FAAA elections were held in April 2012 and the results were announced in May 2012, it is perplexing that the decision by the McLean Forum to support the Integrity Team and the Davidson Team was only made in September 2012. It is not in dispute that the McLean Forum assisted both teams in their respective elections. This discrepancy has not been explained by the directors of the McLean Forum. But it seems to indicate the McLean Forum decided to support its chosen FAAA candidates prior to a formal decision to do so. Those facts demonstrate the inadequate governance arrangements with which the McLean Forum has operated.

177. Tony Sheldon’s evidence was that the McLean Forum decided to support the Integrity Team ticket because he felt that the incumbent leadership led by Michael Mijatov had capitulated to Qantas’ demands for lower rates and reduced working conditions as a result of its enterprise bargaining strategy.²¹⁶ Scott Connolly echoed a similar point by arguing that under Michael Mijatov’s

²¹⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 155.

²¹⁵ TWU McLean Forum Tender Bundle, 20/8/14, p 155.

²¹⁶ Anthony Sheldon, witness statement, 20/8/14, para 48.

leadership the International Division was harming the interests of trade union members in the aviation industry as a result of its bargaining strategy with Qantas.²¹⁷

178. Scott Connolly further said it was important for the McLean Forum to become involved because the TWU and the FAAA shared members at Qantas. He had concerns that the International Division of the FAAA leadership was undermining the collective bargaining of aviation workers inconsistent with the interests of TWU members.²¹⁸
179. The McLean Forum spent \$71,521.36 to support both the Integrity Team and the Davidson Team.²¹⁹ This funding appears to have been mostly used for campaign materials, including printing and associated costs.
180. Once again, Daniel Mookhey was responsible for facilitating payments from the McLean Forum to support both campaigns.²²⁰ As a part of this role, Daniel Mookhey would make payments on behalf of the McLean Forum at the request of Mathew Rocks, who was a TWU of NSW employee working on one or both of the FAAA election campaigns.²²¹

²¹⁷ Scott Connolly, witness statement, 18/8/14, para 44-6.

²¹⁸ Scott Connolly, witness statement, 18/8/14, para 49.

²¹⁹ TWU McLean Forum Tender Bundle, 20/8/14, p 182B.

²²⁰ Daniel Mookhey, witness statement, 18/8/14, para 26.

²²¹ Daniel Mookhey, witness statement, 18/8/14, para 28.

181. The existence of substantial external funding for the Integrity Team was obvious. For example, Michael Mijatov was surprised by the Integrity Team's campaign material, noting:²²²

When I first saw the documents that the Integrity Team were circulating I was suspicious that they were not preparing their own material. As described above, I had previously worked closely with Mr Broome and I knew his capacity to write and the manner in which he expressed himself. I was immediately suspicious that the Integrity Team was not writing their material. I took no issue with someone else writing the Integrity Team's material. However, I was concerned that the Integrity Team was making it sound like they were the authors.

182. Michael Mijatov also noticed that the type of paper and the communication themes of the Integrity Team and the Davidson Team were similar.²²³

183. What was not obvious at the time of the elections was the identity of the sources of the external funds. The consequence was that Michael Mijatov and others were left to embark upon piecemeal enquiries to attempt to piece together the facts which were unknown but undoubtedly of relevance to FAAA members voting in the election.

184. Michael Mijatov discovered that the website www.faa integrity team.com used by the Integrity Team had been registered by Matthew Rocks, whom he discovered was an employee of the TWU of NSW.²²⁴

²²² Michael Mijatov, witness statement, 8/8/14, para 23.

²²³ Michael Mijatov, witness statement, 8/8/14, para 25-6.

²²⁴ Michael Mijatov, witness statement, 8/8/14, para 34-5.

185. The limited nature of the information publicly or readily available to Michael Mijatov and other responsible interested persons is indicative of the problems caused by the current limited level of transparency in the funding of union election campaigns. That is particularly so where one side is backed by a shadowy separate entity associated with another union and that fact is not disclosed either to the members of the union with which the separate entities associated or the members of the union who are voting in that union's election.
186. Why did the McLean Forum, and by extension the leadership of the TWU, oppose Michael Mijatov in the International Division elections? Michael Mijatov suggested two possible reasons. First, in 2010, the TWU, the National Division of the FAAA and the Australian Licensed Aircraft Engineers formed an ad hoc alliance known as the Australian Aviation Unions Federation, which the International Division did not join.²²⁵ Secondly, the International Division rejected what Michael Mijatov and his team saw as a militant industrial strategy against Qantas in 2011, which was being supported by the TWU, the Australian Licensed Aircraft Engineers and the Australian International Pilots Association. This is consistent with the reasons given by Tony Sheldon and Scott Connolly for their support of the Integrity Team.
187. The most important conclusion to be drawn from Michael Mijatov's re-election is that the rank and file members of the

²²⁵ Michael Mijatov, witness statement, 8/8/14, para 51.

FAAA International Division had no knowledge of the McLean Forum's involvement. They also had no knowledge of the arguments and justification for that involvement of those who controlled the McLean Forum. If Tony Sheldon and Scott Connolly's evidence of their concerns is accepted, then those concerns relate to matters of direct relevance and significance to FAAA members. The failure to disclose them to voters, combined with the failure to disclose the nature and extent of the McLean's Forum's contributions to one ticket, created a misleading picture for the FAAA voters as to what the Integrity Team actually stood for. It also hid from voters the true facts of who was influencing – and could reasonably be expected to continue to influence- the candidates receiving substantial external funding.

188. On 11 October 2013, the *Australian Financial Review* published an article by Mark Skulley titled 'TWU bankrolls favoured candidates'. It discussed financial support given by the TWU leadership through the McLean Forum to the Davidson and Integrity teams.²²⁶ Other media outlets also picked up this story. This appears to have been the first occasion on which any person associated with the McLean Forum was forced to admit the expenditure by the McLean Forum on the FAAA elections. From the text of that article, Tony Sheldon appears to have been the spokesman for the TWU and the McLean Forum to the media enquiries.

²²⁶ Mijatov MFI-1, p 57.

189. However not even at that point was full disclosure made of the quantum of the McLean Forum's involvement. The article reads:²²⁷

TWU National Secretary Tony Sheldon confirmed on Thursday that money from an entity known as the McLean Forum Ltd contributed to internal elections in the Flight Attendants Association of Australia in 2012 and the Health Services Union's NSW branch.

The union said that about \$45,000 was contributed to the FAAA elections and around \$65,000 to the HSU elections.

190. Neither of those figures was correct. The McLean Forum spent in excess of \$71,000 on the FAAA elections.²²⁸ It spent about \$52,000 on the HSU elections in 2012.²²⁹

191. On 17 October 2013, Michael Mijatov wrote to the Fair Work Commission to request an inquiry into the McLean Forum's support for the Davidson and Integrity teams.²³⁰

192. On 18 March 2014, a delegate of the General Manager of the Fair Work Commission wrote to Michael Mijatov advising that the Commission was considering the impact of section 190 of the *Fair Work (Registered Organisations) Act 2009 (Cth)*.²³¹ As detailed elsewhere, the FWC considers that s 190 does not render illegal the activities of the TWU or the McLean Forum in the affairs of the FAAA election.

²²⁷ Mijatov MFI-1, p 57.

²²⁸ TWU McLean Forum Tender Bundle, 20/8/14, p 182B.

²²⁹ TWU McLean Forum Tender Bundle, 20/8/14, p 182B.

²³⁰ Mijatov MFI-1, p 58-75.

²³¹ Mijatov MFI-1, p 77.

2012 Flight Attendants' Association Election: Domestic Division

193. Counsel assisting made the following submissions. They are criticised by Jo-Ann Davidson. The criticisms will be dealt with after the submissions have been set out.
194. Jo-Ann Davidson was elected the Secretary of the Domestic Division of the FAAA in 2007 and sought re-election in 2012. Her ticket for the 2012 elections was known as the Davidson Team, and as the 'United Crew'.
195. Against the Davidson Team stood the 'Change Is In The Air' team. The 'Change Is In The Air' team was led by Neil Rao, who was campaigning for Secretary, Chris Worthy, who was campaigning for Assistant Secretary and Toni Lockyer, who was campaigning for President.
196. The 'Change Is In The Air' team was truly a grass-roots campaign. It was especially motivated by a perception that Jo-Ann Davidson's incumbent team was neglecting the needs of members employed by Virgin Australia.

The McLean Forum supports the Davidson Team

197. In or about December 2011, Jo-Ann Davidson spoke to Tony Sheldon about some issues relating to the industry. In the course of that discussion, Jo-Ann Davidson mentioned that she was due for re-election in early 2012. Tony Sheldon indicated that he would be able to assist Jo-Ann Davidson if she needed help in the

election.²³² Tony Sheldon again offered support to Jo-Ann Davidson in March 2012.²³³ At some point Jo-Ann Davidson decided to accept Tony Sheldon's assistance.

198. As previously identified, the McLean Forum only formally resolved to support the Integrity Team and the Davidson Team on 6 September 2012, some months after the election had already been held.²³⁴
199. The reasons why the McLean Forum supported the Davidson Team in the Domestic Division are far from clear.
200. Tony Sheldon stated that the Davidson Team was chosen because it was experienced, was incumbent and was a moderate team that worked well with the TWU.²³⁵ Once again, however, persons associated with the McLean Forum had made a secretive decision to involve it in a union's election campaign, without any disclosure to, or consultation with, the members of that union. Tony Sheldon's explanation does not account for why the rival ticket was seriously considered by him to be a threat to the interests of TWU members generally or McLean Forum contributors specifically.
201. Scott Connolly also did not explain why he agreed to support the Davidson Team. He was only able to give reasons for why the

²³² Jo-Ann Davidson, witness statement, 20/8/14, para 9.

²³³ Jo-Ann Davidson, witness statement, 20/8/14, para 10.

²³⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 155.

²³⁵ Anthony Sheldon, witness statement, 20/8/14, para 47.

McLean Forum supported the Integrity Team in the International Division election. But these reasons did not apply in respect of the Domestic Division election contest.²³⁶

202. Tony Sheldon first arranged for Michael Wong to assist with organising photos for the Davidson Team. Later he arranged for Richard Priest, a TWU employee, to provide more substantive assistance.²³⁷ For example, Richard Priest assisted with the preparation, printing and distribution of campaign material.²³⁸
203. The Davidson Team had only raised funds of around \$5,000 through contributions from team members.²³⁹ The McLean Forum was able to contribute an amount more than ten times that figure.
204. Funding from the McLean Forum was used to help pay for ‘how to vote’ cards and a website for the Davidson team.²⁴⁰ Richard Priest also helped to establish a Facebook page, arranged for mail outs and flyer printing, and assisted with a road show in Sydney and possibly Melbourne.²⁴¹ Jo-Ann Davidson’s evidence was that Richard Priest was organising ‘all’ of the contributions that

²³⁶ Scott Connolly, witness statement, 18/8/14, para 49.

²³⁷ Jo-Ann Davidson, witness statement, 20/8/14, para 12.

²³⁸ Jo-Ann Davidson, witness statement, 20/8/14, para 13.

²³⁹ Jo-Ann Davidson, witness statement, 20/8/14, para 15.

²⁴⁰ Scott Connolly, witness statement, 18/8/14, para 48.

²⁴¹ Jo-Ann Davidson, witness statement, 20/8/14, para 18.

were coming to her ticket by reason of Tony Sheldon's support.²⁴²

205. Baden Kirgan, the managing director of Jeffries Printing, was engaged by the McLean Forum to assist with both the HSU NSW and FAAA elections in 2012. He recalls that Richard Priest requested large multiple print runs on 27 March 2012.²⁴³ In the end, Baden Kirgan completed a number of jobs at Richard Priest's request for the FAAA elections, mostly for the Domestic Division.²⁴⁴
206. As with the Integrity Team's campaign in the International Division election, the support given to the Davidson Team was immediately noticeable to rival candidates who commenced enquiries to ascertain the source of the Davidson team's funding.²⁴¹ Chris Worthy thought that '[t]he Davidson Team's campaign, including the design, printing and postage of the documents must have cost a fortune'²⁴⁵ and he 'began to question members of my own team as to where the Davidson Team's funding was coming from'.
207. Like Michael Mijatov, Chris Worthy and his running-mates were hindered in their enquiries by the secrecy surrounding the McLean Forum's involvement.

²⁴² Jo-Ann Davidson, 20/8/14, T:116.29.

²⁴³ Baden Kirgan, witness statement, 1/8/14, para 5.

²⁴⁴ Baden Kirgan, witness statement, 1/8/14, para 7.

²⁴⁵ Christopher Worthy, affidavit, 15/8/14, para 38.

208. Chris Worthy discovered that the Davidson Team had a dedicated mobile telephone number that operated as a 24/7 hotline and a professional website.²⁴⁶ The Davidson Team was able to use these resources to cold-call voters.²⁴⁷
209. By comparison, the ‘A Change Is In The Air’ campaign led by Neil Rao was run on a very small budget. The candidates used their own home printers and prepared their own wording and graphic design.²⁴⁸ The candidates’ leaflets were all black and white and folded and distributed by hand.²⁴⁹
210. Jo-Ann Davidson said that she was not aware of the McLean Forum.

I first became aware of the McLean Forum after the 2012 election to which I have referred. It happened when material appeared in the press about the TWU funding of FAAA elections involving both the International and my own Division. I have no personal knowledge of the McLean Forum’s establishment or operations or of its payment of accounts relating to the United Crew team election campaign. However, I have been provided by the Royal Commission with documents that suggest that this may have been the case.²⁵⁰

211. Jo-Ann Davidson said that Tony Sheldon told her that he would have funds available but that they would not be TWU funds and that Richard Priest would assist in his own time.²⁵¹ Jo-Ann

²⁴⁶ Christopher Worthy, affidavit, 15/8/14, para 39.

²⁴⁷ Christopher Worthy, affidavit, 15/8/14, para 40.

²⁴⁸ Christopher Worthy, affidavit, 15/8/2014, para 33.

²⁴⁹ Christopher Worthy, affidavit, 15/8/2014, para 33.

²⁵⁰ Jo-Ann Davidson, witness statement, 20/8/2014, para 22.

²⁵¹ Jo-Ann Davidson, witness statement, 20/8/2014, para 12.

Davidson said that although she was aware of the ‘assistance’ provided by Richard Priest in the form of mail-outs and the like, she was not at the time aware of the financial arrangement for the payment of printing, postage, mail outs and other assistance organised by him.²⁵²

212. According to Jo-Ann Davidson, Tony Sheldon had informed her that a separate fund would be used which he ‘explained in detail about’.²⁵³ However, she seems never to have thought to ask Tony Sheldon what the fund was called or where the money in the fund came from. Tony Sheldon apparently gave Jo-Ann Davidson assurances that the fund was legal and Ms Davidson was satisfied with this mere assurance.²⁵⁴

213. This evidence is a further example of the leader of an election campaign wilfully shutting her eyes to what expenses were being incurred, how much was spent and what activities were being conducted as a part of her own election campaign. Jo-Ann Davidson does not seem to have shown a miniscule interest in the source, propriety and legality of the funding for her ticket’s campaign.

214. This behaviour is particularly striking considering that during the course of her campaign questions were asked about her external funding.

²⁵² Jo-Ann Davidson, witness statement, 20/8/2014, para 19.

²⁵³ Jo-Ann Davidson, 20/8/2014, T:118.19-22.

²⁵⁴ Jo-Ann Davidson, 20/8/2014, T:118.14-6.

215. Some of the campaign material produced by the Davidson Team included a barcode with numbers as well as the word TWU, such as ‘2012 – TWU’.

216. Michael Mijatov recalled a conversation to the following effect with Ms Davidson about this material:²⁵⁵

Mijatov: Why is TWU appearing in your election material?

Davidson: Are you sure? Are you sure that someone isn’t making up a story?

Mijatov: Jo-Ann. Cut the crap. It’s your election material. You know what I’m talking about. I haven’t heard it from someone. Your letter has got ‘2012-TWU’ on the letter bar.

Jo-Ann, I don’t care who’s helping you, you’re entitled to be helped by anyone. But I do care if you and the so-called Integrity Team are actually acting behind my back and this is part of a threesome with you, the Integrity Team and the TWU.

So, what have the TWU paid for?

217. Jo-Ann Davidson did not say anything. The evidence continued:

Mijatov: Jo-Ann, this is ridiculous. You’ve got the TWU on there. I could understand if you said to me that you had used the TWU printers, and they were giving you a good deal and they’ve stuffed it up and just put the printing through as ‘TWU’.

Davidson: Oh, just friends – friends are helping my campaign.

218. It is clear that Jo-Ann Davidson decided not to disclose the involvement of the TWU officials and TWU-sourced money in

²⁵⁵ Michael Mijatov, witness statement, 8/8/14, para 29.

her campaign. That decision is also reflected in the Davidson team's campaign materials. Those materials prominently stated:²⁵⁶

No union or employer funds were used to produce this material.

...

P.S. No FAAA or Company resources or funds have been used in our campaign. Friends have made donations to assist.

219. Jo-Ann Davidson testified that her reaction when she became aware of the references to the TWU on the envelopes containing her campaign material was one of embarrassment and concern:²⁵⁷

This reference to TWU was brought to my attention at the time of its distribution. I recall that Mr Priest explained to me that it has been an error on the part of the printers and that the TWU was not paying for the mail out. The error was a matter of some embarrassment to me given the reference on the flyer to the fact that no Union funds had been used.

220. On 23 April 2012, Baden Kirgan, in an attempt to provide an apology for the error of his firm, prepared a letter asserting 'I can assure you that all invoices are being made out to Jo Ann Davidson and all payments are being made by her'.²⁵⁸ However that statement was incorrect. Jo-Ann Davidson never paid those invoices. The McLean Forum did.²⁵⁹ That fact may not have been known to Baden Kirgan, whose firm addressed the invoices to Jo-Ann Davidson. But it must have been obvious to Jo-Ann

²⁵⁶ Christopher Worthy, affidavit, 15/8/14, Exhibit CXW-2, pp 11, 18.

²⁵⁷ Jo-Ann Davidson, witness statement, 20/8/2014, para 16.

²⁵⁸ Baden Kirgan, witness statement, 1/8/14, para 9.

²⁵⁹ Daniel Mookhey, witness statement, 18/8/2014, para 29.

Davidson that the letter contained an erroneous and misleading statement because she must have known that she herself was not paying the invoices. Jo-Ann Davidson received that letter when it was received by Richard Priest from Baden Kirgan.²⁶⁰ Counsel assisting criticised her for apparently having made no attempt to correct it.

221. Jo-Ann Davidson denied that it was relevant to voters to know that an entity associated with the TWU (or any other organisation) was bankrolling her campaign.²⁶¹
222. That position is consistent with her team's conduct and that of the TWU and the McLean Forum. It is wholly inconsistent with any reasonable expectation of transparency and accountability in the funding of union elections.
223. So much for counsel assisting's submissions about Jo-Ann Davidson. Her criticisms, taking them in a different order from those in which she put them, can be summarised as follows. At the outset it may be said that the fact she has made them is valuable, because, perhaps unconsciously, she has assisted in exposing the issues more clearly than a perusal of the evidence and of counsel assisting's submissions in isolation does.
224. Jo-Ann Davidson submitted that since counsel assisting did not accuse her of illegality, their criticisms did not fall within the

²⁶⁰ Jo-Ann Davidson, 20/8/14, T:117.8-9.

²⁶¹ Jo-Ann Davidson, 20/8/14, T: 119.36-40.

Terms of Reference.²⁶² This submission must be rejected. Jo-Ann Davidson's conduct is relevant to paragraphs (a)(ii)(B) (accountability of officers of employee associations to their members in respect of the use of funds or other assets in relation to relevant entities), (a)(iv)(D) (the use of funds solicited in the name of relevant entities for the purpose of furthering the interests of any other person or organisation) and (e)(ii) (the extent to which persons represented by employee associations are informed of matters associated with the existence of relevant entities or activities relating to their operation). None of these is limited to illegal behaviour. Further, paragraph (g) is not limited to illegal behaviour either. It extends to behaviour falling short of professional standards. Some of the arguments of counsel assisting were arguments that Jo-Ann Davidson's conduct may have breached the professional standard appropriate to a trade union official seeking re-election in 2012.

225. Jo-Ann Davidson also submitted that counsel assisting were wrong to criticise her for not making further inquiries of Tony Sheldon. She said that counsel assisting were not applying the state of the law at the time of the relevant offence but only the law in some future ideal state which they were advocating. They were not looking at the matter through 2012 spectacles but the spectacles which might exist in some different future.²⁶³ There is some force in this submission, but it must be qualified. Counsel assisting were identifying or assuming moral standards,

²⁶² Submissions on behalf of Jo-Ann Davidson, 14/11/14, para 11.

²⁶³ Submissions on behalf of Jo-Ann Davidson, 14/11/14, paras 7, 8, 10-11.

prudential criteria and policy considerations, and contending that Jo-Ann Davidson's conduct fell below the standards and clashed with the criteria and the considerations. Counsel assisting were using the case study as the basis for an argument that the law ought to be changed. The plan of counsel assisting was legitimate, even if minds might differ about whether the particular criticisms of Jo-Ann Davidson were just. Counsel assisting were pointing to dangers and risks. They were raising for consideration whether Jo-Ann Davidson's behaviour fell below the professional standard appropriate to a trade union leader seeking re-election, and further contending that if it did, that was a reason why the legislature should intervene to ensure that the professional standard became the legal standard.

226. Jo-Ann Davidson also made a general submission to the effect that to adopt the submissions of counsel assisting would deny her natural justice. Natural justice requires that notice be given of matters which may result in an adverse conclusion. It is very unusual to submit that submissions which give notice are themselves in breach of natural justice. Further, the examination of Jo-Ann Davidson by senior counsel assisting sufficiently indicated considerable scepticism about the propriety of her failure to disclose to her members the sources of her funding.²⁶⁴ Her submissions do not suggest that there is any further evidence she would or could have given, but was deprived of giving because of the way she was examined.

²⁶⁴ Jo-Ann Davidson, 20/8/14, T:117.47-119.40.

227. Jo-Ann Davidson's next submissions were more specific. One related to Tony Sheldon's explanation about what the source of the money being paid to her campaign was. She submitted that she was entitled to rely on what Tony Sheldon said.²⁶⁵ With all respect to Tony Sheldon, he was a wily and experienced campaigner whose statements to her merited some further testing if he had in fact entered on a detailed explanation. And intelligent though Tony Sheldon undoubtedly is, reliance on an assurance by a lay person on a question of law is dangerous. As it happened, the payments were not illegal, so that Jo-Ann Davidson's reliance on Tony Sheldon was not in that respect misplaced. In other circumstances, an unpleasant risk might have come home.
228. Another specific submission made by Jo-Ann Davidson concerned her failure to tell Michael Mijatov about the source of her funding in the course of the conversation in which he challenged her on this. Jo-Ann Davidson submitted that she had no moral or other obligation to Michael Mijatov.²⁶⁶ That is an interesting question. Probably she had no obligation to break her silence. But did she go further than silence? Could it truthfully be said that 'friends' were helping her campaign?
229. Jo-Ann Davidson's next specific submission concerned the mistake made by Baden Kirgan in his letter and her failure to correct it. She submitted that she should not have been criticised

²⁶⁵ Submissions on behalf of Jo-Ann Davidson, 14/11/14, paras 5(c), 9.

²⁶⁶ Submissions on behalf of Jo-Ann Davidson, 14/11/14, para 5(b).

by inquiring rhetorically to whom she should have directed the correction.²⁶⁷ Why not to Baden Kirgan, who laboured under the error?

230. Finally, Jo-Ann Davidson submitted that counsel assisting's submissions were open to three criticisms: they misstated the evidence, they pre-judged her because of their prior negative disposition toward her and they amounted to an unfair attack. They did not misstate the evidence: the differences between counsel assisting and Jo-Ann Davidson did not exist at the level of primary fact, but existed at the level of whether she fell below the standards appropriate for 2012 and what standards are appropriate in future. They did not have a *prior* negative disposition toward her, though after analysing the evidence they seem to have developed a negative disposition *ex post facto*. And although not all of the submissions of counsel assisting can be accepted, on balance they are not objectively unfair in any significant way.

231. It is now necessary to consider what findings should be made in the light of the submissions of both counsel assisting and Jo-Ann Davidson. All the primary facts and most of the other facts alleged by counsel assisting are uncontroversial. The controversial issues may be dealt with as follows:

²⁶⁷ Submissions on behalf of Jo-Ann Davidson, 14/11/14, para 5(d).

- (a) As a matter of prudence and self-interest it would have been wise for Jo-Ann Davidson to have questioned Tony Sheldon more closely about the source of the funds, though the failure to do so led to no harm in this instance. However, her failure to do so was not a breach of the professional standard applying to a trade union official seeking re-election in 2012.
- (b) There is a possible argument that Jo-Ann Davidson knowingly failed to tell Michael Mijatov the truth when she said: 'Friends are helping my campaign'. The argument depends on the view that the McLean Forum could not be described as a friend, and nor could Tony Sheldon, and that Jo-Ann Davidson appreciated this. If the argument were sound, even though Michael Mijatov was not a candidate in direct rivalry with Jo-Ann Davidson because he was running in the International Division Election, not the Domestic Division Election, that would have been a breach of the professional standard applying to a trade union official seeking re-election in 2012. However, it is not possible to accept or even entertain the argument. The conversation is set out in full in counsel assisting's written submissions, and Jo-Ann Davidson's written submissions do not deny it. However, it was not put in terms to Jo-Ann Davidson that her last answer to Michael Mijatov in the quoted part of that conversation was false, and false to

her knowledge. She may very well have been able to give evidence negating fraudulent misrepresentation.

- (c) Jo-Ann Davidson could and should have told Baden Kirgan to correct the error in his letter of 23 April 2012. Her failure to do so meant that Baden Kirgan could have been the unconscious purveyor of untruths. That may have been a breach – perhaps only a very minor one – of the professional standard applying to a trade union official seeking re-election in 2012. It does not involve an allegation of fraud against Jo-Ann Davidson, so that the considerations preventing the acceptance of the possible argument stated in sub-paragraph (b) do not apply.
- (d) Whilst it would be desirable for electors in union elections in future to know what the source of funds for each candidate was, it could not be said in 2012 that failure by Jo-Ann Davidson to reveal her source was a breach of the professional standard applying to a trade union official seeking re-election in 2012.

232. The references in these findings to the relevant professional standard rests on a view about what ordinary people would expect and see as appropriate for trade union officials – for most trade union officials and many of their members are ordinary people. Ordinary people would expect from a candidate that there should be abstinence from knowing untruths. They would also expect an effort to prevent others from disseminating

untruths about the campaign, even innocently. But ordinary people would not expect an interrogation of funders more intense than that which Tony Sheldon experienced. And ordinary people would not expect the sources of campaign funding to be volunteered. Whether the standards of ordinary people are right in these respects is not a matter which can be taken further in this Interim Report.

233. The aftermath of the elections was as follows. Jo-Ann Davidson's team won the election for the FAAA National Division. Following his election loss as part of the 'Change Is In The Air' ticket, Chris Worthy no longer wanted to be a member of the FAAA and decided to start a new Virgin-specific employee association.²⁶⁸ Chris Worthy organised an informal meeting on 8 June 2012 with supporters. It was agreed that the new union would be called 'iCabin Crew Connect'. According to Chris Worthy, there was overwhelming support for a Virgin-specific union and over 900 Virgin Airlines cabin crew expressed support in some way.²⁶⁹

234. On 31 July 2012, iCabin Crew Connect applied to the Fair Work Commission for registration under the *Fair Work (Registered Organisations) Act 2009* (Cth).

235. Regulation 23(1) of the *Fair Work (Registered Organisations) Regulations 2009* provides that:

²⁶⁸ Christopher Worthy, affidavit, 15/8/2014, para 42.

²⁶⁹ Christopher Worthy, affidavit, 15/8/2014, para 43.

Any interested organisation, association or person (the objector) may, no later than 35 days after a notice under regulation 22 is published in the Gazette, lodge with FWA a notice of objection to the registration of the association.

236. Pursuant to this provision, Virgin Airlines, the Australian Municipal, Administrative, Clerical and Services Union, the TWU and the FAAA all objected to the registration of iCabin Crew Connect.²⁷⁰ The Australian Municipal, Administrative, Clerical and Services Union later withdrew its objection in exchange for an undertaking by the iCabin Crew Connect to amend its rules regarding membership eligibility.²⁷¹
237. Application for registration was not granted by the Fair Work Commission.²⁷² Vice President Watson concluded that it was necessary to demonstrate that at least 1,308 Virgin cabin crew supported the registration of iCabin Crew Connect. He relied on s 20(1)(g) of the *Fair Work (Registered Organisations) Act 2009* (Cth) which requires that the majority of the persons eligible to be members of the association support its registration as an organisation. Vice President Watson found that iCabin Crew Connect had not met this requirement.
238. The experience of iCabin Crew Connect demonstrates the significant obstacles that confront members of a union dissatisfied with the performance of their officials. Elections can be expensive. Challengers to an incumbent can face an

²⁷⁰ Christopher Worthy, affidavit, 15/8/2014, para 45.

²⁷¹ Christopher Worthy, affidavit, 15/8/2014, para 46.

²⁷² *iCabin Crew Connect* [2013] FWC 4143 (27 June 2013).

incumbent supported by either his or her own ‘fighting fund’ and/or tens of thousands of dollars in undisclosed contributions from third parties and the officials of other unions. The motives behind that support and the deals done by candidates to secure that support are not disclosed to voters. Voters go to the polls ignorant even of the existence of that funding. Further, to break ranks and form a rival union requires demonstration of majority support for that move, expressed in a sufficiently formal way as to withstand challenge from employer groups and established unions.

Tony Sheldon’s presidential campaign

239. On 4 November 2011, the McLean Forum spent \$7,036 to fund Tony Sheldon’s election campaign for the position of President of the Australian Labor Party.²⁷³
240. It appears that no formal decision was ever taken by the directors of the McLean Forum to spend money on this campaign. It is not even apparent whether the other directors of the McLean Forum were aware of this expenditure.
241. Tony Sheldon was unable to identify what advantage becoming President of the Australian Labor Party would provide to TWU

²⁷³ TWU McLean Forum Tender Bundle, 20/8/14, p 201-202.

members apart from the general benefits of making sure the union movement had a voice in the party.²⁷⁴

242. Tony Sheldon explained his lack of disclosure to contributors of the McLean Forum that the fund was being used to fund his presidential campaign thus:²⁷⁵

Well, two things - both within the authority that had been conferred on the executive team to makes [sic] those sorts of decisions and also in very clear understanding that those people who are contributing to the fund are contributing to what the leadership team believe in about making sure that we have a voice.

243. Once again, Tony Sheldon relied on the supposed authority conferred on the three directors of the McLean Forum by the fund's contributors and the articles of association to make a wide range of decisions seemingly at their own discretion.
244. However those articles do not countenance the expenditure of funds for the personal benefit of a director of the McLean Forum, without the informed consent of the Board.
245. Tony Sheldon initially claimed that there was no personal benefit in his seeking to become the President of the Australian Labor Party.²⁷⁶ This statement is disingenuous. As Tony Sheldon ultimately accepted, to attain the office would have been a personal honour, even if it was accompanied by onerous

²⁷⁴ Anthony Sheldon, 21/8/14, T:95.27-29.

²⁷⁵ Anthony Sheldon, 21/8/14, T:95.39-44.

²⁷⁶ Anthony Sheldon, 21/8/14, T:95.44-46.

duties.²⁷⁷ Tony Sheldon's conduct evinces a culture of entitlement which appears to have pervaded the policy of the McLean Forum directors to fund whatever campaign they chose out of the Transport Election Committee and McLean Forum funds. It also provides yet another example of the inadequate – or non-existent – disclosure and/or accountability to contributors of the decisions taken by those controlling the relevant entity.

D – SOME COMMON THEMES AND COMMON PROBLEMS

246. It is now necessary to consider what more general conclusions about the nature and operation of election funds should be drawn from the facts set out above, and what recommendations should be made.

The artificiality of distinctions

247. There is substantial overlap between the objectives of the TWU and the objectives of the McLean Forum as articulated in its memorandum of association. However the links between these organisations are not limited to commonality of purpose. They include the following links:

- (a) The McLean Forum was created by TWU of NSW officials and named after a prominent former member of the TWU.

²⁷⁷ Anthony Sheldon, 21/8/14, T:97.10-14.

- (b) According to its articles of association, the McLean Forum was created for the purpose of industrial reform and promoting members' welfare.
- (c) The leadership of the McLean Forum comprises senior TWU officials, including the National Secretary, the Secretary of the TWU NSW, and the Assistant State Secretary of Queensland.
- (d) In seeking to justify the McLean Forum's activities and expenditure, its directors have repeatedly relied on the need to protect the interests of TWU members (such as Scott Connolly's argument that issues regarding the bargaining position of the FAAA are important to the interests of TWU members).²⁷⁸
- (e) The employees of the TWU national office and the TWU of NSW were, at least until recently, required to contribute to the McLean Forum as a mandatory condition of their employment.

248. The extent of those linkages lays bare a certain hypocrisy and self-contradiction regarding the current governance and accountability of the McLean Forum. The directors of the McLean Forum were evidently willing, sometimes even at pains, to use the name of the TWU and the interests of TWU members to justify the activities of the McLean Forum. Tony Sheldon

²⁷⁸ Scott Connolly, witness statement, 18/8/14, para 49.

went to some lengths to attempt to re-position the McLean Forum not as a 'slush fund' as that term has come to be understood, but as the 'Political Action Committee' of the TWU.²⁷⁹

249. On the other hand, Tony Sheldon was quick to draw a distinction between the TWU and the McLean Forum as a justification for a lack of transparency surrounding the activities of the latter. For example, in explaining why the McLean Forum did not feel the need to explain to TWU members why it was supporting a ticket in the 2012 NSW HSU elections, Tony Sheldon said that the McLean Forum and the TWU were two separate organisations.²⁸⁰

Inadequate governance, transparency and accountability

250. The McLean Forum has less than satisfactory governance, transparency and financial accountability arrangements.
251. The directors' practice is to commit the funds of the McLean Forum without disclosure to, or consultation with, contributors. Frequently they have made substantial commitments before resolutions were passed authorising that expenditure. One example concerns the 2010 TWU Queensland Branch election. Peter Biagini appears to have received an offer of support from Scott Connolly in late 2009 or early 2010, despite the fact that financial authorisation for the spending by the McLean Forum was not approved until 4 July 2010. Another example concerns

²⁷⁹ Anthony Sheldon, witness statement, 20/8/14, para 25.

²⁸⁰ Anthony Sheldon, 21/8/14, T:91.15-6.

the 2012 HSU NSW election. Tony Sheldon and Wayne Forno had already agreed to provide assistance to Gerard Hayes on 4 April 2012 before the formal decision was made by all three directors later that day and well before an election was even in the offing or other candidates had come forward. Another example concerns the 2012 FAAA elections. The McLean Forum did not formally resolve to support the Integrity Team and Davidson Team until 6 September 2012, several months after the elections had concluded. A final example is that the directors of the McLean Forum never formally authorised spending to support Tony Sheldon's candidacy for President of the Australian Labor Party.

252. In general the McLean Forum engaged in little, if any, communication with TWU members or the contributors to the McLean Forum regarding its activities. It would appear that only the directors of the McLean Forum and direct agents of the McLean Forum, such as Daniel Mookhey and Richard Priest, were aware of the exact nature and quantum of the McLean Forum's activities and spending.
253. Most, if not all, of the employees of the TWU who were, in a practical sense, compelled to contribute to a 'campaign fund' were unaware that they were contributing to the McLean Forum. They were unaware that their contributions were being used for campaigns outside of their branch or the TWU. Tom Pacey's evidence that he was not aware that the 'campaign fund' he was contributing to was the McLean Forum, even though he played a

key role in the New Transport Workers' Team campaign on behalf of the McLean Forum, is particularly compelling.

254. Tony Sheldon asserted that 'members have trusted that we make the right decision about what political decisions we make'.²⁸¹ It has not been a matter of trust, but ignorance, that has left contributors quiet.
255. The history of the McLean Forum indicates it has operated with calculated secrecy. Only the retrospective scrutiny of the media, and the Commission, has caused its affairs to be given any disclosure to contributors, TWU members, or other affected unions generally.

Personal benefits to McLean Forum directors

256. Some of the McLean Forum's activities were carried out at least partly to benefit its directors personally. One example is the McLean Forum's support to Scott Connolly's successful candidacy in the 2010 TWU Queensland Branch election. That enabled him to obtain a higher position of leadership within the union and increased remuneration. Another example is the McLean Forum's support of Tony Sheldon's campaign for President of the Australian Labour Party.
257. Is it appropriate for funds like the McLean Forum, and those who control them, to solicit contributions on the basis of industrial

²⁸¹ Anthony Sheldon, 21/8/14, T:91.33-5.

issues and the job security of branch officials in a particular branch, but thereafter spending those contributions in ways that personally benefit those who control them in some broader endeavour?

258. Is it appropriate for the TWU and the TWU of NSW to cause to be included in employment contracts of its employees a requirement for a contribution to an entity which is capable of being used, at least in part, to further the interests of officials that control the fund which the contributions have made up?

Inadequacy of disclosure of operations to interested persons and voters

259. The McLean Forum had a considerable impact on the campaigns that it supported. That impact was matched by a high level of secrecy. This secrecy was so prevalent that Peter Biagini, Gerard Hayes and Jo-Ann Davidson all claimed, probably correctly, that they were not even aware of the McLean Forum's existence in supporting their respective campaigns.
260. Despite offering their support to Peter Biagini, Gerard Hayes and Jo-Ann Davidson, the directors of the McLean Forum failed to disclose the McLean Forum's involvement to those candidates so as to equip them with the knowledge of the source of the funding promised. On the other hand, neither Peter Biagini, Gerard Hayes nor Jo-Ann Davidson appeared to make inquiries, or any adequate inquiries, about the source of the campaign funding. They failed to undertake any due diligence to identify whether

those funds constituted trade union resources. At the very least the acceptance of secret funds from the McLean Forum showed poor judgement and a lack of personal accountability. All three of these officers were standing for election to a position akin to that of the chief executive officer of a large company. It is astonishing that each placed ignorance as to the financial affairs of his or her campaign on a pinnacle above proper accountability to voters.

261. The campaigns of the New Transport Workers' Team, the 'Our HSU' ticket, the Integrity Team and the Davidson Team were all conducted without any disclosure to voters of the support with which they were being provided by the McLean Forum. The funding that the McLean Forum provided was the single biggest asset of these campaigns. It was several times greater than the funds the teams themselves were able to raise by other means. The comparison between the Integrity Team and the 'Our FAAA' team, as well as between the Davidson Team and the 'Change Is In The Air' team demonstrates the resources gulf between the tickets that were supported by the McLean Forum and the tickets that were not.

262. Where large-scale contributions are made, it is relevant for voters in a union election to know that an entity associated with another union is a significant contributor to a particular ticket in the elections.

Union elections and the adequacy of current regulations

263. Tony Sheldon repeatedly stated that fighting funds like the McLean Forum are similar to Political Action Committees in the political landscapes of Australia and the United States.²⁸² In referring to Political Action Committees, he was referring to various organisations or lobby groups that raise money for political purposes, particularly during political elections.
264. The problem with this analogy is that the operation of Political Action Committees, lobby groups and similar organisations in a political context are governed by laws requiring the disclosure of political donations above a particular amount, particularly during elections. For example, in most political electoral campaigns, it would not be legal for \$200,000 from an external organisation to be spent anonymously. However, this was precisely what the McLean Forum did in funding Peter Biagini's New Transport Workers' Team campaign for the 2010 TWU Queensland election. Far from being an analogy which justifies the activities of the McLean Forum, Tony Sheldon's characterisation of it highlights the inadequacies of the current system in which an entity like the McLean Forum can interfere anonymously in the democratic elections of a number of unions, two of them entirely unconnected with the TWU.
265. The TWU submitted that the McLean Forum is outside the Terms of Reference because it was not established for an 'industrial

²⁸² Anthony Sheldon, 21/8/14, T:81.4-28.

purpose' or for the 'welfare of the members of the association', but a political purpose: to fund elections.²⁸³ This submission must fail. One of the objects set out in the McLean Forum's memorandum of association is 'to advance the interest of workers in the transport industry and of workers generally'.²⁸⁴ That is an industrial purpose. And in any event the supposed dichotomy is a false one. The TWU itself for another purpose said that it 'considers the industrial political, and the political industrial'.²⁸⁵

²⁸³ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 10.

²⁸⁴ TWU McLean Forum Tender Bundle, 20/8/14, p 22.

²⁸⁵ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 95.

CHAPTER 4.3

NEW TRANSPORT WORKERS' TEAM INC.

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A – INTRODUCTION

1. This chapter concerns the New Transport Workers’ Team Inc., a relevant entity related to officials of the Transport Workers’ Union of Australia (Queensland Branch) (**TWU Queensland Branch**). Save where challenged, the following findings are based substantially on the submissions of counsel assisting.
2. As described in Chapter 4.2, the New Transport Workers’ Team ticket was successful in the elections held in November 2010 for positions of office in the TWU Queensland Branch.

B – RELEVANT FACTS

Corporate history and structure

3. Prior to April 2011, the New Transport Workers’ Team was an unincorporated association.
4. At a meeting on 4 April 2011, the New Transport Workers’ Team ticket decided to form an incorporated association under the *Associations Incorporation Act 1981 (Qld)*.¹
5. The minutes of that meeting record that those attending:²

¹ New Transport Workers’ Team Inc. Tender Bundle, 31/10/14, p 1.

² New Transport Workers’ Team Inc. Tender Bundle, 31/10/14, p 1.

- (a) resolved to form an incorporated association;
 - (b) resolved to adopt the model rules under the *Associations Incorporation Act 1981* (Qld); and
 - (c) resolved that the objects of the incorporated association would be:
 - (i) ‘to campaign for an [sic] promote progressive, organizing [sic] focused leadership for the labour movement, and particularly, for transport workers’; and
 - (ii) to do such things as are ancillary to these objects.
6. A form was duly completed to incorporate the New Transport Workers’ Team Inc. and register it.³
7. The form reflected the resolutions of 4 April 2011. The form, together with the minutes of the meeting on 4 April 2011, constitute the entirety of the constituent documents of the New Transport Workers’ Team Inc.
8. On 10 June 2011, the New Transport Workers’ Team Inc. became an incorporated association and a certificate of

³ New Transport Workers’ Team Inc. Tender Bundle, 21/8/14, pp 2-9.

incorporation was issued.⁴ It took over the funds, assets and liabilities of the unincorporated New Transport Workers' Team.⁵

9. At the time of incorporation, the following persons were officeholders for the New Transport Workers' Team Inc.: Peter Biagini (Secretary); Scott Connolly (Treasurer); and Brad Wyatt (President).⁶ At this time, Peter Biagini was the Secretary of the TWU Queensland Branch and Brad Wyatt was the President. Scott Connolly was a member of the Branch Committee of Management (BCOM) and the Executive Officer of the TWU Queensland Branch.⁷ Later, on 29 November 2011, Scott Connolly became the Assistant Secretary of the TWU Queensland Branch.⁸

10. The objects of the New Transport Workers' Team Inc., like the objects clause for the McLean Forum Limited, are very broad and suggest that the purpose and activities of the New Transport Workers' Team Inc. are of a general nature. Evidence given to the Commission by Peter Biagini, however, indicated the true purpose of this entity is much more confined. He said that the New Transport Workers' Team Inc. was 'set up for future elections'.⁹ He also said that those who pay into the New

⁴ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, p 1.

⁵ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, p 8.

⁶ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, p 3.

⁷ Scott Connolly, 21/08/14, T: 22.23-39.

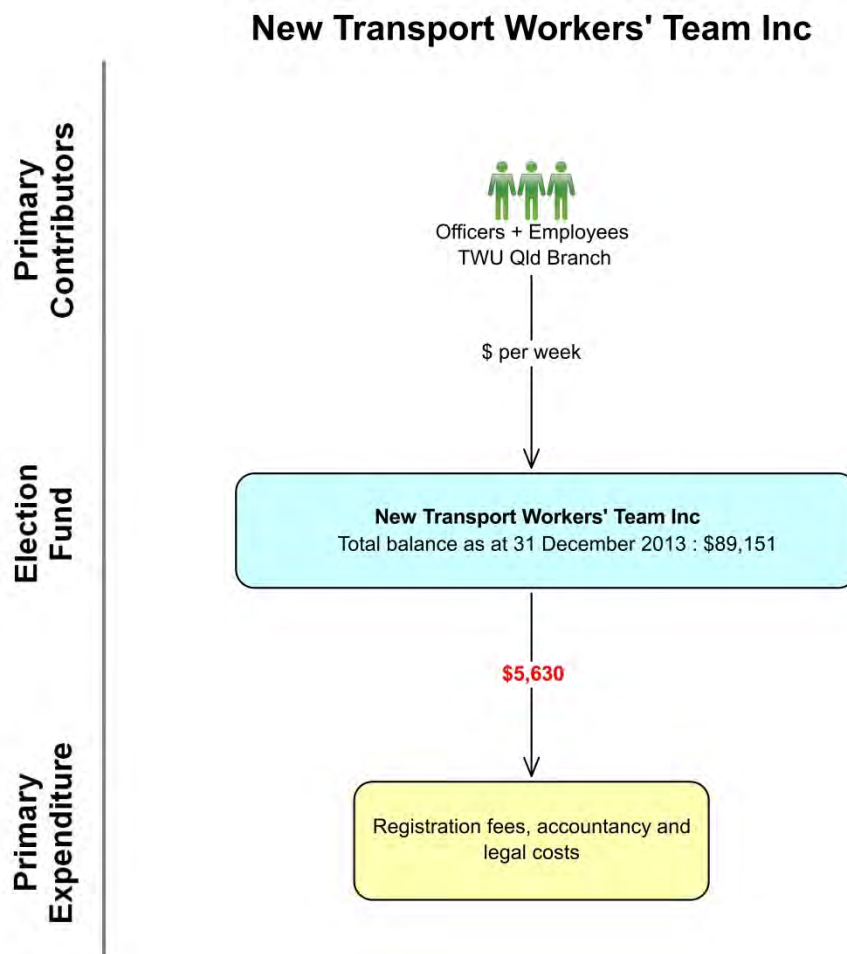
⁸ Scott Connolly, witness statement, 18/8/14, para 58.

⁹ Peter Biagini, witness statement, 20/8/14, para 50.

Transport Workers' Team Inc. are 'made aware of the nature and purpose of the fund'.¹⁰

C – INCOME AND EXPENDITURE

11. The following diagram summarises the income and expenditure of the New Transport Workers' Team Inc.



¹⁰ Peter Biagini, witness Statement, 20/8/14, para 49.

12. Voluntary contributions to the New Transport Workers' Team Inc. are by way of deductions from the salary of officials and employees of the TWU Queensland Branch.¹¹ Relevant officials and employees sign a 'Payroll Deduction Authority' form which authorises a deduction of \$25 per week.¹² That form provides:

As part of my employment with the QLD Transport Workers Union I freely agree to contribute to an elected officers campaign fund at the current rate of \$25 per week. This fund has been set up to be used at the discretion of the QLD State Secretary, or their appointed representative, to promote job security for our team. My signing of the acceptance at the foot of this authority constitutes my written authority for the Union to deduct this amount from my weekly pay and my acknowledgement that the deduction is for my benefit. (Underlining added).

13. It may be noted that the language of authorisation adopted in the form is not co-extensive with the stated objects of the constituent documents of the New Transport Workers' Team Inc. The TWU submitted that the reference to 'job security for our team' should not be narrowly construed and that job security of officials and employees of the Queensland Branch is 'enhanced by promoting progressive leadership generally'.¹³ That construction must be rejected. It is a construction which is tantamount to excising the phrase 'to promote job security for our team' altogether and replacing it with 'for any progressive purpose whatever'. It is not an open construction of the language used.

¹¹ Peter Biagini witness statement, 20/8/14, para 48.

¹² New Transport Workers' Team Tender Bundle, 21/8/14, pp 39-40.

¹³ Interim Submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 237.

14. In addition to the contributions from employees and officials, the New Transport Workers' Team Inc. has conducted one fundraising function, in May 2014, which was attended by Transport Workers' Union officials and delegates.¹⁴
15. The New Transport Workers' Team Inc. has expended \$5,630.45 in the period from its incorporation to 31 December 2013.¹⁵ The expenses have been limited to operational expenditure in the nature of registration fees and accountancy and legal costs.¹⁶

D – PURPOSE OF CONTRIBUTIONS

Financial management

16. The accounts of the New Transport Workers' Team Inc. have been audited by an independent auditor each financial year that the entity has been in operation.¹⁷ The most recent audit report records that, as at 31 December 2013, the New Transport Workers' Team Inc. had total equity of \$89,150.86.¹⁸ This amount was entirely made up of cash at bank.¹⁹

¹⁴ Peter Biagini, witness statement, 20/8/14, para 50.

¹⁵ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 12, 23, 34.

¹⁶ Scott Connolly, witness statement, 18/8/14, para 38.

¹⁷ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 10-38.

¹⁸ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, p 35.

¹⁹ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, p 35.

17. The cash assets of the New Transport Workers' Team Inc. have been held in the following bank accounts:

- (a) a 'Business Cash Maximiser' account with the National Australia Bank under the name 'The New Transport Workers' Team Inc.' with an account number ending 776;²⁰
- (b) a 'Business Cheque' account with the National Australia Bank under the name 'The New Transport Workers' Team Inc.' with an account number ending 629;²¹
- (c) an 'I-saver Introductory Rate' account with the National Australia Bank in the names of Scott James Connolly and Peter Biagini with an account number ending 6638. This account has now been closed,²² and
- (d) a 'Smart Reward Saver' account with the National Australia Bank in the names of Scott James Connolly and Peter Biagini with an account number ending 7994. This account was closed on 11 April 2013.²³

²⁰ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 51-59.

²¹ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 64-71.

²² New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 60-63.

²³ New Transport Workers' Team Inc. Tender Bundle, 21/8/14, pp 72-86.

E – FINDINGS

18. The disparity between the wording used in the payroll deduction form and the broader objects specified in the entity's constituent documents raises governance issues.
19. The disparity raises the potential that money has been or is being received on one basis, but those in control of the entity may in the future use it for other purposes. There are parallels in this respect to issues concerning the McLean Forum Ltd considered in the preceding Chapter. Tony Sheldon's evidence demonstrated how those authorised to spend money held by an entity may consider themselves bound only by the objects clause of an entity and, months or years after receipt of the funds from contributors, have no regard – or expectation or understanding that they should have regard – to the terms on which contributors made their payments.
20. In the case of the New Transport Workers' Team Inc. this possibility has not yet eventuated, and it may never. However, Peter Biagini's description of the purpose of the fund ('for future elections') is not rigorous. It may suggest he himself does not feel constrained to apply the monies only 'to promote the job security of our team' (the wording adopted in the payroll deduction form). These matters do not support any finding or allegation of misconduct by officers of the New Transport Workers' Team Inc. But they highlight the significant governance risks associated with the use of this kind of fighting

fund for the purposes of the funding of candidates in union elections.

CHAPTER 4.4

TWU TEAM FUND

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A – RELEVANT FACTS

1. This Chapter concerns the Victoria/Tasmania Branch of the Transport Workers’ Union (**Victorian TWU**) and a relevant entity associated with the Victorian TWU. This entity has variously been known as the ‘Campaign Fund’ and the ‘Team Fund’. In this chapter it is called the ‘Team Fund’. The following findings substantially correspond with the submissions of counsel assisting. The Victorian TWU’s specific criticisms are addressed in the appropriate place.
2. The Team Fund is a fighting fund that takes the form of a separate bank account held by the current Victorian TWU secretary, Wayne Mader, the assistant secretary, John Berger and the Victorian TWU’s trustee, Christopher Fennell.¹ It has no accompanying formal structure and is not a registered or incorporated entity.
3. The Team Fund raises important questions as to the voluntariness of contributions, the knowledge or consent of the contributors to the expenditure of their funds and the lack of transparency that accompanies funds of this type.

¹ Bank account number 063-188, 10355161: TWU VicTas Tender Bundle, pp 61-74.

Background

4. In 1967, the Team Fund was established by the Victorian TWU.² The Team Fund is currently held at the Commonwealth Bank of Australia, Port Melbourne Branch.³ Since at least 2003, the account signatories for the Team Fund have been the Branch Secretary and two of the other officials of the Victorian TWU.⁴
5. The contributors to the Team Fund are, and at all times have been, officials and employees of the Victorian TWU.⁵
6. One of those officials, Arthur Wood, commenced employment as an organiser for the TWU in 1996 and was elected as an official shortly thereafter in 1998.⁶ He contributed to the Fund from 1998 to 2010.⁷ Upon the termination of his employment, he requested a refund of the funds he had paid into the Team Fund.⁸
7. Arthur Wood was successful in obtaining a partial refund of the money he contributed to the Team Fund.⁹
8. The following diagram summarises the operations of the Team Fund.

² Wayne Mader, 19/8/14, T:35.44

³ TWU VicTas Tender Bundle, p 62.

⁴ TWU VicTas Tender Bundle, p 1.

⁵ Wayne Mader, witness statement, 15/8/14, para 23.

⁶ Arthur Wood, 19/8/14, T:7.36; Arthur Wood, witness statement, 30/7/14, para 5.

⁷ Arthur Wood, 19/8/14, T:7.41; Arthur Wood, witness statement, 30/7/14, paras 7, 11, 32.

⁸ Arthur Wood, witness statement, 30/7/14, para 31.

⁹ Wood MFI-1, p 33.

TWU Team Fund

Primary Contributors

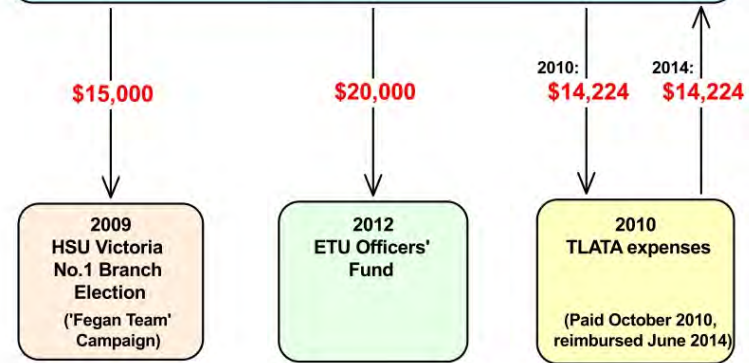


\$ per week

Election Fund



Primary Expenditure



Who controls the Team Fund?

9. The current signatories to the Team Fund are Wayne Mader, John Berger and Christopher Fennell.¹⁰
10. They appear to be the controlling minds of the entity. As set out below, in their sole discretion, these signatories determine the purposes for which the money is used.

Contributions

11. Employees and officials of the Victorian TWU contribute \$25 per week to the Team Fund.¹¹ The contributions are deducted from the contributors' pay. A cheque is drawn from the Victorian TWU's bank account, made payable to cash, for the total amount of the contributions. That cheque is then physically deposited by John Berger into the Team Fund.¹²
12. As at 2 April 2014, the Team Fund's balance¹³ was approximately \$260,000.¹⁴
13. The voluntariness of these payments is disputed. When Arthur Wood commenced employment with the Victorian TWU, he was approached by John Halloran and told that it was a requirement that he contribute

¹⁰ Wayne Mader, 19/8/14, T:33.18.

¹¹ Wayne Mader, 19/8/14, T:36.7.

¹² Wayne Mader, 19/8/14, T:46.40-47.25.

¹³ Including the high interest term deposit, account number ending - 2080.

¹⁴ TWU VicTas Tender Bundle, p 61, 75.

to the Team Fund.¹⁵ Arthur Wood testified that it was made clear to him that making payments into the Team Fund was compulsory.¹⁶ The TWU criticised his evidence as ‘heavily slanted’, proceeding from ‘a person obviously embittered by reason of not being included as a member of the team in the 2010 elections’, and in the end stating no more than that he felt there was an ‘expectation’¹⁷ to make contributions.¹⁸ Those criticisms are not accepted.¹⁹

14. John Halloran denies that he told Arthur Wood that it was compulsory to make payments into the Team Fund.²⁰ However, he agreed that there was an expectation that officials would to pay into the fund.²¹
15. Wayne Mader asserted that it was logical for elected officials to contribute to the Team Fund²² but denied that there was a requirement to make contributions.²³
16. There is no documentary evidence of authorisation by contributors for deductions to be made from their pay and deposited into the Team Fund.²⁴

¹⁵ Arthur Wood witness statement, 19/8/14, para 9.

¹⁶ Arthur Wood, 19/8/14, T:8.1-28.

¹⁷ Arthur Wood, 19/8/14, T:21.44-22.19.

¹⁸ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 243.

¹⁹ Arthur Wood, 19/8/14, T:22.21-26.

²⁰ John Halloran, 19/8/14, T:97.20.

²¹ John Halloran, 19/8/14, T:97.32.

²² Wayne Mader, 19/8/14, T:34.4-6.

²³ Wayne Mader, 19/8/14, T:34.11-13.

17. Wayne Mader's evidence, and Arthur Wood's evidence taken at its lowest, make it clear that there was at least an expectation by the Victorian TWU that employees and officials pay into the Team Fund. It is probable that the payments are likely made by people keen to 'toe the line' with the senior officials of the Victorian TWU. It is also probable that contributors do not feel they have a real choice whether or not to contribute. Even if it is not compulsory to contribute, this was not made clear to Arthur Wood.

Purpose of the Team Fund

18. The purposes of the Team Fund are far from clear.
19. Wayne Mader said that the purpose of the Team Fund has never been, and is not, solely to fund election campaigns in the Victorian TWU.²⁵ There is evidence of occasions where the Team Fund was used to provide support to candidates standing for office in elections run by other organisations.²⁶ There is no written record of the purposes of the Team Fund.²⁷ There is no written record, trust deed or set of rules governing the purposes for which the money in the Team Fund may be used.²⁸

²⁴ TWU VicTas Tender Bundle, pp 265-286.

²⁵ Wayne Mader, 19/8/14, T:43.2.

²⁶ Wayne Mader, 19/8/14, T:43.5-9.

²⁷ Wayne Mader, 19/8/14, T:41.1-2.

²⁸ Wayne Mader, 19/8/14, T:41.1-8.

20. Arthur Wood said that as a contributor, he ‘never had any idea where any of [the money] was, or how it was banked, how the procedure worked’.²⁹
21. John Berger said that the ‘purpose of the [Team Fund] is to assist the candidates in the upcoming contested election, or *any other matters that we see fit to use it for*’ [emphasis added].³⁰
22. Wayne Mader asserted that the Team Fund money was only deployed on the purposes for which the contributions were made.³¹ It was not clear from Wayne Mader’s evidence what the ‘purposes’ were, only that ‘they were in the minds of all of the team and I’m a member of the team’.³²
23. The evidence of those who control the fund disclosed that their intention was to avoid any restraints on their ability to expend Team Fund monies as they saw fit. That evidence revealed no concern that the governance arrangements for this separate entity may be problematic.
24. Is it possible to infer from the Team Fund’s ad hoc expenditure, or speculate, what the purposes of the Team Fund truly are? This may be the only option. But it is far from satisfactory. That makes it simply impossible to assess whether expenditure is being made consistent with the fund’s purpose and the terms on which the contributions were and

²⁹ Arthur Wood, 19/8/14, T:10.17-18.

³⁰ John Berger, 19/8/14, T:91.28-30.

³¹ Wayne Mader, 19/8/14, T:40.46.

³² Wayne Mader, 19/8/14, T:42.4-5.

are made, for the reasoning is entirely circular. The question: 'Is this particular payment within power?' must always be answered: 'Yes, because it has been made.' In truth the propriety of payments is unassessable, because all payments are proper. This poses significant governance concerns, especially because significant funds have been amassed by the Team Fund and some have since not been accounted for.

Expenditure: payments to the HSU

25. On each of 2 December 2009 and 3 December 2009, \$7,500 in cash was withdrawn from the Team Fund.³³ In oral evidence Wayne Mader said that the total of \$15,000 was put toward the campaign of the 'Fegan Team', in elections for the Victoria No. 1 Branch of the HSU. This is presumably a reference to Pauline Fegan. However she was not a candidate in the 2009 HSU elections. And the elections were not held in December of that year: they were held on 21 October 2009.³⁴
26. Cash withdrawals of greater than \$10,000³⁵ must be reported to AUSTRAC.³⁶ Further, cash withdrawals by their nature present difficulties for those who would wish to inquire into expenditure made by and other conduct on the part of those controlling the Team Fund.

³³ TWU VicTas Tender Bundle, pp 42-46.

³⁴ Wayne Mader, 19/8/14, T:44.1-28, 64.4-14 .

³⁵ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 5: 'threshold transaction'.

³⁶ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 43.

27. Was the money withdrawn in two separate transactions to avoid disclosure to AUSTRAC? Wayne Mader gave a negative answer.³⁷
28. John Halloran, the other signatory to the withdrawal, could only speculate that the reason for structuring the payment this way was that that would have been how the Fegan team requested the money be paid.³⁸
29. In a technologically advanced age, it is peculiar that these transactions were carried out through not one, but two, physical cash withdrawals, one day apart more than a month after the election was over and for a person who was not a candidate in those elections. The relevant details about this expenditure of the fund – purpose, payee and amount – are hidden from contributors. This raises significant questions.

Expenditure: payments to the ETU Officers Fund

30. On 9 March 2012, the Team Fund sent \$20,000 via International Money Transfer to the ETU Officers [sic] Fund (**ETU Officers' Fund**).³⁹ The signatories authorising the withdrawal were Wayne Mader and John Halloran.⁴⁰
31. The transaction reference recorded for this transfer was 'Sheldon'.⁴¹ Wayne Mader said that Tony Sheldon had called him⁴² and requested

³⁷ Wayne Mader, 19/8/14, T:64.18.

³⁸ John Halloran, 19/8/14, T:102.1-2.

³⁹ Australia and New Zealand Banking Group Account Name: ETU Officers Fund, BSB: 012 010, Account Number: 110614361.

⁴⁰ TWU VicTas Tender Bundle, pp 57-60.

⁴¹ TWU VicTas Tender Bundle, p 58.

that the Victorian TWU assist 'the ETU officers fund in their election'⁴³ as Tony Sheldon was involved in Mr Riordan's campaign.⁴⁴

32. It was clear from the evidence received that no person was clear as to the purpose of the outgoing funds to the ETU Officers' Fund. Wayne Mader said that he thought it was to assist the ETU National Office and Bernard Riordan in the upcoming election.⁴⁵ Wayne Mader clearly made no independent enquiry about the destination or queried why the funds were being transferred to the New South Wales branch of the ETU and not the National Office.

33. John Berger acknowledged that there was a discussion about making the payment but made no further enquiries as to the reason for the payment; he regarded it as sufficient that Tony Sheldon had asked that the payment be made.⁴⁶ Similarly, John Halloran recalled that Wayne Mader had told him that Tony Sheldon had requested that this payment be made to the ETU Officers' Fund.⁴⁷ The reason given by John Halloran for the payment was 'obviously these people were Mr Sheldon's what we call allies and he wanted us to help support them'.⁴⁸

34. John Halloran said:⁴⁹

⁴² Wayne Mader, 19/8/14, T:69.22.

⁴³ Wayne Mader, 19/8/14, T:66.17-18.

⁴⁴ Wayne Mader, 19/8/14, T:66.47-67.1.

⁴⁵ Wayne Mader, 19/8/14, T:66.45-47.

⁴⁶ John Berger, 19/8/14, T:95.7-13.

⁴⁷ John Halloran, 19/8/14, T:107.26.

⁴⁸ John Halloran, 19/8/14, T:107.29-30.

⁴⁹ John Halloran, 19/8/14, T:108.7-14.

...the McLean Forum paid \$20,000 to the Association for attendance at [the 2010 fundraiser held by the Association] and I'm sure they didn't bring 40 people down to attend it, so I thought this was a rather unaccounted burst of generosity on their part. Then when the request came and it was for \$20,000, I rather assumed that what had happened was that they simply decided to park that money with us and were now reclaiming it; that would be my view.

35. Tony Sheldon had no recollection of requesting that Wayne Mader pay the money to the ETU Officers' Fund.⁵⁰ Tony Sheldon could not recall any telephone conversation but said that if Wayne Mader had asked him, he 'would certainly have made it clear to him that we supported the Riordan team.'⁵¹ It should be said at this point that the manner in which Tony Sheldon gave this evidence contrasted sharply with his demeanour much of the time. He was often evasive or playing to laughs to a gallery which seemed to have assembled itself. But he spoke of his lack of recollection of Wayne Mader's request in a very serious tone of voice. His manner suggested that he was conveying the message: 'I don't remember, and if it had happened I would remember, and I am thus very doubtful that it happened, but out of loyalty to the union I do not want to distance myself from Mader'. He did not, however, use words to that effect.
36. Whether or not this request took place, \$20,000 was paid by way from the Campaign Fund to the ETU Officers' Fund on 9 March 2012 – for some reason, by way of an International Money Transfer.⁵²
37. Wayne Mader asserted that this payment to the ETU Officers' Fund was authorised by the contributors. He said the meeting was held in

⁵⁰ Anthony Sheldon, 21/08/14, T:66.5.

⁵¹ Anthony Sheldon, 21/08/14, T:66.10-11.

⁵² TWU VicTas Tender Bundle, p 58.

Port Melbourne⁵³ with ‘a dozen-odd’ contributors.⁵⁴ Wayne Mader was unable to name persons attending other than himself, John Halloran and John Berger, the other signatories at that time.⁵⁵ John Berger said that it was only himself, Wayne Mader and Christopher Fennell in attendance.⁵⁶ John Halloran only recalled discussing the transfer with Wayne Mader.⁵⁷

38. The Australia and New Zealand Banking Group records of the ETU Officers’ Fund show:

- (a) Bernard Riordan, James McFadyen, Peter Sinclair and Geoffrey Prime were the signatories to the ETU Officers Fund;⁵⁸
- (b) the deposit was made on 9 March 2012;⁵⁹ and
- (c) no withdrawals have been made from 9 March 2012 to 24 June 2014.⁶⁰

39. In addition, there have been no contested elections in the New South Wales division of the ETU since the payment.⁶¹ Bernard Riordan, who is now a Commissioner to the Fair Work Commission, gave evidence

⁵³ Wayne Mader, 19/08/14, T:70.33.

⁵⁴ Wayne Mader, 19/08/14, T:70.12.

⁵⁵ Wayne Mader, 19/08/14, T:71.2.

⁵⁶ John Berger, 19/8/14, T:92.11-13.

⁵⁷ John Halloran, 19/8/14, T:107.21-22.

⁵⁸ ETU Officers Fund, 21/8/14, p 2.

⁵⁹ ETU Officers Fund, 21/8/14, p 6.

⁶⁰ ETU Officers Fund, 21/8/14, pp 7-34.

⁶¹ ETU Officers Fund, 21/8/14, pp 35-120.

that he had no knowledge of the payment.⁶² The ETU Officers' Fund did not incur any election expenses in March 2012.⁶³ In fact, it was Commissioner Riordan's second-last work day on 9 March 2012 before joining the Fair Work Commission.⁶⁴ Stephen Butler was elected unopposed to the position left vacant by Commissioner Riordan's departure.⁶⁵

40. On 20 October 2014, the Commission received three affidavits from James McFadyen, Peter Sinclair and Geoffrey Prime in respect of the \$20,000 payment to the ETU Officers' Fund.
41. Peter Sinclair is a member and office holder of the ETU Officers' Fund.⁶⁶ The ETU Officers' Fund is regulated by the 'Rules of the Electrical Trades Union Officers' Fund'.⁶⁷
42. In July 2011, the Electrical Division of the CEPU had elections in all of its Branches, including NSW and Victoria.⁶⁸ There was significant intra-union conflict between the Victorian Branch of the CEPU and the other Branches (including the National Office) of the CEPU.⁶⁹

⁶² Bernard Riordan, 21/8/14, T:72.21-28.

⁶³ Bernard Riordan, 21/8/14, T:73.22.

⁶⁴ Bernard Riordan, 21/8/14, T:73.26.

⁶⁵ Bernard Riordan, 21/8/14, T:73.33.

⁶⁶ Paul Sinclair, affidavit, 20/10/14, para 2.

⁶⁷ Paul Sinclair, affidavit, 20/10/14, para 3.

⁶⁸ Paul Sinclair, affidavit, 20/10/14, para 15.

⁶⁹ Paul Sinclair, affidavit, 20/10/14, para 18.

43. In the Victorian Branch election, an alternate ticket, known as ‘Club Victory’, was formed to oppose the incumbent office holders.⁷⁰
44. As a result, in around mid-July 2011, \$60,000 was withdrawn for expenditure (such as airfares, printing and other miscellaneous expenses)⁷¹ on the abovementioned campaign.⁷²
45. On 15 July 2011, \$20,000 was deposited into a bank account connected with Club Victory.⁷³ It was understood by the ETU Officers’ Fund that the payment of the \$20,000 would eventually be returned to it by an external source.⁷⁴ Peter Sinclair said that the \$20,000 payment received on 9 March 2012 from the Team Fund was the repayment of the money expended supporting the Club Victory ticket.⁷⁵ He stated:⁷⁶

As I recall it, I was speaking with [Mr Riordan] about other matters (I don’t now recall what), and he mentioned that the money the [ETU Officers’] Fund had paid to Club Victory would be coming back. He asked me to get the relevant bank account details for the [ETU Officers’] Fund.

46. Despite Peter Sinclair’s evidence that he had several conversations during the campaigns with Geoffrey Prime about items of

⁷⁰ Paul Sinclair, affidavit, 20/10/14, para 16-17.

⁷¹ Paul Sinclair, affidavit, 20/10/14, para 21.

⁷² Paul Sinclair, affidavit, 20/10/14, para 20.

⁷³ Paul Sinclair, affidavit, 20/10/14, para 25, Annexure C.

⁷⁴ Paul Sinclair, affidavit, 20/10/14, para 26.

⁷⁵ Paul Sinclair, affidavit, 20/10/14, para 27.

⁷⁶ Paul Sinclair, affidavit, 20/10/14, para 29.

expenditure,⁷⁷ the latter maintained that he never had any involvement in the day to day administration of the ETU Officers' Fund.⁷⁸

47. Wayne Mader's evidence that there was a full meeting of contributors was not credible. The Team Fund, between 1 December 2009 and 18 May 2012, had a total of four significant withdrawals.⁷⁹
48. The payment of \$20,000 to candidates in another election using the contributions of TWU officials would appear to have been a significant matter. Moreover, Wayne Mader's evidence was inconsistent with that of John Berger and John Halloran as to whether a formal meeting took place.
49. The unsatisfactory nature of the evidence makes it impossible at this stage to arrive at specific findings. Whatever is to be made of the evidence, it shows the unsatisfactory way these types of funds can work in practice. Monies travel between entities in byzantine arrangements reflecting favours made by officials to their mate. Officials seem to operate on an understanding that sometimes funds will be 'parked' with them for safe-keeping in a way designed to avoid suspicion.

⁷⁷ Paul Sinclair, affidavit, 20/10/14, para 24.

⁷⁸ Geoffrey Prime, affidavit, 15/10/14, para 3.

⁷⁹ TWU VicTas Tender Bundle, p 41; the withdrawals identified were not explained and were for amounts greater than \$1,500.

Expenditure: payments to Transport, Logistics, Advocacy and Training Association

50. The Association is dealt with in greater detail in Chapter 3.6 above.
51. The expenditure from the Team Fund relates to a function that occurred in July 2010. The Team Fund paid a total amount of \$14,224.18 in 2010.⁸⁰ The Team Fund was reimbursed this amount but only in 2014 and two days after the Commission issued its first Notice to Produce in respect of the Team Fund on 25 June 2014.

Expenditure: contested Victorian TWU elections

52. The only fully contested election for the Victorian TWU this century took place in 2002, though there were contested elections for some positions in 2000⁸¹ and 2006⁸² requiring campaign expenditure.⁸³ In more recent years, there has been no expenditure in relation to the Victorian TWU branch elections.

⁸⁰ Team Fund MFI-1, 31/10/14, p 1.

⁸¹ Arthur Wood, 19/8/14, T:23.36-43.

⁸² Wayne Mader, 19/8/14, T:52.32-40, 56.11-20.

⁸³ Mader MFI-1, p 1-12.

B – ISSUES ARISING

Nature of entity

53. The uncertainty of the legal nature of the Team Fund creates significant consequential uncertainty as to the obligations of those who control it.
54. The Team Fund could not properly be described as a properly formed trust. For what it is worth, there was no subjective intention to create a trust, as the account opening forms reveal: the signatories ticked a box that stated the account was not a trust.⁸⁴
55. The Team Fund is not an incorporated association or company. If it were to be considered as an unincorporated association, it is seriously deficient in its record keeping.
56. Nor does it appear from the evidence of Arthur Wood and those who control the Team Fund that the arrangement was akin to that of agent and principal. Those who control the fund evidently do so on the understanding they can spend the fund's monies in their discretion and without having to obtain the authority of contributors.
57. There are internal bank documents assessing the ability of Wayne Mader and John Berger to service personal loans by reference to the

⁸⁴ Wayne Mader, 19/8/14, T:39.42-44.

balance in the Team Fund.⁸⁵ This conduct was probably unknown to and not approved of by those gentlemen.⁸⁶

Governance: general

58. All witnesses acknowledged that the Team Fund contains money that was held on behalf of the contributors.⁸⁷ There is no supporting documentation establishing or regulating the affairs of the Team Fund. There is no annual reporting whatsoever by those who control the Team Fund to those who contribute. There is no adequate record-keeping as to the affairs of the Team Fund.

Governance: reporting to contributors

59. The occurrence of meetings of contributors to the Team Fund is in dispute. Arthur Wood said that the Team Fund was a topic that was never discussed at the Branch.⁸⁸ Wayne Mader and John Berger denied this assertion.⁸⁹ They said that meetings are held regularly, on an ad hoc basis, to inform people of the Team Fund's balance and expenditure items.⁹⁰ But Wayne Mader was also of the view that if it

⁸⁵ TWU VicTas Tender Bundle, pp 78-103, 107-126.

⁸⁶ Wayne Mader, 19/8/14, T:82.26-83.31, 84.15-38; John Berger, 19/8/14, T:93.46-94.28.

⁸⁷ Wayne Mader, 19/8/14, T:40.17; John Berger, witness statement, 15/8/14, para 35; John Halloran, 19/8/14, T:98.47.

⁸⁸ Arthur Wood, 19/8/14, T:10.23.

⁸⁹ Wayne Mader, 19/8/14, T:36.13-16; John Berger, 19/8/14, T:89.36-38.

⁹⁰ Wayne Mader, 19/8/14, T:36.13-16; John Berger, 19/8/14, T:89.36-38.

is not a requirement of the account, then there was no reason to report transactions to contributors.⁹¹

60. John Halloran could not recall any reports to contributors save that there was a meeting about the increase in contribution.⁹² This is consistent with Arthur Wood's evidence and is compelling. He was the only contributor that was not a signatory. The absence of documentary records supports this evidence. The unexplained expenditure of the Team Fund also lends support to a finding that Team Fund contributors were not kept informed of expenditure. If there had been, questions would probably have been asked and documents prepared to justify the payments to candidates standing for office in unrelated unions, such as the HSU. The evidence of Arthur Wood and John Halloran on this point is to be preferred.

Governance: record keeping

61. The Victorian TWU, in changing its internal process with respect to issuing pay slips, has effectively abolished any sort of paper record held by the Victorian TWU that relates or refers to the Team Fund.
62. There is no procedure in place to record transactions of the Team Fund properly.⁹³
63. On 25 June 2014, the Commission issued Notice to Produce No. 172 to the Victorian TWU.⁹⁴ That notice sought production of:⁹⁵

⁹¹ Wayne Mader, 19/8/14, T:41.27.

⁹² John Halloran, witness statement, 15/8/14, para 31.

⁹³ Wayne Mader, 19/8/14, T:41.1-8.

1. Documents recording the Transfer including, without limitation, Documents recording the account name, account number and BSB of the Election Fund Account.

2. Documents recording the Refund including, without limitation, Documents recording the account name, account number and BSB of the Election Fund Account.

3. All statements of account for the Election Fund Account.

4. Documents recording any payment to, and expenditure from, the Election Fund Account, in the Period excluding Documents recording regular weekly contributions by employees or officials of the Branch.

5. Document recording any request or proposal for a payment from the Election Fund Account in the Period, and any policy or guideline governing use of monies in the Election Fund Account.

Definitions and interpretation:

In the above Schedule:

"Branch" means the Transport Workers Union of Australia, Victorian/Tasmanian Branch.

"Document" includes:

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

"Election Fund Account" means any account with any bank, credit union, investment organisation or other financial institution:

- (a) into which the Transfer was made; or
- (b) from which the Refund was made.

⁹⁴ TWU VicTas Tender Bundle, pp 265-272.

⁹⁵ TWU VicTas Tender Bundle, p 266.

"Period" means the period from 1 January 2007 to date, or any part of that period.

"Refund" means the transfer of funds described in Attachment 1 from 'TWT Fighting Fund'

"Transfer" means the transfer of funds described in Attachment 2 as 'Election Fund'.

64. Attachment 1 and Attachment 2 were the documents provided to the Commission by Arthur Wood showing, respectively, the refund he received from the Team Fund and his payslip that recorded his contributions into the Team Fund.⁹⁶ In response to that notice, the Victorian TWU produced a total of 12 documents.⁹⁷ The most current document was dated 1 September 2008.⁹⁸

65. In its covering letter accompanying its production in response to the notice, the solicitors for the Victorian TWU's stated:⁹⁹

There are documents comprising communications between Maurice Blackburn and the TWU Vic/Tas Branch, its officers, employees and/or agents, whereby TWU Vic/Tas Branch obtained advice and provided instructions, and the TWU Vic/Tas Branch claims legal professional privilege in respect of those documents.

66. The Victorian TWU did not produce any bank account statements or records relating to the Team Fund.¹⁰⁰ Wayne Mader said he took the view that the Team Fund was held in his personal capacity and not as a

⁹⁶ TWU VicTas Tender Bundle, pp 271-272.

⁹⁷ TWU VicTas Tender Bundle, pp 275-286.

⁹⁸ TWU VicTas Tender Bundle, p 275.

⁹⁹ TWU VicTas Tender Bundle, p 273.

¹⁰⁰ Wayne Mader, 19/08/14, T:50.27-29.

union official and therefore the production of the account statements was not required.¹⁰¹

67. Wayne Mader's testimony revealed the extent to which the Victorian TWU were, at the least, far from forthcoming about the affairs of the Team Fund. Documentary evidence received after the hearing¹⁰² shows that two days after Notice to Produce No. 172 was issued, steps were taken by those who control the Team Fund to reconcile its payments with the affairs of the Transport, Logistics, Advocacy and Training Association. The relevant transactions occurred some four years before these reconciliations were attempted. It was only because of actual and threatened scrutiny from the Commission that even the most basic step was taken to check the appropriateness of expenditure previously incurred and to reimburse the Team Fund for expenses it had paid on behalf of the Association. They were expenses for which it ought to have been reimbursed years earlier.¹⁰³

68. Had records of the Team Fund actually been available to contributors in the intervening period, and had the Team Fund been operated openly and with the keeping of the proper records, contributors would have been in a position to raise proper queries as to the appropriateness of the expenditure of their monies and the reasons for why those monies had not been reimbursed. The absence of any such query in the records pertaining to the Team Fund and the obvious lack of co-operation with, and facilitation of, the Commission's inquiries into the Team Fund by those who control it indicate the secrecy with which it

¹⁰¹ Wayne Mader, 19/08/14, T:51.14-15.

¹⁰² Team Fund MFI-1, 31/10/14, p 1.

¹⁰³ See Chapter 3.6 for further details in respect of the Association.

has been operated and the inherent inadequacies of that conduct from the perspective of contributors.

C – RECOMMENDATIONS

69. The Team Fund is not an appropriate vehicle for receipt of funds to be used in union elections: its legal status is uncertain and its governance practices are non-existent. There are real questions as to whether the contributions are made voluntarily by employees and officials. There are also real questions as to what this entity actually spends its money on and the propriety of the use of its funds for those purposes.

CHAPTER 4.5

HSU OFFICERS' ELECTION FUND

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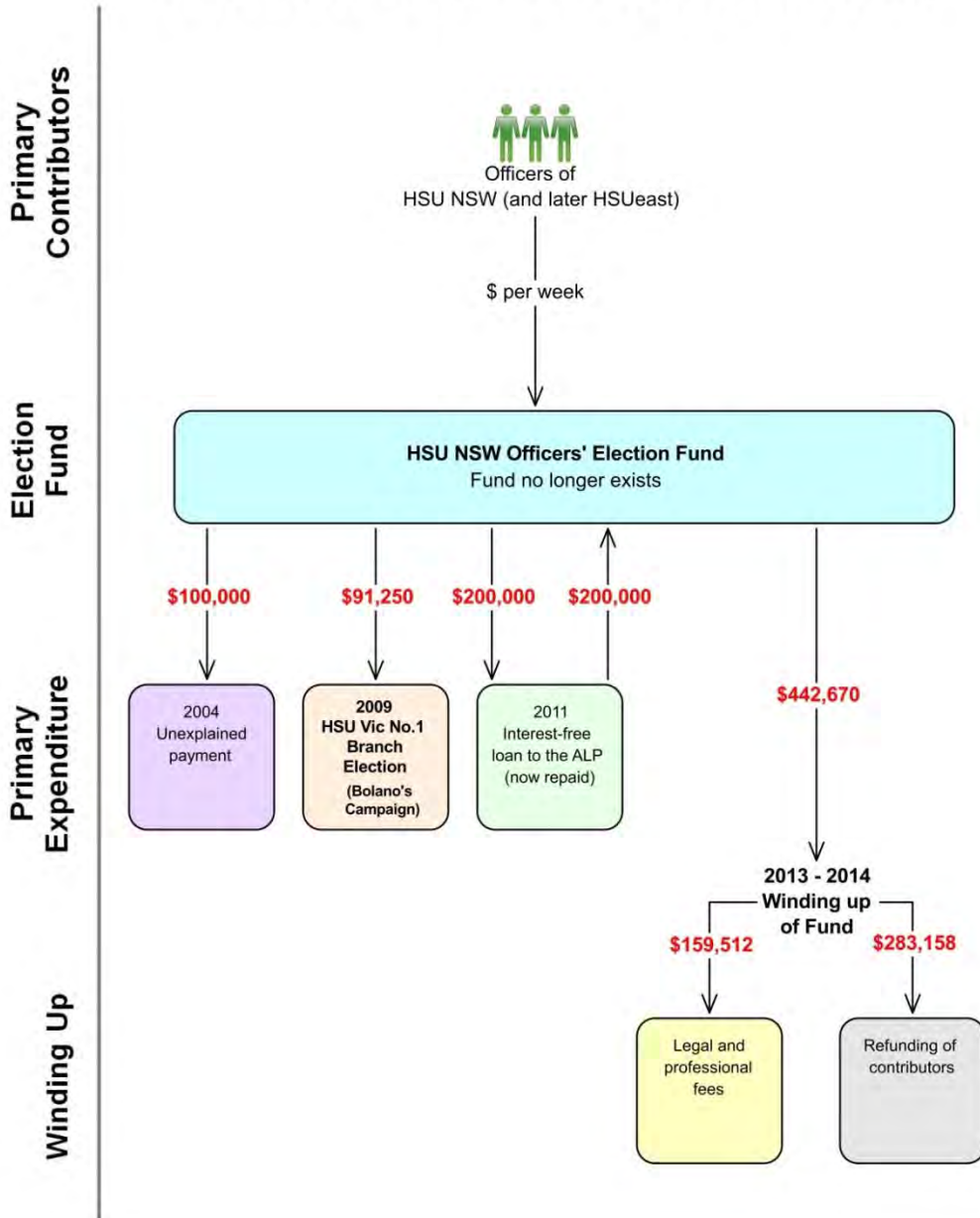
A – RELEVANT FACTS: GENERAL

Formation and amendments to deed

1. This chapter concerns a fighting fund originally known as the ‘Health & Research Employees’ Association Officer’s [sic] Election Fund’ (**Officers’ Election Fund**). The Officers’ Election Fund illustrates the issues that arise when a fighting fund takes the form of a trust. Save where indicated otherwise, the submissions of counsel assisting set out below are to be accepted.
2. The ‘Officers’ Election Fund’ was a trust fund established by a deed executed on 14 August 1997.¹
3. The following diagram summarises the income and expenditure of the Officers’ Election Fund.

¹ Hayes MFI-4, pp 246-1-246-7.

HSU NSW Officers' Election Fund (a trust fund)



4. The trust deed of 14 August 1997 appointed Michael Alexander Williamson and Terry James Tracey as trustees. Michael Williamson was at that time Secretary of the Health and Research Employees' Association of New South Wales, an organisation registered under NSW law. Over time the fund became more widely known as his election fund.
5. The trust deed was amended on 5 November 1999,² 28 May 2004, 23 September 2009,³ and 3 March 2011.⁴
6. The amending deed dated 23 September 2009 recorded that as at and from 21 December 2007, the trustees were Michael Williamson, Peter Mylan, Gerard Hayes, and Kerry Seymour.⁵
7. Initially there were seventeen beneficiaries. Upon election or appointment, an officer of the Health & Research Employees' Association became eligible to become a beneficiary of the trust subject to being invited to join by a majority vote of beneficiaries.⁶ A person who ceased to hold office ceased to be eligible to be a beneficiary.⁷
8. The amending deed of 3 March 2011 followed the amalgamation of three branches of the HSU into what became 'HSU East

² Hayes MFI-4, p 246-2.

³ Hayes MFI-4, p 247.

⁴ HSU Supplementary Tender Bundle, 31/10/14, pp 1-6.

⁵ Hayes MFI-4, p 247.

⁶ Hayes MFI-4, pp 246-1-246-2, cl 2.

⁷ Hayes MFI-4, p 246-6, cl 6.5.

Branch’ of the federally registered HSU, and a state-registered entity known as ‘HSUeast’. The details of that amalgamation are addressed elsewhere.⁸ The amending deed of 3 March 2011 renamed the trust ‘The Health Services Union Officers’ Election Fund’. It also expanded the class of persons eligible to become a beneficiary of the trust so as to include any ‘Officer’ of the HSU and any person ‘invited to join the Fund’, save that any beneficiary who was not an ‘elected Officer’ was not eligible to vote at any meetings to determine the candidates to be supported in a HSU election.⁹

9. The trust deed of 14 August 1997 provided that the objects of the trust were ‘to promote by legitimate means, the interests of the beneficiaries of the HREA by seeking the return of approved candidates at the next ensuing election of officials to be held in accordance with the Rules of the HREA and the provisions of the *Industrial Relations Act* [1996]’.¹⁰ Funds were to be applied to promote those objects ‘in such manner as the Trustees determine and is from time to time approved by a majority of the persons present and voting at a meeting of the beneficiaries’.¹¹
10. The amended deed of 3 March 2011 recorded amendments to the trust’s objects clause. Clause 3.1 of the trust deed was amended to provide that the objects of the trust were ‘to promote by

⁸ See Chapter 9.1.

⁹ Hayes MFI-4, p 301; HSU Supplementary Tender Bundle, pp 1-2, cls 2.1-2.3.

¹⁰ Hayes MFI-4, p 246-3, cl 3.1.

¹¹ Hayes MFI-4, p 246-3, cl 3.2.

legitimate means, the interests of the *members* of the HSU by seeking the return of approved candidates at the next ensuing election of officials’ (emphasis added).¹²

11. Contributions to the fund were initially set at \$20.00 per beneficiary, per week, to be contributed from a beneficiary’s salary, subject to the absolute discretion of the trustees to vary the amount of contribution required.¹³ By 3 March 2011 the contribution was fixed at \$45.00 per member per week.¹⁴ The trustees were entitled to apply or invest the monies standing to the credit of the trust in their names ‘in any investment of any kind or nature that the Trustees in their discretion think fit’.¹⁵

12. The trust deed of 14 August 1997 provided that, in the event of a ballot taking place for the election of any or all officers of the Health & Research Employees’ Association at the next succeeding election, any unspent monies remaining in trust after the election were to be distributed to the beneficiaries who participated in the trust fund prior to the election in the same proportions as those beneficiaries contributed to the trust fund.¹⁶ In the event the election was not contested, the monies were to be distributed to the beneficiaries in proportion to their respective contributions.¹⁷ However, a beneficiary who ceased to contribute

¹² Hayes MFI-4, p 301; HSU Supplementary Tender Bundle, 31/10/14, p 2, cl 3.1.

¹³ Hayes MFI-4, p 246-5, cl 5.1.

¹⁴ HSU Supplementary Tender Bundle, p 4, cl 5.1.

¹⁵ Hayes MFI-4, p 246-4, cl 4.1; HSU Supplementary Tender Bundle, p 3, cl 4.1.

¹⁶ Hayes MFI-4, p 246-6, cl 6.2.

¹⁷ Hayes MFI-4, p 246-6, cl 6.3.

to the trust fund before the next election was not automatically entitled to the return of contributions, and a beneficiary who ceased to be an elected officer or employee of the Health & Research Employees' Association during a term of office between elections was also not entitled to a refund of contributions.¹⁸ The trustees had 'complete and unfettered discretion' whether to refund those contributions.

13. The amending deed of 3 March 2011 altered these provisions. Whereas previously clause 6.2 provided that a contributor was *entitled* to a refund of unspent monies after a contested election, clause 6.2 as amended provided that there 'may' be a refund 'with the consent of a simple majority of the current beneficiaries'.¹⁹ Clause 6.3 was also amended so that where an election was uncontested, any refund required 'the approval of a majority of beneficiaries given at a meeting convened and held for that purpose.'²⁰

Operation

14. On 21 June 2012, Flick J declared that the HSU NSW and the HSU East Branch had ceased to function effectively and made orders dismissing all elected officers from their positions.²¹ From that date, none of the beneficiaries of the trust held elected office.

¹⁸ Hayes MFI-4, pp 246-5-246-6, cls 6.1, 6.4.

¹⁹ HSU Supplementary Tender Bundle, p 4, cl 6.2.

²⁰ HSU Supplementary Tender Bundle, p 5, cl 6.3.

²¹ *Brown v Health Services Union* (2012) 205 FCR 548. See Chapter 9.1.

15. Flick J also appointed the Hon Michael Moore as Administrator of the HSU East Branch and HSU NSW, and made orders for the demerger of the previously amalgamated branches.²² The Hon Moore arranged for elections to be called in the reconstituted branches of the HSU, and also in respect of HSU NSW.²³ Those elections were scheduled for 2 November 2012 to 23 November 2012. It was evident that the beneficiaries who contested the fresh elections would be candidates on competing tickets.²⁴
16. The existence of the trust was well-known at this time. But the amount of money held on trust and other information concerning its operations were not widely known, even, apparently, to one of its trustees.²⁵ Gerard Hayes, after the breakdown in 2012 of his relationship with the other trustees – namely Michael Williamson, Peter Mylan and Kerry Seymour – sought access to information and records concerning the trust that ought to have been available to him since at least 21 December 2007 when he was appointed a trustee.²⁶ It is unclear from the evidence whether, prior to the breakdown in the relationship, Gerard Hayes and the other trustees exercised proper care as to the application and expenditure of trust monies or otherwise fulfilled the fiduciary and other duties of a trustee.²⁷

²² *Brown v Health Services Union* (2012) 205 FCR 548.

²³ HSU Supplementary Tender Bundle, pp 60-61.

²⁴ Hayes MFI-4, p 302.

²⁵ Hayes MFI-4, pp 280-284, 303.

²⁶ Hayes MFI-4, pp 280-281.

²⁷ Hayes MFI-4, pp 280-281.

17. By about September 2012, it was known to Gerard Hayes that the trust fund comprised over \$400,000 in five separate bank accounts.²⁸

Supreme Court litigation

18. In September 2012, W.G. McNally Jones, solicitors, on instructions from Gerard Hayes and Adam Hall, wrote to the other trustees of the trust.²⁹ Each of those letters recorded, at paragraph 16, a concern on behalf of Gerard Hayes and Adam Hall that some of the trustees may have engaged in conduct constituting a breach of trust and which may involve actual misuse of trust funds. The conduct included:

- (a) a failure to return unused funds to the beneficiaries after previous elections, contrary to clause 6.2 and 6.3 of the trust deed;
- (b) the gift of \$100,000 in trust funds to Marco Bolano in 2009 for expenditure in support of his candidacy in an election in the then No. 1 Victorian Branch of the HSU. Mr Bolano was at that time not a beneficiary and the election in respect of which he received the funds was not an election of the kind referred to in the trust deed;

²⁸ Hayes MFI-4, p 306.

²⁹ Hayes MFI-4, pp 289-319.

(c) 'secret dealings with Mr [Barry] Gibson and the Trustees (apart from Mr Hayes)' concerning the operation of the trust, including Barry Gibson 'passing to Mr Hull bank withdrawal slips to be signed by the other Trustees in order to permit the expenditure of Fund moneys'.

19. Against this background, on 5 October 2012, Adam Hall and Gerard Hayes, both beneficiaries of the trust and the latter a trustee, commenced proceedings in the Equity Division of the Supreme Court of New South Wales seeking declarations and orders in relation to the trust.³⁰ The defendants were the three other trustees of the trust. By Amended Notice of Motion,³¹ Gerard Hayes, Peter Mylan and Kerry Seymour sought judicial advice, pursuant to s 63 of the *Trustees Act 1925* (NSW), on the following questions:

- (a) Question 1: Have the objects of the trust as contained within clause 3.1 of the Health Services Union Officer's Election Fund (hereafter referred to as 'the Fund') trust deed been extinguished, avoided, or otherwise ceased to exist, as a result of the demerger of the HSU East branch which occurred on 21 June 2012?
- (b) Question 2: Does the trust deed contain an express clause relating to the distribution of trust monies to the

³⁰ Proceedings No. 2012/308893.

³¹ HSU Supplementary Tender Bundle, 31/10/2014, pp 7-9.

beneficiaries in circumstances where the Union the subject of the trust ceases to operate?

- (c) Question 3: Should the trustees in discharging their obligations to the beneficiaries return monies to the beneficiaries according to the proportion/percentage by which each beneficiary had contributed to the fund ...?
- (d) Question 4: Should the trustees be indemnified in relation to the costs incurred in proceedings 2012/308893?

20. On 21 October 2013 Windeyer AJ made orders in chambers answering the questions as follows:³²

- (a) Question 1: Yes.
- (b) Question 2: No.
- (c) Question 3: Yes.
- (d) Question 4: Yes.

21. The orders of Windeyer AJ also provided that the costs of Gerard Hayes, Peter Mylan and Kerry Seymour be paid out of the trust fund on an indemnity basis and that, in the principal action (brought by Adam Hall and Gerard Hayes), the costs of the

³² HSU Supplementary Tender Bundle, 31/10/2014, p 10.

parties be paid out of the trust fund, 'those of the plaintiffs on an indemnity basis'.³³

22. The solicitors for the HSU NSW informed the Commission that a 'complete distribution to contributors was accordingly effected' and that 'the amount distributed was \$442,670.24'.³⁴ Following further inquiries by the Commission it has emerged that of that fund distribution, in excess of \$160,000 was applied to legal and professional fees relating to the proceedings before Windeyer AJ and accounting fees calculating the amounts payable to individual contributors. As at 6 December 2013, \$159,511.65 had been applied against legal fees relating to the proceedings before Windeyer AJ. A further invoice from the accountant was expected in the near future.³⁵
23. In effect, after provision for legal and accounting fees, less than two thirds of the fund was returned to contributors despite there not having been a contested election in the HSU NSW branch (or HSU East as it was for a period of time) during the time those contributions were received.

³³ HSU Supplementary Tender Bundle, 31/10/2014, p 10.

³⁴ Gerard Hayes, supplementary witness statement, 26/8/14, annexure 5, p 34.

³⁵ HSU Supplementary Tender Bundle, 31/10/2014, p 15.

Expenditure of the Officers' Election Fund

24. The Commission received information concerning expenditure from the trust fund from Gerard Hayes, Robert Hull, Andrew Lillicrap and Marco Bolano.
25. No person had possession of any minutes relating to the affairs of the trust.
26. A letter of 17 September 2014 to the Commission sent by Maurice Blackburn on Gerard Hayes' instructions stated:³⁶

We are instructed that to the best of Mr Hayes' knowledge decisions about the operation of and expenditure from the Fund were made by Mr Williamson.
27. The letter also recorded Gerard Hayes' instructions that meetings were rarely held and were, at most, held annually. Meetings were, however, held after HSU elections to discuss the return of monies to beneficiaries.
28. Robert Hull could recall only one occasion when a full meeting of the beneficiaries was held to approve expenditure.³⁷
29. As to the authorisation of expenditure, Gerard Hayes' information to the Commission was that there was a cheque account and a cheque book used but that these were operated by Michael Williamson. He indicated that although cheques

³⁶ HSU Supplementary Tender Bundle, 31/10/2014, p 23.

³⁷ Robert Hull, witness statement, 12/8/14, para 121.

required the signature of any two trustees, in practice, the use of the money and who signed cheques was dictated by Michael Williamson.³⁸

30. The Commission did not receive evidence concerning the trust from Peter Mylan. Peter Mylan was a trustee of the trust from 21 December 2007. He was not asked about it. Nor, however, did he volunteer to contradict the evidence given to the Commission by others concerning the operation of the trust. Submissions made on behalf of Peter Mylan have contended that as no questions were asked of Peter Mylan and Michael Williamson, and some other trustees (except Gerard Hayes) were not called to give evidence, certain findings cannot be made.³⁹ However, the submissions of counsel assisting put Peter Mylan on notice of the possibility of adverse comment. He has not provided any information to the Commission subsequently to dispute the factual findings for which the final written submissions of counsel assisting contend.

31. The evidence indicates that the operation of this trust was shrouded in obscurity and characterised by carelessness for almost 15 years. The trustees may frequently have been acting in breach of trust, either by specific action (expending trust monies in breach of trust) or by inaction (failing to make payments to beneficiaries where those payments were required by the trust deed). Until the breakdown of the relationship between the

³⁸ HSU Supplementary Tender Bundle, 31/10/2014, p 23, para 15.

³⁹ Submissions of Peter Mylan, 19/11/14, paras 98-100.

trustees and beneficiaries in 2012, beneficiaries and trustees appear to have paid scant attention to the terms of the trust deed, the application of the contributions made to the trust, and the obligations of the trustees in respect to the administration of the trust.

B – RELEVANT FACTS: PARTICULAR PROBLEMS

Donation to Marco Bolano's 2009 election campaign

32. Trust monies totalling \$91,250.40 were contributed to Marco Bolano's election campaign in 2009 and this expenditure was authorised by beneficiaries.⁴⁰

33. Marco Bolano's evidence was that Michael Williamson donated four mail outs from his preferred mail house in Sydney to the campaign of Marco Bolano's ticket in the 2009 HSU No. 1 Branch elections.⁴¹ Marco Bolano also gave evidence that during the campaign, Michael Williamson had indicated to him that Michael Williamson's election fund was 'making a substantial contribution' to Marco Bolano's ticket in the order of a six-figure sum.⁴² Marco Bolano did not know whether this contribution included more than the cost of the four mail outs.

⁴⁰ HSU Supplementary Tender Bundle, 31/10/2014, pp 23, 48; Robert Hull, witness statement, 12/8/14, para 122.

⁴¹ Marco Bolano, witness statement, 12/6/14, para 20.

⁴² Marco Bolano, witness statement, 12/6/14, para 20.

34. Marco Bolano was not a beneficiary of the trust at the time he received campaign monies from it. Nor did the terms of the trust deed permit expenditure of the funds on an election other than for the objects of seeking the return of approved candidates at ‘the next ensuing election of officials to be held in accordance with the Rules of the HREA and the provisions of the Industrial Relations Act’. The 2009 elections for positions of office in the Victorian No. 1 Branch were unrelated to the Rules of the HREA, an organisation registered in NSW.

Loan to the ALP

35. On 25 May 2011 a \$200,000 debit was made from the Officers’ Election Fund bank account.⁴³
36. On 31 October 2011 – some five months later - a \$200,000 deposit was paid into the Officers’ Election Fund.⁴⁴ This deposit is described in the bank statements as ‘Transfer ALP NSW’. It follows from the documents and the evidence of Gerard Hayes and Robert Hull that the Officers’ Election Fund was used to loan, on interest free terms, \$200,000 to the ALP for five to six months. It was purportedly to cover a cash flow problem.⁴⁵

⁴³ HSU Supplementary Tender Bundle, 31/10/2014, p 31.

⁴⁴ HSU Supplementary Tender Bundle, 31/10/2014, p 40.

⁴⁵ HSU Supplementary Tender Bundle, 31/10/2014, pp 23-24.

Other significant expenditure from the Officers' Election Fund

37. The bank statements of the Officers' Election Fund show that aside from the donation to Marco Bolano's campaign and the loan to the ALP, there was one other large withdrawal. An amount of \$100,000 was withdrawn on 16 July 2004.⁴⁶ The Commission has not received any evidence about how this money was used. Gerard Hayes was not at that time a trustee of the trust.

No distributions to beneficiaries of unused contributions

38. Gerard Hayes provided information to the Commission that meetings were held after HSU elections to discuss the return of monies to beneficiaries.

39. During the period 1997 to 2011 there were no contested elections for HSU NSW.

40. A concern that no refunds had been made formed part of the complaint made on instructions of Gerard Hayes and Robert Hull, to Michael Williamson, Peter Mylan and Kerry Seymour in September 2012 that in breach of trust the trustees had failed to return unused funds to the beneficiaries after previous elections.⁴⁷ As previously noted, until amendments were made to the trust deed on 3 March 2011, beneficiaries were entitled to a refund of

⁴⁶ HSU Supplementary Tender Bundle, 31/10/2014, p 55.

⁴⁷ Hayes MFI-4, pp 292, 297, 303, 308.

their contributions in the event an election was not contested. There is no evidence that the trustees had, at any point in time prior to the dissolution of the trust, refunded beneficiaries' contributions in compliance with Clause 6 of the trust deed.

41. That fact and the fact that the trust fund comprised in excess of \$400,000 at the time of its final distribution in 2012 support an inference that the trustees, in possible breach of trust, had failed to distribute the unused contributions to the beneficiaries in proportion to their contributions.

Professional fees and taxes paid out of the trust fund

42. The total amount distributed in legal and professional fees from the trust fund on its final distribution was \$159,511.65.⁴⁸

43. Those monies were distributed as follows:

| | |
|----------------------------|-------------|
| Konstan Lawyers | \$42,140.00 |
| Uther Webster & Evans | \$13,921.06 |
| Australian Taxation Office | \$5,217.15 |
| Grant Thornton | \$2,420.00 |
| Darien Nagle | \$29,502.00 |
| Jean Jacques Loofs | \$8,800.00 |
| W.G. McNally Jones Staff | \$57,511.44 |

⁴⁸ HSU Supplementary Tender Bundle, 31/10/2014, pp 14-15.

C – ISSUES ARISING

44. The experience of the Officers' Election Fund indicates that the legal structure of a trust is not a convenient or appropriate structure for election funds. Despite having a trust deed and the capacity to maintain appropriate records, this trust was operated as, in effect, part of a personal fiefdom of Michael Williamson. Its terms made it difficult for contributors to obtain a refund of contributions. None did until the trust was wound up. Even then, one third of the fund was diverted to paying professional and tax obligations.
45. During its lifetime, the trust was operated by Michael Williamson. Little was revealed to other trustees or to contributors and beneficiaries. Little responsibility was shown to them. It appears that the other trustees accepted that state of affairs and felt no compunction – until the dissolution of personal and professional relationships in 2012 – to attempt to exercise any of their duties as trustees. HSU NSW and Gerard Hayes submitted that he had not willingly accepted the manner in which Michael Williamson behaved, but that what happened 'represented another example of the results of Mr Williamson's 'cult of personality'.⁴⁹ It is true that Michael Williamson seems to have been a larger than life personality. But trustees are supposed to stand up to people of that kind. They are supposed

⁴⁹ Final submission by HSU NSW and Gerard Hayes, 14/11/14, para 23.

to find out what their duties are, what the assets of the trust are, and how it is operating.

46. There was no evidence about the voluntariness of contributions. Nor was there evidence about how far the Officers' Election Fund deterred opposition to the Michael Williamson team merely by the fact of its existence. However it is likely that the fact of the fund's existence operated as a tremendous disincentive against anyone who might have thought to challenge Michael Williamson's team. Mark Hardacre gave evidence to the Commission that Michael Williamson's 'war chest' in the 1980's and 1990's operated as a disincentive to would-be opponents and, further, gave Michael Williamson's team an enormous advantage in any election against a challenging ticket that went far beyond the (already substantial) benefit of incumbency.

47. Finally, no records appear to have been kept of the expenditure of fund monies, the reasons for that expenditure, and the nature of any authorisation given. That level of both secrecy and poor governance compounds the risks associated with the use and operation of funds of this type.

CHAPTER 4.6

OUR HSU INC

| Subject | Paragraph |
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A – RELEVANT FACTS: FORMATION, OPERATION AND STRUCTURE

1. The successor to the Officers’ Election Fund was a fighting fund known as ‘Our HSU Inc’. The findings which follow are based

substantially on an acceptance of the submissions of counsel assisting.

2. Our HSU Inc was registered on 9 July 2012 as an association incorporated pursuant to the *Association Incorporation Act 2009* (NSW).¹ Our HSU Inc was formed by Gerard Hayes himself and others to fund a ticket of candidates in the 2012 HSU NSW Election which was held between 2 November 2012 and 23 November 2012² (**the HSU NSW election**).³
3. Gerard Hayes was unemployed at the time Our HSU Inc was registered as an incorporated association. Gerard Hayes had been a Divisional Secretary of the federally registered ‘HSU East Branch’ and of the state-registered entity ‘HSUeast’ after three branches of the HSU amalgamated.⁴ After Michael Williamson stepped down from his role as General Secretary of HSU East Branch and HSUeast on 22 September 2011, Gerard Hayes became the Acting Deputy General Secretary until Flick J dismissed all officers from their positions and appointed the Hon Michael Moore as Administrator of those entities.

¹ Hayes MFI-4, p 250.

² Hayes MFI-4, p 466.

³ Gerard Hayes, witness statement, 26/8/14, para 12.

⁴ See Chapter 9.1.

4. Our HSU Inc is governed by the rules of the association which are named 'Our HSU Inc Rules'.⁵ The Our HSU Inc Rules provide that the objects of Our HSU Inc are to:
- (a) promote the expression of moderate and progressive social policies and industrial relations in Australia;
 - (b) provide a forum for the development, advancement and debate of socially useful and fair public policies;
 - (c) advance the interests of health workers and of workers generally; and
 - (d) relieve distress among the families and dependants of health workers.⁶
5. Funds are to be applied to promote these objects '[s]ubject to any resolution passed by the Association in general meeting' and 'in such a manner as the Committee determines.'⁷ The objects can only be amended or rescinded by a special resolution of Our HSU Inc.⁸
6. Our HSU Inc is effectively operated by a Committee which consists of the four office-bearers and at least one, but no more than three, ordinary members of the Association.⁹ The Committee

⁵ Hayes MFI-4, pp 251-273.

⁶ Hayes MFI-4, p 256, cl 3.

⁷ Hayes MFI-4, p 270, cl 8.3(a).

⁸ Hayes MFI-4, p 270, cl 8.4.

⁹ Hayes MFI-4, p 261-262, cl 6.2(a).

controls and manages the affairs of the Association.¹⁰ It may exercise all such functions as may be exercised by the Association with the exception of those functions to be exercised by a general meeting of members.¹¹ It has power to perform all such acts and do all such things as appear to the Committee to be necessary or desirable for the proper management of the affairs of the Association.¹²

7. The office-bearer positions are the Presidency, the Vice-Presidency, the Treasurership and the Secretaryship. The holders of these positions are elected by the members of Our HSU Inc at a general meeting. General meetings occur every 12 months or thereabouts.¹³ Similarly, the ordinary members of the Committee are also nominated and elected to the Committee.¹⁴ Gerard Hayes is currently the President of Our HSU Inc.¹⁵ There is no other evidence as to the identity of the other Committee members of Our HSU Inc.

8. Membership of Our HSU Inc depends on nomination by a financial member of Our HSU Inc.¹⁶ After the nomination has been communicated to the Secretary, the nomination must be referred by the Secretary to the Committee. The Committee is

¹⁰ Hayes MFI-4, p 261, cl 6.1(a).

¹¹ Hayes MFI-4, p 261, cl 6.1(b).

¹² Hayes MFI-4, p 262, cl 6.1(c).

¹³ Hayes MFI-4, p 262, cls 6.2(b), 6.3; Gerard Hayes, 26/8/14, T:640.1.

¹⁴ Hayes MFI-4, p 262, cl 6.3.

¹⁵ Gerard Hayes, 26/8/14, T:639.45.

¹⁶ Hayes MFI-4, p 272.

then to determine whether to approve or to reject the nomination.¹⁷

9. The sources of Our HSU Inc funds are from entrance fees paid by new members, annual subscription fees from members, donations or fund-raising activities, regular contributions by members and ‘such other sources as the Committee determines’.¹⁸ The current contribution rate required by members pursuant to rule 5.7 is \$50 per member per week.¹⁹ A memorandum provided by the solicitors for the HSU NSW to the Commission on 14 May 2014 said that this amount is usually paid by members as a deduction from their wages. It also said that: ‘Our HSU Inc does not solicit or accept any contributions from employers who employ HSU members.’²⁰ Some members pay less than \$50 per week depending on their financial circumstances.²¹

10. The number of members and contributors to Our HSU Inc is not clear from the evidence given to the Commission. Gerard Hayes gave evidence that ‘[t]he Our HSU [Inc] fund has approximately 25 to 30 contributors.’²² The memorandum provided by the

¹⁷ Hayes MFI-4, p 258, cl 5.2(a)-(b).

¹⁸ Hayes MFI-4, p 269, cl 8.2(a).

¹⁹ Gerard Hayes, witness statement, 26/8/14, para 15.

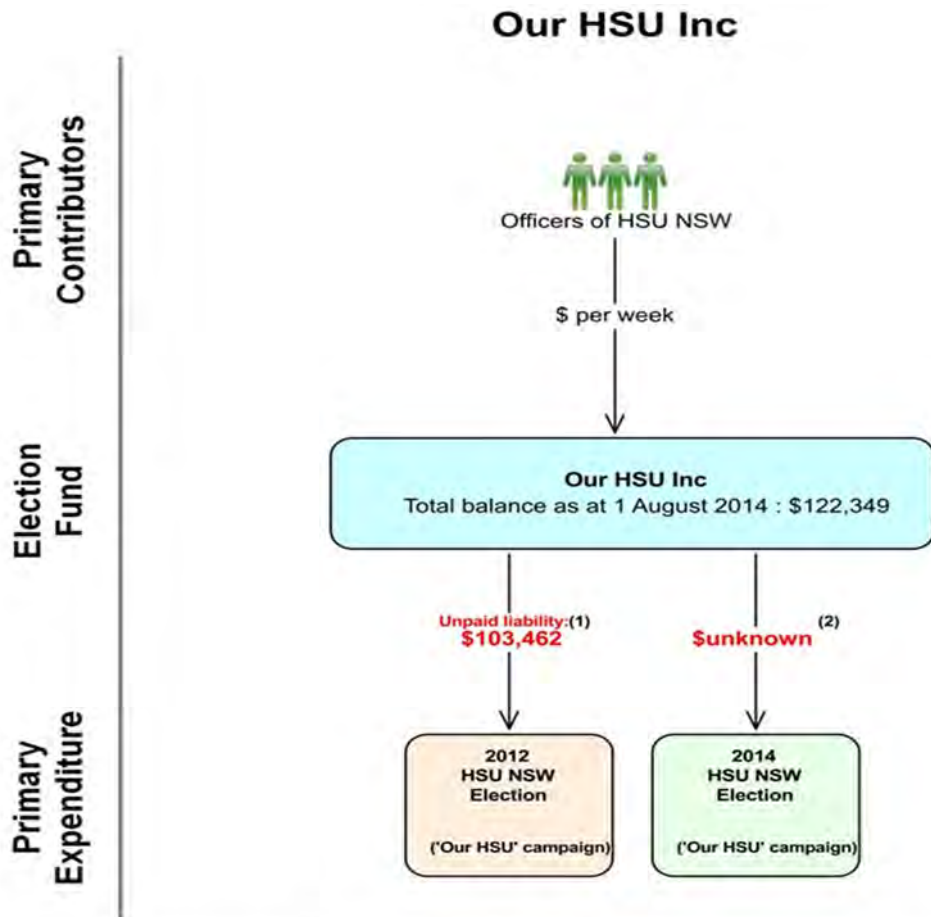
²⁰ Hayes MFI-4, p 244.

²¹ Hayes MFI-4, pp 244-245, 259, cl 5.7; Gerard Hayes, witness statement, 26/8/14, paras 15-18.

²² Gerard Hayes, 26/8/14, T:641.25-26.

solicitors for the HSU NSW to the Commission on 14 May 2014 said that Our HSU Inc currently has 43 members.²³

11. The following diagram summarises the operations of Our HSU Inc.



(1) Unpaid debt - debt due to Jeffries Printing (NSW) Pty Ltd for 2012 HSU NSW Election

(2) Expenses were incurred in connection with the 2014 HSU NSW Elections. The quantum of that expenditure, and the quantum of any unpaid debts arising from that campaign, are not known.

²³ Hayes MFI-4, p 244.

B – RELEVANT FACTS: FINANCIAL DEALINGS OF OUR HSU INC

Funds accrued by Our HSU Inc

12. Our HSU Inc opened a bank account with My Credit Union on 31 July 2012. The first deposit of \$10 was made on 2 August 2014.²⁴ There is no evidence of any other bank accounts held by Our HSU Inc in the period preceding the HSU NSW election. During the entire period leading up to the HSU NSW election, and throughout the election period, Our HSU Inc held a maximum amount of \$199.54 in its My Credit Union bank account.²⁵
13. In early February 2013, payments of \$50 began being deposited consistently into the Our HSU Inc account.²⁶ There were various other small deposits. There is no evidence that any of the deposits into this account are anything other than Our HSU Inc members' contributions or donations.
14. On 1 May 2014 the total amount held in the Our HSU Inc My Credit Union account was \$81,957.08. This amount was transferred to a Commonwealth Bank account named 'Our HSU Incorporated' on 1 May 2014.²⁷ That account was opened on 28

²⁴ Hayes MFI-4, p 368-13.

²⁵ Hayes MFI-4, p 368-13-368-14.

²⁶ Hayes MFI-4, p 368-15.

²⁷ Hayes MFI-4, p 368-112.

March 2014.²⁸ No further transactions have been made on the My Credit Union account. The closing balance of the My Credit Union account on 25 August 2014 was \$0.00.²⁹

15. Prior to the deposit of \$81,957.08³⁰ from the My Credit Union account on 1 May 2014, the Commonwealth Bank account held \$14,930.³¹ The sources of this amount for the most part were regular \$50 payments into the account and three larger payments. Those payments were a cheque deposit of \$4,740 on 17 April 2014,³² a direct credit transfer of \$5,000 from Frances Collins on 22 April 2014³³ and a cheque deposit of \$1,100 on 30 April 2014.³⁴ At 1 August 2014 the Commonwealth Bank account held an amount of \$122,349.43.³⁵

Funds expended by Our HSU Inc

16. There was little evidence concerning expenditure from the Our HSU Inc bank accounts.
17. The My Credit Union account statements show a number of small withdrawals made by way of personal cheques. Three

²⁸ Hayes MFI-4, p 368-107.

²⁹ Hayes MFI-4, p 368-101.

³⁰ Hayes MFI-4, p 368-100.

³¹ Hayes MFI-4, p 368-112.

³² Hayes MFI-4, p 368-108.

³³ Hayes MFI-4, p 368-110.

³⁴ Hayes MFI-4, p 368-112.

³⁵ Hayes MFI-4, p 368-145.

cheques were drawn from this account in February and March of 2013 totalling \$1,947.18.³⁶ A memorandum provided by the solicitors for the HSU NSW to the Commission on 14 May 2014 for HSU NSW said this money was spent on 'barbecue gatherings of members at hospitals during the last election campaign.'³⁷ There is no evidence of the destination or use of the other monies withdrawn from this account.

18. The same memorandum said that '[o]n 6 February 2014 at a meeting of the Association, it was resolved to authorise a payment of \$10,000 for initial campaign expenditure in relation to the union election which is to take place later this year [2014].'³⁸ Since 6 February 2014 three payments have been made from the Our HSU Inc Commonwealth Bank account. A payment of \$6,864 was made on 23 May 2014 described as 'Call Centre-calls'.³⁹ Another payment was made on 5 June 2014 of \$1,650 and described as 'Print Layout'.⁴⁰ A further payment of \$3,267 was made on 11 July 2014 described as 'Call Centre'.⁴¹

19. After the payment of \$3,267 made on 11 July 2014, there were no further payments (excluding bank fees) made from the Our HSU Inc Commonwealth Bank account prior to 1 August 2014.

³⁶ Hayes MFI-4, pp 368-16, 368-17.

³⁷ Hayes MFI-4, p 246.

³⁸ Hayes MFI-4, p 246.

³⁹ Hayes MFI-4, p 368-117.

⁴⁰ Hayes MFI-4, p 368-121.

⁴¹ Hayes MFI-4, p 368-133.

Debts incurred by Our HSU Inc

20. During the course of the 2012 HSU NSW election campaign, Our HSU Inc incurred several debts totalling \$103,461.89 to Jeffries Printing Services (NSW) Pty Ltd.⁴² For both debtor and creditor, that was a significant sum. Those debts should not have been incurred unless they could be paid as they fell due.
21. Daniel Mookhey was '[t]he person obviously running the campaign...'⁴³ according to Gerard Hayes. In his witness statement, Daniel Mookhey said he volunteered for the campaign after having ceased serving as the Transport Workers' Union of Australia's Chief of Staff eight months earlier.⁴⁴ Daniel Mookhey said that 'the choice to volunteer was mine alone'. That decision followed a meeting with Tony Sheldon on 4 April 2012.⁴⁵ His role on the campaign was providing 'strategy, tactical, targeting, communications and organising advice'.⁴⁶ Additionally, Daniel Mookhey, 'administered the campaign's accountability and data systems, which measured the effectiveness of the work campaign volunteers did in applying the campaign's field strategies'.⁴⁷

⁴² Baden Kirgan, witness statement, 1/8/14, para 13.

⁴³ Gerard Hayes, 26/8/14, T:637.1-2.

⁴⁴ Daniel Mookhey, witness statement, 18/8/14, para 18.

⁴⁵ Daniel Mookhey, witness statement, 18/8/14, para 19.

⁴⁶ Daniel Mookhey, witness statement, 18/8/14, para 18.

⁴⁷ Daniel Mookhey, witness statement, 18/8/14, para 18.

22. Daniel Mookhey said that the printing and mailing services provided by Jeffries Printing (NSW) Pty Ltd were supplied ‘via provider credit.’⁴⁸ That euphemistic statement is not supported by contemporaneous records.
23. Daniel Mookhey said that he did not have any discussions with Jeffries Printing (NSW) Pty Ltd about providing this alleged ‘provider credit’. He said that he believed that it was probably Sam Dastyari (then Secretary of the NSW ALP) or Gerard Hayes that organised a credit arrangement.⁴⁹ There is no satisfactory explanation in the evidence as to why the NSW ALP should be involved in this union campaign, nor why its Secretary should be referred to so much in the ensuing correspondence.
24. Gerard Hayes said that he ‘had a view that probably Sam [Dastyari] had contacted Mr Kirgan in the first instance.’⁵⁰ However honestly held Gerard Hayes’ belief was on this point it was wrong.
25. The managing director of Jeffries Printing Services (NSW) Pty Ltd, Baden Kirgan, was ‘contacted by telephone by David Latham ... to provide printing services for Gerard Hayes’ 2012 HSU election campaign’⁵¹ in about July 2012. Baden Kirgan

⁴⁸ Daniel Mookhey, witness statement, 18/8/14, para 23.

⁴⁹ Daniel Mookhey, 20/8/14, T:36.12-16. Since 1 July 2014, Sam Dastyari has been an ALP Senator for New South Wales. Those of his activities discussed in this Interim Report precede his accession to the Senate. The Interim Report, without intending disrespect, will refer to him in the manner used in the text.

⁵⁰ Gerard Hayes, 26/8/14, T:637.5-6.

⁵¹ Baden Kirgan, witness statement, 1/8/14, para 12.

received requests for work to be done from David Latham and Daniel Mookhey during the course of the 2012 HSU NSW election campaign.⁵² David Latham ‘was a university student who was volunteering on the campaign [for the election of the Our HSU team in the 2012 HSU NSW election].’⁵³ Daniel Mookhey said he believed David Latham was also working part time for the Rail, Tram and Bus Union.⁵⁴

26. The plan as understood by Daniel Mookhey was to ‘repay [the printing] debt with the proceeds of the dissolution of a fighting fund some ‘Our HSU’ candidates had previously paid into’.⁵⁵ Gerard Hayes also indicated that ‘the intent was [...] that we could get an amicable agreement to resolve the old officers’ election fund very quickly, so that would have resolved Mr Kirgan’s matter.’⁵⁶ The details of the Officers’ Election Fund are addressed elsewhere.⁵⁷ For present purposes it is sufficient to note that Mr Hayes did not receive a distribution from the Officers’ Election Fund anywhere near the size of the total debts his campaign incurred to Jeffries Printing (NSW) Pty Ltd.
27. After Jeffries Printing (NSW) Pty Ltd started undertaking work for Our HSU Inc, Baden Kirgan said to David Latham in an email dated 23 August 2014 ‘[l]et me know who I am making out

⁵² Baden Kirgan, witness statement, 1/8/14, para 12.

⁵³ Daniel Mookhey, 20/8/14, T:37.36-37.

⁵⁴ Daniel Mookhey, 20/8/14, T:37.46-47.

⁵⁵ Daniel Mookhey, witness statement, 18/8/14, para 23.

⁵⁶ Gerard Hayes, 26/8/14, T:639.15-18.

⁵⁷ Chapter 4.5.

the invoices to and I will send you the bills'.⁵⁸ Baden Kirgan received a reply to this email on the same day from David Latham who said, '[i]f we [scilicet you] can make them out to Our HSU Incorporated that'd be great'.⁵⁹

28. Jeffries Printing (NSW) Pty Ltd sent nine invoices billed to Our HSU Inc, marked to the attention of 'Gerard'.⁶⁰ There are in evidence various examples of work done at the request of David Latham.⁶¹
29. The first invoice issued to Our HSU Inc by Jeffries Printing (NSW) Pty Ltd was dated 17 September 2012.⁶² This invoice was for the amount of \$9,729.50. As at this date the Our HSU Inc My Credit Union bank account held the amount of \$199.54.⁶³
30. The long-suffering good nature of Baden Kirgan can be seen from 28 September 2012. On that day he sent an email to David Latham and Daniel Mookhey regarding a mail-out of material and being paid for postage costs. Baden Kirgan wrote, 'I will flick you an invoice shortly [invoice dated 28 September 2012] but we will need to grab some money from you pretty quickly for the postage'. He went on to write:

⁵⁸ Kirgan MFI-1, p 58.

⁵⁹ Kirgan MFI-1, p 58.

⁶⁰ Kirgan MFI-1, pp 49-57.

⁶¹ Baden Kirgan, witness statement, 1/8/14, para 12; Kirgan MFI-1, pp 20-48.

⁶² Kirgan MFI-1, p 57.

⁶³ Hayes MFI-4, p 368-13.

Dave [Latham] mentioned six potential mailouts, which is great but we can't spot that much postage at the moment as we are still owed a shitload of money from the Federal, State and Local elections by the party and campaigns. I'll have to invoice you when we lodge each mailout and if you can fix up at least the postage straight away (24 hours) that would be appreciated.⁶⁴

31. Daniel Mookhey replied to this email and wrote: 'Flick us the invoice – we will turn them around (relatively) quickly.'⁶⁵
32. All of these communications are inconsistent with Daniel Mookhey's claim that Jeffries Printing (NSW) Pty Ltd had agreed to do the printing for Mr Hayes' Our HSU campaign on 'provider credit'. There never was any agreement to that effect.
33. In October and November, Baden Kirgan continued to undertake work for Our HSU Inc on instructions from David Latham and Daniel Mookhey. He also exchanged a number of emails with David Latham and Daniel Mookhey about the invoices and the payment of outstanding amounts.⁶⁶ In an email dated 1 October 2012, Baden Kirgan wrote to Daniel Mookhey and David Latham: 'Could you please let me know how you go with that postage? A bit desperate for cash.'⁶⁷
34. On 16 November 2012, Jeffries Printing (NSW) Pty Ltd issued the last invoice to Our HSU Inc for payment for work done in relation to the 2012 HSU NSW election campaign.⁶⁸ This invoice

⁶⁴ Kirgan MFI-1, p 63.

⁶⁵ Kirgan MFI-1, p 63.

⁶⁶ Baden Kirgan, witness statement, 1/8/14, para 14.

⁶⁷ Kirgan MFI-1, p 67.

⁶⁸ Kirgan MFI-1, p 49.

was for the amount of \$1,350. On this date the Our HSU Inc bank account with My Credit Union had not accumulated any additional funds since the first invoice was issued from Jeffries Printing (NSW) Pty Ltd. It still held an amount of just \$199.54.⁶⁹

35. The nine invoices issued to Our HSU Inc from Jeffries Printing (NSW) Pty Ltd between 17 September 2012 and 16 November 2012 totalled \$103,461.89. The invoices were sent from Baden Kirgan by email to David Latham and Daniel Mookhey.⁷⁰
36. On 30 November 2012, Daniel Mookhey sent an email to Baden Kirgan promising: 'I guarantee that we'll pay your bills soon!'⁷¹
37. The ever-courteous Baden Kirgan replied to this email on 3 December 2012: 'And yes payment would be a nice Christmas present!'⁷²
38. The bills remained unpaid. Baden Kirgan sent a number of emails to Sam Dastyari regarding the unpaid invoices. Baden Kirgan said he 'was told that Mr Dastyari was the person to talk to in relation to the unpaid invoices'.⁷³ He did not receive any

⁶⁹ Hayes MFI-4, p 368-14.

⁷⁰ Baden Kirgan, witness statement, 1/8/14, para 14.

⁷¹ Kirgan MFI-1, p 73.

⁷² Baden Kirgan MFI-1, p 73.

⁷³ Baden Kirgan, witness statement, 1/8/14, para 15.

reply to those emails from Sam Dastyari, however he did speak to Sam Dastyari in telephone calls.⁷⁴

39. Baden Kirgan continued to correspond with Gerard Hayes about the unpaid invoices after the results of the election were declared in late November 2012. On 1 February 2013, Baden Kirgan sent an email to Gerard Hayes: 'following up on the bills for the campaign printing'.⁷⁵ Gerard Hayes responded to Baden Kirgan on 2 February requesting 'the bill', which the latter sent to him in a reply email later the same morning.⁷⁶ Gerard Hayes informed Baden Kirgan by email on 11 February 2013 that he was working on funding payment of the invoices.⁷⁷
40. Baden Kirgan contacted Gerard Hayes again on 21 March 2013. He requested payment and informed Gerard Hayes: '[W]e are being put in an increasingly difficult position and really need payment ASAP.'⁷⁸ Gerard Hayes replied later the same day, and said: 'I'll make a call and get back to you.'⁷⁹
41. On 3 April 2013 Baden Kirgan emailed Gerard Hayes regarding payment and received no written response. Gerard Hayes next

⁷⁴ Baden Kirgan, 21/8/14, T:3.32-38.

⁷⁵ Kirgan MFI-1, p 81.

⁷⁶ Kirgan MFI-1, p 80.

⁷⁷ Kirgan MFI-1, p 83.

⁷⁸ Kirgan MFI-1, p 87.

⁷⁹ Kirgan MFI-1, p 90.

responded in writing to Baden Kirgan's email on 24 April 2013: 'I'm hoping to catch up with S [Sam Dastyari] on Friday'.⁸⁰

42. By 5 June 2013 the invoices had still not been paid. On that day Gerard Hayes wrote to Baden Kirgan: 'I have not had any further updates [from Sam]. I'm unsure how to proceed.'⁸¹ Baden Kirgan replied to Gerard Hayes' email six minutes later suggesting that it 'might be time to consider putting the hat around amongst the people who were elected on the ticket with you'. Baden Kirgan went on and suggested to Gerard Hayes:⁸²

normally those on union tickets contribute a certain amount of their salary to a ticket re-election fund. It might be prudent to start one now to both pay this bill and put aside money for the next elections. ...I am happy with small regular payment to an agreed timetable - anything is preferable to the current situation for us.

43. On the same date, Our HSU Inc had \$9,118.01 in its My Credit Union bank account.⁸³ There was no written response to Baden Kirgan's suggestion. Nor did Gerard Hayes volunteer to use the assets of Our HSU Inc to pay the debt it owed to Baden Kirgan's firm.

⁸⁰ Kirgan MFI-1, p 99.

⁸¹ Kirgan MFI-1, p 106.

⁸² Kirgan MFI-1, p 105.

⁸³ Hayes MFI-4, p 368-29.

44. On 19 June 2013 Baden Kirgan asked Gerard Hayes if perhaps it would be ‘worthwhile all of us asking Sam for a meeting?’⁸⁴ Again there was no response.

45. On 10 July 2013 Baden Kirgan wrote to Gerard Hayes:⁸⁵

We haven’t heard back from Sam – did you have any luck talking to the other people elected on the ticket about paying their share of the bills?

It’s a full year now since we started doing this work and I’m sure you’d agree we’ve been reasonable but I think it is probably time to start paying some money. It’s a bit hard to credit that we’ve not received a cent for this work in all this time.

Can you please discuss this with your campaign treasurer or whoever set the budget for this campaign and get back to me? We can’t wait for Sam anymore.

46. Gerard Hayes replied to Baden Kirgan later the same day, writing:⁸⁶

The campaign was run by [S]am while I was unemployed. I don’t have anything but debt and I don’t know how this has fallen back to me when it was organised and instigated by others. I’ll keep trying [S]am but I am not in a position to do anything further.

47. After another reply by Baden Kirgan to Gerard Hayes stressing the urgency of payment and making suggestions as to how Gerard Hayes might source the funds, Gerard Hayes wrote at 9.10pm:⁸⁷

⁸⁴ Kirgan MFI-1, p 104.

⁸⁵ Kirgan MFI-1, p 112.

⁸⁶ Kirgan MFI-1, p 112.

⁸⁷ Kirgan MFI-1, pp 111-112.

Sorry Baden. The only Funtime [sic] officials are Andrew and me so there is not any other contributors. The issue is Sams.

48. The next day, 11 July 2013, Baden Kirgan informed Gerard Hayes that he had spoken to Daniel Mookhey who was going to speak to Sam Dastyari.⁸⁸

49. Baden Kirgan contacted Gerard Hayes again on 18 September 2013. He asked if Gerard Hayes had heard anything regarding payment of the outstanding invoices. Mr Hayes replied:⁸⁹

I spoke to Jamie [Clements] who assures me that the matter is under control and he will finalise the matter.

50. Baden Kirgan confirmed in his evidence on 21 August 2014 that the debt owed by Our HSU Inc to Jeffries Printing (NSW) Pty Ltd had still not been paid.⁹⁰

51. Baden Kirgan emailed Gerard Hayes again on 28 November 2013. He requested an update on the payment of the outstanding invoices and then again on 8 January 2014.⁹¹ There is no evidence that Gerard Hayes responded to these emails from Baden Kirgan.

⁸⁸ Kirgan MFI-1, p 111.

⁸⁹ Kirgan MFI-1, p 110.

⁹⁰ Baden Kirgan, 21/8/14, T:5.41-46.

⁹¹ Kirgan MFI-1, p 121.

52. Gerard Hayes gave evidence on 26 August 2014 that Our HSU Inc had come to an agreement with Mr Kirgan, for payment of the outstanding debt to Jeffries Printing (NSW) Pty Ltd.⁹²

Summary of debt incurred and bank balance

| Date | Total debt owed by Our HSU Inc to Jeffries⁹³ | Bank balance of Our HSU Inc⁹⁴ |
|-------------|--|---|
| 17/9/2012 | \$9,729.50 | \$199.54 |
| 28/9/2012 | \$33,233.84 | \$199.54 |
| 28/9/2012 | \$34,918.84 | \$199.54 |
| 5/10/2012 | \$37,118.84 | \$199.54 |
| 5/10/2012 | \$56,733.09 | \$199.54 |
| 30/10/2012 | \$79,229.09 | \$199.54 |
| 2/11/2012 | \$79,955.09 | \$199.54 |
| 15/11/2012 | \$102,111.89 | \$199.54 |
| 16/11/2012 | \$103,461.89 | \$199.54 |
| 31/12/2012 | \$103,461.89 | \$199.54 |
| 31/3/2013 | \$103,461.89 | \$918.01 |
| 30/6/2013 | \$103,461.89 | \$12,818.91 |
| 25/9/2013 | \$103,461.89 | \$29,568.91 |
| 31/12/2013 | \$103,461.89 | \$48,318.91 |
| 31/3/2014 | \$103,461.89 | \$73,658.91 |
| 30/6/2014 | \$103,461.89 | \$114,283.53 |
| 19/8/2014 | \$103,461.89 | \$129,761.33 |

⁹² Gerard Hayes, 26/8/14, T:638.41-45.

⁹³ Kirgan MFI-1, pp 49-57.

⁹⁴ Hayes MFI-4, pp 368-13- 368-101, 368-107- 368-145.

C – CONCLUSIONS

53. This disgraceful saga highlights the surprisingly common practice of candidates who stand for election to plead ignorance and lack of responsibility for the conduct of their campaign, including its expenditure and the debts which that expenditure has caused to be incurred.
54. Gerard Hayes ran in the 2012 HSU NSW election for the position of Secretary. It is a position which is responsible for the day-to-day affairs of the Branch. The Secretary is the Branch's spokesperson. In the eyes of members and the public, the Secretary is the leader of the Branch. In a branch the size of HSU NSW it is akin to the role of a Chief Executive Officer of a large company. Gerard Hayes' own election material said that he was running because he was determined to end the infighting and restore the members' trust in the HSU, because that is the only way to rebuild the union so it is powerful enough to stand up for everyone.⁹⁵ The cleaning up of the HSU after Michael Williamson's fall from grace did not extend so far as to have proper concern for innocent third parties like Baden Kirgan. Gerard Hayes' conduct in campaigning for the position of Secretary, and his conduct towards Baden Kirgan after his successful election, raises serious concerns as to his responsibility.

⁹⁵ Kirgan MFI-1, p 21.

55. Gerard Hayes was a key architect of the creation of Our HSU Inc in July 2012. He is its President. For his personal benefit, Our HSU Inc incurred debts totalling more than \$100,000 to a printing supplier for campaign material. The matter is very serious. Had those debts been incurred by a company, grave questions would have arisen as to whether its directors would have been criminally and civilly liable under the *Corporations Act 2001 (Cth)* for insolvent trading. Similar provisions exist in the *Associations Incorporation Act 2009 (NSW)*.⁹⁶ At no time was Our HSU Inc in a position to pay that debt prior to 30 June 2014 – nearly two years after the debt was incurred. It still did not pay the debt, instead saving up funds to spend on new expenses for Gerard Hayes’ election campaign for the recent 2014 HSU NSW election.
56. Gerard Hayes personally knew those who were orchestrating his campaign – namely Daniel Mookhey and Sam Dastyari. He appears to have abdicated all responsibility to Daniel Mookhey and Sam Dastyari for funding the campaign and paying the campaign debts. Despite being one of the beneficiaries of the material printed by Jeffries Printing (NSW) Pty Ltd, Gerard Hayes took the view that it was not his responsibility to pay for his own campaign material: ‘I don’t know how this has fallen back to me when it was organised and instigated by others.’

⁹⁶ See ss 68-71.

57. It follows that he knowingly allowed debts to be incurred in circumstances where he does not seem reasonably to have satisfied himself that those debts would or could be paid.
58. Written submissions were filed on behalf of the HSU NSW and Gerard Hayes, presumably on the latter's instructions, which are intended to nullify the conclusions just set out, but succeed only in fortifying them. For that reason they merit detailed treatment.
59. First, it was submitted that:⁹⁷
- the matter is a commercial dispute between Our HSU and Jeffries Printing that has now been resolved satisfactorily: a schedule for repayment has been agreed upon that includes Our HSU having made a significant down payment, in the past month, in satisfaction of the outstanding debt.
60. That means that the whole of the money owing was left unpaid for over two years, and a lot of it is still unpaid. That is not how 'commercial' dealings operate 'satisfactorily'. Cash flow is the life of business, particularly of small businesses like Baden Kirgan's.
61. Incidentally, there is no evidence of the payment and no statement of its quantum. Further, the submission is quite disingenuous. Ordinarily the word 'dispute' would refer to some claim of deficient performance or overcharging. But the debtor made no complaint about the quality of the services or their price. A debtor who simply cannot pay admitted debts is not in any realistic sense 'in dispute' with the creditor.

⁹⁷ Final submission by HSU NSW and Gerard Hayes, 14/11/14, para 13.

62. The submission proceeded:⁹⁸

The origin of the commercial dispute between Our HSU and Jeffries Printing is not out of the ordinary. The parties did not enter into a written contract. Hayes did not have direct contact with Jeffries Printing at the time printing by that firm was ordered. Initial confusion arose as to the entity responsible for incurring the expense. Jeffries Printing dealt with numerous individuals within the broader labour movement in NSW in various capacities. Mr Baden Kirgan, the Managing Director of Jeffries Printing, demonstrated a sophisticated understanding of the method and sources of funding of union election campaigns ...

63. As to the first four sentences, it certainly must be hoped that these events were not ordinary ones. As to the next three sentences, they are irrelevant.

64. The passage concludes with two references. One was to Baden Kirgan's email of 28 September 2012 in which he complained of being owed much money from earlier campaigns and begging that at least the postage be paid within 24 hours. The other was Baden Kirgan's email of 5 June 2013 suggesting that Gerard Hayes pass the hat around among the successful candidates. These pleas did not demonstrate 'a sophisticated understanding' of union election funding. Rather they represent the cries of a desperate man who has been let down badly – and not only in this instance.

65. Then the submissions said:⁹⁹

⁹⁸ Final submission by HSU NSW and Gerard Hayes, 14/11/14, para 14.

⁹⁹ Final submission by HSU NSW and Gerard Hayes, 14/11/14, para 15.

At no stage did Jeffries Printing serve a formal letter of demand or commence legal proceedings. Nor were they threatened. Amicable attempts were made to resolve the dispute, which ultimately were successful. The evidence of Mr Kirgan in his witness statement to the RC (Statement of Baden Kirgan 1 August 2014) is that *'From speaking to Mr Hayes, I got the impression that he was genuinely trying to raise the money, and that he felt bad about not having paid it already* (Paragraph 18) and *'My impression of Mr Hayes is that he is a good person who is trying to do the right thing in the organisation'* (Paragraph 21). Mr Kirgan was not challenged on this evidence by anyone. His evidence demonstrates that he was willing to work with Hayes to resolve the issue. He expressed confidence in Hayes' ability to resolve it satisfactorily.

66. The point which counsel assisting is making is not that Gerard Hayes was not trying to raise the money, or was a bad person. It is that the expenditures should never have been made without some confidence in the sources of repayment. Any confidence which Baden Kirgan expressed at any time in Gerard Hayes' ability to resolve the problem was only the courtesy which a disappointed creditor must continue to display in order to avoid alienating the debtor. And what point would formal letters of demand and writs have had? The debtor at no stage until 30 June 2014 had anything like the assets to meet a judgment.

67. Finally, the submissions stated:¹⁰⁰

The evidence simply does not suggest, or support any finding, that Hayes *'knowingly allowed debts to be incurred in circumstances where he had not reasonably satisfied himself those debts would be paid'* (submissions 4.6.58). The evidence of Hayes, and Kirgan, is that all efforts were being made to pay the debt and an amicable agreement has now been reached between the parties to resolve the issue. Never was it suggested in evidence that Hayes, or those associated with him, would not pay the debt.

¹⁰⁰ Final submission by HSU NSW and Gerard Hayes, 14/11/14, para 16.

68. The point is not that Gerard Hayes was trying to repay the debts – though whatever efforts he made were lamentably unsuccessful. The point is simply that the debts should never have been incurred. Those debts did not constitute a single debt incurred suddenly on the face of a momentary, albeit mistaken, belief that it would be paid when it fell due. They were a group of nine debts, incurred on nine separate days over a two month period, created systematically, and revealing a pattern by which people purportedly acting for Our HSU Inc, including a university student, incurred debts that could not possibly be paid as they fell due. Legal persons in the position of Our HSU Inc should either ensure that they have proper funding arrangements before they incur debts, or abandon the electoral field in favour of those who do have arrangements of that kind.
69. It is wrong that a candidate running for election can abdicate responsibility for his or her own campaign debts. A system where a campaign financed by funds from sources not known even to candidates themselves and according to shadowy arrangements that do not provide any guarantee to suppliers of payment ought to be brought to an end. That kind of system means voters do not have any real understanding of who is behind a particular campaign. It may expose candidates once in office to the perception that certain suppliers are being used at inflated rates to ‘pay-off’ unpaid campaign bills. It brings into disrepute the union – and its officers – with the public and suppliers who reasonably associate the propriety and

accountability of persons in office with their conduct in getting elected to office.¹⁰¹

¹⁰¹ See further Chapter 9.

CHAPTER 4.7

THE FUNDING OF HSU NO. 1 BRANCH ELECTION CAMPAIGNS

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A – INTRODUCTION

1. The 2009 elections for positions of office in the Victorian No. 1 Branch of the Health Services Union (**HSU**) were amongst the most fiercely contested union elections in recent history.
2. This chapter outlines the nature, funding and expenditure of the campaigns of the chief rivals in both those elections, namely a ticket led by Marco Bolano, and a ticket led by Diana Asmar.

3. No person affected by counsel assisting's submissions on these campaigns responded to them. The ensuing discussion is substantially based on those submissions.

B – THE 2009 NO. 1 BRANCH ELECTION: INTRODUCTION

The Federal Court decision

4. On 4 August 2009, the Federal Court issued a declaration that the No.1 Branch had ceased to function effectively and appointed John Vines OAM as the Administrator, effective from Monday 17 August 2009.¹
5. In 2009, Marco Bolano decided to run for the position of Branch Secretary of No.1 Branch. He was an Organiser of No.1 Branch at this time.
6. Diana Asmar and Doug Byron ran on separate tickets against Marco Bolano for the position of Branch Secretary.² Ultimately, Marco Bolano was the successful candidate.

¹ Marco Bolano, witness statement, 12/6/14, para 11.

² Marco Bolano, witness statement, 12/6/14, paras 12-13.

C – MARCO BOLANO’S 2009 CAMPAIGN

Responsibility for campaign financing

7. Marco Bolano gave evidence that, ‘at the time, the Victorian ALP seemed to be in a state of civil war and the warring factions were throwing money at candidates in the HSU elections’.³
8. Fundraising was undertaken for Marco Bolano’s campaign by the staff who supported him and by Australian Labor Party Senator David Feeney.⁴
9. Marco Bolano said that his campaign manager was Stephen Donnelly who was, at that time, a staffer to Senator Feeney.⁵ Marco Bolano said Stephen Donnelly managed and administered his election campaign finances.⁶ Stephen Donnelly said that he did not think he was Mr Bolano’s campaign manager.⁷ However Stephen Donnelly said in his evidence that he performed a voluntary role in the election campaign in which he provided logistical advice and support to the campaign.⁸ Stephen

³ Marco Bolano, witness statement, 12/6/14, para 14.

⁴ Marco Bolano, witness statement, 12/6/14, para 17.

⁵ Marco Bolano, witness statement, 12/6/14, para 18.

⁶ Marco Bolano, witness statement, 12/6/14, para 18.

⁷ Stephen Donnelly, 19/6/14, T:882.9.

⁸ Stephen Donnelly, 19/6/14, T:881.3-6.

Donnelly said he did not manage the finances for Marco Bolano's campaign.⁹

10. Stephen Donnelly gave evidence that 'there wasn't really a single person that was responsible for taking charge of the finances for the campaign'.¹⁰ Stephen Donnelly said that accounts were not kept for the campaign, it did not have a formal budget and things were done on an ad hoc basis.¹¹ Marco Bolano said that he did not have time to focus on the financing of his campaign and that money seemed to be coming in as needed.¹²
11. The position is thus that no person now accepts responsibility for the role of campaign manager. The confusion is a further example of the unsatisfactory structure and chain of responsibility which are representative of many union election campaigns.
12. Marco Bolano estimated approximately \$150,000 was spent on his campaign for mail outs, a website, stickers, posters and lanyards.¹³ Stephen Donnelly estimated the cost was in the range of \$100,000 to \$150,000.¹⁴

Contributors to Marco Bolano's election campaign

⁹ Stephen Donnelly, 19/6/14, T:882.19.

¹⁰ Stephen Donnelly, 19/6/14, T:882.22-24.

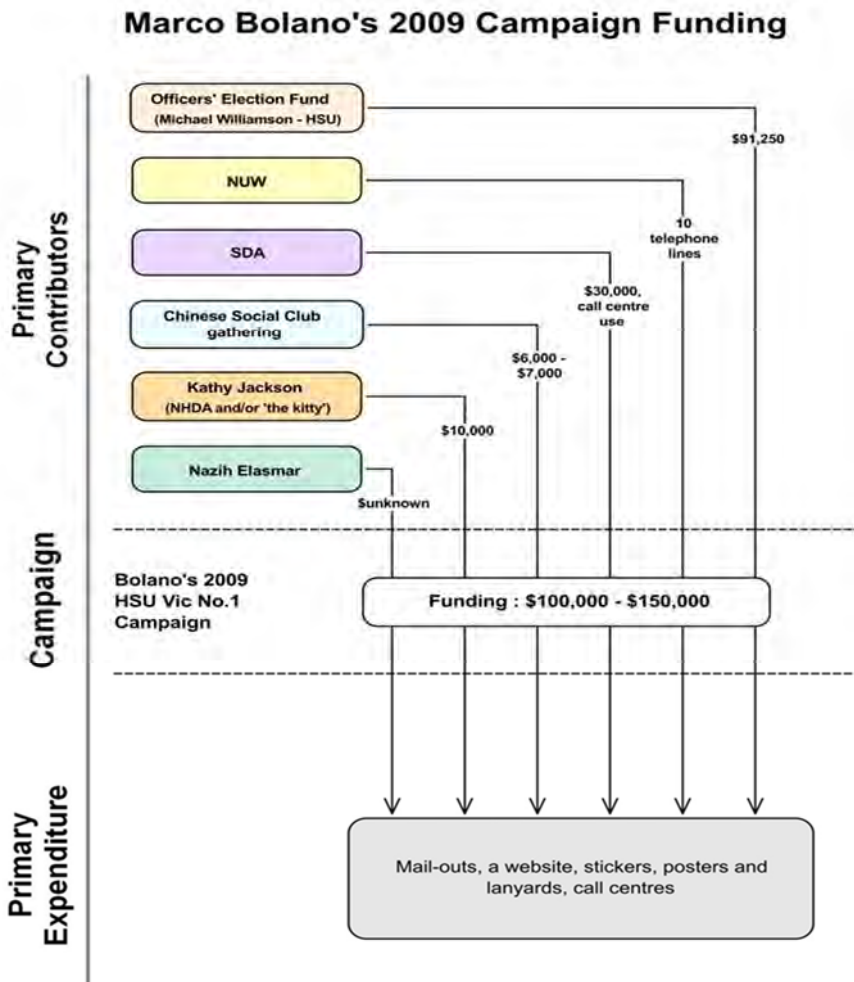
¹¹ Stephen Donnelly, 19/6/14, T:882.27-31; 34-35.

¹² Marco Bolano, 16/6/14, T:571.16-17; 26.

¹³ Marco Bolano, witness statement, 12/6/14, para 16.

¹⁴ Stephen Donnelly, 19/6/14, T:884.32-33.

13. The following diagram illustrates the sources of Marco Bolano's funding.



14. There are no complete records of who contributed or donated to Marco Bolano's election campaign. Marco Bolano said his

knowledge of who donated came from what Stephen Donnelly said to him during the campaign.¹⁵

15. The evidence is considered below by reference to the identity of the various alleged donors.

Michael Williamson's fighting fund

16. Marco Bolano and Stephen Donnelly both gave evidence that Michael Williamson contributed four mail outs from his preferred mail house in Sydney.¹⁶ Marco Bolano did not recall whether all four mail outs were used.¹⁷
17. Marco Bolano said that Michael Williamson indicated to him that his election fund was 'making a substantial contribution' to Marco Bolano's campaign in the order of a six-figure sum.¹⁸ Marco Bolano said that Stephen Donnelly told him that 'Williamson contributed about \$80,000'.¹⁹ Records of the Officers' Election Fund, considered separately in Chapter 4.5, indicate that the figure was most likely approximately \$90,000. Marco Bolano did not know whether Michael Williamson's contribution included more than the cost of the four mail outs.²⁰

¹⁵ Marco Bolano, witness statement, 12/6/14, para 19.

¹⁶ Stephen Donnelly, 19/6/14, T:884.35-885.9.

¹⁷ Marco Bolano, witness statement, 12/6/14, para 20.1.

¹⁸ Marco Bolano, witness statement, 12/6/14, para 20.6.

¹⁹ Marco Bolano, witness statement, 12/6/14, para 20.8.

²⁰ Marco Bolano, witness statement, 12/6/14, para 20.9.

The AWU

18. Marco Bolano said that The Australian Workers' Union (AWU) made a donation of \$30,000 to his campaign.²¹ Marco Bolano said that he learned of this donation when Royce Millar, a journalist from Fairfax Media, rang and told him that Cesar Melhem had said that the AWU contributed \$30,000 to Marco Bolano's election campaign.²² Marco Bolano said that he was surprised to hear this as the AWU backed Diana Asmar in the 2009 HSU elections.²³
19. Stephen Donnelly said that he never saw evidence that the AWU contributed to Marco Bolano's campaign but that he understood that the AWU did make a contribution.²⁴ Stephen Donnelly said his understanding was that the AWU's contribution to Marco Bolano's campaign was 'in the order of around \$10,000'.²⁵
20. The AWU has submitted that its general ledger for the period from 1 July 2009 does not contain any record of a payment from the AWU to Marco Bolano's campaign.²⁶ On this state of the evidence it is not appropriate to find that the AWU did make any payment to the Bolano campaign. But this does illustrate the

²¹ Marco Bolano, witness statement, 12/6/14, para 20.10.

²² Marco Bolano, witness statement, 12/6/14, para 20.10.

²³ Marco Bolano, witness statement, 12/6/14, para 20.14.

²⁴ Stephen Donnelly, 19/6/14, T:885.15-20.

²⁵ Stephen Donnelly, 19/6/14, T:885.26-27.

²⁶ Submissions for the Australian Workers' Union: The Funding of HSU No 1 Branch Elections, 14/11/14, para 2.

disorganised manner in which the financial aspects of it were conducted.

The NUW

21. Both Stephen Donnelly and Marco Bolano said that the National Union of Workers (**NUW**) made their call centre available for use by Marco Bolano's campaign team.²⁷ Marco Bolano gave evidence that the NUW provided ten telephone lines at its Head Office in Melbourne which were used by him and his supporters to contact HSU members daily for a period of two to three months during the campaign period.²⁸

The SDA

22. Marco Bolano said that Stephen Donnelly told him that the Shop Distributive and Allied Employees' Association (**SDA**) donated approximately \$30,000.²⁹
23. Stephen Donnelly gave evidence that for around two weeks, the SDA made its call centres available for telephone calls to be made to HSU members on behalf of Marco Bolano's campaign.³⁰ Stephen Donnelly did not claim that the SDA had made any cash donations to Marco Bolano's campaign.

²⁷ Marco Bolano, witness statement, 12/6/14, para 20.15; Stephen Donnelly, 19/6/14, T:886.39-45.

²⁸ Marco Bolano, witness statement, 12/6/14, para 20.15.

²⁹ Marco Bolano, witness statement, 12/6/14, para 20.17.

³⁰ Stephen Donnelly, 19/6/14, T:886.47-887.6.

24. Thus the SDA made some form of contribution, such as the provision of its call centre, to Mr Bolano's campaign.

Bill Shorten

25. Marco Bolano gave evidence that Stephen Donnelly told him that Bill Shorten made a donation to the Bolano campaign.³¹ Marco Bolano said this donation was in the order of \$5,000.³² There is no documentary evidence supporting this.

26. When Stephen Donnelly was later called to give evidence, he explained that he had never meant to imply that Bill Shorten himself had made a donation to Marco Bolano's campaign.³³ Stephen Donnelly accepted that he may have said to Marco Bolano words to the effect that 'Mr Shorten donated to the campaign'. But he explained in evidence that any use by him of those words was a shorthand way of saying that the AWU had made a donation. Stephen Donnelly said he could understand that people may think that a reference to Bill Shorten donating to the campaign could be construed literally but the representation he would have intended to make was that the AWU, with which Bill Shorten had been closely involved, supported the campaign.³⁴ Stephen Donnelly's evidence should be accepted on this issue.

³¹ Marco Bolano, witness statement, 12/6/14, para 20.19.

³² Marco Bolano, witness statement, 12/6/14, para 20.18.

³³ Stephen Donnelly, 19/6/14, T:888.3-5.

³⁴ Stephen Donnelly, 19/6/14, T:888.10-23.

Philip Morris Tobacco

27. Marco Bolano said Robert Elliott told him that the tobacco company, Philip Morris, made a monetary donation to his campaign.³⁵ Marco Bolano said that both Robert Elliott³⁶ and Katherine Jackson³⁷ told him that Senator Feeney facilitated the donation. Marco Bolano said he did not know the amount of money donated or why the money was donated.³⁸
28. Marco Bolano said Katherine Jackson told him that he attended a lunch at a restaurant called 'Becco' during the campaign with Senator Feeney, Stephen Donnelly, Carol Glen, two men from Philip Morris, and herself.³⁹ Marco Bolano said he had no memory of attending this lunch until Katherine Jackson told him that he had attended it.⁴⁰ Marco Bolano said that he met the two men but did not recall being told they were from Philip Morris or that the purpose of the lunch was to meet with Philip Morris.⁴¹ Marco Bolano gave evidence that he did not know whether or not Philip Morris donated to his campaign.⁴²
29. Katherine Jackson gave evidence that she attended a lunch at Becco during the campaign with Marco Bolano, Senator Feeney,

³⁵ Marco Bolano, witness statement, 12/6/14, paras 20.21-20.23.

³⁶ Marco Bolano, witness statement, 12/6/14, para 20.22.

³⁷ Marco Bolano, witness statement, 12/6/14, para 20.26.

³⁸ Marco Bolano, witness statement, 12/6/14, para 20.24.

³⁹ Marco Bolano, witness statement, 12/6/14, para 20.30.

⁴⁰ Marco Bolano, witness statement, 12/6/14, para 20.29.

⁴¹ Marco Bolano, witness statement, 12/6/14, paras 20.33-20.34.

⁴² Marco Bolano, 16/6/14, T:576.29-32.

Carol Glen and two men from Philip Morris.⁴³ Katherine Jackson recalled that one of the men from Philip Morris was named Bede Fennelly.⁴⁴ Katherine Jackson said she jokingly asked the two men from Philip Morris, ‘What are you doing here? Won’t anyone else take your money?’⁴⁵ Ms Jackson said that Bede Fennelly replied, ‘Yes, we find it hard to find anyone who will take it’.⁴⁶ However, Katherine Jackson did not know for certain whether money from Philip Morris was actually donated to the Bolano campaign in the end.⁴⁷

30. Stephen Donnelly stated that Philip Morris did not donate to the Bolano campaign.⁴⁸ Stephen Donnelly said he attended a lunch at Becco during the Bolano campaign with Marco Bolano, Katherine Jackson, Senator Feeney, Carol Glen and Stanley Chang.⁴⁹ Stanley Chang was at that time a councillor with Darebin Council. Stephen Donnelly said there were no representatives from Philip Morris at this lunch.⁵⁰

31. The evidence of Marco Bolano and Katherine Jackson is uncertain. The evidence of Stephen Donnelly conflicts with it. There is no documentary evidence of receipt of any donation

⁴³ Katherine Jackson, witness statement, 13/6/14, paras 469-472.

⁴⁴ Katherine Jackson, witness statement, 13/6/14, para 470.

⁴⁵ Katherine Jackson, witness statement, 13/6/14, para 473.

⁴⁶ Katherine Jackson, witness statement, 13/6/14, para 474.

⁴⁷ Katherine Jackson, witness statement, 13/6/14, para 480.

⁴⁸ Stephen Donnelly, 19/6/14, T:889.33-35.

⁴⁹ Stephen Donnelly, 19/6/14, T:889.37-45.

⁵⁰ Stephen Donnelly, 19/6/14, T:889.47-890.9.

from Philip Morris. Hence it is not open to make any finding that Philip Morris donated to the campaign or that Senator Feeney facilitated the donation.

Other contributors

32. Marco Bolano said that a man described as Stanley Chan invited him to speak at a Chinese Social Club gathering where a hat or box was passed around and a donation of approximately \$6,000 or \$7,000 was received.⁵¹ There is no documentary evidence of this donation.
33. Marco Bolano said that he could not recall the precise amount but Katherine Jackson also donated a few thousand dollars towards his campaign.⁵² Katherine Jackson gave evidence that she supported Marco Bolano in the 2009 HSU elections and provided him with financial assistance.⁵³ Katherine Jackson said she gave funds to Marco Bolano from an account titled 'National Health Development Account' (NHDA) and a 'kitty' maintained by the No. 3 Branch of the HSU. Katherine Jackson estimated in total that she gave approximately \$10,000 to the Bolano campaign from these sources.⁵⁴

⁵¹ Marco Bolano, witness statement, 12/6/14, para 20.35.

⁵² Marco Bolano, witness statement, 12/6/14, para 20.36.

⁵³ Katherine Jackson, 19/6/14, T:868.22-27.

⁵⁴ Katherine Jackson, 19/6/14, T:868.29-39.

34. Finally, Marco Bolano said that Nazih Elasmr, a member of the Victorian Parliament, made a monetary donation to his campaign but he could not recall the precise amount.⁵⁵

Administration of campaign finances

35. There was a paucity of evidence regarding the administration of the finances of Marco Bolano's 2009 HSU election campaign. Were funds held in cash or in one or more bank accounts? Was there any system of documentation? Stephen Donnelly stated that accounts were not kept.⁵⁶ No documentary records – for example, statements of account or receipts – were produced. There were no procedures in place to record where campaign funds came from, how much money was raised or how the funds were used. This supports the conclusion that this campaign was one in which no person accepted control or responsibility for campaign finances and the administration of funds. Further, those voting in the HSU elections were not able to ascertain how much money was behind the Bolano campaign, where this money had come from, and what were the terms (if any) on which it was given. The funding came from numerous sources. Some of the sources – for example, the in kind support provided by the SDA – were surprising sources. Members of the union voting in the election, and members of other unions whose officials chose to donate union resources to candidates, had no means of holding their candidates or officials to account.

⁵⁵ Marco Bolano, witness statement, 12/6/14, para 20.37.

⁵⁶ Stephen Donnelly, 19/6/14, T:882.28.

D – DIANA ASMAR’S 2009 CAMPAIGN

Diana Asmar: profile

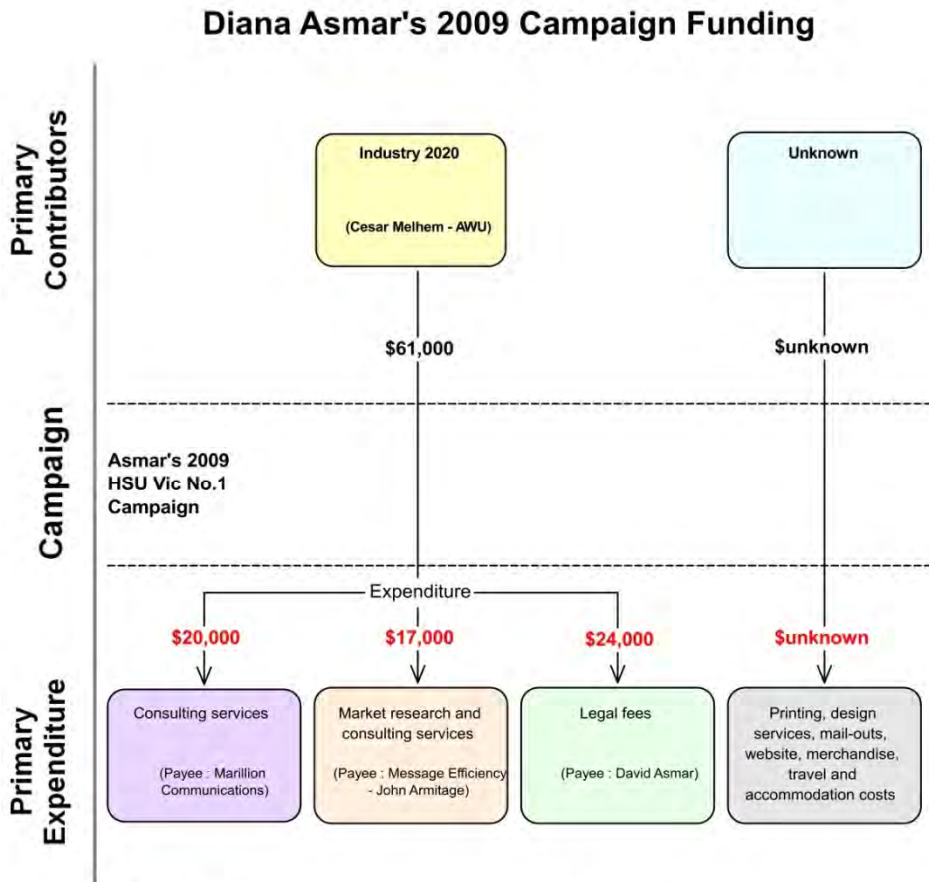
36. Diana Asmar gave evidence that from 1994 to 2004 she worked in a number of positions in hospitals. During that period she also undertook medical-related studies at university. In 1998, she became a member of the HSU No.1 Branch while she was working at the Northern Hospital. From 1998 to 2004, she was an HSU delegate, a Health and Safety representative and the Chair of the HSU Delegates Group at the Royal Melbourne Hospital. In 2004 she was employed as an organiser at the HSU No.1 Branch. She left this position in 2007. From September 2007 to December 2008 she was employed by the Transport Workers’ Union of Australia. Her evidence was that after this she ‘had some casual employment in the health industry’ and ‘continued to seek employment in the health industry’ between 2009 and 2012.⁵⁷
37. During the period 1998 to 2012, she also served as a Councillor on the City of Darebin Council. In that time, she has been the Mayor of the City of Darebin Council three times.⁵⁸

⁵⁷ Diana Asmar, witness statement, 26/8/14, para 7.

⁵⁸ Asmar MFI-3, p 1.

Campaign funding

38. Before examining Diana Asmar's 2012 election campaign, it is convenient to look at the evidence relating to her 2009 campaign.



Note: This diagram indicates legal entities making contributions. Where an entity is associated with a particular union official, that person is named in parentheses together with the associated union.

39. According to Cesar Melhem, Diana Asmar's husband, David Asmar, received \$61,000 of funding for Diana Asmar's 2009 election campaign from a fighting fund known as Industry 200.

The details of Industry 2020 and the details of the donations to Diana Asmar's campaign are addressed elsewhere.⁵⁹

40. A total of six payments totalling \$61,000 were made by Cesar Melhem to David Asmar for the alleged purpose of funding David Asmar's 2009 election campaign. In her evidence, however, Ms Asmar stated that she was not aware of any funding provided by Cesar Melhem 'nor any entity associated with him' for her 2009 election campaign.⁶⁰ At this stage there is an unresolved conflict in the evidence as to what monies were paid by Cesar Melhem to the Asmars, for what purposes, and how much Diana Asmar really did, and does, know about those transactions. Due to the absence of David Asmar overseas, it has not yet been possible to take evidence from him in a public hearing.

E – THE 2012 NO. 1 BRANCH ELECTION

The results

41. There were three tickets in the 2012 election. Marco Bolano headed one, Diana Asmar headed another, and Ricky Lovell headed a third.⁶¹

⁵⁹ See Chapter 3.3, para 73-75.

⁶⁰ Diana Asmar, 19/9/14, T:1072.10-11, 15-16.

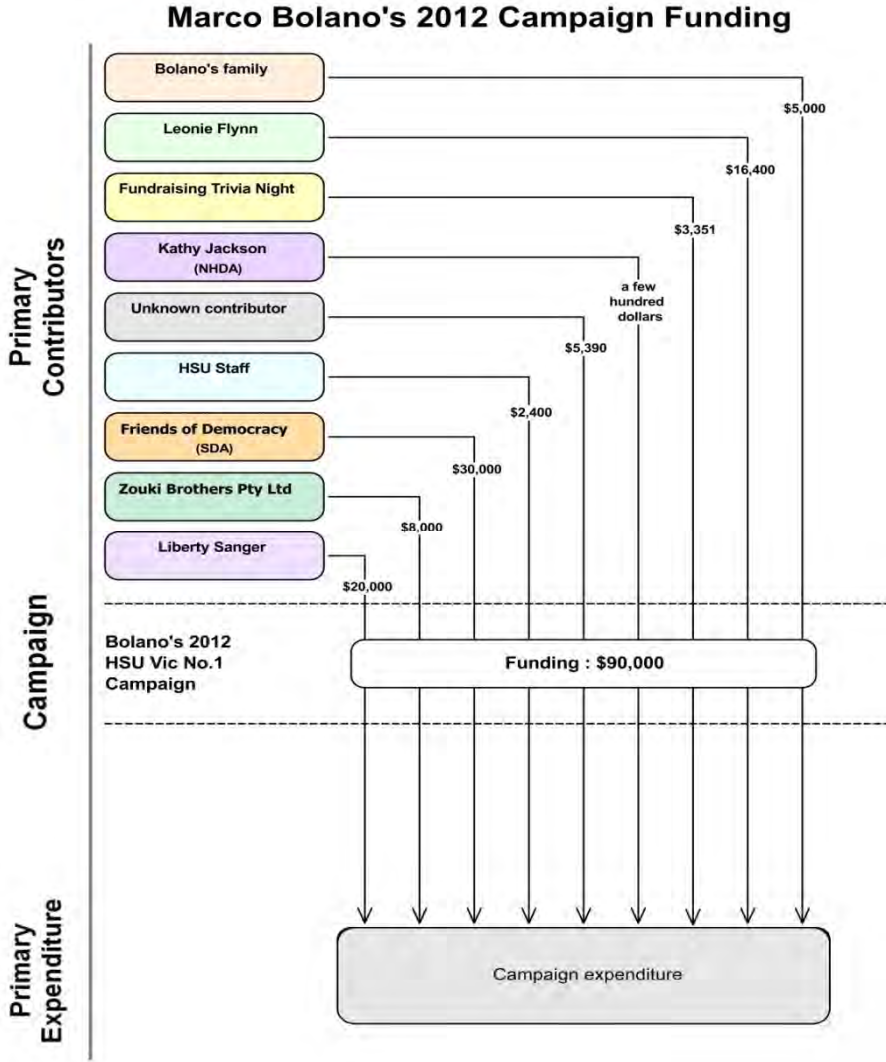
⁶¹ Marco Bolano, witness statement, 12/6/14, para 228.

42. The two principal candidates for the 2012 election were Diana Asmar and Marco Bolano. Ricky Lovell did not have a mail out and did not have very much campaign funding.⁶²
43. Diana Asmar was successful in her campaign for the position of Secretary. A number of other candidates from her ticket were also elected to office. Although Mr Bolano was unsuccessful in the election, the following people were successfully elected from his ticket: Leonie Flynn (Assistant Secretary and Treasurer of No 1 Branch), Patrick O'Brien (BCOM member), Robert Morrey, (BCOM member), Sandra Whyte (National Council) and Sandra Wills (National Council).⁶³

⁶² Marco Bolano, witness statement, 12/6/14, para 229.

⁶³ Marco Bolano, witness statement, 12/6/14, para 244.

Marco Bolano's election campaign funding in 2012



44. Marco Bolano gave evidence that his campaign funding for the 2012 election was held in an account named, 'Al-MBolano 2012

Election Acc'. This was a joint account that Marco Bolano opened with Melissa Butler who was an organiser for his campaign.⁶⁴

45. Marco Bolano said that the people who contributed funds to his campaign understood that this was a joint account.⁶⁵
46. The campaign funds held in Marco Bolano's 2012 campaign account totalled approximately \$90,000.⁶⁶ The funding was as follows.
47. First, there was a \$5,000 donation from Marco Bolano's family.⁶⁷
48. Secondly, there were contributions from Marco Bolano's running-mate, Leonie Flynn, totalling \$16,400.⁶⁸
49. Thirdly, there was cash totalling \$3,350.⁶⁵ representing donations received at a fundraising trivia night.⁶⁹
50. Fourthly, there was a cash donation of a few hundred dollars from Katherine Jackson.⁷⁰ She said she withdrew \$9,000 from the NHDA account and divided this, plus some additional cash

⁶⁴ Marco Bolano, witness statement, 12/6/14, paras 245-246.

⁶⁵ Marco Bolano, witness statement, 12/6/14, para 247.

⁶⁶ Marco Bolano, witness statement, 12/6/14, para 249.

⁶⁷ Marco Bolano, witness statement, 12/6/14, para 249(a); Bolano MFI-1, p 466.

⁶⁸ Marco Bolano, witness statement, 12/6/14, para 249(b); Bolano MFI-1, pp 462-468.

⁶⁹ Marco Bolano, witness statement, 12/6/14, para 249(c); Bolano MFI-1, p 465.

⁷⁰ Marco Bolano, witness statement, 12/6/14, para 249(d).

from the NHDA account which had been withdrawn and not spent, between Marco Bolano and two other candidates for the 2012 elections.⁷¹ The issues surrounding the propriety of these donations are discussed in Chapter 12.3.

51. Fifthly, a cash deposit of \$5,390 was credited to the account on 5 October 2012,⁷² but for which Marco Bolano could not recall further details.
52. Sixthly, there were cash donations from HSU staff totalling \$2,400.⁷³
53. Seventhly, there was a donation in the amount of \$20,000 from an account named 'Friends of Democracy'. The signatories to this account were Michael Donovan, Anthony Burke and Patricia Connolly.⁷⁴ That same account was the source of a further \$10,000 contribution some weeks later.⁷⁵ It is a fund affiliated with the SDA.⁷⁶
54. Marco Bolano gave evidence that he was told that the SDA donated to his campaign because 'they were friends of Mr

⁷¹ Katherine Jackson, witness statement, 14/8/14, para 97.

⁷² Marco Bolano, witness statement, 12/6/14, para 249(e).

⁷³ Marco Bolano, witness statement, 12/6/14, paras 249(f) - 249(g); Bolano MFI-1, p 466.

⁷⁴ Marco Bolano, witness statement, 12/6/14, para 249(h); Marco Bolano, 16/6/14, T:597.45-47; T:598.1-15.

⁷⁵ Marco Bolano, witness statement, 12/6/14, para 249(j); Bolano MFI-1, p 469; Marco Bolano, 16/6/14, T:597.45-47; T:598.1-18.

⁷⁶ Marco Bolano, witness statement, 12/6/14, para 249(h); Bolano MFI-1, p 467.

Feeney and they were going to be friends of mine'.⁷⁷ Marco Bolano said that he spoke to Senator Feeney about the campaign running out of money and Senator Feeney said he would talk to the SDA and to Michael Donovan specifically.⁷⁸

55. Eighth, a donation of \$8,000 from Zouki Brothers Pty Ltd.⁷⁹ Marco Bolano gave evidence that he never met anyone from Zouki Brothers Pty Ltd.

56. Ninth, a \$20,000 donation⁸⁰ paid from an account controlled by Liberty Sanger.⁸¹ Liberty Sanger is a principal lawyer at Maurice Blackburn Lawyers. Marco Bolano said that the donation from Liberty Sanger was not necessarily on behalf of Maurice Blackburn Lawyers and that he had known Liberty Sanger for a few years and he took it as being from her personally.⁸²

Governance: Marco Bolano

57. Marco Bolano said that that the 'campaign in 2012 was not as well organised as it was in 2009 due to lack of resources... there was no real structure in the campaign team...'⁸³ The evidence before the Commission suggests that people involved in the

⁷⁷ Marco Bolano, 16/6/14, T:598.20-22.

⁷⁸ Marco Bolano, 16/6/14, T:598.24-29.

⁷⁹ Marco Bolano, witness statement, 12/6/14, para 249(i); Bolano MFI-1, p 469.

⁸⁰ Bolano MFI-1, p 468.

⁸¹ Marco Bolano, witness statement, 12/6/14, para 249(k).

⁸² Marco Bolano, 16/6/14, T:598.46-599.8

⁸³ Marco Bolano, witness statement, 12/6/14, para 251.

campaign did not have defined roles and responsibilities. There does not appear to have been anyone in charge of the campaign's finances, and much of Marco Bolano's understanding of who contributed money to the campaign stems from inquiries he conducted to assist the work of the Commission.

58. Marco Bolano said that Ben Maxfield, an employee of Senator Feeney, assisted with the campaign in his own time by organising the call centre and communications, by coordinating the people campaigning for Marco Bolano.⁸⁴
59. The lack of organisation, designated roles and responsibilities, oversight and management of Mr Bolano's 2012 campaign raise significant governance and accountability issues.
60. There are in evidence bank statements for the 2012 campaign account showing relevant transactions. But no accounts, receipts or invoices associated with funds raised or expended during the 2012 campaign are in evidence. The task of ascertaining who was involved, how much was contributed by various people or entities, and why, is piece-meal and difficult. Certainly there is no means available for an ordinary member of the union to uncover any complete picture of who funded Mr Bolano's campaign, why, and on what terms.

⁸⁴ Marco Bolano, witness statement, 12/6/14, para 251.

Organisation of Diana Asmar's 2012 election campaign

61. Diana Asmar gave a limited amount of evidence regarding the organisation and conduct of her election campaign in 2012.
62. Diana Asmar was asked about the mail-outs made during her election campaign. Marco Bolano alleged that there were 'approximately 23 to 24 mail-outs' by Diana Asmar's ticket.⁸⁵ While she acknowledged that there were mail-outs made by her ticket during the campaign, she said that she was not aware of the number of mail-outs.⁸⁶ When asked who organised the mail-outs, she responded, '[m]y husband'.⁸⁷ When asked if she had settled any of the promotional material for her campaign, she said that she 'entirely left all that to someone else'.⁸⁸ She stated that she trusted the people who were shaping her message, and that the person shaping her message was her husband.⁸⁹
63. Diana Asmar was then asked about the travel involved and the organisation of the travel during the campaign. Again, she acknowledged that there was travel involved in her campaign, but that she was not aware of the cost of the campaign.⁹⁰

⁸⁵ Marco Bolano, witness statement, 12/6/14, para 253.

⁸⁶ Diana Asmar, 26/8/14, T:547.18-22.

⁸⁷ Diana Asmar, 26/8/14, T:547.24-25.

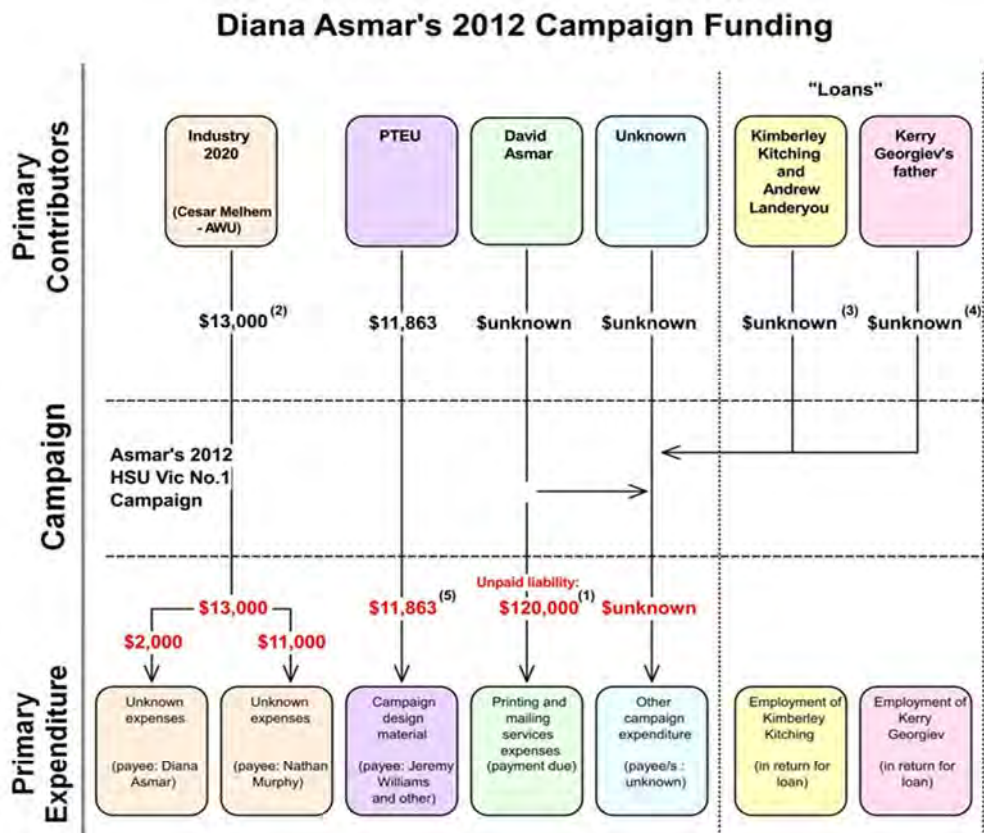
⁸⁸ Diana Asmar, 26/8/14, T:573.10-11.

⁸⁹ Diana Asmar, 26/8/14, T:573.24-30.

⁹⁰ Diana Asmar, 26/8/14, T:547.27-34.

Diana Asmar's campaign funding

64. The following diagram represents Diana Asmar's campaign funding arrangements for the 2012 Campaign:



Note: This diagram indicates legal entities making contributions. Where an entity is associated with a particular union official, that person is named in parentheses together with the associated union.

(1) Unpaid debt - debt due from David Asmar to Total Print Management Pty Ltd pursuant to a settlement deed.

(2) Allegation of Cesar Melhem; supported by Robert McCubbin; denied by Diana Asmar

(3) Allegation of Robert McCubbin, Sandra Porter, Jayne Govan; denied by Kimberley Kitching and Diana Asmar

(4) Allegation of Robert McCubbin, Jayne Govan; denied by Kerry Georgiev and Diana Asmar

(5) Asmar MFI-1, p 42.

65. Whilst appearing before the Commission to give evidence, Diana Asmar was asked a series of questions regarding the funding for her 2012 election campaign. Her evidence sheds very little light on the funding for her campaign as she consistently said that her husband organised all of the finances of the campaign.⁹¹
66. She initially took the position that she did not know the total cost of her election campaign.⁹² When asked who funded the campaign, she responded, ‘My husband’.⁹³ She said that she had not discussed the funding for her campaign with him until ‘[o]nly most recently’.⁹⁴ Even after these conversations, she repeated that she does not know the total cost of the campaign or from where the funds were sourced.⁹⁵
67. A Notice to Produce dated 9 May 2014 was issued to Diana Asmar requesting, among other things, documents relating to her 2012 election campaign including ‘[a]ll Documents recording the making of, or any offer to make, financial or in-kind contributions to your campaign for office [...] or the campaign of your ticket [...]’.⁹⁶ In response to this Notice, she produced no documents to the Commission, and informed the Commission that she had nothing to produce in an email dated 16 May 2014.⁹⁷

⁹¹ Diana Asmar, 26/8/14, T:547.36-38.

⁹² Diana Asmar, 26/8/14, T:547.30-31.

⁹³ Diana Asmar, 26/8/14, T:547.36-38.

⁹⁴ Diana Asmar, 26/8/14, T:547.41.

⁹⁵ Diana Asmar, 26/8/14, T:548.1-6.

⁹⁶ Asmar MFI-1, 26/8/14, p 2.

⁹⁷ Asmar MFI-1, 26/8/14, p 7.

On 22 May 2014, the Commission requested a sworn affidavit from her detailing:⁹⁸

- (a) an explanation as to why she had no documents;
- (b) the names and details of persons who had or who now have the documents requested; and
- (c) an explanation as to why Ms Asmar did not possess any of the documents requested.

68. In her affidavit sworn on 26 May 2014, she said that evidence was that her ‘role was solely to campaign for an election’ and that her ‘campaign for election was, in all aspects, organised and managed by [her] husband David Asmar’.⁹⁹

69. When questioned about her sworn affidavit, she maintained that she had and has no knowledge of where the financial documents for the campaign were located or if they even existed.¹⁰⁰

70. She was then questioned about the affidavit her husband provided to the Commission regarding his response to a Notice to Produce. In light of David Asmar’s statement that he went to friends to

⁹⁸ Asmar MFI-1, 26/8/14, p 10.

⁹⁹ Asmar MFI-1, 26/8/14, p 12.

¹⁰⁰ Diana Asmar, 26/8/14, T:572.29-35.

source funding, she maintained that she had no knowledge of any funding.¹⁰¹

71. Throughout her evidence, Diana Asmar maintained that she was just the figurehead for the campaign.¹⁰² In her words:

They did everything. I did nothing. All I did was go and socialise with the members, door-knock, introduce myself, explain who I am and say hello and ask for their vote and their support for the future.¹⁰³

72. Marco Bolano alleged that Diana Asmar's 2012 election campaign had funding in excess of \$300,000.¹⁰⁴ While the Commission has received some evidence bearing upon the funding of her campaign, it has not received evidence to substantiate funding exceeding \$300,000.

73. Industry 2020, through Cesar Melhem, provided Diana Asmar's 2012 election campaign with \$13,000. Of this amount, \$2,000 was paid directly to David Asmar, while the remainder was provided to Nathan Murphy who was assisting David Asmar with the HSU campaign. The details of these transactions, and Industry 2020's involvement with Diana Asmar's 2012 election campaign, are detailed elsewhere.¹⁰⁵

¹⁰¹ Diana Asmar, 26/8/14, T: 575.1-6.

¹⁰² Diana Asmar, 26/8/14, T:575.17-19.

¹⁰³ Diana Asmar, 26/8/14, T:573.18-21.

¹⁰⁴ Marco Bolano, witness statement, 12/6/14, para 252.

¹⁰⁵ See Chapter 3.4, paras 73-75.

74. When questioned about the provision of assistance by Industry 2020 to her 2012 election campaign, Diana Asmar stated that in her understanding, based on what her husband had told her, Industry 2020 did not provide any funding.¹⁰⁶
75. Cesar Melhem said that he had meetings with David Asmar and Diana Asmar on a number of occasions. Cesar Melhem's diary suggests that he had meetings scheduled with David Asmar on 4 April 2011 and 3 May 2011.¹⁰⁷ In oral evidence Diana Asmar said that she did not attend these meetings and that David Asmar did not tell her that campaign funding was discussed at those meetings.¹⁰⁸ Cesar Melhem next met David Asmar on 18 July 2012, a date very near to the 2012 HSU No 1 Branch election campaign period.¹⁰⁹ Diana Asmar again denied any knowledge of any discussion of campaign funding at that meeting.¹¹⁰
76. A meeting was then held on 27 July 2012 which Diana Asmar attended. Ms Asmar said that she attended one meeting with Cesar Melhem, and that Stuart Miller, Earl Setches and Natalie Hutchins were also present at that meeting.¹¹¹ From Cesar Melhem's diary it appears that Diana Asmar may have been referring to another meeting on 7 August 2012 which these

¹⁰⁶ Diana Asmar, 19/9/14, T:1069.35-37.

¹⁰⁷ Melhem MFI-2, pp 1-2.

¹⁰⁸ Diana Asmar, 19/9/14, T:1070.1-7.

¹⁰⁹ Melhem MFI-2, p 5.

¹¹⁰ Diana Asmar, 19/9/14, T:1070.36-40.

¹¹¹ Diana Asmar, 19/9/14, T:1070.42-47.

people were scheduled to attend.¹¹² However, Diana Asmar maintained in evidence that while she attended more than one meeting with Cesar Melhem, the funding for her campaign was never discussed at those meetings.¹¹³

77. The evidence given to the Commission by Robert McCubbin, Sandra Porter and Jayne Govan throws substantial doubt on Diana Asmar's veracity.
78. Robert McCubbin was frank and forthcoming about his involvement with Diana Asmar's campaigns in 2009 and 2012. He deposed that he was 'aware that [Ms] Asmar met with Mr Melhem at the AWU'¹¹⁴ as he was in the car being driven by David Asmar at times during the 2012 election campaign. He said that 'Ms Asmar explained to us in the car what had happened in the meetings and told us that the funding had been secured from AWU for the elections.'¹¹⁵ Additionally, Robert McCubbin stated that he was present during telephone conversations where Diana Asmar 'authorized [sic] election expenditure.' He continued, 'Ms Asmar authorized (sic) all expenditure.'¹¹⁶ When this evidence was put to Diana Asmar, she denied that she had any knowledge of the funding referred to by Robert McCubbin,¹¹⁷ and stated that she did not recall any

¹¹² Melhem MFI-2, p 7.

¹¹³ Diana Asmar, 19/9/14, T:1071.23-25.

¹¹⁴ Robert McCubbin, supplementary witness statement, 19/9/14, para 43.

¹¹⁵ Robert McCubbin, supplementary witness statement, 19/9/14, para 45.

¹¹⁶ Robert McCubbin, supplementary witness statement, 19/9/14, para 46.

¹¹⁷ Diana Asmar, 19/9/14, T:1073.26-29.

occasion when Robert McCubbin was in the car with David Asmar.¹¹⁸

79. Robert McCubbin also gave evidence about the employment of Kimberley Kitching and Kerry Georgiev. Robert McCubbin said:¹¹⁹

[m]y partner Sandy and I have both been told by Diana Asmar that Kimberley Kitching and her husband Andrew Landeryou lent money to Diana for her HSU election campaign. Diana told us that the payback for the loan was that Kimberley would be employed in the Branch if Diana was successful in the election and that Kimberley would be supported by the Branch in circumstances where she ran for parliamentary elections in the future.

80. Similarly, Robert McCubbin said that he was ‘told by Diana that the reason Kerry [Georgiev] was employed was because Kerry’s father loaned Diana Asmar money for her election campaign and the payback was that Kerry got a job at the branch.’¹²⁰

81. Sandra Porter gave evidence to the Commission that she had a conversation with Diana Asmar in late January or early February 2012. During this conversation, Sandra Porter said:¹²¹

My concern was the employment of Kimberley Kitching, and I directed my question to her as to why she was being employed, and Diana stated to me that Kimberley and her husband had loaned money for the election campaign, and that it was a payback for that loan.

¹¹⁸ Diana Asmar, 19/9/14, T:1073.4-5.

¹¹⁹ Robert McCubbin, witness statement, 13/9/13, para 23.

¹²⁰ Robert McCubbin, witness statement, 13/9/2013, para 28.

¹²¹ Sandra Porter, 16/9/14, T:926.26-30.

82. Counsel for Diana Asmar and Kimberley Kitching put to Sandra Porter that she made that evidence up. Sandra Porter responded; ‘Not at all. I was there in the room and I asked her to her face.’¹²²
83. Jayne Govan gave evidence that supports Robert McCubbin’s and Sandra Porter’s evidence regarding the employment of Kimberley Kitching. While Jayne Govan’s is not first-hand evidence, she said that ‘[t]he discussion around the office is that Kimberley Kitching and Andrew Landeryou gave money to Diana Asmar’s election campaign and that Kimberley Kitching was subsequently employed as a way of paying back the money provided.’¹²³ In addition Jayne Govan added: ‘[t]he discussion around the office is also that Kerry Georgiev’s father provided money to Diana’s election campaign and that in return, Diana would employ Kerry on \$100,000 plus a car.’¹²⁴ In oral evidence to the Commission, Jayne Govan said that she knew this information through Nathan Murphy and Robert McCubbin.¹²⁵
84. The General Manager of the HSU No. 1 Branch, Kimberley Kitching gave evidence regarding the funding of Diana Asmar’s 2012 election campaign. However, Kimberley Kitching denied having any knowledge of the sources of funding of Diana Asmar’s campaign¹²⁶ and that she is not aware if her husband,

¹²² Sandra Porter, 16/9/14, T:926.38-39.

¹²³ Jayne Govan, witness statement, 16/9/13, para 41.

¹²⁴ Jayne Govan, witness statement, 16/9/13, para 42.

¹²⁵ Jayne Govan, 16/9/14, T:962.39-47.

¹²⁶ Kimberley Kitching, 26/8/14, T:522.5-7, 30-32.

Andrew Landeryou, provided any funding to the campaign.¹²⁷ On the topic of her employment, Kimberley Kitching said, 'Diana asked me toward the end of the campaign period whether, if she was successful, I could come to help out at the beginning of her term'.¹²⁸

85. Kerry Georgiev said that she called Diana Asmar after the election result was announced to congratulate her on the result and asked Diana Asmar if there were any jobs available.¹²⁹ Kerry Georgiev then said in evidence that she went to visit Diana Asmar in late December to ask about any available positions. Kerry Georgiev left her resume with Diana Asmar at this meeting. Diana Asmar told Kerry Georgiev that there was nothing available.¹³⁰ A short time later, Kerry Georgiev was employed and began work on 4 January 2013 after Stuart Miller was dismissed by Diana Asmar. Kerry Georgiev also said that she and her family did not donate any money to Diana Asmar's campaign.¹³¹
86. The Commission served a Notice to Produce on a graphic designer who worked on Diana Asmar's 2012 election campaign, Jeremy Williams. He produced a bundle of documents containing correspondence between himself and those involved in Diana Asmar's campaign including David Asmar, Andrew

¹²⁷ Kimberley Kitching, 26/8/14, T:522.34-43.

¹²⁸ Kimberley Kitching, witness statement, 23/8/14, para 6.

¹²⁹ Kerry Georgiev, witness statement, 16/9/14, para 2.

¹³⁰ Kerry Georgiev, 16/9/14, T:940.1-6.

¹³¹ Kerry Georgiev, 16/9/14, T:941.27-30.

Landeryou, Luke Walladge, Earl Setches and Diana Asmar herself. This material shows that Jeremy Williams was in direct contact with David Asmar and Andrew Landeryou regarding payment and instructions regarding what work was to be done on the campaign. On one occasion, Diana Asmar was involved in the email conversation regarding the login details for a campaign website.¹³²

87. Jeremy Williams struggled to obtain payment for his work from David Asmar and Andrew Landeryou. For example on 27 November 2012, Jeremy Williams sent an email to David Asmar, stating: ‘I hope you don’t mind but I have attached an invoice for the last 5 and a bit weeks since the first invoice’.¹³³ After Jeremy Williams failed to obtain payment from David Asmar and Andrew Landeryou for his invoices, on 1 March 2013, he wrote to Earl Setches of the Plumbing Trades Employees Union. He said: ‘[a]s I was asked to address all invoices to the PTEU my only choice is to persue [sic] payment with you’. Jeremy Williams continued: ‘[s]ince December they have constantly played games with this matter [...] This matter has caused me great financial stress’.¹³⁴
88. On the instructions of David Asmar and Andrew Landeryou, Jeremy Williams was invoicing the work he did on Diana

¹³² HSU Supplementary Tender Bundle, p 69-71.

¹³³ HSU Supplementary Tender Bundle, p 72.

¹³⁴ HSU Supplementary Tender Bundle, p 74.

Asmar's campaign to the PTEU.¹³⁵ Eventually he was paid for his work on Diana Asmar's campaign by the PTEU.¹³⁶

89. The Solicitor Assisting requested David Asmar to account for his paltry response to a Notice to Produce seeking documents relating to his wife's campaign.¹³⁷ In an affidavit of 29 May 2014, he stated that he 'approached the Plumbing Trades Employees Union for assistance with paying the [art and design] expenses.'¹³⁸ And that he understood the account was settled by the PTEU.¹³⁹ The Commission requested documents relating to that arrangement in the Notice to Produce. However, he stated in his affidavit that he 'cannot recall the amount involved and I have no documents relating to any tax invoices for this work'.¹⁴⁰ Jeremy Williams provided a number of documents to the Commission that were sent to David Asmar's email address and attached invoices for the work done on the campaign.¹⁴¹ It is curious, to say the least, that less than one year later David Asmar apparently had no record of those emails. Diana Asmar stated in oral evidence that she had no knowledge of the contribution made to her campaign by the PTEU and that she has not had any discussions about the topic with David Asmar.¹⁴² It

¹³⁵ HSU Supplementary Tender Bundle, pp 76-81.

¹³⁶ HSU Supplementary Tender Bundle, pp 82-83

¹³⁷ Asmar MFI-1, 26/8/14, pp 21-22.

¹³⁸ Asmar MFI-1, 26/8/14, p 25.

¹³⁹ Asmar MFI-1, 26/8/14, p 25.

¹⁴⁰ Asmar MFI-1, 26/8/14, p 25.

¹⁴¹ HSU Supplementary Tender Bundle, pp 72, 74, 84.

¹⁴² Diana Asmar, 26/8/14, T:575.8-15.

is exceedingly surprising that in their professional and personal relationship this kind of information did not warrant discussion by David Asmar with his spouse who was leading the campaign.

90. In his affidavit of 29 May 2012 David Asmar said that the 2012 election campaign was ‘almost exclusively funded from [his] own resources including [his] income’.¹⁴³ Apparently the money used came from his personal transaction account. He said that any other money he required for the campaign, he borrowed from friends. He said that it is not his custom to inform lenders what he borrows money for and he did not do so for the 2012 election campaign.¹⁴⁴
91. During the campaign, David Asmar arranged for \$139,865.00 to be spent on printing and mailing services provided by Total Print Management Pty Ltd.¹⁴⁵ He said that it represented ‘the vast majority of the expenditure incurred during the election campaign.’¹⁴⁶ The amount was never paid and is still outstanding. According to a settlement agreement concluded between Total Print Management Pty Ltd on 20 June 2013, payment of \$120,000 is due to the company from Mr Asmar by 31 December 2014.¹⁴⁷

¹⁴³ Asmar MFI-1, 26/8/14, p 24.

¹⁴⁴ Asmar MFI-1, 26/8/14, p 24.

¹⁴⁵ Asmar MFI-1, 26/8/14, pp 33-38.

¹⁴⁶ Asmar MFI-1, 26/8/14, p 26.

¹⁴⁷ Asmar MFI-1, 26/8/14, p 26.

F – CONCLUSIONS

Marco Bolano’s campaigns

92. It is unnecessary to add to earlier comments on the sloppiness with which records were kept of Marco Bolano’s campaigns.

Should Diana Asmar’s evidence be believed?

93. Diana Asmar consistently denied any knowledge of funding for her 2012 election campaign, both in oral evidence and in her affidavit provided to the Commission. She described her role during the campaign as that of a figurehead who had no involvement of the organisation and finances of the campaign. She consistently stated that her husband was responsible for everything to do with campaign funding and organisation, and that she was, and remains almost completely ignorant of those aspects.
94. Evidence given to the Commission shows that Diana Asmar received funding from Cesar Melhem and Industry 2020 during the 2012 election campaign, both directly and indirectly. The evidence also shows that she met Cesar Melhem on at least two occasions. However, according to her, these discussions did not canvass the topic of election funding.
95. Robert McCubbin gave evidence that he was present in a car when Diana Asmar informed her husband that the AWU (i.e. Cesar Melhem and Industry 2020) had agreed to provide funding

to her campaign. Diana Asmar disputed Robert McCubbin's evidence and stated that her husband and Robert McCubbin were never in the car together.

96. Kimberley Kitching gave evidence that she also had no knowledge of any funding provided to Diana Asmar's campaign, even though her husband, Andrew Landeryou, worked with David Asmar to coordinate the campaign. She denied that she walked into a newly created position of General Manager almost immediately on Diana Asmar's assumption of office as a pay-back for substantial funding received by Diana Asmar from Kimberley Kitching and her husband. Likewise Kerry Georgiev denies that there was anything corrupt about her employment days after Ms Asmar took office. That employment commenced after a highly-qualified finance manager with a university degree in accounting, who had been employed by the administrator, was dismissed and Kerry Georgiev, who had no tertiary qualifications, was installed in his place on a higher salary.
97. During the course of the campaign, David Asmar built up a debt of over \$130,000 to Total Print Management Pty Ltd for the printing and mailing of Diana Asmar's election material. Diana Asmar's only evidence as to this debt was that she did not find out about it until this year.¹⁴⁸
98. Diana Asmar provided to the Commission a one page document detailing her lengthy involvement in community and professional

¹⁴⁸ Diana Asmar, 26/8/14, T:576.5-12.

organisations.¹⁴⁹ This document shows that, among other things, she was awarded a National Award for Excellence in Fundraising, chaired various committees such as the Darebin Disability Advisory Committee, and has served as a Councillor on the City of Darebin Council between 1998 and 2012. She also served as Mayor of the City of Darebin Council three times in those years.

99. The evidence obtained by the Commission to date (bearing in mind, as noted above, that David Asmar has not yet given evidence in a public hearing) points to the fact that David Asmar did organise a large part of Diana Asmar's election campaign. The evidence from Robert McCubbin, Sandra Porter and Jayne Govan was compelling. All three of these witnesses were allies of Diana Asmar at the time of the campaign. It accords with the possibilities that she would have been frank to her supporters and those assisting her campaign and told them the truth. It is probable that, in the course of a bitter and heated campaign, a candidate would talk to her trusted campaign colleagues about an issue as significant as campaign funding. Conversely it would appear objectively highly improbable Diana Asmar really had absolutely no knowledge and no involvement in obtaining funds and the designing of her campaign.
100. If it is accepted that in truth Diana Asmar had no knowledge of the funding or organisation of her election campaign, then her conduct during the 2012 election campaign could only be

¹⁴⁹ Asmar MFI-3, p 1.

regarded as, at best, irresponsible. In particular evidence to the effect that she allowed her husband to incur debts of over \$130,000 to Total Print Management Pty Ltd in order to be elected and denying all responsibility for that debt herself, if accepted, would show a total lack of responsibility on her behalf for a significant debt incurred. It is of significant concern that, if Diana Asmar's evidence is to be believed, Diana Asmar, a person who has served as a Mayor on a local council, had a complete disregard for how her own campaign was funded and organised, or what favours from others were obtained in order to fund her campaign. However because, as noted above, the Commission has not yet examined David Asmar on this issue, no findings can be made at this stage.

CHAPTER 4.8

SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION, QUEENSLAND BRANCH FUND

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1. This chapter is concerned with a separate entity associated with the Shop, Distributive and Allied Employees Association, Queensland Branch (**SDA Queensland**) and its officers. It is a fighting fund for the re-election of incumbent officials (the **Fighting Fund**).
2. The chapter deals with the voluntariness of the contributions made to the Fighting Fund; the governance arrangements for the Fighting Fund; and the current regulatory arrangements dealing with this type of relevant entity.
3. The submissions of counsel assisting are set out below. The SDA Queensland, although it was represented at the hearing by senior counsel also appearing for Senator Christopher Ketter, did not file any written submissions in response to the submissions of counsel assisting. Senator Ketter did. He also adopted submissions from the Hon John Hogg and Gerard Dwyer. In most respects the submissions of counsel assisting are adopted below. A different aspect of the SDA Queensland is dealt with in Chapter 12.1.

A – RELEVANT FACTS

Establishment of Fighting Fund

4. The Fighting Fund is a bank account held with the Commonwealth Bank of Australia.¹ The Fighting Fund has been operating, in the form of a bank account, since 1978.²

5. Senator Ketter was from July 1996 and until June 2014, the Secretary-Treasurer of the SDA Queensland.³ Senator Ketter gave evidence that when he commenced as a research officer/organiser with the SDA Queensland in 1982, he started making contributions to a Fighting Fund.⁴ He continued to do so until he ceased to be an officer of the SDA Queensland on 25 July 2014.⁵ At the time Senator Ketter ceased to be the Secretary-Treasurer of the SDA Queensland, he estimates that there was around \$408,000 in the Fighting Fund.⁶

6. The following diagram summarises the primary contributors to and expenditure of the Fighting Fund.⁷

¹ Chris Ketter, 18/8/14, T:70.46-71.4.

² Ketter MFI-2, p 15.

³ Ketter MFI-1, p 1.

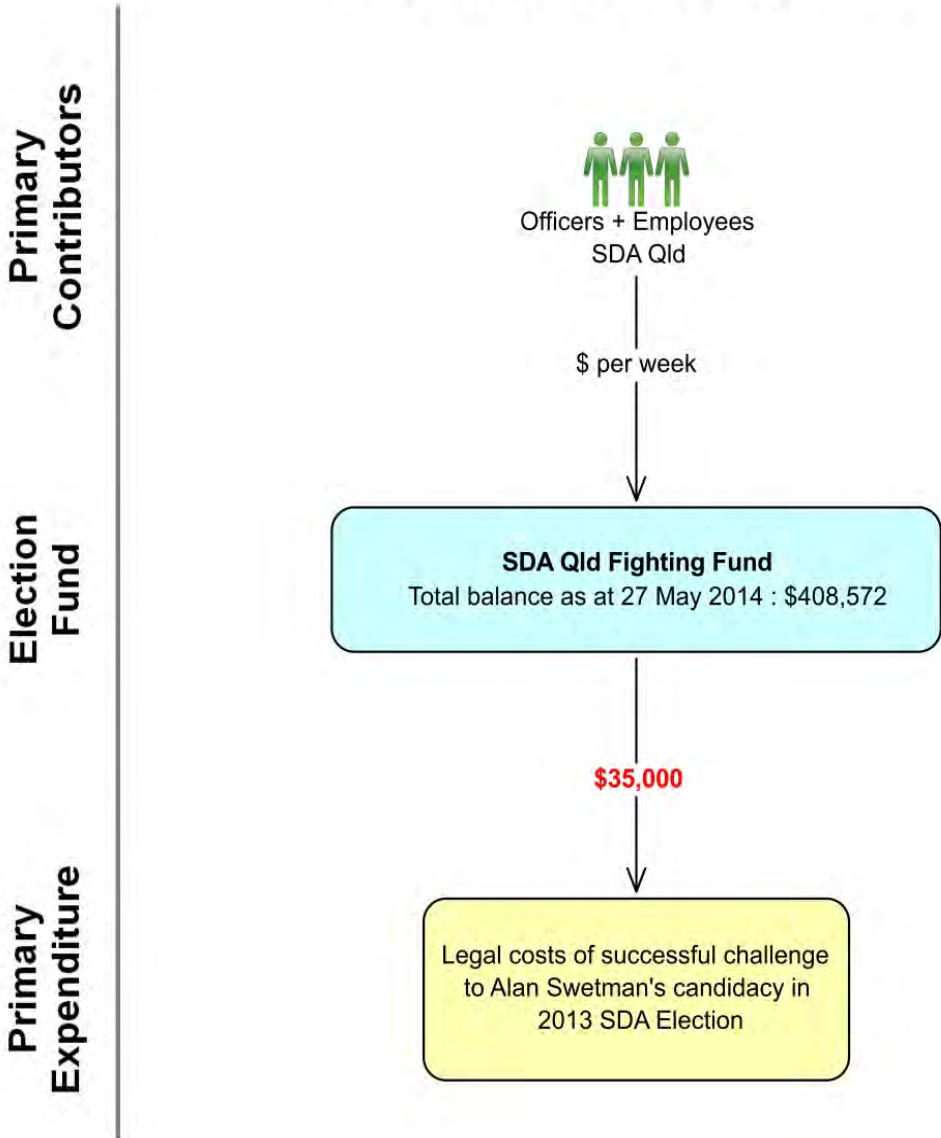
⁴ Chris Ketter, 18/8/14, T:70.28-31.

⁵ Chris Ketter, 18/8/14, T:70:22-44.

⁶ Chris Ketter, 18/8/14, T:80.11-14.

⁷ Ketter MFI-2, p 7.

The SDA Qld Fighting Fund



Control of Fighting Fund

7. There are three signatories to the Fighting Fund.⁸ Senator Ketter's evidence was that, generally, the three signatories to the Fighting Fund make decisions about the operation of the Fighting Fund.⁹

8. In the last few years, the signatories have been, first, John Hogg, the President of the SDA Queensland. John Hogg was previously the Secretary-Treasurer of the SDA Queensland from 1981-1996. He was an ALP Senator for Queensland from 1996-2014, being Senator Ketter's predecessor in that role too.¹⁰ The second signatory has been Ellie Beswick, the Vice-President of the SDA Queensland. The third has been Senator Ketter, during his tenure as the Secretary-Treasurer of the SDA Queensland.¹¹

9. Senator Ketter ceased being a signatory on around 1 August 2014, and was replaced by Chris Gazenbeek.¹² Chris Gazenbeek took over as Secretary-Treasurer from Senator Ketter.¹³

⁸ Chris Ketter, 18/8/14, T:70.46 - 71.4.

⁹ Chris Ketter, 18/8/14, T:84.17-20.

¹⁰ Parliament of Australia, *The Hon John Hogg*, http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=7L6, accessed 18/10/14.

¹¹ Chris Ketter, 18/8/14, T:71.9-11.

¹² Chris Ketter, 18/8/14, T:81.14-21.

¹³ Alan Swetman, 18/8/14, T:11.41-42.

Contributions to Fighting Fund: amount

10. Contributions to the Fighting Fund are made by deductions from the salary of officials and employees of the SDA Queensland.¹⁴

11. The number of people paying into the Fighting Fund varies from time to time. It is usually somewhere between 30 and 40 people at any one time.¹⁵ This number is made up of organisers, recruiters and senior officers and includes most employees of the SDA Queensland, with the exception of secretarial or administrative staff.¹⁶

12. Full-time employees of the SDA Queensland contribute \$48.00 per month to the Fighting Fund.¹⁷

13. Those contributions have been the Fighting Fund's only source of income. It has not and does not receive any contributions from employers.¹⁸

¹⁴ Chris Ketter, 18/8/14, T:71.17-27.

¹⁵ Chris Ketter, 18/8/14, T:71.17-27.

¹⁶ Chris Ketter, 18/8/14, T:71.17-42.

¹⁷ Chris Ketter, 18/8/14, T:71.29-31.

¹⁸ Chris Ketter, 18/8/14, T:71.36-42.

Contributions to Fighting Fund: voluntariness

14. There was a practice at the SDA Queensland of new employees being introduced to the Fighting Fund by the Secretary-Treasurer around the time that they commenced employment.
15. Senator Ketter described how Senator Hogg spoke with him about the Fighting Fund when he joined the SDA Queensland.¹⁹
16. Alan Swetman was employed as an organiser with the SDA Queensland between 1995 and 2013.²⁰ He recounted how, when he was employed by the SDA Queensland, Senator Hogg told him that there would be money ‘taken out of our wages every month to help fight anyone challenging the position of State Secretary and Treasurer’.²¹
17. Senator Ketter had similar conversations with new employees when he was Secretary-Treasurer. However, Senator Ketter claims that he ‘always indicated to people that it was on a voluntary basis’.²² He

¹⁹ Chris Ketter, 18/8/14, T:70.28-37.

²⁰ Alan Swetman, 18/8/14, T:8.11-20.

²¹ Alan Swetman, 18/8/14, T:10.2-4.

²² Chris Ketter, 18/8/14, T:86.46-87.2.

conceded that no-one had ever refused to contribute to the Fighting Fund.²³

18. Rosa Perry was employed as an organiser with the SDA Queensland between 19 June 2006²⁴ and 18 June 2013.²⁵
19. Rosa Perry signed her contract of employment with the SDA Queensland on 26 May 2006.²⁶ Prior to signing her contract of employment with the SDA Queensland, she had a discussion with Senator Ketter in relation to the Fighting Fund.²⁷ Senator Ketter told her that ‘all officials of the SDA contribute \$48.00 every four weeks’.²⁸
20. On 26 June 2006, one week after she commenced employment with the SDA Queensland, she signed an authority form authorising the SDA Queensland to deduct \$48.00 every four weeks from her wages, such amount to be contributed to the Fighting Fund.²⁹ Senator Ketter submitted that the authority to deduct only remained in force until the employee rescinded or amended it.³⁰ But what relationship did that have to a letter provided at or around the end of each financial year to

²³ Chris Ketter, 18/8/14, T:87.38-40.

²⁴ Rosa Perry, 18/8/14, T:40.10-11.

²⁵ Perry MFI-1, p 24.

²⁶ Perry MFI-1, p 4.

²⁷ Rosa Perry, 18/8/14, T:55.29-33.

²⁸ Chris Ketter, 18/8/14, T:87.4-6.

²⁹ Enright MFI-2, p 19.

³⁰ Response of Senator Ketter to the submissions of counsel assisting, 14/11/14, paras 20-21.

organisers who contributed to the Fighting Fund from the SDA Queensland regarding their contributions to the Fighting Fund?³¹ The letter, which was on SDA Queensland letterhead, stated: ‘The employee is *required* to contribute a monthly amount from their wages to a “Fighting Fund”’ (emphasis added).³² The letter went on to record the amount that the employee had contributed in the previous financial year.³³ The Hon John Hogg submitted that no authority to deduct had been cancelled at any time, other than by death, resignation or cessation from office or paid employment of the contributor.³⁴ That may support, rather than detract from, the view that contribution is not a voluntary but a compulsory act.

21. Senator Ketter said that whilst it might be said people were ‘expected’ to contribute to the Fighting Fund, it was ‘not entirely accurate to say that people are required to contribute’.³⁵

22. In addition to providing contributors with letters, Bob Stockwell, the SDA Queensland Administration Manager and signatory of the letters, advised the organisers that contributions to the Fighting Fund could be claimed as a tax deduction.³⁶ Senator Ketter said that Bob Stockwell

³¹ Rosa Perry, 18/8/14, T:43.4-8.

³² Perry MFI-1, p 13.

³³ Perry, MFI-1, p 13.

³⁴ Statement of the Hon J J Hogg in response to certain submissions of Counsel Assisting, 13/11/14, para 29.

³⁵ Chris Ketter, 18/8/14, T:86.38-44.

³⁶ Alan Swetman, 18/8/14, T:11.3-13.

qualified his advice and made it clear that organisers had to take their own independent advice on this matter.³⁷

23. In any event, Rosa Perry and Senator Ketter used the letter to claim a tax deduction for the payments.³⁸ Senator Ketter has since taken steps to repay to the Tax Office the benefit he received from claiming those amounts.³⁹

24. The SDA Queensland no longer issues letters to contributors to the Fighting Fund.⁴⁰

Purpose of Fighting Fund

25. When he became a signatory to the Fighting Fund, Senator Ketter was told that the purpose of the fund was for internal elections of the SDA Queensland.⁴¹

26. Senator Ketter explained to Rosa Perry that the purpose of the Fighting Fund was to ensure that incumbent officials were able to see off any challenges in an election.⁴² Alan Swetman gave evidence that he

³⁷ Chris Ketter, 18/8/14, T:86:25-32.

³⁸ Rosa Perry, 18/8/14, T:43.29-35; Chris Ketter, 18/8/14, T:86.7-9.

³⁹ Chris Ketter, 18/8/14, T:124:2-4.

⁴⁰ Chris Ketter, 18/8/14, T:86:11-23.

⁴¹ Chris Ketter, 18/8/14, T:82.28-37.

⁴² Rosa Perry, witness statement, 18/8/14, paras 5- 6.

understood that if he and other organisers were not contributing to the Fighting Fund, and they did not fight and win elections, they would be terminated by the incoming officials.⁴³

27. Senator Ketter stated that the purpose of the fund was ‘to assist in running the costs of a contested election and... that was the only purpose of the fund’⁴⁴ but that the use of the fund was not limited to the re-election of the Secretary-Treasurer.⁴⁵ The use of the Fighting Fund could extend to the election of other officials, including honorary positions and elected positions on the State Council.⁴⁶

Expenditure of Fighting Fund

28. After his election in July 1996, and up until May 2013, Senator Ketter was not challenged for the position of Secretary-Treasurer.⁴⁷ During that period, there was a steady growth in the Fighting Fund. On 1 July 1996, the balance of the fund was \$74,797.84.⁴⁸ By 28 May 2013, this had increased to \$422,302.73.⁴⁹

⁴³ Alan Swetman, 18/8/14, T:10.6-10.

⁴⁴ Chris Ketter, 18/8/14, T:83.1-3.

⁴⁵ Chris Ketter, 18/8/14, T:83.22-32.

⁴⁶ Chris Ketter, 18/8/14, T:83.22-32.

⁴⁷ Chris Ketter, 18/8/14, T:88.6-8.

⁴⁸ SDA Tender Bundle, 31/10/14, p 10.

⁴⁹ Ketter MFI-2, p 10.

29. In May 2013 three key events took place. On 6 May 2013, the Australian Electoral Commission called for nominations for election to the position of Secretary-Treasurer of the SDA Queensland.⁵⁰ Alan Swetman was nominated shortly afterwards.⁵¹ At 12.00pm on 23 May 2013, Alan Swetman was dismissed from the employ of the SDA Queensland.⁵² Did the coincidence in time between these events point to a larger coincidence?⁵³
30. On 30 May 2013, a withdrawal of \$100,030.00 was made from the Fighting Fund and that amount, less a \$30.00 fee, was transferred to the trust account of Sciaccas Lawyers.⁵⁴
31. On 12 June 2013, Ellie Beswick filed an application in the Federal Court of Australia to challenge the validity of Alan Swetman's nomination.⁵⁵ Ellie Beswick, who along with Senator Ketter was a signatory to the Fighting Fund, instructed Sciaccas Lawyers in that application.⁵⁶ On 18 June 2013, Justice Logan of the Federal Court ruled that Alan Swetman's nomination was invalid.⁵⁷

⁵⁰ Ketter MFI-2, p 16.

⁵¹ Alan Swetman, witness statement, 18/8/14, para 15.

⁵² Swetman MFI-1, pp 4-5.

⁵³ See Chapter 12.1.

⁵⁴ Ketter MFI-2, p 6.

⁵⁵ Ketter MFI-2, pp 19-21.

⁵⁶ Swetman MFI-1, p 7.

⁵⁷ Swetman MFI-1, pp 9-10.

32. The removal of Alan Swetman from the SDA Queensland, and the challenge to his nomination for the position of Secretary-Treasurer, is examined in detail in Chapter 12.1.
33. Of the \$100,000.00 transferred from the Fighting Fund to Sciaccas Lawyers, \$35,000.00 was expended and the balance was returned to the Fighting Fund.⁵⁸

Governance of Fighting Fund

34. Senator Ketter gave the following evidence with respect to the governance of the Fighting Fund:
- (a) the monies in the Fighting Fund were being held by the signatories on behalf of the contributors to the Fighting Fund;⁵⁹
 - (b) there is no deed or any other document regulating the affairs of the Fighting Fund;⁶⁰

⁵⁸ Chris Ketter, 18/8/14, T:85.39-42.

⁵⁹ Chris Ketter, 18/8/14, T:81.44-47.

⁶⁰ Chris Ketter, 18/8/14, T:82.20-22.

- (c) he did not consider himself a trustee in respect of the Fighting Fund, but he did not consider the Fighting Fund as his own personal money;⁶¹
- (d) the views of contributors were not sought regarding the operation of the Fighting Fund;⁶² and
- (e) once contributions are made to the Fighting Fund, it is generally understood by contributors that they had no further claim to those monies.⁶³

35. As described in paragraph 7, the three signatories determine the use of the Fighting Fund monies.

36. The decision to use the Fighting Fund to pay legal fees to challenge Alan Swetman's nomination was discussed by the three signatories.⁶⁴ However, that discussion was not minuted. No report was given to contributors about the outcome of that discussion.⁶⁵

⁶¹ Chris Ketter, 18/8/14, T:82.2-12.

⁶² Chris Ketter, 18/8/14, T:85.18-29.

⁶³ Chris Ketter, 18/8/14, T:108.23-26.

⁶⁴ Chris Ketter, 18/8/14, T: 85.3-16.

⁶⁵ Chris Ketter, 18/8/14, T:85.3-16.

37. Senator Ketter described the use of the money in this way as an expense ‘related to an election’.⁶⁶ It is apparent that Senator Ketter stood to benefit personally from the decision to use the Fighting Fund to finance the legal challenge to Alan Swetman’s nomination. Without Alan Swetman’s nomination, Senator Ketter would be returned unopposed. Despite this conflict, the possibility that Senator Ketter should abstain from determining whether or not to use the Fighting Fund to challenge Alan Swetman was neither discussed nor raised.⁶⁷
38. In general, contributors to the Fighting Fund were given no information about the use that had been made of the funds in the Fighting Fund.⁶⁸ Alan Swetman’s recollection was that the money was simply taken out of his salary and that is the last he saw of it.⁶⁹

Attempts to recover contributions from Fighting Fund: Alan Swetman

39. Both Alan Swetman and Rosa Perry asked for the return of their contributions to the Fighting Fund following the termination of their employment. They were unsuccessful. When Senator Ketter became a signatory of the Fighting Fund, he was told that no employees had any claim over their Fighting Fund contributions upon their departure from

⁶⁶ Chris Ketter, 18/8/14, T:102.29-35.

⁶⁷ Chris Ketter, 18/8/14, T:121.5-13.

⁶⁸ Rosa Perry, 18/8/14, T:44.24-26; Alan Swetman, 18/8/14, T:12.16-26.

⁶⁹ Alan Swetman, 18/8/14, T:12.24-26.

the SDA Queensland.⁷⁰ He appears to have adopted the same position to Alan Swetman and Rosa Perry.

40. Alan Swetman made at least two efforts to have his Fighting Fund contributions returned. The first was a telephone conversation with Senator Ketter in which he stated: 'I want my Fighting Fund money returned'.⁷¹ Senator Ketter simply said 'it's got nothing to do with us' and hung up the phone.⁷² Secondly, he had a telephone conversation with Chris Gazenbeek. He was told that the Fighting Fund has 'nothing to do with ... the day-to-day running of the union'.⁷³ Alan Swetman also asked Chris Gazenbeek who the signatories to the Fighting Fund were so that he could contact them and find out where his money was. He did not receive a response.⁷⁴

41. Alan Swetman never heard back from Senator Ketter, Chris Gazenbeek or anyone else at the SDA Queensland about the return of his contributions to the Fighting Fund.⁷⁵

⁷⁰ Chris Ketter, 18/8/14, T:82.31-37.

⁷¹ Alan Swetman, witness statement, 18/8/14, para 36.

⁷² Alan Swetman, 18/8/14, T:11.35-40.

⁷³ Alan Swetman, 18/8/14, T:11.43-45.

⁷⁴ Alan Swetman 18/8/14, T:11.40-12.1.

⁷⁵ Alan Swetman, witness statement, 18/8/14, para 38.

Attempts to recover contributions from Fighting Fund: Rosa Perry

42. Rosa Perry had a similar experience to that of Alan Swetman when she sought the return of her contributions to the Fighting Fund.
43. From around April 2013, Rosa Perry was on leave without pay from the SDA Queensland. She was facing bankruptcy. She was reliant on her family for support.⁷⁶ In this regard her sister, Nedda Roccisano, acted on her behalf and dealt with the SDA Queensland.⁷⁷
44. Rosa Perry and Nedda Roccisano approached various individuals associated with the SDA Queensland in an attempt to recover Rosa Perry's contributions to the Fighting Fund.
45. On 3 May 2013, Nedda Roccisano emailed Senator Ketter. She inquired how Rosa Perry could access her Fighting Fund contributions.⁷⁸ Senator Ketter responded two days later and said that the Fighting Fund 'is unrelated to the running of the union and has no relationship with the financial conduct or business of the union'.⁷⁹

⁷⁶ Rosa Perry, witness statement, 18/8/14, para 22.

⁷⁷ Rosa Perry, witness statement, 18/8/14, para 22.

⁷⁸ Perry MFI-1, p 26.

⁷⁹ Perry MFI-1, p 27.

46. On 28 May 2013, Rosa Perry sent an email to Joe de Bruyn, the then National Secretary of the Shop, Distributive and Allied Employees Association. She requested his assistance in accessing her Fighting Fund contributions.⁸⁰ She never received a response to that email.⁸¹
47. On 18 July 2013, Rosa Perry made a formal complaint about the Fighting Fund to Tony Schostakowski, Director of the Industrial Relations Service at the Queensland Department of Justice and Attorney-General.⁸² On 22 August 2013, he referred her complaint to the Fair Work Commission.⁸³
48. On 29 August 2013, *The Australian* newspaper published an article titled ‘Shoppies’ slush fund donations “claimed on tax”.⁸⁴ The article quoted Rosa Perry and referred to the letters from Bob Stockwell to contributors to the Fighting Fund.
49. On the same day the article was published, Rosa Perry received a letter from McInnes Wilson lawyers, on behalf of Senator Ketter, claiming that Rosa Perry had defamed Senator Ketter. It demanded, amongst

⁸⁰ Perry MFI-1, p 28.

⁸¹ Rosa Perry, witness statement, 18/8/14, para 27.

⁸² Perry MFI-1, p 30.

⁸³ Perry MFI-1, pp 43-44.

⁸⁴ Enright MFI-2, p 4

other things, a full and unqualified written retraction of the comments.⁸⁵

B – FAIR WORK COMMISSION: REGULATORY ROLE

Investigation following complaint by Rosa Perry

50. Chris Enright, Director of the Regulatory Compliance Branch of the Fair Work Commission, gave evidence to the Commission concerning the steps taken by the Fair Work Commission in response to the complaint by Rosa Perry and the view taken by the Fair Work Commission of its jurisdiction in respect of these matters.

51. In summary, the Fair Work Commission's view is that the Fighting Fund, and funds similar to it, are not generally within its jurisdiction and that they are constructed to ensure that result.⁸⁶

52. Upon receiving the complaint of Rosa Perry, Chris Enright conducted some preliminary investigations, including reviewing an article from *The Australian* referred to in paragraph 48.

53. On 27 September 2013, Chris Enright wrote to Senator Ketter about the Fighting Fund. He attached the article.⁸⁷ Chris Enright sought

⁸⁵ Ketter MFI-2, pp 1-2.

⁸⁶ Chris Enright, witness statement, 18/8/14, para 41.

responses to a series of specific questions about the Fighting Fund, including the name of the fund, the name of the institution where the fund was held, and whether the funds were held on trust or otherwise. Chris Enright considered the answers would have assisted him to ascertain if the matters raised by Rosa Perry fell within the jurisdiction of the FWC.⁸⁸

54. The next stage can be described briefly or at length.
55. To put it briefly, the SDA Queensland was not forthcoming with any information.
56. To put it at length, by letter dated 8 October 2013, Chris Enright received a response from the SDA Queensland's solicitors, A J Macken & Co.⁸⁹ The letter stated that the SDA Queensland sought to be 'meticulous in their compliance with the requirements of the [*Fair Work (Registered Organisations) Act 2009 (Cth)*] and all proper requirements of the officers of the Fair Work Commission'.⁹⁰ The letter went on to seek advice as to whether any and which of the provisions of the *Fair Work (Registered Organisations) Act 2009 (Cth)* required disclosure of 'payments to a related party where the payment

⁸⁷ Enright MFI-2, pp 5-6.

⁸⁸ Chris Enright, witness statement, 18/8/14, para 17.

⁸⁹ Enright MFI-2, p 7.

⁹⁰ Enright MFI-2, p 7.

consists of amounts deducted by the organisation or branch...which are deducted with the written authorisation of an officer or employee'.⁹¹

57. On 20 December 2013, Chris Enright wrote to A J Macken & Co. He stated that the information he sought, if provided, would enable him to understand better the nature of any nexus between the Fighting Fund and the SDA Queensland as a registered organisation.⁹²

58. On 17 January 2014, A J Macken & Co responded by letter. It stated that Rosa Perry had voluntarily elected to authorise deductions from her salary to a Fighting Fund and expressly rejected the implication that Rosa Perry was required to make contributions to the Fighting Fund as a condition precedent to her employment.⁹³ In addition, the letter said that:⁹⁴

The aggregated fund made up of the voluntary deductions of office bearers and employees does not on its face appear to be a fund or account belonging to the employer and therefore would not appear to be within the accounts and audit requirements of Chapter 8, Part 3 of the [*Fair Work (Registered Organisations) Act 2009* (Cth)].

⁹¹ Enright MFI-2, p 7.

⁹² Enright MFI-2, p 8.

⁹³ Enright MFI-2, p 16.

⁹⁴ Enright MFI-2, p 17. That Part of the *Fair Work (Registered Organisations) Act 2009* (Cth) sets out the requirements that are placed on organisations in relation to financial records, accounting and auditing.

59. Chris Enright said that in the opinion of the Fair Work Commission, the Fighting Fund falls outside the jurisdiction of the Fair Work Commission.⁹⁵
60. During the period September 2013 to March 2014, whilst making inquiries of the SDA Queensland, and liaising with A.J. Macken & Co, representatives of the Fair Work Commission were corresponding with Rosa Perry in relation to her complaint.⁹⁶
61. On 17 March 2014, Maryanne Guina, Principal Adviser, Regulatory Compliance Branch of the Fair Work Commission, emailed Rosa Perry and referred her to this Royal Commission, which was then in the process of being established.⁹⁷

⁹⁵ Chris Enright, witness statement, 18/8/14, para 33.

⁹⁶ Chris Enright, witness statement, 18/8/14, para 16; Enright MFI-2, pp 10-15.

⁹⁷ Enright MFI-2, pp 10-11.

Fair Work Commission's experience with election funds

62. Chris Enright conducted inquiries in relation to the operation of 'fighting funds'. He explained that fighting fund arrangements typically involve the following:⁹⁸

- (a) a trust fund or financial account is established, with the account holders or trustees being persons who are also senior officials of the union (such as the union's Secretary and President), in such a manner that the funds are not held or controlled by the union;
- (b) upon commencement of employment or shortly thereafter, union employees and office holders are advised that they are expected, or required voluntarily to contribute a specified amount to the fund and in practice it would appear that most employees and office holders do not object;
- (c) the amount and type of information provided to Fighting Fund contributors about the management of the fund and the uses to which it is put varies between unions;
- (d) contributions are deducted from employees' and office holders' salary payments with their authority;

⁹⁸ Chris Enright, witness statement, 18/8/14, para 34.

- (e) the contributions are paid directly into the Fighting Fund and do not traverse any union accounts;
- (f) under the control of the account holders or trustees, the monies are used to fund the re-election campaigns of some or all the relevant officials; and
- (g) contributions to the fund are not routinely refunded to employees even when there are no contested elections although there are some examples where such contributions have been refunded.

63. Chris Enright also said that the jurisdiction of the regulatory role of the Fair Work Commission is derived from the *Fair Work (Registered Organisations) Act 2009* (Cth) and in particular, the inquiry and investigation jurisdiction of the General Manager (or delegate) under Part 4 of Chapter 11 of that Act. He said that the General Manager (or delegate) may inquire into or investigate a union's or union officer's compliance with:⁹⁹

- (a) the accounts and audit requirements in Part 3 of Chapter 8;
- (b) the Reporting Guidelines;

⁹⁹ Chris Enright, witness statement, 18/8/14, para 35.

- (c) regulations made for the purposes of Part 3 of Chapter 8;
- (d) rules of a reporting unit relating to its finances or financial administration; and
- (e) civil penalty provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth).

64. Chris Enright explained that whether a union ‘fighting fund’ falls within the jurisdiction of the Fair Work Commission will depend on the circumstances of each particular matter. It will depend, fundamentally, on whether the fund monies are in fact held by the federally registered entity (in this case the SDA Queensland), or a controlled entity, and whether there have been any relevant transactions between the SDA Queensland and any such controlled entity or related party.¹⁰⁰

C – LEGAL ISSUES

Legal nature of Fighting Fund

65. Senator Ketter’s evidence as to the status of the Fighting Fund illuminates the uncertainty which surrounds these relevant entities.

¹⁰⁰ Chris Enright, witness statement, 18/8/14, para 36.

66. On the one hand, Senator Ketter considered that the monies in the Fighting Fund were held by the signatories on behalf of the contributors to the Fighting Fund and did not consider that the money was his own. This point of view, with respect, appears to be correct. But on what basis is it correct? That is a difficult question.
67. There was no document regulating the affairs of the Fighting Fund. There was no evidence of any document or oral dealing which would suggest satisfaction of the legal requirement that a trust have certainty of intention and objects. Although this is not determinative, it is significant that Senator Ketter did not consider himself to be in a trustee-beneficiary relationship with the contributors. The contributors were not consulted as to how the monies in the Fighting Fund were to be spent. They were not informed how the money was spent. They were not refunded unspent contributions. They appear to have been treated as entirely without rights in respect of the Fighting Fund, save as to a right – of questionable practical reality – to withdraw their authorities for future deductions to the Fighting Fund to be made from their salaries. What other legal relationships could be ascribed to the structure employed for the Fighting Fund? One is an agency and principal arrangement by which the monies in the Fighting Fund were held by the signatories as agents of the contributors as principals. The other is a contractual arrangement between the signatories and beneficiaries.

68. However, neither of these is compatible with the evidence given in respect of the complete absence of rights on the part of contributors, at least as understood by those controlling the Fighting Fund.
69. Finally, there was no check on the obvious conflict of interest which arose when Senator Ketter used the Fighting Fund for, at least partially, his own benefit.

Voluntariness of contributions

70. Despite Senator Ketter's insistence that contributions to the Fighting Fund have been and are made voluntarily, the balance of the evidence does not support that contention. Annual letters from the SDA Queensland to contributors described the contributions as 'required'.
71. The evidence of Rosa Perry and Alan Swetman indicated that voluntariness on the part of contributors at least in practical terms, is a fiction. In these circumstances, it is arguable that the contributors were put in a position where, as a condition of employment, they were required to make contributions. If that is the case, s 325 of the *Fair Work Act 2009 (Cth)* is relevant. That provision states:

An employer may not directly or indirectly require an employee to spend any part of the amount payable to the employee in a particular way, if the requirement is unreasonable in the circumstances.

72. Where an employee is unreasonably required to spend wages, then the employee may recover the contributions from the employer as an underpayment of wages claim.¹⁰¹
73. If the unreasonable requirement is a term directly or indirectly for the benefit of the employer, or a party related to the employer, that term has no effect.¹⁰²
74. When will it be unreasonable for an employer to require an employee to spend part of his or her wages in a particular way? There is little authority. However, the Explanatory Memorandum to the *Fair Work Act 2009* (Cth) provides the following guidance:¹⁰³

... [i]t is likely to be unreasonable for an employer to require an employee to donate a proportion of his or her pay to a charitable or religious organisation nominated by the employer. It may be reasonable, however, for an employer to require an employee who is a tradesperson to purchase tools required to perform his or her duties (unless the employer is otherwise required to provide those tools).

75. A requirement to make Fighting Fund contributions is not analogous to a requirement to make donations to a charitable or religious organisation. Nor is it analogous to a requirement to purchase tools of trade. However, where a requirement is linked to the ability of an employee to perform his or her duties it may be open to construction as a 'reasonable' requirement. That analysis could not support the validity of a requirement to donate to the Fighting Fund. Officers of the SDA Queensland are democratically elected by members of the SDA Queensland who are entitled to vote. The resourcing of some

¹⁰¹ *Fair Work Act 2009* (Cth), s 327(b).

¹⁰² *Fair Work Act 2009* (Cth), s 326(1).

¹⁰³ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), para 1292.

candidates over others in future elections is not an outcome connected to the ability of a present employee to perform duties. Further, the requirement in effect diverts branch funds from salaries paid to employees straight to fundraising for some candidates. It would appear to be a mechanism that in substance diverts branch resources to union elections contrary to the intent of s 190 of the *Fair Work (Registered Organisations) Act 2009* (Cth).

Current regulatory scheme

76. Under the current legislative regime it is likely that the Fair Work Commission does not have jurisdiction to deal with the typical election fund arrangement, which is designed as *separate* from the union so that it exists in an unregulated gap. In these circumstances, the Fair Work Commission is not able to obtain the most basic information about typical election funds.

77. It is apparent from the SDA Queensland's response to the Fair Work Commission that it, and no doubt every other well-resourced union, is aware of the limitations of the Fair Work Commission under the *Fair Work (Registered Organisations) Act 2009* (Cth). The communications from the SDA Queensland ultimately declined to provide any information that would assist the Fair Work Commission with its inquiries. The inability of Rosa Perry and Alan Swetman to approach any regulatory body with power to investigate the affairs of the Fighting Fund is compelling evidence of the need for regulatory reform. But it would be premature to make specific recommendations at this stage.

PART 5: INCOME PROTECTION & REDUNDANCY FUNDS

CHAPTER 5.1

INTRODUCTION

1. This Part 5 deals with two case studies. Each is concerned with redundancy and income protection insurance schemes controlled by officials from one or more registered organisations and representatives from an employer association.
2. In each case the registered organisation receives substantial payments from the scheme to which it is related. For this reason, its officials aggressively promote the scheme. In particular, the organisation's standard form of enterprise bargaining agreement provides that employers and their employees will participate in the scheme. Given the financial benefits the registered organisation enjoys as a result of its association with the scheme, these provisions are almost always non-negotiable. This is so even if there are more competitive products available in the market. In this sense there is not much 'bargaining' in the enterprise bargaining process. Disclosure to union members of information pertaining to the relationship between the scheme and the registered organisation is very limited.

3. The first case study is in respect of B.E.R.T. Pty Ltd and various related entities based in Brisbane, Queensland. The CFMEU owns shares in the relevant companies, and officers from the Queensland Branch of its Construction and General Division sit on the board of each. Issues relating to these entities are addressed in Chapter 5.2.

4. The second case study concerns a scheme called Protect. Officials from the ETU in Victoria sit on the board of the trustee and related service companies. Issues relating to this scheme are canvassed in Chapter 5.3.

CHAPTER 5.2

BERT, BEWT, CIPQ AND QCTF

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A – SUMMARY

1. This chapter is concerned with a number of relevant entities associated with the Construction, Forestry, Mining and Energy Union (**CFMEU**) and its officers in Queensland. Those entities include:
 - (a) B.E.R.T. Pty Ltd (**BERT**). BERT is the trustee of two redundancy funds. Various employers engaged in the construction industry in Queensland have paid moneys into these funds to cover the cost of subsequent redundancy payouts to employees. The income generated from the investment of these funds does not go to the employees, but is instead held by BERT and spent at the direction of the BERT shareholders, including the CFMEU;
 - (b) B.E.W.T. Pty Ltd (**BEWT**). BEWT is the trustee of a fund that is badged and promoted as a welfare fund;
 - (c) Construction Income Protection Ltd (**CIPQ**). It operates a sick leave and income protection insurance business for employees in the Queensland construction industry;
 - (d) QCTF Pty Ltd (**QCTF**). It is a company that manages the distribution of training grants, the majority of which is paid to the CFMEU.
2. What follows is based substantially, though not completely, on the submissions of counsel assisting. Those submissions were in some

respects strongly criticised by the written submissions of BERT, BEWT, BERT Management Pty Ltd and CIPQ. They were signed by Bill Wallace, General Manager of BERT ('the BERT submissions'). That he was the signatory was perhaps surprising in view of the close scrutiny likely to be applied to an aspect of his conduct. The submissions of counsel assisting are also criticised by the CFMEU and by QCTF. The criticisms are dealt with at appropriate places below.

3. The CFMEU receives many millions of dollars as a result of arrangements with these entities.
4. A substantial amount of the money generated by BERT is used to promote and fund welfare and training schemes which the CFMEU uses for the purposes of attracting new members to the union.
5. There is no evidence that employees who participate in the BERT and BEWT funds are aware of the fact that these welfare and training schemes offered by the CFMEU are, in fact, paid for by the income earned on the redundancy moneys held in trust for the employees. There is no adequate disclosure to them.
6. The income generated by BERT is valuable to the CFMEU. Hence the CFMEU has a strong self-interest in promoting BERT. It does so by seeking to have employers sign enterprise bargaining agreements on terms which oblige the employers to pay into BERT.
7. The CFMEU's self-interest has sometimes led its officers to procure employers to sign enterprise agreements on terms which include a BERT clause by unacceptable means. Indeed those means have

extended to possible criminal conduct and extortion, as Chapter 8.7 concerning Universal Cranes illustrates.

8. There are other troubling features of the BERT scheme, including the way in which the trust funds have been governed. The particular areas of concern are set out below.

(a) BERT may have committed a serious breach of trust in August 2012 by paying moneys out of the BERT fund to provide financial support for workers engaged in unlawful strike action at the Queensland Children's Hospital site. This possible breach of trust occurred because Michael Ravbar and the other union appointed directors of BERT may have breached their duties to BERT. They may have done so by causing the payments to be made, knowing that the payments were not approved by the board of BERT, knowing that the BERT board was deadlocked on the issue, and knowing there were (to say the very least) serious doubts about whether BERT had power to make the payments. These payments also appear to fall outside those contemplated by s 58PB(4)(c) of the *Fringe Benefits Assessment Act 1986 (Cth)* (**FBT Act**), which is the scheme under which BERT must operate in order for fringe benefits tax exemptions to apply.

(b) Some employees who are BERT members are treated unfairly. They do not enjoy the full range of welfare benefits that are funded by the profits generated from the investment of their own redundancy monies. They are excluded from these benefits because they are not union members. The non-

union shareholder and directors want to remedy this obvious deficiency in the system, but Mr Ravbar and the other union appointed directors have blocked any change. They refuse to agree to any change because, under the existing system, the CFMEU uses these benefit programs as selling points for union membership. They are deliberately acting against the best interests of the members of the BERT fund generally in order to secure an advantage for the CFMEU.

- (c) Deadlocks on the BERT board may arise or have arisen. Examples include decisions on the strikers' claims, the unfair treatment of some BERT members, and proposed changes to governance structures. There is no governance mechanism to assist BERT to resolve these deadlocks. The appointment of an independent director is one obvious solution. The non-union directors of BERT have been advocating that change. The union appointed directors of BERT have blocked it. They fear a skilled and independent mind would not agree with their position on some issues.

- (d) The BERT board, due to the matters described above, is dysfunctional. It is also poorly composed. Mr Ravbar and the other union appointed directors appear to be either unaware of or unwilling to meet the obligations owed by directors of a trustee corporation responsible for tens of millions of dollars in trust for members. When there was a choice between ensuring that BERT acted appropriately as a trustee and advancing the interests of the CFMEU, they appear to have chosen the latter. Their behaviour suggests

that they may not be fit and proper persons to occupy positions on the BERT board.

- (e) It may be inferred from the limited disclosure applying to BERT that participating employees are kept in the dark about the fact that they do not earn any interest on the redundancy moneys held with BERT in trust for them. They are also kept in the dark about the use of those redundancy moneys to fund various welfare programs. They are the very same programs that are sold to them by the CFMEU as advantages they will enjoy if they join the union (and cannot enjoy otherwise). Further, the redundancy moneys held in trust for existing workers have been used to generate the tens of millions of dollars that have been paid to the CFMEU (via QCTF) for apprenticeship programs. However:

- (i) The CFMEU does not pay one cent of those general grant moneys towards the training of those existing members whose moneys generate the income to fund the grants, save in the case of a current member of the construction industry who decides, belatedly, to take up an apprenticeship. Moneys held in trust for existing employees are to be used to generate training grant funds paid to the union, it might be expected that those grants would at least be used by the CFMEU to meet the costs of training programs for those employees. This does not happen.

- (ii) Instead, the CFMEU uses these millions of dollars of grant moneys to train apprentices. Training is highly desirable. Training for apprentices is particularly desirable. But should existing employees have to pay for such training? And has sufficient disclosure been made? For example, should existing employees understand that the union uses their own redundancy moneys to generate income to train up persons who may become competitors for their jobs?

- (iii) Only a very small portion of the money granted to the CFMEU goes to meet the fees for actual training courses. The vast bulk of it is earmarked to meet estimated 'administrative' and other costs of the CFMEU itself.

- (iv) These grant moneys are generated from funds held in trust for existing employees. One advantage the union derives from applying grant moneys to the apprentice schemes (rather than to the ongoing training and welfare of the existing workers) is that the schemes are a means by which the CFMEU can increase its membership base. That is because entrants into the programs are expected to join the CFMEU.¹

¹ The CFMEU submissions in reply to other affected parties, 21/11/14, Part 5.2, paras 17-18, claim that the monies paid are not paid to be held by the CFMEU for its own benefit, but are paid for use on approved purposes. Counsel assisting was not suggesting otherwise.

- (f) The CFMEU receives payments from BERT, BEWT and CIPQ for performing work of a kind that it is already obliged to perform, and which it has traditionally performed, for members in return for their membership fees. The CFMEU is paid twice for the same service – once by members and then again by BERT, BEWT and CIPQ.
- (g) There exists an ongoing practice by some employers and workers under which the redundancy scheme is abused. This is evidenced by the fact that, at particular times of year, most notably Christmas and Easter, there are a significant number of employees who make a claim on their BERT account on the basis that they have been made redundant and who, shortly after, are recorded again as being back in the employ of the same employer.² This phenomenon was identified in the Cole Royal Commission’s report. It was referred to as the ‘Christmas Club’. Some effort has been made by BERT to reduce its occurrence. That effort has met with some success.³ But it continues. Since the issue has been identified by BERT management and real attempts have been made to address it, this particular subject is not developed further in this Chapter.
- (h) A question arises whether the relief from the Product Disclosure Statement (PDS) requirements of the

² Shenfield 4/8/14, T:117-118; Stanley 5/8/2014 T:169.

³ Shenfield 4/8/14 T:119.9-13; Stanley 5/8/2014 T:169.

Corporations Act 2001 (Cth) granted to employee redundancy funds by ASIC Class Order CO 02/314 remains appropriate.

B – THE BASIC STRUCTURES EXPLAINED

9. In the following portions of this Chapter the basic structures of each of BERT, BEWT, CIPQ and QCTF are explained.
10. Following this, there will be a more detailed analysis of each of the issues just identified.

BERT

11. BERT was incorporated in 1989.⁴
12. Broadly speaking, the shareholders of BERT represent members of each side of the employer and trade union camps operating in the construction industry in Queensland.
13. As a result of a series of trade union amalgamations, the identity of the trade union shareholders of BERT has changed over time. Until earlier this year, there were three union shareholders – the CFMEU, the Builders Labourers' Federation (**BLF**) and the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**). As a result of a merger between the BLF and the CFMEU in Queensland, there are now only two shareholders,

⁴ BERT Examination Book, Vol 1, p 1.

the CFMEU and CEPU. The former holds three shares and the latter one.⁵

14. On the employer side of the BERT equation sits the Queensland Major Contractors' Association. It holds four shares in BERT.⁶
15. Under BERT's constitution, the Queensland Major Contractors' Association is entitled to appoint four directors to the board, and the CFMEU and CEPU between them are entitled to appoint an additional four directors.⁷
16. BERT was established as a trustee company, and more particularly, to act as trustee in respect of an employee redundancy fund called the BERT Fund.
17. As a result of various changes made to the fringe benefits tax legislation, the shareholders of BERT thought it desirable to establish a second employee redundancy fund. That fund was established, and is called the BERT Fund No.2.
18. The BERT Fund continues to operate because it received a substantial volume of funds to hold on behalf of employees prior to the creation of the BERT Fund No.2. However as from the date of creation of the BERT Fund No.2, employer contributions towards employee redundancy accounts have been paid into the BERT Fund No.2 alone.

⁵ BERT Examination Book, Vol 1, p 8.

⁶ Constitution of B.E.R.T. Pty Limited ACN 010 917 281 (as amended on 20/07/2012), p 5.

⁷ Constitution of B.E.R.T. Pty Limited ACN 010 917 281 (as amended on 20/07/2012), p 12.

19. BERT Fund No.2 is an 'approved worker entitlement fund' under s 58PB(2)(a) of the FBT Act. The benefit which flows from that designation is that employers may make qualifying payments into BERT Fund No.2 under an industrial instrument, and the payments will be exempt from fringe benefits tax under s 58PA of the FBT Act.
20. BERT is the trustee of both the BERT Fund and the BERT Fund No.2. Each trust fund has its own trust deed.⁸ BERT provides a distinct set of financial statements for each trust.⁹
21. Apart from various clauses in the BERT Fund No.2 in order to deal with the Fringe Benefits Tax issues that justified its creation, the terms of each trust deed are substantially the same.
22. The redundancy trusts have operated in the following way:
 - (a) under the terms of various enterprise bargaining agreements between employers of construction workers in Queensland and the CFMEU or CEPU, employers are obliged to pay a dollar amount per employee into the BERT Fund No.2;¹⁰
 - (b) BERT is obliged to hold those monies on trust on the terms set out in the trust deed for the BERT Fund No.2;¹¹

⁸ BERT Examination Book, Vol 1, pp 34-119.

⁹ For example see BERT Examination Book, Vol 1, pp 140-163.

¹⁰ For a list of contribution rates see BERT Examination Book, Vol 1, p 26.

¹¹ BERT Examination Book, Vol 1, p 77.

- (c) under the terms of the trust deed, the principal sum that is paid into the fund for each employee is credited to a redundancy account in the name of that employee. With each payment into the fund for a particular employee, that employee's redundancy account balance increases;
- (d) BERT is permitted to make payments out of a member's redundancy account in one of a number of limited circumstances described in the trust deed. In short, payments out to members are permitted in the event of their becoming redundant or in one of a number of other specified circumstances;¹²
- (e) BERT has power to invest the members' money;
- (f) none of the income earned by BERT through that investment is credited to the members' redundancy accounts;
- (g) instead, the income of the fund falls to be distributed to BERT's shareholders – that is the CFMEU, CEPU and the Queensland Major Contractors' Association.

23. There is an agreement between the shareholders which regulates the way in which they will deal with the net income of BERT. This agreement is called the 'Sponsors' Deed'.

¹² BERT Examination Book, Vol 1, p 34 at 56 and p77 at 99.

24. The Sponsors' Deed¹³ (as amended over time) provides, among other things, that:
- (a) the shareholders, referred to in this deed and in other places as the 'Sponsors', acknowledge that distributions from the BERT Fund to the Sponsors are intended to be applied for the provision of welfare or related assistance for workers in the construction industry or their dependents, and for other initiatives agreed upon by the Sponsors for the benefit of the construction industry;
 - (b) distributions in favour of the Sponsors from the BERT Fund must be dealt with in a manner jointly agreed upon by the Queensland Major Contractors' Association and the unions;¹⁴
 - (c) to facilitate that process, the Queensland Major Contractors' Association and the unions must nominate three persons each to sit on an Advisory Committee, which must meet to advise and recommend to the Sponsors the use to which each of the distributions are to be applied;¹⁵
 - (d) until the Advisory Committee unanimously agrees on the recommendations to be made to the Sponsors, and all Sponsors accept those recommendations, the distributions from the BERT Fund in favour of the Sponsors must be

¹³ BERT Examination Book, Vol 1, p 120.

¹⁴ BERT Examination Book, Vol 1, p 120, at p 123, clause 2.1.

¹⁵ BERT Examination Book, Vol 1, p 120, at p 123, clauses 2.2 and 2.3.

deposited by way of non-interest bearing, repayable on call, loans to the BERT Fund.¹⁶

25. As trustee of the two trusts, BERT is responsible for the management and custodianship of significant sums of money. Although no longer receiving contributions from employers since the commencement of the BERT Fund No.2, the original BERT Fund still holds assets in excess of \$30 million as at 30 June 2013.¹⁷ In large measure, this sum represents amounts held in members' accounts that were paid into the BERT Fund prior to the establishment of the BERT Fund No.2. As for the BERT Fund No.2, as at 30 June 2013 it held over \$14 million in cash and had managed funds of some \$88 million.¹⁸
26. The BERT Fund No.2 made a net profit of \$6.372 million in the financial year ended 30 June 2013.¹⁹ That net profit, together with various forfeited benefits, was subsequently transferred out of the Bert Fund No.2 and paid into the Bert Fund. The sum so transferred was \$7.09 million.²⁰
27. That sum was then 'distributed' out of the BERT Fund to the Sponsors as contemplated by the BERT Fund No.2 Trust Deed²¹ and the Sponsors' Deed. It was then immediately lent back by the Sponsors to

¹⁶ BERT Examination Book, Vol 1, p 120, at p 123, clause 5.1.

¹⁷ BERT Examination Book, Vol 1, p 142.

¹⁸ BERT Examination Book, Vol 1, p 154.

¹⁹ BERT Examination Book, Vol 1, p 155. (Rounded to the nearest \$1,000).

²⁰ BERT Examination Book, Vol 1, p 159. (Rounded to the nearest \$10,000).

²¹ BERT Examination Book, Vol 1, p 77.

BERT as contemplated by clause 5 of the Sponsors' Deed.²² These transactions are effected by way of book entries in the accounts of the BERT Fund. No monies are actually transferred.

28. As a consequence of these distributions to Sponsors and loans back by the Sponsors to BERT over the years, as at 30 June 2013 BERT owed the Sponsors some \$26.7 million.²³
29. This amount of \$26.7 million is referred to in the accounts of the BERT Fund as the 'Welfare Fund'. This is somewhat confusing. In fact, there is no separate account or trust deed in respect of this Welfare Fund. It is merely a large pool of money held by BERT to the order of the Sponsors.
30. From time to time the Sponsors agree upon how portions of those monies are to be spent. When this occurs, the quantum of the BERT Fund's liability to the Sponsors in respect of the loan reduces correspondingly.
31. The position is that the profits of the BERT Fund ultimately sit in the BERT Fund, but outside the money held in each member's redundancy account, to be dealt with by BERT in accordance with the directions of the Sponsors. Many members of the BERT Fund will never come to enjoy the use of those funds, either directly or indirectly. This is so even though their own money is being used to generate this income.

²² BERT Examination Book, Vol 1, p 120 at 123.

²³ BERT Examination Book, Vol 1, p 142.

32. At present the operations of BERT Fund No.2 do not require the issue of a product disclosure statement to prospective members of the fund. This is because eligible employee redundancy funds have an exemption under ASIC Class Order CO 02/314.

BEWT

33. BEWT was incorporated in 2004 by the sponsors of BERT – that is the CFMEU, CEPU and the Queensland Major Contractors’ Association.²⁴ It is the trustee of the Building Employees Welfare Trust.
34. Under the terms of the enterprise bargaining agreements that exist between the CFMEU and some contractors operating in the construction industry in Queensland, contractors agree to pay an amount per employee into the BEWT Welfare Trust.²⁵
35. Under clause 4 of the Trust Deed for the BEWT Welfare Trust,²⁶ BEWT may apply all or any part of the contributions it receives to an entity that BEWT determines will benefit the welfare of the construction industry. An example is an entity which will use the funds to assist or advance education and training in the construction industry.
36. As with the BERT scheme, there exists a Sponsors’ Deed in respect of the BEWT Welfare Trust.²⁷ That Sponsors’ Deed contains provisions

²⁴ BERT Examination Book, Vol 1, pp 166-172.

²⁵ For a list of contribution rates see BERT Examination Book, Vol 1, p 26.

²⁶ BERT Examination Book, Vol 1, p 201 (at p 213, clause 4).

²⁷ BERT Examination Book, Vol 1, pp 244-252.

substantially the same as those that appear in the BERT Sponsors' Deed.

37. The BEWT Welfare Trust was, in fact, established for the purpose of generating funds in an amount that would approximately cover the annual tax liabilities of BERT.
38. The reasons underlying the establishment of BEWT were explained by its financial director (Mr Shenfield) and the solicitor who worked on the establishment of BEWT (Mr Peterson) in a voluntary recorded interview conducted on 30 July 2014.²⁸ Mr Peterson said:

[C]an I just explain then the corollary to that, and that is that you talked about BEWT. The reason why BEWT came into existence, because there was a very open regular discussion with the tax office through this process. When the original BERT fund operated, it operated on the basis that annually its income was applied to the sponsors to the fund, which were tax exempt, and the sponsors to the fund had all signed what was called a sponsor's deed, which meant they immediately returned all the money that they were receiving back to the deed on the basis that it would then get applied for what were industry purposes, or for purposes for the benefit of the industry, and that meant that 100 per cent of the income of the fund was available each year to do that.

The requirement that was imposed upon BERT No. 2 was that it had to - it couldn't pay its income in that manner. It had to effectively achieve compliance with the requirements of 58PB. It had to accumulate its income each year and, on the tax office point of view, that's a very good outcome, because it's a trust that gets then taxed at effectively the top possible rate of tax. It gets subjected to tax on any assessable income at the highest marginal rate of tax. So it was pointed out to the tax office that in one sense by helping industry out by allowing a mechanism which would allow the funds a viable operation, it nonetheless caused a significant tax leakage, because it would now (indistinct) notionally of the income that was derived would be attributed to income tax.

So a separate fund was established, which was designed, in the beginning at least, to make up the shortfall to say the contributions are to be made to

²⁸ Transcript of Private Interview, John Shenfield, 30/7/14, T:6.4-7.7.

this so that the amount available for application - the benefit of the industry - would be - that which would have been lost to the taxation was now being made up because contributions were being made to what was called the BEWT fund and there were tax rulings that were obtained at the time, and I don't know whether they've ever been refreshed again, but there were tax rulings from the ATO to confirm that the contributions that were made to either or both of these funds would not incur any fringe benefits tax liability to employers.

So employers would know that they could make their contributions to these funds and know that by doing so they would not be themselves exposed to tax and the BERT fund No. 2 knew that it would be exposed to tax on its income and it would know that the income from the BEWT fund would not be subject to tax if it made the full distributions in the year that it was intended to make.

Mr Peterson was then asked:²⁹

So were the amounts to go to the BEWT fund calculated to effectively either equal or approximate the amount of income tax that BERT fund No. 2 had to pay?

Mr Peterson responded:³⁰

I think the short answer to that is more or less. I wasn't involved in the calculation of exactly what the figure was. It was certainly -

The intention was to do that. By what accounting (indistinct) or - I don't know the formula that somebody used to come up with that figure, but I suspect it was - I know that was the intention.

39. The whole of the contributions into the BEWT Welfare Fund, less administrative expenses incurred by it, are distributed by BEWT to BERT. The amount distributed for the financial year ended 30 June 2013 was \$3.664 million.³¹ BERT's recorded tax liabilities for that

²⁹ Transcript of Interview, John Shenfield, 30/7/14, T:7.7-11.

³⁰ Transcript of Interview, John Shenfield, 30/7/14, T:7.13-22.

³¹ BERT Examination Book, Vol 1, p 259.

year (which were to be paid using these funds from BEWT) were of the order of \$2.7 million.³²

Construction Income Protection Ltd

40. CIPQ is a corporation that manages a portable sick leave and income protection insurance scheme. Its shareholders are the CFMEU, CEPU and the Master Builders Association.³³
41. Many enterprise bargaining agreements entered into by the CFMEU with employers in the construction industry in Queensland oblige the employers to provide sick leave and income protection insurance for their employees through CIPQ and to pay CIPQ the necessary premiums.
42. In the financial year ended 30 June 2013, CIPQ received employer contributions totaling \$13 million and paid insurance premium expenses totaling \$11.5 million, leaving it with a gross profit of approximately \$1.5 million.³⁴
43. CIPQ's accounts then record a total expenditure of some \$1.22 million dollars, leaving it with a profit before tax of approximately \$352,000, and a net profit after tax of about \$244,000.³⁵

³² BERT Examination Book, Vol 1, p 143 and 155.

³³ BERT Examination Book, Vol 1, p 281 at 290.

³⁴ BERT Examination Book, Vol 3, p 1350.

³⁵ BERT Examination Book, Vol 3, p 1350.

QCTF Pty Ltd

44. QCTF was incorporated in 1996.³⁶ It carries on business using the trading name ‘the BERT Training Fund’.

45. Its shareholders are the CFMEU, CEPU and the Queensland Major Contractors’ Association (that is the Sponsors of BERT and shareholders of BEWT).³⁷

46. The objects of the QCTF as found in its trust deed are to:

generally foster promote encourage advance and assist in the acquisition and enhancement of the knowledge, skills, training and education (both theoretical and practical) of those persons employed in or otherwise providing services in and to the Construction Industry within the State of Queensland and also to foster, promote, encourage, advance, assist organisations involved in such training and educational activities.³⁸

47. The QCTF is entirely dependent upon financial grants for its survival. In very large measure, its funds come from grants made to it by BERT. Thus the monies that the QCTF receives for the BERT Training Fund come predominantly from an entity which has precisely the same set of shareholders as the QCTF.

48. In the financial year ended 30 June 2013, BERT paid \$3.842 million to the QCTF for the BERT Training Fund.³⁹

³⁶ BERT Examination Book, Vol 1, p 265.

³⁷ BERT Examination Book, Vol 1, pp 271-272.

³⁸ BERT Examination Book, Vol 1, p 311 at 315, clause 3.3.

³⁹ BERT Examination Book, Vol 1, p 387.

49. The vast majority of that sum was, as is explained later, paid out to the CFMEU, BLF and CEPU (that is the union shareholders of BERT and the QCTF) for training programs they wished to pursue. Most of the money is not paid out for the training of existing BERT or union members.

C – PARTICULAR ISSUES OF CONCERN: PAYMENTS MADE TO STRIKING WORKERS

50. Earlier in this Interim Report reference was made to the fact that the trust deed for the BERT Fund No.2 contains provisions limiting the trustee's power to pay sums out of a member's account to the member.
51. In August 2012 there was a dispute between the Queensland Major Contractors' Association and the union shareholders of BERT as to whether the clause permitted payments to be made out of the BERT Fund No.2 in favour of employees who were participating in strike action at the Queensland Children's Hospital in Brisbane. Those employees were not being paid, because it is illegal for an employer to pay a worker undertaking industrial action.⁴⁰ Some employees were seeking to have monies paid out of their BERT members' account on the grounds of 'financial hardship'.
52. The BERT board was deadlocked on the question, and the BERT management structure did not contain any mechanism for resolution of the problem. As a result, at least Mr Ravbar and perhaps other union

⁴⁰ See s 474 of the *Fair Work Act 2009* (Cth).

directors of BERT took matters into their own hands and procured the General Manager of BERT to proceed to make the payments.

The trust deed as it then stood

53. At the relevant time clause 29 of the BERT Fund No.2 Trust Deed provided:⁴¹

So long as to do so is not inconsistent with the FBT Requirements, a Benefit is payable upon a claim being made by the Member if the Member has otherwise satisfied the requirements of the industrial instrument having application to the member in respect of his or her entitlement to claim that Benefit and:

- (a) retires from the work force on or after obtaining the age of 55 years;
- (b) suffers financial hardship and provides to the Trustee documentary evidence satisfactory to it that **the member has been unemployed for at least four weeks**;
- (c) dies;
- (d) becomes Totally Permanently Disabled;
- (e) is made Redundant and the Member makes a claim within 56 days of termination of employment;
- (f) permanently leaves the construction industry; or
- (g) permanently leaves Australia. (emphasis added)

⁴¹ Supplemental Deed – BERT fund No 2 signed November 2004, 31/10/14, p 4; Redundancy Fund Trust Deed dated 22 December 2003, 31/10/14, p 23.

54. All members of the BERT Board in and after August 2012 knew the precise terms of this clause.

55. The provisions of the FBT Act are also relevant. That is because payments under clause 29 may not be made where to do so would be inconsistent with, inter alia, s 58PB. The FBT Act sets out a regime by which a fund is entitled to be endorsed by the Commissioner of Taxation as an 'approved worker entitlement fund'. The requirements of eligibility imposed by the FBT Act include that:

- (a) under the fund's constitutive documents, payments from contributions to the fund are to be made only for the purposes listed in s 58PB(4)(c) of the FBT Act. These purposes are:
 - (i) to pay worker entitlements to persons in respect of whom contributions are made, or to pay death benefits to dependants (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) or legal personal representatives (within the meaning of that Act) of those persons;
 - (ii) to make investments to generate income from the assets of the fund;
 - (iii) to reimburse contributors who have paid entitlements directly to persons in respect of whom contributions are made;
 - (iv) to return contributions to contributors;

- (v) to pay, for the benefit of a person in respect of whom contributions are made, an employment termination payment (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) into a complying superannuation fund (within the meaning of section 45 of the *Superannuation Industry (Supervision) Act 1993* (Cth)), a complying approved deposit fund (within the meaning of section 47 of the *Superannuation Industry (Supervision) Act 1993* (Cth)) or a retirement savings account (within the meaning of the *Retirement Savings Accounts Act 1997* (Cth));
- (vi) to transfer contributions to another approved worker entitlement fund;
- (vii) to pay the reasonable administrative expenses of the fund;
- (viii) to pay amounts to a contributor's external administrator that would otherwise be payable as mentioned in subparagraph (iii) or (iv) to the contributor; and
- (ix) to pay interest on, or to repay, money lent to the fund;

- (b) under the fund's constitutive documents, payments from income of the fund are to be made only for the purposes listed in s 58PB(4)(d) of the FBT Act. These purposes are:
 - (i) a purpose mentioned in s 58PB(4)(c)(ii) to (ix) set out above;
 - (ii) to make payments to contributors to the fund; and
 - (iii) to make payments to other persons where the payment is specified in subsection (5).

Rumours of the strikers' claims

56. In late August 2012, Anthony Hackett, President of the Queensland Major Contractors' Association, received an email from Mr Steve Abson. Mr Abson was one of the BERT directors that had been appointed to that position by the Queensland Major Contractors' Association.

57. The email from Mr Abson was principally directed to Bill Wallace, the General Manager of BERT. In that email Mr Abson said that it had come to his attention that some 19 applications for hardship payments had been made by workers at the Queensland Children's Hospital project who were involved in industrial disputation with Abigroup. Mr Abson confirmed Mr Wallace's prior advice that before any such applications were considered, he would obtain independent legal advice on the interpretation of the BERT Trust Deed in considering such applications. Mr Abson stated that the advice should also

consider the ‘downstream legal and reputational consequences’ of any decisions made in relation to the claims.⁴²

58. When Mr Hackett received this email he was extremely concerned. He considered it raised significant reputational issues for BERT. As he saw it, the workers who were making the claims were not unemployed. They were simply on strike. It did not make sense to him that they should ‘get paid for something they’d elected to do’.⁴³ Not only was he concerned that any payment might be potentially illegal given that the prohibition on payments to workers engaged in industrial action, but he also thought it was immoral.⁴⁴
59. John Crittall, the Director of Construction and Policy of the Master Builders’ Association in Queensland, also came to hear that striking workers had made claims on the BERT Fund. The report he received was that CFMEU delegates at the hospital site were informing the workforce that, even though they were on strike, they would soon be able to access money out of the BERT Fund.⁴⁵
60. Mr Crittall then rang Mr Wallace and said that he had heard this news. He said to Mr Wallace that it would be a horrendous outcome for striking workers to receive BERT pay. He said ‘we will never get the blokes back if they’re getting paid’.⁴⁶ He added that the BERT Fund was a redundancy fund and the workers were not redundant, but

⁴² BERT Examination Book, Vol 5, p 1769.

⁴³ Anthony James Hackett, 5/08/14, T:132.6-7.

⁴⁴ Anthony James Hackett, 5/8/14, T:132.15-16.

⁴⁵ John McClintock Crittall, 5/8/14, T:175.45-176.7.

⁴⁶ John McClintock Crittall, 5/8/14, T:176.19-20.

instead were on strike, and there was a huge difference between redundancy and strike. Mr Crittall told Mr Wallace he could not pay striking workers. Mr Wallace said he would get legal advice and ‘do whatever I have to do’.⁴⁷

Legal advice received by BERT

61. The legal advice that Mr Wallace had indicated he would obtain for BERT was furnished on 27 August 2013 by Jim Peterson, a partner at McCullough Robertson, solicitors. The advice was set out in an email of that date addressed to Mr Wallace.⁴⁸
62. Mr Peterson advised that the question of whether the striking workers could be paid on the grounds of financial hardship turned on the interpretation of clause 29(b), and in particular, whether the worker could be said to be ‘unemployed’. Mr Peterson observed that the term ‘unemployed’ was not defined in the deed, and after some analysis, expressed a view to the effect that BERT could **not** justify making the payments under clause 29(b) if the member was in an employer-employee relationship.
63. The conclusion arrived at by Mr Peterson was, with respect, incontestably correct. Whatever be the breadth of the term ‘unemployed’ in some contexts, in the context of the trust deed it could not sensibly be construed to extend to a person who was, in fact, employed by an employer but unlawfully refusing to attend work when required.

⁴⁷ John McClintock Crittall, 5/8/14, T:176.29-30.

⁴⁸ BERT Examination Book, Vol 5, p 1804.

64. The position therefore, was that BERT's own lawyers, following their retainer by BERT's own General Manager, had advised BERT that the payments could not be made.

Board meeting on 30 August 2012: deadlock

65. Following receipt of the legal advice, and on 28 August 2012, Mr Wallace sent an email with a view to calling an extraordinary meeting of the board of directors of BERT to discuss the strikers' claims.⁴⁹

66. One Queensland Major Contractors' Association director who was unable to attend the meeting on such short notice was Hugh Morrison. He sent an email on the evening of 28 August 2013 to Mr Wallace and others stating that unless the company had received advice to the contrary, his decision remained that no payment would be made, and he saw no point in a special meeting to discuss the matter given the information that was already to hand.⁵⁰

67. In any event, a meeting of some of the directors of the BERT Board proceeded at 7.35am on 30 August 2012. Mr Wallace was in attendance as General Manager. Also in attendance were Greg Simcoe (BLF appointed director), Peter Fitzgerald (Queensland Major Contractors' Association), Peter Close (CFMEU), Mr Ravbar (CFMEU), Brad O'Carroll (CEPU) and Chris Stanley (Contractors' Association).

⁴⁹ BERT Examination Book, Vol 5, p 1771.

⁵⁰ BERT Examination Book, Vol 5, p 1770.

68. The minutes of that meeting⁵¹ record that the views of Mr Morrison set out in his email of 28 August were confirmed and noted. There then followed some debate. No agreement being reached as to how the strikers' claim should be handled. Reference was made to the McCullough Robertson advice that BERT had received. The union appointed directors of BERT said that they had received different legal advice.
69. During the course of the meeting, and at about 7.55am, a group of 17 workers in their work clothes walked into the board room and started to ask why their hardship payments were not being processed. As Mr Stanley described in his evidence, this was a 'complete interruption of the conduct of the board and I took offence at ... what appeared to be an attempt to exert undue influence on the decision making of the board'.⁵²
70. Mr Ravbar denied instigating this incident.⁵³ Indeed Mr Wallace gave evidence that Mr Ravbar endeavoured to make the 17 workers depart.⁵⁴ But it is reasonable to infer that one or more of the union directors other than Mr Ravbar, or a CFMEU delegate whom Mr Wallace had told of the meeting, Mr Fluro,⁵⁵ had informed the strikers of the precise time of the BERT board meeting, and had orchestrated their attendance at that particular time that morning.

⁵¹ BERT Examination Book, Vol 5, p 1773.

⁵² Christopher Robert Stanley, 5/8/14, T:161.20-23.

⁵³ Michael John Ravbar, 6/8/14, T:361.6-14.

⁵⁴ Bill Wallace, 22/9/14, T:22.31-36.

⁵⁵ William James Wallace, 22/9/14, T:22.46-23.4.

71. Mr Stanley considered that the conduct of the meeting had been compromised and, as a result, he and Mr Fitzgerald left the meeting. As the minutes of that meeting record, the departure of the employer directors meant there was no quorum. The meeting concluded without any resolution as to how the strikers' claims would be dealt with.

Numerous discussions between Mr Ravbar and Mr Wallace after the board meeting

72. Mr Ravbar spoke to Mr Wallace after the board meeting. He had made it clear on 'numerous' occasions during the course of 30 August 2012 that he thought the strikers should get their money.⁵⁶

'Advice' obtained by the CFMEU

73. As noted above, the minutes of the board meeting of 30 August 2012 recorded the union appointed directors as saying they had received their own contrary legal advice.

74. Although no record of that advice was tabled at that meeting, on 30 August 2012 Hall Payne, solicitors, sent a letter of advice to Mr Ravbar.

75. In that letter Hall Payne made a number of observations in relation to clause 29 of the trust deed. Some observations were made about certain matters being 'arguable', and the point was made that one section of the *Social Security Act* 1991 (Cth) supported an argument that workers were 'unemployed' even if they were, in fact, employed

⁵⁶ Michael John Ravbar, 6/08/14, T:364.14-24.

and on strike. But at no point in that advice did Hall Payne express the view that, on the proper construction of clause 29 of the deed, it was appropriate for BERT to make the payments. With respect, the letter had the air of advice given by solicitors to a long-standing client who was in an untenable position, as the solicitors knew in their heart of hearts, but were seeking to let down gently. The CFMEU submitted that Mr Ravbar 'held a view based on legal advice from Hall Payne that the payments should be made'.⁵⁷ If he held that view, it cannot have been based on the Hall Payne letter. It gave no advice to that effect.

76. Another difficulty with the letter was that Hall Payne had not even been provided with a copy of the deed they were construing. Hall Payne noted this in their letter. They put an express caveat to their advice with a statement that it was possible that there were other terms of the deed that might have an impact on the analysis.

77. The position, therefore, was that while BERT itself had received direct advice from its own lawyers that the payments could not be made, the CFMEU had only obtained a qualified advice from Hall Payne in which supposedly arguable points against the McCullough Robertson opinion had been noted.

Mr Wallace reports he is going to make the payments

78. Later that same day Mr Wallace spoke with Mr Stanley on the telephone and said he had decided to pay the claims and that he was

⁵⁷ CFMEU submissions in reply, 21/11/14, Part 5.2, para 9.

going to do so on the basis of ‘past practice’. Mr Wallace informed Mr Stanley that he would be advising all directors of this in an email.

79. Mr Stanley then sent Mr Morrison an email (at 2.43pm on 30 August 2012) to inform him of what he had been told.⁵⁸

80. Shortly afterwards, and at 2.50pm on 30 August 2012, Mr Wallace sent the following email to the BERT directors:⁵⁹

At the request of the Chairman and the union directors I issue the following. As a result of this morning’s Board meeting that was unable to resolve the matter, I inform all directors that the legal opinion has not been accepted by the Board and I attach the union directors[’] contrary opinion which has also not been accepted by the Board. Accordingly we have no alternative other than to observe the custom and practice that has been followed by the fund for many years and process the claims. I await the boards [sic] advice in regard to future resolution of hardship payments.

Mr Wallace gives Mr Hackett an assurance

81. At some point around this time Mr Hackett responded by telephoning Mr Wallace and debating the legality and propriety of making the payments. At the end of that discussion, Mr Wallace agreed that he would get further legal advice, and that he would not make the payments without giving further notice.⁶⁰ There is some disagreement between Mr Hackett and Mr Wallace as to the precise timing of this call – Mr Wallace thinks that the call took place before he sent his email at 2.50pm.⁶¹

⁵⁸ BERT Examination Book, Vol 5, p 1776.

⁵⁹ BERT Examination Book, Vol 5, p 1778.

⁶⁰ Anthony James Hackett, 5/8/14, T:136.10-17.

⁶¹ Wallace, 22/9/14, T:29.

Mr Wallace makes the payments

82. Mr Wallace proceeded to process the claims and arrange for them to be paid during the course of the afternoon of 30 August 2012. He did this notwithstanding the fact that he knew the BERT board was deadlocked on the issue. He did it notwithstanding that there had been no resolution passed to pay any of the strikers' claims. He did it notwithstanding the fact that he knew that BERT's own lawyers had advised that it did not have power to make the payments. He did it notwithstanding his promise to Mr Hackett not to make the payments without giving further notice.
83. Some 20 claims by striking workers, almost all of whom were members of the CFMEU, were paid out by BERT on 30 August 2012. A total sum in excess of \$60,000 was paid out to workers who were undertaking illegal strike action.⁶² In the process they were delaying the completion of a facility for the provision of health services to sick children. The strike had the potential to cause millions of dollars of losses.⁶³ Given these circumstances it is unclear why these strikers were thought appropriate candidates for hardship payments out of BERT, even if the trustee had discretion to make the payments (which it did not).
84. Mr Wallace can only have taken the extraordinary step of processing the payments because he had been placed under enormous pressure from Mr Ravbar and perhaps the other union directors. He was

⁶² BERT Examination Book, Vol 4, pp 1425-1768.

⁶³ The strike lasted approximately nine weeks – John McClintock Crittall, 5/8/14, T:175.42-43.

reluctant to accept this proposition when examined. However his behaviour is not capable of any other explanation in light of the circumstances which were known to him and others at the time. That behaviour involved ignoring, or failing to find out about, other possibilities – a consideration of the Hall Payne advice by the company’s lawyers; retention of another firm; retention of appropriate counsel; or seeking judicial advice. It is unsatisfactory that although by 2012 Mr Wallace had been the General Manager of a large trust company for seven years, he was ignorant of the fact that it was possible for the trustee company to get advice from the Supreme Court of Queensland as to which course it should take, pursuant to s 96 of the *Trusts Act 1973 (Qld)*. He apparently continues to remain unaware of that facility, with its characteristics of relative cheapness and speed, coupled with complete protection for a trustee who follows the judicial advice.

85. The explanation for his decision that he proffered at the time was ‘custom and practice’. He proffered it again in evidence. Unsurprisingly, it emerged from his examination that there was no custom and practice in relation to making payments in circumstances where the board was deadlocked, the employer representative sponsors were in disagreement with the union representatives and the company’s lawyers had positively advised that the payments were not authorised under the trust deed. The so-called ‘custom and practice’ comprised only two isolated instances, one involving a payment to striking workers long ago, and the other concerning a payment to some flood victims.⁶⁴ Neither of those two cases had the features that confronted

⁶⁴ Wallace, 22/9/14, T:32.11-26.

Mr Wallace on 30 August 2012. The only possible precedent was the first. But a single instance cannot amount to a 'custom' or a 'practice'. The payment to the striking workers had not been made in defiance of the trustee's legal advice.⁶⁵

86. On 30 August 2012 Mr Wallace had to deal with a number of union appointed directors, including in particular, Mr Ravbar, who 'communicated the strength of his views' to the effect that the strikers should be paid.⁶⁶ As the email itself records, and as Mr Ravbar admitted, Mr Ravbar and the other union directors had asked Mr Wallace to send it.⁶⁷

87. It was Mr Ravbar and the other union appointed directors who procured, induced and caused Mr Wallace to act as he did.

Knowledge of Mr Ravbar and others at this time

88. At the time of procuring, inducing and causing Mr Wallace to make the payments on 30 August 2012, Mr Ravbar and the other union appointed directors, along with Mr Wallace, knew each of the following things:

- (a) the BERT board had not resolved to pay the claims;
- (b) the BERT directors appointed by the Queensland Major Contractors' Association had expressed the strong view that

⁶⁵ Wallace, 22/09/14, T:35.34-38.

⁶⁶ Michael Ravbar, 7/8/14, T:445.25-27.

⁶⁷ Michael Ravbar, 7/8/14, T:445.46-446.6.

the claims not be paid, and that as a result, the board was deadlocked;⁶⁸

- (c) BERT had sought legal advice as to its powers, and the advice provided to BERT by its own lawyers was that it could not make the payments;
- (d) the advice the CFMEU had sought and obtained did not contain a clear statement of opinion that BERT had power to make the payments, did no more than identify a series of arguable propositions, and was, in any event, qualified in circumstances where the author of the advice had not even seen the trust deed;
- (e) there was, therefore, a serious question, yet to be resolved, as to whether BERT had the power to make the payments to the strikers, and whether the making of such payments would constitute a breach of trust by BERT;
- (f) in these circumstances, it was wrong for Mr Wallace to process the payments, and he should have been discouraged from doing so.

89. Notwithstanding their knowledge of each of these matters, at least Mr Ravbar and perhaps the other union directors took positive action calculated to encourage Mr Wallace to make the payments, and Mr Wallace proceeded to make those payments.

⁶⁸ Michael Ravbar, 7/8/14, T:447.4-19.

90. During his examination Mr Ravbar said that the strikers ‘shouldn’t be penalised for a dispute that’s not theirs and it’s their money’.⁶⁹ He said that it was the workers’ money and ‘they’re entitled to get it’.
91. When it was then put to him that the money was in fact held by the trustee of a trust on the terms of the trust, Mr Ravbar had this to say: ‘You can play the corporate angle but at the end of the day it’s their money. It’s a workers’ entitlement fund for redundancy purposes’.⁷⁰
92. It is clear that Mr Ravbar’s position, maintained in the witness box, was that he was comfortable with the payments being made, regardless of whether or not the trust deed permitted it. This is but one of many examples of a very common phenomenon: a view by CFMEU officials that their conduct is above the law and that the end justifies the means.
93. At one point he said in the witness box that he was happy for Mr Wallace to make the payments on the basis that to do so would be consistent with ‘custom and practice’. However, when Mr Ravbar was asked about this custom and practice, and whether it involved making payments out on hardship grounds to workers who were on strike, or on other bases, Mr Ravbar said ‘I don’t administer the fund ... I wouldn’t have a clue’.⁷¹
94. In these circumstances Mr Ravbar, cannot have had, and did not have, any genuinely held belief that there existed a custom and practice that permitted Mr Wallace to make the payments. Nor, indeed, was there

⁶⁹ Michael Ravbar, 6/8/14, T:364.20-21.

⁷⁰ Michael Ravbar, 6/8/14, T:364.28-30.

⁷¹ Michael Ravbar, 6/8/14, T:365.22-25.

any relevant custom or practice. Even if there had been, it could not prevail over clause 29(1)(b) of the trust deed.

Mr Hackett writes to Mr Wallace seeking undertakings

95. Following on from his conversation with Mr Wallace of earlier that day, and in ignorance of the fact that Mr Wallace had actually proceeded to make the payments to the strikers', Mr Hackett sent to Mr Wallace a letter dated 30 August 2012.⁷²
96. In that letter Mr Hackett expressed grave concerns over Mr Wallace's decision to consider making the hardship payments to strikers. He noted, correctly, that any hardship the applicants were experiencing was as a result of their decision to withdraw their labour rather than work as they could and should. Mr Hackett instructed Mr Wallace to defer any decision until such time as the board of BERT was satisfied that the Fund, the directors and Mr Wallace had complied with the law and their duties and obligations.
97. In this letter Mr Hackett confirmed what Mr Wallace had indicated in their prior telephone call, namely that Mr Wallace had agreed to reconsider the matter. Mr Hackett, on behalf of the Queensland Major Contractors' Association, sought an undertaking from Mr Wallace by 10am on 31 August 2012 that (a) he not take any step to implement payment before such time as the matter could be formally addressed at a BERT board meeting and subject to appropriate briefing papers being first provided as described above, and (b) in any event, BERT not

⁷² Hackett MFI-1, Letter to William Wallace from Anthony Hackett dated 30 August 2012.

make any hardship payment without first giving the Queensland Major Contractors' Association 7 days' notice in writing.

Mr Hackett learns the payments have been made

98. On the morning of 31 August 2012 Mr Wallace sent Mr Hackett an email in response to his letter of 30 August 2012 seeking the undertakings, advising that 'the claims have been processed via the bank and cannot be stopped'.⁷³
99. Mr Hackett responded to that email later on the morning of 31 August 2012.⁷⁴ In that email Mr Hackett referred to the conversation of the previous day in which Mr Wallace had said he would reconsider the matter. Mr Hackett expressed his surprise in the email that Mr Wallace had nevertheless made the payments. Mr Hackett said he was very disappointed in what had occurred.
100. In the same email Mr Hackett went on to indicate that, in his view, it was now all the more important that Mr Wallace provide the undertakings that had been sought in the letter of 30 August 2012 in respect of any further claims for payment.
101. The result of the actions of Mr Wallace and the union directors of BERT was to cause the Queensland Major Contractors' Association to experience an increase in lack of trust towards the Fund, and for members of the Queensland Major Contractors' Association to fear for

⁷³ Hackett MFI-1, Email to Anthony Hackett from William Wallace dated 31 August 2012.

⁷⁴ BERT Examination Book, Vol 5, p 1780.

the future income of the funds.⁷⁵ As Mr Hackett put it, if employers could not trust the management of the BERT business, why would they put their funds into BERT?⁷⁶

Variation to deed and policy

102. Following this incident, disputes continued at board level about the appropriateness of making payments of the kind that had been made by Mr Wallace. A working party (comprising a number of the board members) was formed to consider and report to the board on the matter.
103. On 13 November 2012, the members of the working party met and considered a suggestion that the fund require any applicant seeking a financial hardship payment to provide evidence from their employer that the applicant was employed and was not involved in industrial action.⁷⁷
104. The union appointed directors would not agree to this proposal. The issue then remained unresolved throughout 2012 and almost all of 2013.⁷⁸ Eventually, by December 2013, a ‘solution’ (of sorts) was agreed upon.
105. That solution came in two parts.

⁷⁵ Anthony James Hackett, 5/8/14, T:143. 12-26.

⁷⁶ Anthony James Hackett, 5/8/14, T:143.30-34.

⁷⁷ BERT Examination Book, Vol 5, p 1822.

⁷⁸ See for example BERT Examination Book, Vol 5, p 1854.

106. First, the BERT submissions advise that the following changes have been approved by the board of BERT and are acceptable to the Commissioner of Taxation, but have not yet been accepted by the Sponsors.⁷⁹ Clause 29 (b) of the trust deed was amended. The qualifying words ‘the member has been unemployed for at least four weeks’ were deleted, with the result that the sub-clause provided for financial hardship payments to be made where the trustee had received ‘evidence satisfactory to it’.⁸⁰

107. Secondly, the fund’s hardship payment claim form was amended to provide, relevantly:⁸¹

Payment will be made where a member of the trust is experiencing financial hardship, provided that the financial hardship has not been directly caused by actions taken by the member.

108. It may be inferred from the deplorably vague language in which these changes have been expressed that they reflect, in effect, a capitulation by the directors of BERT who had been appointed by the Queensland Major Contractors Association. The most likely explanation for such a capitulation is that these directors appreciated that the interminable stalemate was unacceptable (leaving as it did the trust in a state of constant indecision), and that it was better for there to be some resolution of the matter, even if it was to be on terms they did not desire.

⁷⁹ BERT submissions, 13/11/14, para 34.

⁸⁰ BERT Examination Book, Vol 1, p 99.

⁸¹ BERT Examination Book, Vol 5, p 1891.

109. There are a number of serious problems with the 'solution' described above.
110. One problem is that the new pre-condition set out in the hardship claim form (that is, that the hardship is not directly caused by the members action) does not find expression in the trust deed. A true precondition to eligibility for payment would have to be set out in the deed.
111. An associated problem is that, in the absence of any meaningful qualifying criteria in clause 29 (b) of the trust deed, the financial hardship ground is now expressed in terms which introduce substantial uncertainty. Payments may be made where the member 'provides to the trust deed documentary evidence satisfactory to it'. What does this actually mean? The provision has become a vehicle for future debate, stalemate, and ongoing uncertainty.
112. The same is true of the 'qualifying criteria' set out in the amended hardship payment claim form. The question of whether a particular financial hardship has been 'directly caused by actions taken by the member' is one that, in many cases, could be debated for years.
113. If the objective of this 'solution' was to provide for each side (that is, the employers and unions respectively) room for debate on each application, the parties will need to be mindful of an important matter that was overlooked by them in 2012. That matter is the fact that clause 29 effectively provides that no payment may be made to a member if to do so would be inconsistent with the FBT Requirements. As earlier submitted, an ex gratia payment to a striking worker would not be consistent to those requirements.

Conclusions

114. BERT may have breached the terms of the trust deed by paying out monies to the striking workers on or about 30 August 2012 in two respects.
115. First, a hardship payment could not be made to a person who was, in fact, employed by an employer but unlawfully refusing to attend work when required. Such a payment fell outside the scope of clause 29(c) of the trust deed.
116. Secondly, no payment could be made under clause 29 where to do so was inconsistent with the requirements of the FBT Act – and more particularly, where a payment was made for a purpose other than that set out in s 58PB of that Act. BERT has submitted⁸² that hardship payments which comply with clause 29(b) of the trust deed fall within the purpose set out in s 58PB(4)(c)(i) of the FBT Act on the basis that they are payments of ‘worker entitlements to persons in respect of whom contributions are made’. That may be true, but the term ‘worker entitlements’ cannot include a payment which the worker has no entitlement to receive.
117. At least Mr Ravbar and perhaps the other union appointed directors may have procured and induced BERT to commit this breach of trust. He and perhaps they may have encouraged and pressured Mr Wallace to make the payments in the face of legal advice from the company’s own lawyers and a deadlocked board. Mr Wallace would not have made the payments if all directors, acting as they should have, directed

⁸² Letter from BERT to Commission, 14/8/14; BERT submissions 13/11/14, para 38.

him to withhold payments until such time as the propriety of the proposed payments had been determined. Mr Wallace said that he was ‘under pressure from the board but they did not pressure me into making those payments, either side’.⁸³ Of course the employer’s side did not pressure him. Why would he, an experienced trust manager, have made the payments in breach of trust and in breach of his duty to his employer unless he had been subjected to pressure? Both Mr Wallace’s performance over those days and his evidence about that performance were deeply unsatisfactory.

118. Mr Ravbar and perhaps the other union appointed directors to the BERT board may have acted in breach of various duties owed to BERT in their capacities as directors of the company.
119. First, they may have breached their fiduciary and statutory duties (s 181 of the *Corporations Act 2001* (Cth)) to exercise their powers and discharge the duties in good faith in the best interests of BERT and for a proper purpose.
120. On the present state of the authorities there is some debate as to whether directors can breach the duty of good faith under s 181 if the law objectively considers that what the directors did was improper, even if the directors subjectively believed they were acting in the company’s best interests, or whether instead the section will only be contravened where a director deliberately engages in conduct, knowing that it is not in the company’s best interests or for a proper purpose.⁸⁴

⁸³ William James Wallace, 22/9/14, T:37.19-22.

⁸⁴ See Chapter 2.1, para 34 of this Interim Report.

121. For the purposes of this case study the outcome of that debate is immaterial. This is because, having regard to each of the facts and circumstances known to the directors at the time,⁸⁵ it cannot sensibly be suggested that any of them genuinely believed that it was in BERT's interests for the payments to be made.
122. A director's claim that he or she acted honestly is to be assessed by reference to the surrounding circumstances.⁸⁶ In the present case each director must have known of the existence of a real risk that, if the payments were made, BERT would be acting in breach of trust. So much is obvious from the fact of the company's own legal advice, and the fact there had been no authoritative determination to the contrary.
123. The lack of good faith on the part of Mr Ravbar, and perhaps the other union appointed directors, is demonstrated by the fact that they encouraged Mr Wallace to make the payments in the face of that knowledge.
124. The powers of directors' may be exercised only for the purpose for which they were conferred and not for any collateral or improper purpose. This is to be determined by reference to the substantial purpose of the exercise of the power and on an objective basis.⁸⁷
125. In this case the union appointed directors exercised their influence over Mr Wallace for the purpose of ensuring that the striking workers got

⁸⁵ See paragraph 88 above.

⁸⁶ *Grimaldi v Chameleon Mining NL (No 2); Chameleon Mining NL v Murchison Metals Ltd* (2012) 200 FCR 296.

⁸⁷ *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72.

paid. They were seeking to secure benefits for workers, and prepared for BERT to take the risk that the payments were improper.

126. For these reasons Mr Ravbar and perhaps the other union appointed directors may not have exercised their powers in good faith or for a proper purpose, and thereby contravened s 181 of the *Corporations Act* 2001 (Cth) and the corresponding fiduciary duty.
127. Further, these same directors may have breached their fiduciary and statutory duty (s 182 of the *Corporations Act* 2001 (Cth)) not to use their position improperly to gain an advantage for themselves or someone else or cause detriment to BERT.
128. Impropriety is established by a breach of the standards of conduct which would be expected of a person in the position of the director or officer, by a reasonable person with knowledge of the duties, powers and authority of the position and the circumstances of the case.⁸⁸
129. Given their knowledge of the relevant circumstances and the duties they held to ensure that BERT acted consistently with its obligations as trustee, it may have been improper for the union directors to encourage Mr Wallace to make the payments in order to gain an advantage for the striking workers. No reasonably minded person with knowledge of these matters would expect the union appointed directors to behave as they did.
130. In addition, and for the same reasons, the union appointed directors of BERT may also have breached their common law and statutory

⁸⁸ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

obligation (s 180 of the *Corporations Act 2001* (Cth)) to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would exercise if they were a director of BERT and occupied the office, and had the same responsibilities as they had. No reasonably competent director in their position, armed with the information available to them, could have acted as they did.

131. Mr Ravbar and the other union appointed directors may have committed offences under section 184 of the *Corporations Act 2001* (Cth), in that their breaches of the duties of good faith and the like as set out in the previous paragraph were ‘dishonest’ or ‘reckless’.
132. As to dishonesty, the better view appears to be that dishonesty for the purposes of s 184 is to be judged according to the standards of ordinary, decent people.⁸⁹
133. In light of the material circumstances known to them at the time these directors were aware, at the time they were putting pressure on Mr Wallace, that they were acting wrongfully and in a way that exposed BERT to claims of wrongdoing by employers. They could not seriously have thought otherwise given the facts and circumstances known to them. Ordinary, decent people would regard such behaviour – that is, deliberately doing something that one knows to be wrong - as dishonest. Further and in any event, it is plainly conduct that is capable of being characterised as ‘reckless’.
134. Bill Wallace may have committed a breach of the duties he owed as General Manager under his contract of employment with BERT in a

⁸⁹ *Krecichwost v R* (2012) 88 ACSR 339; *SAJ v R* (2012) 269 FLR 390 at [126].

manner meriting his dismissal. He may also have committed breaches of ss 180, 181, 182 and 184 of the *Corporations Act 2001* (Cth).

135. It is recommended that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act 1902* (Cth) and every other enabling power, to the Australian Securities and Investments Commission in order that consideration may be given to whether Michael Ravbar should be charged with and prosecuted for breaches of his duty as an officer contrary to s 184 of the *Corporations Act 2001* (Cth), and whether a civil penalty proceeding should be commenced and carried on against Michael Ravbar for contraventions of ss 180, 181 and 182 of the *Corporations Act 2001* (Cth).

D – PARTICULAR ISSUES OF CONCERN

Unfair and preferential treatment of union members

136. Another feature of the BERT scheme is that the monies held by BERT and described as the ‘Welfare Fund’ are applied to certain welfare programs that are available only to members of the CFMEU, BLF and CEPU and their families.
137. The monies paid out by BERT to these welfare programs represent the income earned by BERT on the BERT members’ redundancy monies. However some of those BERT members are excluded from participating in the welfare programs their own monies fund on the ground that they are not union members.

138. In circumstances where the BERT members' funds are being used to generate the financial resources to fund the welfare programs, there is no proper basis for excluding those members from those programs on the ground that they are not union members. The BERT submissions assert that it is the Sponsors (via their advisory committee) rather than BERT or BERT's board, who make determinations about how and where the distributions of the financial resources to fund the welfare programs are to be made.⁹⁰ Counsel assisting's point stands.
139. The exclusionary provisions exist for the sole purpose of assisting the CFMEU and the CEPU to increase their membership base. It is inappropriate for officers of the union, such as Mr Ravbar and others, to cause the BERT scheme to be manipulated in this way.
140. The welfare programs from which BERT fund members are excluded unless they join the CFMEU or CEPU are many and varied. They include the following:
- (a) CONVERGE – this is a workers' assistance program that provides confidential, professional and free counselling. According to the BERT website, it is available to 'all financial members of the BLF, CFMEU and Plumbers' Union along with their immediate family members';
 - (b) PFG Financial Services and Financial Planning – PFG Financial Services provides financial planning advice to members of the BLF, CFMEU and Plumbers' Union;

⁹⁰ The BERT submissions, 13/11/14, para 41.

- (c) Travel insurance – free travel insurance is available to persons provided they are financial members of the BLF, CFMEU and Plumbers’ Union. The travel insurance covers such persons and their family members when going more than 250km from home for 14 days within Australia or 28 days overseas;
- (d) Funeral benefits – financial members of the BLF, CFMEU and Plumbers’ Union are covered by a funeral benefit of \$10,000 in the event of death of either the member, the members’ wife, husband or de facto or the members’ dependent children up to the age of 16;
- (e) Child care – child care payments are made on a discretionary basis for financial members of the BLF, CFMEU and Plumbers’ Union whose partner dies and who have children aged up to 13 years of age or dependents of the members;
- (f) Dental benefits – all financial members of the BLF, CFMEU and Plumbers’ Union are covered for accidental damage to teeth which occurs outside of working hours. The benefit is also available to immediate family members of those union members;
- (g) Ambulance benefit – CFMEU members in the Northern Territory are covered for ambulance travel costs outside working hours.

141. The fact that these various welfare programs are available to union members, regardless of whether they are also members of the BERT Fund, means that some union members get to enjoy benefits from these welfare programs notwithstanding the fact that they have contributed nothing to the raising of funds required to support the programs.
142. These arrangements are inequitable and indefensible.
143. The preferential treatment of union members appears to have had its roots in the establishment of the BERT Fund in the late 1980's. Whatever questionable justification may have been advanced for the preferential treatment of some members in prior decades, none presently exist.
144. The Queensland Major Contractors' Association is acutely aware of this and has fought hard to effect change.
145. Mr Hackett gave evidence that, over the last few years, and during his tenure as President of the Queensland Major Contractors' Association, he has become aware of this inequality and has asked for changes to be made. The Queensland Major Contractors' Association are opposed to any benefits that are not uniformly available to all paid up members of BERT. This point was made at a meeting of the BERT directors on 4 December 2013.⁹¹
146. The issue was followed up on 30 January 2014 where, at a Sponsors meeting, Mr Hackett said that the Queensland Major Contractors'

⁹¹ BERT Examination Book, Vol 5, p 1892 at 1896.

Association would be advising their appointed directors of BERT to only support future new benefits to BERT members only.⁹²

147. The unions have staunchly resisted making any changes so as to permit all BERT members to enjoy the benefits of the welfare programs that their own funds finance.
148. The Queensland Major Contractors' Association has sought to deal with the issue by indicating it will oppose the introduction of any new benefits, or the renewal of any existing benefits program upon its expiry, unless the benefits are available to all BERT members. Each welfare program is financed only for a finite term and, if it is to continue beyond that term, new funding and other arrangements need to be made. The Queensland Major Contractors' Association will not permit BERT to participate in such new arrangements unless the programs are amended so as to enable all BERT members to participate in them.
149. There is a simple reason why the union officials who are appointed to the BERT Board want to maintain this prejudicial treatment of some BERT members. They want more people to become members of their union. One of the ways they seek to achieve this is to advertise to potential members that, if they join the union, they are able to participate in the welfare programs funded by BERT. They use BERT as a 'selling point'.⁹³

⁹² BERT Examination Book, Vol 5, p 1899.

⁹³ Christopher Robert Stanley, 5/8/14, T:165.18-39.

150. The CFMEU Queensland website provides ample evidence of this fact. Under the heading ‘membership benefits’, readers of the website are told that by being a financial member of the CFMEU you get to enjoy ‘heaps of other benefits’. The membership benefits identified include those funded out of BERT’s resources. After identifying benefits of this kind the website contains the catch cry ‘**It Pays to Belong!**’.⁹⁴
151. It is necessary to record the regrettable fact that Mr Ravbar gave false evidence in relation to this matter.
152. It was put to Mr Ravbar that the ‘union member only’ benefits funded by BERT were used by the CFMEU to try and persuade people to join the union. He denied that proposition.⁹⁵ The CFMEU’s own website shows that answer to be incorrect. This is yet another example of Mr Ravbar’s unreliability as a witness. During the course of his evidence he chose to say things that he knew were untrue because he thought (incorrectly) that it would help the union to defend its position. The CFMEU submitted that Mr Ravbar’s answer was not a denial,⁹⁶ but it plainly was.
153. Mr Ravbar’s evidence was that ‘[at] the end of the day the union’s members should enjoy those benefits’, that unions were the ones that fought for these schemes and that ‘[w]ith our allocation we provide

⁹⁴ BERT Examination Book, Vol 4, p 1411.

⁹⁵ Michael Ravbar, 7/8/14, T:453.43-453.4.

⁹⁶ CFMEU submissions in reply to other affected parties, 21/11/14, Part 5.2, para 15.

welfare benefits for our members and I'm not going to give any freeloader who is a non-unionist those benefits'.⁹⁷

154. It is not true to say, as Mr Ravbar did, that the unions were the only ones that fought for the schemes and put the funds together. It was a co-operative exercise between the unions and the Queensland Major Contractors' Association.
155. It is not true to say, as Mr Ravbar did, that the welfare payments made to the welfare programs in question somehow represent the 'union's allocation' of BERT Funds. They are not payments made by or to the unions at all. They are payments that have been made by BERT to welfare providers.
156. It is not true to say, as Mr Ravbar did, that non-union members of BERT would be 'freeloaders' if they came to enjoy the welfare programs in question. Their own money funds the programs. The 'freeloaders' are union members who are not members of BERT, because they enjoy programs without contributing in any way to the funding of them.
157. No reasonably minded person could regard the current preferential arrangements as fair or appropriate. The arrangements should be immediately varied so that all BERT members may participate equally in the programs funded by moneys held by BERT on behalf of its members.

⁹⁷ Michael Ravbar, 7/8/14, T:453.7-14.

**E – PARTICULAR ISSUES OF CONCERN:
GOVERNANCE/MANAGEMENT STRUCTURES**

158. A striking feature of the management structure of BERT is that the board is comprised of equal numbers of employer representatives and union representatives, each of whom would often be expected to have diametrically opposed views, yet there is no independent director or other mechanism in place to deal with deadlocks when they arise. Counsel assisting correctly described it as dysfunctional and poorly composed. The BERT submissions attacked this:⁹⁸

Whilst the A class and B Class [sic] shareholders may possibly hold diametrically opposed views in respect to some matters ... it is submitted that those matters are not ordinarily relevant to the functioning of BERT.

By their involvement and continuing participation in BERT, and by reference to how BERT has functioned in the past, it is submitted that the employer representatives and union representatives hold a common view in respect of the payment of redundancy entitlements to workers and that this common view has allowed the BERT Board to function and perform its duties.

The text then refers to the following in a footnote:

Whilst recognizing that there was a deadlock in respect of the hardship payments to striking workers matter and that since then the Board has introduced measure [sic] to avoid any similar disputes.

The submissions continue:

One of the several benefits of having equal number employer representatives and union representatives is that decisions are made with the support of the majority of the Board. If there is no agreement about a matter then the status quo is maintained until agreement can be reached.

⁹⁸ The BERT submissions, 13/11/14, paras 43-45.

159. That last passage turns two blind eyes to the problem. Both it and the other passages skate over the hardship payments matter. That was an instance where the union directors, and Mr Wallace, defied the wishes of the other directors, resulting in an extraordinary departure from the terms which the trust deed laid down as preconditions to the payment of ‘redundancy entitlements – the very issue on which the BERT submissions claim that employer representatives and union representatives have a common view. And it was an instance where Mr Wallace had breached a promise he made to Mr Hackett not to make the payments without giving further notice.

160. The BERT submissions also said:⁹⁹

Counsel assisting is relying solely on evidence in respect of the hardship payments to striking workers matter to support a submission that the BERT board is generally dysfunctional and poorly composed.

In terms of the Board’s functionality it is BERT’s submission that the hardship payments to striking workers matter is an example of an exception making the rule. There is no evidence before the Commission that on any other occasion the BERT Board has acted in a manner that could be described as the Board being unable to function or to perform its duties.

Since the hardship payments to striking workers matter, the Board has introduced measures to ensure the payment of hardship monies accords with the terms of the Deed.

In terms of the Board’s composition, the Board is properly composed of A class directors and B class directors in accordance with the terms of the company’s constitution.

161. These submissions simply ignore the egregious aspects of what happened in connection with the hardship payments. They also ignore the deadlock over the Queensland Major Contractors’ Association

⁹⁹ The BERT submissions, 13/11/14, paras 17-20.

initiatives in relation to discrimination in benefits against non-CFMEU/CEPU members.¹⁰⁰ And they ignore the powerful resignation letter of Mr Abson.¹⁰¹ The ‘measures to ensure [that] the payment of hardship monies accords with the Deed’ in fact do nothing of the kind. In any event, the BERT submissions elsewhere say:¹⁰²

Whilst the board of BERT has approved these changes in principle and the ATO has confirmed in writing that the changes are acceptable to the Commissioner of Taxation, the changes are yet to be finalised and have not yet been formally approved by the Sponsors.

162. The solicitors for BERT said that the BERT submissions had been approved by every director of BERT. That such extraordinary conduct can be defended by all directors, including the employer directors, indicates that apart from being dysfunctional because of the deadlock issues the board has become dysfunctional by reason of all members adopting quite untenable views.
163. Within the course of the last year there have been board deadlocks on two critical issues – hardship payments to the strikers and the preferential treatment of union members. In neither case was a mechanism available to BERT to resolve the impasse. The BERT submissions¹⁰³ state:

The BERT Board has now taken steps to ensure that cl 29 of the Deed is complied with in respect of hardship payments.

¹⁰⁰ See paragraphs 144-148 above.

¹⁰¹ See paragraphs 167-170 below.

¹⁰² The BERT submissions, 13/11/14, para 34.

¹⁰³ The BERT submissions, 13/11/14, paras 48-49, 51.

The BERT Board was not involved in the disagreement in respect of the “preferential treatment of union members”. This was a disagreement between the Sponsors.

...

The only relevant issue in respect of BERT was the hardship payments. At the time of the dispute in respect of the hardship payment there was no mechanism available to BERT to resolve the impasse. Since that time the Board have taken several steps to ensure that such an impasse does not occur again in the future. These steps include:

- (a) proposing to amend the terms of the deed; and
- (b) establishing a sub-committee to determine whether the hardship payment is being made in accordance with the Deed.

164. The distinction between a deadlock on the Board and a deadlock among the sponsors is a distinction without a difference. The steps described, even if they were actually in force, do not resolve any risk of a future impasse or ensure compliance with the deed: they are so vague as to make it more likely that there will be either an impasse or non-compliance or both.
165. This deficiency has been recognised by the Queensland Major Contractors’ Association, and attempts have been made by it to effect change. This is appropriate given the fact that BERT is a trustee and holds tens of millions of dollars on trust for a large number of individuals.
166. For their part, the union appointed directors of BERT have resisted any change. They may not see the need for change. When confronted with a stalemate that did not suit their interests, they take action to work around it, as they did in relation to hardship payments to strikers.

167. The frustration experienced by the Queensland Major Contractors' Association in seeking to effect structural change is apparent from Mr Abson's letter of resignation from the board, and the written reasons given by him for that resignation.¹⁰⁴ On the first page of that letter he identified governance issues that needed to be resolved, and said that the appointment of an independent chairman would better facilitate reform. He also said that a change to the constitution and composition of the board would allow a better functioning board of directors.
168. Mr Ravbar was examined about this letter and the need for reform. He chose to argue that Mr Abson 'took the easy option just to give a spray and walk away' rather than staying on the board and working to address the issues.¹⁰⁵ He also endeavoured to create the impression that Mr Abson had not raised the issues set out in his letter whilst he was on the board. He described Mr Abson as someone who was 'a bit bitter after the event'.¹⁰⁶
169. Again, Mr Ravbar's evidence in relation to these matters was not correct. In fact, Mr Abson had sat on the board of BERT and participated in a series of directors' meetings prior to his resignation at which governance and other issues were squarely raised. He was present at a board strategic planning meeting held on 25 March 2013 at which point the question of board conflict was frankly and openly discussed. Indeed at that meeting it was resolved to consider

¹⁰⁴ BERT Examination Book, Vol 5, p 1868-1870.

¹⁰⁵ Michael Ravbar, 7/8/14, T:449.1-3.

¹⁰⁶ Michael Ravbar, 7/8/14, T:449.20-21.

constitutional change and expanding board sponsors and requesting a sponsor meeting to discuss the board conflict.¹⁰⁷

170. Mr Abson's resignation letter of 20 July 2013 did, therefore, set out matters that had been agitated and pursued by Mr Abson and the Queensland Major Contractors' Association appointed directors in the preceding months. When these and other inconvenient truths were placed before Mr Ravbar in the witness box, he refused to acknowledge them.¹⁰⁸
171. Mr Hackett, for his part, gave evidence that the Queensland Major Contractors' Association has continued to agitate for the appointment of an independent director or the introduction of some other mechanism that would assist BERT to be able to move forward when the board became deadlocked. The union has refused at every turn. This must be because the union appointed directors appreciate that an independent mind would detect the weakness in the unions' position on matters such as the preferential treatment of union members of the BERT Fund.
172. An attempt was made to raise the issue with Mr Ravbar during his examination. It is apparent from a review of the transcript of that examination that Mr Ravbar had little or no understanding of the concept of an independent director. He appeared to think that an

¹⁰⁷ BERT Examination Book, Vol 5, p 1853.

¹⁰⁸ Michael Ravbar, 7/8/14, T:448.19-449.26.

independent director was a director appointed by the Queensland Major Contractors' Association.¹⁰⁹

'Compliance fees'

173. One of the ways in which the CFMEU generates revenue through BERT is the payment to it of 'compliance fees'. Approximately \$120,000 was received by the CFMEU in the 2012-2013 financial year alone from the BERT Fund No.2, BEWT and CIPQ for 'compliance fees'.¹¹⁰

174. It would appear that these fees are paid to the CFMEU in return for the CFMEU taking action against defaulting employees to ensure that they pay the amounts they are obliged to pay into BERT, BEWT and CIPQ.¹¹¹

175. Mr Abson had something to say about this in his letter of resignation¹¹². Under the heading '*BERT Brand Reputation*' he said:

the appearance of "sending in the heavies" to collect alleged overdue amounts from some non-compliant employers should be reviewed. Whilst probably effective, this practice does little to advance the Funds [sic] reputation in the eyes of third parties (and prospective member companies) whom have indicated to me that they find it hard to distinguish this activity from some of the more legally questionably forms of industrial activity.

176. The evidence demonstrates that officers of the CFMEU do undertake activities designed to encourage employers who are behind in their

¹⁰⁹ Michael Ravbar, 7/8/14, T:449.28-450.24.

¹¹⁰ BERT Examination Book, Vol 5, p 1908.

¹¹¹ Christopher Robert Stanley, 5/8/14, T:167.34-168.37.

¹¹² BERT Examination Book, Vol 5, p 1869.

payments to BERT, BEWT and CIPQ to pay those outstanding amounts.

177. Mr Stanley testified that the CFMEU's role was the most advantageous for BERT.¹¹³ The BERT submissions relied on that evidence.¹¹⁴ But it does not explain why the CFMEU should be paid for these activities. These are routine activities of the CFMEU, undertaken for union members in return for the union dues paid by those members to the union. It seems, in effect, CFMEU is being paid twice for performing the same obligation. It thereby receives a windfall of over \$100,000 per year out of BERT, BEWT and CIPQ.

Treatment of income on BERT members' funds

178. As has been noted on several occasions:

- (a) interest earned on the redundancy money does not accrue for the benefit of the members of the BERT Fund. The members' redundancy accounts are not credited with their respective share of the income generated from the investment of those monies. Instead, the value of each member's redundancy account is left to erode overtime with the effects of inflation; and
- (b) the income that is earned, and the profits that are generated, are paid out to Sponsors and leant back to BERT, and thereafter dealt with by BERT in accordance with the

¹¹³ Christopher Robert Stanley, 5/8/14, T:168.5-17.

¹¹⁴ The BERT submissions, 13/11/14, para 24.

Sponsors' directions. Those directions include the funding of various welfare programs badged as union programs. In turn, the existence of those welfare programs, and their availability to union members, is used to attract new members to the unions.

179. There is a real problem with this. Union members are led to believe that it is the union which makes welfare programs available to them. The union members who are also members of the BERT Fund are not told that, far from it being the union who is providing those welfare programs, the welfare programs are actually funded by the members themselves. It is the workers' own money that is being used to fund programs that are then being sold to workers by the union as union programs available to union members.
180. Members are not informed of these realities. It is likely that a large number of workers would prefer to have interest accruing on their redundancy monies, rather than having their monies used to generate the funding of welfare programs in which they may never participate.
181. If the union wishes to establish and operate welfare schemes for the benefit of its members, then it can do so using its own financial resources. It should not be using workers' monies to establish these programs without the fully informed consent of the workers, and certainly should not be passing the programs off as union schemes.
182. There is an absence of proper disclosure of these and other matters to prospective members of the BERT funds and contributing employers in conjunction with the general lack of transparency concerning the

operation of the BERT Funds. The BERT Funds are in the nature of managed investments schemes. Yet they operate under the cloak of ASIC Class Order CO 02/314 and are exempt from the requirement to issue a Product Disclosure Statement. It is recommended that the Australian Securities and Investments Commission reconsider that exemption.

The Training Fund: another scheme funded by workers

183. The points just made in relation to the various welfare programs are of equal application in respect of the BERT Training Fund operated by QCTF.
184. As earlier described, QCTF is almost entirely dependent upon receiving a share of the profits of BERT in order to be able to make grants for training schemes, including in particular general grants made to the CFMEU, BLF and CEPU each year.
185. Given that the net profits of BERT represent, in large part, the income earned on redundancy monies of workers held in the hands of BERT, the workers' monies are used to generate the funding for QCTF and the union training grant scheme.
186. How, then, is this income generated from the workers' own money actually being spent?

187. In the 2012-2013 financial year, the vast majority of these funds were paid out to the CFMEU, BLF and CEPU. The CFMEU alone received \$2.235 million.¹¹⁵
188. The whole of that sum was paid to the CFMEU for the purpose of administering and carrying out ‘CFMEU apprenticeship trainee schemes’.
189. This means that the millions of dollars in training funds given to the CFMEU, funded by income earned on BERT members’ accounts, is not being spent on the training of those workers.
190. To the contrary, it is spent on training new entrants to the industry, who as of the date of the grants, are not members of the BERT Fund, and for that matter not even members of the CFMEU. They are new people being introduced into the industry, who will, in due course, compete with the existing members of BERT and the CFMEU for jobs.
191. If the income earned on the redundancy monies of existing BERT members is not to be paid by them but instead applied to a training grant paid to the CFMEU, there can be no doubt that many (if not all) of those members would have a strong preference for seeing a good portion of those grant monies applied toward their own training and advancement.
192. The CFMEU makes much of the need for health and safety training, and there is no doubt that is a matter of fundamental importance. Yet none of the millions of dollars of QCTF general grant money paid to

¹¹⁵ BERT Examination Book, Vol 5, p 1908, (Rounded to the nearest \$1000).

the CFMEU each year is applied by QCTF towards the health and safety training of the workers whose own redundancy monies finance the grants.

193. Why is the CFMEU receiving grant monies of this kind? Why is it seeking and providing funding for training of new entrants to the industry, rather than paying the sums directly to persons who could provide training for existing members?
194. There appear to be a number of explanations.
195. One is that the apprenticeship trainee schemes are a valuable means by which the CFMEU seeks to recruit new members.
196. The applications that the CFMEU lodge with the QCTF all contain the CFMEU logo, are headed 'Apprenticeship Scholarships', and then state 'Building our future'. The 'our' in that logo could well be taken to be a reference to the CFMEU, as the apprentice scholarships appear to be a significant means by which the CFMEU seeks to build its future through the recruitment of young and new members.
197. The application forms go on to refer to the 'CFMEU Apprentice Scholarship' and to 'CFMEU apprentices'. They identify one of the course outcomes as being the development of tradespersons with a 'commitment to union principles'. The CFMEU scholarship application form, issued to young men and women wishing to participate in the program, contains a question 'Are you prepared to join the union?'

198. QCTF's general manager, Mr Stein, accepted what is obvious from the documentation, namely that apprentices who join the CFMEU Apprenticeship Scholarship program either are, or are likely to become, CFMEU members.¹¹⁶
199. Although the CFMEU enjoys this very substantial benefit from its own apprenticeship program, including the increase in its revenue base as a result of increasing its membership each year, it appears that no consideration is given to this matter by QCTF in the course of deciding whether it will provide the CFMEU with grants which, in effect, cover the entire cost of the programs.¹¹⁷
200. A second reason why the CFMEU appears willing to use the income earned on BERT members' redundancy funds for the purposes of training new entrants is that, under the training schemes devised by it, and pursuant to the financial grants made to it by QCTF, the CFMEU is able to take charge of the administration of the scheme and receive substantial monies for doing so, including monies that cover the entire salary costs of a number of its own employees, as well as items such as 'administration' and 'promotion, advertising and travel'.
201. In relation to promotion, advertising, travel and administration, under the general grants approved by the QCTF in favour of the CFMEU in the 2012-2013 year alone, the CFMEU was paid a total of \$344,225.¹¹⁸

¹¹⁶ Jason Stein, 5/8/14, T:187.8-11.

¹¹⁷ Jason Stein, 5/8/14, T:187.35-42.

¹¹⁸ BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

202. Mr Stein had responsibility within QCTF for obtaining a detailed understanding of the applications for general grants. But he was not able to provide the Commission with much information about how such a substantial sum of money is actually spent by the CFMEU. He referred to some advertisements being placed in the union journal for the scheme, but said he was not aware how applications for the scheme were distributed other than the mailing out of some application forms.¹¹⁹ He also said that he had not turned his mind to each cost that would make up the administration costs, and whether the sum paid to the CFMEU in respect of administration actually represented the costs incurred by the CFMEU in administering the scheme.¹²⁰
203. It is to be borne in mind that ‘administration’ and ‘advertising and promotion’ costs, totaling a sum of \$344,225 paid in the 2012-2013 financial year, do not include the portion of the training grants paid to the CFMEU that are intended to cover the total employment costs of training coordinators. They are a separate item applied for and granted. That separate item of cost that was in the grants to the CFMEU for 2012-2013 financial year, \$1,040,516.¹²¹
204. As a result, of the total figure of \$2.235 million paid by way of general training grants to the CFMEU in the 2012-2013 financial year, almost \$1.4 million of that went directly to, and remained with, the CFMEU. Only the balance was ear marked to leave the CFMEU and be spent on the new apprentices. And of that sum, a substantial portion was not spent on training, but instead on the purchase of new tools and clothing

¹¹⁹ Jason Stein, 5/8/14, T:191.9-12.

¹²⁰ Jason Stein, 5/8/14, T:192.13-25.

¹²¹ BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

items. The only amount actually specified in the CFMEU training grant applications to be spent on meeting the fees of professional training providers was \$91,250.¹²²

205. Questions arise as to whether it is appropriate for such a large proportion of the income earned on the BERT members' funds to be directed towards the CFMEU to pursue a form of training scheme which is administered by the CFMEU at very substantial cost, and in respect of which, ultimately, only a modest sum is spent on the actual training of workers, none of whom were members of the BERT Fund whose monies were used to generate the training grant to begin with.
206. There is, of course, nothing wrong with training. The opposite is the case. Both health and safety training and the training of new apprentices is very desirable. But why should it be funded out of existing workers' redundancy accounts? If the CFMEU wants to establish and run a training scheme for persons who are not existing members, it can do so out of its own funds. If the CFMEU is really interested in maximising health and safety training of its existing members, why is it not directing QCTF to pay the millions of dollars of general grant monies directly to OH&S training providers for the provision of training to current BERT and CFMEU members? The QCTF submitted that it was unfair to criticize it for not understanding how each grant it made was spent.¹²³ That was not counsel assisting's point. Nor was counsel assisting criticising the value of the training which QCTF administered. Counsel assisting instead was questioning

¹²² BERT Examination Book, Vol 2, pp 563-583, at pp 567, 571, 575,579 and 583.

¹²³ QCTF submissions, 14/11/14, paras 4-18.

whether the BERT members whose redundancy funds were used to generate the money spent were aware of that fact, and whether, if they were aware, they would wish their employer to enter an enterprise agreement on terms which included a 'BERT' clause. These are matters largely outside QCTF's knowledge.

F – CONCLUSIONS

207. The following general conclusions are drawn from the above analysis:

- (a) in various significant respects BERT has not been well directed by its board and its general manager. Payments may have been made in breach of trust. Certain members are unfairly deprived of access to programs that their own funds support;
- (b) one reason this state of affairs exists is because Mr Ravbar and other union appointed directors are able to take advantage of a state of deadlock on the board on key issues. The result is that appropriate changes to existing unfair practices cannot be remedied. On an occasion where the deadlock did not suit those directors (payment to striking workers), the deadlock was not an obstacle because the union appointed directors were able to apply pressure to management to get the result they wanted in any event;
- (c) there is an urgent need to reform the BERT governance structure in order to address these matters, whether by way of the appointment of an independent director, or some other

mechanism whereby a suitably neutral person can be introduced to resolve impasses at board level;

- (d) union and BERT members and their employers do not appear to be aware of significant financial aspects of the BERT fund operations and benefit programs, including the facts that:
 - (i) they earn no interest on their redundancy monies;
 - (ii) the interest earned on their redundancy monies is used to fund the benefit programs offered to CFMEU members, and to fund apprenticeship programs;
- (e) BERT and the CFMEU need to assume responsibility for ensuring that, before an employer is asked to execute an EBA which provides for BERT and BEWT, and before an employer and its employees join those funds, they are made aware of the way in which the BERT and related funds operate, including in the particular respects described in these submissions;

208. In light of the above matters it is recommended, following counsel assisting's submission, that this Interim Report and any other relevant materials be referred, pursuant to s 6P of the *Royal Commissions Act* 1902 (Cth) and every other enabling power, to the Australian Securities and Investments Commission in order that consideration may be given to whether the exemptions granted to employee redundancy funds by ASIC Class Order CO 02/314 remain appropriate.

209. The BERT submissions oppose this recommendation.¹²⁴

Counsel assisting does not provide any indication as to how or why any removal by ASIC of its class order relief would assist or ameliorate in respect of any of the matters raised in Counsel Assisting's submissions ... Contributions by employers to the fund are not in the form of an investment. The Commission did not hear any evidence as to the likely increased administrative costs to which the fund would be exposed in the event that such a recommendation was implemented. The recommendation also exceeds the terms of reference of the Commission.

210. The recommendation falls within at least paras (a)(i), (ii), (iv)(A) and (e) of the Terms of Reference. Removal of the relief would inform members of unions, BERT members and their employers of the actual operations of BERT and related funds. Any reasonable increase in administrative costs would be a price worth paying for that benefit. In substance employer contributions have created an investment.

G – A LATE SUBMISSION

211. The transcript of a telephone conversation between various persons, including counsel assisting and Mr Shenfield, the finance manager of BERT, contains the following:

Counsel assisting: What about claims for financial hardship of a member's account?

Mr Shenfield: Well, the procedure is this. The claim is made and we ask for evidence that you have financial hardship. Typically that would be at least three or four substantial overdue notices – not in respect of TVs or anything like that – rent overdue, and it's considered on those merits.

¹²⁴ The BERT submissions, 13/11/14, para 55.

And the fact that he's on strike does not come into it, as far as I'm aware.

212. That transcript was received into evidence at a late stage, namely 8 December 2014. Counsel for the CFMEU and Mr Ravbar provided a supplementary written submission on 9 December 2014.
213. The CFMEU and Mr Ravbar submit that this information bears on an assessment of Mr Ravbar's evidence. They also say that it is relevant to an assessment of the questions asked of Mr Ravbar by counsel assisting during his examination, and the submissions of counsel assisting, which did not refer to this information.
214. The CFMEU and Mr Ravbar submitted that the late disclosure of the transcript and the failure of counsel assisting to have any regard to it in the examination of Mr Ravbar and others when dealing with the hardship payments is further evidence of 'a palpable lack of balance' in the approach of those assisting the Royal Commission.¹²⁵
215. The particular argument advanced by the CFMEU and Mr Ravbar is as follows:¹²⁶
10. The transcript makes plain that the issue of whether workers were on strike and whether a strike related to the claimed hardship was not a relevant consideration when hardship claims were considered. It was recognised that money standing to the individual worker's credit was regarded as in principle that worker's money and that was how hardship claims were dealt with. This is consistent with the attitude taken in respect of the hardship payments eventually made in the matter under consideration. On its face it is clear that not taking into account that a worker's hardship was or may have been attributable to

¹²⁵ CFMEU submissions, 10/12/14, para 9.

¹²⁶ CFMEU submissions, 10/12/14, para 10.

strike was the practice before and at the time of the strike at the Children's Hospital site. Rather the issue was whether there was hardship and its nature. It was not the union representatives in BERT who were seeking a new approach to assessing hardship claims but the employer representatives.

11. There is no reason to reject Mr Ravbar's evidence as to why he believed that the hardship payment issue should be decided by the general manager Mr Wallace. There is no reason to reject as disingenuous Mr Ravbar's stated belief that the legal advice obtained permitted the hardship payments to be made. There is every reason to accept that the decision to make hardship payments as a matter of practice and precedent never had regard to whether the worker making the claim was on strike.

216. These submissions are not accepted.

217. To begin with, it is to be borne in mind that Mr Shenfield is the finance manager of BERT. He is not a board member, and it was not his function to process hardship claims. Indeed in a later part of the transcript of the telephone conversation, not quoted by the CFMEU or Mr Ravbar, Mr Shenfield made this clear, expressly stating 'I don't process them', identifying those who did and adding 'I'm giving you very qualified information. Take it that way please.'¹²⁷

218. For these reasons alone his understanding on the subject would be expected to be of limited interest to the Commission. As a point of preliminary contact between the Commission and BERT a number of general questions were put on him on a variety of topics. That does not mean his answers were, or were expected to be, of great probative value on all issues. On a number of issues he identified who the people

¹²⁷ At T26.24 The fact that Mr Shenfield was right to put such a qualification on the information he provided due to his lack of knowledge is apparent from the fact that he did not refer, during his interview, to the fact that BERT had actually received legal advice to the effect that the hardship payments could not be made to striking workers – a critical fact central to the matter in question.

of central importance were. On the hardship claim issue, his answers and documents subsequently reviewed by counsel assisting revealed that Mr Shenfield was not a person who was well placed to assist, compared with Mr Ravbar, Mr Stanley, Mr Wallace and others.

219. Further, the propositions advanced by the CFMEU and Mr Ravbar that the issue of whether workers were on strike was not a relevant consideration, and that there was a practice not to take into account whether a worker was on strike, run counter to the evidence before the Commission. An assessment of that evidence does not change by reference to what Mr Shenfield had to say during his transcribed conversation with counsel assisting and others.
220. To the extent that the CFMEU's submission relates to the hardship claims under consideration in August 2013, the evidence described above makes it clear that the fact the workers were on strike was a relevant consideration. Indeed it was so central to the consideration that it resulted in a deadlock at board level and it resulted in BERT and the CFMEU seeking legal advice on the question. Many of the criticisms of Mr Ravbar relate to his conduct undertaken in circumstances where BERT's solicitors had advised that the payments could not have been made and the board was deadlocked. The further submissions of the CFMEU and Mr Ravbar overlook these matters, and focus only on the question of whether the workers were on strike.
221. To the extent their submissions relate to hardship claims considered before August 2013, Mr Shenfield did not say that there had ever been a previous occasion on which strikers had made a hardship claim. As such, what he had to say on the topic was quite neutral. He was not

saying that there was any practice relating to the processing of claims by strikers – he was not even saying that there was a practice of strikers making claims to begin with. In the ordinary course, when no strike was involved, the matters he described in relation to the processing of a claim are not at all surprising.

222. It was Mr Ravbar, Mr Wallace and others who were well placed to deal with the question of whether there existed any practice that had application in the circumstances that confronted them in August 2013 – that is, if situations of that kind had arisen in the past (that is, striker claims followed by a board deadlock, legal advice from BERT’s own lawyers to the effect that the payments were not permitted, and so on), and if so, whether they were handled in the same way. For the reasons given earlier, the evidence revealed that no such practice existed. Indeed there was only one prior occasion, in the relatively distant past, that even involved a striker making a claim.

223. Given that Mr Shenfield had not suggested that BERT had been confronted with a set of circumstances of the kind that confronted it in August 2013, let alone developed a practice for dealing with such a situation; given that Mr Shenfield was not in a position to provide details and expressly indicated he could only give ‘very qualified information’ which was itself of a general kind; and given that by the time Mr Ravbar came to be examined counsel assisting had received the materials in the hearing bundles which shed considerable further light on the circumstances surrounding the handling of the controversial hardship claims (including, indeed, the legal advice that BERT’s solicitors had received – a fact not revealed during Mr Shenfield’s transcribed interview) counsel assisting cannot be criticised

for examining Mr Ravbar, or making submissions, without reference to what Mr Shenfield had to say.

224. The submission concerning the conduct of counsel assisting generally was only one of a number of submissions in which the CFMEU and its officers contended that counsel assisting displayed a lack of balance. Careful consideration has been given to this contention on each occasion it was made, both in relation to this Chapter and all other Chapters in relation to which it was made. In each case, the submission is erroneous.

CHAPTER 5.3

PROTECT SCHEME

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A – INTRODUCTION

The problem

1. The Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) was formed by the amalgamation of several federally registered organisations from plumbing, electrical and communications trades.
2. At the end of 2013 the CEPU had 112,049 members. Over 60% of these members belong to the Electrical, Energy and Services Division of the CEPU.
3. This chapter concerns relevant entities associated with a branch of this division, namely the Electrical Trades Union of Australia – Victorian Branch (**Victorian ETU**).
4. Enterprise agreements entered into by the Victorian ETU as a bargaining representative often include a specification that Protect, an income insurance protection product, be purchased for employees. Protect is a relevant entity as described in the Commission’s Terms of Reference.
5. The result of the complex series of arrangements described in more detail below is that the Victorian ETU receives a Management Fee which is, in effect, a 20% surcharge. That surcharge passes intact, albeit via an intermediary, from an employer's books to the Victorian ETU's accounts.
6. The overall effect of the arrangements is that the Victorian ETU derives \$4.55 million per annum in fees and other income from payments made by employers pursuant to the terms of Enterprise

Agreements negotiated with employers directly or with the Victorian chapter of the National Electrical and Communication Association (NECA) on their behalf.¹

The money flow illustrated

7. The flow of money from employers through the relevant entities and to the Victorian ETU is seen in the following diagram.²

¹ Green MFI-1, p A.

² Green MFI-1, p A.

B – RELEVANT FACTS

Background

8. From time to time the Victorian ETU negotiates a ‘pattern’ or framework Enterprise Agreement (**Framework Agreement**) with NECA. NECA is the peak industry body representing employers in the industry.³
9. NECA negotiates the terms of the Framework Agreement on behalf of its employer members.⁴ The outcome of these industry negotiations at a State level between NECA and the Victorian ETU is that NECA's members, after agreement is reached on the Framework Agreement, put the agreement to a vote of their employees. Each employer subsequently submits its Enterprise Agreement - reflecting the terms of the Framework Agreement as voted on by its employees - to the Fair Work Commission for approval.⁵
10. Clauses in these Enterprise Agreements require employers to make payments to, or acquire services from, relevant entities associated with the Victorian ETU or other unions.
11. In around mid-July 2010, the 2010 - 2014 Framework Agreement was negotiated by the Victorian ETU and NECA. That pro forma agreement includes the following clauses:
 - (a) a severance fund clause. It requires employers to make weekly severance (or redundancy) payments to the Protect

³ Philip Green, witness statement, 5/9/14, para 13.

⁴ Philip Green, 5/9/14, T:38.26-31.

⁵ See, for example, Green MFI-1, pp 134-195.

Severance Fund.⁶ The Protect Severance fund is a relevant entity associated with the Victorian ETU;

- (b) an income protection insurance clause. This clause requires employers to provide Income Protection Insurance through a Victorian ETU nominated policy and scheme.⁷ The premium is collected and administered by the ‘Protect’ Severance Scheme;
- (c) a super fund clause. It requires an employer to pay all weekly superannuation contributions for employees into the Cbus industry superannuation fund. Cbus is a relevant entity associated with the CFMEU;⁸ and
- (d) a long service leave fund clause. This clause requires employers to make long service leave contributions to a not-for-profit entity, CoInvest Limited.⁹

12. These clauses have ultimately been adopted in numerous Enterprise Agreements now approved by the Fair Work Commission.¹⁰

Severance Payments

13. The Protect Severance Scheme, known as the ‘Electrical Industry Severance Scheme’ was established by the Victorian ETU and NECA by a trust deed dated 19 February 1998.¹¹ Dean Mighell, who resigned as State Secretary of the Victorian ETU in March 2013,¹² was

⁶ Green MFI-1, p 133D-133E.

⁷ Green MFI-1, p 133J.

⁸ Green MFI-1, pp 133F-133G.

⁹ Green MFI-1, p 133F.

¹⁰ See, for example, Green MFI-1, pp 134-195.

instrumental in the establishment of the scheme.¹³ So too was Philip Green. Philip Green was the Executive Director of NECA until June 2014.¹⁴

14. ElecNet (Aust) Pty Ltd is the trustee of the Protect Severance Scheme.¹⁵ Its constitution requires it to have three directors appointed by the Victorian ETU and two by NECA.¹⁶ It also has an independent director. Dean Mighell and Philip Green were directors of this company at the time of the Commission's hearings concerning this case study.¹⁷

15. Under the trust deed for the Protect Severance Scheme, employers become members of the scheme and make severance or redundancy contributions to the scheme on behalf of their employees in the amounts specified in an Enterprise Agreement.¹⁸ ElecNet (Aust) Pty Ltd, as trustee, credits each contribution made in respect of an employee to what is called a 'Worker's Account'.¹⁹ A severance payment will be made from the Worker's Account to the worker if the worker's employment is terminated, or on the worker's retirement or

¹¹ Green MFI-1, pp 298-345.

¹² Dean Mighell, witness statement, 5/9/14, para 1.1(c).

¹³ Dean Mighell, 5/9/14, T:79.32-80.15.

¹⁴ Philip Green, 5/9/14, T:37.13-14.

¹⁵ Green MFI-1, p 301.

¹⁶ Green MFI-1, p 358.

¹⁷ Green MFI-1, p 287.

¹⁸ Green MFI-1, pp 310-312, cl 4, 5.

¹⁹ Green MFI-1, pp 312-313, cl 6.

death.²⁰ The balance of a worker's account is forfeited to the scheme if he or she cannot be located.²¹

16. Significant severance contributions are made to the scheme by employers each year. As at 30 June 2013, the Protect Severance Scheme held assets totalling \$245.8 million.²² In that financial year it generated \$11.8 million in net profit from its investments and other operating activities.²³ Under the trust deed,²⁴ this income from the scheme may be used to pay the reasonable administrative expenses of the scheme (cl 14.1(f)), make payments to members of the Protect scheme (cl 14.1(i)), or be retained in the trust (cl 14.2). Income retained by the trust and capitalised is available for distribution to NECA and the Victorian ETU. NECA is entitled to 25% of the trust distribution; the Victorian ETU to 75% of it.²⁵ A distribution has not been made since 2008.²⁶
17. ElecNet (Aust) Pty Ltd, as trustee of the Protect Severance Scheme, engages another entity, Protect Services Pty Ltd, to provide administrative services to the Scheme. Those services are the collection of severance and income protection premiums from employers, and extend to collection of arrears and the engagement of debt collection services to pursue any recovery action.²⁷ The services agreement provides that ElecNet (Aust) Pty Ltd will pay Protect

²⁰ Green MFI-1, p 314, cl 8.2.

²¹ Green MFI-1, p 317, cl 12.

²² Green MFI-1, p 426.

²³ Green MFI-1, p 425.

²⁴ Green MFI-1, pp 321-322, cl 14.

²⁵ Green MFI-1, p 322, cl 14.2.

²⁶ Dean Mighell, witness statement, 5/9/14, para 4.1(a)(vi).

²⁷ Green MFI-1, p 583.

Services Pty Ltd \$3.30 per week per employee for those services.²⁸ In the financial year ending 30 June 2013 this totalled \$3.9 million.²⁹ ElecNet (Aust) Pty Ltd pays these service fees out of the income it generates from its investment activities.

18. The Board of Protect Services is identical to that of ElecNet (Aust) Pty Ltd.³⁰ Its constitution also requires that the board comprise three directors nominated by the Victorian ETU and two nominated by NECA.³¹ Protect Services is trustee of the Protect Services Trust.³² The beneficiaries of that trust fall into two classes,³³ the Victorian ETU Class and the NECA Class. In any year where there is a trust distribution, the Victorian ETU is entitled to 75% of it; NECA to 25% of it.³⁴ For the financial year ending 30 June 2013, the Victorian ETU was allocated half a million dollars. NECA was allocated \$170,000.³⁵

19. In addition to the trust distributions, both ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd pay directors' fees to the Victorian ETU and NECA.³⁶ In the financial year ending 30 June 2013, ElecNet (Aust) Pty Ltd and Protect Services paid the Victorian ETU almost \$300,000 in directors' fees. NECA was paid \$160,000.³⁷

²⁸ Green MFI-1, p 579.

²⁹ Green MFI-1, p E.

³⁰ Green MFI-1, pp 472-473.

³¹ Green MFI-1, p 482, cl 4.2.

³² Green MFI-1, pp 522-565.

³³ Green MFI-1, pp 561-565.

³⁴ Green MFI-1, p 565.

³⁵ Green MFI-1, p 654.

³⁶ The directors' fees are paid to the Victorian ETU and NECA and not to the directors in their personal capacity.

³⁷ Green MFI-1, p C and H; Green MFI-1, pp 446-447.

Income Protection Insurance

20. The Framework Agreement between NECA and the Victorian ETU requires an employer to provide Income Protection Insurance through a Victorian ETU nominated policy and scheme.³⁸ It further provides that the premium and charges are to be collected and administered by the 'Protect' Severance Scheme.³⁹

21. The Framework Agreement between NECA and the Victorian ETU provides:⁴⁰

These are the premium rates and levels of cover that shall apply, unless reduced by the agreement of NECA and the ETU. It is the intention of NECA and the ETU to seek a lower premium. The premium rates and level of cover shall not exceed the amounts set out in the final column of the table above.

22. The table in the Framework Agreement conveys the same information as the table in Schedule 1 of the Supply Agreement discussed further below.⁴¹

23. What the clause does not disclose is that the Victorian ETU has separately entered into an exclusive 'Supply Agreement' with a company named ATC Insurance Solutions Pty Ltd.⁴² The clauses in the individual Enterprise Agreements which give effect to the Framework Agreement do not disclose that either. The Supply Agreement records the Victorian ETU's appointment of ATC Insurance Solutions Pty Ltd to procure insurance cover for the benefit of

³⁸ Green MFI-1, p 133J, cl 29; pp 133S-133T, cl 30.

³⁹ Green MFI-1, p 133J, cl 29; pp 133S-133T, cl 30.

⁴⁰ Green MFI-1, p 133T.

⁴¹ Green MFI-1, p 233.

⁴² Green MFI-1, pp 212-234.

employees under the relevant Enterprise Agreements.⁴³ ATC Insurance Solutions Pty Ltd receives approximately \$14 million per year in premiums and charges by reason of this Supply Agreement.⁴⁴ The Supply Agreement sets the price ATC will charge employers for income protection insurance. The price incorporates an 'ETU Management Fee'.⁴⁵

24. The quantum of the ETU Management Fee is not disclosed separately to employers in the insurance premiums quoted in the Enterprise Agreements.⁴⁶ The employer's Enterprise Agreement sets the rate for income protection insurance. It is the bundled up amount incorporating the ETU Management Fee. This is not an insignificant matter. The ETU Management fee is set at \$4 per week per apprentice, and \$5.50 per week per tradesman.⁴⁷ That represents around 20% of the cost of the insurance product charged to the employer.⁴⁸ In the financial year ending 30 June 2013 the inclusion of the ETU Management Fee resulted in \$3.7 million being paid to the Victorian ETU.⁴⁹

25. The title 'Management Fee' is misleading. Protect Services Pty Ltd provides the necessary administrative services for managing the collection, application, and monitoring of employer payments.⁵⁰ Protect Services Pty Ltd is not paid for those services by the Victorian ETU. Rather, it is paid either:

⁴³ Green MFI-1, p 215.

⁴⁴ Green MFI-1, p 444.

⁴⁵ Green MFI-1, pp 222-233.

⁴⁶ Philip Green, 5/9/14, T:45.11.

⁴⁷ Green MFI-1, p 233.

⁴⁸ Green MFI-1, p 233.

⁴⁹ Green MFI-1, p 447.

⁵⁰ Green MFI-1, pp 603-642.

- (a) by ElecNet (Aust) Pty Ltd as trustee for the Protect Severance Scheme pursuant to the Services Agreement;⁵¹ or
 - (b) by a \$1.65 per employee per week surcharge levied directly on the employer by ElecNet (Aust) Pty Ltd.⁵²
26. The \$1.65 levy is charged to any employer who only pays income protection insurance premiums and does not also make severance contributions to the Protect Severance Scheme.⁵³
27. Additionally, the Victorian ETU receives an additional \$60,000 per year in cost-recovery fees from ATC Insurance Solutions Pty Ltd.⁵⁴ That sum is paid directly to the Victorian ETU from ATC Insurance Solutions Pty Ltd.⁵⁵
28. The Supply Agreement between the Victorian ETU and the insurance-provider, ATC Insurance Solutions Pty Ltd, provides that the very existence of the Supply Agreement, and its terms, and any information relating to it, is confidential subject to limited exceptions.⁵⁶ It was signed in 2012 by Dean Mighell as Secretary of the Victorian ETU⁵⁷ and Christopher Anderson,⁵⁸ director of ATC Insurance Solutions Pty

⁵¹ Green MFI-1, p 603.

⁵² Green MFI-1, p 575.

⁵³ Green MFI-1, p 574.

⁵⁴ Green MFI-1, p G.

⁵⁵ Green MFI-1, p G.

⁵⁶ Green MFI-1, pp 216, 227.

⁵⁷ Green MFI-1, p 232.

⁵⁸ Green MFI-1, p 196.

Limited.⁵⁹ Dean Mighell likened the Victorian ETU's role in the facilitation of the supply of the Protect scheme to that of a broker.⁶⁰

29. The following year, in May 2013, Dean Mighell, through his company Dean Mighell & Associates Pty Ltd,⁶¹ signed an Independent Contractor's Agreement with ATC Insurance Solutions Pty Ltd.⁶² A \$100,000 upfront payment was payable within 30 days of Dean Mighell signing the contract.⁶³ ATC Insurance Solutions Pty Limited agreed to pay Dean Mighell \$15,000 per month exclusive of GST in return for Dean Mighell providing advice and expertise in relation to Income Protection Schemes for Trade Unions.⁶⁴ ATC Insurance Solutions Pty Ltd terminated the agreement on 14 April 2014,⁶⁵ although Dean Mighell invoiced ATC Insurance Solutions Pty Ltd a fortnight later for an additional \$165,000 said to be due as a bonus payment.⁶⁶ Dean Mighell conducts his business from the Victorian ETU headquarters.⁶⁷
30. Christopher Anderson, the Chief Executive Officer of ATC Insurance Solutions Pty Ltd,⁶⁸ said that the Independent Contractor's Agreement between ATC Insurance Solutions Pty Ltd and Dean Mighell was entered into essentially to 'open up doors for [ATC Insurance Solutions Pty Ltd] in other unions and introduce [ATC Insurance

⁵⁹ Green MFI-1, p 232.

⁶⁰ Dean Mighell, 5/9/14, T:80.17-25.

⁶¹ Green MFI-1, pp 235-237.

⁶² Green MFI-1, pp 238-247.

⁶³ Green MFI-1, pp 240, 247.

⁶⁴ Green MFI-1, pp 238, 246.

⁶⁵ Green MFI-1, p 259.

⁶⁶ Green MFI-1, p 260.

⁶⁷ Green MFI-1, p 251.

⁶⁸ Christopher Anderson, witness statement, 5/9/14, para 1.

Solutions Pty Ltd] to other officials at other trade unions to really promote our income protection program'.⁶⁹

Superannuation

31. The Framework Agreement provides that employers must pay their superannuation contributions for employees to the industry fund Cbus.⁷⁰ That fund, a relevant entity associated with the CFMEU, is dealt with in Chapter 8.3.

Long Service Leave

32. The Framework Agreement provides that employers make long service leave contributions to a non-profit company, CoInvest Limited.⁷¹ Pursuant to statutory arrangements, all members of the construction industry, including employers, workers, working subcontractors and apprentices are required to be registered with CoInvest.⁷² It administers a portable long service leave scheme for the construction industry in Victoria.⁷³ The justification for the scheme is that the industry is characterised by project work. A very large percentage of workers in the industry, therefore, shift employers frequently and would not be eligible for typical long service leave entitlements.⁷⁴
33. Philip Green, previously of NECA, and Troy Gray, the current State Secretary of the Victorian ETU, are both directors of CoInvest

⁶⁹ Christopher Anderson, 5/9/14, T:70.46-71.3.

⁷⁰ Green MFI-1, pp 133F-133G.

⁷¹ Green MFI-1, pp 133F, 133H-133I.

⁷² Philip Green, 5/9/14, T:55.32-38; *Construction Industry Long Service Leave Act 1997* (Vic) s 8.

⁷³ Philip Green, 5/9/14, T:55.37-40.

⁷⁴ Philip Green, 5/9/14, T:55.45-56.9.

Limited.⁷⁵ The Victorian ETU receives about \$46,000 in directors' fees from CoInvest Limited in return for the services of Troy Gray.⁷⁶ NECA also receives directors' fees from CoInvest Limited.⁷⁷

34. CoInvest Limited is not a 'relevant entity' of the Victorian ETU as that term is defined in the Commission's terms of reference. However the nature of this entity and its operation provides a more complete picture of the range of circumstances in which the standard Victorian ETU Enterprise Agreement may require an employer to obtain services from, or make payments to, a nominated service provider.

C – ARE THE COMMISSIONS DISCLOSED?

Victorian ETU disclosure to members

35. Dean Mighell gave evidence that the commissions received by the Victorian ETU were disclosed to members in oral discussions and that 'members had access to all of that information through our published accounts'.⁷⁸
36. The only disclosure of the commissions received by the Victorian ETU is through its audited accounts.⁷⁹ This was described by Troy Gray, current Secretary of the Victorian Branch of the ETU, as information 'widely distributed throughout the industry'.⁸⁰ That disclosure is not made. Nor is it clear, complete or up to date. Extracted below is the

⁷⁵ Green MFI-1, pp 698-699.

⁷⁶ Green MFI-1, p I.

⁷⁷ Philip Green, 5/9/14, T:56.15-19.

⁷⁸ Dean Mighell, 5/9/14, T:76.16-17.

⁷⁹ Troy Gray, 5/9/14, T:90.4.

⁸⁰ Troy Gray, 5/9/14, T:89.34-90.4.

extent of the disclosure in the 2013 accounts for the Victorian ETU in respect of the commissions received, titled ‘management fees’:

| | Consolidated | | Parent | |
|--|--------------|-----------|-----------|-----------|
| | 2013 | 2012 | 2013 | 2012 |
| | \$ | \$ | \$ | \$ |
| 2. REVENUE | | | | |
| (a) Revenue from continuing operations | | | | |
| Sales revenue | | | | |
| - Sale of goods | 19,819 | 22,470 | 19,819 | 22,470 |
| Finance income | | | | |
| - interest received | 1,134,398 | 1,201,600 | 313,938 | 665,557 |
| Other revenue | | | | |
| - member subscriptions | 7,814,579 | 7,835,456 | 7,814,579 | 7,835,456 |
| - management fees | 2,821,987 | 3,029,269 | 2,918,787 | 3,029,269 |

That disclosure does not even go so far as to identify the ‘management fees’ as deriving from the Protect product.

37. Troy Gray testified that the members were also given the details of the commissions received by the Victorian ETU through the website,⁸¹ the Victorian ETU’s magazine⁸² and membership mid-term meetings.⁸³ At these meetings, approximately 20 minutes are dedicated to the finances of the Victorian ETU.⁸⁴ Troy Gray estimated that those attending would represent around 95.999% of the Victorian ETU’s membership.⁸⁵

38. Troy Gray’s solicitors categorised certain documents promised in his testimony and voluntarily produced after it as follows:⁸⁶

1. Attachment 1 contains numerous articles from mainstream media which disclosed to the general public that the ETU received a

⁸¹ Troy Gray, 5/9/14, T:92.6.

⁸² Troy Gray, 5/9/14, T:92.7-8.

⁸³ Troy Gray, 5/9/14, T:92.12.

⁸⁴ Troy Gray, 5/9/14, T:92.17-22.

⁸⁵ Troy Gray, 5/9/14, T:92.23.

⁸⁶ ETU Tender Bundle, 31/10/14, pp 1-2.

management fee of approximately 25% of the income protection insurance premium.

2. Attachment 2 contains numerous samples of the disclosure that was contained in hundreds of EBAs entered into with Employers between 2003-2005 and hundreds of Deeds entered into between 2004-2008. The samples include agreements or deeds with the same companies (or their related entities) that are referred to in the samples contained in Tab B of the court book, which is therefore further evidence of prior disclosure to such companies.
3. Attachment 3 contains excerpts from numerous articles published in a raft of ETU News Magazines sent to all of the approximately 19,000 members of the ETU. The articles clearly disclose the fact that the ETU receives income, including the actual amount, as a result of the income protection insurance premiums.
4. Attachment 4 contains a letter on ETU letterhead sent to Employers when they open an account with Protect, which discloses that the ETU receives a benefit as a result of the income protection insurance premiums.
5. Attachment 5 contains a pamphlet that is also sent to Employers when they open an account with Protect, which discloses that the ETU receives a benefit as a result of the income protection insurance premiums.
6. Attachment 6 contains a letter on ETU letterhead sent to all employees when an account is opened for them with Protect which discloses that the ETU receives a benefit as a result of the income protection insurance premiums.
7. Attachment 7 contains the disclosure on the ETU website that the ETU receives income from the income protection services provided through Protect.
8. Attachment 8 - contains samples of EBAs to which the ETU is party and under which the income protection is provided by a provider other than Protect
9. Attachment 9 contains samples of EBAs to which the ETU is **not** party, but which contain requirements for the Employer to provide income protection insurance through Protect. The premiums in those EBAs are the same as in the ETU EBAs.

We are also instructed by Protect that there are many Employers who are party to non-ETU agreements who also use the Protect income protection insurance scheme. This establishes that there are many Employers and Employees who choose to use Protect for income protection insurance without any involvement of the ETU. We submit that the reason for this is that the premium is very competitive and affordable and the product is of a very high quality in terms of cover and reliability.

10. Attachment 10 contains the power point presentation provided to 1000s of members. It was during this presentation that Mr Gray explained the extra income sources of the ETU and the additional benefits it allowed the ETU to provide to its members.
39. However, the only disclosure that could be regarded as sufficiently informative was a small segment in the September 2002 ETU News magazine. A small piece in a magazine issued over twelve years ago can hardly be considered ‘disclosure’ to modern employers or employees. It stated the following:⁸⁷

How the income insurance commissions work

... It was agreed between the ETU and NECA that the income insurance would be provided and administered through Protect.

The ETU went to the insurance market, then negotiated an agreement with IUS which vastly improved income insurance and trauma policy for no additional cost to the employer. This scheme remains the best in the country.

In recognition of the fact that the ETU does all the work in bringing people to this scheme a minimal commission up to \$3.25 per person is paid directly to the ETU trusts. Every cent of the commissions are paid to those trust funds.

The end result, [sic] employers pay the same amount, workers get the income and trauma benefits plus extra services via the ETU Trusts. This scheme has now saved hundreds of members and their families from extreme financial hardship.

40. This seems to be the only instance of disclosure by the Victorian ETU since the final report of the Royal Commission into the Building and Construction Industry was tabled in Federal Parliament on 20 August 2002. The Cole Royal Commission considered the Protect Scheme for the purposes of its inquiries and made findings as to the inadequate or non-existent disclosure to negotiating or affected persons of the commission paid by the Scheme. The 2002 ETU News article did detail the amount of the commission and how the commission revenue is utilised by the Victorian ETU. However it is now long out of date

⁸⁷ ETU Tender Bundle, 31/10/14, pp 3-6.

and does not represent the Victorian ETU's current arrangements with ATC Insurance Solutions Pty Ltd (as distinct from IUS) or the entity which is nowadays ultimately receiving the commission (namely the Victorian ETU itself, not a trust).

41. The only disclosure of the ETU's commission on the Victorian ETU's website is as follows:⁸⁸

The ETU receives some income from the income protection services provided by Protect. At the State Secretary's recommendation the Branch Executive has decided to allocate these funds to the retraining of unemployed members to assist their transition to new roles.

42. Other documents produced in Mr Gray's voluntary production included 'numerous articles from mainstream media which disclosed to the general public that the ETU received a management fee of approximately 25% of the income protection insurance premium.'⁸⁹ The media articles produced were all dated between 7 October 2002 and 28 March 2003 in respect of the Cole Royal Commission's hearings and report.⁹⁰ They were over a decade old. There were no current media articles produced.

43. It follows that no meaningful, or no adequate, disclosure of the fact and quantum of commissions earned by the Victorian ETU disclosure has been made by the Victorian ETU to employees or employers using the Protect insurance product – or considering whether to use that product in the context of EBA negotiations.

⁸⁸ ETU Tender Bundle, 31/10/14, p 7; Victorian ETU, *Financial Management*, <https://www.etuvic.com.au/your-good-governance/financial-management>, accessed 21/10/14.

⁸⁹ ETU Tender Bundle, 31/10/14, p 1.

⁹⁰ ETU Tender Bundle, 31/10/14, pp 8-13.

Victorian ETU disclosure to employers

44. The evidence received from Dean Mighell in respect to the disclosure given to employers was:⁹¹

[W]hen an employer signs a deed of adherence to make contributions to Protect, then it is stated quite clearly in those terms that the ETU will receive management fees or commissions, I'm not sure of the wording they use. Every month NECA will receive the exact sum of those commissions to the dollar of what's received...and it's also published.

...

I think individual employers through – I would have to check, but I think the individual employer member statements would also contain it. I think it's also been reported on the Protect website as well. I'd have to check but certainly, you know, there's been no shortage of disclosure and something we've been extremely mindful of since the Cole Royal Commission, quite frankly.

45. Troy Gray said that in most cases, the commission was disclosed prior to the Enterprise Agreement being signed⁹² but that it did not disclose the exact figure.⁹³ Troy Gray agreed to provide the documentary evidence supporting his testimony.⁹⁴
46. The voluntary production of Troy Gray following his testimony did not include any documents that informed an employer of the commission *before* the employer became contractually obliged to take out the income protection policy.

⁹¹ Dean Mighell, 5/9/14, T:78.41-79.2, 79.5-11.

⁹² Troy Gray, 5/9/14, T:91.11-14.

⁹³ Troy Gray, 5/9/14, T:91.8-9.

⁹⁴ Troy Gray, 5/9/14, T:93.31.

47. The employer is only informed of the commission when the employer receives a ‘pack’ upon opening an account with Protect.⁹⁵ Within that pack, a letter from the Victorian ETU discloses:

The Protect Injury and Illness Insurance policy is held by the Electrical Trades Union of Australia Victorian Branch and is issued by ATC Insurance Solutions. The ETU commits a great deal of effort and resources to regular re-negotiation and implementation of the insurance policy and, consistent with industry and commercial practices, the Union receives a financial benefit which is used to support member services such as the ETU Distress, Mortality and Training fund.⁹⁶

48. An employer (who ultimately pays the commissions) receiving that information would still be unaware that the price for income protection insurance stipulated in the Enterprise Agreement includes a 20% loading or commission payable to the Victorian ETU.

NECA disclosure to employers

49. Philip Green, the CEO of NECA prior to 30 June 2014, dealt with the fact that the Victorian ETU received substantial commissions as a result of the Protect scheme as follows. He testified that that fact was disclosed to members through members’ meetings in the course of the negotiation for the Framework Agreement. He testified that this was the only disclosure.⁹⁷ He testified that the quantum of payments made to the ETU from time to time was not disclosed.⁹⁸
50. Subsequent to receiving this evidence, the Commission issued Notice to Produce No. 675 to NECA requiring production of:

⁹⁵ Troy Gray, 5/9/14, T:90.21-34.

⁹⁶ ETU Tender Bundle, 31/10/14, p 15.

⁹⁷ Philip Green, 5/9/14, T:45.4.

⁹⁸ Philip Green, 5/9/14, T:45.11

1. All Documents recording the disclosure (including, but not limited to, minutes of meeting) made to members of NECA in respect of:
 - (a) the “Protect” commission payable to the Victorian ETU; and
 - (b) the trust distribution to NECA and the Victorian ETU from either:
 - (i) ElecNet (Aust) Pty Ltd; or
 - (ii) Protect Services Pty Ltd.
2. All Documents recording the due diligence undertaken to ascertain alternative cover to Protect as recorded in the Transcript.

Definitions and interpretation:

In the above Schedule:

Document includes:

- (a) an electronic Document;
- (b) anything on which there is writing;
- (c) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (d) anything from which sounds, images or writings can be reproduced with or without the aid of anything else;
- (e) a map, plan, drawing or photograph;
- (f) all parts of a Document. For example:
 - (i) where a Document is an email chain, all parts of that chain;
 - (ii) where a Document is an email with one or more attachments, the email and all its attachments; and
 - (iii) where a Document is a facsimile, all parts of the facsimile (including any covering letter, any attachments and the facsimile confirmation sheet).

Framework EA means the framework Enterprise Agreement titled “Enterprise Agreement 2010-2014” between the Victorian ETU and NECA.

NECA means the National Electrical and Communications Association.

Transcript means the transcript of proceedings on 5 September 2014, pp 47-48, attached at Schedule B to this Notice.

Victorian ETU means the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia Electrical Division, Victorian Division.

51. The documents produced under Notice to Produce No. 675 revealed that there were no meeting minutes recording the disclosure to NECA members of the fact or quantum of the Victorian ETU’s commission in respect of the Protect Scheme.
52. The only other documents produced were the particular audited accounts that refer to the trust distributions received from either ElecNet (Aust) Pty Ltd or Protect Services Pty Ltd.
53. It follows that NECA does not, or does not adequately, disclose the quantum of payment that the Victorian ETU receives as a result of the Protect scheme.

D – ARE THE TRUST DISTRIBUTION INCOME AND DIRECTORS’ FEES DISCLOSED?

54. The table below summarises the income received from the trust distributions and directors fees received by NECA and the Victorian ETU from Protect Services Pty Ltd and ElecNet (Aust) Pty Ltd:

| Year | Entity | Protect Services Pty Ltd | | ElecNet (Aust) Pty Ltd | |
|------|--------|--------------------------|-----------------------|--------------------------|----------------------------|
| | | Trust Distribution \$ | Directors’ Fees \$ | Trust Distribution \$ | Directors’ Fees \$ |
| 2008 | ETU | | | 4,783,605 ⁹⁹ | Unavailable ¹⁰⁰ |

⁹⁹ ETU Tender Bundle, 31/10/14, pp 16-48.

¹⁰⁰ The Commission was not provided with ElecNet (Aust) Pty Ltd Financial reports for the financial year ended 30 June 2008.

| | | | | | |
|------|------|------------------------|-----------------------|-------------------------|------------------------|
| | NECA | | | 1,594,535 ⁹⁹ | 157,093 ¹⁰⁰ |
| 2009 | ETU | | | _ ⁹⁹ | 258,000 ¹⁰¹ |
| | NECA | | | _ ⁹⁹ | 144,000 ¹⁰² |
| 2010 | ETU | | | _ ¹⁰³ | 258,000 ¹⁰⁴ |
| | NECA | | | _ ¹⁰³ | 144,000 ¹⁰⁴ |
| 2011 | ETU | | | _ ¹⁰⁵ | 276,000 ¹⁰⁴ |
| | NECA | | | _ ¹⁰⁵ | 154,664 ¹⁰⁴ |
| 2012 | ETU | 137,627 ¹⁰⁶ | 71,250 ¹⁰⁷ | _ ¹⁰⁸ | 213,750 ¹⁰⁹ |
| | NECA | 45,876 ¹⁰⁶ | 39,999 ¹⁰⁷ | _ ¹⁰⁸ | 119,997 ¹⁰⁹ |
| 2013 | ETU | 509,257 ¹⁰⁶ | 85,500 ¹¹⁰ | _ ¹¹¹ | 199,500 ¹⁰⁹ |
| | NECA | 169,752 ¹⁰⁶ | 47,999 ¹¹⁰ | _ ¹¹¹ | 111,997 ¹⁰⁹ |

55. The sole disclosure to NECA's members of the amounts received in connection with the Protect scheme is effected through its published financial accounts.¹¹²

56. In the Cole Royal Commission, NECA complained that it did not receive full and frank disclosure of the commissions received by the Victorian ETU as a result of the Protect scheme during the course of framework agreement negotiations. That was a serious issue. The

¹⁰¹ ETU Tender Bundle, 31/10/14, pp 16-48.

¹⁰² ETU Tender Bundle, 31/10/14, pp 16-48.

¹⁰³ ETU Tender Bundle, 31/10/14, pp 49-83.

¹⁰⁴ Green MFI-1, p 387.

¹⁰⁵ Green MFI-1, p 374.

¹⁰⁶ Green MFI-1, p 654.

¹⁰⁷ ETU Tender Bundle, 31/10/14, p 84.

¹⁰⁸ Green MFI-1, p 402.

¹⁰⁹ Green MFI-1, p 447.

¹¹⁰ Green MFI-1, p H.

¹¹¹ Green MFI-1, p 432.

¹¹² Philip Green, 5/9/14, T:43.41-44.

evidence received by this Commission highlights the inconsistency which is now apparent between NECA's demand for disclosure in 2002 and its own current approach to its disclosure to its own members – an issue of equal seriousness.

57. The Victorian ETU's disclosure of the trust distribution received has not been recorded in the 2013 accounts.¹¹³ Dean Mighell said that the Victorian ETU relied heavily on their auditors 'so if there's an omission, I can't explain why'.¹¹⁴

E – CASE STUDY: THIESS AND THE VICTORIAN DESALINATION PROJECT

Background

58. During its inquiries into Protect, the Commission considered a particular case study concerning the Thiess contract for the desalination project. It illustrates how EBA negotiations can lead to the inclusion of a clause in the EBA ultimately reached which requires an employer to use the service or product of a relevant entity in respect of employees covered by the EBA.¹¹⁵
59. Andrew Ermer is an Employee Relations Specialist employed by Thiess Pty Ltd.¹¹⁶ He was involved, as a Thiess representative, in the

¹¹³ Green MFI-1, pp 90-120.

¹¹⁴ Dean Mighell, 5/9/14, T:78.14-22.

¹¹⁵ There may also be a question of whether s 47(6) of the Schedule Version of Part IV of the *Competition and Consumer Act 2010* (Cth) is contravened. See Chapter 6.2, paras 89-91.

¹¹⁶ Andrew Ermer, witness statement, 5/9/14, para 2.

negotiation of an Enterprise Agreement for the Victorian Desalination Project in Wonthaggi, Victoria.¹¹⁷

60. The Thiess Enterprise Agreement was negotiated under enormous time pressure. The project tender had been awarded to Thiess on around 1 July 2009¹¹⁸ and the project was to be built in two years.¹¹⁹
61. A number of unions were involved in the negotiations of the Enterprise Agreement.¹²⁰ The CFMEU and the Victorian ETU were dominant players.¹²¹
62. The Victorian ETU was adamant that the Protect Severance Scheme be used for electrical instrumentation trades employees' severance or redundancy payments.¹²² The CFMEU, AMWU, AWU and PTEU preferred a different industry scheme named Incolink.¹²³ Thiess did not shop around for competitive severance or redundancy scheme tenders and agreed to the unions' requests.¹²⁴

Income Protection Insurance

63. However, when it came to income protection insurance, Andrew Ermer (on Thiess' behalf) did obtain a competitive quotation from Aon Consulting Pty Limited.¹²⁵ The CFMEU and the AMWU wanted

¹¹⁷ Andrew Ermer, witness statement, 5/9/14, para 4.

¹¹⁸ Andrew Ermer, 5/9/14, T:16.25-26.

¹¹⁹ Andrew Ermer, witness statement, 5/9/14, para 12.

¹²⁰ Andrew Ermer, witness statement, 5/9/14, para 16.

¹²¹ Andrew Ermer, 5/9/14, T:16.12-14.

¹²² Andrew Ermer, 5/9/14, T:16.45-47, 17.1-8.

¹²³ Andrew Ermer, witness statement, 5/9/14, para 29.

¹²⁴ Andrew Ermer, 5/9/14, T:16.28-43; Andrew Ermer, witness statement, 5/9/14, para 27.

¹²⁵ Andrew Ermer, witness statement, 5/9/14, para 38.

Thiess to pay premiums to the Incolink Income Protection and Trauma Scheme.¹²⁶ The initial starting point was \$43.00 per week per employee.¹²⁷

64. The first policy proposal from Aon was not comparable with the Incolink offering.¹²⁸ The key issues raised were:

- (a) the length of extended job cover;
- (b) Transport Accident Commission Top-Up was not included;
and
- (c) some of the policy exclusions.¹²⁹

65. The Victorian ETU's preferred provider for income protection was Protect. However, Protect could not match Incolink's offering.¹³⁰ The Victorian ETU reluctantly proposed that its workers also be covered by Incolink for income protection insurance.¹³¹ The Victorian ETU offered no reason for choosing Incolink rather than the alternative Aon proposal.¹³² Andrew Ermer said that he thought the reason was that the parties 'were in a room where all the unions were represented so, effectively, they weren't going to go anything different to the other unions'.¹³³

¹²⁶ Andrew Ermer, witness statement, 5/9/14, para 35.

¹²⁷ Andrew Ermer, witness statement, 5/9/14, Annexure A, p 1.

¹²⁸ Andrew Ermer, 5/9/14, T:18.42-45.

¹²⁹ Andrew Ermer, witness statement, 5/9/14, para 39.

¹³⁰ Andrew Ermer, witness statement, 5/9/14, para 55.

¹³¹ Andrew Ermer, 5/9/14, T:21.10-21.

¹³² Andrew Ermer, 5/9/14, T:21.19.

¹³³ Andrew Ermer, 5/9/14, T:21.19-21.

66. On 20 November 2009, Andrew Ermer met with Carlos Cortese, Incolink's insurance broker, to discuss the Incolink offering.¹³⁴ Carlos Cortese identified shortcomings of the first insurance policy offered by Aon.¹³⁵

67. On 27 November 2009, Andrew Ermer received the following email:¹³⁶

From: Erik Gyllenhammer [<mailto:erik.gyllenhammer@aon.com.au>];
Sent: 27/11/2009 7:54:10 AM
To: Andrew Ermer [<mailto:aermer@thiessdegremont.com.au>];
Subject: Re: FYI

Thanks Andrew,

I have excellent news to share with you in advance of your union meetings this morning.

Kind regards,
Erik

68. Aon was, after intense negotiations, prepared to offer the same coverage as the Incolink offering but for \$20.00 per worker per week less.¹³⁷ The offer had the following improvements on its first proposal:

- (a) removal of all of the exclusions in relation to HIV/AIDS, stress, anxiety, depression, congenital deformities or abnormalities and pre-existing conditions;¹³⁸
- (b) a profit-share arrangement¹³⁹ to Thiess in relation to the Victorian Desalination Project income protection programme;¹⁴⁰

¹³⁴ Andrew Ermer, witness statement, 5/9/14, para 39.

¹³⁵ Andrew Ermer, witness statement, 5/9/14, Annexure B, pp 3-5.

¹³⁶ ETU Tender Bundle, 31/10/14, p 85.

¹³⁷ Andrew Ermer, 5/9/14, T:20.20.

¹³⁸ Andrew Ermer, witness statement, 5/9/14, para 41.

- (c) a digital dedicated phone line specific to the Victorian Desalination Project;¹⁴¹ and
- (d) a focused and dedicated account management team headed by the insurance company's General manager and a full complement of experienced claims managers.¹⁴²
69. Andrew Ermer said the revised proposed policy was put forward at the enterprise agreement negotiations on 27 November 2009.¹⁴³ Troy Gray denied that Thiess tabled the proposal.¹⁴⁴ He said, 'if that had have been tabled to that extent of what he said, then that would have absolutely pricked my ears up because I've never seen it'.¹⁴⁵
70. However, it is more probable than not that the Aon offer was tabled. Andrew Ermer's evidence was that despite the alternative policy offering matching cover for cover apart from the 'extended job cover' clause,¹⁴⁶ the unions refused to consider the alternative policy,¹⁴⁷ but Incolink did reduce the price of its offering to \$33.00 per worker per week in response to Aon's revised policy.¹⁴⁸ An inference may be drawn from this evidence that the reason Incolink reduced the costing

¹³⁹ The profit-share arrangement was offered in response to the Victorian ETU's claim that union schemes reinvested fund profits into training and apprenticeship scheme and the like within the construction industry: see Andrew Ermer, witness statement, 5/9/14, para 43.

¹⁴⁰ Andrew Ermer, witness statement, 5/9/14, Annexure E, p 17.

¹⁴¹ Andrew Ermer, witness statement, 5/9/14, Annexure E, p 23.

¹⁴² Andrew Ermer, witness statement, 5/9/14, Annexure E, p 23.

¹⁴³ Andrew Ermer, witness statement, 5/9/14, para 42.

¹⁴⁴ Troy Gray, 5/9/14, T:96.20-21.

¹⁴⁵ Troy Gray, 5/9/14, T:96.36-38.

¹⁴⁶ The Aon Consulting Ltd policy offered a 3 month extended job coverage. The Incolink policy offered a 9 month period.

¹⁴⁷ Andrew Ermer, witness statement, 5/9/14, para 42.

¹⁴⁸ Andrew Ermer, witness statement, 5/9/14, para 50.

of its product was because the Aon revised policy matched the Incolink offering. It follows that Andrew Ermer did in fact table the Aon revised proposal, or otherwise provided sufficient details of it so as to induce a revised offering from Incolink.

71. In December 2009, Thiess was running out of time on its time-sensitive project.¹⁴⁹ It therefore agreed with Incolink's income protection insurance policy despite it being \$10.00 per worker per week (roughly 40%) more than Aon's offering.¹⁵⁰ This amounted to an increased cost to Thiess of several million dollars for the project.¹⁵¹

Issues with the Incolink coverage

72. In March 2011, two particular Victorian ETU members and employees of Thiess tried to make a claim under the Incolink income protection program.¹⁵² Those claims were denied under the 'pre-existing conditions' exclusion clause in the Incolink income protection policy.¹⁵³

73. The Aon policy would have covered these employees.¹⁵⁴

¹⁴⁹ Andrew Ermer, 5/9/14, T:21.37-39.

¹⁵⁰ Andrew Ermer, witness statement, 5/9/14, para 50.

¹⁵¹ Andrew Ermer, 5/9/14, T:22.33-37.

¹⁵² Troy Gray, 5/9/14, T:100.19-28.

¹⁵³ Troy Gray, 5/9/14, T:100.32-34.

¹⁵⁴ Andrew Ermer, 5/9/14, T:35.47; Andrew Ermer, witness statement, 5/9/14, para 41; Annexure D, p 15.

F – LEGAL ISSUES

Outline of issues

74. Several legal issues arise. In summary, they are:
- (a) the adequacy of disclosure by the Victorian ETU and NECA;
 - (b) the extent to which the inclusion of clauses requiring an employer to use the Protect product involves a conflict of interest; and
 - (c) the application of the *Competition and Consumer Act 2010* (Cth) and the Australian Consumer Law to this specific context of industrial relations negotiations.

Obligations of disclosure: the Victorian ETU as group purchaser

75. The Victorian ETU is paid a management fee for arranging and administering the insurance scheme including having custody of the insurance policy as a group purchaser.¹⁵⁵
76. A group purchasing body will generally be providing financial services by applying for or acquiring a risk management product, and possibly by holding the risk management product on behalf of those covered.¹⁵⁶
77. The starting position under Chapter 7 of the *Corporations Act 2001* (Cth) is that a person providing financial services is required to hold an Australian Financial Services Licence.

¹⁵⁵ Dean Mighell, witness statement, 3/9/14, para 4.1(c)(iii).

¹⁵⁶ Australian Securities and Investments Commission, *Group purchasing bodies for insurance and risk products*, Regulatory Guide 195, June 2010, RG 195.4.

78. However, the Victorian ETU is exempt from the requirement to hold an Australian Financial Services Licence covering the provision of a custodial or depository service because it holds the risk management product (i.e., the Protect income protection policy) on trust for or on behalf of another person.¹⁵⁷

79. Pursuant to ASIC Class Order [CO 08/1] made pursuant to ss 601QA(1)(a) and 911A(2)(1) of the *Corporations Act* 2001 (Cth), group purchasing bodies must meet certain conditions. The Victorian ETU as a group purchasing body is required to disclose certain information to members who will be covered by the Protect income protection product. Paragraph 10(e)(iv) of that Class Order provides:

10. The Group purchasing body must:

...

(e) take reasonable steps to give, as soon as practicable after the body has reason to believe that the financial services to which the risk management product relates will be provided to a person, and if the person to be covered by the product may elect whether to be covered or not, before the election is made, the following information and statements in writing to the person:

...

(iv) if the body will receive payments (*rebates*) from the issuer of the product or any financial services licensee or their associates to arrange for the issue of a risk management product or for a person to be covered by an existing risk management product, the amounts (if any) that will be paid to the person to be covered by the product from those rebates or, if the amounts cannot be ascertained, general information about how the amounts will be determined.¹⁵⁸

80. The Victorian ETU has not satisfied this condition. Its disclosure to its members has been insufficient because the disclosure – so far as it had

¹⁵⁷ Australian Securities and Investments Commission, *ASIC Class Order – Group purchasing bodies*, CO 08/1, 15 July 2014, para 4(b)(ii).

¹⁵⁸ Australian Securities and Investments Commission, *ASIC Class Order – Group purchasing bodies*, CO 08/1, 15 July 2014, para 10(e)(iv).

been made – was in general terms and does not specify the amount that will be paid to the Victorian ETU. The arrangements also provide a specific example of a broader concern. The concern is that there is no competitive neutrality in this kind of arrangement. Under the arrangement, a group purchasing body that receives and retains benefits (as the Victorian ETU does by reason of its 20% ‘management fee’) may be acting in the interests of the sellers of risk management products (ATC Insurance Solutions Pty Ltd) rather than the buyers (employers) and the beneficiary insured persons (employees).¹⁵⁹

81. ASIC has formed the view that a not-for-profit company ought be granted relief from the requirements of an AFSL. That is because ‘in the absence of a profit-making motive, the group purchasing body is likely to be acting in a way that is fair to its members’.¹⁶⁰ In this regard, Regulatory Guide 195: ‘Group purchasing bodies for insurance and risk products’ states:

RG 195.8 [ASIC] has granted class order relief to certain group purchasing bodies because we consider that compliance with Chs 7 and 5c [of the *Corporations Act 2001 (Cth)*] is disproportionately burdensome for them. We have limited the relief to circumstances where the group purchasing body is most likely to be acting in the interests of the persons to covered by the risk insurance product, rather than in its own interests or in the interests of anyone else.¹⁶¹

82. The benefits received by the Victorian ETU as a result of the Protect scheme can be summarised as follows:

- (a) commissions received from ATC Insurance Solutions Pty Ltd;

¹⁵⁹ Australian Securities and Investments Commission, *REPORT 140: Report on submissions for CP 80 Group insurance arrangements*, September 2008, para 11-13.

¹⁶⁰ Australian Securities and Investments Commission, *REPORT 140: Report on submissions for CP 80 Group insurance arrangements*, September 2008, para 18.

¹⁶¹ Australian Securities and Investments Commission, *Group purchasing bodies for insurance and risk products*, Regulatory Guide 195, June 2010, RG 195.8.

- (b) trust distributions from ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd; and
- (c) directors' fees from ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd.

83. The benefits outlined in 82(a) and 82(b) are directly proportionate to the amount of people under the group purchasing policy; the Victorian ETU is given an incentive to provide a greater membership base so that the profit flowing to it is maximised.
84. The current regulatory requirements applicable to the Protect arrangements have a shortcoming. There is no requirement for Victorian ETU to disclose to the employer or its members the trust distribution and other income it receives via ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd when the employer uses the Protect income protection product.
85. There is another shortcoming. There is no requirement for the Victorian ETU to disclose to the purchaser of the insurance policy, the employer (as distinct from employees), the amount received in commissions as a result of the policy. Without that knowledge, an employer is unaware of the substantial elevation of price on the premium and may lose the opportunity to obtain competitive, alternative quotations for income protection insurance. That is the vice that is simply not covered by the current regulations on group purchasing bodies.
86. The filing of audited financial accounts for registered organisations under the *Fair Work (Registered Organisation) Act 2009 (Cth)* does not necessarily in general at all overcome the shortfalls in disclosure.

It certainly does not do so in the circumstances under consideration. It is not clear from those accounts how the companies relate to the Protect scheme. And it is not clear from those accounts how the profits and expenses are shared between the related entities. In any event, the idea that an employer involved in EBA negotiations would or could trawl through the accounts of the relevant registered organisation and identify potential commissions relevant to the negotiation is impractical and unrealistic.

Obligations of disclosure: NECA and shortfalls in its disclosure to employers

87. Above a finding was made that NECA has not, or has not adequately, disclosed to its member employers that the Victorian ETU receives a commission as a result of the Protect scheme. That is so despite NECA negotiating and agreeing to a ‘pattern’ or framework agreement that, when adopted, has the effect of requiring employer members of NECA to use the Protect product for employees covered by the agreement.
88. NECA, having representative directors on the board of ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd, knows that a substantial commission is paid to the Victorian ETU. It knows the percentage quantum and cost per employee of this commission.
89. Appropriate disclosure would involve NECA disclosing to its members, in a comprehensive way, the trust distribution it receives. The disclosure in the audited accounts is insufficient because it is not apparent on the face of the disclosure that the trust distributions are determined on the success of the Protect scheme. Nor is that disclosure necessarily going to be in the mind of an employer considering

whether to adopt or resist the clauses in the pattern agreement mandating the employer's use of the Protect scheme.

Fiduciary duties and conflicts of interest: general

90. The elements of the fiduciary duties owed by officers of employee associations, and which apply equally to officers of NECA, were summarised in Chapter 2.1.
91. The Commission has not received any evidence suggesting that there is, presently, an express obligation on NECA of disclosure.
92. However, NECA is an organisation itself registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). Its officers have the same duties pursuant to that statute as union officials.
93. NECA knows the size and nature of the commissions received or likely to be received by the Victorian ETU from employers' use of the Protect product. NECA knows the director fees and trust distributions to which both NECA and the Victorian ETU are entitled. It is likely that compliance with the statutory duties of officers would require disclosure of these facts to NECA members.
94. That is particularly so in circumstances where NECA itself receives a not immaterial financial benefit from the Protect scheme.
95. Agency may be created pursuant to statute. Pursuant to the *Fair Work Act 2009* (Cth) an employee organisation will automatically become the bargaining representative of a member employee.¹⁶²

¹⁶² *Fair Work Act 2009* (Cth) s 176(1)(b)(i).

96. In this way an agency relationship exists between the Victorian ETU and its member employees.

Fiduciary duties and conflicts of interest: ETU and Employees

97. Whether there is a conflict will be determined by comparing the duty owed by the Victorian ETU to those on whose behalf it bargains with its interest in the Protect scheme in the context of its activities.¹⁶³
98. The Victorian ETU's principal role and duty in enterprise agreement negotiations is to advance its member employees' rights and interests. Its interest in the Protect scheme includes at least a financial interest in the revenue received from the scheme. There is a correlation between the number of employees covered by the scheme and the quantum of commissions and potential trust distributions it receives.
99. Those two considerations suggest that the Victorian ETU's position as bargaining representative for employees and financial beneficiary of the scheme involves an actual or potential conflict of interest. In order to deal with that conflict appropriately, adequate disclosure is necessary but not sufficient. The ultimate requirement is that the Victorian ETU have the fully informed consent of those whose behalf it bargains.
100. The extent of the disclosures made by the Victorian ETU do not satisfy this essential criterion. Hence there may have been a breach of fiduciary duty.

¹⁶³ *Birchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384.

Fiduciary duties and conflicts of interest: NECA and employers

101. In negotiating a pattern or framework agreement and endorsing it on behalf of its members, NECA failed to disclose to its member employers that:

- (a) it receives and is entitled to trust distributions dependent on the success of the Protect scheme; and
- (b) the Victorian ETU receives a substantial commission which is added to the price of the insurance premium that is paid by the member employers.

102. Like the Victorian ETU, the position of actual and potential conflict in which NECA has put itself necessitates fully informed consent from its members. A necessary requirement would be adequate disclosure of NECA's own interests in the Protect scheme.

103. On the evidence available to the Commission, NECA has failed to meet this requirement. Hence there may have been a breach of fiduciary duty.

Potential conflict – Directors of ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd

104. Finally, one further potential conflict is of relevance. The directors of ElecNet (Aust) Pty Ltd and Protect Services Pty Ltd owe certain duties to those entities. They also, as directors drawn from the Victorian ETU and NECA, owe duties in their union/NECA capacities to those entities. Those duties have an obvious potential conflict with each other. Adequate disclosure, and fully informed consent, are the only means by which those duties could be reconciled.

The Australian Consumer Law

105. Section 18 of the Australian Consumer Law provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.¹⁶⁴
106. The terms ‘trade’ and ‘commerce’ are expressions of fact and terms of common knowledge.¹⁶⁵ They are not restricted to dealings or communications that have a dominant objective of profit-making.¹⁶⁶ In the present circumstances, in the context of EBA negotiations, the terms agreed bear a trading or commercial character in so far as they concern the acquisition, by an employer, of an insurance product from the Protect scheme.
107. In *Concrete Constructions (NSW) Pty Ltd v Nelson*,¹⁶⁷ the High Court held that:

the section is concerned with ...the conduct of a corporation towards persons,...with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which of their nature, bear a trading or commercial character.’¹⁶⁸

¹⁶⁴ *Competition and Consumer Act 2010* (Cth) Sched 2 s 18. It applies in Victoria: *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8.

¹⁶⁵ *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 137.

¹⁶⁶ *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 137.

¹⁶⁷ (1990) 169 CLR 594 at 600-601 per Mason CJ, Deane, Dawson and Gaudron JJ.

¹⁶⁸ *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 604 per Mason CJ, Deane, Dawson and Gaudron JJ.

Australian Consumer Law: Representation

108. The relevant conduct¹⁶⁹ is that of the Victorian ETU and NECA, in propounding the terms of the pattern agreement. That conduct represented to employers that the Victorian ETU and NECA had the intention to seek a lower premium (**Representation**).¹⁷⁰ This Representation was repeated by the Victorian ETU in some of the specific EBAs it subsequently negotiated. In fact, the Victorian ETU can have had no such intention. It had contractually committed itself in its Supply Agreement with ATC Insurance Solutions Pty Ltd to using the services of ATC Insurance Solutions Pty Ltd for the premium prices set out in that Agreement.¹⁷¹
109. Philip Green's evidence was that at the time of making the Framework Agreement, NECA did intend to seek a lower premium.¹⁷² There is insufficient evidence to find to the contrary.

Australian Consumer Law: In 'trade or commerce'

110. If the Victorian ETU is to contravene the provision, it must have engaged in trade or commerce. The dealing as a whole is of a trading or commercial nature,¹⁷³ because:
- (a) entering into an enterprise agreement coincides with contracts and relationships of employment which may be characterised as 'in trade or commerce';

¹⁶⁹ 'Conduct' is defined as doing or refusing to do any act, including the making of a contract: s 4(2) of the *Competition and Consumer Act 2010* (Cth).

¹⁷⁰ Philip Green, 5/9/14, T:48.36-37.

¹⁷¹ Green MFI-1, pp 212-234.

¹⁷² Philip Green, 5/9/14, T:63.10.

¹⁷³ *Obeid v Australian Competition and Consumer Commission* [2014] FCAFC 155 at [31].

- (b) the provisions in the enterprise agreement result in a commercial transaction taking place between the employer and the Protect scheme;
- (c) the commissions payable are large and rest on a dominant purpose of profit-making for the Victorian ETU;
- (d) the complexity of the company structure and flow of monies suggest a commercial arrangement between the parties; and
- (e) the Supply Agreement between ATC Insurance Solutions Pty Ltd and the Victorian ETU contemplates that the Framework Agreement will deliver clients to ATC Solutions Pty Ltd. Engaging in activities on behalf of another person may acquire the requisite character if it is made in the course of, or for the purposes of, some trade or commercial dealing.¹⁷⁴

111. The Representation has ‘an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character’¹⁷⁵ such that it falls within the ambit of section 18. Hence the Victorian ETU may have contravened s 18.

Pattern or framework agreements

112. It may be desirable to recommend that a condition of the maintenance of pattern agreement arrangements should be adequate disclosure of one party’s interest in any entity with whom an EBA may require an employer or employees to deal. That disclosure ought be contained in the text of the EBA, and should include, in particular, disclosure of the

¹⁷⁴ See also *Fasold v Roberts* (1997) 70 FCR 489 at 531.

¹⁷⁵ *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603-604 per Mason CJ, Deane, Dawson and Gaudron JJ.

nature of the interest, its dollar value, and, where possible, its percentage of the cost of the goods or services at issue.

G – POSSIBLE RECOMMENDATIONS

113. The Protect Scheme is targeted towards an industry-wide need for appropriate insurance products tailored to a particular sector of employees.
114. The vice in the current practices of both NECA and the Victorian ETU is that employers and employees are not provided with sufficient information to assess for themselves the appropriateness of the requirement in any particular EBA that the relevant employer use the Protect product.
115. It may be desirable to recommend that the Victorian ETU and NECA fully disclose to their members and to any party with which they are negotiating an EBA, in writing, any direct or indirect financial benefit that may be derived by any negotiating party to an industrial agreement from any term sought in the enterprise bargaining agreement, such as commissions, trust distributions or other income. The most obvious, and prominent, place for that disclosure would be the relevant EBAs and any corresponding pattern EBA. Indeed the recommendation may be of far wider application than just NECA and the Victorian ETU. The purpose of the case study was to illustrate the issue. The solution may be of general application.
116. The Australian Industry Group contends that this reform, together with a similar full disclosure requirement proposed by counsel assisting in

relation to pattern bargaining agreements,¹⁷⁶ would be worthwhile but inadequate.¹⁷⁷ The Australian Industry Group made earlier proposals for significant reforms.¹⁷⁸ These are very valuable proposals which deserve close examination. However, this Interim Report focuses on establishing the facts in relation to the matters it has examined. The interests of coherence and breadth will be best served by holding proposals for reform over until its Final Report next year. That is the course which will be adopted, here as elsewhere.

¹⁷⁶ Counsel assisting written submissions, 31/10/14, Chapter 19.5, para 10.

¹⁷⁷ Australian Industry Group written submissions, 14/11/14, p 1.

¹⁷⁸ Australian Industry Group submissions on Issues Paper 4: Relevant Industries, 22/8/14.

PART 6: SUPERANNUATION FUNDS

CHAPTER 6.1

INTRODUCTION

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A – PRELIMINARY

1. Superannuation funds may also be relevant entities within the meaning of the Terms of Reference.
2. Chapter 6.2 concerns TWUSUPER, a related entity of the TWU. The chapter considers in particular TWU's practice of seeking that TWUSUPER be a fund nominated in enterprise agreements as a mandatory superannuation fund into which employers must pay superannuation contributions on behalf of their employees. It also

considers the financial and other arrangements between the TWU and TWUSUPER.

3. Chapter 6.3 concerns the Labour Union Co-operative Retirement Fund (**LUCRF**), a related entity of the National Union of Workers (**NUW**). It also considers the use of compulsory fund clauses in enterprise agreements as distinct from default fund clauses.
4. The balance of this chapter outlines the legislative arrangements relevant to choice of superannuation fund clauses in the context of enterprise agreements and collective agreements.

B – CHOICE OF SUPER: THE STATUTORY BACKGROUND

5. The *Superannuation Guarantee (Administration) Act 1992* (Cth) requires employers to make a prescribed minimum level of superannuation contributions to a complying superannuation fund on behalf of their eligible employees. The level was initially 3 percent of salary. By the time of the events discussed in Chapter 6.2, relating to Paul Bracegirdle, it had risen to 9 percent. Some employers may pay more. Employees commonly regard their superannuation entitlements as an important part of their overall remuneration. So do employers. Both employees and employers are right to do this.
6. The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) amended the *Superannuation Guarantee (Administration) Act 1992* (Cth) to provide for increased freedom for workers to choose the fund to which their superannuation entitlements are paid.

7. Part 3A of the *Superannuation Guarantee (Administration) Act 1992* (Cth) is designed to enable employees to choose their superannuation fund.
8. Section 32C states that an employer is taken to have complied with the choice of fund requirements, generally, if contributions are made to a fund that is chosen by the employee.
9. ‘Default’ fund clauses in enterprise agreements are permitted under s 194 of the *Fair Work Act 2009* (Cth) on certain conditions.
10. So far as what may be termed ‘compulsory’ fund clauses are concerned, it is lawful for both collective agreements¹ and enterprise agreements² to continue to contain terms which do not allow for choice of funds.
11. Subsection 32C(6) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) provides:

A contribution to a fund by an employer for the benefit of an employee is also made in compliance with the choice of fund requirements if the contribution, or a part of the contribution, is made under, or in accordance with:

[...]

(d) a collective agreement; or

[...]

(h) an enterprise agreement.

¹ *Superannuation Guarantee (Administration) Act 1992* (Cth), s 32C(6)(d).

² *Superannuation Guarantee (Administration) Act 1992* (Cth), s 32C(6)(h).

12. This provision enables bargaining representatives, nominated by majority ballot, to select a compulsory superannuation fund. But the consequence of the provision is to deny employees genuine freedom of choice.
13. A particular issue arises when the bargaining representative has an interest in choosing the superannuation fund. The possibility of a conflict between that of interest of the bargaining representative and the bargaining representative's duty in good faith to advance the interests of each employee arises. The experiences of Paul Bracegirdle set out in Chapter 6.2, and of Katherine Cole in Chapter 6.3, illustrate how these legislative arrangements make it very difficult, if not impossible, for employees to exercise genuine choice of their superannuation fund even when they are active participants in the industrial relations system.

C – RECOMMENDATION

14. For reasons given in Chapter 6.2 it is desirable to foreshadow a recommendation in the Final Report that sub-paragraphs (d) and (h) be deleted from s 32C(6) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

CHAPTER 6.2

TWU SUPER

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A – INTRODUCTION

1. In 1984, the Transport Workers’ Union of Australia (**TWU**) established a superannuation fund in conjunction with the Australian Road Transport Industrial Organisation.¹ The fund is known as TWUSUPER.

2. TWUSUPER is a fund established for an industrial purpose or the welfare of members of the TWU and is a separate legal entity from the TWU. It thus falls within the definition of ‘separate entity’ in the

¹ William McMillin, witness statement, 2/7/14, para 5.

Terms of Reference. Paragraph (a)(iv) of the Terms of Reference applies.

3. This chapter concerns the practice of the TWU in certain enterprise bargaining negotiations of insisting that employers agree to pay superannuation contributions on behalf of each employee to TWUSUPER only, whether the particular employee agrees or not. It is a practice that has no real justification. But the result of it is that TWUSUPER provides a large income stream each year to the TWU.

B – PAUL BRACEGIRDLE’S STORY

Background

4. Paul Bracegirdle is a truck driver. That is an arduous and responsible occupation. He said: ‘I drive a 60-foot piece of machinery. I don’t even have places to park it half the time.’² He gave oral evidence in Perth on 23 June 2014. He did so at some inconvenience to himself for it was necessary for him to start work late. He gave evidence neatly dressed in his work attire. He was 48 years old. He was a vigorous, straightforward and decent man who gave his evidence forcefully, without self-consciousness or self-pity. He was totally credible. Mr Bracegirdle’s employer Toll Holdings Limited (Toll), the TWU and TWUSUPER had notice of the fact that he was to give evidence to the Commission, but they chose not to be represented on the day he gave evidence. Their absence rested on sound forensic judgments. No

² Bracegirdle MFI-1, p 14.

cross-examination could have advanced the interests of any client represented by cross-examining counsel.

5. Paul Bracegirdle is a member of the TWU. He is employed by Toll in Western Australia. He has worked for Toll for about nine years.³ He started on a casual basis.⁴ He became a full time employee in around 2009.⁵ His 'site' or 'yard' was in Horrie Miller Drive, near Perth International Airport.⁶
6. When Paul Bracegirdle became a full time employee of Toll he discovered that he was not able to choose the superannuation fund into which Toll's contributions would be paid. That arose from arrangements agreed between Toll and the TWU.⁷ He said:⁸

When you become a full-time employee you have to fill out all sorts of various paperwork, and one of those being superannuation accounts and things. I signed who I wanted my super to go to. That came back to me a few days later saying that wasn't possible, "You don't get a choice".

He was told that he had to use TWUSUPER.⁹ He resented this. His position was not that of a mere busybody or troublemaker or pedant. He had solid reasons for his dissatisfaction with his inability to choose his own superannuation fund.

³ Paul Bracegirdle, 23/6/14, T:6.42-46, 7.1-2, 34-36.

⁴ Paul Bracegirdle, 23/6/14, T:7.46-47.

⁵ Paul Bracegirdle, witness statement, 23/6/14, para 3.

⁶ Paul Bracegirdle, 23/6/14, T:8.33-45; Paul Bracegirdle, witness statement, 23/6/14, para 12.

⁷ Paul Bracegirdle, 23/6/14, T:8.8-12.

⁸ Paul Bracegirdle, 23/6/14, T:8.8-12.

⁹ Paul Bracegirdle, 23/6/14, T:8.14-16.

7. First, he had personal reasons. He fears his daughter ‘will never be able to work’ because she ‘has a very low intellectual ability’.¹⁰ He wanted, and wants, to choose his own fund because he believes that will enable him to give her the ‘best and most comfortable future’ after his death.¹¹ He testified:¹²

I think you should be able to look into which super funds offer the best rates of return, the least fees – various things. And I just didn’t think that TWUSUPER was stacking up as well as some of the commercial organisations, some of the banks and things.

8. He expressed the second reason for his position thus:¹³

I just thought it was wrong. You know, I just couldn’t believe it, that, you know, we could be told where to put 10 per cent of our income. I was shocked.

9. Paul Bracegirdle then began a campaign to advance his position. So far it has lasted five years and has had only incomplete success.

2009 events

10. First, Paul Bracegirdle asked Alan Cameron for assistance. He was Toll’s payroll officer. He was unable to help and just said: ‘Take it up with someone else.’¹⁴ Paul Bracegirdle then approached his onsite union delegate. He ‘didn’t really know much about it.’¹⁵ But he put Paul Bracegirdle in touch with John Cain, then a TWU organiser who

¹⁰ Paul Bracegirdle, 23/6/14, T:11.4-6. See also Paul Bracegirdle, witness statement, 23/6/14, para 20.

¹¹ Paul Bracegirdle, 23/6/14, T:11.6-10.

¹² Paul Bracegirdle, 23/6/14, T:11.8-12.

¹³ Paul Bracegirdle, 23/6/14, T:11.12-15.

¹⁴ Paul Bracegirdle, 23/6/14, T:8.20-22.

¹⁵ Paul Bracegirdle, 23/6/14, T:8.24-28.

came on site from time to time. He was: ‘you know, a bit of a wheel, if anything really needed sorting out, he would come in, quite a big chap.’¹⁶ John Cain told him: ‘No, it’s not possible. Can’t do it.’¹⁷

11. Paul Bracegirdle thought ‘No, this has got to be a joke.’¹⁸ So he decided to approach his then local Federal Member of Parliament, a senior member of Cabinet, Stephen Smith.¹⁹ He asked: ‘where this was in legislation, if it was true or not.’²⁰ Mr Smith’s electoral officer, Laurence Coleman, in turn, approached Chris Bowen, the Federal Minister for Financial Services, Superannuation and Corporate Law at the time.²¹ According to Laurence Coleman’s letter to Chris Bowen dated 1 October 2009, Paul Bracegirdle:²²

believes that his inability to choose the superannuation fund into which his employer pays his contributions is unfair and places him at a disadvantage in comparison to those who are able to choose their superannuation fund. He has asked that legislation and Government policy be changed to give workers in situations like his the ability to choose their superannuation fund.

12. Chris Bowen replied directly to Stephen Smith on 18 January 2010. He said:²³

¹⁶ Paul Bracegirdle, 23/6/14, T:9.20-22.

¹⁷ Paul Bracegirdle, 23/6/14, T:8.28-31. See also Paul Bracegirdle, witness statement, 23/6/14, para 6.

¹⁸ Paul Bracegirdle, witness statement, 23/6/14, para 6.

¹⁹ Paul Bracegirdle, 23/6/14, T:9.29-35; Bracegirdle MFI-1, p 1.

²⁰ Paul Bracegirdle, 23/6/14, T:9.39.-40.

²¹ Paul Bracegirdle, 23/6/14, T:9.41-43; Bracegirdle MFI-1, pp 2-3.

²² Bracegirdle MFI-1, p 1.

²³ Bracegirdle MFI-1, p 2.

As you are aware, some employees may not be eligible to choose a superannuation fund. Employees who receive employer superannuation contributions under a collective agreement are not eligible for choice of fund as these agreements allow employees to directly negotiate with their employer the superannuation fund into which their contributions will be paid and are therefore consistent with the choice of fund policy.

13. This may have been technically correct. But it was disingenuous. The letter did not promise any changes to legislation or government policy. It did say that Paul Bracegirdle's concerns had been referred to the Cooper Review into superannuation.²⁴ Paul Bracegirdle was sent a copy of Chris Bowen's letter to Stephen Smith.²⁵
14. Paul Bracegirdle then started to take an active role in advocating superannuation choice in negotiations for the next enterprise agreement. He realised that he could become a bargaining representative himself. He saw this as a good way in which to get his voice heard.

2011-2013 enterprise agreement: before the 2 September 2011 hearing

15. Paul Bracegirdle attempted to become his own bargaining representative for the purposes of negotiating the 2011-2013 Enterprise Agreement between Toll and the TWU.²⁶ He was not making progress in his conversations with the TWU delegates, the latest of whom was Kevin Ennor.²⁷ His letter appointing himself (dated 5 November 2010) was given to his Toll yard manager, Stuart Donnelly, but never found

²⁴ Bracegirdle MFI-1, p 2.

²⁵ Paul Bracegirdle, witness statement, 23/6/14, para 8.

²⁶ Paul Bracegirdle, witness statement, 23/6/14, paras 10-11.

²⁷ Paul Bracegirdle, witness statement, 23/6/14, paras 16, 18.

its way to the senior management of Toll.²⁸ Damian Sloan (the senior legal counsel, workplace relations and safety for Toll) attributed this largely to a misunderstanding by the Toll yard manager.²⁹

16. On 21 February 2011, Damian Sloan had a phone conversation with Paul Bracegirdle.³⁰ As a result, on the same day Damian Sloan sent Paul Bracegirdle a letter.³¹ However, Paul Bracegirdle never received this letter.³² This is unfortunate, for the letter was the most helpful response by far that Paul Bracegirdle had yet received from those he had been dealing with – the TWU, the government and Toll. First, the letter lucidly set out the problem.³³

Under the *Superannuation Guarantee (Administration) Act 1992* (Superannuation Act), an employee is entitled to choose the fund into which his or her employer is to pay compulsory superannuation contributions.

Part 3A, Division 2 of the Superannuation Act sets out situations in which the “choice of fund requirements” will be taken to have been met, even if the employee has not been able individually to choose their own fund.

Section 32C(6) of the Superannuation Act provides that payments made pursuant to certain negotiated industrial instruments satisfy the choice of fund requirements. That is, if the instrument specifies a fund into which contributions must be paid, the employee will not be able to nominate an alternative fund into which compulsory contributions should be paid. The title of the negotiated instrument is not important. All that matters is that it

²⁸ Paul Bracegirdle, witness statement, 23/6/14, para 17; Damian Sloan, witness statement, 2/7/14, paras 27, 28; Sloan MFI-1, p 98.

²⁹ Damian Sloan, witness statement, 2/7/14, para 28; Paul Bracegirdle, witness statement, 23/6/14, para 17.

³⁰ Paul Bracegirdle, witness statement, 23/6/14, para 14; Damian Sloan, witness statement, 2/7/14, para 31.

³¹ Sloan MFI-1, pp 98-101.

³² Paul Bracegirdle, witness statement, 23/6/14, para 22.

³³ Sloan MFI-1, pp 98-101.

be a registered or “formalised” agreement made under Federal or State industrial legislation.

A great many industrial instruments apply across the Toll Group. Many of these require superannuation contributions to be made into particular superannuation funds. Where the instrument has been negotiated with the Transport Workers Union, it is common for it to require contributions to be made into the TWU Superannuation Fund [ie, TWUSUPER].

In recent times, Toll has received requests from a number of employees seeking to exercise choice as to their superannuation fund. In other words, they have sought to “opt out” of the default fund into which contributions are being paid, in favour of a fund of their own choice.

Toll has taken the approach, and will continue to take the approach, that it will comply with its legal obligations when it comes to superannuation choice.

17. The relevant parts of s 32C(6) of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) were set out above.³⁴
18. The letter then explained Toll’s position in relation to the Group Enterprise Agreement then being negotiated, predominantly with the TWU:

The Group’s preferred position is to allow every employee the ability to choose their own superannuation fund. However, being aware of the sensitivity of this issue to the TWU, we proposed retaining TWUSuper as the default fund, but to allow individual employees (at their own volition and without encouragement from Toll) to opt out in favour of a fund of their choosing.

19. Damian Sloan then set out Toll’s suggested clause. Thereafter the letter continued:

The TWU’s log of claims did not allow for any choice.

³⁴ Chapter 6.1, para 11.

The issue of superannuation choice was discussed with the TWU's negotiating committee at a meeting on 25 November 2010. At that time, the TWU informed Toll that it was not authorised by its members to move from its position, and that our proposed clause was rejected.

20. The letter concluded:

I invite you to put forward any information or proposals which you would like to be considered by Toll regarding the Group EA. We will consider any such information and proposals and respond as quickly as possible.

I venture to suggest that in light of the history outlined above, the resolution of this matter in a way satisfactory to you may require you to obtain support from the TWU.

21. Damian Sloan's prophecy was accurate. But the TWU did not provide that support.

22. On 4 July 2011, an Enterprise Agreement negotiated by Toll and the TWU was approved by a large majority – 5289 out of 5987 (though not by Paul Bracegirdle's yard, which voted against 49 votes to 1).³⁵ This event took place despite Toll's failure to deal with Paul Bracegirdle as 'a new bargaining representative', on the ground that he had not responded to Damian Sloan's letter of 21 February 2011 – not surprisingly, since he had not received it.³⁶

2 September 2011 hearing

23. On 2 September 2011, the application for approval of the 2011-2013 Enterprise Agreement was brought before Commissioner Cambridge.³⁷ In Paul Bracegirdle's understanding, initially this was to be an 'E-

³⁵ Bracegirdle MFI-1, pp 5-7; Paul Bracegirdle, witness statement, 23/6/14, para 15.

³⁶ Bracegirdle MFI-1, p 7; Paul Bracegirdle, witness statement, 23/6/14, para 22.

³⁷ Bracegirdle MFI-1, pp 4-16.

Hearing ... just to rubber-stamp it all'.³⁸ But he got in touch with Commissioner Cambridge's associate, and it became an oral hearing in Sydney.³⁹ Paul Bracegirdle participated in it from Perth on the telephone.⁴⁰ At this hearing, Paul Bracegirdle appeared on his own behalf. Maurice Baroni (a partner of Clayton Utz) appeared on behalf of Toll. Michael Burns (an advocate employed by the TWU) appeared on behalf of the TWU.⁴¹ In the course of the hearing Paul Bracegirdle complained about non-receipt of any correspondence from Damian Sloan. He also complained that neither the TWU nor Toll had ever 'come to me in a meeting, sat down face to face and said, "What are your gripes, Paul? What's your problem, mate? We can work through it."'”⁴² Commissioner Cambridge did see as unsatisfactory the history by which Paul Bracegirdle was a bargaining representative but had had no opportunity to participate in the bargaining.⁴³ But Commissioner Cambridge also drew attention to the large majority of employees nationally who had approved the Enterprise Agreement.⁴⁴

24. Paul Bracegirdle suggested that the issue of superannuation choice could easily be remedied by making a site agreement that made special provision for the employees at Paul Bracegirdle's yard to have a choice in respect of their superannuation fund.⁴⁵ Paul Baroni said the matter

³⁸ Paul Bracegirdle, 23/6/14, T:11.38-39.

³⁹ Paul Bracegirdle, 23/6/14, T:11.39-41.

⁴⁰ Bracegirdle MFI-1, p 5; Paul Bracegirdle, 23/6/14, T:11.34-47.

⁴¹ Bracegirdle MFI-1, p 5; Michael Burns, 21/8/14, T:7.37-47.

⁴² Bracegirdle MFI-1, p 11.

⁴³ Bracegirdle MFI-1, pp 11-12.

⁴⁴ Bracegirdle MFI-1, p 12.

⁴⁵ Paul Bracegirdle, 23/6/14, T:12.7-24; Bracegirdle MFI-1, pp 12-14.

‘certainly could be dealt with under clause 14’ of the 2011-2013 Enterprise Agreement.⁴⁶

25. Michael Burns did not make any submissions, except on a discrete administrative issue. But he was present during the entirety of the hearing.⁴⁷ He made no protest about the references to a site agreement.
26. Commissioner Cambridge adjourned the matter for a week to allow Paul Bracegirdle to obtain legal advice in relation to any further objection he might have.⁴⁸

8 September 2011 Letter

27. On 8 September 2011, Paul Bracegirdle wrote an important letter to Commissioner Cambridge. The substance of it was as follows:⁴⁹

Dear Commissioner Cambridge,

As you know I notified Toll of my intension [sic] to be a bargaining representative on the fifth of November 2010. I don't think it my fault that the operations manager never handed that over to Mr Sloane [sic] until months later. Once Mr Sloane [sic] did recieve [sic] it I think it was incumbent on Toll and the TWU to let me know when and where these negotiations were to take place as you know they never did. I don't think they should try and make me culpable for thier [sic] infirmity.

After our hearing on the 2nd September 2011 I rang Mr Baroni and asked how I could make things as easy and quick [as possible] for everyone involved he suggested I go for a site specific aggreement [sic]. I also rang Kevin Ennor, our local union organiser. He said he would be happy for it to be in the agreement. Here is what I suggest.

⁴⁶ Bracegirdle MFI-1, p 14.

⁴⁷ Bracegirdle MFI-1, p 9.

⁴⁸ Bracegirdle MFI-1, pp 15-16.

⁴⁹ Bracegirdle MFI-1, pp 17-18. See generally Paul Bracegirdle, 23/6/14, T:15.3-18.6.

I would be happy to sign the application for approval of agreement if Mr Baroni would put in an amendment so as we could choose our own super fund if so desired. And in the spirit of good faith bargaining, I would not even mind if this was a default system.

I note your concerns about the benefits [sic] of this agreement taking a while to get thru [sic] to the rest of Toll employees. Toll has already paid the back pay and increased rate of pay to it's [sic] employee's [sic] covered in this agreement, and I am confident that the old agreement still covers the worker's [sic] right's [sic] until the New one is ratified.

I know the names on this petition mean very little but all of the people believe we can have a seperate [sic] site agreement pertinent to our choice of super fund.

Thank you for your time and patience.

28. Attached to that letter was a petition of three pages. At the head of each page appeared the statement: 'I am in agreement with Paul Bracegirdle: I too wish to chose [sic] my own Superannuation Fund in the current 2011-2013 EBA currently before Commissioner Cambridge.'⁵⁰ That petition received written assent from 53 other people in the yard.⁵¹ That was about three-quarters of the employees in the yard.⁵² Paul Bracegirdle had simply approached people he had met in the yard in the five days after the hearing. No-one who had been approached refused to sign.⁵³ Paul Bracegirdle explained this high level of support thus:⁵⁴

once you tell people they don't actually have a choice of their own super, people find it amazing. People say, "What are you talking about, Paul?" And they're just shocked.

⁵⁰ Bracegirdle MFI-1, p 19-21.

⁵¹ Paul Bracegirdle, 23/6/14, T:14.31; Bracegirdle MFI-1, 19-21.

⁵² Paul Bracegirdle, witness statement, 23/6/14, para 30.

⁵³ Paul Bracegirdle, 23/6/14, T:13.23-14.40.

⁵⁴ Paul Bracegirdle, witness statement, 23/6/14, para 30.

29. The conversation with Maurice Baroni to which Paul Bracegirdle referred in the letter took place less than an hour after the hearing before Commissioner Cambridge.⁵⁵
30. Paul Bracegirdle's letter was a forceful document.
31. On 9 September 2011, Commissioner Cambridge made an order approving the agreement. In the course of his decision he said:⁵⁶

[6] *Mr Bracegirdle* raised concerns about the bargaining process that led to the making of the Agreement and which did not appear to involve him in his capacity as a bargaining representative. *Mr Bracegirdle* also raised concern about some of the terms of the Agreement. Particular concern was raised with clause 28(d) of the Agreement which removed employee choice of superannuation fund and compelled contributions to be made into "TWUSUPER".

[7] During the Hearing I expressed my personal disapproval of a term such as clause 28(d) of the Agreement. However, I understand that the choice of fund requirements of the *Superannuation Guarantee (Administration) Act 1992* permits a term such as clause 28(d) of the Agreement. Therefore the terms of clause 28(d) of the Agreement, as distasteful as I personally find them, do not prevent approval of the Agreement.

[8] The Hearing was adjourned to allow *Mr Bracegirdle* a period of 7 days to obtain legal or other advice which might assist with the provision of some communication to FWA indicating any basis upon which the approval of the application might be refused.

FWA has received written communication from *Mr Bracegirdle* dated 8 September 2011 which, inter alia, mentions that the Employer and "*our local union organiser*" are said to be "*happy*" to establish a Site Arrangement under clause 14 of the Agreement which would provide for choice of superannuation fund. The communication from *Mr Bracegirdle* has attached a petition of some 53 individuals who have expressed a wish to be given a choice of superannuation fund. I strongly urge that such a Site Arrangement be established.

⁵⁵ Paul Bracegirdle, 23/6/14, T:15.41-44.

⁵⁶ Bracegirdle MFI-1, 23/6/14, p 23.

32. These statements provoked correspondence from the TWU which ought not to have been sent, and which is dealt with in the Appendix to this Chapter.
33. Despite Paul Bracegirdle's best efforts, no site agreement of the kind discussed at the 2 September 2011 hearing was made. Paul Bracegirdle said that that option was disregarded by TWU delegates on site after the 2011-2013 Enterprise Agreement had received the seal of approval from Commissioner Cambridge.⁵⁷ The TWU submitted that there were insuperable legal problems in so proceeding. Perhaps it is right. But whether or not it is right, the fact is that Paul Bracegirdle had thought that after the assurances given before Commissioner Cambridge there would be no problem obtaining a site agreement. The 'assurances' comprised Commissioner Cambridge's endorsement of the idea of a site agreement, Maurice Baroni's acceptance of the idea that the problem could be dealt with by a site agreement, and Michael Burns's silence in the face of the positive statements of Commissioner Cambridge and Maurice Baroni.⁵⁸ Paul Bracegirdle spoke to three TWU site delegates, Kevin Ennor, Craig Butler and David Sheaf every day for months.⁵⁹ At every meeting which discussed superannuation, he would ask questions. He testified:⁶⁰

When I asked questions, the TWU people would go so far as to move tables and just have a little group meeting about other things. Another lady from TWU Super came in and was trying to obviously get people to roll over their existing funds into the TWU Super fund. I had many questions to ask her and they just shut me down. The TWU

⁵⁷ Paul Bracegirdle, 23/6/14, T:20.4.

⁵⁸ Bracegirdle MFI-1, pp 14-15.

⁵⁹ Paul Bracegirdle, witness statement, 23/6/14, paras 30-34.

⁶⁰ Paul Bracegirdle, witness statement, 23/6/14, para 33.

representatives stopped the meeting, moved to a small table and talked to one person who had a query about his super fund.

34. On 29 November 2011, Paul Bracegirdle filed proceedings in the Fair Work Commission to try to achieve a site agreement.⁶¹ Toll was in support of Paul Bracegirdle's application for a site agreement.⁶² The problem lay with achieving agreement from the TWU. Adam Dzieciol, an in-house lawyer for the WA branch of the TWU,⁶³ advised that the TWU would not support a site agreement.⁶⁴ The hearing was adjourned to allow time for the parties to negotiate.⁶⁵ Paul Bracegirdle testified: 'we were rushed out of that hearing here in this building quick smart'.⁶⁶
35. On 14 February 2012, Adam Dzieciol sent an email to the Fair Work Commission, copying in Damian Sloan and Michael Burns. It stated:⁶⁷

The TWU maintains its opposition to the application by Mr Bracegirdle, and is not prepared to consider any form of a [sic] "*local*" agreement, or any other proposal to deal with the superannuation issue at Mr Bracegirdle's workplace, as an overwhelming majority of Toll employees voted in favour of the Agreement.

Further, I am advised that the TWU did not at any time give an indication to the Tribunal that the Union may be prepared to consider a "*local agreement*" to deal with choice of superannuation fund issue, and that the TWU was not aware of Mr Bracegirdle's assertions that this may be the case until it received the decision of the Tribunal regarding the certification of the Agreement.

⁶¹ Damian Sloan, witness statement, 2/7/14, para 43.

⁶² Damian Sloan, witness statement, 2/7/14, para 46.

⁶³ Damian Sloan, witness statement, 2/7/14, para 48.

⁶⁴ Damian Sloan, witness statement, 2/7/14, para 49.

⁶⁵ Damian Sloan, witness statement, 2/7/14, para 47.

⁶⁶ Paul Bracegirdle, 23/6/14, T:19.38-39.

⁶⁷ Sloan MFI-1, 2/7/14, p 123.

The transcript of the hearing before Commissioner Cambridge, however, reveals that Michael Burns did not deny the TWU's preparedness.

36. Michael Kaine (Assistant Secretary of the TWU) stated that he had contacted Toll – he did not say whom within Toll, nor when – to indicate that the TWU would not press compliance with the clause should Paul Bracegirdle wish to change his superannuation fund.⁶⁸ This was in substantial contrast to the message the TWU sent to Toll in its email from Adam Dzieciol. Michael Kaine said that Adam Dzieciol's email never came to his attention.⁶⁹ Michael Kaine professed himself unable to 'help ... out with that inconsistency'.⁷⁰

2013-2017 Enterprise Agreement

37. Paul Bracegirdle ensured that he was properly appointed as his own bargaining representative for the purposes of the 2013-2017 Enterprise Agreement.⁷¹ Paul Bracegirdle was kept apprised of the progress of the negotiations by Damian Sloan, including progress with the 'window' clause.⁷²
38. Meanwhile, Paul Bracegirdle continued to raise the issue with TWU delegates and representatives. He asked Jim McGiveron, the former West Australian Branch Secretary of the TWU, about the

⁶⁸ Michael Kaine, 3/7/14, T:206.18-29; Michael Kaine, witness statement, 3/7/14, para 21.

⁶⁹ Michael Kaine, 3/7/14, T:207.1-208.2.

⁷⁰ Michael Kaine, 3/7/14, T:208.1-2.

⁷¹ Paul Bracegirdle, witness statement, 23/6/14, paras 36-37.

⁷² Damian Sloan, witness statement, 2/7/14, para 59.

superannuation issue. But Jim McGiveron told him ‘to F – off. “No-one cares, Paul. Go away”.’⁷³ Rick Burton, who went on to replace Jim McGiveron as West Australian Branch Secretary, was present when this conversation occurred.⁷⁴ The incident took place in front of a room full of people. The purpose of the meeting was to update employees on the EBA. Paul Bracegirdle said of Jim McGiveron: ‘I think he’d had enough of me. I think he wanted to come in personally and tell me face to face.’⁷⁵ Paul Bracegirdle was also treated without respect by David Sheaf, a TWU delegate who habitually said to him: ‘Whatever Paul’ and ‘Just go away Paul’.⁷⁶

39. In respect of negotiations for the 2013-2017 Enterprise Agreement, Mr Sloan’s evidence was that:⁷⁷

Superannuation choice (or lack thereof) was again a topic of discussion ... We encountered similar resistance from the TWU to this claim.

[at] an early stage of the [2013] negotiations there was a discussion regarding the possibility of allowing a period of time – a “window” – for employees to exercise individual choice of superannuation. Mr Kaine stated that he was open to that discussion.

40. Even though Toll’s original position was to allow a six month ‘window’ for both new and existing employees to opt out of TWUSUPER,⁷⁸ the period accepted was reduced to three months and

⁷³ Paul Bracegirdle, 23/6/14, T:20.39; Paul Bracegirdle, witness statement, 23/6/14, para 35.

⁷⁴ Paul Bracegirdle, 23/6/14, T:20.45.

⁷⁵ Paul Bracegirdle, 23/6/14, T:21.3-16.

⁷⁶ Paul Bracegirdle, witness statement, 23/6/14, para 39.

⁷⁷ Damian Sloan, witness statement, 2/7/14, paras 56-57.

⁷⁸ Damian Sloan, witness statement, 2/7/14, para 58.

confined to existing employees.⁷⁹ That was eventually reflected in clause 30 of the 2013-2017 Enterprise Agreement.⁸⁰

41. Paul Bracegirdle took advantage of this ability to opt out in the ‘window’ timeframe. But he saw it as a ‘hollow, small win’. He said that ‘big business should [not] be involved with unions like that. It doesn’t make much sense to me. You know, I think the line has become blurred’.⁸¹

C – DID THE TWU TAKE STEPS TO ADDRESS PAUL BRACEGIRDLE’S CONCERNS?

42. The TWU submissions endeavoured to downplay the significance of the way Paul Bracegirdle had been treated. The submissions said: ‘The TWU took steps to address Mr Bracegirdle’s concerns’.⁸² Some of what is said in support of these supposed ‘steps’ calls for examination. The TWU’s points are not in chronological order, and have been rearranged into chronological order.

- (a) ‘The leadership of the TWU did not become aware of Mr Bracegirdle’s concerns until at least after he appeared at the hearing on 2 September 2011.’⁸³ Yet he had made them known to people whom he thought were ‘the leadership’ – the two TWU officials he spoke to in 2009 and Kevin Ennor from 2010 on. It

⁷⁹ Damian Sloan, witness statement, 2/7/14, para 58.

⁸⁰ Sloan MFI-1, pp 167-168.

⁸¹ Paul Bracegirdle, witness statement, 23/6/14, para 48.

⁸² Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 122.

⁸³ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 122.

does not speak well for the TWU chain of reporting that his remonstrations remained unknown to the higher ‘leadership’.

- (b) The TWU contended that ‘Mr Sloan ... offered him the opportunity to put material forward in connection with the bargaining’.⁸⁴ The problem is that Mr Sloan’s letter of 21 February 2011 containing this offer never arrived. And Mr Sloan’s offer reflects a courtesy from Toll, not the TWU.
- (c) The TWU contended that any argument that Paul Bracegirdle was ‘effectively shut out of the bargaining process’ is ‘without foundation’.⁸⁵ Commissioner Cambridge did not seem to think it was without foundation.
- (d) The TWU submitted:⁸⁶

Mr Kaine gave evidence that, after the approval of the 2011 Toll Agreement, discussions were held with Toll in relation to the superannuation issue. The TWU informed Toll that: “if an employee wishes to transfer into another superannuation fund we will not take issue with that”.

But the TWU submissions do not explain how this can be reconciled with Adam Dzieciol’s email dated 14 February 2012, copies of which were sent to Damian Sloan and Michael Burns. That email does not sit well with what Michael Kaine said his communication was. And the TWU submissions do not explain

⁸⁴ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 124.

⁸⁵ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 124.

⁸⁶ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 122.

how this can be reconciled with Michael Burns' letter of 12 September 2011, which was discussed with Michael Kaine, endeavouring to stop Commissioner Cambridge publicising Paul Bracegirdle's complaint on the ground that it would 'result in significant industrial disharmony'.⁸⁷

- (e) The TWU argued that one of its committees had agreed 'that a period of time would be afforded during which employees could nominate a fund other than [TWUSUPER] for their contributions.' The TWU contended that this 'resulted in the insertion of clause 30(e) of the 2013 Toll Agreement providing for a period of 3 months during which an individual employee could elect to have superannuation contributions paid into a superannuation fund other than [TWUSUPER].'⁸⁸ Even if this is completely true, the 'window' was confined only to existing employees. And even if others took advantage of it as well as Paul Bracegirdle, it does not seem to have been extensively publicised amongst employees, at least by the TWU.

The TWU submitted that it took steps to address Paul Bracegirdle's concerns. This submission completely failed to deal with the uninterrupted history of circumstances revealing uncooperativeness with or a total lack of decency towards Paul Bracegirdle. From 2009 to the present day they have treated him like a pest – a whining mosquito or an unpleasant cockroach. Eventually they gave a measure of ground to him personally, but did not seem to spread the news to

⁸⁷ See Appendix to this Chapter.

⁸⁸ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 123.

others in his position. They showed much more concern about maintaining the majority position than listening to his point of view.

D – MICHAEL KAINE’S DEFENCE OF THE TWU

Michael Kaine’s evidence

44. It was put to Michael Kaine, Assistant Secretary of the TWU, several times that it was unnecessary to insist on TWUSUPER being the compulsory fund. He stressed two main points. The first main point was that what he called ‘corporate funds’ would ‘generally have inferior returns as opposed to the cohort of industrial funds’.⁸⁹ He said: ‘It will have undisclosed commissions, it will have undisclosed arrangements between the company and the fund, the corporate fund that is seeking to be imposed on them.’⁹⁰ In a milder way, something similar can be said of the relationship between the TWU and TWUSUPER. Michael Kaine’s second main point was that in order to resist that imposition, ‘there should be the choice of employees to be able to resist those attempts and that choice is maximised and the capacity to have that choice is maximised where there is greater collective strength.’⁹¹

45. Senior counsel assisting accepted, for the sake of argument, that it was one thing to resist a clause in an EBA requiring contributions to be put into a ‘corporate or for-profit fund’. But he suggested that it was

⁸⁹ Michael Kaine, 3/7/14, T:193.23-27.

⁹⁰ Michael Kaine, 3/7/14, T:193.27-33.

⁹¹ Michael Kaine, 3/7/14, T:193.31-34. See also T:194.26-196.23.

another thing for an EBA to require that all contributions be paid into a particular industry fund.⁹² The witness said:⁹³

one of the objectives that exists in the group of workers that is the TWU, in the rules of the TWU, is that there will be established and maintained an industry superannuation fund. Now, for transport workers that is the TWUSUPER fund and workers act inconsistently [sic] with that objective when they maximise their membership of the TWUSUPER fund.

46. Counsel assisting then asked:⁹⁴

You advance the proposition ... that there is a long and well-established history of industry super funds outperforming retail super funds. Assuming that to be the case, why should an employee not have an option of choosing which industry super fund to have his or her contributions paid into?

The witness said, incorrectly: "I think I've just answered that question."

The witness went on:⁹⁵

In relation to transport workers, there's been a consistent objective, indeed, the TWUSUPER fund I think if it wasn't the first industry fund established, it was certainly one of the first couple of industry funds established. That was established by transport workers coming together and essentially fighting the fight to have a fund established and establishing that fund together with the responsible employer association in the industry, being the Australian Road Transport Industrial Organisation, and so the TWUSUPER fund is a fund which is tailored to understand the needs of the industry, it understands the context of workers in the industry, and it's for those reasons that for example in the batch of agreements that you've provided to me, the collective speaks, the collective speaks in a way that says that they want their contributions paid into that fund that, in essence, they or their predecessors have established.

47. Counsel assisting made one more attempt:⁹⁶

⁹² Michael Kaine, 3/7/14, T:195.16-28.

⁹³ Michael Kaine, 3/7/14, T:195.16-28.

⁹⁴ Michael Kaine, 3/7/14, T:195.30-36.

⁹⁵ Michael Kaine, 3/7/14, T:195.37-196.7.

Q. Your proposition is that the collective voice would extinguish the ability of the individual to choose a different even industry super fund if he or she so wished?

A. No. My proposition is not that the collective would extinguish choice. My proposition is that the collective enables a real-life industrial relations choice; that is, a choice not to have imposed on them a corporate fund with inferior rates of return, with secret commissions, with undisclosed, unknown arrangements between the corporation that is imposing the fund and the overarching commercial vehicle that runs the fund, usually one of the major banks; that's what I'm saying.

This, for the third time, evades the point. Counsel assisting was not talking about corporate funds. He was merely asking why an individual who desired to do so could not choose a different industry fund. To say that counsel assisting never received a satisfactory answer would be misleading. He never received any answer at all.

48. Michael Kaine did accept that 'obviously' it was 'possible' that a single individual employee 'might' be able to select a fund that has done better than TWUSUPER and would do better in future. But he said:⁹⁷

... superannuation is and obviously is an industrial relations issue and it's in a sense not an issue that workers have ever seen as severable from the terms and conditions that they otherwise aspire to in their agreements, in their terms and conditions, so it's an exercise of their collective strength for their terms and conditions of employment, including superannuation, including not just the quantum of superannuation but the vehicle in which they trust as a collective that superannuation to be dealt with.

49. The witness's appeals to the values of 'collective strength' were really appeals to the power of the majority, under the influence of doubtless well-intentioned union officials, to suppress minority wishes –

⁹⁶ Michael Kaine, 3/7/14, T:196.9-20.

⁹⁷ Michael Kaine, 3/7/14, T:204.26-35.

ruthlessly, if necessary. Those appeals never demonstrated that any legitimate industry goal (like preventing a powerful employer from forcing its employees into its own superannuation fund) could justify a clause which prevented an employee from having the opportunity to choose some industry fund other than TWUSUPER, or even having the opportunity to choose any fund that that employee wished to.

TWU submissions supporting Michael Kaine

50. This is a convenient stage at which to consider submissions of the TWU which align themselves with Michael Kaine's points.
51. The TWU submitted that clause 28 of the 2011-2013 Enterprise Agreement and clause 30 of the 2013-2017 Enterprise Agreement 'were not unilaterally imposed by officials of the TWU', but involved 'a process which was 'democratic, consultative and participatory'.⁹⁸ The TWU then gives details of the process. This misses Paul Bracegirdle's point. His point is that however democratic, consultative and participatory the process, the relevant clauses were unsatisfactory to him, and that no good reason has been advanced for applying them to dissenters like him. The TWU stresses the very high majority achieved for the first of the two agreements. The plebiscitary tyranny of the TWU is as much a tyranny as any other kind of tyranny created by a majority over a minority. The need for this particular tyranny has not been demonstrated.

⁹⁸ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 111.

52. Then the TWU relied on the fact that a survey of members in 2013 asked members to rate the importance of ‘employer contributions to strong industry super funds’.⁹⁹ The actual question posed has a significantly different focus from the words which are quoted in the TWU’s submission which is set out above. The actual question was:

Superannuation is important to my family’s future. I know that additional employer contributions to strong industry super funds are important for retirement security. Improving superannuation levels to meet the 15% employer contributions target is ...

Then the respondent was asked to choose between ‘Very important’, ‘Important’ and ‘Not important’. That question, contrary to what the TWU’s submissions suggest, focuses on the importance of ‘*additional* employer contributions’. The reference to ‘strong *industry* super funds’ is not the central theme. The results of the survey are not given. But it would not be surprising if the superannuants were in favour of a 15% employer contribution target.

53. The TWU then submitted: ‘TWU believes that the interests of its members and transport workers generally are best served by workers coming together collectively to join an industry superannuation fund rather than being exposed to corporate, for-profit funds that are not established to further their interests.’¹⁰⁰ Again this misses the point. It does so in a double sense. The first aspect is that the TWU may well believe this, and most of its members and other transport workers may well believe it too. But these factors are not commensurable with those

⁹⁹ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 113, relying on Michael Kaine, witness statement, 3/7/14, para 7(d).

¹⁰⁰ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 114.

troubling Paul Bracegirdle. The second aspect is that the submission, like Michael Kaine in his testimony, propounds a false dichotomy. It is one thing to oppose employers who want the superannuation contributions they make on behalf of their employees to go into a superannuation fund they have created. It is a quite different thing to view the compulsion of employees who do want the contributions to go into a superannuation fund affiliated with the union as not being a legitimate or rational method of attaining the first goal.

54. Then the TWU submissions accuse counsel assisting of ‘profound ignorance’ about ‘extensive and expert consideration’ and ‘repeated and detailed investigation’ which has taken place over ‘many years’ in respect of superannuation arrangements. But the submissions refer to only three examples. One is the Review into the Governance, Efficiency, Structure and Operation of Australia’s Superannuation System (‘the Cooper Review’). The second is a review which has not yet been completed by the Fair Work Commission. The third is an inquiry commenced this year by the federal government which is also not yet completed. The TWU submissions point to not one part of the Cooper Review which might bear on the merits of remedying Paul Bracegirdle’s complaint by repealing s 32C(6)(d) and (h) of the *Superannuation Guarantee (Administration) Act 1992* (Cth). And the Toll submissions point to not one part of any submission to either of the other two inquiries which might bear on it either. In like vein, the TWU accused counsel assisting of being ignorant of other instances in which employees cannot nominate a fund to which superannuation contributions made on their behalf can be directed. They refer to contributions under ‘a broad range of instruments, including Australian Workplace Agreements ..., Individual Transitional Employment

Agreements ..., a workplace determination, former industrial awards and various public sector superannuation arrangements'.¹⁰¹ Again, not a single particular clause which might illustrate the TWU's point is given. Submissions of this kind command no intellectual assent.

55. The TWU also submitted that 'the Commission is not best placed to make recommendations in relation to broad policy questions involving superannuation'. It was submitted that it is unsatisfactory for such broad policy questions to be determined on the basis of evidence of the circumstances of one employer and one individual employee in Mr Bracegirdle and little more.¹⁰² The Commission, of course, is deeply conscious of its own inadequacy. But sometimes 'broad policy questions' *are* illuminated by examining the circumstances of a particular employee. The detail of one employee's struggle gives life and colour and vitality to the problem. It opens up aspects which experts on broad policy questions may overlook. Sometimes policy inquiries can be taken over by particular classes of stakeholder to the extent that the problems of individuals who are outside those classes are forgotten. This particular submission of the TWU is linked with the earlier submission seeking to downplay the way Paul Bracegirdle was treated.¹⁰³

¹⁰¹ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, paras 117, 118.

¹⁰² Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 119.

¹⁰³ See paras 42-43.

**E – FINANCIAL LINKS BETWEEN THE TWU AND TWUSUPER:
GENERAL**

TWU submissions relating to Michael Kaine’s points

56. So the need for ‘collective strength’ does not fully, or at all, explain the TWU’s insistence that TWUSUPER be the only fund and not merely the default fund. Does another explanation lie in the financial links between the TWU and TWUSUPER?
57. The table set out below shows the total money flowing from TWUSUPER to the TWU (and its branches) in each financial year:¹⁰⁴

| Financial Year | Amount paid to the TWU |
|-----------------------|-------------------------------|
| 2006/2007 | \$684,145.10 |
| 2007/2008 | \$700,589.23 |
| 2008/2009 | \$809,365.22 |
| 2009/2010 | \$875,963.81 |
| 2010/2011 | \$851,755.13 |
| 2011/2012 | \$908,056.97 |
| 2012/2013 | \$1,022,497.95 |
| 2013/2014 | \$968,776.14 |

58. Each payment summarised above is the total of the following categories of payments:
- (a) director’s meeting fees;

¹⁰⁴ McMillin MFI-2.

- (b) reimbursement of director's expenses;
- (c) superannuation liaison officer expenses;
- (d) office rental;
- (e) advertising expenses; and
- (f) sponsorship.

F – SUPERANNUATION LIAISON OFFICERS

59. A Superannuation Liaison Officer is an employee of the TWU who acts as a liaison between TWUSUPER and its members.¹⁰⁵
60. Each branch appoints a Superannuation Liaison Officer with no input from TWUSUPER.¹⁰⁶ The Superannuation Liaison Officer will carry out certain duties. In consideration for these duties, TWUSUPER pays to the TWU 50% of the officer's wage (or such other amount as is determined by the TWU branch secretary at his discretion, subject to approval by the board of TWUSUPER).¹⁰⁷ TWUSUPER in no way supervises the Superannuation Liaison Officers in their duties and leaves those duties entirely to the TWU to determine and enforce.¹⁰⁸ TWUSUPER has no control over the Superannuation Liaison Officers.¹⁰⁹ TWUSUPER receives no updates or reports nor does it

¹⁰⁵ William McMillin, witness statement, 2/7/14, para 19.

¹⁰⁶ William McMillin, 2/7/14, T:92.25-26.

¹⁰⁷ William McMillin, 2/7/14, T:93.5-12.

¹⁰⁸ William McMillin, 2/7/14, T:93.23-28.

¹⁰⁹ William McMillin, witness statement, 2/7/14, para 29.

impose any key performance indicators on the Superannuation Liaison Officers.¹¹⁰

61. William McMillin was the Chief Executive Officer of TWUSUPER from 6 December 1999 to 31 December 2012.¹¹¹ He saw the goals of TWUSUPER to be in common with the TWU in that they both wished to ‘provide a well-managed and successful fund for the members which is...what [TWUSUPER is] trying to do’.¹¹²
62. Previously the arrangements applicable between the TWU and TWUSUPER governing the appointment and duties of the Superannuation Officers were the subject of a formal written agreement.¹¹³ It is no longer used.¹¹⁴ A draft agreement governing the current arrangements has been prepared but, at the time of the hearing, was not yet in final form or in effect.¹¹⁵
63. In the 2012/2013 financial year, the smallest payment to a branch of the TWU in respect of the Superannuation Liaison Officer expenses was \$63,012.40; the highest was \$164,207.89.¹¹⁶

¹¹⁰ William McMillin, 2/7/14, T:95.1-5.

¹¹¹ William McMillin, witness statement, 2/7/14, para 4.

¹¹² William McMillin, 2/7/14, T:95.19-23.

¹¹³ McMillin MFI-1, 2/7/14, pp 134-135.

¹¹⁴ William McMillin, 2/7/14, T:96.35-97.8; William McMillin, witness statement, 2/7/14, para 32.

¹¹⁵ McMillin MFI-3, 2/7/14.

¹¹⁶ McMillin MFI-2, 2/7/14, row 41.

64. William McMillin said that he trusted the Superannuation Liaison Officers to do the right thing by spending 50% of their time and energy promoting TWUSUPER and:

doing it in a positive way and contributing to the liaison role that they play which means bringing back references to us, members' queries, bringing our staff into sites which they can't get into otherwise, helping to organise events and all the other things that they do.¹¹⁷

65. In the 2010/2011 financial year, the Victorian branch of the TWU invoiced TWUSUPER in an amount of \$93,434. The relevant Superannuation Liaison Officer was John Berger, the Assistant State Secretary. The invoiced amount represented 50% of the total cost of John Berger's salary.¹¹⁸ John Berger's evidence was that in that financial year he spent just two and a half days in his duties as a Superannuation Liaison Officer, in addition to making a few follow-up calls in respect of that work and fielding a number of telephone calls per month.¹¹⁹

66. William McMillin said he would be surprised if that was the totality of what John Berger had done in his role as Superannuation Liaison Officer.¹²⁰ But he also agreed that if this was the case, it would be an entirely inappropriate use of members' money.¹²¹

67. The practical outcome of this lucrative arrangement for the TWU is that an employee of the branch is named as the Superannuation Liaison

¹¹⁷ William McMillin, 2/7/14, T:96.21-26.

¹¹⁸ TWUSUPER Tender Bundle, 31/10/14, p 10.

¹¹⁹ John Berger, 2/7/14, T:54.16-17, 65.16-27, 67.4-6.

¹²⁰ William McMillin, 2/7/14, T:99.47-100.1.

¹²¹ William McMillin, 2/7/14, T:100.24.

Officer, and, in return, TWUSUPER pays the branch half the person's salary. The Superannuation Liaison Officer is not accountable to TWUSUPER for the performance of his or her duties in the role.

68. The assistant secretary is one of the highest-paid union officials, second only to the branch secretary. It is unsurprising that John Berger was unable to spend more time in his duties as Superannuation Liaison Officer.
69. The TWU submitted that the duties of a Superannuation Liaison Officer are more extensive than John Berger suggested. This may be true, but the examples given were extremely amorphous – for example, making members 'love the Fund', reaching out to the TWU and employer associations to gain as many members for the Fund as possible, and being a 'leader in governance and compliance'.¹²² Further, Michael Nealer gave evidence of spending much more time on Superannuation Liaison Officer duties than John Berger.¹²³ But John Berger's evidence retains its power.

G – OTHER PAYMENTS

Sponsorship payments

70. The aim of the sponsorship payments was described by William McMillin as 'getting [TWUSUPER] access to members or prospective

¹²² William McMillin, witness statement, 27/6/14, para 15; William McMillin, 2/7/14, T:112.3-114.10.

¹²³ Michael Nealer, witness statement, 2/7/14, para 23; Michael Nealer, 2/7/14, T:76.33-77.36.

members of the fund, as well as employers who are going to be the people at the end of the day making contributions to the fund'.¹²⁴

Office rental

71. William McMillin explained the reason for the expense thus:

There are two TWU branches where we have staff occupying space within the TWU office and that's the rental that we pay for the use of that space. They're there because that gives them direct access to the TWU officials. It gives them direct access to the SLO and it gives them opportunities when members come into the TWU office to maybe talk about superannuation, but they may come for other reasons and it gives us a chance to talk to them if we can.¹²⁵

Advertising Expenses

72. This expense incorporates expenditure incurred by TWUSUPER as a result of advertising in the TWU journals, on its flyers, in TWU newsletters and on TWU websites.¹²⁶

H – CONCLUSIONS

Paul Bracegirdle's position

73. Paul Bracegirdle attempted to interest a Toll employee in his plight, spoke to TWU officials about it, raised it with the Federal Government, nominated himself as a bargaining representative, appeared before Fair Work Australia, petitioned his colleagues for a site arrangement, and secured the agreement of a majority of those colleagues for such an

¹²⁴ William McMillin, 2/7/14, T:90.3-8.

¹²⁵ William McMillin, 2/7/14, T:105.27-35.

¹²⁶ William McMillin, 2/7/14, T:106.1-4.

arrangement. But he was still effectively shut out of the bargaining process. He was unable to exercise a right to nominate a superannuation fund of his choosing. He has had to put up with unpleasant behaviour from TWU officials because of his efforts. Only recently did he enjoy a modified and transitory success.

74. Paul Bracegirdle was an utterly compelling witness. His story exemplified the vice of any clause in an enterprise agreement which denies employees' choice of superannuation fund. In a dignified way Paul Bracegirdle has attempted for five years to change the status quo so that agreements may specify TWUSUPER as a default fund but not prohibit employees like him choosing to allocate nearly 10% of their income for investment as they see fit. Although in the 2013-2017 Enterprise Agreement there was a three month window of choice for existing employees, the whole battle remains to be refought in future.
75. Despite Michael Kaine's earnest efforts no explanation was given to justify a clause compulsorily nominating one fund over all others.

TWUSUPER's defence of its arrangements

76. The written submissions of counsel assisting stated that where the financial and other links between the TWU and TWUSUPER are as significant as they are, some level of suspicion as to the real reason for the arrangements may be inevitable.
77. However, the written submissions concluded by saying that it is not necessary to make a final finding on the reasons for why the TWU has

had a practice of attempting to compel employers to use TWUSUPER. It would be sufficient to stop the practice in the future.

78. The submissions of TWUSUPER responded to this by contending that no suspicions could justifiably arise.
79. TWUSUPER drew attention to the division of seats on the board of the responsible entity, TWU Nominees Pty Ltd, between employer representatives and employee representatives. It pointed to that as a successful industry wide model. It may be noted in passing that the same could be said, in the abstract, about Cbus, but there are grave questions about that model as it has turned out in practice.¹²⁷
80. TWUSUPER accepts that the TWU has a connection with the trustee, because it is one of the entities that nominates persons for appointment to the board of the trustee. But it submits that it is an entirely separate entity from TWUSUPER. TWUSUPER holds a Registrable Superannuation Entity Licence pursuant to the *Superannuation Industry (Supervision) Act 1993* (Cth). It holds an Australian Financial Services Licence pursuant to the *Corporations Act 2001* (Cth). It is regulated by the Australian Prudential Regulation Authority. It is also regulated by the Australian Securities and Investments Commission. TWUSUPER pointed out that because the *Superannuation Industry (Supervision) Act 1993* (Cth) applied to it, there were numerous covenants binding the trustees and the directors. TWUSUPER referred to s 52(2), (6), (7) and (8) and s 52A of the *Superannuation Industry (Supervision) Act 1993* (Cth). TWUSUPER pointed to the powers of

¹²⁷ See Chapter 8.3.

the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission. It pointed to obligations created by income tax enactments, privacy legislation, anti-money laundering legislation and counter-terrorism financing legislation.

81. These last references to legislation reveal how far the TWUSUPER submissions have drifted from Paul Bracegirdle's point. He wants to have control over the superannuation arrangements that apply to him. He is the beneficiary of a trust. His beneficial interests under that trust may be the most important asset he has, even including his residence. In that sense what is involved is 'his' superannuation. Of course he might well be better off if his superannuation investments were to remain with TWUSUPER. But he wants the chance to seek a superior result. He wants that chance because of his daughter. He also wants it as a matter of principle. The validity of these considerations is not affected by the possibility that he may do worse away from TWUSUPER. What is more, Paul Bracegirdle wants merely to consider whether to join another superannuation fund regulated by precisely the same legislation as that which regulates TWUSUPER. He does not want to operate a self-managed superannuation fund. Even if he did, funds of that kind are subject to close legislative regulation. If enterprise agreements with a trade union required employees to bank only with banks, half the directors of which were appointed by that trade union, it would be no answer to an objection to that course to say that the bank in question would be subject to the general law. All banks are subject to the general law. So are all superannuation funds.

82. TWUSUPER maintains that the various categories of money flowing from TWUSUPER to the TWU are no more than ‘necessary and commercially desirable and appropriate in running a \$3.9bn superannuation fund the results of which (particularly in comparison with retail funds) speak for themselves’.¹²⁸ Let it be assumed, for the moment, that that is true, even though all that Paul Bracegirdle wants is the chance to find a fund getting better results. The fact is that there are fiduciary difficulties facing the TWU. The TWU owes fiduciary duties to its members. By hard – even adamantine – bargaining it has secured a contractual right from Toll. The right compels Toll to pay the superannuation contributions it must make by law into TWUSUPER. The consequence of that right is that material advantages flow back to the TWU. The TWU has a duty to its members to act bona fide in their best interests. It is controversial whether that is itself a fiduciary duty. But coupled with that duty, fiduciary or not, the TWU has a duty – which is fiduciary – to its members to avoid its self-interest coming into conflict with that duty. Its duty is to advance its members’ interests. Those interests may be best advanced by letting them invest their superannuation money in any of a large range of funds as they think fit, provided that they are complying funds. The self-interest of the TWU is to compel Toll to invest members’ money in only one fund – TWUSUPER. That self-interest is reflected in the income stream which flows back to the TWU. It is no answer, where a fiduciary is alleged to be in breach of fiduciary duty by gaining financial advantages from its principal to say that those advantages are no greater than those which would have been

¹²⁸ ‘Response of TWU Super to Counsel Assisting’, 14/11/14, para 4.9.

extracted by any commercial rival of the fiduciary from its principals to whom the rival owes no fiduciary duty.

83. In any event, the submissions of counsel assisting rightly concluded that it was not necessary to decide whether any suspicions could justifiably arise. Those submissions proceeded on the basis that an amendment to s 32C(6) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) by omitting paras (d) and (h) was necessary, and was supported by the injustice to people in the position of Paul Bracegirdle. That submission was sound. And the submissions are also sound in concluding that it is not necessary, to support it, to find anything suspicious in the way TWUSUPER has actually been run. Suspicions do remain, for the points made above about superannuation liaison officers remain valid.

Toll's defence of its position

84. Toll preferred employees to have the freedom to choose the fund into which the employer's contribution should be placed. But it abandoned that position in the negotiations for the 2011-2013 Enterprise Agreement because it was not worth 'getting into a fight, and possibly derailing the negotiations', over that particular clause.¹²⁹
85. Toll submitted that what had happened to Paul Bracegirdle was an instance of what was:

common in enterprise bargaining across a spread of industries [for] pressure including industrial pressure [to be] applied to ... employers such

¹²⁹ Damian Sloan, witness statement, 2/7/14, para 25.

as Toll to pay mandated employer contributions to a Trade Union sponsored fund.¹³⁰

86. Toll also drew attention to various respects in which Damian Sloan had endeavoured to help Paul Bracegirdle, and contended that if he were shut out of the bargaining process it was no fault of Toll.¹³¹ That is to be accepted.
87. Toll remarked of the pressure which had led to it agreeing to pay contributions to TWUSUPER: ‘Whether or not this is the preferred outcome is the matter for debate.’¹³² Indeed that is so. Whatever the virtues of majority choice and effectively applied industrial muscle, there comes a point on some issues at which reason, moderation and common humanity require that the power of the majority within trade unions and the power of trade unions against employers be exercised with restraint. There are many things, for example, which members of an executive backed by the majority of a legislature in turn backed by a popular mandate *could* do. But they desist from doing those things because of a regard to minority concerns. That type of restraint and self-control was not much in evidence in the dealings the TWU had with Paul Bracegirdle. If a power used in an unrestrained way causes unjustifiable harm, there is much to be said for abolishing the power.
88. It may be accepted that Toll desired to comply with the law. Toll on five occasions claimed that that desire was fulfilled in relation to Paul Bracegirdle.¹³³ It is not proposed here to make an allegation to the

¹³⁰ Submissions: Toll Holdings Limited, 13/11/14, para 3.7.

¹³¹ Submissions: Toll Holdings Limited, 13/11/14, paras 3.4, 3.10-3.12 and 3.14.

¹³² Submissions: Toll Holdings Limited, 13/11/14, para 3.8.

¹³³ Submissions: Toll Holdings Limited, 13/11/14, paras 2.2, 2.4, 3.7 and 3.14.

contrary of those claims, but it is proposed to place a question mark over them for future consideration.

89. It is a question mark not raised during the hearings; but it does not depend on evidence beyond the 2013-2017 Enterprise Agreement itself and it is not proposed to make any finding or recommendation about it. The problem can be exemplified by cl 30 of the 2013-2017 Enterprise Agreement. Can it be said that cl 30 of the 2013-2017 Enterprise Agreement contravenes s 47(6) of the Schedule 1 version of Pt IV of the *Competition and Consumer Act* 2010 (Cth)? Section 47(6) provides:

A person (the **first person**) ... engages in the practice of exclusive dealing if the first person:

- (a) supplies, or offered to supply, goods or services;
- (b) supplies, or offers to supply, goods or services at a particular price; or
- (c) gives or allows, or offers to give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services by the first person;

on the condition that the person (**the second person**) to whom the first person supplies or offers or proposes to supply the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the first person.

90. The argument would depend on characterising the TWU as a 'first person' who supplies services (for example, the promise in cl 10(a) that Transport Workers will not pursue any further claims for wages during the Term) to a second person (Toll) on the condition that Toll will acquire services (investment of its compulsory superannuation contributions) from TWUSUPER, which is not related to the TWU.

There may be many problems in the argument underlying the question. One problem may be that the TWU is only party as a bargaining representative, and hence arguably is only an agent for the employees, not a principal; on the other hand, the expression ‘Parties’ is defined as meaning ‘Toll, the Union and the Transport Workers’. In its supplementary submissions dealing with this point, the TWU submitted that pursuant to s 172(1) of the *Fair Work Act 2009* (Cth) an enterprise agreement is an agreement between an employer and the employer’s employees who will be covered by the agreement.¹³⁴ Another problem is that the Federal Court has held that an enterprise agreement is not a contract, arrangement or understanding but a creature of statute, despite its origins in negotiation and agreement.¹³⁵ In its supplementary submissions on this point the TWU also submitted that Toll does not acquire services from TWUSUPER for the purposes of s 47(6) by reason of being required by the terms of enterprise agreement to make superannuation contributions to TWUSUPER; the TWU submitted that any benefit of making the superannuation contributions is received by the employees¹³⁶. However this point turns on the characterisation of the services acquired. In the analysis above the services are the investment of the compulsory superannuation contributions, not the receipt of benefits from or relating to those contributions. Another problem in the argument

¹³⁴ Note on Section 47(6) of the *Competition and Consumer Act* by the Transport Workers Union of Australia at para 7. This Note is dated 28 November 2014 but was received by the Commission on 11 December 2014.

¹³⁵ *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339; *Toyota Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [88].

¹³⁶ Note on Section 47(6) of the *Competition and Consumer Act* by the Transport Workers Union of Australia at para 10

underlying the question is s 51(2)(a) of the legislation.¹³⁷ It provides that in determining whether a contravention, inter alia, of s 47(6) has been committed, regard shall not be had:

- (a) to any act done in relation to, or to the making of a contract or arrangement, or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees ...

91. The point is raised here only so that Toll, the TWU and other unions may wish to consider it in relation to enterprise bargaining agreements they may wish to negotiate in future. The Australian Competition and Consumer Commission has informed the Royal Commission that it is currently assessing the issue.

I – RECOMMENDATION

92. There are strong grounds for repealing s 32C(6)(d) and (h) of the *Superannuation Guarantee (Administration) Act 1992* (Cth). But it is not desirable to make that recommendation now. In the meantime the TWU will be able to supply to the Commission information about the elements of the industrial and policy context it accused counsel assisting of being ignorant about. Perhaps others can do so as well.
93. This case study presents a sharp conflict between the need of a union to rely on its collective strength and the claims of individual liberty. Michael Kaine's evidence reflects the view that the need for collective

¹³⁷ This point was also taken by the TWU in its supplementary submissions: see Note on Section 47(6) of the *Competition and Consumer Act* by the Transport Workers Union of Australia at paras 11 – 13.

strength must have primacy. Paul Bracegirdle's evidence reflects competing claims. Yeats wrote in his epitaph on Swift:

Swift has sailed into his rest;
Savage indignation there
Cannot lacerate his breast.
Imitate him if you dare,
World-besotted traveller; he
Served human liberty.

Now Paul Bracegirdle will live for several more decades. He is indignant, but not savagely so. His indignation does not lacerate his breast. But, like Swift, he has served human liberty.

APPENDIX TO CHAPTER 6.2

94. As explained earlier,¹³⁸ in his decision of 9 September 2011 approving the 2011-2013 Enterprise Bargaining Agreement between Toll Holdings Limited and the TWU, Commissioner Cambridge indicated disapproval of cl 28(d).
95. On 12 September 2011, Mr Burns wrote a letter to Commissioner Cambridge concerning the 9 September 2011 decision. The letter stated:¹³⁹

12 September 2011
Commissioner Ian Cambridge
Fair Work Australian Attorney General's Department 80 William Street
EAST SYDNEY NSW 2011

By email: chambers.cambridge.c@fwa.gov.au

Dear Commissioner

**AG2011/11054 – TOLL GROUP AND TRANSPORT WORKERS
UNION FAIR WORK AGREEMENT 2011-2013**

We refer to the above agreement which was approved on Friday, 9 September 2011 in decision number [2011] FWA 6210.

We request that the decision be amended to remove certain references to TWUSuper. We believe that the Commissioner's expression of his personal disapproval of the legitimate TWUSuper clause in the agreement will result in significant industrial disharmony between Toll, the TWU and its members.

In particular we request that the following paragraphs be removed or amended as follows:

Para [6] second sentence – removed
Para [7] whole paragraph – removed

¹³⁸ Chapter 6.2 paras 31-36.

¹³⁹ Kaine MFI-1.

Para [8] second sub-paragraph – amended to reflect the fact that communications were received from Mr Bracegirdle, but removing any reference [to] the choice of super issue.

The purported basis for Mr Bracegirdle’s objection to the agreement was his alleged non-involvement in the negotiation process. This was denied by Toll. In the transcript of the proceedings before the Commission on Friday, 2 September 2011 the Commissioner states [at PN94]: “*I find no other particular element of the matter that would impede approval, other than the suggestion that the failure to involve a duly authorised bargaining representative might somehow disturb the approval.*” [emphasis in original]

Since the agreement has been approved, it is assumed that Mr Bracegirdle was unable to elaborate upon any basis upon which the approval for the application should be refused as requested by the Commissioner [transcript PN94]. If that is the case, then we believe that the Commissioner was within his rights to approve the agreement without further reflecting on the TWUSuper issue.

The form F17 filed by the employer shows [at its para 2.7] that of the 5,987 employees who cast a valid vote for the agreement, 5,289 employees (88%) voted in favour of the agreement, which included the TWUSuper clause.

The union is extremely concerned that the personal views of the Commissioner regarding the TWUSuper clause as expressed in the decision will undermine the agreement which was negotiated in good faith between the parties over a considerable period of time and expense and which has been overwhelmingly approved by the Toll employees who are covered by it.

We are grateful for the Commissioner’s consideration of the Union’s request.

Please contact Michael Burns on ... with any questions in relation to this request.

Yours faithfully

Michael Burns
General Counsel
Transport Workers’ Union of Australia

96. Commissioner Cambridge does not seem to have deigned to reply to the letter of 12 September 2011. For reasons appearing below, it is very difficult to disagree with this reaction to it.

97. This letter raises two problems. One is an important problem of professional etiquette and ethics. The other is a more controversial, perhaps, problem concerning the techniques available to Fair Work Commissioners.
98. Michael Burns said that the decision to send the letter was made by himself, in telephone conference with Michael Kaine.¹⁴⁰ Michael Kaine testified that he did not ask Michael Burns to write the 12 September 2011 letter.¹⁴¹ Both Michael Burns and Michael Kaine acknowledged that this was the only time the TWU had requested a change like this to a decision of the Fair Work Commission or equivalent body.¹⁴²
99. Michael Burns gave the following partially evasive testimony on the point:¹⁴³
- Q. You were seeking to have the decision changed, in effect?
- A. Yes.
- Q. That's an extraordinary step for a litigant to take, is it not?
- A. I just withdraw that. I'm not seeking for the decision to be made – to be changed, because the decision was to approve the enterprise agreement.
- Q. Yes.
- A. What I was seeking to change was the removal of Commissioner Cambridge's personal expression.

¹⁴⁰ Michael Burns, 21/8/14, T:8.28-29.

¹⁴¹ Michael Kaine, 3/7/14, T:220.8-10.

¹⁴² Michael Kaine, 3/7/14, T:223.16-224.12; Michael Burns, 21/8/14, T:12.16.

¹⁴³ Michael Burns, 21/8/14, T:10.31-12.16.

Q. Just to be clear on what you were seeking ... I'm just going to take you to a copy of the Commissioner's decision. ... So you were seeking the removal of the sentence beginning:

"Mr Bracegirdle also raised concern about some of the terms of the Agreement"

That's not an expression of opinion, that's just recording what occurred at the hearing; correct?

A. Yes.

Q. And then paragraph 7, you were seeking the removal of the entire paragraph?

A. Yes.

Q. And paragraph 8, you say, "second sub-paragraph" which, I think, means the unnumbered paragraph immediately below numbered paragraph 8, and you say:

" – amended to reflect the fact that communications were received from Mr Bracegirdle, but removing any reference to the choice of super issue."

What changes specifically were you seeking to be made to that paragraph?

A. I can't recall. It was three years ago.

Q. I put it to you again, it was a fairly extraordinary step for a litigant to take, to write to a Commissioner, subsequent to the delivery of a decision, asking that the decision be amended or changed?

A. I don't think it's that uncommon for parties to communicate with Commissioners.

Q. Seeking that a decision be amended or changed?

A. It's quite common for decisions that have errors in them to be amended by the Commissioner.

Q. Oh, quite, if there's been some slip or the like, but not to have substantive paragraphs removed?

- A. These were substantive paragraphs in which I believe that comments were made by the Commissions which were inappropriate.
- Q. Did you ever, on any other occasion, write to either Fair Work Australia or the Commission seeking to have decisions changed – not to correct slips, but to have substantive paragraphs removed or the like?
- A. No.
- Q. You never did that in your time at the union on any other occasion?
- A. No.
- Q. Have you ever done it in your legal career?
- A. No.
- Q. Other than on this occasion?
- A. That's right.

100. The problem of professional etiquette and ethics arises from the following circumstances.

101. Michael Burns, despite having Paul Bracegirdle's contact details,¹⁴⁴ failed to send to Paul Bracegirdle a copy of his 12 September 2011 letter to Commissioner Cambridge.¹⁴⁵ Paul Bracegirdle was a member of the TWU working in a Toll yard. It would have been easy for Michael Burns to send a copy of the letter to Paul Bracegirdle. But Michael Burns took no steps to find out his address.¹⁴⁶

102. It is, or ought to be, well-known to legal practitioners that it is inappropriate to conduct unilateral communications with a court. A

¹⁴⁴ Michael Burns, 21/8/14, T:9.45.

¹⁴⁵ Michael Burns, 21/8/14, T:9.35.

¹⁴⁶ Michael Burns, 21/8/14, T:9.37-10.7.

solicitor must not communicate with a court concerning any matter of substance in connection with current proceedings (excepting legitimate ex parte applications) unless the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court, or the opponent has consented to the communication.¹⁴⁷

103. Written communications between a party to litigation and the judge's associate should normally be confined to matters concerning practice or procedure.¹⁴⁸ The letter of 12 September 2011 falls outside this category.
104. Strictly speaking, Commissioner Cambridge was not sitting in a court as that expression is used in Chapter III of the Constitution. But the rule which applies to communications between practitioners and judges applies equally to communications between practitioners and people in important decision-making positions like that of Commissioner Cambridge.
105. The questions addressed to Michael Burns by senior counsel for the TWU and Michael Burns' own legal representative did not go to the failure to send a copy of the 12 September 2011 letter to Paul Bracegirdle. They went only to the merits of its contents. It is difficult to see how Michael Burns' conduct in this regard could be defended as a matter of etiquette and ethics. In submissions the TWU did not attempt to. The legal representative of Michael Burns did not file submissions.

¹⁴⁷ *Revised Professional Conduct and Practice Rules 1995* (NSW) A.56-A.58; *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) (No 2)* [2013] NSWSC 1971.

¹⁴⁸ *R v Fisher* [2009] VSCA 100 at [38].

106. But was the content of the 12 September 2011 letter justifiable? Both Michael Burns and Michael Kaine defended the decision to dispatch the letter, despite the mystery surrounding Michael Kaine's role in that decision. To some extent Michael Burns' defence can be found in the long passage just quoted from his testimony.¹⁴⁹ But he developed this position further. First, as he put it in answer to questioning from counsel for the TWU, it is very unusual for a Commissioner to express personal views about the appropriateness of terms and conditions in an enterprise bargaining agreement which has been agreed between the parties.¹⁵⁰ Secondly, in answer to his own legal representative, he testified as follows:¹⁵¹

Q. Why did you write to Commissioner Cambridge?

A. Because I believed his expression of his personal views in relation to the TWUSUPER issue, in particular, were inappropriate and they weren't required for the approval of the enterprise agreement. There was nothing in section 186 which permits that. The statutory basis for the approval of the agreement had been satisfied and, therefore, the Commissioner was bound to approve the agreement, and the comments that he'd made were beyond the statutory basis for the approval of the agreement.

Q. Were you then aware that whatever he said in his decision would be published in conjunction with the enterprise agreement to any interested party who sought that agreement on the internet?

A. Yes.

Q. Did you take that matter into consideration in deciding to write to the Commissioner?

A. Yes.

¹⁴⁹ See above para 99.

¹⁵⁰ Michael Burns, 21/8/14, T:13.34-39.

¹⁵¹ Michael Burns, 21/8/14, T:14.3-23.

107. Michael Kaine's view was as follows. After accepting that on 12 September 2011 the TWU was extremely concerned about what Commissioner Cambridge had said, he gave the following testimony:¹⁵²

Q. Tell me if you know or not, but just from your involvement in the National Office, the concern or the reference to the union being extremely concerned was that an accurate statement as at 12 September 2011, that the union was extremely concerned about what the Commissioner had said?

A. Yes, I think that's an accurate statement.

Q. And the concern emanated from the apprehension that the views of the Commissioner would "undermine the agreement"?

A. The concerns emanated – my concern, I don't know – I wasn't aware of this letter, but my concern emanated from the fact, as I think I've already mentioned, that the commissioner chose to express a view in circumstances – express a view in the way he did in circumstances where there was a valid vote of an overwhelming majority of works that under our industrial legislation means there has been formed genuine agreement between the parties, which has the further imprimatur of the superannuation legislation in respect of choice and the Commissioner chose to express himself in such a way as to suggest that the union and its members, the 5,200 or so of them, by implication had somehow acted in an inappropriate manner. That was the basis of our concern.

Q. Wasn't the concern really that if a public statement of that kind was made, that a view might spread at large that EBAs shouldn't include clauses of the kind contained in 28(d) but, rather, should enable workers to make a free choice about what super fund their contributions should be paid into? That was the concern.

A. No, because that concern that you've articulated, Mr Stoljar, is not a concern that was one that hadn't been articulated in the community at large; that is, it's a matter – the question of industry super funds full stop and the question of provisions of the choice legislation is something that had been raised in the past.

¹⁵² Michael Kaine, 3/7/14, T:222.24-225.16.

- Q. It was a fairly drastic step to take, wasn't it, to write to the Commissioner asking him to remove paragraphs from his public decision?
- A. It was fairly drastic language that the Commissioner has used in circumstances where the union members have done no more than action their statutory rights.
- Q. All right, but coming back to my question, it was a pretty drastic step to take to write to the Commissioner asking him to remove paragraphs of his decision; do you agree?
- A. I think in the normal course of events we wouldn't write to a Commissioner asking that, but in these circumstances, in the context that I've outlined, I can well understand why that step was taken.
- Q. To your knowledge has the union ever written to a Commissioner at Fair Work Australia, as it then was, or the Fair Work Commission, asking them to redact paragraphs of their decision? Is that something that's happened on other occasions?
- A. Not to my knowledge, no.
- Q. So this was the only time?
- A. To my knowledge, yes.
- Q. How long have you been in the – you have been assistant secretary since 2006, was it?
- A. Yes, that's correct.
- Q. And before that you were at the New South Wales iteration of the union?
- A. That's right.
- Q. You were legal counsel?
- A. Yes.
- Q. And how long were you there for?
- A. Since '99.
- Q. And in the entirety of that period, this was the only occasion on which the union has taken a step of this kind, to your knowledge?

- A. To the best of my knowledge, yes.
- Q. Do you know whether the Toll Group was copied into this request to Commissioner Cambridge?
- A. I have no idea.
- Q. Just coming back to the second paragraph of that letter, what's propounded is that, "We believe", that is at least the National Office of the TWU believes ... that the Commissioner's expression of his personal disapproval ... will result in significant industrial disharmony between Toll, the TWU and its members. So there was an apprehension in the National Office that if other members of the union saw this, that they, too, would wish to articulate a view of the kind expressed by Mr Bracegirdle, namely that they wanted to choose their own super?
- A. No, as I've said, the overarching concern was the manner in which the Commissioner had expressed his views and our concern was that somehow – and I think – I think a person perhaps not understanding the full context, not understanding the legislation, who read this decision might think that the union indeed had done something wrong in the actions that it took and I think that that was potentially damaging.
- Q. What is the language that suggests that the union has done something wrong that you say gave rise to the concern in the decision? On page 121, what is the language in the decision that you say made a suggestion of impropriety on the part of the union?
- A. "During the Hearing I expressed my personal disapproval ... et cetera. Therefore the term of clause 28(d) ... as distasteful as I personally find them, do not prevent the approval of the Agreement." They are the words.
- Q. But that isn't the context in which he is stating that the provisions in the Superannuation Guarantee Administration Act, particularly section 32C subsection (6), contemplate?
- A. Well, you asked me what the words were and they're the words that I'm telling you are the source of the concern.

108. This passage points to the responsibility of Michael Kaine for the letter of 12 September 2011 being greater than other evidence might suggest. It completely fails to identify any language used by Commissioner

Cambridge which might be taken as indicating that the TWU had done something wrong. The learned Commissioner was criticising the law, not the union. Further, if there were any merit in Michael Burns' stand, it is surprising that he did not object during the 2 September 2011 hearing to the sentiments orally expressed by Commissioner Cambridge which were later repeated in his decision. If Michael Burns' point was good in relation to the 9 September 2011 decision, it was good in relation to the 2 September 2011 hearing. That highlights the fact that the point is not a good one. Judges and others who have to decide matters according to law often say that while the law compels a particular result, which they loyally arrive at, they regard that result as undesirable and as one which should be remedied by those with the power to do so. But they say that whether it causes disharmony or not.

109. Incidentally, the letter was also not sent to Toll's solicitors.¹⁵³ Non-dispatch of the letter had the result – whatever its purpose – that the Toll lawyers, Maurice Baroni and Damian Sloan, who had been much more cooperative with Paul Bracegirdle than the officials of his own union, could not intervene.
110. It is best to regard the conduct of Michael Burns in relation to the two criticisms just made as proceeding from an unfortunate oversight. It is not necessary to take the matter any further.

¹⁵³ Letter of 9 December 2014 from Clayton Utz to Solicitor Assisting Royal Commission. Cf Michael Burns, 21/8/14, T:9.30-32.

CHAPTER 6.3

LUCRF

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A – INTRODUCTION

1. This chapter concerns a case study involving the Labour Union Co-operative Retirement Fund (**LUCRF**), an industry super fund associated with the National Union of Workers (**NUW**).¹ It is a further example of circumstances where an enterprise agreement or (award) contains provisions which deny some employees choice of super fund. The submissions of counsel assisting were to the following effect.

Factual background

2. LUCRF Super is an industry superannuation fund.² It was established in 1978.³ The trustee of the fund is L.U.C.R.F Pty Ltd.⁴ Its Board comprises five directors nominated by the NUW, five nominated by industry, and two independent directors.⁵
3. LUCRF Super has over \$4 billion in funds under management, more than 180,000 members across Australia and more than 16,000 participating employers.⁶

¹ LUCRFSuper website, 'Our People LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about/our-people>.

² LUCRFSuper website, 'About LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about-lucrf>.

³ LUCRFSuper website, 'About LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about-lucrf>.

⁴ LUCRFSuper website, 'About LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about-lucrf>.

⁵ LUCRFSuper website, 'Our People LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about/our-people>.

⁶ LUCRFSuper website, 'About LUCRFSuper', accessed 15/10/14, <https://www.lucrf.com.au/about-lucrf>.

Enterprise agreements

4. This Chapter concerns the enterprise agreements agreed between the Association of Market and Social Research Organisations Inc (**AMSRO**) and the NUW in 2003-2005,⁷ 2005-2008⁸ and 2010-2013.⁹ Together, these will be called ‘the Agreements’.
5. Each of the Agreements included a clause which stipulated that employers were required to make superannuation contributions on behalf of employees into the LUCRF.¹⁰

The attitude of the Industry body to choice of superannuation fund

6. It is not always a union who insists upon such clauses. Sometimes it is an employer or its negotiating representative.
7. AMSRO is the peak employer body in the market and social research industry covering about 70 per cent of the employers in that industry.¹¹ It is an incorporated association set up for the benefit of its members to promote the industry to potential clients, to assist with regulatory issues, such as privacy, and also to provide advice and assistance with respect to industrial relations.

⁷ Maher MFI-1, pp 1-45.

⁸ Maher MFI-1, pp 46-90.

⁹ Maher MFI-1, pp 91-138.

¹⁰ Maher MFI-1, pp 13-14, clauses 16.1.2, 16.2.1; pp 57-58, clauses 16.1.2, 16.2.1 and pp 104 -105, clauses 16.1.2, 16.2.1.

¹¹ Andrew Maher, 11/9/14, T:15.32-39.

8. AMSRO has co-ordinated the negotiations with the NUW for several industrial agreements on behalf of AMSRO's members.¹² Andrew Maher, a partner at HR Legal, and since approximately 2004 AMSRO's principal legal adviser,¹³ assisted with the negotiations for the 2005-2008 and 2010-2013 agreements.¹⁴
9. Clause 16 of the 2003-2005 Agreement provided for LUCRF Super to be the mandatory fund for all employees eligible to receive superannuation contributions from their employer.¹⁵ It provided:

16. SUPERANNUATION

...

16.1.2 Fund

In this clause all references to Fund shall mean the Labor [sic] Union Co-Operative Retirement Fund (LUCRF).

...

16.2 Employer and employee compulsory contributions

- 16.2.1** In addition to other payments provided for under this Agreement, the employer shall make a superannuation contribution to the Fund on behalf of the eligible employees, together with deducting employee contributions from employee earnings of the eligible employees and forwarding them to the Fund, of 9% of the employee's ordinary time earnings.

...

¹² Andrew Maher, witness statement, 11/9/14, para 4.

¹³ Andrew Maher, witness statement, 11/9/14, para 3.

¹⁴ Andrew Maher, witness statement, 11/9/14, para 5.

¹⁵ Maher MFI-1, pp 13-14.

10. In the context of negotiating the subsequent 2005-2008 Agreement, AMSRO sought feedback from its members in relation to changes they would like to see made to clause 16.¹⁶

11. Andrew Maher gave evidence that, from his discussions with AMSRO members, and his involvement in the Industrial Relations Committee of AMSRO, he learned that:
 - (a) there was a degree of non-compliance with clause 16 in the 2003-2005 Agreement, especially with more senior staff who had strong preferences as to their superannuation fund,¹⁷ with some AMSRO members directing superannuation to the fund nominated by the employee;¹⁸

 - (b) there was a general recognition that certain employees, in particular high income earning employees, wanted to be able to choose the superannuation fund into which contributions on their behalf were made;¹⁹

 - (c) up until that time it had been mandatory to make contributions to LUCRF subject to a fairly difficult opt out clause;²⁰

 - (d) some AMSRO members also expressed a concern that freedom of choice for all employees would impose a large administrative

¹⁶ Andrew Maher, 11/9/14, T:16.15-18; Andrew Maher, witness statement, 11/9/14, para 8.

¹⁷ Andrew Maher, 11/9/14, T:16.20-21.

¹⁸ Andrew Maher, witness statement, 11/9/14, para 8.

¹⁹ Andrew Maher, witness statement, 11/9/14, para 8.

²⁰ Andrew Maher, 11/9/14, T:16.39-43.

burden on employers due to the high levels of casualisation and mobility within the workforce.²¹

12. It would appear that the balancing of those considerations led to AMSRO seeking the compromise arrangement reflected in clause 16 of the 2005-2008 agreement,²² which had the effect that higher-level employees were entitled to freedom of choice, whilst lower-level workers were not.²³ Clause 16 of the 2005-2008 agreement²⁴ provided:

16. SUPERANNUATION

...

16.1.2 Fund

In this clause references to **Fund** for all employees in classifications lower than field manager shall mean the Labour Union Co-Operative Retirement Fund (LUCRF). For employees at the classification level of field manager or higher, **Fund** shall be the fund selected in accordance with Superannuation Guarantee legislation (with the default fund, as defined in the legislation, being the Labour Union Co-operative Retirement Fund (LUCRF).

...

16.2 Employer and employee compulsory contributions

- 16.2.1** In addition to other payments provided for under this Agreement, the employer shall make a superannuation contribution to the Fund on behalf of the eligible employees, together with deducting employee contributions from employee earnings of the eligible employees and forwarding them to the Fund, of 9% of the employee's ordinary time earnings.

...

²¹ Andrew Maher, witness statement, 11/9/14, para 9.

²² Andrew Maher, 11/9/14, T:16.20-47, 17.1-29.

²³ Andrew Maher, witness statement, 11/9/14, para 10.

²⁴ Maher MFI-1, pp 57-59.

13. Clause 16 retained this wording in the 2010-2013 agreement.²⁵
14. Andrew Maher gave evidence that, in his view and based on his experience in negotiations with the NUW, a clause providing full choice of superannuation fund to all employees of AMSRO's members would have been resisted by the NUW and would have required AMSRO to make other concessions to the NUW.²⁶
15. The negotiations for the 2014 enterprise agreement have concluded and the status quo insofar as clause 16 is concerned has been maintained. LUCRF Super remains the mandatory fund for all employees below a certain level who are eligible to receive superannuation contributions from their employers.²⁷

The attitude of the employee to choice of superannuation fund

16. The effect of clause 16 on employees engaged for jobs with lower classifications has been the source of frustration and concern for some employees. In some cases it has operated to an employee's financial detriment.
17. The Commission heard evidence from Katherine Cole. She is in her 60s. She has worked as a freelance researcher since approximately 2000²⁸ for a company known as Square Holes Pty Ltd (**Square**

²⁵ Maher MFI-1, pp 104-105.

²⁶ Andrew Maher, 11/9/14, T:17.44-47, 18.1-5.

²⁷ Andrew Maher, 11/9/14, T:18.7-17; Andrew Maher, witness statement, 11/9/14, para 13.

²⁸ Katherine Cole, 11/9/14, T:9.39-42.

Holes).²⁹ Katherine Cole was employed in a position that was, under the terms of clause 16 of the enterprise agreement, not sufficiently senior to entitle her to choose her own superannuation fund.

18. Katherine Cole and her husband have their own self-managed super fund.³⁰ Katherine Cole's husband is retired.³¹ Payments of Katherine Cole's superannuation to a fund other than that self-managed superfund were likely to affect Mr Cole's aged pension and result in Mr and Mrs Cole being financially worse off.³² Katherine Cole simply wanted her superannuation paid into that self-managed super fund. She wanted nothing to do with LUCRF Super.³³ However, the effect of clause 16 was that her employer, Square Holes, was obliged to make the superannuation payments on her behalf to LUCRF Super or otherwise risk being in breach of the agreement.
19. Katherine Cole was, at that time, entitled to approximately \$64 per month in superannuation contributions from her employer, Square Holes.³⁴ However, were she to withdraw her superannuation from LUCRF, LUCRF would charge her investment fees and \$60 per withdrawal.³⁵

²⁹ Katherine Cole, witness statement, 11/9/14, para 4.

³⁰ Katherine Cole, 11/9/14, T:11.1-16.

³¹ Katherine Cole, witness statement, 11/9/14, para 10.

³² Katherine Cole, 11/9/14, T:11.1-16.

³³ Katherine Cole, 11/9/14, T:10.43-47, 11.1-16.

³⁴ Katherine Cole, witness statement, 11/9/14, para 33.

³⁵ Cole MFI-1, p 62.

20. Katherine Cole gave evidence that if Square Holes were required to pay her superannuation into LUCRF it would all go in fees: ‘...it would be disadvantageous financially to me as over the financial year I would not earn enough to cover [LUCRF’s] fees’.³⁶
21. To avoid these consequences of her employer, Square Holes, paying her superannuation to LUCRF, Katherine Cole took the drastic step of resigning from her employment rather than continuing with something that she thought would be financially disastrous, namely staying in LUCRF.³⁷
22. Katherine Cole now restricts her working hours to fewer than 18 hours per month³⁸ to ensure that she stays below the \$450 per month threshold at which point Square Holes would be required to make superannuation contributions on her behalf.³⁹ Katherine Cole would like to work more than 18 hours a month. But there is no financial incentive for her to do so when any superannuation that she earns will be lost to fees.⁴⁰

The attitude of the employer to choice of superannuation fund

23. Robyn Brady is the bookkeeper for Square Holes.⁴¹ She testified that approximately every six months an employee of Square Holes will

³⁶ Katherine Cole, 11/9/14, T:12.34-47, 13.2-5; Cole MFI-1, p 72.

³⁷ Katherine Cole, 11/9/14, T:13.7-21.

³⁸ Katherine Cole, witness statement, 11/9/14, para 40.

³⁹ Katherine Cole, 11/9/14, T:13.23-35.

⁴⁰ Katherine Cole, witness statement, 11/9/14, para 42.

⁴¹ Roslyn Brady, witness statement, 11/9/14, para 2.

raise with her a request that that employee's superannuation be paid into a fund other than LUCRF Super.⁴²

24. She stated that she is aware of two other employees of Square Holes who have informed her that they would like the option of choosing the superannuation fund into which Square Holes makes payments on their behalf.⁴³

The attitude of the union to choice of superannuation fund

25. Godfrey Moase, the Assistant Secretary of the General Branch of the NUW was on the NUW negotiating team for the most recent NUW-AMSRO agreement covering the period 2010 – 2013.⁴⁴ He gave evidence that in negotiating the 2010-2013 agreement no particular attention was drawn to clause 16.⁴⁵ The terms and conditions contained in the previous agreement in relation to superannuation were simply reproduced.⁴⁶ Similar clauses to clause 16 appear in underlying awards for employees and employers engaged in the market research industry, and have done for some considerable period of time.⁴⁷ He said that if a majority of the NUW's members wanted to make a change to the superannuation clause, to allow lower paid workers to

⁴² Roslyn Brady, witness statement, 11/9/14, para 7.

⁴³ Roslyn Brady, witness statement, 11/9/14, para 8.

⁴⁴ Godfrey Moase, 11/9/14, T:23.28-30.

⁴⁵ Godfrey Moase, 11/9/14, T:24.23-27.

⁴⁶ Godfrey Moase, 11/9/14, T:24.29-33.

⁴⁷ Godfrey Moase, witness statement, 11/9/14, paras 14, 15.

have freedom of choice, then the NUW would seek to make changes to that clause in the bargaining process.⁴⁸

B – CONCLUSIONS

Opt out clauses

26. Each of the enterprise agreements included an opt out clause. Andrew Maher called it ‘fairly Byzantine’ and ‘fairly difficult’.⁴⁹ The clause required individual employers to make an application to the Australian Industrial Relations Commission (as it then was) for exemption from the requirement to pay contributions to LUCRF.⁵⁰ By way of example clause 16.11 of the 2005-2008 agreement⁵¹ provided:

16.11 Exemption

16.11.1 An individual employer...may make application to the Australian Industrial Relations Commission for exemption from the requirement to pay contributions to the Fund pursuant to this clause.

16.11.2 The Australian Industrial Relations Commission may grant such exemption having regard to the following procedures and circumstances:

...

16.11.2(b) The contributions by the employer to the alternative superannuation Fund are made on the basis of the entitlement established by this clause.

⁴⁸ Godfrey Moase, 11/9/14, T:25.25-45.

⁴⁹ Andrew Maher, 11/9/14, T:16.41-43.

⁵⁰ Maher MFI-1, p 59.

⁵¹ Maher MFI-1, p 59.

- 16.11.2(c) Approval for exemption has been sought at first instance by the employer either directly or through their employer organisation from the NUW.
- 16.11.2(d) The Commission may attempt to conciliate on any disagreement as to the Fund to apply to the employees of the employer.
- 16.11.2(e) If conciliation fails, the Commission may adjourn for a reasonable period to allow a representative from LUCRF to interview employees regarding superannuation. These interviews are only for the purposes of discussing superannuation.
- 16.11.2(f) Employees then may choose the Fund to apply from those proposed by the employer or LUCRF.
- 16.11.2(g) Where the parties are unable to, [sic] reach agreement the matter shall be referred to the Commission for determination.
- ...
- 16.11.2(i) Applications for exemption must be lodged within a period of six months from the date of the employer becoming bound by the Award or this Agreement, whichever occurs earlier.

27. In the 2014 agreement this clause has been largely retained in its current form although the language has been updated to refer to the Fair Work Commission.⁵²

28. By Andrew Maher's own admission this clause is difficult. It is poorly drafted and the outcome it offers employees is unclear. It requires employees, operating in lower classifications of employment, to approach their employers and request that their employer seek exemption from the requirement to pay contributions to LUCRF.⁵³ These requests may only be lodged within six months from the date of

⁵² Andrew Maher, 11/9/14, T:18.7-17.

⁵³ Maher MFI-1, p 59.

the employer becoming bound by the agreement.⁵⁴ This places an unnecessary burden on both employees and employers.

29. Not surprisingly, this clause has not, to Andrew Maher's knowledge, ever been tested and he was not sure that even if it were tested, it would be successful.⁵⁵
30. It is also worth remembering that the only employees who are denied choice of superannuation fund by the AMSRO agreement and therefore might wish to take advantage of this opt out clause are those in the lower classifications of employment. Godfrey Moase gave evidence to the Commission that the majority of the NUW's members engaged in this industry fall into the lower classifications of employment.⁵⁶

Arguments against free choice?

31. As an employer representative, Andrew Maher suggested that law reform could take the form of mandating that choice of superannuation fund fall within the individual flexibility terms in enterprise agreements. This would allow an employee to approach his or her employer, and if the employer agreed, to vary the mandatory term of the enterprise agreement. Andrew Maher said this arrangement would give the employer some capacity to refuse to provide choice of fund if it felt that it was going to be unnecessarily onerous.⁵⁷ But again this would require employees engaged in the lower classifications of

⁵⁴ Maher MFI-1, p 59.

⁵⁵ Andrew Maher, 11/9/14, T:18.7-17.

⁵⁶ Godfrey Moase, 11/9/14, T:27.20-29.

employment to obtain their employers' consent before such a term could be varied.

32. Andrew Maher acknowledged that, save for the administrative burden on employers to which he referred, there were no arguments of which he was aware against introducing legislation giving employees complete freedom to choose the superannuation fund.⁵⁸ Counsel for the NUW did not challenge this point in cross-examination.⁵⁹ One option that would accommodate the concern revised by Andrew Maher but avoid the prejudice caused by the current system to particular employees would be to continue to permit the specification in collective agreements of a default fund but remove the option of specifying a mandatory or compulsory fund.
33. Godfrey Moase was asked what the NUW saw as the difficulty in providing employees with the freedom to choose their superannuation fund. His answer did not address the question,⁶⁰ although he acknowledged that a substantial majority of employees working in the industry do not have the opportunity to make a market-based selection as regards their choice of superannuation fund.⁶¹
34. Likewise Godfrey Moase was asked whether there would be any difficulty in making LUCRF the default fund from which people could

⁵⁷ Andrew Maher, 11/9/14, T:19.2-33.

⁵⁸ Andrew Maher, 11/9/14, T:19.35-41.

⁵⁹ Andrew Maher, 11/9/14, T:20.7-21.21.

⁶⁰ Godfrey Moase, 11/9/14, T:26.41-47, 27.1-5.

⁶¹ Godfrey Moase, 11/9/14, T:27.45-28.1.

opt out.⁶² Again his answer was non-responsive to the question. He commented the NUW had inherited this practice and had not had a significant number of its members pushing for this change.⁶³

C – RECOMMENDATION

35. LUCRF Super did not supply any submissions in answer to those of counsel assisting. The submissions of counsel assisting should be accepted. This case study of LUCRF supports what is said in relation to the Paul Bracegirdle study about the repeal of s32C(6)(d) and (h) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

⁶² Godfrey Moase, 11/9/14, T:27.7-18.

⁶³ Godfrey Moase, 11/9/14, T:27.7-18.

PART 7: TRAINING FUNDS

CHAPTER 7.1

INTRODUCTION

1. There are relevant entities that take the form of a training organisation, or of a fund purportedly to be used for training purposes.
2. Among the examples which emerged in the Commission's public hearings are:
 - (a) a fund known as the Transport, Industry Training Education and Industrial Rights Fund (**the TEIR Fund**) established by the Transport Workers' Union of NSW (**TWU of NSW**) in around 2000. It had no separate legal personality from the TWU of NSW;
 - (b) a company known as the Transport Education Audit Compliance Health Organisation Limited (**TEACHO**) established by the TWU of NSW in March 2009; and
 - (c) the Maritime Employees Training Limited (**METL**) established by the MUA in August 2008.

3. Each of these case studies raises distinct issues. For example, METL was undoubtedly set up to fill an industry-wide shortage of Australian Maritime Workers with an Integrated Ratings (IR) qualification. There can be no question as to the legitimacy of its operation and the training it provides. The issues which do emerge relate to the circumstances in which companies donate significant sums of money to METL and the extent to which some companies have made donations in order to buy industrial peace on their sites or vessels. These issues will be considered further next year.
4. Different concerns arise in respect to the TEIR Fund. It is no longer in operation. It is primarily a case-study illustrating the means by which employee organisations such as the TWU have extracted contributions from employers in the past, and further the absence of governance, transparency and accountability processes accompanying receipt and expenditure of those funds. The TEIR Fund is addressed in Chapter 7.2.
5. Finally, yet other issues arise in respect to TEACHO. TEACHO is the successor to the TEIR Fund in many respects. TEACHO received injections of cash from an employer who agreed to contribute as part of enterprise agreement negotiations as the price of procuring union entry into an enterprise bargaining agreement. TEACHO is also the subject of Chapter 7.2.

CHAPTER 7.2

TEACHO

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A – INTRODUCTION

1. This chapter primarily concerns the Transport Education Audit Compliance Health Organisation Limited (**TEACHO**) and its predecessor, the Transport Industry Training Education and Industrial Rights Fund (the **TEIR Fund**). Save where challenged, the findings set out below are based substantially on the submissions of counsel assisting.
2. TEACHO was established by the Transport Workers' Union of NSW (**TWU of NSW**) in March 2009. It subsequently became a national organisation.
3. The federal Transport Workers' Union (**TWU**) is currently TEACHO's sole shareholder. As TEACHO has a separate legal personality to the TWU, it is a relevant entity within the Commission's Terms of Reference.
4. A particular focus of this chapter is the arrangements between the TWU and Toll regarding TEACHO. That case-study is a lens through which to examine the appropriateness of a union demanding inclusion of requirements in agreements that make it mandatory for an employer to make contributions to third parties in which the union or its officials have an interest.

B – THE TEIR FUND

Background and corporate structure

5. Prior to TEACHO, the TWU of NSW created the TEIR Fund.
6. The TEIR Fund was established in around 2000 by the TWU of NSW.¹ Mr Tony Sheldon, then the TWU of NSW Branch Secretary, was primarily responsible for the TEIR Fund's establishment.²
7. The TEIR Fund was established with the broad objective of advancing transport workers, including (without limitation) by way of training initiatives. This included providing training to members and delegates in their industrial and employment rights, enforcing the entitlements of members and union activities.³
8. The objectives of the TEIR Fund were not documented properly and there was no governance framework under which the TEIR Fund was to operate.⁴
9. The TEIR Fund's accounts were not separated from the TWU of NSW's accounts. No separate ledger was established.⁵ It was not a legal entity separate from the TWU of NSW.

¹ Wayne Forno, witness statement, 3/7/14, para 6.

² Wayne Forno, 3/7/14, T:241.12.

³ Wayne Forno, witness statement, 3/7/14, para 10.

⁴ TEACHO MFI-1, p 45.

⁵ TEACHO MFI-1, p 45.

Activities of the TEIR Fund

10. Between 2000 and 2007, the TEIR Fund received funding from employers, including labour hire and transportation companies, who paid levies under enterprise agreements or deeds entered into between the employer and the TWU.⁶ The transportation companies that paid this levy included Westgate, Linfox, Startrack Express, TNT and Toll.⁷
11. The training levy for labour hire companies was calculated at 1 percent of total payroll covering transport workers, while the contribution made by transport companies varied and was subject to negotiation.⁸
12. As a result of these payments, considerable sums were paid to and accumulated in the TEIR Fund. By 2007, the TEIR Fund held \$1.434 million.⁹

Public criticism of the TEIR Fund

13. On 22 September 2007, the *Sunday* program on Channel Nine ran a story on the TEIR Fund. It alleged that the financial management of the TEIR Fund was deficient.¹⁰
14. Following the adverse public attention, the TEIR Fund was investigated by the Australian Taxation Office, Australian Securities

⁶ Wayne Forno, witness statement, 3/7/14, para 11.

⁷ Wayne Forno, witness statement, 3/7/14, para 11.

⁸ Wayne Forno, witness statement, 3/7/14, para 13.

⁹ TWU of NSW financial reports 2007, 2008, 2009, p 6.

¹⁰ TEACHO MFI-1, p 3.

and Investment Commission, Australian Electoral Commission, Australian Industrial Registry and the NSW Industrial Registry.¹¹

15. As a result of the fallout from the fund's public exposure, there was a reduction in the income of the TEIR Fund after 2007 as on expiry of agreements, requirements for employer contributions in enterprise agreements were not replicated in new agreements.¹² The balance of the TEIR Fund remained substantial and was never transferred to TEACHO; it was retained by the TWU of NSW.¹³

Deloitte report

16. Following the adverse media attention, the TWU of NSW engaged the professional services firm Deloitte to prepare an internal report into the TEIR Fund. Deloitte delivered its report on 21 February 2008.¹⁴
17. The Deloitte Report's key findings were as follows:
- (a) a 'council' was not formally established as a separate entity distinct from the TWU as contemplated by the agreements;
 - (b) the TEIR Fund was not separated from an accounting perspective from the general ledger of the TWU of NSW;
 - (c) no independent, external audit of the TEIR Fund was performed;

¹¹ Wayne Forno, witness statement, 3/7/14, para 26; TEACHO MFI-1, pp 3-6, 14-18.

¹² Wayne Forno, witness statement, 3/7/14, para 20.

¹³ Wayne Forno, witness statement, 3/7/14, para 35.

¹⁴ TEACHO MFI-1, pp 41-51B.

- (d) there was limited documentation setting out the governance framework under which the 'Council' was intended to operate;
- (e) there was no specific documentation in place that defined the attributes of expenditure in order to facilitate its classification between general TWU expenditure and the expenditure of the TEIR Fund. This meant that determining the rationale for the expenditure was difficult;
- (f) some expenditure fell outside the objectives of the TEIR Fund;
- (g) there was no documented procedure for managing the completeness or accuracy of contributions made by contributors to the TEIR Fund; and
- (h) there was no verification of the accuracy of the remittances received into the TEIR Fund.¹⁵

18. The recommendations outlined by Deloitte were designed to establish a clear governance structure around the expenditure of the fund. Deloitte recommended that the TWU of NSW:

- (a) define the objectives of the Council;
- (b) prepare plans that outline the method the objectives shall be achieved (such as annual business plan and programs);
- (c) determine the composition of the Council's membership;

¹⁵ TEACHO MFI-1, pp 45-46.

- (d) separate the financial activities of the TEIR Fund from those of the TWU's accounts;
 - (e) develop delegation of authority tables and financial management processes (including budgeting and contribution collection);
 - (f) develop guidelines that define the attributes of expenditure that were appropriate to the TEIR Fund to achieve transparency in relation to decisions made in respect of expenditure classification; and
 - (g) regular and independent oversight of expenditure incurred and completeness and accuracy of contributions received.¹⁶
19. The recommendations were accepted by the TWU of NSW.¹⁷ But implementation of them was slow.
20. TEACHO was not formally registered until 17 March 2009.¹⁸
21. In October 2009, there was further adverse media coverage about the TEIR Fund and its failure to implement the recommended changes.¹⁹ On 12 October 2009, *The Age* reported:

Trucking firms are still pouring money into a secretive Transport Workers Union slush fund almost two years after investigations found the fund lacked transparency and was riddled with audit problems.

¹⁶ TEACHO MFI-1, p 46.

¹⁷ TEACHO MFI-1, p 46.

¹⁸ TEACHO MFI-1, pp 52, 58.

¹⁹ TEACHO MFI-1, pp 94-96.

...

In March, Mr Forno had announced the fund would be managed from July by a new company, the Transport Education, Audit, Compliance and Health Organisation, run by five board members, two from the union, two representing transport industry employers and “an independent chair”.

But company records show there are only three directors of the company – Mr Forno, the union’s Woollongong and south coast of NSW sub-branch secretary, Richard Olsen, and a paid union officer, Nimrod Nyols.²⁰

22. Mr Forno denied that the adverse media attention was the catalyst for appointing the two industry directors to TEACHO.²¹ The evidence tendered at the hearing did not support his position. In particular, the contemporaneous email correspondence²² and a TWU press release²³ provide a persuasive basis to infer that the adverse media attention was the catalyst that forced the TWU of NSW to implement a proper company constitution.

How the TEIR Fund monies were expended

23. The TWU of NSW received legal advice to the effect that the funds held in the TEIR Fund should not be transferred to TEACHO.²⁴ Approximately \$1.4 million was left in a special account in the TWU of NSW’s books.²⁵ This money was used for the annual Delegates’ Conference of the TWU (NSW branch).²⁶

²⁰ TEACHO MFI-1, p 94.

²¹ Wayne Forno, 3/7/14, T:255.44-256.10.

²² TEACHO MFI-1, pp 97-102.

²³ TEACHO MFI-1, p 96.

²⁴ Wayne Forno, witness statement, 3/7/14, para 35.

²⁵ Wayne Forno, 4/7/14, T:274.18-24.

²⁶ Wayne Forno, 4/7/14, T:274.30-41.

24. The Delegates' Conference was described by Mr Forno as political, industrial, safety and campaign (such as safe rates) training.²⁷ The TWU of NSW website states:

... more than 600 Transport Workers' Union delegates from across New South Wales and the ACT will gather in Western Sydney for our annual Delegates Conference.

By sticking a hand up to act as a workplace leader, delegates take responsibility for the safety, conditions and the future of their workmates.

Conference is our opportunity to celebrate this hard work, as well as an opportunity for further training and education and a chance to hear from industry, union and political leaders.²⁸

25. It is difficult to determine whether the use of the funds from the TEIR Fund on the Delegates' Conference was appropriate and within the terms on which the money was received. There were never any written guidelines developed in relation to the expenditure for the TEIR Fund.²⁹

C – TEACHO

Formation and structure

26. TEACHO was registered in New South Wales on 17 March 2009.³⁰ TEACHO remained largely inactive until late 2010.³¹ TEACHO is a company limited by guarantee.³² Upon its incorporation, the TWU of NSW was the sole shareholder of TEACHO. In 2010, a decision was

²⁷ Wayne Forno, 4/7/14, T:275.44-45.

²⁸ TWU of NSW, *Delegates Conference 2014*, <http://www.twunsw.org.au/delos2014>, accessed 26/10/14.

²⁹ Wayne Forno, 4/7/14, T:276.3-10.

made by the TWU to transition TEACHO into a national body and to replace the TWU of NSW with the TWU as the sole shareholder of TEACHO.³³

27. Clause 5.1 of TEACHO's constitution stipulates that the sole member of TEACHO is the TWU.³⁴

28. The objects of TEACHO are:

(a) to create a Training Fund to collect and receive the Training Levy and to seek other funding, contributions and grants and to expand on, grant to or pay moneys in the Training Fund and any other funding, contributions and grants for the benefit of workers in the transport industry:

(i) to promote:

- A. vocational training;
- B. occupational health and safety training;
- C. safer workplace practices; and
- D. knowledge of workplace laws and entitlements; and

(ii) to perform other services for the benefit of workers in the transport industry including (but not limited to):

- A. training and assisting in the job placement of retrenched workers;
- B. training transport workers in vocational and professional skills, occupational health and safety and industrial rights; and

³⁰ TEACHO MFI-1, p 52, 58.

³¹ Wayne Forno, 4/7/14, T:272.26-28.

³² TEACHO MFI-1, p 52.

³³ Wayne Forno, 3/7/14, T:249.38-44; TEACHO MFI-1, p 90C.

³⁴ TEACHO MFI-1, p 69.

- C. further industrial rights compliance in the transport industry;
 - (b) other than in relation to the Training Fund, to promote the development of the transport industry as an Australian industrial resource; and
 - (c) to do such other things as are incidental or ancillary to the attainment of the object described above.³⁵
29. TEACHO is governed by a board comprising three officials of the TWU, four directors drawn from employers, industry and academia and an independent Chair. The directors on the TEACHO board as at 26 June 2014 were:
- (a) Dr Daryll Hull (Independent Chair);
 - (b) Mr Laurie D'Apice, President Human Resources, Linfox;
 - (c) Mr Wayne Forno, TWU of NSW and NSW branch Secretary;
 - (d) Mr Michael Kaine, TWU Assistant National Secretary;
 - (e) Mr Eric 'Tony' Wilks, Group General Manager Industrial Relations, Toll Holdings Ltd;
 - (f) Professor Michael Quinlan;
 - (g) Mr Paul Ryan, Industrial Advisor, Victorian Transport Association; and
 - (h) Mr Anthony Sheldon, TWU National Secretary.³⁶

³⁵ TEACHO MFI-1, p 67.

30. TEACHO's Chief Executive Officer was Dr Romana Hutchinson. She held this position from November 2012³⁷ to 30 June 2014.³⁸ Dr Hutchinson holds an honorary position on the Branch Committee of Management of the South Australian branch of the TWU.³⁹

Governance concerns

31. The TWU is given significant powers in respect of the governance of TEACHO. For example, the TWU has the sole entitlement to vote at general meetings⁴⁰ and the sole right to appoint directors.⁴¹

32. Dr Hull's evidence was that, in practice, this is not how TEACHO operates.⁴² His evidence was 'that while the TWU may determine who is on the Board, it will not actively engage in direction over the Board. This is not recorded in writing but is the way the Board operates'.⁴³

33. Dr Hull admitted that the legal structure of TEACHO is such that the role of the board is fettered even though, in practical terms, there had not been any interference with the operations of the board.⁴⁴ It was Dr Hull's view that TEACHO would have a wider acceptance in the

³⁶ TEACHO MFI-1, pp 53-54.

³⁷ Romana Hutchinson, witness statement, 4/7/14, para 13.

³⁸ Romana Hutchinson, witness statement, 4/7/14, para 53.

³⁹ Romana Hutchinson, witness statement, 4/7/14, para 7.

⁴⁰ TEACHO MFI-1, p 76.

⁴¹ TEACHO MFI-1, p 77.

⁴² Daryll Hull, witness statement, 4/7/14, paras 23-24.

⁴³ Daryll Hull, witness statement, 4/7/14, para 24.

⁴⁴ Daryll Hull, 4/7/14, T:287.40-46.

industry-wide forum if it separated itself from the TWU and amended its legal structure.⁴⁵

34. What is the level of engagement of the board of directors of TEACHO? A lack of engagement from directors will often lead to lapses in corporate governance and financial management. There is no evidence that any lapses have in fact yet occurred with the TEACHO board. There is no doubt that the TEACHO arrangements represent an improvement on those of the TEIR Fund.
35. Mr Forno was unable to identify whether the position of Chief Financial Officer existed within TEACHO and if so, who held the position.⁴⁶
36. Dr Hull said that it had taken around 18 months to improve the corporate governance of TEACHO because the board only meets four times in a year.⁴⁷
37. Mr Forno said he does not familiarise himself with the underlying contractual arrangements that apply to TEACHO.⁴⁸
38. Mr Forno was not aware of any other staff members except for Dr Hull and Dr Hutchinson.⁴⁹ By inference, he was not aware of the part-time administrative assistant, Ms Lucie Way.⁵⁰

⁴⁵ Daryll Hull, 4/7/14, T:288.13-17.

⁴⁶ Wayne Forno, 4/7/14, T:279.15-22.

⁴⁷ Daryll Hull, witness statement, 4/7/14, para 18.

⁴⁸ Wayne Forno, 4/7/14, T:280.42-45.

Funding of TEACHO

39. The negotiations for the Toll Group and Transport Workers Union Fair Work Agreement 2011 – 2013 commenced in around October 2010.⁵¹ The TWU made it clear that its endorsement of any enterprise agreement would be conditional on a contribution to TEACHO.⁵² The only reason that Toll agreed to the contribution was to ‘get the deal done’.⁵³ It was to achieve industrial peace.⁵⁴ Toll’s written submissions do ‘not shy away from the contention’ that this was ‘its primary motive’.⁵⁵ Toll did not undertake any due diligence on what activities were undertaken by TEACHO.⁵⁶ Rather it was understood by Toll that TEACHO would engage in projects aimed at improving safety and compliance across the transport industry.⁵⁷
40. Mr Kaine, the lead negotiator for the TWU, made it known that TEACHO payments would be an issue over which the members would take industrial action.⁵⁸ On 22 February 2011, in an email to the solicitor for Toll, Mr Kaine wrote, ‘the committee has indicated that it will not settle until an acceptable offer regarding the contribution is

⁴⁹ Wayne Forno, 4/7/14, T:280.2-6.

⁵⁰ Romana Hutchinson, witness statement, 4/7/14, para 15.

⁵¹ Damian Sloan, witness statement, 2/7/14, para 12.

⁵² Damian Sloan, 2/7/14, T:144.2-5.

⁵³ Damian Sloan, 2/7/14, T:144.32.

⁵⁴ Damian Sloan, 3/7/14, T:167.18-168.34.

⁵⁵ Submissions: Toll Holdings Limited, 13/11/14, para 4.8.

⁵⁶ Damian Sloan, 2/7/14, T:145.9-15.

⁵⁷ Damian Sloan, 2/7/14, T:145.43.

⁵⁸ Damian Sloan, 2/7/14, T:143.31-42.

made'.⁵⁹ Mr Kaine was evasive when answering questions in relation to this point. He declined to accept that it was a 'deal breaker' because he did not understand what that meant.⁶⁰ But he admitted that it was a fundamental component to the negotiations.⁶¹ If Mr Kaine's evidence did not go as far as that of Mr Sloan, the latter is to be preferred.

41. The contribution agreed was dealt with in a side deed. This was because Toll did not want the amount of contributions or the terms of the side deed made public.⁶² The payments under the deed were as follows:

- (a) an up-front component of \$100,000;
- (b) a first at-risk component of \$25,000; and
- (c) a second at-risk component of \$25,000.⁶³

42. The first at-risk component was payable subject to TEACHO meeting certain key performance indicators.⁶⁴ The key performance indicators are set out at clause 3.2 of the Deed:

- (a) Prosecutions and Audits

⁵⁹ TEACHO MFI-1, p 109.

⁶⁰ Michael Kaine, 3/7/14, T:214.36-215.16.

⁶¹ Michael Kaine, 3/7/14, T:215.37-42

⁶² Damian Sloan, 2/7/14, T:149.38-39.

⁶³ Damian Sloan, 2/7/14, T:150.2-6; Sloan MFI-1, p 240.

⁶⁴ Sloan MFI-1, p 241.

- (i) The Union will conduct audits, wage inspections or other compliance measures of a Transport Competitor during each of the years 2011, 2012 and 2013;
- (ii) Where the Union discovers significant breaches by a Transport Competitor of the Road Transport and Distribution Award 2010, the Road Transport (Long Distance Operations) Award 2010 and/or any other industrial instrument that may bind the Transport Competitor it will, after providing the Transport Competitor reasonable opportunity to rectify such breaches, undertake appropriate enforcement action(s) (which may include prosecutions) in respect of any unrectified breaches;
- (iii) In deciding what prosecutions, audits or other compliance measures are taken by the Union, the Union has agreed to have regard to any concerns raised by Toll as to practices in the industry; and,
- (iv) The Union must prepare a report for Toll as to the progress and status of any prosecutions referred to in clause (ii) above and the findings of audits referred to in clause (i) above and the steps the Union has taken or intends to take to ensure future compliance. Such report must be provided to Toll at the scheduled meetings referred to in clause 42.5 of the EA, provided that, in recognition of the date of the signing of this Deed, a report need not be provided at the first of those meetings.

(b) Training and Other matters

The Union and Toll will discuss and agree training that it will jointly approach TEACHO to provide to Toll's employees, owner drivers or fleet operators with respect to general compliance matters including, but not limited to, log book compliance, their individual occupational health and safety obligations or industrial rights, load restraint requirements or measures to assist and help individuals to adequately manage fatigue. The parties agree that the scope of such training must be reasonable and must also have regard to the desire of Toll to have the KPIs under the Deed met. In the event of a dispute as to these matters clause 5.2 will apply.⁶⁵

⁶⁵ Sloan MFI-1, p 241.

43. A 'Transport Competitor' was not defined with any specificity in the Deed.⁶⁶ Mr Sloan said that there was no formal process for identifying a 'Transport Competitor'; that the TWU would know the companies that were Toll's competitors.⁶⁷

44. The second at-risk component is contained at clause 4:

Toll will pay TEACHO the Second At Risk component of \$25,000 at the end of each year the EA is in operation, or at the time the EA expires, subject to the Union demonstrating that during the Term at least 4 other transport operators have agreed to make contributions to TEACHO in an amount commensurate with Toll's contribution (relative to the size of the other operators).

At least two of those other operators must come from the following list:

- Linfox

- Glenn Cameron Transport

- Border Express

- Ron Finemore Transport

- Allied Express

- SCT Transport

In order to access an end of year payment, as contemplated by this clause, the Union must secure contributions to TEACHO from 2 transport operators by the end of 2011 with 1 of those coming from the list.⁶⁸

45. Mr Sloan accepted that Toll's understanding of how the clauses would work in practice was:

⁶⁶ Damian Sloan, 3/7/14, T:154.25-26; Sloan MFI-1, p 242.

⁶⁷ Damian Sloan, 3/7/14, T:154.27-29.

⁶⁸ Sloan MFI-1, p 242.

- (a) the phrase ‘the union will conduct audits, wage inspections or other compliance measures’ in clause 3.2(a)(i) was intended to mean that the TWU would exercise entry rights under the *Fair Work Act 2009* (Cth);⁶⁹
- (b) ‘audit, wage inspections or other compliance measures’ contemplated that the TWU would enter the competitor’s premises and audit them in order to determine whether the compliance measures in place in respect of the transport competitor were sufficient;⁷⁰
- (c) if the TWU discovered significant breaches by a transport competitor, it would, after providing the transport competitor reasonable opportunity to rectify the breaches, undertake appropriate enforcement action, which may include prosecutions;⁷¹
- (d) the TWU would have regard to concerns raised by Toll. In this respect, the prosecutions, audits or other compliance measures that would be taken would focus on things in respect of which Toll was compliant;⁷²
- (e) the purpose of this clause was to ‘level the playing field’. The intended corollary was that the transport competitor would start to incur compliance expenses. In raising the safety standards of

⁶⁹ Damian Sloan, 3/7/14, T:155.11-16.

⁷⁰ Damian Sloan, 3/7/14, T:155.32-38.

⁷¹ Damian Sloan, 3/7/14, T:155.40-47.

⁷² Damian Sloan, 3/7/14, T:156.14-19.

its competitors, Toll's competitive position would be improved;⁷³ and

(f) the inclusion of clause 4 was to procure a circumstance in which Toll was not the only company making payments to TEACHO.⁷⁴

46. Mr Kaine said that the TWU did not cavil with clauses 3.1 - 4 because the TWU saw them as consistent with the TWU's efforts across the industry to increase standards.⁷⁵ It was his evidence that the inspections were not carried out specifically because of clause 3.2(a) of the Deed but in accordance with the TWU's status as a regulator.⁷⁶

47. Toll submitted that the evidence of Mr Sloan was 'direct' and 'entirely honest'.⁷⁷ If anything these characterisations downplay Mr Sloan's testimony, for he was an admirable witness – frank, clear and highly intelligent. This is not surprising for he was the one man in either Toll or the TWU who tried to help Paul Bracegirdle.⁷⁸ But there are difficulties with the impugned clauses, even read in the light of the disarming explanations of Mr Sloan.

48. It may be accepted that the TWU would, in the ordinary course of its activities, receive some safety complaints from members which would

⁷³ Damian Sloan, 3/7/14, T:157.13-22.

⁷⁴ Damian Sloan, 3/7/14, T:162.12-15.

⁷⁵ Michael Kaine, 3/7/14, T:216.36-40.

⁷⁶ Michael Kaine, 3/7/14, T:217.13-17.

⁷⁷ Submissions: Toll Holdings Limited, 13/11/14, para 4.11.

⁷⁸ See Chapter 6.2 of this Interim Report.

enliven its rights of entry under section 481 of the *Fair Work Act 2009* (Cth). The statutory framework is as follows:

- (a) a union official may enter the premises of an employer to investigate a suspected contravention of the Act or a term of a fair work instrument that relates to, or affects, a member of the permit holder's organisation:
 - (i) whose industrial interests the organisation is entitled to represent; and
 - (ii) who performs work on the premises;⁷⁹
- (b) a union official must reasonably suspect that the contravention has occurred or is occurring. The burden of proof for establishing this fact is on the union official;⁸⁰
- (c) a union official must not misuse this right;⁸¹
- (d) the provision is not intended to allow a union official to enter premises to engage in 'fishing expeditions';⁸²
- (e) a union official will be held to misuse these rights if the official exercises those rights repeatedly with the intention or with the

⁷⁹ *Fair Work Act 2009* (Cth), s 481.

⁸⁰ *Fair Work Act 2009* (Cth), s 481(3).

⁸¹ *Fair Work Act 2009* (Cth), s 481, Note 3.

⁸² Explanatory Memorandum, *Fair Work Bill 2009* (Cth), [1923].

effect of hindering, obstructing or otherwise harassing an occupier or employer.⁸³

49. The differences between the TWU's ordinary exercise of its power and what the Toll deed contemplated are threefold:
- (a) First, the TWU will conduct enquiries of nominated companies by reason that they are named by Toll or are known competitors of Toll, not by reason of a reasonable suspicion that the company is involved in contraventions of its obligations.
 - (b) Secondly, the TWU will report to a competitor of the company being audited (namely Toll) as to its investigation. This implies that the TWU is being induced to exercise its powers to the detriment of a competitor of Toll and in a particular way.
 - (c) Thirdly, in return for the TWU exercising its statutory powers, at Toll's request or in Toll's interest, Toll will make a payment to an entity associated with the TWU and on the TWU's request.
50. The nature of these arrangements means they may take on the character of a payment by Toll for the direct benefit of TEACHO and the indirect benefit of the TWU in return for officials and employees of the TWU exercising their statutory powers in a certain way and in the absence of a reasonable suspicion of contravention. The contractual creation of a duty on the TWU to conduct 'audits, wage inspections or other compliance measures' includes entering premises with no express stipulation that there be a reasonable suspicion of

⁸³ *Fair Work Act 2009* (Cth), s 508(4).

contravention. It is obscure whether it is to be implied. Toll advanced the following submission:⁸⁴

While certain payments contemplated under the “side deal” might encourage TWU officials to exercise their audit functions, there is no suggestion that the audit (if undertaken) would be undertaken in an unlawful manner, would involve any less objectivity than any other audit or would have any pre-ordained outcomes. At its worst, it might be thought to have encouraged audits to be undertaken but Toll submits that there is nothing untoward in audits being undertaken, as this audit work is likely to encourage adherence to appropriate levels of safety within the transport industry. Compliant companies had nothing to fear from an audit. Further, the “side deal” was struck in circumstances where Toll and Toll’s competitors were then presently subject to Awards and Enterprise Agreements containing extensive obligations concerning the same subject matter, namely work health and safety.

51. This misses the point. It could not be suggested that a legislative provision giving officers of the union the right to enter an employer’s workplace without consent entitled the union, for financial reward, to act so as intentionally to advantage one competitor to the detriment of another. The statutory power must be exercised for a proper purpose, and without dictation. That is so even if it is assumed that the union officials will not enter unless they have a reasonable suspicion of contravention. The Deed creates a strong incentive to stretch that elastic expression ‘reasonable suspicion’ in a way it would not have been stretched had the Deed not been entered.
52. The TWU defended its conduct by submitting that: ‘[t]ransport operators should not be permitted [to] obtain a competitive advantage by failing to comply with the law at the expense of their workers.’⁸⁵ That is an argument that the end should justify the means. It is

⁸⁴ Submissions: Toll Holdings Limited, 13/11/14, para 4.10.

⁸⁵ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 167.

important that transport operators comply with the law. The means employed to attain this goal, however, are of questionable legality.

53. The TWU also submitted that: '[t]here is no foundation for the suggestion that some difference arises between the ordinary exercise of the powers of the union and those contemplated by the deeds with Toll'.⁸⁶ Why, then, did the Deed commit Toll to pay, and provide for TEACHO to receive, substantial sums of money should the TWU use its powers in the manner contemplated by the Deed? Trading corporations do not ordinarily engage in the practice of paying another party up to \$50,000 for the mere promise that that other party will do what it would have done anyway for no payment at all. Further, the TWU's submission does not deal with the fact that the TWU has promised Toll to exercise its discretion by executing any right of entry powers in a particular way. And in exercising that discretion, it is to have regard to any concerns raised by Toll as to practices in the industry. This cloaks the possibility of Toll having a large influence on the TWU's discretion.

54. Consideration should be reserved on the issue of whether the *Fair Work Act 2009* (Cth) should be amended expressly to prohibit a union or an official of the union agreeing to exercise, or in fact exercising, right of entry powers for reward, whether payable to the union, an official or a related entity, and whether civil or criminal penalties should be imposed on a union or third party who entered such an agreement.

⁸⁶ Interim submissions on behalf of the Transport Workers' Union of Australia, 14/11/14, para 166.

55. On 21 October 2014, it was announced that the ACCC was conducting an investigation into the arrangement between Toll and the TWU.⁸⁷ With respect, this is appropriate.

Activities of TEACHO: Bluecard training

56. In practice, TEACHO has two main areas of responsibilities:

- (a) management of what is known as the Bluecard training scheme;⁸⁸ and
- (b) a broader training and education program.⁸⁹

57. Dr Hutchinson described the Bluecard program as:

...essentially a skills passport that shows that an employee meets the requirements under the OH&S unit. The OH&S unit is TLIF1001A – “Follow Occupational Health & Safety Procedures” which is a National Competency Standard. It is a small card about the size of a driver’s licence.⁹⁰

58. TEACHO is responsible for the administration of the Bluecard system (including issuing the physical Bluecards and licensing registered training organisations to deliver Bluecard training) and provides an audit service of its licensed registered training organisations.⁹¹

⁸⁷ Robert Gottliebsen, *ACCC turns spotlight on Toll, TWU*, http://www.theaustralian.com.au/business/opinion/accc-turns-spotlight-on-toll-twu/story-fnp85ntp-1227096867038&t+ACCC_turns_spotlight_on_Toll,TWU, 23/10/14.

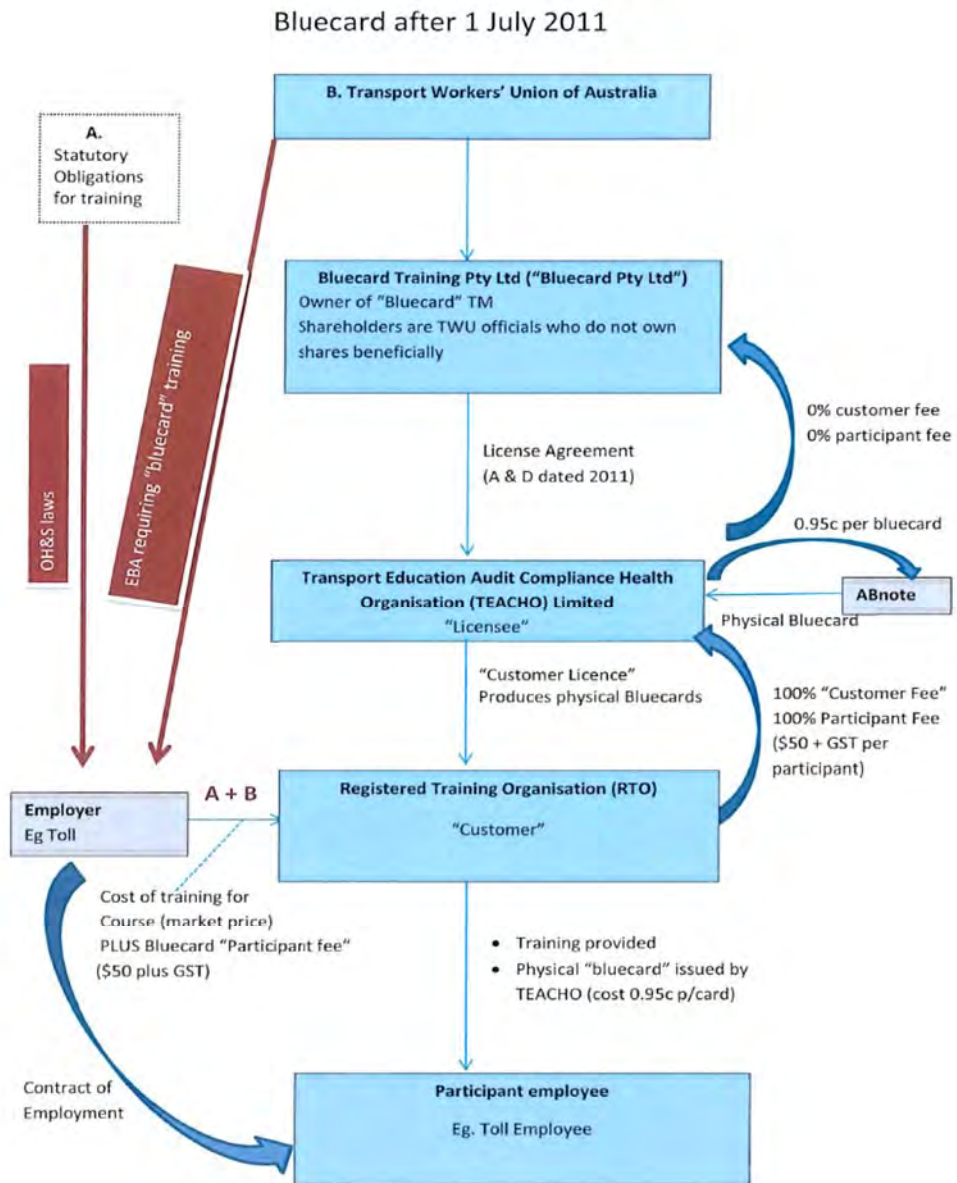
⁸⁸ Daryll Hull, witness statement, 4/7/14, para 29.

⁸⁹ Daryll Hull, witness statement, 4/7/14, para 56.

⁹⁰ Romana Hutchinson, witness statement, 4/7/14, para 22.

⁹¹ Romana Hutchinson, witness statement, 4/7/14, paras 17, 7.

59. The funding of the Bluecard system is depicted in the following diagram:⁹²



⁹² TEACHO MFI-1, p 353.

60. No objection was taken to the correctness of the diagram.⁹³
61. All Registered Training Organisations are subjected to a mandatory audit process by the Australian Skills Quality Authority.⁹⁴
62. A desktop audit was undertaken by Dr Hutchinson of the Bluecard-licensed registered training organisations in 2013.⁹⁵ This is an audit additional to the statutory audit. Dr Hutchinson's audit consisted of sending letters to 30 registered training organisations and then reviewing the material provided to ensure compliance.⁹⁶ The only subject matter audited was the OH&S unit. There is also the ability for the Bluecard holder to add other qualifications to the back of the card.⁹⁷ TEACHO does not audit the other requirements.⁹⁸
63. Out of the registered training organisations that responded, College of Warehousing was the only organisation that failed the audit.⁹⁹ College of Warehousing continues to pay for trainees to complete the Bluecard training. This brings into question the utility of this exercise.¹⁰⁰ Furthermore, correspondence produced to the Commission suggests that TEACHO is unable to refuse a licensee.¹⁰¹

⁹³ Transcript: TWU Super/TEACHO, 4/7/14, T:266.11-14.

⁹⁴ William Potter, witness statement, 3/7/14, para 6.

⁹⁵ Romana Hutchinson, witness statement, 4/7/14, para 27.

⁹⁶ Romana Hutchinson, witness statement, 4/7/14, paras 30-33.

⁹⁷ Romana Hutchinson, witness statement, 4/7/14, para 24.

⁹⁸ Romana Hutchinson, witness statement, 4/7/14, para 25.

⁹⁹ Romana Hutchinson, witness statement, 4/7/14, para 33.

¹⁰⁰ TEACHO MFI-1, p 295.

¹⁰¹ TEACHO MFI-1, p 351.

64. The only expense incurred by TEACHO, apart from wage expenses, is the cost of having the Bluecards developed. The cost per card is just under \$1.¹⁰²
65. There is no statutory requirement to hold a Bluecard.¹⁰³ It is not a regulated qualification.¹⁰⁴
66. Toll agreed to provide its employees with Bluecard training in both its 2011 and 2013 Enterprise Agreements with the TWU.¹⁰⁵ The feedback that Toll received from its employees was that the Bluecard was unnecessary as it covers the same ground as its established training program, the 'Toll Passport'.¹⁰⁶
67. Mr Sloan said that Toll incurred the unnecessary expense of \$50 per worker because:

It was unlikely in the extreme that the TWU would agree to the removal of that clause, so the question is for the ongoing expense as unnecessary as it was, was it worth the risk of industrial action or disputation that could have cost the business hundreds of thousands, if not millions of dollars. It's just a commercial analysis based on the risk profile.¹⁰⁷

68. Similarly, Mr D'Apice, President of Human Resources at Linfox and director of TEACHO, gave evidence that Linfox does not use the

¹⁰² Romana Hutchinson, 4/7/14, T:310.45-47.

¹⁰³ William Potter, 3/7/14, T:187.33-37.

¹⁰⁴ William Potter, 3/7/14, T:187.37.

¹⁰⁵ Damian Sloan, witness statement, 2/7/14, para 88; Sloan MFI-1, pp 42-44; Sloan MFI-1, p 33.

¹⁰⁶ Damian Sloan, 3/7/14, T:166.34-42.

¹⁰⁷ Damian Sloan, 3/7/14, T:167.21-29.

Bluecard program.¹⁰⁸ This is because ‘Linfox provides its own training to drivers via a program called “Redbook”, which I think is better than Bluecard training’.¹⁰⁹

69. Mr William Potter is the National Learning and Development Manager at Toll NQX. It was his view that the Bluecard is an additional cost to industry to record training that has already been stringently regulated.
110

70. The evidence supports a finding that the Bluecard program duplicates what is already a mandatory training requirement for transport workers and by doing so unnecessarily increases costs to employers. It seems its real benefit is that a driver does not have the ‘inconvenience’ of carrying a paper statement of attainment but rather, has a card the size of a driver’s licence to evidence the attainment. That is not ultimately much of a benefit given the costs involved.

71. The TWU submitted that there were no generally applicable mandatory training requirements for transport workers.¹¹¹ That is questionable. The Chairman of TEACHO, Dr Darryl Hull, said that:¹¹²

The Bluecard at present shows that a person has achieved the Occupational Health and Safety (OH&S) competency of “safe working”. This competency is a unit of competency mandated by the Transport and Logistics Industry Skills Council (TLISC) as the agent of the

¹⁰⁸ Lorenzo D’Apice, witness statement, 4/7/14, para 15.

¹⁰⁹ Lorenzo D’Apice, witness statement, 4/7/14, para 16.

¹¹⁰ William Potter, witness statement, 3/7/14, para 30.

¹¹¹ Interim submissions on behalf of the Transport Workers’ Union of Australia, 14/11/14, para 152.

¹¹² Darryl Hull, witness statement, 4/7/14, para 32.

Commonwealth Government. This unit of competency can only be delivered by a Registered Training Organisation (RTO). A training organisation can only be registered to deliver that unit of competency by the Australian Skills Quality Authority (ASQA).

72. Similarly, Mr William Potter in his statement said:¹¹³

The Training Packages developed by all [Industry Skills Councils] include “Follow occupational health and safety procedures” as a component. The [TLISC] has developed a Training Package titled “TL110 – Transport and Logistics Training Package”. A component of that Training Package is a unit of competency, titled “TLIF 1001A Follow occupational health and safety procedures”.

73. Dr Romana Hutchinson, TEACHO’s Chief Executive Officer, gave evidence that the Bluecard accreditation was for the unit of competency titled ‘TLIF 1001A “Follow Occupational Health and Safety Procedures”’.¹¹⁴

74. None of this evidence was challenged by the TWU.

75. The other qualifications placed on the back of the Bluecard are not audited. This causes the validity and utility of the Bluecard as a concept to be doubted.

76. Further, the Bluecard is not regulated by any government body. As such, it is likely that an employer would still require the paper statement of attainment that contains the National Recognised Training Logo.¹¹⁵

¹¹³ William Potter, witness statement, 3/7/14, para 17.

¹¹⁴ Romana Hutchinson, witness statement, 4/7/14, para 22.

¹¹⁵ Hutchinson MFI-1, Tab 10.

77. It is true that Bluecard is transportable across the industry. It is true that it has been praised by the Full Bench of the Industrial Relations Commission of New South Wales.¹¹⁶ It is true that it is required by many awards. But the issue is whether Toll should have been compelled to contribute to TEACHO.
78. TEACHO is not a training organisation that represents a new or additional training program for the industry. Rather, it appears duplicative and wasteful, and an arrangement only really agreed to by employers in order to get an enterprise agreement over the line.
79. Without the leverage available in the context of enterprise agreement negotiations it may be doubted whether TEACHO would have the support of the industry. Its broader training and education program was, until only very recently, non-existent.

Activities of TEACHO: Healthy Workers Program

80. Dr Hutchinson said that the only other program that TEACHO was involved with was the 'Healthy Workers Project' in conjunction with Toll and Beyond Blue.¹¹⁷ TEACHO's involvement in this project may be summarised as follows:
- (a) Dr Hutchinson reviewed the one hour presentation delivered by Beyond Blue, took feedback from the participants and recorded

¹¹⁶ *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* (2006) 158 IR 17.

¹¹⁷ Romana Hutchinson, witness statement, 4/7/14, para 36.

their reaction to the seminar.¹¹⁸ This feedback was provided to Beyond Blue.¹¹⁹

- (b) TEACHO has covered 15% of the cost of each session, at a total cost of \$10,620.¹²⁰
- (c) Sporadically, TEACHO will pay for a presenter's travel and accommodation if Beyond Blue is unable to source a presenter locally.¹²¹

Activities of TEACHO: future plans

- 81. Dr Hull envisages that TEACHO will take steps to become an industry body and have the Government take on Bluecard as the mandated form of identification for all people who drive trucks.¹²²
- 82. This business plan involves Dr Hull taking a more direct role in assisting TEACHO through his networks and contacts in Sydney.¹²³ It was Dr Hull's evidence that this decision to operate TEACHO from Sydney was behind the termination of Dr Hutchinson's position as chief executive officer.¹²⁴ Dr Hutchinson agreed and said:

¹¹⁸ Romana Hutchinson, witness statement, 4/7/14, para 39.

¹¹⁹ Romana Hutchinson, witness statement, 4/7/14, para 40.

¹²⁰ Romana Hutchinson, witness statement, 4/7/14, para 41.

¹²¹ Romana Hutchinson, witness statement, 4/7/14, para 42.

¹²² Daryll Hull, witness statement, 4/7/14, para 36.

¹²³ Daryll Hull, witness statement, 4/7/14, para 62.

¹²⁴ Daryll Hull, witness statement, 4/7/14, para 67.

[F]rom an operational perspective, it is easier to have access to the bigger corporations in Sydney. Daryll Hull said to me that TEACHO would be easier to operate from Sydney where the majority of national companies are located.

...

From July 2014 onwards, I will be a contractor for TEACHO and my role will be to develop projects and look after the RTOs.¹²⁵

83. This evidence is at odds with the contemporaneous termination letter written by Dr Hutchinson on 11 March 2014 addressed to Messrs Sheldon and Kaine.¹²⁶ Dr Hutchinson wrote:

Daryll Hull made reference to the Royal Commission, and stated that my union membership would be a liability in my position at TEACHO.

...

In any event if there was to be any issue with the Royal Commission or relocation of the corporate function of TEACHO, this should be addressed objectively and openly discussed.¹²⁷

84. The description of Dr Hutchinson's role from July 2014 does not differ in any material way from the role she was undertaking as chief executive officer.

¹²⁵ Romana Hutchinson, witness statement, 4/7/14, para 52-53.

¹²⁶ TEACHO MFI-1, p 188.

¹²⁷ TEACHO MFI-1, p 188.